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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

SEPTEMBER TERM, 1894—JANUARY TERM, 1895.

VOLUME XLIII.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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BY D. A. CAMPBELL, REPORTER OF THE SUPREME COURT,
In behalf of the people of Nebraska.

THE SUPREME COURT

OF

NEBRASKA.

1895.

CHIEF JUSTICE,

T. L. NORVAL.

JUDGES,

A. M. POST,
T. O. C. HARRISON.

COMMISSIONERS,

ROBERT RYAN,
JOHN M. RAGAN,
FRANK IRVINE.

OFFICERS.

ATTORNEY GENERAL,

A. S. CHURCHILL.

CLERK AND REPORTER,

D. A. CAMPBELL.

DEPUTY CLERK,

W. B. ROSE.

DISTRICT COURTS OF NEBRASKA.

JUDGES.

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J. E. BUSH.....Beatrice.

Second District—

S. M. CHAPMAN.....Plattsmouth.

Third District—

CHARLES L. HALL.....Lincoln.
E. P. HOLMES.....Lincoln.
A. S. TIBBETS.....Lincoln.

Fourth District—

G. W. AMBROSE.....Omaha.
J. H. BLAIR.....Omaha.
E. R. DUFFIE.....Omaha.
A. N. FERGUSON.....Omaha.
M. R. HOPEWELL.....Tekamah.
W. W. KEYSOR.....Omaha.
C. R. SCOTT.....Omaha.

Fifth District—

EDWARD BATES.....York.
ROBERT WHEELER.....Osceola.

Sixth District—

WM. MARSHALL.....Fremont.
J. J. SULLIVAN.....Columbus.

Seventh District—

W. G. HASTINGS.....Wilber.

Eighth District—

W. F. NORRIS.....Ponca.

Ninth District—

J. S. ROBINSON.....Madison.

Tenth District—

F. B. BEALL.....Alma.

Eleventh District—

A. A. KENDALL.....St. Paul.
J. R. THOMPSON.....Grand Island.

Twelfth District—
H. M. SINCLAIR.....Kearney.

Thirteenth District—
WILLIAM NEVILLE.....North Platte.

Fourteenth District—
D. T. WELTY.....Cambridge.

Fifteenth District—
ALFRED BARTOW.....Chadron.
M. P. KINKAID.....O'Neill.

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOLUME XLII.

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PIZEY, PAUL
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WALSH, JOHN P.
WHIPPLE, OTIS G.
WOOD, MAE C.
YOUNG, CLARENCE W.
YOUNG, WILLIAM H.

In Memoriam.

TURNER M. MARQUETT.

TURNER M. MARQUETT was born in Clarke county, Ohio, July 9, A. D. 1831, and died at Tampa, Florida, December 22, A. D. 1894.

At the session of the supreme court of the state of Nebraska, March 5, 1895, there being present, Hon. T. L. Norval, chief justice, Hon. A. M. Post and Hon. T. O. C. Harrison, judges, Hon. Robert Ryan, Hon. John M. Ragan, and Hon. Frank Irvine, commissioners, and David A. Campbell, clerk and reporter, the following record was made in memory of HON. TURNER M. MARQUETT:

HON. AMASA COBB:

MAY IT PLEASE YOUR HONORS: Your committee to whom was assigned the sad duty of preparing and presenting resolutions to the memory of HON. TURNER M. MARQUETT, deceased, beg leave to submit the following:

Resolved, That the supreme court and the bar of the state of Nebraska unite in expressing deep and profound regret on account of the death of HON. TURNER M. MARQUETT.

Resolved, That in his death society has lost one of its ablest and most learned members; one whose career is co-extensive with the state; one who was distinguished for uniform kindness and courtesy, for great intellectual attainments and unswerving integrity.

Resolved, That in his death the law has lost a great advocate, eminent for his profound logic, his keen perception, his extensive research, and his wonderful power of analysis.

Resolved, That while his legal acumen and his splendid ability placed him in the foremost rank of his profession, yet he manifested in all the walks of life a simplicity of character that commanded admiration and endeared him to his friends.

Resolved, That we deplore his death and mourn the loss we sustain;

and for the benefit of a sorrowing profession we call to mind his studious habits, his genial manners, his simple modesty, his untiring industry, his delicate sense of honor, his broad and liberal culture, his profound yet varied learning.

AMASA COBB,
GEORGE H. HASTINGS,
E. WAKELEY,
JAMES W. DAWES,
FRANK MARTIN,
O. A. ABBOTT,
W. M. ROBERTSON,
M. L. HAYWARD,
E. C. CALKINS,

Lincoln, March 5, 1895. *Committee.*

If your honors please, your committee suggest the adoption of these resolutions, and I move that they may be spread upon the records of the court.

HON. GEORGE H. HASTINGS:

In regard to the resolutions just presented I only desire to say that in the untimely death of TURNER M. MARQUETT the bench, the bar, and the people have been touched by a loss that can never be repaired or made good. He was ripe in the knowledge and understanding of the law, and his genius and learning, as well as his widely diversified experience, peculiarly fitted him as a leader in his chosen profession. By dint of his own efforts, goaded on by a lofty ambition to master the intricate, devious, and deep-planted principles that are "a rule and guide to our actions," he began in a humble way at the bottom, and gradually, but surely, forced his way through all difficulties until he stood at the top, where his broadened and enlarged vision penetrated far beyond the scope and ken of his fellows. Like so many of our greatest thinkers, lawyers, and statesmen, he trod no royal road to fame. No powerful friends nor inherited wealth was at his command. Single handed and alone, with his genius, industry, and inherent principles of unswerving honesty as his capital, together with his unchanging loyalty to his clients, these potent attributes of character, with his modest and unassuming manner, which was so characteristic of the man, he began winning his promotions and earning his leading position before the bar. One of the most striking characteristics MARQUETT possessed was his inflexible and unyielding adherence to

the rigid principles of honesty and fairness. This was marked not only in his personal affairs and his dealings with men, but the same trait was carried into his practice of the law. His ambition to present his cases well before the court and jury was unbounded, and his effort to successfully present them untiring, yet he scorned to resort to subterfuge or trickery. He indulged in no questionable practices. He countenanced no unwarranted scheme for an instant. He relied solely upon the merits of his cause and the forcible demonstration of the law as he understood and interpreted it. These he applied with great skill and force. How successful he was the reports of this and half a dozen other courts of last resort will testify, for he has left his impress thereon, which will be as enduring as time, as lasting as the history of jurisprudence. His strong, vigorous reasoning, and his cogent, terse manner of stating his conclusions, are seldom equaled—never excelled.

No man of my acquaintance had such an impassioned love and exalted idea of personal and political liberty as had MARQUETT. On the stump, before the bench, and in private life liberty was a theme that never grew old, and in him it found a staunch and able advocate, a tireless champion. Some of the best years of his life he devoted to the cause of personal liberty, and in her unequal struggle for liberty his potential voice was heard, and the power of his strong arm felt when our sister state of Kansas was in the throes of an armed struggle over the question of slavery within her borders.

Only a few weeks before his death he told me of his unsuccessful contest for political honors, which occurred about the period of the admission of Nebraska into the sisterhood of states. The story so aptly illustrates the character of the man, I cannot refrain from giving it. MARQUETT said: "After the contest was practically settled, and it had become apparent that I was to be defeated, my opponent came to me and said: 'MARQUETT, I have you beaten. The place is mine beyond your power to prevent. While the people may be for you, the politicians are with me, for I am a better politician than you are, and know better how to control men. Now, if you will withdraw from the contest, and make my election unanimous, I will take the office and you may distribute the patronage that belongs to it.'" MARQUETT said: "No; you have beaten me, it is true, because, as you have stated, you are a better politician, and a better manipulator

of men than I am. You take the office and the patronage as well. I want none of it. I will remain here with the people of Nebraska. I will retain my honor, my practice, and my manhood. In twenty-five years from now people will inquire where you are, but no one will be able to answer the question. Every one will know where MARQUETT is. He will be right here in Nebraska, one of the citizens of that state." He spoke with prophetic truth. During the quarter of a century that has passed since that contest the people of the state of Nebraska have always known where MARQUETT was. They have known him not only as the great lawyer, jurist, and advocate, but as the friend of the poor and distressed, the unyielding defender of the oppressed, the noble man, the upright citizen. He was brave, patriotic, and just, unselfish to the last degree, loyal to his country, his clients, and his friends, simple, unpretending, and honest. The state, the bench, and the bar have lost a man whose place cannot be filled, and whose memory will not be forgotten.

HON. JAMES W. DAWES:

MAY IT PLEASE THE COURT: While I had known T. M. MARQUETT by reputation from the time of my coming to Nebraska, it had not been my good fortune to see and hear him until in the fall of 1872. A political meeting had been arranged for at the then county seat of my home county, and T. M. MARQUETT was named as the orator of the occasion. My personal acquaintance with him dates from that meeting. The address to which we listened was forceful and at the same time eloquent; a mingling of wit, wisdom, scathing sarcasm, good-natured raillery, and irresistible logic. Going back twenty-two years in this man's life, and we find him in the very prime of his manhood. I can see him now as he appeared before us on that September night. His form straight as an arrow, in manner alert and active; with an eye that flashed and sparkled, as he warmed to his work, responding to the enthusiasm of his audience, and rising to the full inspiration of his subject, which was the whole field of national politics, as looked upon and presented by him, from the standpoint of his well-known ardent and intense republicanism. He impressed me then as one who possessed clear, strong, and logical reasoning powers; as a man who, while respectful and tolerant of the views held by others, yet having strong convictions of his own, and those convictions backed

by a courageous spirit, that in its fixed quality was akin to the rock, leading him, as occasion required, to a full and fearless expression of his opinions. He impressed me as a man who had no sympathy with the temporizing policy of sham and pretense; as one having what may be termed a God-given reverence for law, and for that principle which has been embodied in the expression, "Equality of all men under the law;" as a man of broad and catholic spirit, a lover of mankind; as an unfaltering believer in the certain perpetuity of our republican institutions; and I recall that, as he discussed the spirit and genius of our form of government, portraying a still more brilliant and glorious future, he proclaimed himself to be a firm and unshaken believer in the doctrine of our Manifest Destiny. At such time as this, when the spirit of memory is active with all of us, we may properly indulge in personal incident relating to, and illustrating the character of, him in whose honor we are gathered. I go back to the winter of 1881–82. A great struggle was on. Great interests were at stake, and hung trembling in the balance. Interests represented by MR. MARQUETT were involved. He needed help, and he turned to those from whom, by reason of past relations, he felt warranted in asking assistance in time of need. Among those upon whom he called was one, a young man, who was under many obligations for acts of personal kindness and friendship. MR. MARQUETT made his wishes known; and the young man, filled with a deep sense of his personal obligation, scarce knew which way to turn, but chose at length to cast himself upon MR. MARQUETT'S generosity, and in doing this he made no mistake. He expressed his desire to make return of kindness and friendship by actions that should speak louder than mere words; "but," said he, "my word and pledge of support is given in another direction, and what can I do?" To this candid statement, while a shadow of disappointment passed over his countenance, but, without a moment's hesitation, MR. MARQUETT replied, as he extended his right hand and clasped the hand of his young friend, "You can redeem your promise." A man cast in smaller mold, less generous, less lofty of spirit, the mere politician, would have been fruitful of reasons and excuses such as might have tempted this young man to a betrayal of his trust. Not so MARQUETT. He was only less jealous of another's honor than of his own.

I recall a conversation had with MR. MARQUETT one evening on

the east-bound train from Omaha. Talk had drifted in the direction of his professional work. But a short time before this he had been to St. Louis for the purpose of taking testimony in what he referred to as the Missouri Pacific case. At one time during the taking of testimony, the "Wizard of Wall Street" had been present, and I was interested in asking for, and in hearing from Mr. MARQUETT his impressions of this man, which he gave to me in the form of critical analysis. After he had talked at some length about him, he said, as if just occurring to him at that moment, "Gould sat right across the table from me, and he tried to look me down; but I looked him down." And then, his voice dropping to a lower key and talking more to himself than to his companion, added, "I was right, and he could not look me down, I looked him down." He might have said with Brutus,

> "There is no terror, Cassius, in your threats,
> For I am armed so s rong in honesty,
> That they pass by me as the idle wind,
> Which I respect not."

It seems to me that here in these incidents we may find the key to this man's life purposes and to his character. He wished, first of all, to be honest with himself, to stand right with his own conscience, and then, with the consciousness of being right, he became fearlessly aggressive, and was not to be turned aside or thwarted in his purpose; was not to be intimidated by threats, direct or indirect. If he was right, then the end desired justified the means, and bending to his task, he pressed on to the end, with a will and determination as relentless and unyielding as fate. It may, however, be said of him, that in all the years of his gallant and heroic warfare he fought always in the open field, frank and fearless.

As I understand this man's early life, he was not a favored child of fortune, one of those for whom from childhood the rough places are smoothed away, one of those who are shielded by friends from all necessity of struggle or effort; and who, when they have reached man's estate, drop quietly into a place prepared for, and made ready for them. On the contrary, life with him from the first meant struggle and effort, as a matter of necessity. If place he would have, it must be as the result of his own efforts. If he would wear his spurs, he must win them. He must himself determine his stature among men. As we look back over his busy life, it would seem as though he

had adopted and made his own the sentiment to which Scott gave utterance in "Old Mortality," when he said,

> "One crowded hour of glorious life,
> Is worth an age without a name."

He made his place. He won his spurs. He reached his grand stature among men while standing at the "Flaming forge of life," and with steady, sturdy, persistent blows, with an intensity of purpose, and concentration, aye, consecration, of effort along the lines of his chosen profession, compelling fortune, forcing success. His ardor and devotion never cooled or lessened. He turned neither to the right nor to the left, but pressed straight on. With him duty meant action, and with him opportunity was always present. Time was his workshop, and as the end of life on earth for him approached it found him still at work, at the fullness and zenith of his powers. It found him a time tried, time tested, true and faithful friend and servant unto the end.

Passing upon the life-work and upon the individual characteristics of this man, we may most fittingly speak of it, and of him in the language of Festus:

> "Life's more than breath and the quick round of blood;
> It is a great spirit and a busy heart.
> We live in deeds, not years; in thoughts, not breaths;
> In feelings, not in figures on a dial.
> We should count time by heart throbs. He most lives
> Who thinks most, feels the noblest, acts the best."

A brave, loyal, tender, generous, patriotic, and liberty-loving spirit has gone from among us. So, feeling toward you, thus thinking of you, dead friend and brother, we leave you at rest beneath the sweet benediction of

> "That best portion of a good man's life,
> His little, nameless, unremembered acts
> Of kindness and of love."

HON. J. M. WOOLWORTH:

To the judges of this tribunal and to the elder members of the bar the occasion which has arrested for a space the contentions of the forum and the proceedings of the Court is one of peculiar and touching solemnity. From the earliest days of the judicial history of Nebraska, MR. MARQUETT has been a prominent and familiar figure at the bar. Since we became a State he has been engaged in a very large

proportion of the great cases which have been brought here for judgment. Hardly has a term passed at which he has not appeared where I now stand, and with a peculiar power sustained the interests entrusted to him. We shall not see him here again. The ties of long association, of delightful comradeship, of affectionate friendship, are broken. We remain. We are admonished that the day draws on apace when our places here will be vacant.

I shall leave to others the mention of his social virtues, although no one valued more highly than I his kindly and affectionate nature. However much absorbed by the cares and duties of life, he held the doors of his heart wide open and welcomed with a generous hospitality every claim upon his charity and sympathy. All the influences of his example were good. He was above reproach in all the relations of life. Nor shall I take time to mention his services to the State in official station. At one time he held a large place in political life. His opinions on all the great questions, which, during his life, divided his fellow-citizens, were held with tenacity and maintained by an advocacy at once strenuous and kindly. At one time he was the great favorite of the people and had at his command the best gifts which their suffrages could bestow. Afterwards he withdrew himself almost altogether from partisan contentions and left to others the honors which would have been his had he been willing to accept them. There are not lacking circumstances and transactions in MR. MARQUETT's public life and services of more than common interest, but I shall not attempt to recount them.

I shall content myself in this brief tribute to our deceased friend to speak of him as a lawyer. I cannot but think that had he left behind a message to his friends he would have desired this aspect of his life and character should be held most in memory and esteem. From his early manhood the Law was his life. All his years were given to it without reserve. All his energies, without stint, were bent to its service. His ambitions were to attain eminence in it, and the joys he coveted were those which attend success. His plan was from first to last pursued with constancy in his onward progress towards the goal he had set before him, and at the end he found himself with the treasured and garnered rewards of a consistent life. When in search of health and strength which his professional labors had impaired, he took himself to a distant land with a premonition that his career was

drawing to an end. He must have rejoiced in a noble ambition wholly realized; a life of large, substantial and useful service completed and brought to the desired end.

MR. MARQUETT'S professional life and character are somewhat difficult of analysis. He had not a capacity for clear, precise, and accurate statement. He did not at the beginning of a trial or an argument lay before the court or the jury, either in outline or detail, the elements of his case so that, as it was developed in the testimony or in the argument, each fact and proposition and authority fell into its own place—the whole, from opening to conclusion, presenting a logical, consistent piece of carefully framed mechanism. His method was the very opposite of this. Sometimes there seemed to be a certain confusion of thought, an inaptness of expression, a want of vividness of perception; but underneath all this there was a method of his own. I do not think it was wrought out with premeditation, but it was after all an art which was concealed by art. As he was working his way through his case, in some inexplicable way he arrested and held the attention with singular tenacity, and he wrought upon the sympathies of his hearers, drawing them to him and to his cause, not against their will, but as willing believers in him and in what he had to say. When he had completed his task and you retraced the steps by which he had led you, you could see in the midst of the confusion a clear, certain, defined, logical track leading to a judgment favorable to him. His addresses to juries were characteristic; they were singularly persuasive, not by explosions of eloquence nor by any rigid and consistent course of reasoning. They did not seem to be constructed upon any well-defined plan, but they touched first here and then there what was vital to the case and illumined the subject with a certain pathos and humor. If you did not know him and his ways you would say that it was an unstudied, haphazard presentation. But there were whole passages which had been framed and wrought out with infinite care, even to phrases and words; but the work was done so naturally, and the result was so consistent with himself, that the labor was all concealed. In this his art was consummate. I have sometimes thought that in their homely ways and their persuasive and cogent processes, logical in the highest degree when seeming to be least logical, that Lincoln and MARQUETT were much alike.

One thing must be mentioned with emphasis: MR. MARQUETT had

a great capacity for work. He mastered every case he tried or argued. He explored with unwearying patience every recess of his case, no matter how obscure nor how remote from the main issue. He understood the facts and he gathered the authorities with the utmost industry. He was never taken by surprise, because he knew what would surprise others. But it would be a mistake to suppose that he ever lost himself in the details of his case. He was always master of the circumstances; they never mastered him. He soon saw what were the facts or the propositions of law on which it turned and he held to them with attention, never for a moment diverted by incidents or accidents, or whatever did not make directly to the end. He sometimes piled up authorities to a great height, but never so as to cover from view the principle which established his contention. He was not a case lawyer, although he used cases freely; but all his citations were fused into principles which he had absorbed into his being.

But I have drawn out this analysis of MR. MARQUETT'S character as a lawyer at too great length. I must say, that in my opinion he was a man of rare qualities; qualities of the highest order. The estimate which the members of the bar and the judges placed upon him and the great success which he attained attest the justness of this estimate. If what I have said shall seem to any to lack in warmth of admiration for the character of our friend, or of emotion that he has been withdrawn from this field of his great contentions, I beg to say that while of late years we have not been brought in frequent and close association, at times in our lives we have been very near to each other; and it is a great happiness to me that our affections and sympathies, as well as our respect, were strongly enlisted for each other, and that their force was never afterwards impaired. More than a third of a century has passed since we began life together. He has been taken. We are left. Our sorrow for the bar, the Court, the State, his family, and ourselves is not measured by the words we can utter in his praise.

HON. M. L. HAYWARD:

MAY IT PLEASE THE COURT: The resolutions just read truthfully, but only partially, express our feelings toward MR. MARQUETT and our great sorrow at his departure. To those resolutions I add but a word. He was indeed, as has been said, a leader of men

and a great lawyer, but he was possessed of qualities higher, nobler, and grander than these. He was a brave, true, loyal man. His integrity, his loyalty, his manhood, rise above all his great learning—above all place and power he ever reached. He entered public life at a time of trouble and doubt, at a time when many whom we now call great bowed humbly before the institution of slavery and allowed the hope of office to swerve them from truth and loyalty. In those days when so many, in the presence of rebellion, hesitated and were willing to sacrifice freedom and right for peace, our departed friend stood like a great rock in the ocean, beating back the waves of clamor and fear with a loyalty that was unquestioned, and a love for freedom that only ended with his life. At no time in his life could he address the public without expressing his undying loyalty to his country and his boundless love for his country's flag. He was loyal to his clients, to his home, and to his friends. I well remember the convention spoken of by General Hastings. It was at Nebraska City in 1868. MR. MARQUETT was the choice for congress of the people, and of a majority of the members of that convention, but an adjournment was secured by those opposed to him, and by some means, known only to shrewd politicians, votes enough were changed to nominate his opponent. After the nomination he was called upon for a speech. With a loyalty to his party that no bad treatment could change, and with eloquent words that no man in the state could equal, he summoned every republican to battle, and urged a campaign that would insure victory for his adversary. In the struggle that followed he was everywhere in the front rank, working as hard for his party as though he had been its chosen standard bearer. In that year it was determined to elect to the legislature the republican candidates in democratic Otoe county. I was told to select for the last week before election the man I considered the best vote-getter in the state. MR. MARQUETT was chosen and came. That week I learned to know the true, kindly nature of the man. He, the favorite of the people, the ablest speaker in Nebraska, and I, a young man just admitted to the bar, traveled and spoke together. Not once was there an effort on his part to draw attention to himself. With no assumption of superiority, but always anxious that I should have ample time and opportunity to speak, he labored only for votes. This kind treatment of those who labored with him in politics and in court made the young men his

friends. In court he never acquired that unfortunate habit, too common with many great lawyers, of drawing all attention to himself at the expense of his younger associates. To assist him in the trial of a case assured every man fair treatment. He began his life-work a third of a century ago, in this then unsettled territory, where men were compelled to rely upon themselves. There was then no calling for aid from the public, and if the south wind withered the fruits of their labors those sturdy pioneers toiled and suffered in silence, trusting to their own labors to bring better days. This made them strong, honest, and manly. So I say again, he was a kind, a true, a loyal man. The story of his useful and honorable life is written in our Law Reports. His integrity, loyalty, and manhood will give luster to his name and perpetuate his memory. It may be said of him: "To live on in the hearts of those we leave is not to die."

HON. O. A. ABBOTT:

MAY IT PLEASE THE COURT: One of the members of the bar of this court, whose presence has long been familiar here, has passed over to the silent majority. From his nerveless fingers books and briefs have forever fallen, and his persuasive eloquence has been forever stilled by that mysterious change men call death. His forceful, earnest words will no longer fall on the patient ears of an attentive court, will no longer charm and instruct those who may linger here to listen or to learn. To his tireless industry and patient research all his brethren of the bench and bar are much indebted.

In a sense, in a very large sense, he was one of the sponsors for the State at the time of its baptism into the Union, and for nearly forty years T. M. MARQUETT, as lawyer and legislator, has been recognized as one of the master builders of our judicial fabric—one of the foremost minds in the shaping of the political and economic policies of the state, and it is eminently fit and proper that we should pause for a time in our labors to take some note of his departure and place upon perpetual record some token of our respect for, and appreciation of, a life devoted to such service, for he has fallen, not like the summer flower blown aside by the evening wind, but fallen like some sturdy oak in the forest that has withstood the storms of years, a guide and landmark for others; fallen with all the rich fruitage of his years of experience—startling his friends by the suddenness of

that fall, and leaving a vacancy in our ranks that may never be filled. He will be missed and mourned by all. Fortunately for him, for us, for all the state, there is nothing in his life or character, public or private, that does not challenge the admiration of all good men. No matter how strong the search-light of investigation may be focused upon it, there is no trait in his character, no lesson of his life, that should in charity be covered by the mantle of silence to-day. The state is to be congratulated on its possession of so priceless a heritage as the life and example of T. M. MARQUETT. The example of such a life is an inspiration to all.

The history of the world is only the history of individual men who have helped to make this grand old world of ours wiser, better, and happier; the history of individual men who have led in the march of human progress and human advancement, who have helped to mark out safe highways for your footsteps and mine. Others more intimately associated with him have told and will tell in eloquent, loving words the story of his life, but each one of us may bring here to-day some tribute of his affection to the memory of our departed brother. His genius was the genius of hard work, of unremitting toil, of patient industry. His success was the success that always waits upon the tireless laborer. The laurel wreath of pre-eminence in his chosen profession was won by his own hand, unaided by adventitious fortune. The pathway he marked out the humblest of his associates *may* follow to success, and all *must* follow who would write their names high alongside his own. The wisdom of our fathers is in the saying that fortune knocks once at every man's door, but in the profession of the law the laurel-crowned genius of success knocks only at the door of the toilers and she enters by none other.

> "All are architects of fate,
> Working in these walls of time;
> Some with massive deeds and great,
> Some with ornaments of rhyme."

It is no disparagement of the work of this toiler to say that his work was not ornamental, not always methodical. He wrought on the grand sustaining columns of truth and justice, brushing aside with a master's hand the sophistries that only serve to conceal their grander proportions. As in his survey of the facts that surround every case, his eye instinctively sought out the mountain peaks of truth, justice,

and the eternal right, but did not overlook the quiet vales of mercy and justice that lie between. In all his work he sought the approval of his own conscience with unflinching zeal and loyalty to the interests committed to his care, despising the plaudits of the thoughtless multitude that approves to-day and condemns to-morrow without cause.

There is always endless labor for such men to perform. The work of his hand is visible on every record of this court. Every published volume of its reports bears silent testimony to the tireless vigilance and faithful labors of T. M. MARQUETT. It is no matter for wonder that such men, spurred on by the unceasing calls of duty to an ever-increasing clientage, should at last overtax their own powers of endurance, and it is a pathetic fact in his history that when at last he yielded to the commands of his medical advisers and sought to save his life by flight from the scene of his daily labors, he still attempted to take his work with him, unable to realize how near he was to his journey's end, how near he was to that haven of eternal rest so wisely hidden from mortal eyes, and, like the weary traveler, he suddenly cast his burden aside and laid himself down to rest and dreamless sleep in the full vigor of his intellect, with all his reasoning powers undimmed by age, escaping that experience we most dread and fear who live to see the evening of life approach—mental decay before physical death.

If the one thing that most distinguishes civilized man from the brute and the savage is his ability and disposition to labor, then he was one of the highest and best types of civilized man, and on the marble slab that shall mark his final resting place no prouder legend can be graven than is contained in the words,

"A weary laborer is resting here."

Oh, those graves of ours! How rich we are in the memories that cluster around them! How poor the world would be without the graves of its illustrious dead! Young as our State is to-day there is an inspiration in the names that have already been graven on the monuments that mark their final resting places—GANTT, BRIGGS, ESTABROOK, MASON, and now MARQUETT. Who among the living shall be the next to "wrap the drapery of his couch about him and lie down to pleasant dreams" in their glorious company? Who of us, when the records of our lives shall have been closed, will be found to have been worthy companions of the dead whose memory we

this day commemorate? Who of us, if suddenly called upon for an account of our services to our profession and to mankind, will be satisfied with the record we have made?

I can to-day pay no higher tribute to the work and worth of one whose friendship I have long enjoyed than to here resolve to profit by the example of his life and character, and to express the hope that his example may, in the poet's words,

> "Help us do our work as well,
> Both the unseen and the seen,
> Make the house where gods may dwell
> Beautiful, entire and clean."

HON. M. B. REESE:

This is, so far as I now recall, the first time this court has ceased from its labors for the purpose of doing homage to the memory of one of its officers who has never been identified with it save as an attorney at its bar. If this is true, there must be some reason for the action of the court and bar, which has not obtained in other cases, for the whole of the pathway of the court is strewn with the tombs of its dead. I presume there has been no year of the court's existence in which some one or more of the practitioners at its bar has not been called to answer to the summons of death, but it has not seemed proper to take judicial notice of the fact until upon the present occasion. While it is true that MR. MARQUETT was a state practitioner at the time of the organization of the court, and has been its trusted and trustworthy aid for more than a quarter of a century, yet this alone cannot furnish the sole reason for this action, for others have fallen under like circumstances and no notice of the fact can be found upon the records of this tribunal. It is true that he was a lawyer of more than ordinary abilities, yet that fact alone does not furnish the reason, for members of the bar of this court, who were recognized as possessing abilities far above the average, have passed away, and no orders commemorating their success in life at the bar are found upon our records. It is true he was a man of known integrity and honesty of purpose, yet this alone, for the same reason, cannot furnish the solution of the question. We readily concede that his capacity for organizing and controlling the actions of men was great, but others of our craft have excelled in that particular and the court and bar have lamented their demise, but no record of the actions or orders of

the court perpetuating the memory of such is found upon its records. Many others of the commendable virtues and capabilities of MR. MARQUETT might be named, but they would still fail to furnish the explanation. I am persuaded, then, that we all agree that the life, services, integrity, ability, and devotion to his profession of our deceased brother, T. M. MARQUETT, when considered as a whole, command our respect and admiration, and we are here fulfilling a double duty: that of commemorating his virtues and presenting him as a pattern by which we all, with profit, may order our own conduct, and thus leave the world the better by our having lived in it and formed a part of it.

I am not unmindful of the fact that occasions of this kind are often seized upon by those who are called upon to speak as an opportunity for the display of eloquence and a distortion of facts; that the mistakes, foibles, and errors of the deceased are carefully hidden from sight and fulsome and extravagant praises are indulged in to such an extent as to deprive the occasion of all benefit to the living and honor to the dead. I trust I may be excused from thus insulting the memory of the respected dead, lessening my own self-respect and the respect, if any, which my fellows and associates have for me. MR. MARQUETT made mistakes in life. Who has not? He sometimes erred in judgment. Where can be found the name of a human being who has not? But when we compare the whole course of his life with those of others we are compelled in candor to say, his life and works were worthy of imitation. He came to this state in its infancy. He with many others, some of whom have passed on before him, and comparatively few of whom survive him, entered heartily upon the labor of building up a great commonwealth which should be dedicated to the brotherhood of man, the fullest freedom of conscience, and the recognition of personal liberty and equality before the law. While in one sense not a politician, yet he at all times kept his eye upon the craft of State, and, when necessary, lent a willing hand and gave his best efforts toward maintaining its social, moral, and financial integrity. It was with pleasure and profit that I formed his acquaintance nearly a quarter of a century ago. At that time he was esteemed by those who knew him as a just and upright man, a safe adviser, and a good lawyer. None of us who knew him ever doubted his final ascendency, were he blessed with life and health. His social

qualities were unsurpassed. He loved the right because he despised the wrong. He was true to himself, never forfeiting his self-respect, and was, therefore, true to his fellow-men and always possessed their respect and confidence. He was no trimmer, but shaped his course by an enlightened judgment, and hence was sometimes criticised, but never justly denounced. His devotion to his chosen profession was scarcely equaled, but his fealty was to the higher aims and loftier attainments of that, in itself, most noble of all professions, rather than to success at the sacrifice of principle. He looked upon the law as a rule of human conduct which properly had its place but little below the divine command. He found its basic principles in the eternal rules of right, which come from above, and the deviations from that rule by courts and legislatures only gave him the higher respect for the rule itself. Always kind, courteous, and obliging to his antagonist at the bar, yet he was firm in his adherence to his own beliefs, judgments, and convictions. These characteristics, here so weakly presented, were a part of his very being, and hence continued to the end of his career. While connected with this court myself, it was frequently my good fortune to be an attentive listener to his able discussions of legal principles. While unable at all times to agree with him, yet I have always heard him with pleasure and profit.

The difficulties and privations which he was called upon to endure during the earlier days of his life seem to have called his latent resources into activity and developed the occult powers of his mind. He was one of the men of our profession of whom it can be said, he was never idle. His aim and purpose seemed to have been to master the subject in hand. He had the rare faculty of almost absolute mental concentration. He was during his whole life a student of the closest application. He never forgot that he did not know all there was of the law to be known, but with an industry seldom found he sought to present, combat for, and protect all the rights of his client which had been committed to his care. Conservative, careful, thoughtful, he sought to maintain the cause he espoused. He preferred to maintain the legal rights of his client by a bold stand for principle rather than to resort to the tactics so often made use of by men of less ability and honesty. His life was one of honor. His course as a lawyer was one of integrity. His purposes were ennobling.

As he lived, so he died. He leaves no blot upon his record. There

is nothing for which his friends could desire to apologize or offer explanations. The record is made up, never to be changed, but no change is desired. The entries are closed and the complete record is made. The life and character of TURNER M. MARQUETT is an open book to be read by all. His career, as we review it, is one after which the lawyer, the politician, the citizen, and the upright man may well pattern. He has fought a good fight. He is at rest, and as we recall his many virtues we can but stand with uncovered heads and with grief lament his departure from among us.

HON. W. S. SUMMERS, DEPUTY ATTORNEY GENERAL:

A type of American manhood has gone. A grand patriot has fallen. A great lawyer is at rest. A strong mind has ceased to think. A good man is dead. The subject of the resolutions read to-day combined in a rare degree splendid moral and great mental qualities. His was an intellect of high order. It was trained in the school of severe discipline. It was enriched in the broad fields of culture. His logic was simple and searching. His inquiry was, What is the law and what are the facts? He was kind in heart, genial in manner, uniform in courtesy, manly in bearing, retiring in habit, grand in character. He was born to poverty and reared in obscurity. Unaided he climbed the steep and thorny pathway of life. No patrician influence claimed for him a high position. Desire to be and to know cheered him on. A splendid mind, a restless ambition, a great soul, these made it possible for him to attain an exalted place in the realm of true greatness. But the genius of death touched his heart. The sun of his existence reached its zenith and fell into the ocean of eternity. Death? No, there is no death. The world simply gave one of its noblest gifts to God. There is no death,—"This life of mortal breath is but a suburb of the life, whose portal we call death."

HON. WILLIAM GASLIN:

Almost thirty years ago I located in Omaha, and soon became acquainted with MR. MARQUETT. Three years later I took a homestead in Harlan county. At that time Crete was the terminus of the Burlington & Missouri River railroad. In 1872 it was extended to Lowell, where I opened an office and commenced the practice of law in June of that year. My legal business brought me in close contact

with MR. MARQUETT, who was the only attorney of the railroad. He tried all its cases in the South Platte country, and had much additional law business. We then had but one term of district court a year in the western counties. I admired MR. MARQUETT'S adroitness as a pleader and advocate in the cases where we opposed each other at the bar. I soon learned to love, respect, and admire him. Occasionally I would go to Lincoln and avail myself of the hospitality of MR. MARQUETT'S office, where I was welcomed by a warm grasp of the hand and a sincere smile. Books were laid aside, and that busy brain, which seldom rested, turned from its contemplation of legal problems. I received such a whole-souled, hearty greeting that, for the time, I forgot my troubles. In times of prosperty he met me in the usual way of a courteous and genial friend, but when adversity came he showed his sympathy by unusual kindness. After these visits I left his office, and returned to my western home with a lighter heart, and settled down to my toils, hardships, and privations with renewed vigor. In 1875 I was elected district judge. He tried many cases before me, and treated me with as much respect and courtesy as if I had been chief justice of the supreme court of the United States. He was kind, considerate, and courteous to opposing counsel, and always forbearing to younger attorneys. I never saw him excited, disconcerted or out of patience, in the most hotly contested cases. The more intricate and disadvantageous the case, the more he appeared at ease. He never lost his presence of mind or temper, and the more the odds were against him, the more self-possessed he was. This gave him an overwhelming advantage in the trial of a cause. He was one of the most successful lawyers in jury trials, and seldom met his equal as a practitioner in courts of equity.

I will not comment further on his qualities as a lawyer. They have been eloquently and truthfully portrayed by the distinguished gentlemen who preceded me.

I knew no man in Nebraska more thoroughly than MR. MARQUETT. I have met him under all circumstances. I have seen him alone in the private walks of life and in legal contests in court. He practiced before me when I was district judge. I visited him in his home and received his hospitality in the sacred precincts of his family. Though he was a man of rare attainments and high position, he was as unassuming as the most humble citizen. He zealously regarded the

rights of others. Apparently he had no idea of his superiority over other men. He was generous and charitable to a fault, and always ready to make donations to the poor. Sometimes he was a victim of impostors. Many poor families in Lincoln and elsewhere have received benefits of his charity. I never knew a person who was his enemy. MR. MARQUETT ranked among the greatest lawyers of his time. He was a loyal citizen and a kind husband and father. As such he will still live in the memory of men.

MR. CHIEF JUSTICE NORVAL:

For more than thirty-five years HONORABLE TURNER M. MARQUETT practiced his profession in this state. During that time his life and character were prominently identified with the history of Nebraska. It is, therefore, fitting and proper that this court should pause in the midst of its labors to take notice of his death, review the lessons of his life, and listen to the eulogies his good works and noble manhood have prompted his associates to pronounce.

In making response to the resolutions which have just been presented it would, doubtless, be quite sufficient for me to say that the court fully indorses the sentiment therein so truthfully expressed, and that we heartily concur in all that has been so appropriately and eloquently said by the members of the bar. So many able addresses have been delivered here and elsewhere upon the life and character of our departed friend that little need be added by the court. It would, however, be unjust to ourselves, and to the memory of the deceased, to permit this occasion to pass without adding our testimony, expressive of our estimation of his high character and abilities as a man and a lawyer, even though it be at the risk of repeating something that has already been expressed by others.

MR. MARQUETT was born in Clarke county, Ohio, July 9, 1831, and when the final summons came he was in the sixty-fourth year of his age. He was reared upon a farm. Before reaching his majority he entered the Ohio University, from which he was graduated upon the completion of the scientific course. He came to Nebraska in 1856, and located at Plattsmouth. The following spring he commenced the practice of law at that place, and soon won his way to the front rank of the profession. He was admitted to the bar of this court December 14, 1859. In 1869 he was appointed general attorney of the Bur-

lington railroad, which position he ably filled until his death. He removed to Lincoln in 1874, where he afterwards resided and continued in the practice of the law.

In politics he was always a republican, firm and consistent in the maintenance of its principles. He was frequently called upon to help fight its battles; and as a platform orator he had but few equals. Soon after becoming a citizen of Nebraska he was trusted by the people of his county with the discharge of many public duties. He was six times elected to the legislature, being a member of the lower house during the fourth, fifth, and sixth sessions of the territorial legislature, and of the seventh, eighth, and ninth sessions of the territorial council. The journals of the house and council—the recorded history of their proceedings—speak his eulogy, and will in all time bear witness to his untiring industry, the marked ability, and the lofty sense of public duty by which his career as a legislator was so strikingly distinguished. In 1866 he was the candidate of his party for representative in congress, the Hon. J. Sterling Morton being his opponent on the democratic ticket. Mr. MARQUETT was elected, and had the honor of being the first member of congress from Nebraska after the admission of the state into the Union. His term expired on March 4, 1867. As the state was not admitted until March 2, his term of service was brief, yet long enough to permit him to cast his vote for the passage of all the reconstruction measures over the veto of the president. In 1868 he was chosen as one of the presidential electors from Nebraska and cast his vote for General Grant. Such is the bare catalogue of the places of public trust he has held.

As a citizen, he always acted well his part. He was enterprising and public-spirited. In his character he was true to every principle of the noblest manhood, honorable and upright in all his dealings with his fellow-men. He possessed a great and generous heart. To the claims and calls of charity he had an ever listening ear. Without ostentation, he gave freely to relieve distress and suffering. He was a quiet, unassuming man, unselfish and kind, and simple in his habits and dress. He cherished no hatreds, and never manifested any malice towards individuals. He was loved and respected by every one who knew him.

With MR. MARQUETT'S home life I am unacquainted, but I am told by those who are capable of speaking that he was a kind, indulgent,

faithful and devoted husband and father. His home was always pervaded by a spirit of mutual sympathy, confidence, forbearance, and love. It is there that he will be the most missed. We are fully conscious we can say nothing to lessen the anguish caused by the heavy blow that has fallen upon his wife and children. They have the satisfaction of knowing that he has left for them the noble legacy of a splendid name, the record of an incorruptible officer and a brilliant lawyer, and the blessed memory of a life of generosity, goodness, and love.

My recollection of MR. MARQUETT goes almost back to the date I commenced the practice of the law, having first made his acquaintance during the May, 1872, term of the district court of Seward county. The acquaintance then formed soon ripened into an intimate frendship, which countinued undisturbed. I practiced with him at the bar. Sometimes we were on the same side of the case, and, at other times, we were opposing counsel. This, together with his frequent trial of causes before me while upon the district bench, and his extended practice in this court since I became a member thereof, have enabled me to form a correct estimate of him as a man, as well as his merits as a lawyer. MR. MARQUETT was a diligent student and exclusively devoted to his chosen profession. He lived in it and for it. There was nothing superficial about him or his methods. He was always strictly loyal to the interests of his clients. When he took a cause, he entertained no doubt as to its justice, and he urged it in the courts with the energy and perseverance which resulted from the utmost faith in its merits. His zeal for his client never abated, and he knew no limit of honorable endeavor. His mind readily grasped and solved the pivotal points of a case. His conception of professional morals was pure, noble, and refined. His oral promises, given out of court, relating to a cause were as sacredly kept as were his written stipulations filed with the clerk. To the bench and his professional brethren he was ever courteous, both in bearing and language. To the young practitioner, especially, he was always kind and considerate, and to him many of them are indebted, not alone for legal advice given without compensation, but for success in their profession. As an advocate before either a court or jury he had no superior in this state, and few equals. He was a logical reasoner. In his statement of legal propositions he was clear and forcible. He was emi-

nently a successful practitioner. His fame as a lawyer was not limited to the state of his adoption. That his clientage was large is attested by the numerous and important cases found in each of the forty-one volumes of our reports, where his name appears as counsel, and where reference is frequently made to his arguments and the authorities cited. His duties and responsibilities were numerous, yet there was no flagging of interest and no neglect of duty. He was faithful to the end.

One of the bright lights of the bar of this state is extinguished, and a good and just man has crossed the Mysterious River; but how truly it may be said of him, he left no duty unperformed and no blemish upon his character. In his death a great loss has fallen upon the bench and bar, as well as upon the people of this city and state. Let us cherish and revere his memory and emulate his virtues.

The resolutions and addresses accompanying them, with this response, will be entered at length upon the records of the court, and published in the appropriate volume of the reports; and as a further mark of respect to the memory of the deceased, the court will now adjourn for the day.

SUPREME COURT COMMISSIONERS.

(Laws 1893, chapter 16, page 150.)

SECTION 1. The supreme court of the state, immediately upon the taking effect of this act, shall appoint three persons, no two of whom shall be adherents to the same political party, and who shall have attained the age of thirty years and are citizens of the United States and of this state, and regularly admitted as attorneys at law in this state, and in good standing of the bar thereof, as commissioners of the supreme court.

SEC. 2. It shall be the duty of said commissioners, under such rules and regulations as the supreme court may adopt, to aid and assist the court in the performance of its duties in the disposition of the numerous cases now pending in said court, or that shall be brought into said court during the term of office of such commissioners.

SEC. 3. The said commissioners shall hold office for the period of three years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of the supreme court, payable at the same time and in the same manner as salaries of the judges of the supreme court are paid. Before entering upon the discharge of their duties they shall each take the oath provided for in section one (1) of article fourteen (14) of the constitution of this state. All vacancies in this commission shall be filled in like manner as the original appointment.

SEC. 4. Whereas an emergency exists, this act shall take effect and be in force from and after its passage and approval.

Approved March 9, A. D. 1893.

See page lxix for table of Nebraska cases overruled.

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

A table of statutes and constitutional provisions cited and construed, numerically arranged, will be found on page lxxiii.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1894.

PRESENT:

HON. T. L. NORVAL, CHIEF JUSTICE.
HON. A. M. POST, } JUDGES.
HON. T. O. C. HARRISON, }

HON. ROBERT RYAN, }
HON. JOHN M. RAGAN, } COMMISSIONERS.
HON. FRANK IRVINE, }

ZOETH WAGNER AND LAWRENCE WAGNER V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1894. No. 6666.

1. **Criminal Law:** ACCESSORIES. In misdemeanors there are no accessories. Those whose conduct is such that it would constitute them accessories before the fact, if the principal offense were a felony, are, if it be a misdemeanor, guilty as principals.

2. **Information:** ASSAULT. Therefore, under an information charging the defendant with procuring, aiding, and abetting another to commit an assault with intent to wound, the defendant may be convicted of assault and battery.

3. ———: FELONIES. An information which in apt words charges the commission of an offense, which the statute makes a felony,

is not bad because it does not charge that the act was feloniously committed.

4. **Criminal Law:** INTENT: ACCESSORIES. Where a particular intent is an essential element of a crime, one is not guilty as an accessory before the fact to such crime unless he participates in or has knowledge of such intent.

ERROR to the district court for York county. Tried below before WHEELER, J.

George B. France, for plaintiffs in error.

George H. Hastings, Attorney General, contra.

IRVINE, C.

The plaintiffs in error, together with Otis Koontz, were informed against in one information, charging Otis Koontz with stabbing one Casper Salmen with intent to wound, and charging Lawrence Wagner and Zoeth Wagner, the plaintiffs in error, with having before said offense procured, incited, abetted, and aided Koontz in the perpetration thereof. Koontz demanded a separate trial, was convicted and sentenced. The two Wagners were tried together. Lawrence Wagner was convicted of assault and battery. Zoeth Wagner was found guilty as charged in the information. They were sentenced and have filed separate petitions in error to reverse the several judgments against them.

Lawrence Wagner filed no motion for a new trial, and the only point arising in his case, and the only one argued by counsel, is that under an information charging him as accessory before the fact to the statutory felony of stabbing with intent to wound no conviction could be had of assault and battery. It is familiar law that no conviction as accessory will lie under an indictment charging one as principal, and *vice versa* (Wharton, Criminal Law, 208); but it is also true that in misdemeanors there are no accessories.

This rule does not mean that one conducting himself in such a manner that if the principal offense were a felony he would be an accessory is not punishable at all, if the offense be a misdemeanor, but it means that in misdemeanors the law does not distinguish between principals and accessories, and that all who participate, whether present or absent when the crime is committed, are alike guilty as principals. (Wharton, Criminal Law, 223.) This is true whether the offense is one at common law or whether it is one created by statute. (*Stratton v. State*, 45 Ind., 468; *Lowenstein v. People*, 54 Barb. [N. Y.], 299.) It would seem, therefore, that at common law language sufficient, if the offense were a felony, to charge one as accessory before the fact, would constitute a good indictment, in the case of a misdemeanor, as principal and sustain a conviction as such. It is true that the criminal jurisprudence of this state is based on the Criminal Code, but we think that the Code is in this respect declaratory of the common law. The first section of the Criminal Code provides for the punishment of those who "aid, abet, or procure any other person to commit any felony." This section provides for the punishment of accessories before the fact in the same manner as at common law, and the terms used are substantially the terms used in defining at common law such accessories; the definition is restricted to felonies. Generally throughout the Code offenses existing at common law are described by their common law terms without further definition, and such offenses have always been construed with reference to the common law. The statute in regard to batteries does not use the term "battery," but uses the language "unlawfully strike or wound another." This is substantially the common law definition of a battery, although, perhaps, somewhat restricted as to the nature of the beating required, but not as to the persons doing it. We think it quite clear that the legislature did not intend by defining accessories in the terms of common law to pre-

vent the punishment of those who aid, abet, or procure the commission of misdemeanors, and that such persons remain punishable as principals. If this be so, then the information in charging the aiding, abetting, and procuring of the perpetration of the felony sufficiently charged the aiding, abetting, and procuring of minor offenses included in the greater charge, and so by apt words charged Lawrence Wagner with acts which in law constituted him a principal to the misdemeanor of which he was convicted. The judgment as to Lawrence Wagner must, therefore, be affirmed.

Zoeth Wagner was convicted of being an accessory before the fact of stabbing with intent to wound. He filed a motion for a new trial and a number of errors are assigned. The first is that the information is insufficient. The information, omitting the purely formal parts, is as follows: "That Otis Koontz, on the 25th day of April, A. D. 1893, in said county of York, in and upon one Casper Salmen, then and there being, unlawfully and maliciously did make an assault with a certain knife which he, the said Otis Koontz, then and there in his right hand had and held, said Casper Salmen on his left breast and on the head near the top of him, the said Casper Salmen, the said Otis Koontz, then and there unlawfully, maliciously, and feloniously, did strike, stab, cut, and wound, with the intent then and there of him the said Otis Koontz, him the said Casper Salmen, then and there to wound; and before said striking, stabbing, and wounding, and felony were committed by the said Otis Koontz, to-wit, on the 25th day of April, A. D. 1893, Lawrence Wagner and Zoeth Wagner, in said county of York, unlawfully, purposely, and feloniously did procure, incite, abet, and aid him, the said Otis Koontz, in the perpetration of the said striking, stabbing, cutting, and wounding, and felony, in the aforesaid manner and form." The defect which it is claimed exists in this information is that it fails to charge that

Koontz "feloniously" made the assault, and that it cannot properly charge an offense against the accessory without sufficiently charging the principal. We do not think the information deficient in this respect. It will be observed that the information charges that Koontz unlawfully and maliciously made the assault, and unlawfully "and feloniously did strike, stab, cut, and wound" Salmen with intent to wound him. We think the latter language sufficiently charges the assault to be felonious, but aside from that we do not think that the information would be bad for the total failure to use the word "felonious," provided the offense were otherwise correctly described. The statute creating this offense is as follows: "If any person shall maliciously shoot, stab, cut, or shoot at any other person with intent to kill, wound, or maim such person, every person so offending shall be imprisoned in the penitentiary not more than twenty years nor less than one year." (Criminal Code, sec. 16.) Under this statute it has been held that the use of the word "maliciously" was not essential to charge the offense, the other words being sufficient to charge what in law amounts to malice. (*Whitman v. State*, 17 Neb., 224.) In that case, as well as in *Hopkins v. State*, 36 Neb., 160, it was held that it was not even necessary to use the precise words of the statute, provided words identical in meaning were used. This information uses the words of the statute. The Criminal Code constitutes all offenses punishable by imprisonment in the penitentiary felonies. (Criminal Code, sec. 247.) Section 16, above quoted, defines this offense and makes it punishable in the penitentiary. The offense being charged in all the terms of the statute, the words used, in their legal intendment, charged a felony, and the use of the expletive "feloniously" was unnecessary. This is especially true in view of section 412 of the Criminal Code, providing that no indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stayed, arrested, or in any manner affected for any defect or imper-

fection which does not tend to the prejudice of the substantial rights of the defendant upon the merits. The omission of the purely expletive "feloniously" could not by any possibility tend to the prejudice of Wagner upon the merits.

It is urged, however, that the evidence was insufficient to sustain this verdict against Zoeth Wagner, and we think this assignment well taken. The evidence tends to show that on the afternoon preceding the events upon which the information is based Koontz and Lawrence Wagner, both more or less intoxicated, were entertaining themselves by riding a horse back and forth on the sidewalks of the town of Lushton. Salmen, who was employed in a store in the town, remonstrated with them and an altercation ensued between him and Koontz. Salmen withdrew into the store. Koontz and Lawrence Wagner soon after dismounted and Lawrence Wagner entered the store and used language towards Salmen of a character tending to incite the latter to violence. The proprietor of the store compelled them to desist, when Lawrence Wagner invited Salmen to come outside, and repeated the offensive language. Salmen accepted the invitation, and going outside, an affray took place in which Lawrence Wagner received what seems to be a well merited punishment. Salmen then returned to the store. Some time afterwards and about dark Koontz entered the store and quietly addressing Salmen asked him to come outside, saying he wished to speak to him. Salmen went out and the altercation of the afternoon was at once renewed. Both men took off their coats, but the sleeve of Koontz did not at once slip over his right hand. When Koontz got his coat removed the men started for one another and almost simultaneous blows were struck. Koontz's blow was received by Salmen on the top of his head and turned out to be a stab with a knife. Koontz struck again, stabbing Salmen in the breast. Salmen called out to the by-standers that Koontz had a knife, to take it

away from him. Either by Salmen's efforts or the action of the by-standers the knife was then wrenched from Koontz's hand, when Salmen proceeded to knock Koontz down and administer a somewhat severe punishment to him. Spectators then interfered, Salmen went to a physician to have his wounds dressed, and Koontz was placed under arrest. The evidence connecting Zoeth Wagner with the occurrence is as follows: Zoeth Wagner lived a short distance from the town with his father. About the time of Salmen's affray with Lawrence, Koontz went to the Wagner house accompanied by a man who testifies that when they reached the house Koontz knocked at the door and Zoeth came out. A whispered conversation occurred between Zoeth and Koontz. The witness and Koontz started back to town and Zoeth overtook them as they walked. There is evidence to show that after reaching town a short conversation took place between Lawrence and Zoeth. Zoeth afterwards stood outside the store and was there while Koontz was within and when he came out followed by Salmen. There is testimony tending to show that when Koontz's sleeve caught as he was taking his coat off, Zoeth called out to Salmen, "Don't jump onto him until he gets his coat off," and that after Koontz got his coat off Zoeth said, addressing Koontz, "Give it to him now you have got him, give it to him." There is evidence tending to show that after the knife was taken or fell from Koontz's hand, and while Salmen was beating Koontz, Zoeth made some effort to make his way through the crowd and reach the combatants. Zoeth Wagner relates the conversation between him and Koontz at the Wagner house, and his is the only testimony upon the subject. He says that Koontz informed him that his brother Lawrence wished him to come to town; he asked if Lawrence was drunk; Koontz said he was. The conversation was held in a low tone to prevent the father of the Wagners from hearing it. Zoeth then finished his supper and started to

town for the purpose of looking after Lawrence. We think that thus far the evidence would be sufficient to warrant the jury in finding that Zoeth abetted Koontz in an assault on Salmen, but there is certainly nothing so far to justify the inference that he was a participant in the purpose of stabbing Salmen or in the intent of wounding him. Several witnesses testify that Zoeth Wagner was in the store after the affray; that Koontz was brought in and that a low conversation occurred between him and Zoeth. One witness testifies that he heard Koontz ask Zoeth if the latter had got his (Zoeth's) knife; the answer was not heard. There is no evidence that the knife used belonged to Zoeth or had ever been in his possession, although the knife was produced at the trial. On the contrary, there is evidence that a similar knife had been seen in Koontz's possession several days before. If in order to constitute Zoeth guilty of the offense of which he was convicted it was necessary to show that he participated in Koontz's intent of wounding Salmen, we do not think this evidence in a criminal case is sufficient to establish such participation. If there were any proof that the knife belonged to Zoeth the case might be different; but it would be to establish a felony on very slender evidence if a witness' recollection as to the use of a pronoun in an overheard whispered question to which the answer was not heard were permitted to supply this proof. We therefore proceed upon the ground that the evidence was sufficient to justify the jury in finding that Zoeth had in some manner counseled, aided, or abetted Koontz in making an assault upon Salmen, but that it was insufficient to show that Wagner contemplated an assault with a knife with the intention on the part of Koontz of wounding Salmen. Under this state of facts was Salmen guilty as an accessory to the felonious assault? We think the general rule is that one who counsels or invites another to perpetrate an act is responsible not only for that act, but for all the probable consequences of such counsel, and we are

aware that if it be shown that several conspire to commit an offense, and if in the act of committing that offense another is committed, there are cases that hold that all engaged in the conspiracy are responsible for the latter crime. This is the effect of all the cases cited by the attorney general in support of this conviction. But this is a crime of a peculiar nature. The intent to wound by stabbing is an essential element of the principal offense, and where a particular intent is requisite to constitute a crime, one who is not present, in order to be an accessory before the fact, must have participated in that particular intent. (*Meister v. People*, 31 Mich., 99; *Savage v. State*, 18 Fla., 909.) Where a specific intent is not an element of the offense, one who instigates an act, the natural and probable consequence of which is the commission of other acts constituting such offense, may be reasonably charged as accessory thereto. But where a specific intent is essential to constitute an offense, how can it be said that one who instigates an entirely different act, neither knowing nor contemplating the formation of that specific unlawful intention on the part of the person instigated, nor intending to place such intention in his mind, is guilty of having procured, aided, or abetted the offense to which such intent is essential? We think the jury was not warranted from the evidence referred to in finding that Zoeth Wagner either knew of the intention on the part of Koontz to stab and wound Salmen, or that with the intention himself of having Salmen wounded he instigated Koontz to assault him. The judgment against Zoeth Wagner is, therefore, reversed and the cause as to him remanded for a new trial.

JUDGMENT ACCORDINGLY.

JOHN S. BISHOP V. WILLIAM MIDDLETON ET AL.

FILED DECEMBER 4, 1894. No. 5612.

1. **Pleading.** It is unnecessary to plead what the law presumes. Therefore a pleading which avers facts from which the law presumes another fact sufficiently pleads that other fact.

2. **Practice in Supreme Court.** Assignments of error not specifically called to the attention of the court by brief or argument will be deemed waived, although a party in his brief states generally that he does not desire to waive any assignment.

3. **Exemptions:** LABORERS' WAGES. The decision in *Singer Mfg. Co. v. Fleming*, 39 Neb., 679, in regard to the validity of the act to provide for the better protection of the earnings of laborers, servants, and other employes of corporations, firms, and individuals engaged in interstate business (secs. 531*c*–531*f*, Code of Civil Procedure) followed and reaffirmed.

4. ———: ———. The term in the title of that act, "corporations engaged in interstate business," construed with reference to the object of the act, means a corporation doing business and employing men in this state, and having in another state such a *situs* as to permit of its being reached by process of garnishment there.

5. ———: ———. The act referred to applies to a case where the debt was incurred before the passage of the act, and was assigned in good faith to a third person after its passage, but where such third person thereafter again assigned it for the purpose of evading the exemption laws of this state.

6. ———: ———. An assignment for the purpose of evading the effect of our exemption laws was unlawful before as well as after the passage of the act, and the act affects only the remedy. Its application to the case of debts incurred prior to its passage does not, therefore, impair the obligations of contracts.

7. ———: ———. Evidence examined, and *held* sufficient to sustain the verdict.

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

See opinion for statement of the case.

John S. Bishop, for plaintiff in error:

The account was sold in Iowa. To support this action the act must have been wrongful or punishable in Iowa, where it took place. Whatever would be a good defense to the action if brought there, must be a good defense here and everywhere. (Cooley, Torts [2d ed.], 552; Bishop, Non-Contract Law, secs. 1280, 1281.)

The act of 1889 can only be applied to contracts made since its passage. Laws are construed to be prospective and not retrospective, unless their language imperatively requires such a construction. (*Auffm'ordt v. Rasin,* 102 U. S., 620.)

The act of 1889 is unconstitutional. The subject is not clearly expressed in its title. The subject-matter of the act as expressed in the title is the protection of wages of persons employed by corporations doing an interstate business, while in the body of the act its operation is not so restricted. The act provides a penalty and defines a crime which are not expressed in its title. The title of an act must express the subject of the bill. (Constitution of Nebraska, sec. 11, art. 3; *Ives v. Norris,* 13 Neb., 252.)

The subject-matter of the act is unconstitutional. It extends the criminal and penal laws of Nebraska over Iowa, and makes the selling of an account in Iowa unlawful, which by the laws of Iowa is lawful. (*Burlington & M. R. R. Co. v. Thompson,* 31 Kan., 180; *Slack v. Gibbs,* 14 Vt., 364.) It impairs the obligation of a contract right possessed in the account the subject of the original suit. The value of the account has been diminished by legislation. (*Oatman v. Bond,* 15 Wis., 22; *Homestead Cases,* 12 Am. Rep. [Va.], 515; *Planters Bank v. Sharp,* 6 How. [U. S.], 301; *Green v. Biddle,* 8 Wheat. [U. S.], 1; *Commercial Bank v. State,* 4 Smedes & M. [Miss.], 507; *Rees v. Watertown,* 86 U. S., 107; *Memphis v. United States,* 97 U. S., 293.)

The Iowa judgment is conclusive, and estops Middleton,

who appeared personally in that action. (*Green v. Van Buskirk*, 7 Wall. [U. S.], 139; *Cole v. Cunningham*, 133 U. S., 107; *Uppinghouse v. Mundel*, 103 Ind., 238; *Morgan v. Neville*, 74 Pa. St., 53.)

L. C. Burr, also for plaintiff in error.

W. P. Hall, *Halleck F. Rose*, and *Adams & Scott*, *contra*, cited: *Albrecht v. Treitschke*, 17 Neb., 205; *Wright v. Chicago, B. & Q. R. Co.*, 19 Neb., 182; *Union P. R. Co. v. Smersh*, 22 Neb., 751; *Snyder v. Brune*, 22 Neb., 189.

IRVINE, C.

In 1888 Middleton was indebted to the defendant in error, Dr. Latta, in the sum of $91, for professional services. The plaintiff in error, Bishop, was an attorney at law, and in November, 1888, the account was placed in his hands for collection. The legislature of 1889 passed an act entitled "An act to provide for the better protection of the earnings of laborers, servants, and other employes of corporations, firms, or individuals engaged in interstate business." This act appears as sections 531*c*–531*f*, Code of Civil Procedure, and is quoted at large in the opinion in *Singer Mfg. Co. v. Fleming*, 39 Neb., 679. After this act took effect, and on November 11, 1889, Dr. Latta assigned this account to Bishop, who assigned it later to one West, an attorney at law practicing in Council Bluffs, Iowa. West assigned it to one Tucker, and as attorney for Tucker began suit in Iowa aided by attachment. Middleton was then employed by the Chicago, Burlington & Quincy Railroad Company, and was working at Holdrege, in this state. The railroad company was garnished and wages earned by Middleton within sixty days were seized and applied to the satisfaction of the judgment, which was finally rendered in the case by the Iowa court. Middleton was the head of a family, and there is no doubt that the wages so seized were

exempt under the laws of Nebraska; $114.78 was the sum so seized and applied to the payment of the judgment. Middleton then brought his suit against Bishop and Latta to recover back the sum so seized, together with his expenses, alleging that the assignment from Latta to Bishop was for the purpose of avoiding the law of Nebraska concerning exemptions. There was a trial to a jury and a verdict and judgment in favor of Middleton against Bishop for $103.74. The jury found in favor of the defendant Latta. There is no averment in the petition that the assignment from Bishop to West was for the purpose of avoiding the effect of the exemption laws of this state, but the petition avers that a suit was instituted in Iowa, that service of garnishment summons was made to seize exempt wages of Middleton, and under section 531*e* of the Code of Civil Procedure, being section 3 of the act referred to, this constitutes *prima facie* evidence of an evasion of the laws of Nebraska, and the facts alleged raise a legal presumption of such evasion. It is not necessary to plead what the law presumes; and the facts being pleaded which raised this presumption, it was unnecessary to plead expressly the unlawful intent. To reverse the judgment so rendered against him Bishop prosecutes error.

Several assignments of error will not be noticed, for the reason that they are not referred to in the briefs, and must therefore be deemed waived. It is true that the plaintiff in error says in his brief that he does not wish to waive the assignments not noticed therein; but the reason of the rule whereunder such assignments are treated as waived is not merely an inference as to the intention of the plaintiff in error. This court has a right to require, and does require, not only that alleged errors shall be specifically assigned, but that counsel in argument, or in the briefs, shall point out in what respect the ruling complained of is erroneous. Where one assigns generally that there was error in a certain ruling he must by argument, orally or in his

brief, indicate wherein the error lies; and this court will not, in the absence of such indication, undertake to investigate and discover such error. Many of the points urged in argument have since the submission of this case been considered and decided in the case of *Singer Mfg. Co. v. Fleming, supra.* In fact it may be stated that this case presents every question presented in that except the one covered by the fifth point of the syllabus in the former case. It is unnecessary to restate or rediscuss these questions. The decision in *Singer Mfg. Co. v. Fleming,* so far as it is applicable here, is adhered to.

It is urged that the verdict is not sustained by the evidence, for the reason that there is no evidence tending to prove that the sale of the account by Bishop to West was for the purpose of avoiding the effect of the laws of this state, that there is no evidence that Bishop aided or counseled a violation of the act in question, or that he caused to be done any of the acts made *prima facie* evidence of an evasion of our law. The evidence does show that Bishop assigned the account to West; that West resided in Iowa, and was there practicing law; that West assigned to Tucker; that Tucker, through West as his attorney, began suit in Iowa aided by attachment; that the railroad company was garnished, and that the wages of Middleton, exempt under the laws of Nebraska, were seized by that process. Section 3 of the act in question provides that proof of the institution of a suit, or service of garnishment summons by any person, firm, or individual in any court of any state or territory, other than this state, or in this state, to seize by process of garnishment any of the wages of the persons defined in section 1 of the act shall be deemed *prima facie* evidence of an evasion of the laws of the state of Nebraska, and a breach of the provisions of the act on the part of the creditor or resident of Nebraska causing the same to be done. The evidence was, therefore, ample to make a *prima facie* case against Bishop, unless the act requires affirmative

proof that the resident of Nebraska caused the institution of the suit, and unless there is an absence of such proof. Bishop testified that he did not assign the account to West for the purpose of evading our laws, and that nothing was said in regard to the institution of any proceedings. But it appears that West was informed by Bishop of Middleton's employment. That the negotiations referred not to this claim alone but to others also. It does not appear that West knew Middleton or had any information as to his financial responsibility. Middleton resided at a distance. Bishop had for more than a year been endeavoring to collect the account in this state. From these facts, and from those already stated, we think the jury was justified in inferring that the assignment was with the contemplation of collecting the account by such proceedings, and for the purpose of evading the effect of our exemption laws. So that if it be necessary to show, in addition to the facts raising the presumption referred to in section 3, that the defendant caused the performance of any such acts, we think there was sufficient evidence to show that fact.

It is further urged that the verdict is contrary to the evidence because Bishop sold the account in Iowa. It was said in *Singer Mfg. Co. v. Fleming* that the gist of the action lies in the unlawful seizure of the debtor's property in this state; but it is not necessary to here decide whether liability could be evaded by the creditor's going to Iowa and there transferring the account. The evidence shows that the negotiations for the sale were begun in Council Bluffs, but that they were consummated by correspondence by mail between Bishop and West, Bishop then residing and being in Nebraska. His acts were committed here.

By one of the instructions the jury was told that in order that the plaintiff should recover the jury must find, among other things, that he was a laborer, servant, clerk, or other employe of a corporation, firm, or individual in

this state. It is claimed that this instruction was erroneous because the title of the act includes only employes of corporations, firms, or individuals engaged in interstate business. The instruction should have been so qualified in order to be exact; but the uncontradicted evidence showed that Middleton was an employe of a corporation in some places designated as "The Chicago, Burlington & Quincy Railroad Company," and in others as "The Burlington & Missouri Railroad Company in Nebraska;" that the latter company was originally incorporated to build and operate a line of railroad whose termini were fixed within this state, but that it was afterwards consolidated with the Chicago, Burlington & Quincy Railroad Company, an Illinois corporation which had become under the laws of Illinois and Iowa the owner of the property and franchises of the Burlington & Missouri Railroad Company of Iowa. The articles of consolidation show that the railroads of the parties thereto connected at the boundary line between Iowa and Nebraska. This proof, together with the fact that Middleton was employed by the company in Nebraska, and that compulsory service of garnishment had been made upon the company in Iowa, established clearly that the corporation was one doing an interstate business, and the inaccuracy in the instruction was therefore without prejudice. We do not think that in order to make the act applicable it is necessary to show that the corporation is one engaged in commerce among the states within the meaning of those cases construing the federal constitution. The act should be construed with reference to its object. Its object was to prevent the evasion of our exemption law by garnishment of a corporation employing a man in this state, but having such a *situs* in another state as to permit of its being reached by legal process there. Undoubtedly this corporation fell within that class.

It is next urged that because the debt sued on was incurred before the act of 1889 was passed, the application

of that act would operate to impair the obligations of a contract. In the first place the claim did not pass to Bishop until after the act of 1889 took effect. There was no legislation then which in anywise changed the relations of Bishop and Middleton after the assignment to Bishop. The act which forms the basis of this action was not the transfer from Latta to Bishop, but it was the transfer from Bishop to West which occurred after the statute took effect. The statute is not therefore given a retroactive effect by applying it to that transfer. But beyond this this act in no sense makes unlawful a contract which was before its passage lawful. Independent of the statute the institution of proceedings in evasion or in fraud of law is unlawful. It is admitted in the argument that a resident of Nebraska might by injunction be prevented from enforcing his demand in another state in violation of our law. This act merely provides a better and more adequate remedy against such proceedings. It is an act affecting the remedy alone, and not the contract. It is probably true, as counsel argue, that its passage rendered less valuable such claims as the present, but this is solely because of the former want of an adequate remedy on behalf of the debtor to prevent the creditor from enforcing his demand by unlawful means. Such a creditor cannot complain because the legislature has deprived him of the opportunity to adopt such unlawful means without incurring liability therefor. Judgment

AFFIRMED.

HENRY WAX V. STATE OF NEBRASKA.

FILED DECEMBER 5, 1894. No. 5409.

1. **A bill of exceptions must be certified by the clerk of** the trial court, as being a part of the record in said court, or as being the original bill of exceptions in the cause, in order that the matters therein may be considered by this court.
2. **In a prosecution for obtaining money under false pretenses** it is the duty of the jury, in case of a conviction, to find the value of the money feloniously obtained; but a verdict of guilty will not be set aside because it fixes the value of the money at a few dollars more than is established by the evidence, where the uncontradicted proofs show that the sum procured from the complaining witness exceeded in value $35.
3. **To authorize a conviction under an information charging the obtaining of money by false pretenses,** the defendant's false representations need not have been the sole moving cause that induced the person defrauded to part with his money, but it is sufficient if it appear that they were one of the causes of inducement, and that he would not have done so without them.

ERROR to the district court for Pierce county. Tried below before ALLEN, J.

C. C. Jones, G. T. Kelley, and *H. F. Barnhart,* for plaintiff in error.

W. S. Summers, Deputy and Acting Attorney General, for the state.

NORVAL, C. J.

The plaintiff in error was tried and convicted in the court below of obtaining the sum of $536 from the Pierce State Bank under false pretenses, and was sentenced to the penitentiary for the period of two years.

The first proposition discussed in the briefs is that the

verdict is contrary to the evidence adduced on the trial of the case. This point we might well refuse to notice, since the same is not raised by the petition in error, although the sufficiency of the evidence to sustain a conviction was properly brought to the attention of the trial court by the motion for a new trial filed by the prisoner. True it is, that the overruling of the motion for a new trial is assigned for error in the petition in error, but this assignment is too indefinite to call for a review of the evidence, since such motion sets up fourteen separate and distinct grounds for the setting aside of the verdict, each of which, excepting three, being based either upon the giving and refusing of instructions or the decisions of the court upon the admission and exclusion of testimony. The rule applicable to this state of the record was announced by this court in *Wiseman v. Ziegler*, 41 Neb., 886, as follows: "An assignment of error for the denial of a motion for a new trial is bad if it fails to specify to which of the several points made by the motion the assignment applies." Again, there is another reason why we might properly decline to consider the evidence, and that is it is not before us in an authenticated bill of exceptions. Attached to the transcript of the proceedings in the district court is what purports to be a bill of exceptions containing the testimony taken on the trial of the cause, but the bill is not authenticated by the certificate of the clerk of the district court showing that it is either the original bill of exceptions which was settled and allowed in the case, or a copy thereof. Such a certificate is indispensably necessary. (*Aultman v. Patterson*, 14 Neb., 57; *Hogan v. O'Niel*, 17 Neb., 641; *Flynn v. Jordan*, 17 Neb., 518.)

No objection having been made to the bill of exceptions, by motion to quash, or otherwise, we have concluded to consider the testimony therein contained to see whether it supports the verdict. It appears that on the 23d day of March, 1891, the plaintiff in error borrowed from the

Pierce State Bank the sum of $536, and secured the payment thereof by executing a chattel mortgage upon a number of horses, cows, and other personal property. The chattel mortgage, immediately following the description of the property therein given, contains this statement: "The above described chattels are now in my possession and owned by me, and free from all incumbrances in all respects." It was proved by at least four witnesses called by the state that the plaintiff in error, at and prior to the obtaining of the loan in question, stated to C. A. Reimers and W. A. Spencer, the president and cashier, respectively, of the Pierce State Bank, that he owned the property which he pointed out to them and which was subsequently described in the mortgage. The officers of the bank heretofore mentioned each testified that the above representations as to the ownership of the property were relied upon in making the loan, and that the bank was thereby induced to part with the money. It is established by uncontradicted testimony introduced by the state, as well as by the admission of the accused when upon the witness stand, that a large portion of the property mentioned in the chattel mortgage at the time the same was executed did not belong to the plaintiff in error, but was owned by his brother, Charles Wax. This evidence was ample to sustain the averments of the information, and that the representations were made knowingly for the purpose of cheating and defrauding the bank of its money. It should be stated that there was introduced testimony tending to show that Charles Wax was present at the time the loan was made and the mortgage was given, assisted his brother in describing some of the property, and that it was the understanding that Charles Wax was to sign the mortgage with his brother, but he did not do so. This evidence, as well as the right or authority of the plaintiff in error to mortgage the property of his brother Charles, was fairly submitted to the jury by the sixth paragraph of the instructions given by the court upon

its own motion. We cannot disturb the verdict as being unsupported by the evidence.

Complaint is made that the court erred in giving the seventh paragraph of its charge to the jury. This assignment must be disregarded, inasmuch as no exception was taken to the instruction when given. (*Barr v. City of Omaha*, 42 Neb., 341.)

The next assignment is that the court erred in refusing to give instructions Nos. 1, 2, 3, 5, 8, 9, 10, and 11, asked by the defendant. This assignment is insufficient to present for review each of the instructions therein mentioned. The refusal to give the prisoner's third request to charge was not excepted to at the time, hence it cannot be considered. The fifth and eighth requests refused were fully covered by the instruction given by the court upon its own motion, therefore error cannot be predicated upon the refusal to give them. (*Oliver v. State*, 11 Neb., 1; *Binfield v. State*, 15 Neb., 484; *Bradshaw v. State*, 17 Neb., 147; *Marion v. State*, 16 Neb., 349.) The assignment of error based upon the refusal of the instructions, not being well taken as to several of the requests to charge, under the repeated decisions of this court, must be overruled as to all.

It is urged that the evidence fails to show that the amount of the money obtained by the plaintiff in error from the bank was $536, the sum fixed by the verdict. The amount of the loan negotiated, as well as the amount of the note given therefor, was $536. From this sum, the undisputed evidence discloses, the bank deducted and retained $32 as usurious interest on the money. The exact sum obtained by the plaintiff in error was $504. He was not, however, prejudiced by the fact that the value fixed by the jury in their verdict was $32 too much, for the reason that had they found the amount of money actually obtained was what the evidence shows it to have been, $504, it would not have reduced the offense to the grade of a misdemeanor. Where the value of the money or property obtained by

false pretenses is $35 or over, the statute makes the crime a felony, punishable by imprisonment in the penitentiary. (Criminal Code, sec. 125.)

It is finally insisted that the court below erred in refusing to permit the plaintiff in error to prove that the bank would not have made the loan and parted with the money, had it not been for the agreement to pay the $32 as illegal interest. Had the excluded testimony been admitted it would not have been a defense to the charge against the prisoner. To render him guilty, his false representations as to his ownership of the property offered as security for the loan need not have been the only moving cause that induced the bank to pay over the money. In 2 Wharton, Criminal Law, sec. 1176, the rule is stated thus: "But it is not necessary to a conviction that the false pretense alleged should have been the sole inducement by which the property in question is parted with, if it had a preponderating influence sufficient to turn the scale, although other considerations operated upon the mind of the party. And this is true even though the prosecutor would not have surrendered the goods solely on the pretense alleged. To require that the belief should be the exclusive motive would exclude conviction in any case; for in no case is any motive exclusive." The doctrine of the text is fully sustained by the authorities cited in the note to the section. (See, also, 2 Bishop, Criminal Law, sec. 461.) There is no reversible error in the record and the judgment is

AFFIRMED.

BERNARD PILL V. STATE OF NEBRASKA.

FILED DECEMBER 5, 1894. No. 6513.

1. **A recognizance** for an appeal from a conviction for a misdemeanor before a justice of the peace is invalid, if the court where, and before which, the prisoner is to personally appear is not stated in the recognizance.
2. **Questions Not Raised Below:** REVIEW. The constitutionality of sections 152, 153, and 154 of the revenue law of 1879 is not decided.

ERROR to the district court for Colfax county. Tried below before SULLIVAN, J.

E. T. Hodsdon and *G. R. Doughty*, for plaintiff in error, cited: *Vierling v. State*, 33 Ind., 218; *O'Dea v. Washington County*, 3 Neb., 122; *Casey v. Peebles*, 13 Neb., 7; *State v. Hurds*, 19 Neb., 316; *White v. City of Lincoln*, 5 Neb., 516; *City of Tecumseh v. Phillips*, 5 Neb., 305; *State v. Lancaster County*, 6 Neb., 474; *Holmberg v. Hauck*, 16 Neb., 337; *Ex parte Thomason*, 16 Neb., 238; *Messenger v. State*, 25 Neb., 674; *Touzalin v. City of Omaha*, 25 Neb., 825.

George H. Hastings, Attorney General, for the state, cited: *State v. Awbrey*, 8 So. Rep. [La.], 440; *Belt v. Spaulding*, 20 Pac. Rep. [Ore.], 827; *Howard v. State*, 30 Tex. App., 680; *Pippin v. State*, 20 S. W. Rep. [Tex.], 979; *McDaniel v. State*, 20 S. W. Rep. [Tex.], 1108.

NORVAL, C. J.

On the 23d day of July, 1892, one Bernard Pill was convicted in a justice court of Colfax county for peddling without having first obtained a license so to do, and was sentenced to pay a fine of $50 and the costs of prosecution, and to stand committed until such fine and costs were paid. On the same day, and within the time allowed by statute, for the purpose of appealing from the judgment of con-

viction pronounced against him, he entered into the following bond or recognizance:

"THE STATE OF NEBRASKA
v.
BERNARD PILL.
} Judgment before M. T. Bohman, Justice.

"Whereas on the 23d day of July, A. D. 1892, the state of Nebraska obtained a judgment against the said Bernard Pill on the docket of the said M. T. Bohman, justice of the peace for Schuyler precinct, for $50 and costs, taxed at $7.15, and the said Bernard Pill intends to appeal therefrom to the district court of Colfax county: Now, therefore, we, Bernard Pill, as principal, and ———, as surety, do hereby, pursuant to the statutes in such case made and provided, promise and undertake that the said appellant, if judgment be adjudged against him on said appeal, will satisfy said judgment and costs, not exceeding one hundred dollars; and we do also undertake in such last mentioned sum that the said appellant will prosecute his appeal to effect and without unnecessary delay."

"BERNARD PILL.
"E. F. FOLDA.

"Executed and acknowledged before me and surety approved the 23d day of July, A. D. 1892.

"M. T. BOHMAN,
"*Justice of the Peace.*"

On the 31st day of August, 1892, a transcript of said judgment and proceedings was filed in the office of the clerk of the district court of Colfax county. Subsequently, at the September term, 1892, of said district court, the plaintiff in error moved the court to be permitted to amend his recognizance given for an appeal, so as to make the same conform to the requirements of the statute; which motion was denied and an exception was taken to the ruling. On the same day the appeal was, on motion of the county attorney, dismissed. The plaintiff in error excepted, and prosecutes error to this court.

Section 5951 of the Consolidated Statutes, the same being section 324 of the Criminal Code of this state, prescribes the form for recognizances on appeals in cases of misdemeanors, which section reads as follows:

"Sec. 5951 (324). The defendant shall have the right of appeal from any judgment of a magistrate imposing fine or imprisonment, or both, under this chapter, to the district court of the county, which appeal shall be taken immediately upon the rendition of such judgment. * * * No appeal shall be granted or proceedings stayed unless the appellant shall, within twenty-four hours after the rendition of such judgment, enter into a recognizance to the people of the state of Nebraska in a sum not less than one hundred dollars, and with sureties to be fixed and approved by the magistrate before whom said proceedings were had, conditioned for his appearance at the district court of the county at the next term thereof, to answer the complaint against him. The magistrate from whose judgment the appeal is taken shall make return of the proceedings had before him, and shall certify the complaint and warrant, together with all recognizances, to said district court, on or before the first day of the term thereof next thereafter to be holden in the county, and he may also require the complainant and witnesses to enter into recognizances, with or without security, as he may deem best, to appear at said court at the time last aforesaid, and abide the order of said court, and in case of refusal to enter into such recognizance he may enforce the same by imprisonment, if necessary."

The recognizance in the case in hand conforms to the requirements of section 1007 of the Code of Civil Procedure, relating to undertakings for appeals in civil cases from justice courts, but the condition in said recognizance does not comply with the statute above quoted governing the taking of appeals from convictions before magistrates, in that it fails to bind, or require, the plaintiff in error to appear before the district court of Colfax county at the

next term thereof held after his sentence, to answer the offense charged in the complaint under which he was tried. The statute expressly prescribed that recognizances on appeals in cases of misdemeanor shall be "conditioned for his [defendant's] appearance at the district court of the county at the next term thereof to answer the complaint against him." It is not sufficient that a recognizance be conditioned in the terms provided by law for an appeal undertaking in civil cases. The recognizance in the case under review recites that said "Bernard Pill intends to appeal therefrom to the district court of Colfax county," but it omits to bind him to appear before said court at the first succeeding term thereof subsequent to the execution of said bail bond, or at any other time, or to appear before any court whatever. The court to which the prisoner shall appear must be expressed in the bail bond, or derivable from its words, otherwise the recognizance is fatally defective and will confer no jurisdiction upon the district court. This doctrine is laid down by numerous authorities. (1 Bishop, Criminal Procedure, sec. 264*b*; 2 Am. & Eng. Ency. Law, 17, 19; *Williamson v. State*, 12 Tex. App., 169; *Barnes v. State*, 36 Tex., 332; *Howard v. State*, 30 Tex. App., 680; *Sherman v. State*, 4 Kan., 570; *State v. Awbrey*, 8 So. Rep., [La.], 440; *State v. Allen*, 33 Ala., 422; *Pippin v. State*, 20 S. W. Rep. [Tex.], 979; *Spencer v. State*, 24 S. W. Rep. [Tex.], 27; *Harris v. State*, 24 S. W. Rep. [Tex.], 103, 290; *Crise v. State*, 25 S. W. Rep. [Tex.], 285; *Forbes v. State*, 25 S. W. Rep. [Tex.], 1072; *Barela v. State*, 26 S. W. Rep. [Tex.], 397.) The only authority cited by plaintiff in error holding a contrary rule is *Vierling v. State*, 33 Ind., 218. This case is in conflict with the great weight of the adjudicated cases, is unsound, and we cannot follow its lead. We do not claim that it is essential to the validity of a recognizance that the same shall be conditioned in the exact words of the statute; but a substantial compliance with section 324 of the Criminal Code will be sufficient.

That the court at which the prisoner is required personally to appear must be stated in the recognizance there is no room to doubt. This requirement of the statute is not directory merely, but is mandatory. Manifestly this is the effect of section 388 of the Criminal Code, which declares that "No action brought on any recognizance shall be barred or defeated, nor shall judgment thereon be reversed by reason of any neglect or omission to note or record the default, nor by reason of any defect in the form of the recognizance, if it sufficiently appear from the tenor thereof at what court the party or witness was bound to appear, and that the court or officer before whom it was taken was authorized by law to require and take such recognizance." The foregoing provision was construed by this court in *Shupe v. State*, 40 Neb., 524, where it was held that a recognizance is not invalidated by reason of defects in the form thereof, if it appears from the recognizance at what court the party was required to appear, and that the court or officer before whom it was taken had the power to require and approve such recognizance. The irresistible conclusion, deducible from the decision just mentioned and the statute upon which it is founded, is that it is indispensable to the validity of a bail bond that the trial court where and before which the prisoner is bound to appear must be designated, or stated, in such bond. It follows that the recognizance before us is fatally defective, and that the court below did not err in refusing to allow the same to be amended. It being void, there was nothing to amend. The appeal was properly dismissed.

It is finally insisted that the law under which the plaintiff in error was convicted is obnoxious to section 11 of article 3 of the state constitution. The prosecution was brought under sections 152, 153, and 154 of the revenue law of 1879, the same being entitled "An act to provide a system of revenue." It is claimed that the sections referred to are not embraced in the title of the act. We

must decline to consider the constitutionality of these sections at this time, since no such question was presented to or decided by, the court below. If the plaintiff desired to raise the validity of the law under which the conviction was had, he should have prosecuted error to the district court, and distinctly raised therein the constitutionality of the statute. By reason of the defect in the recognizance alluded to above the district court did not acquire jurisdiction of the case. It therefore had no authority to decide the point now attempted to be raised, nor has this court jurisdiction to do so. The judgment is

AFFIRMED.

WILLIAM TUÖMEY V. JOHN M. WILLMAN.

FILED DECEMBER 5, 1894. No. 5585.

1. **Failure to Except to Order Overruling Motion for New Trial:** REVIEW. In a cause brought to this court on error we will not review the evidence for the purpose of ascertaining whether it sustains the finding or verdict, nor the rulings on the admission or exclusion of testimony, where no exception was taken to the order of the court below overruling the motion for a new trial.
2. **Sufficiency of Findings.** *Held*, That the findings support the judgment.

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

M. L. Hayward, for plaintiff in error.

John C. Watson, *contra*.

NORVAL, C. J.

This action was brought in the district court of Otoe county by plaintiff in error to recover possession of a stock

of boots and shoes. At the close of the trial the court found both the right of property and right of possession of the goods and chattels in controversy in the defendant, and assessed the value of the property at the time it was taken under the writ at the sum of $850. A judgment was entered upon the findings that the defendant have restitution of the property, and damages in the sum of $1 for the detention thereof, and in case a return of said goods cannot be had, that the defendant recover said sum of $850. Plaintiff presented a motion for a new trial, which was overruled by the court, but no exception was taken to the ruling.

The propositions argued in the brief of plaintiff are the following: (1.) The findings are not supported by the evidence. (2.) The court erred in its rulings on the admission of testimony. (3.) The findings do not support the judgment. We cannot review the evidence for the purpose of ascertaining whether or not it sustains the findings and judgment, nor the rulings of the trial court on the admission or exclusion of testimony, since no exception was taken to the order overruling the motion for a new trial. To entitle a party to a review in this court, by proceedings in error, of questions which must be raised in the trial court by a motion for a new trial it is indispensable that an exception be taken to the ruling on such motion. (*Lowrie v. France*, 7 Neb., 191; *Tomer v. Densmore*, 8 Neb., 384; *Burke v. Pepper*, 29 Neb., 320.) The sufficiency of the evidence to sustain the finding and the rulings upon the introduction of testimony were both, and properly so, called to the attention of the court below in the motion for a new trial, but the failure of the plaintiff to except to the order overruling said motion precludes this court from considering or passing upon either of said questions. The findings are ample to support a judgment for the value of the property, $850, in case a return cannot be had. The statute authorizes, in an action of replevin, where the

verdict or finding is in favor of the defendant, that he have a judgment for a return of the property, or the value thereof in case there can be no return, or the value of defendant's right of possession, and for damages for withholding the property. The judgment conforms strictly to the requirements of the statute. Had the right of possession merely been found to be in the defendant, then it would have been proper for the court to have assessed the value of the defendant's interest; but this was not necessary, since the defendant was found to be the general owner of the property. Quite likely the finding as to ownership is not proper under the evidence, and that the defendant had merely a special interest in the property; but these questions cannot be determined, since the proper foundation was not laid therefor in the court below by the taking of an exception to the overruling of the motion for a new trial. The judgment is

AFFIRMED.

GUST HEAD V. STATE OF NEBRASKA.

FILED DECEMBER 5, 1894. No. 7048.

1. **Assault With Intent to Ravish Child:** INTENTION OF ACCUSED: EVIDENCE. In a prosecution for an assault with intent to ravish and carnally know a female child under the age of consent (Criminal Code, sec. 12) the fact that the intention of the prisoner at the time of the assault proved was to have carnal knowledge of the prosecutrix with her consent and not otherwise is immaterial.

2. ——: EVIDENCE. The prisoner, who had tendered his services to see the prosecutrix, nine years of age, home from a dance in the village of their residence, attempted while on the way from the dance hall to decoy her into a barn at or after the hour of midnight, and desisted only when he found the barn was locked. About that time, hearing some persons approaching, he seized her

in his arms and hastily carried her into a privy in the rear of a store near by, and seventy-five feet from the sidewalk. While in his arms he prevented her from crying out by putting his hands over her mouth; and, according to her testimony, he thrust his finger down her throat, lacerating it severely and causing her considerable pain. When he entered the privy with the prosecutrix the latter stumbled and fell, when the prisoner pushed her head down through one of the holes in the seat. At that point some men on the street hearing her cries hastened to her relief, but were compelled to break the door of the privy which the prisoner had locked on entering. *Held*, To sustain the verdict of assault with intent to ravish, under sections 12 and 14, Criminal Code.

3. **Criminal Law**: INTOXICATION: EVIDENCE. While intoxication is no excuse for an assault committed when under the influence thereof, it is proper to be considered by the jury for the purpose of determining whether the prisoner was at the time in question capable of entertaining the specific intent charged.

ERROR to the district court for Dawson county. Tried below before HOLCOMB, J.

George Gillan and *G. W. Fox*, for plaintiff in error.

George H. Hastings, Attorney General, for the state.

POST, J.

This is a petition in error to review a judgment of the district court for Dawson county, whereby the plaintiff in error was convicted of an assault with intent to commit the crime of rape upon May Elliott, a female child under fifteen years of age. The evidence of the state, which was not controverted at the trial, is to the effect that the child above named, under nine years of age, on the night in question, with permission of her mother, attended a masquerade ball in the village of Cozad. During the evening she danced several times with the prisoner, who is shown to have been somewhat intoxicated. When she started to leave the dancing hall, about midnight, the prisoner offered to accompany her home, a few rods distant. On the way

home he induced her to sit down on the sidewalk, saying that he would get some candy and peanuts and they would then go into a barn near by and have some fun. He attempted to get into the barn designated but found it locked. About that time, on hearing some persons approaching, he seized her in his arms and carried her into a privy in the rear of an adjoining store, about seventy-five feet from the sidewalk. In order to prevent her crying while in his arms he put his hands over her mouth and thrust his finger down her throat, severely lacerating it, and causing her considerable pain. On entering the privy he bolted the door, when the child, according to her testimouy, stumbled and fell, and the prisoner pushed her head down through one of the holes of the seat. At that point some men on the street were attracted by her outcries and immediately hastened to her rescue. The prisoner on leaving the privy disappeared for a time but afterward returned to the hall where the dance was still in progress.

The facts stated prove the commission of an assault and battery,—a most disgusting and atrocious wrong to the person of the child named in the indictment. But it is contended by counsel for the prisoner that they are insufficient to warrant the jury in finding the existence of the specific intent essential to a conviction for the crime charged. It should be remembered in this connection that the child assaulted was in a legal sense incapable of consenting to the carnal act, hence the prisoner, if he intended at the time of the assault to carnally know or abuse said child, is guilty of all of the elements of the crime charged. (*Davis v. State*, 31 Neb., 247.) It is elementary law that the assault and the specific intention in all such cases must concur in point of time, and must be accompanied by an act or acts in some manner adapted to the accomplishment of the thing intended. In this case the acts of the prisoner were not only well adapted to the purpose alleged, but are of such a character as to satisfy us that his intention was to consummate

the sexual act with the child under his care and protection. The attempt to decoy her into the barn at dead of night we regard as a circumstance so entirely inconsistent with the theory of his innocence as to exclude every rational hypothesis except that of the criminal design charged, while his subsequent acts convince us that it was his intention to use force if necessary to accomplish his purpose. That conclusion has the support of abundant authority. (See *Crew v. State*, 22 S. W. Rep. [Tex.], 973; *State v. Shroyer*, 16 S. W. Rep. [Mo.], 286; *Hays v. People*, 1 Hill [N. Y.], 351; *State v. Smith*, 80 Mo., 516; *State v. Montgomery*, 63 Mo., 296.)

Another contention is that the prisoner was intoxicated to such a degree that he was incapable of forming the intention essential to the crime of rape in this instance. That question was fairly submitted to the jury by instructions which advised them that while drunkenness is in general no excuse for crime, the evidence thereof should be considered for the purpose of determining whether the prisoner was at the time of the assault capable of entertaining the specific intent charged. In that there was not error (see *Hill v. State*, 42 Neb., 502, and authorities cited), and the evidence fully sustains the finding of the jury. There are other errors alleged in the giving of instructions, but as the charge on the branch of the case to which they apply was more favorable to the prisoner than he was entitled to, it follows that the exceptions are without merit. There is no error in the record prejudicial to the prisoner, and the judgment is

AFFIRMED.

JAMES E. MURPHEY V. STATE OF NEBRASKA.

FILED DECEMBER 5, 1894. No. 6738.

1. **Assault With Intent to Inflict Great Bodily Injury:** INFORMATION. In a prosecution under the provisions of section 17*b*, Criminal Code, for an assault with intent to inflict great bodily injury, it is sufficient to charge the offense in the language of the statute without stating the means with which the assault was committed.

2. ———: CHARACTER OF INJURY: QUESTION FOR JURY. The term "great bodily injury," as there employed, is not susceptible of a precise definition, but implies an injury of a graver and more serious character than an ordinary battery; and whether a particular case is within the meaning of the statute is generally a question of fact for the jury.

3. ———: ———. A great bodily injury, within the meaning of the statute, does not necessarily mean a permanent injury.

4. **Criminal Law:** TRIAL: EXCLUDING STATE'S WITNESSES FROM COURT ROOM. The trial court may, in its discretion, refuse to exclude the witnesses for the state from the court room during the trial, and such an order, in the absence of an evident abuse of discretion, is not the subject of review on appeal.

5. ———: REBUTTING EVIDENCE. As a rule, the party holding the affirmative will not be permitted to prove again in rebuttal facts shown in making out his case in chief; but it is within the discretion of the court to permit the introduction, in closing, of evidence not strictly rebutting.

6. ———: ASSAULT: PRESUMPTION OF AN INTENTION TO INJURE: PROOF. No wrong, however serious to the person of another, will alone warrant a conviction for an assault with intent to inflict great bodily injury; but when the injury proved is the natural and necessary consequence of the deliberate and inexcusable act of the accused, the presumption is that it was the result contemplated by him in the commission of the assault. Such presumption is, however, one of fact merely; and while the jury may infer the intention alleged without other proof, there is no obligation resting upon them to do so.

7. ———: ———: ———: ———. Nor is it essential to a conviction for such offense that the accused should have intended the

precise injury which followed. It is sufficient if serious bodily harm of any kind was contemplated by him at the time of the assault.

8. **Assault with Intent to Inflict Great Bodily Injury:** SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION. The prisoner, without provocation, struck the prosecutor, an elderly man, a blow with his fist, instantly knocking him down, and kicked him twice or more. The latter, on attempting to arise, discovered that his right leg was broken. With the assistance of friends he retreated across the street, where, a few minutes later, he was followed by the prisoner, who again struck him, saying, "D—n your old soul, I will teach you to keep your nose out of my business." The prosecutor, who was suffering and helpless from the effect of his broken limb, was thrown or pushed by the prisoner from the sidewalk into the gutter, where the latter kicked at him several times, but the interference of by-standers prevented the infliction of further injury. *Held*, To sustain the conviction for assault with intent to inflict great bodily injury.

9. **New Trial:** CONFLICTING EVIDENCE: IMPEACHING VERDICT: REVIEW. Where the evidence by which it is sought to impeach a verdict on account of the prejudice of a single juror, subsequently discovered, is conflicting, an order denying a new trial will not as a rule be disturbed on appeal. (*Hill v. State*, 42 Neb., 503.)

10. **Juror:** ACCEPTANCE: PREJUDICE AS GROUND FOR NEW TRIAL. A party who chooses to accept a juror shown by his examination to be disqualified on account of an opinion formed from a knowledge of the facts involved cannot afterward allege the prejudice of such juror as ground for a new trial.

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

The facts are stated in the opinion.

George B. France and *D. C. McKillip*, for plaintiff in error:

The information fails to charge the accused with any crime other than assault and battery. (Consolidated Statutes, sec. 5595; *Buchanan v. State*, 13 S. W. Rep. [Tex.], 1000.)

The court should have separated the state's witnesses during the trial. (1 Greenleaf, Evidence, 432.)

Proof of the physical condition of the prosecutor at the time of the trial was erroneously admitted in evidence. (*State v. Redfield*, 35 N. W. Rep. [Ia.], 673; *People v. Miller*, 52 N. W. Rep. [Mich.], 65; *Carr v. State*, 23 Neb., 759.)

The facts and circumstances do not show an attempt to inflict serious or dangerous injury, and therefore they are not sufficient to justify the jury in forming an inference of felonious intent to inflict the injury charged. (*Johnson v. State*, 14 Ga., 55; *Kunkle v. State*, 32 Ind., 220; *Mullen v. State*, 45 Ala., 45; *Allen v. State*, 52 Ala., 391; *State v. Clark*, 45 N. W. Rep. [Ia.], 910; *Krum v. State*, 19 Neb., 728.)

The accused had no thought or intention of breaking the prosecutor's leg, and cannot be found guilty, under the charge, for any injury not intended, even though it was the direct result of the assault. (*State v. Vosburgh*, 51 N. W. Rep. [Wis.], 1093; *State v. Clark*, 45 N. W. Rep. [Ia.], 910; *People v. Miller*, 52 N. W. Rep. [Mich.], 65; *Mullins v. State*, 37 Tex., 339; *Simpson v. State*, 59 Ala., 10; *Krum v. State*, 19 Neb., 728.)

No injury, however great, without the intent, will be sufficient, and no degree of assault and battery of a less dangerous or permanent injury will constitute the "great bodily injury" contemplated by the statute. (*Halsell v. State*, 29 Tex. App., 22; *George v. State*, 21 Tex. App., 315; *Buchanan v. State*, 13 S. W. Rep. [Tex.], 1000; *Godfrey v. People*, 63 N. Y., 207; *Keley v. State*, 12 Tex. App., 245; *People v. Miller*, 52 N. W. Rep. [Mich.], 65; *State v. Vosburgh*, 51 N. W. Rep. [Wis.], 1093.)

Accused was prevented from having a fair and impartial trial because two of the jurors had previously formed opinions as to his guilt. (*Miller v. State*, 29 Neb., 437; *Thurman v. State*, 27 Neb., 628; *Owens v. State*, 32 Neb.,

167; *Cowan v. State*, 22 Neb., 523; *Graham v. State*, 13 S. W. Rep. [Tex.], 1013.)

Counsel for plaintiff in error cited the following authorities in their criticism upon the instructions of the court: *Milton v. State*, 6 Neb., 137; *Ballard v. State*, 19 Neb., 609; *Long v. State*, 23 Neb., 33; *Clark v. State*, 32 Neb., 246; *Olive v. State*, 11 Neb., 1; *Krum v. State*, 19 Neb., 728.

George H. Hastings, Attorney General, for the state:

Assault with intent to inflict great bodily injury is a new offense. (Criminal Code, sec. 17*b*; *Stricklett v. State*, 31 Neb., 674; *Smith v. State*, 34 Neb., 689.)

Where an offense is charged in the language of the statute it is sufficient. (1 Bishop, Criminal Procedure, secs. 611, 612, and cases cited; *State v. Lauver*, 26 Neb., 757.)

The crime is sufficiently charged in an information which accuses the defendant of an assault and battery, alleging that defendant willfully and maliciously struck and beat the person injured with intent of doing him great bodily injury. (*State v. Carpenter*, 23 Ia., 506; *State v. Clark*, 80 Ia., 517.)

Evidence to prove the extent of the injury resulting from the assault was properly admitted. (1 Phillipps, Evidence, 378; *Curry v. State*, 5 Neb., 412.)

The evidence is sufficient if it shows that defendant unlawfully and purposely made a violent assault upon the complaining witness and inflicted great bodily injury. (*Denman v. State*, 15 Neb., 138; 2 Wharton, Criminal Law, sec. 941.)

As to the claim of accused that he is entitled to reversal on account of the prejudice of certain jurors, see *Hill v. State*, 42 Neb., 503; Thompson & Merriam, Juries, sec. 275; *Palmer v. State*, 4 Neb., 68.

POST, J.

This is a petition in error and presents for review the judgment of the district court for Seward county, whereby the plaintiff in error was convicted of an assault upon one Oliver with intent to inflict great bodily injury.

1. It is argued, first, that the information charges an assault and battery only and will not sustain a conviction for an aggravated assault. That contention is based upon the proposition that section 17*b* of the Criminal Code contemplates an assault with a weapon other than the members of the body. The effect of that section, as held in *Smith v. State,* 34 Neb., 689, was to create a new and substantive offense, and being a purely statutory one, it may be charged in the language of the act. (1 Bishop, Criminal Procedure, 611, 612.) The cases which appear to sustain a different view arose, it is believed, without exception, under statutes in which manner of the assault or the instrument used is included within the definition of the offense. The term "great bodily injury," as employed in the statute, is perhaps not susceptible of a precise legal definition. It is, however, as injury of a graver and more serious character than an ordinary battery; and whether a particular injury is within the meaning of the statute, is generally a question of fact for the jury and not of law. (See *State v. Gillett,* 56 Ia., 459.) That a great bodily injury, within the meaning of the statute, may be inflicted without the use of a "dangerous" or even "offensive" weapon is quite apparent from the facts of this case, to which reference will hereafter be made. The objection to the information is therefore without merit.

2. It is next contended that the trial court erred in refusing to exclude the witnesses of the state from the court room during the trial. But while the request is one rarely denied, especially when made by the defendant in a criminal prosecution, it is a subject within the discretion of the trial

court, and the refusal in this instance does not appear to have been an unreasonable exercise of that discretion. (1 Greenleaf, Evidence, 432.)

3. The state was permitted over the objection of the accused to prove by the prosecutor Oliver that in consequence of the injury received on the occasion of the assault charged his general health was seriously impaired and that he was still unable to perform manual labor. The evidence was rightly admitted. The extent of the injury inflicted by the accused was a proper subject of inquiry as bearing upon the question of the intent, and although the state might perhaps have rested upon proving that the leg of the prosecutor was broken during the assault, there was no error in permitting it to pursue the subject to the extent of showing the permanent effect of the injury. It was at most cumulative evidence and within the discretion of the court.

4. The prosecutor was recalled by the state in rebuttal for the purpose of contradicting certain statements of the accused, and over the objection of the latter gave evidence which was a substantial repetition of portions of his testimony given for the state in its case in chief. According to the prevailing rule, the plaintiff should be required to try his case out where he has once begun, and will not be allowed to prove again in rebuttal facts shown in presenting his *prima facie* case. The court may, however, in its discretion, receive evidence not strictly rebutting and such an exercise of discretion will not be made the subject of review except in case of evident abuse. (1 Thompson, Trials, 346.) These observations apply as well to the testimony of Joseph Oliver, son of the prosecutor, given in rebuttal.

5. The next assignment relied on is that the verdict is not sustained by the evidence. We learn from the bill of exceptions that on the day in question Mr. Oliver, the prosecutor, drove from his home to the village of Utica accompanied by his son and his niece, and that after hitch-

ing his team at a convenient place he visited the stable kept by the accused, the purpose of his visit being a friendly one and in no way tending to provoke the assault which followed. He was at once accosted by the accused and charged with having spoken disparagingly of a horse owned by the latter. Oliver, who appears to have been anxious to avoid an altercation, denied the above charge, when the accused, almost without warning, struck him a blow with his fist, instantly knocking him down. He was apparently unconscious from the effect of the blow and has no recollection of what immediately followed, but Mr. Hibbard, who witnessed the assault from the opposite side of the street, saw the accused kick him twice at that time. Friends soon afterward came to his relief, when it was discovered that both bones of his right leg were broken near the ankle. He was assisted to a chair on the opposite sidewalk, where he was, a few minutes later, again assaulted by the accused, who had in the meantime followed him from the stable. Several witnesses to the second assault testify to facts which prove it to have been as brutal as it was unprovoked. For instance, Mr. Leggitt, a disinterested and apparently truthful witness, described it in the following language: "Just about that time Mr. Murphey was leaving his barn door and came across in a hurried like way and was talking pretty loud and swearing some. I would not attempt to repeat what he said, but when he came up to where Mr. Oliver sat in the chair, he said, 'D—n your old soul, I will learn you to keep your nose out of my business,' or something to that effect, and Mr. Oliver put out his foot and it came against Murphey, and he said, 'Jim, you go away. I have not said anything about you, and I don't want anything to do with you.' Just about that time Murphey grabbed Mr. Oliver by his clothes and Oliver fell over on the sidewalk, and they rolled out into the ditch. Then Jim struck him again. I took hold of him and said, 'Jim, Jake [meaning the prose-

cutor] is an old man; let up,' and he did let up. When I took hold of him he tried to kick Mr. Oliver. I don't think he struck him, but did kick at him. Of course, being in my arms, he could not strike him very hard." The prosecutor, referring to the same transaction, testified as follows:

Q. What did he do then?

A. He struck me and kicked me.

Q. What effect did the kick have on you when he struck you first?

A. Knocked me off the chair, and I went on the sidewalk and he kicked me off into the street.

Q. Do you know how many times he kicked you?

A. I cannot tell how many times.

Q. Whereabouts on your person did he kick you?

A. He kicked me on my right side about here (indicating).

Q. State what effect it has had on you, if any.

A. It has had this effect, that I cannot sleep at nights nor can I eat my regular meals. When I lay down at nights there is a pressure right there all the time, and I cannot lay on that side.

He is corroborated by other witnesses with respect to the kicking at that time. It is not essential to a conviction for the offense charged that the accused should have intended the precise injury which followed as the result of the assault. It is sufficient if serious bodily harm of any kind was contemplated. (*People v. Miller*, 52 N. W. Rep. [Mich.], 65.) True, the injury, however serious, would not of itself authorize a conviction under the statute, and may for the purpose of this prosecution be regarded as immaterial, except so far as it tends to explain the motive of the accused. But where the injury proved is the natural and necessary consequence of the deliberate and inexcusable act of the accused, the inference is that it was the result contemplated by him when the assault was committed, and

may be sufficient evidence of the specific intent which is essential to a conviction. Such inference or presumption is, however, one of fact merely; and while the jury may convict without other proof of the intention alleged there is no obligation resting upon them to do so unless satisfied thereof beyond a reasonable doubt. That the accused intended to inflict a great bodily injury upon the prosecutor, is certainly a reasonable inference from the facts of this case. The knocking down and kicking, without provocation, of a man much his elder, his pursuit and second assault upon his crippled and helpless adversary, coupled with the attempt to again kick the latter while prostrate before him, not to mention the injuries actually inflicted, convinces us, and evidently satisfied the jury, that the wrongs intended were more serious than an ordinary assault and battery; and the fact that the broken leg may not have been the precise injury intended is, as we have seen, entirely immaterial. Nor have we overlooked the fact that in some jurisdictions the offense here involved is construed to mean both a serious and permanent injury to the person of the party assaulted. (See *Buchanan v. State*, 13 S. W. Rep. [Tex.], 1000; *Halsell v. State*, 29 Tex. App., 22.) We are, however, unable, to adopt that conclusion. The seriousness of the injury cannot, we think, in law or fact be said to depend upon its permanence. It is a fact abundantly attested by the observation and experience of ordinary men, that the most serious and dangerous of personal injuries are frequently attended by no lasting effect upon the health, strength, or comfort of the injured person. To adopt the view suggested by counsel in this case would not, it seems to us, be a construction of the statute, but rather an amendment thereof.

6. Another ground alleged is that two of the jurors had previous to the trial expressed opinions which show them to have been prejudiced against the accused. One of the jurors, Lortz, testified on his examination that he had

known both the accused and the prosecutor for nine or ten years, when his examination was concluded as follows:

Q. Have you ever talked with any of these parties?

A. Not with either one of the parties.

Q. Have you talked with any one?

A. Everybody in Utica, almost.

Q. I will ask you if, from what you seen and heard in regard to this case, you have formed or expressed any opinion as to the guilt or innocence of the defendant?

A. Yes, sir.

Q. Have you that opinion yet?

A. Yes, sir.

Q. I will ask you if such opinion as you have would interfere with your rendering a fair and impartial verdict on the testimony here?

A. No, sir.

State passes for cause.

Defendant passes for cause.

The juror named, in an affidavit filed by the state, admitted that he had formed an opinion with respect to the guilt of the accused from talking with the witnesses, and refers to his examination at the time he was passed for cause, but expressly denies the statement imputed to him in the affidavits submitted by the accused. It was said in *Hill v. State*, 42 Neb., 503, decided at the present term, that where the evidence by which it is sought to impeach a verdict on account of the prejudice of a single juror is conflicting, the order overruling a motion for a new trial on that ground will not, as a rule, be disturbed on appeal. In addition to what is there said it should be noted that there was in this instance sufficient ground for challenge, since the juror had at the time of his examination an opinion from talking with the witnesses. The inference is, therefore, that the accused believed the mind of the juror to be prejudiced in his own favor. Having knowingly taken the risk of an adverse verdict he will not now be heard to

complain. The other juror, Welty, also in explicit terms denies the alleged statements. The case is therefore clearly within the rule above stated.

7. Exception was taken to each paragraph of the charge of the court and the refusal of numerous requests to instruct. The charge is, in the main, an accurate statement of the law applicable to the case and certainly affords no just ground of criticism by the accused. The only proposition which it is deemed necessary to notice in this connection is that the court, after charging that an assault with intent to inflict great bodily injury means "an injury of a graver and more serious character than an ordinary assault and battery," should have technically defined the latter offense. Our statute does not follow the common law definition of an assault and battery. It is by section 17 of the Criminal Code provided that "If any person shall unlawfully assault or threaten another in a menacing manner, or shall unlawfully strike or wound another, the person so offending shall, upon conviction thereof, be fined," etc. That provision was, in substance, repeated in more than one paragraph of the instructions given by the court on its own motion. The charge, so far as it relates to that branch of the case, was even more favorable to the accused than he was entitled to, since the jury were told in express language that in order to convict they must be satisfied beyond a reasonable doubt that he intended by the assault to feloniously and maliciously inflict the injury alleged. That the offense charged is a felony is true, as we have seen, but that malice is not an element thereof seems clear from the language of the statute. A careful inspection of the record has disclosed no error prejudicial to the accused. It follows that the judgment should be and is

AFFIRMED.

NORVAL, C. J., absent and not sitting.

PIERCE, WRIGHT & COMPANY, APPELLANT, V. EZRA W. DAVEY ET AL., APPELLEES.

FILED DECEMBER 5, 1894. NO. 5348.

Usury. Where a note was given for $1,750, the amount of a loan, it being agreed between the parties to the loan that it was to bear interest at ten per cent per annum, the loan to run for five years and the note given was made to draw interest at seven per cent per annum and the sum of $208.50 was retained from the amount of the loan as and for a payment of interest in advance, and this sum, together with the seven per cent to be collected semi-annually during the existence of the loan, not amounting to more than ten per cent per annum for the amount of the loan, *held*, not a usurious transaction.

APPEAL from the district court of Knox county. Heard below before POWERS, J.

E. A. Houston, for appellant.

O. W. Rice, contra.

HARRISON, J.

The plaintiff instituted an action in the district court of Knox county to foreclose a mortgage on certain lands described in the petition, alleging, in substance, that there was due on the note secured by the mortgage sought to be foreclosed, by reason of the default of defendants in the performance of conditions of the mortgage to be performed by them, the sum of $1,750, and interest at seven per cent per annum from November 27, 1889, the date of the execution and delivery of the note and mortgage by defendants to plaintiff. The defendants in their answer state that they applied to the agent of the plaintiff for a loan and received it in the sum of $1,525, for which they were required to and did execute and deliver to plaintiff a note

for $1,750, with coupons attached evidencing the interest it was to bear, seven per cent per annum, payable semi-annually, and also executed and delivered the mortgage in suit, securing the payment of the note and its coupons; that this constituted a usurious transaction, the $225, and seven per cent per annum interest on $1,750, the face of the note given, for five years, the time of the loan, being more than ten per cent per annum on $1,525, the amount which they claim was paid to them and was the actual sum loaned. In other words, the answer was a plea of usury. To this answer the plaintiffs filed a reply, in which it was stated that the defendants made application to plaintiff for a loan of $1,800, which was approved and allowed in the sum of $1,750; that the agreed rate of interest thereon was to be ten per cent per annum; that $208.50 was retained of the $1,750 as a payment of interest in advance, or a portion of the three per cent for five years, and a part of the ten per cent interest which the loan was to bear and was so retained by and with the agreement and consent of defendants. The trial court made a finding in favor of plaintiff in the sum of $1,750, less $208.50 interest paid in advance, and rendered a decree in accordance with such finding. It seems clear that the trial court must have concluded that the defendant's plea of usury was not supported by the evidence, but that the plaintiff was not entitled to receive the interest or any part of it in advance. The evidence is very meager and unsatisfactory, but, we think, may be said to establish that the defendant made an application to plaintiff for a loan of $1,800, and the papers were afterwards executed and delivered showing the loan to be in the sum of $1,750; that of this amount defendants received the sum of $1,525, either in payment of liens upon the property or in cash. The expenses of obtaining an abstract, releases of some mortgages which were paid from the proceeds of the loan and released before plaintiff's mortgage was filed and recorded, the recording of plaintiff's mort-

gage, etc., were paid from the sum of $225, remaining of the $1,750, after deducting the $1,525 which was paid to defendants or for their benefit, and the $208.50 was, we must conclude from the evidence, as did the trial court a portion of the interest retained in advance. As we have determined—as is evident from its finding did the lower court—that the amount of the loan was $1,750, then the seven per cent per annum for five years, with the addition of the $208.50 retained by the plaintiff, or even the $225 which is the sum that defendant contended at the trial was retained, make less than the amount of the interest at ten per cent per annum on the $1,750 for the five years, the time for which the loan was effected, and our inquiry is narrowed to the question of whether taking the interest in advance rendered the transaction an illegal one. Section 1, chapter 44, of the Compiled Statutes is as follows: "Any rate of interest which may be agreed upon, not exceeding ten dollars per year upon one hundred dollars, shall be valid upon any loan or forbearance of money, goods, or things in action; which rate of interest so agreed upon may be taken yearly, or for any shorter period, or in advance, if so expressly agreed." This section of our statutes was construed by this court in the case of *Rose v. Munford*, reported in 36 Neb., pages 148 to 153, inclusive, where it was said: "The construction placed upon the above provision by counsel for appellant is that when the loan is for a longer period than a year at the highest rate, the interest may be taken annually, but not in advance. In other words, interest can be lawfully taken in advance only when the contract is to be performed within a year. We do not yield assent to such interpretation. The words used by the legislature have no such meaning. The statute provides that when it is so agreed interest 'may be taken yearly, or for a shorter period, or in advance.' The right to stipulate that the borrower shall pay interest in advance does not depend upon the time the loan runs. To hold that it does would be inter-

polating words into the statute. The agreement in this case to pay interest annually in advance does not taint the transaction with usury." (See, also, *Tepoel v. Saunders County Nat. Bank*, 24 Neb., 815.) If the right exists to stipulate that interest shall be paid in advance, it certainly may be paid in advance or retained from the amount of the loan; and if it does not exceed the legal rate, such payment or taking of the interest in advance will not taint the transaction with usury. (See *Brown v. Scottish-American Mortgage Co.*, 110 Ill., 235; *Hoyt v. Pawtucket Institution for Savings*, 110 Ill., 390; *Telford v. Garrels*, 24 N. E. Rep. [Ill.], 573; *Fowler v. Equitable Trust Co.*, 12 Sup. Ct. Rep., 1.) Whether the doctrine that interest may be paid in advance or retained from the amount loaned would be held to cover transactions wherein the amount loaned and the time of its existence would by the application of such rule and allowing the interest to be paid or retained in advance, at the inception of the loan take it all, or so near it as to leave very little for the party borrowing, we need not say. Such is not the case before us. The amount retained was something less than three of the ten per cent, and will not sustain the defense of usury. The decree of the district court will be modified insomuch as it deducted from the amount of its finding in favor of plaintiff the sum of $208.50, and as thus modified affirmed.

JUDGMENT ACCORDINGLY.

ALLEN GOBLE ET AL., APPELLEES, V. JOHN J. O'CONNOR ET AL., APPELLANTS.

FILED DECEMBER 5, 1894. No. 5730.

Judicial Sales: FRAUD TO PREVENT BIDDING: TITLE OF PURCHASER. A bidder at a judicial sale of real estate induced another bidder thereat to cease bidding, by the promise to pay him a sum of money for so doing, and by this means procured the real estate to be sold to him for a less sum than would otherwise have been realized from its sale. *Held*, That the sale was fraudulent and invalid and the purchaser obtained no title thereby or by the deed executed and delivered to him in pursuance thereof as against parties whose interests were defrauded; and the property may be recovered in an action for such purpose, by the parties entitled thereto, and they will not be required to repay to him such portions of the purchase price paid by him as were expended to discharge mortgage or other liens and incumbrances from the property existing thereon at the time of the sale, including the lien under which such sale was made, or other moneys expended by him on the property or its title.

APPEAL from the district court of Douglas county. Heard below before HOPEWELL, J.

John D. Howe, for appellants, cited: *Pearsoll v. Chapin*, 44 Pa. St., 13; *Seylar v. Carson*, 69 Pa. St., 81; *Dillon v. Merriam*, 22 Neb., 151; *Loney v. Courtnay*, 24 Neb., 583; *Wardell v. Union P. R. Co.*, 103 U. S., 651; *Pettit v. Black*, 8 Neb., 52; *Grant v. Lloyd*, 12 Sm. & M. [Miss.], 191; *Des Moines & M. R. Co. v. Alley*, 3 McCrary [U. S. C. C.], 589; *Reed v. Exum*, 84 N. Car., 430; *Flash v. Wilkerson*, 20 Fed. Rep., 257; *Clements v. Moore*, 6 Wall. [U. S.], 299; *Boyer v. Barr*, 8 Neb., 68; *Fay v. Parker*, 53 N. H., 342; *Albrecht v. Walker*, 73 Ill., 69; *Roose v. Perkins*, 9 Neb., 304; *Riewe v. McCormick*, 11 Neb., 261; *Boldt v. Budwig*, 19 Neb., 739; *Homan v. Laboo*, 2 Neb.,

291; *Aultman v. Steinan*, 8 Neb., 109; *Swift v. Dewey*, 20 Neb., 107; *Buchanan v. Griggs*, 20 Neb., 165.

John P. Breen and *E. W. Simeral, contra.*

HARRISON, J.

July 23, 1890, appellees filed a petition in the district court of Douglas county, in which it was stated in substance that they are the minor children and heirs and all the heirs of Charlotte A. Goble, deceased, and John Williams is their duly appointed and qualified guardian; that Charlotte A. Goble was, during her lifetime, the owner of lot 2, in block 80, in the city of Omaha, and with her husband, Milton H. Goble, executed and delivered to one Eliza Hughes a mortgage on said premises to secure the payment of six promissory notes, amounting to the aggregate sum of $6,000; that this mortgage was on the 1st day of July, 1884, sold and assigned by Eliza Hughes to one Joseph M. Rees, who died July 25, 1885, J. J. O'Connor being appointed executor of his will and estate; that as such executor J. J. O'Connor foreclosed the mortgage for a balance of $4,000 and interest due thereon, and a decree was entered in the foreclosure suit foreclosing the mortgage and ordering a sale of the premises to pay the sum adjudged due thereon, $4,960 and accrued interest and costs, and the further sum of about $657.35, taxes due one of the defendants in the foreclosure suit; that a stay of sale was taken for the statutory period, and on June 3, 1890, pursuant to order of sale issued and the regular proceedings thereunder, the sheriff of Douglas county offered the property for sale and sold the same to John J. O'Connor for the sum of $6,506, he being the highest bidder; but in this connection it is alleged that John J. O'Connor, "improperly and in fraud of their rights, before and at the time of said sale, and during the time that said sheriff was crying out the bids on said property, did,

by means of promises of favor and reward, prevent and dissuade other persons from bidding at said sale, and did then and there promise one McFarland, of the law firm of Saunders & McFarland, of the city of Omaha, who was present and who was a bidder at said sale, a large sum of money if he, McFarland, would desist and cease bidding, and that said McFarland, because of and owing to said promise and agreement, did actually cease bidding at such sale; that said O'Connor, by means of promises of favor and reward, did prevent one Saunders, of the law firm of Saunders & McFarland, from bidding at said sale, by means of all of which said O'Connor obtained said premises at an undervalue of his said bid, and at a price far below the actual value of said premises, and much below the sum which would have been realized at said sale, but for the improper conduct of said O'Connor, aforesaid, and the collusion between the said bidders at such sale." That the sale was confirmed and a deed was made by the sheriff for the property and delivered to John J. O'Connor, which he caused to be recorded, and claims the property and threatens to dispossess the plaintiffs (appellees) and also threatens to sell and dispose of the premises to some innocent purchaser; that appellees did not discover or have knowledge of the improper conduct and collusion at the sale until after its confirmation by the court; that they are entitled to all the proceeds of the sale of said property in excess of the amount of the liens thereon and to have a fair and just sale made. The petition asks relief as follows: "Therefore ask that said sale, and the said deed made in pursuance thereof, may be set aside by order of this court, and that the defendant John J. O'Connor account for the rents and profits from this property since he has occupied it, and inasmuch as said O'Connor is threatening to dispossess these plaintiffs from said premises and is threatening to dispose of said premises, and inasmuch as plaintiffs have no adequate remedy at law

to prevent these threatened violations of their rights in the premises, it is asked that this court grant a restraining order, enjoining said O'Connor from disposing of or incumbering said premises, and from dispossessing these plaintiffs from said premises, or moving into or upon said premises himself, until this case can be heard and fully determined, and for such other and further relief as equity can give." A restraining order was issued and on application a temporary injunction was granted. John J. O'Connor filed an answer to the petition, in which he stated that Milton Goble purchased from Eliza Hughes the premises described in the petition, taking the title in the name of Charlotte A. Goble, and executed the notes and mortgage for $6,000, and that the same was for a part of the purchase price of the property; that the notes and mortgage were assigned to Rees; that Rees died as alleged in the petition and O'Connor was the executor of his will and foreclosed the mortgage and at the sale bought the premises for $6,505; that at the time of such sale the property had been sold for taxes, and the liens for taxes amounted to $647, and that the building on the lot was at the time of the sale dilapidated and out of repair and the fence and other parts of the property had been destroyed and that it sold for its full value; also denied that O'Connor offered Saunders & McFarland large sums of money to prevent them from bidding at the sale, and further stated: "That after defendant purchased said lot he paid to redeem same lot from tax sale the sum of $103 on June 12, 1890, and also paid county tax on same day $50.35, and on June 30 of said year paid city taxes on said lot of $99.60, all of which sums were valid and paramount liens on said property; that for the repairs and betterment of the property defendant expended for painting and glass, $59.15; repairing steam heater as follows: boiler work, $80.65; brick work, $15; lime and sand, $2; repairing roof, water pipe, and chimney, $12; mason for repairs, plaster, and chimney,

$3.50; repairs plumbing and steam heating, new reservoir, $67.35; repairing and sodding embankment, $11.70; all of said repairs being necessary to protect said property from going to decay and ruin; that the amount of the defendant J. B. Dickey's claim, to-wit, $805.43, has been paid out of the sum of $6,505, paid by defendant at said sheriff's sale, and the amount due on the decree of the estate of Joseph M. Rees has been paid to the heirs and the costs prior to the commencement of this suit; also a portion of the surplus has been paid to said minors, plaintiffs; that said defendant has been ready at all times and is now willing to accept the amount so paid for said real estate, with his improvements and interest, and allow said plaintiffs to redeem the said property and has offered to plaintiffs to accept said money and allow him to redeem said property; but that neither said plaintiffs, nor any one for them, has tendered any sum whatever to defendant to reimburse him any of the amounts by him paid out on account of said sale and of said property as aforesaid. Defendant denies that plaintiffs are entitled to any relief, but said defendant is willing that said sale and deed may be set aside and that the property be resold on condition that out of the proceeds he shall be paid the amount so paid at said sale and for improvements and taxes with interest; and defendant, further answering said petition, denies each and every allegation in the said petition contained. Defendant further avers that Milton H. Goble, the father of said children, plaintiffs, who are under the age of twenty-one years, is a necessary party to this suit, he being a tenant by the curtesy subject to said sale and deed. Wherefore defendant prays that said Goble, the father of said children, may be made a party defendant to this suit, and that if said sale and deed be set aside, it shall only be on condition that the defendant be reimbursed for the moneys he, defendant, paid out at said sale and in discharging incumbrances upon said property and for necessary repairs and improve-

ments of the property in question, and for such other and further relief as may be just and proper." To this answer the following reply was filed: "Replying to the answer of the defendant John J. O'Connor, filed herein, the plaintiffs admit that the claim of J. B. Dickey on the premises has been paid out of the money realized at the sheriff's sale of the property, and they admit that the claim of the Joseph M. Rees estate under the mortgage foreclosed has been paid to said estate and that the costs of the foreclosure case have likewise been paid out of the money realized at the sheriff's sale, and these claims canceled of record, but they deny that they have received any of the surplus remaining after paying off the claims aforesaid, out of the amount realized at the foreclosure sale, and deny that they ever authorized anybody to receipt for said surplus or any portion thereof for them, or either of them. Still further replying they deny each and every allegation of new matter of defense contained in said answer, and deny each and every allegation of said answer inconsistent with and contradictory of their petition filed herein, except the allegations of the answer hereinbefore admitted." On motion of appellees the case was dismissed as to J. B. Dickey. A trial of the case to the court resulted in findings and a decree in favor of the appellees. The first portion of the findings is as follows:

"On this 9th day of April, 1892, this case coming on for final determination and judgment, upon the proof, pleadings, and arguments of counsel heretofore heard, taken, and submitted herein, and the court having considered and being now fully advised in the premises, finds that the minor plaintiffs, Allen and Gertrude Goble, were, on and prior to the 3d day of June, 1890, the owners of the property described in their petition filed herein, to-wit, lot two (2), in block eighty (80), in the city of Omaha, Douglas county, Nebraska, subject, however, to the purchase money mortgage made to Eliza Hughes, assigned to

Joseph M. Rees, and held by the defendant O'Connor as executor of his estate, and to the tax lien of James B. Dickey, described in their petition; that on said day, by due process of law, said premises were offered at sheriff's sale by the sheriff of said county to satisfy said mortgage and tax lien; that the defendant John J. O'Connor was a bidder for said property at said sheriff's sale on his own behalf, and that at said sale, and while the same was in process, the said O'Connor, in order to stifle and stop competitive bidding against him, did corruptly and fraudulently promise and offer to one John M. McFarland, who was present, and who was, likewise, a bidder for said property at said sale, the sum of two hundred dollars ($200), which offer was accepted by the said McFarland, and that in consequence of said promise and offer the said McFarland ceased to bid at said sheriff's sale, and in consequence thereof the said O'Connor fraudulently procured the said property to be struck off to him at an undervalue, and the court finds that in pursuance of such promise and offer the said O'Connor did shortly thereafter pay to said McFarland the sum of $200, and now this court, declares, as a conclusion of law, that by reason of these fraudulent acts of the defendant O'Connor this sheriff's sale was and is fraudulent and void. To which finding of facts and conclusion of law the defendant O'Connor excepts."

This is followed by findings that O'Connor paid into court June 10, 1890, the amount of his bid and received the sheriff's deed, that by reason of the fraud perpetrated at the aforesaid sale upon which it was issued it was void and conveys no title to said O'Connor to said premises. There is also a finding that at and prior to the time the sheriff's deed was executed, the appellees were in possession of the property, and that shortly afterwards O'Connor illegally dispossessed and ousted them therefrom, and has since held the possession; and further, that the mortgage and tax liens have been paid and discharged with the

money paid into court on the O'Connor bid, $805.43 of it being applied to the payment of Dickey's tax lien, and that O'Connor, after he received the sheriff's deed, paid $103 to redeem the lot from tax sale for taxes levied thereon prior to 1890, and $149.85, city and county taxes for the year 1889, and the further sum of $303.47 for repairs and improvements on the property. The court further finds as a matter of law:

"The court further finds as a matter of law, and because of the aforesaid fraudulent acts of the defendant O'Connor at said sale, that he, the said defendant O'Connor, is not entitled in this action to be reimbursed any of the moneys he has as aforesaid expended in satisfying said decree, or in payment of taxes, or otherwise, and that he is not herein entitled to have a lien on said property therefor, or any part thereof, and that the plaintiffs are not required in this action, as a condition precedent to the relief herein demanded, to in any manner refund to him any of said sums, to which conclusion of law defendant excepts."

Here follows a finding that Charlotte A. Goble was at the time of her death, in 1885, the owner of the lot; that her husband, Milton H. Goble, still survives and is the owner of an estate by curtesy in the property, and that appellees are, therefore, not in law entitled to the rents and profits of the premises or to recover them from O'Connor for the time he has occupied the property, and the part of the prayer of the petition in which such recovery is asked is denied, and it is further declared that Milton H. Goble was not a necessary party to this suit. The decree sets aside the sheriff's deed and annuls the title acquired by O'Connor thereunder and orders that the recording of the decree in the office of the register of deeds shall operate as a cancellation of record of the sheriff's deed; that within twenty days of the rendition of the decree, O'Connor shall deliver possession of the premises to appellees, and if not done a writ of restitution to issue, and further orders taxation of costs against O'Connor.

O'Connor excepted to the findings of fact, conclusions of law, orders, and decree, and asked that supersedeas bond be fixed, which was done. The bond was given and an appeal of the case to this court in behalf of O'Connor perfected. There is not much conflict in the evidence as to what took place at the sale, and we think the court's findings as to its being made at less than the value of the property or what could have been obtained for it if there had been no attempt by fraudulent practices on the part of O'Connor to stop competition, are sustained by the testimony. Hence the findings by the court that fraud was practiced by the purchaser, O'Connor, and its result was the sale of the property to him at less than would have been obtained for it if no unfair means had been employed to stifle competition, will not be disturbed; and this brings us to the main question which arises in the case for our adjustment.

The counsel for appellant strenuously insist that the appellees, before they should be granted any relief, should be required to do equity under the rule that he who seeks equity must do equity. If the court concludes that the appellees are entitled to relief, he states in concluding his brief that it should be as follows:

"The equitable condition should be imposed that the plaintiffs asking relief refund the amount of the purchase price of the lot and tax liens paid by O'Connor's bid, and for the betterments less the rental value while occupied by O'Connor, and to this end M. H. Goble, the father and owner of the estate by the curtesy, should have been brought in in order that complete equity might be done.

"2. Or secondly, the property should be resold and the purchase price of the lot, etc., be paid from the proceeds to O'Connor.

"3. Or in setting aside the sale, the satisfaction of the decree, etc., should be set aside and O'Connor be held subrogated to the liens he paid off, etc., and in accounting for rents he should be credited with money paid for betterments.

"4. Or O'Connor should be required to pay such additional sum as might possibly have been realized from the sale had McFarland bid what was equal to $7,500 for the lot clear, which he swore he might have possibly been led by excitement to bid; which would be a matter of less than $400 more than was realized.

"5. O'Connor should be charged with all costs that have been made necessary by the failure of the sale."

It being established that appellant, at the time of the sale of the premises by the sheriff under the order of the court, by his promise to pay the other bidder the sum of $200 if he would cease bidding, induced such party to offer no further bids and obtained the property at a less sum than would have been offered and paid for it if such influence had not been brought to bear by appellant, makes a clear case of fraudulent practice on his part during such sale and of such fraud as against and detrimental to the rights of appellees herein as rendered the sale invalid, and no title vested in him by such sale, or the conveyance made in pursuance thereof, which can be asserted or will be upheld as against the appellees. That such a sale and purchase is fraudulent and void is so well settled by the authorities that we deem no citation of them necessary.

The only remaining question is, will a court of equity order that appellants be repaid the purchase money which extinguished incumbrances upon the premises, existing prior to and at the time of the sale, and other expenditures made by him upon the property and its title? Is he entitled to any relief, or must it be denied him? He has invoked against the appellees the rule of equity that "he who seeks equity must do equity." We do not think he is in a position in this case to claim the benefit of the above rule. A maxim which we think more applicable to his position, as indicated by the facts and circumstances adduced at the trial of the case, is "he that hath committed iniquity shall not have equity" (Francis, Maxims, 8); and another, that

"he who comes into a court of equity must come with clean hands." These have a direct application to the facts of the present case. The appellant, by his own fraudulent acts, has placed himself in such a position that the court can afford him no relief. All these payments were made in pursuance of, and as a part and in completion of, the sale which was made to him, and which was fraudulent as to the rights of appellees because of his wrongful acts and practices at and during such sale, and his right to be reimbursed all payments and expenditures must arise out of the sale which was tainted with his fraud and wrong, and void in consequence thereof, and his claim derived from such a source cannot be recognized in any court. To require the appellees to repay what has been paid out by appellant in this case would not be enforcing the rule that "he who seeks equity must do equity." "The rule has no application to cases of actual fraud. It would be against good policy that it should; for it would act as an encouragement to unfair dealing. A man might gain, but he could not lose by his frauds. If he succeeded, he would reap the fruits of his knavery; but if detected, he would be entitled to a return of his money, and moreover to be reimbursed to the value of his improvements." (*Gilbert v. Hoffman*, 26 Am. Dec. [Pa.], 103.) The sale to appellant was void because of his wrongful and fraudulent acts at the time of the sale, and he acquired no title as against appellees, and is not entitled to have the money paid out by him refunded; and this last, not by way of punishment, and not that the court would help or desire to aid appellees beyond the demands of justice and equity, but because, by his own wrong, the appellant has placed himself in such a position that the court is unable to grant him relief. (*McCaskey v. Graff*, 23 Pa. St., 321, 62 Am. Dec., 336; *Gilbert v. Hoffman, supra; Sands v. Codwise*, 4 Johns. [N. Y.], 597, 4 Am. Dec., 305; *Elam v. Donald*, 58 Tex., 316; *Hayes Estate, Allegheny Nat. Bank's Appeal*, 159 Pa. St., 381; Sheldon, Subroga-

tion, sec. 44; *Devine v. Harkness*, 117 Ill., 145; *Guckenheimer v. Angevine*, 81 N. Y., 394; *Milwaukee & M. R. R. R. Co. v. Soutter*, 13 Wall. [U. S.], 517; *Martin v. Hodge*, 1 S. W. Rep. [Ark.], 694; *Johnson v. Moore*, 33 Kan., 90; *German Bank of Memphis v. United States*, 13 Sup. Ct. Rep., 702; *Wilkinson v. Babbitt*, 4 Dill. [U. S.], 207; *Perkins v. Hall*, 12 N. E. Rep. [N. Y.], 48; *Acer v. Hotchkiss*, 97 N. Y., 395.)

The case of *Connecticut River Savings Bank v. Barrett*, 33 Neb., 709, cited by attorney for appellant is not one which can be called in point in this case. In that case NORVAL, J., in stating his conclusion from an examination of the facts proved, says: "The state of the proof justified the trial court in finding that Philpot was not the absolute owner of the school land, but that he held the title in trust for Barrett, subject to his lien thereon for the amount paid the state to obtain the title. The appellant having paid the balance of purchase money to the state, he was entitled to a lien for that amount with interest, which the decree gives him." Clearly no such condition of facts exists in the case at bar, nor, we think, did that call for the application of any of the rules and principles applicable in the present case. In that case there was no actual fraud on the part of Philpot, nor was he expecting to make anything out of the deal. In the case at bar there was active and actual fraud and wrong by the appellant and with the motive and purpose of gain and advantage to himself. The decree of the district court is

AFFIRMED.

FRANCIS D. BLAKESLEE, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 5, 1894. No. 5232.

1. **Injunction to Restrain Railroad Company from Using Right of Way:** SUFFICIENCY OF PETITION. A petition for an injunction is not sufficient where it states conclusions and not the facts upon which such conclusions are based, or where the acts, the doing or threatening to do which it is sought to enjoin, are not averred, but must be supplied or appear only by inference.

2. ——: ——. The petition examined, and the facts therein stated *held* insufficient to constitute a cause of action.

APPEAL from the district court of Nuckolls county. Heard below before MORRIS, J.

B. P. Waggener, David Martin, James W. Orr, G. W. Stubbs, and *A. R. Talbot,* for appellant.

S. W. Christy, contra.

HARRISON, J.

August 28, 1891, the appellee herein instituted an action in the district court of Nuckolls county to enjoin the appellant from using the right of way over and across a quarter section of land situate in said county, of which he was the owner. The petition filed was as follows:

"The plaintiff complains of the defendant, and for cause of complaint alleges and shows:

"First—That the plaintiff now is, and for more than ten years immediately last past has been, the owner in fee of the northwest quarter of section No. twenty-nine (29), in township No. three (3), in range No. eight (8) west of the sixth principal meridian, in Nuckolls county, Nebraska.

"Second—That on or about the 1st day of August, 1887, the Pacific Railway Company, being the Nebraska exten-

sion of the defendant company, located its line of road, running from Superior, Nebraska, through Nuckolls and Adams county to the city of Hastings, over the land of the plaintiff above described, and took for right of way and railroad purposes a strip of land one hundred feet in width extending from the east to the west line thereof, the north boundary being about seven rods distant from the north line of the plaintiff's premises above described and running about parallel with said line the entire distance across said land.

"Third—That the amount of land taken by said railroad for right of way is the sum of six and one-fourth acres, and was, at the time of the taking thereof by said company as aforesaid, of the value of $112.50, and the strip of land lying on the north side of the track of said road, containing about seven acres, was, at the time of the location of said road, of the value of $125, and by reason of location of the road as aforesaid is depreciated in value in the sum of $10 per acre, and the remaining one hundred and forty-six and three-fourths acres is depreciated in value by reason of the location of the defendant's road across said land as aforesaid, the sum of $441, being $3 per acre, that the plaintiff is damaged by reason of the taking of the land for right of way and the location and construction of the road, as aforesaid, in the sum of $625.

"Fourth—The said defendant, through the officers and agents of the Pacific Railway Company, attempted to acquire title to said right of way by certain proceedings for the condemnation of real estate, which was attempted under chapter 16 of the Compiled Statutes of Nebraska, a full and complete copy of all the proceedings are in words and figures as shown by Exhibit A of this petition, and made part hereof, and are so defective that they gave the county court no jurisdiction to act in the premises, or to do anything by reason thereof in the matter of condemnation of right of way for defendant.

"Fifth—The plaintiff alleges and shows that the county court was without jurisdiction to appoint appraisers to assess the damages to the plaintiff by reason of the taking of the land by the defendant company as aforesaid, for the reason that there is no finding by said county court, or the judge thereof, that the plaintiff herein was a non-resident, neither is there any evidence of any kind of record that said plaintiff was a non-resident of the state of Nebraska, and therefore the said county court, or the judge thereof, was without jurisdiction to appoint said commissioners to appraise the damage, and said commissioners were without jurisdiction to find and assess the damage accruing to the plaintiff by reason of the location of the defendant road as aforesaid.

"Sixth—The plaintiff further represents and shows that the first notice he had that the defendant company had located its track over his land as aforesaid and appropriated the six and one-fourth acres thereof for right of way was on the —— day of spring of 1891, and long after that time for appeal from said condemnation proceedings had expired, and he immediately authorized and empowered Theodore J. Moelle to proceed and attempt to make a settlement with the railroad company and to receipt for the damages, if such settlement could be made, and to give said company a full discharge for all the damage and injury done the plaintiff by reason of the location and construction of the said road as aforesaid, and in case no adequate settlement could be made with said company, to take such legal steps as were necessary to recover the amount of his damages for the taking and injuring of his land as aforesaid, and that on the 5th day of August, 1891, the defendant company declined the proposition of settlement in the following words: 'The company cannot admit Mr. Blakeslee's claim to compensation other than such as was awarded by the commissioners.'

"Seventh—The plaintiff further alleges and shows that

no other service or notice in said proceedings for the condemnation for the right of way over said land in the county court of Nuckolls county was ever had or attempted, except the publication of the notice included in Exhibit A hereto attached.

"Wherefore the plaintiff prays that the Missouri Pacific Railway Company, the defendant, be perpetually enjoined from using the right of way over the aforesaid land or operating their railroad over the same, until they have acquired a title thereto by a conveyance from the plaintiff, or by a regular legal proceeding under the statute of Nebraska providing for the condemnation of the right of way for railroad track and purposes, and the payment of the damages accruing to the plaintiff by reason thereof; and for such other, further, or different relief as equity may require, and for costs."

To this petition the appellant interposed a demurrer, the grounds of which were:

"1. The court has no jurisdiction over the person of the defendant.

"2. The court has no jurisdiction of the subject of the action.

"3. There is a defect of parties defendant.

"4. The petition does not state facts sufficient to constitute a cause of action."

The case was presented and argued to the court on the petition and demurrer thereto and the demurrer was overruled. The appellant then filed a motion for leave to answer, attaching to the motion its answer and also an affidavit in support of the motion. The court refused to grant leave to file the answer, and on consideration of the petition rendered judgment, perpetually enjoining the appellant from further trespassing upon, or occupying, or using any portion of the premises described in the petition, "for right of way for railway, or any other purpose," until it "acquired title thereto by legal proceedings." From this decree the company has appealed to this court.

In our view of the case as presented here it will only be necessary to notice one of the points discussed by counsel in their briefs filed herein, and that is, did the petition state facts sufficient to constitute a cause of action? The remedy prayed for in the petition in this action is the one provided by our Code in section 250, where it is stated: "The injunction provided by this Code, is a command to refrain from a particular act. It may be the final judgment in an action, or may be allowed as a provisional remedy;" etc. The pleading in an action of injunction to obtain the relief should set forth the particular act or acts, from the doing, or threatening to do, which it is asked of the court to command the party to refrain. The only connection which it is alleged existed between the appellant and the Pacific Railway Company, which, it is stated in the petition, prosecuted the condemnation proceeding and located its right of way over this land, is contained in the statements, first, that "the Pacific Railway Company, being the Nebraska extension of the defendant company," and second, "the said defendant, through the officers and agents of the Pacific Railway Company, attempted to acquire title to said right of way by certain proceedings for the condemnation of real estate," in neither of which, nor in any other portion of the petition, is there any direct statement that the two companies were one and the same corporation, or under the same management, or controlled by the same officers, nor is it anywhere pleaded that the Pacific Railway Company was controlled or operated by the appellant, or that it was not a separate company, and having an existence distinct and apart in all particulars from the appellant; nor are there such facts pleaded in the petition that the inference from them must or can be fairly drawn that there was only one organization, that of the appellant; nor is there any averment in the petition that the appellant company ever in the past used or threatened to use, operated or threatened to operate, is now using or

operating or threatening to do so in the future, the right of way or a line of railroad over or across the appellee's land, or any facts stated from which it may be fairly inferred or concluded that the appellant so acted, is acting, or intends so to act. We think this is clearly insufficient, for it is a rule of pleading in such cases as the one at bar that a petition for an injunction is not sufficient from which it appears only by inference, and not by averment, that acts are being committed and continuing (for this is an action in injunction against what, if correctly stated, would be a continuing trespass), or one threatened which will cause such an injury to plaintiff in the suit as will entitle him to the allowance of the order. (*St. Joseph & D. R. Co. v. Dryden*, 17 Kan., 280; Maxwell, Code Pleading, 195, and cases cited; *Johnson v. Van Cleave*, 23 Neb., 559; *Mace v. Commissioners of Carteret County*, 99 N. Car., 65, 5 S. E. Rep., 740; *Lamm v. Burrell*, 14 Atl. Rep. [Md.], 682; *Day v. Louisville, N. O. & T. R. Co.*, 11 So. Rep. [Miss.], 25; *Spokane St. R. Co. v. City of Spokane*, 32 Pac. Rep. [Wash.], 456, 5 Wash., 634.)

The counsel for appellee in his brief says: "And we find the appellant in possession and occupancy of the same, and operating the road. It is the appellant that is the present trespasser, and continuing the trespass of which we complain. Who then should the injunction be brought against? We seek to enjoin the appellant from further trespassing upon our premises." This is, we take it, a clear statement of the relief appellee desired to obtain by his action; and if such had been the statements in his petition, it would have presented a very different case for consideration and adjudication than was set forth in the pleading filed and now before us. The demurrer of appellant to the petition should have been sustained and the decree of the district court is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

MARTIN LANGDON V. CAMPBELL & DEERSON.

FILED DECEMBER 5, 1894. NO. 5556.

Review: FAILURE TO FILE BRIEFS. No brief having been filed by either party, the judgment, conforming to the pleadings and the evidence, is affirmed. Following *Damon v. City of Omaha*, 38 Neb., 583.

ERROR from the district court of Sarpy county. Tried below before ESTELLE, J.

Martin Langdon and *Anthony E. Langdon*, for plaintiff in error.

C. L. Hover, contra.

RYAN, C.

This action was begun by defendants in error in the Sarpy county court for an alleged balance of $16.48 due from the plaintiff in error. A set-off was pleaded to this claim. From the judgment of the county court an appeal was taken to the district court, wherein, on a trial duly had, there was judgment against the plaintiff in error. There has been filed no brief in this case, and as the petition and the evidence, uncontradicted in support of its allegations, were sufficient to sustain the verdict, we shall not examine further to discover what merit, if any, there may be in the several assignments of error. (*Damon v. City of Omaha*, 38 Neb., 583.) The judgment of the district court is

AFFIRMED.

RICHARD ELLISON V. CLARA A. BROWN ET AL.

FILED DECEMBER 5, 1894. No. 5428.

Malicious Prosecution: DAMAGES: INSTRUCTIONS. An instruction which, in effect, left the determination of general damages resulting from malicious prosecution to be determined by the jury, guided by their opinions and judgment as reasonable men, *held* proper, where no evidence of special damages had been offered.

ERROR from the district court of Thayer county. Tried below before HASTINGS, J.

C. L. Richards, Marquett, Deweese & Hall, and *W. H. Morris,* for plaintiff in error, contending there was error in the court's charge to the jury, cited: *Moorhead v. Adams,* 18 Neb., 574; *Wasson v. Palmer,* 13 Neb., 378.

Hambel & Heasty, contra.

RYAN, C.

There was a verdict in the district court of Thayer county in favor of Clara A. Brown in this action for damages sustained by her from a malicious prosecution commenced in the county court of Thayer county, on an information sworn to by Joel T. Albright, thereto incited, as she alleged, by Richard Ellison. For the review of the judgment rendered on the aforesaid verdict Albright refused to join in error proceedings in this court, for which reason Ellison joined him as a defendant in his petition in error filed for the purpose indicated. The information above mentioned was filed February 24, 1886, and charged that on that day Clara A. Brown did unlawfully, willfully, and maliciously, in the day-time, break and enter a certain described store-house, which at that time was in the possession of Joel T. Albright, with the intent to steal certain

merchandise, the property of said Albright, contrary to the statutes of the state of Nebraska, etc. Previous to the said prosecution Albright had arranged to exchange 320 acres of his land for the stock of merchandise with reference to which the burglary was charged. Ellison had a mortgage on the same stock, and seems to have been desirous that the exchange should be fully consummated. His consent to a readjustment of his lien was therefore considered a matter of course, provided Albright and Brown should agree as to other details. This agreement was reached, and Albright sent information of that fact to Ellison, who, as Brown claims, refused to perform as he had promised to do in case Albright and Brown should come to an understanding. Thereupon Brown, who had delivered possession of the store-house and merchandise, by the use of a key which fitted a creamery lock which he had, resumed possession until matters should be adjusted all around. He was arrested, but as his wife, Clara A. Brown, as a member of the firm of J. L. Brown & Co. (for whom J. L. Brown had been acting), insisted that by the use of a revolver, if required, she would still retain possession, Albright, by means of the information above referred to, secured her arrest and absence so that safely he could and did obtain the possession which he coveted. The full details of the exchange above referred to and the difficulties encountered will be found described in *Ellison v. Albright*, 41 Neb., 93. The evidence was sufficient to sustain the averments, that the prosecution was begun solely that Albright might obtain possession of the stock of merchandise of which he had been dispossessed, and that there existed no justification for instituting criminal proceedings against Mrs. Brown. There was also such evidence as fully justified the jury in finding that the relation of Ellison to the prosecution was as charged in the petition. Mrs. Brown was taken to Hebron, distant about sixteen miles from the place of her arrest, and was detained there two or three days,

though the evidence does not show that during this time she was confined in the jail. Under the circumstances the verdict was not for too large a sum.

It is urged, however, that the jury was not sufficiently instructed as to the measure of damages which would be applicable provided defendant in error was entitled at all to a recovery. If any special instruction was required, it should have been requested. (*Klosterman v. Olcott*, 25 Neb., 382.) This was not done. Plaintiff in error, however, insists, that the only instruction given on this subject was so palpably defective that of necessity the verdict was thereby vitiated. The instruction complained of was in the following language: "The court instructs the jury, that if you find in favor of the plaintiff, against either or both the defendants, you will assess her damages at such sum as you shall find from the evidence before you on this trial plaintiff has actually been damaged by reason of such of the injuries complained of in plaintiff's petition as it is shown by a preponderance of proof she has suffered." In argument it is said that this instruction is vague and well calculated to mislead the jury; that it does not require the jury to be governed by the evidence, and that the jury from it might understand that if they found against either defendant, they might assess damages against both; and finally, that no guide was furnished whereby they might properly estimate damages. In another instruction which was asked by Ellison the jury had been told that they must be satisfied from the evidence of the truth of these four propositions: "First, that the defendant Ellison did instigate or cause a criminal prosecution of the plaintiff Clara A. Brown; second, that the charge in the information of breaking the store as set forth in the information was untrue; third, not only that the information was untrue but that there was no reasonable or probable cause for believing it to be true; and fourth, that defendant Ellison, if he did instigate the prosecution, was actuated by malice in doing so." In other instructions

the necessity of proof of each fact, essential to entitle to a verdict, was insisted upon, so that the jury could not have reasonably supposed that they might assume the existence of facts which had not been proved. The instruction criticised does not justify a supposition that though the jury found only against one defendant they might return a verdict also against his co-defendant. No more exact statement of the measure of damages applicable than that above given has been suggested by counsel for plaintiff in error. In *Bank of Commerce v. Goos*, 39 Neb., 437, it was said: "General damages are such as the jury may give when the judge cannot point out any measure by which they are to be ascertained except the opinion and judgment of a reasonable man." Of necessity this criterion was the only one available in this case, and the instruction criticised, with fairness suggested to the jury its application. No error is discovered in the record, and the judgment of the district court is

AFFIRMED.

HOME FIRE INSURANCE COMPANY OF OMAHA V. ELIJAH L. JOHNSON, REVIVED IN THE NAME OF JACOB GALLEY, ADMINISTRATOR.

FILED DECEMBER 5, 1894. No. 5777.

1. **Continuance.** An application for continuance *held* properly denied when there was no showing of unavoidable absence of an important witness, nor that if a continuance was granted, his attendance or testimony would afterward be secured.

2. **Review:** RULINGS ON EVIDENCE. An erroneous exclusion of testimony is ordinarily cured by the admission of that excluded.

3. **Trial:** ABSENCE OF STENOGRAPHER. The mere refusal of the court to require the service of a stenographic reporter for the trial of a cause is not reversible error, although it may become such if thereby prejudice is shown to have resulted to the party whose request in this regard has been denied.

ERROR from the district court of Nuckolls county. Tried below before MORRIS, J.

A. S. Churchill, for plaintiff in error.

W. A. Bergstresser and *Cole & Brown*, *contra*.

RYAN, C.

This action was prosecuted in the Nuckolls county district court for the amount of loss sustained by defendant in error, by the burning of his building insured by plaintiff in error. There was a verdict and judgment for the amount of insurance named in the policy, with interest.

The first error assigned is that the court improperly denied plaintiff in error a continuance upon the showing made of the absence of defendant in error and of C. J. Slater. By these witnesses it was claimed in this showing that the insurance company would be able to show, in support of the averments of its answer, that its agent, Mr. Sutherland, did not, before the loss, place this risk with plaintiff in error, but that after the fire he received payment of the premium and wrote up the policy sued on. As to the absence of Elijah L. Johnson, the defendant in error, it was shown that previous to the time the application for a continuance was made he had been a great while sick, and unable to leave his house for a long time,—indeed such was his condition when the insurance was effected. The verdict was returned and judgment rendered on November 7, 1891, and we find in the record a stipulation establishing the fact that Mr. Johnson died February 6, 1892. It is therefore specially worthy of note that there was no statement in connection with the affidavits for a continuance which would tend to establish any expectation that if this cause had been continued, Mr. Johnson's evidence would ever have been procured. In relation also to Slater, there was no showing that his testimony would have

been procured if a continuance had been granted. In addition to this fact there was no proper proof of the inability of Slater to attend the term of court at which this cause was tried. It is true there were affidavits of the attorney for plaintiff in error as to the sickness of Slater, but these were evidently predicated upon a mere letter of the secretary of the insurance company, in which it was stated that Slater was in Colorado, or had been when he was last heard from, a few days before the secretary's letter was written, and this letter stated that he was sick and unable to travel at the time indicated. The district court properly held this showing insufficient.

Next it is insisted that there was no reporter, by whom the evidence was taken on the trial, and that the presiding judge had refused to delay the trial until a reporter could be secured. It is easily conceivable that a case of hardship might arise by a refusal of the character indicated, and if such hardship appeared, the judgment could not stand. Provision has been made for the use of stenographers as reporters, and to the proper administration of justice their services are very valuable, and they should be required to be in attendance, just as is required of any other officer of the court, when a trial is in progress. In the case at bar, however, there was attempted no showing that by reason of the absence of the reporter the plaintiff in error was prevented from settling a proper bill of exceptions. What was proposed as a complete bill showing all the evidence given and offered was served on the defendant in error and settled by the judge who presided at the trial, as in all respects full and correct. In respect to the ruling of the district court as to the presence of a stenographer there was, therefore, no prejudicial error shown.

It is urged that there was error in the ruling which denied the right to prove by Mr. Sutherland, the agent of the insurance company, when the insurance was in fact made. The importance of this question as related to the theory of

plaintiff in error has already been made to appear, and need not now be further explained. No doubt it was error to refuse to allow the proof to be made as offered, but this error was soon after cured by the admission of the very evidence which had been excluded on this point. We see no error in the admission of a copy of the proofs of loss of which the original was in possession of the insurance company, for there was undisputed evidence that the loss was total, and that the company's adjusting agent had acted on the proofs as made. No objection as to the giving or refusal of instructions is made, it will therefore be assumed that no good ground of objection exists. The judgment of the district court is

AFFIRMED.

WILLIAM C. FABENS, APPELLANT, V. ATCHISON & NEBRASKA RAILROAD COMPANY ET AL., APPELLEES.

FILED DECEMBER 5, 1894. No. 5714.

Review: CONFLICTING EVIDENCE. A finding and judgment of the district court will not be disturbed when the evidence upon which the cause was tried was conflicting, without a decided preponderance in favor of appellant.

APPEAL from the district court of Lancaster county. Heard below before FIELD, J.

John S. Gregory, for appellant.

Marquett, Deweese & Hall, contra.

RYAN, C.

The lots involved in this controversy were appropriated by the Atchison & Nebraska Railroad Company in 1872, —the damages having been duly ascertained and paid.

This action was brought in the district court of Lancaster county by the former owner of said lots, by whom it was averred that by non-user the rights of said railroad company and its grantee had been lost, whereby plaintiff became absolute owner, and he accordingly prayed that his title might be quieted. After issues had been joined, a stipulation of facts was filed, which left to be determined but one question of fact, and that was whether or not there had been a non-user of the right of way of the defendants during the period which intervened between the condemnation proceedings and the commencement of this action. Upon conflicting evidence, which certainly did not preponderate in favor of plaintiff, there was a finding and decree in favor of the defendants. Under these circumstances the judgment of the district court must be

AFFIRMED.

WALTER SHOEMAKER ET AL., APPELLEES, V. C. W. HARVEY, IMPLEADED WITH DAKOTA LOAN & MORTGAGE COMPANY, REORGANIZED AS THE GLOBE INVESTMENT COMPANY, APPELLANT.

FILED DECEMBER 5, 1894. No. 5362.

1. **Attachment on Land:** LEVY: POSTING COPY. A levy of an order of attachment on real property by posting a copy thereof is not effective as against third parties, when there is an occupant of such property.

2. ——: LEVY UPON EQUITABLE INTEREST. If there is no possession of real property by an attachment defendant having an equitable interest therein, no valid levy and sale can be made upon such equitable interest, neither can it under such circumstances be subjected otherwise than by invoking the aid of a court of chancery. Following *Dworak v. More*, 25 Neb., 735.

APPEAL from the district court of Madison county. Heard below before POWERS, J.

Robertson, Wigton & Whitham, and *N. D. Jackson,* for appellant.

Lewis & Holmes, contra.

RYAN, C.

This action was brought in the district court of Madison county by the Stillwater Lumber Company and the firm of Walter Shoemaker & Co. to subject to the payment of a judgment held by each of them against C. W. Harvey & Co. a half section of land which it was alleged said firm had disposed of in fraud of the rights of said judgment plaintiffs. A description of this land will hereinafter appear in the sheriff's return, and need not now be given. Neither is it necessary to describe the particular estates conveyed, further than to say that the entire title was vested in Augusta Harvey, a sister of C. W. Harvey, and Mary Metzger, who claimed through a conveyance from her daughter, Mary Harvey, wife of C. W. Harvey. These parties have not appealed, and the title they held is referred to simply to explain the manner in which were derived the rights of the Dakota Loan & Mortgage Company. On April 29, 1887, while title was in Augusta Harvey and Mary Metzger, an order of attachment was issued out of the office of the clerk of the aforesaid district court in the case wherein Walter Shoemaker & Co. were plaintiffs against C. W. Harvey & Co. On the 14th of May, 1887, there was issued by the same clerk an order of attachment against C. W. Harvey & Co. in favor of the Stillwater Lumber Company. The date of levy of the order last referred to was May 18, 1887, that of the first named was April 30 of the same year. The question which we shall consider arises on both returns, and as they are similar in

every respect, except that of date and names of parties plaintiff, it will be sufficient for our purpose to quote the sheriff's return of the first levy made. It was as follows:

"April 29, 1887. Received this order, and according to the command thereof, I did, on the 30th day of April, 1887, at 2 o'clock P. M., in the presence of W. H. Lowe and F. E. Hardy, two residents of Madison county, attach the following real estate, to-wit: The north half (½) of section No. twenty-one (21), township twenty-three (23) north, range three (3) west of the sixth principal meridian, in Madison county, Nebraska. And after administering an oath to said W. H. Lowe and F. E. Hardy to make a true inventory and appraisement of said property in writing, I then with them made an inventory and appraisement of said property, which is herewith returned. I also on said day posted a certified copy of the order in a conspicuous place upon said lands. After diligent search, I cannot find the within named C. W. Harvey & Co. in Madison county, Nebraska. GEO. DAVIS,

"Sheriff."

On the 3d day of May, 1887, Mary Metzger and her husband made to the Dakota Loan & Mortgage Company a mortgage on the real estate which had been conveyed to Mary Metzger. Augusta Harvey mortgaged her estate in the property sought to be subjected on the same day, and to the same company as did Mary Metzger. The two mortgages were filed for record May 9, 1887. There were other mortgages made contemporaneously with those above described, and filed so soon afterward that they are governed by the same rules as are applicable to those above described, accordingly no separate mention of them will be made, for their priority as against the plaintiffs in this action will be understood to be the same as that of those above distinctly mentioned. From that part of the decree which postponed the above mortgages to the rights of the two judgment creditors above named the Dakota Loan & Mort-

gage Company, reorganized as the Globe Investment Company, appeals.

There was no evidence of any knowledge on the part of this mortgage company of any intent of the mortgagors to hinder or defeat creditors of C. W. Harvey & Co. in the collection of claims, much less did this mortgagee contribute intentionally to the consummation of such a design. The relative priority in right of the plaintiffs on the one hand, and of the mortgage company on the other, therefore depends upon the application of legal principles to undisputed facts. The return of the sheriff was of a levy of attachment on the land prior in point of time to the giving of the mortgages. In so far as third parties are chargeable with notice of a levy of the nature of that recited in the sheriff's return, section 205 of our Code of Civil Procedure provides: "Where the property attached is real property, the officer shall leave with the occupant thereof, or if there be no occupant, in a conspicuous place thereon, a copy of the order." In his return the sheriff failed to state whether or not there was an occupant of the land levied upon. If in fact there was an occupant, the posting of a copy of the order on the premises subserved no purpose. To sustain this as sufficient it must be assumed that no person was in possession. In other words, that there was no occupant. It is not to be understood that to show that jurisdiction has attached any such presumption is to be entertained, for we do not consider that question. For the sake of the argument merely, let it be assumed that the premises levied upon were without an occupant. In that event the mode of giving notice of the levy, as was done, would be open to no objection, but the levy itself would be of no validity, for the reasons which we shall now briefly state. The attachments were issued against the property of C. W. Harvey & Co. The levy was, of course, only upon the interest which that firm had in the real property. The legal title was in Augusta Harvey and Mary Metzger, the

interest held by C. W. Harvey & Co. could not, therefore, have been more than a mere equitable interest. A levy and sale could be made on such an interest only, when it was coupled with possession of the real property to be levied upon. If there was only an equitable interest held by the defendant, the property could be subjected only by equitable proceedings brought for that purpose. (*Rosenfield v. Chada*, 12 Neb., 25; *Nessler v. Neher*, 18 Neb., 649; *Connell v. Galligher*, 36 Neb., 749, 39 Neb., 793; *Dworak v. More*, 25 Neb., 735.) In the case last cited the following language was used: "Under our statute a levy of an ordinary execution, upon an equitable interest in real estate, unless the debtor is in possession, will not pass the title of such real estate, as such execution can be levied only on a legal interest. (Code, sec. 477.) If a creditor desires to reach an equity, he may, upon the return of an execution unsatisfied, invoke the aid of a court of chancery to obtain equitable relief." From these considerations it unavoidably results that the rights of the mortgagee were superior to those of the creditors of C. W. Harvey & Co., based upon the alleged levy of the orders of attachment. To the extent that the district court held otherwise, its judgment is reversed and the cause is remanded for further proceedings.

REVERSED.

GEORGE W. BREWSTER, APPELLANT, V. BANK OF AINSWORTH, APPELLEE.

FILED DECEMBER 5, 1894. No. 5821.

Usury: INTEREST ON NOTE. In a suit by the original payee of a promissory note tainted with usury, such payee is not entitled to recover any interest whatever, and can recover only the actual amount of money advanced by him in consideration of the

execution of such note, diminished by all payments of both principal and interest made thereon.

APPEAL from the district court of Brown county. Heard below before KINKAID, J.

Tiffany & Vinsonhaler, for appellant, cited: *Nelson v. Hurford*, 11 Neb., 465; *Koehler v. Dodge*, 31 Neb., 328; *Wilhelmson v. Bentley*, 25 Neb., 473; *Eiseman v. Gallagher*, 24 Neb., 79; *Robbins v. Muldrow*, 18 Pac. Rep. [Kan.], 64; *Kendall v. Crouch*, 11 S. W. Rep. [Ky.], 587; *Sanford v. Kane*, 24 N. E. Rep. [Ill.], 414; *Erickson v. Bell*, 53 Ia., 627; *Brown v. Waters*, 2 Md. Ch., 201.

L. K. Alder, contra, cited: *France v. Smith*, 54 N. W. Rep. [Ia.], 366; *Brown v. Cass County Bank*, 53 N. W. Rep. [Ia.], 412; *Mason v. Searles*, 9 N. W. Rep. [Ia.], 370; *Call v. Palmer*, 6 Sup. Ct. Rep., 301; *Yeiser v. Fulton*, 36 Neb., 518.

RAGAN, C.

George W. Brewster brought this suit in equity in the district court of Brown county against the Bank of Ainsworth, William F. Brewster, and R. L. Miller. He alleged that on the 8th day of September, 1890, he was indebted to the Bank of Ainsworth; that to secure the payment of such indebtedness he delivered to the bank certain notes owned by him which had been executed by W. F. Brewster and secured by a chattel mortgage on a printing establishment sold by him, G. W. Brewster, to W. F. Brewster; and that R. L. Miller had purchased such printing establishment and assumed the payment of said notes. He further alleged that his indebtedness to the Bank of Ainsworth had been extinguished and that the bank was threatening to enforce the collection of said notes. He prayed for an injunction restraining the bank from collecting the notes and restraining W. F. Brewster and R. L. Miller from

paying them, and that said notes might be surrendered to him. W. F. Brewster and R. L. Miller did not appear in the case. The Bank of Ainsworth answered, and the court found and decreed against the claim of George W. Brewster, but, in accordance with the prayer of the bank's answer, found that there was due to it from George W. Brewster a certain sum of money and rendered a decree in favor of the bank and against George W. Brewster for the amount found due and the costs of the suit. To reverse this decree George W. Brewster appeals.

1. It appears from the record that in April, 1887, George W. Brewster gave his note to the Bank of Ainsworth for $500, due in ninety days. This note was given for money borrowed by Brewster from the bank at that time. Brewster received from the bank $470 in money, $30 being reserved by the bank as interest on the $500 for ninety days at the rate of two per cent per month. It also appears that Brewster paid the bank interest on this note at said usurious rate of interest until the 8th of September, 1890. At that time Brewster owed the bank a balance on this $500 note of $521.60; and on that date he executed and delivered a note for said sum of money, as he contends, to the bank, and to secure the payment of this note he deposited the note of W. F. Brewster mentioned above. This note of September 8, 1890, drew interest at the rate of two per cent per month, and was due in six months. Brewster paid interest on it from time to time according to his usurious contract, and the bank applied some of the collections made on the collateral notes also towards the payment of the note, and it continued to run until the 9th of October, 1891. At that time Brewster was owing on the note of September 8, 1890, $498.10; and on that date he executed to the bank a note for that amount, due in thirty days, drawing interest at the rate of two per cent a month, the W. F. Brewster notes remaining in the bank as collateral security. The theory of George W. Brewster then in this case is this,

that the note which he gave the bank on the 9th of October, 1891, was a renewal of the note which he had given the bank September 8, 1890, and that note was a renewal of the first note he had given to the bank in April, 1887; that all said notes were usurious, and that he had paid the bank in usurious interest and from collateral notes a sum in excess of the $470 originally received from the bank in 1887. The bank does not deny that all said notes drew interest at the rate of two per cent a month, nor does it deny that Brewster had made payments of interest as he claimed; but the contention of the bank is this, that in March, 1890, it was pressing Brewster for the payment of his note of $500 of April, 1887, and that Brewster came to the bank asking to have it renew the loan; that it refused to do so, but that it then told Brewster that it had then on deposit some money belonging to one Uttley of Chicago, and that it would lend him a sufficient amount of Uttley's money with which to pay what he, Brewster, was owing it, the bank, and that in fact it did lend to Brewster on the 8th of September, 1890, for Uttley, $521.60; that the note that Brewster executed on that date was made to Uttley and owned by him, and that with the proceeds of this Uttley note the indebtedness which Brewster owed the bank was paid off and discharged; that when this note matured it was not paid, and that Uttley demanded his money; and that on the 9th of October, 1891, for the purpose of paying off the Uttley note, the bank loaned to George W. Brewster $498.10 and took his note therefor, and that the proceeds of that note paid Uttley's note. The court found that George W. Brewster, on the 8th of September, 1890, paid the bank in full all he owed it, and that he made that payment by borrowing the money from Uttley and for which he gave Uttley a note for $521.60 of that date; and the court further found that the Uttley note was paid by George W. Brewster on the 9th of October, 1891, with the proceeds of a note of that date for $498.10 which Brewster gave to the

bank; and the evidence supports these findings. The court then correctly refused to allow the interest payments made by Brewster on the notes of April 1887, and of September 8, 1890, to be applied towards the discharge of the note given by Brewster to the bank on October 9, 1891.

2. There remains then only the question of the correctness of the decree of the court as to the amount which he found due to the bank from Brewster on the note dated October 9, 1891. The court found that there was still due the bank from Brewster on this note $405.90, but the court recites in its decree that, notwithstanding this latter note was usurious, as it drew two per cent a month, he found and decreed that the bank was entitled to recover the amount of the note, $498.10, and seven per cent interest thereon from the date of the note to the date of the decree, deducting from that amount the interest payments made on the note by Brewster and credits made on the note by the bank from the proceeds of the collateral notes. In this the learned district court was in error. Section 5, chapter 44, Compiled Statutes, 1893, provides: "If a greater rate of interest than is hereinbefore allowed [ten per cent per annum] shall be contracted for or received or reserved, the contract shall not, therefore, be void; but if in any action on such contract proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall only recover the principal, without interest, and the defendant shall recover costs." The court having found that the note made by Brewster to the bank on the 9th of October, 1891, was tainted with usury, the bank then could only recover the actual amount of money which it loaned Brewster on said note, and from that amount should have been deducted all payments of interest which he had made on the note, together with any credits to which the note was entitled by reason of collections made of collateral notes, and the judgment should have been only for that amount, and would have drawn

interest at the rate of seven per cent per annum; but the bank was not entitled to any rate of interest whatever on the amount of money it had loaned Brewster on that note. The judgment of the district court is reversed and the case remanded.

REVERSED AND REMANDED.

HARRISON, J., took no part in the above decision.

ABSALOM WAGGONER ET AL. V. FIRST NATIONAL BANK OF CREIGHTON ET AL.

FILED DECEMBER 5, 1894. No. 5549.

1. **Partnership**: EXISTENCE: QUESTION FOR COURT. Where there is no dispute as to the facts, or where all the facts are found or admitted, then the question of copartnership or no copartnership is a question of law for the court.

2. ———: ———: QUESTION FOR JURY. Where there is a dispute as to whether a copartnership exists and a dispute as to the existence of facts which are necessary to constitute a copartnership, the question is for the jury under proper instructions.

3. ———: DEFINITION. Copartnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions. Following Kent's definition, 3 Com., 34.

4. ———: WHAT CONSTITUTES. Sharing the losses of a venture is not essential to a copartnership. If there is a community of interest in the profits as such of the business, and not by way of compensation for services rendered or capital loaned towards the prosecution of the business, it is sufficient to constitute a partnership.

5. ———: SHARING PROFITS: EVIDENCE OF EXISTENCE. Sharing in the profits of an enterprise is *prima facie* evidence of a copartnership, but the presumption of partnership arises from a sharing in profits is not a conclusive one and may be rebutted by the evidence.

6. ———: ———: ———. Community of interest in profits, not by way of compensation for services rendered or capital loaned, but profits as such, a community of interest in the property the subject of the venture, and a community of power of management of such property, are correct tests of copartnership.

7. ———: ———: ———. The receipt by a party of a share of the profits of a venture merely as compensation for services, such party having no interest in the property made the subject of the venture, and no power in the management or control of such property, does not constitute such person a partner. Third point in syllabus of *Strader v. White*, 2 Neb., 348, overruled. *Gibson v Smith*, 31 Neb., 354, reaffirmed.

8. ———: ———: ———. A loan or advance of money to be invested in some enterprise, the lender to have a share in the profits as a remuneration for such loan or advancement, he having no interest in the property made the subject-matter of the business, and no power of management or control of such property, does not constitute such lender a partner.

9. **Chattel Mortgages:** RELEASE: EVIDENCE OF PAYMENT. The execution and filing of a release of a chattel mortgage is not conclusive evidence of the payment of the debt secured by such mortgage, in favor of the mortgagee of the property whose mortgage lien attached prior to the execution and filing of such release.

ERROR from the district court of Knox county. Tried below before ALLEN, J.

Gregory, Day & Day, Green & Baxter, and *H. S. Draper*, for plaintiffs in error, cited: Cobbey, Chattel Mortgages, sec. 434; *Deeter v. Sellers*, 102 Ind., 458; *Nichol v. Stewart*, 36 Ark., 612; *Durkee v. Stringham*, 8 Wis., 1.

W. L. Henderson, O. W. Rice, and *Barnes & Tyler, contra*, cited: 1 Lindley, Partnership, sec. 11; *Pleasants v. Fant*, 22 Wall. [U. S.], 116; *Chapman v. Lipscomb*, 18 S. Car., 222; *Dils v. Bridge*, 23 W. Va., 20; *Beckwith v. Talbot*, 2 Col., 639; 17 Am. & Eng. Ency. Law, 852; *Plunkett v. Dillon*, 3 Del. Ch., 498.

RAGAN, C.

On the 7th day of May, 1891, a promissory note, due in five months, for $987.20 was given to the Boyer-Shelly Company. This note was signed "James Carlin, S. F. Backus." On the same day a chattel mortgage was given to the Boyer-Shelly Company to secure the payment of this note on the following property: "Sixty head of steers, two and three years old, and branded with slit in right ear. Said cattle were purchased in Union Stock Yards, South Omaha, Nebraska, and are to be shipped to Creighton, Nebraska, and taken to James Carlin's place, four and one-half miles north, put in pasture and remain until ready for market. The above described cattle are all the cattle of this brand on Mr. Carlin's place. That said stock, cattle, and chattels are now in perfect health and in the undisputed possession of said party of the first part on the premises of said party, on section 33, township 30, range 5, in Knox county, Nebraska." This mortgage began as follows: "Know all men by these presents, that we, S. F. Backus and James Carlin (comprising the firm S. F. Backus & Co.), of the county of Knox and state of Nebraska," etc. The mortgage was signed "James Carlin, S. F. Backus," and a true copy thereof was filed in the office of the county clerk of Knox county, on the 9th day of May, 1891, at 9 o'clock A. M., and indexed "Backus S. F. & Co., mortgagor; Boyer-Shelly Company, mortgagee." On the 18th day of May, 1891, a note for $374.50 was given to the said Boyer-Shelly Company, due October 7, 1891. This note was signed "S. F. Backus & Co., by Jas. Carlin." On said 18th day of May a chattel mortgage was given to the said Boyer-Shelly Company on the following described property, to-wit: "Thirty-five steers, two years old, and branded with slit in right ear. Said cattle were purchased in Union Stock Yards, South Omaha, Nebraska, and are to be shipped to Creighton,

Nebraska, and taken to James Carlin's place four and one-half miles north, put in pasture and remain until ready for market. The above described cattle are all the cattle of this brand and age, except sixty head of cattle mentioned in mortgage dated May 7, 1891, and located on James Carlin's place." This mortgage began as follows: "Know all men by these presents, that we, S. F. Backus and James Carlin (comprising the firm S. F. Backus & Co.), in the county of Knox, state of Nebraska," etc., and the mortgage was signed "S. F. Backus & Co., by Jas. Carlin," and a copy thereof was filed in the office of the county clerk of Knox county on the 26th day of May, 1891, at 9 o'clock A. M., and appears to have been indexed "Backus S. F. & Co., mortgagor; Boyer-Shelly Company, mortgagee." On the 2d of April, 1891, a note for $315, due five months after date, was given by James Carlin to the First National Bank of Creighton, Nebraska, and on the same day, for the purpose of securing the payment of said note, James Carlin gave a chattel mortgage to the said bank on the following described property, to-wit: "Thirty-five head of two and three year old steers, marked with a slit in the right ear, kept on my farm near Bazile Mills, Nebraska." This mortgage, or a copy thereof, was filed in the office of the county clerk of said Knox county on the 6th of July, 1891, at 9 o'clock A. M. On the 24th day of July, 1891, James Carlin gave another note for $309 to said First National Bank, due ninety days after date, and on the same day executed another chattel mortgage covering the identical property described in his first mortgage to said bank, and this mortgage, or a copy thereof, was filed in the office of the county clerk of Knox county on the 25th of July, 1891, at 9 o'clock A. M. On the 8th day of October, 1891, James Carlin gave two notes to the State Bank of Creighton, Nebraska, one for $700 and one for $600, each due ninety days after date; and to secure the payment of the same, on said 8th

of October, he executed to the State Bank of Creighton a chattel mortgage on the following described property, to-wit: "Sixty-four two and three year old steers, all marked with a slit in right ear, and are to be fed at Bazile Mills, Nebraska." This mortgage, or a copy thereof, was filed in the office of the county clerk of Knox county on the 13th of October, 1891, at 9 o'clock A. M.

It appears that about November 1, 1891 Waggoner & Birney, the plaintiffs in error, at the request of James Carlin, paid to the Boyer-Shelly Company the full amount of the principal and interest due them on the notes and chattel mortgages held by them and which had been given them on the 7th and 18th days of May, as already stated; and the Boyer-Shelly Company indorsed and delivered said notes and chattel mortgages securing the same to Waggoner & Birney, and at the same time executed and delivered to Waggoner & Birney releases of said chattel mortgages. The object of this transaction was that Carlin desired Waggoner & Birney to lend him some $300 and take a mortgage on all these cattle to secure the amount due the Boyer-Shelly Company and the amount Waggoner & Birney was to advance him. For this purpose Waggoner & Birney appear to have taken the note of Carlin for the amount of the Boyer-Shelly Company's notes and interest and the amount which Waggoner & Birney were to lend or advance Carlin; and at the same time took a chattel mortgage on the ninety-four head of cattle described in the Boyer-Shelly Company's mortgages to secure its payment. About the time Waggoner & Birney had this transaction with Carlin they ascertained that the mortgages made to the Boyer-Shelly Company purported to be executed in the name of S. F. Backus & Co., and thereupon Waggoner & Birney deposited with their bankers at South Omaha the notes and mortgages they had purchased of the Boyer-Shelly Company, the releases of the same, and the new mortgage executed to them by Carlin, and instructed their bankers to

send the new mortgage made by Carlin to Knox county for record. The bank, however, by mistake and contrary to the orders of Waggoner & Birney, appears to have sent to the county clerk of Knox county the releases of the Boyer-Shelly Company's mortgages and these releases appear to have been entered of record by the county clerk of Knox county. The evidence also tends to show that about May 1, 1891, S. F. Backus and James Carlin both resided in South Omaha. About this time Carlin became the owner of a piece of land near Bazile Mills, in Knox county. That an agreement was entered into about this time between Carlin and Backus that the latter should have the option of becoming a half owner in the land, but this part of the agreement between them was never consummated. By virtue of the agreement between the parties, however, Backus advanced $300 towards paying for the sixty head of cattle which were purchased of the Boyer-Shelly Company on the 7th of May, and he and Carlin executed the note and mortgage of that date to the Boyer-Shelly Company for the remainder of the purchase price of said cattle. These cattle were then shipped to and put upon the Carlin farm in Knox county. About the 18th of May, Backus gave his accommodation note to Carlin for $600. Carlin appears to have about this time borrowed from the State Bank of Creighton, Nebraska, some $600, giving the bank his note for the money and depositing the note of Backus as collateral security. With this money he went to Omaha and purchased the thirty-five head of cattle, for which he executed to the Boyer-Shelly Company the note and mortgage, dated May 18. These cattle were also shipped to the Carlin farm and put on the pasture there with the others.

Backus testified on the trial that he and Carlin, about the first of May, 1891, entered into a copartnership under the firm name of S. F. Backus & Co., that they had drawn and signed articles of copartnership; that these articles of copartnership were never filed in Knox county;

that all the cattle belonged to the copartnership of S. F. Backus & Co.; that he, Backus, did not know until about Thanksgiving day, 1891, that Carlin had attempted to mortgage the property to the banks, or to any one else; that the agreement between himself and Carlin was, when the cattle were sold or disposed of, that he, Backus, should first have back the amount of money he had advanced to the copartnership and should also have one-half of the profits made on the cattle; that he mortgaged his house and lot in South Omaha to raise the money to pay the freight on the cattle shipped to the Carlin firm in Knox county; that this copartnership was not to run any specified length of time. Several witnesses also testified on the trial that Backus had told them that he had no partner; that Carlin was not his partner, and that the only interest he had in the cattle was $300 he had loaned Carlin, or advanced to Carlin, towards their purchase. Carlin did not testify in the case, but Birney testified that Carlin had told him about November 1, 1891, that Backus "had nothing to do with the cattle;" that he, Carlin, owed Backus $300, which the latter had loaned him, Carlin. The articles of copartnership testified to by Backus were not introduced in evidence.

From the time the cattle reached the Carlin farm until the day before Thanksgiving day, in 1891, these cattle were herded and pastured on the Carlin farm and were all the time in the possession there of Carlin or Backus or S. F. Backus & Co., or the servants and agents of one of them, and were in the possession of Backus on the day before Thanksgiving day, 1891, when they were seized by the First National Bank and the State Bank of Creighton on the mortgages given by Carlin on the 2d and 24th days of July and 8th day of October, 1891, respectively. On the 4th day of December, 1891, S. F. Backus and James Carlin executed to Waggoner & Birney a bill of sale of the ninety-four head of steers, and on the same date S. F.

Backus and James Carlin executed and acknowledged a writing setting forth that they, S. F. Backus and James Carlin, were a copartnership doing business under the name of S. F. Backus & Co.; the execution on behalf of said firm on the 7th day of May, 1891, of the note and mortgage to the Boyer-Shelly Company; the execution and delivery on behalf of said firm to the Boyer-Shelly Company of the note and mortgage of May 18, 1891; that neither of said notes, nor any part thereof, had ever been paid; that said notes and the mortgages securing the same were, on the date of the execution of said instrument, December 4, 1891, owned by Waggoner & Birney; and that said mortgages had on the 10th day of November, 1891, been entered satisfied in the office of the county clerk of Knox county through mistake and misapprehension and in fraud of the rights of Waggoner & Birney, and on the same day Waggoner & Birney brought this suit in replevin to the district court of Knox county against the State Bank and the First National Bank of Creighton, claiming to be the owners, and entitled to the immediate possession of the ninety-four head of steers mentioned and described in the five mortgages above set forth.

At the close of the evidence counsel for the banks moved the court to instruct the jury to return a verdict in their favor, because: "First, that the testimony as introduced is not sufficient to authorize a recovery on the part of the plaintiffs; second, plaintiffs have failed to show there was any partnership existing between James Carlin and S. F. Backus, but, on the contrary, the evidence discloses that it amounted to no more than a loan of $300 on the part of Backus to James Carlin, to be returned in any event, but if any money was made on the cattle deal, he was to receive a portion of the profits; third, because the plaintiffs in this case have shown no right to recover on the instruments introduced, as the same are shown in law to have been canceled and discharged of record; fourth, because

the testimony shows that after the cancellation and discharge of the instruments upon which plaintiffs seek to recover, the defendants, in good faith, took possession of the property under the mortgages they had thereon with the view of securing their payment by foreclosure of the same, and under the evidence and law as it stands here at this time are entitled to a verdict for the return of the property." This motion the court sustained, and the jury, in obedience to its instruction, returned a verdict in favor of the banks; and to reverse the judgment pronounced by the court on such verdict Waggoner & Birney prosecute proceedings in error to this court.

1. Counsel for the banks say in their briefs that the district court held the four points made in their motion to be well taken as his reason for sustaining such motion. Assuming this to be correct, we think the learned judge was wrong. The question as to whether or not a copartnership existed between S. F. Backus and James Carlin was in this case one of fact for the determination of the jury. The rule is that where there is no dispute as to the facts, or where all the facts are found or admitted, then the question of copartnership or no copartnership is a question of law for the court. (*Everitt v. Chapman*, 6 Conn., 347; *Farmers Ins. Co. v. Ross*, 29 O. St., 420; *Kingsbury v. Tharp*, 61 Mich., 216.) Where there is a dispute as to whether a copartnership exists and a dispute as to the existence of facts which are necessary to constitute a copartnership, the question is for the jury. (*Seabury v. Bolles*, 51 N. J. Law, 103; *Meriden Nat. Bank v. Gallaudet*, 120 N. Y., 298; *McMullan v. Mackenzie*, 2 Greene [Ia.], 368; *Butler v. Finck*, 21 Hun [N. Y.], 210; *McDonald v. Matney*, 82 Mo., 358; *Partridge v. Ryan*, 14 Ill. App. Ct., 598; *Chamberlain v. Jackson*, 44 Mich., 320; *Densmore v. Mathews*, 58 Mich., 616.) In the case at bar evidence had been introduced of statements made by Carlin to the effect that he and Backus were not copartners, and that the money

which Backus had advanced towards paying for the cattle was a loan to him, Carlin; and evidence had also been introduced of statements made by Backus to the effect that he had no partner, that Carlin was not his partner. Now if these statements of Carlin and Backus were competent at all, they afforded some evidence which tended to show that no partnership in fact existed between Carlin and Backus. On the other hand, Backus testified positively that he and Carlin were copartners; that they had reduced their agreement of copartnership to writing; that he, Backus, when the partnership property should be disposed of, was to have back the money he had advanced towards purchasing the cattle and one-half the profits of the venture. The mortgages made by Carlin and Backus to the Boyer-Shelly Company were also in evidence and they recited that Carlin and Backus were copartners doing business under the firm name of S. F. Backus & Co. This evidence tended to show the existence of a copartnership, and the learned district court, by deciding this question of fact, usurped the functions of the jury. The serious doubt that arises from a consideration of the evidence in this record is whether, had the court submitted the question of copartnership to the jury and it had found that no copartnership existed, such finding could have been sustained. However, we have no authority to determine this question of fact, and do not mean to do so. Whether a copartnership existed between Backus and Carlin there was at least some doubt, and it was for the jury to say. We might stop here, but counsel for the banks have made a somewhat extended argument designed to show that as a matter of law it cannot be said that a partnership existed between Backus and Carlin from any or all the evidence in this record. We repeat that as the facts exist in this case we have no authority to decide the question as to whether or not a partnership exists between Backus and Carlin, nor do we so decide. A partership exists when two or more persons contribute

their property or services to be employed jointly in some enterprise or business the profit or loss of which is to be shared among them in some fixed proportion. (Walker, American Law, 227.) Partnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions. (3 Kent, Com., 34.) Sharing the losses of a venture is not essential to a copartnership. If there is a community of interest in the profits of the business as such and not by way of compensation for services rendered or capital loaned towards the prosecution of the business it is sufficient to constitute a partnership. (*Cothran v. Marmaduke*, 60 Tex., 370; *Stevens v. Gainesville Nat. Bank* 62 Tex., 499; *Richards v. Grinnell*, 63 Ia., 44; *Munro v. Whitman*, 8 Hun [N. Y.], 553.) Sharing in the profits of an enterprise is *prima facie* evidence of a copartnership; but the presumption of partnership arising from a sharing in profits is not a conclusive one and may be rebutted by evidence. (*Fourth Nat. Bank of St. Louis v. Altheimer*, 91 Mo., 190; *Lockwood v. Doane*, 107 Ill., 235; *Oppenheimer v. Clemmons*, 18 Fed. Rep., 886; *Meehan v. Valentine*, 29 Fed. Rep., 276; *Parker v. Canfield*, 37 Conn., 250.) Community of interests in profits, not by way of compensation for services rendered or capital loaned, but profits as such, and community of interests in the property the subject of the venture, and community of power of management of such property are correct tests of copartnership. (*Lengle v. Smith*, 48 Mo., 276; *Beckwith v. Talbot*, 2 Col., 639; *Beecher v. Bush*, 45 Mich., 188; *Wilcox v. Dodge*, 12 Ill. App. Ct., 517; *Nebraska R. Co. v. Lett*, 8 Neb., 251; *Gibson v. Smith*, 31 Neb., 354.) In *Strader v. White*, 2 Neb., 348, in the third point of the syllabus, it is said: "If a person contract with a partnership to contribute his services to the enterprise, for which he is to be compensated by a proportion of the

profits, he becomes a member of the firm, and liable for its debts, although he do not stipulate to bear any part of the losses." The rule as here stated is not sustained by the weight of authority and can no longer be regarded as law. The liability of White in that case was not placed on the ground that White became a member of the copartnership because he was to receive a proportion of its profits for services rendered by him, but his liability was placed on a finding made by the jury that White was in fact one of the members of the copartnership, though a secret member; and in view of that finding of the jury the case was correctly decided, but the rule as stated in the syllabus is too broad. This syllabus was practically, though not expressly, overruled in *Gibson v. Smith, supra.* The receipt by a party of a share of the profits of a venture merely as compensation for services, such party having no interest in the property made the subject of such venture, and no power in the management or control of such property, does not constitute such person a partner. (See the cases collected and authorities cited, 17 Am. & Eng. Ency. of Law, p. 846.) And a loan or advance of money to be invested in some enterprise, the lender to have a share of the profits as a remuneration for such loan or advancement, he having no interest in the property made the subject-matter of the business and no power of management or control of such property, does not constitute such lender a partner. (See the cases collected and the authorities cited, 17 Am. & Eng. Ency. of Law, p. 850.) A material inquiry in this case was whether the money advanced by Backus was intended by him and by Carlin to be a mere loan to the latter, and another material inquiry was whether Backus, by signing a note with Carlin to the Boyer-Shelly Company for these cattle, intended thereby merely to lend his credit to Carlin; and these questions should have been submitted to the jury.

2. Counsel for the banks say that when Carlin executed the mortgages in question to his clients, he was openly and

notoriously in possession of these cattle, and that his clients received these mortgages without notice of any claim of any one else on the cattle, and that the district court so held. Whether Carlin at the time he made the mortgages to the banks was in the open and notorious possession of the cattle, and whether the banks received their mortgages without notice of the mortgages of Waggoner & Birney, if material in this case, were questions of fact for the jury, and the jury alone had the authority to determine such questions of fact.

3. Counsel for the banks also say that the court held that the releases executed by the Boyer-Shelly Company of the mortgages made to them amounted to a payment and complete satisfaction of the mortgages so far as the rights of the banks were concerned. The banks were not prejudiced by the releases made of these mortgages by the Boyer-Shelly Company, nor by the filing of such releases with the county clerk of Knox county. The lien of the banks on this property attached, if at all, long before these releases were executed, and at a time when the mortgages now held by Waggoner & Birney were in full force and of record in Knox county. The right of the banks to this property is not to be determined by the condition of the mortgage record of Knox county at the time they took possession of the property. Whether Waggoner & Birney, by having the Boyer-Shelly Company execute releases of these mortgages, and by filing the releases in the office of the county clerk of Knox county, and by paying the amount of the notes secured by said mortgages, intended thereby to absolutely pay off and discharge the notes secured by said mortgages, was also a question of fact for the jury, to be determined from all the evidence in the case. If the intention of Waggoner & Birney was that the mortgage releases should only be filed after it was ascertained that Carlin had a clear title to the property, and the mortgage, made by him to them about the 1st of November,

for the amount of the mortgages of the Boyer-Shelly Company, and the amount of the loan Waggoner & Birney was to make to Carlin, should be a first lien upon the cattle, and if the releases were placed by Waggoner & Birney with their bankers, not for the purpose of being filed, but to be held by them until the title of Carlin to the property should be determined, and the bank, through neglect or mistake, contrary to the intention of Waggoner & Birney, and contrary to their instructions, sent the releases to the clerk of Knox county, where they were recorded, then such facts did not operate as a payment and discharge of the notes and mortgages held by Waggoner & Birney. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

H. C. MCEVONY V. DAVID ROWLAND.

FILED DECEMBER 5, 1894. No. 5923.

1. **Fraudulent Conveyances:** CONTRACTS BETWEEN RELATIVES: REPLEVIN: INSTRUCTIONS: EVIDENCE. A son sold a stock of merchandise to his father. A creditor of the son attached the goods and the father replevied the property. On the trial of the replevin action the court refused to instruct the jury: "The court instructs the jury that transactions between relatives whereby property is transferred from one to another in payment of alleged past due indebtedness, by reason of which creditors are deprived of their just dues, will be scrutinized very closely, and the good faith of such transactions must be clearly established." *Held*, That by the instruction the court was requested to direct the jury that the father was required to establish the good faith of the sale made to him by his son by more than a preponderance of the evidence, and that the court did not err in refusing to give the instruction. *Stevens v. Carson*, 30 Neb., 544, *Carson v. Stevens*, 40 Neb., 112, and *Brownell v. Stoddard*, 42 Neb., 177, followed and reaffirmed.

2. ——: ——: EVIDENCE. There was some conflict in the evidence and some suspicious circumstances in the transaction between the father and the son. The jury found the issues in favor of the father. *Held*, That the verdict was supported by the evidence.

ERROR from the district court of Holt county. Tried below before BARTOW, J.

R. R. Dickson and *Jacob Fawcett*, for plaintiff in error.

M. F. Harrington, contra.

RAGAN, C.

In December, 1890, the Rector-Wilhelmy Company brought suit in the district court of Holt county against M. T. Rowland and A. E. Rowland, and caused a writ of attachment to be issued and levied upon a stock of merchandise as the property of the latter. David Rowland, the father of M. T. Rowland and A. E. Rowland, then brought this action in replevin against H. C. McEvony, the sheriff of said county, claiming the ownership and possession of the goods attached by said sheriff. There was a trial to a jury, with a verdict and judgment in favor of David Rowland, and McEvony brings the case here, assigning the following errors:

1. The second and third errors assigned relate to the sufficiency of the evidence to sustain the verdict rendered, and the first error assigned is that the verdict is contrary to law. If the evidence sustains the verdict then it is not contrary to the law of the case. David Rowland claimed the property replevied under a sale thereof made to him by his son, A. E. Rowland. Whether this sale was an honest one and made for an honest purpose was the principal thing litigated in this action. The evidence, like the evidence in most cases of this kind, was conflicting, and there are in the evidence some suspicious circumstances, but the evidence sustains the verdict.

2. The fourth assignment of error is "errors of law occurring at the trial." This assignment is too indefinite for examination.

3. The fifth assignment of error is: "That the verdict is contrary to the instruction of the court given upon its own motion." As the charge of the district judge contains seven separate paragraphs or instructions, we are unable to determine at which one this assignment is aimed.

4. The sixth assignment of error is in the following language: "That the court erred in refusing to give instructions 1, 4, 6, 7, 8, and 9, asked by the plaintiff in error." The first of these instructions refused was as follows: "The court instructs the jury that transactions between relatives whereby property is transferred from one to another in payment of alleged past due indebtedness, by reason of which creditors are deprived of their just dues, will be scrutinized very closely, and the good faith of such transactions must be clearly established." *Stevens v. Carson*, 30 Neb., 544, was a suit between a wife and her husband's creditors. The district court instructed the jury as follows: "The jury are instructed that in a contest between the wife and the creditors of her husband in regard to property transferred to her by him there is a presumption against her which she must overcome by affirmative proof and prove beyond question." "The jury are instructed that in a contest between the wife and the creditors of her husband in regard to property transferred to her by him there is a presumption against her which she must overcome by affirmative proof and prove beyond question the *bona fides* of said sale." These instructions were held by this court to be erroneous, as they required the wife to show the good faith of the transaction between herself and husband beyond a reasonable doubt. NORVAL, J., speaking for the court, said: "Where a debtor transfers property to his wife and such transfer is contested by the creditors of the husband, the presumption is against the *bona fides* of

the transaction, and the law places the burden upon the wife to show that the sale was not made to defraud the creditors of the husband; but she is not required to satisfy the jury in such a case beyond question that the sale was an honest one. A preponderance of the evidence is all that is required." To the same effect see *Carson v. Stevens*, 40 Neb., 112; *Brownell v. Stoddard*, 42 Neb., 177. Now the word "clearly" means without uncertainty; and in the case at bar the court was asked to instruct the jury, not only that the transaction between David Rowland and his son should be closely scrutinized, and that the burden of proof was on David Rowland to establish the good faith of the transaction between himself and son by a preponderance of the evidence, but that the good faith of the transaction between David Rowland and his son must be made to appear without uncertainty. This was more than the law required. The burden was on David Rowland to establish by a preponderance of the evidence that the sale to him from his son was made in good faith, for a valuable consideration, and without intent to hinder, delay, or defraud the son's creditors; but David Rowland was not obliged to establish these facts, or either or any of them, clearly, without uncertainty, beyond question or beyond a reasonable doubt. The court did not err in refusing to give the instruction, and as the assignment is to all the instructions, or the court's refusal to give them all, it must be overruled.

5. The seventh assignment is in the following language: "That the verdict is contrary to instructions numbered 2, 3, and 5, given by the court at the request of the plaintiff in error." The substance of these instructions is that the law presumes every sale of personal property to be fraudulent and void as against creditors of the seller, unless a change of the possession of the property follows the sale; that the burden of proof was on David Rowland to show that the transaction between him and his son, A. E. Rowland, was one had in good faith, and to establish that fact

by a preponderance of the evidence; that the jury was to determine from all the surrounding circumstances in evidence whether the change of possession from A. E. Rowland to David Rowland was an actual, real, and continued change or a shift or pretense. The issues of fact submitted by these instructions were resolved by the jury in favor of David Rowland, and we cannot say that the finding of the jury is in any respect contrary to these instructions or any of them.

6. The eighth assignment of error is in the following language: "That the court erred in giving instruction No. 5, given by the court upon its own motion." The plaintiff in error took no exception to the giving of this instruction, and for that reason we cannot review the assignment.

7. The ninth assignment of error is: "That the court erred in giving instructions numbered 1, 2, 3, and 4, given by the court at the request of David Rowland." The second of these instructions was as follows: "If you find for the plaintiff in this case, you will also find by your verdict the value of the property taken by the defendant sheriff, and the measure of plaintiff's recovery will be the value of the goods with interest thereon at the rate of seven per cent per annum from December 20, 1890." As the court did not err in giving this instruction, and as the assignment is to all the instructions *en masse*, it must be overruled.

8. The tenth and eleventh assignments of error are that the damages are excessive, and that the court erred in not granting the plaintiff in error a new trial on the ground of newly-discovered evidence. Neither of these points is argued in the brief of counsel, and we therefore conclude that they are abandoned.

9. The final assignment of error is that the court erred in overruling McEvony's motion for a new trial. What has already been said disposes of this assignment.

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

AFFIRMED.

JAMES T. WILLIS V. STATE OF NEBRASKA.

FILED DECEMBER 5, 1894. NO. 7155.

1. **Criminal Law:** PROOF OF CONFESSION: CROSS-EXAMINATION OF WITNESS. In the trial of a criminal case, when the state calls a witness for the purpose of proving a confession made by the prisoner, before the witness is allowed to detail such information, it is the privilege of defendant's counsel to cross-examine the witness as to the circumstances under which the confession proposed to be detailed was made.

2. ———: ———: ———. In such case, if the defendant's counsel neglect to cross-examine the witness before he answers, and the answer is responsive to the inquiry, error cannot be predicated on the refusal of the trial court to strike out the answer of the witness.

3. ———: WITNESSES: PROOF OF INTOXICATION. In the trial of a criminal case it is competent for the state in rebuttal to show that a witness who testified for the defendant was intoxicated at the time of the happening of the events about which such witness has testified. *Hill v. State*, 42 Neb., 503, reaffirmed.

4. **Murder:** REASONABLE DOUBT: INSTRUCTION. In a murder trial the court instructed the jury: "A doubt to justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that were the same kind of doubt interposed in the graver transactions of life it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty." *Held*, That the instruction was correct. *Polin v. State*, 14 Neb., 540, reaffirmed.

5. ———: ———: ———. In a murder trial the court instructed the jury: "The court further instructs the jury, as a matter of law, that the doubt which the juror is allowed to retain on his own mind, and under which he should frame his verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt, and a juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to possible states of facts differing from that established from the evidence. You are not at liberty to disbelieve as jurors, if from

the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. The jury are instructed that if, after a careful and impartial consideration of all the evidence in the case, they can say they feel an abiding conviction of the guilt of the defendant, and are fully satisfied to a moral certainty of the truth of the charge made against him, then the jury are satisfied beyond a reasonable doubt." *Held*, That the instruction was correct in every respect.

6. ———: INSTRUCTION: MALICE. In such trial the court instructed the jury: "If one with deliberation and premeditation uses a deadly weapon * * * and shoots another intentionally, and such other, * * * in consequence thereof, dies, the person thus shooting is held responsible for the death, and if the killing is neither justifiable nor excusable in law, is liable to be punished for murder in the first degree." *Held*, That the instruction was erroneous, as the element of malice was omitted therefrom, but that the giving of it was not prejudicial to the plaintiff in error, as the court in other instructions had charged that in order for the killing of the deceased to be murder in the first degree that the plaintiff in error must have killed him purposely and of deliberate and premeditated malice.

7. **Homicide**: SELF-DEFENSE: INSTRUCTION. Willis was tried for murder in the first degree for the killing of Bates. His defense was self-defense. The evidence tended to show that Bates had repeatedly made threats against Willis, and that these threats had been communicated to the latter; that at the time of the homicide Bates was in the saloon of Willis; that a quarrel arose between them, and Willis ordered Bates to leave the saloon; that Bates declined to do this, but took off his coat and walked up in front of the bar behind which Willis was standing and said, "I can do you," at the same time putting his hand behind him or into his hip pocket, at which moment Willis shot him. The court charged the jury: "To justify the taking of life in self-defense it must appear from the evidence that the defendant not only really and in good faith endeavored to decline any further trouble, and to escape from his assailant before the fatal shot was fired, but it must also appear that the circumstances were such as to excite the fears of a reasonable person that the deceased intended to take his life or do him great bodily harm, and also that the defendant really acted under the influence of these fears and not in a spirit of revenge." *Held*, Erroneous, because (1) if Willis, at the time Bates approached him, honestly believed, as a reasonable human being,

that Bates was about to take his life or to do him serious bodily harm, the law did not require him to fly; (2) he had a right to stand his ground and make such defense as he honestly believed, as a reasonable human being, was absolutely necessary to protect himself from death or serious injury; (3) that the common law rule—to justify a party assaulted in taking the life of his assailant he must "retreat to the wall"—was not applicable to the facts in this case; (4) nature has endowed all living beings with the love of life and the instinct of self-preservation. Man is no exception to this law; and when he is unlawfully attacked and the circumstances surrounding him fix in his mind a sincere conviction that his life is endangered or his body in imminent peril, he may lawfully do that thing which in his judgment, as a reasonable human being, he honestly deems absolutely necessary to protect his life or save his body from serious injury. *Parrish v. State*, 14 Neb., 60, distinguished.

8. **Criminal Law:** MOTION TO QUASH VERDICT. Filing a motion to quash a verdict more than three days after its rendition is equivalent to amending a motion for a new trial at that time, which cannot be done.

9. **Murder:** INFORMATION. The information charging plaintiff in error with the crime of murder in the first degree and on which he was tried, set out in the opinion and in all things approved.

ERROR to the district court for Dakota county. Tried below before NORRIS, J.

Statements of facts and proceedings appear in the opinion of the commissioner.

Jay & Beck and *W. P. Warner*, for plaintiff in error:

The fourteenth instruction, given by the court on its own motion, was erroneous. (*Leonard v. Territory*, 7 Pac. Rep. [Wash.], 873; *Commonwealth v. Miller*, 139 Pa. St., 77.)

The court erred in giving the fifteenth instruction on its own motion. It is erroneous to give an instruction which is more in the nature of an argument than a statement of the law. (*Dunn v. People*, 109 Ill., 635; *Ludwig v. Sager*, 84 Ill., 99; *State v. Orr*, 64 Mo., 339; *Morris v. Lachman*, 8 Pac. Rep. [Cal.], 799.)

The sixteenth instruction was erroneous in omitting the question of malice. (*People v. Sweeney*, 55 Mich., 586; *McClaine v. Territory*, 25 Pac. Rep. [Wash.], 453.)

The seventeenth instruction was not a correct statement of the law. (*Long v. State*, 23 Neb., 34.)

The eighteenth instruction, given by the court on its motion, was erroneous. (*Brinkley v. State*, 8 So. Rep. [Ala.], 22; *Jones v. State*, 76 Ala., 8; *Cary v. State*, 76 Ala., 78; *Perkins v. State*, 47 N. W. Rep. [Wis.], 827; *Pond v. People*, 8 Mich., 150; *Burgess v. Territory*, 19 Pac. Rep. [Mo.], 558; *Stoneham v. Commonwealth*, 10 S. E. Rep. [Va.], 238; *Erwin v. State*, 29 O. St., 186; *State v. Evans*, 10 S. E. Rep. [W. Va.], 792; *United States v. Wiltberger*, 3 Wash. [U. S.], 515; *Vollmer v. State*, 24 Neb., 838; *Runyan v. State*, 57 Ind., 84; *People v. Hull*, 49 N. W. Rep. [Mich.], 288; *People v. Kuehn*, 53 N. W. Rep. [Mich.], 721; *Hurd v. People*, 25 Mich., 405; *People v. Lilly*, 38 Mich., 270; *People v. Lennon*, 71 Mich., 298; *Jones v. State*, 17 Tex. App., 602; *Bell v. State*, 20 Tex. App., 445; *Spearman v. State*, 23 Tex. App., 224; *Brumley v. State*, 21 Tex. App., 222; *Patillo v. State*, 3 S.W. Rep. [Tex.], 766; *Horbach v. State*, 43 Tex., 242.)

Instructions twenty and twenty-one, given by the court on its own motion, were erroneous. (*Lang v. State*, 1 S. W. Rep. [Tenn.], 319; *State v. Banks*, 73 Mo., 592.)

The verdict was a privy verdict, and void, and should not have been received by the judge. (*Young v. Seymour*, 4 Neb., 86; *Longfellow v. State*, 10 Neb., 105; *Hobart v. Hobart*, 45 Ia., 503; *Wightman v. Karsner*, 20 Ala., 446; *Brumley v. State*, 20 Ark., 77.)

The motion filed by plaintiff in error in arrest of judgment should have been sustained. (*Schaffer v. State*, 22 Neb., 557; *Fouts v. State*, 8 O. St., 98; *Robbins v. State*, 8 O. St., 131; *Kain v. State*, 8 O. St., 306; *Hagan v. State*, 10 O. St., 459; *State v. Brown*, 21 Kan., 38; *Leonard v. Territory*, 7 Pac. Rep. [Wash.], 872; *State v. McCormick*, 27 Ia., 402.)

George H. Hastings, Attorney General, for the state:

The motion to strike out the testimony of the witness Schmied was properly overruled. (*Anderson v. State,* 25 Neb., 550; *Clough v. State,* 7 Neb., 322.)

The fourteenth paragraph of the instructions given by the court upon its own motion was a correct statement of the law pertaining to reasonable doubt. (*Miller v. People,* 39 Ill., 457; *Commonwealth v. Webster,* 5 Cush. [Mass.], 295; *State v. Ostrander,* 18 Ia., 458; *Arnold v. State,* 23 Ind., 170; *May v. People,* 60 Ill., 119.)

The fifteenth instruction is sustained by *St. Louis v. State,* 8 Neb., 416.

The sixteenth instruction correctly stated the law of the subject to which it pertained. (*Preuit v. People,* 5 Neb., 384; *State v. Turner,* Wright [O.], 20; *Hill v. Commonwealth,* 2 Gratt. [Va.], 595.)

The seventeenth instruction was without error. (*Bartling v. Behrends,* 20 Neb., 215; *Campbell v. Holland,* 22 Neb., 607.)

The following cases are cited to sustain the eighteenth instruction: *Parrish v. State,* 14 Neb., 67; *Harrison v. Harrison,* 43 Vt., 417; *State v. Sloan,* 47 Mo., 604; *State v. Collins,* 32 Ia., 36; *State v. Goodrich,* 19 Vt., 116; *Commonwealth v. Crawford,* 8 Phila. [Pa.], 490; *State v. Wood,* 53 Vt., 560; *Kendall v. State,* 8 Tex. App., 569; *State v. Dixon,* 75 N. Car., 275; *Presser v. State,* 77 Ind., 274; *People v. Coughlin,* 65 Mich., 704; *State v. Matthews,* 78 N. Car., 523; *Duncan v. State,* 49 Ark., 543; *Runyan v. State,* 57 Ind., 80; *People v. Gonzales,* 71 Cal., 569; *Fortenberry v. State,* 55 Miss., 403; *Steinmeyer v. People,* 95 Ill., 383; *State v. Parker,* 96 Mo., 382; *State v. Donnelly,* 69 Ia., 705; *Panton v. People,* 114 Ill., 505; *State v. Partlow,* 90 Mo., 608; *Gallagher v. State,* 3 Minn., 185; *People v. Williams,* 32 Cal., 280; *People v. Campbell,* 30 Cal., 312; *Stewart v. State,* 1 O. St., 66; *People v. Ander-*

son, 44 Cal., 65; *State v. Quin*, 3 Brev. [S. Car.], 515; *People v. Doe*, 1 Mich., 451; *Patten v. People*, 18 Mich., 314; *Cotton v. State*, 31 Miss., 504; *Oliver v. State*, 17 Ala., 587; *Dupree v. State*, 33 Ala., 380; *State v. Benham*, 23 Ia., 154; *State v. Burke*, 30 Ia., 331; *Noles v. State*, 26 Ala., 31; *Dill v. State*, 25 Ala., 15.

The nineteenth instruction is not erroneous. (*Vollmer v. State*, 24 Neb., 844; *Panton v. People*, 5 Am. Crim. Rep. [Ill.], 425, note, and cases; *Barnards v. State*, 88 Tenn., 229; *White v. Territory*, 3 Wash. Ter., 397.)

Words and epithets, however irritating they may be, are no excuse for making a felonious assault. (Wharton, Homicide, sec. 393, and cases.)

If a party to the cause have knowledge of any circumstances tending to disqualify certain jurors from serving in a particular case, he cannot hold back these facts until after the rendition of a verdict, and then produce them in support of a motion for a new trial. (*Tomer v. Densmore*, 8 Neb., 384; *Palmer v. People*, 4 Neb., 75; Thompson & Merriam, Juries, sec. 275.)

The information was sufficient. (*Fonte v. State*, 8 O. St., 98; *Shaffer v. State*, 22 Neb., 557.)

J. J. McAllister, also for the state.

RAGAN, C.

James T. Willis in the district court of Dakota county was found guilty by a jury of the crime of manslaughter for the killing of one Amberry Bates, and he brings the judgment pronounced against him on such finding here for review, assigning the following errors:

1. That the court erred in overruling plaintiff in error's motion to strike out the testimony of one Schmied, a witness who testified on the trial of the case on behalf of the state. Schmied, without any objection on the part of plaintiff in error, had testified that he resided in Dakota

City, where the killing of Bates occurred; that he was engaged in the publishing of a newspaper at that place, and acquainted with the plaintiff in error and had been for some years; that on the day of the killing of Bates, and very soon thereafter, he went to the saloon of the plaintiff in error, where Bates was killed, and there had a conversation with the plaintiff in error in reference to the homicide. He then testified that on the same evening between 7 and 8 o'clock, in the sheriff's office, he had another conversation with the plaintiff in error, and thereupon he was asked by counsel for the state this question: "Q. What, if anything, did Mr. Willis say in that conversation? A. Why, we were down there, and I says, 'Would you like to make a statement for publication,' and he says 'No.' 'Well,' I says, 'I didn't know but what maybe you wanted to state the facts.' I says, 'It would be better to give the facts than the rumored report any time.'" Counsel for plaintiff in error then moved the court to strike out the above testimony, for the reason that the expression used by the witness, "It would be better to give the facts than the rumored report any time," was an inducement held out to the plaintiff in error to make a statement. No objection was made to the question propounded to Schmied, nor did counsel cross-examine nor seek to cross-examine him before he answered, as to whether any threats were made or inducements held out to induce the plaintiff in error to make the statement he did. In the trial of a criminal case, where the state calls a witness for the purpose of proving a confession made by the prisoner, before the witness is allowed to detail such information it is the privilege of defendant's counsel—and the better practice—to cross-examine the witness as to the circumstances under which the confession proposed to be detailed was made. Counsel cannot wait until the witness has answered and then move to strike the statement from the record, if the answer is responsive to the inquiry. The assignment of error, however, is

without merit, for the reason that the witness in the testimony which it was moved to strike out made no statement of any confession made to him by the plaintiff in error as to whether he committed the crime with which he was charged. He declined to make a statement, saying that he would tell his story before a coroner's jury.

2. That the court erred in overruling objections made by plaintiff in error to the evidence of one Rathbun. One Brown was a witness for the state, and testified that he was present at the homicide; saw Willis shoot Bates, and that after he had shot him and he fell Willis walked up to where Bates was lying and shot him again. One Endersby was called as a witness for Willis and testified that he was present at the homicide and also testified that said Brown was not present. On rebuttal the state called the witness Rathbun, and he testified that he saw the witness Endersby within five minutes after the shooting of Bates occurred. He was then asked by the state this question: "Did you notice his condition as to whether he was intoxicated or not?" To this the counsel for plaintiff in error objected, on the ground that the evidence was incompetent, irrelevant, immaterial, and not rebuttal. The objection was overruled and the plaintiff in error excepted. In *Hill v. State*, 42 Neb., 503, Hill was being tried for murder and called a witness who testified in his behalf. The state, on cross-examination of this witness, asked him if he had not been arrested for vagrancy, drunkenness, and other misdemeanors. Hill took an exception to this, and assigned the action of the court in permitting this witness to be thus cross-examined as error. This court, speaking through POST, J., said: "The limits within which cross-examination will be allowed respecting the past life of a witness other than the defendant in a criminal prosecution, for the purpose of affecting his credibility, rests in the discretion of the trial court." The evidence offered, and the admission of which is assigned as error here, was competent, material,

and relevant, and, following the rule of *Hill v. State, supra*, it would have been competent for the state, by cross-examination of Endersby himself, for the purpose of affecting his credibility as a witness, to show that he was intoxicated at the time of the killing of Bates; and we know of no rule of law that prevented the state from showing that fact by any competent evidence on rebuttal. The jury was entitled to know whether Endersby heard and understood the matters and things about which he testified as a sober man of ordinary intelligence, or whether his sight, hearing, and understanding, or either or any of them, were at the time affected by intoxicants.

3. That the court erred in giving to the jury on its own motion instruction No. 14, as follows: "The rule of law which clothes every person accused of crime with the presumption of innocence, and imposes upon the state the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty of crime to escape, but is a humane provision of law, intended, so far as human agencies can, to guard against the danger of any innocent person being unjustly punished. A doubt to justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that were the same kind of doubt interposed in the graver transactions of life it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt." The criticism on this instruction is the language, "and unless it is such that were the same kind of doubt interposed in the graver transactions of life it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty." In *Polin v. State*, 14 Neb., 540, Polin was prosecuted for murder. The district

court instructed the jury: "The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinarily prudent men with a conviction on which they would act in their most important concerns or affairs in life;" and this court held the instruction to be correct. In *May v. People*, 60 Ill., 119, a reasonable doubt was defined as follows: "A reasonable doubt, beyond which the jury should be satisfied in a criminal case before finding the accused guilty, is one arising from a candid and impartial investigation of all the evidence, and such as in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause." (See, also, *Dunn v. People*, 109 Ill., 635.) The instruction assailed was correct.

4. That the court erred in giving on its own motion instruction No. 15, as follows: "The court further instructs the jury, as a matter of law, that the doubt which the juror is allowed to retain on his own mind, and under which he should frame his verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt, and a juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to possible states of facts differing from that established by the evidence. You are not at liberty to disbelieve as jurors, if from the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. The jury are instructed that if after a careful and impartial consideration of all the evidence in the case they can say they feel an abiding conviction of the guilt of the defendant, and are fully satisfied to a moral certainty of the truth of the charge made against him, then the jury are satisfied beyond a reasonable doubt." The objections made to this instruction are, first, that it does not properly define a rea-

sonable doubt. In *St. Louis v. State*, 8 Neb., 416, St. Louis was on trial for murder, and the district court instructed the jury: "Absolute, unequivocal, positive certainty is not required in any case. Mere speculation or contingent doubt may be found in connection with almost all human affairs. Absolute, unequivocal, mathematical certainty is rarely attainable, and this would be a degree of perfection not required of the jury by the laws." On error proceedings to this court LAKE, J., said: "Perhaps there is a greater and more dangerous display of adjectives indulged in here than was necessary, or even advisable, but we do not think there is any reason to suppose that the jury were at all misled thereby. * * * And as to the use of the word 'unequivocal,' to which exception is particularly taken, we can see no objection to it in this connection. The object of the instruction * * * was to impress the minds of the jury with the impropriety of indulging in unreasonable, captious doubts, as is not unfrequently done, in order to escape the legitimate effect of morally satisfactory evidence." The second objection to the instruction is that it does not enunciate a proposition of law but is in the nature of argument. In *Dunn v. People*, 109 Ill., 635, an instruction much like the one under consideration was held by that court to be more like an argument than a proposition of law, and declared to be erroneous. There is, however, a difference between the instruction in the Illinois case and the one under consideration. For our part we entirely approve of this instruction given by the trial court. The doubt on which a juror predicates his verdict of not guilty must always be a reasonable one; and a doubt produced by undue sensiblity in the mind of a juror in view of the consequences of his verdict is not a reasonable doubt. Nor can a juror lawfully conjecture the existence of a fact not warranted by the evidence, and say that a doubt predicated thereon is a reasonable one. Jurors may not lawfully disbelieve as jurors if from the evidence they would believe as men.

The oath taken by a juror does not impose on him an obligation to doubt where no doubt would exist if no oath had been administered; and if from all the evidence in the case the jury have an abiding conviction of the guilt of the defendant, and are satisfied to a moral certainty that he is guilty of the charge made against him, then the jury is satisfied beyond a reasonable doubt. These are the propositions enunciated by the instruction, and they are not arguments; they are propositions of law as sound as they are sensible.

5. That the court erred in giving on its own motion instruction No. 16, as follows: "The court further instructs the jury that in criminal law a person is always held to intend the natural and probable results of his own acts, unless the contrary is made to appear from the evidence; and if one with deliberation and premeditation uses a deadly weapon like a pistol and shoots another intentionally and such other is wounded, and in consequence thereof dies, the person thus shooting is held responsible for the death, and if the killing is neither justifiable nor excusable in law he is liable to be punished for murder in the first degree." The just criticism on this instruction is that the element of malice is omitted; but the court was not obliged to use in every instruction the terms "purposely and of deliberate and premeditated malice" found in the statute. The court told the jury in its third instruction that if the killing of Bates was done purposely and with deliberate and premeditated malice it was murder in the first degree; and in the seventh instruction he told the jury that in order for the killing of Bates to have been murder in the first degree, Willis must have killed him purposely and of deliberate and premeditated malice. This we think was sufficient. (*People v. Bawden*, 27 Pac. Rep. [Cal.], 204.)

6. That the court erred in giving on its own motion the seventeenth instruction, as follows: "In considering whether the killing of Amberry Bates was justifiable on

the grounds of self-defense, you should consider all the circumstances attending the killing, the conduct of the parties at the time and immediately prior thereto, and the degree of force used by the prisoner in making what he claimed to be this self-defense as bearing upon the question, whether the shot or shots were actually fired in self-defense or whether fired in carrying out an unlawful purpose." The criticisms on this instruction are two: First, that the court submitted to the consideration of the jury the degree of force used by Willis in defending himself against the deceased; and, second, that the words "in evidence" should have been included in the phrase "they should consider all the circumstances attending the killing." There is no merit in either one of these objections.

7. That the court erred in giving on its own motion instruction No. 18, as follows: "To justify the taking of life in self-defense it must appear from the evidence that the defendant not only really and in good faith endeavored to decline any further trouble and to escape from his assailant before the fatal shot was fired, but it must also appear that the circumstances were such as to excite the fears of a reasonable person that the deceased intended to take his life, or do him great bodily harm, and also that the defendant really acted under the influence of these fears, and not in a spirit of revenge." The defense of Willis to the charge upon which he was tried was that he killed Bates in self-defense. By this instruction the court told the jury that for Willis to make out his defense it must appear from the evidence that he in good faith endeavored to decline any further trouble with Bates and endeavored to escape from him before he shot him. In *Parrish v. State*, 14 Neb., 60, it was held: "In case of personal conflict resulting in death, in order to prove the defense of justifiable homicide, it must appear that the party killing had endeavored by all reasonable means, before giving the fatal blow, to escape from the scene of the difficulty." It appears from the re-

ported opinion in that case that Parrish killed the deceased while he was retreating and endeavoring to escape from a crowd of which Parrish was one. In view of the facts there can be no question as to the correctness of the rule as applied to the evidence in that case. In *Pond v. People*, 8 Mich., 150, it is said: "Whenever a forcible felony is attempted against a person or property, the person resisting the attempt is not obliged to retreat, but may pursue his adversary, if necessary, till he finds himself out of danger. But he may not properly take life if the evil may be prevented by other means within his power." In *Erwin v. State*, 29 O. St., 186, the facts were: A controversy had arisen shortly before the homicide, between Erwin and the deceased as to the possession of a building or shed. Erwin's tools had been thrown out of the shed, and he replaced them and locked the building, and the locks were afterwards broken. On the day of the homicide Erwin was in the shed securing his tools, and the deceased was near his own house and close by the shed, when angry words passed between the deceased and Erwin. The deceased, with an axe on his shoulder, approached in a threatening manner the shed where Erwin was, and as he approached Erwin warned him not to enter the shed. The deceased did not heed the warning and advanced to the shed within striking distance of Erwin, and the latter shot and killed him. The court held: "Where a person in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavors to kill him, the person so assaulted, without retreating, although it be in his power to do so without increasing his danger, may kill his assailant if necessary to save his own life or prevent enormous bodily harm." To the same effect see *Perkins v. State*, 47 N. W. Rep. [Wis.], 827; *State v. Sloan*, 47 Mo., 604; *Presser v. State*, 77 Ind., 274; *State v. Burke*, 30 Ia., 331; *Patillo v. State*, 3 S. W. Rep. [Tex.], 766. In the case at bar the

evidence tended to show that Bates was a large and powerful man, of a quarrelsome disposition, especially so when drinking; that he had repeatedly made threats against Willis, and that these threats had been communicated to the latter; that on the afternoon of the homicide Bates was in the saloon of Willis and had been drinking intoxicating liquors; that a quarrel arose between Bates and Willis and Willis ordered Bates to leave the saloon; that Bates declined to do this, but took off his coat and throwing it on a counter or table walked up in front of the bar behind which Willis was standing and said: "I can do you," at the same time putting his hand behind him or into his hip pocket, at which moment Willis shot him. Keeping in view the facts of this case, we think the instruction, in so far as it told the jury that to justify Willis in taking the life of Bates in self-defense, it must appear from the evidence that Willis endeavored to escape from Bates before shooting him, was erroneous. If Willis, at the time Bates approached him and put his hand behind him, honestly believed, as a reasonable human being, that Bates was about to attempt to take his life or to do him serious bodily harm, the law did not require him to fly. He had a right to stand his ground and make such defense as he honestly believed was absolutely necessary to protect himself from death or serious injury. The rule of the common law that to justify a party assaulted in taking the life of his assailant he "must retreat to the wall" is not applicable to the facts in this case. That rule probably had its origin in an age before the use of fire-arms and gunpowder became general. The common law rule, however, is a general one and varies with the circumstances of each case. If the encounter between Bates and Willis had taken place in an open field or in a street, the instruction of the court would have been less objectionable and less prejudicial to the plaintiff in error. Willis was in his own house, engaged in the pursuit of his business, and to say to the jury

that when Bates approached him with threatening gestures, if Willis honestly believed that Bates was then about to shoot him or make an assault upon him which might result in seriously injuring him or depriving him of his life, that at that moment it was his duty to endeavor to escape, was equivalent to telling the jury that it was the duty of Willis at the time to fly, though by so doing his danger might be augmented. Nature has endowed all living beings with the love of life and the instinct of self-preservation. Man is no exception to this law; and when he is unlawfully attacked, and the circumstances surrounding him fix in his mind a sincere conviction that his life is endangered or his body in imminent, peril, he may lawfully do that thing which in his judgment as a reasonable human being, he honestly deems absolutely necessary to protect his life or save his body from serious injury.

8. That the court erred in giving on its own motion instruction No. 20, as follows: "You are instructed that mere words, however irritating, are no excuse for a felonious assault, and although you may believe from the evidence that insulting and opprobious epithets were used by the deceased, Amberry Bates, to the defendant James T. Willis, yet if said defendant Willis immediately revenged himself by using a revolver and shooting and killing the said Amberry Bates, then the defendant is guilty and you should so find from your verdict." Under the evidence in the case this instruction was correct.

9. That the court erred in giving instruction No. 21, as follows: "You are instructed that the fact that the deceased, Amberry Bates, may or may not have been of a quarrelsome disposition, or that he may have made assaults upon other parties, does not affect the nature of the act of killing him. Such testimony is admissible only as it may tend to throw light upon the question as to whether or not the defendant acted in self-defense, and can only be considered by you for this purpose. If you find beyond a rea-

sonable doubt that the killing was not done in self-defense, then the act was murder or manslaughter, and the character of the deceased is immaterial, and it matters not whether he was a good or a bad man." This instruction was correct.

10. That the court erred in refusing to give instruction No. 16, requested by the plaintiff in error. It is as follows: "The court instructs the jury, as a matter of law, that the evidence of communicated threats, made by the deceased against the defendant, is intended to shed light upon the mental attitude of the prisoner towards the deceased when the homicide occurred. "Uncommunicated threats are evidence of the mental attitude of the deceased towards the prisoner. Both are admissible when such threats have been made, recently before the killing, by the deceased against the accused, and uncommunicated to him before the killing. It is proper to permit the defendant to prove that on occasions recently before the killing the deceased threatened to others, upon more than one occasion, to kill the defendant, although it does not appear that such threats were ever communicated to the defendant before the killing." There was no error in refusing to give this instruction, for the reason that the court had already given the substance of it in instructions 10, 11, and 13, given at the request of the plaintiff in error.

11. The verdict in this case was rendered on the 7th day of April. On the 9th day of April a motion for a new trial was filed. On the 19th of April the plaintiff in error filed a motion to quash the verdict, for the reason that the same was not returned or delivered in open court. We will not consider this error, for the reason that it was not assigned in the motion for a new trial. If this verdict was not returned in open court, the plaintiff in error knew that at the time he filed his motion for a new trial, and should have made that one of the grounds thereof. Filing a motion to quash a verdict more than three days after its rendition is equivalent to amending the motion for a new trial, which cannot be done.

12. The next error alleged is that the court erred in not sustaining the motion of the plaintiff in error for a new trial on the third ground alleged in said motion, namely, that one David Waterman, one of the jurors who tried the plaintiff in error, testified on his *voir dire* examination that he had no opinion as to the guilt or innocence of the plaintiff in error; and that in truth and in fact, before the trial began, said Waterman had expressed an opinion as to the guilt of the plaintiff in error. The record does not contain the *voir dire* examination of Waterman. The affidavits filed in support of this motion for the plaintiff in error tend to show that Waterman, before the trial of the plaintiff in error began, had expressed an opinion that the plaintiff in error should be punished for the killing of Bates, and that on his *voir dire* examination he testified that he had formed or expressed no opinion as to the guilt or innocence of the plaintiff in error. The affidavit of Waterman in resistance of this motion denies that he had ever formed or expressed an opinion prior to the time of the trial as to the guilt or innocence of the plaintiff in error. The district court passed upon the conflicting statements of these affidavits. We cannot say that he came to an incorrect conclusion.

13. The final assignment of error is that the court erred in overruling the motion of plaintiff in error to arrest the judgment. This motion is predicated upon the contention that the facts stated in the information do not constitute the crime of murder. The information is in words and figures as follows: "Of the April term of the district court, held within and for Dakota county, Nebraska, in the year of our Lord one thousand eight hundred and ninety-four, J. J. McAllister, prosecuting attorney for said county of Dakota, in the name and by the authority and on behalf of the state of Nebraska, information makes, and gives the court to understand and be informed, that James T. Willis, on the second day of January, in the year of our

Lord one thousand eight hundred and ninety-four, in the county of Dakota and state of Nebraska, contriving and intending, of his deliberate and premeditated malice, one Amberry Bates feloniously to kill and murder, in and upon said Amberry Bates, then and there being, did, unlawfully, willfully, forcibly, purposely, and of deliberate and premeditated malice, make an assault, and that the said James T. Willis, a certain pistol, then and there charged with gunpowder and divers, to-wit, five, leaden bullets, which said pistol he, the said James T. Willis, in his right hand then and there had and held, then and there, willfully, unlawfully, purposely, and of deliberate and premeditated malice, did discharge and shoot off, to, against, and upon the said Amberry Bates, and that the said James T. Willis, with the divers, to-wit, two, of the leaden bullets aforesaid, then and there, by force of the gunpowder aforesaid, by the said James T. Willis aforesaid discharged and shot off as aforesaid, then and there, unlawfully, purposely, and of deliberate and premeditated malice, did strike, penetrate, and wound the said Amberry Bates, in and upon the left side of the forehead of him, the said Amberry Bates, thereby then and there, purposely and of deliberate and premeditated malice, giving to him, the said Amberry Bates, in and upon the breast of him, the said Amberry Bates, one mortal wound, of the length of one inch and of the depth of six inches, of which said mortal wound the said Amberry Bates then and there instantly died; and so the said J. J. McAllister, prosecuting attorney as aforesaid, does say that the said James T. Willis him, the said Amberry Bates, unlawfully, purposely, and of deliberate and premeditated malice, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska." The defect of the information is alleged to be that in the charging part thereof there is no allegation of an intent or purpose to kill. Counsel cite us to the case of *Schaffer v.*

State, 22 Neb., 557, in support of their contention; but the information in that case did not contain the sentence "contriving and intending, of his deliberate and premeditated malice," etc., and is therefore not in point. The information is entirely correct.

For the errors committed by the court in giving the eighteenth and nineteenth instructions of the instructions on its own motion, set forth above, the judgment of the district court is reversed and the case remanded.

REVERSED AND REMANDED.

KANSAS CITY, WYANDOTTE & NORTHWESTERN RAILROAD COMPANY V. ANDREW J. CONLEE.

FILED DECEMBER 5, 1894. No. 5222.

1. **Depositions.** Either party to a suit may commence taking testimony by deposition at any time after service upon the defendant in such action. (Code Civil Procedure, sec. 373.)

2. **Continuance.** Suit was brought and service had on defendant in August, 1890. March 27, 1891, the defendant applied for a continuance, on the ground of the absence from the state of a witness whose testimony was material for the defendant. The witness did not reside within the jurisdiction of the court when the suit was brought, and defendant had made no effort to procure the witness' deposition. *Held*, That the overruling of the application for a continuance by the district court was correct.

3. **Ruling on Motion for Continuance:** REVIEW. The ruling of a district court on a motion for a continuance will not be disturbed unless it is manifest the court abused its discretion, and the litigant, himself guiltless of negligence or laches, was thereby deprived of an opportunity to make his case or defense.

4. **Parol Contract of Employment:** CONSTRUCTION: STATUTE OF FRAUDS. On December 19, 1889, a railroad company and one Conlee entered into an oral agreement, by the terms of which the former employed the latter, and he agreed to serve the railroad company for one year at $150 per month, service to

begin January 1, 1890. The railroad company refused Conlee employment and he sued it for damages. *Held*, (1) That as the contract rested entirely in parol and was impossible of consummation within a year from the date of its making, it was within subdivision 1, section 8, chapter 32, statute of frauds, and voidable at the option of either party thereto; (2) that the fact that Conlee was to be paid for his year's services "at the rate of $150 a month" did not make the contract of employment one from month to month or by the month. *Kiene v. Shaeffing*, 33 Neb., 21, distinguished.

ERROR from the district court of Gage county. Tried below before APPELGET, J.

The facts are stated by the commissioner.

M. Summerfield, S. Rinaker, and *R. S. Bibb*, for plaintiff in error:

It was an abuse of discretion for the trial court to overrule the motion for a continuance. (*Johnson v. Mills*, 31 Neb., 524; *Beatrice Sewer Pipe Co. v. Irwin*, 30 Neb., 86; *Miller v. State*, 29 Neb., 437.)

The evidence shows that the alleged contract was void under the statute of frauds, being an oral contract which by its terms was not to be performed within a year. (*Kleeman v. Collins*, 9 Bush [Ky.], 460; *Tuttle v. Sweet*, 31 Me., 555; *Drummond v. Burrell*, 13 Wend. [N. Y.], 307; *Meyer v. Roberts*, 46 Ark., 80; 8 Am. & Eng. Ency. Law, 686; *Blanck v. Littell*, 9 Daly [N. Y.], 268; *McElroy v. Ludlum*, 32 N. J. Eq., 828; *Levison v. Stix*, 10 Daly [N. Y.], 229; *Salb v. Campbell*, 27 N. W. Rep. [Wis.], 45; *Wilkinson v. Heavenrich*, 26 N. W. Rep. [Mich.], 139; *Reid v. Kenworthy*, 25 Kan., 701; *Baxter v. Bishop*, 22 N. W. Rep. [Ia.], 685.)

Alfred Hazlett, contra, cited, as to the statute of frauds: *Dugan v. Anderson*, 36 Md., 585; *Pinckney v. Talmage*, 10 S. E. Rep. [S. Car.], 1083; *Kiene v. Shaeffing*, 33 Neb., 21.

RAGAN, C.

A. J. Conlee sued the Kansas City, Wyandotte & Northwestern Railroad Company (hereinafter called the "Railroad Company") in the district court of Gage county. Conlee had a verdict and judgment and the Railroad Company prosecutes to this court proceedings in error.

Conlee in his petition in the court below alleged: "That on the 19th day of December, 1889, the plaintiff, at defendant's request, agreed with the defendant to enter into its employment for a period of one year, commencing on January 1, 1890, as a clerk in the offices of said defendant in the city of Kansas City, Kansas, and as general commercial agent for the defendant, who is operating a line of railroad from Kansas City to the city of Beatrice, Nebraska, at the rate of $150 per month. The defendant then employed the plaintiff as aforesaid and agreed to pay him for said services the sum above stated. On the 1st day of January, 1890, and many times since said date, he requested the defendant to receive and retain him in such services for the wages above set forth, and the defendant refused and still refuses so to do." The answer to this petition was a general denial and a plea of the statute of frauds. Of the errors assigned by the Railroad Company we notice only two.

1. The first assignment of error is that the district court erred in overruling the application of the Railroad Company for a continuance of the case. The petition in this case was filed on the 15th day of August, 1890. The railroad company demurred to this petition on the 26th of December, 1890, and on the 9th day of March, 1891, filed its answer. The application for a continuance was filed on the 27th day of March, 1891. The grounds upon which was based the affidavit for a continuance were that one Erb was the general manager and vice-president, and one Summerfield the superintendent of the Railroad Company; that they

were the parties and the only parties who had any authority to make the contract of employment sued upon by Conlee; and the affidavit filed in support of the motion for a continuance further stated that the maker of the affidavit was informed and believed that Conlee claimed and would testify that he made the contract of employment pleaded by him, with either Erb or Summerfield or both of them; and that said last named parties were material witnesses for the Railroad Company, and would testify that they did not make the contract sued on by Conlee, and that they were then, March 27, 1891, and had been for some weeks, either in Kansas City, Kansas, or in New York. Section 373 of the Code of Civil Procedure provides: "Either party may commence taking testimony by depositions at any time after service upon the defendant." The Railroad Company did not avail itself of this provision of the statute to take the depositions of Summerfield and Erb, or either of them, nor did it make any effort to take their depositions, although abundant time had elapsed from August 15, 1890, to do so. The affidavit in support of the application for a continuance did not show that the Railroad Company had used reasonable diligence or any diligence whatever to obtain the evidence of Erb and Summerfield, or either of them, and the court did not err in overruling the application to continue the case. An application for a continuance of a cause is addressed to the sound legal discretion of the trial court, and its ruling thereon will not be disturbed, unless it clearly appears that such discretion has been abused, and that by the refusal of the continuance a party has been without his fault deprived of an opportunity of making his case or defense (*Singer Mfg. Co. v. McAllister*, 22 Neb., 359); and a district court does not abuse its discretion in overruling an application for a continuance when it does not clearly appear that the party asking for the continuance has used reasonable diligence to procure the evidence on account of which he asks for the continuance of the case.

2. The second assignment of error which we notice is that the verdict and judgment are contrary to the law of the case. Subdivision 1 of section 8, chapter 32, Compiled Statutes, 1893, provides that every agreement that by its terms is not to be performed within one year from the making thereof shall be void unless such agreement, or some note or memorandum thereof, be in writing and subscribed by the party to be charged therewith. There is no claim in this case by Conlee that the contract upon which he sues was in writing, but he sues upon an oral contract made with the railroad company on the 19th day of December, 1889; by the terms of which contract the railroad company employed him for the period of one year, commencing January 1, 1890; by the terms of which contract he, Conlee, agreed to serve the railroad company for a year from the 1st of January, 1890, at the rate of $150 a month. Is this contract within the statute just quoted? In *Drummond v. Burrell*, 13 Wend. [N. Y.], 308, a party contracted by parol to work for another for the term of two years, for which he was to receive $100, or $50 per year. It was held that as the contract by its terms was not to be performed and could not possibly be performed within one year, it was within the statute. In *Salb v. Campbell*, 27 N. W. Rep. [Wis.], 45, the contract was for a hiring for a term of four years from the 1st of February, 1881, at $3.50 a week for the first year, $5 a week for the second year, $6.50 a week for the third year, and $8 a week for the fourth year, and it was held that such contract was within the statute. (See, also, *McElroy v. Ludlum*, 32 N. J. Eq., 828.) We think, therefore, that since the contract sued upon rested entirely in parol and was impossible of consummation within a year from the date of its making, it is therefore within the statute of frauds and voidable. Counsel for Conlee, if we understand his argument, insists that since by the terms of the contract his client was to be paid at the rate of $150 per month, the

contract was a hiring by the month. We are unable to give the contract this construction. Conlee himself testified on the trial that "I was to work for them a year, commencing the 1st of January, 1890, at $150 a month." In *Kiene v. Shaeffing*, 33 Neb., 21, it is said: "A verbal contract of employment, to be void by the statute of frauds, must be one that from its terms the parties did not intend should be completed within a year." And it is also said in that case: "A contract of employment from month to month, although continued for three and one-half years, is not within the statute." (See, also, *Powder River Live Stock Co. v. Lamb*, 38 Neb., 339.) In the case at bar, however, we are constrained to hold that by the terms of the contract between them neither the railroad company nor Conlee intended that such contract should be completed within a year from the date it was made; and that the contract was not an employment from month to month nor by the month, but a contract for one year from January 1, 1890. The verdict and the judgment are contrary to the law of the case, and the judgment of the district court is reversed and the case remanded.

REVERSED AND REMANDED.

WORLD PUBLISHING COMPANY V. JOHN S. MULLEN.

FILED DECEMBER 5, 1894. No. 5399.

1. **Libel:** CONSTRUCTION OF WORDS. The courts no longer strain to find an innocent meaning for words *prima facie* defamatory, neither will they put a forced construction on words which may fairly be deemed harmless.

2. ———: ———. Any written or printed statement which falsely and maliciously charges another with the commission of a crime is libelous *per se*.

3. ——: ——. In determining whether the words of a publication are libelous the courts will not resort to any technical construction of the language used, but read the language in court as they would read it elsewhere.

4. ——: ——. Language alleged to be libelous is to be construed in its ordinary and popular sense, and the question is whether the language, when so construed, conveys, or is calculated to convey, to persons reading it the charge of a crime.

5. ——: ——. A publication, to be libelous *per se*, because charging another with the commission of a crime, does not need to contain the technical statutory language and phrases essential to a good indictment for the crime charged.

6. ——: ——. Any language the nature and obvious meaning of which is to impute to a person the commission of a crime, or to subject him to public ridicule, ignominy, or disgrace, is actionable *per se*.

7. ——: ——. *Finch v. Vifquain*, 11 Neb., 280, *Rosewater v. Hoffman*, 24 Neb., 222, and *Pokrok Zapadu Publishing Co. v. Zizkovsky*, 42 Neb., 64, reaffirmed. *Geisler v. Brown*, 6 Neb., 254, overruled.

ERROR from the district court of Douglas county. Tried below before IRVINE, J.

The opinion contains a statement of the case.

Morris & Beekman and *Gurley & Marple*, for plaintiff in error:

The language complained of was not in itself libelous, and there was in the petition no colloquium or innuendo laid by the defendant in error by which it could be made so. The court erred in not entering judgment for the plaintiff in error notwithstanding the verdict. (Odgers, Libel & Slander [1st Am. ed.], 112; *Greenwood v. Cobbey*, 26 Neb., 455; *Sweetapple v. Jesse*, 5 B. & Ad. [Eng.], 31; *West v. Smith*, 4 Dowl. [Eng.], 703; *Tebbetts v. Goding*, 9 Gray [Mass.], 254; *Brettun v. Anthony*, 103 Mass., 37; *Jones v. Hungerford*, 4 Gill & J. [Md.], 402; *Geisler v. Brown*, 6 Neb., 259.)

Mahoney, Minahan & Smyth, contra, cited: *McMurry v. Martin,* 26 Mo. App., 437; *Iron Age Publishing Co. v. Crudup,* 85 Ala., 519; *Karow v. Continental Ins. Co. of New York,* 57 Wis., 56; *Finch v. Vifquain,* 11 Neb., 280; *Rosewater v. Hoffman,* 24 Neb., 222; *Thomas v. Blasdale,* 147 Mass., 438; *Karger v. Rich,* 51 N. W. Rep. [Wis.], 424; *Montgomery v. Knox,* 23 Fla., 595; *Doan v. Kelley,* 121 Ind., 413; 1 Chitty, Pleading [13th Am. ed.], 656; *McGavock v. Pollack,* 13 Neb., 535; *Renfrew v. Willis,* 33 Neb., 98; *Brown v. Piner,* 6 Bush [Ky.], 518; *St. Martin v. Desnoyer,* 1 Minn., 156.

RAGAN, C.

John S. Mullen brought this, a suit for libel, in the district court of Douglas county against the World Publishing Company, a corporation engaged in the publication of a newspaper in the city of Omaha, and hereinafter called the "Publishing Company." There was a trial to a jury, with a verdict and judgment for Mullen, and the Publishing Company brings the case here for review. The evidence has not been preserved by a bill of exceptions and there was no motion in the court below for a new trial. After the jury had returned its verdict, counsel for the Publishing Company moved the court for judgment upon the pleadings, notwithstanding the verdict, upon the ground that the petition of Mullen did not state a cause of action. This motion the district court overruled, and its ruling on this motion is the only assignment of error argued here.

The article printed by the Publishing Company alleged by Mullen to be libelous and on which he bases his suit is in words and figures as follows:

"MULLEN'S INSURANCE.

"*The Company Declines to Pay the Risk of His Building.*

"John S. Mullen is the plaintiff in two suits in the county court against the German Fire Insurance Company

of Peoria, Illinois. The suits are to recover the value of two insurance policies which Mullen held on his saloon and store in Albright, which were destroyed by fire August 31, 1890. There were a number of suspicious circumstances at the time, and it was reported that Mullen fired the buildings himself. The agent of the insurance company investigated the matter, and as a result the company refused to pay the insurance, which amounts to $1,900 on both policies. Mullen now brings suit and it will be contested by the company. Its agent said it had excellent grounds for contesting the case, but refused to state what facts they were in possession of in regard to Mullen's complicity."

Mullen alleged no special damages in his petition and it contains no colloquium or innuendo, and the argument of the Publishing Company is that the petition does not state a cause of action, as the language is not libelous *per se.* Counsel for the Publishing Company well say: "The courts no longer strain to find an innocent meaning for words *prima facie* defamatory, neither will they put a forced construction on words which may fairly be deemed harmless." Any written or printed statement which falsely and maliciously charges another with the commission of a crime is libelous *per se;* and in determining whether the words of a publication are libelous the courts will not resort to any technical construction of the language used, but the court and the jury will read the words in court as they would read them elsewhere. Language alleged to be libelous is to be construed in its ordinary and popular sense, and the question is whether the language, when so construed, conveys, or is calculated to convey, to persons reading it the charge of a crime. (*Pokrok Zapadu Publishing Co. v. Zizkovsky,* 42 Neb., 64.) The question here then is, what is the plain import, the ordinary meaning of the language of the article published? What would ordinary men of ordinary common sense understand from reading this article? That Mullen owned a saloon and store in Albright; that

it was insured against loss or damage from fire in the sum of $1,900 by the German Fire Insurance Company of Peoria, Illinois; that the property was destroyed by fire on August 31, 1890; that there were a number of suspicious circumstances surrounding the destruction of the insured property which caused the insurance company to refuse to pay the loss; that the insurance company at least suspected Mullen of burning the property himself or being an accomplice therein; and that it was reported—some person or persons had said—that Mullen had burned the insured property. In *Rosewater v. Hoffman*, 24 Neb., 222, Rosewater caused to be published in a newspaper a letter in which he stated that a friend of his had told him that "He [Hoffman] once served me a very scurvy trick. He borrowed my horse and saddle some years ago and rode off and sold the property. He was arrested near Springfield, Missouri, and lodged in jail. The sheriff telegraphed me that he had him in charge, but I finally concluded I would not prosecute him. He was then released. If you write down there you will get other particulars." This language was held by this court to be libelous *per se* because it charged Hoffman with having committed the crime of larceny. It is to be observed that Rosewater in the article did not himself charge Hoffman with having stolen the horse, but that his, Rosewater's, friend had told him, Rosewater, that Hoffman had borrowed the horse and rode it off and sold it. In the case at bar the Publishing Company did not make the direct charge that Mullen had burned his insured property, but the Publishing Company in effect states that some one had reported to it, the Publishing Company, that Mullen had burned his insured property. The Publishing Company should, therefore, be held responsible as if it had charged directly that Mullen committed the crime of arson under section 57 of our Criminal Code. Counsel for the Publishing Company insist that Mullen, in order to have been guilty of arson un-

der the statute, must have willfully and maliciously set fire to his insured property with the intent to obtain the insurance money; and that there is nothing in the language of the article published that charges Mullen with intentionally, unlawfully, willfully, or maliciously setting fire to the insured property, and that, therefore, the language of the publication is not libelous *per se.* To hold that the language of this article is not libelous because it does not contain words necessary to the framing of a good indictment against Mullen for arson would be, in effect, to give one construction to language out of court and another in court. A publication, to be libelous *per se,* because charging another with the commission of a crime, does not need to contain the technical statutory language and phrases essential to a good indictment for the crime charged. In support of their contention that the language of this publication is not libelous *per se* counsel cite us to the case of *Geisler v. Brown,* 6 Neb., 254. The publication in that case was: "Last night Mrs. Geisler beat her little stepdaughter most unmercifully with a club as large as a man's wrist, striking her over the head and making the blood flow freely." It was held that this language was not libelous *per se.* But this case can no longer be regarded as authority, and was, in effect, though not expressly, overruled in *Finch v. Vifquain,* 11 Neb., 280. In the latter case Finch was grand worthy chief templar of a temperance organization of this state and also secretary of the State Temperance Alliance. Vifquain published an article in a newspaper, in which he said of Finch that he was "a seducer of innocent girls, * * * an arch hypocrite and scoundrel, who was simply using his talents for money-making purposes and not through any sincerity in the cause in which he is laboring;" and the court held, and we think correctly, that the language was libelous *per se.* The rule is that any language the nature and obvious meaning of which is to impute to a person the commission of a crime,

or to subject him to public ridicule, ignominy, or disgrace, is actionable of itself. The petition states a cause of action and the judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

W. A. L. GIBBON V. AMERICAN BUILDING & LOAN ASSOCIATION.

FILED DECEMBER 5, 1894. No. 5588.

Judgment Non Obstante Veredicto: MOTION FOR NEW TRIAL. *Manning v. City of Orleans*, 42 Neb., 712, followed and reaffirmed.

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

Mahoney, Minahan & Smyth, for plaintiff in error.

A. J. & W. S. Poppleton, contra.

IRVINE, C.

The defendant in error sued the plaintiff in error for $155, which the petition alleged the plaintiff in error, as a collector for the defendant in error, had received to the use of the defendant in error and had not paid over. The answer denied every allegation of the petition, and counterclaimed for $156.56, as the surrender value of stock in the association owned by the plaintiff in error. The reply denied the right under the contract of membership to surrender the stock. It will be observed that the pleadings presented issues of fact which it was necessary to determine in order to ascertain the rights of the parties. The court granted a peremptory instruction to find for the defendant

in error for the amount by it claimed. The jury, nevertheless, brought in its verdict, finding for the defendant in error in the sum of $12. There was no motion for a new trial, but some days after the verdict was returned the defendant in error moved for judgment *non obstante veredicto* for $155 and interest. This motion was by the court sustained and judgment entered accordingly for $174.22. The case, it will be seen, presents the same questions as arose in *Manning v. City of Orleans*, 42 Neb., 712. For the reasons stated in the opinion in that case the judgment in this must be reversed and the cause remanded with instructions to enter judgment in conformity with the verdict.

REVERSED AND REMANDED.

THADDEUS J. FOLEY, APPELLEE, V. WILLIAM M. HOLTRY, APPELLANT.

FILED DECEMBER 5, 1894. No. 5446.

1. **Estoppel:** PLEADING. The plaintiff is not estopped by an averment in his petition immaterial at that stage of the pleadings. Notwithstanding such immaterial averment, he may in his reply aver a different state of facts.

2. **Fraudulent Representations:** CONTRACTS: RESCISSION. In an action to rescind a contract for the sale of stock in a corporation because of fraudulent representations inducing the contract, the representation proved was that a report of the secretary of the corporation showed that it was earning a profit of two per cent per month. The report referred to did show what was represented, but the report was false, and the defendant knew that it was false. *Held*, That the defendant thereby adopted the report as his own statement, and was responsible to the same extent as if he had represented the profit to be in fact as it was shown by the report.

3. ———. A person is justified in relying on a representation made to him in all cases where the representation is a positive state-

ment of fact, and where an investigation would be required to discover the truth.

4. ———. The fact that the plaintiff made inquiries elsewhere which did not disclose the falsity of the representations is no defense. The plaintiff is entitled to relief if the representations were a material inducement to the contract, although he may have made efforts to discover the truth thereof, and did not rely wholly upon the veracity of defendant.

REHEARING of case reported in 41 Neb., 563.

Grimes & Wilcox, and *E. C. Calkins*, for appellant, in arguing that the evidence submitted was not sufficient to sustain a finding in favor of the plaintiff upon the merits either in an action at law or in equity, cited: *Emery v. Johnson*, 37 Neb., 53; *McClanahan v. McKinley*, 52 Ia., 222; *Dickson v. Knox*, 71 Ia., 728; *Poland v. Brownell*, 131 Mass., 138; *Salem India Rubber Co. v. Adams*, 40 Mass., 256; *Brown v. Leach*, 107 Mass., 364; *Ely v. Stewart*, 2 Md., 408; *Whiting v. Hill*, 23 Mich., 399; *Hobbs v. Parker*, 31 Me., 143; *Slaughter v. Gerson*, 13 Wall. [U. S.], 379; *Long v. Warren*, 68 N. Y., 426; *Tallman v. Green*, 3 Sandf. [N. Y.], 437; *Vincent v. Berry*, 46 Ia., 571; *Columbia Electric Co. v. Dixon*, 46 Minn., 463; *Grymes v. Sanders*, 93 U. S., 55; *White v. Smith*, 18 Pac. Rep. [Kan.], 931; *Doran v. Eaton*, 40 Minn., 35; *Morgan v. Dinges*, 23 Neb., 271; *Reynolds v. Palmer*, 21 Fed. Rep., 433.

The plaintiff, after he had sufficient notice or means of knowledge of his rights, delayed the election to rescind so as to estop him to seek his remedy in equity. (*Knopp v. Kelsey*, 102 Mo., 291; *Hooper v. Wells, Fargo & Co.*, 27 Cal., 11; *California Electrical Works v. Finck*, 47 Fed. Rep., 583; *Veazie v. Williams*, 3 Story [U. S.], 612; *Gillespie v. Sawyer*, 15 Neb., 536; *Forbes v. McCoy*, 24 Neb., 702; *Greenwood v. Finn*, 136 Ill., 146.)

E. J. Hainer, *B. I. Hinman*, and *T. Fulton Gantt*, *contra.*

IRVINE, C.

An opinion was filed in this case June 26, 1894 (41 Neb., 563). A short statement of the case will be found in that opinion. The judgment of the district court was then reversed upon the ground that the conduct of the plaintiff, subsequent to a time when the petition admitted he learned of the fraud, estopped him from rescinding the contract. A rehearing was allowed and the court is now convinced that in the former opinion an error was committed as to the effect which should be given to the averment in the petition referred to. The language of this averment, in the original petition, is as follows: "As soon as plaintiff discovered that said representations were false, to-wit, on or about the 30th of April, 1890, and at several times since, plaintiff applied to defendant, and tendered to him said two hundred shares of the capital stock aforesaid." In the amended petition, upon which the case was tried, the language is the same, except that in place of the word "discovered" the pleader uses the phrase "had reason to believe." Upon the rehearing there has been considerable argument addressed to the question as to whether these phrases are or are not equivalent. We do not, however, think this question material. In the former opinion it was held that there was no such delay in bringing the action as would of itself bar the plaintiff from relief, and relief was denied solely because, with admitted knowledge of the facts, the plaintiff had permitted the defendant to incur large expense in improving the property taken by him in exchange for the stock, and had continued to deal with the stock as his own, and take part in the management of the corporation. This was a matter of defense, and was not a fact which the plaintiff was called upon to anticipate and negative in his petition. Therefore, the averment in the petition that plaintiff had reason to believe that the representations were false on April 30, 1890, was not a necessary or even a ma-

terial allegation in the petition; the time when plaintiff learned of the fraud only became material when the defendant by answer pleaded the facts constituting the estoppel. The defendant by answer pleaded the estoppel, and also pleaded that the plaintiff had full knowledge of the standing and condition of the company at the time of his purchase. The reply meets this by averring that plaintiff had no actual knowledge of the facts constituting his cause of action until after the improvements were made and immediately prior to the commencement of the action. Unless, therefore, the immaterial averment in the petition estops the plaintiff from afterwards asserting a contrary state of facts, the time when he learned of the fraud was properly placed in issue and left for determination upon the evidence. In *Lee v. Rogers*, 1 Lev. [Eng.], 110, the plaintiff counted on a promise made May 1, 3 Car. I, for money lent. The defendant pleaded that the writ was first brought February 4, 14 Car. II, and that he did not promise within six years before said 4th of February. The plaintiff replied that defendant assumed within six years before said 4th of February. It was moved in arrest of judgment that it appeared by the declaration that the cause of action arose more than six years before action brought, and that the replication was a departure; but it was held that the statute of limitations must be pleaded, and that, therefore, the replication was no departure, because the pleading of time in the declaration was immaterial. In *Morgan v. Vaughan*, T. Raym. [Eng.], 456, the plaintiff unnecessarily alleged his age at a particular time, and the defendant urged this as an estoppel from showing the fact; but it was held to constitute no estoppel, because plaintiff's infancy and not his precise age was the issue, and the averment was immaterial. In *Gledstane v. Hewitt*, 1 Tyr. [Eng.], 445, the action was detinue for a promissory note, the declaration counting on a general bailment. The defendant pleaded a special bailment and the replication confessed and avoided.

It was held that this was no departure because the averment of the general bailment in the declaration was immaterial. The pleader can hardly be held to a stricter accountability under the Code than at common law, and we have concluded that whatever might be the effect of the averment in the amended petition, if offered as an admission, it was an averment not material in that stage of the pleadings, and that the plaintiff is not estopped thereby. This conclusion leads to an examination of the whole case.

The law governing the case is for the most part well settled, and the question presented is really not what principles of law control the case, but whether there was evidence to which the law of rescission is applicable. The elements necessary to sustain such an action have been recently summarized by this court as follows: (1) It must be alleged and proved what representation was made; (2) that it was false; (3) that plaintiff believed the representation to be true; (4) relied on and acted upon it; (5) and was thereby injured. (*Stetson v. Riggs*, 37 Neb., 797.) To these requirements the courts formerly added another, to-wit, that defendant must have known that the representations were false. A more accurate statement in view of the later decisions would be that the defendant must either know that the representations were false, or else they must be made without knowledge as positive statements of known fact. The rule as thus formulated practically charges the defendant with notice of the truth in all cases where he makes positive representations of existing facts. We shall examine the evidence with reference to the foregoing propositions.

False representations, in order to make a case for relief, must generally be positive statements in regard to existing facts and not mere expressions of opinion or promises as to future occurrences. The representations charged in the petition were that the elevator company stock was owned by well known, reliable business men of experience; that Mr. John Bratt was president of the company and had in-

vested in the stock $2,500; that the corporation was solvent; that it had earned for the preceding six months two per cent per month on its paid-up capital stock, and that all of forty per cent of its capital stock was paid up. The evidence shows that the stock of the company was owned by the men who were represented to own it and that John Bratt was president. These representations may, therefore, be dismissed from further consideration. The evidence also shows that Mr. Bratt did hold capital stock to the amount of $2,500 par value, but that this was held under an agreement whereby Bratt had the option of retaining the stock or turning it in to Holtry and another stockholder and receiving therefor his investment back with ten per cent interest; an option which he finally exercised. It appears, however, by Foley's own testimony, that he had sufficient information as to the nature of this agreement to put him upon inquiry as to Bratt's investment, if he did not have complete knowledge of the fact. Nothing, therefore, can be counted on the falsity of this representation.

As to the representation in regard to the amount of capital stock paid up, Mr. Foley testified positively that Holtry represented to him that the capital stock was $75,000, and that forty per cent had been paid in; but he stated upon cross-examination that before the trade was consummated he learned that only thirty-seven and one-half per cent of the stock which he was buying had been paid, and he also testified when on the stand in rebuttal that he learned before the trade was made that all the stock had not been subscribed. Upon this point, therefore, the plaintiff can claim nothing.

As to the representation in regard to the solvency of the corporation, there is no proof of any direct representation on the subject. It appears that a report of the secretary prepared shortly before the trade was made showed that the corporation was solvent, but Foley testifies that he did not see this report until after the trade was made, although

statements had before been made to him in regard to a portion of its contents. If there was any representation as to solvency it must, therefore, be implied from the representations made as to the company's earnings, and we are thus limited in our further inquiry to the allegations in regard to those representations. The specific representation claimed to have been made on the subject was that for a period of six months preceding the transaction the company had been earning a profit of two per cent a month on its capital stock. The evidence is not only ample to sustain the finding of the trial court upon this issue, but it is such that no other finding could be sustained. Mr. Foley several times, and in the most positive terms, testifies to this representation, and Mr. Holtry himself says: "According to the last statement, as I told Mr. Foley, since Mr. Allum had gotten it out, did show a gain of pretty nearly two per cent per month. Of course the books were not closed up and we cannot tell exactly the amount." Mr. Holtry repeats in two other places that he made this statement to Mr. Foley. The statement appears to have been made with reference to the secretary's report, and it is inferable from all the evidence that Holtry was basing his statement upon the showing made by that report, and that Foley was so informed. The representation, then, was not in regard to the profit as an independent fact, but as to a profit as shown by the secretary's statement. The effect of this distinction it will be necessary to notice hereafter.

Was this representation true? There is no doubt that on January 10 a statement was prepared purporting to show the business from July 10, 1889, to January 10, 1890, and that it disclosed a profit during that period of about two per cent a month. This report does not seem to have been presented to the directors until March 6, but it had been disclosed to individuals and its contents were known to Holtry and others interested. A vigorous effort was made by the defendant to prove the substantial accuracy of this re-

port. The question before us is not, however, whether there was evidence to sustain the report, but whether there was sufficient evidence impeaching it to sustain the finding of the trial judge. The evidence upon this subject is very voluminous, and we cannot refer to it in detail. An experienced book-keeper testified in regard to an examination of the books and business. The effect of his testimony is that when the books are carefully examined and certain corrections in the method of book-keeping made, they disclose that there was no profit made during the period in question. The elevator company, besides its business at North Platte, its principal location, had agents at a number of other points engaged in the business of buying and selling grain. In the accounts with these agents the books, at the time the statement was made, failed in some instances to show proper credits, thus making the resources of the company appear greater than they were in fact. Some of these items are quite satisfactorily explained. It does not appear that in any case were the books fraudulently kept, but it does seem from a review of the testimony that the method pursued left the books in such a condition that the statement of January 10 exhibited too large a proportion of resources. There is also evidence tending to show the omission from the books of several items of outstanding indebtedness, and we think there was ample to warrant the court in finding that such a method had been pursued as to relegate some losses to the preceding six months, and postpone others until the following six months, both processes resulting in a fictitious showing of prosperity during the period in question.

The representation by Holtry having been as to what this statement showed and not directly and positively as to what the profit actually had been, the next question which arises is whether under the circumstances he is responsible. If Holtry possessed and claimed to possess no knowledge except that derived from the statement, we would not hesi-

tate to say that he could not be held responsible. In other words, if his representation amounted to this, that he did not know of his own knowledge the condition of the company, but that the secretary's report showed a certain profit, then, the report showing such profit, the falsity of the representation would not be established. But while it is clear that in his conversation with Foley he based his representation upon the showing made in the report, he coupled this statement with a distinct representation that the mill was a good paying investment. It is probable that this would have to be taken as a statement of fact within his own knowledge, but it is not necessary to so decide. We think that if as a matter of fact Holtry knew that the report was false and that the mill had not been earning a profit, then he cannot protect himself by falling back upon the contents of the report. If he knew the report was false and based his representation upon its contents, by so doing he adopted the report as his own representation and must be held responsible for its falsity. Upon this subject the evidence is that Holtry was at the time, and had from the start been, general manager of the company, with his place of business in the mill, and, therefore, presumably had some familiarity with the business. There is also evidence tending to show that he made entries upon some of the books. He presumably had access to the books. These facts in themselves are only circumstances showing the opportunity of knowledge upon his part, but do not directly show his knowledge. Mr. Carter, who is a stockholder, testifies that after the report was made known, and before the trade between Holtry and Foley, Carter went to Holtry and said: "Everything looks pretty well now. It seems as if everything was turning, and we are making money. I presume I can use—I suppose some call it 'dividend'—what the profit would be for my share for interest upon my notes. I says, 'They have been talking about it, and I would turn that over.'" To this he testifies that

Holtry responded, "Mr. Carter, we are not making money." Carter then said, "Mr. Allum said so yesterday in the meeting; he reported it." Holtry then said: "We are not making anything. We are running behind all the time. We have to say something to satisfy them—something that will content them." He further testifies that Holtry added, "We have to do something or else they will shut us up." Carter said, "That is a queer way of making a report if we are not making anything." Holtry responded, "Well, we are not making anything, and the stiller we keep the better it will be." Severe comments are made in argument upon Carter's credibility; but this was a question for the trial judge and he evidently believed his testimony. If we accept it we must conclude that Holtry knew that the report was false; that he knew the company had not earned any profit and that when he referred to the report as showing a profit, it was done with the deliberate intention of inducing Mr. Foley to believe a state of affairs very material to the value of the stock and which Holtry knew did not exist. There is ample direct testimony by Foley that he believed the representations made to him. The defendant called several witnesses, by whom he proved that shortly after the trade Foley stated to them that the mill had been earning two per cent a month. While this testimony was introduced for another purpose, it tends to show that Foley at the time did believe the representations to be true. Equally positive is Foley's testimony that he relied on this representation and acted upon it. It does appear that he made inquiry of others and that to a certain extent he also relied upon their statements, but it is not necessary in such a case that the plaintiff should have relied entirely upon the representations made to him. It is sufficient if they formed a material inducement to the trade. That they did so in this case, appears not only from Foley's testimony, but is inferable from all the circumstances. It is urged that Foley had no right to rely

upon this statement, but that he should have made inquiry from other sources. We have little sympathy with the theory always advanced in such cases that the defendant should be protected from the consequences of false statements made by him for the purpose of inducing the plaintiff to act, because the plaintiff had sufficient confidence in the defendant to believe the statement and not proceed upon the assumption that he was dealing with a man unworthy of belief. There are some cases where the fact lies so open before the plaintiff that he is unwarranted in closing his eyes to its existence and depending upon a statement made to him by the other party. We do not think that this principle applies to any case where an absolute statement of fact is made and where an investigation elsewhere would be necessary to disclose its falsity. (2 Pomeroy, Equity Jurisprudence, 891.) In such case the plaintiff may, if he choose, rely upon the representation made to him, and if he do so, the defendant cannot complain. It is true that Mr. Foley made inquiries of Mr. Patterson, another stockholder, before he made his trade, and that Mr. Patterson made a similar statement as to the secretary's report. Mr. Patterson was apparently deceived thereby also, and it all comes back to the falsity of this report. Its falsity being known by the defendant, the report was nevertheless used by him to induce the trade. That the representation operated to plaintiff's injury is too clear to require discussion. The plaintiff, therefore, was entitled to the relief awarded him by the decree of the district court, unless he in fact knew of the falsity of the representations before the defendant made the improvements upon the property by him received. On this issue the decree contains no direct finding. Our attention is called to certain testimony of the plaintiff which it is claimed establishes the fact of such knowledge. In one place, on cross-examination, the plaintiff states, being examined as to the allegation as to knowledge on the 30th of April, that he had reason then to believe that the

representations were false, but we think the clear preponderance of the evidence is that he was not in possession of actual knowledge of the fact until a much later time. That in fact when he first consulted an attorney his belief was not based on evidence sufficient then to justify legal proceedings. We do not think that he was compelled to begin his action, or even to notify defendant of his election to rescind the moment his suspicions were aroused. It was sufficient if, after being put upon inquiry, he proceeded with reasonable promptness to ascertain the facts. Our attention is also called to a point in his testimony where he states that in February he learned from the statement that there had been a loss, but this testimony, when taken with its context, refers back to the testimony of Mr. Patterson, and from that it appears that the loss referred to, as shown by the statement, was a loss shown to have occurred prior to the period to which the representations related. There are other circumstances tending to show knowledge or means of knowledge prior to the defendant's making the improvements. The questions thus presented are wholly questions of fact, and we do not feel warranted in expanding this opinion by a review of the evidence on the subject. We think that when the evidence is taken together, it shows that while the plaintiff was in possession of information prior to the time of the making of the improvements sufficient to arouse his suspicions, and sufficient even to impose upon him the duty of investigating and ascertaining the facts, he did not learn facts sufficient to demand of him action until after the improvements were completed, and that the delay in ascertaining the facts was satisfactorily explained and cannot be attributed to plaintiff's negligence.

JUDGMENT AFFIRMED.

J. A. CRUMP ET AL. V. J. F. KING.

FILED DECEMBER 5, 1894. No. 5208.

Review: SUFFICIENCY OF EVIDENCE. No question was presented in this case except the sufficiency of the evidence. The evidence was *held* sufficient.

ERROR from the district court of Gage county. Tried below before APPELGET, J.

Hazlett & Le Hane, for plaintiffs in error.

Griggs, Rinaker & Bibb, contra.

IRVINE, C.

The defendant in error sued the plaintiffs in error on a promissory note which the evidence showed was executed by Crump as principal, and McDowell as surety, for a portion of the purchase price of a stock of goods sold by King to Crump and one Nicholson. The defense was that King falsely represented to Crump, as an inducement to the sale, that the past sales of the store had amounted to $25,000 a year. A jury was waived and the case tried to the court, which found for the plaintiff.

The only assignment of error argued is that the finding was not sustained by the evidence. Upon the issue as to whether or not such representation as that pleaded was made, as well as upon every other issue in the case, the evidence was conflicting. It is not the province of this court in the exercise of its appellate jurisdiction to weigh conflicting evidence. Following repeated rulings on similar questions the judgment of the district court must be

AFFIRMED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1895.

PRESENT:

HON. T. L. NORVAL, CHIEF JUSTICE.
HON. A. M. POST, HON. T. O. C. HARRISON, } JUDGES.
HON. ROBERT RYAN, HON. JOHN M. RAGAN, HON. FRANK IRVINE, } COMMISSIONERS.

JESSE ATWOOD V. JARED T. ATWATER ET AL.

FILED JANUARY 2, 1895. NO. 5647.

1. **Officers:** CIVIL LIABILITY. A judicial officer, acting within his jurisdiction and in a judicial capacity, is not liable in a civil action for his judicial acts. A mere error of judgment does not subject him to an action for damages.

2. ——: ——: FALSE IMPRISONMENT. A ministerial officer is not liable in an action for false imprisonment for the arrest of a person under a warrant lawful on its face and issued by proper authority. If such officer exceeds his authority and acts oppressively in the execution of the process, he will not be protected therein.

ERROR from the district court of Saline county. Tried below before MORRIS, J.

E. S. Abbott, for plaintiff in error.

Geo. H. Hastings, *contra*, cited: *Stewart v. Hawley*, 21 Wend. [N. Y.], 552; *Harman v. Brotherson*, 1 Denio [N. Y.], 537; *Weaver v. Devendorf*, 3 Denio [N. Y.], 117; *Horton v. Auchmoody*, 7 Wend. [N. Y.], 200; *Carter v. Dow*, 16 Wis., 317; *Wall v. Trumbull*, 16 Mich., 228; *Comstock v. Crawford*, 3 Wall. [U. S.], 396; *Long v. Burnett*, 13 Ia., 28; 2 Freeman, Judgments, 524, 529; *Brown v. Wood*, 1 Bailey [S. Car.], 457; *Butler v. Potter*, 17 Johns. [N. Y.], 145; *Busteed v. Parsons*, 54 Ala., 393; *Marks v. Townsend*, 97 N. Y., 590; *Bamberger v. Kahn*, 43 Hun [N. Y.], 411; Cooley, Torts, 460; *Savacool v. Boughton*, 5 Wend. [N. Y.], 170.

NORVAL, C. J.

This was an action by Jesse Atwood against Jared T. Atwater and W. T. Buchanan for false imprisonment. From a verdict and judgment in favor of both the defendants the plaintiff brings error.

The petition charges, substantially, that the plaintiff was, on the 1st day of August, 1889, assaulted by the defendants and then imprisoned by them in the city jail of the city of Crete, which was in a filthy and indecent condition, for the period of thirty-six hours next following without any just or reasonable cause therefor; that in consequence of such imprisonment plaintiff was prevented from attending to his business, and suffered great mental anguish, a sense of shame, humiliation, degradation, and other wrongs and injuries, to his damages in the sum of $1,000, including $50 for costs and attorney's fees in procuring his release from imprisonment. The defendants filed separate answers denying each and every averment in the petition contained,

and setting up, as a justification for the arrest and imprisonment of the plaintiff, that the defendant William T. Buchanan was the duly elected, qualified, and acting police judge of the city of Crete, and that the defendant Jared T. Atwater was the duly appointed, qualified, and acting city marshal of said city; that on the date mentioned in the petition a complaint, in due form, was filed in the office of such police judge, charging the plaintiff with having violated the ordinance of said city relating to the keeping and harboring of dogs within the corporate limits of such city, upon which complaint a warrant was duly issued and signed by said police judge for the arrest of plaintiff, which was delivered to said city marshal to be served, who, in pursuance of the command therein arrested this plaintiff and took him before the said police judge; that thereupon a trial was had upon said complaint in the manner provided by law, and the plaintiff was convicted of the offense charged on said complaint and the court assessed a fine of $2 and costs of prosecution, and to stand committed to the city jail until such fine and costs were paid; that plaintiff refused to pay either the fine or costs, and defied the defendants and the city authorities to imprison him; that the plaintiff asked that he be imprisoned in order that he might bring an action for false imprisonment against the city and against its officers; whereupon the police judge, as in duty bound to do, issued a mittimus in due form of law, directed to the city marshal to safely keep the plaintiff until said judgment and sentence were complied with, and in accordance with the command thereof the city marshal did commit the plaintiff to the city jail, and there held him under and by virtue of said mittimus for about twenty-four hours, and that all the acts done and complained of by the plaintiff were done under and by virtue of the said warrant and the said mittimus, duly issued and placed in the hands of the said city marshal. The answer further pleads that the action is barred by the statute of limitations, but this de-

fense is not now relied upon. The plaintiff, for reply to the several answers, admits that the defendants at the time mentioned were, respectively, the city marshal and police judge; that a complaint was filed as alleged, and plaintiff was arrested thereon and brought before said police judge as alleged, and that he was fined as stated, but avers that he was adjudged guilty on his plea of not guilty, and was fined without trial, or without proof of any kind being adduced before said police judge. Plaintiff also denies the existence of any ordinance such as referred to in the answers, denies the existence of any law, ordinance, or other authority of any kind requiring or permitting the imprisonment of any person in the jail of said city on conviction for the violation of its ordinances. It does appear that the police judge sentenced Atwood without having first made and entered upon his docket a finding that he was guilty, and for this error Atwood was discharged upon *habeas corpus.* (*Atwood v. Atwater*, 34 Neb., 402.)

The sole errors assigned for a reversal are based upon the giving of the first and third paragraphs of the court's charge to the jury, and the refusing to give the first and second instructions requested by the plaintiff. The instructions given by the court upon its own motion, which are here complained of, read as follows:

"1. Gentlemen of the jury, the court instructs you that under the pleadings and the law in this case, the only question for you to consider is the manner of treatment received by this plaintiff while under arrest and in the act of arrest."

"3. If the jury shall find from the evidence that in the matter of the arrest, and in their conduct toward the plaintiff while he was under arrest, was no more harsh or cruel than the circumstances under which they acted required, or as ordinarily prudent and careful men would act under the same circumstances, then your verdict should be for the defendants."

The evidence adduced on the trial of the cause is not be-

fore us, the same not having been preserved by a bill of exceptions. As a reviewing court, therefore, we must assume that there was evidence before the jury tending to establish the defense pleaded by the defendants in their answers. We have, then, only to determine whether the foregoing instructions were erroneous in view of the defense interposed and the issues tendered by the pleadings. The jury were told, in effect, by the instructions of which complaint is made, that the defendants were not liable unless they treated the plaintiff in making the arrest, or while under arrest, in a more harsh or cruel manner than was warranted under the circumstances of the case. In other words, that the police judge incurred no liability by reason of the issuing of the warrant and mittimus, and that they protected the city marshal in executing the same in all his acts committed within the scope of his duties, but if he unnecessarily abused the plaintiff in making the arrest, or while under arrest, he must respond in damages. It is a familiar rule to the bench and the profession, and one of great antiquity, that a judicial officer, whether of a court of limited or general jurisdiction, is not liable in a civil action for acts performed in his judicial capacity, if he has acquired and does not exceed the jurisdiction conferred by law. He is not liable in damages for mere error of judgment while acting within his jurisdiction, but he is not protected if he assumes to act beyond the scope of his authority. (2 Freeman, Judgments, sec. 530; *Harman v. Brotherson*, 1 Denio, [N. Y.], 537; *Weaver v. Devendorf*, 3 Denio [N. Y.], 117; *Horton v. Auchmoody*, 7 Wend. [N. Y.], 200; *Stewart v. Hawley*, 21 Wend. [N. Y.], 552; *Carter v. Dow*, 16 Wis., 317; *Wall v. Trumbull*, 16 Mich., 228; *Little v. Moore*, 4 N. J. Law, 74*; *Butler v. Potter*, 17 Johns. [N. Y.], 145; *Pratt v. Gardner*, 2 Cush. [Mass.], 63; *Craig v. Burnett*, 32 Ala., 728; *Clark v. Holdridge*, 58 Barb. [N. Y.], 61; *Busteed v. Parsons*, 54 Ala., 393; *Marks v. Townsend*, 97 N. Y., 590; *Marks v. Sullivan*, 9 Utah, 12.)

The reason for the rule stated is well expressed by Chief Justice Kent in *Yates v. Lansing*, 5 Johns. [N. Y.], 282, in the following language: "No man can foresee the disastrous consequences of a precedent in favor of such a suit. Whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society, and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty."

Carter v. Dow, 16 Wis., 317, is quite like the one at bar. That was an action by Carter against a justice of the peace, a constable, and one Dow for false imprisonment. Carter had been arrested on the complaint of Dow for violating an act passed by the legislature to regulate and license the keeping of dogs, and was taken before the justice and fined. In the circuit court Carter recovered judgment, which, on appeal to the supreme court, was reversed, that court holding that the justice of the peace, although he may have erred in his conclusions, the proceedings were not void for want of jurisdiction, and that such officer is not liable for a mere error of judgment, but only when he fails to acquire jurisdiction.

Horton v. Auchmoody, 7 Wend. [N. Y.], 200, was an action against a justice of the peace for damages sustained by the plaintiff for acts done by the defendant to his judicial capacity. Savage, C. J., in delivering the opinion of the court, says: "Where a justice acts without jurisdiction, he is a trespasser; but having jurisdiction, an error in judgment does not subject him to an action; he is entitled to the protection afforded to a judge of a court of record. The argument for the plaintiff in error is, that though the justice once had jurisdiction, he had lost that jurisdiction; that the adjournment being an act not authorized by law, the

cause was at an end, and any further proceeding was without jurisdiction, as much so as a judgment would be without any previous process. It must be conceded that so far as the parties litigant before the justice in that suit are concerned, this court have considered an unauthorized adjournment an end of the suit; but where a remedy is sought against the justice, the principle of judicial irresponsibility should be interposed, so far as it is applicable. * * * In this case the justice had jurisdiction of the cause, of the parties, and of the question of adjournment; his error was an error of judgment, and according to the decisions above referred to, the consequence of that error was that the cause was discontinued as between the parties, and any judgment entered after such adjournment was liable to be reversed; but I believe none of the cases considered such a judgment a proper subject of inquiry as to its merits in another tribunal. If the justice is liable in this case, it must be conceded that such liability arises from a judicial act, which is contrary to established principles."

Stewart v. Hawley, 21 Wend. [N. Y.], 552, was where a magistrate, on the filing of a complaint charging a violation of the statute for the observance of Sunday, issued a warrant for and had the person complained of arrested and brought before him, when the charge was investigated and the accused was fined. An action was thereupon brought by the defendant in the criminal suit against the magistrate and the constable who executed the warrant for his arrest. The court held that the magistrate was not liable for false imprisonment, although he might have erred in holding that a criminal offense had been committed, and that the constable who made the arrest was not liable in trespass, the warrant being regular on its face. Nelson, C. J., in his opinion in the case, makes use of this language: "It cannot be doubted but that the justice, by means of the complaint in this case and the warrant issued thereupon, acquired jurisdiction over the subject-matter and the person

of the defendant, and that his error, if any, was an error of judgment. He may have misapprehended the true import of the statute, and concluded that the plaintiff fell within the prohibition, when he did not; but no principle of law is better settled than that for such mistake the magistrate is not responsible in an action. (1 Brod. & Bing., 432; *Mills v. Callet*, 6 Bing., 85; 3 Maule & Selw., 411; 8 Wend., 462; 11 Wend., 95; 19 Wend., 61, 62.) The case of *Mills v. Callet* is very strong and decisive. The only question, said Tindall, C. J., is whether the magistrate had jurisdiction to investigate and commit. He further remarked, that if a party charged with an offense be brought before a magistrate, the officer must exercise a judgment on the case, and is not liable for mere error of judgment. * * * If we are right in the conclusion respecting the justice, it necessarily follows that the warrant was a protection to the officer; for if there was matter enough to justify the proceeding of the justice, it would of course justify the officer. Indeed, if there had been no recital of the offense in the warrant, the constable would have been protected; for, to subject him to responsibility in this action, it must be shown not merely that the magistrate had no jurisdiction to issue the process, but that it so appeared on the face of the process."

Cooley, J., in *Wall v. Trumbull*, 16 Mich., 228, in discussing the rule relating to the liability of officers exercising judicial powers for errors in judgment, where they do not exceed their jurisdiction, observes: "In determining whether the members of a township board voting for the allowance are liable, the first question which arises is, whether the nature of their duties is judicial, or ministerial only; for the rule of liability is altogether different in the two cases. A ministerial officer has a line of conduct marked out for him, and has nothing to do but follow it; and he must be held liable for any failure to do so which results in the injury of another. A judicial officer, on the other hand, has certain powers confided to him, to be exer-

cised according to his judgment or discretion; and the law would be oppressive which should compel him in every case to decide correctly at his peril. It is accordingly a rule of very great antiquity that no action will lie against a judicial officer for any act done by him in the exercise of his judicial functions, provided the act, though done mistakenly, were within the scope of his jurisdiction." The learned judge, after citing numerous authorities, uses this language: "This principle of protection is not confined to courts of record, but it applies as well to inferior jurisdictions; the only difference being that authority in a court of general jurisdiction is to be presumed, while the jurisdiction of inferior tribunals must affirmatively appear on the face of their proceedings. (*Wight v. Warner*, 1 Doug. [Mich.], 384; *Clark v. Holmes*, 1 Doug. [Mich.], 390; *Chandler v. Nash*, 5 Mich., 409.) Nor does the rule depend upon whether the tribunal is a court or not; it is the nature of the duties to be performed that determines its application."

Authority is conferred by statute upon a police judge to try all offenses against the ordinances of the city. In the case before us, Buchanan, as such police judge, had jurisdiction to hear the complaint and issue the warrant. Having jurisdiction over the subject-matter, the fact that he erred in not making a finding upon which to base the judgment and sentence will not render him liable. For lack of a finding the sentence was not void, but was merely erroneous, and subject to a reversal in a proper proceeding. (*Doty v. Sumner*, 12 Neb., 378; *Connelly v. Edgerton*, 22 Neb., 83.)

The remaining question is as to the liability of the marshal for serving the warrant and imprisoning the plaintiff in accordance with the command of the mittimus to him directed by the police judge. Both writs were regular on their face, and the court, or judge, had the jurisdiction to issue the same. This being so, the marshal was protected by the processes for everything he did thereunder within

the line of his official duty. But he would be liable for any unnecessary abuse of the plaintiff, or if he exceeded his authority and acted oppressively in the execution of the writs. The principle is well recognized by the authorities that a ministerial officer, acting under a process regular and valid on its face issuing from a court or tribunal with apparent jurisdiction to issue the same, is protected in obeying it. (2 Freeman, Judgments, sec. 529; *Marks v. Sullivan, supra; Hobbs v. Ray*, 25 Atl. Rep. [R. I.], 694; *Leib v. Shelby Iron Co.*, 97 Ala., 626; *Henke v. McCord*, 55 Ia., 378; *Erskine v. Hohnbach*, 14 Wall. [U. S.], 613; *Savacool v. Boughton*, 21 Am. Dec. [N. Y.], 181, and cases cited in the note.) In *Erskine v. Hohnbach, supra*, the court say: "If an officer or tribunal possess jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to a ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued."

The instructions given by the court fairly submitted to the jury the question of the liability of the defendants, and the court below did not err in giving the same. The view already expressed disposes of the objections made to the refusal to give plaintiff's requests. The judgment is right and is

AFFIRMED.

NELLIE KELMAN v. SIMEON H. CALHOUN, IMPLEADED WITH JOHN C. CALHOUN.

FILED JANUARY 2, 1895. No. 6161.

1. **Negotiable Instruments:** BONA FIDES OF TRANSFER: BURDEN OF PROOF. Where, in an action on a promissory note by an indorsee thereof, the defense interposed is fraud in the inception of the note, the burden is upon the plaintiff to prove that he is a *bona fide* holder for value; but where the only defense is the failure of consideration, the burden is upon the defendant to overcome the presumption that the note was transferred before due for value in the usual course of business. (*Violet v. Rose*, 39 Neb., 660.)

2. ——: ——: EVIDENCE examined, and *held* not to prove a failure of consideration or to overcome the presumption that the plaintiff is a *bona fide* holder of the note sued on.

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

Edwin F. Warren, for plaintiff in error, cited: *Wortendyke v. Meekham*, 9 Neb., 21; *Dobbins v. Oberman*, 17 Neb., 163; *Sedgwick v. Dixon*, 18 Neb., 545; *Koehler v. Dodge*, 31 Neb., 328; *Helmer v. Commercial Bank*, 28 Neb., 47; *Cropsey v. Averill*, 8 Neb., 152; *Western Cottage Organ Co. v. Boyle*, 10 Neb., 409; *Coakley v. Christie*, 20 Neb., 509; *Bank of Orleans v. Barry*, 1 Denio [N. Y.], 116; *Suydam v. Westfall*, 2 Denio [N. Y.], 205; *Shriver v. Lovejoy*, 32 Cal., 574; *Missouri Loan . nk v. Garner*, 1 Mo. App., 200; *Bond v. Storrs*, 13 Conn., 412; *Dye v. Dye*, 21 O. St., 86; *Commercial Bank v. French*, 21 Pick. [Mass.], 486; *Buchner v. Liebig*, 38 Mo., 188; *Scott v. Shirk*, 60 Ind., 160; *Hamilton v. Vought*, 5 Vroom [N. J.], 191; 2 Randolph, Commercial Paper, sec. 998; *Goodman v. Simonds*, 20 How. [U. S.], 343; *Bank of Pittsburgh v. Neal*, 22 How. [U. S.], 96; *Murray v. Lardner*, 2 Wall. [U. S.], 110.

M. L. Hayward, contra, cited: *Shaw v. Clark*, 49 Mich., 384; *Lake v. Reed*, 29 Ia., 258; *Myers v. Bealer*, 30 Neb., 281; *National Bank of North America of Boston v. Kirby*, 108 Mass., 497; *Parsons v. Jackson*, 99 U. S., 434; *Newell v. Gregg*, 51 Barb. [N. Y.], 263; *Chouteau v. Allen*, 70 Mo., 339; *Dillon v. Scofield*, 11 Neb., 419; *Wilson v. Burney*, 8 Neb., 39; *Burr v. Boyer*, 2 Neb., 265; Parsons, Contracts, 17, 26 and note 3; Byles, Bills, p. 241; *Enterprise Distilling Co. v. Bradley*, 17 Ill. App., 509; *Aten v. Brown*, 14 Ill. App., 453; *Norman v. Waite*, 30 Neb., 302; *O'Leary v. Iskey*, 12 Neb., 136; *Courtnay v. Price*, 12 Neb., 192.

POST, J.

This was an action in the district court of Otoe county on a promissory note for $250 executed by the defendant in error and John C. Calhoun to John F. Callen, bearing date of March 10, 1890, and maturing sixty days after date. The petition is in the usual form in actions by indorsees of commercial paper, except that it is therein alleged that the note was transferred to the plaintiff by the payee for value before maturity in the usual course of business. The answer, after a denial of the transfer and the plaintiff's title to the note, contains the following allegation: "Defendant, further answering, avers that he is only a surety on said note and so signed the same, and the plaintiff had knowledge of this fact. Plaintiff has brought no one into court but this answering defendant; that said note was given by John C. Calhoun to one John F. Callen for a half interest in a certain advertising contract in Nebraska and Iowa; that said Callen represented to said John C. Calhoun that he understood the business and would devote his time and best efforts to make the same a success; that he had made large money in other similar contracts and would show said John C. Calhoun how to conduct and

manage said business so as to make it profitable, and that by reason of such representations and agreements so made to John C. Calhoun this defendant was induced and persuaded to sign said note as security, but that instead of trying to work up business said Callen neglected the same while with the said John C. Calhoun and shortly thereafter went alone into Iowa and there worked up a profitable business under said contract, and failed and neglected to account to John C. Calhoun for his share of the profits thereof, or to apply the same to the payment of said note, it being the agreement that said note was to be paid out of the said John C. Calhoun's share of the profits in said business; that by the reason of the acts of said Callen nothing was realized to said John C. Calhoun, and the transaction was a fraud and a swindle on him and on this defendant; that nothing can be made out of said Callen on execution, and that his business keeps him constantly traveling, and he is not a resident of this county, and that said parties will be without remedy in the matter, except as they are relieved from the payment of said note; that said Callen pretended to indorse said note before maturity, and that by said plaintiff's instructions the same was not protested at maturity, and payment has never been demanded of the maker of said note, and that said Callen was by the acts of said plaintiff relieved from his liability as such indorser on said note."

The district court, on its own motion, gave the following instruction, which is now alleged as error: "You are instructed that plaintiff having alleged in her petition that defendant made, executed, and delivered the promissory note in question to John C. Calhoun, for value received, and that afterwards said Callen, before maturity of said note, that is, before the same became due and payable, sold and assigned, transferred, and duly indorsed the same to plaintiff for value received, and the defendant, among other matters of defense, having denied that John F. Callen for

value received and in good faith indorsed, transferred, and sold said note to plaintiff before maturity thereof, and having also denied that plaintiff is the real owner of said note, the plaintiff having interposed a general denial in reply to said answer, you are instructed that the burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence that she is the *bona fide* owner of said promissory note, that she purchased the same before it became due and payable, and that she paid therefor a good and valuable consideration, and unless you so find from a fair preponderance of the evidence, your verdict will be in favor of defendant." It must be admitted that the question here involved was somewhat obscured by the earlier decisions of this court; but in *Violet v. Rose*, 39 Neb., 660, the cases were examined and the rule thereof held to be that where in an action by an indorsee the defense presented is fraud in the inception of the note, the burden is upon the plaintiff to prove that he is a *bona fide* holder; but where the only defense is a failure of consideration, the burden is upon the defendant to overcome by proof the presumption of the common law that the paper was transferred for value before maturity and in the usual course of business. From an analysis of the answer in this case it is clear that the only reliance of the defendant is upon a failure of consideration, hence it is clearly within the rule above stated and the court accordingly erred in giving the instruction complained of.

2. From a careful reading of the proofs in the record we are constrained to add that in our judgment the verdict should have been set aside for another reason, viz., that the finding of the jury is so manifestly against the evidence as to call for interference by the court. The plaintiff, who was at the time in question an unmarried woman, possessed of money for investment, and living in the family of the payee, Callen, in the city of Omaha, testified that she purchased the note in controversy on or about the day of its date for $225. She is fully corroborated by Callen, who

is even more explicit, and states the transaction in detail, viz., that he received for the note $100 on the day of the transfer by check of the plaintiff, credit for the sum of $50, in which sum he was indebted to her for money advanced, and $75 in cash at a later date but within thirty days from the day of the transfer. She is supported likewise in all essential particulars by the testimony of Callen's wife and sister. In addition to the witnesses above named Mr. Lange, cashier of the bank at which the plaintiff kept her account, testified that she consulted him regarding the purchase of the note and the solvency of the makers; and further, that she placed it in his hands for collection some four or five weeks before its maturity, also, that a check for $100, drawn by her in Callen's favor, was paid by the witness a few days previous. He testified that the plaintiff's checks for smaller amounts had previously been cashed by Callen, which tends strongly to support the theory of the plaintiff that he, Callen, was at the date of the alleged transfer of the note indebted to her for money advanced. The only evidence claimed to be in conflict with the foregoing is that of the defendant, who testified to a conversation with the plaintiff in the presence of Mrs. Callen, the sister-in-law of the latter, about a month after the note matured. In that conversation the plaintiff, according to the testimony of the defendant, remarked that she had advanced money to Callen from time to time, but would not let him have any more money on the note until she knew it would be paid without a contest; that she was about to be married and would need her money. It has been said that mere verbal admissions should be received with caution. That such evidence "consisting, as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake" (1 Greenleaf, Evidence, 200), although admissions deliberately made and precisely identified may afford proof of the most satisfactory character. (1 Greenleaf, Evidence, 200.)

Were the question simply one of veracity between the defendant and the five witnesses who testified for the plaintiff, corroborated as are the latter by the facts shown by the cashier, Mr. Lange, we might see our way clear to sustain the finding of the jury; but when we remember that the judgment rests upon the defendant's recollection of an inadvertent remark of the plaintiff, completely at variance with her claim of title to the note then long past due, and the fact that she looked to him for payment, the verdict appears to be so clearly and palpably wrong as to present a proper case for reversal on that ground.

We are likewise unable to perceive any substantial basis for the finding of a failure of consideration of the note. The inducements which led to the abandonment of the advertising scheme by John C. Calhoun, the principal of the note, are clearly set forth in the following communication, of which he is the admitted author:

"LINCOLN, NEB., April 13, 1890.

"*J. F. Callen, Esq., Omaha, Neb.*—FRIEND J. F.: The contents of this will doubtless surprise you. Have decided to give up the adv. business. Have been offered a good position—salary and expenses—and have accepted it to-day. Had a letter from Mandell in which he says they will do no advertising. I hoped to get on my feet through the Newcastle ad., but now that that has fallen through, I must take another means, and that means is something for which I am better adapted than for soliciting ads. I am no advertising man and never will be one, and you have been very kind to coach me this far. Address me Swedeburg, Neb. Hold until called for.

"Yours in haste, JACK."

That letter was the deliberate act of the writer, and is unmistakable evidence of the fact that he voluntarily abandoned the advertising venture for what was believed to be a more lucrative and congenial occupation. Being the first to violate the contract, he cannot, while in default of the

conditions thereby imposed, rely upon it for a cause of action or defense. For reasons stated the judgment is

REVERSED.

GEORGE P. HOUSH V. STATE OF NEBRASKA.

FILED JANUARY 2, 1895. No. 6926.

1. **Homicide.** Evidence examined, and *held* sufficient to sustain the verdict of manslaughter.

2. ———: INSTRUCTIONS. An instruction in a prosecution for murder to the effect that the jury may, if the evidence warrants, convict of murder in the first degree, murder in the second degree, or manslaughter, is not objectionable on the ground that it excludes a verdict of acquittal and requires the jury to convict of a felonious homicide, particularly where in other paragraphs they are cautioned against conviction unless satisfied of the guilt of the prisoner beyond a reasonable doubt.

3. ———: ———: "MALICE." It is proper to instruct that "malice," in its legal sense, denotes that condition of mind which is manifested by the intentionally doing of a wrongful act without just cause or excuse. It means any willful or corrupt intention of the mind.

4. ———: JUSTIFICATION. The bare belief of one assaulted that he is about to suffer death or great bodily harm will not of itself justify him in taking the life of his adversary. There must exist reasonable ground for such belief at the time of the killing, and the existence of such grounds is a question of fact for the jury.

5. ———: WEIGHT OF PRISONER'S TESTIMONY. It is not error in a trial for murder to instruct that the jury may take into consideration the interest of the prisoner in weighing his evidence. (*St. Louis v. State*, 8 Neb., 405.)

6. **Instructions.** MERE NON-DIRECTION by the trial court affords no ground for the reversal of a judgment unless proper instructions have been asked and refused. (*Hill v. State*, 42 Neb., 503.)

7. **New Trial:** NEWLY-DISCOVERED EVIDENCE. It is not error to refuse a new trial on the ground of newly-discovered evidence when the statements, in the affidavit upon which it is based, are contradicted by the sworn evidence of the proposed witness.

ERROR to the district court for Antelope county. Tried below before ROBINSON, J.

N. D. Jackson, for plaintiff in error, cited: Wharton, Criminal Law [9th ed.], secs. 488, 489; *Clark v. State*, 32 Neb., 246; *Long v. State*, 23 Neb., 51; *Billings v. State*, 107 Ind., 54; *Gandy v. State*, 23 Neb., 448.

Geo. H. Hastings, Attorney General, contra, cited: *Gallagher v. State*, 3 Minn., 185; *People v. Williams*, 32 Cal., 280; *People v. Campbell*, 30 Cal., 312; *Rasberry v. State*, 1 Tex. App., 664; *Stewart v. State*, 1 O. St., 66; *People v. Anderson*, 44 Cal., 65; *State v. Quin*, 3 Brev. [S. Car.], 568; *People v. Doe*, 1 Mich., 451; *Patten v. People*, 18 Mich., 314; *Cotton v. State*, 31 Miss., 504; Horrigan & Thompson, Cases on Self-Defense, 476; *Oliver v. State*, 17 Ala., 587; *Dupree v. State*, 33 Ala., 380; *State v. Benham*, 23 Ia., 154; *State v. Burke*, 30 Ia., 331; *Noles v. State*, 26 Ala., 31; *Reg. v. Bull*, 9 C. & P. [Eng.], 22; *Dill v. State*, 25 Ala., 15; 1 Bishop, Criminal Law, secs. 842, 843; *Davis v. State*, 31 Neb., 240; *Parrish v. State*, 14 Neb., 60; *State v. Vance*, 17 Ia., 138; *State v. Scott*, 4 Ired. [N. Car.], 409; *Atkins v. State*, 16 Ark., 568; *Shorter v. People*, 2 Com. [N. Y.], 193; *State v. Horne*, 9 Kan., 120; 1 Wharton, Criminal Law, sec. 102; *Curry v. State*, 4 Neb., 552; *Palmer v. State*, 4 Neb., 68; *Schlencker v. State*, 9 Neb., 242; *Milton v. State*, 6 Neb., 143; *Carr v. State*, 23 Neb., 755; *Vollmer v. State*, 24 Neb., 844; *Commonwealth v. York*, 9 Met. [Mass.], 104; *Creek v. State*, 24 Ind., 151; *State v. Collins*, 32 Ia., 36; *Patterson v. People*, 46 Barb. [N. Y.], 625; *State v. Matthews*, 78 N. Car., 523; *Steinmeyer v. People*, 95 Ill., 383; *State v. Rose*, 30 Kan., 501; *Panton v.*

People, 5 Am. Crim. Rep. [Ill.], 425, note; *Barnards v. State*, 88 Tenn., 229; *White v. Territory*, 3 Wash. Ter., 397; *St. Louis v. State*, 8 Neb., 405.

POST, J.

The facts of this case must have appealed strongly to the sympathies of the jury, as they certainly do to ours. On the day of the homicide the prisoner, a small and feeble man, weighing less than 135 pounds, and a cripple, his left leg having been amputated above the knee, was three times assaulted by the deceased, a man weighing nearly 200 pounds. On each occasion the prisoner was thrown to the ground and violently choked by the deceased, who was at the time intoxicated, and who during one of such assaults is shown to have threatened the prisoner's life. The only apparent provocation for said assaults, or any of them, was the fact that the prisoner had denounced the action of the deceased in striking and otherwise abusing Ernest Staples, a boy sixteen years of age, who at the time in question had business at the livery stable where the altercation occurred, and who had, by some means not disclosed, excited the enmity of the deceased. On releasing the prisoner after the last assault, the deceased followed the boy above named to where the latter was in the act of unhitching his horse, about forty feet from the stable. After punishing the boy to his satisfaction he started to return to the stable along the sidewalk at a right angle therewith, pushing and kicking the boy before him. When he reached the stable door the prisoner, who was standing just inside the threshold, struck him a blow in the neck with a knife, completely severing the jugular vein, and from which death resulted almost instantly. The theory of the state is that the prisoner, incensed by the wrongs he had suffered, followed the deceased to the door and, waiting for his return, struck the fatal blow without warning and without sufficient provocation. On the other hand the prisoner contends that in tak-

ing the life of the deceased he was acting in self-defense and upon sufficient provocation. There is evidence tending to prove that he was at the fatal moment resting against the cheek or casing of the door, engaged in adjusting the wooden leg to his limb, which was rendered necessary in consequence of the violence just suffered at the hands of the deceased. He accounts for the presence of the knife at the instant of homicide by the fact that it was necessary to make a hole in the strap used to support his wooden limb, and which was broken during the scuffle. The witnesses for the prisoner and some of those for the state testify that as the deceased approached the door he was commanded by the prisoner to let the boy alone. The deceased then rushed at him, but was ordered to stand back or he would get hurt. At that time, according to the same witnesses, the deceased was about four feet from the prisoner with his hand raised as if about to strike. According to the testimony of the latter the deceased had something in his hand which was believed to be a knife, and being unable to retreat on account of the injuries just suffered, there was no alternative but to defend himself by use of the means employed. Other witnesses, evidently not unfriendly to the prisoner, testify that he was standing with his left hand on the door casing and his right hand, in which he was holding the knife, behind him, and as he ordered the deceased to stand back he took one step forward and struck with the result stated. The question of justification was submitted to the jury on the foregoing evidence, and while a verdict of acquittal would perhaps have been quite as satisfactory to the trial court, we can perceive no ground for interference. The question whether there existed in the mind of the prisoner an apprehension based upon reasonable grounds therefor of imminent peril to life or limb through the further assault of the deceased, and whether the means adopted for his defense were reasonable and appropriate for that purpose, in view of all the circumstances

surrounding him at the time, is essentially one of fact. No mere difference of opinion between the judge and the jury will warrant the setting aside of a verdict based upon conflicting evidence. There is a wide distinction between such a case and one in which there is a failure of proof upon a material issue or where the verdict is so clearly wrong as to lead irresistibly to the conclusion that it is the result of prejudice, passion, or inattention to the evidence. It cannot, therefore, be said that the judgment is so clearly against the evidence as to call for a reversal of the judgment on that ground. The conclusion renders necessary an examination of the other assignments of error.

2. Exception is taken to paragraph No. 5 of the instructions given by the court on its own motion, as follows: "In a prosecution for murder in the first degree, if the evidence fails to sustain such charge, the jury may, if the evidence warrants, find the defendant guilty of murder in the second degree, or manslaughter, as the case may be." The particular criticism of this instruction is that it is incomplete, since the jury were thereby allowed no alternative but to convict either of murder or manslaughter and not permitted to render a verdict of acquittal. The criticism is, however, not merited, as the jury were in other paragraphs instructed fully and accurately upon the subject, and in explicit terms directed to acquit unless satisfied beyond a reasonable doubt that the killing was not justifiable on the ground of self-defense.

3. The next exception is directed to instruction No. 11, viz: "'Malice,' in its legal sense, differs from the meaning which it bears in common speech. In common acceptation it signifies ill-will, hatred, or revenge toward a particular individual. Such a condition of mind would, of course, constitute malice in the eye of the law, but such is not necessarily its legal sense. 'Malice,' in its legal sense, denotes that condition of mind which is manifested by the intentionally doing of a wrongful act without just cause or

excuse. It means any willful or corrupt intention of the mind." The above definition of "malice," it is argued, is incomplete, but we regard it as substantially within the definition in *Harris v. State*, 8 Tex. App., 90, and which was approved in *Carr v. State*, 23 Neb., 749. It is certainly not in conflict with the authorities cited by REESE, J., in the last named case, and possesses merit which cannot unfortunately be claimed for every instruction which we have had occasion to examine, viz, brevity and perspicuity.

4. The next assignment involves the following instruction: "You are instructed as a matter of law that when a person is assaulted by another, and from the nature of the attack, viewed in the light of any previous threat or hostile declaration made by the assailant and of his known character for violence, the party assaulted has reasonable grounds to believe and does believe that the assailant intends presently to take his life or do him some bodily injury, he will be justified in killing his assailant, providing the circumstances are such that such extreme measure would seem to the comprehension of a reasonable man necessary in such situation to prevent the threatened injury. Whether the appearances of danger are sufficient to convince a reasonable man in the situation of the accused that death or the infliction of great bodily harm upon the person of the accused was intended by the deceased is a question of fact for the jury." The criticism of the foregoing proposition is stated with great force and precision in the brief submitted by counsel for the prisoner, from which we quote as follows: "It [the instruction] requires the jury to measure the defendant's mental responsibility, not by his own standard, but by that of some ideal or imaginary man, * * * whereas the true inquiry is, did the defendant believe, at the time the fatal blow was struck, that the deceased intended to kill him or do him great bodily harm?" The view thus stated has, it is admitted, the sanction of eminent authority (see Wharton, Criminal Law [9th ed.], 488, 489),

although it has not been generally accepted as the law by the courts of this country or England. The doctrine of the instruction has not only been accepted by the courts, but it rests upon reasons obviously sound and productive of the best interests of society as well as justice to the accused. The principle which underlies the rule there stated is that human life should not be made to depend upon conditions so unreliable and hazardous as the bare belief of any man that he is in danger of death or bodily harm; for, as said in *State v. Harris*, 1 Jones, Law [N. Car.], 190,—a well considered case,—"if the person charged with the homicide is to judge for himself whether the reasonable ground existed the most atrocious murders may be committed with impunity. The prisoner says he believed his life was in danger. Who can look into his heart? If the law allows him to judge, who can contradict him? The circumstances are nothing. It is his belief that justifies him. The law is not so. It is only from circumstances accompanying the transaction that reasonable ground can be ascertained, and of their bearing and influence the jury are the sole judges." The following are selected from the many cases in harmony with the above: *People v. Coughlin*, 67 Mich., 466; *State v. Sterrett*, 68 Ia., 76; *State v. Archer*, 69 Ia., 420; *State v. Bohan*, 19 Kan., 28; *Davis v. People*, 88 Ill., 350; *Watson v. State*, 82 Ala., 10; *Penland v. State*, 19 Tex. App., 365; *Clifford v. State*, 58 Wis., 477; and like views were expressed, although the question was not decided, in *Parrish v. State*, 14 Neb., 60, and *Vollmer v. State*, 24 Neb., 844. The objection to the instruction is, therefore, without merit.

5. Exception was taken to the following paragraph of the instructions: "Under the law of this state the accused is a competent witness in his own behalf and you are bound to consider his testimony; but in determining what weight to give to his testimony you may weigh it as you would the testimony of any other witness, and you may take into

consideration his interest in the result of the trial, his manner, and the probability or improbability of his testimony, and giving to his testimony such weight as, under all the circumstances, you think it entitled to." Were the question an open one at this time the writer would with reluctance sanction a practice which permits any reference by the court to the subject of the prisoner's credibility as a witness. There is on principle no more reason to call the attention of the jury to him and to caution them to consider his interests as affecting his credibility than for like caution with respect to any other witness; but that question has been fully settled in this court by decisions in conformity with the practice in this case, which we are constrained to follow. (See *St. Louis v. State*, 8 Neb., 405; *Murphy v. State*, 15 Neb., 383.)

6. It is next contended that the court erred in not further defining manslaughter. The only definition of that offense is found in instruction No. 8, which is practically in the language of the statute; but the jury were properly instructed respecting the crime charged, and advised that malice is an essential element of murder, both in the first and second degree. They were also advised that they might, if the evidence warranted, find the defendant guilty of manslaughter. In other words, the court charged that if the killing was unlawful and malicious, it was murder; but if it was unlawful and without malice, the offense was manslaughter. That, we think, a sufficient direction when assailed for the first time after verdict, particularly in view of the fact that the only reliance of the prisoner was justification on the ground of self-defense. The killing, according to the verdict, was not justifiable, hence it was unlawful, and was, therefore, murder or manslaughter; and as the conviction was for the last named offense, there is no apparent ground for complaint on his part. No definition of manslaughter has been suggested in the argument, nor can we conceive of one which adds anything to the precise definition of the statute, viz., the unlawful killing of another

without malice, either in a sudden quarrel or unintentionally while the slayer is engaged in the commission of an unlawful act. But the record shows no exception to the charge on that ground. If, in the opinion of the prisoner, he was entitled to a more explicit direction upon any subject, he should have submitted proper instructions, and if refused, the question would have been thus presented for review. Mere non-direction, as said in *Hill v. State*, 42 Neb., 503, affords no ground for reversal of a judgment unless proper instructions have been asked and refused. *Long v. State*, 23 Neb., 51, cited in support of a different view, is not in point, since the duty of the trial court to instruct in the absence of a request therefor was not considered in that case.

7. Finally, it is claimed that the motion for a new trial should have been sustained on account of newly-discovered evidence. According to the affidavit of the prisoner, he had, subsequent to the trial, discovered that he could prove by one Roan that the latter had witnessed the killing from the middle of the street in front of the stable and distinctly saw the deceased raise his right hand as if about to strike the affiant with a knife which he then held. On the hearing of the motion the witness above named was produced by the state and upon his examination contradicted the prisoner in every particular. He not only denied witnessing the homicide, but swore that he was in the city of Norfolk at the time in question. From other evidence taken at the time we are led to believe that said witness had deliberately imposed upon the prisoner by falsely stating that he, witness, was present and could give material evidence in his favor. But that fact merely proves how base and entirely unworthy of belief is the witness by whose evidence it is sought to change the result of the trial,—an additional reason for the refusal to disturb the verdict. We find no error in the record, hence the judgment is

AFFIRMED.

W. H. REYNOLDS V. ALLEN G. FISHER ET AL.

FILED JANUARY 2, 1895. No. 6892.

1. **Taxes:** COLLECTION. The warrant required by law to be attached to a tax list when it is delivered to a county treasurer for collection is the source of his power and authority to resort to the proceedings provided by statute for enforcing the collection of the taxes when it becomes necessary so to do. If no warrant is so attached he lacks the authority to compel the payment of the taxes.

2. ———: ———: AUTHORITY. Where the tax list was prepared by the county clerk by transcribing the assessment into two books and the warrant directing the treasurer to collect the taxes contained in the list was attached to but one of the books, and it was admitted that the two books constituted the tax list for the year, the warrant attached to the one book was a sufficient authorization to the treasurer to collect any taxes in the list as shown in either book, in any manner provided by law.

3. ———: LIEN: EXTENT. The taxes assessed on personal property are not confined as a lien to the property upon which they are assessed, but are a lien upon all personal property owned by the person assessed, during the existence of the taxes, from and after the delivery of the tax list to the county treasurer for collection.

4. ———: ———: ENFORCEABLE BY REPLEVIN. The county treasurer is ordinarily restricted in the enforcement of the collection of taxes to the use of the remedies provided by statute, but where, as in this case, the taxes are a lien on the property and he seeks to gain possession by virtue of such lien and the property is in the possession of other parties who claim the right of possession and contest the treasurer's right to take the property, the legislature having failed to provide any means or remedy, the right to resort to the proper legal proceeding is implied, and replevin being the proper action, he may maintain such an action and have his right to possession adjudicated.

5. ———: ———: PRIORITY. The lien of the taxes *held* superior in this case to the liens created upon the property by chattel mortgages executed subsequent to the delivery of the tax list to the county treasurer.

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

Thos. L. Redlon, for plaintiff in error, cited: Consolidated Statutes, 1891, sec. 4038; *Wygant v. Dahl*, 26 Neb., 572; *Hill v. Palmer*, 32 Neb., 632; *Boyce v. Stevens*, 49 N. W. Rep. [Mich.], 577; *Barker v. Morton*, 19 Ind., 146; *Evans v. Bradford*, 35 Ind., 527; *McNeil v. Farneman*, 37 Ind., 203; 2 Desty, Taxation, p. 776; *Virden v. Bowers*, 55 Miss., 1; *Clifton v. Wynne*, 80 N. Car., 145.

Albert W. Crites, contra, cited: *Richards v. Clay County*, 40 Neb., 45; Cooley, Taxation, 435; *City of Carondelet v. Picot*, 38 Mo., 125; *Andover & Medford Turnpike Co. v. Gould*, 6 Mass., 40; *Miller v. Anderson*, 47 N. W. Rep. [S. Dak.], 957; *Bibbins v. Clark*, 57 N. W. Rep. [Ia.], 884.

HARRISON, J.

On August 1, 1893, the plaintiff commenced an action of replevin against defendant before a justice of the peace in Chadron precinct, Dawes county, to obtain possession of certain goods and chattels, claiming such possession as county treasurer of Dawes county, under and by virtue of the statutory lien on personal property for taxes assessed upon personalty as provided in section 139, chapter 77, Compiled Statutes, 1893, which is as follows: "The taxes assessed upon personal property shall be a lien upon the personal property of the person assessed, from and after the time the tax books are received by the collector." From an appraisement of the property made at the time of the service of the writ of replevin it appeared that the property taken under the writ exceeded in value the sum of $200. The case was therefore transferred to the district court, where, after some preliminary motions, etc., the cause was submitted to the court for adjudication upon the following stipulation of facts:

"1. The plaintiff is now the elected, qualified, and acting county treasurer of said county, and has been such officer since the first Tuesday after the first Monday of January, 1892.

"2. That on the 1st day of April, 1891, and on the 1st day of April, 1892, Roderick McLeod was the owner of a large stock of merchandise, consisting of boots and shoes, furnishing goods and groceries, as well as the furniture and fixtures of his store-room, which said goods he was daily retailing to customers in the city of Chadron, and replacing from time to time by new goods.

"3. That said stock of goods was listed and assessed for taxation on April 1 of said years 1891 and 1892, and taxes were levied thereon to the amount as follows: 1891, $96.87, and for 1892, $64.29, which taxes became delinquent on the 1st day of February, 1892, and the 1st day of February, 1893, if at all. That the tax list of 1891 was delivered to the treasurer of Dawes county on or about October 1, 1891, but that no warrant was attached thereto by the county clerk.

"4. The county clerk prepared the tax list of 1892 in two separate books, one containing the personal property and the city and village real taxes, and the other the county real estate taxes, and delivered them to said treasurer about the 5th day of January, 1893.

"5. That no warrant was attached to or written in the book containing the personal taxes and city and village real tax for the year 1892, commanding said treasurer to collect the same, but a warrant was attached to the book containing the county real estate tax, a copy of which warrant is hereto annexed, marked 'Exhibit A,' and made a part hereof.

"6. That a decree was duly entered in the district court of Dawes county, Nebraska, in December, 1892, wherein W. H. Reynolds, plaintiff herein, and James C. Dahlman and others were defendants, a true copy of which decree is hereto attached, and marked 'Exhibit B,' and made a part hereof.

"7. That on the 19th day of July, A. D. 1893, Roderick McLeod executed and delivered to the First National

Bank of Chadron his chattel mortgage for a valuable consideration by him in hand received, whereby he conveyed to said bank a certain defined portion of said stock of merchandise of the value of $700, and upon the same day delivered the possession of said goods to the said bank, and said goods were, upon the succeeding day, July 20, 1893, removed from the store-room wherein said stock was situated at the date of said mortgage, which was given to secure a *bona fide* indebtedness owing from McLeod to said bank.

"8. That on said 19th day of July, 1893, said McLeod, for a valuable consideration before received by him from C. M. Henderson & Co., executed and delivered to them a chattel mortgage, which was accepted and filed in the office of the county clerk of Dawes county, Nebraska, the same day, a true copy of which chattel mortgage, together with file mark thereon, is hereto attached and made a part hereof, and marked 'Exhibit C,' and immediately delivered the possession of said goods to the defendant Allen G. Fisher, as agent for the said mortgagee, who received possession thereof and accepted the same under the said chattel mortgage, as agent for the said mortgagees, and no portion of said goods has been removed from said building by any person except as hereinafter stated.

"9. That on the said 19th day of July, 1893, said McLeod, for a valuable consideration before received by him from Large & Amsden, executed and delivered to them a chattel mortgage, which was accepted and filed in the office of the county clerk of Dawes county, Nebraska, the same day, a true copy of which chattel mortgage, together with file mark thereon, is hereto attached and made a part hereof, and marked 'Exhibit D,' and immediately delivered the possession of said goods to the defendant Allen G. Fisher, as agent for said mortgagees, who received possession thereof and accepted the same under the said chattel mortgage, as agent for the said mortgagees, and no portion of said goods has been removed from said building by any person except as hereinafter stated.

"10. That on the said 19th day of July, 1893, said McLeod, for a valuable consideration before received by him from Tootle, Hosea & Co., executed and delivered to them a chattel mortgage, which was accepted and filed in the office of the county clerk of Dawes county, Nebraska, the same day, a true copy of which chattel mortgage, together with the file mark thereon, is hereto attached and made a part hereof, and marked 'Exhibit E,' and immediately delivered the possession of said goods to the defendant Allen G. Fisher, as agent for said mortgagees, who received possession thereof and accepted the same under the said chattel mortgage, as agent for said mortgagees, and no portion of said goods has been removed from said building by any person except as hereinafter stated.

"11. That on the 19th day of July, 1893, said McLeod, for a valuable consideration before received by him from the American Hand-Sewed Shoe Company, executed and delivered to them a chattel mortgage, which was accepted and filed in the office of the county clerk of Dawes county, Nebraska, the same day, a true copy of which chattel mortgage, together with the file mark thereon, is hereto attached and made a part hereof, and marked 'Exhibit F,' and immediatly delivered the possession of said goods to defendant Allen G. Fisher, as agent for said mortgagees, who received possession thereof, and accepted the same under the chattel mortgage, as agent for the said mortgagees, and no portion of said goods has been removed from said building by any person except as hereinafter stated; that said C. M. Henderson & Co. is an Illinois corporation, duly incorporated and existing, and the American Hand-Sewed Shoe Company is a Nebraska corporation, duly incorporated and existing, and Large & Amsden and Tootle, Hosea & Co. are each partnerships and both engaged in the business of wholesaling boots and shoes; that said Allen G. Fisher, as agent of the above mentioned mortgagees, remained in actual, exclusive, and undisputed possession of

said stock of goods, except only the goods mortgaged to the First National Bank, which were removed by the said bank (out of said building) from the time of delivery of said mortgages, and the goods mortgaged therein, on July 19, 1893, until the afternoon of July 21, 1893, when the sheriff, with a writ of replevin in this action, gained admission into said building, wherein said goods were in the possession of the defendant Fisher, and took them and carried them away pursuant to said writ.

"12. That when the said chattel mortgages were executed and delivered, and the goods therein described were delivered and possession thereof received and taken under said mortgages pursuant thereto, neither of the defendants, nor C. M. Henderson & Co., nor Tootle, Hosea & Co., nor the American Hand-Sewed Shoe Company, were given or had any actual notice or knowledge of said taxes, and had no notice thereof save such as the law might imply from the records of the district court of Dawes county, Nebraska, and in the offices of the county clerk and treasurer.

"13. That after said mortgages were made and received and the possession of the goods therein described received thereunder the defendant Fisher, as agent for the said mortgagees, the county treasurer, by virtue of his office as county treasurer, for the purpose of collecting the taxes above mentioned, demanded payment thereof from the said Roderick McLeod, and no portion thereof was paid; that the said mortgagor's indebtedness still remains in full force and unpaid.

"14. That before beginning this suit plaintiff demanded possession of the goods, for the purpose of collecting said taxes, which was refused by defendants.

"15. That soon after such demand and refusal the county treasurer, as plaintiff, brought this action against the defendants before D. Y. Mears, Esq., a justice of the peace of said county, to recover possession of said goods for the

purpose of collecting said taxes, for the reason and upon the grounds stated in the affidavit in replevin herein, and under the writ of replevin herein seized said goods, then in the hands of said defendant under said mortgages, which goods so taken in replevin herein are of the agreed value of $606.40, and were so taken in replevin on the 21st day of August, A. D. 1893.

"16. The party adjudged to have title and right to possession on the foregoing facts shall recover six cents damages and costs of suit.

"And it is further stipulated and agreed that this cause shall be decided on the foregoing facts, and that if the losing party shall desire to have a bill of exceptions allowed for the purpose of prosecuting error in the supreme court, this stipulation of facts contains all the evidence in this suit, and the same shall be settled and allowed as a bill of exceptions, and made a part of the record by the clerk of the district court."

The court made a finding in favor of defendants and rendered judgment accordingly, motion for new trial was submitted and overruled, and the case has been removed to this court by petition in error.

It is stated in paragraphs 3, 4, and 5 of the stipulation of facts "that the tax list of 1891 was delivered to the treasurer of Dawes county on or about October 1, 1891, but that no warrant was attached thereto by the county clerk;" that in preparing the tax list for the year 1892, which was to be delivered to the treasurer, the assessments of the personal property and the city and village real estate were transcribed into one book, and the assessments of county real estate into another, and no warrant was attached to or written in the book containing the list of personal and city and village real estate taxes. Section 80 of chapter 77, entitled "Revenues," Compiled Statutes of 1893, which refers to the tax list and its preparation, is as follows: "After the equalization by the county and

state boards, as hereinbefore provided, and the levy of taxes made by them, and before the first day of October, the county clerk shall transcribe the assessments of the several precincts, townships, cities, or villages into a suitable book to be provided at the expense of the state, properly ruled and headed with distinct columns, in which shall be entered the description of lands, number of acres and value, number of city and village lots and their value, value of personal property, and each description of tax, with a column for polls, one for payment, and a number of columns for delinquent taxes of previous years;" and section 83 of the same chapter provides as follows: "The tax list shall be completed and delivered to the county treasurer on or before the first day of October annually, and before its delivery the county clerk shall attach a warrant under the seal of the county, which warrant shall be signed by said clerk and shall in general terms command the said treasurer to collect the taxes therein mentioned according to law; but no informality therein and no delay in delivering the same after the time above specified shall affect the validity of any taxes or sales, or other proceedings for the collection of taxes as provided for in this act." The warrant provided for in this section is the treasurer's authority for enforcing the collection of any and each particular tax of the list to which it is attached when it becomes necessary to resort to any of the proceedings provided by law. To collect the tax, then, the warrant must be in the hands of the collector, and, in this state, attached to the tax list, as his authorization to institute such proceedings. If he proceeds without it, he becomes a trespasser. An officer of the law who makes a levy must be empowered to do so by the proper writ in his possession. So with the treasurer. The warrant required by the law to be attached to the tax list is the source of the right to use the means of collection provided by the statutes. (Cooley, Taxation, 292; 25 Am. & Eng. Ency. of Law, 292, and

cases cited.) As there was no warrant attached to the tax list for 1891, the treasurer had no right to enforce the collection of the personalty tax for that year, by distress or other proceedings provided by the statutes in relation to taxes and their collection. We are not deciding that the tax list for 1891 was invalid, or that the collector could not legally receive voluntary payments of taxes and retain them. There is some argument to this effect in the brief filed, but we do not think that it is one of the points arising from the facts contained in the record as presented here, hence we do not consider nor adjudicate it. The statement in the stipulation of facts is that "the county clerk prepared a tax list for 1892 in two separate books," did not transcribe the assessments into one book as the law prescribes, but used two books and only attached the warrant which ordered the county treasurer to collect the taxes contained in the list to one book, and it is claimed that this did not empower him to collect the taxes set forth in the one book which it is admitted was a portion of the list. It is not contended that there was anything wrong with any portion of the list, nor even that there was any irregularity in its preparation, and it is conceded, or admitted, that the two books taken together constituted the tax list for 1892. While no doubt it would have been the proper practice to have followed the directions contained in the law and placed all assessments in one book, if possible to do so, or probably to obviate any objection, if written into more than one book, to have attached a warrant to each book, yet we think that attaching the warrant to the one book of the two which contained the tax list in this case was sufficient to authorize the treasurer to proceed with the collection of the taxes. The taxes were not illegal, nor assessed for an unauthorized purpose, and their collection not harmful nor detrimental to the rights of any person against whom they were legally a charge or to whose claims or liens upon any property they were superior. The treasurer in this case

was asserting his rights to the possession of this property, for the purpose of subjecting it to sale and applying the proceeds to the payment of the taxes assessed not against the defendants in the replevin suit, but against O'Connor Bros., from whom the defendants had received the goods under and by virtue of chattel mortgages, as set forth in the stipulation of facts herein, and his right to such possession was based in part upon his power to take such goods and sell them, contained in the warrant attached to the tax list and in part as being superior to the rights of defendants by virtue of the lien of the taxes upon the property, created by section 139, chapter 77, Compiled Statutes, 1893. The tax list in question was delivered to the treasurer about January 5, 1893, and from and after that time became a lien upon the property of O'Connor Bros., not necessarily upon the property assessed alone, but upon all the personal property of which they were the owners after the delivery of the tax list to the treasurer. (*Hill v. Palmer*, 32 Neb., 632.)

There has been some considerable discussion in the courts over the question of how far a lien on personalty for taxes, such as is contemplated by the foregoing section of our law, can be, or ought to be, sustained, the opposition to it being based mainly upon the proposition that it is against public policy, in that to enforce it would interfere with the due course of trade, and it has been said that it will not be allowed to prevail as against purchasers in the regular course of business, but this is not the point presented in this case. Here we are to decide as between the lien for taxes and the liens created by chattel mortgages, executed after the tax list had been made and delivered to the treasurer. There can exist no doubt of the intention of the law-makers, in the section quoted, to create the lien. It is expressed in unmistakable terms, and if held inferior and subject to all and any transfers by way of mortgage or lien, or liens created by levy of process subsequent to its creation by the

delivery of the tax list to the treasurer, then do we all but destroy it. It may be said that it does not become operative until the treasurer has taken the property into his possession, but we cannot think so. If such had been the intention, the treasurer could as well have been left to his remedy by distraint, which would have been fully as efficacious without this provision for a lien. As between the liens created by the execution of the chattel mortgages and the statutory lien for the taxes, we are satisfied the one for taxes was prior and superior and entitled to be first satisfied from the property in controversy, and the treasurer entitled to possession by virtue of the lien and the command of his warrant of collection. Having reached the conclusion that the treasurer had a lien upon the property in controversy and one which was a superior lien, we are confronted with the question, could the treasurer maintain an action of replevin to recover the possession of the goods? Counsel call attention to the fact that our revenue laws contain a provision for the collection of taxes by distress and, in addition to this, by suit or action, and contend that no other or different action will lie, or method can be employed than those provided, and cites, with other cases, that of *Richards v. Commissioners of Clay County*, 40 Neb., 45, a late decision by this court, with the doctrine of which, in its general application to the facts and circumstances of the case in which it was announced, we then agreed and do now. It was held in the case cited: "Taxes are not debts in the ordinary acceptance of the term, and generally an action at law will not lie for their collection. While the right to an action may be implied from the failure of the legislature to provide any means for enforcing the payment of taxes, yet, where the legislature has provided means of enforcing payment, that remedy is exclusive." The legislature has provided the means of subjecting the property to the payment of the taxes, and has further enacted that they shall be a lien on certain property, and the treasurer in

this case sought to bring into action one of the means given him by law for collection, and in order to do so was forced to assert and enforce his right to priority for such purpo-e, by virtue of his lien, and the legislature having failed to point out the manner in which the superiority of his lien might be determined, or to provide an action by which the right to possession might be established, we think the usual and ordinary remedy in such cases, that of replevin, could be resorted to by him, as its use is clearly implied by such failure. It follows that the judgment of the district court must be reversed and the cause remanded.

REVERSED AND REMANDED.

W. H. REYNOLDS v. HIRAM G. MCMILLAN.

FILED JANUARY 2, 1895. No. 6891.

1. **Res Adjudicata.** The determination of this case is controlled by the decision in the case of *Reynolds v. Fisher*, 43 Neb., 172, filed at this time.

2. **Taxes: LIEN: PRIORITY.** The lien of the taxes *held* prior and paramount to the liens of levies of attachment writs which were made subsequent to the delivery of the tax list to the county treasurer.

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

Thos. L. Redlon, for plaintiff in error.

Albert W. Crites, contra.

HARRISON, J.

The facts in this case do not differ materially from those in the case of *Reynolds v. Fisher*, 43 Neb., 172, in which an

opinion is submitted at this time. The liens under which the right of possession was claimed by defendants were created by levying writs of attachment on the property after the tax list had been placed in the hands of the county treasurer for collection. The cases were submitted together, and the decision in that case is appropriate to this, and, in accordance with the conclusion reached, the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

FREDERICK CURTIS ET AL., APPELLANTS, V. JOHN C. ALLEN ET AL., APPELLEES.

FILED JANUARY 2, 1895. No. 7417.

1. **Educational Institutions.** The institution for the blind at Nebraska City is one for "educational purposes," within the meaning of section 19, article 5, of the constitution of this state.
2. ——: ARE NOT ASYLUMS. The mere fact that persons are blind, poor, and indigent does not entitle them to any privilege in the aforesaid institution for the blind, except to receive an education, and incidentally such aid and support as thereby shall be rendered necessary.

APPEAL from the district court of Otoe county. Heard below before CHAPMAN, J.

W. M. Clary, for appellants.

Geo. H. Hastings, contra.

RYAN, C.

This is an appeal from the district court of Otoe county. The appellants, by their petition in the said court, alleged

that the action was brought on behalf of themselves and all others similarly situated who should come in as plaintiffs and contribute to the expense of this litigation; that each of said plaintiffs was, at the time of bringing this action, a resident and citizen of Nebraska, of suitable age and capacity; that by reason of being blind, plaintiffs had been admitted into the Nebraska institution for the blind, a charitable institution of this state, situate at Nebraska City; that plaintiffs had been inmates and students of said institution for more than two years before the filing of said petition; that each of plaintiffs was then poor and indigent; that William Ebright, one of the defendants, was then principal and superintendent of said institution, and as such principal was in the control and management thereof, subject only to the orders of the board of public lands and buildings of said state. Following the above averments there were others that the defendants, aside from Mr. Ebright, were members of and constituted the board of public lands and buildings just referred to, and that to said board was entrusted the general supervision and control of all the buildings, grounds, and lands of the state, the state prison, asylums, and all other institutions thereof, except those for educational purposes. It was further alleged that the said board, together with the defendant William Ebright, had control over, and were entrusted with, the government of said Nebraska institution for the blind, and that said Ebright and said board had made the rules and regulations for the admission, government, control, and education of the inmates or pupils thereof and had fixed, or assumed to fix, a term of the length of the course of studies to be pursued therein by plaintiffs and other inmates of said institution by reason of being unable to acquire an education in the common schools of the state. The right of the plaintiffs to the relief prayed, which was that the defendant should be perpetually enjoined from interfering with plaintiffs' right to remain inmates forever of said in-

stitution at the expense of the state, was claimed in the following language used in the petition: "And these plaintiffs further allege that by reason of their infirmity they are by law entitled to be and remain in the said institution for the blind at Nebraska City aforesaid, and to be supported, cared for, and educated at the expense of the state of Nebraska; that they are in truth and in fact the wards of the state and have the right to remain there at all times so long as they are guilty of no infraction of the rules and regulations of said institution enacted for the good government of the same." By the petition it was made to appear that the reason that the plaintiffs were denied the privilege of remaining in said institution was that its management insisted that it was an educational institution, and that the summer school vacation was about to commence, during which plaintiffs were required to care for and maintain themselves, although, as plaintiffs made known, they had no home or place of abode. It is not deemed necessary to set out the averments of the answer, for the sole question for our consideration is apparent from the averments of the petition. There was a decree denying the relief prayed, from which plaintiffs have appealed.

Lest we should be misunderstood it is proper at this juncture to state that we recognize the difficulties which might surround this case under certain conditions. Mr. Ebright's authority is alleged to have been derived from that of the board of public lands and buildings. The rules and regulations of the institution under consideration depend for their validity upon the powers possessed by Mr. Ebright and the board which appointed him. If the petition had been framed on the theory that neither the board of public lands and buildings nor its appointee had authority to adopt rules and regulations for the government of the institution for the blind, and that its management was not subject to their control, questions would have been presented which by the allegations and admissions of ap-

pellants in their petition are herein certainly rendered immaterial,—probably, in any event, the powers of *de facto* officers could not be questioned in a collateral proceeding. Whatever shall be said in the further discussion of this case must be understood as in view of the condition of the issues tendered by appellants and not as an independent recognition of the authority of the board of public lands and buildings or its appointees with reference to the management of this institution.

In the case of *State v. Bacon*, 6 Neb., 286, the main question which now confronts us was stated as the second essential proposition to be determined under the pleadings and the evidence in this language: "Does the institution for the education of blind persons come within the exception of section 19, article 5, of the constitution?" The essential facts stated in the case just cited were that under the provisions of the act whereby was established the institution with which we have now to deal the board of public lands and buildings assumed control and had removed the respondent from his position as principal of said institution. By *mandamus* this board, as relator, sought to compel defendant, the deposed principal, to deliver up the books, records, furniture, and papers in his possession belonging to said institution. The first question involved, as stated in the opinion delivered by GANTT, J., was this: "Has the state board of public lands and buildings the power to appoint and remove officers of state institutions properly under their supervision and control?" There was a concurrence of all the judges of this court in denying the right to remove, and this was a negative of such a right of removal, even by officers properly under the supervision and control of said board. From this predicate the denial of the writ of *mandamus* prayed necessarily followed, and, therefore, there existed no need for the discussion of the second proposition. It was nevertheless discussed, GANTT, J., maintaining the affirmative and MAXWELL, J., and LAKE, C. J., sustaining

the negative. The opinion of LAKE, C. J., opens, however, with this apologetic statement, to-wit: "I was absent during the argument of the respective counsel, and, therefore, am not in possession of the points on which they severally relied, and but for the disagreement of my brother judges on one of the principal questions would have remained silent." It is proper further to note that no brief was submitted. At least none appears now on file. Under these circumstances we are now called upon to consider the question as to which there has already been filed conflicting opinions. What weight should have been accorded the opinions of LAKE, C. J., and MAXWELL, J., respectively, as to a proposition perhaps not necessary to the determination of the case then under consideration need not now be stated. It is proper, however, to note that practically their views have been acted upon as authoritatively defining the *status* of this institution, at least so far as to place its management under the control of the state board of public lands and buildings, as "an institution for the protection and relief of unfortunates." The language just quoted is Judge LAKE'S definition of an asylum. Within this class the opinion of Chief Justice LAKE and that of Judge MAXWELL place the institution for the blind. As a logical sequence of this classification and the definition of an asylum given in connection therewith, plaintiffs insist that as wards of this state they are entitled in all respects to be cared for in this institution during the terms of their natural lives. Was such a result within the contemplation of the legislature when the institution was created is the question with which we have now to deal.

In the act creating this institution there was no reference by name to an asylum, the designation is always an institution. It therefore would seem that there was attached to the word "asylum" too much importance in all the opinions filed in *State v. Bacon, supra.* It is true that in the act approved February 13, 1877 (Session Laws, 1877,

p. 188), there is mention of an asylum for the blind, but so there is of an asylum for the deaf and dumb, an institution provided for by an act approved February 23, 1875 (Session Laws, 1875, p. 146), its purpose being defined as follows:

"Sec. 8. The object of said institution shall be to promote the intellectual, physical, and moral culture of the deaf and dumb by a judicious and well adapted course of instruction, that they may be reclaimed from their lonely and cheerless condition, restored to society, and fitted for the discharge of the duties of life."

This institution, whose object is thus defined with respect to the deaf and dumb of Nebraska, might perhaps be considered as falling within the fourth definition of the word "asylum" as given in the Century Dictionary, to-wit: "An institution for receiving, maintaining, and, so far as possible, ameliorating the condition of persons suffering from bodily defects, mental maladies, or other misfortunes, as an asylum for the blind, for the deaf and dumb, for the insane, etc., a Magdalen asylum." These considerations illustrate the danger of attempting to define the *status* of an institution by resort only to a term by which it at times has been loosely designated.

In the opinions filed in *State v. Bacon, supra*, the word "asylum" was applied to the institution for the blind, notwithstanding the fact that by the legislature no such descriptive term had been used in the act which provided for its creation and maintenance. By the act approved February 13, 1877, the legislature in its enumeration of the subjects of the powers and duties of the board of public lands and buildings included the asylum for the deaf and dumb and grounds, and the asylum for the blind and grounds. This court in *Re Board of Public Lands and Buildings*, 18 Neb., 340, held that the board just referred to had no power under said act to appoint or remove officers of state institutions, that power, by the adoption of

the constitution, having been devolved upon the governor, and, therefore, it would seem that the word "asylum," as used in the act of 1877, applies simply to a building in each instance of its use. If the scope of the holding in *Re Board of Public Lands and Buildings* is correctly apprehended, it would seem to render of little force the arguments advanced in the opinions filed in *State v. Bacon* as to the second proposition therein discussed, for if, in any event, the supervisory control of the board could extend only to buildings and grounds, that is, to real property, it was immaterial what might be said as to the management of the institution in any other such respect as the removal of the principal of that institution and the recovery from his possession of its personal property. In our view, the sole question is whether or not the institution for the blind at Nebraska City is an educational institution within the purview of section 19, article 5, of the constitution. In the opinion of GANTT, J., filed in *State v. Bacon, supra,* attention was called to the fact that by the act creating the institution for the blind of this state provision was made for a principal, whose duty it was to report to the governor, prior to each session of the legislature, the number of pupils, their names, ages, sexes, as well as the studies and trades taught. He also challenged attention to the fact that by said act teachers were provided for, and that by section 17 thereof it was provided that "all blind persons within the state, of suitable age and capacity, shall be entitled to an education in this institution at the expense of the state," and furthermore, that "each county superintendent of common schools shall report to the principal of the institution for the blind, on the first day of April of each year the name, age, residence, and post-office address of every blind person and every person blind to such an extent as to be unable to acquire an education" (Session Laws, 1875, p. 153) in his county. It was also noted by Judge GANTT that the act appropri-

ated two thousand dollars annually, or so much thereof as might be necessary, to meet the ordinary expenses of the institution, and that the current expenses should be drawn by warrants upon the temporary school fund of the state. The argument made upon consideration of these provisions and the analogies of other statutory provisions was, it seems to us, very convincing. There are other provisions made by statute which tend to fortify Judge GANTT'S argument. Section 14, subdivision 7, chapter 79, Compiled Statutes, provides that "the county superintendent shall report on or before the first Tuesday in September of each year to the superintendent of the blind asylum the name, age, residence, and post-office address of every person blind to such an extent as to be unable to acquire an education in the common schools and who resides in the county in which he is superintendent, and also to the superintendent of the Nebraska institute for the deaf and dumb the name, age, and post-office address of every deaf and dumb person between the ages of five and twenty-one years who resides within his county, including all such persons as may be deaf to such an extent as to be unable to acquire an education in the common schools." These provisions as to the institution for the blind and for that of the deaf and dumb are much the same, whereby is evidenced a recognition of the fact that one is as much educational as the other. By section 17 of the act of 1875 creating the institution for the blind it was provided that all blind persons resident of this state, of suitable age and capacity, shall be entitled to an education at the expense of the state. (Session Laws, 1875, p. 153.) There was no requirement that there should be repayment to the state of any expenses, whatever might be the financial condition of pupils, except those incurred in the purchase of necessary clothing. In the case at bar the right of appellants to be supported in the institution for the blind for all time was based upon the allegations that appellants were blind, poor, and indigent. By section 1,

chapter 67, Compiled Statutes, provision is made for the support of every person "unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause." In the first instance the duty of support is devolved upon the relatives of the pauper. If their circumstances are such that they cannot furnish such support the county assumes that liability. As the appellants have shown that they are blind, poor, and without means of subsistence, they are entitled to support in their respective counties out of the poor fund raised for that purpose. The authorities of the state could not divert its temporary school fund to the establishment and maintenance of a poorhouse even if they so desired. It is quite clear that they have made no such attempt, but that the institution for the blind is educational in its purpose, the provision for shelter and board of the pupils while under instruction being merely a necessary incident. The judgment of the district court is

AFFIRMED.

LYDIA BUTLER, APPELLEE, V. JOHN FITZGERALD ET AL., APPELLANTS.

FILED JANUARY 2, 1895. No. 6385.

1. **Dower.** The statute of this state, prescribing in what real estate of the husband a wife shall be entitled to dower, is but declaratory of the common law.

2. ———: DURATION. When lawful marriage of a man and woman and the ownership of real estate by the former concur, an inchoate dower right attaches in the nature of a charge or incumbrance upon the real estate of the husband; and when such right has once attached, it remains and continues a charge or incumbrance upon the real estate, unless released by the voluntary act of the wife or be extinguished by operation of law, and is consummate upon the death of the husband.

3. **Judicial Sales.** The rule of *caveat emptor* applies to a purchaser of real estate at a judicial sale thereof on execution; and the conveyance made in pursuance thereof conveys no greater estate than would a quitclaim deed for the real estate executed by the execution debtor.

4. ———: DOWER NOT EXTINGUISHED BY. The sale of the real estate of the husband under execution on a judgment against him alone, followed by judicial confirmation and conveyance, does not extinguish the inchoate dower right of the wife in such real estate, and upon the death of the husband the wife is entitled to have her dower assigned out of such real estate.

5. **Dower:** STATUTORY CONSTRUCTION. Real estate which has been sold under execution on a judgment against the husband alone, such sale followed by judicial confirmation and conveyance, is real estate aliened by the husband, within the meaning of section 7, chapter 23, Compiled Statutes, 1893.

6. ———: ———. The phrase "enhanced in value," found in section 7, chapter 23, Compiled Statutes, 1893, is limited in its meaning to appreciation in the value of real estate by reason of improvements put thereon by the alienee.

7. ———: ASSIGNMENT: APPRAISEMENT. In estimating the value of real estate, aliened by the husband during his marriage, for the purpose of assigning his widow dower therein, the value of the real estate is to be estimated as it is at the time of the assignment of dower, excluding the increase in value of the real estate resulting from improvements made thereon by the alienee subsequent to the date of alienation.

APPEAL from the district court of Lancaster county. Heard below before TIBBETS, J.

Marquett, Deweese & Hall and *Abbott, Selleck & Lane*, for appellants:

The sheriff's sale was an alienation within the meaning of section 7, chapter 23, Compiled Statutes. (*Smith v. Addleman*, 5 Blackf. [Ind.], 407; *Powell v. Monson & Brimfield Mfg. Co.*, 3 Mason [U. S.], 374; *Wood v. Morgan*, 56 Ala., 397; *Price v. Hobbs*, 47 Md., 359.) And the value at the time of such alienation should be the basis of computing the dower interest. (*Guerin v. Moore*, 25 Minn.,

462; *Walker v. Schuyler*, 10 Wend. [N. Y.], 480; *Dorchester v. Coventry*, 11 Johns. [N. Y.], 510; *Humphrey v. Phinney*, 2 Johns. [N. Y.], 484; *Allan v. Smith*, 1 Cow. [N. Y.], 180; *Shaw v. White*, 13 Johns. [N. Y.], 179; *Dolf v. Basset*, 15 Johns. [N. Y.], 21; *Marble v. Lewis*, 53 Barb. [N. Y.], 432.)

As to the definition of dower see *Hurst v. Hotaling*, 20 Neb., 178.

Appellee's estate should also be diminished by the amount of the taxes and interest thereon. (Cons. Stats., sec. 4380; *Dworak v. More*, 25 Neb., 735; *Page v. Davis*, 26 Neb., 670.)

Stewart & Munger and *Leese & Starling, contra:*

Appellee was not liable for the taxes paid by Wright. (*Miller v. Pence*, 23 N. E. Rep. [Ill.], 1032; *Felch v. Finch*, 52 Ia., 563; *Vinson v. Gentry*, 21 S. W. Rep. [Ky.], 578; *Shell v. Duncan*, 10 S. E. Rep. [N. Car.], 330.)

The value at the time of assigning dower should be taken. (*Thompson v. Morrow*, 5 Serg. & R. [Pa.], 289; *Johnston v. Vandyke*, 6 McLean [U. S.], 422; *Shirtz v. Shirtz*, 5 Watts [Pa.], 255; *Powell v. Monson & Brimfield Mfg. Co.*, 3 Mason [U. S.], 347; *Mosher v. Mosher*, 15 Me., 371; *Allen v. McCoy*, 8 O., 418; *Smith v. Addleman*, 5 Blackf. [Ind.], 406; *Wall v. Hill*, 7 Dana [Ky.], 172; *Rawlins v. Buttel*, 1 Houst. [Del.], 224; *Wooldridge v. Wilkins*, 3 How. [Miss.], 360; *Dunseth v. Bank of United States*, 6 O., 78; *Green v. Tennant*, 2 Har. [Del.], 336; *Bowie v. Berry*, 1 Md. Ch., 452; *Summers v. Babb*, 13 Ill., 483; *Fritz v. Tudor*, 1 Bush [Ky.], 28; *Boyd v. Carlton*, 69 Me., 200; *Price v. Hobbs*, 47 Md., 359; *Manning v. Laboree*, 33 Me., 343; *Hobbs v. Harvey*, 16 Me., 80; *Thornburn v. Doscher*, 32 Fed. Rep., 812; *Westbrook v. Vanderburgh*, 36 Mich., 30.)

The title acquired in the land by the purchaser at a sale under execution is that only of the person against whom

the execution is issued. (Secs. 490 and 500, Code; *Mansfield v. Gregory*, 8 Neb., 432; *Westheimer v. Reed*, 15 Neb., 662; *Dayton v. Corser*, 53 N. W. Rep. [Minn.], 717.)

And an execution against the husband alone will not bar the widow's dower. (*Dayton v. Corser*, 53 N. W. Rep. [Minn.], 717; *Dingman v. Dingman*, 39 O. St., 172; *Parmenter v. Binkley*, 28 O. St., 32; *Mandel v. McClave*, 46 O. St., 407; *Gould v. Luckett*, 47 Miss., 116; *Cowan v. Lindsay*, 30 Wis., 587; *Combs v. Young*, 26 Am. Dec. [Tenn.], 225; *Rutherford v. Read*, 6 Humph. [Tenn.], 423; 1 Scribner, Dower, p. 472; Freeman, Judgments [2d ed.], sec. 361*a*; *Gove v. Cather*, 23 Ill., 634; *Hamilton v. Southern Nevada Gold & Silver Mining Co.*, 33 Fed. Rep., 562; *Grissom v. Moore*, 100 Ind., 296; 5 Am. & Eng. Ency. of Law, par. 11, p. 921; *Vinson v. Gentry*, 21 S. W. Rep. [Ky.], 578; *Snyder v. Snyder*, 6 Mich., 469.)

RAGAN, C.

It appears from a stipulation of the parties to this suit in the record that the material facts in this case are that Lydia Butler and David Butler were husband and wife, and resided as such in this state from the year 1866 until David Butler's death, in May, 1891, and that Lydia Butler still resides in this state; that on the 6th of October, 1879, David Butler was the owner in fee-simple of certain real estate, which on said day was levied upon by an execution issued on a judgment obtained against David Butler alone and sold to satisfy such judgment; that John Fitzgerald became the purchaser of said real estate at said execution sale, and said sale was followed by a judicial confirmation and conveyance to him of said real estate. Lydia Butler brought this suit to the district court of Lancaster county against John Fitzgerald and others to recover her dower in said real estate which had been sold and conveyed under execution as aforesaid. She had judgment, and John Fitzgerald and others interested in said real estate have appealed.

The stipulation of facts referred to, and on which the case was tried in the court below, provides that if the court shall find that Lydia Butler was entitled to dower in said real estate, the court shall ascertain the value of such dower interest and render judgment therefor in her favor; that said Lydia Butler agrees to accept a gross sum of money in lieu of said dower. The two important questions presented by this appeal are:

1. Does the sale of the real estate of a husband under execution on a judgment against him alone, followed by judicial confirmation and conveyance, extinguish the dower interest of the widow of said husband in said real estate? Blackstone defines "dower" at common law thus: "Tenant in dower is where the husband of a woman is seized of an estate of inheritance and dies; in this case the wife shall have a third part of all the lands and tenements whereof he was seized at any time during the coverture, to hold to herself for the term of her natural life;" and he further says that the object of the common law in giving a widow dower in the estate of her husband was to provide "for the sustenance of the widow and for the nurture and education of the younger children." (1 Cooley's Blackstone, book 2, pp. 128, 129.) Section 1, chapter 23, Compiled Statutes, 1893, provides: "The widow of every deceased person shall be entitled to dower, or the use, during her natural life, of one-third part of all the lands whereof her husband was seized, of all [an] estate of inheritance at any time during the marriage, unless she is lawfully barred thereof." It will be seen that our statute in the matter of a widow's dower follows the rule of the common law, or, more properly speaking, the statute is but declaratory of the common law. In 2 Scribner, Dower, page 2, section 2, it is said: "It will be observed that this estate [dower] arises solely by operation of law and not by force of any contract, expressed or implied, between the parties; it is the silent effect of the relation entered into by them, not as in itself inci-

dental to that relation or as implied by the marriage contract, but merely as that contract calls into operation the positive institutions of the municipal law." And it was expressly held in *Shearer v. Ranger*, 39 Mass., 447, that "an inchoate right of dower is an existing incumbrance on land within the meaning of the covenant against incumbrances." However this may be, it is clear that when a lawful marriage of a man and woman and the ownership of real estate by the former concur, an inchoate dower right attaches in the nature of a charge or incumbrance upon the real estate of the husband. Under certain conditions, unnecessary to notice here, the dower right may never attach, but when it has once attached, it remains and continues a charge or incumbrance upon the real estate, unless released by the voluntary act of the wife or extinguished by operation of law; and is consummate upon the death of the husband, and in certain other contingencies, not involved in this case, provided for by section 23 of chapter 25 of the statutes, entitled "Divorce and Alimony." In this case none of the conditions existed which prevented the inchoate dower right of Lydia Butler from attaching to the real estate of her husband owned by him at the time of his marriage to her or acquired by him thereafter. The husband is dead, and we now proceed to inquire whether his widow, within the meaning of section 1, chapter 23, quoted above, has been or is "lawfully barred" of a dower interest in the real estate in controversy. The rule of the common law as to the effect of a husband's acts during the coverture on the dower interest of his wife in his real estate is thus stated in 1 Scribner, Dower, page 603, section 1: "After the right of dower has once attached it is not in the power of the husband alone to defeat it by any act in the nature of an alienation or charge. It is a right attaching in law, which, although it may possibly never become absolute, (as if the wife died in the lifetime of the husband,) yet, from the moment that the facts of marriage and seizin concur, it is so fixed on the land as

to become a title paramount to that of any person claiming under the husband by subsequent act. The alienation of the husband, therefore, whether voluntary, as by deed or will, or involuntary, as by bankruptcy or otherwise, will confer no title on the alienee as against the wife in respect of her dower, but she will be entitled to recover against such alienee, (except as to damages,) in the same manner as she would have recovered against the heir of the husband had the latter died seized." In the case at bar the real estate in controversy was not aliened by the husband, as that phrase is ordinarily understood. He was deprived of the title to this real estate involuntarily; and we may presume that the only act of his which led to his being deprived of this real estate by the law was his voluntarily contracting the debt made the basis of the judgment, under which the real estate was sold. The decisions of the courts of last resort of the states in construing statutes like our own, and the decisions of the courts of last resort of the states whose statutes do not define power, but follow the common law rule, sustain the proposition quoted above from Scribner, as to the inability of a husband by any voluntary act of his to bar his wife's right of dower to his real estate, after such right has once attached, either directly or indirectly. In *Pifer v. Ward*, 8 Blackf. [Ind.], 251, it was held that "if a mechanic's lien accrue after the employer's marriage, and the employer die after the accruing of the lien, the right of dower of the employer's widow will be paramount to the lien;" and in *Bishop v. Boyle*, 9 Ind., 169, it was held that "the widow's right of dower extends to and includes a house erected on lands of her husband, and her claim is superior to a mechanic's lien for which the property was sold under a decree against the husband to enforce the lien." The court said: "The wife's dower is a favorite of the law, not resting in contract or resulting from the marriage relation. Hers is the elder lien. The mechanic bestows his labor with a knowledge

of her prior right to the real estate, and he knows that the house he is building, as brick is added to brick and nail after nail is driven, becomes real estate. He can protect himself by security or not venture. She is passive and can do nothing. It is for this reason that she is declared to be a favorite of the law." (See, also, *Mark v. Murphy*, 76 Ind., 534.) In *Shaeffer v. Weed*, 3 Gil. [Ill.], 511, it was held that "a widow's dower cannot be affected by the lien created by the statute for the benefit of mechanics, etc., but she is entitled to dower in all the real estate of which her husband was seized during coverture, unless she has released it in the form prescribed by law." In *Gove v. Cather*, 23 Ill., 634, it was held that the enforcement of a mechanic's lien for improvements made by the husband in his lifetime will not cut off his wife's right of dower even to the extent of the value of such improvements. (See, also, *Dingman v. Dingman*, 39 O. St., 172.) In *Grady v. McCorkle*, 57 Mo., 172, William Grady owned certain lands and agreed with his son Leonard that if the latter would go on the lands and improve them he would convey the same to him by way of advancement and charge him with their value. Leonard took possession of the lands and made improvements on them and occupied the lands until his death. William Grady died not having conveyed the lands to Leonard. The widow and heirs of Leonard Grady brought a suit against the widow and heirs of William Grady for specific performance of William Grady's contract, and the court decreed a specific performance of the contract. The widow of William Grady was a party to this suit and served with process but made no appearance. After this the widow of William Grady brought suit for her dower interest in the lands, and the court held: "The alienation of real estate by the husband, whether voluntary, as by deed or will, or involuntary, as by proceedings against him, or otherwise, will confer no title on the alienee as against the wife in respect to her dower;" and that the suit

for specific performance of the contract made by the widow's husband and the decree enforcing such contract did not bar the widow's dower rights, as they were not drawn in question in the specific performance suit; that the decree in that case had the same effect and no more than a deed would have had executed by William Grady alone at the time the decree was rendered had he then been living. Section 64, chapter 46, General Statutes of 1878, of the state of Minnesota, provides that a surviving husband or wife shall be entitled to and shall hold in fee-simple an undivided one-third of all lands of which the deceased was at any time during the marriage seized or possessed. A wife owned certain real estate. A judgment was obtained against the wife and her lands levied upon and sold to satisfy the judgment. The wife then died, and the husband brought suit against the purchasers of the real estate at the execution sale to recover his rights in said real estate. And in *Dayton v. Corser*, 53 N. W. Rep., 717, the supreme court of Minnesota held that "the inchoate contingent interest of a husband or wife in real estate owned by the other fixed (by the statute just quoted), and commonly called the 'dower right,' is not divested by a transfer of title from the owner of the property to a purchaser at an execution sale founded upon a judgment against such owner." The court said: "It hardly seems necessary to cite authorities to the proposition that at common law a wife could not be deprived of her dower rights in the real estate of her husband through a sale upon execution under a judgment obtained against him subsequently to the marriage." (See, also, *Barker v. Parker*, 17 Mass., 563.) It is to be remembered that the language of our statute is that the widow shall have dower in all the real estate of which her husband was seized during the marriage, "unless she is lawfully barred thereof." Keeping in view the nature of a dower interest as defined by the common law and the reason and spirit of the common law on the subject and the authorities just

cited, we would feel safe in saying that the dower rights of the appellee in this case were not extinguished or barred by the sale on execution of her husband's real estate during his life on a judgment rendered against him. But our statute has not remitted the courts for guidance entirely to the common law and common law decisions in respect of dower for determining in what manner a wife or widow may be lawfully barred of her dower rights. Sections 12, 13, and 15 of chapter 23, Compiled Statutes, 1893, provide in what manner a married woman may bar her dower rights in the real estate of her husband. Substantially these provisions provide that a married woman shall be deemed to have released or waived her rights to dower in her husband's real estate only by her voluntary act or contract; and section 43 of chapter 73, Compiled Statutes, 1893, provides that a married woman, "to convey her right of dower, she must execute a deed with or without her husband;" and section 7 of said chapter 23 provides that "when a widow shall be entitled to dower out of any lands which shall have been aliened by the husband in his lifetime, * * * such lands shall be estimated in setting out the widow's dower according to their value at the time when they were so aliened." This statute is of itself a legislative recognition of the inability of a husband to deprive his wife of her dower rights in his real estate by a direct or indirect alienation thereof. And section 477 of the Code of Civil Procedure provides that judgments shall be a lien upon the lands of a debtor; and section 491*a* of the Code provides that when an execution shall be levied upon real estate the sheriff shall cause the interest of the execution debtor in such real estate to be appraised at its real value; and by sections 499 and 500 of the Code it is provided, in substance, that the sale of a debtor's real estate on execution, and the conveyance of such real estate to the purchaser thereof at such sale, shall vest in such purchaser the interest which the execution

debtor had in said real estate at the time the judgment under which it was sold became a lien thereon. In the case at bar David Butler had the title to the real estate in controversy at and before the time it was sold on execution, but that title was incumbered or burdened with the inchoate dower interest of his wife, the appellee, and when the judgment was rendered against David Butler it became a lien upon the interest of David Butler in said real estate, but that lien was subject to the inchoate dower interest of the wife therein. When this real estate was sold and the sale confirmed and the sheriff executed a deed in pursuance thereof, he conveyed to Fitzgerald all the interest that David Butler had in this real estate, and such purchaser took the title to this real estate charged with the same burdens and incumbrances thereon that it was charged while the title rested in David Butler, the wife's inchoate dower right. The rule of *caveat emptor* applies to a purchaser of real estate at a judicial sale thereof on execution, and the conveyance made to such a purchaser by the sheriff has no greater effect and conveys no greater estate than would a quitclaim deed for the premises executed by the execution debtor. (*Norton v. Nebraska Loan & Trust Co.*, 35 Neb., 466; *Hamilton v. Southern Nevada Gold & Silver Mining Co.*, 33 Fed Rep., 562.) What the law does not permit a husband to do directly he may not do by indirection; and as we have seen it was not in the power of David Butler, by voluntarily alienating his real estate during his marriage, to deprive his wife of her dower rights therein, it logically follows that the sale of David Butler's real estate on execution on a judgment rendered against him alone did not bar or extinguish the dower right of his wife or widow therein; and it is immaterial whether the debt on which such judgment was rendered was contracted voluntarily or otherwise by the husband. We accordingly hold and decide that the sale of the real estate of a husband under execution on a judgment against him alone, followed

by judicial confirmation and conveyance, does not extinguish the inchoate dower of the wife in such real estate; and that upon the death of the husband the widow is entitled to have her dower assigned out of such real estate.

2. The second question is, in estimating the value of the real estate in controversy for the purpose of assigning the widow her dower therein, whether its value at the date of the judicial conveyance made thereof in pursuance of its sale on execution, or its value at the date of the husband's death, shall be adopted. At common law the rule was if a husband died seized of real estate, in estimating its value for assigning his widow dower therein its value at the date of the assignment of dower was adopted. (2 Scribner, Dower, sec. 30, p. 595.) The present English rule is that, where the title to real estate is in an alienee of the husband, in estimating the value of such real estate for the purpose of assigning the husband's widow dower therein, the value of the real estate at the time of the husband's death is taken; and if improvements have taken place between the time of the husband's death and the time of the assignment of dower, then the value must be taken at the date of the assignment. The common law rule for estimating the value of real estate out of which dower is to be assigned to a widow, the title to which real estate is at the time in an alienee or a grantee of an alienee of the husband, is stated in some old English cases found in 2 Scribner, Dower, 605, as follows: "If a man be seized of land in fee, and take a wife, and enfeoff a stranger of the land, and the feoffee builds thereupon a castle or mansion-house, or other buildings, or otherwise improves it, so that it is worth more by the year than when it was in the possession of the husband, the wife shall not have her dower, but according to the value it was of in the time of her husband." "E., who was the wife of R., demands one-third part of three acres of land with the appurtenances in E., as her dower, against W., and W. comes and says that he bought the land of her

husband, naked and unbuilt upon, and he built upon it; and he willingly allows to her her third part, saving the buildings to himself. And therefore she had her seizin, saving to the said W. the houses built by him, etc., because he had, without the buildings, where she might have her land, etc." In *Humphrey v. Phinney*, 2 Johns. [N. Y.], 484, Chief Justice Kent, who delivered the opinion in that case, cited the old English cases just quoted and declared that "such was the law as understood and declared in the most ancient decisions of which we have any record." The American rule follows the rule of the common law. (2 Scribner, Dower, 612. See the rule stated and the authorities collated in support thereof in 5 Am. & Eng. Ency. of Law, p. 929, note 2.) Section 7, chapter 23, Compiled Statutes, 1893, provides: "When a widow shall be entitled to dower out of any lands which shall have been aliened by the husband in his lifetime, and such lands shall have been enhanced in value after the alienation, such lands shall be estimated, in setting out the widow's dower, according to their value at the time when they were so aliened." This statute is declaratory of and follows the common law rule. But the real estate in this controversy was sold under execution on a judgment rendered against the husband alone. Was the judicial sale of this real estate and the confirmation and conveyance made in pursuance thereof an "alienation" of such real estate by the husband within the meaning of this statute? It would seem that the alienation mentioned in the statute meant some voluntary act of the husband. The word "alienate" means: "To transfer property to another; to make a thing another man's. In common law to alienate realty is voluntarily to part with ownership in it, by bargain and sale, conveyance, gift, or will." "Alienation" means: "An act whereby one man transfers the property and possession of lands, tenements, or other things to another." (Anderson's Law Dictionary.) But in *Ayer v. Spring*, 9 Mass., 7, it was held that "where

land was taken by execution from a husband, the wife was held to be dowable in the land, as it existed at the time of the extent of the execution, and not in the erections or improvements afterwards made;" and in *McClanahan v. Porter*, 10 Mo., 746, it was held that "a purchaser of lands under execution against the husband occupies the same position as the alienee of the husband." To the same effect see *Price v. Hobbs*, 47 Md., 359; *Wood v. Morgan*, 56 Ala., 397. These authorities are quoted with approval, or rather without dissent, in 2 Scribner, Dower, p. 612. We feel constrained therefore to hold that real estate which has been sold under execution on a judgment against the husband alone, such sale confirmed and a conveyance made in pursuance thereof, is real estate aliened by the husband within the meaning of said section 7, chapter 23.

It appears from the stipulation of facts in this case that the real estate in controversy at the date of the judicial conveyance made thereof in pursuance of its sale on execution was of a certain value, and that the value of the real estate at the date of David Butler's death, exclusive of improvements thereon, was of a different value. The contention of the appellant is that in estimating the value of this real estate for the purpose of assigning Mrs. Butler dower therein its value at the date of the judicial conveyance thereof made in pursuance of its sale on execution should be taken, while the appellee contends that the real estate as it existed at the date of David Butler's death, excluding improvements made thereon since the date of the sheriff's deed, should be the one adopted. The statute, said section 7, chapter 23, provides that in estimating the value of the real estate for the purpose of the widow's dower therein its value at the time it was aliened shall be taken when such real estate shall have been enhanced in value after the alienation. We are thus brought to the consideration of the question, what is the meaning of "enhanced in value" in the statute? Does it mean an appreciation

and increase in value from any and all causes, or is it limited in its meaning to appreciation in the value of the real estate by reason of improvements put thereon by the alienee? In *Thornburn v. Doscher*, 32 Fed. Rep., 810, the precise question arose and the court held that "in estimating the value of a widow's dower in land aliened by the husband in his lifetime, she ought to have the benefit of the increase in value between the date of such alienation and the death of the husband, not arising from improvements made or placed thereon." In *Allen v. McCoy*, 8 O., 418, it is said that in making assignment of dower, the rule of value is to be taken at the time of assignment; but all increased value from actual improvements on the ground is to be excluded. In *McClanahan v. Porter*, 10 Mo., 746, it was held that "where lands have increased in value from extrinsic causes not connected with the labor or expenditures of the alienee, the widow takes according to the value at the time of the assignment." In *Summers v. Babb*, 13 Ill., 483, it was held: "A widow is only entitled to take her dower according to the valuation of the land at the time of the alienation. She is not dowable of improvements put upon the land, but is entitled to the benefit of its increased value, arising from other causes than the labor and expenditure of the alienee." In *Thompson v. Morrow*, 5 Serg. & R. [Pa.], 289, Tilghman, C. J., discussing the point under consideration, said: "So far as concerns improvements made by the alienee, it is agreed that the tenant shall be protected from this hardship; but as to any value which may chance to arise from the gradually increasing prosperity of the country, and not from the labor or money of the alienee, it would be hard indeed upon the widow, if she were precluded from taking her share of it. She runs the risk of any deterioration of the estate, which may arise either from public misfortune, or the negligence, or even the voluntary act of the alienee; for, although he destroy the buildings erected by the husband,

the widow has no remedy, nor can she recover any more than one-third of the land as she finds it at the death of her husband." And in *Powell v. Monson & Brimfield Mfg. Co.*, 3 Mason [U. S.], 347, Mr. Justice Story, referring to the opinion of *Thompson v. Morrow*, *supra*, said: "This doctrine appears to me to stand upon solid principles, and the general analogies of the law. If the land has in the intermediate period risen in value, she receives the benefit; if it has depreciated, she sustains the loss. * * * If, on the other hand, the value of the land has increased solely from the improvements made upon it, and without those improvements it would have remained of the same value as at the time of the alienation, the old value, and not the improved value, is to be taken into consideration. For practical purposes it is impossible to make any distinction between the value of the improvements and the value resulting from the improvements; between improvements which operate on a part of the land, and those which operate upon the whole. Upon the whole my judgment is that the dower must be adjudged according to the value of the land in controversy at the time of the assignment, excluding all the increased value from the improvements actually made upon the premises by the alienees, leaving to the dowress the full benefit of any increase of value arising from circumstances unconnected with those improvements." We think the reasoning of these cases is unanswerable, and we therefore conclude that in estimating the value of real estate aliened by the husband during his marriage for the purpose of assigning his widow dower therein, the value of the real estate is to be estimated as it stood at the time of the assignment of dower, excluding the increase in value of the real estate resulting from improvements made thereon by the alienees after the date of the alienation. The judgment of the district court is

AFFIRMED.

DAVID B. L. BREED, APPELLEE, V. VIOLET MCCOY ET AL., APPELLEES, IMPLEADED WITH JOHN FITZGERALD ET AL., APPELLANTS.

FILED JANUARY 2, 1895. No. 5724.

Res Adjudicata. The facts and the questions of law involved in this case are the same as in *Butler v. Fitzgerald*, 43 Neb., 192, and on the authority of the latter case the judgment of the district court rendered in this case is affirmed.

APPEAL from the district court of Lancaster county. Heard below before TIBBETS, J.

Marquett, Deweese & Hall, for appellants.

Stewart & Munger and *Leese & Starling, contra.*

RAGAN, C.

The facts in this case and the questions of law involved are the same as in *Butler v. Fitzgerald*, 43 Neb., 192, decided at this term, and on the authority of the latter case the judgment of the district court rendered herein is

AFFIRMED.

GIDEON E. MYERS ET AL., APPELLEES, V. CATHERINE MAHONEY ET AL., APPELLANTS.

FILED JANUARY 2, 1895. No. 6796.

Foreclosure: DECREE: EFFECT AS TO PARTIES DISCLAIMING. In an action to foreclose mortgages persons who were made defendants upon allegations charging them with being the owners of the equity of redemption, but against whom no personal relief was sought, cannot be heard to complain of a decree affecting merely the land when by their pleadings they have disclaimed all interest therein.

APPEAL from the district court of Dawes county. Heard below before BARTOW, J.

Spargur & Fisher, for appellants.

D. B. Jenckes, C. H. Bane, and *W. W. Wood, contra.*

IRVINE, C.

The pleadings in this case are complicated and peculiar, the proceedings were for the most part unusual, the decree is difficult of construction. The considerations which must control a review of the case are, however, simple. The action was brought by Gideon E. Myers and Joseph E. Boone to foreclose a mortgage on lot 12, block 11, in the city of Chadron. The defendants were Catherine Mahoney, Jeremiah Mahoney, Joseph Beatty, Charles E. Foster, the Western Farm Mortgage Company, the Mercantile Trust Company, and one Good. The Western Farm Mortgage Company and Good made no appearance. The petition alleged the making and delivery by the Mahoneys to the plaintiffs of three promissory notes, all of which matured before action brought, and a mortgage securing said notes. It alleged that the plaintiffs had been partners under the name of Myers & Boone, and the notes were payable to "Myers & Boone" by that name. The mortgage nowhere appears in the record. The petition also alleged facts in support of a prayer for a receiver.

The Mercantile Trust Company filed an answer confessing the plaintiffs' petition, and a cross-petition alleging the making and delivery to the Western Farm Mortgage Company of a promissory note by Myers and wife and Josiah B. Boone and wife, who are elsewhere described as the plaintiffs, and the execution by the same persons of a mortgage on the property in controversy to secure the note. The cross-petition, in addition to other averments necessary to a foreclosure, pleads a transfer of the note and mortgage

by the Western Farm Mortgage Company to the Mercantile Trust Company.

J. L. Browne filed a petition to be made a party defendant. No order making him such party appears, but he nevertheless filed an answer and cross-petition, alleging the making and delivery by Myers and wife and Josiah B. Boone and wife to the Western Farm Mortgage Company of another note and of a mortgage on the premises in controversy securing the same. He alleges that he has title to said note and mortgage through an assignment to him for the benefit of creditors, made by the Western Farm Mortgage Company. Elsewhere in the record the plaintiff Boone is named as Jacob Boone. This confused state of the pleadings in regard to the name of one of the plaintiffs is not material to a decision of the case, but is mentioned merely to illustrate the general condition of the record.

The record discloses that after the execution of the two mortgages to the Western Farm Mortgage Company the land was conveyed to Catherine Mahoney, and that the mortgage to the plaintiffs and the notes to secure which it was given were executed by Catherine and Jeremiah Mahoney. The petition charges that the Mahoneys conveyed to Beatty and Foster without consideration and for the sole purpose of enabling Beatty, Foster, and the Mahoneys to receive and retain the rents to the exclusion of plaintiffs.

Foster and Beatty filed an answer as follows:

"The defendants Foster and Beatty, each for himself answering the petition of plaintiffs and defendants' cross-petition, denies each and every allegation therein set out, except as to the execution of notes sued upon and mortgages, and of these, having no knowledge, they demand strict proof.

"And these defendants, as to the cross-petition, demur thereto on the ground that the facts stated in said petition do not constitute a cause of action."

The Mahoneys filed an answer as follows:

"Now come the said defendants Mahoney, and each for himself, as a separate answer to the petition of the plaintiffs, alleges that they each deny every allegation contained in said petition except such as are herein specifically admitted.

"2. And each of said defendants alleges that defendant Catherine Mahoney is and was at all the dates hereinafter set out and at all dates mentioned in petition of plaintiff a married woman, and she did not at any of the transactions mentioned contract with relation to her separate estate, and she did not take title to the property in controversy, for the purchase and holding thereof, but as the grantors thereof were well advised at the date of said deed, was taken in said Catherine Mahoney simply and solely as a matter of convenience in transferring the same.

"3. And said defendants allege that they, in good faith, for valuable consideration and without any fraudulent intention, transferred said real estate to present owners, and without any benefit or interest, of any nature whatsoever, to them or either of them.

"4. And for a defense and counter-claim against plaintiffs, defendants and each of them allege that plaintiffs failed and neglected to pay the interest upon said mortgage of plaintiffs to Western Farm Mortgage Company, and the taxes for the year 1892, and the second mortgage given by plaintiffs in the sum of $583.65, amounting in all to the sum of $825; that in the warranty deed made by plaintiffs to these answering defendants at date of the mortgage sued upon by plaintiffs said plaintiffs covenanted said premises to be free from said and all incumbrances except $4,000 mortgage, as will appear by Exhibit A to affidavits of Foster & Beatty on file herein, which is made a part of this answer, and is a true copy of the deed of conveyance by plaintiffs to Mahoney, and thereby by the breach thereof all the defendants hereto were damaged in the sum of $825, for which amount defendants pray an

accounting may be taken and had between them and the plaintiffs, and for judgment; and defendants allege further that by reason of all of said delinquencies the said holder of first mortgage was incited by plaintiffs to begin a foreclosure of their said mortgage before said mortgage was rightfully due, and has falsely and maliciously published in their pleadings herein, and in the affidavits filed to procure a receiver herein, that defendants and each of them is and was insolvent, which is false and untrue, and not warranted by the facts, and which had damaged these answering defendants in the sum of $2,000, for which amounts, together with a dismissal of plaintiffs' petition, these defendants pray.

"5. Defendants admit simply the execution of the instruments set out in plaintiffs' petition.

"And by way of defense to cross-petitions these defendants allege that the facts stated therein do not constitute a cause of action against either of these defendants."

On the 26th day of February, 1894, a decree was entered, which recites, however, that the case was heard and determined January 25. From this decree it would appear that the plaintiffs had demurred to the answer of the Mahoneys, because the decree opens with a recital that the case being heard upon such demurrer, the court "doth sustain such demurrer to the second and third, and part of the fourth, paragraphs of said answer." The decree then recites that the demurrers to the cross-petitions are overruled, and that the case being heard on the pleadings and evidence, the court found in favor of each of the mortgagees and awarded foreclosure, and that the hearing of the application for a receiver was by consent postponed until February 8; that on February 8 such application was heard, and at that date (about two weeks after final hearing on the merits, before any appeal was instituted or any application made for a stay) the court appointed a receiver to take charge of the property "during the pendency of

this action and until final determination and disposition thereof be made by the court." From this decree the Mahoneys, Beatty, and Foster appeal.

Recurring to the answer of Foster and Beatty it will be seen that they deny every allegation of the petition except the execution of the notes and mortgages. Among the allegations so denied are the averments that they claimed an interest in the property and that the premises were conveyed to them. They, therefore, show no interest in the action and their answer amounts to a disclaimer. No personal relief was awarded or sought against them. Without regard to the correctness of the proceedings they have shown no grounds for an appeal. With such an answer on file they have no right to complain of the decree which relates to the property alone. The Mahoneys are in the same position. Mrs. Mahoney in the second paragraph of the answer expressly disclaims any beneficial interest in the premises, and in the third paragraph both the Mahoneys aver that they conveyed the real estate "to present owners" for value and without any fraudulent intent. The last clause of this paragraph is somewhat ambiguous, but taken in connection with the rest evidently means that there was no benefit or interest reserved to the Mahoneys. No personal judgment was prayed for against the Mahoneys and the decree relates only to the property and establishes no personal liability against them. The Mahoneys, therefore, claiming no interest in the premises, cannot complain of the decree. For the foregoing reasons the judgment of the district court is

AFFIRMED.

CHADRON BANKING COMPANY, APPELLEE, V. JEREMIAH MAHONEY ET AL, IMPLEADED WITH JOSEPH M. ROBINSON, APPELLANT.

FILED JANUARY 2, 1895. No. 6794.

1. **Appeal and Error:** ELECTION: HOW DETERMINED. The filing with a transcript of the record of a paper containing assignments of error will not alone require the court to treat the proceeding as one in error and not as an appeal. To have such effect the instrument filed should possess the essential elements of a petition in error.

2. **Pleading:** DEFENSES. Whether the grantee of a married woman may defend against a mortgage given by her before the conveyance on the ground that it was given only to secure her husband's pre-existing debt, *quære.* Such defense must be pleaded in order to be availing.

3. **Review:** BILL OF EXCEPTIONS: OMISSIONS FROM. The only objection to the introduction of a written instrument was that it appeared upon its face to have been altered in a material part. The objection was overruled by the district court, and neither the copy of the instrument in the bill of exceptions nor the other evidence therein disclosed such alteration. *Held,* That error did not appear.

4. ———: AFFIDAVITS NOT USED BELOW. In such case an affidavit not used on the hearing in the district court but attached to the record here is incompetent to show that the original instrument appeared to be altered.

5. ———: TRANSCRIPT. In reviewing cases in this court the transcript here filed is the sole, conclusive, and unimpeachable evidence of the proceedings in the district court.

6. ———: PARTIES: WAIVER. Where a stranger filed a petition in a case asking to be made a party, and thereafter filed pleadings but obtained no order of the court making him a party, and the party appealing did not answer his pleading, but on the trial cross-examined his witnesses, and the court, without special objection thereto, entertained the case of such intervenor and rendered a decree thereon, *held,* that the appellant could not for the first time in this court urge that the intervenor had not in fact become a party.

7. **Pleading:** EVIDENCE. Where averments in a cross-petition are not denied, proof to establish them is unnecessary, and a decree will not be set aside because the proof offered was incompetent.

8. **Receivers.** The appointment of a receiver is a provisional remedy and should not be made at the time of the final decree except where an occasion exists whereunder the statute or usages of courts of equity authorize such appointment.

9. ——: ERROR IN APPOINTING. Therefore, in an action to foreclose mortgages where the petition prayed for the appointment of a receiver pending the action, but the application was not heard until final hearing, the court erred in appointing a receiver upon the final hearing, before the institution of an appeal or an application for a stay.

10. ——: APPOINTMENT: GROUNDS. A receiver should not be appointed because a state of affairs is anticipated which would justify such an appointment. The occasion must exist and be not merely anticipated in order to authorize the appointment.

APPEAL from the district court of Dawes county. Heard below before KINKAID, J.

Albert W. Crites, for appellant, cited, contending that there was error in admitting the record of assignment: *Buck v. Gage*, 27 Neb., 306; that no receiver should have been appointed: *Sea Ins. Co. v. Stebbins*, 8 Paige Ch. [N. Y.], 565; *Morris v. Branchaud*, 52 Wis., 191; *Burlingame v. Parce*, 12 Hun [N. Y.], 148; *Smith v. Kelley*, 31 Hun [N. Y.], 387; *Haas v. Chicago Building Society*, 89 Ill., 502.

C. H. Bane, D. B. Jenckes, Spargur & Fisher, and *W. W. Wood, contra*, cited as to the appointment of the receiver: *Jacobs v. Gibson*, 9 Neb., 382.

IRVINE, C.

The Chadron Banking Company brought this action to foreclose a mortgage on lot 11, in block 11, and other property in the city of Chadron. The petition alleged that on February 20, 1893, Jeremiah Mahoney and Catherine

Mahoney, his wife, made and delivered to the plaintiff their promissory note for $3,602.85, and to secure the same executed to the plaintiff a mortgage on the property in question. Then followed other averments necessary to a foreclosure, and allegations of fact in support of an application for a receiver. The petition also alleged that Joseph M. Robinson claimed an interest in said lot 11 by virtue of a quitclaim deed from the Mahoneys, but that the said deed was without consideration and made for the purpose of enabling Robinson to collect the rents and withhold possession from the plaintiff. The Mercantile Trust Company practically confessed the petition, and then, by way of cross-petition, alleged that in 1889 Arthur C. Putnam and wife made and delivered to the Western Farm Mortgage Company a note for $4,000, and executed a mortgage on said lot 11 to secure the same; that the note and mortgage had been transferred to the Mercantile Trust Company. The foreclosure of this mortgage was prayed. J. L. Browne, who was not an original party to the action, filed a petition asking to be made a defendant. No order making him such appears, but he filed a cross-petition alleging the making and delivery by Putnam and wife of another note and mortgage to the Western Farm Mortgage Company and an assignment for the benefit of creditors by the Western Farm Mortgage Company to Browne, and sought a foreclosure of this mortgage. Three defendants claimed mechanics' liens upon the premises, the validity and position of which were confessed on the record. The Western Farm Mortgage Company was a defendant, but made no appearance. The defendant Robinson answered by denying generally all the allegations of the cross-petition of the Mercantile Trust Company. The answer made no reference whatever to the cross-petition of Browne. For answer to the petition Robinson denied all the allegations in regard to the making and delivery of and default in the note and mortgage. He then averred that on May 12, 1893, the

Mahoneys, by deed of quitclaim, for value and in good faith, conveyed the premises to Robinson for his own use and without any trust or reservation in favor of the grantors or any other person. He also pleaded a number of facts relating only to the application for a receiver, and which we need not here notice. The Mahoneys answered denying all allegations in the petition not specifically admitted, then averring that Catherine Mahoney did not in any of the transactions contract with relation to her separate estate; that she did not take title to the property for the purchase and holding thereof, but solely as a matter of convenience; that the Mahoneys, in good faith for value and without intent to defraud, conveyed to "present owners," and then pleaded specifically to the application for a receiver. The Mahoneys made no answer to either cross-petition. Their answer to the petition was a disclaimer of all interest in the property. The petition prayed for a deficiency judgment against the Mahoneys, but on the trial the right to such judgment was expressly waived and the decree establishes no liability against them. The Mahoneys, therefore, have nothing to complain of in the decree, and we do not understand that they appeal therefrom. On the 16th day of February, 1894, a decree was entered reciting that the cause came on to be heard on February 2. The facts are then found in favor of the plaintiff and the cross-petitioners and an order made foreclosing their several liens. The decree then proceeds to recite that the cause came on to be heard on the same day on the application for a receiver and the court made an order appointing a receiver to take charge of the premises "during the pendency of this action and until final determination and disposition thereof be made by the court," with directions to the receiver and a requirement that possession be delivered to him. The defendant Robinson appeals. The appellees contend, however, that the proceeding should be considered as one in error because an

assignment of errors was filed. We do not find such an assignment in the record, but the filing of a paper with the transcript merely indicating the points upon which the appellant relies to reverse the case would not make the proceeding one in error. To have that effect the instrument filed should have the essential elements of a petition in error. The procedure should be such as to disclose an election to proceed in error, not by appeal.

The points argued in the brief of the appellant relate largely to matters of evidence. The first point urged is that the court erred in refusing to permit Robinson to cross-examine the witness Putnam for the purpose of showing that the note to the plaintiff, to secure which the mortgage was made, was made to evidence a pre-existing indebtedness to the plaintiff, and that no consideration was at the time paid to the Mahoneys. If this were true, it would not affect the validity of the mortgage. It is true that Mrs. Mahoney, in her answer, avers that she is a married woman and did not contract with reference to her separate estate; but this plea must be taken as referring to her general personal liability, because she, at the same time, disclaims that she ever had any beneficial interest in the mortgaged premises. Whether a defense would arise in favor of the grantee of a married woman, against her mortgage covering her separate estate, made for the purpose of securing a pre-existing debt of her husband, is not here presented, because Robinson does not plead it. The facts sought to be elicited on cross-examination may have been pertinent to the application for a receiver, but that branch of the case must be disposed of on other considerations.

It is urged that certain oral testimony in regard to the assignment of the mortgage to the Mercantile Trust Company was improperly admitted. It has been frequently held that the improper admission of evidence in a case tried to the court is not alone ground for reversal. A written assignment of the note and mortgage was offered and re-

ceived in evidence. The only objection made to it was that it appeared upon its face to have been altered in a material part, to-wit, in the name of the assignee. This objection was overruled by the court. The bill of exceptions contains a copy of the assignment. This copy discloses no such alteration, and the only evidence that the original disclosed such an alteration was the testimony of one witness that the name of the assignee did not look as if it were the same handwriting as the rest of the instrument, but that the witness did not know whether or not it was the same. There is also attached to the copy referred to an affidavit to the effect that the original did disclose an alteration; that it was in the possession of the opposite party; that affiant had made application to the court to compel its production, and that said application had been denied. This was not an affidavit used on the hearing in the district court. It is no part of the record and cannot be considered here for any purpose. We must review cases here upon the record as made in the district court, and of this record the transcript here filed is the sole, conclusive, and unimpeachable evidence.

It is next urged that the court erred in admitting in evidence the record of the assignment from the Western Farm Mortgage Company to Browne. It will be remembered that there was no order making Browne a party and that Robinson made no answer to his cross-petition. The record discloses, however, that Robinson cross-examined the witnesses sworn on behalf of Browne; that the court entertained on the final hearing Browne's cross-petition, and Robinson did not in the district court, and does not now, complain that the decree in favor of Browne was erroneous because he was not a party. This being true, we must assume that Browne's right to intervene is unquestioned and that he became in fact a party, although in so doing we do not wish to encourage the idea that a stranger may, without leave of the court, file pleadings in a case and obtain relief

where no appearance is made by the parties affected. The instrument offered in evidence was from the miscellaneous record of Dawes county, and was the record of an assignment made in South Dakota by the mortgage company, a corporation of that state, to Browne. The original was not in anywise accounted for, and the presumption, of course, would be that it was in Browne's possession. For this reason, if not for several others, the evidence was incompetent; but Robinson did not answer this cross-petition, and the fact of the assignment was therefore not in issue and its proof was unnecessary.

The other assignments relate to the application for a receiver. This may be disposed of very briefly. The application was for a receiver "pending the action." The terms of the order appointing a receiver were that he should take charge of the property "pending the action." This order was a part of the final decree. The appointment of a receiver is a provisional remedy. It is not the ultimate object of the action, and there is no occasion, after the court has finally determined the rights of the parties, to appoint a receiver "pending the action." The Code, section 266, as well as the usages of courts of equity, provide for the appointment in certain cases of receivers after judgment to carry the decree into effect, but this appointment was not made for any such purpose, but merely for the purpose of holding possession of the property, preserving it and collecting the rents. It is also provided that a receiver may be appointed after judgment to preserve the property during the pendency of an appeal. But this order was made as a part of the final decree; no appeal had been taken; no steps had been taken towards instituting an appeal. It is possible, though this we do not decide, that in some cases a receiver might be appointed pending a stay of execution, but no stay had been asked for. For all that appeared when this receiver was appointed the mortgagees might have proceeded in twenty days (the time fixed for redemp-

tion) to sell the property. It is always a harsh proceeding to oust one from the possession of real estate by the appointment of a receiver. In order to justify such action the trial court should be quite clearly satisfied that grounds for such action exist and that the protection of the rights of the parties requires it. Receivers should not be appointed simply because an occasion for their appointment is anticipated or may in the future arise. The occasion must exist when the appointment is made. We think the learned judge erred in appointing a receiver at this stage of the proceedings. The decree, so far as it relates to the receivership, is reversed; otherwise it is affirmed.

JUDGMENT ACCORDINGLY.

CHARLES M. CHAMBERLAIN V. CITY OF TECUMSEH.

FILED JANUARY 3, 1895. No. 6330.

1. **Liquors: CANCELLATION OF LICENSE: PARTIAL REPAYMENT OF FEE.** It is the settled law of this state, where a liquor license has been issued by a city council, and on appeal such license is canceled, that the licensee is entitled to a repayment *pro tanto* of the sum paid for the same for the unexpired time. *Lydick v. Korner*, 15 Neb., 500, and *State v. Weber*, 20 Neb., 473, followed.

2. **Review.** *Held*, That the findings are contrary to the admitted facts in the case.

ERROR from the district court of Johnson county. Tried below before BUSH, J.

T. Appelget and *Chamberlain Bros. & Rood*, for plaintiff in error.

S. D. Porter, *contra*.

NORVAL, C. J.

This case was decided by the court below upon an agreed statement of facts, from which it appears that in the month of April, 1888, one R. M. Frost made application to the council of the city of Tecumseh for a license to sell intoxicating liquors for the municipal year beginning on the first Tuesday of May following. A remonstrance was filed against the issuing of such license, which was overruled, a license was issued as prayed, and the applicant paid into the city treasury therefor the sum of $1,000. Thereupon the remonstrators prosecuted an appeal to the district court, where the decision of the city council was sustained. Whereupon the remonstrators prosecuted a petition in error to this court, and on the 8th day of February, 1889, the judgment of the district court was reversed and the license canceled. (*Foster v. Frost*, 25 Neb., 731.) Frost sold intoxicating liquors under said license from the beginning of the municipal year, 1888, to the date of the filing of the opinion by this court vacating said license, but not thereafter. On the 5th day of March, 1889, Frost presented to the city council another petition for a license to sell intoxicating liquors in said city for the remainder of the municipal year, and two days later he filed with the city clerk a liquor bond in the usual form. To the granting of the petition a remonstrance was filed, and the hearing thereon was fixed for March 25, 1889. A trial was had at the time designated, when the city council overruled the remonstrance and granted a license to the applicant. The remonstrators had an exception taken, and demanded a transcript of the proceedings, which was made out and delivered to them on the same day. A license was at once made out by the city clerk, and tendered to the applicant, who declined to accept the same. The city having failed to refund any portion of the $1,000 paid into the city treasury by Frost for the

license which was vacated and annulled by this court, this action was brought by Charles M. Chamberlain, the assignee of Frost, to recover the unearned portion of the money paid for said license when the same was obtained. The district court rendered judgment against the city for $166.09, and the plaintiff brings the cause to this court for review, alleging that the findings and judgment are contrary to the facts and law of the case.

In *Lydick v. Korner*, 15 Neb., 500, this court held that where a liquor license is canceled by the court, the licensee is entitled to a payment to him, *pro tanto*, of the sum paid for such license for the unexpired time; and in the opinion in *State v. Weber*, 20 Neb., 473, COBB, J., uses this language: "And upon such cancellation the said Lena Klindt and Lena Staltenberg will be entitled to a repayment of a portion of the sum paid into the village treasury for said license, bearing the same relation to the whole sum so paid as the unexpired portion of the year for which the same was granted bears to the whole year." While each member of the court as now constituted entertains some doubt as to the soundness of the doctrine laid down in these cases, we do not now feel justified in disturbing a rule which has been so long recognized and followed by the courts. The right to recover unearned license money is settled by the above decisions, and if a different rule is to be adopted it must come through a legislative enactment. The trial court held that plaintiff was only entitled to have refunded such portion of the $1,000 paid by Frost for the license as the time that elapsed from February 8, 1889, the date the license was vacated by this court, to March 25, 1889, when the second license was tendered, bears to a year, the period for which the first or original license was granted. In this the court below erred. Frost was under no legal obligation to receive the second license which was tendered him on March 25. The record shows, as already stated, that a remonstrance had

been filed against the issuing of the second license, and upon the same being overruled, exceptions were taken, and a transcript of the proceedings was made out and delivered to the remonstrators for the purpose of taking an appeal from the decision of the city council. No authority, therefore, existed for the delivering of such license until a sufficient time had elapsed for perfecting such appeal. (*State v. Bonsfield*, 24 Neb., 517; *State v. Bays*, 31 Neb., 514.) Again, the minimum sum for which a liquor license can be granted is by statute fixed at $500. (See sec. 1, ch. 50, Comp. Stats.) Neither that amount, nor any other sum, had been paid into the city treasury by Frost under his second application. The license fee is required to be paid before a license can be legally issued. (*Claus v. Hardy*, 31 Neb., 35.) Frost was not entitled to a license solely on the credit of the amount due him for the unexpired term for which he had previously paid, since such sum did not exceed $250. At most he could only have claimed a credit for the money due him on his former payment. (*State v. Cornwell*, 12 Neb., 470.) It follows that Frost was not bound to receive the license tendered him, and that his assignee, the plaintiff, is entitled to recover from the city the full amount of unearned license money due at the time this license was revoked.

JUDGMENT REVERSED.

CLARENCE L. CHAFFEE V. ATLAS LUMBER COMPANY.

FILED JANUARY 3, 1895. No. 5558.

1. **Fraudulent Conveyances:** CONSIDERATION. **It is firmly established in this state that a pre-existing debt is a sufficient consideration for a chattel mortgage, and protects the mortgagee to the same extent as had there been a new consideration.**

2. ———: PREFERENCES. Another rule equally well settled by a long line of judicial decisions is that an insolvent debtor may in good faith pay or secure one creditor to the exclusion of others.

3. ———: CHATTEL MORTGAGES: POSSESSION. Although the possession of mortgaged chattels by the mortgagor raises the presumption that the mortgage was fraudulent, yet such presumption is not conclusive, but may be overthrown by evidence showing that the instrument was given in good faith.

4. ———: ———. THE PRESUMPTION OF FRAUD arising from the possession of mortgaged chattels by the mortgagor remains only so long as he retains possession. There is no such presumption after the mortgagee obtains possession of the property.

5. ———. CERTAIN INSTRUCTIONS given and refused not reviewed, because of the insufficiency of the assignments relating thereto in the petition in error.

6. Chattel Mortgages: FORECLOSURE. Mortgaged chattels should be disposed of according to the stipulation of the mortgage and the provisions of the statute relating to the foreclosure of chattel mortgages. If the mortgagee does not do so, that, of itself, will not invalidate the lien of the mortgage. If he fails to sell the property, or if he disposes of the same in a mode contrary to the stipulation of the parties, or the requirements of the statute, the mortgagee must account for its value.

ERROR from the district court of Furnas county. Tried below before COCHRAN, J.

Martin Langdon, McClure & Anderson, and *I. Dunn*, for plaintiff in error, cited: *Savage v. Hazard*, 11 Neb., 327; *Temple v. Smith*, 13 Neb., 514; *Dorrington v. Minnick*, 15 Neb., 404; *Lane v. Starkey*, 15 Neb., 289; *Tallon v. Ellison*, 3 Neb., 75; *Brunswick v. McClay*, 7 Neb., 137; *Jones v. Hetherington*, 45 Ia., 681; Herman, Chattel Mortgages, 229–236; *Anderson v. Patterson*, 25 N. W. Rep. [Wis.], 541; *Bullis v. Drake*, 20 Neb., 171; *White v. Woodruff*, 25 Neb., 805; *Rector-Wilhelmy Co. v. Nissen*, 35 Neb., 716.

W. S. Morlan, contra, cited: *Ahlman v. Meyer*, 19 Neb.,

65; *Fitzgerald v. Andrews*, 15 Neb., 52; *Kay v. Noll*, 20 Neb., 389; *Taylor v. Ryan*, 15 Neb., 578; *Cameron v. Marvin*, 26 Kan., 612; *Frankhouser v. Ellett*, 22 Kan., 127; *Jones v. Huggeford*, 3 Met. [Mass.], 515; *Briggs v. Parkman*, 2 Met. [Mass.], 258; *Kleine v. Katzenberger*, 20 O. St., 117; *Miller v. Lockwood*, 32 N. Y., 293; *Ford v. Williams*, 24 N. Y., 359; 1 Parsons, Contracts, 571; *Turner v. Killian*, 12 Neb., 580; *Rowley v. Rice*, 10 Met. [Mass.], 7; 3 Am. & Eng. Ency. Law, 181; *Robinson v. Williams*, 22 N. Y., 382; Jones, Chattel Mortgages, sec. 79; *Byram v. Gordon*, 11 Mich., 531; *Kaysing v. Hughes*, 64 Ill., 123; *Stoughton v. Pasco*, 5 Conn., 442; *Bumpas v. Dotson*, 7 Humph. [Tenn.], 310; *New v. Sailors*, 114 Ind., 407; Jones, Chattel Mortgages, sec. 644; *Gregory v. Thomas*, 20 Wend. [N. Y.], 17; *Hill v. Beebe*, 13 N. Y., 556; *Lyon v. Ballentine*, 63 Mich., 97, 6 Am. St. Rep., 284.

NORVAL, C. J.

This action was brought by the Atlas Lumber Company, a corporation, against one S. S. Hewitt, to recover possession of a stock of lumber and building material situated in the town of Beaver City. The plaintiff claimed the property under a chattel mortgage executed by one William M. Ingalls, and by him delivered to the plaintiff. Hewitt, as sheriff of Furnas county, held the property under a writ of attachment issued out of the district court of said county in a suit wherein the Howell Lumber Company was plaintiff and said Ingalls was defendant. C. L. Chaffee, being the successor of the Howell Lumber Company, and the owner of all the property and accounts belonging to said company, was, on his own motion, substituted by the court as defendant in place of the sheriff. Upon the trial the jury returned a verdict in favor of the plaintiff, and assessing his damages in the premises at one cent. The defendant filed a motion for a new trial, which was overruled, and judg-

ment was thereupon entered by the court upon the said verdict of the jury.

The first contention made by counsel in the brief of plaintiff in error is that the verdict is contrary to, and is not supported by, sufficient evidence. It appears from the evidence in the record that the defendant in error on, and for a long time prior to, April 30, 1890, was engaged in the lumber business at Beaver City, this state, the enterprise being conducted by one William M. Ingalls, its manager. On the date aforesaid the Atlas Lumber Company sold and disposed of the business and stock on hand to said Ingalls for the sum of $2,700, Ingalls paying $1,300 of the consideration in cash, and the balance, amounting to $1,400, was divided into four equal payments of $350 each, for which Ingalls gave his notes, but the same were unsecured. Two of these notes having matured, and the same not having been paid, one Burt Coldren, a representative of the defendant in error, about the last of July, or the first of August, 1890, went to Beaver City, interviewed Mr. Ingalls, and requested that he take up the old notes and give new ones in their place and secure the same by a chattel mortgage on his stock. Mr. Ingalls objected and refused at that time to give security, on the ground that it would injure his credit. About the 6th day of August, 1890, Mr. Coldren called again upon Mr. Ingalls and renewed his demand for security, and as an inducement for the latter to secure the claim, Coldren proposed to reduce the rate of interest from ten per cent to eight per cent, and to extend the time of payment one year on other indebtedness of Ingalls to the company. This proposition was finally accepted by Ingalls, and he on said date gave four new notes, amounting to $1,437.33, payable as follows: One for $437.33, due October 1; $300, due January 1, 1891; $300, due April 1, 1891; and $400, due on July 1, 1891. Mr. Ingalls at the same time secured the payment of these notes by a chattel mortgage covering his stock of lumber,

including the property in controversy herein. This mortgage was duly filed in the office of the county clerk of Furnas county on the next day after it was executed. At the same time, as further security for said indebtedness, Ingalls assigned to defendant in error a mechanic's lien upon a church building for $372 and transferred accounts due him amounting to something less than $500, which accounts were deposited for collection in a bank at Beaver City. After the giving of the mortgage Ingalls remained in possession of the stock and sold the same in the usual course of business. About the first day of May, 1890, Ingalls purchased, on sixty days' time, of the Howell Lumber Company, lumber and building material amounting to the sum of $1,664, no part of which has been paid. For some cause or other Ingalls did not succeed in his business venture, and on or about the 20th day of September, 1890, he left Beaver City for Salt Lake City, with the purpose of not returning. He met Mr. Howard, the president of the defendant in error, at Denver, and on September 23d, at the request of Howard, and as a further or additional security for his indebtedness, he executed a bill of sale to the Atlas Lumber Company of his entire stock of lumber and building material, which was recorded on the 27th day of said month in Furnas county. On the 13th day of October, 1890, the Howell Lumber Company attached the stock on hand, which was covered by said chattel mortgage and bill of sale, and the sheriff held the same until replevied in this suit.

It is insisted that the chattel mortgage was given by Ingalls, and received by the defendant in error, for the purpose of defrauding the Howell Lumber Company. This contention is not well founded. The uncontradicted testimony shows that the mortgage was given for the sole purpose of paying a *bona fide*, pre-existing debt, a portion thereof being then past due. This was a sufficient consideration, and protects the defendant in error to the same

extent as though there had been a new consideration given when the mortgage was executed. (*Turner v. Killian*, 12 Neb., 580; *Henry v. Vliet*, 36 Neb., 138.) It is true that the officers of the Atlas Lumber Company were aware, when the mortgage in question was taken, of the indebtedness of Ingalls to the Howell Lumber Company, and that Ingalls was being pressed by the latter for the payment thereof, but this did not invalidate the mortgage. It is no longer a mooted question in this state that a debtor, in failing circumstances, as was Ingalls when the mortgage was executed, may lawfully pay, or secure, one creditor to the exclusion of others. (*Lininger v. Raymond*, 12 Neb., 19; *Deitrich v. Hutchinson*, 20 Neb., 52; *Rothell v. Grimes*, 22 Neb., 526; *Ward v. Parlin*, 30 Neb., 376.) Instead of there being an intention to defraud, either on the part of the mortgagor or mortgagee, the contrary conclusively appears from the record. It was only after much persuasion that Ingalls was induced to give the security. But it is contended that the fact the mortgagor remained in possession and sold lumber and converted the moneys derived therefrom to his own use shows the transaction to be fraudulent, and that the mortgage was a mere device to assist Ingalls to prevent his other creditors from collecting or securing their claims. While the possession of mortgaged chattels by the mortgagor raises the presumption that the mortgage was fraudulent, yet it is not conclusive, but may be overcome by evidence showing that the same was made in good faith. (*Robison v. Uhl*, 6 Neb., 328; *Miller v. Morgan*, 11 Neb., 121; *Turner v. Killian*, 12 Neb., 580; *Davis v. Scott*, 22 Neb., 157.) In the case at bar there is no question, from the evidence adduced, that the mortgage and the bill of sale were made in the utmost good faith and without any intent to defraud the creditors of Ingalls. Again, the presumption of fraud raised by the statute from the possession of mortgaged chattels by the mortgagor remains only so long as the

mortgagor retains such possession. In this case there is ample testimony to establish, and which would have justified the jury in drawing the conclusion, that at and some time prior to the levying of the attachment the defendant in error was in possession of the stock of lumber, holding the same under the chattel mortgage and bill of sale, already alluded to as security for a *bona fide* debt. We have no hesitancy in saying that the verdict and judgment are supported by sufficient evidence. (*Sherwin v. Gaghagen*, 39 Neb., 238.)

The next assignment in the petition in error is in the following language: "The court erred in giving the following instructions upon its own motion, to-wit: Nos. 2, 3, 4, 5, 6, 7, 8, and the following part of the eighth instruction: 'But a mortgage to a creditor taking a mortgage, or buying a stock of goods for the purpose of securing a *bona fide* claim of such mortgagee, is not fraudulent, even if such mortgagee knows that by such mortgage, or sale, other creditors are defrauded;' 9, 10, 11, 12, 13, 14, 15, 16, and 17." The foregoing assignment is insufficient, and must be overruled, under the repeated holdings of this court, unless it can be sustained as to all the instructions therein mentioned. Plaintiff in error, in the brief filed, claims a reversal alone for the giving of seven out of the sixteen instructions complained of in the assignment, thereby, in effect, conceding that the remaining nine instructions, to which no criticism is offered, are not erroneous. Several paragraphs of the charge of the court covered by the assignment, if not all of them, not only lay down correct legal propositions, but are applicable to the issues made by the pleadings and evidence, among which are the eleventh, thirteenth, and seventeenth, which read as follows:

"11. The law presumes transactions are honest, and made for an honest purpose, until the contrary is shown; and the burden of the proof to show a dishonest purpose in this case is upon the defendant.

"13. The jury are instructed that a person who is indebted, and unable to pay all of his debts in full, has a right to prefer any one or more of his creditors to the exclusion of all others; and in payment of a *bona fide* indebtedness to one of his creditors, a debtor may exhaust the whole of his property, so as to leave nothing for the other creditors who are equally meritorious.

"17. A pre-existing debt already due is a good consideration for a chattel mortgage, or bill of sale, to secure the payment of the same, and protects the party taking such security to the same extent as would a new consideration given at the time of the making of the mortgage, or bill of sale."

The last two instructions just quoted are in line with the decisions of this court, already cited in this opinion, and the eleventh instruction states an elementary principle of law. This assignment is, therefore, overruled without considering any of the other instructions embraced in such assignment.

At this time we will dispose of another assignment, namely, "the court erred in refusing the following instructions asked by the defendant: Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12, and 14." It is not deemed necessary to set out these requests to charge in this opinion. Suffice it to say, that the propositions of law enunciated in the fourth and fifth requests were fully stated in the instructions given by the court, and it was not error to refuse to charge the jury again upon the same points. The fourth and fifth requests having been properly refused, this assignment, for the reasons stated in our discussion of the preceding assignment, will be dismissed without further consideration.

Complaint is finally made because the court, at the request of the plaintiff below, gave this instruction:

"1. The jury are instructed that to entitle the plaintiff to recover in this case it is only necessary that he should prove by a preponderance of the evidence that he had a

valid lien on the property replevied to secure an honest, *bona fide* debt, and was entitled to possession by virtue of such lien at the time of the commencement of this action, and it was wrongfully detained by the defendant. So far as this action is concerned, it is immaterial whether the plaintiff, after taking possession of said property, sold the same under one or another of his claimed liens, whether he sold at private or public sale, or what disposition he made of the property."

The criticism made is upon the last clause of the above instruction. It is contended that it does not correctly state the law, but on the contrary that it is material what the plaintiff below did with the property after taking possession thereof. The evidence discloses, after the Atlas Lumber Company acquired possession of the stock under its mortgage and bill of sale, that it sold the property in the usual course of business for the purpose of paying its claim. This method of sale did not conflict with any of the terms of the bill of sale, although the same was not in compliance with the requirements of the chattel mortgage, or the statute relating to the foreclosure of such instruments. Since the mortgagee was claiming under the bill of sale, as well as the mortgage, it could make no difference, so far as the validity of his lien was concerned, that the property was sold at private, instead of public, sale. While a mortgagee of chattels must dispose of the property according to the stipulation of the mortgage and the provisions of the statute governing the foreclosure of chattel mortgages, yet it is not the law if he fails so to do in any essential particular, or if he omits to sell the property after taking possession of the same, that the mortgage is thereby invalidated and the lien lost, but in either case when other creditors have a junior claim upon the property, the mortgagee must account for its value. (*Lininger v. Herron*, 23 Neb., 197; *Loeb v. Milner*, 21 Neb., 392.) It matters not, so far as the mortgagor or his other creditors are con-

cerned, whether the property was sold at private or public sale, or what the mortgagee did with the property after the same came into its possession. The instruction, therefore, was not erroneous. The judgment is

AFFIRMED.

W. N. DRYFUS V. MOLINE, MILBURN & STODDARD COMPANY.

FILED JANUARY 3, 1895. No. 5326.

1. **Justice of the Peace:** ERROR PROCEEDINGS. No motion for a new trial is necessary in a cause taken from a justice court by a proceeding in error, in order to have the judgment reviewed in this court.

2. ———: GENERAL APPEARANCE. Where a defendant in a justice court, after the rendition of a judgment against him, appears therein and moves a retaxation of the costs, it constitutes a general appearance in the cause, and is a waiver of all objections to jurisdiction over his person.

3. ———: TRANSCRIPT: CONCLUSIVENESS. The record of the proceedings and judgment in a justice court, as embodied in a duly certified transcript, imports absolute verity, and cannot be contradicted by extrinsic evidence in the appellate court. *Sullivan v. Benedict*, 36 Neb., 409, followed.

ERROR from the district court of Custer county. Tried below before HAMER, J.

Judson C. Porter, for plaintiff in error.

Darnall & Kirkpatrick, contra.

NORVAL, C. J.

This suit was instituted before a justice of the peace on the 29th day of October, 1890, by the Moline, Milburn &

Stoddard Company against W. N. Dryfus, a summons being issued returnable on November 3, which was returned duly served upon the defendant. On the return day both parties appeared, each filing a bill of particulars, and on application of the defendant a continuance was had until December 2, when there was a trial to a jury, who, being unable to agree were discharged and the case was adjourned by the justice to December 9, when the defendant having failed to appear at the hour fixed for the trial, or within one hour thereafter, the plaintiff demanded a trial, which was had to the court, with a finding and judgment against the defendant in the sum of $151.25. On the 15th day of December, 1890, the defendant filed a motion before the justice to set aside said judgment, but upon what ground does not appear. The hearing upon said motion by agreement of parties was set for December 22, when, the plaintiff and defendant being present, the justice sustained said motion, set aside said judgment, and set the cause down for trial on December 31, at which time, on motion of the defendant, the hearing was again adjourned to January 29, 1891, at 10 o'clock A. M. On said date the cause was called for trial, the plaintiff being present by its attorneys and the defendant by his attorney, whereupon the defendant objected to the jurisdiction of the justice for the reason, "That the case was not called at the hour set for trial, 10 o'clock A. M., and for one hour thereafter, and it appearing to the court that the same was not called until 11:45 A. M., standard time, and the court being unable to appear and call said cause, being fully advised in the premises, doth overrule said objection, whereupon the defendant refused further to appear." There was a trial to the court upon the merits, which resulted in a judgment in favor of the plaintiff in the sum of $152.54 and costs. On February 5, 1891, the defendant appeared before the justice and moved that the jury costs be retaxed, which motion was sustained by the justice. Subsequently the defendant filed

a petition in error in the district court to reverse said judgment, alleging that the justice erred in overruling his challenge to the jurisdiction of said cause and rendering judgment therein. At the hearing the district court found that there was no error in said judgment and proceedings, and entered a judgment of affirmance, whereupon the plaintiff in error presented a motion for a new trial, which was overruled by the court. An exception was taken to the decision. The cause was removed to this court by petition in error.

The denying of the motion for a new trial by the district court upon the affirmance of the judgment is assigned as error. Such a motion was wholly unnecessary to obtain a review of the cause in this court, since only questions of law were presented by the petition in error to the district court for determination. (*Newlove v. Woodward*, 9 Neb., 502; *Leach v. Sutphen*, 11 Neb., 527.) The grounds set up on the motion for a new trial were two: 1. Surprise that the justice's transcript "contained erroneous entries which were added and attached thereto without the knowledge of the plaintiff, and which this plaintiff had no opportunity of having corrected, the nature and character of which erroneous entries are fully set forth in the affidavits which are filed herewith, and are hereby made a part of this motion." 2. The court erred in affirming the justice's judgment.

As to the first ground contained in the motion, it is sufficient to state that, since it is based upon matters not appearing upon the face of the record itself, and the affidavits filed in support of the motion not having been incorporated in a bill of exceptions, the point cannot be considered. (*Walker v. Lutz*, 14 Neb., 274; *Van Etten v. Kosters*, 31 Neb., 285.) Moreover, the district court had no power in this proceeding to correct the transcript, or to grant a new trial on account of the same not speaking the truth. The entry on the justice's docket, as embodied in the transcript duly certified, imports absolute verity, and cannot be contra-

dicted by affidavits. If the transcript is defective or erroneous, a diminution of the record should have been suggested before the error proceedings were determined by the court below, and the justice required to send up a true and perfect copy of his docket. (*Haggerty v. Walker*, 21 Neb., 596; *Sullivan v. Benedict*, 36 Neb., 409.) As no motion for a new trial was necessary to present to this court for review the decision of the district court affirming the judgment, there was no reversible error in denying the second ground set up in said motion.

It is insisted that the justice lost jurisdiction to render judgment by failing to call the case at the hour the same was set for trial, or within one hour thereafter, and section 916 of the Code of Civil Procedure is cited in support of this contention, which declares: "The parties are entitled to one hour in which to appear, after the time mentioned in the summons for appearance, but are not bound to remain longer than that time, unless both parties have appeared, and the justice being present is engaged in the trial of another cause." Whether the foregoing section has any application except as to the time in which parties shall appear on the return day of the summons, we will not now stop to consider. Conceding, for the purpose of this case, that it applies to each adjournment of a case, and that the justice erred in not sustaining the objection of the plaintiff in error to the jurisdiction, still it does not follow that the judgment should have been reversed. The justice had jurisdiction of the subject-matter; and the acts of the plaintiff in error in appearing before the justice subsequent to the rendition of the judgment and in moving a retaxation of the costs constitute a general appearance in the case and a waiver of all objections to jurisdiction over his person. (*Crowell v. Galloway*, 3 Neb., 215; *Warren v. Dick*, 17 Neb., 241; *Tootle v. Jones*, 19 Neb., 589; *Leake v. Gallogly*, 34 Neb., 857.) The judgment of the district court is therefore

AFFIRMED.

SEVEN VALLEYS BANK V. J. WOODS SMITH.

FILED JANUARY 3, 1895. No. 4681.

Review. A cause tried in the district court to a jury cannot be reviewed in this court before a final judgment has been entered upon the verdict in the court below.

ERROR from the district court of Custer county. Tried below before HAMER, J.

J. C. Naylor, M. McSherry, and *Yates & Moore,* for plaintiff in error.

Kirkpatrick & Holcomb, contra.

NORVAL, C. J.

This was an action instituted before a justice of the peace by the plaintiff in error, where it obtained a judgment, and the defendant prosecuted an appeal. In the district court there was a verdict for the defendant. The record before us consists solely of the transcript of the justice docket, the pleadings in the district court, and the verdict of the jury. If a judgment has been entered on the verdict, the record before us fails to disclose it. There being no final judgment in the case, the proceeding in error must be dismissed. (*Daniels v. Tibbets,* 16 Neb., 666; *Gartner v. State,* 36 Neb., 280; *Stone v. Neeley,* 34 Neb., 81; *Smith v. Johnson,* 37 Neb., 675; *Baker v. Kloster,* 41 Neb., 890.) The petition in error is

DISMISSED.

S. P. GIST ET AL. v. C. M. FEITZ ET AL.

FILED JANUARY 3, 1895. No. 6200.

1. **Principal and Surety.** The relation of principal and surety may exist without the knowledge or consent of the principal, provided it is voluntarily assumed by the surety for the accommodation of the beneficiary and based upon a sufficient consideration.

2. ——: NEGOTIABLE INSTRUMENTS: FRAUD. In an action on a note by the payee against two makers, one answered alleging that he was surety thereon for the other, that he was induced to sign said note by means of the representations of the plaintiff to the effect that he had been requested by the principal to become surety for him, the principal, but that such statement was wholly false, and made for the purpose of fraudulently inducing him to become a party to said note. *Held*, To state a defense.

3. **Evidence** examined, and *held* to sustain the judgment complained of.

ERROR from the district court of Richardson county. Tried below before BUSH, J.

Isham Reavis, C. F. Reavis, and *E. W. Thomas,* for plaintiffs in error, cited: 5 Wait, Actions & Defenses, 202; *Hughes v. Littlefield,* 18 Me., 400; *Powers v. Nash,* 37 Me., 322; Brandt, Suretyship, secs. 107, 311; *Talmage v. Burlingame,* 9 Pa. St., 21; *Peake v. Estate of Dorwin,* 25 Vt., 28; *Carter v. Jones,* 5 Ired. Eq. [N. Car.], 196; *Elkinton v. Newman,* 8 Harris [Pa.], 281; *Graves v. Lebanon Nat. Bank,* 19 Am. Rep. [Ky.], 50; Baylies, Sureties, 224; *Moies v. Bird,* 11 Mass., 436.

Frank Martin, contra.

POST, J.

This was an action by the plaintiffs below, who are also plaintiffs in error, against Fred Stoll and one Feitz, as

joint makers of a promissory note. Feitz made default in the district court for Richardson county, but Stoll, the defendant in error, answered, admitting the execution of the note, but alleging, in substance, that his signature thereto was procured by means of the false and fraudulent representations of the plaintiffs, to the effect that Feitz, the principal maker, and who had received all of the consideration therefor, had requested him, Stoll, to sign the same as surety for the said principal; that, relying upon said statements, and being willing to accommodate Feitz, he signed said note as surety for the latter, but that such statements were false and made for the purpose of fraudulently procuring his signature, etc. In the reply it is admitted that the note was signed by the answering defendant as surety, some time subsequent to the execution thereof by Feitz, the principal; but the alleged false statements are in express terms denied. It is charged therein, also, that the note was executed by said defendant at the special instance and request of his co-defendant, Feitz, and for his accommodation. Final judgment was entered on a verdict for the defendant which it is sought to reverse by means of this proceeding.

The issues as thus stated fairly indicate the evidence of the respective parties. Feitz testified, in behalf of the defendant, that he refused to secure said note, or ask the latter to sign with him, and cautioned him (defendant) against signing the note, if requested to do so by plaintiff. He is, in that respect, corroborated by Stoll, who also testified that the sole inducement for the execution of the note was the representation made by one of the plaintiffs, to the effect that Feitz had requested him to become surety thereon. The above is explicitly denied by the plaintiff named in the testimony of the witnesses, and who is, to some extent, corroborated by admitted facts of the case. It cannot be denied that a finding for the plaintiffs upon the evidence in the record would have been more satisfactory to us, al-

though it is not so clearly wrong as to demand a reversal of the judgment on that ground.

It is, however, argued by plaintiffs that privity between principal and surety is not essential to the liability of the latter, but that a creditor may obtain the undertaking of an entire stranger to the transaction as security, without even consulting the debtor. That proposition, it is true, has the support of respectable authority, and may for the purpose of this case be accepted as sound law (see Brandt, Suretyship, 127, 358; *Hughes v. Littlefield*, 18 Me., 400; *Talmage v. Burlingame*, 9 Pa. St., 21; *Peake v. Estate of Dorwin*, 25 Vt., 28), although it can have no application to the facts as found. In every case, we believe, which appears to support the foregoing proposition the surety voluntarily assumed the obligation sought to be enforced for the accommodation of the beneficiary; and the rule, as thus qualified, we regard as altogether sound and reasonable. In this instance it appears that Stoll was willing to accommodate the principal, who is a near relative, and that he signed the note in the belief that he was doing so at the request of the latter, and for his benefit. He did not, according to the finding, assume the relation of surety for Feitz on any other terms, or for any other consideration, certainly not for accommodation of the plaintiffs. We have no difficulty in agreeing with counsel in their contention that the facts, as found by the jury, are a complete defense to the plaintiffs' action. The judgment is therefore

AFFIRMED.

CHARLES G. DORSEY, APPELLEE, V. FRANCIS A. NICHOLS ET AL., APPELLANTS.

FILED JANUARY 3, 1895. No. 5865.

1. Evidence examined, and *held* to sustain the finding of the district court.

2. Review: JURISDICTION. A defendant who has answered to the merits and submits to the jurisdiction of a court of equity cannot object for the first time on appeal in this court, on the ground that the plaintiff had an adequate remedy at law. (*Sherwin v. Gaghagen*, 39 Neb., 238.)

APPEAL from the district court of Gage county. Heard below before HASTINGS, J.

Griggs, Rinaker & Bibb, E. E. Brown, and *Robert Ryan,* for appellants.

L. M. Pemberton, contra.

POST, J.

This is an appeal from the district court of Gage county, the subject of the controversy being the line between lots 1 and 2, in block 64, in the city of Beatrice. We learn from the pleadings that there have been two surveys of said city, the first of which, or old survey, as it is designated in the record, was about the year 1857, and the new, or Smith survey, in the year 1872. The plaintiff is admitted to be the owner in fee-simple of lot 2, while the title to lot 1 is, and has long been, in the defendants and their grantors. Both lots were improved with reference to the old survey, and while the boundaries thereof were still marked by the original stakes. There is situated on lot 2 a frame store building, erected in 1869 or 1870, the east wall of which is on the line as originally marked. On lot 1 is a hotel

building, described in the record as the "Randall House," the east wall of which is on the line abutting on Sixth street, according to the old survey, but projecting two feet or more into the street, according to the Smith survey. The property in dispute is the strip two feet in width between the division lines as shown by the two surveys. The plaintiff, it seems, had been, at the time of the Smith survey in 1872, in the exclusive, uninterrupted, adverse possession for more than ten years of the disputed property under a claim of title thereto. In fact his prescriptive title at that date is not seriously controverted. But it is alleged that in the year 1882, the location of said line being in dispute in consequence of the Smith survey, a compromise was effected between the plaintiff acting in his own behalf, and the defendant Nichols acting for himself and others jointly interested with him as owners of lot 1, whereby it was mutually stipulated and agreed that the line established by the last named survey should be accepted and confirmed as the true boundary of said lots. It is further alleged that thenceforth, until about the time of the commencement of this action, the said line was recognized by the plaintiff as the division between his property and that of the defendants. The reply is a general denial. On a final hearing before the district court there was a decree for the plaintiff in accordance with the prayer of his petition, perpetually enjoining the defendants from their threatened interference with his possession of the strip of ground in dispute and particularly from removing or interfering with the foundations of his building situated on said lot 2 and dismissing a cross-petition by the defendants, in which substantially the same relief was asked against the plaintiff. The findings of the court are as follows:

"The court being fully advised in the premises finds for the plaintiff, and that the said Charles G. Dorsey is and was, at the commencement of this action, the owner of lot 2, block 64, in the city of Beatrice, Nebraska, and of the

building situated thereon, and that said building was placed and located on said lot where the same now stands about the year 1869, and was located in accordance with the original survey and plat of the city of Beatrice as the same appears of record; and that the said Charles G. Dorsey and the grantors through whom he claims title have been continuously in the possession of the said building from the erection of the same until the present time. And the court further finds that no boundary line between said lot 2, in block 64, and lot 1, in said block 64, was ever agreed upon or settled and determined by the agreement and consent of said parties. The court further finds that about the year 1882 said plaintiff, by oral license, permitted the said defendant to excavate and lay a wall under the east side of his said frame building on said lot 2 an indefinite distance back along the line of said lot as determined by the survey of A. B. Smith in the year 1872, and during the year 1882 said excavation was made and said wall laid for the distance of from fifty to sixty feet southward from the north line of said lot, and that afterwards, and without the consent of said plaintiff, said excavation and the said wall were extended to the south line of said lot 2; and the court further finds that in the year 1888 said plaintiff recognized the line of said second survey by A. B. Smith as the boundary between said parties in laying a sidewalk along the north line of said lot 2.

"2. The court further finds, as a matter of law, that said plaintiff is not estopped by the license given by him as aforesaid, nor by his recognition of said line of the survey of 1882 in the building of the sidewalk, from asserting his title and possession to the premises occupied by him and covered by his frame building as aforesaid, and that the plaintiff is the owner of said premises so occupied by him, and that such occupancy is in accordance with the original survey and plat of the city of Beatrice."

It is deemed unnecessary to examine the evidence at

length. It is sufficient to say that Mr. Nichols testifies positively to the compromise alleged, and that the wall on the line of the Smith survey, to which reference is made in the findings of the court, was built by the defendants in pursuance of an express understanding with the plaintiff that the latter was thereby relinquishing all claims either to title or possession of said property, and that their purpose in erecting the said wall was to reduce the disputed property to possession, which purpose was known to and acquiesced in by the plaintiff. There is considerable evidence corroborative of the above and tending strongly to sustain the contention of the defendants. The plaintiff on the other hand testifies that some time in 1882 Nichols applied to him for license to excavate under his, plaintiff's, building on lot 2 in order to secure additional space for the storing of beer kegs by the saloon in the basement of the Randall House adjacent thereto, and which was accordingly granted on condition that the defendants would provide adequate support for the wall of his said building. Nichols, according to the plaintiff, acting under the license thus conferred, built an inexpensive wall of stone about two feet west of the east wall of the plaintiff's building. Said wall commenced at a point about fifteen feet from the front of the lot and extended back twenty or thirty feet, the wall of the store building being supported by wooden posts instead of the stone foundation removed by defendants. He explicitly denies authorizing the extension of the wall beyond the point above designated and which was necessary for the accommodation of the saloon mentioned. He testifies also that the extension of said wall was constructed from the east or Randall House side of the line without his knowledge, and that he had no notice whatever of its existence or of defendant's claim of title to the premises in dispute until about the time of the commencement of this action. He is also corroborated by other evidence. The recognition of the Smith survey, to which reference is made

in the finding, consisted in the laying of a wooden sidewalk extending from east to west in front of lot 2 and commencing at the east line thereof as established by said survey. It is not claimed that the plaintiff is by that fact alone estopped to assert whatever rights he may have to the property in controversy. It is at most a circumstance tending to support the contention of the defendants, and which was, we must assume, accorded the consideration to which it was entitled by the district court.

From a consideration of all the facts disclosed we are unable to perceive any ground for interference with the finding complained of. The rule which must govern this case has been so often asserted as to render further reference to it in this connection entirely unnecessary.

There is a further claim by the defendants, viz., that the plaintiff, on the showing made by the record, has an adequate remedy at law, and that equity is therefore without jurisdiction over the subject of the controversy. Two sufficient answers are suggested to that proposition: First, the same questions were presented by the defendants themselves in their cross-petition; and second, the objection comes too late when made for the first time as it is in this court. (See *Sherwin v. Gaghagen*, 39 Neb., 238.) The decree of the district court is accordingly

AFFIRMED.

RYAN, C., not sitting.

EUNICE BALDWIN, APPELLANT, V. WELLINGTON R. BURT ET AL., APPELLEES.

FILED JANUARY 3, 1895. No. 5797.

1. **Secondary Evidence:** FOUNDATION FOR INTRODUCTION. Courts have not attempted to define the precise degree of dili-

gence essential in attempting to procure the primary evidence of a material fact in order to establish the foundation for secondary evidence. But it is sufficient, as a rule, if the party offering such proof has exhausted all the sources and means of discovery which the nature of the case would suggest, and which are accessible to him.

2. ———: ———: MORTGAGES. Evidence examined, and *held* that a sufficient foundation had been established for the admission of secondary evidence of the mortgage alleged in petition.

3. **Fraudulent Conveyances:** ATTACK BY PARTY NOT PREJUDICED. A conveyance or mortgage without consideration, and in fraud of the rights of creditors, cannot be assailed by one not prejudiced thereby. Such a contract is void as to creditors, but only so far as may be necessary for their protection. It is effective for all other purposes.

4. **Bona Fide Purchasers of Realty:** BURDEN OF PROOF. Where a claim to real estate can be sustained only on the ground that the party asserting it is a subsequent purchaser or mortgagee in good faith, such person is required to show affirmatively that he purchased without notice of the equities of the adverse party, relying upon the apparent ownership of his grantor or mortgagor.

5. **Limitation of Actions:** MORTGAGE FORECLOSURE. An action by a subsequent mortgagee to enforce his equities as against the mortgagor and purchaser through a decree foreclosing the prior mortgage to which he was not made a party, may be brought at any time within ten years after the cause of action accrued.

6. ———: ———. The action in such a case is upon the mortgage, and is governed, as to the time of commencement, by the provisions of section 6 of the Code.

7. **Pleading:** CONCLUSIONS: ESTOPPEL. One who in pleading has stated a legal conclusion instead of a material fact cannot object to a denial thereof in the same terms on the ground that it is a conclusion of law and not an allegation of fact.

8. ———: NIL DEBET. The plea *nil debet* under our system puts in issue no fact and cannot be regarded as a defense. Accordingly *held* that an answer to a petition for foreclosure denying "that there is anything due on the note and mortgage" tenders no issue.

9. **Mortgages:** FORECLOSURE: ACTION BY SUBSEQUENT MORTGAGEE: ACCOUNTING: CONSIDERATION: PLEA OF NIL DEBET:

RES ADJUDICATA: PARTIES. B. purchased property at judicial sale to satisfy a decree of foreclosure in his own favor. Subsequently the holder of a second mortgage, who had not been made a party to B.'s foreclosure proceeding, commenced an action for an accounting against the mortgagor, and for leave to redeem from B. The latter answered alleging a former action by L. to foreclose the same mortgage; that he, B., had filed an answer therein alleging in substance that L., the plaintiff, was not the party in interest; that said mortgage was without consideration, and denying that there was any sum whatever due thereon,—whereupon "it was, upon the merits thereof, adjudged and decreed that said action be dismissed." *Held*, (1) The plea of no consideration was not available to B., whose rights were acquired through the prior mortgage; (2) the allegation that there was nothing due on the mortgage was a mere conclusion and presented no issue; (3) the allegation that L. was not the party in interest did not involve the merits of the cause but the plaintiff's capacity to sue.

APPEAL from the district court of Douglas county. Heard below before IRVINE, J.

The opinion contains a statement of the case.

Cavanagh & Thomas and *Ambrose & Duffie*, for appellant:

The copy of the mortgage should be admitted in evidence and considered. (*Minor v. Tillotson*, 7 Pet. [U. S.], 99; *Proprietors of Braintree v. Battles*, 6 Vt., 399; *Peay v. Picket*, 3 McCord [S. Car.], 322.)

The mortgage is not fraudulent, and if it were, the defendants cannot complain. (*Burt v. Baldwin*, 8 Neb., 487; *Freeman v. Auld*, 44 N. Y., 50; Wiltsie, Mortgage Foreclosure, sec. 395; *Bradley v. Snyder*, 14 Ill., 263; *Green v. Dixon*, 9 Wis., 532*; *Snyder v. Warren*, 2 Cow. [N. Y.], 518.)

The action is not barred by the statute of limitations. (*State v. Conway*, 18 O., 234; *Keokuk County v. Howard*, 41 Ia., 11; *McKesson v. Hawley*, 22 Neb., 692; *McDowell v. Lloyd*, 22 Ia., 448; *Parker v. Kuhn*, 21 Neb., 413; *Hol-*

den v. Gilbert, 7 Paige Ch. [N. Y.], 208; *Sheldon v. Edwards*, 35 N. Y., 286.)

The burden was on the defendants to show that they were *bona fide* purchasers without notice of the mortgage. (*Sillyman v. King*, 36 Ia., 207; *Nolan v. Grant*, 53 Ia., 392; *Fogg v. Holcomb*, 64 Ia., 621; *Boone v. Chiles*, 10 Pet. [U. S.], 211; *Barney v. McCarty*, 15 Ia., 510; *Landers v. Bolton*, 26 Cal., 393.)

The following cases are cited upon the question of former adjudication: *Goodenow v. Litchfield*, 59 Ia., 226; *Brigham v. McDonald*, 19 Neb., 407; *Wilch v. Phelps*, 16 Neb., 515; *Densmore v. Tomer*, 14 Neb., 392; *Helphrey v. Redick*, 21 Neb., 83; *Russell v. Place*, 94 U. S., 606; *Aiken v. Peck*, 22 Vt., 260; *Hooker v. Hubbard*, 102 Mass., 245; *Packet Co. v. Sickles*, 5 Wall. [U. S.], 580; *Griffin v. Seymour*, 15 Ia., 30; *Foster v. Busteed*, 100 Mass., 409; *Neafie v. Neafie*, 7 Johns. Ch. [N. Y.], 1; *Peterborough v. Germaine*, 3 Bro. P. C. [Eng.], 281; *Brandlym v. Ord*, 1 Atk. [Eng.], 571; *Gardner v. Raisbeck*, 28 N. J. Eq., 71; *Cater v. Dewar*, 2 Dick. [Eng.], 654; *Campbell v. Tompkins*, 32 N. J. Eq., 170; *Brooks v. Dalrymple*, 12 Allen [Mass.], 102; *Bucklin v. Bucklin*, 1 Abb. App. Dec. [N. Y.], 242; Jones, Mortgages, sec. 614.

Kennedy, Gilbert & Anderson, Montgomery, Charlton & Hall, Wharton & Baird, Meikle & Perley, and *Arthur C. Wakeley*, for appellees:

The action is barred by a former adjudication. (*Rogers v. Russell*, 11 Neb., 362; *Carroll v. Patrick*, 23 Neb., 835; Freeman, Judgments, sec. 270; *Hamilton Loan & Trust Co. v. Gordon*, 32 Neb., 663; Bailey, Onus Probandi, p. 597; Estee, Pleading, sec. 185; *United States v. Hough*, 103 U. S., 71; *Sheldon v. Edwards*, 35 N. Y., 286; Freeman, Judgments, sec. 276*a*; *Cromwell v. County of Sac*, 94 U. S., 352; *Foote v. Gibbs*, 67 Mass., 412; *Kelsey v. Murphy*, 26 Pa. St., 78; *Neafie v. Neafie*, 7 Johns. Ch.

[N. Y.], 1; Freeman, Judgments, sec. 173; *Fields v. Flanders*, 40 Ill., 470.)

The action is barred by the statute of limitations. (Bailey, Onus Probandi, p. 599; *Parker v. Kuhn*, 21 Neb., 413.)

Appellant's mortgage was not entitled to be recorded or read in evidence. (*Albertson v. State*, 9 Neb., 429.)

Appellees were *bona fide* purchasers. (*Traphagen v. Irwin*, 18 Neb., 195; *Lamb v. Jeffrey*, 47 Mich., 28.)

The following cases are also cited by appellees: *Briggs v. French*, 2 Sum. [U. S.], 251; *Osborne v. Brooklyn City R. Co.*, 5 Blatch. [U. S.], 366; *Smith v. Kernochen*, 7 How. [U. S.], 198; *Newby v. Oregon, C. R. Co.*, 1 Sawyer [U. S.], 63; *Barney v. Lewey*, 13 Johns. [N. Y.], 224; *Conger v. Chilcote*, 42 Ia., 18.

J. L. Kaley, G. M. O'Brien, Curtis & Shields, Geo. E. Pritchett, J. W. Carr, Saunders & Macfarland, B. G. Burbank, Guy R. C. Read, John Q. Burgner, J. W. West, Bradley & De Lamatre, A. J. Poppleton, and *W. S. Poppleton*, also for appellees.

POST, J.

On the 4th day of May, 1875, John Gallagher executed in favor of the defendant, Wellington R. Burt, a mortgage, whereby he conveyed to the latter certain real estate in Douglas county to secure an indebtedness of $20,000. On the 10th day of August, 1875, Matthew Baldwin, who had in the meantime acquired the title to said property by deed from Gallagher, conveyed the same by mortgage to Morgan Baldwin, to secure payment of a note of even date therewith for $12,500, payable six years from date, with annual interest at six per cent. Said mortgage was executed in the state of Illinois and acknowledged before Henry Wisner, who, according to the certificate attached thereto, was at said time a commissioner for the state of Nebraska. It appears also to have been filed for record with the county

clerk of Douglas county on the 7th day of October, 1875. On the 12th day of August, 1876, proceedings were instituted in the district court of Douglas county by Burt, the defendant herein, for the foreclosure of the mortgage first above mentioned, without naming Morgan Baldwin, who still held the mortgage last described, as a defendant, and which resulted in a decree for the plaintiff in the sum of $22,938.76 and costs, taxed at $451.30. To satisfy said decree the mortgaged property was sold to the plaintiff therein, Burt, and a deed therefor executed in due form by the sheriff pursuant to an order of the court. On the 5th day of August, 1891, the plaintiff herein, who had acquired title to the mortgage executed by Matthew Baldwin through the will of the mortgagee, commenced this proceeding for the purpose of asserting her rights thereunder. The relief asked is, first, an accounting and decree of foreclosure as against the mortgagor, and, second, the right to redeem as against Burt and the defendants (nearly three hundred in number) who claim through him.

Owing to the voluminous character of the pleadings, which comprise 133 pages of type-written matter, it is impracticable to give in this connection more than a brief summary of the issues thereby presented. The answers, after showing the interests of the several defendants as purchasers or mortgagees, deny the execution of the mortgage alleged by the plaintiff in terms admitted to be sufficiently specific to put the latter upon her proof. It is in all of them alleged that in the year 1881 proceedings were instituted in the circuit court of the United States for the district of Nebraska, by one Henry M. Lewis as plaintiff, for the foreclosure of said pretended mortgage, in which Wellington R. Burt, who then held the property in controversy through the sheriff's deed herein mentioned, was made a defendant; that issue was joined by the answer of said Burt, and the reply of the complainant, Lewis, and that on the 28th day of May, 1883, a decree was entered in

favor of the defendants therein upon the merits of the cause, and dismissing the bill of the complainant at his cost. For a third defense it is alleged that if such a mortgage was in fact executed by Matthew Baldwin it was without any consideration whatever, and in pursuance of a corrupt and fraudulent purpose of the said Matthew and his father, Morgan Baldwin, to defraud the creditors of the former. A fourth defense is the statute of limitations. It is also in most of the answers alleged that the defendants therein named purchased in good faith, relying upon the title of Burt without notice of the mortgage, which is the subject of this action. The plaintiff, in reply, admits the bringing of the action in the circuit court as above stated, but alleges that the note and mortgage in controversy had previously been assigned to Lewis, the plaintiff therein, in order to enable the latter to prosecute foreclosure proceedings in that court, and that she, the plaintiff, was at said time the real party in interest. She denies also that the decree of dismissal therein involved the merits of the cause, in terms to which reference will hereafter be made.

1. The first question to which we will give attention is presented by the ruling of the district court in rejecting as evidence a copy of the mortgage described in the petition. Matthew Baldwin, in his deposition, after stating that the mortgage was given as security for money advanced and paid for his benefit by his father, the mortgagee, testified further as follows:

Q. Mr. Baldwin, you may examine the paper which I now show you, a copy of which is marked "Exhibit A," and attached hereto as a part of this interrogatory, and state whether you have ever seen it before and what it is.

A. I have seen the paper. I wrote it and it is a note which I gave to my father accompanying the mortgage in Douglas county, Nebraska.

Q. You may examine the paper, which I now show you, which is attached hereto as a part of this interrogatory and marked "Exhibit B," and state what said paper is.

A. This is a copy of the mortgage which I gave father on lands in Douglas county, Nebraska.

Q. Now, Mr. Baldwin, you may state when and where this note and mortgage were delivered to your father.

A. They were delivered to father some time in August, 1875, at Flint, Michigan, at the house of Mr. A. C. Johnson.

In connection with the deposition containing the evidence quoted, the paper therein referred to as "Exhibit B" was offered in evidence and received subject to the objection that it was "incompetent, immaterial, and not the best evidence." The deposition of A. C. Johnson was then read, from which it appears that the witness was for more than forty years the legal adviser of the deceased, Morgan Baldwin, and, since the death of the latter, has stood in the same relation toward the plaintiff, his widow. He fully corroborates Matthew Baldwin in respect to the delivery of the note and mortgage. He further testifies that said mortgage was placed in his hands for safe keeping in the year 1880, soon after the death of the said Morgan Baldwin; that he last saw it in the fall of 1882, when it was still in his possession, and that he has never surrendered possession thereof to any person, although he is now unable to find it after the most diligent and careful search among the papers in his office and his residence. Plaintiff thereupon offered in evidence also the record of said mortgage in the office of the register of deeds for Douglas county, and which was received subject to the above objections. At that point the objections mentioned were argued to the court and sustained, and, according to the bill of exceptions, the action dismissed for want of competent evidence of the mortgage described in the petition. Judging from the opinion of the court which we find in the record, it would seem that the argument in support of the objection was directed exclusively to the record of the register of deeds as independent evidence, and the copy identified by the witnesses above

named entirely overlooked. But while we conclude that the record as made up does not fairly represent the position of the district court, it does present the question whether the copy, as thus identified, was admissible without regard to the record of the mortgage; in short, whether a sufficient foundation had been laid for the reception of secondary evidence of the mortgage. It was there contended, and which contention is renewed in this court, that to entitle deeds and mortgages acknowledged before a commissioner in another state to record in this state the certificate of acknowledgment must be accompanied by the certificate of the secretary of state, contemplated by section 36, chapter 73, Compiled Statutes. But we do not regard that question as essential to the merits of the controversy, since, in our judgment, the copy first mentioned was admissible in evidence upon the showing made, and is *prima facie* evidence of the original. The courts have never attempted to define the precise degree of diligence essential to be shown in the effort to produce a written instrument in order to render admissible parol evidence of its contents. But it would seem to be sufficient if the party offering such proof has in good faith exhausted all of the sources and means of discovery which the nature of the case would suggest, and which are accessible to him. (1 Greenleaf, Evidence, 558; Wharton, Evidence, 147; *Minor v. Tillotson*, 7 Pet. [U. S.], 99; *Proprietors of Braintree v. Battles*, 6 Vt., 399; *Buchanan v. Wise*, 34 Neb., 695.) There is no suggestion of fraud in that respect, nor can we conceive of any motive for the suppression of the mortgage by the plaintiff. Conceding the acknowledgment thereof to be defective, and that it was not entitled to record, it is still effective as against the mortgagor and his grantees with notice (*Connell v. Galligher*, 36 Neb., 749), and should have been admitted for that purpose. It is agreed by counsel that the record presents the merits of the controversy, and we have accordingly, at their request, examined all questions of substance to which our attention

has been directed, and will proceed to notice them, although not in the exact order of their presentation.

2. One contention of the defendants, as we have seen, is that the mortgage was without consideration and a fraud upon the creditors of the mortgagor, Matthew Baldwin. The only evidence adduced by either party which bears upon the subject of consideration is the testimony of Matthew Baldwin, who swears that the note above described represents money actually paid for and advanced to him by his father, and the witness Johnson, who swears that he saw and examined the notes paid for his son by Morgan Baldwin, and that some of them were paid with money loaned by the witness. That evidence we think quite sufficient to overcome the presumption of fraud arising from the relationship of the parties and establish *prima facie* the good faith of the mortgage. But admitting that it is in fact without consideration, and therefore fraudulent as to creditors, is that fact available as a defense in this action? It may be stated, as a general rule, that contracts which are valid, except as against those in adverse interest, cannot be assailed by persons not prejudiced thereby. A voluntary settlement is void only as to creditors, and as to them only so far as may be necessary for their protection. As to all other purposes it is valid and effective. As said in *Curtis v. Price*, 12 Ves. [Eng.], 103: "Satisfy the creditors and the settlement stands." (See, also, May, Fraudulent Conveyances, 689; 1 Story, Equity Jurisprudence [12th ed.], sec. 371; Bump, Fraudulent Conveyances [2d ed.], 315, 481; Wiltsie, Mortgage Foreclosure, 395; *Freeman v. Auld*, 44 N. Y., 50; *Bradley v. Snyder*, 14 Ill., 263; *Richardson v. Welch*, 47 Mich., 309.) None of the defendants are creditors of Matthew Baldwin, and none claim through him. On the other hand, all claim through the prior mortgage from Gallagher to Burt, which was, it is conceded, a prior lien, and the titles acquired through it are not called in question. Matthew Baldwin might have

executed the mortgage without any consideration whatever, and for the avowed purpose of defrauding his creditors, but upon what principle can Burt and his grantees complain? It is in legal contemplation no concern to the holder of the security whether the mortgagor sells or incumbers his equity of redemption, or whether he is divested of his title by means of legal process. So, waiving for the present the question whether the defendants or any of them are *bona fide* purchasers, it is obvious that they acquired the rights of Burt only and must, for the purpose of this controversy, stand in his shoes. It follows that the question of the good faith or fraud in the execution of the plaintiff mortgage is foreign to the present inquiry.

3. Are the defendants *bona fide* purchasers or lien-holders? The various answers, so far as they refer to the *bona fides* of the defendants, differ widely, and it may be doubted whether that issue is presented by the pleadings; but a consideration of that question is unnecessary in this connection, for the reason that such a contention is entirely unwarranted by the proofs. It was said in *Bowman v. Griffith*, 35 Neb., 361, that "where a claim to real estate can be sustained only on the ground that the person asserting it is a subsequent purchaser in good faith, such person is required to show affirmatively that he purchased without notice of the equities of another and relying upon the apparent ownership of his grantor." No evidence was offered tending to prove that the defendants, or any of them, purchased in ignorance of the plaintiff's mortgage, or that they advanced any money or other consideration relying upon Burt's title as it appeared of record. They are, therefore, not within the rule stated, and are chargeable with notice of whatever equities existed in favor of the plaintiff at the time when their several interests were acquired.

4. It is strenuously insisted that the bar of the statute is complete and that the decree should be affirmed on that ground. That contention has for its basis the proposition

that the action is one to redeem from the prior mortgage, and, therefore, within the provisions of section 16 of the Code, while the contention of the plaintiff is that it is primarily an action for the foreclosure of her mortgage and therefore governed by the provisions of section 6. The district court, in ruling upon a demurrer to the petition, appears to have adopted the latter construction, and that view we regard as altogether sound. The language of the last named section is, "An action for the recovery of the title or possession of lands, tenements, or hereditaments can only be brought within ten years after the cause of such action shall have accrued. This section shall be construed to apply also to mortgages." In *Hale v. Christy*, 8 Neb., 264, it was held under the provision quoted that an action to foreclose a mortgage may be commenced at any time within ten years after the cause of action accrued, and the rule there stated has been often reasserted by this court. We can conceive of no ground for distinction on principle between that case and the one before us. In each the mortgage is the cause of action, and the fact that the plaintiff, as against some of the defendants, is entitled to redeem only, we must regard as immaterial, since the statute runs not against the particular relief which equity allows, but against the cause of action. A critical analysis of the cases which bear upon the subject is unnecessary in this opinion, since the solution of the question may be attained by an application of familiar and well established principles. The principal debt, by the terms of the note, matured six years after the date thereof, to-wit, August 10, 1875. Leaving out of consideration all questions arising out of the assignment thereof to Lewis, the plaintiff could have maintained an action on the mortgage at any time within ten years after maturity of the principal sum, which, excluding days of grace, was August 10, 1891, or five days after the commencement of this action. It has been frequently said by this court, and is elementary law, that in order to conclude

subsequent mortgagees by a decree of foreclosure they must be made parties to the proceeding by the holder of the prior mortgage. Now the position of Burt, and those who claim through him, is that in consequence of the decree foreclosing the first mortgage and the subsequent proceedings thereunder the plaintiff cannot prosecute an action on her mortgage, but that her remedy is under section 16, by which "an action for relief not hereinbefore provided for can only be brought within four years after the cause of action shall have accrued." In other words, they contend that she is concluded and barred of a substantial right by a decree to which she is not a party,—a proposition which "needs but to be stated to be disproved." The views here expressed find support in the case of *McKesson v. Hawley*, 22 Neb., 692, and in nowise conflict with *Parker v. Kuhn*, 21 Neb., 413. The last named case was one in which it was sought to redeem from the lien of a judgment on the ground of fraud, and to which the period named in section 16 is applicable for obvious reasons.

5. We will now examine the question presented by the plea of former adjudication. No evidence whatever was given or offered by any of the parties upon that branch of the case, hence our investigation must be confined to the pleadings. Of the several answers perhaps that of Burt contains the most specific allegations, and it is sufficient for our purpose to refer to it alone. After alleging that a suit was commenced in the circuit court by Lewis, a citizen of the state of Wisconsin, as assignee of the plaintiff for the foreclosure of the mortgage now in controversy, and the service of process upon Matthew Baldwin, the mortgagor, and Burt, the answering defendant, and the answer therein by the latter, he concludes as follows: "In the said answer therein so filed by said Burt it was alleged that said Lewis was not the real party in interest in the suit; that the said pretended note and mortgage were without consideration and denied that there was any sum whatever due on said

pretended note and mortgage, and further alleged that said pretended note and mortgage were never delivered to said Morgan Baldwin; that said Matthew was the son of said Morgan and Eunice Baldwin; that the real party in interest in said suit in circuit court as against said Burt was said Matthew S. Baldwin, and said Burt asked to be hence dismissed with his costs; that said Henry M. Lewis duly replied to said answer of Burt in said suit in the circuit court, denying said answer of said Burt, and thereupon the issues were joined, and thereafter on the 25th, 26th, 27th, and 28th days of May, 1883, said cause came on for final hearing in said circuit court on said bill, answer, reply, and proofs, * * * and after hearing the allegations of the parties and the evidence offered on behalf of said complainant and said defendant Burt, and arguments of respective counsel, and being fully advised in the premises, said court made and entered its decree by which it was adjudged and decreed upon the merits of the issue so joined, that said suit be dismissed at complainant's cost, and the same was so dismissed; that by reason of the transfer of said pretended note and mortgages as aforesaid by said Eunice Baldwin, executrix, and of said suit in the circuit court, and the decree therein, the right of the plaintiff herein and all others in respect to said pretended note and mortgage were fully and finally adjudicated so far as said Wellington R. Burt and all persons claiming title to said lands, through or under him, are concerned."

The reply, so far as it refers to above mentioned plea is as follows: "Plaintiff denies the matters in controversy in this action were in any manner determined or adjudicated in said action in the circuit court of the United States for the district of Nebraska, wherein Henry M. Lewis was complainant and Matthew Baldwin and others were defendants, and states the fact to be that said court found that Henry M. Lewis never had possession of said note and mortgage and never paid any consideration therefor, and

that he had no interest therein recognizable in a court of equity and said court did not pass upon the merits of said action, but did dismiss the same because of want of interest of the complainant Henry M. Lewis. Plaintiff further states that among other issues of said cause of Henry M. Lewis against Matthew Baldwin and others aforesaid it was claimed by said defendants therein that said Henry M. Lewis was not the owner of said note and mortgage and had no interest recognizable in a court of equity, and said court dismissed said cause without passing upon the merits and plaintiff denies that the decree therein entered was an adjudication of any matter involved in this action."

As preliminary to the principal contention it is argued that the denial that Lewis' bill "was dismissed on its merits" is a mere conclusion which tenders no issue of fact. The subject of pleading where the defense is estopped by judgment or decree has no place in this discussion, since, granting the reply to be defective as claimed, it is clear that the defendant was guilty of the first vice in that regard and will not now be heard to complain. The allegation that a judgment or decree is on the merits without stating further facts, is certaintly met by a denial in the same terms. We therefore assume the facts relied upon as a former adjudication to be well pleaded. But we agree with counsel for the plaintiff that such facts are not sufficient in law to create an estoppel by judgment, although we reach that conclusion by a somewhat different process of reasoning. Counsel take it for granted that the answer in the former suit tendered two issues, one involving the merits of the cause and the other the right of Lewis, the plaintiff, to maintain an action on the mortgage, and they contend that in the absence of extrinsic evidence that the decree is based upon the merits of the former suit, it will not in this proceeding be treated as conclusive. An examination of the answer has, however, led us to the conclusion that there was presented in that suit a single de-

fense only, and that involving not the merits of the cause but the right of the plaintiff to sue. True, it was charged, according to the answer herein, that the mortgage was without consideration, but that fact, as we have seen, concerns creditors only, and could not have been interposed as a defense by Burt. It was also denied that "there was any sum whatever due on said pretended note and mortgage," but a denial in those terms could not have been responsive to the allegation of the bill. The plea *nil debet*, under our system, puts in issue no fact and cannot be regarded as a defense. (*Gray v. Elbling*, 35 Neb., 278; Maxwell, Pleading and Practice, 393.) The decree dismissing the former suit must, for the reasons stated, have rested upon the ground that the plaintiff was not the party in interest, and is, therefore, not a bar to this proceeding. It follows that the decree appealed from should be reversed and the cause remanded to the district court for further proceedings not inconsistent with the views herein expressed.

REVERSED.

IRVINE, C., not sitting.

IRVING L. DONALDSON v. H. C. FISHER.

FILED JANUARY 3, 1895. No. 5432.

A justice of the peace in this state has no authority to settle a bill of exceptions by which it is sought to preserve the testimony used in the hearing upon a motion to discharge an attachment.

ERROR from the district court of Johnson county. Tried below before BABCOCK, J.

Chamberlain Bros. & Rood, for plaintiff in error.

S. P. Davidson and *J. Hall Hitchcock, contra.*

HARRISON, J.

The defendant in error commenced an action before M. E. Cowan, justice of the peace in Nemaha precinct, Johnson county, against plaintiff in error to recover the sum of $102.81, and also filed an affidavit in attachment. Summons and order of attachment were issued and duly served. Plaintiff in error appeared and filed a motion to dissolve the attachment, and affidavits in support of the motion. Affidavits were also filed by defendant in error in support of the attachment, one of which was attacked by plaintiff in error in a motion to strike it from the files. On hearing, the motion to strike the affidavit from the files was overruled and the case was then argued and submitted on the original motion to dissolve the attachment, and such motion was overruled, to which action the plaintiff in error excepted and secured a bill of exceptions to be settled by the justice of the peace, and presented the case by petition in error to the district court of Johnson county, where, on hearing, the decision of the justice of the peace was affirmed and the case has been brought to this court by petition in error.

In our view of this case we think that if the justice of the peace could not legally settle the bill of exceptions embodying the evidence examined by him on the hearing of the motion to dissolve the attachment, then the case is not properly here for our examination; and the rule established by this court is that the testimony used before a justice of the peace in this state, on the hearing of a motion to dissolve an attachment, cannot be preserved and presented to a higher court in proceedings in error, for the reason that the justice has no power by law to settle a bill of excep-

tions containing such testimony. (See *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520, and cases cited.) In the text of the opinion in the main case just cited appears the following statement: "There is no room for doubt that it is the settled law of this state that a justice of the peace is not authorized to sign a bill of exceptions preserving the testimony on which he acted in sustaining or overruling a motion to dissolve an attachment." The bill of exceptions in this case was settled without authority of law and we cannot consider it, and the judgment of the district court is

AFFIRMED.

IRVING L. DONALDSON V. DEWITT C. ELLSWORTH.

FILED JANUARY 3, 1895. No. 5433.

Res Adjudicata. The decision of this case is governed by the opinion filed herewith in the case of *Donaldson v. Fisher*, 43 Neb., 260.

ERROR from the district court of Johnson county. Tried below before BABCOCK, J.

Chamberlain Bros. & Rood, for plaintiff in error.

S. P. Davidson and *J. Hall Hitchcock*, *contra*.

HARRISON, J.

The questions presented for determination in this case are identical with those of the case of *Donaldson v. Fisher*, 43 Neb., 260. The opinion in that case is adopted in this, and the decision of the district court is

AFFIRMED.

HIRAM R. EDGAR, APPELLANT, V. GEORGE W. KELLER ET AL., APPELLEES.

FILED JANUARY 3, 1895. No. 5357.

Review: INTERLOCUTORY ORDERS. An order of a district court which, in effect, determines that an appeal from an inferior court had been perfected in due time allowed by law for such purpose and places the case upon its docket for adjudication, *held*, not a final order and not subject to review upon error to this court.

APPEAL from to the district court of Cherry county. Heard below before CRITES, J.

J. Wesley Tucker, for appellant.

Ed. Clarke, contra.

HARRISON, J.

The plaintiff commenced an action against the defendants in the county court of Cherry county, and on the 10th day of November, A. D. 1890, and as a result of a trial therein, recovered a judgment for $25 and costs. It appears that during the progress of appeal proceedings by the defendants the county judge took, in accordance with a promise made to the attorney for defendants, the transcript, together with other and the original papers in the case, into the clerk's office and left them there for filing; that for some reason the filing mark was not then placed upon the transcript or any of the papers. After the expiration of thirty days from the time the judgment was rendered in the county court the plaintiff filed the following motion:

"Comes now the plaintiff and avers and shows to the court that on the 10th day of November, 1890, plaintiff herein recovered judgment against the defendant herein, before F. M. Wolcott, county judge in and for the county of Cherry aforesaid, for the sum of $25 and costs, taxed at

$298.75; that on the 11th day of November, 1890, the defendant executed his appeal bond, which was approved by the said F. M. Wolcott, county judge as aforesaid; that the defendant has failed to perfect his appeal by delivering to the clerk a transcript of said case and having his appeal docketed within thirty days next following the rendition of said judgment; that plaintiff herein has caused a transcript of the proceedings of said county judge to be filed and caused said case to be docketed. Wherefore plaintiff prays that judgment be entered in favor of plaintiff, and against the defendant, for $25 and costs as aforesaid, taxed at $298.75, together with all costs that have accrued in this court, and that execution be awarded thereon."

On the 22d day of May, 1891, during a term of the district court then being held in Cherry county, affidavits were filed and oral testimony taken, the purpose of the evidence adduced being to show the leaving, or filing, of the transcript with the clerk within the time required by law in order to perfect the appeal, and on the part of the plaintiff to prove the opposite state of facts. The conclusions and order of the judge who heard this portion of the case in the district court are contained in the following statement: "And after hearing the evidence on both sides, the court overruled said motion, and directed the clerk to file the document transcript, as of December the 4th, 1890, upon the payment of the fees therefor by defendants, to which ruling and judgment of the court the plaintiff then and there duly excepted." The effect of the above decision of the court was to establish that the defendants had in fact perfected the appeal within the time provided by law, and were entitled to the full benefit of such appeal, and further to retain the case for trial in the district court upon its merits. The question then arises, was this such an order as to entitle the plaintiff to its review in proceedings in error to this court upon such order, separated and independent of the case in which it was a part of the proceed-

ings? A final order from which error will lie for its review is defined in section 581 of the Code of Civil Procedure, and is stated to be "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, * * * is a final order which may be vacated, modified, or reversed, as provided in this title." The order complained of in the error proceedings now under consideration was not such an order as is described in the section quoted. It was not final, for, whether it was a correct or erroneous determination of the matters presented for adjudication, the case was retained by the court for hearing, or trial and judgment, between the parties upon its merits. The plaintiff is not prevented by it from recovering judgment. It follows that it cannot be reviewed in this proceeding. (See *Grimes v. Chamberlain*, 27 Neb., 605; *Hall v. Vanier*, 7 Neb., 398; *Persinger v. Tinkle*, 34 Neb., 5; *Artman v. West Point Mfg. Co.*, 16 Neb., 572; *Brown v. Edgerton*, 14 Neb., 453; *Brown v. Rice*, 30 Neb., 236.) The petition in error is

DISMISSED.

SIOUX COUNTY V. CHARLES C. JAMESON.

FILED JANUARY 3, 1895. No. 5749.

County Board: PASSING ON CLAIMS. 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.

ERROR from the district court of Sioux county. Tried below before Bartow, J.

Hugh T. Conley, for plaintiff in error, cited: *Hamlin v. Meadville*, 6 Neb., 227; *Rogers v. Walsh*, 12 Neb., 28; *City of Blair v. Lantry*, 21 Neb., 259; *Cuming County v. Tate*, 10 Neb., 195; *State v. Dixon County*, 24 Neb., 106.

D. B. Jenckes and *George Walker*, *contra*, cited: *Richardson County v. Hull*, 24 Neb., 536; *Brown v. Otoe County*, 6 Neb., 111; *Clark v. Dayton*, 6 Neb., 192; *Ragoss v. Cuming County*, 36 Neb., 375.

HARRISON, J.

It appears from the record that the defendant was, during the years of 1887, 1888, and 1889, county clerk of Sioux county; that he had, when it was necessary in the performance of the duties of his office, employed and paid an assistant, or clerk, and presented bills for the amounts paid such clerk or assistant to the county commissioners in the shape of claims, which were allowed, and warrants drawn on, and paid from, the general fund. The claims so allowed and paid amounted in the aggregate to $98. To recover such amount the plaintiff instituted this action in the county court of Sioux county, where it was awarded a judgment therefor. The defendant appealed to the district court, and on October 31, 1891, the plaintiff filed its petition, to which the defendant interposed a general demurrer, which was, on hearing, sustained, and the plaintiff elected to abide by its petition, and plead no further. The action was dismissed, and the plaintiff has brought the case to this court by an error proceeding to obtain a review of the action of the district court.

The petition raises the question, could the county commissioners allow a claim for the service of a clerk or an assistant to the county clerk and order the amount of the claim paid from the general fund of the county? This was for them to determine at the time the claims were presented for their examination and allowance or disallowance,

and from their decision the legislature has provided for an appeal. "It has been definitely settled by repeated decisions of this court that the county board, in the examination and allowance or rejection of claims against the county, acts judicially, and its judgments or orders in such cases are conclusive unless reversed in the manner provided by law." (*State v. Churchill*, 37 Neb., 704. See, also, *Brown v. Otoe County*, 6 Neb., 111; *State v. Buffalo County*, 6 Neb., 454; *Ragoss v. Cuming County*, 36 Neb., 375.) This being true, it follows that the ruling of the district court sustaining the demurrer was right.

AFFIRMED.

ORA G. PREWITT V. YORK COUNTY.

FILED JANUARY 3, 1895. No. 4904.

Review. In this case there is presented by the argument of plaintiff in error only the sufficiency of the evidence to sustain the verdict. As this evidence was conflicting, the conclusion reached by the jury will not be disturbed.

ERROR from the district court of York county. Tried below before BATES, J.

E. A. Gilbert, for plaintiff in error.

F. C. Power, *contra*.

RYAN, C.

On the 3d day of September, 1889, there was filed in the office of the county clerk of York county a petition, signed by O. G. Prewitt and twenty-one other persons, addressed to the board of supervisors of said county. It was in this

language: "We, the undersigned residents of the county of York, hereby very earnestly and respectfully petition your honorable body to open a ditch and drain the road at O. G. Prewitt's place, and asked for in his petition hereto annexed." The petition referred to stated that the petitioner therein named was the owner of the west half of the southeast quarter of section 20, township 11, range 2. Following this averment was his prayer that the board would cause to be located a ditch to drain the ditch and draw now located on said land and in the road on the south side thereof, said ditch to extend from said place in said road in a southwesterly direction for about seventy or eighty rods, upon the land of D. M. Russell. The reason assigned for the location of the ditch was in this language: "Your petitioner represents in support of this petition that said ditch will drain the public road hereinbefore mentioned, and will conduce to the public health, convenience, and welfare." The petition was referred to its road and bridge committee by the board of supervisors, which committee reported that it found against the improvement. This report was adopted. From the above action of the county board Prewitt appealed to the district court, in which a trial was had, which resulted in a verdict and judgment adverse to Prewitt. The only error argued is that the verdict was contrary to the evidence. In this we cannot concur. The evidence was merely conflicting, and the verdict for that reason must stand. Ordinarily, it would be proper to affirm the judgment of the district court without further comment. In this case, however, the attorney for the defendant in error has very commendably raised some questions of such general importance that we feel it necessary to say that we have not passed upon them because they were not argued by the plaintiff in error. In view of their importance it is deemed advisable that the constitutionality of certain provisions of chapter 89, Compiled Statutes, some of which were criticised in *Jenal v. Green Island Drainage Co.*, 12

Neb., 163, as well as the right of a petitioner for a ditch to appeal to the district court from an order denying his petition should be argued fully before those questions shall be finally determined. The judgment of the district court is

AFFIRMED.

GEORGE HODGKINSON ET AL. V. SARAH HODGKINSON.

FILED JANUARY 3, 1895. No. 5440.

Married Women: DESERTION: DAMAGES. An action is maintainable by a wife for such damages as she has sustained from desertion by her husband, against any person or persons who have brought about such abandonment.

ERROR from the district court of Nemaha county. Tried below before BROADY, J.

E. W. Thomas and *G. W. Cornell*, for plaintiffs in error, cited, as to the wife's right of action: *Lynch v. Knight*, 9 H. L. Cas. [Eng.], 577; *Westlake v. Westlake*, 34 O. St., 621; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep., 13; 1 Bishop, Marriage & Divorce, sec. 1358; *Weedon v. Timbrell*, 5 T. R. [Eng.], 357; *Cross v. Grant*, 62 N. H., 675; *Bigaouette v. Paulet*, 134 Mass., 123; Maxwell, Pleading & Practice, 241; 2 Chitty, Pleading, 314.

Stull & Edwards, *contra*, cited on the same point: Consolidated Statutes, sec. 1413; Cooley, Torts, 227, note 3; Stewart, Husband & Wife, 59, sec. 1, and 78, sec. 2; 9 Am. & Eng. Ency. Law, 810, and cases cited; *Warren v. Warren*, 50 N. W. Rep. [Mich.], 842; *Bennett v. Bennett*, 116 N. Y., 584.

RYAN, C.

The defendant in error recovered a judgment against plaintiffs in error in the district court of Nemaha county. The cause of action, as stated, was that plaintiffs in error had induced their son, her husband, permanently to abandon the defendant in error, and to refuse to provide for her support. In connection with the history of desertion brought about as aforesaid there were allegations that plaintiffs in error had manifested the most determined and persistent disapproval of becoming grand-parents, and that to prevent this consummation they had induced their son to attempt to procure an abortion, which had failed, whereupon defendant in error was driven from the house of plaintiffs in error, wherein, with her husband, she had previously been living, and the separation and abandonment complained of immediately followed. The evidence was very conflicting, but there was sufficient to sustain the averments of the petition. There was presented in the motion for a new trial a claim that, because of surprise, plaintiffs in error should have been granted a new trial. In support of this claim there seems to have been used certain affidavits, but as there was no identification or preservation of them by bill of exceptions, they cannot be considered. No other error arising during the trial was presented or argued. The giving and refusal to give instructions afford no ground of complaint, for exception was taken only to a refusal to give one instruction requested, and the substantial part of that instruction was embodied in others given by the court on its own motion.

It is contended, however, that this action was not maintainable by the defendant in error, and that in any event a recovery could be had only for the loss of services of the husband. In respect to the proposition last mentioned it perhaps would be a sufficient answer to point out that at common law the services and chattels of the husband did

not belong to the wife, as did those of the latter to the former, for which reason the general rule contended for is not derivable from a mere analogy as urged in argument. The right of the wife to bring this action in her own name is conferred by section 3, chapter 53, Compiled Statutes, which provides: "A woman may, while married, sue and be sued, in the same manner as if she were unmarried." In *Bennett v. Bennett*, 116 N. Y., 584, there is a satisfactory discussion of the rights of a married woman to recover for damages to herself under the rules of the common law, and as the same are affected by the provision of our statute above quoted, and it is shown that at the common law the right to the recovery of damages existed but could only be had by the husband and wife jointly, on the theory that during coverture the independent claims of the wife to rights of action and chattels were suspended. By the statutory provision that a woman may, while married, sue as if she were single this condition of suspension was terminated, and the wife could then sue, just as at common law she could sue in her own name when the suspension of her right in that respect had been ended by the death of her husband. (See also in support of the right of a married woman to maintain an action of the nature of that at bar, the case of *Warren v. Warren*, 89 Mich., 123.) The judgment of the district court is

AFFIRMED.

EMMA HARGRAVE ET AL. V. HOME FIRE INSURANCE COMPANY.

FILED JANUARY 3, 1895. No. 6110.

Peremptory Instruction. When there was such a conflict of the evidence that a verdict might reasonably have been found in favor of the plaintiff, it was error for the district court to instruct the jury peremptorily to find for the defendant.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

John P. Breen, for plaintiffs in error.

Jacob Fawcett, contra, cited in support of the direction of the verdict: *Hyatt v. Brooks*, 17 Neb., 33; *Lent v. Burlington & M. R. R. Co.*, 11 Neb., 201; *Burlington & M. R. R. Co. v. Wendt*, 12 Neb., 76; *Post v. School District*, 19 Neb., 135; *Burns v. City of Fairmont*, 28 Neb., 866; *Hughes v. Ins. Co. of North America*, 40 Neb., 626.

RYAN, C.

In compliance with a peremptory instruction there was a verdict for the defendant, on which judgment was duly rendered by the district court of Douglas county. In effect, there is but one assignment of error presented, and that is as to the instruction to find for the defendant. It is not necessary to determine whether or not plaintiff was probably entitled to a judgment in view of all the evidence introduced, for the determination of contested questions of fact is within the province of the jury, and it is error to direct what verdict shall be found. (*Hall v. Vanier*, 6 Neb., 85; *Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *Grant v. Cropsey*, 8 Neb., 205; *Houck v. Gue*, 30 Neb., 113.) Where from the testimony before the jury different minds might draw different conclusions, it is error to direct a verdict. (*Suiter v. Park Nat. Bank of Chicago*, 35 Neb., 372.) Where the evidence, which would sustain or defeat a recovery, is conflicting, the question is for the jury. (*Union P. R. Co. v. Cobb*, 41 Neb., 120.)

The policy admitted to have been issued to the plaintiff was of date February 3, 1890, and was for the period of one year from February 1, 1890. The articles insured were household furniture, beds, bedding, wearing apparel, etc. The policy was not issued upon a written application,

but upon the request of George W. Hopper. It was sent to Lizzie Kirk about two months after its date. She testified that at the time the policy was given her, the person by whom it was delivered notified her that afterwards she might make payment of the premium at the door. Subsequently Mr. Johnson, who was collector for the defendant, asked payment of the premium, which Miss Kirk at the time was not able to make. Mr. Hopper was, by Mr. Johnson, requested to ask Miss Kirk to pay the amount of the premium, and did so, but was able to obtain only a promise that she would pay it as soon as the assured could secure money for that purpose. On the 28th day of July, 1890, a fire broke out in a block very close to the building wherein was kept the insured household goods. Miss Kirk paid the premium to Mr. Hopper, and in about half an hour after such payment the aforesaid fire reached the building occupied by Miss Kirk. Some of the goods insured were totally destroyed, others were damaged. The money paid to Mr. Hopper was at once paid to the defendant. It was received without any knowledge on the part of the officers of the company that the property described in the policy was either being destroyed or imminently threatened by fire. When Mr. Hopper received the premium he said to Miss Kirk that it was pretty late to make payment, but he did not think her building was in any danger. It is evident, however, that her own realization of the danger to be apprehended was such that she hurriedly paid the premium, which otherwise she might not have done, and requested Mr. Hopper at once to turn it over to the defendant. On the day following the fire Miss Kirk called at the office of defendant and, orally having given notice of the loss, demanded payment. This was refused for the reason then assigned to her that the payment of the premium had been so long deferred that her policy, by the company, had been regarded as canceled, and, furthermore, she was informed in this connection that

the premium had been received by the company without knowledge of the then existing fire which destroyed the goods described in the policy. The amount of said premium was thereupon tendered to her, but she refused to receive it. It is not deemed a specially important fact that Mr. Hopper was not a commissioned agent of the defendant. He in fact applied for the policy and it was issued as he requested. The defendant does not question that the policy was delivered to the assured, and so became as operative as could any policy without payment of the premium. Mr. Hopper had been encouraged by Mr. Barber, secretary of defendant, to bring to the company applications in the precise manner in which this was brought. For bringing these applications Mr. Hopper was entitled to a commission from the defendant, and this was the only compensation which he was entitled to receive. There was evidence that Miss Kirk was the sole owner of the insured property, though for the purposes of this case it may be conceded that this proposition was questioned. At the date of the policy there was a chattel mortgage on the property insured. Afterwards this was in part satisfied, and for the balance not paid another mortgage was made. No possession, however, was taken under either of these mortgages, neither was there any foreclosure. There was, therefore, no such change of title as to avoid the policy. (*Union Ins. Co. v. Barwick*, 36 Neb., 223.) At most, on these propositions the defendant could only claim that there was a preponderance of evidence in its favor. Whether or not this claim was well founded we do not decide. For fear we may be misunderstood in relation to the right of this company to consider a policy as void by virtue of an undisclosed, mere mental operation on the part of the officers of the defendant in that direction, we desire to say that there was no competent evidence whatever of a cancellation of the policy sued on. The other questions which were presented, and which we have described at some length,

might reasonably have been resolved in favor of plaintiff. Under such circumstances they should have been passed upon by the jury. The judgment of the district court is

REVERSED.

DUFF GREEN, APPELLEE, V. GEORGE W. HALL ET AL., APPELLANTS.

FILED JANUARY 3, 1895. No. 5931.

Appeal: WAIVER BY PAYMENT MUST BE VOLUNTARY. A motion of an appellee to dismiss an appeal because of the payment by appellant of the judgment from which an appeal had been taken must be overruled when it is shown that such payment was not voluntary, but was made to avoid a sale of appellant's property on an execution issued for the satisfaction of the aforesaid judgment.

MOTION by appellee to dismiss appeal from the district court of Douglas county.

Kennedy, Gilbert & Anderson, for the motion.

E. W. Simeral and *William Simeral, contra.*

RYAN, C.

In this case there was an appeal from a deficiency judgment for $3,578.10 and costs, rendered in the district court of Douglas county, of which judgment a transcript was duly filed in the office of the clerk of the district court of Lancaster county. For its collection there afterwards, on October 6, 1892, was placed in the hands of the sheriff of the last named county an execution, under and by virtue of which the sheriff advertised for sale 116 lots, owned by appellant Coffman. The date fixed for this sale was No-

vember 29, 1892. It does not appear, however, why this sale was not made, neither does the sheriff's return show a postponement. The execution was returned, paid in full July 6, 1893, on which day there was executed by the sheriff, a receipt for the costs. The judgment with accruing interest was discharged by the following payments: January 4, 1893, $504.37; March 2, 1893, $2,904.72; June 19, 1893, $355.50. All these payments, as will readily be seen, were made while the sheriff held the execution for the collection of the judgment in extinguishment of which they were made. The appellee after the case had been submitted for final determination filed a motion to dismiss the appeal for the reason that the judgment appealed from had been fully, actually, unconditionally, and voluntarily, paid by one of the appellants. In resistance of this motion, the appellants have submitted the affidavit of Victor H. Coffman, the appellant by whom the payments were made, to which affidavit he attached a copy of the execution and return showing the receipt of the execution by the sheriff, his advertisement of the lots of Coffman for sale as above described, and the date whereon said return was made, and the payment of costs. The dates of the several payments above recited were shown in support of the motion of appellee. Coffman's affidavit was to the effect that to avoid a sale of the lots advertised he had made these payments, and that they were not voluntarily made. There was given no supersedeas undertaking to suspend the enforcement of the judgment against appellants, as might have been done under the provisions of section 677 of the Code of Civil Procedure. Under these circumstances a sale of the property advertised would have vested in the purchaser a title which could not be affected by the reversal of the judgment appealed from. (Sec. 508, Code Civil Procedure.)

In support of the motion to dismiss there has been cited but one precedent, which it is claimed is found in *Hipp v.*

Crenshaw, 64 Ia., 404. There is, however, in the case cited, a recognition of the principle that if payment of a judgment appealed from is made under duress, the appeal should not be dismissed on motion of the appellee based solely on the fact of such payment. It was held that the appeal should be dismissed because the payment had been made, merely to enable appellant to obtain a loan on real property effected by the lien of the judgment appealed from, a condition of affairs which did not justify the inference of duress. The right of a judgment debtor to have an appeal determined, notwithstanding payment thereof has been coerced by legal process during its pendency, is sustained by *Hiler v. Hiler*, 35 O. St., 645. (*In re Walter*, 7 So. Rep. [Ala.], 400.) In *Scholey v. Halsey*, 72 N. Y., 578, it was moreover held not indispensable to a right of recovery of money paid on a judgment before its reversal to show that such payment had been coerced by execution. The motion of appellee to dismiss this appeal should be

OVERRULED.

JAMES DUGGAN V. JOHN HANSEN.

FILED JANUARY 3, 1895. No. 5100.

1. **Animals:** RUNNING AT LARGE. Duggan owned a bull which escaped from his premises and broke into the pasture of one Fatchett, in which the latter was keeping for hire a mare of one Hansen. Duggan and Fatchett knew the bull had broken into the latter's pasture and by agreement between them he was allowed to remain in the pasture over night, during which time he killed the mare of Hansen. Hansen then sued Duggan for the value of the mare. *Held*, (1) That the bull was running at large in the night-time within the meaning of section 14, article 3, chapter 2, Compiled Statutes, 1893; (2) that although Fatchett's conduct in permitting the bull to remain in the pasture with

Hansen's mare over night was evidence of such negligence on his part as would have justified a jury in finding him liable for the value of the mare, yet Fatchett's negligence was no defense for Duggan.

2. The evidence examined, and *held* to support the judgment of the district court.

ERROR from the district court of Perkins county. Tried below before CHURCH, J.

Saunders & Prime and *John J. Halligan*, for plaintiff in error:

The animal was not running at large. (Bouvier's Law Dictionary; *Thompson v. Corpstein*, 25 Cal., 653.)

Hansen is chargeable with Fatchett's negligence and cannot recover. (3 Wait, Actions & Defenses, p. 617; *McCarthy v. Wolfe*, 40 Mo., 520; *Sargent v. Slack*, 47 Vt., 674; *Halty v. Markel*, 44 Ill., 225; *Knowles v. Mulder*, 41 N. W. Rep. [Mich.], 896; *Brooks v. Taylor*, 65 Mich., 208; *Meier v. Shrunk*, 44 N. W. Rep. [Ia.] 209.)

Parsons & Logan, contra.

RAGAN, C.

James Duggan by this, a proceeding in error, seeks to reverse the judgment of the district court of Perkins county rendered against him at the suit of John Hansen. The only assignment relied upon for the reversal of the judgment is that it is contrary to the law and the evidence of the case. Hansen owned a mare which one Fatchett was pasturing for hire. At this time Duggan owned a bull. This bull broke away from the premises or herd of Duggan and broke into the pasture of Fatchett, in which was Hansen's mare, and while in the pasture gored the mare, of which she died; and Hansen brought this suit against Duggan to recover the value of the mare.

Section 14, article 3, chapter 2, Compiled Statutes, 1893,

provides: "No cattle, horses, mules, swine or sheep shall run at large during the night-time, between sunset and sunrise, in the state of Nebraska, and the owner or owners of any such animal shall be liable in an action for damages done during such night-time." The first contention of plaintiff in error is that the evidence does not disclose that his bull was running at large in the night-time within the meaning of this statute. The evidence shows that the bull escaped from Duggan's premises or herd some time late in the afternoon or in the early evening and broke into Fatchett's pasture. Duggan learned of the fact, and by agreement between Fatchett and Duggan the bull was permitted to remain in the pasture into which he had broken during the night. This evidence then establishes the fact that the bull was running at large, that is, he was free to go where he chose in Fatchett's pasture during the night that he gored Hansen's mare. The evidence sustains the finding of the jury that this bull was a vicious and dangerous animal, and known by Duggan to be vicious and dangerous at and before the time that he committed the injury for which Duggan is sued in this case. The next argument is that Hansen cannot recover in this case because it is said that Fatchett, being Hansen's bailee, was guilty of contributory negligence in permitting Duggan's bull to remain over night in the pasture with Hansen's mare, and that Fatchett's negligence was the negligence of Hansen. The evidence in the record shows that soon after the bull broke into Fatchett's pasture he had knowledge thereof, and that he agreed with Duggan or his agent that the bull might remain in the pasture over night, and that Hansen's mare was at the time in the pasture. This act of Fatchett was evidence of negligence on his part from which the jury would have been justified in finding a verdict against him in favor of the owner of the mare if he had been sued for her value by Hansen; but it does not follow that because Fatchett through his negligence rendered himself liable to

Hansen for the value of the mare that such negligence exonerates Duggan. This is the first time we have known it argued that where the negligence of two parties injured a third and such third party sued one of the negligent parties, that the one sued could exonerate himself by showing the negligence of his co-actor. Duggan owning this bull and knowing that he was vicious and dangerous, knowing that he had escaped from his herd or pasture and was at large in Fatchett's pasture, made no effort to regain possession and control of the bull, but permitted him to remain at large over night. This was sufficient evidence of negligence on the part of Duggan to justify the jury in finding him liable for the value of Hansen's mare. The judgment of the district court is

AFFIRMED.

JOHN PIPER ET AL. V. WILLIAM WOOLMAN.

FILED JANUARY 3, 1895. No. 5735.

1. **Libel:** EVIDENCE. The deacons of a church made a written accusation against a member thereof, a clergyman, charging him "with repeatedly and persistently uttering statements that are contrary to the truth. We charge him with giving way to violent and unchristian temper. We charge him with defaming the good name of members of this church." The clergyman then sued the deacons for libel, making these accusations the basis of his suit. *Held*, (1) That the publication was libelous *per se;* (2) that the finding and judgment made by the church in the trial of the clergyman on the charges were not competent evidence for either party in the libel suit, and were properly stricken out of the answer of the deacons.

2. **Pleading.** THE OFFICE OF A REPLY is to deny the facts alleged as defenses in the answer, or to allege facts in avoidance of such defenses.

3. **Libel:** OPINION EVIDENCE. On the trial of the libel suit the plaintiff called as a witness another clergyman, of whom he inquired what effect it would have upon a clergyman to charge

him with repeatedly and persistently uttering statements that are contrary to the truth, and with defaming the good name of members of the church. The witness answered that the charge would be detrimental to the clergyman's reputation and usefulness, and would destroy his reputation for honesty and qualifications for his office. *Held*, That the evidence of the witness was a mere opinion and its admission was error.

4. ———: PRIVILEGE. In such libel suit the defendants pleaded: "And defendants allege that at said time both they and the plaintiff were members of said First Congregational church of Palisade, Nebraska, and that they, the defendants, preferred such charges in the manner herein set out; that said charges were so preferred and exhibited in said church by defendants according to the usage and discipline thereof." *Held*, A good plea of qualified privilege.

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

M. M. House and *L. H. Blackledge*, for plaintiffs in error:

Defendants should have been allowed to plead sufficient facts to show that the charges were acted upon by the church. (*Hale v. Wigton*, 20 Neb., 83.)

The plea of privilege was sufficient and the evidence proffered thereunder was wrongfully excluded. (*Shurtleff v. Stevens*, 51 Vt., 501; 1 Hilliard, Torts, p. 355; *Wright v. Woodgate*, 2 Cromp, M. & R. [Eng.], 573; *Jarvis v. Hatheway*, 3 Johns. [N. Y.], 180; *Hale v. Wigton*, 20 Neb., 83; *Gardemal v. McWilliams*, 26 Am. St. Rep. [La.], 195; *Dial v. Holter*, 6 O. St., 229; *McKnight v. Hasbrouck*, 20 Atl. Rep. [R. I.], 95; 2 Greenleaf, Evidence [14th ed.], sec. 421; *Broughton v. McGrew*, 5 L. R. A. [Ind.], 406; Abbott, Trial Evidence, pp. 663, 669, 670.)

The defense of privilege may be given under the general issue. (Newell, Defamation, p. 649, sec. 63; 1 Hilliard, Torts, p. 362; *Bradley v. Heath*, 12 Pick. [Mass.], 163; *Fero v. Ruscoe*, 4 Comst. [N. Y.], 162; *Torrey v. Field*, 10 Vt., 353.)

The court erred in admitting the evidence of the witness, Clifton, as to his opinion of the effect certain charges would have on the plaintiff. (1 Sutherland, Damages, p. 793; *Alexander v. Jacoby*, 23 O. St., 358.)

W. O. Woolman, contra:

The alleged finding of the church was properly stricken out. (*Tubbs v. Lynch*, 4 Har. [Del.], 521; 2 Wait, Actions & Defenses, p. 266; Boone, Code Pleading, secs. 11, 12; *McLaughlin v. Campbell*, 14 N. Y. Weekly Digest, 194.)

The motion to strike the matter from the reply was properly overruled. (*Eikenberry v. Edwards*, 32 N. W. Rep. [Ia.], 183; *Paxton Cattle Co. v. First Nat. Bank of Arapahoe*, 21 Neb., 621.)

The words of the charge were clearly libelous *per se*. (*Brooker v. Coffin*, 5 Johns. [N. Y.], 188; *Matin v. Stillwell*, 13 Johns. [N. Y.], 275*; *Hayner v. Cowden*, 27 O. St., 292; Odgers, Libel & Slander [1st Am. ed.], 82*; *Malone v. Stewart*, 15 O., 319; Townsend, Libel & Slander, sec. 182; *Geisler v. Brown*, 6 Neb., 254.)

Defendants omitted the necessary allegation that the charges were preferred regularly and in good faith. (*Smith v. Thomas*, 2 Bing. N. C. [Eng.], 372; Hilliard, Torts, p. 355; *Kleizer v. Symmes*, 40 Ind., 562; *Coombs v. Rose*, 8 Blackf. [Ind.], 155; *Jarvis v. Hatheway*, 3 Johns. [N. Y.], 180; *Farnsworth v. Storrs*, 5 Cush. [Mass.], 412; *York v. Pease*, 2 Gray [Mass.], 282; Odgers, Libel & Slander [1st Am. ed.], 239*; *Wilson v. Collins*, 5 C. & P. [Eng.], 373*; *Oddy v. Lord George Paulet*, 4 F. & F. [Eng.], 1009.)

There was no sufficient plea of justification. (Odgers, Libel & Slander, p. 174*; *Van Ness v. Hamilton*, 19 Johns. [N. Y.], 349; *Andrews v. Vanduzer*, 11 Johns. [N. Y.], 38; *Billings v. Waller*, 28 How. Pr. [N. Y.], 97; *Swann v. Rary*, 3 Blackf. [Ind.], 298; *Wachter v. Quenzer*, 29 N. Y., 547; *Robinson v. Hatch*, 55 How. Pr. [N. Y.], 55; Bliss, Code Pleading, sec. 363; *Swift v. Dickerman*,

31 Conn., 285; *Storey v. Early*, 86 Ill., 461; *Fowler v. Gilbert*, 38 Mich., 292; *Langton v. Hagerty*, 35 Wis., 150; *Buckley v. Knapp*, 48 Mo., 152; *Proctor v. Houghtaling*, 37 Mich., 41; *Chamberlin v. Vance*, 51 Cal., 79; *Heilman v. Shanklin*, 60 Ind., 424; *Dever v. Clark*, 25 Pac. Rep. [Kan.], 205.)

RAGAN, C.

William Woolman sued John Piper and J. B. Howard in the district court of Hitchcock county for damages for libel. Woolman had a verdict and judgment and Piper and Howard bring the case here for review.

Woolman alleged in his petition that on the 8th day of November, 1891, he was a clergyman of the Congregational church; that on said date Piper and Howard, well knowing the premises, and maliciously intending to injure Woolman in his profession and calling as such clergyman, published and caused to be published of and concerning him in his capacity as such clergyman, in the presence and hearing of divers persons, the following false, malicious, and defamatory matter, to-wit: "We charge him with repeatedly and persistently uttering statements that are contrary to the truth. We charge him with giving way to violent and unchristian temper. We charge him with defaming the good name of members of this church." We have omitted the innuendoes.

To this petition Piper and Howard answered: (1) They admitted the publication of the charges made the basis of Woolman's action; (2) they pleaded that the charges were true; (3) they denied that they made the publication maliciously or with intent to injure Woolman; and denied that they made such charges of or concerning Woolman as a clergyman; (4) they alleged that at the time of making the charges that both they and Woolman were members of the First Congregational church at Palisade, and that they were officers and deacons of the church, and as such it was

their office and duty to prefer such charges, and that such charges were preferred in said church by them according to the usage and discipline of the church; (5) they alleged that the church afterwards tried Woolman on the charges thus preferred against him by them, the defendants, that such trial was according to the usages and discipline of the church, and that the church found Woolman guilty of the charges made against him and dismissed him from its membership.

1. This last paragraph of the answer of Piper and Howard was, on motion of Woolman's counsel, stricken out by order of the district court; and this action by said court is the first error assigned here by Piper and Howard. We do not think the court erred in striking out of the answer of Piper and Howard this clause, for the reason that we are of opinion that neither the finding of the church that Woolman was guilty of the charges preferred against him, nor the judgment of dismissal from its membership pronounced on such finding by the church, was competent evidence for Piper and Howard in this action to prove their defense that the charges they made against Woolman were true. If the church had found Woolman not guilty of the charges preferred against him by Piper and Howard such finding of the church would not have been competent evidence on behalf of Woolman to prove that the charges made were in fact false.

2. Woolman in his reply, in addition to other matters, alleged: "Plaintiff further states that these defendants, maliciously intending to injure him in his profession and calling as clergyman, conspired together to bring this plaintiff into public scandal, ridicule, and contempt without the knowledge and consent of the members composing said church." The court overruled the motion of Piper and Howard to strike out this part of the reply, and this is the second error assigned here. The court should have sustained this motion. This language, if it belonged anywhere,

belonged in the petition. The office of a reply is to deny the facts alleged as defenses in the answer or to allege facts in avoidance of such defenses. This part of the reply did neither.

3. The other errors assigned, and which we notice, have reference to rulings of the court upon the admission and rejection of evidence at the trial. One Clifton was called as a witness for Woolman and testified that he was a minister of the gospel and a member of the Methodist Episcopal church. He was then asked: "State, if you know, what effect, if any, the following charges would have upon a clergyman in the capacity of a clergyman: 'We charge him with repeatedly and persistently uttering statements that are contrary to the truth.'" Counsel for Piper and Howard objected to this question, as incompetent, immaterial, and irrelevant. The objection was overruled, and the witness answered as follows: "They would certainly be detrimental to his reputation and usefulness." The witness was then asked: "You may state what effect the publishing of the following words would have upon a clergyman in his capacity as a clergyman: 'We charge him with defaming the good name of members of the church and subjecting the church society to public reproach.'" This question was objected to and the objection overruled, and the witness answered: "It would destroy his reputation for honesty and qualifications for his office, in my judgment." This testimony was clearly incompetent. The jury were sitting to try what effect the charges made by Piper and Howard against Woolman had had upon the latter. Clifton's evidence was a mere opinion. The case on trial was not one which called for expert testimony nor was it one in which such testimony was proper; and had it been, Clifton had not qualified himself to speak as an expert on the matter in controversy.

One Kountz was called as a witness for Piper and Howard, and was asked: "What kind of a meeting was that?

Was it public service or church meeting?" Woolman's counsel objected to this question, and the objection was sustained. This ruling of the district court was error. The theory of Woolman was that Piper and Howard made the charges against him in the church at Palisade at a time when there was a congregation present consisting of many persons, some of whom were and some of whom were not members of the church; and he put evidence in the record which tended to establish that theory.

The defense of Piper and Howard was that they were deacons of the church, and that as such officers it was their duty to prefer the charges against Woolman, and that they had preferred such charges according to the usage and the discipline or by-laws of the church, and that they did make the charges to the church proper, that is, to the church members alone. In other words, one of the defenses of Piper and Howard was that of qualified privilege, and the evidence excluded by the court tended in some degree to establish the defense.

It seems that the learned judge of the district court excluded the evidence offered by Piper and Howard which tended to support their contention that the charges they preferred were preferred by them as deacons of the church, and made to the church members alone, and made in pursuance of the discipline and by-laws of the church which made it their duty to prefer such charges, because the court was of opinion that the defense of qualified privilege interposed by Piper and Howard was not sufficient in substance and form. The plea was as follows: "And defendants allege that at said time both they and the plaintiff were members of said First Congregational Church of Palisade, Nebraska, and that they, the defendants, preferred such charges in the manner herein set out; that said charges were so preferred and exhibited in said church by defendants according to the usage and discipline thereof." This was a good plea of qualified privilege. (*McKnight v. Hasbrouck*, 20 Atl. Rep. [R.I.], 95.)

It was not necessary to make this defense good for Piper and Howard, to set out in their answer a copy of the minutes of the church meeting showing that they had been elected deacons; nor to set out parts of the discipline or by-laws of the church which made lying by a church member an offense against the laws and rules of the church; nor to set out such parts of the discipline or by-laws of the church as made it the duty of the deacons thereof to prefer formal charges against a member guilty or supposed to be guilty of the offense of lying. These things were all matters of evidence. The plea was good because it complied with the provisions of the Code which require a pleader to state the facts. The charges made by Piper and Howard were libelous *per se*, and the law presumes that they were made maliciously.

The material issues under the pleadings were whether Piper and Howard made the charges against Woolman as a clergyman or against him simply as a member of the church; whether the charges made were true; and, whether true or false, whether they were made by Piper and Howard without malice, with good motives, and for justifiable ends. And all evidence which tended to prove or disprove these issues the litigants were entitled to have go to the jury. The judgment of the district court is

REVERSED AND THE CAUSE REMANDED.

HENRY RISSE V. MORITZ GASCH ET AL.

FILED JANUARY 3, 1895. No. 5127.

1. **A new trial is a statutory remedy, and can be granted by a court of law only upon the grounds, or some of them, provided for by the statute.**

2. **Review.** An assignment, "Errors of law occurring at the trial," is sufficient, in a motion for a new trial, to enable the district court to determine whether it erred in admitting or rejecting evidence; but under such an assignment in a petition in error the supreme court cannot review anything.

3. ———: VERDICT: CONCLUSIVENESS. The supreme court is not invested with authority by the constitution or laws of the state to set aside the verdict of a jury, having for its support sufficient competent evidence, even though this court may be of opinion that had it been the triers of the case, it would have reached a different conclusion.

4. **Trial by Jury.** To have disputed questions of fact, put at issue in actions at law, tried and determined by a jury is one of the rights guarantied by the constitution of the state to its citizens.

5. **The evidence** examined, and *held* to support the finding of the jury that "The instrument introduced in evidence in controversy is not the last will and testament of Carl Julius Gasch, deceased."

ERROR from the district court of Adams county. Tried below before GASLIN, J.

M. A. & J. C. Hartigan, for plaintiff in error.

Capps & Stevens, contra.

RAGAN, C.

Henry Risse filed, or caused to be filed, in the county court of Adams county a writing purporting to be the last will and testament of Carl Julius Gasch, deceased, and prayed that said writing might by said court be proved and adjudged the last will and testament of said deceased. The widow and only heir, a son, of Carl Julius Gasch, deceased, appeared in the county court and objected to the paper filed by Risse being approved and adjudged to be the last will and testament of the deceased, on the ground that it was in fact not his will, that he had never signed it. The county court admitted the paper filed to probate as the will of the deceased, and the widow and heir appealed to

the district court, where the issue, whether the paper purporting to be the last will and testament of Carl Julius Gasch, deceased, had ever been executed by him, was tried to a jury, which rendered a verdict that "We find the instrument introduced in evidence in controversy is not the last will and testament of Carl Julius Gasch, deceased;" and Risse brings the judgment pronounced on that verdict here for review, and assigns the following errors:

1. The first assignment of error is in the following language: "That the court erred in the admission of testimony offered by the respondent, and duly excepted to by the plaintiff and proponent when the same was offered." This assignment is too indefinite for consideration. The plaintiff in error at the trial made many objections to the evidence introduced by the defendants in error, and we are unable to determine from this assignment at what particular evidence offered or given by the defendants in error it is aimed.

2. The second and third assignments are: "That the court erred in giving of instructions requested by the defendants, and the court erred in refusing to give instructions asked by the plaintiff." These assignments, and each of them, are too indefinite for review. It has been so many times decided by this court that a general objection to the ruling of a district court in giving instructions or refusing instructions cannot be considered, that it is unnecessary to do more than call attention to the rule.

3. The fourth and fifth assignments are, that the verdict is not sustained by the evidence and the judgment is contrary to the law of the case. The judgment is not contrary to the law of the case if the verdict is sustained by sufficient competent evidence, and that we will consider later.

4. The sixth assignment is: "That the verdict was given under the impulse and under the influence of passion and sympathy rather than under the law and evidence of the case." Assuming that the assignment is true as a matter

of fact, and that the verdict of the jury was the result of impulse and passion and sympathy, the record contains no proof of it; and we know of no law which would permit a district court or this court to grant a litigant a new trial because it believed the jury, under the impulse and influence of passion and sympathy, had returned a verdict against him. A new trial is a statutory remedy and can be granted by a court of law only upon the grounds, or some of them, provided for by the statute.

5. The seventh assignment is: "That the verdict should have been for the plaintiff instead of for the respondents." This is included in the assignment that the verdict is not supported by the evidence.

6. The eighth assignment is: "That there were errors at law occurring at the trial, and which were duly excepted to by the plaintiff, which in themselves were a sufficient cause for a new trial. The court erred in refusing to grant the plaintiff's motion for a new trial." The assignment, "Errors of law occurring at the trial," is sufficient in a motion for a new trial to enable the district court to determine whether it erred in admitting or rejecting evidence, but under such an assignment in a petition in error this court cannot review anything; and the court did not err in overruling the motion of Risse for a new trial if the verdict of the jury is supported by the evidence.

7. The only assignment of error urged here by counsel for the plaintiff in error which we are permitted under the law and the decisions of this court to examine is the one that the verdict is unsupported by the evidence. The only issue in the case was whether the paper proposed for probate, and alleged to be the last will and testament of Carl Julius Gasch, deceased, was in fact his last will and testament; that is, whether he signed such paper. To prove that he did, plaintiff in error called as a witness one Enking, who testified that on the 15th day of June, 1875, he was a real estate agent and broker residing in the city of

Fond du Lac, Wisconsin, and that on that day Carl Julius Gasch, in his presence, signed his name to the paper offered in evidence in this controversy, and declared it to be his last will and testament; that he, Enking, drew said will at the request of Carl Julius Gasch; that Charles Ferdinand Gasch, a brother of Carl Julius Gasch, was present when the latter signed his name to the paper as his will and witnessed the same, and that one Liebemann was also present and saw Carl Julius Gasch sign his name to the paper alleged to be his will and signed it as a witness.

Charles Ferdinand Gasch testified that he was a brother of Carl Julius Gasch, deceased; that the paper in controversey was signed by Carl Julius Gasch June 15, 1875, in the office of Enking, in Fond du Lac, Wisconsin; that he saw Carl Julius Gasch sign said paper, and that he, Charles Ferdinand Gasch, at the request of Carl Julius Gasch, witnessed his signature to it; that the signature, Carl Julius Gasch, on the paper in controversy was the signature of his brother, Carl Julius Gasch.

Charles Liebemann testified that the signature of one of the witnesses on the paper alleged to be the last will and testament of Carl Julius Gasch was his, Liebemann's.

The defendants in error, to sustain their contention that the signature on the paper alleged to be the last will and testament of Carl Julius Gasch was not his signature nor his handwriting and therefore not his will, produced the following evidence:

The widow testified that she was married to Carl Julius Gasch, deceased, in Germany; that in 1847 they immigrated to the United States and soon thereafter bought and settled on a farm some twenty miles northeast of the city of Sheboygan, in Sheboygan county, Wisconsin; that she and her husband and their son, Morris Gasch, lived together on said farm prior to and some time after and during the entire year of 1875; that they lived peaceably and happily together; that her husband, Carl Julius Gasch,

transacted his business at Sheboygan, the county seat of his own county, going there frequently in the morning and returning in the evening; and that he was not in the city of Fond du Lac at any time during the year 1875, and that the only time he was in the city of Fond du Lac during the time they lived in the state of Wisconsin was in 1861, at the time the son enlisted in the United States army; that her husband's brother, Charles Ferdinand Gasch, who testified to signing as a witness the paper claimed to be the will of her husband, came to the United States from Germany the same year that she and her husband came, but that they did not come together, and that her husband and his brother never met after they left Germany until about Christmas of 1870; that until that time her husband did not know where said brother was; that about that time the brother came to the home of the witness and desired the witness' husband to mortgage his farm and furnish the brother some money; that the witness objected to this; that it was not done, and as a result the brothers had trouble; that the brother was at the house of witness and her husband about two years after that, and at that time wished her husband to furnish him money, which was not done, and the brothers again had trouble, that no visits were interchanged between the brothers or their families, although from 1870 until long after 1875 the brother resided in Calumet county, some forty miles from where the witness resided; that her husband always signed his name Julius Gasch; that the signature on the paper claimed to be the will of her husband was not his signature, nor his handwriting; that her husband in his last sickness expressed a desire to make a will and said to a neighbor who was present that he, the deceased, had no will; that from the time she and her husband settled in Adams county, Nebraska, the spring of 1884, until her husband's death, which occurred in 1888, no letters or communications passed between the brothers or their families.

Morris Gasch, the son and only heir of Carl Julius Gasch, testified that he enlisted in the army in 1861 and served nine months; that he enlisted at the city of Fond du Lac, Wisconsin, and that his father was present at the time; that his father was never in Fond du Lac at any other time to the knowledge of the witness; that he was married in 1870 in Wisconsin and lived with his father and mother on the father's farm prior to and subsequent to the year 1875 and during the entire year of 1875; that he rented his father's farm; that he and his wife and the father and mother all lived on the farm; and that his father was not in the city of Fond du Lac, Wisconsin, during the year 1875. He also testified about the two visits made by his uncle, Charles Ferdinand Gasch, to his father's house, and about the trouble between the two brothers, substantially the same as testified by his mother; that his father usually transacted his business while he lived in Wisconsin at the county seat town of Sheboygan; that he signed his name Julius Gasch; that the witness was well acquainted with the handwriting of his father, and that the handwriting and signature on the paper claimed to be his father's will was not his father's handwriting or signature.

Other witnesses testified to their acquaintance with Carl Julius Gasch while he lived in Wisconsin, and that he was there known by the name of Julius Gasch and that he signed his name Julius Gasch.

A justice of the peace of Wisconsin testified that he, by virtue of his official position, had had occasion to take the acknowledgments of papers signed by the deceased, and to those papers he signed his name Julius Gasch. A distillery bond was also put in evidence, on which the deceased was surety. This bond was executed in the state of Wisconsin, and the name of the deceased was signed thereon Julius Gasch. The deed made to the deceased for the farm he bought in Wisconsin was put in evidence, and in that the deceased was described as Julius Gasch; and the deed he made

to the purchaser of his farm when he sold out and moved to Nebraska was put in evidence, and that was signed and acknowledged Julius Gasch. Various deeds, leases, coupons, and papers bearing the admittedly genuine signature of the deceased, signed Julius Gasch, and signed by him after he came to Nebraska, were also put in evidence.

On cross-examination of Liebemann, whose named appeared signed to the paper purporting to be the will of the deceased, he stated that he did not remember the circumstance of having signed his name to the paper; that he could not say that he ever knew the deceased, and that the only thing he was sure of was that the signature was his, and that he signed it at the request of some one.

It also appeared from the cross-examination of Charles Ferdinand Gasch that on June 15, 1875, he lived in Calumet county, Wisconsin, some forty miles from where the deceased lived, and that about that time the deceased came to his, Charles Ferdinand Gasch's, home and he and his brother went to the city of Fond du Lac, as the deceased expressed a wish to buy a horse, and they went there for that purpose, and it was at that time that the will was made. By the terms of the will all the property of the deceased, except one hundred dollars a year to the widow during her life, and one hundred dollars in cash to the only heir, the son, was devised to the children of Charles Ferdinand Gasch. He testified to no reason assigned by the deceased as to why the deceased was thus disinheriting his wife and child; nor does he testify to any consultation between himself and the deceased as to the intentions of the deceased to make the will prior to the date of its execution; nor does he testify as to whether the deceased bought a horse at that time.

One Bigelow, a neighbor of the deceased, who was present at his last sickness, testified that the deceased expressed a desire to make a will stating that he had none.

In all of the papers introduced in evidence on the trial

bearing the admittedly genuine signature of the deceased his name was signed Julius Gasch in English; and there is no evidence whatever in the record that he was ever known at any time or place to sign his name Carl Julius Gasch either in English or German, except the German signature to the paper alleged to be his will.

Enking, in his cross-examination, admitted that he was not well acquainted with the deceased; that he had seen him only once or twice prior to the time of the execution of the paper claimed to be his will.

The foregoing is not all the evidence introduced by the parties, but it may fairly be said to be the substance of it; and now we are asked to say that this evidence does not support the finding of the jury. Had we been the jury we might have reached a different conclusion, but how can we say that the conclusion reached by the jury under this evidence is the wrong one? Or, rather, how can we say that the jury's conclusion is unsupported by sufficient competent evidence? We did not see nor hear the witnesses testify. We had no opportunity of observing their demeanor while upon the stand. So far as their evidence is concerned we have before us but the lifeless record in which the testimony of one witness, if consistent with itself, weighs just as much as the testimony of another. Except the signature in writing attached to the paper alleged to be the will of the deceased, and which is in German characters, we have never seen any signature or handwriting of the deceased. The jury had before it numerous papers on which the handwriting and signature of the deceased appeared, and which handwriting and signature were indisputably genuine. The jury had an opportunity to compare the admittedly genuine handwriting of the deceased with that alleged to be his on the paper alleged to be his will. We have not even that opportunity. The original papers bearing the genuine handwriting and signature of the deceased introduced in evidence on the trial have not been brought

here for our inspection. We have before us type-written copies of them. That some one appeared before Enking and signed the paper in evidence Carl Julius Gasch in German and represented himself to be that person and published this paper to be his last will and testament we think is highly probable; but was that person Carl Julius Gasch, or Julius Gasch, the man who died in Adams county in 1888? We do not know. The jury said in effect by their verdict that the person who signed the paper was not the identical Carl Julius Gasch, or Julius Gasch, who died in Adams county in 1888, and whose widow and son are the defendants in error here; and as that finding is not unsupported by sufficient competent evidence, we are not at liberty to disturb it.

Twelve jurors, wholly disinterested in the results of this case, have said on their oaths that the signature to the paper in controversy was not the signature of Carl Julius Gasch, who died in Adams county in 1888, and that he was not present in Fond du Lac, Wisconsin, on the 15th of June, 1875. This court is not invested with authority by the constitution or laws of this state to set aside this finding, if it has for its support competent evidence, even though we might be of opinion that had we been the triers of the case we would have reached a different conclusion. To have disputed questions of fact put at issue in actions at law tried and determined by a jury is one of the rights guarantied by the constitution of the state to its citizens. But another thought occurs in this connection. This trial was presided over by a learned judge who had had sixteen years of experience as a judge. During that time there had probably been tried before him a thousand jury cases. He heard this testimony; he saw these witnesses testify; he observed their demeanor upon the stand; and he has, by overruling the motion of the plaintiff in error for a new trial, stamped upon this finding the seal of his approval. The verdict of the jury, then, fortified as it is by the evi-

dence, by the oaths of the jurors, and by the approval of the trial judge, binds and concludes this court, and the judgment of the district court must therefore be and is

AFFIRMED.

OMAHA STREET RAILWAY COMPANY V. JAMES S. CAMERON.

FILED JANUARY 3, 1895. No. 5745.

1. **Street Railways:** NEGLIGENCE: QUESTIONS OF FACT. Cameron sued a street railway company for damages sustained by him by reason of one of its cars striking and overturning his buggy while he was driving it across the railway company's tracks at the intersection of two streets. The court refused to give an instruction tendered by the railway company as follows: "While the law requires that the railway company shall use all ordinary care and caution while running its trains by intersecting streets, still travelers upon the street at such intersections are likewise required to use care and caution in getting on the street in front of the moving trains. And where the plaintiff, as in this case, was familiar with Twenty-fourth street, and with the street car tracks thereon, and was familiar with the fact that the said street cars are operated by electricity, and are known to run at considerable speed, it was his duty in driving upon this street from an intersecting street to use care and caution to avoid coming into collision with the street cars, and the failure of the plaintiff to use such care and caution, if he did so fail to use such care and caution, would prevent recovery of damages; and if from the whole case you find that the plaintiff was guilty of such carelessness on his part, then your verdict should be for the defendant." *Held*, That the court did not err in refusing to give the instruction, if for no other reason, because of the fact that it required the court to tell the jury that Cameron was possessed of certain knowledge and familiar with certain facts and circumstances, and that certain duties resulted therefrom, when this knowledge and these facts and circumstances if known and possessed by Cameron were elements for consideration by the jury, and it was for the jury to say what duties devolved on him by

reason thereof, and whether or not in driving upon the railway tracks in the manner he did, he was exercising ordinary care.

2. ———: RELATIVE RIGHTS OF COMPANY AND TRAVELER. The court instructed the jury: "You are instructed that the relative rights and duties of street cars and travelers on the highway where they are passing each other, or going in the same direction, is qualified to a certain extent at street intersections. At such an intersection each have the right to cross, and must cross. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other." *Held*, That the instruction was correct.

3. ———: CONTRIBUTORY NEGLIGENCE: HARMLESS ERROR. In such case the court instructed the jury: "The rule of law is that one guilty of contributory negligence cannot recover in an action; but if you find from the evidence in this case that there was negligence on the part of both plaintiff and defendant the plaintiff may be entitled to recover, unless you find from the evidence that the plaintiff could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence. And if you find that the plaintiff could have so done, but has failed in this particular, then he cannot recover herein." *Held*, That the railway company was not prejudiced by the giving of this instruction. The court suggests a doubt as to the propriety of giving an instruction couched in such general language.

4. ———: NEGLIGENCE. The evidence examined, and *held* to support the finding of the jury that the injury of the plaintiff resulted from the negligence of the railway company, the plaintiff himself being at the time in the exercise of ordinary care.

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

John L. Webster, for plaintiff in error.

Breckenridge, Breckenridge & Crofoot, contra, cited, as to the relative rights of traveler and company: *O'Neill v. Drydock E. B. & B. R. Co.*, 29 N. E. Rep. [N. Y.], 85; *Shea v. St. Paul City R. Co.*, 52 N. W. Rep. [Minn.], 902. In support of the instructions: *Omaha Horse R. Co. v.*

Doolittle, 7 Neb., 485; *Union P. R. Co. v. Rasmussen*, 25 Neb., 813; *Lynn & B. R. Co. v. Boston & L. R. Co.*, 114 Mass., 88.

RAGAN, C.

James S. Cameron sued the Omaha Street Railway Company, hereinafter called the "Railway Company," for damages in the district court of Douglas county. Cameron pleaded that the Railway Company was a corporation operating a street railway in the city of Omaha, on Twenty-fourth street, among others, the motive power of which was electricity, and for cause of action against the Railway Company alleged in substance, that on Twenty-fourth street the Railway Company had two tracks and this street was intersected at right angles by Binney street running east and west; that about 10 o'clock at night on November 27, 1890, Cameron with a single horse and buggy was driving west on Binney street; that he drove on the intersection of the two streets, crossed the east track of the Railway Company and while his buggy was on the west track it was struck by a south bound car on said west track, the buggy destroyed and Cameron severely injured; that Cameron at all times was in the exercise of ordinary care, and that the damage and injury sustained resulted from the negligence of the Railway Company in running its car south in the west track on Twenty-fourth street and across the intersection of Binney street at a high and negligent rate of speed, and from the neglect of the Railway Company to give any signal or warning of the approach of the car to the intersection of Binney and Twenty-fourth streets, by bell or otherwise. The answer of the Railway Company was, in substance, a general denial. Cameron had a verdict and judgment and the Railway Company brings the case here for review.

1. The eminent counsel for the Railway Company has devoted a very large part of his argument in this court to showing that by the use of proper care Cameron could

have seen the approaching train and have kept off the railway track in front of it; that Cameron drove on the railway tracks at the streets' intersection at a negligent and high rate of speed; that a warning was given of the approach of the car to the intersection of Twenty-fourth and Binney streets by the ringing of the car bell; that when Cameron drove on the track the car was too close to him to be stopped sooner than it was; that the car was not running at an unusual or negligent rate of speed and that it is doubtful if the train collided with Cameron's buggy. These are all arguments that could have been and doubtless were urged to the jury. They involve only questions of fact, concerning each one of which the evidence was more or less conflicting.

The theory of Cameron was that he drove west on Binney street at the rate of five or six miles an hour; that before reaching the intersection of that street with Twenty-fourth street he listened for a signal or noise of approaching cars and heard none; that as he drove into Twenty-fourth street he looked north for an approaching car and saw none; that no bell was rung nor any other warning given of the approaching train; that he drove across the east track of the Railway Company and was almost over the west track with the head of his horse turned slightly to the southwest for the purpose of driving down Twenty-fourth street, on the west side of the west track, when a car of the Railway Company, running south on the west track at the rate of fifteen or twenty miles an hour, struck his buggy and overturned it, damaging it and injuring him; and the evidence tends to support his theory. On the other hand, the contention of the Railway Company is that Cameron was driving west on Binney street at a negligent and high rate of speed; that he did not stop before driving on the Railway Company's tracks on Twenty-fourth street; that he did not listen for an approaching train or for the signals of one; that when he drove in Twenty-fourth street and before driving on its

tracks he did not look to see if a train was approaching from the north; that its train was running at a usual rate of speed; that a bell or gong was sounded as the train approached the Binney street crossing; and that as a matter of fact its train did not collide with Cameron's buggy, but that the latter in attempting to escape from the approaching train, drove his buggy against the curbstone and overturned it; and, unless it be the last contention mentioned, the evidence tended to support the theory of the Railway Company. Which of these theories is or was correct was for the jury to determine. By its verdict it has adopted the theory of Cameron, and we cannot say that its finding in that respect lacks sufficient evidence to support it. (*American Water-Works Co. v. Dougherty*, 37 Neb., 373; *Missouri P. R. Co. v. Baier*, 37 Neb., 235; *Omaha Street R. Co. v. Craig*, 39 Neb., 601; *Omaha & R. V. R. Co. v. Morgan*, 40 Neb., 604; *Chicago, B. & Q. R. Co. v. Oleson*, 40 Neb., 889.)

2. It is also assigned as error that the district court erred in giving to the jury on its own motion instruction No. 3, as follows: "The rule of law is that one guilty of contributory negligence cannot recover in an action; but if you find from the evidence in this case that there was negligence on the part of both plaintiff and defendant, the plaintiff may be entitled to recover, unless you find from the evidence that the plaintiff could by the exercise of ordinary care have avoided the consequences of the defendant's negligence. And if you find that the plaintiff could have so done, but has failed in this particular, then he cannot recover herein." We do not think the Railway Company was prejudiced by the giving of this instruction. At its request the court instructed the jury: (3) "The jury are further instructed that if they find from the evidence that the injury of Cameron was produced by a car coming in collision with his buggy, still the plaintiff cannot recover if he recklessly and carelessly drove onto Twenty-fourth

street from Binney street without stopping and looking to see if a car was approaching, if his failure to stop and look for an approaching train contributed to the accident." Again, at the request of the Railway Company the court instructed the jury (4) that if Cameron "failed to use proper precautions, but regardless of his personal safety drove on Twenty-fourth street at a rapid rate of speed and upon the track in front of the train without any warning, then he took upon himself the risk of danger, and that said conduct constituted contributory negligence on his part which would prevent recovery." This last instruction was wrong. It was not for the court to say whether Cameron's conduct under the circumstances rendered him guilty of contributory negligence; that was for the jury. (See the authorities cited above.)

But because the court gave these instructions to the jury the Railway Company could not have been prejudiced by instruction No. 3, given to the jury on the court's own motion; nor can we say that said instruction No. 3 was misleading or erroneous as applied to the facts in this case. There was some evidence which tended to show that the car which collided with Cameron's buggy was running at a rate of fifteen or twenty miles an hour, and that no warning was given by the ringing of a bell or otherwise of the approach of this car to the street crossing; and there was some evidence which tended to show that Cameron drove on this crossing at a high rate of speed without looking or listening for an approaching car. Now the instruction told the jury in effect that if it should find that Cameron was guilty of negligence in going on the track in the manner that he did, and that the Railway Company was also guilty of negligence in running its train at a great rate of speed on said intersection without giving warning of its approach thereto, that still Cameron might recover, unless the jury should believe that Cameron, by the exercise of ordinary care after he discovered the approaching train, could have avoided the

consequences of the negligence of the Railway Company and failed to do so.

In *Omaha Horse R. Co. v. Doolittle*, 7 Neb., 481, it is said: "Where the carelessness of the plaintiff as well as that of the defendant operates directly to produce the injury complained of, the plaintiff is not entitled to recover; but in cases of mutual negligence the plaintiff is entitled to recover, unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence." The instruction complained of is within the rule announced in this last case, and we cannot say that the court erred in giving it.

It is doubtless true that a party's negligence will not alone defeat his right to recover, but it must further appear that his negligence either caused or contributed to the injury for which he sues; and it is also true that if a plaintiff and defendant are both guilty of some negligence, that if the negligence which is the proximate cause of the injury was that of the defendant, and the plaintiff, after discovering this negligence, exercised ordinary care to escape the threatened danger and failed, he may still recover. But we venture to suggest a doubt as to the propriety of giving an instruction couched in such general language as the one under consideration. In such cases as the one at bar the plaintiff has been injured, and the inquiry for the jury is: By whose fault was the plaintiff so injured? If the proximate cause of the plaintiff's injury was his own negligence, he cannot recover; if the proximate cause of his injury was the negligence of the defendant, he may.

3. The third error assigned is that the court erred in refusing to give to the jury instruction No. 5 requested by the railway company, as follows: "While the law requires that the railway company shall use all ordinary care and caution while running its trains by intersecting streets, still travelers upon the street at such intersections are likewise required to use care and caution in getting on the

street in front of the moving trains. And where the plaintiff, as in this case, was familiar with Twenty-fourth street, and with the street car tracks thereon, and was familiar with the fact that the said street cars are operated by electricity, and are known to run at considerable speed, it was his duty in driving upon this street from an intersecting street to use care and caution to avoid coming into collision with the street cars, and the failure of the plaintiff to use such care and caution, if he did so fail to use such care and caution, would prevent recovery of damages, and if from the whole case you find that the plaintiff was guilty of such carelessness on his part, then your verdict should be for the defendant." We do not think the refusal of the court to give this instruction was error, for two reasons: First, we doubt the propriety of the district court's telling the jury in this case that Cameron was familiar with Twenty-fourth street and with the street car tracks thereon; and was familiar with the fact that the cars were operated by electricity and were known to run at considerable speed. And, in any event, it is clear that the district court did not err in refusing to give the instruction, if, for no other reason, because of the fact that it required the court to tell the jury that Cameron was possessed of certain knowledge and familiar with certain facts and circumstances and that certain duties resulted therefrom; when this knowledge and these facts and circumstances, if known and possessed by Cameron, were elements for consideration by the jury in determining what duties devolved on him by reason thereof, and whether or not Cameron, in driving upon these railway tracks in the manner he did, was exercising ordinary care. Another reason why the court did not err in refusing to give this instruction is that the district court had already given all that part of the instruction to which the railway company was entitled in the fourth and sixth instructions requested by the railway company, and in which instructions the court told the jury that it was the duty of Cam-

eron to use care and prudence when driving on the intersections of Twenty-fourth and Binney streets to ascertain that a car was not in immediate proximity; and that if they found that Cameron carelessly and negligently drove on such intersection at a rapid rate of speed without taking proper precautions to find out whether a train was approaching, and the result of such carelessness was a collision with the street car, he could not recover.

4. The fourth assignment of error argued is that the court erred in giving instruction number one asked by Cameron. In the motion for a new trial, and in the petition in error as well, it is assigned that the court erred in giving instructions number one, number two, and number three, asked by Cameron. The third of these instructions is as follows: "You are instructed that the relative rights and duties of street cars and travelers on the highway where they are passing each other or going in the same direction is qualified to a certain extent at street intersections. At such an intersection each have the right to cross and must cross. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner so as not to unreasonably abridge or interfere with the right of the other." We entirely approve of this instruction, and since the court did not err in giving all three of the instructions the assignment of error must be overruled. There is no error in the record and the judgment of the district court is

AFFIRMED.

CHARLES STUTZNER V. AUGUST PRINTZ.

FILED JANUARY 3, 1895. No. 5717.

1. **Attachment:** PLEADING. In an action accompanied by attachment proceedings the filing by the defendant of a motion to dissolve the attachment does not excuse him from pleading to the petition. Although such motion be pending, if he fail to plead to the petition within the time provided by law, his default may be entered and the plaintiff proceed to judgment.

2. ———: MOTIONS: RENEWAL. The court should not entertain a second motion where one for the same purpose has been overruled, unless leave to file is specially given; and whether such leave shall be given rests in the discretion of the trial court. *Livingston v. Coe*, 4 Neb., 379, followed.

3. ———: ———: FILING. A motion to discharge an attachment, to be available, must be filed before judgment in the action, but if so filed the court may rule thereon after judgment. *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520, followed.

4. ———: ERROR PROCEEDINGS: IMPLIED AFFIRMANCE. In an action begun in the county court, that court made an order sustaining an attachment and rendered judgment in the action for the plaintiff. The defendant prosecuted error to the district court, assigning error in both orders. The district court reversed the judgment but made no express order in relation to the order sustaining the attachment. The defendant did not except to this ruling and did not thereafter in any way call upon the district court to rule upon the order sustaining the attachment. *Held*, That this in effect amounted to an affirmance of the order of the county court sustaining the attachment, and that the district court was justified in refusing to entertain an independent motion to discharge for the same reasons as alleged in the motion in the county court.

ERROR from the district court of Sarpy county. Tried below before ESTELLE, J.

James Hassett and *A. E. Langdon*, for plaintiff in error.

C. L. Hover, *contra*.

IRVINE, C.

Printz brought an action against Stutzner in the county court of Sarpy county to recover on a note which Printz had signed as surety for Stutzner and had paid. Printz on the same day filed an affidavit for an attachment. Stutzner filed a motion to dissolve the attachment, whereupon Printz moved for a continuance and the cause was continued to February 5, but on February 2 a default was entered against Stutzner and judgment rendered upon the petition. On February 5 the motion to discharge the attachment was overruled. Stutzner prosecuted error to the district court, assigning in his petition in error errors relating both to the judgment and to the order sustaining the attachment. The cause coming on to be heard in the district court on the petition in error, the following order was made: "This court finds that there was error in the proceedings in the court below, in that the judgment was rendered before the time set for trial. It is, therefore, ordered by the court that the said cause be reversed, to which order of the court the defendant in error excepts and is hereby allowed forty days from the rising of the court to prepare and serve his bill of exceptions." Thereafter a petition was filed and the defendant, without pleading to the petition, filed a motion in the district court to dissolve the attachment, setting up the same grounds as appeared in his motion in the county court. A default was thereafter entered against Stutzner for failure to plead to the petition. A motion to strike from the files the second motion to dissolve the attachment was overruled, but the court refused to hear, in support of such motion to dissolve, the affidavits which had been used in the county court and refiled in the district court. It inferentially appears that the court refused to pass upon the second motion to dissolve upon its merits, and a judgment was rendered in favor of Printz, followed by an order to pay the proceeds of the sale of the attached

property to Printz. It would seem from this that a sale of the attached property had already been had, but by what authority does not appear in the record. From these proceedings Stutzner again prosecutes error to this court.

The first error assigned is in sustaining the motion for a default. It is claimed that the entry of a default was erroneous because Stutzner had filed a motion to dissolve the attachment. The effect of this motion will be considered later. Even if the motion had been a proper one, it would not relieve Stutzner from his default. An attachment is an ancillary proceeding. While it requires the pendency of an action to support it, still the determination of the attachment rests upon its own facts and not upon the facts of the action. (*Reed v. Maben*, 21 Neb., 696.) Notwithstanding, therefore, that an action is aided by attachment and that the defendant has appeared to resist the attachment, he is not thereby excused from filing a pleading to the petition, and if he fail to so plead within the time allowed, his default may be entered against him and the plaintiff may in due course proceed to judgment upon his cause of action. Most of the other assignments of error relate to the action of the court in refusing to entertain the motion to discharge the attachment filed in the district court. A reference to the order deciding the petition in error in the district court shows that the judgment of the county court was reversed solely because it was prematurely rendered. The district court had, therefore, not ruled upon the petition in error in so far as it related to the order of the county court sustaining the attachment and did not reverse that order. The plaintiff in error was entitled after final judgment in the action to have reviewed on error not only the judgment itself but the order sustaining the attachment. (*Walker v. Morse*, 33 Neb., 650.) The order reversing the judgment alone for the reasons stated impliedly affirmed the rest of the proceedings, and this, if done without consideration of other assignments, may have been

error prejudicial to the plaintiff in error, but he did not except to this order, nor did he in his motion for a new trial in the district court or in his petition in error here assign as error the failure or refusal of the district court to reverse the judgment of the county court sustaining the attachment. The action of the county court in that respect remains, therefore, unreversed and unattacked. The proceeding adopted by the plaintiff in error, instead of asking to have reviewed the action of the county court sustaining the attachment, was to file a new motion in the district court, after a reversal of the county court's judgment, seeking a dissolution of the attachment upon the same grounds as were urged in the county court. In *Livingston v. Coe*, 4 Neb., 379, it was said that it is a wholesome rule of practice to refuse to entertain a second motion, where one for the same purpose has been overruled, unless leave to file is specially given, but that where there has been an omission through inadvertence or ignorance of the facts, application should be made for leave to file a new motion to obtain a ruling on such new matter. But the granting of such leave is a matter resting entirely in the discretion of the court to which the application is addressed. The district court, therefore, had a right in its discretion to refuse to entertain a second motion to dissolve the attachment, and we cannot say that there was an abuse of discretion in so refusing, especially as no new grounds were averred.

It is urged that there had been in fact no adjudication in the county court of the attachment, for the reason that the motion to discharge the same was not passed upon until after final judgment. Since this case was submitted it has been held that a motion to discharge must be made before final judgment, but that after judgment the court may rule upon such motion. (*Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520.) The order of the county court sustaining the attachment was, therefore, *coram judice*, and not having been reversed, and the refusal of the district court

to reverse it not having been excepted to or assigned as error, we must treat the action of the county court as an adjudication of the question and as justifying the district court in refusing to entertain an independent motion for the same purpose.

JUDGMENT AFFIRMED.

NELLIE WOODARD V. PERRY E. BAIRD ET AL.

FILED JANUARY 3, 1895. No. 6786.

1. **Appeal and Error:** ELECTION BY FILING PETITION. When a case is, in its nature, appealable, and the party seeking a review files in connection with the transcript a petition in error, he will be deemed to have elected to proceed in error and not by appeal.

2. **Review.** A case will in general be reviewed in this court, only with reference to the theory adopted by the parties in the district court.

3. ——: CONTRACTS: PRACTICAL CONSTRUCTION BY PARTIES GOVERNS. Therefore, where the action was brought upon a contract somewhat ambiguous as to its nature, but both parties in the district court concurred in construing it in a peculiar manner, neither will be permitted in this court to urge a different construction.

4. ——: CONCLUSIVENESS OF TRANSCRIPT. An affidavit filed with the record in this court, stating when the terms of the district court were held, is incompetent to contradict a contrary showing in the transcript of the record itself.

5. ——: COSTS: TAXATION. In cases where no other statutory provision controls, the awarding and taxation of costs rests in the discretion of the trial court and will not be reviewed except for abuse of discretion.

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

Spargur & Fisher, for plaintiff in error.

C. H. Bane, D. B. Jenckes, W. W. Wood, Perry E. Baird, and *J. R. Webster, contra.*

IRVINE, C.

Perry E. Baird and Mary J. Baird were plaintiffs in the district court, and Nellie Woodard defendant. The moving party in this court is Nellie Woodard, who filed a transcript here, accompanied by a petition in error, and also by a paper entitled "Assignments in error upon appeal." The case was in its nature appealable, and from the briefs it would seem to be the object of Woodard to have the case treated as brought here both by appeal and by petition in error. This course is not permissible. A party must elect which remedy to pursue, and having filed a petition in error, she must be presumed to have selected that remedy. The case will, therefore, be treated as a proceeding in error. (*Burke v. Cunningham*, 42 Neb., 645.)

On March 12, 1892, the Bairds entered into a written contract with Woodard, providing that the Bairds agreed to lease to Woodard the "east one-half of the west 44 feet of lots 15, 16, 17, in block 11, in the city of Chadron, being the east one-half of the brick building known as Central Block;" that the lease should begin April 1, 1892, and terminate October 1, 1893, and that in consideration thereof Woodard should pay to the Bairds $800 upon the execution of the lease; $223.66 on or before June 1, 1892; $40 on or before July 1, 1892; $80 on or before January 1, 1893; one-half of the taxes upon Central Block for 1892 to be paid on or before May 1, 1893; $80 on or before July 1, 1893, and one-half of the premium necessary to keep the Central Block insured in the sum of $6,000 during the continuance of the lease. The contract then proceeded as follows: "Now, therefore, it is agreed that if the above covenants and agreements are kept and performed by

the said party of the second part, and the said sums paid as stipulated therein, then, and upon the fulfillment of those covenants and conditions, the said party of the first part will, at the expiration of the said lease, sell and transfer to the party of the second part the said property herein leased, with the usual covenants of warranty, upon the terms and conditions as follows: Two thousand six hundred and twenty-five dollars to be paid down in cash by the said party of the second part to the said party of the first part when the sale and transfer of said property is made, to-wit, upon the 1st day of October, 1893, and for the balance of the consideration for said property the said party of the second part shall at the same time, to-wit, upon the 1st day of October, 1893, execute and deliver to said Perry E. Baird two notes in the sum of $500 each, in favor of said Perry E. Baird, and secure the same by mortgage upon the property herein above mentioned, to be purchased by the said party of the second part upon October 1, 1893; one of the said notes to be due and payable on or before April 1, 1894, and one to be due on or before October 1, 1894; and each of said notes to draw interest until paid at the rate of ten per cent per annum, interest payable semi-annually, thus making the total sum of $3,625 in money and notes to be paid by the said party of the second part at the time the sale and transfer of said property is made, to-wit, upon the 1st day of October, 1893, which sum is in addition to the sums which are to be paid under the said lease prior to October 1, 1893.

"It is further agreed that if the party of the second part should desire to procure a loan to enable her to meet the payment of the said $2,625 to be made at the time of the purchase of said property, to-wit, October 1, 1893, the said party of the second part shall be allowed to secure said loan to the extent of $2,000, by giving a first mortgage upon said property to be bought by her as aforesaid, providing the face value of the note or notes thus to be secured

by the said mortgage shall not in the aggregate exceed the sum of $2,000, and in case the said loan of said $2,000 shall be made by the said party of the second part and secured by mortgage as stated above, then and upon that event the two notes of $500 each, in favor of said Perry E. Baird, which have been mentioned above, shall be secured by mortgage upon said property, second to the said mortgage of $2,000, otherwise the said two notes of $500 each are to be secured by first mortgage, provided always that this agreement is not a present sale of said property, but is an agreement to sell at a future time upon the fulfillment of certain conditions precedent to said sale, and the title, ownership, and possession of the said property remains in the party of the first part until the sale and transfer is made, and the possession of the party of the second part under the lease herein specified to be made, is and shall be in the possession of the tenant and not of the ownership, and the party of the first part shall have the right to take possession of said property by the terms of the said lease, as provided by law in leasing property, in the same manner as though this agreement were not made, providing that the terms of the said lease are not complied with.

"It is further provided and agreed that this contract and agreement is not to be delivered to either of the parties hereto, but is to be placed in the escrow with the Bank of Chadron, and is to be returned to the parties of the first part, or either of them, on or by the 1st day of November, 1893, providing the covenants and agreements made by the party of the second part shall not by that time be fulfilled, and upon the failure of the party of the second part to fulfill her covenants and agreements by the 1st day of November, 1893, then and in that case, the parties of the first part shall be released from any and all obligations under this contract and agreement."

On the 16th day of October, 1893, this action was begun, the petition alleging the making of the contract just

described and the delivery of possession to Woodard; that Woodard had paid certain specified sums amounting to $1,743.66, in addition to a portion of the insurance provided for in said contract. The petition then averred that Woodard had failed to pay her portion of the taxes amounting to $134.90, and her portion of the second year's insurance premium, as well as certain portions of other payments provided for in the contract. It was further alleged that there existed an incumbrance upon the whole of said Central Block in the nature of a mortgage securing $4,000 to the Dakota Loan & Trust Company, which mortgage was then due, and that the plaintiffs were ready and willing to pay the same upon compliance by the defendant with the covenants set out in said contract; that the plaintiffs were ready and willing, and thereby tendered a deed in court to the defendant for delivery upon her compliance with her contract, and generally the plaintiffs pleaded that they had performed all the conditions of the contract upon their part, and that the defendant refused to pay the purchase money. The prayer was that the defendant be required to perform and pay the remainder of the purchase money, and that in default thereof the premises be sold and applied to the payment thereof and for a deficiency judgment. There were also allegations to the effect that Nellie Woodard was insolvent, and that the property at that time was insufficient in value to discharge the indebtedness and there was a prayer for a receiver.

To this petition Woodard filed an answer, beginning by a denial of all allegations not specifically admitted. Then there was an admission of the execution of the contract of sale "and purchase of the real estate in controversy as stated." The answer then alleged that the plaintiffs could not convey the property clear of incumbrance, and that they had failed to release the same from the lien of a certain mortgage for the sum of $4,000 due and payable July 1, 1893, which mortgage was still in force and remained

wholly unsatisfied; that the purchase price of said premises was $5,500, with eight per cent interest from March 1, 1892, and that Woodard had paid thereon the sum of $1,800 and upwards. Then follows this clause: "This defendant alleges that when the plaintiffs shall have released the said premises from obligation of said $4,000, which she prays they may be compelled forthwith to do, she will be ready and willing to fulfill the said contract according to the terms thereof. Wherefore this defendant prays that the action of these plaintiffs be dismissed, or that a decree be had herein declaring that the discharge of the said $4,000 be made a condition precedent in the performance of the said contract and for such other and further relief as may be just and equitable."

A decree was rendered finding due upon the contract the sum of $3,466.41, providing that within thirty days the plaintiffs should procure and deposit in the Bank of Chadron for delivery to the defendant a release of the mortgage to the Dakota Loan & Trust Company, and that said release should be delivered to the defendant upon her making the payments required in the decree, then providing that the defendant should, within thirty days, pay into the Bank of Chadron as much of the purchase money as should be necessary to secure such release, and that the balance should be paid to the plaintiffs or into the bank for their benefit; that the defendant should also pay the taxes for 1892, and execute two notes as provided in the contract, with a further provision permitting the placing of a senior mortgage upon the premises for $2,000, as provided in the contract. The decree then ordered that if the plaintiffs should procure the release as required within the time specified, and if the defendant should fail to perform the conditions upon her part, then the premises should be sold as upon execution, for the satisfaction of the whole amount due the plaintiffs. At the same time a receiver was appointed "to take charge of said premises during the pend-

ency of this action and until final determination and disposition thereof be made by the court," etc.

The errors assigned in the petition in error will be considered *seriatim*. "There is no term of court ordered of record to begin January 2d, 1894." The record recites that the proceedings were had at a special term begun and holden on the 2d day of January, 1894, therefore this assignment of error is not sustained by the record as there is nothing to show when the term adjourned. It is true that there is an affidavit in the record showing that no term was called for that time, but this affidavit is not in any manner authenticated, and is incompetent evidence as against the certified transcript of the record.

The petition "does not state facts sufficient to constitute a cause of action." It would certainly be a very reasonable construction of this contract to hold that it contemplated a present lease of the premises with an option of purchase to be exercised by payment of the purchase money and securing the deferred payment at any time before November 1, 1893, a date after this suit was begun, and if such option was not exercised, then that the contract should never take effect as a contract of sale, but that the vendee's rights should simply be forfeited. The defendant did not, however, contend for any such construction. The plaintiffs treated it as a contract of sale and the defendant met it in her answer by an allegation that it was such a contract and that she were willing to perform; she only asked that the plaintiffs be required to discharge the incumbrance. The court granted her all the relief she asked. A case must be reviewed in this court upon the same theory upon which it was presented in the district court, and the defendant having treated this as a contract of sale and averred her willingness to perform if the mortgage were released, she cannot here be heard to urge that the contract should be otherwise construed. She did not in her answer or otherwise in the district court set up that the action was prematurely brought

and after such an answer she cannot be here permitted to do so.

The court erred in "denying the motion for a new trial." The motion for a new trial contains nine assignments, and this assignment of error is therefore too indefinite for consideration.

"The decree is not for any definite amount, and there is no finding of any exact amount due upon which to base a decree." This assignment is not supported by the decree, which is for an exact and determined amount. Counsel argue in their brief that the amount found was too large but this is not assigned as error.

"The court erred in taxing costs against defendant." The taxation of costs in a case of this character was in the discretion of the trial court (Code of Civil Procedure, sec. 623), and its action will not be reviewed except for abuse of discretion. If it had been made to appear that the default of the defendant in making payments had been due to the failure of the plaintiffs to discharge the incumbrance it might have been considered an abuse of discretion to tax the costs against the defendant, but when it was not pleaded and did not appear that the defendant had tendered the purchase money or offered upon her part to perform, we do not think there was any abuse of discretion in taxing costs against her.

"The court erred in failing to dismiss the action in the court below." What we have already said in regard to the effect of the defendant's answer disposes of this assignment. The court treated the case just as both parties asked to have it treated and the defendant cannot complain thereof.

"For other errors prejudicial to plaintiff in error manifest upon the face of the record." This assignment is too vague for consideration.

The plaintiff in error has, therefore, failed to present any reason for reversing the judgment. She argues in her brief a number of questions not raised by any assignment of

error. Among these is the propriety of the order appointing a receiver. In affirming the judgment we do not wish to be considered as approving the action of the trial court in that respect. By the pleadings and the terms of the decree it is apparent that the defendant could not be required to perform until the plaintiffs should discharge the mortgage. The plaintiffs being so in default the court should not have wrested the possession from the defendant by the appointment of a receiver, and should not in any event have appointed a receiver "pending the action" in the final decree, there being nothing then made to appear which would prevent the conclusion by sale or otherwise of the whole controversy, within a very brief period.

JUDGMENT AFFIRMED.

STATE OF NEBRASKA, EX REL. FIRST NATIONAL BANK OF YORK, V. GEORGE S. COOK, TREASURER.

FILED JANUARY 3, 1895. No. 5483.

1. **Municipal Corporations:** WARRANTS. The warrants of a municipal corporation are not negotiable instruments. They do not constitute a new debt or evidence of a new debt, but are only the prescribed means devised by law for drawing money from the treasury.

2. ———: ———: THE ACT OF A TREASURER IN PAYING money is ministerial and he may only make payments upon orders of the officers in whom the law reposes the authority to direct such payment.

3. ———: ———. A WRIT OF MANDAMUS will not be issued to compel a treasurer to pay a warrant unless the right of the relator to receive payment thereof is clear.

4. ———: ———: RIGHTFUL REFUSAL OF PAYMENT. A city granted a franchise for the construction of water-works, contracted to pay certain hydrant rentals and that in case the owners of the works

should issue mortgage bonds the city would pay a sufficient amount of the hydrant rentals to the trustee under the mortgage to discharge the interest on the bonds. A claim for hydrant rentals was audited and allowed by the council and a warrant was issued on representations by an agent of the water-works company that its bonds had not been sold. This representation proved false. An action was begun to foreclose the mortgage securing the bonds and the city was cited in that action to show cause why it had not paid the hydrant rentals to the trustee. The council, by resolution, directed the treasurer not to pay the warrant until a settlement should be effected. *Held*, That under such circumstances an application for a *mandamus* to compel payment of the warrant must be denied.

ORIGINAL application for *mandamus*.

George B. France, for relator, cited, to the contention *inter alia* that a warrant *prima facie* valid should be paid: *Ray v. Wilson*, 10 So. Rep. [Fla.], 613.

G. W. Bemis, *E. A. Gilbert*, and *N. V. Harlan*, *contra*:

The warrant is invalid because no annual appropriation bill was passed by the council within the first quarter of the fiscal year. (*Town of Olin v. Myers*, 7 N. W. Rep. [Ia.], 509; 1 Dillon, Municipal Corporations, sec. 291; *State v. Gray*, 23 Neb., 365; Consolidated Statutes, secs. 2899, 2902, 2909, 2911; *City of Blair v. Lantry*, 21 Neb., 258.)

Courts will not grant a *mandamus* to a person to do any act when it is doubtful whether he ought to do it. (High, Extraordinary Legal Remedies, sec. 9, p. 13; *People v. Davis*, 93 Ill., 133; *Commissioners of Highways v. People*, 99 Ill., 587; *Oakes v. Hill*, 8 Pick. [Mass.], 46; *People v. Klokke*, 92 Ill., 134.)

No legal estimate or appropriation bill had been passed prior to the passage of the ordinance. (*City of Blair v. Lantry*, 21 Neb., 258; *McElhinney v. City of Superior*, 32 Neb., 744; *Grand Island Gas Co. v. West*, 28 Neb., 852.)

IRVINE, C.

This is an original application for a writ of *mandamus* to compel the respondent, treasurer of the city of York, to pay a warrant alleged to have been issued by the authorities of that city in favor of the relator for $1,789. It is alleged that this warrant was drawn on the water fund, and that the respondent has in his possession over $3,000 in said water fund applicable to the payment of the warrant. The warrant is dated August 15, 1889, and indorsed as having been presented on the same day, and not paid for want of funds. The answer admits that the treasurer now holds in his possession more than enough to pay the warrant, belonging to what is denominated the water fund, and derived from taxes collected under the levy of 1889; admits that the warrant was drawn as alleged; that it was presented and payment refused. As grounds for refusing to pay the warrant the respondent alleges: First, that the warrant does not in form comply with the requirements of the law; second, that there was no valid appropriation against which the warrant could be drawn; third, that no authority was ever granted to issue the warrant to the relator; fourth, that the city of York had entered into a contract with one Strang and another, granting to them a franchise for a system of water-works, contracting with them to lease a certain number of hydrants at a certain rental, and agreeing that in case Strang and McConnell should issue mortgage bonds upon said water works, a sufficient sum from the hydrant rentals to discharge the interest upon such bonds should be paid to the trustees under the mortgage as the rentals became payable; that this franchise passed to a corporation known as the York Water-works Company, which made its mortgage securing bonds amounting to $60,000, and that the agreement of the city referred to was, by its clerk, certified upon such bonds; that the water-works company, about July 1, 1889, filed its claim

against the city for hydrant rentals for the past six months; that its claim was allowed in the sum of $1,789, and that the warrant in question was drawn for that claim; that Strang, one of the original grantees of the franchise, a stockholder in and the agent of the water-works company, in order to procure the allowance of the claim referred to, represented that all the interest coupons on said bonds, up to July 1, 1889, had been paid and canceled, and, relying upon that representation, the claim was allowed; whereas, in fact, said coupons had not been paid, but are still outstanding, and the holders thereof demand payment from the city; that on May 22, 1890, the city council passed a resolution, set out in the answer, that no further payments be authorized on account of hydrant rentals until a settlement should be had between the water-works company and its bond-holders, and all coupons surrendered to the city, and directed the treasurer not to pay the warrant in question until such settlement should be had; that the trustee of the mortgage had brought suit in the circuit court of the United States to foreclose the same on account of default in the payment of said interest coupons; fifth, that for certain reasons set out in the answer the contract, with reference to hydrant rentals, was without legal authority and void; sixth, that no estimate had been made or published, as required by statute, of the expenses of the city government.

We have very briefly stated the nature of some of these defenses for the reason that it will not be necessary to consider them all. The referee appointed for the purpose has reported his findings of fact, the sufficiency of the evidence to sustain which is not questioned. From these findings it appears that the claim was presented, allowed, and the warrant issued for the purpose stated in the answer; that the plaintiff purchased the claim after its allowance, and before the warrant was drawn, without actual notice of the issuance of the bonds; that the bonds and mortgage were

made and issued as alleged in the answer, and that the contract of the city was as therein set out; that when the warrant was issued Strang represented to the council that the bonds had not been sold; that an action is pending in the federal court as charged in the answer, and that the city has been cited to appear in said case and show cause why it has not paid the past due coupons to the trustee, and that the rescinding resolution set out in the answer was passed as alleged. The report of the referee finds on all the other issues, but the facts already stated are sufficient to control the case. It has been held that *mandamus* will lie to compel the payment by a treasurer of warrants legally issued upon accounts duly audited and allowed, when such warrants have been presented and payment refused, and there are sufficient funds in the treasury to pay said warrants after the payment of all warrants drawn against that fund prior to the same. (*State v. Gandy*, 12 Neb., 232.) It will be observed that this rule is restricted to the case of warrants legally issued. It is well settled that such instruments are not negotiable instruments, and that a purchaser thereof does not take the same discharged of any equities existing against the original holder. (*School District v. Stough*, 4 Neb., 357; *Union P. R. Co. v. Buffalo County*, 9 Neb., 449; *Burlington & M. R. Co. v. Clay County*, 13 Neb., 367.) The reason given in some of the best considered cases for holding such instruments non-negotiable is that a municipal corporation has no power in the absence of an express grant to issue unimpeachable evidences of indebtedness. Thus, in *Police Jury v. Britton*, 15 Wall. [U. S.], 566, Mr. Justice Bradley says: "It is one thing for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations which may be multiplied to an indefinite extent." And in *Mayor of Nashville v. Ray*, 19 Wall.

[U. S.], 468, the following is said in regard to the nature of such warrants: "Vouchers for money due, certificates of indebtedness for services rendered, or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for liquidating the amounts legitimately due to public creditors, are of course necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company, and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, and in our opinion no such power does legally exist, unless conferred by legislative enactment, either express or clearly implied." It is also said in that case that the officers of a city have no authority to issue warrants for an illegal purpose, and that their acts cannot create an estoppel against the city.

In the absence of a statute conferring special characteristics upon warrants the authorities are practically unanimous that such instruments are merely devices for properly drawing money from the treasury; they are little more than certificates of indebtedness. "The warrant is not intended to constitute a new debt or evidence of a new debt, * * * but is the prescribed means the law has devised for drawing money from the county treasury." (*Dana v. City of San Francisco*, 19 Cal., 486.) An indorsee may sue upon such warrant, not because he has title under the law merchant, but because the indorsement amounts to an assignment of the debt upon which the warrant is issued. The auditing of claims and issuing war-

rants therefor are not such settlements as to have the force of a judicial proceeding or to estop the corporation issuing the warrant. (*Shirk v. Pulaski County*, 4 Dill. [U. S.], 209; citing numerous cases.) This must be true when the body allowing the claim has not been given authority to act judicially in determining the legality of the claim. While money remains in the possession of the treasurer, the authorities having the power of disposing of the same have entire control of it, and the rescission of an order directing its payment before the payment is in fact made, is as between the holder and the treasurer a defense to the latter. (*Tucker v. Justices of Iredell County*, 13 Ired. Law [N. Car.], 434; *Dey v. Lee*, 4 Jones Law [N. Car.], 238.)

The case of *People v. Klokke*, 92 Ill., 134, is very instructive with reference to the question before us. That case was an application to compel the county clerk to issue a warrant and to compel the treasurer to countersign and pay the same. There had been a disputed account between the county and the relator. In the course of the controversy a proposition was made to compromise by the payment of a certain sum, and a resolution had been passed authorizing the payment of another sum. Before the proposition to compromise had been accepted, the commissioners rescinded this resolution, and the court held that under the circumstances the clerk and treasurer would not be compelled by *mandamus* to issue or pay the warrant. It was further held that whether the board could rightfully rescind the order could not be determined in that action, but that the clerk and treasurer were merely ministerial officers, and whether or not the board could rightfully rescind the order, the resolution rescinding it deprived these officers of their only authority in the premises.

In *People v. Johnson*, 100 Ill., 537, a county warrant had been issued to one Comiskey. Comiskey indorsed it in blank and lost it. It subsequently came into the hands of the relator who purchased it for value without notice of

the defective title. In the meantime Comiskey had procured a duplicate warrant which was paid. The court said that the drawing of the order did not operate as a payment or change the character of the indebtedness; that such orders are given simply as a part of the system provided for paying county indebtedness; that the loss of the order could not have affected Comiskey's rights, that while, as a general rule, *mandamus* will lie to compel the payment of orders legally drawn, still where by reason of extraneous circumstances a well founded doubt arises either as to the right of the applicant to receive the fund or the duty of the officer to pay it, *mandamus* is not the proper remedy. The claimants must resort to some other appropriate action.

Applying these principles to the case before us, we think it plain that the writ must be denied. The issuing of the warrant did not change the nature of the indebtedness. The bank took it subject to all defenses which might have been urged had it been issued to the water-works company. Before its payment the council learned that it had been induced to allow the claim by reason of false representations made on behalf of the water-works company. It then directed its ministerial officer not to pay the warrant. Another action is pending whereby other persons seek to enforce payment to them of the same claim. It is not for the treasurer to review the action of the council and determine for himself whether or not a claim is justly payable to a particular person. He acts only under the authority given by the council acting in accordance with law, when he makes the payment. Without such authority a payment by him would be wrongful and subject him to personal liability. We cannot, in an application for a *mandamus* against him, undertake to try the disputed claims of the relator and the bond-holders. The bond-holders are not parties to this suit, and the city is not a party. The relator has not shown a clear legal right.

WRIT DENIED.

POST, J., not sitting.

MERRIT D. WELCH v. F. J. AYRES ET AL.

FILED JANUARY 4, 1895. No. 5709.

1. **Summons:** SERVICE BY PUBLICATION: JURISDICTION. Jurisdiction of the defendant cannot be acquired by service by publication, in an action for the recovery of money, under the third clause of section 77 of the Code, unless the defendant is a non-resident of the state, or a foreign corporation having property in this state, or debts owing to him, which are sought to be taken by some provisional remedy, or to be appropriated by judicial proceedings.

2. ———: ———: ———. In such an action where the defendant has within the state no property, nor debts owing to him, jurisdiction will not be acquired over his person by the publication of the summons.

3. ———: ———: ———. For the purpose of ascertaining its jurisdiction in such a case, it is competent for the court to hear testimony, when the question of jurisdiction is properly raised by the defendant.

4. **Appearance:** WAIVER OF DEFECTS IN NOTICE. When a defendant appears and files a motion to dismiss the suit because of defects in the service by publication, he thereby waives all irregularities and defects in such service.

ERROR from the district court of Antelope county. Tried below before ALLEN, J.

Ricketts & Wilson, for plaintiff in error, cited: *Weil v. Larkins*, 3 Neb., 384; *Weinland v. Cochran*, 9 Neb., 480; *Crowell v. Horacek*, 12 Neb., 622; *Keene v. Sallenbach*, 15 Neb., 200; *Kennard v. Hollenbeck*, 17 Neb., 362; *Kimbro v. Clark*, 17 Neb., 403.

O. A. Williams, contra.

NORVAL, C. J.

On the 17th day of December, 1891, this action was brought in the court below by plaintiff in error against F.

J. Ayres and J. B. Blanchard upon two promissory notes executed by the defendants. At the same time, upon an affidavit for an attachment in proper form being filed by the plaintiff, alleging that the defendant Blanchard was a non-resident of this state, an order of attachment was issued against the goods and effects of said Blanchard. The sheriff levied the writ upon the south half of the northwest quarter, and the north half of the southwest quarter of section 21, in township 27 north, of range 7 west, in Antelope county. The defendant Ayres waived the service of a summons and entered his voluntary appearance in the action, and upon his default for want of an answer, judgment was taken against him in favor of the plaintiff for the sum of $1,597.95. On the 30th day of January, 1892, an affidavit, in due form, was filed with the clerk of the district court for service by publication upon the defendant Blanchard, on the ground that she was a non-resident of the state, and had property in this state, which had been attached in the action. Subsequently, service of summons was had upon Blanchard by publication, and afterwards she appeared and moved the court to dismiss the action for want of jurisdiction, for the reason that she had no property within this state at the time the suit was instituted, or since. Affidavits were filed in support of the motion, in which it is stated, in effect, that J. B. Blanchard was not the owner of any property, real or personal, situated or located within the jurisdiction of the court, and that she had not been the owner of, and had no right, title, or interest in, the lands attached since December 20, 1888, but that on said day, for a valuable consideration, she transferred said real estate to one Maggie Swearinger. The court sustained the motion of the defendant Blanchard, dismissed the cause as to her, and vacated the attachment. This ruling of the court is the only point presented for review.

Our Code of Civil Procedure (section 77) provides:

"Service may be made by publication in either of the following cases: First—In actions brought under the fifty-first, fifty-second, and fifty-third sections of this code, where any or all of the defendants reside out of the state. Second—In actions brought to establish or set aside a will, where any or all the defendants reside out of the state. Third—In actions brought against a non-resident of this state, or a foreign corporation, having in this state property or debts owing to them, sought to be taken by any of the provisional remedies, or to be appropriated in any way. Fourth—In actions which relate to, or the subject of which is, real or personal property in this state where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a non-resident of the state or a foreign corporation. Fifth—In all actions where the defendant, being a resident of the state, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent." Service by publication was made in this cause under the third clause, or subdivision, of said section 77. It is plain that said clause authorizes the service of a summons by publication alone upon the concurrence of the following conditions: First, the defendant must be a non-resident of the state, or a foreign corporation; second, that the defendant is the owner of property, or has debts owing to him within the state; third, that such property or debts are sought to be taken by a provisional remedy, or to be appropriated by judicial proceedings. If any one of the foregoing conditions does not exist, jurisdiction of the defendant will not be acquired by publication of the summons. That the defendant Blanchard was not a resident of Nebraska, that she had property in this state, and that the writ of attachment which issued in the cause was levied thereon, are all

averred in the affidavit filed for service by publication. It is not disputed that at the commencement of the suit Blanchard was a non-resident; but it is contended, and the testimony adduced on the hearing of the motion to dismiss shows, that she was not the owner of the property attached, or any other property within the state when the action was instituted against her. The right to institute and prosecute an action against a non-resident debtor for the recovery of money only, and to serve summons upon him by publication, under the third clause of section 77, depends as much upon the existence of the fact of the defendant's ownership of the property within the state as upon the fact of his non-residence; and the existence of both facts are essential to the validity of the proceedings. Service of publication under said clause of section 77 can only be had against a non-resident of this state who has property therein. (See *National Bank of New London v. Lake Shore & M. S. R. Co.*, 21 O. St., 221.) The supreme court of California, in *Anderson v. Goff*, 13 Pac. Rep., 73, held that while under the statute of that state it was not necessary to aver in the affidavit for service for publication that the defendant has property in the state, or that a writ of attachment has issued, yet those facts must exist in order to render the judgment valid.

In the case at bar all the jurisdictional facts are set up in the affidavit under which the publication of the summons was made, and the question is presented whether it was competent for the trial court to receive testimony for the purpose of showing that the defendant Blanchard did not own the property attached. We think the answer must be in the affirmative. The affidavit for publication, although *prima facie* evidence of the existence of the jurisdictional facts therein alleged, is not conclusive. Suppose in this case the defendant had made a special appearance, and moved to quash the service on the ground that she was a resident of the state. Would it be contended for a mo-

ment that she would not be permitted to establish by competent evidence that she was a resident of Nebraska and had been ever since the action was brought? Certainly not. Then it would seem clear that a defendant served by publication in an action for the recovery of money may show the non-existence of any fact essential to confer jurisdiction, such as that the defendant owns no property situated within this state. The right to make service by publication in an action like this depends upon the existence of the three jurisdictional facts specified in the third clause of section 77 of the Code, and not alone upon the averment thereof in the affidavit for publication. Such being the case, it follows that it is competent for the court to hear testimony for the purpose of ascertaining whether or not it has jurisdiction in the case. This doctrine is held and applied by the supreme court of Ohio, under a statute similar to our own, in the case reported in 21 Ohio State, cited above. The court, in the opinion of that case, distinctly states that it was proper for the trial court to determine upon the evidence adduced, whether the non-resident was the owner of the property sought to be taken by the process of attachment. We are in no doubt that, in an action like this, ownership in the non-resident debtor of the property attached is essential to jurisdiction. By this is not meant that the property must stand in his own name. If he has an attachable interest in the property, so far as the question of ownership is concerned, it is sufficient to confer jurisdiction. Suppose a debtor has transferred his property for the purpose of defrauding his creditors, as the plaintiff claims was done in this case, although there is but slight evidence tending to establish such fact in this record, such property may be seized under a writ of attachment as the property of the fraudulent transferrer, and this court has so declared in *Keene v. Sallenbach*, 15 Neb., 200; *Kennard v. Hollenbeck*, 17 Neb., 362; *Kimbro v. Clark*, 17 Neb., 403; *Gillespie v. Cooper*, 36 Neb.,

775. It requires no argument to convince any one that the interest of the debtor in such property, when situated within this state, constitutes a sufficient ownership to authorize the service of summons by publication, when all other jurisdictional facts appear. This being an action *in personam*, and the defendant Blanchard not having any property within this state at the commencement of this action, for the reasons stated above, the service of a summons upon her by publication was insufficient, and conferred no jurisdiction upon the court over her person. Had the proper motion been made, namely, to quash the service, the court below should have declared that there had been no service of process upon the non-resident defendant, and that she is not required to answer. No such motion, however, was filed, but one to dismiss the action. The court erred in its ruling in dismissing the suit, since the court had jurisdiction of the subject-matter, and the plaintiff may yet be able to make personal service of summons upon the defendant Blanchard in this state. The motion which was made and sustained was too broad. It should have been limited to the single question of the jurisdiction of the court over the person of the defendant Blanchard. The filing of a motion to dismiss the suit constitutes a general appearance. It is a waiver of all defects in the service by publication, and gives the court jurisdiction of the person of the defendant. (*Aultman v. Steinan*, 8 Neb., 109; *Bucklin v. Strickler*, 32 Neb., 602.) The judgment is reversed and the cause reinstated.

REVERSED.

MICHIGAN STOVE COMPANY v. C. H. MILLER.

FILED JANUARY 4, 1895. No. 5233.

Bill of Exceptions: ALLOWANCE BY COUNTY JUDGE: ATTACHMENT. A county judge has no jurisdiction to settle a bill of exceptions preserving the evidence adduced on the hearing of a motion to dissolve an attachment. *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520, and *Donaldson v. Fisher*, 43 Neb., 260, followed.

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

Dryden & Main, for plaintiff in error, cited: *Taylor v. Tilden*, 3 Neb., 339; *Kellogg v. Huntington*, 4 Neb., 96; *Nickerson v. Needles*, 32 Neb., 240; *Hubbard v. Quisenberry*, 28 Mo. App., 20.

R. A. Moore and *Calkins & Pratt, contra*, cited: *Hilton v. Ross*, 9 Neb., 406; Constitution, sec. 24, art. 1; Code, secs. 908, 950, 988, 1085; *Osborne v. Canfield*, 33 Neb., 330.

NORVAL, C. J.

This action was commenced in the county court by the plaintiff in error on an account for goods sold and delivered in the sum of $169, and on an accepted draft for $150.14. An affidavit for an attachment was filed, alleging that the defendant had disposed of his property with the intent to defraud his creditors. An undertaking in attachment was given, an order of attachment was issued, which was levied upon certain property as belonging to the defendant, and one A. G. Scott was garnished. The defendant moved to dissolve the attachment on the grounds that the affidavit for attachment does not state facts sufficient to authorize the issuance of an attachment, and that the statements contained in said affidavit are untrue. This motion was heard

upon affidavits and oral testimony, which motion was overruled, and a bill of exceptions embodying the testimony adduced upon said hearing was settled and allowed by the county judge. Subsequently the cause was tried to the court. A jury being waived, judgment was rendered in favor of the plaintiff, and an order for the sale of the attached property was issued. The defendant prosecuted a petition in error to the district court, where the plaintiff filed a motion to strike the bill of exceptions from the files, for the reason that the county judge had no authority to sign the same, which motion was denied. The order of the county court sustaining the attachment was reversed, and the attachment dissolved.

No claim is made in this court that the original affidavit for attachment was defective, or insufficient, or that the district court based its decision upon that ground. On the contrary, it is conceded that the court below, in reaching the conclusion it did, decided and held that the statements contained in the attachment affidavit were untrue. The proposition, therefore, presented by the record for our consideration is whether the county judge exceeded his jurisdiction in signing the bill of exceptions in this case. Since the decision in the district court was pronounced, the precise question herein involved, after an extended review of the statutes and authorities bearing thereon, was passed upon in *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520. It was there decided that a county judge is without authority to sign a bill of exceptions embodying the evidence used on the hearing of a motion to vacate an attachment. (*Real v. Honey*, 39 Neb., 516; *Hopkins v. Scott*, 38 Neb., 661; *Donaldson v. Fisher*, 43 Neb., 260.) No good reason has been advanced for overruling the doctrine of these cases. We would be better satisfied if the authority of county judges and justices of the peace to settle bills of exceptions was not so restricted by statute. The legislature will doubtless afford relief should its at-

tention be called to the subject. The decisions alluded to are decisive of this case. The district court erred in refusing to strike the bill of exceptions from the files, and in reversing the order of the county court overruling the motion to dissolve the attachment. The judgment of the court below is reversed, and the order of the county court sustaining the attachment is affirmed.

JUDGMENT ACCORDINGLY.

JENNIE E. GLASS V. G. C. ZUTAVERN ET AL.

FILED JANUARY 4, 1895. No. 6331.

1. **Fraudulent Conveyances:** HUSBAND AND WIFE: BURDEN OF PROOF. A conveyance by an insolvent debtor to his wife, whereby other creditors are prevented from enforcing payment of their claims, is presumptively fraudulent as to such creditors, and the burden is on one claiming through it to prove the contrary.
2. **Bill of Exceptions:** ALLOWANCE BY CLERK. It is only in the exceptional cases enumerated in section 311, Civil Code, that the clerk of the district court is authorized to allow and sign bills of exceptions. (*Scott v. Spencer*, 42 Neb., 632.)

ERROR from the district court of Johnson county. Tried below before BUSH, J.

T. Appelget, for plaintiff in error:

A wife may contract with her husband and become his creditor. (*Lipscomb v. Lyon*, 19 Neb., 515; *Hill v. Fouse*, 32 Neb., 637.)

It is not a fraud upon other creditors for a husband to make his wife a preferred creditor. (*Lipscomb v. Lyon*, 19 Neb., 515.)

C. Rood and *S. P. Davidson, contra,* cited: *Stevens v. Carson,* 30 Neb., 550; *Thompson v. Leonig,* 13 Neb., 386; *Steele v. Coon,* 27 Neb., 598; *Swartz v. McClelland,* 31 Neb., 648.

POST, J.

This was an action in the district court for Johnson county to recover for the conversion of a stock of drugs and druggists' fixtures. The plaintiff below, who is also plaintiff in this court, claimed through James R. Glass, her husband, under a chattel mortgage to secure an alleged indebtedness to her, while the defendant Zutavern, as sheriff, and the other defendants as attaching creditors, claimed through certain orders of attachment issued in actions commenced by them against the said James R. Glass. There was a verdict and judgment for the defendants, from which the plaintiff has prosecuted proceedings in error in this court.

The first of the alleged errors is that the district court erred in modifying two instructions asked by the plaintiff. The modifications complained of consist in the addition to a paragraph evidently intended as a statement of the facts essential to entitle the plaintiff to recover, the proposition that the jury must be satisfied that the plaintiff's mortgage was in good faith for a sufficient consideration and not for the purpose of defrauding the creditors of the mortgagor. There was no error in the action assigned. Indeed, the instructions as submitted failed to state the law applicable to the case on trial, and to have given them in the form presented would have been prejudicial error. It had been clearly shown that the effect of the mortgage of the plaintiff from her husband was to defeat the creditors of the latter, and to prevent them from realizing on their claims against him. It was, therefore, presumptively fraudulent, and the burden was upon the plaintiff to prove the

contrary, hence the direction that she must affirmatively establish her good faith was rightly given.

It is next complained that the court erred in giving instructions 1, 2, 3, 4, and 5 asked by the defendants, and 1, 2, 3, 4, 5, and 6 on its own motion. This method of assigning errors, it has been frequently held, is insufficient, provided any of the instructions complained of correctly state the law and it is conceded that some of them do in this case. It is next argued that the court erred in refusing instructions 5 and 10 asked by the plaintiff. But the first named instruction is not contained in the record while we find no exception to the refusal of the other, if indeed it was refused which is not clear from the record.

The only other assignment is that the evidence does not sustain the judgment. But that question cannot be considered in the absence of a bill of exceptions properly authenticated. The only pretense of an observance of the statutory requirements for the settlement and allowance of exceptions is a certificate of the clerk to the effect that "the foregoing is all the evidence given or offered, with the rulings and exceptions thereon," etc. It is only in the exceptional cases enumerated in sec. 311, Civil Code, that the clerk is authorized to allow and sign the exceptions. (*Scott v. Spencer*, 42 Neb., 632, and cases cited.) The certificate of the clerk being without authority, it follows that the question of the sufficiency of the evidence is not presented to this court. The judgment of the district court must therefore be

AFFIRMED.

JOSEPH KRCHNAVY V. STATE OF NEBRASKA.

FILED JANUARY 4, 1895. No. 6755.

1. **Criminal Law:** ASSAULT WITH INTENT TO MURDER: INSTRUCTIONS. In a prosecution for an offense which consists in the doing of an act accompanied by a specific intent as assault with intent to murder, it is not error to instruct that the accused is presumed to have intended the natural and proximate consequences of his voluntary acts; but such presumption should be limited to the actual results of the act proved.

2. ——: EVIDENCE OF INTENT. The law does not require in every case independent evidence of the particular intention. On the contrary the circumstances attending the principal act may be of such a character as to exclude every rational hypothesis except the existence of the specific intent charged.

3. ——: ——. The test in such cases is one of logic rather than one of law; and while the jury are at liberty, if the circumstances warrant, to infer the intention from the act, they are under no legal obligation to do so.

4. **Homicide:** CHARACTER OF WEAPON: QUESTION FOR COURT. Where a weapon and the manner of its use in the commission of an assault are such as to admit of but one conclusion in that respect, the question whether or not it is deadly, within the meaning of the law of homicide, is one of law and the court should take the responsibility of so declaring.

5. ——: ——: QUESTION FOR JURY. But where it may or may not be likely to produce fatal results according to the manner of its use, or the part of the body at which the blow is aimed, its character in that respect is one of fact for the jury.

6. **Instructions embodying the law of self-defense,** *held*, properly refused in the absence of evidence tending to show that the assault charged was justifiable on that ground.

ERROR to the district court for Saunders county. Tried below before WHEELER, J.

The facts are stated in the opinion.

C. S. Allen, Good & Good, and *J. K. Vandemark,* for plaintiff in error:

The trial court's eleventh instruction was wrong in stating that the law presumes a person intends the natural consequences of his act. (*State v. Neal,* 37 Me., 470; *State v. Stewart,* 29 Mo., 420; *Curry v. State,* 4 Neb., 545; *People v. Sweeney,* 55 Mich., 586.)

A hoe handle used to strike but once, is not a deadly weapon, and the court should not have assumed it was. The question was for the jury. (*People v. Comstock,* 13 N. W. Rep. [Mich.], 617; Thompson, Trials, sec. 2181.)

The act of defendant in striking one blow with a hoe handle, which might have caused death but did not, is not alone sufficient to justify the jury in finding an intent to murder. (*People v. Sweeney,* 55 Mich., 586; *Curry v. State,* 4 Neb., 545.)

The specific intent to murder must be proved. (Bishop, Criminal Law [3d ed.], sec. 761.)

George H. Hastings, Attorney General, for the state, cited: *Curry v. State,* 4 Neb., 545; *Smith v. State,* 7 So. Rep. [Ala.], 103; *Foster v. People,* 50 N. Y., 609; *State v. Alford,* 10 So. Rep. [La.], 887; *Evans v. Commonwealth,* 12 S. W. Rep. [Ky.], 767.

POST, J.

This is a petition in error and presents for review a judgment of the district court for Saunders county, whereby the plaintiff in error was convicted of an assault with intent to murder. The offense, it seems, was committed at a dance in a saloon in the village of Touhy on the 8th day of September, 1893. Of those present a number, including the prosecuting witness, Ganson Stoughton, had, during the evening, indulged freely in the use of liquor, and were, at the time of the assault, about two hours after midnight, ap-

parently intoxicated. Shortly before the assault there was a quarrel between Anton Krchnavy, a brother of the prisoner, and one Greever, which resulted in a scuffle on the porch or sidewalk in front of the saloon. The prosecutor, according to the witnesses for the state, insisted that they should go away from the saloon to fight, and, according to the defendant's witnesses, he interfered to prevent others from separating the combatants. There is evidence tending to prove that during the scuffle above mentioned there was some controversy between the prosecutor and Frank Krchnavy, also a brother of the prisoner, during which blows were exchanged by them. They were soon separated when Stoughton, according to the witness for the defense, retired, saying, "You son of a b—, I'll fix you," and returned a minute and a half or two minutes later with a club or stick of some kind in his hand. He said, presumably addressing the prisoner and his brothers, "Now, d—n you fellows, come on. I'll fix you. I'll knock your brains out." He made no attempt to strike, but retreated backward from the porch eight or ten steps, when the prisoner, who had approached him from behind, struck him a blow on the head with a garden hoe, instantly knocking him down and fracturing his skull so that it became necessary to remove fifteen or more pieces thereof.

The attack upon the judgment in the oral argument, and also in the excellent brief submitted by counsel for the prisoner, is directed in particular against the eleventh instruction given by the court on its own motion, as follows: "The law presumes that all persons intend the natural and probable consequences of their acts, and where it appears that one person has assaulted another with a dangerous and deadly weapon, the presumption is that he intends the natural and probable consequences of his acts. If you believe from the evidence, beyond a reasonable doubt, that the defendant assaulted the witness Stoughton with a garden hoe, struck him on the head with such force and violence as to

crush his skull, and further find from the evidence, beyond a reasonable doubt, that such assault was made purposely and maliciously, then, in such case, you would be justified in finding the defendant guilty as charged in the information."

1. The first objection to the above instruction is that it can only be interpreted to mean "that when one assaults another with a deadly and dangerous weapon, it raises a legal presumption that he intends to kill." It was said in *Curry v. State*, 4 Neb., 545, that "a person is presumed to do that which he voluntarily and willfully does in fact do; but if the intent is to be carried beyond the result actually produced by the acts of the accused, evidence must be introduced to justify the jury in so finding." The above is substantially the rule as stated in *Commonwealth v. Webster*, 5 Cush. [Mass.], 305, and may be accepted as the law of this state. We do not, however, interpret the rule to require in every case independent evidence of the particular intention. On the contrary, the circumstances attending the principal act may be of such a character as alone to exclude every rational hypothesis except the existence of the specific intent charged. According to the modern and more reasonable view the test in all such cases is a rule of logic rather than a rule of law; and while a direction to the effect that men are presumed to intend the natural and probable consequences of their voluntary acts is generally held unobjectionable, what is meant thereby is that the jury are at liberty, if the circumstances warrant, to infer the intent from the act. Such inference, in the language of Dr. Wharton, is not one of law but of probable reasoning as to which the court may lay down logical tests for the guidances of the jury, but can impose no positive binding rule. (Wharton, Criminal Evidence, secs. 735, 736.) Judged by that test it may be conceded that the proposition stated by the court is incomplete, and unless supplemented by other instructions, merits the criti-

cism to which it has been subjected. But in another paragraph the jury were cautioned as follows: "The force with which a blow was struck, where it does not result in death, is evidence bearing upon the question of the intent with which the blow was struck. But the fact that the blow might have produced death is not conclusive evidence that the assaulting party intended to kill, but is simply a fact to be weighed and considered as evidence in determining the intent." By a third paragraph they were further cautioned as follows: "You are instructed that the intent being one of the principal elements of the crime charged against the defendant, it is necessary for the state to prove beyond a reasonable doubt that the assault was made upon the said Ganson Stoughton with malice aforethought, or with the intention previously formed to kill him, and if you entertain a reasonable doubt of the existence of such intent, then you must acquit the defendant of assault with intent to murder." Reading the several paragraphs of the charge together we can conceive of no just ground for complaint by the prisoner. As a statement of the law it is above criticism by him, and is, as we shall presently see, fully warranted by the facts of the case.

2. It is next contended that the instruction is erroneous, in consequence of the assumption therein that a garden hoe is a deadly weapon. There is an apparent diversity of opinion respecting the subject suggested. The question whether a weapon is deadly, within the meaning of the law of homicide, is by some writers said to be one of fact for the jury. Mr. Bishop, on the other hand, says: "It [a deadly weapon] is a weapon likely to produce death, or great bodily injury. In a case of doubt, the manner in which it was used may be taken into the account in determining whether or not it was deadly. And when the facts are all established, the question of whether a particular weapon was deadly or not is of law for the court. Yet practically, as in most instances, the establishment of the facts awaits the

rendition of the verdict the jury must pass upon this question, under instructions from the court." (Bishop, Statutory Crimes, 320.) The doctrine of the well-considered cases may be thus summarized: Where the weapon in question and the manner of its use are of such character as to admit of but one conclusion in that respect, the question whether or not it is deadly, within the foregoing definition, is one of law, and the court must take the responsibility of so declaring. But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its character is one of fact to be determined by the jury. By a reference to the instruction complained of it will be observed that a garden hoe is not therein declared to be *per se* a deadly weapon. The substance of the language used is that the jury would be warranted in finding that the weapon was in fact a deadly one, if satisfied beyond a reasonable doubt that the prisoner therewith maliciously struck the prosecutor a blow on the head with such force as to crush his skull, and that such blow was well calculated to produce death. In short, the character of the weapon was made to depend both upon the manner and the intention with which it was used. The instruction is therefore in strict accord with the rule stated. It is also unquestionably warranted by the evidence. Counsel, in their brief, speak of the assault as having been made with a hoe handle, an assumption unwarranted by the record. The only evidence with respect to the weapon is that it was a hoe of the ordinary kind, which had recently been used in mixing mortar. The blow was struck not with the handle, but with the back part, or iron shank which connects the steel blade with the handle, and lateral cuts, at right angles with the principal wound, indicate that the injury was produced both by the shank and the back part of the blade of the hoe. We must remember, too, that the prosecutor was struck on the back of the

head, not lightly, but evidently with considerable force, and that his life is probably due to the fact that the force of the blow was in some measure arrested by his hat. The instruction is therefore not objectionable on either ground urged. Indeed, it is probable, although not decided, that the court would have been warranted in charging, as a matter of law, in view of the circumstances attending the assault, that the hoe was a deadly weapon.

3. Numerous instructions were asked bearing upon the subject of self-defense, and their refusal is also assigned as error. At the conclusion of the argument we were strongly impressed with the soundness of that contention, but a careful reading of the record has convinced us that there is no evidence whatever to which such a charge could apply. It is not necessary in this connection to discuss at length the law of self-defense. It is sufficient for present purposes that in order to lay a foundation for the submission of that subject there must be some evidence tending to prove that the act in question appeared to be necessary for the protection of the person of the prisoner or another. The prisoner in the case at bar did not testify in his own behalf, and we have searched the record in vain for such foundation. The prosecutor, it is true, was intoxicated and evidently abusive, but his attitude when assaulted was in no sense aggressive. Judged by the testimony for the prisoner, he appears rather to have been acting on the defensive and, as we have seen, was retreating backward from the persons in front of the saloon when he was struck from behind by the prisoner. There being no error in the rulings assigned, the judgment of the district court must be

AFFIRMED.

CHARLES W. OLANDER, APPELLEE, V. WILLIAM TIGHE ET AL., APPELLANTS.

FILED JANUARY 4, 1895. No. 6255.

Judgments: LIEN ON VENDOR'S INTEREST IN LAND: EXECUTIONS. A judgment recovered in the district court against the vendor of land which is situate in the county in and for which the court is held, who has not, at the time of the recovery of the judgment, executed and delivered a deed for the land or received all the purchase money, is a lien upon the interest of the vendor in the land, viz , the unpaid purchase money; and a levy of an execution issued upon such judgment on the land, and a sale thereunder will pass to the purchaser the interest of the vendor.

APPEAL from the district court of Cass county. Heard below before CHAPMAN, J.

Wooley & Gibson, for appellants, cited: *Filley v. Duncan*, 1 Neb., 139; *Dorsey v. Hall*, 7 Neb., 465; *Uhl v. May*, 5 Neb., 161; *Courtnay v. Parker*, 21 Neb., 582.

H. D. Travis and *A. N. Sullivan, contra*, cited: *Webb v. Wynn*, 35 Ga., 216; *Bank of Cass County v. Morrison*, 17 Neb., 341.

HARRISON, J.

On March 15, 1892, the appellee herein filed a petition in the district court of Cass county in which he alleged, in substance, that F. G. Nelson, one of the parties defendant, prior to the month of May, 1888, held a contract for conveyance to him by Eugene L. Reed and Josiah Bellows, also of defendants, of a certain lot in Riverside addition to the city of Weeping Water, which lot was at that time unimproved and worth not to exceed $130; that plaintiff bought of Nelson an undivided one-half interest in the lot

and they took possession and jointly erected a dwelling house and placed other lasting and valuable improvements thereon, and they and their families occupied the house and premises as their home; that the purchase price of the lot was fully paid on or before September 2, 1889; that afterwards (according to the deed introduced in evidence, this was on June 17, 1890,) J. H. Bellows and Eugene L. Reed executed and delivered a deed for this lot to Nelson and he mortgaged it to a building and loan association to secure a loan of $500; and on June 18, 1890, conveyed the lot to the appellee; that prior to December 4, 1890, and on that date, Eugene L. Reed had no interest or title in or to the lot in controversy; that on the date last mentioned Francis N. Gibson of defendants, recovered a judgment against Eugene L. Reed in the district court of Cass county for the sum of $5,733 and in January, 1892, caused an execution to be issued out of said court upon said judgment and levied by the sheriff, who was made a party defendant in the case at bar, on the lot owned by Nelson and appellee, and that a sale of the lot under the levy of the writ of execution, is threatened, which will cast a cloud upon plaintiff's title and cause him great and irreparable injury. The relief asked was that Gibson and the sheriff be restrained and enjoined from making the threatened sale of the property and from interfering or intermeddling with appellee's title to or possession of the lot. Gibson and the sheriff filed an answer in which they admitted the recovery of the judgment on the date alleged in the petition, the issuance and levying of the writ of execution upon the lot described, and alleged that at the time this action was brought they were proceeding to sell the property for the purpose of applying the proceeds in payment upon the judgment; that at the time of the rendition of the judgment, December 4, 1889, the title to the property was in Eugene L. Reed, and that neither appellee nor Nelson had theretofore paid Reed or Bellows for the property and were not then entitled to a

conveyance of it to them or either of them. A reply was filed by appellee denying the new matter contained in the answer. A trial of the issues to the court resulted in a finding in favor of appellee, and a decree granting a perpetual injunction against the enforcement of "the pretended lien of defendant Gibson on lot 1, block 3, Riverside addition to Weeping Water, Nebraska," from which an appeal has been perfected to this court.

The evidence in this case discloses that on the 1st day of May, 1888, F. G. Nelson and the plaintiff purchased the lot described in the pleading of Reed and Bellows, and a contract was then executed by which it was agreed that Nelson and plaintiff would pay for the lot the sum of $125 on September 1, 1889, and when the lot was fully paid for a deed was to be executed and delivered to them by the other parties. The contract contained further provisions in regard to punctuality in payment of the consideration and forfeiture of all rights under it, in case of default in its conditions, etc. The plaintiff and Nelson took possession of the lot and built thereon a dwelling house and barn, dug a well, and made other improvements and occupied the premises, each living in his own agreed portion or rooms of the house, and it further appears that Nelson and the plaintiff had agreed as to which half of the lot should finally belong to them respectively. The plaintiff testifies that he paid one-half the consideration September 1, 1889; but in this connection it further appears that a portion of the purchase price was not paid until June, 1890, when the lot was conveyed to Nelson and by him mortgaged to a building and loan association and then conveyed to the plaintiff. The judgment in favor of Gibson and against Eugene L. Reed was rendered in the district court of Cass county, December 4, 1889, this being the judgment upon which the execution was issued and which was levied upon the property described in the petition and the enjoining of the further enforcement of which is the relief sought in this action.

The contract for sale of the lot was to both parties, the plaintiff and Nelson, and to neither for any particular portion of it, and neither of them by its terms was to pay any allotted share of the purchase price. At the time the judgment was rendered the legal title was in Reed and Bellows and a part of the purchase price was unpaid. The lien of the judgment attached to the interest of the party in whom the legal title rested when it was rendered, such interest being the purchase money which then remained unpaid, and a sale under the execution would pass this interest to the purchaser. See *Courtnay v. Parker*, 16 Neb., 311, in which it was held, in an opinion written by MAXWELL, J.: "Where judgment is recovered against one who has agreed to sell land but made no deed nor received the whole of the purchase money, it is a lien on the vendor's interest in the land, and a purchaser under the judgment is entitled to the money remaining unpaid." For a further opinion in the same cause in which the above rule was reaffirmed, see 21 Neb., 582. In *Reynolds v. Cobb*, 15 Neb., 378, it was held: "A sale of real estate upon execution vests in the purchaser all the rights of the judgment debtor at the time when the lien of the judgment attached to the land." (See, also, *Colt v. Du Bois*, 7 Neb., 391; *Norfolk State Bank v. Murphy*, 40 Neb., 735.) It follows that the decree of the district court must be reversed and the action ordered dismissed.

REVERSED AND DISMISSED.

HORACE HART, APPELLEE, V. WILLIAM TIGHE ET AL., APPELLANTS.

FILED JANUARY 4, 1895. No. 6256.

Judgments: LIEN ON VENDOR'S INTEREST IN LAND: EXECUTIONS. The syllabus of the opinion filed at this time in the case of *Olander v. Tighe* 43 Neb., 344, is adopted in this case.

APPEAL from the district court of Cass county. Heard below before CHAPMAN, J.

Wooley & Gibson, for appellants.

H. D. Travis and *A. N. Sullivan*, *contra*.

HARRISON, J.

The facts in this case are substantially the same as in the case of *Olander v. Tighe*, 43 Neb., 344, and the cases were briefed and submitted together. The opinion filed at this time in that case is applicable to and adopted in this. The decree of the district court is reversed and the action ordered dismissed.

REVERSED AND DISMISSED.

JOSEPH WATSON V. ORANGE A. ROODE.

FILED JANUARY 4, 1895. No. 5037.

1. **Sale of Horse:** BREACH OF WARRANTY: ACTION FOR DAMAGES. The law in relation to warranty, applicable to the facts in this case, and also to the admissibility of certain parol testimony in regard to the warranty that the horse was registered, having been stated upon a former hearing in this court, and being approved and adhered to, will not be restated in the syllabus.

2. ——: ——: INSTRUCTIONS. Instructions requested by defendant in error, and action of trial court in giving them, approved.

3. Witnesses: EVIDENCE: INSTRUCTIONS. Instructions offered by plaintiff in error *held* properly refused.

4. Trial: NOTES OF TESTIMONY BY JUROR: EXCEPTIONS: REVIEW. Where it is sought to present to the court for determination the question of the right of jurors to take notes or copies of portions of testimony and carry them to their room to be used during their deliberations, and it does not appear from the showing of facts made, nor from the record, that the party complaining, or his counsel, had no knowledge of such actions of the jurors before they retired or before they returned their verdict, the showing is insufficient to present the main point for consideration and decision.

5. Costs: ORDER FOR SECURITY: REVIEW: HARMLESS ERROR. A defendant, during the pendency of an action in which plaintiff had given security for costs, made a motion for an order to the plaintiff requiring him to furnish additional security for costs. *Held*, That after judgment rendered against defendant, including costs, it will not be reversed because of the denial of such motion, as it is not prejudicial or injurious to the rights of defendant.

ERROR from the district court of Gage county. Tried below before BRODY, J.

The opinion contains a statement of the case.

R. S. Bibb, for plaintiff in error:

There is no warranty of soundness in the instrument sued on.

When a party sells a horse and warrants as to particular defects, his warranty is confined to those defects. (*Richardson v. Brown*, 1 Bing. [Eng.], 344; *Budd v. Fairmauer*, 8 Bing. [Eng.], 48, and cases cited; *Anthony v. Halstead*, 37 L. T., n. s. [Eng.], 333; Benjamin, Sales [ed. 1889], sec. 935.)

The taking of notes by the juror was error. (*Cheek v.*

State, 35 Ind., 492; *Eden v. Lingenfelter*, 39 Ind., 19; *Lotz v. Briggs*, 50 Ind., 346; *Watson v. Davis*, 7 Jones Law [N. Car.], 178; *Burton v. Wilkes*, 66 N. Car., 604.)

J. E. Bush, also for plaintiff in error.

Griggs & Rinaker and *Alfred Hazlett, contra:*

The statement in the warranty as to the effect of the injury to the horse must be held to be such a guaranty as to make the seller liable in damages, in case the horse should be lessened in value because of the injury. While the injury was one that left its outward sign, easily to be observed, its effect was internal, and hence the purchaser was not charged with notice of its extent. (*Shewalter v. Ford*, 34 Miss., 417; *Fisher v. Pollard*, 2 Head [Tenn.], 314; *Thompson v. Botts*, 8 Mo., 710; *Callaway v. Jones*, 19 Ga., 277; *Watson v. Roode*, 30 Neb., 264; Benjamin, Sales, p. 611.)

The warrantor should not be permitted to vary his warranty by parol. (*Pinney v. Andrus*, 41 Vt., 631; *First Nat. Bank of Kansas City v. Grindstaff*, 45 Ind., 158; *Fletcher v. Young*, 69 Ga., 591; Benjamin, Sales, p. 611.)

In the absence of a showing to the contrary it will be presumed that the defendant consented to the taking of notes by the juror. (*Long v. State*, 95 Ind., 481; 2 Thompson, Trials, sec. 2585.)

A party who sees a juror taking notes and does not object is not entitled to a new trial on that ground. (*Watson v. Walker*, 23 N. H., 472; *Little Schuylkill Navigation, Railroad & Coal Co. v. Richards's Administrator*, 57 Pa. St., 142; *Greff v. Blake*, 16 Ia., 222; *Mercer v. Harris*, 4 Neb., 85.)

HARRISON, J.

In an action which defendant in error had commenced in the district court of Gage county there was filed in his

behalf February 3, 1887, an amended petition, which was in words and figures as follows:

"1. The plaintiff complains of the defendant for that on the 18th day of November, 1884, the defendant, as an inducement to plaintiff to purchase from him, said defendant, a certain imported black stallion called Knight of the Shires, for the sum of $2,000, said defendant warranted the said horse to be a foal getter and sound in every respect, except an enlargement of said horse's bag, which was caused by a kick, and represented the said horse as being then and there sound; that the title to the same was clear, and that said horse was registered in the stud book of England, as well as his dam and sire, and would furnish the secretary's receipt for such pedigree; and plaintiff, relying on said warranty and statements, purchased said horse from the defendant for the sum of $2,000 then duly paid.

"2. Plaintiff avers that said horse, at the time of said sale, was unsound in this, that the enlargement of said horse's bag was hernia at the time of said sale, and in no way was he free from difficulty or trouble, and was of no value whatever; that one testicle of said horse was mashed and completely ruined, and was of no benefit to the said horse, and on account of said hernia, mashed testicle, and urethral gleet, all of which the said horse had at the time of the purchase, combined, caused the death of said horse, to-wit, on the 16th day of June, 1886.

"3. Plaintiff avers that the pedigree of said horse was not as warranted by the defendant, and that the said defendant never has furnished the secretary's receipt for such pedigree as agreed to have been done on the part of the defendant.

"4. Plaintiff avers that said horse was not a good foal getter, and by reason of the above premises plaintiff has sustained damages in the sum of $5,000.

"Wherefore plaintiff prays judgment against said defendant for the sum of $5,000, together with costs of suit."

To this the plaintiff in error filed an answer, in which he admitted the sale of the stallion to defendant in error on the day stated, and further answered as follows:

"Defendant denies that the sum of $2,000, or any other sum, was paid by the plaintiff to the defendant for said horse, but alleges that plaintiff merely exchanged the said horse, Knight of the Shires, for a certain jack, a horse, and a town lot in the town of Wymore, Nebraska, and the plaintiff's note for $600, and that the said plaintiff finally traded to this defendant for said note a couple of mares and a couple of colts; that no money was ever received by defendant from plaintiff for said horse, and that the value of all the property received by defendant in the exchange did not exceed the sum of $700; that the amount of $2,000 was fixed by plaintiff and defendant as a trading price, the same being fictitious and wholly regardless of the true value of the property exchanged, and largely in excess of the same.

"3. Defendant further answering says that he denies that he warranted the said horse as alleged in plaintiff's petition, and this defendant denies that the plaintiff relied upon any warranty or statements made by the defendant, or that he was induced thereby to trade for the said horse, and defendant alleges that prior to and at the time of the trade for said horse the said plaintiff had knowledge that the said horse, Knight of the Shires, was not registered in the stud-book of England, but that said horse was eligible to registry upon the mere payment of the registration fee of one pound, or about $5.

"Defendant further answering says that he denies each and every allegation in said petition contained, not herein expressly admitted or denied."

The reply to this answer was a general denial. From the record and the statements made in the briefs filed in this court we gather that the case was tried in the district court and a verdict rendered for defendant in error, which

on motion for a new trial by the losing party was set aside and a new trial ordered. The result of the second trial was a verdict and judgment thereon for the same party. The case was brought to this court on error and reversed and remanded. (For opinion see 30 Neb., 264.) In the district court, after the case was returned there on March 2, 1891, there was filed by plaintiff in error a motion to require defendant in error to give new and additional security for costs. This motion was supported by an affidavit. On hearing, the motion was overruled and an exception taken as appears of record. A trial was had to the court and a jury on April 4, 1891. The jury returned a verdict in favor of defendant in error, in which the amount of his damages was assessed at $1,154. A motion for a new trial was filed by plaintiff in error, which was submitted and overruled, and judgment entered on the verdict. To secure a review of the proceedings in the case, since it was returned from this court to the district court, counsel for Watson have prosecuted error proceedings to this court.

The warranty upon which this action was founded, and for the alleged breach of which the defendant in error was given a verdict for damages, was as follows:

"DILLER, NEB., November 18, 1884.

"In consideration of two thousand ($2,000) dollars, the receipt whereof is hereby acknowledged, I have this day sold my imported black English draft horse, Knight of the Shires, to O. A. Roode, and hereby agree to warrant and defend the title to said horse from all claims whatsoever; and I also guaranty said horse to be a foal getter, and I further state that the enlargement of the horse's bag was caused by a kick, and in no way troubles him, and I further guaranty the said horse to be registered in the stud-book of England,—also his dam, as well as sire,—and will furnish secretary's receipt for such pedigree. It is further agreed that if said O. A. Roode is unable to pay a note bearing even date with this agreement from the proceeds

of the first year's services of said horse, he shall have the privilege of another year's time on two hundred ($200) dollars. JOSEPH WATSON."

Counsel for plaintiff in error contend and insist that the above instrument does not contain such a warranty, or such warranties as are alleged in the petition as the foundation of the action; that it is stated in the petition that the horse was warranted sound in every respect except an enlargement of the bag that was caused by a kick, and that there is no such warranty in the contract of sale. It will be remembered that the petition further states that the horse was warranted to be a foal getter, and the contract of sale states: "I also guaranty the said horse to be a foal getter, and I further state that the enlargement of said horse's bag was caused by a kick and in no way troubles him." The contract of sale may be fairly said to contain a warranty, first, of the title to the horse; second, that he was a foal getter; third, that the visible, apparent defect, the enlargement of the bag, was caused by a kick and did not trouble him as a foal getter, or otherwise; fourth, that the horse was registered in the stud-book of England. It was so construed in the former hearing of this case in this court. For the decision then rendered, see 30 Neb., 264; and to the interpretation then given it we now adhere, firmly believing it to be the correct one. See also the cases cited to support the rule of law announced, and more particularly those in support of the doctrine, where it is stated that "the seller may bind himself as against patent defects if the warranty is so worded." That the term "foal getter" meant that the horse would be able to do reasonable service in begetting foals, which was the meaning ascribed to it in the former decision. See *McCorkell v. Karhoff*, 58 N. W. Rep., 913, a late decision by the supreme court of Iowa, where it was held: "A warranty of a stallion sold for breeding purposes, that he was 'sound and healthy, and, with proper handling, a foal getter,' was

a warranty that he could do reasonable service as a foal getter, and the requirements thereof were not satisfied where, with proper handling, only eight mares out of fifty-five served were gotten with foal."

The evidence in the case at bar discloses that the horse was purchased for the stud, and that this fact was known to plaintiff in error at the time of the sale, and the warranties were asked and given with it in view; that the enlargement of the scrotum, or the injury to the horse, from whatever cause produced, rendered him almost entirely useless for breeding purposes; that the average percentage of colts produced equals sixty-five per cent, or about two-thirds of the number of mares served; that this horse served eighty mares during the season of 1885, of which number but fifteen were with foal, and only nine produced living colts, and further established that the injury affected the horse generally, and he probably died from the effects of it on June 16, 1886. The evidence was directed to the issues raised by the pleadings and submitted by the court to the jury and amply sustained its findings and the verdict rendered.

There was a warranty that the horse was registered in the stud-book of England, and that he was not is admitted. During the cross-examination of Roode he was asked, "Now, in answer to Mr. Hazlett's question, you say you relied upon the warranty? A. Yes. Q. Now then, didn't the defendant tell you at that time this horse was not registered in the stud-book of England?" This last question was objected to by counsel for Roode and the objection was sustained and an exception taken, and this ruling is one of the errors assigned. This question was presented to this court during a former hearing and then passed upon. It was held that the evidence was not competent, and the action of the court in rejecting it was sustained for the reason that, if received, its effect would be to contradict or vary the written contract. After a careful consideration of

the subject we are satisfied that the rule announced in the former decision is the correct one. Counsel contend that they were not seeking by the testimony offered, or endeavoring, to contradict or vary the terms of the written instrument, but to show that Roode knew the horse was not registered and did not rely upon the statement in the warranty in reference to the horse being registered. The question put to Roode did not ask him for his knowledge or lack of knowledge of the fact of the horse being registered, but called for a statement made in regard to it by the vendor, Watson, during the conversations and negotiations had prior to the time of the execution of the written instrument and which led up to and the culmination of which was its execution. The infirmity of the testimony sought to be introduced, and the reason for its exclusion, was that it was a part of the transaction between the parties and became merged in the written contract, and that its admission would directly contradict and render of no effect one material portion of the written contract. The general rule that such testimony will not be received is well settled. For cases more particularly applicable see *Smith v. Taylor*, 23 Pac. Rep. [Cal.], 217; *Koerper v. Jung*, 33 Ill. App., 144.

This also disposes of the assignment of error in which complaint is made of the refusal of the trial court to give instructions numbered eight and fourteen, requested by plaintiff in error, as they referred to the same subject-matter as the testimony which was excluded by the court, and which we have determined was properly withheld from the consideration of the jury; and if the evidence was incompetent it follows that instructions upon the same points were improper and the refusal to give them not erroneous. Complaint is made that instructions five and six, requested on the part of Roode and given by the court, were defective and should not have been read to the jury. These two instructions were upon the warranties as embodied in the

writing introduced in evidence and the breach of them, and we think were applicable to the issues presented by the pleadings and to which the evidence adduced in the case was directed, and fairly submitted such elements of the action to the jury, and that there was no error committed in giving them.

Under the assignment that "the court erred in overruling the motion for a new trial" it is stated by counsel that the motion should have been granted for the reason, if for no other, that the jury took notes of the testimony and copied the warranty, and took them to the jury room. For the facts in regard to this assignment we are referred to the affidavit of J. E. Bush, which is as follows:

"J. E. Bush, after being duly sworn, upon oath deposes and says that he is one of the above named defendant's attorneys in the above entitled action and assistant in the trial of said action at the present term of this court; and that during the trial of said action members of the jury took notes of the testimony introduced on the part of the plaintiff, and took with them such notes so taken, to their room, and had them while they were deliberating upon their verdict in said action; that one of the jurors upon said action copied the warranty which plaintiff introduced in evidence, and took said copy with him into the jury room, and had the same in the jury room while the jury was considering upon the verdict in said action."

It will be noticed that there is no statement in the affidavit of which the above is a copy that neither plaintiff in error nor his counsel knew, at the time of the trial and prior to the retirement of the jury, that some of the jurors were taking notes of the evidence, or that they carried such notes to the jury room. If error for the juryman or jurors to take notes of the evidence and carry them to the jury room for use during their deliberations, which we do not decide, "in order to make the fact of such conduct available as ground for a new trial, * * * no objection

having been made in court, it must appear that not only the defendant, but also his counsel, was not aware that the juror took the notes, and in the absence of a showing to the contrary it will be presumed that they knew it and consented to it." (Thompson, Trials, sec. 2585, and cases cited.)

The only other assignment of error which is argued in the briefs filed in behalf of plaintiff in error is that the court erred in overruling defendant's motion for additional security for costs. In stating the case we made mention of this motion and the affidavit in support of it. It may be true that the court erred in overruling this motion; but if so, the plaintiff in the district court having prevailed, and judgment having been rendered against the defendant, including costs, the fact that such motion was overruled ought not to work a reversal of the judgment, as it has in no manner injured him or prejudiced his rights. (*International & G. N. R. Co. v. Williams*, 18 S. W. Rep. [Tex.], 700.)

There is quite a number of other errors assigned in the petition, but as they are not referred to or noticed in the argument, according to the settled rule of this court, they will be deemed waived.

AFFIRMED.

PETER W. ROSE V. LIONEL C. BURR.

FILED JANUARY 4, 1895. No. 5708.

1. **Appeal:** MOTION DOCKET: NOTICE OF MOTION: EXCEPTION TO RULING. Where from the journal entry of the hearing of a motion it appears that an exception was noted by a party to the ruling of the court on such motion, it will be presumed that the party was present at the time of the hearing, or represented by counsel.

2. **Ruling on Motion to Reinstate Appeal:** REVIEW: APPEAL BOND. An appeal was taken to the district court from the judgment of a justice of the peace. The appellee filed a motion by which he sought to have the appellant furnish additional appeal bond, which was sustained, and he was allowed a definite time within which to give such undertaking, but did not do so within the time allowed, when the appeal was dismissed on motion of appellee. At a subsequent term of the court appellant filed a motion, the object of which was to have the appeal reinstated, and supported the motion by affidavits. *Held*, That on a consideration of the showing made in such affidavits, in connection with the facts attending the prior hearings and orders in the case, the refusal to reinstate the appeal was not an improper exercise or abuse of the discretion of the court and not erroneous.

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

Sawyer, Snell & Frost, for plaintiff in error, cited: *Berggren v. Berggren*, 24 Neb., 764; *King v. Jackson*, 25 Neb., 466.

Pound & Burr, contra.

HARRISON, J.

The defendant in error commenced an action against the plaintiff in error before a justice of the peace in Lancaster county, in which judgment was rendered in his favor, from which judgment an appeal was taken to the district court by the plaintiff in error. The transcript was filed in the district court July 10, 1891, and the appeal bond, and other papers in the case, July 30, 1891. It appears that at this time, of the rules of practice which had been adopted and were in force in the district court the twenty-first read as follows: "A motion docket will be furnished for the use of the bar, and the filing of a motion and the entry in such docket of notice of the motion or of the hearing of a demurrer and entering the title of the cause in which it

is filed, with date of entry, together with a brief statement of the object of the motion and the names of the attorneys of record in the cause, for twenty-four hours before the morning of motion day, shall be notice thereof to the opposite party in all cases where a different notice is not required by statute."

In the record is the following copy of an entry of a motion to require the plaintiff in error to furnish additional appeal undertaking:

"Pound & Burr. Lionel C. Burr } Motion for additional
v. security on appeal
"A. J. Sawyer. Peter W. Rose. } bond.

Sustained
by affida- } L. C. Burr."
"Filed July 7, 1891. vits of

This motion was heard October 1, 1891, the tenth day of a term of court, the journal entry of the proceedings and order made at the time being as follows: "This cause now comes on to be heard upon the motion of the plaintiff to require the defendant to give additional security on the appeal bond herein, and after due consideration the court sustains said motion, and the said defendant is hereby ordered to give additional security on said appeal bond within twenty days from this date, and that in default thereof this action to stand dismissed, to which the said defendant duly excepts." A copy of a journal entry of what was further done in the case shows that on October 24, 1891, the appeal was dismissed on motion of defendant in error, plaintiff in error having failed and neglected to give additional appeal bond. Nothing further was done in the case until the next term of court, at which time a motion was made by plaintiff in error, the object of which was to obtain a reinstatement of the appeal. This motion was supported by affidavits and upon hearing was overruled. To obtain a review of the action of the district court, by which it refused to reinstate the appeal, this error proceeding has been prosecuted to this court.

It will be remembered that the journal entry of the hearing of the motion to require additional security to be furnished, states that the defendant (plaintiff in error) excepted to the order then made. If he was present by himself or any one of his counsel to note his exceptions, it was sufficient notice of the order entered and what would follow if he failed to comply with the requirements of the order. We have examined and considered the affidavits filed with the motion to set aside the dismissal and again place the appeal on the docket of the court, and when viewed in connection with all the facts and circumstances attendant upon the first hearing and order and further proceedings in the case, we do not think there was any improper exercise or abuse of the discretion of the court in refusing to reinstate the appeal.

AFFIRMED.

OSCAR C. RAGAN, APPELLEE, V. CHARLES A. MORRILL ET AL., APPELLEES, IMPLEADED WITH HARGREAVES BROTHERS, APPELLANTS.

FILED JANUARY 4, 1895. No. 4835.

Appearance: WAIVER OF JURISDICTION. The question whether or not the district court has jurisdiction of the subject of the action and of his person cannot be raised by one who, in respect to such subject, has voluntarily appeared and presented his claim by proper pleading for adjudication by such court.

APPEAL from the district court of Seward county. Heard below before SMITH, J.

A. J. Cornish, for appellants.

D. C. McKillip, S. H. Sedgwick, Colman & Colman, and *Harwood, Ames & Kelly, contra.*

RYAN, C.

This action was begun by Oscar C. Ragan in the district court of Seward county, to have it decreed that the southwest quarter of section 19, in township 11 north, range 1 east, 6th principal meridian, was unaffected by a lien as incidental to either of two judgments, one of which was in favor of Tootle, Hosea & Co., the other in favor of Charles A. Morrill. These judgments had been rendered against John O'Donnell while he was the owner of the aforesaid property, and while he and his family were in possession thereof, claiming the same as their homestead. These judgment creditors made a showing that Hargreaves Bros. had two mortgages on the premises above described, by virtue of which said judgment creditors were entitled to certain rights, and they therefore, by motion, asked that Hargreaves Bros. should be made defendants as necessary parties. This motion was sustained, and afterwards Hargreaves Bros. appeared and answered the cross-petition of Tootle, Hosea & Co. and that of Charles A. Morrill. In these cross-petitions no claim of lien had been asserted by virtue of the judgments alone, and consequently the district court, before Hargreaves Bros. had been made defendants, had decreed the relief prayed in the original petition so far as to determine that said judgments by their own force created no lien. The controversies thenceforward were simply as to the rights of the creditors of the firm of O'Donnell Bros., which firm had been composed of John and James O'Donnell. Tootle, Hosea & Co. and Charles A. Morrill obtained their judgments not only against John O'Donnell as above recited, but as well against James, the indebtedness in each instance having been incurred by the firm of O'Donnell Bros. for goods sold said firm while it was engaged in the retail mercantile business in the towns of Waco and Utica. It is unnecessary, in this particular connection, to state what facts were set out in the

cross-petition of Tootle, Hosea & Co. and that of Charles A. Morrill. The responsive answers and cross-petition of Hargreaves Bros. in the first place contained a general denial of the averments of the cross-petition of Tootle, Hosea & Co. and of Charles A. Morrill, except as afterwards the correctness of some of the statements of said cross-petitions should be admitted. Following the above denials the answer and cross-petition of Hargreaves Bros. admitted that John O'Donnell and his wife had executed their promissory note to Hargreaves Bros., as trustee for certain creditors of the said John O'Donnell, for the sum of two thousand dollars, secured by the mortgage of the makers of said note on the real property hereinbefore described, and that there had been paid on said note the sum of eight hundred dollars and the interest on that payment. Hargreaves Bros. further alleged that as trustee for said creditors said firm had received one hundred and fifty dollars cash on said two thousand dollar note, when, at the request of the beneficiaries, the said Hargreaves Bros., as trustee, sold and indorsed said note, on which there was at the time due the sum of eighteen hundred and fifty dollars and interest, and distributed said payment of one hundred and fifty dollars and the proceeds of the sale of said note among the beneficiaries for whom the firm of Hargreaves Bros. was trustee, whereby said trust was fully discharged, and that afterwards, by reason of its liability as indorser on said note, the firm of Hargreaves Bros. had been compelled to take up said note, wherefore they alleged that said firm, as the owner of said note, was entitled to avail itself of the mortgage given as security for the payment thereof. There were then made the ordinary averments necessary to show that the right of foreclosure existed, and said foreclosure was accordingly prayed by Hargreaves Bros. as the owner of said note. By replies the facts averred affirmatively by Hargreaves Bros. were denied.

It is not entirely clear, though from the record it ap-

pears highly probable, that for the satisfaction of the Hargreaves Bros.' mortgage on the real property, such real property had been sold and the proceeds thereof paid into the hands of the clerk of the district court aforesaid, before any other creditors of O'Donnell Bros. by intervention became parties to the action. The probability just spoken of has its main support in the fact that some time after there had been filed the above answer and cross-petition of Hargreaves Bros., the firm of Raymond Bros. & Co., that of Montgomery & Colton, and that of Allen Bros. having first obtained leave to intervene, filed cross-petitions, in each of which it was alleged, and thenceforward seems to have been accepted as true, the fact that such payment had been made to the clerk aforesaid. In each cross-petition just referred to there were averments that the amount for which Hargreaves Bros. sought a foreclosure was a trust fund in which each of the cross-petitioners was beneficially interested, and that by a violation of its duties and obligations as trustee the said firm of Hargreaves Bros. had rendered itself liable for the entire claim held by each cross-petitioner against the firm of O'Donnell Bros., and each cross-petition last named contained a prayer accordingly. After the filing of the cross-petitions by the intervenors the firm of Hargreaves Bros. demurred to each of them for the reasons following: "First, the court has no jurisdiction over the subject of the action or over the person of these defendants; second, there is a defect of parties, both plaintiff and defendant; third, several causes of action are improperly joined; fourth, the cross-petition does not state facts sufficient to constitute a cause of action."

There has been no suggestion in argument which would indicate how there was either a defect of parties or the misjoinder of causes of action, and, unaided by such suggestion, we have been unable to discover any ground for these assignments. By the answer and cross-petition of

Hargreaves Bros. that firm voluntarily became a party to this action, without objection, for the purpose of foreclosing the mortgage which had been given them by John O'Donnell and his wife on the land with reference to which this action was originally brought. It was also by said answer and cross-petition made to appear that with respect to the whole transaction between Hargreaves Bros. and O'Donnell Bros. the firm first named sustained the relation of trustee towards the creditors of the firm last named. After this it was too late for Hargreaves Bros. to insist by demurrer, or, as was afterwards attempted, by answer respectively to the cross-petitions of Charles A. Morrill, Tootle, Hosea & Co., Raymond Bros. & Co., Montgomery & Colton, and Allen Bros., that the district court of Seward county had no jurisdiction of the subject of the action or over the persons of the defendants. No recapitulation is deemed necessary to demonstrate that there were sufficient facts stated to constitute a cause of action against Hargreaves Bros. by each of the parties who sought relief as against said firm.

On trial of the issues finally joined there was a decree finding in favor of the cross-petitioners respectively, and granting the relief prayed by them against Hargreaves Bros. It would subserve no useful purpose to review in detail the evidence, upon consideration of which this decree was entered. It was as conflicting as could well be imagined in respect to the several issues of fact tried. Under such circumstances this court will not interfere with the conclusions reached by the trial court. The judgment of the district court is

AFFIRMED.

NORVAL, C. J., took no part in the consideration of the above case.

WILSON A. WELLS, APPELLANT, V. DAVID CITY IMPROVEMENT COMPANY ET AL., APPELLEES.

FILED JANUARY 4, 1895. No. 4694.

1. **Review:** CONFLICTING EVIDENCE. When the only question on appeal presented is the sufficiency of disputed evidence to sustain the findings of fact made by the district court, the judgment appealed from will be affirmed.

2. **Mechanics' Liens:** SWORN STATEMENT: TIME TO FILE. A subcontractor is entitled to no lien for material unless affirmatively he establishes by proof that within sixty days from the date whereon the last item of material was furnished by him he filed in the proper office a sworn statement, in compliance with the requirements of section 2, article 1, chapter 54, Compiled Statutes.

APPEAL from the district court of Butler county. Heard below before POST, J.

A. J. Evans, Matt. Miller, and *Reese & Gilkeson,* for appellant.

Steele Bros. and *F. I. Foss, contra.*

RYAN, C.

This action was brought for the foreclosure of a lien for lumber and other material sold by appellant to B. P. Fifield, who had contracted to build the hotel now known as the Perkins House, in David City. There was judgment in the district court of Butler county in favor of the defendants. Appellant's relation to the owner of the hotel, the David City Improvement Company, was that of subcontractor. To enable him, therefore, to assert his claim for a lien on the improved property, it devolved on him to show that the last item of his account was not more than sixty days previous to the the date on which his affidavit

for a lien was filed. (Sec. 2, art. 1, ch. 54, Comp. Stats.) The date on which this sworn statement for a lien in this case was filed was September 14, 1888. To its binding force it was therefore necessary that there should have accrued a part of the account as late, or later than July 16, 1888. There was a great deal of evidence introduced as to the material having been furnished on July 16th and 25th, respectively, for the construction of the hotel. It seems from this evidence to have been quite satisfactorily established that neither of these two items was furnished Mr. Fifield by plaintiff for use in the hotel, and that such part as may have been so used was purchased by a tenant for his own benefit after the improvement company had refused to make the improvements which he desired. Upon evidence which was conflicting, certainly with no preponderance in favor of appellant, the district court found "that the allegations of plaintiff's petition were not true, and that plaintiff's pretended lien was not filed within the time required by law," etc. Under such circumstances no citation of authorities is necessary to sustain the rule, well known and uniformly followed, that when the evidence is merely conflicting the judgment of the district court will not be disturbed, when the sole question presented is as to the sufficiency of the evidence to sustain the judgment appealed from. The judgment of the district court is

AFFIRMED.

POST, J., having presided in the district court, took no part in the determination of the above cause in this court.

ANDREW J. JOHNSON V. WILLIAM E. HARDY ET AL.

FILED JANUARY 4, 1895. No. 5710.

Ejectment. "In ejectment by a tenant in common against a person in possession without right, the plaintiff can recover only to the extent of his title." *Crook v. Vandevoort*, 13 Neb., 505, overruled; *Mattis v. Boggs*, 19 Neb., 698, and *Kirk v. Bowling*, 20 Neb., 260, reaffirmed.

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

Ricketts & Wilson, for plaintiff in error.

Abbott, Selleck & Lane, contra.

RAGAN, C.

This is an action of ejectment brought by William E. Hardy and Cora K. Pitcher against Andrew J. Johnson in the district court of Lancaster county. Hardy and Pitcher, in their petition, alleged that they were the owners of and had a legal estate in lot 1, block 2, in J. O. Young's South Addition to East Lincoln, and were entitled to the immediate possession thereof; and that Johnson had held the possession of said real estate against them since the 1st day of May, 1890. The answer of Johnson was a general denial, the statute of limitations, and adverse possession of the property for more than ten years prior to the bringing of the suit. Hardy and Pitcher had a verdict and judgment, and Johnson brings the case here on error.

The petition in this case was filed on the 17th day of September, 1890, and summons duly issued. This summons was returned on the 29th of September, 1890, not served because Johnson could not be found in the county. On the 9th of February, 1891, an alias summons was issued for Johnson, which was duly served on him. This action,

then, was commenced against Johnson on the 9th day of February, 1891, the date of the alias summons which was served on him. (Section 19, Code of Civil Procedure.) The undisputed evidence in the case is that Cora K. Pitcher conveyed her interest in the property in question to one Thomas P. Kennard by a deed on October 27, 1890, which deed was duly witnessed, acknowledged, and recorded in the office of the recorder of deeds of Lancaster county on November 6, 1890. At the time this suit was brought Cora K. Pitcher had no interest whatever in the premises in controversy; and, for the purposes of this case, it may be said that at the time the suit was brought the premises were owned by William E. Hardy and Thomas P. Kennard as tenants in common.

On the trial of the case Johnson requested the district court to charge the jury that if they should find from the evidence that prior to the 9th of February, 1891, Cora K. Pitcher had parted with her interest in the property in controversy, the plaintiffs could not recover in the action. The court refused to give this instruction, and charged the jury as follows: "Plaintiffs claim to own and to have the legal title to the premises in controversy together, and are in law called co-tenants. If you find from the evidence that prior to the 9th day of February, 1891, either of the plaintiffs to this action conveyed and parted with any or all of his or her interest in said premises, and if you should find from the evidence that the plaintiffs, or either of them, at the commencement of this action, were the owners of a portion only of said premises, and had the legal title thereto, and were entitled to immediate possession thereof, then you are instructed that you should find for the plaintiffs, or either of them, to the extent which the testimony shows their or either of their interest in the said premises to be." The jury found "that the plaintiffs have a legal estate in and are entitled to the possession of the real property described in the petition," and the court

rendered judgment as follows: "It is therefore considered and adjudged by the court that the said plaintiffs, William E. Hardy and Cora K. Pitcher, have the legal estate in, and are entitled to the possession of, the premises described in the petition." Here, then, we have a joint suit by two parties who allege that they are the owners of certain real estate, a finding of the jury that the two parties are the owners of the real estate, and a judgment pronounced in accordance with such finding. As already stated, the undisputed evidence in the case is that prior to the commencement of the suit Cora K. Pitcher had parted with her interest in the property. The finding of the jury, then, is contrary to the evidence and contrary to the instruction given by the court.

But it is said that this verdict and judgment should not be disturbed because the seisin and possession of one tenant in common are the seisin and possession of the others; and that one tenant in common may maintain an action of ejectment in his name for the entire premises against a disseisor thereof. To support this proposition we are cited to *Crook v. Vandevoort*, 13 Neb., 505. In that case this court did so decide; but in *Mattis v. Boggs*, 19 Neb., 698, *Crook v. Vandevoort* was expressly overruled, and the law declared to be that "In ejectment by a tenant in common against a person in possession without right the plaintiff can recover only to the extent of his title." The question arose again in *Kirk v. Bowling*, 20 Neb., 260, and it was again held "A tenant in common of real estate can only recover in ejectment to the extent of his title." The two cases last cited are decisive of the question at bar.

The judgment is reversed and the cause remanded to the district court with instructions to permit Hardy to amend his petition, if he so desires, by making his co-tenant a party plaintiff or defendant, upon paying all the costs in the suit up to such time.

JUDGMENT ACCORDINGLY.

MELISSA A. WILDMAN V. ANDREW J. SHAMBAUGH.

FILED JANUARY 4, 1895. No. 5403.

Ejectment: REVIEW. The questions of law suggested by plaintiff in error in this case not examined, as the evidence fails to show that appellant is in anywise interested in any part of the property in controversy.

ERROR from the district court of York county. Tried below before BATES, J.

M. M. Wildman and *George B. France*, for plaintiff in error.

Sedgwick & Power, *contra*.

RAGAN, C.

This is an action in ejectment brought by Melissa A. Wildman, against Andrew J. Shambaugh, in the district court of York county. Shambaugh had a verdict and judgment and Wildman prosecutes a petition in error to this court. The controversy relates to a part of the southwest quarter of section 30, township 12 north, and range 4 west, of the 6th P. M. This quarter section of land contains $150\frac{5}{100}$ acres. The government of the United States conveyed by its patent this quarter section of land to one Latham. Latham conveyed to one Dorsey, by warranty deed, a part of the quarter section, describing it as "the east half of the southwest quarter," etc., and Dorsey conveyed the same land to Shambaugh. Latham's heirs and widow conveyed another part of the quarter section to one Harlan, describing it as "the west half of the southwest quarter," and Harlan conveyed the same land to David Wildman.

The real controversy in the case then is, what did

Latham convey to Dorsey when he made him a deed for the east half of the quarter section? Did he convey him $75\frac{10}{100}$ acres, or did he convey him 80 acres off the east side of said quarter section of land?

The contention of Melissa Wildman is that Dorsey and his grantees, by the deeds mentioned, became possessed of the actual one-half only of said quarter section of land,—that is, $75\frac{10}{100}$ acres,—while the contention of Shambaugh is that the land was conveyed to Dorsey, described by governmental subdivisions, and that as the quarter section contains less than 160 acres, and that as his deed calls for the east half of the quarter section according to the United States government survey, he took full eighty acres of land. There is involved in this case a very important question, but we cannot decide it for the reason that there is not in this record one syllable of evidence which shows or tends to show that Melissa Wildman owns, or has ever owned, or has any claim of title to, either in law or equity, any part whatever of this quarter section of land. The evidence tends to show that David Wildman is the owner of the west half of the quarter under conveyances from Latham's heirs, and that Shambaugh owns the east half of the quarter under conveyances from Dorsey. The question in the case is, if Shambaugh owns the east half of the quarter, how many acres of land off the east side of the quarter does he own? And if David Wildman owns the west half of the quarter section, how many acres of land off the west side of the quarter section does he own? Melissa Wildman must recover in ejectment, if at all, upon the strength of her own title; and since there is an entire failure of the evidence to show that she has any interest in any part of the real estate in controversy, the judgment of the district court must be and is

AFFIRMED.

CHARLES C. CARLETON V. STATE OF NEBRASKA.

FILED JANUARY 4, 1895. No. 6772.

1. **Murder.** The evidence examined, and *held* sufficient to sustain a conviction of murder in the first degree.

2. **Criminal Law:** WEIGHT OF EVIDENCE: CREDIBILITY OF WITNESSES. In criminal cases, as in civil, the credibility of witnesses and the weight to be given their testimony are matters for the determination of the jury. It is for the jury to determine whether it is convinced beyond a reasonable doubt of the defendant's guilt, not for the reviewing court to say whether it is so convinced. A reviewing court can only inquire whether the evidence was sufficient to warrant the jury in finding the defendant guilty.

3. ———: CIRCUMSTANTIAL EVIDENCE. Where in a criminal case 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. But this rule merely requires the exclusion of such hypotheses as are based on circumstances established by the evidence. It does not require the jury to acquit because of evidence which, if believed, would establish facts consistent with innocence, but which evidence the jury is justified in disbelieving.

4. ———: EVIDENCE: RULINGS ON OBJECTIONS. If the evidence offered be legally admissible for any purpose, an objection to such evidence should be overruled. Evidence cannot be excluded because it is not material to every issue in the case.

5. **Homicide:** SELF-DEFENSE: CHARACTER OF DECEASED: EVIDENCE. In a prosecution for homicide it is admissible for the defendant, having first established that he was assailed by the deceased and in apparent danger, to prove that the deceased was a person of ferocity and violent disposition, and this for the purpose of showing either that the defendant was acting in terror and hence incapable of that specific malice necessary to constitute murder in the first degree, or that he was in such apparent extremity as to make out a case of self-defense, or that the deceased's purpose in encountering the defendant was deadly.

6. ———: ———: ———: ———. Such proof must be made by evidence of the general reputation of the deceased. It cannot be made by proving either specific acts on his part or the opin-

ions of witnesses as to his disposition based on their own observations.

7. ———: EVIDENCE. Certain rulings of the trial court on the materiality of evidence and the right of cross-examination reviewed and the rulings sustained.

8. ———: INSTRUCTIONS. It is the duty of the court to instruct the jury on the law of the case, whether requested so to do or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the consideration of the jury an essential issue or element of the case is erroneous; but when the jury is instructed generally upon the law, and when the instructions given do not have the effect above stated, then error cannot be predicated upon the failure of the court to charge upon some particular phase of the case unless a proper instruction was requested by the party complaining.

9. ———: ———. A statement made by the court in ruling upon the evidence, that an instruction of a certain character would be given in relation to such evidence, does not excuse a party from properly requesting such instruction at the proper time.

10. ———: ———. The failure or refusal of the court to instruct the jury must be excepted to in the trial court in order to be availed of on error.

11. ———: ———: MALICE: SELF-DEFENSE. If a killing be in self-defense, it is not malicious, and if malicious it cannot be in self-defense; therefore, where a jury is instructed that a killing in self-defense is excusable, the instruction is not erroneous because it does not say that such killing is excusable, although malicious, the other instructions properly defining malice.

12. ———: ———. An instruction stating that one cannot avail himself of the law of self-defense where, after he has secured himself from danger, he takes the life of his assailant in a spirit of revenge or for some unlawful purpose, is not erroneous, the rest of the charge plainly stating that the taking of life from motives of self-preservation, based on reasonable grounds of belief, is not in pursuance of an unlawful purpose.

13. ———: ———: SELF-DEFENSE. Where the circumstances warrant the submission to the jury of the theory of self-defense, it is not error to charge that if the defendant provoked the difficulty for the purpose of wreaking vengeance on the deceased he cannot avail himself of the law of self-defense, there being no direct evidence of such an attack, but circumstances being such as to warrant the inference of one.

14. ——: ——: REASONABLE DOUBT. Where a charge distinctly states that to warrant a conviction the state must make out the whole case beyond a reasonable doubt, it is not necessary to repeat in every instruction the degree of proof required.

15. ——: ——. Instructions in a case are to be construed together, and if when so construed they state the law applicable to the case without confusion or conflict, a single instruction is not erroneous because in itself incomplete.

16. **Murder:** PURPOSE: MALICE. Where a person has actually formed the purpose maliciously to kill another, and has deliberated and premeditated upon it before committing the offense, this constitutes murder in the first degree. The length of time that intervenes between the time such purpose is formed and its execution is not material.

17. ——: INSTRUCTIONS. It is not error to instruct the jury that it is sufficient to constitute murder in the first degree, "if there was such design and determination to kill distinctly formed in the mind at any moment before or at the time the blow was struck," where the remainder of the instruction properly defines purpose, deliberation, and premeditation, states that the proposed act must have been deliberated and premeditated upon before it was committed, and it is evident that the language quoted referred to the existence of the purpose and not the time of its formation.

18. **Instructions.** A repetition of a proposition of law in the instructions is not reversible error unless it appears that such repetition might operate to the prejudice of the accused.

19. ——: WEIGHT OF EVIDENCE. It is not error to charge the jury that in weighing the testimony of the defendant they should fully and fairly consider whether it is true and made in good faith, the terms "true" and "made in good faith" being in such case synonymous, and, therefore, not implying that the testimony should be rejected, although true, if not "made in good faith."

20. **Criminal Law:** REASONABLE DOUBT. The following instruction held not erroneous: "The jury are instructed that a reasonable doubt is a term often used, probably well understood, but not easily defined. It is not every possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition

that they cannot say and feel that they have an abiding conviction to a moral certainty of the truth of the charge. If upon the proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal, for it is not sufficient to establish a probabiiity, though a strong one, arising from the doctrine of chances, that the facts charged are more likely to be true than the contrary, but the evidence must establish the facts to a reasonable and moral certainty,—a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This is proof beyond a reasonable doubt, because if the law, which mostly depends upon considerations of a moral nature, should go farther than this and require absolute certainty, it would defeat criminal prosecutions altogether. A reasonable doubt does not consist of possible or conjectured doubts. If after a careful, impartial, and candid consideration of all the evidence in this case the jury have an abiding conviction of the guilt of the defendant, and are fully satisfied of the truth of the charge against him, then they are satisfied beyond a reasonable doubt."

21. ———: INSTRUCTIONS. A judgment will not be reversed because an instruction was somewhat argumentative in its nature, when the argument consisted simply of stating a reason for a rule of law, there being no comment upon the facts and no appeal in any manner to the jury.

22. **New Trial**: MISCONDUCT OF PARTIES. Where a new trial is asked for on the ground of misconduct of parties, jurors, or witnesses, and the evidence is conflicting as to the existence of such misconduct, the finding of the trial court will not be disturbed.

23. **Misconduct of Juror.** A verdict should not be set aside because a juror, before the jury was sworn, was found with liquor in his possession, it not being established that he was intoxicated, or that after his acceptance as a juror he partook thereof.

ERROR to the district court for Dodge county. Tried below before MARSHALL, J.

The facts are stated by the commissioner.

Frick & Dolezal, for plaintiff in error:

The admission of evidence for only one purpose was erro-

neous, because not followed by a proper instruction limiting it to that purpose. (*Scott v. McKinnish*, 15 Ala., 662; *Letton v. Young*, 2 Met. [Ky.], 558.)

The presumption of innocence remains with the defendant in a case where self-defense is interposed, and the burden of proof never shifts from the state to the defendant. (*Gravely v. State*, 38 Neb., 871.)

Where any fact or group of facts or circumstances are such as to be capable of two inferences, one in favor of guilt and the other in favor of innocence, the latter inference must be drawn and held until it is overcome by other proof. (*Dreessen v. State*, 38 Neb., 375; *McNamee v. State*, 34 Neb., 288.)

A reviewing court in a capital case should take conflicting evidence and inference and sift the case without reference to the verdict. (*State v. Goodson*, 12 S. E. Rep. [N. Car.], 329; *Raggio v. People*, 26 N. E. Rep. [Ill.], 377; *Warren v. State*, 16 S. W. Rep. [Tex.], 747; *Edwards v. State*, 26 Pac. Rep. [Wash.], 258; *State v. Billings*, 46 N. W. Rep. [Ia.], 862; *State v. Blackville*, 11 S. E. Rep. [N. Car.], 284; *Westbrook v. People*, 18 N. E. Rep. [Ill.], 304.)

Instructions on all matters in issue were necessary whether requested or not. (*State v. Matthews*, 20 Mo., 55; *State v. Stonum*, 62 Mo., 596; *Sandwich Mfg. Co. v. Shiley*, 15 Neb., 111; 11 Am. & Eng. Ency. Law, 251; *Milton v. State*, 6 Neb., 137; *Grim v. Robinson*, 31 Neb., 540; *Gilbert v. Merriam*, 26 Neb., 194; *City of Plattsmouth v. Boeck*, 32 Neb., 301.)

Instructions sixteen, seventeen, eighteen, and nineteen, relating to self-defense, were erroneous. (*Ballard v. State*, 19 Neb., 609; *Varnell v. State*, 9 S. W. Rep. [Mo.], 65. *Alexander v. State*, 7 S. W. Rep. [Tex.], 867; *Tingle v. Commonwealth*, 11 S. W. Rep. [Ky.], 812; *Gonzales v. State*, 12 S. W. Rep. [Tex.], 733; *Smith v. Commonwealth*, 16 S. W. Rep. [Ky.], 137; *Franklin v. State*, 18 S. W.

Rep. [Tex.], 468; *Bonner v. State*, 15 S. W. Rep. [Tex.], 821; *Nalley v. State*, 17 S. W. Rep. [Tex.], 1084.)

An erroneous instruction is not cured by giving in the charge a good instruction on the same point. (*McPherson v. Wiswell*, 19 Neb., 117; *Fitzgerald v. Meyer*, 25 Neb., 77; *Wasson v. Palmer*, 13 Neb., 376; *Ballard v. State*, 19 Neb., 610; *Selden v. State*, 18 S. W. Rep. [Ark.], 459.)

The tenth instruction is erroneous because it misstates the law as to deliberation and premeditation and omits to submit the question of the excitement of defendant. It is erroneous because, by three times repeating the shortness of the time of deliberation and premeditation, the court made that principle too prominent. (*Zimmerman v. State*, 14 Neb., 568; *Sherrar v. State*, 17 S. W. Rep. [Tex.], 621; *Reyons v. State*, 22 S. W. Rep. [Tex.], 590; 2 Thompson, Trials, secs. 2330, 2331; *Tillery v. State*, 5 S. W. Rep. [Tex.], 842.)

A juror who has an opinion based on rumor and newspaper accounts and says he can try the case the same as if he had heard nothing about it, is incompetent to serve in a criminal case. (*Miller v. State*, 29 Neb., 437; *Owens v. State*, 32 Neb., 167.)

George H. Hastings, Attorney General, C. Hollenbeck, County Attorney, and *Geo. L. Loomis*, for the state:

The verdict will not be disturbed when supported by evidence. (*Palmer v. People*, 4 Neb., 68; *Schlencker v. State*, 9 Neb., 241.)

As to the misconduct of jurors and the right of defendant to have the verdict set aside on that ground the following cases are cited: *Rider v. State*, 9 S. W. Rep. [Tex.], 688; *Burgess v. Territory*, 19 Pac. Rep. [Mont.], 558; *Townsend v. Briggs*, 32 Pac. Rep. [Cal.], 307; *Texas C. R. Co. v. Stewart*, 20 S. W. Rep. [Tex.], 962; *State v. Rush*, 8 S. W. Rep. [Mo.], 221; *Barker v. Livingston*

County Nat. Bank, 30 Ill. App., 591; *Warren v. Spencer*, 9 N. E. Rep. [Mass.], 527.

Before error can be predicated upon a failure of the court to present a particular feature of the case to the jury, the party complaining should, by an appropriate instruction, request the court to charge upon that feature. (*German Nat. Bank of Hastings v. Leonard*, 40 Neb., 676.)

The instruction of the court defining a reasonable doubt is a clear exposition of the subject, in almost the language that has been repeatedly approved by this court. (*Polin v. State*, 14 Neb., 540; *Carr v. State*, 23 Neb., 749; *Long v. State*, 23 Neb., 33.)

IRVINE, C.

The plaintiff in error was charged with murder, in the district court of Dodge county, found guilty of murder in the first degree, and sentenced to be hanged. This judgment he seeks to reverse by this proceeding. One hundred and fifty errors are assigned, and a review of the case has been necessarily laborious, although we have been aided by able efforts of counsel on each side and by a transcript of the record which might well serve as a model. We shall first consider the assignment of error that the evidence was insufficient to sustain the verdict rendered. The serious nature of the case, as well as the fact that a statement of the evidence at this time will assist in understanding the discussion to follow of the specific assignments, warrants us in narrating the evidence in some detail, even though such a course necessarily must extend this opinion further than is usually expedient.

In 1892, August Gothman, the deceased, was a resident of Shelby county, Iowa. He seems to have been a German by birth, and was about forty-five years of age. In November of that year he was married in that county to one Minnie Orsulak, a girl eighteen years of age. At the time of the marriage Gothman was a widower with four children.

In the spring of 1893 he removed with his family to Pierce county, in this state. An old man named Dista, the father of Gothman's former wife, there lived with them, as did also the Orsulak family. In May of 1893 the Gothman family left Pierce county. Gothman left on horseback in the forenoon, while his wife, his four children, and Dista followed in two wagons in the afternoon of the same day. The defendant Carleton resided with his father about five miles west of Fremont on what is known as the "Military road." Carleton was twenty-four years of age.

Some time after the departure of the Gothman family from Pierce county, Dista, Minnie Gothman, and the four children appeared at Carleton's house. They arrived on Friday evening, May 19th. It does not appear how they came to stop there, and it does not appear that there had been any previous acquaintance or connection whatever between any of them and either of the Carletons. From what appears to be an assumption of counsel, rather than any direct inference from the evidence, it would seem that their object was to remain to await tidings of Gothman, who was supposed to have proceeded to South Omaha. While at the Carleton house Mrs. Gothman was habitually addressed by the children as "Minnie," and it is quite clear that for some time the Carleton household supposed she was an elder sister of the children. Between her and the defendant there arose a somewhat sudden attachment. On the Monday following their arrival Carleton and Minnie Gothman drove away from the Carleton house. Carleton testifies that he took her at her own request and started towards Fremont, and that on the way to Fremont she asked him if he did not know of some place in the country where she could get board; that he responded that he did know of such a place, and thereupon turned from the road leading to Fremont and drove her to the house of a man named Van Ness who lived some six or eight miles northwest of Carleton's. It is certain that he took her to Van Ness',

and that he there arranged for her remaining a week. He then returned home, and in answer to questions by the other members of the Gothman family informed them that Minnie had gone to Sioux City and would not come back. During the drive to Van Ness', Carleton testifies that he proposed to marry Minnie, and that a marriage was agreed upon between them. The following day the remainder of the Gothman family proceeded on their way to Omaha, and the day following that Gothman appeared with another man, saying he had a card from his family, and asking if there had been a family at Carleton's place. Carleton described the family which had been there as an old gentleman and five children. Gothman asked when they had left and where they said they were going. Gothman stated that it was his family, but did not state his name. Gothman then left. The time of this incident is fixed as Wednesday, May 24. The following Sunday Carleton proceeded to Van Ness', met Minnie there, went with her to North Bend, and proceeded by rail to Schuyler. He says that on the way to Schuyler he first learned that her name was Orsulak and that she was not the sister of the Gothman children; that she informed him during the journey that Gothman and her people desired her to marry Gothman and that she did not want to do so. They went to the county judge at Schuyler, procured a license, and a marriage ceremony was there performed. Thereupon they returned to Carleton's home and lived together there as man and wife until the 8th day of June. On the night of the 7th of June Gothman reappeared at the Ruwe hotel at Fremont, remained there over night and departed early in the morning of the 8th. Carleton had an engagement on the 8th of June to shell corn in Fremont. One John Hughes was also engaged in the same work, and about 7 o'clock of that morning Carleton and Hughes were driving along the "Military road," which follows the railroad from Carleton's place towards Fremont. Carleton drove a team

hitched to a wagon. Along the road Hughes observed a man walking along the railroad track. Carleton made some remark about the man which Hughes does not remember. Carleton testifies that he thought he recognized this man as Gothman. This man was walking west, which was towards the Carleton place. They drove on until they reached a cross-road leading north, when Carleton told Hughes to inform Wesson (for whom they were to shell corn) that he, Carleton, would not work that forenoon. Hughes dismounted and proceeded to Fremont, while Carleton turned north on the cross-road and, driving at a pace which he characterizes as a fast trot, proceeded by that cross-road and then by another road leading west, back to his home. Arriving there he found Minnie and his father. He told Minnie that he thought that Gothman was coming, and requested his father to take her to Van Ness'. He then unhitched the team from the wagon, and hitched it to a buggy. His father and Minnie mounted and drove towards Van Ness'. As they passed out upon the highway and turned to the west three men drove along the road going east and observed them. Two of these men were witnesses, and they testify that immediately after passing Carleton's place and about one hundred and fifty yards east of Carleton's they observed a man lying by the wayside, resting upon his elbow, his face turned in the direction of Carleton's house. They afterwards saw Gothman's body at Fremont and identified him as the man resting by the wayside. From their testimony it would seem at least probable that Gothman saw the senior Carleton and Minnie as they drove away.

A man named Lucke, an employe of Carleton, was that morning at work in a field about a mile and a half from the house. As Carleton, senior, and Minnie passed the field an interview was held between Carleton, senior, and Lucke. Lucke returned to the house and there found inside the house the defendant and Gothman, smoking to-

gether and engaged in what was apparently a friendly conversation. Some inquiry was made by Carleton of Lucke as to why he left the field. Lucke explained that he had broken an implement, and Lucke and the defendant left the house, the defendant apparently to examine this implement. When outside the house Lucke explained that he had returned not because of such accident, but had come because defendant's father had sent him down to avoid any trouble between the defendant and Gothman, and had directed him to work in the field across the road from the house. Carleton said to go back to the field; that he did not think there would be any trouble; "that the old man was all right." Lucke then stated that he would like to attend a meeting of the Sons of Veterans to be held at Fremont, and would like to quit a little early. Carleton then stated that he need not work there; that he could take the team, go to Fremont, shell corn there during the day and attend the lodge, and Hughes would bring the team back. Lucke then went to an upstairs room and changed his clothes. After doing so another conversation took place as to which the evidence is conflicting. Lucke's version of it is that he told the defendant that he was afraid that Carleton, senior, would be angry if he went away and if they had any trouble the father would charge it to Lucke; and that the defendant replied that "if the old man gave him one word he would get away with him and the world would never be any the wiser." Carleton denies this, and says that what he said was, that he didn't think there would be any trouble but "if there is, I can take care of myself." It appears from the evidence that Gothman came out of the house some time while Lucke and Carleton were talking together, and when Lucke left was sitting outside the kitchen door. Just before Lucke drove away a man named Malcolm drove into the yard. Malcolm says that Carleton and Lucke came out of the house together as he drove up, and that another man, supposed to be Gothman, was sit-

ting on the well curb about ten or fifteen feet from the house. Malcolm remained some fifteen or twenty minutes after Lucke left, Gothman remaining at the well curb the whole time. While Malcolm was there, Carleton went to the barn and from there came towards the house with a hammer in his hand. Malcolm left at about 10 o'clock. About 11 o'clock Carleton, with blood upon his shirt, appeared at the house of a neighbor named Kimmel, and stated to Mrs. Kimmel that he had killed a man. The details of this conversation and of others following can be more properly stated later on. He asked Mrs. Kimmel to go to the field and inform her husband; but then stating that he intended to go also, she reached the conclusion that it was unnecessary for her to go and he proceeded alone. He talked to Kimmel, then proceeded to where another neighbor, Mr. Middaugh, was at work, talked to Middaugh and Middaugh's son, then returned to his house, put on his coat, caught, saddled, and mounted a pony and rode to Fremont, stopping on his way to inform at least one other family of neighbors of the occurrence. He went into Fremont and delivered himself into custody.

Neighbors who had been informed of the occurrence went to the Carleton house, and were soon followed by persons from Fremont, including the coroner. Carleton's house has on its ground floor three rooms. A kitchen lies to the south, through which entrance to the house was customary. The door into this kitchen is on the east end of the room. Entering this door and turning to the right one reaches a door into a room designated usually by the witnesses as the "sitting room." There is a step of about eight inches as one goes through this door. Opening off of this sitting room to the west, and by a door about midway across the room, is a bedroom, in which there were two beds and a bureau. Those who came to the house observed outside the kitchen door some spots which seemed to be blood. Inside the kitchen there were more

traces of blood, and upon the carpet of the sitting room and between the doors referred to there were still more. The appearance of this room indicated that an attempt had been made to wash or wipe away the blood. Some charred substances were found in the kitchen stove. Within the bedroom, lying upon the floor and covered with a blanket was the dead body of Gothman, the head resting in a pool of blood. A hammer was found near the kitchen door, and the defendant's father the next day observed a splinter which had apparently recently been knocked from near the bottom of the door leading from the kitchen to the sitting room. A chair was at the same time found with one leg broken. There were no other evidences of a struggle observed.

After the coroner arrived the body of Gothman was placed in a box brought there for that purpose, loaded into an undertaker's wagon, driven to Fremont, and placed in a basement room occupied by the undertakers. The only wound noticed up to this time was a gunshot wound in the center of the forehead. In the evening an attempt was made to embalm the body, and something more than a pint and less than a quart of embalming fluid was injected into the brachial artery, when it was observed that the fluid was escaping through another wound in the back of the head. The following day an autopsy was held, when it was found that there were three wounds. One bullet entered the forehead about on the median line and about half an inch above the eyebrow. The left eyebrow was singed and the right eye ecchymosed. Another bullet entered the right temple on a line with the upper attachment of the ear and about an inch in front thereof. A third bullet entered some distance beneath the occipital protuberance. The autopsy did not develop with any degree of certainty the course taken by these three bullets. There was a great deal of medical testimony upon the subject of the wounds. It may be summed up as follows: The witnesses for the state consid-

ered any one of the three wounds sufficient to cause death in a very brief time. The witnesses for the defense did not consider either the wound in front or the wound in the temple necessarily fatal, and agreed that it was possible that a man might, after receiving either or both, struggle for some time vigorously. But they all thought that the wound in the back of the head was of such a character as to cause instant death. No witness testified that the other wounds would not probably cause instant death, but the effect of their testimony is that death or collapse would not necessarily follow from either or both of them. This testimony is important in considering the theory of the defense. As a result of the medical testimony it may be assumed that the jury was justified, in connection with the circumstances of the case, in finding either that death resulted instantaneously from the first shot, or that Gothman continued to struggle until the third shot was fired. There is no evidence to show in what order the three wounds were inflicted. We have mentioned them simply in the order in which they were discovered, and not with reference to any theory as to the order of their infliction.

It is evident that in the investigation of this case the relations of Gothman and the defendant with Minnie Orsulak, or Minnie Gothman, are an important element. There is no doubt she was the wife of Gothman. There is no doubt that within a very few days after Carleton first saw her she engaged herself to marry him. There is scarcely room for doubt that for some time after the family reached Carletons, he, as well as his father and his employe, Lucke, supposed her to be the sister of the Gothman children. The precise state of Carleton's mind, as well as Gothman's, becomes, therefore, important. So far as Gothman's information is concerned the evidence is very meager. He seems to have been informed that his family had stopped at Carleton's, and in his quest for them saw fit to go presumably from Omaha, or South Omaha, to en-

quire of Carleton as to their whereabouts. Upon his first visit nothing occurred to inform him that Minnie had not left with the rest of the family. He would naturally return to South Omaha expecting to find her with them. There is evidence that he was in South Omaha on the 7th of June, and was seen a short time before the departure of an evening train going towards the depot. It also appears that he saw Dista in South Omaha, but what occurred between them is not proved. It would be a fair inference, if not one practically irresistible, that after Gothman returned to South Omaha he learned that Minnie was not with the family, and that his object in going to Fremont the second time was, in part at least, to ascertain her whereabouts. There is nothing in the evidence from which it could be inferred that he had any knowledge of Carleton's marriage to her. There is evidence tending to show that the fact of the issuing of the license was published in the Schuyler papers, but there is no evidence that Gothman saw those papers, and to infer that he did would be a remote conjecture. The most that could be inferred from the evidence is that Gothman might have known from communications with Dista and the children that there had been some intimacy between Carleton and his wife, and that he suspected Carleton of having something to do with her elopement.

As to Carleton's information on the day of the shooting the evidence is conflicting. His own testimony is that he had no reason to suppose Minnie to be other than the sister of the Gothman children until, on the train to Schuyler, she informed him otherwise, and that he did not know until after the homicide that she was Gothman's wife. Opposed to this is the testimony of Gothman's thirteen-year-old daughter, to the effect that immediately after Carleton took Minnie to Van Ness' the daughter informed Carleton that Minnie was her step-mother. This child also testified that while they were all at Carleton's Carleton

asked Minnie to let him see a ring which he seems to have noticed, and that Minnie said that it was her wedding ring; that Carleton then asked her where her husband was, and Minnie said she would not tell him. According to Carleton's testimony Minnie had told him at some time before the homicide that if Gothman found her he would want to kill her for leaving him. The credibility of witnesses is for the jury, and from the above the jury would be justified in finding that before the homicide Carleton had learned that Minnie was the wife of Gothman. They would almost surely find that his information was such as to lead him to apprehend serious difficulty as a result of a meeting with Gothman.

As the next step in reviewing the evidence it is proper to consider the declarations made by Carleton after the tragedy, as to the manner of its occurrence. The first person he saw was Mrs. Kimmel. She testified that Carleton came to her kitchen door; that she observed the blood upon his clothing, and, supposing that he had been butchering said, "You have been trying to kill yourself, have you?" He said, "No, but I killed a man." She then asked him if the man was dead, and Carleton said that he had shot him "until he couldn't go any more," and told her that he was "a bum" who had asked him for something to eat, and, being refused, had pulled his gun. Whereupon Carleton took the gun away from him and shot him. Carleton says that his remark was that he had shot him until the gun would not go any more.

Carleton then proceeded to the field where Mr. Kimmel was at work. He told Mr. Kimmel that he had killed a tramp; that the man wanted something to eat; that he was standing in the door; that, as he went to go past him, the tramp drew a gun on him; that Carleton seized the gun, shoved it aside; that it went off, and he took it away from the tramp and shot him. Kimmel thinks Carleton told him he shot him three times. He exhibited the

gun to Kimmel; took the cylinder out and exhibited that. Kimmel did not observe the condition of the cylinder, but remembers that Carleton said that there were three empty cartridges. From Kimmel's Carleton went to another field, where J. C. Middaugh was at work. To Middaugh he said that a tramp had come to his place; that they had got into a "fuss," and that he had killed the man; that the man wanted bread; he would not give it to him; the man drew a gun on him; Carleton took it away from him and shot him with it. He had a revolver apart, and holding the cylinder up said, "Here, you can see how often I shot him." Middaugh observed three empty chambers. Middaugh further testifies that he advised Carleton to give himself up, and that Carleton said that he had had a notion to bury the man and say nothing about it; that he cleared up the blood on the floor and burned up the man's hat, and then thought it would not be best to bury him. Carleton admits that he did burn up Gothman's hat, together with the cloth with which he had attempted to clean the blood from the floor. A son of Middaugh was at work near his father. After talking to Middaugh Carleton went to the son and said that a man had come there, and he did not intend "to let anybody run him out of his house;" that they had talked about three-quarters of an hour, when the man asked when the noon train passed; that Carleton showed the man from the newspaper when the train left Fremont; that the man then asked him for something to eat, which Carleton refused, and the man drew a gun upon him. Carleton took his hand and shoved the gun aside, the man fired, and Carleton then took the gun away and killed him. He also stated that the man claimed to come from South Omaha and had been talking about renting a farm. Young Middaugh asked Carleton if he knew the man's name and Carleton drew from his pocket-book a piece of paper with the man's name on it. Young Middaugh had forgotten the name, but recalled it as Goffman.

We do not think it necessary to detail the other statements made by Carleton. Before going to Fremont he made a substantially similar statement to another neighbor, Mrs. Malloy, and in Fremont substantially similar statements to the city marshal, the coroner, and to two newspaper reporters who interviewed him. With the exceptions already noted, Carleton admits that he made these statements, and gave as an explanation that he did not wish to disclose the truth until he should have an opportunity to do so at the coroner's inquest. In the argument a very strenuous and able effort is made to weaken the effect of these statements, but counsel are driven, in order to do so, to argue that almost every witness misunderstood or failed in his memory as to Carleton's words in some respect. We are aware that such misunderstandings and failures of memory frequently occur, and that such evidence should properly be considered by a jury with caution. But when a number of witnesses substantially agree in their narration, and no interest is shown, the jury certainly has a right to believe their testimony.

One other fact in this connection is significant. The marshal, at Carleton's request, went with him to where Lucke was working, and there Carleton said to Lucke, "You know that tramp that was up to the place," or something like that, and Lucke said "Yes," and Carleton said, "I killed him." The marshal and Lucke corroborate each other in regard to this statement. Carleton explains that in the parlance of the neighborhood any one traveling on foot was denominated a tramp, and that it was in this sense that he used this term in speaking to Lucke and the other witnesses. But bearing in mind the previous occurrences in which Lucke had participated, and what had occurred between Lucke and Carleton shortly before the tragedy, the use of this language was certainly significant, and bears strongly against the defendant. Viewed in the light most favorable to Carleton this was not a frank statement to

Lucke, and taken in connection with Lucke's knowledge of the previous facts and Carleton's knowledge of that knowledge, it tends to show an intention on Carleton's part to give Lucke a hint in regard to the latter's action.

At this point it would be proper to review Carleton's testimony; but before doing so it may be well to say that the pistol with which the wounds were inflicted was a six-shooting Smith & Wesson revolver, which belonged to Lucke, and which Lucke kept sometimes in the drawer and sometimes on top of the bureau in the bedroom in which Gothman's body was found. This bureau stood in such a position that if the revolver lay on top of it, it might have been seen from some points in the sitting room. It appears that Carleton knew that Lucke had the revolver. There is no direct evidence that he knew in what portion of the room Lucke habitually kept it, or where it was on that particular morning.

Carleton, as has been already intimated, took the stand on his own behalf. His testimony as to events prior and subsequent to the tragedy has been already sufficiently stated. His account of the shooting is briefly as follows: When Gothman first came he inquired of Carleton if the latter had seen a team of stray mules. Some further talk ensued when, at Carleton's invitation, Gothman sat down. Carleton gave him a cigar and they both smoked. After Lucke and Malcolm went away Carleton took the hammer mentioned by Malcolm in his testimony and set about driving nails in the kitchen. Gothman inquired if there was any land to rent in the neighborhood. He wished Carleton to look around and inform him if he learned of any. Thereupon Gothman took a memorandum book from his pocket and at Gothman's dictation Carleton wrote Gothman's name and address in the book. Gothman then tore the leaf out and handed it to Carleton and asked Carleton to write his name and address. He then inquired as to the time when trains ran to Norfolk. He also inquired whether

Carleton was married, and then asked how long he had been married. Carleton informed him, and told him his wife "was over on the bluffs—went with my father." Carleton by this time lit another cigar and presented another to Gothman. He does not think Gothman lit it. Carleton then went to a point near the house to get some nails which he remembered having left there. When Carleton left the house Gothman was sitting on the edge of a table, the position of which Carleton fixes as in the sitting room not far from the door leading to the bedroom, but at a point from which the bureau in the bedroom was not visible. Carleton returned toward the house, the hammer in his right hand. Gothman met him at the kitchen door, Gothman standing immediately inside the door. He said to Carleton, "Where is my woman?" Carleton said he did not know. Gothman said, "If you don't tell me I will kill you," and thereupon put the gun close to Carleton's face. Carleton is left-handed. He seized the gun with his left hand, grasping the cylinder and barrel, and endeavored to keep the muzzle away from himself and to get the gun. Gothman was by these movements shoved into the corner of the kitchen close to the door leading into the sitting room. Carleton had placed his right arm around Gothman and Gothman's left arm was under Carleton's. While they struggled in this position the gun was discharged. The struggle continued and the gun was again discharged and then both men fell through the door-way leading into the sitting room, Gothman upon his left side and Carleton to Gothman's right. From the time they fell upon the floor Carleton found his left arm free from Gothman and holding the gun. Carleton endeavored to fire it off but does not know whether or not he succeeded. Carleon arose as quickly as he could. Gothman did not move.

It may be remarked that Carleton's narrative, however improbable, is not necessarily inconsistent with any established fact. Considering the physical facts alone the most

serious objection to accepting his account is the position of the wounds in Gothman's head. The defense accounts for this upon the theory that in the struggle Gothman's head was turned so as to present first his right temple and then his forehead in front of the pistol, and that the wound in the back of the head was received after Gothman fell to the floor, through an accidental discharge of the pistol, probably on its striking the floor. It is in evidence that after the pistol had been placed in the custody of the officers in Fremont it was accidentally discharged in removing it from a drawer. It also appears that on the trial there was a broken spring in the pistol, while before the tragedy it was in good order.

We think we have stated substantially all the important evidence, and stated it as favorably to the accused as possible, and this evidence we think justified the jury in finding the verdict of guilty. Considering the relations of the two men to Minnie Gothman, and the evidence which the jury had a right to believe as to the knowledge of each in regard to the other's relations to her; considering the defendant's acts in abandoning his trip to Fremont and driving rapidly home by another road and forthwith sending his father and Minnie away; considering the statement Lucke swears was made to him; considering the probable topic of discussion between the two men, the fact that Gothman went to the house unarmed and could not have known of the position of the pistol except by his own observation after he reached the house, and that Carleton knew Lucke had the pistol and probably knew where it was; considering the persistency after the shooting with which Carleton related a false account of the events; and considering especially the relative positions and character of the three wounds, we think there can be no doubt that there was sufficient evidence to warrant the jury in finding that the shooting was willful and malicious, and that there had been premeditation for some period. The necessary

duration of the intent to kill will be discussed in considering the instructions.

It is argued that while there might be sufficient evidence to sustain a verdict in a civil case, that this one should not be sustained unless this court is satisfied by the evidence beyond a reasonable doubt of the defendant's guilt. But even in a criminal case the credibility of witnesses and the weight to be given to the testimony are questions for the jury. In weighing the evidence the jurors must be satisfied beyond a reasonable doubt that it establishes the guilt of the accused; but in examining the sufficiency of the evidence in this court our inquiry must be whether upon every essential element of the case there was evidence which the jury was justified in believing, and which, if believed, would establish the guilt of the accused. It is not for this court to determine the question of the accused's guilt or innocence by ascertaining whether as an original proposition we would be satisfied beyond a reasonable doubt. It is only for us to determine whether or not there was evidence upon which the jury was justified in basing its conclusion. (*Palmer v. People*, 4 Neb., 68; *Schlencker v. State*, 9 Neb., 241; *Murphy v. State*, 15 Neb., 383; *Housh v. State*, 43 Neb., 163.)

In those cases cited on behalf of the accused, where a verdict has been set aside by this court, it was not because the evidence before the jury, while entitled to some weight, did not have in the minds of this court the convincing effect deemed necessary in a criminal case, but it was because of a failure of proof on some essential features. Thus in *McNamee v. State*, 34 Neb., 288, there was not sufficient evidence to show that death resulted from the blow administered by the defendant. In *Dreessen v. State*, 38 Neb., 375, the proof was circumstantial, and the circumstances established did not exclude the hypothesis of death by natural causes. The plaintiff in error seeks to apply this principle. But it must be remembered that the

rule is, in regard to circumstantial evidence, that it must be of such a character as to exclude every reasonable hypothesis except that of the defendant's guilt. In *Binfield v. State*, 15 Neb., 484, this same rule was invoked, and the hypothesis of innocence, which it was claimed had not been excluded, arose from a consideration of the testimony of the defendant; but it was said that the jury had a right to disbelieve his testimony, and if it was not believed it furnished no evidence of any hypothesis whatsoever. So here the jury had a right, and it was its duty, to weigh Carleton's testimony as that of other witnesses, to consider his interest in the result, the inherent probability or improbability of his story and its harmony or want of harmony with known facts. There was no evidence conclusively showing that his story was not true. It might possibly be harmonized with established facts, but it was improbable and certainly did not compel belief. The hypothesis of innocence which entitles a person accused of crime to an acquittal is an hypothesis based on the facts proved, not upon the possibility that an error was made in rejecting incredible testimony.

We are now brought to a consideration of the more specific assignments of error. Owing to their number the discussion of each must be necessarily brief. All the assignments have been considered, and we shall endeavor to present our conclusions upon each question of law involved, although it is not practicable to enter into elaborate discussions. Ninety of these assignments of error relate to rulings of the court admitting and rejecting testimony. We see no error in any of these rulings, but in the opinion shall refer only to those assignments to which attention is called in the briefs. These are, however, fairly representative of nearly all the other assignments.

John Orsulak, the father of Minnie, being on the stand, was inquired of as to his acquaintance with Gothman. It was shown by this witness that Gothman had been married

in November, 1892, and that the witness was present at the marriage. The question was then asked, "Whom did he marry?" An objection to this question was overruled, and the witness answered that Gothman married witness' daughter Minnie. The court stated, with reference to this objection, that the testimony could only be admitted for one purpose, to-wit, to establish a motive, and that the jury would be so instructed. Counsel for the defendant thereupon stated that with that understanding they would refrain from making further objections. A question is presented which will be discussed later as to the failure of the court to give such instruction. So far as the evidence is concerned we think it was clearly admissible for the purpose stated by the court. Evidence, if admissible for any purpose, must be admitted. It cannot be excluded simply because it is not material to all of the issues. The evidence being proper for one purpose the court properly overruled the objection, and, so far as the ruling on the evidence goes, the objection neither gained nor lost force because the court stated a reason for the ruling.

In support, presumably, of the theory of self-defense the defendant sought to introduce evidence as to the temper and disposition of the deceased. Several of the assignments of error relate to rulings on questions of this character. There was no effort made to show the reputation of the deceased. The court permitted several witnesses to testify as to their acquaintance with him, and to testify from their observation as to his disposition in regard to violence when in anger. The court, however, excluded similar evidence as to his exhibitions of jealousy. There was a constant effort on the part of these witnesses to relate some particular instance of Gothman's attacking some one with an ax. These efforts the court always checked, as the court also interfered wherever the questions asked were of such a character as to elicit other proof of specific acts. In this course of ruling the court committed no error prejudicial to

the defendant. As to the admissibility of evidence of the character of the deceased in such cases we think that the reasonable rule, as well as that which is gathered from a careful weighing of the conflicting cases on the subject, is well stated by a text-writer as follows: "It is admissible for the defendant, having first established that he was assailed by the deceased and in apparent danger, to prove that the deceased was a person of ferocity, brutality, vindictiveness, and of excessive strength; such evidence being offered for the purpose of showing either (1) that the defendant was acting in terror, and hence incapable of that specific malice necessary to constitute murder in the first degree; or (2) that he was in such apparent extremity as to make out a case of self-defense; or (3) that the deceased's purpose in encountering the defendant was deadly." (Wharton, Criminal Evidence, sec. 84.) But while this statement shows that the ultimate object of the proof offered was legitimate it does not obviate the general rule that when character is in issue the proof must be of general reputation, not of specific acts, and not by proving the opinion of the witness based on his own observation as to the general character of the person in question. This general rule is so well established that the citation of authorities would be superfluous. We wish, however, to call attention to the case of *Reg. v. Rowton*, 10 Cox C. C. [Eng.], 25, as being a comparatively recent case, presenting precisely the questions involved here, which are there elaborately and very ably discussed by several judges. In that case the evidence related to the character of the defendant, but this can make no difference in principle as to the nature of the evidence admissible. The error, therefore, was in admitting evidence amounting merely to the witnesses' conclusions, based upon observations of the deceased, and this was error in favor of the defendant. There was no error in refusing to permit this class of testimony to be made the cover for proof of specific acts.

Several questions were asked of the same witness by which it was sought to show that Gothman left Pierce county as a fugitive from justice, having committed a felonious assault just before leaving. This evidence was properly excluded. In so far as it might tend to establish character it was objectionable as relating to a single specific act. For no other purpose could it throw any light upon the case and it was wholly immaterial. One of the questions thus asked was as to whether Gothman had told the witness the morning he left Pierce county where he was going, and the offer was made to prove that he said he was going to look for stray cattle. This was wholly foreign to the issues and would establish nothing in anywise relating to this case.

When Lucke was upon the stand he testified that he had had a talk with Carleton, senior, as the latter drove by with Minnie, and that he had then gone to the house. It was not then shown what communication had passed between them, but Lucke swore that after reaching the house he told the defendant what his father had said, and then, over the objection of the defendant, he was permitted to relate what he told Carleton that Carleton's father had told Lucke. The statement was merely that Carleton, senior, had directed Lucke to come down to the house to avoid any trouble between the defendant and Gothman. This was a part of the *res gestæ*, and we think clearly admissible. It will be remembered that this conversation was held after Gothman reached Carleton's house, and that it related to the probability of trouble between Carleton and Gothman, and it was explanatory of Lucke's being there and of the conversation that led to the statement by Carleton about "getting away with the old man."

On cross-examination of Lucke it developed that in his testimony at the coroner's inquest he had not related Carleton's ominous remark about "getting away with the old man." On redirect examination he stated that he did not

relate this conversation because no question was asked him to bring it out. On recross-examination he was asked whether the coroner did not ask him at the inquest, referring to Charley Carleton, "'What did he say he came back for, Mr. Lucke?' and did you not answer to that, 'I believe he mistrusted this was the girl's father,' and following that question did not the court ask you this, 'What else did he say,' and did you not answer to that question, 'He hitched up the buggy, I suppose.'" An objection to this was sustained. It will be observed that the questions and answers included in this question as having occurred at the inquest plainly related to a conversation upon Carleton's return early in the morning instead of going to Fremont, and his reasons for so doing, and did not relate in any way, or suggest in any way, the conversation with Carleton after Gothman arrived, or the conversation with Carleton, senior. It was not, therefore, relevant to the subject of redirect examination.

When Carleton was upon the stand the first question in cross-examination was as follows: "Charley, when did you first tell this story of this transaction as you have told it on the stand?" This was objected to for several reasons, one of which was that it might call for a statement made to defendant's counsel. The court instructed the witness that he was not required to disclose any such statement or the time of making it. With that admonition the witness was permitted to answer, and he stated in effect that he had not told this story to others than his attorney. Another objection urged to this question, as well as to several of somewhat similar import, is that it was unfair to the defendant, first, because there was no evidence that he had ever been examined in the same manner as when on the stand; and, secondly, because the question characterized his account of the affair as a "story." It was already in evidence that the defendant had a number of times immediately after the shooting given a different account to different people, and

we think it was legitimate cross-examination to ascertain if possible when, if at all, he had first disclosed the state of affairs to which he had just testified. The state acted upon the theory, which the jury evidently believed, that this account was an afterthought, and, in sifting the story on cross-examination, the time when it was first told became a significant fact. The objection that the questions put to the defendant on the stand had never been asked him before has no force. If his account were true he would be able, without such an examination, to narrate its substance; and neither the defendant nor the jury could have been possibly misled by the question. Nor do we think that the fact that counsel for the state, in addressing the witness the question, characterized his narrative as a "story," affords any ground for complaint. The word "story" is in its etymology akin to "history." Of course, in examining such questions it will not do to consider merely questions of philology. It is necessary to consider the common and general acceptance of the words. The Century Dictionary defines the word "story" in part as follows: "A connected account or narration, oral or written, of events of the past; history; an account of an event or incident; a relation; a recital; a narrative, either true or fictitious, * * * specifically a fictitious tale; * * * the facts or events in a given case considered in their sequence, whether related or not; an anecdote; a report; an account; a statement; anything told; a falsehood; a lie; a fib;" etc. These definitions, while much more extended than those given in other dictionaries, are similar in their effect. Of course an intonation might be given implying on the part of counsel for the state a disbelief in defendant's narrative, but this in itself would be no ground for reversal. Counsel for the state were not required to believe or pretend to believe defendant's testimony, and the record does not preserve the intonation. Apart from the manner of counsel the question could only be objectionable if its effect were to place

in the mouth of the witness a word which by his being compelled to adopt it would imply falsehood on his part. Considering the definitions above given we do not think that any member of the jury could possibly have inferred from the fact that the witness answered the question, framed as it was, that he admitted that he had given a fictitious narrative.

A number of assignments of error relate to the instructions. One of the exceptions on this branch of the case goes to the failure of the court to give a specific instruction admonishing the jury to consider the evidence of the marriage of Gothman and Minnie only as bearing on the proof of motive. It will be remembered that when the state sought to introduce evidence of this marriage, objection was made, and the court stated that the evidence could be admitted only for the purpose of establishing a motive and that the jury would be so instructed. We have already held that the court did right in admitting the evidence. It is claimed now on behalf of defendant that the court erred in not, by an appropriate instruction, restricting the evidence to the purpose for which alone the court deemed it admissible. No exception was taken, at the time the jury was instructed, to the failure of the court to give such an instruction. No instruction was in the regular manner requested upon the subject, and we cannot find any assignment in the motion for a new trial presenting the question. The defendant claims, however, that in the absence of a request for an instruction it was the duty of the court of its own motion to instruct on every material feature of the case, and that the exceptions to the charge as given cover errors of omission as well as commission; that this is especially true in view of the statement made by the court when the evidence was received; and that the defendant had a right to rely on that statement and not make a specific request; that in any event the acceptance by the defendant of the ruling made during the trial and his re-

fraining from making further objections to that class of testimony amounted to a request. A number of cases are cited in support of the first proposition so advanced and a review of the authorities bearing on the question may not be inappropriate.

In *Meyer v. Midland P. R. Co.*, 2 Neb., 319, it was said that it is the right of a party by proper instructions to have the minds of the jury directed to the essential features of the case, and their attention challenged to the testimony which should influence them in making up their verdict, and that when this is not done, but their minds diverted from the real issues to be tried and permitted to wander into the region of conjecture, the chief value of a judicial trial is lost. But this language was used in discussing the refusal of the trial court to give a proper instruction when requested. In *Milton v. State*, 6 Neb., 136, it was said that the charge should be a clear and explicit statement of the law applicable to the facts in the case, and should cover all the questions involved in the issues, and that the instructions in the case then on hearing left the jury in doubt as to the law; but the case was not reversed for that reason, but, as the court carefully stated, for the sole reason that the verdict was not sustained by the evidence. It has been several times held that it being the duty of the court to instruct the jury on the law of the case, an entire failure so to do is reversible error, unless it is apparent that the jury, without the aid of instructions, came to the correct conclusion. (*Sandwich Mfg. Co. v. Shiley*, 15 Neb., 109; *York Park Building Association v. Barnes*, 39 Neb., 834.) And so it has also been held that the failure to submit to the jury a material issue in the case, where there is evidence to support it, is reversible error. (*Waldorf v. Haggin*, 39 Neb., 735; *Aultman v. Martin*, 37 Neb., 826.) Somewhat akin to these cases, and based on the same principle, are those which hold that where the court gives an instruction purporting to state to the jury all the elements necessary

to a verdict such instruction is erroneous if it fails to include all such necessary elements. (*McPherson v. Wiswell*, 19 Neb., 117; *Runge v. Brown*, 23 Neb., 817; *Gilbert v. Merriam & Roberson Saddlery Co.*, 26 Neb., 194; *Bowie v. Spaids*, 26 Neb., 635; *City of Plattsmouth v. Boeck*, 32 Neb., 297.) On the other hand, a verdict will not be set aside merely because the charge was couched in too general language, unless by appropriate request a more specific instruction was asked. (*Sioux City R. Co. v. Brown*, 13 Neb., 317.) It has also been held that while a party, without a particular request therefor, has a right to have the jury instructed generally upon the issues in the case, still complaint cannot be made of the failure to present some particular phase of the case unless he has requested a proper instruction upon the subject. (*Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *German Nat. Bank v. Leonard*, 40 Neb., 676; *York Park Building Association v. Barnes*, 39 Neb., 834; *Hill v. State*, 42 Neb., 503; *Housh v. State*, 43 Neb., 163.) In *Grim v. Robinson*, 31 Neb., 540, it was said that an instruction was erroneous for not stating all the questions arising in the case; but an inspection of that case discloses that the court held the instruction referred to erroneous for what it contained and because it withdrew from the jury a material issue.

The foregoing cases are fairly illustrative of, if they do not comprise, all this court has said bearing on the subject under discussion, and from them we deduce the rule that it is error for the trial court to fail entirely to instruct the jury on the law of the case, whether requested so to do or not; that it is likewise error to partially instruct the jury, but by the omission of certain elements impliedly to withdraw from the attention of the jury an issue or element in the case necessary to determine the rights of the parties, and that an exception to instructions so partially stating the case covers the error of omission, but that when the jury is instructed, and when the instructions given do not

impliedly withhold from the jury some of the issues or elements proper for their consideration, error cannot be predicated upon the fact that the court failed to charge upon some particular phase of the evidence, or some particular feature of the case, unless a proper instruction was offered by the party complaining. This rule is in accordance with the general current of authorities, a good collation of which may be found in 11 Am. & Eng. Ency. of Law, pp. 251–258.

The failure to instruct the jury upon the effect of the evidence of Gothman's marriage did not withdraw from them any issue in the case, directly or by implication. Such an instruction, if given, would only guide the jury in weighing one feature of the evidence in connection with issues fully placed before the jury in other instructions. If the defendant had a right to such an instruction he should have requested it. The proper time to make the request is when the evidence is concluded, and the proper manner of making it is by submitting in writing the instruction desired. (Criminal Code, sec. 478.) We cannot regard the casual statement by the judge during the trial that he would so instruct as anything more than an expression of his disposition to do so if properly requested. It certainly did not obviate the necessity for a proper request. A request and a refusal being, therefore, necessary in order to present the right to such an instruction, and no exception having been taken at the time to the failure to give such an instruction, and the matter not having been called to the attention of the trial court in the motion for a new trial, no error on this ground appears.

Instructions numbered 16, 17, 18, and 19, relating to self-defense, are in the briefs complained of as erroneous. The argument relates largely to the effect of the four instructions taken together, but error is assigned in such a manner as to permit a review of each instruction. These instructions are as follows:

"16. The jury are instructed that the rule of law on the subject of self-defense is this: Where a man, in the lawful pursuit of his business, is attacked, and when, from the nature of the attack, there is reasonable ground to believe there is a design to take his life, or do him great bodily harm, and the party attacked does so believe, then the killing of the assailant under such circumstances will be excusable or justifiable homicide, although it should afterward appear that no injury was intended and no reasonable danger existed. It is enough that there be an apparent danger: such an appearance as would induce a reasonable person in defendant's position to believe that he was in immediate danger of great bodily injury. Upon such appearances a party may act with safety; nor will he be held accountable though it should afterward appear that the indications were wholly fallacious, and that he was in no actual peril. The rule in such cases is this: What would a reasonable person, a person of ordinary caution, judgment, and observation, in the position of the defendant, seeing what he saw, and knowing what he knew, suppose from this situation and these surroundings? If such reasonable person, so placed, would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril, and in acting upon such appearance.

"17. The jury are instructed that while a person has the right, when assaulted by another in such a manner as to excite in him a reasonable belief that he is in danger of losing his life or receiving great bodily injury, to resist the attack by using such force as is apparently necessary to defend himself, yet if, after he has secured himself from danger, he takes the life of his assailant in a spirit of revenge, or for some unlawful purpose, he cannot claim exemption from punishment on the ground of self-defense.

"18. The jury are instructed that in considering whether the killing was justifiable on the ground that the killing

was in self-defense, they should consider all the circumstances attending the killing, the character, number, and place of the wounds, the conduct of the parties at the time and immediately prior thereto, and the degree and nature of the force used by the defendant in making what is claimed to be this self-defense, as bearing upon the question whether the shots, if fired, were actually shot in self-defense, or whether they were shot in carrying out an unlawful purpose; and if the jury believe from the evidence, beyond a reasonable doubt, that the force used was unreasonable in amount and character, and such as a reasonable mind would have so considered under the circumstances, it is proper for the jury to consider that fact, if it is proven, in determining whether the killing was in self-defense.

"19. The jury are instructed that the law of self-defense does not imply the right of attack, nor will it permit of acts done in retaliation or for revenge. Therefore, if the jury believe from the evidence that the defendant sought, brought on, or voluntarily entered into a difficulty with the deceased, August Gothman, for the purpose of wreaking vengeance upon him, or to accomplish some unlawful purpose, or if the jury shall find and believe from the evidence that he killed the deceased at a time when he had, because of the acts of the deceased, no reasonable apprehension of immediate and impending injury to himself, and did so to accomplish some unlawful purpose, or did it from a spirit of retaliation and revenge for the purpose of punishing the deceased for past threatened injuries done to him, the defendant, then the defendant cannot avail himself of the law of self-defense. Before a person can justify taking the life of a human being on the ground of self-defense he must, when attacked, employ all reasonable means within his power, consistent with his own safety, to avoid the danger and avert the necessity for the killing."

The first objection urged to these instructions is that

they placed before the jury the law of self-defense in such a manner as to lead the jury to believe that, although the shooting were in self-defense, the defendant would be guilty if actuated by malice. Inasmuch as the instructions told the jury very plainly that self-defense rendered homicide excusable, we cannot see how the instructions can be given the prejudicial effect claimed by the defendant. By another instruction the jury had been told in apt terms what constituted malice. We cannot see how self-defense and malice could combine, nor how, under the instructions, it was possible for the jury to believe they could coexist. The jury was instructed that in order to make out a case of self-defense the shooting must be for the purpose of self-preservation, and they were also told that in order to be malicious the shooting must have been from an unlawful and unjustifiable motive. We think that these rules are correct; and to say that a shooting is in self-defense and at the same time malicious is a contradiction in terms. To have told the jury that if the facts constituting self-defense existed the defendant should be acquitted, although the homicide were malicious, would be equivalent to saying that under some circumstances murder is not murder in the eye of the law.

The objection urged to the seventeenth instruction is that it left the jury to infer that the killing would not be excusable if done after the defendant had secured himself from danger, although he might still entertain a reasonable belief that the danger continued. The language of this instruction was taken almost verbatim from *Davis v. State*, 31 Neb., 240. It is true that the court was not then considering a contingency precisely similar to the one proposed here in argument. But we think the rule as stated properly provides for such a contingency. The language is not merely that the defendant cannot claim exemption from punishment, if after he secures himself from danger, he takes the life of his assailant. There are qualifying words

which remove any inference that the fact alone of security would render the homicide punishable. In order to render it punishable the jury was told that the homicide must be committed in a spirit of revenge or for some unlawful purpose, and in the rest of the instructions the jury had been told that the purpose of self-preservation from apparent danger, based on reasonable grounds for belief, was a lawful purpose.

As to the nineteenth instruction it is urged that it was erroneous because not based on the evidence; that the word "difficulty" was too general, and that there was no evidence that Carleton had brought on a difficulty with the deceased. As to the term "difficulty" it is argued that the jury might infer that Carleton's harboring or marrying Minnie was bringing on a "difficulty" within the meaning of the instruction, or that the jury might consider some other antecedent and independent fact as the bringing on of a "difficulty." We do not think so. Instructions, of course, must be critically examined, but there should be no over-refinement or hair-splitting in their analysis. We think the plain and unmistakable import of the language was that the law of self-defense could not be availed of if Carleton, for the purpose of wreaking vengeance on Gothman, provoked an attack of a physical character. It is true there is no direct evidence of any such state of affairs, nor was there any direct evidence that the shooting was in self-defense. Carleton's testimony is not that he fired at first in self-defense, but that the pistol was twice discharged accidentally, and then he continued to shoot, or try to shoot, after he obtained possession of the pistol and while Gothman lay on the floor. It is probable that the testimony as to the last fact was sufficient direct testimony to require the submission of the theory of self-defense to the jury. If the defendant had not been upon the stand at all, the circumstances in evidence might have been sufficient to so require. But the theory of self-defense hav-

ing been so introduced into the case, the whole of the law upon the subject, so far as it applied to the facts, to the extent which they might reasonably be inferred from the circumstances as well as from direct evidence, was properly stated. The jury was not required to accept the defendant's testimony as true, and if they rejected it they might base their conclusions upon the circumstances in evidence, and these circumstances certainly warranted as much a belief that the attack was made or provoked by Carleton as that it was made or provoked by Gothman.

The second objection urged to the nineteenth instruction is that it proposes to the jury that their belief contrary to the theory of self-defense was sufficient to a conviction, without stating to them that their belief of guilt must be beyond a reasonable doubt. In other words, that it was erroneous to establish a test of the jury's belief without stating the degree of certainty required. In support of this objection we are cited to the case of *Ballard v. State*, 19 Neb., 609; but when we turn to that case we find that the language of the instruction there held erroneous was: "If you are satisfied from the evidence that the defendant was at the time of the killing insane, * * * then you should acquit." It will be seen that that language required the jury to be satisfied by at least a preponderance of the evidence of the innocence of the defendant, while the language of the instruction in question is in effect that if the jury believed from the evidence that the act was committed in the absence of facts constituting the defense in question he should be convicted. In one case the instruction placed the defense before the jury as a matter for affirmative proof. In the other it required for a conviction that the state should exclude the facts constituting the defense. The instruction is not, therefore, open to the objection sustained to the instruction in the Ballard case. In this case the jury was over and over again impressed with the necessity of being satisfied beyond a reasonable doubt of the defendant's guilt,

and in at least five places they were expressly or by plain implication told that the state must make out every essential feature beyond a reasonable doubt. We do not think that after having once impressed this fact upon the jury it was necessary in every instruction to repeat it. As opposed to this view counsel cited us to certain cases holding that if the court misstates the law in one instruction the error is not cured by a correct statement in another. Among such cases are *Wasson v. Palmer*, 13 Neb., 376; *Ballard v. State, supra; Fitzgerald v. Meyer*, 25 Neb., 77; *School District v. Foster*, 31 Neb., 501. But these were all cases where the instruction complained of misstated the law. On the other hand, where an instruction is simply incomplete, so that taken by itself it might operate to mislead, another instruction complementary thereto and stating the proper limitations and conditions cures the error which might otherwise exist in the first instruction. The charge is to be taken together, and when the instructions taken as a whole, without conflict or confusion, state the law, error cannot be predicated upon the fact that any one of them was in itself, and unexplained, incomplete and calculated to mislead. (*Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *Gray v. Farmer*, 19 Neb., 69; *St. Louis v. State*, 8 Neb., 405; *Murphy v. State*, 15 Neb., 383; *Bartling v. Behrends*, 20 Neb., 211; *Campbell v. Holland*, 22 Neb., 587; *City of Lincoln v. Smith*, 28 Neb., 762; *St. Paul Fire & Marine Ins. Co. v. Gotthelf*, 35 Neb., 351; *Krchnavy v. State*, 43 Neb., 337.) Measured by this rule, there was no error in the instruction.

Another instruction of which complaint is particularly made is the tenth, which is as follows:

"10. The jury are instructed that while the law requires, in order to constitute murder in the first degree, that the killing shall be done purposely and of deliberate and premeditated malice, still it does not require that the premeditation and deliberation, or the willful intent and

purpose, shall exist for any length of time before the crime is committed; it is sufficient if there was such design and determination to kill distinctly formed in the mind at any moment before or at the time the blow is struck or the fatal shot is fired; and in this case, if the jury believe from the evidence, beyond a reasonable doubt, that the defendant feloniously, purposely, and of his deliberate and premeditated malice, shot and killed the deceased in manner and form as charged in the information, and that before or at the time the shot was fired, the defendant had formed in his mind a willful, malicious, deliberate, and premeditated design or purpose to take the life of the deceased, and that the shot was fired in furtherance of that design or purpose, and without any justifiable cause or legal excuse therefor, then the jury should find the defendant guilty of murder in the first degree. To constitute murder in the first degree there must have been an unlawful killing of a person, done purposely and with deliberate and premeditated malice. If a person has actually formed the purpose maliciously to kill, and has deliberated and premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the time of forming the purpose and the time of its execution. It is not the length of time intervening between the time of the formation of the purpose and the time of the actual killing which constitutes the distinctive difference between murder in the first and in the second degree. An unlawful killing, done purposely and with deliberate and premeditated malice, constitutes the crime of murder in the first degree, while murder in the second degree consists in an unlawful killing, done purposely and maliciously, but without deliberation and premeditation. To constitute murder in the first degree it matters not how short the time may be between the time of the formation of the purpose to kill and its execution, if the party has turned it over in his mind—that is, weighed and deliberated upon it."

The first objection urged to this instruction is directed to that portion of it which says that in order to constitute murder in the first degree "it is sufficient if there was such design and determination to kill distinctly formed in the mind at any moment before or at the time the blow is struck or the fatal shot is fired." This language, if it stood alone, might be ambiguous and objectionable, as possibly implying that it would be murder in the first degree if the intent were formed simultaneously with the infliction of the wound; but by the latter portion of the instruction it clearly appears that the intent must have been formed, and that there must have been deliberation and premeditation before the act was performed, and also that there must have been a turning over in the mind, "a weighing and deliberation." And by the twelfth instruction it was stated, "If an intention to kill exists, it is willful; if this intention be accomplished by such circumstances as evidence a mind fully conscious of its purpose and design, it is deliberate. Premeditate means to think of in advance; to determine upon beforehand. It means that there was a design to kill before the act of killing took place." This was a clear and explicit statement that, in order to constitute the act one of premeditated and deliberate malice, the intent to perform it must have preceded the performance and that the mind must have beforehand considered it and determined upon it. The language complained of, therefore, could only mean that there had been formed in the mind an intent to kill, and that that intent existed so formed at the time the blow was struck. It is no doubt true that the terms "deliberation" and "premeditation" require some time for reflection, and that it is not sufficient that the intent to kill be formed simultaneously with the striking of the blow. (*Simmerman v. State*, 14 Neb., 568; *Milton v. State*, 6 Neb., 136.) But in the latter case it was said, "Where a person has actually formed the purpose maliciously to kill another, and has deliberated and pre-

meditated upon it before committing the offense, the length of time that intervenes between the time such purpose is formed and its execution is not material." In the same case it is said that our statute was taken from Ohio, and the court, therefore, follows the interpretation placed by the Ohio courts upon the statute. A portion of a decision quoted with approval in the Milton case is as follows: "The intention to do the injury must have been deliberated upon and the design to do it formed before the act was done, though it is not required that either should have been for any considerable time before." (*State v. Turner*, Wright [O.], 30.) The instruction of the court was, therefore, correct. The intent to kill must precede the killing, and under such circumstances that there has been a deliberation upon the subject, but it is not necessary that the state should show that the intent existed and had been deliberated upon for any particular period of time. Indeed the defendant does not seriously combat this proposition, but, in addition to contending that the portion of the instruction referred to was opposed to this principle of law, he also argues that the court by repetition rendered too prominent the brevity of deliberation required. In *Seebrock v. Fedawa*, 30 Neb., 424, it was said that a judgment will not be reversed because the trial court repeated in the instructions the same proposition of law where it does not appear that the purpose was to mystify the jury and that the jury was misled by reason thereof. And in *Carstens v. McDonald*, 38 Neb., 858, it is said that the giving of an instruction upon a subject already specifically covered may be sufficient ground for reversal, but it will not have that effect where it appears that the jury were not thereby misled or confused, and *Seebrock v. Fedawa* is cited in support of the rule. The two opinions were written by the same judge, and were evidently intended to state the same rule. In view of the latter case, *Seebrock v. Fedawa* should not be construed so as to require for a

reversal that the court in repeating the instruction intended to confuse and mislead the jury; and in view of the former case, as well as the language of the opinion in the latter, the syllabus in the latter should not be interpreted to mean that prejudice will be presumed merely from repetition in the instructions. The clear inference from both cases is that a repetition of the same rule will not be ground for reversal unless its effect was to mislead or confuse the jury. (See on this point, also, *Hill v. State, supra.*) It is true that in the court's charge in the case under consideration it is several times stated in substance that no particular length of time prior to the act during which the intention to kill existed and was deliberated upon need be shown, but this was each time in connection with a statement of the elements necessary to constitute murder in the first degree. The necessity of deliberation and premeditation was impressed upon the jury. The limitation upon the idea was given at the same time. The instructions did not conflict. The words repeated were not stated in such connection as to prejudice the rights of the accused, and we do not think that the jury could have been misled or confused thereby.

Instruction No. 15 was as follows:

"15. The jury are instructed that the credit and weight to be given to statements or declarations of the defendant depend very much upon what the statements or declarations are. If the crime itself as charged is proven by other testimony, and if it is also proven that the party charged with committing the crime was so situated that he had the opportunity to commit the crime, and his statements or declarations are consistent with such proof, and corroborative of it, and the witness or witnesses who swear to the statements or declarations is or are apparently truthful, honest, and intelligent, these statements or declarations so made may be entitled to great weight with the jury."

This instruction is objected to on the ground that it

tended to impress the jury with the idea that greater weight should be attached to statements made by the defendant which were unfavorable to him than to statements which were favorable. We can hardly defend the policy of giving instructions of this character, but we think this instruction had a tendency directly the opposite to that conceived by the defendant. There were in evidence statements made by the defendant hereinbefore referred to, to the effect that he had shot a tramp, and implying at least that the act was on his part willful. The court by this instruction cautioned the jury that they should weigh such statements in connection with the proof of other facts and the credibility of witnesses testifying to such facts, and that if the statements were consistent with such proof, and corroborative of it, they might be entitled to great weight. This was in effect a charge that the statements were not entitled to great weight unless corroborative of the testimony in every particular. The instruction was favorable to the prisoner instead of unfavorable. That the statements and declarations referred to were those made by the prisoner out of court and not his testimony on the stand, and that this construction is the correct one and the one which the jury must have given it is apparent from reading the two instructions immediately preceding. Both clearly referred not to his testimony but to statements out of court. One of these is as follows: "The statements or declarations of the prisoner out of court should be acted upon by the jury with great caution, and unless they are supported by other evidence tending to show that the prisoner committed the crime they are rarely sufficient to warrant a conviction." In this connection complaint is also made of the twenty-sixth instruction, which is as follows:

"26. The jury are instructed that they have no right to disregard the testimony of the defendant on the ground alone that he is a defendant and stands charged with the commission of a crime; nor are the jury required to blindly

receive the testimony of the defendant as true, but the jury are to fully and fairly consider whether it is true and made in good faith, and for this purpose the jury have a right to consider the interest of the defendant in this prosecution. The law presumes the defendant to be innocent until he is proved guilty by the evidence beyond a reasonable doubt, and the law allows him to testify in his own behalf, and the jury should fairly and impartially consider his testimony together with all the other evidence in the case, and if from all the evidence, the facts and circumstances proved, the jury have any reasonable doubt of the guilt of the defendant as charged in the information, then the jury should give the defendant the benefit of the doubt and acquit him."

Objection is made to two phrases therein; one is that the jury is not required to "blindly" receive the testimony of the defendant as true, and the other is that they should consider whether it was "made in good faith." We can see no possible objection to this language. It states the law and states it correctly. The instruction as a whole is certainly not unfair to the defendant, and the use of the word "blindly" in connection with the rest of the instruction implied no disbelief by the court. As to the expression in regard to "good faith," the argument is that if the jury believed his testimony to be true it made no difference whether it was given in "good faith" or in "bad faith." With all due respect to the learned counsel representing the defendant, and while duly appreciating the ability they have displayed in the defense, we may be pardoned for saying that the distinction sought to be drawn is at least over-nice. If the defendant's story was true, it was for that reason given in good faith. If it was false, then it was in bad faith because it was false. "True" and in "good faith," used in such a connection, are necessarily convertible terms, and while it was not necessary to use both it was beyond all possibility that the jury could have been

led by their use to believe that the defendant's testimony was true, but nevertheless given in bad faith and therefore to be rejected.

A very vigorous argument is directed against instruction numbered five, defining reasonable doubt. This instruction was as follows:

"5. The jury are instructed that a reasonable doubt is a term often used, probably well understood, but not easily defined. It is not every possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say and feel that they have an abiding conviction to a moral certainty of the truth of the charge. If upon the proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal, for it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the facts charged are more likely to be true than the contrary, but the evidence must establish the facts to a reasonable and moral certainty,—a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This is proof beyond a reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go farther than this and require absolute certainty, it would defeat criminal prosecutions altogether. A reasonable doubt does not consist of possible or conjectural doubts. If after a careful, impartial, and candid consideration of all the evidence in this case the jury have an abiding conviction of the guilt of the defendant, and are fully satisfied of the truth of the charge against him, then they are satisfied beyond a reasonable doubt."

The language of that instruction was taken almost

bodily from the charge of Chief Justice Shaw in the case of *Commonwealth v. Webster*, 5 Cush. [Mass.], 295. Instructions in substance the same as this have been approved in several cases in this state (*Polin v. State*, 14 Neb., 540; *Langford v. State*, 32 Neb., 782; *Willis v. State*, 43 Neb., 102); and in two cases where other instructions on the subject had been given, the court has taken occasion to commend the charge of Chief Justice Shaw upon the subject. (*Cowan v. State*, 22 Neb., 519; *Carr v. State*, 23 Neb., 749.) The instruction in its general effect has, therefore, the support of the former adjudications of this court, and the only reasonable ground of criticism is to that portion of it which says that if the law, "which mostly depends upon considerations of a moral nature, should go further than this and require absolute certainty it would exclude circumstantial evidence altogether." It is claimed that this portion of the instruction is argumentative and for that reason vicious. It is somewhat argumentative, but only in the way of giving a reason for a rule of law. It is not argumentative upon the evidence, nor was it at all prejudicial to the rights of the accused. In *Long v. State*, 23 Neb., 33, certain instructions were criticised because containing a mixture of law and argument. But the argument in those instructions was addressed to the credit which should be given witnesses, a subject exclusively for the jury, and there were also comments on the public policy of convictions, and the public danger resulting from turning criminals loose. Such a charge in the first respect infringed upon the province of the jury, and in the second respect it appealed to influences wholly improper for consideration. The clause particularly complained against in the instruction we are considering might properly have been omitted, but it was not a comment upon the facts; it was not an appeal in any sense to the jury. It merely stated in cold terms a sufficient reason for not requiring an impossible degree of proof, and that by way of explaining and enlightening the rule of law re-

ferred to. It is argued that the expression that to require absolute certainty "would defeat criminal prosecutions altogether" was an intimation to the jury that this prosecution should not be defeated. We do not think so. The language was general, and in so far as it expressed a principle of public policy, to-wit, the necessity of effective prosecutions, this was a principle which must have been in the minds of the jury as strongly before as after the instruction was read. In *Ballard v. State*, 19 Neb., 609, the jury was told that if they should find the defendant insane then they should acquit him, "and turn him loose." The same argument as here used was urged against the expression "turn him loose." That language was certainly much more objectionable than this, inasmuch as it involved the idea of the danger of turning loose upon the public an insane person of homicidal tendencies; but even there the language used was not considered sufficient in itself to justify a reversal.

Instructions 20 and 21 relate to the purpose and effect of evidence in regard to the character of the deceased. We will not quote them for the reason that they state substantially the rule upon the subject as deduced from the authorities as hereinbefore set out in discussing the evidence. It is claimed that error lay in the instructions because they confined the evidence in its application to the good faith of defendant's belief of danger, and because they required as an antecedent to its consideration that there should be some evidence tending to show an attack by the deceased. In these respects the instructions were right. The ferocity or violent disposition of the deceased could be no more used alone to establish that an attack had been made by him than similar traits on the part of the defendant could be proved for the purpose of establishing that he was the guilty person. The evidence only became material when accompanied by some evidence of an attack, and this for the purpose of showing defendant's state of mind as

well as the probable character of the attack as it appeared to the defendant. These elements the instructions properly submitted to the jury.

In the motion for a new trial several assignments relate to alleged misconduct on the part of jurors. The acts complained of range themselves in four classes. First—That some of the jurors, contrary to their examination on *voir dire*, had formed and expressed opinions as to the guilt of the defendant. Second—That the jury had been wrongfully allowed to separate. Third—That some of them had partaken of intoxicating liquors. Fourth—That one had secretly taken notes of the evidence and read the same to the others during their deliberations. As to the first and fourth classes of objections, it is sufficient to say that the evidence in support thereof consisted almost entirely of the statements of third persons, as to declarations made by the jurors after the jury was discharged; that this evidence was met by direct and positive contradiction both as to the declarations and the facts. Testimony to impeach a verdict in such a manner should be received with great caution, and the evidence being conflicting the finding of the trial court will not be disturbed. (*Hill v. State*, 42 Neb., 503.) As to the alleged separation of the jurors, there is no evidence showing any separation except what was rendered necessary by physical demands, an officer in such case accompanying the juror who separated from his companions. As to the drinking of intoxicating liquors, it appears that after some of the jurors had been examined on their *voir dire*, and before the jury was sworn or completed, a bottle of whiskey was found in the possession of one juror who had been passed for cause and who ultimately served on the jury. This was at once taken away from him by the sheriff. The mere fact of the possession of this whiskey before the jury was sworn would certainly not vitiate a verdict. There is some evidence tending to show that the juror in question had been drinking before

the bottle was taken away. These facts are, however, all denied, and the finding of the trial judge will not be disturbed. It is not necessary, therefore, to consider whether the drinking of intoxicants at that stage of the case would invalidate the verdict.

A strong effort was made to secure a new trial on the ground of alleged misconduct of one Smith. The evidence on this point tends to show that Smith's name was indorsed on the information as a witness for the state; that he had been subpœnaed and was in attendance during the trial until about the close of the state's case, when he was discharged from attendance without being placed on the stand; that during the trial he approached Mrs. Wood, the mother of the defendant, and endeavored to ascertain from her what the defense would be, and made some suggestions as to what might be proved; that during the trial Smith was seen in conversation with several of the witnesses, among them Henry Lucke. On this slender basis the defense tried to make out that Smith, of his own volition, or at the procurement of some one, sought to influence the testimony, particularly that of Lucke. In other words, that he suborned perjury. This is a very serious charge, and the evidence signally failed to establish it.

Complaint is also made because Henry Lucke, before the trial, misled the defense as to his testimony by not stating the remark made by Carleton about getting away with Gothman. We have never heard that the failure of a witness for the state to disclose, upon inquiry by the defense, what his testimony would be, is ground for a new trial. In such a case a party might be so surprised as to warrant, on proper application, interference by the court for his protection, but it appears that the trial lasted several days, and that the county attorney, in his opening statement to the jury, stated according to the facts what Lucke's testimony would be. This gave every opportunity to cross-examine all the witnesses on the basis of such statement,

and certainly gave reasonable opportunity to meet the testimony. No application for a postponement of the trial was made.

We think we have now covered every point made by counsel in argument or in the briefs, and we have considered the assignments of error, whether referred to or not. We find no error in the record, and the judgment of the district court is

AFFIRMED.

FRANK E. JANDT V. LUCIEN DERANLIEU.

FILED JANUARY 5, 1895. No. 5289.

1. **Review:** TRANSCRIPT OF RECORD. To enable this court to review the judgment of the district court reversing the judgment of the county court on error proceedings, the petition in error on which the district court acted must be incorporated into the record brought here. (*Lean v. Andrews*, 38 Neb., 656.)
2. **Transcript for Review:** TIME FOR FILING. A transcript of the proceedings containing the final judgment sought to be reviewed must be filed with the petition in error in order to confer jurisdiction upon the court. (*Garneau v. Omaha Printing Co.*, 42 Neb., 847.)

ERROR from the district court of Dawes county.

E. W. Dailey and *Spargur & Fisher*, for plaintiff in error.

Albert W. Crites and *W. H. Fanning*, *contra*.

NORVAL, C. J.

This action was commenced in the county court of Dawes county by plaintiff in error to recover the sum of $505.91 upon an account for goods sold and delivered to

the defendant. At the same time the plaintiff sued out a writ of attachment, and certain personal property of the defendant was seized thereunder. Subsequently the defendant appeared and filed a motion to quash and set aside the writ of attachment, which was overruled. Thereupon he moved to dissolve the attachment, which motion was denied. Upon the trial on the merits the plaintiff had judgment, and the defendant prosecuted a petition in error to the district court, where it appears, from the stipulation of the parties, the order made by the county judge upon the motion to discharge the attachment was reversed, and the attached property was discharged. Plaintiff has filed a petition in error in this court to obtain a reversal of the judgment of the district court.

The petition in error must be dismissed for the reason no transcript of the final judgment rendered by the district court is before us. In *Garneau v. Omaha Printing Co.*, 42 Neb., 847, it is said: "A cause cannot be docketed in this court, either on appeal or error, until a transcript of the proceedings in the trial court is filed. The transcript of the record is the foundation of the proceeding here, and until the same is filed this court acquires no jurisdiction to hear and determine the cause. Until then there is no case to review. The statute requires that it shall be filed with the petition in error." (See *City of Brownville v. Middleton*, 1 Neb., 10; *Ward v. Urmson*, 40 Neb., 695; *Baker v. Kloster*, 41 Neb., 890.)

There has been filed in the court a stipulation of the parties which states that the order of the county court in the attachment proceedings was reversed, but the stipulation cannot take the place of a certified transcript of the judgment sought to be reviewed. (*Credit Foncier of America v. Rogers*, 8 Neb., 34; *McCarn v. Cooley*, 30 Neb., 552.)

Again, the judgment cannot be reviewed, for the reason that the record does not contain the petition in error which was presented to the district court. We therefore have no

means of knowing what errors were alleged in the lower court for a reversal of the proceedings of the county court. The bringing up of the petition in error was necessary to obtain a review of the decision of the district court. (*Lean v. Andrews*, 38 Neb., 656.) The proceedings are

DISMISSED.

BERTHA PAUL V. GOTTLIEB ZIEBELL.

FILED JANUARY 5, 1895. No. 5213.

1. **Change of Venue:** AFFIDAVIT: JUSTICE OF THE PEACE. When a proper affidavit made by a defendant for a change of venue of a cause pending before a justice of the peace is seasonably filed, and the provisions of the statute as to the payment of costs have been complied with, it is mandatory upon the justice to whom the application is made to transfer the cause to the nearest justice of the peace of the county to whom the objections stated in the affidavit do not apply.

2. **Affidavit for Change of Venue.** The defendant may state in such affidavit for a change of the place of trial any objection which is deemed well founded, which would disqualify the next nearest, or any other justice in the county, from hearing the cause.

3. **Venue:** PROOF OF BIAS OF NEAREST JUSTICE. The plaintiff is not authorized to prove, by affidavit or otherwise, the interest, bias, or prejudice of such nearest justice of the peace in order to prevent the defendant from procuring a change of the place of trial.

ERROR from the district court of Madison county. Tried below before NORRIS, J.

Wigton & Whitham, for plaintiff in error, cited: Maxwell, Justice Practice, 126; *Hitchcock v. McKinster*, 21 Neb., 148; *In re Garst*, 10 Neb., 78; *Osborn v. Shotwell*,

33 Neb., 348; *Johnson v. Jones*, 2 Neb., 137; *Kepley v. Irwin*, 14 Neb., 300; *Rector Holy Trinity Church v. United States*, 12 Sup. Ct. Rep., 512.

Mapes & Licey, contra:

NORVAL, C. J.

This action was commenced by the plaintiff in error before H. G. Brueggemann, a justice of the peace in and for Norfolk precinct, Madison county, to recover the sum of $100.20. On the return day of the summons the defendant filed a motion for a change of venue to R. H. Maxwell, a justice of the peace for Battle Creek precinct, because of the bias and prejudice of Justice Brueggemann. The motion was accompanied by the following affidavit:

"THE STATE OF NEBRASKA, }
MADISON COUNTY. }

"Gottlieb Ziebell, being first duly sworn, says that he is the defendant above named; that he cannot, as he verily believes, have a fair and impartial hearing in this case before H. G. Brueggemann, justice of the peace in and for Norfolk precinct, Madison county, Nebraska, on account of the interest, bias, and prejudice of said justice. Affiant further says that he cannot have a fair and impartial trial in this case, as he verily believes, before Geo. N. Beels, justice of the peace in and for said precinct, on account of the bias, interest, and prejudice of said Justice Beels. Affiant further says that he cannot have a fair and impartial hearing in this case, as he verily believes, before E. C. Wormer, justice of the peace in and for Wormerville precinct, said county, on the ground that said justice is interested, biased, and prejudiced. Affiant says that he verily believes he cannot have a fair and impartial trial in this case before ——— ———, justice of the peace for Valley precinct, on account of the interest, bias, and prejudice of said justice in said case. Affiant further says that he verily

believes that he cannot have a fair and impartial trial in this case before Geo. Zimmerman, on account of the bias and prejudice of said Justice Zimmerman.

"GOTTLIEB ZIEBELL.

"Subscribed in my presence and sworn to before me this 17th day of May, 1890. BURT MAPES,

"*Notary Public.*"

The plaintiff, before the ruling on said motion was made, objected to the venue being changed to Justice Maxwell, for the reason that a fair and impartial trial of the cause could not be had on account of the interest, bias, and prejudice of said Maxwell, as shown by the affidavit of George L. Whitham. Thereupon Justice Brueggemann entered upon his docket an order transferring the cause to Justice Maxwell, and an exception was taken to the ruling. Before the last named justice the plaintiff made affidavit that she believed a fair and impartial trial could not be had before Mr. Maxwell on account of the interest, bias, and prejudice of said justice, and asked that the cause be remanded to the justice granting the change of venue, which motion was denied, and the plaintiff took an exception. The cause was thereupon tried to a jury, with a verdict and judgment in favor of the defendant. Error was prosecuted by the plaintiff to the district court to reverse the two rulings mentioned above, where the same were affirmed.

It is contended that Justice Brueggemann erred in granting a change of venue over the objections of the plaintiff. Section 958*a* of the Code of Civil Procedure provides: "That in all civil and criminal proceedings before justices of the peace, any defendant in such proceedings may apply for, and obtain, a change of venue, by filing an affidavit in the case made by the defendant, his agent or attorney, stating that the defendant cannot, as affiant verily believes, have a fair and impartial hearing in the case on account of the interest, bias, or prejudice of the justice, and by paying the costs now required to be paid by defendant on change

of venue, for the causes and in the cases mentioned in chapter four of title thirty, part two of the revised statutes, and thereupon the proceedings shall be transferred to the nearest justice of the peace to whom the said objections do not apply, of the same county, to be proceeded with in the manner pointed out for the transfer and procedure in cases on change of venue for the cause mentioned in said chapter four." Section 958*b* declares: "The application shall be made before entering upon the merits of the case by the introduction and reception of evidence, and no second change of venue shall be allowed for the same cause in the same proceeding." These sections provide for the defendant's obtaining a change of venue in a cause pending in a justice court, as well as for prescribing the showing necessary to be made in order to procure such change. It has been more than once held by this court, in construing the foregoing sections, that, when an affidavit in the language of the statute is filed in proper time, it is the duty of the justice to change the venue to the nearest justice of the county to whom the objections stated in the affidavit do not apply, provided the provisions of the law relating to the payment of costs have been complied with. The justice to whom the application is made has no discretion in the premises. (*In re Garst*, 10 Neb., 78; *Osborn v. Shotwell*, 33 Neb., 348; *State v. Cotton*, 33 Neb., 561; *Peyton v. Johnson*, 37 Neb., 886.) It is equally as well settled by these decisions that, although the defendant has no right to name the justice to whom the cause shall be transferred, yet it is proper to state in his affidavit for a change any objections, which are deemed well founded, to the justice next nearest to the one before whom the action is pending, and which would disqualify such nearest justice from hearing the cause. It logically follows from this that it is proper to state in the affidavit made for the purpose of procuring a change of the place of trial any real or substantial grounds existing which would prevent any justice in the county from

giving the defendant a fair and impartial trial in the cause. If he fail so to do, the objection is waived. (*In re Garst, supra.*) This is obvious from the fact that the statute allows but one change of venue for the same cause, and that it requires, when such change is made, that it shall be "to the nearest justice of the peace, to whom said objections do not apply, in the same county."

It is argued that the court erred in transferring the cause to Justice Maxwell's court, since the plaintiff had filed an affidavit to the effect that she could not have an impartial hearing in the cause before him on account of his bias and prejudice. This contention is not tenable. Under sections of the statute above quoted a change of venue can be had only on the application of the defendant. The plaintiff is not entitled to such a change on account of the interest, bias, or prejudice of the justice, but can obtain a change of the place of trial alone under and for the cause stated, and in the mode pointed out, in sections 954, 955, 957, and 958 of the Code, which read as follows:

"Sec. 954. The place of trial may be changed if, on the return of process, or at any time before trial shall have commenced, it shall be made satisfactorily to appear to the justice of the peace before whom any cause is instituted, or is pending for trial, by the affidavit of either of the parties in the case, that such justice is a material witness for either party, or if a jury be demanded by the adverse party, then that he cannot, as he verily believes, have a fair and impartial trial in the precinct or place for which said justice may have been elected, on account of the bias or prejudice of the citizens thereof.

"Sec. 955. If the place of trial be changed on account of the justice being a material witness in the cause, such cause may be transferred for trial before some other justice of the peace in the same precinct. If the place of trial be changed on account of the bias or prejudice of the

citizens of such precinct or place, the case shall be taken to some justice in an adjoining precinct in the same county.

"Sec. 957. Before any such change shall be allowed, the costs, as specified in the next following section, shall be paid by the party applying for such change.

"Sec. 958. When such change is at the instance of the plaintiff, he shall be taxed with all the costs which have accrued and which shall accrue in the cause, until such transcript and papers shall be delivered to the justice to whom such cause is removed for trial; and when on the application of the defendant, he shall be taxed for the costs which have accrued for issuing subpœnas for witnesses and service thereof, witness fees, and costs of the justice for transferring the cause to the docket of the other justice."

There is no provision of the statute which authorizes or allows the plaintiff to urge that a justice of the peace is interested, biased, or prejudiced as grounds why he should not hear and determine the cause. The defendant alone can interpose such objections, and when he has done so in the mode pointed out by statute, it is mandatory upon the justice before whom the action is pending to grant the change to the nearest justice in the county to whom no objection of interest, bias, or prejudice has been averred in the defendant's affidavit. If the plaintiff can urge the objection that the justice nearest to the one to whom the application for change of the place of trial is made is interested, or is biased or prejudiced against him, then, unless restrained by his conscience, he may make the same objection to each of the other justices in the county, and the defendant would be required to submit to a trial of the cause in the forum chosen by the plaintiff. To so construe the statute would, in many causes, prevent the defendant from procuring a change of venue for the grounds stated in section 958*a* of the code. We are constrained to hold that the objections urged by the plaintiff against Justice Maxwell were insufficient to prevent the transfer of the cause

to him, and that the justice did not err in refusing to remand the cause to justice Brueggemann. The judgment of the district court is therefore

AFFIRMED.

LANDAUER, KAIM & STRENG v. G. H. MACK & COMPANY.

FILED JANUARY 5, 1895. No. 4872.

1. **Attachment:** ISSUES ON MOTION TO DISSOLVE. On the hearing of a motion by a defendant to discharge an attachment allowed in an action against him on the ground that he had fraudulently disposed of his property with intent to defraud creditors, the alleged fraudulent transaction being the conveyance by mortgage of certain property, the validity of such mortgage is not put in issue and cannot be determined. *McCord v. Krause*, 36 Neb., 764.

2. **Fraudulent Conveyances:** PREFERRING CREDITORS. While it is permissible for an insolvent debtor to prefer one or more creditors to the exclusion of others, such preference must be an honest one and not a device to enable the debtor to fraudulently delay or defeat other creditors.

3. ——: ——. The fact that a preference is given to a *bona fide* indebtedness is not of itself sufficient protection even for the creditor, provided he was aware of and participated in a purpose to fraudulently defeat the claims of other creditors.

4. **Attachment.** In order to sustain an attachment as against the defendant, it is sufficient to establish the existence of one or more of the statutory grounds therefor as against him, without regard for the rights of other parties.

5. ——: SUFFICIENCY OF EVIDENCE TO SUSTAIN AFFIDAVIT. Evidence examined, and *held* to sustain the statement in the affidavit for attachment.

6. ——. *Landauer v. Mack*, 39 Neb., 8, overruled.

REHEARING of case reported in 39 Neb., 8.

Chas. Offutt, for plaintiff in error.

Bartlett, Crane & Baldrige and *E. R. Duffie*, *contra*.

POST, J.

A former opinion in this case will be found in 39 Neb., 8. A re-examination of the record led to the conclusion that the order of the district court discharging the attachment rests upon a finding in favor of the validity of the mortgages mentioned in the opinion rather than the want of grounds for attachment as against the defendant, and is, therefore, within the rule recognized in *McCord v. Krause*, 36 Neb., 764. Acting upon that conclusion, a rehearing was ordered and the cause again submitted on its merits. It is of the utmost importance in this connection to keep in mind the precise question presented by the motion to discharge, viz., whether the evidence establishes sufficient ground for the attachment as against the defendant Gottlieb H. Mack, doing business in the name of G. H. Mack & Co., and not whether the rights of the several mortgagees are superior to the claims of the plaintiffs. In our consideration of the subject we are embarrased somewhat by the fact that most of the cases cited from this court have turned upon the question of the rights of third persons; and not until the case of *McCord v. Krause, supra*, were the rights of the defendant under like conditions directly presented for determination.

There is offered at this time no criticism of the proposition in the former opinion, that the burden is upon the plaintiff to sustain by a preponderance of evidence the statements of the affidavit for attachment, or proof of facts from which the truth of such statements will be inferred. It is also firmly established by the later decisions of this court that fraud will not be inferred as a matter of law from the preference of one or more creditors by a debtor

in failing circumstances. (*Hershiser v. Higman*, 31 Neb., 531; *Hamilton v. Isaacs*, 34 Neb., 709; *Jones v. Loree*, 37 Neb., 816; *Phelan v. Smith*, 40 Neb., 765.) Among the facts disclosed by the record we notice that the sheriff of Douglas county, Wm. Coburn, was in possession of the property in controversy as agent of the several mortgagees at the date of the order discharging the attachment. Were the case at bar one by or against Coburn for the purpose of determining his right of possession of the property, we could, without difficulty, sustain a judgment in his favor on the ground that one or more of the mortgages are *bona fide*, and because he could, by reason of his privity with the mortgagees, successfully interpose in his own behalf any defense existing in their favor. Inasmuch as our investigation has resulted in a conclusion adverse to the order of the district court, it is deemed proper to refer to some of the salient facts of the case; but preliminary to such examination it should be remarked that the grounds of attachment are that defendant has sold and disposed of his property with intent to defraud his creditors and to hinder and delay them in the collection of their claims; that he is about to sell and dispose of his property with like fraudulent intent, and is about to remove it with intent to cheat and defraud his creditors.

On the 15th day of February, 1890, Mack, the defendant, who was then hopelessly insolvent, executed six different chattel mortgages covering his entire personal estate, and amounting in the aggregate to $22,856.76. He at the same time executed two real estate mortgages for the aggregate amount of $825. Among the mortgages executed on that day were the following: One in favor of the First National Bank of Omaha, for $6,908.16; one in favor of Elizabeth Mack, wife of the mortgagor, for $5,939.16; one in favor of S. Trottner and H. Lichtenberg, brothers-in-law, for $2,912.56; and one in favor of Sebastian Trottner, also a brother-in-law, for $2,160,—making a total of $11,-

011.72 in favor of near relatives. A number of the mortgages made at or about that time were for amounts in excess of that claimed by the mortgagees,—for instance, one in favor of the defendant's book-keeper, McLeod, for $200, when the amount claimed by him was $72.50; one in favor P. J. Van Slyck, of Omaha, for $325, to secure an indebtedness of $188.50; one in favor P. Whitlock, of Richmond, Virginia, for $250, to secure an indebtedness of $182.50; one in favor of C. Jensen, of New York, for $1,116.25, to secure an indebtedness of $736.25.

A further reference is required in this connection to the mortgage in favor of the defendant's wife. It is shown by the testimony of McLeod, the book-keeper, that a new set of books were opened by the defendant, January 1, 1890, and that all of the bills payable were transferred to the new book, except a note held by Mrs. Mack. The witness, who is certainly not unfriendly to the defendant, testified as follows:

Q. Did you have a conversation with G. H. Mack with regard to that [the credit in favor of Mrs. Mack] at the the time the new books were being made out?

A. Yes, sir.

Q. State what it was.

A. It was standing on the old book to the credit of bills payable forty-six hundred and some dollars.

Q. Did it state to whom it was payable?

A. It does on page 18 of the old book. I saw it there, and asked Mr. Mack what it was for. He said it was a note Mrs. Mack had for that amount. I asked him if I should transfer it to the other book, and he said, "No, close it up to profit and loss," and it was done.

Q. When did that happen?

A. Between the 1st and 15th of January, when I finished opening this set of books.

Q. Was any change made in the books in that respect since February 15?

A. Yes, sir. * * *

Q. How long after February 15 was it that you made that entry in her account of this note.

A. I cannot tell. I think it was the 15th. Everything that has been done since then has been done as of the 15th.

Q. What was that entry?

A. To Mrs. Mack, $4,826.53.

Q. Why did you not put the amount of the mortgage note on that date, viz., $5,939.16?

A. I could not put it there. That was not her account.

The mortgages executed on the day above named were, except that in favor of Mrs. Mack, all made without the knowledge or request of the mortgagees, and, according to the testimony of Mrs. Mack, those in favor of her brother, Sebastian Trottner, and the firm of Trottner & Lichtenberg, were executed in accordance with her solicitation. Said mortgage was also filed by the defendant, or under his direction, in the following order: That in favor of the First National Bank of Omaha at 1:15 P. M., on the day of its execution; that in favor of Elizabeth Mack at 1:17 P. M.; that in favor of Sebastian Trottner at 1:19 P. M.; one in favor of Calixto, Lopaz & Co. at 1:20 P. M.; that in favor of Trottner & Lichtenberg at 1:21 P. M., and the others following at like intervals, on the same day. It also appears that Coburn was put in possession by the time, if not before, the last mortgage was filed, and before notice was given to the bank above named of the mortgage in its favor. At that date the defendant was indebted to plaintiffs for merchandise in the sum of $1,849.50. Of that amount the sum of $659.70 matured February 9, and the note therefor had been protested for non-payment. On the 14th, the day preceding the execution of the aforesaid mortgages, Mr. Harris, representing the plaintiffs, called on the defendant and insisted upon payment of the amount then due and security for the unmatured notes. His demand not being productive of satisfactory results, he re-

turned the following morning, when the defendant, according to the affidavit of the latter, offered to pay the balance due on the note first above mentioned, but declined to furnish the security demanded, whereupon Harris became abusive and threatened to cause his property to be attached and his business and credit to be ruined unless security was forthcoming immediately. His affidavit, so far as it relates to that subject, concludes as follows: "This affiant states that said Harris, after making many loud and profane remarks, so loud that it attracted the attention of many of affiant's customers and other persons who were in affiant's store at said time, the said Harris left said store, and this affiant states that immediately afterward he made and executed the four chattel mortgages first above mentioned and described." The mortgages to which reference is therein made are those in favor of the First National Bank, Elizabeth Mack, Sebastian Trottner, and the firm of Trottner & Lichtenberg. About 11:30 A. M. of the same day Mr. Breckenridge called at the store of the defendant for the purpose of presenting for payment a past due bill in favor of the Mutual Union Cigar Company. According to the affidavit of the former, he inquired if the defendent was in trouble, and in reply was assured by the latter that he was not, except as to a claim in favor of the plaintiffs. Defendant at that time mentioned, with an oath, the representative of the plaintiffs who had, as he said, caused him trouble. The affiant then said to him: "If you are crowded so that you have to give chattel mortgages I want you to remember my client," to which the defendant assented; but during that conversation Mr. Coburn came into the store, and to the surprise of the affiant, took possession by virtue of the mortgages above described.

The foregoing, which are in the main undisputed, are selected from the many facts disclosed tending to characterize the transaction so far as the defendant is concerned. It is probable that to the persistence and abuse of the

plaintiff's agent should be attributed the defendant's attempt to defeat their claim; but whatever may have been his motive, it is reasonably certain that one purpose of the hurried execution of the several mortgages, without so much as consulting his own books to ascertain the amounts due the mortgagees, was to prevent the enforcement of the plaintiff's claim by resort to legal process. The evidence in support of the motion is directed chiefly to the question of the good faith of the claims secured, and for the purpose of the present inquiry we assume the mortgages, and each of them, to represent the *bona fide* indebtedness of the defendant, although it may be doubted whether the explanation of the mortgage to the defendant's wife is such as to overcome the presumption of fraud which results therefrom. It may be conceded, also, that they were taken by the mortgagees for the purpose of security only, without notice of any fraudulent intention on the part of the mortgagor. The defendant, however, has suggested no explanation of his devious course consistent with honesty of purpose on his own part. The fact that the preference by an insolvent is given to a *bona fide* claim is not of itself sufficient, even for the protection of the mortgagee, provided he was, at the time the security was accepted, aware of and participated in a purpose to fraudulently delay or defeat the claims of other creditors. Where there is an actual intent to defraud, no form in which the transaction is put can shield the property so transferred from the claims of pursuing creditors, even though a full consideration be received therefor. (Kerr, Frauds, 199; May, Fraudulent Conveyances, 233; *Starin v. Kelly*, 88 N. Y., 419; *Billings v. Russell*, 101 N. Y., 226; *Blennerhassett v. Sherman*, 105 U. S., 117, and cases cited.) As said in *David v. Birchard*, 53 Wis., 492, "It is not the honesty of the debt secured by, but the purpose of the conveyance, to which the statute has reference; that an honest debt is an important factor in the transaction, but if the mortgage was made

with the intent to hinder and delay creditors, then it is void though an honest debt be secured by the instrument." (See, also, *Johnson v. Whitwell*, 24 Mass., 73; *Giddings v. Sears*, 115 Mass., 507; *Shelley v. Boothe*, 73 Mo., 74.)

In order to sustain an attachment as against the defendant it is, for obvious reasons, sufficient to establish the existence of ground therefor as against him without regard to the rights of other parties. The character of the title or interest acquired by purchase or mortgage from an insolvent debtor is wholly immaterial unless put in issue by creditors. We will add, in justice to the district judge, that if it were clear from the record that the order complained of was based upon a finding of good faith on the part of the defendant, we would in this proceeding be constrained to accept his conclusion. But we are satisfied, both from the proofs and the argument on the former submission, that the substantial foundation for the order is a finding in favor of the validity of the mortgages. It follows that the cause is within the doctrine of *McCord v. Krause, supra*, and must be governed by that case. The order discharging the attachment is accordingly reversed and the cause remanded to the district court for further proceedings therein in accordance with the opinions.

REVERSED AND REMANDED.

JACOB FAWCETT, APPELLANT, V. D. A. POWELL ET AL., APPELLEES.

FILED JANUARY 5, 1895. No. 5712.

1. **Negotiable Instruments:** FRAUD: BURDEN OF PROOF. In an action by an indorsee of a promissory note against the maker, where the defendant pleads fraud in the inception of the note, the burden is upon the plaintiff to show that he is a *bona fide* holder for value. Following *Violet v. Rose*, 39 Neb., 660.

2. ——: ——: ——. The appellant's failure to make the proof required, under the circumstances above indicated, necessitates an affirmance of the decree entered by the district court.

APPEAL from the district court of Douglas county. Heard below before DAVIS, J.

Fawcett, Churchill & Sturdevant, for appellant.

Brome, Andrews & Sheean, contra.

No briefs filed.

RYAN, C.

This was a foreclosure proceeding begun in the district court of Douglas county by appellant against D. A. Powell and Mary L. Powell on their real estate mortgage made to Frank H. Kingman. The notes secured by the mortgage, for the foreclosure of which this action was commenced, were transferred by Kingman to Frank Barnard and C. L. Blazer, through whom appellant Fawcett claimed title. Fawcett made each preceding holder of these notes held by him a defendant. The defendants, D. A. and Mary L. Powell, answered, denying that Fawcett was a holder of any notes as a purchaser, or for value, and setting up that Blazer, by falsely representing the value of the stock of the Don Carlos Lumber Company, had induced D. A. Powell to purchase of this stock $10,000 in stock at its par value, in payment for which D. A. Powell gave his notes, amounting to $10,000, to Kingman, by whom they were fraudulently transferred to Barnard and Blazer, through whom Fawcett, with knowledge of the character and history of said notes, derived his title thereto. Two banks were made parties plaintiff by intervention on their own application, and thereupon they alleged that they had taken as collateral security to loans made to Fawcett some of the notes of Powell, secured by the aforesaid mortgage. In favor

of these banks, as well as in favor of two individuals who, by intervention, asked the foreclosure of an independent mortgage on the same property as that in respect to which Fawcett claimed the right to foreclosure, the relief prayed was granted. There now remains but one party complaining, and that party is appellant Fawcett, who, in argument on his own behalf, says that the sole question to be determined is whether or not under the evidence he was an innocent purchaser of the paper in controversy. The defense pleaded was fully substantiated by the evidence as against the original payee of Powell's notes. It was shown by the proof that the firm of Fawcett & Davis, of which appellant was a member, leased three adjoining rooms and sublet one of these rooms to the Don Carlos Lumber Company, and that during the time in which the transactions complained of transpired Mr. Davis, of the firm of attorneys aforesaid, was president of the Don Carlos Lumber Company, and its legal adviser. The firm of Fawcett & Davis sub-leased a room to the lumber company for the convenience of Mr. Davis, as its president, and because the firm of Fawcett & Davis expected that the fees to be earned by that firm as attorneys at law would compensate for the inconvenience of yielding up the possession of one room. Mr. Fawcett had been succeeded as cashier by Mr. Barnard, and had sold to him his stock in the Mechanics & Traders National Bank of Omaha. Mr. Fawcett's description of his purchase of the notes in respect to which he sought the foreclosure of the mortgage made by Powell was as follows:

"Mr. Barnard, who at that time was vice president of the Mechanics & Traders Bank and had been a client of mine, came to me and said he wanted to raise $5,000, and brought these notes and that mortgage and wanted to know if I could sell them for him. I had once before sold $4,500 worth of the paper for him to Mr. Hopkins, secured by mortgage or deed of trust on this Missouri property, and he had taken up the notes and paid them.

I took this paper to Mr. Hopkins first. Mr. Hopkins said he didn't care to buy it. I then offered the paper to John L. McCague. Mr. McCague said that it was a larger amount than he wanted to buy. I then went back to the office, and some time during the day Mr. Barnard came in and I told him I had been unable to sell the paper to either Mr. Hopkins or Mr. McCague, and I didn't know of any one else to deal with; but he said he wanted $5,000 very badly and wanted it that day, and he went out of the room and came in with Mr. Blazer. He was alone at the time I spoke. He came in and said, 'You cut the paper in two, take $5,000 for it,' and Mr. Barnard said he would indorse the whole paper. I asked him how he could afford to do that if he was only getting half the money. He said half the money would go to him. He said he had an arrangement with Blazer by which he would be secured for the other half, and he knew where it was coming from all right and that he would cut the paper in two. I told him if he would give me $5,000 stock of the Mechanics & Traders National Bank as collateral I would take it. He said he would and did so, and I went right over to the Commercial National Bank. * * * I showed Mr. Millard the papers which I had, which were two of these notes and the $5,000 of the Mechanics & Traders Bank stock and asked him if he would loan me $5,000 on that collateral. He said he would, and I gave him my note for $5,000 and deposited two of these notes and the $5,000 in stock as collateral security, and I deposited the $5,000 in the Mechanics & Traders Bank to the credit of Barnard."

The bank for which Mr. Millard was acting was protected by the decree of the district court as the *bona fide* holder of the notes pledged to it as collateral security. We have been unable to discover in the entire transaction as described by Mr. Fawcett the least indication that he purchased any notes in the sense in which the term "pur-

chased" is ordinarily used or accepted. It is highly probable that by raising the sum of $5,000 for Mr. Barnard by pledging notes to the same amount as well as other collateral security furnished by Mr. Barnard himself, the other notes to the amount of $5,000 became the property of Mr. Fawcett. This, however, was in no sense such a purchase as might be described as in the ordinary course of business. The defense of fraud in the inception of the notes held by Mr. Fawcett was established without question—indeed the perpetrators of the fraud for some reason failed to testify. The rule which governs the right of a holder of a note under these circumstances is thus stated in *Violet v. Rose*, 39 Neb., 660: "It seems that in an action by an endorsee of a promissory note against the holder, where the defendant pleads fraud in the inception of the note, the burden is upon the plaintiff to show that he is a *bona fide* holder for value." Mr. Fawcett failed to do this, and the judgment of the district court is

AFFIRMED.

GERMAN-AMERICAN INSURANCE COMPANY OF NEW YORK V. JOSEPH S. HART.

FILED JANUARY 5, 1895. No. 5830.

1. **Pleading:** AMENDMENT: REVIEW. Unless it is affirmatively made to appear what particular amendment of a pleading was allowed, no question is presented for review as to the proper exercise of its discretion by the district court.

2. **Insurance:** MISREPRESENTATIONS BY APPLICANT: WAIVER. Where representations of the extent to which incumbrances existed on property sought to be insured were made, which unintentionally were incorrect, but were so known to be by the insurance company's agent, who nevertheless issued the policy of insurance as requested, and therefor received the premium,

which, with said representations, he forwarded to his principal, by whom the premium was retained and the policy allowed to remain in force, the jury were properly instructed, in effect, that by retaining the premium and not canceling the policy before loss was sustained for nearly four months after issue of the policy, the company was bound as an insurer, provided the existence of the above facts was shown by the evidence.

3. ———: ———: EVIDENCE. Actual representations as to the existence of safeguards against fire which were made to the agent of the insurer may be proved by parol evidence, notwithstanding the fact that such representations, incorrectly reduced to writing by such agent, were attested as true by the signature of the insured, even though by the terms of the policy issued it is provided that such representations shall be deemed a warranty, and as such a part of the policy itself.

ERROR from the district court of Franklin county. Tried below before GASLIN, J.

See opinion for statement of the case.

Jacob Fawcett, for plaintiff in error:

Statements of the agent at the time of effecting the insurance are not admissible, after the contract has been reduced to writing and delivered by the company and accepted by the assured, to change or vary the terms of the policy. Parol evidence is never admissible to vary the terms of a written instrument. (*Wilkins v. State Ins. Co. of Des Moines*, 45 N. W. Rep. [Minn.], 1; *Western Assurance Co. v. Rector*, 3 S. W. Rep. [Ky.], 415; *McNierney v. Agricultural Ins. Co.*, 48 Hun [N.Y.], 244; *Franklin Fire Ins. Co. v. Martin*, 8 Ins. L. J. [N. J.], 134; *Smith v. Cash Mutual Fire Ins. Co.*, 24 Pa. St., 324; *Loehner v. Home Mutual Ins. Co.*, 17 Mo., 248; *Hartford Fire Ins. Co. v. Webster*, 69 Ill., 392; *Dewees v. Manhattan Ins. Co.*, 6 Vroom [N. J.], 366; *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill., 517; *Walker v. State Ins. Co.*, 26 Pac. Rep. [Kan.], 718; *Herbst v. Lowe*, 65 Wis., 316; *Ripley v. Ætna Ins. Co.*, 30 N. Y., 136; *Glendale Mfg. Co. v. Pro-*

tection Ins. Co., 21 Conn., 37; *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn., 235; *Barrett v. Union Mutual Fire Ins. Co.*, 7 Cush. [Mass.], 180; *Union Mutual Life Ins. Co. v. Mowey*, 96 U. S., 544; *Chase v. Hamilton Ins. Co.*, 20 N. Y., 54.)

The following cases are cited upon the question of warranty: *Brooks v. Standard Fire Ins. Co.*, 11 Mo. App., 349; *Loehner v. Home Mutual Ins. Co.*, 17 Mo., 248; *Mers v. Franklin Ins. Co.*, 68 Mo., 131; *Glendale Mfg. Co. v. Protection Ins. Co.*, 21 Conn., 37; *First Nat. Bank v. Ins. Co. of North America*, 50 N. Y., 45; *Witherell v. Maine Ins. Co.*, 49 Me., 200; *Johnson v. Dakota Fire & Marine Ins. Co.*, 45 N. W. Rep. [N. Dak.], 799; *Fisher v. Crescent Ins. Co.*, 33 Fed. Rep., 544; *Chrisman v. State Ins. Co.*, 18 Pac. Rep. [Ore.], 466; *Cuthberson v. North Carolina Home Ins. Co.*, 2 S. E. Rep. [N. Car.], 258; *Garver v. Hawkeye Ins. Co.*, 28 N. W. Rep. [Ia.], 555; *Blumer v. Phœnix Ins. Co.*, 45 Wis., 622; *Ætna Ins. Co. v. Resh*, 40 Mich., 241.

The false representation of a material fact avoids the insurance if the policy is issued on the faith of it, whether it was made by mistake or design. (*Westchester Fire Ins. Co. v. Weaver*, 17 Atl. Rep. [Md.], 401; *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y., 47.)

The policy was void by reason of the failure of the assured to keep a watch upon the premises at night as warranted in the application. (*Rankin v. Amazon Ins. Co.*, 26 Pac. Rep. [Cal.], 872; *Whitlaw v. Phœnix Ins. Co.*, 28 U. C. C. P., 53; *Rankin v. Amazon Ins. Co.*, 25 Pac. Rep. [Cal.], 260; *First Nat. Bank v. Ins. of North America*, 50 N. Y., 45; *Blumer v. Phœnix Ins. Co.*, 45 Wis., 629, 48 Wis., 535; *Ripley v. Ætna Ins. Co.*, 30 N. Y., 136; *Glendale Mfg. Co. v. Protection Ins. Co.*, 21 Conn., 36; *Trojan Mining Co. v. Fireman's Ins. Co.*, 7 Pac. Rep. [Cal.], 4; *Wenzel v. Commercial Ins. Co.*, 7 Pac. Rep. [Cal.], 817.)

The policy was void by reason of mortgages not dis-

closed in the application and by the subsequent tax sale not consented to by the defendant. (*McNierney v. Agricultural Ins. Co.*, 48 Hun [N. Y.], 244; *Smith v. Continental Ins. Co.*, 43 N. W. Rep. [Dak.], 910; *Westchester Fire Ins. Co. v. Weaver*, 70 Md., 540; *Smith v. Niagara Fire Ins. Co.*, 15 Atl. Rep. [Vt.], 353; *Redmon v. Phœnix Fire Ins. Co.*, 51 Wis., 292; *Russel v. Cedar Rapids Ins. Co.*, 42 N. W. Rep. [Ia.], 654; *Mulville v. Adams*, 19 Fed. Rep., 887; *Ryan v. Springfield Fire & Marine Ins. Co.*, 46 Wis., 671; *Blooming Grove Mutual Fire Ins. Co. v. McAnerney*, 102 Pa. St., 335; *Byers v. Farmers Ins. Co.*, 35 O. St., 606; *Sentell v. Oswego County Farmers Ins. Co.*, 16 Hun [N. Y.], 516; *Ætna Fire Ins. Co. v. Resh*, 40 Mich., 241; *Indiana Ins. Co. v. Brehm*, 88 Ind., 578; *Glade v. Germania Fire Ins. Co.*, 56 Ia., 400.)

F. M. Sturdevant, also for plaintiff in error.

F. I. Foss, contra:

The acts of the agent were the acts of the company. It was estopped from alleging the omission or misstatement of the facts in the application, and parol evidence is admissible to show that the agent participated in the preparation of the application. (*Rowley v. Empire Ins. Co.*, 36 N. Y., 550; *Malleable Iron Works v. Phœnix Ins. Co.*, 25 Conn., 465; *Franklin v. Atlantic Fire Ins. Co.*, 42 Mo., 456; *Plumb v. Cattaraugus County Mutual Ins. Co.*, 18 N. Y., 392; *Ayers v. Home Ins. Co.*, 21 Ia., 185; *May v. Buckeye Mutual Ins. Co.*, 25 Wis., 306; *New England Fire & M. Ins. Co. v. Schettler*, 38 Ill., 166; *Union Mutual Ins. Co. v. Wilkinson*, 13 Wall. [U. S.], 23; *American Life Ins. Co. v. Mahone*, 21 Wall. [U. S.], 152.)

Parol evidence was admissible to show that the agent was correctly informed of the incumbrance. (*Loehner v. Home Mutual Ins. Co.*, 17 Mo., 246; *Miller v. Mutual Benefit Life Ins. Co.*, 31 Ia., 216; *Rowley v. Empire Ins.*

Co., 36 N. Y., 550; *Chase v. Hamilton Ins. Co.*, 20 N. Y., 54; *Owens v. Holland Purchase Ins. Co.*, 56 N. Y., 565; *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y., 47; *Jenkins v. Quincy Mutual Fire Ins. Co.*, 7 Gray [Mass.], 370.)

The company was bound by the knowledge of the agent. (*Eilenberger v. Protective Mutual Fire Ins. Co.*, 89 Pa. St., 464; *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y., 434.)

Where an application is made a part of a policy by the terms of it, and some false assertion has been inserted in the application by the agent, when the truth has been at the same time well known to him, the insured shall not be prejudiced thereby. (*Rowley v. Empire Ins. Co.*, 36 N. Y., 550; *Ames v. New York Union Ins. Co.*, 14 N. Y., 253; *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y., 117; *Plumb v. Cattaraugus County Mutual Ins. Co.*, 18 N. Y., 392; *Bidwell v. Northwestern Ins. Co.*, 24 N. Y., 302.)

RYAN, C.

On the 26th day of August, 1890, a policy was issued by plaintiff in error, whereby was insured against loss by fire a grist mill and machinery, therein described, for the period of one year from the above date. This policy was issued to Louisa S. Schwarz, the holder of title of record, loss, if any, payable to Joseph S. Hart, a mortgagee of the insured property, as his interest might appear. The insured property was totally destroyed by fire on the 14th day of December, 1890. Plaintiff in error complains of a judgment rendered in the district court of Franklin county on a verdict against it for the sum of $1,000, the exact amount for which the property destroyed had been insured.

The first assignment of error is that the district court erred in permitting an amendment during the trial, by the addition to the reply of two pages of new matter which, it is alleged, raised a new issue. By reference to the tran-

script we find that almost five pages are covered by the reply as it therein appears. There is no indication by which we can ascertain what portion of the reply was contained in any particular two pages of that pleading as it stood in the district court, even if we should entertain the unwarranted presumption that the addition complained of was the first two pages or the last two pages as the reply originally appeared. By a reference to the bill of exceptions no aid is afforded plaintiff in error, for the proceedings of the district court on this matter are therein recorded in this language: "Counsel for plaintiff here allowed to add to his reply filed herein sundry statements by way of amendments, to which counsel for defense object for the reason that the proposed amendment does not add anything to the reply already filed and does not state facts sufficient to constitute an estoppel, or any waiver by defendant of any of the defenses to plaintiffs cause of action. Overruled. Defense excepts." If we correctly understand the objections on which the district court ruled, they were, in effect, that the proposed amendment did not constitute an estoppel, neither did it change the issues already made up. There is discovered no error in permitting the amendment of the reply under the circumstances stated in the discussion of this assignment of error.

There was sufficient evidence to sustain the verdict, and as it was for a less sum than the amount of the mortgage held by Mr. Hart, and was for the exact amount of insurance effected by the policy, the several assignments of error by which these questions are separately presented in various forms will receive no further attention.

A. J. Benjamin was the local agent of the plaintiff in error at Riverton, a village within a very short distance of the property insured. This agent knew that there were certain mortgages on the property insured in addition to the mortgage to Mr. Hart, when he issued the policy in question. By an oversight of both the applicant for insurance and

Mr. Benjamin, there was no mention made of a mortgage for $160, due Messrs. Dawes & Foss as commission for effecting the loan made by Mr. Hart. There was also another mortgage to secure payment of the sum of $300, unsatisfied of record, but there was evidence that this had been paid off. Plaintiff in error insists that the provision in the policy that any misrepresentation in the application as to the existence of incumbrances on the insured property would avoid the policy, entitled the company to be relieved from payment on account of this loss. A like contention is made as to the fact that by the written application it appears that defendant in error stated that there was three barrels of water kept at a certain place in the mill, and that a night watch was always on duty. In respect to the barrels of water it is sufficient to say that the evidence showed that while no water was kept in barrels on the premises when this representation was made, such barrels of water were soon afterwards placed there and so remained until the fire. The evidence in relation to the keeping of a night watch was given by Mr. Benjamin, the agent of the company, who said: "He [the husband of defendant in error] came to my office to sign the application, and I asked the questions just as they are on the blank, and when we came to the watchman business he said, in answer to that question, 'No, not a regular watchman. There are three of us there, and now we are working most of the time, day and night, and there will be one of us there all the time.' I said, 'That will be as good as a regular watchman.' He said, 'Yes,' and I put it in the answer, 'Yes, sir.' I think I should have put in the answer, 'Yes, sir,' most of the time.'" The argument on behalf of plaintiff in error is for the most part an effort to secure a rigid enforcement of the harsh provisions of the policy in relation to these misstatements in the application. Mr. Benjamin, as he testified, was entrusted with printed policies signed by the officers of the plaintiff in

error. With him, therefore, was lodged a certain discretion as to their issuance. Perhaps in the earlier history of insurance it may have been the requirement that a written application should be made to the company at its central place of business and that upon the information so obtained the executive officers of the company determined whether or not it was advisable to issue the policy for which application had been made. In such case the local agent had no duty to perform except such as required the exercise of no discretion or judgment on his part. In modern times, however, this primitive method of doing business has been abandoned and the local agent is entrusted with policies to be filled out and delivered as in his judgment he shall think advisable. The necessity of an application has, therefore, in a large measure, ceased, and while the company may still disapprove of the issue of a policy, this right will be found to exist by virtue of reservations in the policy itself. Until this right of disapproval is exercised the policy is by the company treated as binding, at least as against the insured. Under these conditions it is but fair that the right to revoke the policy should continue no more than a reasonable time. In the case under consideration there was no disapproval of the policy until a lapse of nearly four months after it had been issued, and then only after a total loss had been sustained. To inflexibly hold now that the representations made in the application amounted to a warranty and that, if in any respect they were untrue, the liability of the company would be avoided, irrespective of the fact that the policy was not in fact issued in reliance upon the representations made in the application, would be to sacrifice matters of substance to those of mere form. Forfeitures are not favored in law. The inflexible construction contended for would amount to nothing less than a forfeiture. It may be that by the terms of the policy it was provided that an untrue answer in the application should avoid the policy, yet we can see

no reason why this should be given such rigid application that no inquiry may be made into surrounding circumstances for the purpose of determining whether or not any damage was sustained by reason of such misstatement or whether or not the company was misled by it. It seems to us that for the reasons given the plaintiff in error had no just ground for complaint because of the giving of the following instruction:

"5. If the statements as to incumbrances of $160 and $300 mortgages on the property, of a watchman and barrels of water in said mill, in the application, are mistakes of the agent of defendant in writing down these answers and not the correct answers of plaintiff, and the authorized agent of the defendant, and with full knowledge of these facts in the case, allowed the policy in question in this case to remain in full force after taking plaintiff's money and did not cancel it, said defendant will be liable."

While the manner of expressing the above ideas might be improved upon, the ideas themselves are just. There had been no proof made as to the scope of the powers of the local agent. He had been furnished by his principal with a printed blank in which were contained one hundred and forty questions to be answered by the applicant for insurance. The answers to these questions were written by the local agent of the company. In relation to some of the answers made this agent knew of the inaccuracy. The answer to which most criticism is now directed was not recorded as given. It would be manifestly unfair to hold liable only the applicant for each of these inaccuracies. It is insisted, however, that to allow evidence as to the real facts which surround and, in our views, which should qualify the effect of the inaccurate statements in the application, would be to permit of the introduction of parol evidence to vary the terms of a written contract, and this contention is made because by the terms of the policy the representations referred to are made a part of the policy it-

self. In this contention there is some plausibility, yet we think it should no more be rigidly enforced than a stipulation in an executory contract for the recovery in case of failure to perform, of a fixed amount carefully described as liquidated damages as to which it is permitted to be shown that in fact not liquidated damages but a penalty was actually intended. The application signed is competent evidence to show what representations were made by the applicant, but there is no good reason for holding that this precludes all other evidence. The application cannot be made a contract either in form or substance even though it is therein agreed that it shall be called by that name or have that force. It is at most evidence of representations of facts preliminary to, and it may be to induce the making of, a contract of insurance. When these representations are written out by the agent of the insurance company the signing of them is competent evidence that such representations were made by the applicant. In view of the fact, however, that the company does not issue its policy on the faith of these representations it is permissible to show what representations were actually made to the agent who in fact issued the policy and received the premium. His principal is bound to abide by the exercise of such discretion as has been vested in him as its agent. If, upon the policy being forwarded with the application and even upon other evidence, or, in fact without evidence, the company is dissatisfied, it may disaffirm the act of its agent, return the premium, and cancel the policy. It cannot, however, return the premium, and cancel or repudiate the policy when by reason of a loss of the insured property it becomes to its interest so to elect to do.

Considerable attention was given in argument to the fact that while Mrs. Schwarz held the legal title of the property insured she did so in trust for her husband. There is nothing in the record to indicate that this fact, if such it was, had the least bearing either by way of inducing the

insurance or causing the loss. It is a pure technical abstraction. Again, it was stipulated that the land on which the insured mill stood had been sold for taxes when the policy was issued. No tax deed was made, or rather it would be more accurate to say, there was no proof of the existence of a deed either when the policy issued or when the trial was had, so that, so far as a divestiture of title is concerned, there were made no proofs. Of the sale as creating a mere lien there exists no necessity of an independent discussion. The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. JOHN SKIRVING, V. W. W. BETHEA.

FILED JANUARY 5, 1895. No. 6829.

1. **The right of appeal** did not exist at common law. This right is purely a statutory one, and unless expressly conferred does not exist. *Wilcox v. Saunders*, 4 Neb., 569, and *State v. Ensign*, 11 Neb., 529, followed.

2. **An appeal** does not lie from the judgment of a board of supervisors removing from office a county officer impeached before and convicted by them on charges of maladministration in office.

ORIGINAL application for *mandamus* to compel the county clerk of Holt county to accept and approve the appeal bond of John Skirving who sought to appeal from a judgment of the board of supervisors removing him from the office of clerk of the district court for official misdemeanors. *Writ denied.*

T. V. Golden, R. R. Dickson, and *N. D. Jackson,* for relator.

H. E. Murphy and *M. F. Harrington, contra.*

RAGAN, C.

John Skirving was clerk of the district court of Holt county. As a result of impeachment proceedings instituted against him he was, by the board of supervisors, found guilty of corruption, official misdemeanors, and of willful maladministration in office, and a judgment removing him from office was rendered against him by said supervisors. Skirving thereupon made out and tendered to the county clerk of said county a bond for the purpose of appealing from the judgment rendered against him in said impeachment proceedings to the district court of said county. The county clerk refused to accept and approve said bond. Skirving then instituted this action in this court against W. W. Bethea for a peremptory writ of *mandamus* to compel Bethea, who is county clerk of said Holt county, to accept and approve the bond tendered him for the aforesaid appeal.

The sole question in the case is whether a judgment of removal from office rendered by a board of supervisors against a clerk of the district court, as a result of impeachment proceedings, is appealable. The right of appeal did not exist at common law. This right is purely a statutory one, and unless expressly conferred does not exist. (*Wilcox v. Saunders*, 4 Neb., 569; *State v. Ensign*, 11 Neb., 529.) We do not think that the legislature ever intended that an appeal should be granted from such a judgment as the one in this case. In the first place, there is no appeal provided for, either expressly or by implication; and it was not the intention of the legislature that an officer convicted and removed from office for betraying the trust reposed in him by the people should stay execution of removal by appealing. This would be for the law to defeat its own ends. (*State v. Meeker*, 19 Neb., 444.) The effect of an appeal in this case

would be to stay execution of the judgment appealed from. If the legislature had intended that the party found guilty of misconduct in office, and ousted therefrom, should have the right to have the impeachment proceedings tried again by the courts, it would have provided in express terms for an appeal. It has not done so. There is no provision anywhere in the statutes for an appeal in this kind of a case. There is no provision in the statutes for a retrial of such a case before a court or before a jury. The writ must therefore be

DENIED.

MINNIE FIRESTEIN, APPELLANT, V. MOSES HORWICH ET AL., APPELLEES.

FILED JANUARY 5, 1895. No. 5206.

Conveyances: CANCELLATION: FRAUD: EVIDENCE: EQUITY: REVIEW. This case involves no disputed question of law. The evidence examined, and *held* to support the finding of the district court, that the conveyances made by the appellant to the appellees in this case were not procured from the former by fraud, duress, or undue influence, and the decree affirmed.

APPEAL from the district court of Dodge county. Heard below before POST, J.

Frick & Dolezal, for appellant.

Kennedy & Learned, contra.

RAGAN, C.

Minnie Firestein brought this suit in equity in the district court of Dodge county against Moses Horwich, K. Horwich, Nathan Ginsberg, and L. Ginsberg. Mrs. Fire-

stein alleged in her petition, in substance, that in January, 1891, she was the owner of certain real estate situate in the city of Fremont, together with a stock of merchandise, some household goods, and other personal property; that her husband, Pinkus Firestein, as her agent, was in the management of her mercantile business; that she and her husband were illiterate, unable to read or write the English language, and could but imperfectly speak or understand it; that the defendants well knew all these facts; that the defendants, or some of them, had been on terms of intimacy with Mrs. Firestein and her husband for a number of years, and that she and her husband had been accustomed to look to the defendants, or some of them, for advice and counsel in the conduct of their affairs; that without the knowledge of Mrs. Firestein, her husband, in January, 1891, purchased of a peddler some goods, which, in a day or two afterwards, it was discovered had been stolen from another store in Fremont; that she and her husband became alarmed for fear that they should be accused of the larceny of these goods, or of having purchased them, knowing them to be stolen, and communicated with the defendants, or some of them, who lived in Omaha, and the defendants came to the residence of Mrs. Firestein in Fremont, and she and her husband there counseled with the defendants for advice as to what they should do with reference to the stolen property which the husband had bought; that the defendants knew that the property purchased by the husband of Mrs. Firestein was stolen property, and had conspired together to have the husband of Mrs. Firestein purchase it, and thus lead the plaintiff and her husband into trouble; that the defendants, conspiring to cheat and defraud Mrs. Firestein of her property, advised her that she and her husband were likely to be prosecuted for the offense of buying knowingly stolen property, and sent to the penitentiary; advised herself and husband to convey and transfer to the defendants,

or some of them, all the property owned by Mrs. Firestein in trust for her use, and advised her to at once leave the country and remain away until such time as they could safely return; that by the representations of the defendants she was put in great fear and believed that she and her husband would be sent to the penitentiary if they remained in the country, and, relying upon the counsel given her by the defendants, she and her husband executed deeds of conveyance and bills of sale for all the property in controversy to the defendants, or some of them, in trust for herself, as she then believed; that the defendants then furnished her $500 in money and advised herself and husband to go to Toronto, Canada, which they did, promising to send to them there their household goods, which they did not do; that the defendants at the same time executed and delivered their notes for $1,500 to Mrs. Firestein for the purpose of enabling her to raise further sums of money that she might need; that the agreement between Mrs. Firestein and her husband and the defendants was that the conveyances and bills of sale should be made to the defendants, or some of them, in trust for the use of Mrs. Firestein, and that when she might return to the country safely, and did return, that the defendants would reconvey and restore the said property to Mrs. Firestein; that the defendants, in pursuance of their conspiracy to cheat and defraud Mrs. Firestein, caused absolute deeds of said property to be made up and duly executed by the plaintiff and her husband, and caused absolute bills of sale of the personal property to be made to the defendants and executed by Mrs. Firestein; that at the time she executed these deeds and bills of sale she supposed and believed that they contained the agreement made between her and the defendants that the latter would hold the property in trust for her use; that soon after the execution of said deeds and bills of sale the defendants took possession of all said property and converted the personal property to their

own use. The prayer was for a decree compelling the defendants to restore the personal property converted to their own use, or account for its value in money, and that the defendants be decreed to hold said property in trust for Mrs. Firestein and reconvey the same to her. The answer of the defendants, so far as material here, was a general traverse of the allegations of the petition, and an affirmative defense that the conveyances made to them by Mrs. Firestein were made in pursuance of an actual purchase of the property. The district court found the issues in favor of the defendants and dismissed the action of Mrs. Firestein, and she has appealed.

The able and industrious counsel for the appellant admits in his argument here that the evidence on behalf of his client is not sufficient to establish that these conveyances made by her were made on account of duress, and that the evidence as to direct fraud was conflicting; but he argues that the decree should be reversed because the evidence shows that the conveyances were procured from the appellant by a "species of artful and inequitable conduct, and insidious constraint, which amount to undue influence." Doubtless the district court would have been justified in finding from the evidence that these conveyances made by the appellant were procured from her by an undue influence exerted over her by the defendants; but the district court has not so found, and we are unable to say that its finding that the conveyances were not procured from the appellant by an undue influence exerted over her by the defendants is unsupported by the evidence. The evidence given on the trial in behalf of the appellant tended to support her theory of the case. The evidence offered on behalf of the defendants tended to support their theory of the case. It was largely a question of veracity between the appellant and her husband and the defendants. The district court came to the conclusion that the evidence offered and given by the appellant did not establish appel-

lant's contention that these conveyances were obtained from her by fraud, duress, or even undue influence. We do not know how much of the evidence given by the parties to this suit as to the conversation and transactions between them, out of which this controversy arose, was believed by the learned judge who tried this case. For our part we do not believe that any of the parties told the truth, the whole truth, and nothing but the truth. There is no disputed question of law in this case. The issues involved are issues of fact, and these issues once established, the law of the case is too plain for argument. The decree of the district court must be and is

AFFIRMED.

POST, J., not sitting.

HENRY WILCOX V. JULIUS H. BEITEL.

FILED JANUARY 15, 1895. No. 5225.

1. **Replevin:** EVIDENCE. Evidence in the case examined, and *held* to sustain the judgment of the trial court.

2. ———: DEMAND. Where a defendant in replevin did not come into possession of the property rightfully, or when he contests the case on the trial on an affirmative claim of right to the possession of the property, it is not necessary for the plaintiff to make proof of demand and refusal, in order to recover costs.

ERROR from the district court of Kearney county. Tried below before GASLIN, J.

C. C. Flansburg, for plaintiff in error, cited: *Goodman v. Kennedy*, 10 Neb., 270; *Bardwell v. Stubbert*, 17 Neb., 488; *Burlington & M. R. R. Co. v. Bear*, 18 Neb., 494; *Pence v. Arbuckle*, 22 Minn., 417; *Hawkins v. Methodist*

Episcopal Church, 23 Minn., 256; *Califf v. Hillhouse*, 3 Minn., 217; *Gregg v. Wells*, 10 Ad. & E. [Eng.], 90; *Peters v. Parsons*, 18 Neb., 194.

Sheppard & Black, contra, cited: Maxwell, Justice Practice [5th ed.], 704; Wells, Replevin, secs., 348, 374.

NORVAL, C. J.

This was a suit in replevin brought by Julius H. Beitel against Henry Wilcox, to recover possession of one grey mare, one grey horse, one lumber wagon, and a set of double harness. The petition contains the usual averments found in a petition in replevin, and the answer is a general denial. A jury was waived, and the cause submitted to the court, upon the pleadings and evidence, upon consideration whereof the court found the right of property and right of possession thereof, at the commencement of the action, to be in the plaintiff, and assessed his damages at one cent for the wrongful detention.

The first assignment of error is that the finding is against the weight of the evidence. There is but little dispute upon the facts. The record discloses that the mare and the horse in controversy were raised in Illinois by J. T. Beitel, the father of Julius H. Beitel, the plaintiff below, and who was the owner of them, and of the wagon as well, until the fall of the year 1886, when the team and wagon were delivered, in Illinois, to Eugene F. Beitel, a brother of the said Julius H., who brought the same to Nebraska. After their arrival in this state, Julius H. Beitel leased to his brother Eugene a farm in Franklin county, and the latter took the team to said farm, where he used the same in carrying on the business of agriculture until during the month of February, 1890, when Eugene absconded and left the state, leaving the property upon his brother's farm. On the first day of February, 1889, the said Eugene Beitel procured a loan of the Bank of Wilcox, in the sum of

$70, through its cashier, Henry Wilcox, and to secure the payment thereof executed and delivered a chattel mortgage upon said team, wagon, a set of double harness, and five cows. Subsequently, on the 6th day of April, 1889, said bank made said Eugene a loan of $84, and to secure its payment a mortgage was taken upon the same team of horses and two cows. Shortly after Eugene absconded, the defendant in error took possession of the team, wagon, and harness, and they remained in his possession until October, 1890, when they were taken from him by the plaintiff in error under said chattel mortgage. Thereupon the defendant in error brought this action. Julius H. Beitel claims to be the owner of the property replevied and by reason thereof is entitled to its possession. As to the harness, the testimony is clear that they belong to defendant in error, he having purchased them from a Mr. Blake, of Bloomington, Nebraska, in the fall of 1888, and sent the same out to the farm occupied by his brother Eugene, to be used by him.

It is insisted by counsel for plaintiff in error that the proof falls far short of showing that Julius H. Beitel owned the team and wagon, or that they were ever in his possession until shortly prior to the bringing of this suit. Either counsel is in error in his contention, or we have failed to comprehend the testimony in the bill of exceptions. J. H. Beitel, the plaintiff below, testified, in answer to questions, as follows:

Q. State if you are the owner of the gray horse, eleven years old, weighing 1,300 pounds, one gray mare, twelve years old, weighing 1,300 pounds, and the wagon and harness, the subject of this action.

A. Yes, sir.

Q. Whom did you get them of?

A. The property was sold me by my father in the fall of 1886.

Q. Where have they been kept since that time?

A. On my farm in section 32, town 4, range 16, Franklin county, Nebraska.

Q. When were they taken on the place, and how long did you keep them?

A. They were taken to that same place the same fall I got them, 1886. They remained until early in the spring, or late in the winter of 1890.

Q. Then where were they taken?

A. They were taken to my brother's, A. C. Beitel, for a short time, until it became convenient for him to convey them to me at Franklin, Nebraska. They were then in my possession until the first of October, 1890, or thereabout.

Q. You have owned those horses ever since you got them from your father in 1886?

A. Yes, sir.

Cross-examination:

Q. Where were the horses when you got them of your father?

A. In Illinois.

Q. How did you get them out here?

A. My father sent them out.

Q. How did he send them?

A. By rail.

Q. Who came with them?

A. My brother Eugene.

Q. He is the man who made the mortgage to Mr. Wilcox?

A. Yes, sir.

Q. When did he get here?

A. In the fall of 1886.

Q. He brought these horses out here?

A. He came with them.

Q. Then where did he go?

A. He went out pretty soon after that onto my farm.

Q. When did he take possession of the farm?

A. The same fall he moved onto it.

Q. Were these horses in his possession at the time he moved on there?

A. Yes, sir, I suppose so.

Q. How long before he left there?

A. He left late in the winter of 1889–90, I think it was in February, 1890.

Q. He had continued to reside on this land of yours during that time?

A. Yes, sir.

Q. His family was there?

A. Yes, sir.

Q. He used these horses farming there?

A. Yes, sir.

Q. And used the wagon?

A. Yes, sir.

Q. And the harness?

A. Yes, a part of the time.

Q. When did you first learn of this mortgage being upon the property?

A. I think about the middle of June, 1890.

It further appears from the testimony of the same witness that the team and wagon were given to him by his father as an advancement, and that in October, 1886, his father sent him in a letter the following written statement of the property so advanced to him:

HINCHLEY, Oct. 5, 1886.

J. H. BEITEL, Dr.

To T. J. BEITEL.

1886, Sept. 7,	To 1 gray mare	$100 00
	To 1 gray horse	100 00
	To 1 lumber wagon	55 00
	To 1 4 section harrow	16 00
	To ½ share corn planter	10 00
	To ½ share Deering binder	25 00
		$306 00

The testimony of the plaintiff below stands wholly uncontradicted, and the record further discloses that the mare was bred in 1888 by Eugene for the plaintiff, and the latter obligated himself for the payment of the services of the horse; that Eugene represented to Mr. Wilcox that he was the owner of the property, but to others he claimed that it belonged to his brother Julius. Upon a consideration of the whole testimony we do not perceive how the trial court could have reached a different conclusion. There is absolutely no proof to be found in the bill of exceptions that any portion of the mortgaged property belonged to Eugene, excepting that he represented to Mr. Wilcox he owned the team, and that he kept and used the same while farming his brother's land. We do not think this had the effect of transferring the title from Julius to Eugene.

The principle of estoppel cannot be invoked in this case. There is not a scintilla of testimony to show that Julius H. Beitel was aware that his brother ever claimed to own the property in controversy, or to treat it as his own, prior to the making of the mortgages, or knew of their existence until some time after they were executed; nor does it appear that the bank was induced to alter or change its position, or was in any manner prejudiced by reason of the silence of defendant in error after he learned that the property had been mortgaged by his brother. It is not shown that the bank would have been able to have collected its debt had it been immediately notified by Julius H. Beitel of the facts regarding the ownership of the property. Had the defendant in error knowingly permitted his brother to treat the property as his own, he would thereby be excluded from claiming the same; but such element is entirely wanting in this case. True, Eugene had possession of the property for a long time, but there was nothing remarkable in that, as it frequently happens that a landlord furnishes his tenant with teams for the purpose of farming. If the rule for which plaintiff in error contends should be

adopted, it would be unsafe for one to allow another to use his property, since the latter might mortgage it and thereby defeat the rights of the owner therein.

It is finally argued that the court erred in rendering judgment for costs against the plaintiff in error, since no demand was made for the property prior to the bringing of the action, and in support of the contention *Peters v. Parsons*, 18 Neb., 194, is cited in the brief of counsel. In that case it was held that the defendant will not be liable for costs in an action of replevin when he is rightfully in possession of the property, unless the plaintiff demands possession thereof prior to the bringing of the suit. That case is not analogous to the one at bar, inasmuch as the defendant below did not come rightfully into the possession of the property. He had taken it from the plaintiff against his protest, without right or authority; besides, the defendant contested the case on the trial on a claim of superior right to the property by virtue of the chattel mortgages. It was not necessary, therefore, that the plaintiff should have made a demand for the property in order to entitle him to recover costs. (*Ogden v. Warren*, 36 Neb., 715; *Rodgers v. Graham*, 36 Neb., 730.)

JUDGMENT AFFIRMED.

LOIS R. GODMAN ET AL., APPELLANTS, V. MARGARET F. CONVERSE, APPELLEE.

FILED JANUARY 15, 1895. No. 5607.

1. **Administration of Estates:** ACCEPTANCE OF BENEFITS UNDER WILL. One who accepts benefits under a will must, as a rule, conform to all of its provisions and renounce every right inconsistent therewith.

2. ——: ——: ALLOWANCE TO WIDOW. A testator by will left

to his widow certain property accompanied by the following condition: "The bequest to my wife, Mrs. M. F. C., is in lieu of all appropriations that the law would give her, except one year's support, which I desire she shall have." The widow, on proof of the will, filed in the county court an instrument in writing by which she in express terms consented to all of the provisions thereof. She was subsequently allowed support for one year. *Held*, That having elected to accept the provisions of the will she is not entitled to a further allowance for her support pending the settlement of the estate.

3. ——: ——: ——: CONSTRUCTION OF STATUTE. The provision of the first subdivision of section 176, chapter 23, Compiled Statutes, for an allowance to the widow of certain property of her deceased husband "as well when she receives the provision made for her in the will of her husband as when he dies intestate," refers to the property mentioned in that subdivision only.

4. ——: ——: ——. *Godman v. Converse*, 38 Neb., 657, overruled.

REHEARING of case reported in 38 Neb., 657.

Chas. O. Whedon, for appellants.

Marquett, Deweese & Hall, contra.

POST, J.

A former hearing of this cause resulted in a judgment affirming the order appealed from. (See *Godman v. Converse*, 38 Neb., 657.) A reconsideration was, however, deemed advisable, in view of the fact that the appellee's election to avail herself of the provision made for her by the will of her deceased husband has not received the attention which the importance of the subject suggests. As stated in the opinion heretofore filed, the deceased, by his last will, among other bequests, left to the appellee, his widow, his library, jewels, furniture, and household goods of every description, one buggy and harness, five cows, five horses, and $6,000 in money, beside the use, during her lifetime, of certain real estate in Lancaster county. The

eighth paragraph of the will contains the following provision: "The bequest to my wife, Mrs. M. F. Converse, is in lieu of all appropriations that the law would give her, except one year's support, which I desire she shall have." On the day set for the proof of the will the following record, among others, was made by the county court:

"Whereupon Margaret F. Converse, widow of said Joel N. Converse, deceased, filed the following acceptance, to-wit:

"In County Court within and for Lancaster County.

"IN THE MATTER OF THE LAST WILL AND TESTAMENT OF JOEL N. CONVERSE, DECEASED.

"Now comes Margaret F. Converse, and hereby consents to all the provisions of said will this day proved and allowed in said court, and asks that this, her consent, be entered upon the records of said court, and the said Margaret F. Converse also requests that N. B. Kendall be appointed by said court as joint executor with her.

"MARGARET F. CONVERSE."

It is further shown by the records of the county court that the appellee was allowed on her own application the sum of $600 out of the estate for one year's support. That the property left by the deceased was ample for the payment of the several bequests is a proposition not controverted on this appeal. The question is, therefore, fairly presented, whether the appellee, by her unequivocal acceptance of the provisions in her favor will be held to have confirmed and ratified the conditions imposed upon her by the testator. The general rule is thus stated in 1 Jarman, Wills, *415: "He who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all of its provisions and renouncing every right inconsistent with it." The right of election by the widow in like cases, as said in *Lessley v. Lessley*, 44 Ill., 527, rests upon the ground that "The wife has an interest in the es-

state of the husband, of which he cannot deprive her by will, or otherwise, without her consent, and when he attempts to do so she has the right to elect whether she will take the provision made for her by the will or renounce it and hold such rights in his estate as the law gives her. She cannot claim a portion of the provisions of the will and reject others, and claim under the statute. She must claim alone, under the will or altogether independent of its provisions." And to the same effect see 2 Redfield, Wills, 352; 2 Herman, Estoppel, ch. 17; Bispham, Equity Jurisprudence, 295; *Stevenson v. Brown*, 4 N. J. Eq., 503; *Hyde v. Baldwin*, 17 Pick. [Mass.], 303; *Smith v. Smith*, 14 Gray [Mass.], 532.

The appellee evidently regarded the provisions of the will as more beneficial to her than the rights conferred by law, and that fact we must assume was the inducement which led her to elect in favor of the will rather than to take under the statute. The only right conferred upon her by the will, in addition to the specific bequests, is the right to support for one year. If she may now reject the provision with respect to her support pending the settlement of the estate, she may, it seems, by an application of the same principle ignore other conditions of the will and successfully prosecute a claim of dower notwithstanding the liberal bequests in lieu thereof. Our conclusion from this examination is that the case of *Baker v. Baker*, 57 Wis., 382, cited in the former opinion, is not applicable to the facts of the case before us, first, because there was therein no provision similar to the one under consideration whereby the bequests are declared to be in lieu of the appellee's rights under the statute, and, second, there was not in that case, as in this, a formal consent to all of the conditions of the will. It would seem that statutory provisions for the support of the testator's widow and children could not be waived by the act of a single member of the family so as to prevent the others from asserting their rights. The

principle which underlies the law of election in all such cases is that of estoppel, which applies only to parties to the transaction and those in privity with them. But a discussion of that question is unnecessary at this time, since the appellee, judging from the will, is the only surviving member of the testator's family, and it is not claimed that she was under any disability at the time of her election to avail herself of the provisions of the will.

We are referred in this connection to the first subdivision of section 176, chapter 23, Compiled Statutes, which reads as follows: "The widow, if any, shall be allowed all the articles of apparel and ornament, and all the wearing apparel and ornaments of the deceased, the household furniture of the deceased, not exceeding in value $250, and other personal property to be selected by her, not exceeding in value $200; and this allowance shall be made as well when the widow receives the provision made for her in the will of her husband as when he dies intestate." The proviso contained in the last sentence quoted, it is claimed, applies as well to the provision for the support of the widow as to the property contemplated by the subdivision above set out; but a proviso, unless a different intention is apparent from the act itself, will be construed as referring to what immediately precedes it only. (See *School District v. Coleman*, 39 Neb., 391.) It is apparent, therefore, that the language quoted cannot, by any reasonable or natural construction, be held applicable to the provision for the support of the widow, which is found in the second subdivision of the section mentioned. It follows that the application for the additional allowance to the appellee, pending the settlement of the estate, should have been denied, and that the order of the district court confirming the allowance by the county court should be

REVERSED.