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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1896.

VOLUME XLIX.

D. A. CAMPBELL,
OFFICIAL REPORTER.

LINCOLN, NEB.:
STATE JOURNAL COMPANY, LAW PUBLISHERS.
1897.

Entered according to act of Congress in the office of the Librarian of Congress,
A. D. 1897,
By D. A. CAMPBELL, Reporter of the Supreme Court,
In behalf of the people of Nebraska.

THE SUPREME COURT

OF

NEBRASKA.

1896.

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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. *Provided*, That upon the expiration of the terms of said commissioners as hereinbefore provided, the said supreme court shall appoint three persons having the same qualifications as required of those first appointed as commissioners of the supreme court for a further period of three years from and after the expiration of the term first herein provided, whose duties and salaries shall be the same as those of the commissioners originally appointed. (Amended, Laws, 1895, chapter 30, page 155.)

AMENDED RULES OF COURT.

3. [ORDER OF HEARING.]—The court, in advance, shall, by order, designate what cases shall be submitted and when, having reference to the order of time in which such cases were originally docketed. Advanced cases and cases in which rehearings shall have been granted will be placed on the call for the sitting of court next following the expiration of the time for serving briefs as provided by the rules.

9. [BRIEFS.]—Within twenty days after the docketing of a cause in this court, and within the same time after a rehearing shall have been allowed, the party holding the affirmative shall furnish a printed brief of his points and citations in support thereof, to the opposite party or his attorney of record, by whom in turn a like brief in reply shall be served within twenty days after service of the first required brief, or, if none such shall have been served, then within twenty days after the expiration of the time allowed for that purpose. Before the submission of any cause, each party shall file with the clerk of this court ten printed copies of the brief which he has furnished the opposite party or his attorney of record, with proof of service thereof. Each brief shall by number designate the several pages of the record containing matter bearing upon the questions discussed in such brief. Every reference to an adjudicated case shall be by the title thereof, as well as by the volume and page where it may be found, and the particular edition of any textbook referred to must be given in connection with the cited page or section thereof.

13. [CAPITAL CASES—SUSPENSION OF SENTENCE.]—In all criminal cases brought on error to this court, where it appears that the court below has passed sentence of death upon the plaintiff in error, it is ordered that the sentence and judgment be suspended until the further order of this court, and it shall be the duty of the clerk to indorse such suspension upon the transcript filed in said cause and immediately transmit a certified copy thereof to the officer charged with the execution of said sentence.

See page xlix for table of Nebraska cases overruled.

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

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1896.

PRESENT:

HON. A. M. POST, CHIEF JUSTICE.

HON. T. O. C. HARRISON, HON. T. L. NORVAL, } JUDGES.

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

CITY OF OMAHA V. SAMUEL HAWVER.

FILED JUNE 16, 1896. No. 6747.

1. **Municipal Corporations:** DEDICATION FOR STREET: EVIDENCE. Where the acts of an owner of real estate are relied upon to prove that he has dedicated it to the public the acts must be such as to clearly manifest an intention on his part to dedicate it, and the public must have so acted with reference to the property as to indicate an intention of acceptance of the property dedicated.

2. **Dedication:** EVIDENCE. Acts of an owner which amount to a dedication of his property to the public must be such as indicate an abandonment of the use of the property exclusively to the public.

3. ———: ———. The plaintiff owned an unplatted tract of land in the limits of a city so situate that Sixth street of said city, if extended, would pass through it. Before said street was extended through his land he sold a part of the tract, conveying it by metes and bounds, one of the calls in the conveyance being so many feet

to the west line of Sixth street. *Held*, That this act of the owner was not alone sufficient to sustain a finding that he had dedicated any part of his land to the public to be used as a part of said street.

4. ———: ———. Certain acts of an owner of real estate, from which it was claimed he had dedicated to the public a part thereof, set out in the opinion, and *held* not sufficient to sustain a finding of such dedication.

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

E. J. Cornish and *James H. Macomber*, for plaintiff in error.

References: *Harding v. Jasper*, 14 Cal., 643; *State v. Trask*, 27 Am. Dec. [Vt.], 559; *Carter v. City of Portland*, 4 Ore., 339; *Bartlett v. City of Bangor*, 67 Me., 460; *Town of San Leandro v. Le Breton*, 72 Cal., 170; *Meier v. Portland Cable R. Co.*, 16 Ore., 500.

Leavitt Burnham and *Alfred Pizey*, *contra*.

References: *McDaniel v. Mace*, 47 Ia., 510; *Bushman v. Gibson*, 15 Neb., 676; *Sanford v. Covington*, 12 Ky. Law Rep., 450; *Graham v. Hartnett*, 10 Neb., 521; *Irwin v. v. Dixion*, 9 How. [U. S.], 10; *In re Beach Avenue*, 70 Hun [N. Y.], 353; *Princeton v. Templeton*, 71 Ill., 69; *Hiatt v. Brooks*, 17 Neb., 33; *Burlington & M. R. R. Co. v. Wendt*, 12 Neb., 76.

RAGAN, C.

Samuel Hawver brought this suit in the district court of Douglas county against the city of Omaha to recover the value of certain of his real estate which he alleged the city, without any authority of law, had on the 19th of November, 1888, appropriated to its use for the purposes of a street. So much of the answer of the city as is material here was as follows: "The said city denies that on the 19th day of November, 1888, it entered upon, seized, or took possession of and appropriated to its use the said

strip of ground in controversy, but in that behalf alleges the fact to be that said strip of ground, long prior to said date, had been duly dedicated by the plaintiff to the public as a public highway and for the use of the public as a public street." Hawver had a verdict and judgment and the city has brought the case here for review.

1. Hawver owned what is known as "Tax Lot 11" in section 26, township 15 north, and range 13 east. On one side of this land was what is known as "Credit Foncier Addition," to the south line of which extended Sixth street. On the other side of Hawver's land, crossing an imaginary extension of said Sixth street at right angles, was Bancroft street. An extension of Sixth street in a straight line from the south side of "Credit Foncier Addition" to Bancroft street would pass through Hawver's land. It is not disputed that in November, 1888, the city of Omaha extended Sixth street from the south line of "Credit Foncier Addition" to Bancroft street, and in so doing appropriated a strip of land 60 feet in width and 1,287 feet in length through said tax lot 11, but the contention of the city is that the strip of ground so appropriated by it for the extension of Sixth street had been prior to that time dedicated to the public for the purposes of a street by Hawver, and this was the only point litigated in the court below. At the close of the evidence the city requested the court to charge the jury as follows: "You are instructed that if you find from the evidence that prior to the commencement of this action the plaintiff dedicated the strip of ground in controversy as a part of Sixth street, it would be your duty to return a verdict in this action in favor of the defendant." The court refused to give this instruction and limited the jury to a consideration of the value of the real estate of Hawver appropriated by the city for the purposes of Sixth street. If the evidence introduced before the jury would have supported a special finding that Hawver had dedicated the real estate to the public for the purposes of a street, then the court erred in refusing to give the instruction re-

quested. The evidence introduced on the trial directed to the question as to whether Hawver had made a dedication of the real estate was as follows: In July, 1885, Hawver sold and conveyed to one Kasper an acre, more or less, of said tax lot 11. The real estate conveyed was described by metes and bounds, one of the calls in the conveyance being the west line of Sixth street.

Q. You may state whether or not any plat was presented to you at the time of making this land contract.

A. Yes, sir.

Q. Describe that plat as near as you can.

A. It was not an engineer's plat. It was a sketch that he had drawn off. He said he had drawn it to a scale and showed me how Sixth street would come through Ann Arbor street and Castellar street, and also the street on the east side of the half street.

Q. This plat of which they speak was a mere paper?

A. Yes, sir.

Q. You do not know whether it was ever filed or acted upon, or what was done with it?

A. No, sir. It was drawn up for the purpose of showing what might be done with the land. It was on stiff engineer's paper.

Q. State whether or not Sixth street in front of your property since that time has been used as a street since it was graded.

A. Since last year, I believe.

Q. What was it before that time?

A. I understand it was a street before it could be used for travel.

Q. Why?

A. There was a ravine in front of my property.

Q. Do you remember the time that Sixth street, near Bancroft, was graded—when the dirt was taken out?

A. Yes, sir.

Q. When was that?

A. At the time they were grading Bancroft street.

Q. Who was grading Bancroft street?

A. The city.

Q. The contractor took the dirt off from Sixth and put it into Bancroft street?

A. Yes, sir.

Q. How far did that extend north from Sixth street at that time?

A. I would think about three hundred feet.

Q. To the point where the gully commences?

A. No, they did not go that far.

Q. What year was Bancroft street graded?

A. I think in 1888.

Q. Is it not a fact that Sixth street, when Bancroft street had been improved somewhat, was graded prior to 1890, and in the year 1888?

A. There has been dirt taken out of there; yes, sir.

Q. In what year was that?

A. At the time they graded Bancroft street. I could not say the year.

Q. It was in the year 1888?

A. I could not say the year.

Q. Can you approximately state?

A. It has been two or three years before this last grading was done.

Q. That was on the line of Sixth street, near Bancroft?

A. Yes, sir.

Q. And extended up to the point where the land fell off into this deep gully?

A. It extended something like three hundred or three hundred and fifty feet north of Bancroft street.

Q. Who took this dirt out of Sixth street near Bancroft?

A. The contractor that had the contract for Bancroft street.

Q. He went on there and took dirt out and carried it onto Bancroft street?

A. Yes, sir.

Q. Was that the contractor for the city for grading Bancroft street?

A. Yes, sir.

Q. His grades are made under the direction of the city engineer?

A. Yes, sir.

Q. Do you know that fact?

A. That is always the fact.

Q. Do you know that they are made under the direction of the city engineer?

A. I do not know; they generally give instructions; I only say the fact as I understand it. I do not know whether the engineer gave the instructions or not.

Q. So far as you know, he might have gone on and taken it by his own authority?

A. Yes, sir.

Q. Do you remember the time that Sixth street, near Bancroft, was graded—when the dirt was taken out?

A. Yes, sir.

Q. When was that?

A. The time that they graded Bancroft street.

Q. Who was grading Bancroft street?

A. The city.

Q. The contractor took the dirt off from Sixth and put it in Bancroft?

A. Yes, sir.

Q. What year was Bancroft street graded?

A. I think 1888.

Q. This is the time that this dirt was taken out of there?

A. Yes, sir.

So far as the above bears upon the city's exercising acts of control over the land in question prior to November, 1888, we think the only legitimate inference from this evidence is that the city contractors, while grading Bancroft street, without authority from anybody went upon the land of Hawver and took away dirt and used it in grading Bancroft street. There is no evidence that this was done under or by the direction of the city authorities, or any of them, nor with their knowledge, nor

does it appear that Hawver ever knew or consented to this act of the contractors. Indeed, it would seem that Hawver at this time was a non-resident of the state. But it is insisted that the act of Hawver in selling and conveying a part of his land, and describing the land sold by metes and bounds, one of which boundaries was Sixth street, is evidence sufficient to sustain a finding that he had dedicated the land now sued for to the public for the purposes of a street. All that we know of the so-called "plat" made by Hawver we gather from the testimony quoted above. No plat of any kind was offered in evidence on the trial, and it is clear that the plat made by Hawver was not such an one as is contemplated by sections 104, 105, and 106, chapter 14, article 1, Compiled Statutes. Hawver had not laid out his land into a city or village, or any addition to one. He had not caused it to be surveyed and platted into lots, blocks, streets, and alleys. In so far as the evidence shows, he had done nothing looking to his land becoming an addition to the city of Omaha, nor towards platting it into lots and blocks. The fair inference from the evidence is that he supposed that Sixth street would some time be extended through his land, and that he made a tracing of his property on a piece of paper simply for his own use and convenience; and in the deed to Kasper he described the land sold to him as bounded on one side by Sixth street, though at that time the street had not been extended and nothing had been done looking to its extension. Where the acts of an owner of real estate are relied upon to prove that he has dedicated it to the public, the acts must be such as to clearly manifest an intention on his part to dedicate it; and the public must have so acted with reference to the property as to indicate an intention on its part of acceptance of the property dedicated. (*Graham v. Hartnett*, 10 Neb., 517; *Gwynn v. Homan*, 15 Ind., 201.) Acts of an owner which it is claimed amount to a dedication of his property to the public must be such as indicate an abandonment of the use of the property exclusively to

the public. (*Irwin v. Dixion*, 50 U. S., 9.) In *Bushman v. Gibson*, 15 Neb., 676, this court held: "Where certain lands in an addition to a city, but not platted, were conveyed by metes and bounds, one of the calls in the deed being a certain number of feet to an alley, thence along said alley, etc., there being in fact no alley at the place indicated, as was well known to the purchaser, but a strip twenty feet in width was reserved for that purpose when the city in fact was extended to that point, held, that the alley was not a public one and the purchaser could not enjoin the owner of the fee from erecting bars across the same." Tested by these authorities, the conduct of Hawver in making the plat of this land and conveying a part of it by metes and bounds, one of which boundaries was Sixth street, is not alone sufficient evidence to sustain a finding that he had dedicated the land in controversy to the public for the purposes of a street. The court therefore did not err in refusing to give the instruction asked by the city and its judgment is

AFFIRMED.

HENRY C. SPENCER ET AL. V. WILLIAM A. WOLFE.

FILED JUNE 16, 1896. No. 6635.

1. **Administration of Estates:** ADMINISTRATORS: PLACE OF APPOINTMENT: RESIDENCE: JURISDICTION. Section 177, chapter 23, Compiled Statutes, construed, and *held:* (1.) When a person dies intestate, being an inhabitant of this state, letters of administration must be granted in the county of which he was an inhabitant at the time of his death. (2.) If an intestate at the time of his death resided outside this state, and left here an estate to be administered, then an administrator may be appointed in any county in which any of such estate is situate; and the administrator first appointed will be entitled to the entire estate of the intestate in this commonwealth, to the exclusion of administrators appointed afterwards in other counties of the state. (3.) The judgment of a county court appointing an administrator is not void because

the petition therefor does not allege that the intestate was at the time of his death a resident of the state of Nebraska.

2. **Administrators:** PETITION FOR APPOINTMENT. A petition for the appointment of an administrator must allege the necessary facts which confer jurisdiction on the county court, and if it fails to do so the judgment of the court appointing the administrator will be void. *Moore v. Moore*, 33 Neb., 509, followed.

3. ———: ———: DESCRIPTION OF PROPERTY. It is not necessary in a petition for letters of administration to set out the description of either the real or personal property belonging to the intestate's estate. *In re Miller*, 32 Neb., 480, followed.

4. ———: ———. A petition by a creditor of an intestate to be appointed his administrator alleged that the intestate died seized of real and personal estate situate in the county; that the real estate was worth about $5,600; that the personal estate was estimated to be worth several hundred dollars. *Held*, That the allegations were sufficient.

5. **Appearance:** WAIVER OF NOTICE: JUDGMENT. Persons not under guardianship and not minors, nor under other legal disability, cannot be heard to complain of a judgment rendered in a proceeding to which they were parties, because the notice required by law of such proceeding was not given them, when the record discloses that they voluntarily appeared and participated in such proceeding.

6. **Appointment of Administrators.** Section 178, chapter 23, Compiled Statutes, construed and *held:* (1.) That a county court is not by this statute absolutely required to appoint the widow or next of kin of an intestate, or some person selected by them, administrator of the intestate's estate. (2.) If it appears that the person proposed for administrator is unsuitable or incompetent, the county court is not obliged to appoint such person, notwithstanding that application may be made therefor by the widow or next of kin within thirty days after the intestate's death.

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

J. E. Cobbey, for plaintiffs in error.

References: *Atkinson v. Hasty*, 21 Neb., 666; *Estate of Moore v. Moore*, 33 Neb., 515; *Moise v. Mutual Reserve Fund Life Association*, 13 So. Rep. [La.], 170; *King v. United States*, 27 Ct. Cl., 529; *Rutherford v. United States*, 27 Ct. Cl., 539; *Sayre v. Sayre*, 22 Atl. Rep. [N. J.], 198; *Henry v. Roe*, 18 S. W. Rep. [Tex.], 806; *In re Miller's Appeal*, 32

Neb., 480; *In re Washburn's Estate*, 47 N. W. Rep. [Minn.], 790; *Martin v. Gage*, 147 Mass., 204; *Smith v. Sherman*, 4 Cush. [Mass.], 408; *Borer v. Chapman*, 7 Sup. Ct. Rep., 342; *Moore v. Jordan*, 13 Pac. Rep. [Kan.], 337; *Succession of White*, 12 So. Rep. [La.], 758; *Estate of Stevenson*, 72 Cal., 164; *In re Estate of Dorris*, 93 Cal., 611; *Cramer v. Sharp*, 49 N. J. Eq., 558.

Murphy & Le Hane, contra.

Reference: *Child v. Gratiot*, 41 Ill., 359.

RAGAN, C.

From the record and the briefs of the respective counsel the undisputed facts in this case seem to be as follows: Charles H. Spencer, a resident and citizen of the state of Iowa, died intestate in the state of Colorado on the 16th of August, 1892. He left a widow, Mary A. Spencer, and a son, H. C. Spencer, residents of the state of Iowa. He left another son, L. E. Spencer, a resident of Gage county, Nebraska, and he also left a daughter, Mary E. Dudley, a resident of the state of Colorado. None of his heirs were minors. At the time he died Charles H. Spencer was indebted to the German National Bank of Beatrice, Nebraska. William A. Wolfe was cashier of this bank and, in March, 1893, he petitioned the county court of Gage county to appoint him administrator of the estate of the intestate. This appointment was resisted by the widow and heirs of Spencer, deceased, and while the application was pending L. E. Spencer also petitioned the county court to appoint him administrator of his deceased father. The county court, however, refused to appoint L. E. Spencer and appointed Wolfe, who accepted the trust and qualified therefor. From this action of the county court the widow and heirs of Spencer, deceased, appealed to the district court, and the case was submitted to that tribunal upon the transcript of the proceedings had in the county court and a judgment rendered

affirming the judgment of the county court. To reverse this judgment of the district court the widow and heirs of Charles H. Spencer, deceased, have prosecuted here a petition in error.

1. The first argument relied on here for a reversal of the judgment of the district court is that the county court had no jurisdiction to appoint Wolfe administrator of Spencer's estate. It is not disputed but that the county court is by the constitution and laws of the state invested with exclusive original jurisdiction in the matter of settling up the estates of deceased persons and the appointment of administrators, but it is said that the petition filed by Wolfe to be appointed administrator conferred no jurisdiction upon the county court to act, because the petition did not allege that Spencer at the time of his death was a resident of the state of Nebraska. There is no merit in this contention. Section 177, chapter 23, of the Compiled Statutes of 1895 provides: "When any person shall die intestate, being an inhabitant of this state, letters of administration of his estate shall be granted by the probate court of the county of which he was an inhabitant or resident at the time of his death. If such deceased person, at the time of death, resided in any other territory, state, or country, leaving estate to be administered in this state, administration thereof shall be granted by the probate court of any county in which there shall be estate to be administered; and the administration first legally granted shall extend to all the estate of the deceased in this state, and shall exclude the jurisdiction of the probate court of every other county." This section provides for the appointment of administrators in two classes of cases: (1) When a person shall die intestate, being an inhabitant of this state, then letters of administration must be granted by the county court of the county of which he was an inhabitant or resident at the time of his death; and (2) if an intestate, at the time of his death, resided outside of this state and left an estate here to be administered, then the county

court, of any county in which the deceased left an estate to be administered, may appoint an administrator; and the first administrator, so appointed, becomes entitled to the entire estate of the deceased, in the state, to the exclusion of any other administrator appointed in any other county of the state. *Atkinson v. Hasty*, 21 Neb., 663, is not authority for the contention of the plaintiff in error, notwithstanding in that case it was said: "The jurisdiction of the county court, by section 177, * * * is made to depend upon the facts that the deceased had died intestate and was at the time of his death an inhabitant or resident of the county in which the court is authorized to act." But it is evident that the writer of that opinion was speaking of the first division of said section 177. In *Moore v. Moore*, 33 Neb., 509, said section 177 was construed, and it was held: "Where the deceased was a non-resident of the state, leaving property in this state to be administered, an administrator may be appointed in a proper case by the county court of any county in which there is an estate to be administered." A second argument in support of the contention that the county court had no jurisdiction is "that the petition filed by Wolfe does not allege that the deceased left any personal estate in Gage county, or that the real estate of the deceased in the county is productive of rents, or that it was necessary to sell such real estate to pay the debts of the deceased." The petition of Wolfe alleged "that the said Charles H. Spencer died seized of real and personal estate situate in Gage county, consisting chiefly of real estate * * * worth about $5,600. All of such personal estate being estimated to be worth several hundred dollars." A petition for the appointment of an administrator must allege the necessary facts which confer jurisdiction—on the county court—and if it fails to do so, the appointment and all subsequent proceedings are without jurisdiction and void. (*Moore v. Moore*, 33 Neb., 509.) But it is not necessary in a petition for letters of administration to set out a description of either the real or personal

property belonging to the estate of the deceased. (*In re Miller*, 32 Neb., 480.) The allegations of Wolfe's petition, in reference to the property situate in Gage county of which the intestate died seized, were sufficient.

2. Section 195, chapter 23, of the Compiled Statutes, 1895, provides: "When application shall be made to the judge of probate for the appointment of an administrator of an intestate's estate * * * he shall cause notice of the same, and of the time and place of the hearing thereof, to be given by personal service on all persons interested, or by publication under an order of such court in such newspaper printed in this state as he may direct." The county court of Gage county ordered a notice, addressed to the heirs and next of kin of Charles H. Spencer, deceased, to be published for three weeks in a newspaper printed and published in Gage county, which recited that Wolfe had filed his petition in the county court asking to have himself appointed administrator of the estate of Charles H. Spencer, deceased, and that the hearing of the matter was set for March 4, 1893. It is now insisted that the judgment under consideration must be reversed, because the county court made its order appointing Wolfe administrator, without the notice to the heirs and next of kin of Spencer, deceased, having been published as required by the court's order. The answer to this objection is that all the heirs, being of full age, next of kin, and widow of Spencer, deceased, entered their appearance in the county court in the proceeding in which the county court made the order complained of. These heirs and next of kin having voluntarily appeared in the county court in the proceeding in which Wolfe was appointed administrator, and having resisted that appointment, it is wholly immaterial whether the notice ordered by the county court was published a proper length of time or published at all or not. Persons not under guardianship and not minors, nor under other legal disability, cannot be heard to complain of a judgment rendered in a proceeding to which they were parties, be-

cause the notice required by law of such proceeding was not given them, when the record discloses that they voluntarily appeared and participated in said proceeding.

3. As already stated, while the application of Wolfe was pending to be appointed administrator of Charles H. Spencer, deceased, L. E. Spencer, his son, a resident of Gage county, made application to the county court to be appointed administrator of his deceased father. His mother and his brother and sister all united in his petition. The next argument here is that the county court erred in not appointing L. E. Spencer the administrator instead of Wolfe. Section 178, chapter 23, Compiled Statutes of 1895, provides: "Administration of the estate of a person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled to the same in the following order: First—The widow, or next of kin, or both, as the judge of probate may think proper, or such person as the widow or next of kin may request to have appointed, if suitable and competent to discharge the trust. Second—If the widow, or next of kin, or the person selected by them, shall be unsuitable or incompetent, or if the widow or next of kin shall neglect for thirty days after the death of the intestate to apply for administration or to request that administration be granted to some other person, the same may be granted to one or more of the principal creditors, if any such are competent and willing to take it. Third—If there be no such creditor competent and willing to take administration, the same may be committed to such other person or persons as the judge of probate may think proper." It is now argued that by the provisions of this statute L. E. Spencer, being an heir of Charles H. Spencer, deceased, his mother and brother and sister uniting in the request, was entitled as a matter of right and law to be appointed administrator of his father's estate; but we do not think that a county court is by this statute absolutely required to appoint a widow or next of kin of a deceased, or some person selected by

them, administrator of the deceased's estate. We think the county court is invested with some discretion in this matter. At any time within thirty days after the death of the intestate there can be no doubt but that the widow or next of kin are entitled, all other things being equal, to be appointed administrator of the intestate's estate or to select such administrator. By the expression, "all other things being equal," we mean that in order to entitle a widow or next of kin of an intestate to be entitled to administration of his estate, or to be entitled to name a person to be appointed administrator of his estate, it must appear that the party proposed for administrator is a suitable and competent person therefor. If it shall appear that such person is unsuitable or incompetent then we do not think that the county court is obliged to appoint such person administrator of the intestate's estate, notwithstanding that they may make application therefor within thirty days after the intestate's death. But whatever be the rights of the widow and next of kin as to the administration of the estate of the intestate it is clear under this statute that such exclusive right does not continue longer than thirty days from the death of the intestate. (*In re Miller*, 32 Neb., 480.) In the case at bar Charles H. Spencer died in August, 1892. Up to the 1st of March, 1893, neither his widow nor any of his heirs or next of kin had made any application whatever for the appointment of an administrator of the estate left by him in said county. The county court then was not obliged to appoint the son of the deceased his administrator instead of the intestate's creditor. But it is insisted that the rule is that where an heir applies for letters of administration before they have actually issued to a creditor, the heir is entitled to the appointment. To support this contention we are cited by counsel to *Succession of White*, 45 La. Ann., 632. In that case White died intestate in Louisiana on the 23d of November, 1892. He left no heir "then present" in the state. Three days after his death the public administrator "opened his succession"

and applied for the administration, alleging that the "succession is vacant and that there is property here requiring administration." Pending the application of the public administrator a sister of the intestate living in Liverpool, England, requested the probate court to appoint her agent, a resident of Louisiana, administrator of the estate of the deceased. The Louisiana Code on the subject provided: "In all intestate successions, where there is no surviving husband or wife or heir present or represented in the state, the public administrator of the parish shall be appointed by the judge of the proper court to administer the same." The probate court appointed the public administrator and denied the application of the next of kin of the intestate to have her agent appointed administrator. But the supreme court of Louisiana reversed the holding of the probate court and held that the sister of the deceased was entitled to have her agent appointed as his administrator. It based its decision upon the construction of the statute just quoted. It said: "This language [the statute] obviously refers to the date of appointment as the time at which it is to be determined whether the conditions on which his right depends exist, and if, at that time, it is made to appear that there is a 'husband or wife or heir present or represented in the state,' the application of the public administrator must yield to the preference accorded by the law to such surviving spouse or heir." (Act 87 of 1870, Louisiana Code.) But it is evident that this decision is of no controlling force in the case at bar. It is based on the construction—doubtless correct—of the statute of Louisiana just quoted, but which is very different in its requirements from ours on the subject of the appointment of administrators. The judgment of the district court is

AFFIRMED.

OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY v. ROSA LEVINSTON, ADMINISTRATRIX.

FILED JUNE 16, 1896. No. 6665.

1. **Death by Wrongful Act:** ACTION FOR DAMAGES: VERDICT FOR PLAINTIFF. Evidence examined, and *held* sufficient to sustain the verdict.

2. **Instructions.** If an instruction construed as a whole states the law correctly as applied to the evidence in the case, it is not erroneous, although a portion thereof taken separately may not have been accurate.

3. **Negligence:** INSTRUCTIONS: STREET RAILWAYS. While it is not generally proper to group together certain facts and state to the jury that if they are found to exist they constitute negligence, still it is not reversible error to do so provided the facts so stated are such as to induce an inference of negligence in all reasonable minds.

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

Connell & Ives, for plaintiff in error.

Cowin & McHugh, *contra*.

IRVINE, C.

This was an action by Rosa Levinston, as administratrix of her husband, Karl Levinston, deceased, to recover for injuries causing the death of the decedent. The plaintiff in error operates a line of street railway between and through the cities of Omaha, Nebraska, and Council Bluffs, Iowa. It is conceded that Karl Levinston was on the night of May 1, 1890, a passenger on one of the trains of the railway company, boarding the train in Council Bluffs and being transported to Omaha. The train consisted of a closed motor car and an open trailer. After the train crossed Tenth street, in Omaha, Levinston fell therefrom and was run over by the trailer. Injuries were inflicted from which he died some days later. The

plaintiff in the district court pleaded that the injuries resulted from the negligence of the railway company in not stopping long enough at the Tenth street crossing to permit all the passengers desiring to alight to do so; and in starting its train while Levinston was in the act of alighting, with one foot on the step of the car and the other about to be placed on the pavement. The railway company denied these averments and pleaded contributory negligence. There was a verdict for the plaintiff. Only two assignments of error are presented for review. These are, first, that the verdict was not sustained by the evidence, in that there was certain uncontradicted evidence which required a verdict for the defendant, and second, that the court erred in one instruction.

Witnesses on behalf of the plaintiff testified to the effect that when the train reached Tenth street it stopped in such a position that the trailer was at or near the west line of Tenth street; that several passengers alighted and that Levinston, who had been seated in the front car, had reached the steps of the rear platform of the front car and was about to alight, when the conductor, who stood on the front platform of the trailer, gave to the motorman the signal to start, which was obeyed, and the train started when Levinston was in the act of stepping to the street; that he was thereby thrown under the wheels of the trailer. Witnesses on behalf of the defendant testify that Levinston made no movement to alight while the train was stopped at Tenth street, but after it had started, and while it was proceeding westward from Tenth street, he arose from his seat and leaped from the train while in motion. Whether the act of a passenger in endeavoring to alight from a street car while in motion, under the circumstances narrated by defendant's witnesses, would constitute so clear a case as to justify a peremptory instruction to find for the defendant we need not inquire, because as we view the evidence we think there was a conflict upon this point, and we shall review the case on the theory of the defendant, that if the facts were established

in accordance with the testimony of plaintiff's witnesses there could be no recovery. In pursuance of this theory the defendant contends that the uncontradicted testimony disclosed that when the train stopped at Tenth street the rear end of the trailer stood not farther west than the west crossing of the street; that Levinston was not dragged by the train more than six feet, and that when he was picked up he was from forty to sixty feet west of the crossing. It is argued from these facts that the testimony of the plaintiff's witnesses as to Levinston's endeavoring to alight while the train was stopped at the crossing could not possibly be true, and that he therefore must have jumped from the moving train after it had started. We cannot, however, accept the three postulates of the defendant as established without contradiction. It is true there is no evidence to show that the stop was made at any point farther west than would place the rear end of the trailer at the west crossing of Tenth street; and it is furthermore true that no witness testified that Levinston was dragged more than six feet. It is also true that most of the witnesses placed the point at which he was picked up more than forty feet west of the crossing. But there was evidence tending to show that the trailer was twenty feet long. Levinston fell from the rear platform of the motor car, which must have been a few feet west of the front platform of the trailer. He was then dragged about six feet, according to some of the witnesses. This would place him at a point about thirty feet west of the crossing, and one witness, at least, testifies that he was found only thirty to forty feet west of the crossing. It must be remembered that this occurred in the night-time, that men's opinions as to distance are not always accurate, and that a distance which some men might estimate as fifty feet others might not estimate as more than thirty. All the distances given were mere approximations and matters of opinion, and not of measurement and calculation. This remark is especially applicable to the evidence as to the distance which Levin-

ston was dragged by the car. Some witnesses say he was not dragged at all. One witness, at least, says that he may have been dragged six feet. There was necessarily no means of accurately determining this fact, and the circumstances were such that no witness could probably form a very accurate opinion on the subject. We think this opinion evidence entirely too open to doubt to permit us to give it such a controlling force as to constitute it an absolute demonstration of the falsity of other testimony which the jury must have believed in reaching its verdict. We can see in the case nothing except a question of conflicting evidence, the solution of which by the jury is final.

The instruction complained of is as follows: "It is conceded that the deceased, Levinston, was on the passenger train of the defendant company, a passenger to be carried from Council Bluffs to the city of Omaha. It was the duty of the employes of the defendant company, when it stopped at Tenth street for the purpose of allowing passengers to alight, to wait as long as it was necessary for all the passengers to alight, and to see to it that those who desired to alight at that point had an opportunity to do so; and if the conductor of the train failed to look at the front car, to see about the alighting of passengers and to know that all those who desired to alight had alighted; that the deceased, Levinston, was one of those who desired to alight and was in the act of alighting, and the conductor gave the signal to start forward before Mr. Levinston alighted, whether he saw him or not, and that by reason of the car starting forward before he had alighted, and by reason of the car starting forward the deceased, Levinston, fell and was injured, then your verdict should be in favor of the plaintiff for such damages as, under the instructions of the court elsewhere given, you find her entitled to." The portion of this instruction particularly complained of is that part which states it to be the duty of the defendant to see to it that those who desired to alight had an opportunity to do

so, and to know that all those who desired to alight had alighted. When the whole instruction is considered, we do not think that it was erroneous. The jury was not told that it might base a verdict merely on the portions of the instruction of which complaint is made. The rest of the instruction showed that it was necessary, in order to charge the company, that the conductor should have failed to look at the front car to see about the alighting of passengers, and by that failure failed to know that those desiring to alight had done so; and furthermore, that Levinston must have been at that time in the act of alighting and the conductor must have given the signal to start before he alighted. An instruction of this character is always dangerous, and the practice of so framing instructions in negligence cases has been frequently disapproved. But it was the duty of the street railway company, as a public carrier of passengers, to exercise the highest degree of care for their safety. The proof showed that Levinston attempted to alight from the rear platform of the motor. The conductor was on the front platform of the trailer, and it was therefore practicable for him to observe Levinston's acts. If in that situation Levinston was in the act of alighting and the conductor, without seeing him and without taking precautions to see that all who by such acts or similar acts had shown an intention to alight had done so, caused the train to be started and the injury thereby resulted, we can see no room for any difference of opinion as to the inference to be drawn. Any reasonable mind must conclude under such a state of facts that the company did not exercise the highest degree of care of which human foresight and vigilance is capable. The instruction is not reasonably susceptible of the construction which the defendant places upon it of charging the conductor with notice of secret uncommunicated intentions on the part of the passenger to alight; and it was not erroneously prejudicial to the defendant.

JUDGMENT AFFIRMED.

M. ALTSCHULER V. SNYDER & BREWER.

FILED JUNE 16, 1896. No. 6715.

1. **Bill of Exceptions:** ALLOWANCE BY COUNTY JUDGE: ATTACHMENT. Prior to the act of 1895 (Session Laws, ch. 72) a county judge had no authority to allow a bill of exceptions embodying the evidence on a motion to discharge an attachment. *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520, followed.

2. ———: ———. The clause of the act of 1895, whereby it is made to apply to all cases then pending, cannot be so construed as to cure error in a judgment rendered prior to its passage, such judgment being based on a consideration of a bill of exceptions unauthorized when the judgment was rendered.

ERROR from the district court of Red Willow county. Tried below before WELTY, J.

W. S. Morlan and *A. F. Moore*, for plaintiff in error.

Smith & McCreary, contra.

IRVINE, C.

Snyder & Brewer brought an action against Altschuler before a justice of the peace. A writ of attachment was issued and levied upon property of Altschuler. By stipulation the cause was transferred to the county court, where a motion of Altschuler to discharge the attachment was sustained. From the order discharging the attachment error was prosecuted to the district court. The district court reversed the order of the county court discharging the attachment, made an order reinstating the attachment, and directed the sale of the attached property. From this order Altschuler prosecutes error to this court.

It appears from the record certified to the district court from the county court that the county court discharged the attachment on the consideration of evidence adduced on the hearing of the motion to discharge. There is in the record what purports to be a bill of exceptions em-

bodying such evidence. The only assignment of error in the petition in error in the district court was that the county court erred in discharging the attachment. The county court did not err if the evidence was not insufficient to support its finding that there was no ground of attachment. In order to review the action of the county court the district court must have considered the evidence as presented to it by this so-called "bill of exceptions." That it did so is apparent from the fact that it overruled a motion to quash the bill. Prior to the act of 1895 (Session Laws, ch. 72) a justice of the peace or county judge was without authority to settle a bill of exceptions embodying the evidence on such a motion. (*Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520.) The judgment of the district court which we are now reviewing, as well as the judgment of the county court which it reversed, was prior to the passage of that act.

It is argued that *Moline, Milburn & Stoddard Co. v. Curtis, supra*, and prior cases were not cases where the attachment had been dissolved, and that where an attachment has been dissolved section 236*e* of the Code of Civil Procedure permits a bill of exceptions. The section referred to does not, however, relate to procedure, or confer any authority to settle a bill of exceptions. It merely provides a method whereby an order discharging an attachment may be superseded pending a review on error. It does not confer the right to review, because that right already existed. Nor does it confer any right to a bill of exceptions. It relates solely to the preservation of the attachment pending a review. This was clearly decided in *Moline, Milburn & Stoddard Co. v. Curtis, supra.* Counsel confuse the right to review on error with the right to a bill of exceptions. The latter is merely ancillary to the former, and the former does not imply the latter, as has been often decided.

It may be urged that the act of 1895 referred to is retroactive and renders effective bills of exceptions in fact allowed, but without authority, before its passage. It

is true that the act, after conferring authority in general terms to settle bills of exceptions, provides: "This act shall apply to all cases now pending or hereafter brought." The act, being remedial in its character, should receive a liberal construction; but it is impossible to construe it so liberally as to affect the present case. The question before the district court was whether the county court erred in discharging the attachment. The question before us is whether the district court erred in reversing the order of the county court. At the time the district court made its order there was no authority for a bill of exceptions in such a case; so that it unquestionably did err in refusing to quash the bill and in reversing the order of the county court on a consideration of an unauthorized bill. The judgment of the district court was erroneous when rendered, and it was beyond the power of the legislature to cure the error by subsequent enactment. If the act of 1895 validated this bill and cured the error in the district court's judgment, then it necessarily vitiated and rendered erroneous all orders and judgments rendered prior to its passage in accordance with the law existing at the time such orders or judgments were entered.

The judgment of the district court is reversed and the cause remanded with directions to affirm the judgment of the county court.

REVERSED AND REMANDED.

RAGAN, C., not sitting.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1896.

PRESENT:

HON. A. M. POST, CHIEF JUSTICE.

HON. T. O. C. HARRISON, } JUDGES.
HON. T. L. NORVAL, }

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

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. EZRA B. SHAFER.

FILED SEPTEMBER 16, 1896. NO. 6767.

1. **Damages:** EVIDENCE: EMINENT DOMAIN: RAILROAD COMPANIES. While the jury should not, in assessing damage in favor of a property owner upon the appropriation of land for right of way purposes by a railroad company, take into consideration as a distinct element of damage such remote contingencies as the frightening of horses and injury to persons and property by passing trains, such matters are proper subjects of inquiry in determining to what extent, if at all, the value of the property in question has been impaired by the construction and operation of the road.

2. **Failure to File Instructions:** REVIEW. The neglect of the district court to file with the clerk instructions given, in order to be available as ground for reversal, must be called to the attention of that court by means of the motion for a new trial. (*Tagg v. Miller*, 10 Neb., 442.)

3. **Witnesses:** VALUE OF PROPERTY: EVIDENCE. One who has resided upon and owned real estate for twenty years, and is acquainted from hearsay with the recent sales of land in the vicinity and the prices paid therefor, is a competent witness to the value of his own property.

4. ———: FOUNDATION FOR TESTIMONY. Error in receiving the testimony of a witness who has not been shown to possess the requisite knowledge of the subject involved, is cured when by means of the cross-examination a sufficient foundation is laid for such testimony.

ERROR from the district court of Seward county. Tried below before BATES, J.

The opinion contains a statement of the case.

R. S. Norval and *J. W. Deweese*, for plaintiff in error:

The first and second instructions were erroneous. (*St. Louis & S. W. R. Co. v. Hammers*, 51 Kan., 127; *Atchison & D. R. Co. v. Lyon*, 5 Am. & Eng. R. Cas. [Kan.], 295; *Blakeley v. Chicago, K. & N. R. Co.*, 25 Neb., 212; *Republican V. R. Co. v. Linn*, 15 Neb., 241; *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb., 589.)

Error resulted from the failure of the court to file with the clerk certain instructions read to the jury. (*Tagg v. Miller*, 10 Neb., 443; *Fry v. Tilton*, 11 Neb., 456.)

The court erred in permitting the witnesses to give their opinion as to the amount of damages sustained. (*Chicago, K. & W. R. Co. v. Stewart*, 50 Kan., 33; *City of Chicago v. Taylor*, 125 U. S., 161; *St. Louis, K. & N. R. Co. v. St. Louis Union Stock Yard Co.*, 57 Am. & Eng. R. Cas. [Mo.], 680; *Missouri P. R. Co. v. Coon*, 15 Neb., 232; *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb., 381; *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb., 591; *Missouri P. R. Co. v. Hayes*, 15 Neb., 229.)

Biggs & Thomas, contra.

References in argument in favor of the instructions: *Love v. Putnam*, 41 Neb., 86; *Omaha S. R. Co. v. Beeson*, 36

Neb., 361; *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb., 90; *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb., 381.

The contention relating to the failure to file the instructions should be disregarded, it not having been raised by the motion for a new trial. (*Tagg v. Miller*, 10 Neb., 443; *Fry v. Tilton*, 11 Neb., 456; *Koehler v. Summers*, 42 Neb., 320; *Ward v. Western Horse & Cattle Ins. Co.*, 42 Neb., 374.)

The owner of land taken for right of way by a railroad company, having resided on the land and improved it, and who swears that he knows its value, is a competent witness, as well as persons living in the neighborhood who are acquainted with the value of land in the vicinity. (*Burlington & M. R. R. Co. v. Schluntz*, 14 Neb., 421; *Sioux City & P. R. Co. v. Weimer*, 16 Neb., 272; *Blakeley v. Chicago, K. & N. R. Co.*, 25 Neb., 207; *Burlington & M. R. R. Co. v. White*, 28 Neb., 166; *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb., 90.)

POST, C. J.

This proceeding presents for review the judgment of the district court for Seward county awarding in favor of the defendant in error, Shafer, damage on account of the appropriation by the plaintiff in error, the Chicago, Burlington & Quincy Railroad Company, of the property of the former for right of way purposes. In the brief of counsel three reasons are assigned for a reversal of the judgment complained of, and which will be noticed in the order presented.

The trial court, among other instructions relating to the measure of damage, gave the following:

"No. 1. The jury are instructed that in determining the amount of damages, if any, which the plaintiff is entitled to recover by reason of the location and operation of defendant's said railroad, you may take into consideration all facts and conditions which actually tend to depreciate the market value of the plaintiff's land, considering the close proximity of said railroad to defendant's [plaintiff's] buildings."

"No. 6. You should not take as a separate and distinct basis for the assessment of damages such remote contingencies as the frightening of horses, liabilities of fires, and damage to persons and property from passing trains. Such contingencies are only to be considered for the purpose of determining whether, and to what extent, the value of the property will be decreased by the building and operation of the railroad. If, in consequence of its exposure to such damages, the actual value of the property is diminished to any extent, then such decrease in value measures the actual loss to the owner."

It is argued by way of criticism of these paragraphs that they lack precision as a statement of the law of the case, and that they authorize a recovery for purely speculative damages, such, for instance, as negligence in the future operation of the road. In *Omaha S. R. Co. v. Beeson*, 36 Neb., 361, it was said: "If the house was rendered intrinsically less valuable by reason of dust and smoke from passing engines, that fact was admissible, not as an independent element of damage, but to be taken into consideration in determining the value of the entire tract, as it then was burdened by the right of way," and the rule there recognized was, in *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb., 90, applied to a state of facts substantially like those here involved. Aside from the paragraphs quoted the jury were, in substance, charged that it was their duty, first, to ascertain from the evidence the market value of the plaintiff's land actually taken for right of way, to-wit, 3,100 acres; second, to ascertain in like manner the depreciation in value, if any, of the plaintiff's entire tract of forty acres resulting from the construction and operation of the defendant's road through said premises, and to return a verdict in favor of the former for the aggregate of the amount so found; and by still another paragraph the jury were advised that they should, in the assessment of damage, take into consideration such injuries to the property as necessarily and actually result from the legal and proper construction of the defendant's

road, and from its future lawful and perpetual use. The charge as a whole fairly states the rule of damage, and is not deserving of the criticism to which it has been subjected by counsel. (See, in addition to cases above cited, *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb., 542; *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb., 94; *Smith v. Crete, M. & W. R. Co.*, 29 Neb., 142; *Omaha S. R. Co. v. Todd*, 39 Neb., 818.)

It is next complained that the court below erred in the giving, over the objections of the defendant below, of certain instructions at the request of plaintiff which had not been filed as required by law. Section 4 of "An act to amend section 58, chapter 14, General Statutes," approved February 25, 1875 (Compiled Statutes, ch. 19, sec. 55), provides that instructions shall be filed by the clerk before being read to the jury; and in section 5 of the same act it is declared that "a neglect or refusal on the part of the court to perform any duty enjoined by the preceding sections shall be error in the trial of the case and sufficient cause for the reversal of the judgment rendered therein." (Session Laws, 1875, p. 77, sec. 5.) It is probable that the foregoing provision is, in view of the peremptory language there employed, mandatory, and that the district court erred in reading the instructions, over the defendant's objection, without first causing them to be filed with the clerk. It was, however, held in *Tagg v. Miller*, 10 Neb., 442, that the neglect or refusal to observe the requirements of that statute must, to be available as ground for reversal of the final judgment, have been called to the attention of the district court by means of a motion for a new trial. No reference having been made in the motion filed in this case to the action now complained of, the subject may be dismissed without further comment.

It is contended that the district court erred in the admission of certain evidence bearing on the question of damage. To illustrate the exceptions which are grouped under this assignment it will be sufficient to cite the plaintiff's own testimony, as follows:

Q. I will ask if you know the value of tax lot No. 13 (the property described in the pleadings) on or about the 9th day of April, 1892?

A. I do.

Q. You may state about what that is worth.

A. One hundred and twenty-five dollars per acre. * *

Q. You may state, Mr. Shafer, how much less is tax lot No. 13 worth by reason of the location of defendant's road across it than it was before the location of the road.

Objected to, as irrelevant, incompetent, immaterial, and that no proper foundation has been laid, and it is not a proper rule for the measure of damage or value to allow the witness to give his opinion as to value of remaining tract at this time. Overruled. Exception.

A. About $1,000 less.

The objections urged to this evidence by counsel are twofold, viz.: (1.) There was no foundation for such examination, the plaintiff not being possessed of sufficient knowledge of the subject to qualify him as a witness to the value of the property. (2.) It is an invasion of the province of the jury, by permitting the witness, indirectly, to assess the damage. But the vice, if any, of the ruling assigned was, we think, cured by the cross-examination of the witness, who, in response to the inquiry of defendant's counsel, testified:

Q. Do you know what was the value of tax lot No. 13 just after the condemnation and construction of the road through there?

A. Which lot is that?

Q. This ten-acre lot.

A. Yes, sir.

Q. What was it?

A. One hundred and twenty-five dollars per acre.

Q. Before the construction of the road?

A. Yes, sir.

Q. How much afterward?

A. It was worth $1,000 less for my use.

Q. What is the basis and reason for your estimate of the damage?

A. It was worth two-thirds less than it was without the road.

Q. Then you mean to say the taking out of the right of way depreciated the value of tax lot No. 13 two-thirds of its value?

A. The way it is cut up and divides it from my other property makes it hardly any benefit to me, or very little, at least.

It appears further from the cross-examination that the plaintiff has resided upon and owned the tract of land in question, which adjoins the city of Seward, for more than twenty years, and knew the cost of the improvements thereon. He is also shown to have been acquainted with the recent sales of land in that vicinity and the prices paid thereat. It has been frequently said by this court that to qualify a witness to give testimony concerning the value of land he must be shown to possess some knowledge of the subject, although the amount or scope of such knowledge has not been defined. Nor is it at this time deemed necessary, if, indeed, it were possible, to lay down a precise rule by which to determine the competency of witnesses as to value in all cases. It is sufficient that resident owners of land in a farming neighborhood have generally been held competent witnesses to the value of real estate in such community. In a leading case upon the subject, *Robertson v. Knapp*, 35 N. Y., 91, the witnesses, all of whom were residents of the immediate neighborhood, some being engaged in farming and others retired farmers, were held competent without further showing. In the opinion it is said: "There are no certain data which, if given, will fix the value of land. The same data will produce widely different results as to the value, depending, perhaps, on location and the use to which it can be applied, or upon the demand. The value of land in the vicinity is usually understood by all of the residents of a farming neighborhood, without respect to occupation." The opinion of such a witness may not be the best or most satisfactory evidence attainable, and yet

it is difficult to conceive of persons better qualified to testify upon the subject of the value of farming lands than resident owners of like property in the particular locality. It is, to say the least, competent evidence, its weight or probative force to be determined by the jury and depending upon the facts of the particular case. Again, the record discloses that the original award of damage by the commissioners named for that purpose was made April 23, 1892, which corresponds substantially with the date laid in the question first above quoted. It is obvious, therefore, that the plaintiff's testimony in chief, supplemented by his cross-examination. shows his competency as a witness and was appropriate for the purpose of proving damage. And the fact that the witness, in response to proper questions, answered that the property was worth less by $1,000 immediately after the construction of the road, instead of stating its value at said date, presents no ground for reversal, since the objections go to the form of the interrogatories only, and not the sufficiency or materiality of the answers. The foregoing observations are applicable to the testimony of other witnesses to which reference is made in the brief by counsel.

There is no error in the record prejudicial to the rights of the plaintiff in error, and the judgment will be

AFFIRMED.

W. B. SCARBOROUGH V. MYRON N. MYRICK.

FILED SEPTEMBER 16, 1896. No. 6243.

Rehearing: CORRECTION OF TRANSCRIPT: REVIEW.

REHEARING of case reported in 47 Neb., 794.

F. C. Power, for plaintiff in error.

George B. France, contra.

POST, C. J.

The irregularity in the notice of the commencement of this cause in the district court, upon which was based a former judgment of reversal (*Scarborough v. Myrick*, 47 Neb., 794), being shown by the amended transcript to have resulted from an error in the transcribing of the proceedings below, and the other questions presented having on the former hearing been resolved in favor of the defendant in error, the judgment of the district court will be

AFFIRMED.

SCHOOL DISTRICT NO. 46 OF DOUGLAS COUNTY V. SCHOOL DISTRICT NO. 53 OF DOUGLAS COUNTY.

FILED SEPTEMBER 16, 1896. No. 6669.

1. **New School Districts:** DIVISION OF CORPORATE PROPERTY: SUPERINTENDENT. It is by section 9, subdivision 1, of our school law (Compiled Statutes, ch. 79) made the duty of the county superintendent of public instruction, upon the erection of a new school district formed in whole or in part from one or more districts possessed of school-houses or other property, to determine the amount due to such new district from the parent district or districts on account of such property, upon the basis, as nearly as practicable, of the taxable property in the respective districts at the time of the division.

2. ———: ———: ESTOPPEL. The duty in that regard is a continuing one, and the failure of the superintendent to take any action toward a division of the corporate property will not, in the absence of such long continued acquiescence as would work an estoppel against the new district, prevent the latter from asserting its rights with respect to such property.

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

The opinion contains a statement of the case.

E. J. Cornish, for plaintiff in error:

Whenever the legislature of a state, or any person to whom a legislature delegates its power, divides a school district, but does not in the act of division provide in terms for a division of the property and the payment of the debts, then and in that case the old district continues to own all the property within its territory and is liable for all the debts of the old district. (*Board of Education of Barker District v. Board of Education of Valley District*, 4 S. E. Rep. [W. Va.], 640; *City of Winona v. School District*, 40 Minn., 13; *Laramie County v. Albany County*, 92 U. S., 307; *Town of Mt. Pleasant v. Beckwith*, 100 U. S., 514; *Town of Dupere v. Town of Bellevue*, 31 Wis., 120; *Hampshire County v. Franklin County*, 16 Mass., 76; *Turnbull v. Board of Education of Alpena Township*, 45 Mich., 496; *North Yarmouth v. Skillings*, 45 Me., 133; *Widham v. Portland*, 4 Mass., 384; *Hartford Bridge Co. v. East Hartford*, 16 Conn., 149.)

When the county superintendent acts under a power delegated to him by the legislature his authority is at an end. He cannot afterwards review his action or change the decision he has made. The power to make such change, if it exists at all, exists only in the legislature. (*Bowdoinham v. Richmond*, 6 Greenl. [Me.], 112; *Hampshire County v. Franklin County*, 16 Mass., 76.)

References as to effect of acquiescence in the division of the school district: *School District v. School District*, 81 Mich., 339; *Metz v. Anderson*, 23 Ill., 463; *People v. Maynard*, 15 Mich., 470; *Stuart v. School District*, 30 Mich., 69; *Ratcliffe v. Faris*, 6 Neb., 539; *School District v. Estes*, 13 Neb., 52; *Rathbun v. McConnell*, 27 Neb., 239; *Harbach v. Miller*, 14 Neb., 9.

Robert W. Patrick, contra.

POST, C. J.

On the 8th day of March, 1888, James B. Bruner, as superintendent of public instruction for Douglas county,

by an order in due form made and entered of record, altered the boundaries of school district No. 46 of said county by detaching therefrom and adding to district No. 53, on that day organized, certain territory in said order particularly described. The basis of said order was a petition signed by the requisite number of voters, in order to confer upon the superintendent jurisdiction in such proceeding. It is shown that district No. 46 was, at the date of such change of boundary, free from debt and possessed of a school-house and site and $32.50 in money. No steps were taken at the time of the division for an apportionment of the property mentioned between said districts, nor was there any subsequent action to that end, except as hereafter stated. On the 17th day of November, 1889, there being in the treasury of district No. 46 the sum of $800, derived from the sale of the school-house above mentioned, Mr. Mathews, successor in office of Mr. Bruner as superintendent of public instruction, proceeded to apportion the said fund between the districts named by awarding to district No. 53 the sum of $557.27, and in favor of district No. 46 $242.73; the basis of such apportionment being the assessed valuation of the respective districts for the year 1888. District No. 46 having refused, after notice in due form of such apportionment, to pay the amount thereby awarded in favor of district No. 53 or otherwise recognize the validity of such proceeding, this action was brought by the district last named upon such award and prosecuted to judgment in its favor in the district court, and which judgment is now before us for review upon allegations of error.

The first contention upon this hearing is that the order altering the district bounds exhausted the jurisdiction of the superintendent over the subject, and that in the absence of an express provision therein on that subject the title of district No. 46, as the parent district, to the corporate property is not affected by such change. In support of that contention we are referred to numerous authorities, which unite in holding that in the absence of

express legislative provision governing the subject upon the separation from a town or other municipality of a portion of its territory by annexation to another, or in the creation of a new corporation, the first or parent corporation retains all of its property and franchises and continues liable for its obligations. We are, however, unable to perceive the application of that rule to the case at bar, in view of the plain provision of our statute. Section 9, subdivision 1, of the school law (Compiled Statutes, ch. 79) provides: "When a new district is formed in whole or in part from one or more districts possessed of a school-house or other property, the county superintendent, at the time of forming such new district, or as soon thereafter as may be, shall ascertain and determine the amount justly due to such new district from any district or districts out of which it may have been in whole or in part formed, which amount shall be ascertained and determined as nearly as practicable according to the relative value of the taxable property in the respective parts of such former district or districts at the time of such division, and the fact that such school-house or other property is not paid for shall not deprive such new district of its proportionate share of the value thereof; *Provided*, That such new district shall remain bound for such indebtedness to the same extent as though the new district had not been formed; unless in case of indebtedness not bonded the same shall be adjusted as hereinafter provided." The legislature has by the section here quoted declared the right of the respective districts, under like circumstances, in terms too plain for construction. The duty of the superintendent with respect to the property of the parent district is in such cases plainly enjoined by law, and that duty, we are constrained to hold, is a continuing one, unaffected by his failure to act within the time contemplated by statute. There may be, it is conceded, an acquiescence by a corporation, under the circumstances stated, for such a period as to estop it from claiming an interest in the corporate property, but such

a contention is without support in the issues or the proofs of this case. There being no error in the record, the judgment of the district court should be

AFFIRMED.

CLARA L. BACHELOR ET AL., APPELLANTS, V. FERDINAND SCHMELA, APPELLEE.

FILED SEPTEMBER 16, 1896. No. 6558.

Executors and Administrators: ACCOUNTS: FINAL SETTLEMENT: JUDGMENTS. The law recognizes a substantial difference between the final settlement of the accounts of an executor or administrator and those made annually or at stated periods during the course of the administration. A final settlement made pursuant to notice to persons interested in the estate is in the nature of a judgment and conclusive as to all matters included therein until reversed or set aside by means of a direct proceeding, or impeached on account of fraud, while an interlocutory *ex parte* accounting is but *prima facie* correct and subject to re-examination so long as the administration account remains unsettled.

APPEAL from the district court of Cuming county. Heard below before NORRIS, J.

I. C. Bachelor, *Uriah Bruner*, and *Mahoney & Smyth*, for appellants.

M. McLaughlin and *T. M. Franse*, *contra*.

POST, C. J.

In the year 1876 Andrew Bergtold died intestate in Cuming county, leaving surviving him, a widow, Amelia Bergtold, and three children under the age of three years. Said deceased at the time of his death was possessed of considerable property, consisting of houses and lots in the city of West Point and 160 acres of farm land situated in said county. The said Amelia, some time in the

year 1887, married the appellee, Ferdinand Schmela, who was shortly thereafter, upon the application of the former, appointed administrator of the estate of said deceased. Said estate was unincumbered by debts, and the only claim presented in response to the statutory notice to creditors was the charge for publishing said notice. In the month of February, 1879, on the application of said Amelia, the south half of lot 16, in block 15, in the city of West Point, including the dwelling-house of the deceased, was set off and assigned to her as her dower interest in the said estate, and which assignment was in due form confirmed by the county court. Thereafter the said Schmela, as administrator, proceeded to erect upon the lot so assigned to his wife a brick block and to fit and furnish the same as a saloon, at a total cost of nearly $5,000, for which credit was claimed in the accounts rendered by him as such administrator. Said Schmela had in the meantime been appointed guardian of the infant children of the deceased, and although the record is not clear upon the subject, the inference therefrom is that he had, pursuant to license from the district judge for Cuming county, sold a portion of the property inherited by said children, to pay the alleged indebtedness of said estate. On the 14th day of April, 1887, said administrator exhibited to the county court his amended and supplemental report, showing a balance due him of $4,080.92, being for money expended in the erection of the aforesaid building upon his wife's dower estate. The court, upon the examination of the said account, made the following finding and order: "The court finds that said Ferd. Schmela, during the period covered by such report, acted as administrator and guardian at one and the same time; that his functions and acts as guardian were not well defined, but that there is no evidence that he acted in bad faith. * * * The court, being fully advised in the premises, finds said report to be correct. It is therefore considered, ordered, and adjudged that such report be, and the same hereby is, accepted and

approved, and that said administrator be allowed no compensation or attorney's fee. The court further finds that the services of the guardian *ad litem* herein are worth $100. It is therefore ordered that said guardian *ad litem*, Uriah Bruner, be allowed the sum of $100, to which finding and judgment the administrator excepts." Although we discover no record of an appeal or proceeding in error from the foregoing order, the district court, according to the transcript introduced in evidence, on the 19th day of December, 1887, found "that the report of said administrator made to the county court was correct, and there was due the administrator from said estate on the 18th day of July, 1886, the sum of $4,080.92, which is still due and unpaid, with interest, and that the judgment of the county court is in all things confirmed, except as modified by this decree." The modification referred to consists in the allowance of $50 additional to the guardian *ad litem*, and $250 to the administrator as attorney's fees, payable out of the estate. In the month of February, 1893, said Schmela, claiming to be a creditor of the said estate, petitioned the county court for the appointment of an administrator *de bonis non*. Notice of such petition having been given, the said Amelia Schmela, and Clara L. Bachelor and Lilly Bergtold, children of the deceased, appeared and objected to the appointment of an administrator, on the ground, among others, that said Schmela was not a creditor of said estate, and that his alleged claim was, on the contrary, false and fraudulent. Upon a hearing before the county court said objections were overruled and letters of administration issued to Emil Heller in accordance with the prayer of said petition, which order was, on appeal to the district court, in all things confirmed, and from which judgment an appeal has by the heirs mentioned been prosecuted to this court.

The alleged indebtedness of said estate to the appellee, Schmela, is a balance of $1,300 and interest of the $4,080.92 claimed by the latter in the report to which

reference has been made, after applying thereon money in his hands realized, presumably, from the sale of appellants' property. It is, in our view of the case as presented, necessary to notice a few only of the propositions discussed by counsel for appellants.

As to the evidence adduced in support of appellee's claim for money expended in improving his wife's dower estate we are not advised, and from the record before us, which is of the most confusing and unsatisfactory character, we can perceive no foundation for such a demand. It is reasonably certain from the proofs before us that the property of the deceased, except the lot assigned to the widow as her dower interest, and two others valued at $1,100, according to appellee's sworn statement, had been disposed of by him previous to his removal for cause. What is now in fact proposed is to exhaust the remnant of the property inherited by these appellants from the deceased in the improvement of a single lot incumbered by the widow's life estate. Comment upon that proposition is unnecessary. Nor, indeed, is argument required to prove that the claim upon which this proceeding rests arises out of a flagrant abuse by the appellee of his trust as administrator and guardian, which the law will neither sanction nor condone.

But the judgment in this case is defended upon the ground that the order approving the appellee's account is conclusive, and that the question of the validity of his said claim against the estate is now *res judicata*. There is, however, in this record no foundation for that contention. The final settlement of the accounts of an executor or administrator and his discharge by the judge or court having jurisdiction of the subject, upon the conditions and in the manner prescribed by statute, is, in contemplation of law, a judgment, and is conclusive as to all matters embraced therein until reversed or set aside by means of a direct proceeding for that purpose, or impeached for fraud. There is a recognized and substantial difference between a final settlement of the character

above indicated and the approval of accounts rendered from time to time during the course of the administration. The latter is, to use the language of Judge Brewer in *Musick v. Beebe*, 17 Kan., 47, "simply a statement of the administrator that he has received such amounts and paid out such, and the approval finds that statement to be true. It is, therefore, in the nature of an adjudication, a judicial determination; but it is, so to speak, only a present adjudication and *prima facie* correct—one made for the purpose of enabling the court to keep watch of the estate and to control the disposition of its assets and the payment of its debts. * * * It may be challenged without appeal, and in the same court, and without motion for rehearing or any direct proceedings to set it aside, and any errors or mistakes in it may be corrected at any subsequent settlement. These accounts are settled *ex parte*, and without even the pretense of notice, by publication or otherwise, to any parties interested. But the final settlement of an estate is a more stringent and less easily avoided adjudication. It is more emphatically a judgment. True, it may by the probate court be opened up and the administration continued, but this requires a direct proceeding therefor." The effect there given an *ex parte* interlocutory accounting by an executor or administrator accords with the decided weight of authority, if, indeed, there exists a contrariety of opinion upon the subject. (See *Winborn v. King*, 35 Miss., 157; *Picot v. Biddle*, 35 Mo., 39; *Clark v. Cress*, 20 Ia., 50; *In re Heath's Estate*, 58 Ia., 36; *Goodwin v. Goodwin*, 48 Ind., 584; *State v. Wilson*, 51 Ind., 96; *Griggs v. Shaw*, 42 N. J. Eq., 631.) And that the authorities above cited are applicable to like orders under our statute is quite apparent from an inspection of section 282, chapter 23, Compiled Statutes, entitled "Decedents," which requires every executor or administrator to render an account within one year from the date of his appointment, but without making any provision for notice of such accounting; also, section 287 of the same

chapter, requiring notice to all persons interested of the allowance of the administration account of any executor or administrator. There is in this proceeding nothing to indicate that the report here referred to was intended as final accounting by the appellee, or that it was so regarded by the court, and we are not required to indulge any mere speculation in order to sustain a transaction so manifestly unconscionable as that upon which the appellee's claim depends. In no just or legal sense is the appellee shown to be a creditor of the estate of said Andrew Bergtold or entitled to insist upon the appointment of the administrator thereof. The judgment of the district court will accordingly be reversed and the cause remanded, with direction to reverse the order of the county court.

REVERSED AND REMANDED.

CHARLES HOLSWORTH, APPELLANT, V. FRED O'CHANDER, APPELLEE.

FILED SEPTEMBER 16, 1896. No. 6663.

Res Judicata: OVERSEERS OF HIGHWAYS. A judgment upon the merits against the defendant, an overseer of highways, for the removal, under color of his office, of a fence situated on the plaintiff's land, the sole defense being the existence of an alleged public road at the *locus in quo*, is, in the absence of fraud, a bar to a subsequent proceeding by the successor in office of the former in behalf of the public to restrain the threatened obstruction of such alleged highway in which the rights of the parties depend upon the facts put in issue in the former action.

APPEAL from the district court of Dakota county. Heard below before NORRIS, J.

R. E. Evans and *John T. Spencer*, for appellant.

References: *Langdon v. State*, 23 Neb., 509; *Rathman v. Norenberg*, 21 Neb., 467; *Graham v. Flynn*, 21 Neb., 229; *O'Dea v.*

State, 16 Neb., 241; Elliott, Roads & Streets, 7, 658-671; *City of Eureka v. Armstrong*, 22 Pac. Rep. [Cal.], 828; *Hartford v. New York & N. E. R. Co.*, 59 Conn., 250; 21 Am. & Eng. Ency. Law, 128; *Washington, etc., Steam Packet Co. v. Sickles*, 5 Wall. [U. S.], 592; 2 Black, Judgments, 739; Bigelow, Estoppel [3d ed.], 112; *Cecil v. Cecil*, 19 Md., 80; *Springport v. Teutonia Savings Bank*, 75 N. Y., 397; *Dodge v. Zimmer*, 110 N. Y., 43; *Densmore v. Tomer*, 14 Neb., 392; 1 Herman, Estoppel, secs. 155, 291, 292; *Cabot v. Washington*, 41 Vt., 168; *Hill v. Morse*, 61 Me., 541; *Brenner v. Bigelow*, 8 Kan., 496; *Strother v. Butler*, 17 Ala., 733; *Wood v. Jackson*, 8 Wend. [N. Y.], 9; *Cromwell v. Sac County*, 94 U. S., 351; *Hooker v. Hubbard*, 102 Mass., 245; *Russell v. Place*, 94 U. S., 606; *Potter v. Baker*, 19 N. H., 166; *Bosquett v. Crane*, 51 Cal., 505; *Standish v. Parker*, 2 Pick. [Mass.], 20; *Teal v. Terrell*, 48 Tex., 491; *Baker v. Rand*, 13 Barb. [N. Y.], 152; *Harding v. Hale*, 2 Gray [Mass.], 399; *Rube v. Sullivan*, 23 Neb., 783; *Quinton v. Burton*, 61 Ia., 471; *Elsworth v. Lord*, 42 N. W. Rep. [Minn.], 389; *Elk County v. Earley*, 15 Atl. Rep. [Pa.], 602; *Appeal of Township of North Manheim*, 14 Atl. Rep. [Pa.], 137; *City of Demopolis v. Webb*, 6 So. Rep. [Ala.], 408; *Burlington v. Schwarzman*, 52 Conn., 181.

Barnes & Tyler, *Lynn & Sullivan*, *Carter & Brown*, *J. C. Crawford*, *Jay & Beck*, and *Mockett*, *Rainbolt & Polk*, *contra.*

References: *Cole v. City of Muscatine*, 14 Ia., 296; *Coykendall v. Durkee*, 13 Hun [N. Y.], 260; *Putnam v. Valentine*, 5 O., 187; *Irwin v. Dixion*, 9 How. [U. S.], 10; *New York v. Mapes*, 6 Johns. Ch. [N. Y.], 46; *Mohawk & H. R. Co. v. Artcher*, 6 Paige Ch. [N. Y.], 83; *Dana v. Valentine*, 5 Met. [Mass.], 8; *Parker v. Winnipiseogee*, 2 Black [U. S.], 545; *Van Bergen v. Van Bergen*, 3 Johns. Ch. [N. Y.], 282; *Porter v. Witham*, 17 Me., 292; *Crowder v. Tinkler*, 19 Ves. [Eng.], 617; *Tichenor v. Wilson*, 4 Halst. [N. J.], 197; *Case v. Beauregard*, 101 U. S., 688; 1 Herman, Estoppel, secs. 155, 230; 21 Am. & Eng. Ency. Law, 129; *Westmoreland v. Conemaugh*, 34 Pa. St., 231; *Ferris v. Bramble*, 5 O.

St., 109; *People v. Brighton*, 20 Mich., 71; *Anderson v. Commissioners of Hamilton County*, 2 O. St., 644; *Beebe v. Scheidt*, 13 O. St., 415; *Milton v. Wacker*, 40 Mich., 229; *Shue v. Highway Commissioners*, 41 Mich., 638; *State v. Weimer*, 20 N. W. Rep. [Ia.], 171; *Alcott v. Acheson*, 49 Ia., 569; *Wabaunsee v. Muhlenbacker*, 18 Kan., 129; *McCearly v. Lemeunier*, 3 So. Rep. [La.], 649; *Tupper v. Huson*, 1 N. W. Rep. [Wis.], 332; *Tillman v. People*, 12 Mich., 405; *Field v. Village of Manchester*, 32 Mich., 279; *Wayne County v. Miller*, 31 Mich., 447; *Speir v. New Utrecht*, 24 N. E. Rep. [N. Y.], 692.

POST, C. J.

This is an appeal from a decree of the district court for Dakota county dismissing the petition of the plaintiff, who, as overseer of highways, seeks to restrain the defendant from the threatened obstruction of a certain alleged public road within the plaintiff's district. The defendant for answer alleges that he is the owner, in his own right, of the premises described, and admits the building of a fence as charged at the point in question, but denies the existence of a public road upon his said premises. He also pleads as a defense a former judgment, to which extended reference will hereafter be made. The reply puts in issue all allegations of new matter contained in the answer.

It is shown by the evidence in the record that in the year 1885 one Lars O'Chander, defendant's immediate grantor, was the owner in his own right of the premises described in the petition, to-wit, the south half of the northeast quarter of section 28, township 27, range 8 east, in Dakota county, and also of the southeast quarter of section 29, in said township; that in the month of July of said year one Barnes, a predecessor of the plaintiff, in the office of overseer of highways, claiming the existence of a public road over and upon the premises above described, and in the exercise of his authority as such overseer, cut down and removed a fence before that time

erected by the said Lars O'Chander across said alleged road on the southeast quarter of section 29, about eighty rods distant from the point of the defendant's threatened obstruction; that an action of trespass was thereupon brought by the said Lars O'Chander as plaintiff against the overseer above named and which was prosecuted to judgment upon its merits in favor of said plaintiff in the district court for Dakota county. It is also clear from the record that the purpose of the plaintiff is by means of this suit to assert in behalf of the public the identical claim which was relied upon as a justification by his predecessor in the suit last mentioned, viz., the existence of a public highway through sections 28 and 29, by reason of certain proceedings before that time had by the county board of said county, and also on account of the alleged continued and uninterrupted use thereof by the public as such for more than ten years. Pertinent in this connection is the answer filed by Barnes in that action, viz.:

"Comes now the defendant and for answer to plaintiff's petition filed herein states: That he denies each and every allegation therein contained except such as are hereinafter admitted or otherwise answered; that as to whether plaintiff is the owner of the real estate in said petition described defendant has neither knowledge nor information sufficient to form a belief, and defendant states the fact to be that there is running through said real estate a public highway or road, and further, that plaintiff is estopped from denying that the same is a lawful public highway or road for the reason that the said plaintiff has received the sum of $100 as damages from the said county for land taken in the establishment of said highway; and for the further reason that plaintiff in the year 1882 or 1883 petitioned the board of county commissioners of said county for a resurvey of said highway, which said resurvey was duly ordered by said board and carried out; that the defendant is the supervisor of highways for the district in which said real estate and

road are located; that on the 30th day of July, 1885, plaintiff had obstructed the said highway by building a wire fence across and in the same, and that on said day this defendant, finding the said highway so obstructed and acting as such road supervisor, removed such obstruction by cutting the said fence, and thereby opened said highway for travel."

The foregoing allegations having been put in issue by a general denial, there was a trial to a jury, at the conclusion of which a verdict was returned in favor of the plaintiff for nominal damage in obedience to the following peremptory direction of the court, and upon which judgment was subsequently entered:

"1. Plaintiff brings this action to recover damages for trespass upon his land and injury to his fence, alleged to have been committed on July 30, 1885. Defendant admits the removal of the fence and justifies his acts by reason of the fact that he is and was road supervisor and as such removed the fence, which he claims was upon the public highway and obstructed travel.

"2. You are instructed that there is no testimony before you establishing a public road over and across the land where the fence was situated, and the only question for you to determine is the amount of damages plaintiff has sustained by reason of the removal of the fence.

"3. You should assess plaintiff such damages as he has shown himself entitled to by a fair preponderance to be entitled to, and find a verdict accordingly."

There is also evidence tending to prove the acquiescence by the county in the result stated by the abandoning of its claim respecting said road and the removal of a bridge before that time erected on the line thereof. Counsel for plaintiff, however, insist that that judgment is not a bar to this action, because (1) the *locus in quo* herein differs from that involved in the former suit; (2) there is no privity between this plaintiff and his predecessor in office, Barnes.

To the first contention it is a sufficient answer that the

effect which counsel accord to the former judgment is entirely too restricted. Indeed, the inference is irresistible from the facts and circumstances in evidence that the real controversy, and to which the judgment there rendered is responsive, was, as it is in this case, the legal existence as an entirety of the alleged road, as a public highway, through the action of the county board or by reason of adverse user. The fact, therefore, that the *locus in quo* was a point on the line of the alleged road eighty rods distant from the obstruction now complained of is without significance.

Preliminary to an examination of the second proposition it may be observed that there can be no doubt of the privity between the defendant herein and his grantor, Lars O'Chander. Privity in its broadest sense denotes the mutual or successive relationship to the same right of property. (Bouvier's Law Dictionary; 2 Greenleaf, Evidence, sec. 189; 1 Herman, Estoppel, p. 149.) The defendant, therefore, as grantee of the property described, by deed from the said Lars O'Chander subsequent to the judgment in the former suit, is in a position to assert whatever rights, if any, accrued to the latter thereunder. This observation leads to the second and principal ground of contention, viz., the relation of the plaintiff herein in his representative capacity as overseer of highways to his predecessor, Barnes, in the former action. It is conceded that a single recovery for trespass would not in every case work an estoppel as against the rights of the public. But we are, on principle, unable to perceive that the attitude of the plaintiff in the prosecution of this action differs essentially from that of his predecessor in the assertion by the latter of the identical claim. If he has any standing as a party to this proceeding,—a proposition strongly controverted,—it is by reason of his duty with respect to the highways of his district and the fact that in the discharge of such duty he stands as the representative of the public at large. To demonstrate the foregoing proposition it is only necessary to inquire

what will be the effect upon the rights of the parties of the final decree herein. That a result favorable to the contention of the plaintiff will work an estoppel as against the claim of the defendant follows necessarily from the reasoning of the former, and accords with the theory upon which the action is prosecuted. And that a result adverse to the plaintiff will estop the public with respect to the claim asserted in its behalf cannot be doubted, since the primary purpose of this proceeding is the enforcement, not of a mere private right, but a public easement in the defendant's property. The plaintiff is, in his capacity as overseer, authorized, after reasonable notice, to remove fences or other obstructions from the public roads at the cost of the owners or persons creating the same (Compiled Statutes, ch. 78, sec. 69); but whether he proceeds under the statute or invokes the powers of a court of equity, he acts by virtue of his office; and a judicial determination respecting his rights in a given case ought, on principle, to conclude the public, whom he represents, as effectually and for all purposes as if the action had been prosecuted in the name of the county or other public body. A recognized test in determining the effect of a judgment or decree is the relation thereto of the party against whom or in whose favor it is subsequently alleged as an estoppel. Thus, for instance, one made a defendant in his official capacity will not be personally bound by the judgment rendered, and one impleaded in his personal capacity only, will not be bound officially. (Freeman, Judgments, sec. 156.) We cannot upon this record doubt that the judgment here pleaded would have been a complete bar to a subsequent proceeding by Barnes, the plaintiff's predecessor, in his official capacity to restrain the further interference by defendant's grantor with the alleged highway. The acts charged as the basis of the former action, and the interposition therein by the overseer named of his official character in justification was but the assertion, in behalf of the public, of a public right, by its accredited representative,

acting within the scope of his authority. It was, in legal effect, an act of the public, not as a body corporate it is true, but according to its more comprehensive definition, which includes the people or community at large, without regard to the territorial limits of any town or county. The public is, in that enlarged sense of the term, a distinct legal entity, capable of acquiring rights by adverse use, and may in turn lose such rights by non-user. It was in that sense privy to the claim asserted in its behalf, and is accordingly concluded by the adverse result.

DECREE AFFIRMED.

MARTHA BLOMGREN V. OLAF HOLMQUEST.

FILED SEPTEMBER 16, 1896. No. 6707.

1. **Witnesses:** UNINTELLIGIBILITY OF TESTIMONY: REVIEW. The fact that the testimony of a witness is unintelligible to the official stenographer of itself affords no ground for the reversal of a judgment.

2. **Trial:** BILL OF EXCEPTIONS: REVIEW. It is the duty of parties to assist in preserving the evidence in the manner prescribed by law, and the failure, through his own neglect, of the unsuccessful party to secure a true bill of exceptions presents no ground for relief at the hands of the appellate court.

3. **Boundaries:** CONFLICTING EVIDENCE: REVIEW. Evidence examined, and *held* to sustain the judgment of the district court.

ERROR from the district court of Cuming county. Tried below before NORRIS, J.

Uriah Bruner, for plaintiff in error.

Ira Thompson, and *Sears & Thomas*, *contra*.

POST, C. J.

This was an action of ejectment in the district court for Cuming county by the plaintiff in error, Martha

Blomgren, against the defendant in error, Olaf Holmquest, the property in controversy being a strip of land particularly described, six rods in width by eighty rods in length, bounded on the west by the section line between sections 13 and 14, township 21, range 7 east. The only substantial dispute relates to the location of the section corner common to sections 11, 12, 13, and 14, and which, according to the contention of the plaintiff, is six rods west of the point found by the trial court to be the true corner. The case, upon the record, is a typical one and presents the contradictions respecting division lines and monuments common to controversies of its character. The plaintiff introduced witnesses whose testimony tends to prove the establishment of the corner in dispute according to the original survey at the point contended for by her. She is corroborated, also, by two apparently competent surveyors, Nason and Collins, who surveyed portions of the sections above mentioned in the years 1880 and 1888, and who, in the absence of the original monuments, located the corner after consulting the government field notes. On the other hand, Kline, who, as county surveyor, made a survey of the premises some time between the years 1882 and 1888, records the finding of the original government corner where the road as now located between sections 13 and 14 intersects the road extending east and west on the north side of said sections, and which is in accordance with the finding complained of. The defendant also introduced a number of witnesses, who claim to have seen the original mound which marked the section corner as early as 1868, and whose testimony is in harmony with the conclusion reached below. Tested by the rule often asserted by this court, there is in the record abundant evidence to sustain the judgment, and the assignment which presents that question may accordingly be dismissed without further comment.

The only other allegation of error which requires notice is presented by the following record of the examina-

tion of Mr. Heller, the county surveyor, as a witness for the plaintiff: "By the Court: Mr. Heller, taking the section line between 11 and 12, does the prolongation of that line coincide with the section line between 13 and 14 as established by Kline? For answer the witness takes a plat and goes to the judge's desk, where he explains the same to the court in tones and manner unintelligible to the reporter, which said answer could not, therefore, be preserved in the record, to which proceeding the plaintiff duly excepted." It will be observed that the only fact to which the foregoing exception can apply is that the answer of the witness was not understood by the official stenographer, in consequence of which such evidence was not preserved of record. It cannot on the record be charged that attorney for the plaintiff was unable to hear, or for any reason failed to comprehend the answer, and the fact that he pursued the examination on the line suggested by the judge's interrogatory induces the belief that the witness was in fact understood. It was the duty of counsel, under these circumstances, to insist upon a full report of the evidence, in which he would, we must presume, have had the assistance of the court. Having neglected the opportunity presented, he will not now be heard to complain.

JUDGMENT AFFIRMED.

STATE OF NEBRASKA, EX REL. LOUIS OTTO, V. COUNTY COMMISSIONERS OF LANCASTER COUNTY.

FILED SEPTEMBER 16, 1896. No. 6834.

Mandamus: PROCEDURE: APPLICATION. In an action for *mandamus* the application for the writ shall be by motion, supported by an affidavit in which the facts are stated upon which the application is predicated. A petition, verified as pleadings in civil actions under the Code are ordinarily, is insufficient when depended upon to fill

the place of an affidavit, and an application thus made should be denied and the writ withheld. (*State v. Mayor of City of Lincoln*, 4 Neb., 260.)

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

Stearns & Strode, for plaintiff in error.

W. H. Woodward, *J. L. Caldwell*, and *F. A. Boehmer*, *contra*.

HARRISON, J.

The relator herein claimed to be entitled to hold the office of constable and to exercise the duties thereof in and for the city of Lincoln, and made an application to the district court of Lancaster county for the issuance of a writ of *mandamus*, directed against respondent, ordering and compelling it to approve his official bond as such officer, which he alleged he had prepared and presented to the board and which it had failed and refused to approve, notwithstanding the board admitted the "sufficiency of the financial ability of the sureties" and that the bond was in proper form. It was objected for respondents in the trial court, and is urged here, that the application was insufficient, in that it was not supported by an affidavit of the truth of the facts alleged as its basis. The application was in form an ordinary petition, and the verification stated that the relator had read the application, "and that the facts therein contained are true, as he verily believes." No motion for the issuance of the writ was made, nor was there any affidavit filed setting forth the facts relied upon as establishing the relator's right to demand that the writ should issue. The application was fatally defective, and such defect was sufficient reason for withholding the writ. (Code of Civil Procedure, sec. 649; *State v. Mayor of the City of Lincoln*, 4 Neb., 260; *State v. School District*, 8 Neb., 98; *Collett v. Allison*, 25 Pac. Rep. [Okl.], 516.) In the last

named case the supreme court of Oklahoma had under consideration section 649 of our Code of Civil Procedure, which was extended to Oklahoma by section 11 of the organic act of the territory. There are other questions discussed in the briefs filed, but as the conclusion reached on the point considered effects a final disposition of the action, we need not discuss them. The judgment of the district court is affirmed.

We may say here that the applicability or wisdom of the rule announced may well be doubted in a case wherein a public prosecutor or attorney makes, or it becomes his duty to make, application for a writ of *mandamus*, and he has not personal knowledge of the facts and they cannot be or are not very readily brought to his personal knowledge, so that he can state them positively in a petition or affidavit, but the question is not involved or presented in the present case and no opinion is expressed upon it. The action now before us is one in which the rule is applicable and of force.

AFFIRMED

WILLIAM H. CRITES ET AL. V. LEVI C. HART ET AL.

FILED SEPTEMBER 16, 1896. No. 6648.

1. **Fraudulent Conveyances:** INSOLVENCY: PARTNERSHIP: TRUST FUNDS. The property of an insolvent, either person or partnership, is not a trust fund in the hands of the debtor in favor of creditors, in the true sense of the words "trust fund." The creditors do not, merely because of such relation to the debtor, have any recognizable or enforceable lien on the property of the debtor, nor is there any trust character attaching to it which interferes with a *bona fide* sale of it by the debtor.

2. ———: ———: ———: EVIDENCE. A firm, heavily indebted at the time, may sell a large portion of its property, its stock in trade, and also its business, and receive in consideration therefor the promissory notes of the purchaser, and these facts alone are not conclusive evidence that the sale was fraudulent. They are but facts to be considered in connection with all other facts and cir-

cumstances adduced in evidence on the trial on the question of the fraudulent or good-faith character of the transfer.

3. ———: EVIDENCE. The question of fraud in a transfer of property, as affecting the rights of the creditor of the vendor, is one of fact, to be determined in each case from the evidence introduced at the trial, and where a finding on such question is based on conflicting evidence it will not be disturbed, unless manifestly wrong.

ERROR from the district court of Merrick county. Tried below before SULLIVAN, J.

W. T. Thompson, for plaintiffs in error.

John Patterson, contra.

HARRISON, J.

The defendants in error in this court were plaintiffs in the district court, where the action was originally commenced, and will hereinafter be referred to as plaintiffs and the opposing parties as defendants. The suit is one on the official bond of William H. Crites, of defendants, as sheriff of Merrick county, to recover of him and his bondsmen a sum named in the pleading as the value of certain personal property which it was claimed belonged to the plaintiffs, and of which, it was alleged, there was a wrongful seizure and sale by the sheriff under and by virtue of executions issued by the county judge of said county, and placed in the hands of the sheriff for service, to enforce judgments rendered in that court against Edward P. Berryman, William Patterson, and Charles W. Rhodes, one in favor of the Studebaker Manufacturing Company, one belonging to I. L. Elwood & Co., and also one in favor of the United States Wind Engine & Pump Company. All claims asserted in the action arising from the completed service of the executions issued on the judgments in favor of the last two of the creditors just mentioned were either settled or abandoned before the time of the trial in the district court and did not further figure or appear in the controversy. The answer

contained a denial of any wrongful character of the seizure under the executions, also denied the plaintiffs' ownership of the property seized and sold, and alleged, in substance, that plaintiffs claimed such ownership under and by virtue of a pretended sale, evidenced by a bill of sale to them by Berryman, Patterson & Co., a firm composed of Edward P. Berryman, William Patterson, and Charles W. Rhodes, conducting a wholesale and retail hardware business in Central City, Nebraska, of the goods levied upon and sold by the sheriff, together with all the other goods then in stock in the business and the book accounts of the firm; that the firm of Berryman, Patterson & Co. was, at the time of such transfer to plaintiffs, insolvent and known by plaintiffs to be so; that the transfer from the firm to plaintiffs was made with the intent to hinder and delay its creditors in the collection of claims against it and to defraud its creditors, which purpose and intention was known to plaintiffs herein; that the consideration passing from plaintiffs to Berryman, Patterson & Co. in the transfer between them was in amount $30,000, which was not paid in cash, but their three notes were given and received, each for $10,000, one of which matured in one year after its date, one in two years, and one in three years after date. It was further pleaded that at the time of the sale by the firm to plaintiffs, the Studebaker Manufacturing Company creditor was a creditor of the firm of Berryman, Patterson & Co. There was also stated to be a relationship existing between each of the plaintiffs and a member or members of the firm of Berryman, Patterson & Co. In the reply filed the alleged relationship of the plaintiffs, respectively, to members of the firm of Berryman, Patterson & Co. was admitted, and all allegations of fraud or fraudulent intent as entering into the transaction of the sale of stock of hardware, etc., were denied. In a trial of the issues the jury returned a verdict favorable to the contentions of plaintiffs, and after defendants' motion for new trial was heard and overruled a judgment

was rendered on the verdict, hence the error proceedings on the part of the defendants.

It is claimed by counsel that certain facts were undisputed, among which are recited the following: That at the time of the transfer of the stock of goods, etc., to plaintiffs the Studebaker Manufacturing Company was a creditor of the firm making the transfer; that Levi C. Hart, one of the plaintiffs, was a brother-in-law of Charles W. Rhodes, a member of the firm of Berryman, Patterson & Co., and Anson L. Havens, the other plaintiff, bore a like relationship to Edward P. Berryman, another member of said firm; that Charles W. Rhodes, at the date of the transfer of the stock, was indebted to Hart in the sum of $4,000, and that Berryman, Patterson & Co. then owed Hart $9,500; that at the time of the sale Edward P. Berryman, at Hart's request, made a report, which was examined by Hart before the sale, of the assets and liabilities of the firm of which he, Berryman, was a member, which showed the aggregate amount of the indebtedness of the firm to be about thirty-one or thirty-two thousand dollars, and the assets consisted of the stock of goods, book accounts, bills receivable, etc., of the value of $30,000, and real estate of the value of $10,000 (this real estate was not sold or conveyed to plaintiffs); that of the consideration for the transfer of the stock, etc., in amount $30,000, no cash was paid, but three notes of $10,000 each were given, maturing in one, two, and three years from date; and it is asserted by counsel that, in view of the undisputed facts, the verdict and judgment ought not, and cannot, under the rules of law applicable and governing, be allowed to stand, but must be set aside, and states his further contention in this connection as follows:

"We maintain the law to be:

"1. That a debtor, while the owner of property, sustains two distinct relations in regard to it, viz., that of owner, and that of *quasi*-trustee for his creditors.

"2. That all persons who have notice that a proposed

vendor has creditors and is in failing financial circumstances, or is insolvent, are bound to take notice of such trust relation in their dealings with reference to the property of such vendor, and when the natural and probable effect of a sale of the property of the vendor under such circumstances might reasonably be understood to hinder, delay, or defraud the creditors of the vendors in the collection of their claims, such sale will be held to have been made in bad faith, and be null and void as to creditors. This proposition follows as a legal corollary to the first, and is substantially the rule as announced by this court in the case of *Beels v. Flynn*, 28 Neb., 575."

In relation to what is set forth under the heading "1," we will say that we do not understand that an individual or a partnership, the owner of property, even if insolvent, holds such property in trust for general creditors, in the true sense of the term, merely because the parties stand to each other in the relation of debtor and creditor. We understand it to mean no more, when used in such connection, than that the debtor will, in all his dealings with the property, be fair and honest, and will apply it, or its proceeds, in payment of any existing debts, in the manner and to the extent honesty and uprightness among men demand. The creditors do not, merely because they are creditors, have any lien, either legal or equitable, which is enforceable or recognized as such, or which interferes with the debtor's sale and disposal of property in any manner, provided it is not fraudulent or with intent to defraud creditors, or to hinder and delay them in the collection of their claims. The case of *Beels v. Flynn, supra*, the decision in which is relied upon as supporting the positions of counsel as stated in the quotations herein from his brief, is similar to the one at bar mainly in the fact that the payment of the consideration in the sale attacked in that case was almost entirely deferred and evidenced by the note of the purchaser, which, it was observed, might have the effect to hinder and delay creditors of the seller. The further fact was shown

in *Beels v. Flynn* that on the day succeeding the one of the sale the purchaser was informed by one or more of the creditors of the party from whom he bought that the creditors would probably try to reach and collect the amount due on the note, and he immediately went to the other party and traded him some land for the note.

In the opinion in the case of *Nebraska Moline Plow Co. v. Klingman*, 48 Neb., 204, it was held: "The fact that a copartnership, largely indebted, sells most of its property and its business to one of small means, in consideration of a small amount of cash and the purchaser's promissory notes, is a circumstance tending to show that the transaction was fraudulent, but not conclusive, nor, alone, sufficient evidence that it was fraudulent." It will be gathered from such of the main facts as are stated in what we have just quoted that the point raised for consideration and adjudication was like unto that presented in the case of *Beels v. Flynn*, and also in the case at bar. In the body of the opinion, written by RAGAN, C., it was said: "Counsel for the plow company insist, however, that as the evidence shows the consideration for the sale was $200 in money and the remainder of the purchase price was the notes of the purchaser, the court should therefore say the transaction was fraudulent; and counsel insist that *Beels v. Flynn*, 28 Neb., 575, supports their contention, where a sale is made by a debtor of all his property, for a part cash and the remainder in the promissory notes of the purchaser, such transaction is conclusive evidence of a fraudulent intent. In the case cited a debtor had sold all his property to Beels in consideration of some cash and the promissory notes of Beels. Flynn, as sheriff, seized the property under attachment process and sold it, and Beels sued the sheriff for conversion. The sheriff justified the seizure by virtue of his attachment writs, and defended on the ground that the sale to Beels was fraudulently made by the debtor, with the intention on the part of the debtor and Beels to defraud the latter's creditors. The jury found on this issue

for the sheriff, and this court affirmed the judgment. The only issue presented to the jury was whether the sale made by the creditor to Beels was made in good faith. The jury found that it was not, and the only question presented to this court on proceedings in error was the sufficiency of the evidence to sustain the finding of the jury. It is said in the syllabus that Beels is not a *bona fide* purchaser and not entitled to protection. But this was no more than saying that the evidence sustained the finding of the jury, that Beels was not a *bona fide* purchaser. Whether Beels was a *bona fide* purchaser or not was not a question of law, but of fact. The jury found that he was not a good-faith purchaser and this court affirmed the judgment, and the opinion meant and means no more than that the evidence before the jury was sufficient to sustain its finding. It is doubtless true that the sale by one of all his property for some cash and the promissory notes of the purchaser, the seller at the time being in debt and the purchaser being a man of small means, is evidence of a fraudulent intent; but this court has never consciously held that such facts alone were conclusive evidence of fraud. To so hold would be to repeal the statute which has, wisely or unwisely, declared that intention to be a question for the determination of the jury or trial court, from all the facts and circumstances surrounding the transaction put in evidence in the particular case." So, in the case at bar, no one of the undisputed facts was conclusive evidence of the alleged fraud in the sale of the stock of goods, etc., nor were they when grouped together; but they were evidential circumstances tending to prove the allegations of fraud, but to be considered in connection with all the facts and circumstances of which there was evidence adduced in the trial of the cause. The main questions to be determined by the jury were whether the alleged fraud or fraudulent intent had been shown to have been an element of the transfer of the stock of goods and other property, and to the knowledge of, or

participated in by, the parties thereto. "Whether or not a transfer of property is fraudulent as against the creditors of the vendor is a question of fact, determinable solely upon the evidence adduced in each case." (*Goldsmith v. Erickson*, 48 Neb., 48.) The evidence was conflicting. There were many facts and circumstances which tended to support the pleadings of fraud. On the other hand, there was much in the evidence which would induce a contrary belief. We have carefully perused and considered all the evidence, and it need not be quoted from or summarized here. Doubtless there was sufficient in it to have sustained a finding and verdict contrary to the one returned, but there was also sufficient to warrant the finding and verdict made, hence it will not be disturbed. The judgment of the district court must be

AFFIRMED.

L. D. DAVIDSON, APPELLANT, V. S. M. CROSBY ET AL., APPELLEES.

FILED SEPTEMBER 16, 1896. No. 6843.

1. **Fraud:** EVIDENCE. Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced on him.

2. ———: ———. The finding of a trial judge based upon conflicting evidence, when there is sufficient evidence to support it, will not be disturbed.

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

J. O. Detweiler and *John T. Cathers*, for appellant.

McClanahan & Halligan, *contra*.

HARRISON, J.

This action was commenced in the district court of Douglas county, the relief sought being the rescission of a contract of sale whereby the appellant purchased of appellees 155½ shares of the capital stock of the Commercial Directory Company, a corporation doing business in Omaha, the shares being of the face value of $100 each, and to secure a reconveyance to appellant, by appellees, of the title to certain real estate which had been passed to them during and as a part of the consideration moving to them in the transaction the basis of complaint; also the surrender by appellees of some promissory notes executed and delivered by appellant to appellees, evidencing a portion of the amount of the purchase price of said stock. It was further asked that appellees be restrained from further selling or disposing of the promissory notes, or conveying the lands to persons other than appellant. It appears that on July 1, 1892, the appellant and appellees, through an agent or broker, W. A. Spencer, concluded a sale or trade by which appellant became the owner and possessed of the shares of stock hereinbefore described, and paid therefor the sum of $6,100, as follows: $1,000 cash; conveyed to appellees the title to twenty acres of land situated in Polk county, Florida, valued at $1,200; also three lots in Ocala, Florida, valued at $2,100, less incumbrance of $600, which incumbrance was assumed and to be paid by appellant; one note executed by appellant in the sum of $100, due in thirty days from date, and another note for $300, maturing ninety days from date. For the balance of the consideration, $2,000, it is asserted by appellant that appellees were to accept the title to 123 acres of land situate in Suwannee county, Florida, if, as the result of an investigation by appellees in regard to its quality, etc., it proved to be as represented by appellant. If not, then appellees were to receive four promissory notes of $500 each, to mature, one in six, one in twelve, one in eighteen,

and one in twenty-four months, executed by appellant and delivered on the date of the sale to W. A. Spencer, to be held until appellees ascertained the facts concerning the land, and if it was determined to be as represented by appellant, then the four notes to be returned to him and the title to the land conveyed to appellees. If the land did not fulfill the representation, then the notes were to be given to appellees. Appellees assert, however, that it was to be optional with them whether they would accept a conveyance of the land or receive the notes, and that they concluded to take the notes, and that about two weeks subsequent to the time the deal was closed, so informed Mr. Spencer, who then gave the notes to them. The appellant, as a basis for his demand for the rescission of the sale or trade, alleged that the appellees, to induce him to enter into the contract, made certain false and fraudulent representations of and concerning the stock, its value, etc., which were believed and relied upon by him in making the purchase. The paragraph in which the facts in relation to which it was stated false representations were made were particularly and specifically designated reads as follows: "The defendants, to induce and persuade the plaintiff to enter into said agreement, falsely and fraudulently represented to the plaintiff that said capital stock was worth the sum of $50 per share; that the assets of said Commercial Directory Company were all good, genuine, legitimate, and collectible securities; that said assets were of the amount of $10,987.37; that the liabilities of said Commercial Directory Company were but $3,200, and no more, they, the said defendants, knowing at the time of making said representations the same to be false and untrue, and made the same for the purpose of cheating and defrauding this plaintiff."

The question of which party should prevail in the branch of the case in regard to the four notes of $500 each, and whether the possession of them was obtained by appellees in accordance with the terms of the con-

tract, or contrary thereto, and consequently wrongfully, was not urged by counsel for appellant in the argument or brief, and needs no further notice, but we will say that it is evident that the general finding in favor of appellees included one that the facts in respect to this contention were as asserted by appellees, and there was ample evidence to support such a finding. It is clear from a consideration of all the evidence bearing on the point of the alleged false representations by appellees that the stock was worth $50 per share, or one-half its face value; that if made, and false, it was not relied upon by appellant in making the trade and did not control his actions therein to any appreciable extent. He made calculations framed on other information and reached a conclusion of his own deduced therefrom which fixed for him the value of the stock and made an offer to purchase it, governed as to its worth by such conclusion, and finally succeeded in acquiring it at a valuation of between thirty-nine and forty dollars per share. The trial court made the following finding: "The court finds upon the issues joined for the defendants, and that the defendants did not obtain the money and property and notes described in plaintiff's petition by fraud and misrepresentation." The rule as to the proof in such cases is stated to be: "Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced upon him." (*Clark v. Tennant*, 5 Neb., 549; *Missouri Valley Land Co. v. Bushnell*, 11 Neb., 192; *Western Horse & Cattle Ins. Co. v. Putnam*, 20 Neb., 331; *Brown v. Herr*, 21 Neb., 113; *Dirkson v. Knox*, 30 N. W. Rep. [Ia.], 49.)

We have carefully examined all the evidence presented and do not deem it necessary to quote from it or make an extended statement of it here. That on the part of plaintiff tended to prove the allegations of fraud and deceit practiced by defendants to induce plaintiff to consummate the trade, while, on the other hand, that introduced on behalf of defendants was directed toward an effort to prove that no misrepresentations were made by

defendants; that plaintiff was not in any manner or to any extent deceived or misled by the statements of defendants in regard to the property involved in the transactions between them; that plaintiff did not rely, in making the trade, on any statements of defendants, and was not influenced thereby, and that the conditions and relations existing at the time of the trade, with reference to the parties and to the property, the knowledge of it possessed by the plaintiff or the means of obtaining such knowledge then afforded, were such as to effectually debar the plaintiff from any complaint of the nature of this, the foundation of the present action. The evidence was conflicting, but there was sufficient to sustain the finding of the trial judge, that fraud and misrepresentation on the part of the defendants had not been shown. (*Dirkson v. Knox, supra.*) This being true, the finding will not be disturbed and the judgment of the district court is

AFFIRMED.

IRVINE, C., took no part in the decision.

MARY E. OVERALL ET AL. V. JOHN A. MCSHANE.

FILED SEPTEMBER 16, 1896. No. 6797.

Judicial Sales: APPRAISEMENT: OBJECTIONS. Objection that the appraisement made as a part of the proceedings in a judicial sale is too low or too high must be made and, with a motion to vacate the appraisement, be filed in the cause in which the sale is about to be effected, before the sale. (*Vought v. Foxworthy*, 38 Neb., 790; *Burkett v. Clark*, 46 Neb., 466.)

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

David Van Etten and *Silas Robbins*, for plaintiffs in error.

Frank T. Ransom, contra.

HARRISON, J.

In an action commenced in the district court of Douglas county to foreclose a mortgage the case proceeded to decree of foreclosure, to enforce which an order of sale issued, sale was made, and a motion to confirm it filed. At this stage of the proceedings a motion to set aside the sale was presented on behalf of the principal defendants, the ground of the motion being that the appraisement of the property made and returned as a part of a complete and perfect judicial sale was too low. This motion was overruled and the motion to confirm the sale sustained. It is urged in this court that the trial court erred in not setting the sale aside. The sole question presented here, as in the trial court, was with reference to the appraisement, and the objection that it was too low was not made until after sale; to be available it should have been made, and the motion to vacate the appraisement filed in the case, before the sale took place. (*Vought v. Foxworthy*, 38 Neb., 790; *Burkett v. Clark*, 46 Neb., 466.) We have, however, in this case examined the record and evidence before the judge of the district court when he made the ruling to which complaint is here pressed, and conclude that his action in overruling the motion to set aside the sale was proper in view and consideration of what was before him in regard to the appraisement and its amount. It follows that the order confirming the sale must be

AFFIRMED.

IRVINE, C., took no part in the consideration of the case.

WILLIAM SPURCK V. CLARA DEAN.

FILED SEPTEMBER 16, 1896. No. 6827.

1. **Bill of Exceptions:** AUTHENTICATION. A bill of exceptions should be authenticated by the certificate of the clerk of the trial court to entitle it to examination and consideration in the supreme court.
2. **Conflicting Evidence:** REVIEW. Questions of fact, and upon conflicting testimony, are to be decided by the trial jury, and a verdict will not be set aside on the ground of the want of sufficient evidence to support it, unless the want is so great as to show that the verdict is manifestly wrong. (*Sycamore Co. v. Grundrad*, 16 Neb., 529.)
3. **Evidence:** ACTION FOR WAGES. Where, in an action to recover an amount alleged to be due the plaintiff as wages for work and labor performed at an agreed price, there is a conflict in respect to the amount agreed upon, evidence of the value, at the time of the contract, of the work performed is competent and admissible.

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

R. D. Sutherland, for plaintiff in error.

Searle & Coleman, *contra*.

HARRISON, J.

The plaintiff instituted this action to recover of defendant an amount alleged to be due as compensation for work and labor performed by plaintiff for defendant during the times stated in the petition filed, wherein there also appeared an allegation that the work was done at a stipulated or agreed price per week. Issues were joined and tried and the result was a judgment for plaintiff, seeking a reversal of which defendant has prosecuted error proceedings to this court.

Of the alleged errors the one mainly urged and relied upon in the argument as being fatal to the judgment rendered is that the verdict was not sustained by suffi-

cient evidence. A determination of this question in this, as in any other case, necessitates an examination of the evidence as preserved and presented in a bill of exceptions. What purports to be such bill in the present case is attached to the record, but is not authenticated by the certificate of the clerk of the district court in which the cause was tried; hence it is not properly before us for examination and is not entitled to be considered. (*Romberg v. Fokken*, 47 Neb., 198; *Childerson v. Childerson*, 47 Neb., 162; *Romberg v. Hediger*, 47 Neb., 201.) We have, however, searched through it, and discover a conflict in the evidence in respect to the fact as to which it was contended it was unsatisfactory, but also conclude that there was sufficient to support the verdict returned by the jury, from which it follows that the verdict will not be disturbed. (*Sycamore Co. v. Grundrad*, 16 Neb., 529.)

During the progress of the trial of the cause evidence was admitted of what was the value of the services performed by the plaintiff at the time when the contract was made and during its performance. It is urged that inasmuch as the plaintiff claimed that the consideration to be paid for the labor had been agreed upon was a fixed sum, any evidence of its worth was incompetent and irrelevant and should not have been allowed. No objections were interposed during the trial to any of this evidence which it is claimed should not have been admitted, but whatever the condition of the record in this respect, there was a conflict in the evidence in relation to the amount of the price agreed upon to be paid and received for the labor, and it was competent to show what the work was worth when the contract was made, and such evidence as was admitted was not erroneous. (*Allison v. Horning*, 22 O. St., 138; *Swain v. Cheney*, 41 N. H., 232; *Fry v. Tilton*, 11 Neb., 456.) The judgment of the district court is

AFFIRMED.

D-70 Neb 705, 711

ADDISON B. JOHNSTON ET AL. V. MILWAUKEE & WYOMING INVESTMENT COMPANY.

FILED SEPTEMBER 16, 1896. No. 7367.

1. **Instructions:** ASSIGNMENTS OF ERROR. Errors in respect to giving instructions must be separately assigned in the motion for new trial. If assigned in group, and any one of the group against which the assignment is directed is without error, the assignment must be overruled. (*Spears v. Chicago, B. & Q. R. Co.*, 43 Neb., 720.)

2. **Trial:** SPECIAL FINDINGS. "When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly." (Code of Civil Procedure, sec. 294.)

3. ———: ———: REVIEW. Where there are several special findings of facts, and among them one which can but be and is a conclusion or an inference drawn from the others, and it is manifestly wrong, it will be disregarded.

4. **Principal and Agent:** RATIFICATION. The ratification by a principal of the unauthorized act of an agent may be either express or implied. (*Taylor v. Conner*, 41 Miss., 722.)

5. ———: ———. The acceptance or retention by the principal, after knowledge of the facts, of the fruits of an unauthorized act of an agent is a ratification of the agent's act, and it relates back to the time of the act and makes it as if the agent had been empowered to perform it at its date, and the principal is bound in all respects as if he himself had been the actor. (*Hughes v. Ins. Co. of North America*, 40 Neb., 627.)

6. ———: ———. If the principal desires to repudiate the unauthorized act of his agent, he must, as soon as he acquires knowledge of the facts, return, or tender a return, of any benefits by him received as the proceeds of such acts, or be held to have ratified them.

7. ———: ———: PLEADING: EVIDENCE. Proof of the ratification by the principal of the unauthorized acts of the agent was competent in an action of replevin under an answer of general denial. (*Merrill v. Wedgwood*, 25 Neb., 283.)

8. **Unauthorized Sale by Agent:** RETENTION OF PROCEEDS: RATIFICATION: REPLEVIN: PLEADING AND PROOF. In the case at bar plaintiff commenced an action of replevin to recover of the defendants certain cattle, the possession of which had been acquired by defendants through an alleged unauthorized sale of the cattle to them by an agent of plaintiff. The defendants' answer was a gen-

eral denial. After the commencement of the action, but before trial, the plaintiff gained knowledge that it had received the benefit of a portion of the proceeds of the unauthorized sale. *Held*, That it should then have returned to the defendants so much of the proceeds of the sale as had been applied to its benefit, or tendered such return, and its failure to do so would be a ratification of the sale, which related back to its inception, and which could be proved on the trial by defendants under the general denial and without the filing on their part of a supplemental answer setting up such ratification.

9. **Assignments of Error:** REVIEW. The questions passed upon in the former opinion were, owing to the defective assignment of errors in the motion for a new trial, not properly before this court and need not now be re-examined.

REHEARING of case reported in 46 Neb., 480.

The facts and issues appear in the opinion and in the former reports of the case in 35 Neb., 554, and 46 Neb., 480.

John L. Webster, for plaintiffs in error:

Under the seventh, eighth, ninth, and tenth special findings of fact the plaintiff must be held to have ratified the sale of the cattle and judgment should have been entered for the defendants. (*Cook v. Tullis*, 18 Wall. [U. S.], 338; *Hughes v. Ins. Co. of North America*, 40 Neb., 627; *Starks v. Sikes*, 8 Gray [Mass.], 609; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H., 205; *Planters Bank of Mississippi v. Sharp*, 4 S. & M. [Miss.], 75; *McMahan v. McMahan*, 13 Pa. St., 376; *Charles v. State*, 11 Ark., 389; *United States Express Co. v. Rawson*, 106 Ind., 215; *Goss v. Stevens*, 32 Minn., 472; *Ruggles v. Washington County*, 3 Mo., 496; *Shoninger v. Peabody*, 57 Conn., 42; *Russ v. Telfener*, 57 Fed. Rep., 973; *Persons v. McKibben*, 5 Ind., 261.)

Failure to return or tender back the money applied by the agent Adams in payment of debts owing by the Milwaukee & Wyoming Investment Company was a ratification of the sale of the cattle. (*Perkins v. Boothby*, 71 Me., 91; *Mayor of Nashville v. Ray*, 19 Wall. [U. S.], 484; *Taylor v. Conner*, 41 Miss., 722; *First Nat. Bank of Las Vegas v.*

Oberne, 121 Ill., 25; *Baer v. Lichten*, 24 Ill. App., 311; *Thompson v. Peck*, 115 Ind., 512; *Moriarity v. Stofferan*, 89 Ill., 528; *Harding v. Parshall*, 56 Ill., 219; *Nichols v. Shaffer*, 63 Mich., 599; *First Nat. Bank of Trenton v. Badger Lumber Co.*, 54 Mo. App., 327.)

Even if the plaintiff should have offered at the trial to refund to defendants the amount of money, the use and benefit of which they have enjoyed, it would be too late to avoid the ratification. (*Southern Oil Works v. Jefferson*, 70 Tenn., 581.)

The defendants had the right to prove an act of ratification which occurred after the suit was brought. (*Gelatt v. Ridge*, 117 Mo., 555.)

It was not necessary for the defendant, by supplemental answer, to plead ratification. (*Towne v. Sparks*, 23 Neb., 142; *Merrill v. Wedgwood*, 25 Neb., 283; *Cool v. Roche*, 15 Neb., 25; *Blue Valley Bank v. Bane*, 20 Neb., 294; *Richardson v. Steele*, 9 Neb., 483; *Long v. Osborn*, 59 N. W. Rep. [Ia.], 14; *Eadie v. Ashbaugh*, 44 Ia., 520.)

J. W. Sparks and *George H. Noyes, contra:*

The statutes of Wyoming rendered the sale to defendants void. (*Holman v. Johnson*, 1 Cowp. [Eng.], 343; *Timp v. Dockham*, 32 Wis., 146; *Yates v. Fassett*, 5 Den. [N. Y.], 21; *Tucker v. Mowrey*, 12 Mich., 378; *Petrie v. Hannay*, 3 T. R. [Eng.], 422; *Sowles v. Welden Nat. Bank*, 61 Vt., 375; *Melchoir v. McCarty*, 31 Wis., 252; *Brazee v. Bryant*, 50 Mich., 136; *Winfield v. Dodge*, 45 Mich., 355; *Dodson v. Harris*, 10 Ala., 566; *Hauf v. Northwestern Masonic Aid Association*, 76 Wis., 450; *Poulton v. London & S. W. R. Co.*, L. R., 2 Q. B. [Eng.], 534; *Clark v. Metropolitan Bank*, 3 Duer [N. Y.], 241.)

References to questions relating to ratification: *Flagg v. Flagg*, 39 Neb., 229; *Pemigewasset Bank v. Brackett*, 4 N. H., 557; *Hornfager v. Hornfager*, 6 How. Pr. [N. Y.], 13; *Hope v. Brinckerhoff*, 4 Edw. Ch. [N. Y.], 687; *Hoyt v. Sheldon*, 4 Abb. Pr. [N. Y.], 59; *Ormsbee v. Brown*, 50 Barb.

[N. Y.], 436; *Farwell v. Myers*, 59 Mich., 179; *Smith v. Phelan*, 40 Neb., 765; *Kavanaugh v. Brodball*, 40 Neb., 875; *Marshall v. Bunker*, 40 Ia., 121; *Campbell v. Williams*, 39 Ia., 646; *Cassell v. Western Stage Co.*, 12 Ia., 47; *Kingsbury v. Buchanan*, 11 Ia., 387; *Cary v. Hewitt*, 26 Mich., 228; *Merrill v. Denton*, 73 Mich., 628; *Belden v. Laing*, 8 Mich., 500; *Clark v. West*, 23 Mich., 242; *Wilson v. Montague*, 57 Mich., 638; *Bartlett v. Goodwin*, 71 Me., 350; *Powell v. Henry*, 96 Ala., 412; *Wittenbrock v. Bellmer*, 57 Cal., 12; *Read v. Buffum*, 79 Cal., 77; *Singer v. Schilling*, 74 Wis., 369; *Lee v. Burnham*, 82 Wis., 209; *Thacher v. Pray*, 113 Mass., 291.

HARRISON, J.

This, an action of replevin, was commenced in the district court of Merrick county by the Milwaukee & Wyoming Investment Company, a corporation, to recover the possession of 250 head of cattle. It was claimed that the cattle had been delivered to, and were in the possession of, the defendants in the suit, pursuant to an unauthorized and attempted transfer to them made by a person at the time in charge of the stock ranch of plaintiff in Wyoming. A trial of the issues joined resulted in a verdict and judgment for the defendants. The judgment then rendered, in error proceedings to this court by the plaintiff, was reversed and the cause remanded to the district court, where, in a second trial of the litigated questions, the plaintiff was successful and was accorded a judgment. The case was again removed to this court, this time on behalf of the defendants, and, on hearing, the judgment was reversed and the case ordered remanded. A motion for rehearing was interposed for plaintiff and, on presentation, was sustained, since which action the case has been again submitted for consideration and decision of the questions raised by the petition in error.

In the opinion written when the cause was first submitted to this court a somewhat extended and detailed

statement of the facts was inserted (see *Milwaukee & Wyoming Investment Co. v. Johnston*, 35 Neb., 554), and it will be unnecessary to restate them here. The decision rendered as the result of the consideration of the questions presented on its second appearance here is reported in 46 Neb., 480, and entitled *Johnston v. Milwaukee & Wyoming Investment Co.* In the syllabus to the first opinion, *Milwaukee & Wyoming Investment Co. v. Johnston*, it was stated:

"1. Where a principal empowers an agent to transact business with respect to which there is a well defined and publicly known usage the presumption is, in the absence of facts indicating a different intent, that such authority was conferred in contemplation of such usage, and persons dealing with such agent in good faith will not be bound by limitations upon such usual authority.

"2. But such usage, to bind a principal, must have existed for such a time, and become so widely and generally known, as to warrant the presumption that he had it in view at the time of the appointment of the agent.

"3. The M. & W. I. Co., a Wisconsin corporation owning a cattle ranch in Wyoming, appointed one A. its agent in Wyoming, with limited power, viz., to hire and pay for the necessary help, and pay the current expenses with money remitted on his statement, and to care for and round up the cattle and ship them, when fit for market, to Chicago in care of a particular commission house. In an action of replevin by the company aforesaid against J. & R., to recover cattle claimed by the latter to have been purchased from A. on the ranch aforesaid, held, error to receive evidence on the part of the defendants to prove that, at the time they purchased the cattle from A., it was the custom or usage of managers of cattle companies doing business in Wyoming to sell the cattle from the ranches of such companies, in the absence of any evidence that the plaintiff company had knowledge of such usage."

And in the body of the opinion appears the following: "Adams was given no authority to ship cattle elsewhere,

nor was he authorized to sell or dispose of the cattle at any time or in any way or place. He had specific instructions from the officers of the plaintiff company not to sell any cattle from the ranch. These instructions were verbal, given him at the time of his employment and never modified thereafter. In addition to the above terms of hiring there was no official or corporate action appointing Adams as manager, and no record in the minutes of the company of his employment;" and further: "Since the judgment must be reversed, for reasons stated, it is not deemed necessary to consider the other questions presented."

The headnotes of the opinion in *Johnston v. Milwaukee & Wyoming Investment Co., supra,* were as follows:

"1. One dealing with the agent of a business corporation, in a matter relating to its business operations and not involving its corporate functions, is not charged with notice of its by-laws.

"2. Therefore, the apparent authority of such agent cannot be extended or restricted by such by-laws in the absence of actual notice thereof.

"3. Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped, as against such third person, from denying the agent's authority. Whether or not an act is within the scope of the agent's apparent authority is to be determined under the foregoing rule as a question of fact, from all the circumstances of the transaction and the business.

"4. Evidence of such apparent authority is not restricted to proof of general custom, or to proof that the agent had previously performed similar acts to the knowledge of the principal. The nature of the business usage not amounting to a general custom, and the fact,

if it exists, that the principal is at a great distance and the agent apparently entirely in charge of the business, may in proper cases be, among other things, elements for consideration."

The conclusions announced here were the results of a consideration of one portion of the trial court's charge to the jury and some special findings submitted to that body. The paragraph of the instructions which was examined was quoted in the body of the opinion. At the close of the opinion it was stated: "It follows that the special findings referred to were insufficient whereon to found the judgment, and that the instruction quoted was erroneous."

The motion for rehearing, to the extent we need notice it, was based upon the ground that the action of the trial court in giving any portion of the charge to the jury was not open to review, there being no sufficient assignment in the motion for a new trial of any alleged errors in the instructions. The motion for new trial, in the particular to which we have just alluded, was in terms as follows:

"5. The court erred in giving the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth paragraphs of the instructions given on its own motion."

Some of the instructions included in the foregoing assignment of error were correct. The assignment of error was insufficient and must be overruled. (*Spears v. Chicago, B. & Q. R. Co.*, 43 Neb., 720.) We will say that at the former hearing of the case, in the arguments, either oral or by brief, our attention was not specifically directed to the manner in which error had been assigned, in the motion for a new trial, in regard to the instructions to the jury, and in our subsequent considerations of the questions involved and in the preparation of an opinion this particular point escaped notice and hence was not accorded the weight and force to which it was entitled.

It was properly presented and urged to the judge of

the trial court that, under certain of the special findings of facts contained in the special verdict of the jury, the defendants were entitled to a judgment in their favor, since the special findings referred to established a ratification by the plaintiff of the sale of the cattle by Adams, the agent, to defendants. Such special findings were as follows:

"7. Did Thomas R. Adams, within the scope of his authority, pay out for the plaintiff's use in connection with the running of the Wyoming ranch any of the money received from the defendants for the cattle in question?

"A. Yes.

"8. If said Adams paid out any of said money for such purpose, how much did he so pay out?

"A. Amount shown by checks, which is five hundred twenty-eight and 80-100 dollars ($528.80).

"9. If said Adams made such payments, when did the plaintiff learn that fact?

"A. February 15, 1890.

"10. If Adams made such payment out of said money, has the plaintiff ever tendered such money back to the defendants?

"A. No."

The petition in the action was filed December 14, 1889. It will be noticed that the jury answer that it was of date February 15, 1890, that plaintiff first learned that Adams had paid, in the interest of and for plaintiff, a sum of money received from defendants in payment for the cattle in controversy, that its discovery of such fact was subsequent to the commencement of this action.

The petition of plaintiff was in the usual form of petitions in actions of replevin. The defendant's answer was a general denial. In the statement of facts set forth in the opinion in *Johnston v. Milwaukee & Wyoming Investment Co., supra,* after noticing the payments for these cattle by defendants to Adams, by checks and their deposit in a bank at Cheyenne to the credit of Adams, it is further said: "This money was all checked out by Adams for

his own use." However this may have appeared in the record of the first trial in the district court, the jury, from the evidence adduced at the second trial, made the findings on this point which we have quoted herein, and they were sustained by the evidence. In section 292 of the Code of Civil Procedure it is stated in relation to special findings of facts or special verdicts, they must present the facts as established by the evidence, and in such manner that nothing remains to the court but to draw from them conclusions of law. Section 294 of the Code is as follows: "When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly." On the subject of ratification by a principal of the unauthorized acts of an agent (if it be conceded, for the sake of argument, that the act of Adams, the sale of the cattle, was unauthorized, which we do not now decide) this court thus expressed the rule: "The acceptance by a principal of the fruits of an unauthorized contract made by his agent is a ratification of such agent's conduct, and said ratification relates back to the date of the performance of the act ratified, and the principal is bound by the effects thereof, and the results flowing therefrom, as much so as if he had himself performed the act." (*Hughes v. Ins. Co. of North America*, 40 Neb., 627.) "The ratification * * * operates upon the act ratified precisely as though authority to do the act had been previously given." (*Cook v. Tullis*, 18 Wall. [U. S.], 338; *Russ v. Telfener*, 57 Fed. Rep., 973; Mechem, Agency, sec. 167.) "Ratification may be express or implied." (*Taylor v. Conner*, 41 Miss., 722.) The principal, after knowledge of the facts, must return, or tender a return, of the proceeds or benefits received by him by virtue of the unauthorized acts of the agent, or be held to have ratified the acts; and this applies to corporations, as principals, equally as to persons. (*Perkins v. Boothby*, 71 Me., 91; *Nichols v. Shaffer*, 63 Mich., 599; *First Nat. Bank of Trenton v. Badger Lumber Co.*, 54 Mo. App., 327; *Persons v. McKibben*, 5 Ind.,

261; *First Nat. Bank of Las Vegas v. Oberne*, 121 Ill., 25.) Proof of a ratification of the agent's acts by the principal, if matter of defense, was competent in an action of replevin under an answer of general denial. Under a general denial, in an action of replevin, a defendant may introduce "evidence of any special matter which amounts to a defense to the plaintiff's cause of action." (*Merrill v. Wedgwood*, 25 Neb., 283.)

But it is urged that in an action of replevin the rights of the parties are to be determined as of the time of the commencement of the suit, and that the finding of the jury is that the defendant did not obtain knowledge of its debts having been paid by Adams, the agent, with a portion of the proceeds of the sale of the cattle to defendants until after it had instituted the suit, and further, in this connection, that if competent, it could only have been made so by the filing of a supplemental pleading on the part of defendants. To this it must be said that when the plaintiff gained knowledge of its reception of the benefit of a portion of the proceeds of the sale of the cattle to defendants and did not return what it had received, or tender a return, it ratified the act of the agent, unauthorized though it may have been, and the ratification related back to the inception of the act, and it was as if the authority had been previously given, except rights of third parties had intervened. (*Cook v. Tullis, supra.*) In the action of replevin the defendants were entitled to give evidence of the ratification. A supplemental pleading would have furnished plaintiffs no greater knowledge in regard to the defense than they possessed before it was filed, and would have raised no right in defendants to other or additional defenses than they were entitled to make under the general denial. Nor need the fact of the filing of such pleadings, or the want of it, materially affect an adjustment by the court of the costs. Nor do we think we are straining the measure of justice in so holding. It was certainly but just and right, if the plaintiff discovered that the agent, Adams, had used a part of the

money paid to him by defendants in the cattle transaction in paying the plaintiffs' debts, and the jury has said it was so by its findings, and that Adams did it within the scope of his authority, that plaintiff should return the amount so used for its benefit, or tender a return of it, if it desired to repudiate the whole of the act of the agent when he sold the cattle to defendants as unauthorized, and this whether the discovery was made before or after commencement of the action to recover the cattle. "The ratification of the unauthorized agreement of an agent relates back to its inception, and in an action brought thereon such ratification need not be pleaded, but may be shown in proof of the agreement." (*Long v. Osborn*, 59 N. W. Rep. [Ia.], 14.) It was competent for the defendants in this action to prove the ratification which occurred on the part of plaintiff after the commencement of this suit, and without filing a supplemental answer. (*Persons v. McKibben*, 5 Ind., 261; *Gelatt v. Ridge*, 117 Mo., 555.)

We have examined the opinion in the case of *Wittenbrock v. Bellmer*, 57 Cal., 12; also, *Read v. Buffum*, 79 Cal., 77, and the note to the opinion in the case of *Persons v. McKibben*, 61 Am. Dec., 85, to all of which attention was directed by counsel, and have given to the reasoning therein contained due weight, but do not consider it sufficiently forcible to govern our conclusions in the present case. It is true that the jury made a further finding on this same subject, the question which produced it and the answer being as follows: "If you find that Adams so paid out and appropriated to plaintiff's use and benefit some of the money received by him from defendants for the cattle in controversy, and that plaintiff, since this suit was commenced, discovered that fact and has not paid or tendered back to the defendants the money so paid out and appropriated, state whether the plaintiff has, by reason thereof, ratified the sale of the cattle by Adams to the defendants. Answer: No." If it be conceded that when the jury had reached the conclusions on this subject which it had announced in its an-

swers to the previous questions, and which we have hereinbefore quoted, that it but amounted to evidence of a ratification, from which an inference of ratification might be drawn, and was yet a question of fact to be submitted to the jury for their determination, it must be said that it was one as to which the conclusion was irresistible that there could be but one true one, *i. e.*, that there had been a ratification. The answer to the eleventh paragraph was manifestly wrong; it could be but a conclusion from the other findings, was dependent upon them for its existence, and could not be different and directly to the contrary of its constituents, the facts on which it was predicated, and hence it must, in this consideration, be disregarded.

It is urged that the case falls within the rule announced in the case of *Thacher v. Pray*, 113 Mass., 291, wherein it was held: "One without authority sold the plaintiff's chattel to the defendant, receiving in payment a bank check, which he indorsed and gave the plaintiff in payment of a debt he owed him. The plaintiff, in ignorance of the sale, collected the check and applied the proceeds to the payment of that debt. In an action to recover the value of the chattel, held, that the plaintiff's receipt and collection of the check were not a ratification of the sale, and that he had a right to appropriate the check to the extinguishment of the debt in payment of which it was given him." In the case referred to it appeared that one Gray, having in his possession a horse belonging to the party, afterwards plaintiff in the action, made an unauthorized sale of the horse to a third person, receiving in part payment therefor a check in the amount of $100. Gray was at the time indebted to the owner of the horse for some potatoes which he had purchased, and in partial payment of the account indorsed the check for $100 and forwarded it by letter to his creditor, who received it and gave Gray credit for its amount on the potato account. All this was done before the creditor became aware of the fact of the unauthorized sale of his horse by Gray,

and that the check for $100 had been derived from such sale. Subsequent to his discovery of the sale of the horse, and that the check for $100 was a portion of the proceeds of the sale, the owner commenced an action against the party who purchased the horse from Gray to recover its value, and refused to return the $100 to the defendant, and the supreme court held as we have just quoted. If we are governed alone by the facts as presented in the special findings on the subject, as, indeed, we must be, then there is a very important and an essential element of the Massachusetts case, and one upon which, to a large extent, the decision hinges, that is entirely lacking in this case, *i. e.*, the payment of an indebtedness by the agent to the principal with the funds derived from the sale of the horse. If we look beyond the special findings and go back to the evidence, the result of our explorations in behalf of the contentions of plaintiff will afford substantially no greater assistance. It appeared in evidence that when Adams was given charge of the ranch of plaintiff, it was of his instructions that he should send a report every month to the office of the company at Milwaukee, in which should be stated the amount of wages due the cowboys and other employes of the ranch for the current month, also the amounts of bills for groceries and supplies of all kinds, and all other expenses, of any nature, incurred necessarily in conducting the ranch, and a draft would be sent to him by the treasurer in such sum as was required, to be by him cashed and the money properly disbursed. It is also claimed that there was evidence to show that Adams had not applied some of the funds sent him by the company to the purposes for which they were intended and forwarded, but had appropriated them to his own use and left the bills unpaid, and that he had thus become indebted to the company; that the bills which he paid with the money obtained from defendants for the cattle were the particular ones for the payment of which money had been sent him by the company, and wrongfully used by Adams; that his

payment of them by the money received from defendants in the unauthorized sale of the cattle to them operated a discharge of his obligations, paid his indebtedness to the company, and hence the company's reception and retention of the money so paid could not and did not work a ratification of the sale of the cattle. Whether this would be a tenable position, as we view it, we are not now called upon to decide. We have read the record carefully and have not discovered any evidence to the effect that any money was ever sent to Adams to pay the specific items of account or expenses which he did pay with the money which defendants paid him for the cattle. There are some general statements that he had forwarded reports of expenses and funds had been sent him to pay the accounts shown in the reports, but whether the items referred to had ever been included in any of the reports or any money sent him to meet them does not appear. It was shown that Adams had received drafts sent to him by the treasurer of the company, and it was also shown that he had an account with a bank or banks, not in the name of the company, but at all times in his own name; that he had deposited drafts sent to him by the company in the bank to his own credit, and that he drew checks against this account to pay expenses of the business of the company at the ranch, and it is not shown whether all of it was applied in the proper direction or not. In fact there was no evidence to sustain a misappropriation by Adams of any sum of money sent to him by the company. There were some general statements from which such an inference might possibly be drawn, but there was nothing as to any specific sum or sums sufficient to make the basis for a certain and ascertained claim, such as was necessary to warrant the assertion that in paying the bills of the company with the money obtained from defendants, Adams was paying such debt to the company. This element not being present in this case, the rule in the Massachusetts case is not applicable or governing herein. It follows from what has been said that the

special findings of facts were inconsistent with the general verdict, and the trial court erred in rendering judgment herein for the plaintiff.

As we have before expressed, the matters passed upon in the opinion which followed the former hearing were not, owing to the defective assignment of error in relation to the instructions, properly before the court, and hence we need not now re-examine them. The judgment of the district court is reversed and the case remanded.

REVERSED AND REMANDED.

J. L. WHITE, APPELLEE, V. ATLAS LUMBER COMPANY, APPELLANT.

FILED SEPTEMBER 16, 1896. No. 6674.

1. **Contracts:** DEFAULT: FORFEITURE: WAIVER. Where time is made the essence of a contract and a forfeiture is provided in case of default, the acceptance of part of overdue payments on the contract is a waiver of the right to declare a forfeiture as to all defaults in payments then existing.

2. **Mortgages:** IMPROVEMENTS BY MORTGAGEE: RENTS. A mortgagee of real estate in possession before foreclosure, in the absence of an express or implied agreement upon the subject, is not entitled to any credit for permanent improvements made by himself, but he is liable for the net rents and profits which he has received, or which he might have received by the exercise of reasonable care.

3. ———. *Higginbottom v. Benson*, 24 Neb., 461, distinguished.

4. ———: INSURANCE: TAXES. A mortgagee is entitled to be reimbursed for insurance premiums and taxes paid, with interest thereon.

APPEAL from the district court of Frontier county. Heard below before WELTY, J.

W. S. Morlan, for appellant.

Cobb & Harvey, contra.

NORVAL, J.

There is but little controversy as to the facts in this case. On the 22d day of September, 1887, the plaintiff, J. L. White, and E. E. Brannon purchased of A. G. Hagadorn lot 6, in block 24, of the village of Curtis, agreeing to pay therefor $650, as follows: Fifty dollars in cash and the sum of $200 in four equal monthly payments of $50 each, and to assume a mortgage on the premises for $400, drawing ten per cent interest, owned by Myra Cropsey. Hagadorn, at the time of the purchase, executed a bond conditioned for the conveyance of the lot by warranty deed upon the above payments being made. Immediately thereafter White and Brannon commenced the erection of a house on the lot, purchasing the materials of Howard Bros. and paying therefor, except the sum of $259.36, for which amount Howard Bros. filed a mechanic's lien against the property. White and Brannon paid $100 only on the lot, and about $300 for labor and materials in the construction of the building. Brannon sold his interest in the premises to the plaintiff, who afterwards, on February 20, 1888, entered into an arrangement with Hagadorn and Howard Bros. whereby Hagadorn was to execute a deed of the premises to M. W. Hicks, as agent of Howard Bros., and Hicks was to convey to plaintiff upon his paying to Hagadorn $173.30 on April 20, 1888, the remainder of the purchase price, and to Howard Bros. the sum of $264, the balance due them on lumber. White also was to assume the payment of the Cropsey mortgage. Hagadorn, in accordance with this agreement, executed a deed of the property to Hicks, who in turn gave White a contract of purchase, which was left with Hagadorn. The building, though not entirely completed, was at the time leased to Mrs. Aiken for six months, and this lease was subsequently turned over by White to Hicks, the rents to be applied on the indebtedness aforesaid. Plaintiff has made no further payments. The premises were afterwards conveyed by

Hicks to Hagadorn, and by the latter to the defendant, the Atlas Lumber Company, successor to Howard Bros. The grantee in each deed had actual knowledge of plaintiff's rights. The defendant entered into possession of the premises and has collected the rents, paid the Cropsey mortgage and the Hagadorn note, the taxes and the insurance, and expended in making permanent and lasting improvements the sum of $283.34. The defendant claims to be the owner of the premises by reason of the failure of the plaintiff to make the payments in accordance with the terms of the contract. White brought this action, praying that an account be taken, and that, if anything should be found due defendant, on paying the same the title be confirmed in plaintiff, or that defendant be required to pay plaintiff his interest in the property, and for general equitable relief. Upon the trial the court found due defendant from plaintiff the sum of $58.88, which sum he was required to pay in ten days, and upon his paying said sum defendant should convey said lot to plaintiff. Defendant appeals.

The first question arising upon this record is, Has plaintiff forfeited his interest in the premises? The contract which Hicks gave plaintiff contained the following stipulations: "And the said party of the second part hereby covenants and agrees to pay said party of the first part the sum of four hundred thirty-seven ($437) dollars and thirty (30) cents, and assume and pay a certain mortgage on lot of four hundred dollars, and interest thereon, as said payments become due, in the manner following: The above $437.30 to be paid as follows: Said party to pay A. G. Hagadorn a note of $173.30 on the 20th day of April, as it becomes due; and pay the said M. W. Hicks, or Howard Bros., on April 20, 1888, the sum of $264 on a certain promissory note of even date herewith, and make payments on above $400 mortgage, as specified, as said payments are due, with interest at the rate of ten per cent per annum, payable annually, on the whole sum remaining from time to time unpaid, and to pay all taxes,

assessments, and impositions that may be legally levied or imposed upon said land subsequent to the year 1888. And in case of the failure of the said party of the second part to make either of the payments or perform any of the covenants on his part hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and liquidation of all damages by him sustained, and he shall have the right to re-enter and take possession of the premises aforesaid." There is no doubt that time may be made the essence of a contract, as where the contract contains a provision of forfeiture upon the failure of the purchaser of real estate to make the payments at the times specified. It will be observed that time is made the essence of the contract under consideration, and if the transaction should be construed a purchase of the premises by plaintiff from Hicks, the conclusion would be irresistible that White has forfeited all equities and title to the property, unless Hicks and the defendant, by their course of dealing with plaintiff, have waived the right to insist on the forfeiture. White was not the purchaser from Hicks, but from Hagadorn. The premises, it is true, were conveyed by the latter to Hicks, who held the title, not as purchaser, but in trust as security for the amounts due from White to Hagadorn and Howard Bros., respectively. The transaction was, in effect, the same as if Hagadorn had conveyed directly to plaintiff, and he in turn had made a deed absolute of the property to Hicks to secure the indebtedness in question. In such case the contract given by Hicks would be a defeasance, and he could not insist upon the condition of forfeiture in the contract, since the relation of mortgagor and mortgagee would exist between the parties, and White's equities could be extinguished alone through foreclosure proceedings. This is, in effect, an action to redeem, and under

the facts and circumstances of the case it would be inequitable and unjust to deprive plaintiff of the right to redeem merely because he failed to make the payments promptly according to the contract, inasmuch as it is developed by the testimony adduced on the trial that the lease of the property from plaintiff to Mrs. Aiken was turned over by him to Hicks as additional security, and that the rents were collected by the latter after White was in default in his payments. This constituted a waiver of the right, if any existed, to declare a forfeiture. (*Paulman v. Cheney*, 18 Neb., 392.)

It is argued that the finding of the amount required to be paid by the plaintiff to redeem is unsupported by the evidence. The record fails to show what items were allowed the respective parties by the court in the accounting, it having made a general finding of the amount due defendant. Counsel on either side, in their briefs, have furnished us with what they regard as an accurate statement of the account between the parties. But these statements do not agree in every particular; especially is this true as to the item of $283.34 charged by the defendant for improvements put upon the property while in possession. Plaintiff rejects this charge. Howard Bros., through their agent and manager, Hicks, took possession of the property without the consent of plaintiff and withheld possession thereof from White. There was no contract or agreement authorizing the improvements in question to be made. The relation held by the parties was that of mortgagor and mortgagee, and the latter is not entitled to credit for permanent improvements placed upon the premises. (*Mahoney v. Bostwick*, 30 Pac. Rep. [Cal.], 1020; *Harper's Appeal*, 64 Pa. St., 315; *Moore v. Cable*, 1 Johns. Ch. [N. Y.], 385; *McCarron v. Cassidy*, 18 Ark., 34.) The case of *Higginbottom v. Benson*, 24 Neb., 461, does not conflict with this conclusion. In that case there was a foreclosure of a senior mortgage, the junior mortgagee not being made a party to the action. It was held that as the purchaser under the decree did so in good

faith, believing that he was acquiring a perfect title, in an action to redeem by the holder of the junior mortgage he was entitled to credit for valuable improvements placed upon the premises while in possession, and that he was not chargeable with rents and profits during his possession. The cases are unlike. The precedent cited was a contest between a junior mortgagee and the purchaser in good faith under the foreclosure of the senior incumbrance, and not between the mortgagor and mortgagee, as in the case at bar. The defendant should be credited with the sums paid for taxes and insurance premiums upon the premises, with interest from the dates of the respective payments. (*Townsend v. Case Threshing Machine Co.*, 31 Neb., 836.) Likewise for the amount of its debt, as well as for the sums paid by it in discharge of the Cropsey mortgage and the claim of Hagadorn, with ten per cent, that being the rate of interest which the several obligations bore. On the other hand, the defendant is liable to account for the net rents and profits received, or which could have been realized by the exercise of ordinary care. (*Comstock v. Michael*, 17 Neb., 288; *Kemp v. Small*, 32 Neb., 318; *Morrow v. Jones*, 41 Neb., 867.) The amount realized on the Aiken lease turned over by plaintiff was the sum of $150, for which amount plaintiff should be credited, with interest. The testimony of the plaintiff tends to show that the premises were of the fair rental value of $20 per month, with the exception of one year, during which $12 or $14 a month would have been a good rent, while Hagadorn, on behalf of plaintiff, testified that $12.50 per month was a fair rental of the building during the entire time defendant was in possession. The defendant offered no testimony as to the rental value, and we shall, in making our calculation, accept the testimony of plaintiff as correct. Especially should we do this, inasmuch as the finding of the trial court was in plaintiff's favor, and since the defendant's own books show it received for a considerable portion of the time $15 per month as rent from the premises in dispute. In

arriving at the net rental, the costs of collecting, which the evidence discloses to be ten per cent, should be deducted from the gross sum. The account at the date of the decree was as follows:

DEFENDANT'S CREDITS.

White's note to Hagadorn	$173 30
White's note to Howard Bros	264 00
Cropsey's mortgage	400 00
Interest at ten per cent on above sum from February 20, 1888, to September 20, 1893	467 14
Taxes	40 12
Interest thereon to date of decree	11 57
Insurance	22 50
Interest thereon up to decree	3 26
Total defendant's credits	$1,381 89

Plaintiff is entitled to credits as follows:

Rent collected from Mrs. Aiken, less ten per cent	$135 00
Interest to date of decree, five years	67 50
Rent four years, at $20 per month, less ten per cent	864 00
Interest computed from the mean time of payments	172 80
Rent one year, at $14 per month, less ten per cent	141 20
Total	$1,380 50

Thus it will be observed from the foregoing statement, which is amply sustained by the evidence, that the total of plaintiff's credits is but $1.39 less than the aggregate amount of credits on the other side of the account, so that it is plaintiff, and not defendant, who is prejudiced by the finding of the decree; but as he is not complaining, the decree is

AFFIRMED.

ALICE A. MINICK V. ELIZABETH A. MINICK.

FILED SEPTEMBER 16, 1896. No. 6720.

1. **Affidavits:** BILL OF EXCEPTIONS. Affidavits used in the district court cannot be considered by this court unless embodied in the bill of exceptions.
2. **Transcripts:** REVIEW. The transcript of the record of the district court imports absolute verity.
3. ——: ——: JUDGMENTS. *Held,* That the decree was rendered during term, and not in vacation.

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

B. F. Johnson, for plaintiff in error.

G. W. Cornell, contra.

NORVAL, J.

This is a proceeding to review the decree of the district court of Nemaha county cancelling of record a real estate mortgage, the mortgage debt having been paid in full.

A single ground for reversal is urged, namely, that the decree was rendered in vacation. This contention is not sustained by the record. While it is true the transcript discloses that on April 1, 1893, during the March, 1893, term of the district court, the case was tried and submitted to the court, and by agreement of the parties the court was to take the same under advisement and decide the same in vacation, and the decision when made should be of that term and of the date of the trial, it does not appear that the decree was rendered by the judge in vacation, except by the affidavit of Alice A. Minick filed in support of her application to vacate the decree. This affidavit not being incorporated in a bill of exceptions cannot be considered by us. The decree, so the record shows, was actually pronounced and entered upon the

court journal on and as of the date of August 18, 1893. It purports on its face to have been rendered by the court, and not by the judge thereof in vacation. The presumption cannot be indulged that the decree was entered out of term. The transcript of the record of the trial court imports absolute verity. The decree is

AFFIRMED.

EDWARD T. GRAHAM V. JAMES FRAZIER.

FILED SEPTEMBER 16, 1896. No. 6702.

1. **Conflicting Evidence:** REVIEW. A question of fact determined on conflicting evidence will not be reviewed.

2. **Instructions:** ASSIGNMENTS OF ERROR. Errors in instructions should be separately assigned in the motion for a new trial, as well as the petition in error.

3. **Rulings on Evidence:** ASSIGNMENTS OF ERROR. Alleged errors in the admission of evidence, to be available in this court, must be specifically assigned in the petition in error.

4. **Trial:** OBJECTIONS: REVIEW. An objection to the admissibility of testimony cannot be raised for the first time in the reviewing court.

5. ———: DOCUMENTS: BILL OF EXCEPTIONS. A ruling excluding a paper or document as evidence cannot be considered when such paper or document has not been embodied in the bill of exceptions.

6. ———: IMMATERIAL TESTIMONY: HARMLESS ERROR. The judgment will not be reversed for the admission of immaterial testimony, when the same could not have prejudiced the rights of the complaining party.

7. **Sales:** DELIVERY: BREACH OF CONTRACT: MEASURE OF DAMAGES. The measure of damages for a breach of a contract by the vendor of personal property failing to make delivery to the vendee, generally, is the difference between the contract price and the fair market value of the property at the time and place specified in the agreement for delivery.

8. ———: ———: ———: ———: EVIDENCE. *Held*, That the evidence introduced by a plaintiff did not trench upon the above rule.

9. Tender: WAIVER. A formal tender of money is never required where it is disclosed, if it had been made, it would have been fruitless.

10. Trial: REMARKS OF JUDGE: REVIEW. *Held*, That the remarks of the trial judge made in the presence of the jury, which are set out in the opinion, were not prejudicial.

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

Allen, Reppert, Reed & Ellis, Ricketts & Wilson, and *Frank T. Ransom*, for plaintiff in error.

Charles Offutt, contra.

NORVAL, J.

James Frazier brought this suit in the district court of Douglas county against Edward P. Graham, alleging in his petition that plaintiff, on or about June 30, 1892, purchased of the defendant 220 head of fat cattle at the agreed price of four cents per pound, said cattle to be delivered by the defendant at any time at plaintiff's election, on or before July 8, 1892; that plaintiff paid to defendant $600 as part of the purchase price, and the latter has since retained the same; that on July 4 and 6, 1892, the remainder of the consideration was offered and tendered to the defendant, which he refused to accept, and declined to deliver the cattle, or any part thereof, and that thereby plaintiff has sustained damages in the sum of $5,000, for which sum judgment was prayed. The defendant answered by a general denial, and pleaded an oral contract differing from the one set up in the petition, as to the number of cattle bought, and the date agreed upon for performance, and averred that plaintiff failed to appear and accept the cattle at the time and place for delivery, although time was made the essence of the contract; wherefore defendant claims to be relieved from the terms of said contract. He also pleaded the statute of frauds, and in his answer tendered to the

plaintiff the sum of $600, the same being the money referred to in the petition as having been paid on the contract. Plaintiff replied by a general denial of the allegations of the answer, and pleaded a part performance of the contract by the payment to, and retention by, defendant of $600 as part of the purchase price of the cattle when the contract was made. There was a jury trial, with a verdict and judgment against defendant in the sum of $2,692.48.

The plaintiff, James Frazier, is a stock buyer residing at Columbus, Platte county. On the 30th day of June, 1892, he went to the farm of Edward Graham, the defendant, about one mile from Creston, in the same county, and while there he entered into an oral contract with Graham for the purchase of the latter's cattle, consisting of something over 200 head, at the agreed price of four cents per pound, payment of consideration, or all but $600 thereof, to be made at time of delivery of the cattle by the defendant at Creston on a future date. There is a conflict in the testimony as to the exact time fixed by the parties for the delivery. That introduced by the plaintiff tends to show the agreement was that he was to accept the cattle at his option on a day not later than July 8, while the testimony on behalf of the defendant is to the effect that the limit for delivery was July 5. It is undisputed that plaintiff did not call to receive the cattle, nor did he pay, or offer to do so, the residue of the purchase price until in the afternoon of July 6, at which time he demanded the cattle, and the defendant refused to deliver them under the contract. The demand was renewed the next day. The verdict being in favor of plaintiff, on or prior to July 8 must be accepted by us as the period fixed by the parties for delivery, and hence the demand for the cattle was seasonably made.

Another controverted issue in the case is whether any part of the consideration was paid down. It appears that on the date of the purchase plaintiff and defendant went together to the Bank of Creston and while there plaintiff

drew a sight draft for $650 on Gassman & Dudley, of South Omaha, in favor of defendant; that the bank took the draft and paid Frazier $50 of the amount; and $600 plaintiff claims was thereupon credited by the bank to Graham's account. The latter insisted upon the trial that the draft was not accepted by him as absolute payment, but conditional that if it was paid the $600 would be credited on the purchase price. There was testimony to support the respective contentions, but the jury decided this disputed question of fact against the defendant by the following special finding:

"Did the defendant Graham on the 30th day of June, 1892, accept a credit in the Bank of Creston as a part payment of $600 at the time, upon the contract between him and the plaintiff for the sale and purchase of the cattle? Answer yes or no.

"The answer of the jury is 'Yes.' W. M. DODGE,
"Foreman."

This finding being abundantly supported by the proofs, disposes of the contention of the defendant that there was no part payment of the purchase price at the time the contract was entered into. It should be stated that this draft in the ordinary course of business was paid, and the proceeds have been retained by the defendant. In his answer filed in this case he for the first time offered to refund the $600 to the plaintiff.

There is a conflict in the testimony as to what transpired on July 6 and 7 when Frazier demanded the cattle. He strenuously insists the refusal of Graham to permit him to take the cattle on either day was put upon the sole ground that the delivery according to the agreement was to be made and the purchase money paid not later than July 5, and as the plaintiff had failed to comply with the contract on his part to be performed, defendant was relieved from all obligations to deliver the cattle. On the other hand, the contention of the defendant is that he gave an additional reason for his refusal, namely,

that plaintiff did not tender payment for the cattle in cash, but in drafts, which Graham insists that he declined to accept, and so advised Frazier. That tender was not made in actual money at the time produced is clear, but there is a dispute in the testimony as to whether the refusal to deliver the cattle was unqualified and absolute alone, or whether it was coupled with the objection that drafts were offered in payment instead of cash. There is no lack of testimony to sustain either view. It was for the jurors, and not us, to weigh the conflicting testimony and pass upon the credibility of the witnesses. This they have done, and their decision is final. If plaintiff offered to procure the money with which to pay the remainder of the purchase price, and defendant absolutely refused to deliver the cattle on the ground that the contract was at an end, then the failure to prove a tender would not prevent a recovery. (*Post v. Garrow*, 18 Neb., 682.) There being an abundance of evidence to establish the contract and breach thereof as alleged by plaintiff, the judgment, if it is to be reversed, must be reversed for some ground or cause other than that the verdict is without proofs to support it.

Criticisms are made in the brief of counsel upon the fourth paragraph of the charge and plaintiff's fourth instruction, and to the action of the court in refusing defendant's fourth request, but they cannot be considered because of the insufficiency of the assignments relating to instructions in the motion for a new trial. The assignments are to the instructions *en masse*,—those given as well as those refused. It is the settled rule that an allegation of error to the giving or refusing of a group of instructions is bad unless well taken as to all included in such group. (*Dempster Mill Mfg. Co. v. First Nat. Bank of Holdrege*, 49 Neb., 321, and cases there cited.) The court's charge consisted of nine consecutively numbered paragraphs. More than one of the instructions given by the court on its own motion were clearly proper. Especially is this true of the first three, which stated the

issues tendered by the pleadings, the seventh paragraph which stated that the burden of proof was upon the plaintiff to establish by a preponderance of the evidence each material averment in his petition, and also of the tenth instruction which told the jury that the credibility of the witnesses and the weight to be given the testimony were questions exclusively for the jury; yet these instructions were grouped with the other paragraphs of the charge in a single assignment in the motion for a new trial. The assignment not being good as to those, it must be overruled as to the others included therein. At least one of the four instructions given at the request of the plaintiff is above criticism, and one, if not more, of defendant's requests to charge was properly denied. The others will not be considered.

Error is assigned in the court's permitting plaintiff to testify to a conversation had with the defendant a few days prior to June 30, the date of the sale, when he made an unsuccessful attempt to purchase the cattle. The substance of this conversation as detailed by plaintiff was that he inquired of the defendant what was the lowest price he would take for the cattle, and received a reply: "I put them up until I can get four cents, and when you can give four cents you can buy the cattle; that is the least that will buy them." Frazier declined to pay the sum asked, but subsequently, on June 30, agreed to do so. This testimony was entirely harmless. It related to negotiations which finally resulted in the contract of purchase, and that, too, at the price first asked by Graham,—four cents per pound.

Criticism is made upon the admission of testimony of plaintiff as to the market value of these cattle in South Omaha on the 6th and 7th days of July, 1892, the contention being that evidence of the value at Creston, Nebraska, the place where the contract called for the delivery, alone was admissible for the purpose of fixing the amount of recovery. Unquestionably as a general rule the measure of damages for a breach of a contract by the

seller of personal property failing to make delivery to the purchaser is the difference between the contract price and the fair market value of the property at the time and place specified in the agreement for delivery. (*Goodrich v. McClary*, 3 Neb., 123; *Post v. Garrow*, 18 Neb., 682; *Denver, T. & G. R. Co. v. Hutchins*, 31 Neb., 572.) The testimony referred to, when considered in connection with the other evidence introduced, in nowise trenched upon the rule of damages above stated and which was given to the jury for their guidance. It was shown that the prices of cattle in the state were ruled largely by the South Omaha market, the only difference between the prices at that point and those at the interior towns being the cost of shipment, shrinkage, commissions, etc., and further, that twenty-five cents per one hundred pounds would cover the freight from Creston to South Omaha, feed, commissions, yardage, and other charges. With this evidence before the jury, together with the market price of cattle in South Omaha, on July 6, 7, and 8, there was no difficulty in ascertaining the value of these cattle at Creston on the same dates. The testimony was not misleading, but was proper and pertinent, and showed an advance in the market value of the cattle over the contract price of more than one dollar per one hundred pounds.

Error is assigned in excluding Exhibit 8 from the jury. We are unable to determine whether this ruling is prejudicial or not, since the exhibit referred to is not preserved in the bill of exceptions. (*Keens v. Robertson*, 46 Neb., 837; *Fremont Butter & Egg Co. v. Peters*, 45 Neb., 356; *Barr v. State*, 45 Neb., 458.)

Complaint is made of the ruling of the court in admitting over the objection of the defendant the following telegram from the cashier of the South Omaha National Bank to the Bank of Creston:

"JULY 7th.

"*Bank of Creston, Neb.:* Gassman & Dudley will pay draft on them by James Frazier for purchase money for

220 cattle at four cents, purchased from Ed. Graham. Cattle to be consigned to firm. You tender payment to Graham for Frazier. H. C. BOSTRICK,

"*Cashier.*

"Charge Gassman & Dudley."

Evidence was introduced to the effect that when plaintiff demanded the cattle, he and his attorney, Mr. Reeder, informed the defendant—which was true—that arrangements had been made with the Bank of Creston for the payment of the balance of the purchase price, at least one-half thereof to be paid in actual cash and the remainder in either Chicago or New York exchange; that if the defendant desired the currency for the entire amount instead of the drafts for a portion, plaintiff proffered to procure the same from a certain bank in Columbus, and that Graham thereupon stated he would as soon accept the drafts as money, if he were to let the cattle go; yet he absolutely and unconditionally refused to deliver the cattle, not because the currency was not at the time produced, but on the ground that the plaintiff had not called for the stock within the time fixed by the agreement. It is undisputed that plaintiff at neither time when demand was made had the money with him, but he was ready and willing to obtain the same, and would have done so if the defendant had desired it. The precise relevancy of the telegram copied above to the issues in the case we fail to discover. It is certain, however, in view of the foregoing facts, and that the case was not tried upon the theory that the money was actually produced by plaintiff, but that the production thereof was waived by the defendant by his absolute and unqualified refusal to deliver the cattle, that the admission of the telegram could not have prejudiced the rights of the defendant. The jury could not, under the instructions, have failed to understand that unless they found such waiver the plaintiff was not entitled to damages. If the delivery of the cattle was refused upon the express ground that they were called for at too late a date,

plaintiff was under no obligation to formally tender the remainder of the purchase money in order to enforce his rights under the contract, since a tender is never required where it appears, if it had been made, it would have been fruitless.

There was no reversible error in the trial court making the following statements in the presence of the jury during the cross-examination of defendant's witness, Fleming: "The court states in the presence of the jury that this line of examination has developed the theory of the plaintiff." The judge did not say what he regarded to be the theory of the plaintiff, nor did he use language from which the views of the judge could be inferred, much less that the plaintiff's theory of the case was the proper or legitimate one. The remark did not in the least discredit the witness before the jury, as counsel for defendant below contend. To us the sentence conveys no intelligible meaning, and manifestly no possible harm resulted from its utterance.

The record shows that plaintiff brought suit for the breach of this contract in Platte county on the evening of July 6, 1892, and summons was served on the defendant the next day. Subsequently, this action was instituted, and the former one was dismissed by the plaintiff. It is argued that the rights of the parties under the contract were fixed on the commencement of the first action, and that plaintiff could not thereafter affect a further breach of the contract by renewing the demand for a delivery of the cattle, and therefore it was error for the court to admit in evidence the conversations between plaintiff and defendant or plaintiff's counsel had on July 7, or to instruct the jury that they might base their verdict upon facts tending to show a breach of the contract occurring after July 6. We have already determined that alleged errors in the instructions cannot be considered by reason of the insufficiency of the assignment in the motion for a new trial. A sufficient answer to the objection made to the testimony

relating to what transpired between the parties on July 7 is that the point is not raised by any assignment in the petition in error. (*Smith v. Mason*, 44 Neb., 610.) Moreover, the testimony alluded to was admitted without objection, so that the error, if any, in its admission is not a subject for consideration at this time. (*Western Union Telegraph Co. v. Lowrey*, 32 Neb., 732.) The verdict being supported by the evidence, and no reversible error appearing in the record, the judgment is

AFFIRMED.

POST, C. J., not sitting.

JOHN C. DREXEL ET AL. V. GEORGE F. DANIELS ET AL.

FILED SEPTEMBER 16, 1896. No. 6675.

1. **Instructions:** ASSIGNMENTS OF ERROR. An assignment in a petition in error that the verdict is contrary to law does not present for review alleged errors in the instructions.

2. ———: ———. Such an assignment raises the question whether the verdict is contrary to the law as contained in the charge given by the court to the jury.

3. **Action on Order for Goods Shipped:** VERDICT FOR PLAINTIFF. *Held*, That the verdict is sustained by the evidence, and that the assessment of the amount of recovery is not excessive.

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

A. C. Wakeley, for plaintiffs in error.

Gregory, Day & Day, contra.

NORVAL, J.

This was an action to recover upon an alleged order by the defendants requesting plaintiffs to manufacture and

ship to defendants a quantity of slippers. There was a trial to a jury, with verdict and judgment for plaintiffs for the full amount claimed in the petition. Defendants have removed the cause into this court, assigning nineteen grounds for reversal, only three of which are relied on in the brief filed, and the others will not be considered. The assignments argued are:

1. The verdict is contrary to law.
2. Verdict is not sustained by sufficient evidence.
3. Error in the assessment in the amount of recovery, the same being too large.

Under the first of these assignments counsel for defendants below has argued at length that the verdict is contrary to the principles of law applicable to the facts, and which should govern in the case, and that the charge of the court to the jury was erroneous. The assignment that the verdict is contrary to law is insufficient to call for a review of the instructions. Alleged errors therein, to be available in this court, must be raised by proper exceptions in the trial court, in the motion for a new trial, and by specific assignments in the petition in error. Here a general exception to the entire charge was taken, and not to each paragraph, and alleged errors in the instructions were grouped in a single assignment in the motion for a new trial. In this condition of the record the instructions cannot be considered, and yet the defendants, under the assignment that the verdict is contrary to law, seek to have us do so, when the correctness of the charge of the court is not thereby challenged. That the verdict is contrary to law is one of the statutory grounds for a new trial, and if such ground is sufficient to search the record and present for review errors in the court's charge, then, under such an averment, the rulings upon admission and exclusion of testimony, and any other decisions made during the progress of the trial, could be reviewed, and the other specific grounds for a new trial specified in the Code are entirely superfluous. The averment that the verdict is contrary to law presents

the question whether the finding of the jury is in accord with the law embodied in the instructions. (Hayne, New Trial & Appeal, sec. 99, and cases cited; *Froman v. Patterson*, 24 Pac. Rep. [Mont.], 692; *Bauder v. Schamber*, 63 N. W. Rep. [S. Dak.], 227; *Brumagim v. Bradshaw*, 39 Cal., 24.) In the last case the court say: "It is not enough to aver that the verdict is against law, and then offer to support the averment by showing that the verdict is not supported by the evidence, and is for that reason 'against law.' If such a course of proceeding was tolerated, all the other specific grounds for new trial enumerated in the statute might, for the same reason, be condensed into the one general ground, that 'the verdict is against law,' for in that general sense it would be 'against law,' if there was any valid reason whatsoever for a new trial. But the statute, in authorizing a new trial on the ground that the verdict 'is against law,' evidently does not intend to include in that phrase all or any of the other several distinct and separate grounds of the motion which are specified in the act."

For convenience the assignments that the verdict is contrary to law and is contrary to the evidence will be considered together. Plaintiffs are manufacturers and wholesale dealers in slippers in Boston, and defendants are retail dealers in boots, shoes, etc., in the city of Omaha. On September 11, 1890, defendants ordered from plaintiffs, through H. C. Jack, their traveling representative, then in Omaha, two bills of slippers, one for $416.20, for early shipment and delivery, and the other, amounting to $649.80, was not to be shipped until March 15, 1891. The slippers designated in the smaller order were shipped to the defendants and received and paid for by them. The larger order was filled and the goods therein mentioned shipped to defendants on April 10, 1891, by the Merchants' Dispatch, as per order. The bill of lading was sent to and received by defendants, but when the goods arrived in Omaha they declined to receive them from the railroad company, and have refused

to pay for them. It is to recover the contract price of the last lot of slippers sent that this action was instituted. It is not contended that the goods in any respect failed to comply with those ordered, but it is insisted in the brief of defendants below that the order for the second consignment was countermanded by them. No such defense was interposed by the answer; nevertheless, whether there was a rescission, and the effect thereof, was submitted to the jury under the charge of the court. Whether the correct rule was stated it is unnecessary to determine. The answer admits the giving of the orders and the shipment of the goods, but alleges that the orders were verbal—separate and distinct from each other—and in nowise connected with or dependent upon each other; that with respect to the larger order no note or memorandum thereof in writing was made or subscribed by the defendants; that they have not accepted or received the goods, or any part thereof, and have never paid any part of the purchase money, and, therefore, the said order and contract are void under the statute of frauds. In view of the correspondence between the parties, defendants in their brief have expressly refused to insist upon the defense of the statute of frauds, and therefore it requires no consideration by us. In addition to the undisputed facts already stated, the evidence introduced by plaintiffs tends to show that the slippers covered by defendants' larger order were to be manufactured by the plaintiffs, and that they were so manufactured. They were not shipped by March 15, according to contract, for the reason plaintiffs were requested not to do so by the letter of defendants under date of January 8, 1891. The verdict returned is evidently not against or inconsistent with the seventh paragraph of the court's charge, which is in this language:

"7. You are further instructed that if you find from the evidence that the plaintiffs were to manufacture the goods covered by the $649.80 order, and ship the goods to defendants at Omaha, and you further find that plaint-

iffs did manufacture the goods covered by said order and did ship them to defendants at Omaha, then such shipment of the goods to defendant would constitute a delivery of the goods by plaintiffs to defendants, even though defendants refused to take the goods after their arrival at Omaha."

There is likewise, in the bill of exceptions, ample evidence from which the jury could find the facts upon which the above instruction was based. The verdict is not only in accordance with the law as stated in the charge of the court, but consistent with the evidence, upon which the instructions depended.

The amount of recovery is not excessive. The verdict was for $649.80, the contract price, and interest thereon at seven per cent. This was in accordance with the rule stated in the instructions. No reversible error appearing in the record, the judgment is

AFFIRMED.

C. AULTMAN & COMPANY V. ELISHA L. MARTIN.

FILED SEPTEMBER 16, 1896. NO. 7246.

1. **Instructions:** ASSIGNMENTS OF ERROR: MOTION FOR NEW TRIAL. An assignment of error in a motion for a new trial that "the court erred in giving instructions 2, 3, 5, 6, 7, and 8, and each of them, asked for by plaintiff," is sufficiently specific to call for review by the supreme court of each of the instructions specified. It is not an assignment to the giving of the instructions *en masse*, but to each one separately.

2. ———: ———: ———. The first paragraph of the syllabus in *Russel v. Rosenbaum*, 24 Neb., 769, overruled.

3. **Sales:** CONTRACTS: INSTRUCTIONS. *Held*, No reversible error in the instructions.

4. **Evidence:** FOUNDATION. No foundation having been laid for the introduction of Exhibit J, offered in evidence, there was no error in excluding it from the jury.

5. **Remittitur.** A remittitur of $16 ordered to be filed by plaintiff below as a condition of affirming the judgment.

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

Sawyer, Snell & Frost, for plaintiff in error.

Charles H. Sloan and *John P. Maule, contra.*

NORVAL, J.

This is the second appearance of this case in this court, the opinion filed on the former hearing being reported in 37 Neb., 826. The last trial resulted in a verdict and judgment in favor of the plaintiff below in the sum of $150. The defendant has brought the record here for review. The former opinion contains a brief statement of the issues presented by the pleadings and will not be repeated here.

It is developed by the record that Martin, the plaintiff below, was the agent of the defendant at Fairmont in the sale of its machinery during the years 1885 and 1887, under written contracts. In 1885 Martin sold for defendant a threshing machine to one Carlow, the notes taken therefor being secured by a chattel mortgage on the machine, as well as by a real estate mortgage. Carlow having made default in payment of one of the notes, the machine was taken by Martin under the chattel mortgage and sold, which he bought in his own name. Subsequently defendant ratified the foreclosure by accepting the machine from Martin. It was left in the latter's hands for resale, who, after repainting and repairing the machine, sold it again in 1888 to one George Frappia, taking his notes in payment therefor, which notes were delivered to defendant, indorsed by Martin without recourse. Two of these notes are due and remain unpaid, and defendant seeks by its counter-claim in this action to hold plaintiff for their payment, as guarantor, under the following stipulation in the written contract of agency for the year 1887: "The party of the second part, waiving demand, protest, and notice of protest, hereby

guaranties the payment at maturity of all notes which may be taken for C. Aultman & Co.'s goods, and agrees further to indorse the same at any time when required so to do, by signing a guaranty of payment thereon, if not in accordance with the provisions of this contract and if not in accord therewith as to financial responsibility." Martin, on the contrary, insists that he did not make the sale to Frappia under the contract of 1887, but under a special agreement, by the terms of which he was not to guaranty the notes taken for the resale of the machine, and plaintiff was to indorse the same without recourse, which he did.

Objections are made to the ninth instruction given by the court on its own motion, and to the seventh at the request of the plaintiff, which instructions are as follows:

"9. If you find that defendant accepted the notes of Frappia at the time they were taken from it by plaintiff, indorsed by him without recourse, and made no objection at the time, nor within a reasonable time after that, then its claim against the plaintiff on account of any guaranty of those notes provided for by contract would be waived, and you should find against defendant as to any guaranty of such Frappia notes."

"7. (Asked by plaintiff.) If you find from the evidence that the plaintiff acted in the years of 1885 and 1887 under a written contract with plaintiff, the terms of which were specific, then in the year 1888 you find there to have been no new contract, the presumption is that the terms of the contract of 1887 would control the sales in 1888; but if you find from the evidence that a special agreement was entered into between the plaintiff and the said defendant, through David Bradley & Co., concerning the old machine, at the time of Martin's delivery of the original notes to said David Bradley & Co., or subsequent thereto, that Martin should specially prepare the then second-hand machine for sale, under special terms and special contract different from the written contract, and that said sale was consummated in the year

1888, and that a reasonable compensation for the sale thereof was twenty per cent, then you must credit Mr. Martin with twenty per cent of the selling price of the machine when sold to Frappia."

Counsel for plaintiff argue that the above instructions cannot be reviewed, for the reason that they were not objected to specifically in the motion for a new trial. The ninth and tenth assignments of error therein being in the following language:

"9. The court erred in giving instructions numbered 2, 3, 5, 6, 7, and 8, and each of them, asked for by and on behalf of the plaintiff and duly excepted to by the defendant.

"10. The court erred in giving instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, and each of them, on its own motion, to the giving of which defendant duly excepted."

It is contended that each of these assignments is too general, and not sufficiently specific to call for a review of the instructions mentioned farther than to ascertain that any one of them was properly given. It is firmly established by a long line of decisions that an assignment of error to instructions *en masse*, if any one of them was properly given, will not be considered. But the assignments in this case do not fall within the rule just stated, since the instructions are not assigned *en masse*, but each one is specifically, singly, and distinctly pointed out in the motion for a new trial as erroneous, as much so as though there had been a separate assignment for each instruction given. We are aware that this view is not in harmony with some of the decisions of this court. Thus, in *Brooks v. Dutcher*, 22 Neb., 644, an exception to instructions was taken in these words: " 'The defendant excepts to each and every one of the above instructions separately.' " This was held a general exception, and insufficient to allow the instructions to be reviewed. To the same effect are *Dodge v. People*, 4 Neb., 220; *Brooks v. Dutcher*, 24 Neb., 300; *Walker v. Turner*, 27 Neb., 103. In *Russel v. Rosenbaum*, 24 Neb., 769, it was held that an as-

signment of error in the motion for a new trial that "error of the court in giving each of the instructions given to the jury on the court's own motion" was insufficient to call for its consideration in this court. The decisions in the cases mentioned above are entirely too technical, and should not be followed upon the question of practice under consideration. Errors should be so specifically and definitely assigned in the court below as to challenge the court's attention to each decision complained of, and thus give the trial judge an opportunity to review his own rulings and correct any errors therein. Each specification of error in a motion for a new trial should be complete in itself,—so framed as to embrace a single ruling. The motion in this case meets these requirements,—as much so as if the specification of errors in the giving of instructions had been multiplied by making a separate assignment for each instruction given.

Complaint is made that the instructions quoted were not applicable to the evidence. The record refutes this contention. The jury was warranted by the evidence in drawing the conclusion that the sale of the machine by Martin to Frappia was not made under the contract of agency for the year 1887, and if it was not so made, then Martin was not liable under the stipulations contained in the contract as guarantor. Moreover, even though the sale was not made under a special agreement, but under the contract of 1887, there was evidence conducing to show that C. Aultman & Co. accepted, without objection, the Frappia notes from Martin, indorsed by the latter without recourse, which constituted a waiver of the provisions in the contract of 1887 relating to the guaranteying of the payment of notes. There was no reversible error in the instructions referred to.

Objection is made to the eighth instruction given at plaintiff's request, by which the jury was told, in effect, that if the agreement was that plaintiff should sell the machine and take from his first receipts the amount due him for freight and money expended in foreclosure, then

said items would not be due until Martin collected some money from the sale of said machine, which was in 1888, and that the same would not be barred until four years thereafter, and that this action was begun in 1890, which arrested the running of the statute of limitations. This instruction not only contained a correct exposition of the law, but it was applicable to the issues made by the pleadings and the evidence, and there was no error in the giving thereof.

Another error assigned is based upon the refusal of the court to admit in evidence Exhibit J, offered by defendant. It purports to be a bill of particulars in the justice court of J. G. McFadden, in a case entitled Elisha L. Martin v. C. Aultman & Co. The purpose of this was to show that Martin claimed judgment for a less sum on the various items than was asked in the district court. No foundation was laid for the introduction of the paper mentioned. It was not shown to have been prepared, signed, or filed by Martin, or by his authority, much less that the cause was tried thereon in any court, or that this suit was instituted before Justice McFadden. The exhibit was properly excluded.

The following letter offered in evidence by defendant was excluded by the court:

"FAIRMONT, NEB., Oct. 21, 1886.

"*David Bradley & Co., Council Bluffs, Iowa*—GENTS: Yours of 19th at hand, contents noted. I did not sell the machine; done my best; there was not a thresher sold here this fall. All I ask is what money I have in it. I think it had better be sent back to the Bluffs. My charges: Freight, $85; expenses of selling, $25; making $110. Send me this amount and I will load the machine and ship it to you.

"Yours truly, E. L. MARTIN."

The above was written by plaintiff to defendant's agents, and refers to the machine sold under the chattel mortgage given by Carlow. Plaintiff in this suit claims

that defendant is indebted to him on account of the Carlow foreclosure in the sum of $31, for cash advanced, and $10 additional for his services, while the letter claims but $25 for expenses of making the sale and makes no claim for his own services. The letter should have gone to the jury, and there was error in rejecting it. The letter was not, as contended by plaintiff, a mere proposition of compromise, but purports to state the amount due him on account of the chattel mortgage foreclosure. For the error indicated the judgment must be reversed, unless the plaintiff below files a remittitur with the clerk of this court within thirty days of $16, as of the date of the judgment, but in case such remittitur is filed, then the judgment will be affirmed for the sum of $134, with interest thereon.

JUDGMENT ACCORDINGLY.

NEBRASKA NATIONAL BANK OF YORK V. NELSON M. FERGUSON ET AL.

FILED SEPTEMBER 16, 1896. No. 6688.

1. **Corporations:** EXECUTION OF NOTES. Promissory notes purporting to be executed by a corporation construed to be the obligations of the corporation, and not of the members thereof.

2. ——: CORPORATE EXISTENCE: ESTOPPEL. When a party contracts with, sues, and obtains judgment against an imperfectly organized corporation, he is estopped from denying its corporate existence, and is precluded from recovering from its members individually, as if they were partners, upon the same indebtedness.

ERROR from the district court of York county. Tried below before BATES, J.

Sedgwick & Power, for plaintiff in error.

References: *Attorney General v. Lorman*, 59 Mich., 157; 14 Am. & Eng. Ency. Law, 269, 270; *Lawrence v. Allen*, 7

How. [U. S.], 785; *In re Kenyon*, 1 Utah Ter., 47; *Abbott v. Omaha Smelting & Refining Co.*, 4 Neb., 416; *Capps v. Hastings Prospecting Co.*, 40 Neb., 470; Cook, Stock & Stockholders [2d ed.], sec. 709; 1 Morawetz, Corporations [2d ed.], sec. 238; *Herron v. Cole Bros.*, 25 Neb., 692.

Gilbert Bros. and *N. V. Harlan*, *contra.*

References: *First Nat. Bank of Davenport v. Davies*, 43 Ia., 424; *Harrod v. Hamer*, 32 Wis., 162; *Mokelumne Hill Canal & Mining Co. v. Woodbury*, 14 Cal., 427; *Raisbeck v. Oesterricher*, 4 Abb. N. C. [N. Y.], 444; *Cross v. Pinkneyville Mill Co.*, 17 Ill., 54; *Langan v. Moingona Coal Co.*, 49 Ia., 371; *Smith v. Steele*, 8 Neb., 115; *Doolittle v. Marsh*, 11 Neb., 243; *Howell v. Roberts*, 29 Neb., 483; *Fay v. Noble*, 7 Cush. [Mass.], 188; *First Nat. Bank of Salem v. Almy*, 117 Mass., 476; *Stout v. Zulick*, 48 N. J. Law, 599; *Planters & Miners Bank v. Padget*, 69 Ga., 164; *Merchants & Manufacturers Bank v. Stone*, 38 Mich., 779; *Humphreys v. Mooney*, 5 Colo., 282; *Central City Savings Bank v. Walker*, 66 N. Y., 424; *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep., 197; *Whitney v. Wyman*, 101 U. S., 392; *Globe Publishing Co. v. State Bank*, 41 Neb., 175; *Cresswell v. Oberly*, 17 Brad. [Ill.], 281; *Pochelu v. Kemper*, 14 La. Ann., 307; *Estey Mfg. Co. v. Runnels*, 20 N. W. Rep. [Mich.], 823; *Lombard v. Chicago Sinai Congregation*, 64 Ill., 479; *Humphries v. Spafford*, 14 Neb., 488; *McClure v. Warner*, 16 Neb., 447; *State v. Minnesota Thresher Mfg. Co.*, 41 N. W. Rep. [Minn.], 1020; *Densmore v. Red Wing Lime & Stone Co.*, 48 N. W. Rep. [Minn.], 528.

NORVAL, J.

This action was instituted in the county court by the Nebraska National Bank of York against Nelson M. Ferguson and others to recover from defendants, as stockholders of the York Butter & Cheese Company, the amount of two promissory notes executed by said company. A general demurrer filed by the defendants to

plaintiff's bill of particulars was sustained and the action dismissed by the county court. The bank thereupon prosecuted proceedings in error to the district court, where the judgment of the county court was affirmed. The plaintiff has brought the case to this court for review.

The bill of particulars avers, in substance, that on or about the 25th day of May, 1889, the defendants pretended to form a corporation under the name of York Butter & Cheese Company, and executed pretended articles of incorporation, elected officers, issued stocks in said corporation, and the defendants subscribed for said stock; that said pretended articles of incorporation provided, among other things, that "the business of this corporation shall be the manufacture of butter and cheese, and the purchase of milk and cream and such other property as may be necessary in connection with said business, and the corporation may purchase and hold, and convey and incumber, such real estate as may be necessary for the carrying on of such business, or as may be offered it in payment, or as security for claims owned by the corporation, and may purchase, raise, and deal in such live stock and other property as may be thought best by the board of directors in connection with the said business. The indebtedness of this corporation shall never exceed one-half of its paid up capital." It is further alleged that the defendants did not file said articles of incorporation, or a copy thereof, with the secretary of state, and did not file with the secretary of state any certificate executed by the defendants, or any one of them, so that said defendants became individually liable for the indebtedness of such pretended corporation; that the paid up capital did not at any time amount to more than $5,500, yet the defendants from time to time held meetings and voted to incur indebtedness exceeding one-half of the paid up capital; that on or about the 22d day of February, 1890, and on the 10th day of March, 1890, in the name of the said butter and cheese company,

they borrowed money from the plaintiff and gave its promissory notes therefor, one for the sum of $513.50 and the other for $850; that the indebtedness of the company at and prior to the borrowing of the money exceeded one-half of the paid up capital of the company; that said notes were executed in the name of the "York Butter & Cheese Company, by F. A. Bidwell, president, J. D. White, secretary;" that plaintiff, on November 3, 1890, recovered judgment on said notes against said butter and cheese company for the sum of $778.58, no part of which has been paid, except $281.18. It is also alleged that the corporation at the time of the borrowing of the money was, and now is, insolvent; that no notice of the existing debts of the corporation has ever been published in a newspaper, as required by law, and that by reason thereof "said defendants are personally liable for the debts contracted by the said corporation."

It will be observed that the notes mentioned in the pleadings were signed "York Butter & Cheese Company, by F. A. Bidwell, president, J. D. White, secretary," and not with the individual names of the defendants, who were stockholders of the corporation. The instruments, as we gather from the averments of the bill of particulars, purport to be executed by and to be the obligations of the corporation. It does not appear that defendants are anywhere named as parties to them, either directly or impliedly. The corporation alone is designated as the party to be bound, and as it is not alleged or disclosed that the instruments are ambiguous, extrinsic evidence could not be resorted to to show that their effect and purport are different from that which the language employed plainly and unequivocally denotes; hence the notes must be construed to be the obligations of the corporation. It is true it is averred that the defendants borrowed the money for which the notes were given, but it is manifest from the entire pleading the loans obtained were corporate transactions, and corporate debts were incurred. Credit was extended the corporation, and

plaintiff must have so regarded it, else it would not have accepted the notes of the corporation and brought suits and recovered judgments against it thereon. But it is said that the corporation was not liable for the money borrowed, because stockholders, as such, are powerless to transact corporate business, and that a corporation must contract through its directors, and not its stockholders. It is not averred that the board of directors of the York Butter & Cheese Company did not authorize the borrowing of the money. Moreover, the company recognized and ratified the transaction as valid and binding, by permitting judgments to go against it, as fully as if the notes upon which they were entered had been executed by its directors.

It is argued that the defendants were associated together for the purpose of engaging in the business of manufacturing; that the filing with the secretary of state of the articles of incorporation, or certificate of incorporation of a manufacturing company, is a condition precedent to the existence of any corporate franchise, and that since they were not so filed the defendants are liable as general partners. On the other hand, the defendants insist that the company was not exclusively a manufacturing corporation, and, therefore, under the general corporation law it was not necessary that the articles should be filed with the secretary of state, but the filing thereof with the county clerk was sufficient. It is unnecessary to consider or decide the question argued. Assuming for the purpose of this case, without deciding the point, that such filing with the secretary of state was indispensable to the formation of a *de jure* corporation, nevertheless it is now too late for plaintiff to insist upon a partnership or individual liability of the defendants. It is precluded from doing so by bringing actions upon the notes and recovering judgments against the York Butter & Cheese Company. 1 Cook, Stock & Stockholders [2d ed.], sec. 243, reads as follows: "In all cases, however, in which the members of an association might have

been held liable as partners, the right of the creditor to enforce that liability is barred by his bringing suit and obtaining judgments against the supposed corporation." In *Cresswell v. Oberly*, 17 Brad. [Ill.], 281, it is said: "But while the evidence fails to show a corporation fully organized at the time the indebtedness in question accrued, we think the plaintiffs are precluded from alleging that its organization was not then complete. They have elected to treat said indebtedness as an indebtedness of the corporation, and to sue the corporation and obtain judgment against it therefor. So far as they are concerned, all question on that subject should be deemed to have been foreclosed. The judgment having the effect of an admission by the plaintiffs, in the most solemn form, that the claim for which it was recovered was the debt of a corporate body, and therefore a debt in respect to which the members of the association were exempted from liability as partners, it should be held to operate against the plaintiffs as an estoppel." To the same effect is *Pochelu v. Kemper*, 14 La. Ann., 307; *Lombard v. Chicago Sinai Congregation*, 64 Ill., 477.

In addition to the recovery of judgments against the York Butter & Cheese Company upon the indebtedness made the foundation of this suit, plaintiff actually dealt with said company as a corporation, and therefore its corporate existence cannot be assailed by plaintiff in this action. As the liability of the defendants by reason of the company creating an indebtedness exceeding the statutory limit, and failing to give the annual notice of its indebtedness, is not argued in the brief of plaintiff, it will not be considered. The judgment is

AFFIRMED.

SAMUEL JOHNSON V. MINNIE WIRTH ET AL.

FILED SEPTEMBER 16, 1896. No. 6788.

Conflicting Evidence: REVIEW: HOTEL: LOSS OF GOODS. In this case the questions presented are with respect to facts determined by the jury upon conflicting evidence. The verdict, being sufficiently sustained, cannot be disturbed.

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

John Schomp and *E. C. Wood*, for plaintiff in error.

C. A. Baldwin, *contra*.

RYAN, C.

Plaintiff in error sued the defendants in error for the value of an overcoat and a pair of gloves lost by the former while, as he alleged, he was a guest in the hotel of the defendants in Omaha. In the district court of Douglas county there was a verdict and judgment thereon in favor of the defendants. There was a sharp conflict in the evidence as to whether the plaintiff was a transient guest at the hotel of the defendants or a boarder for the period of ten days during which he remained. There was also a controversy as to whether or not plaintiff was warned not to take his overcoat and gloves to his room before he did so, and as to whether or not in express terms he assumed all risks incident to the course he pursued. It seems to be conceded by the parties that the theft was committed by a person who was assigned lodging in the room occupied by the plaintiff. There was testimony on behalf of the defendants that plaintiff was very slightly acquainted with this man before the hotel authorities assigned the place of lodging to him, and that when plaintiff first stopped at the hotel he selected a room having two beds with the understand-

ing that one bed might be occupied by a stranger, and that he selected a room of this kind because his board per week would be but $5, whereas if he took a room provided with one bed the weekly rate would be $6. On the other hand plaintiff testified that the man placed in his room was a stranger to him and that permission had been given to put a man in said room only upon condition that the hotel authorities knew such man, and that in fact the man assigned was a stranger to every one about the hotel. On conflicting evidence of this character the jury found for the defendants and its verdict must stand.

Plaintiff, by a deposition taken in Chicago, gave his testimony and was not present at the trial. He now complains that the testimony of each of the defendants was not the same as it was on former trials when he had been present, and that, therefore, there was surprise. The testimony which, if a new trial should be allowed, he proposes to offer is simply cumulative in its nature and contradictory of the statements of the defendants. Ordinarily, the discretion of the district court in refusing to grant a new trial to permit of the introduction of evidence of the character proposed must conclude the matter, and in this case we find no exceptional circumstances presented. There is complaint made that a tailor was not permitted to testify that he was qualified to judge of the value of the overcoat that was lost; that he had seen it, and that from the testimony as to value given by defendants, neither of them could have understood that it was tailor-made and what was its real value. It is perhaps to be regretted that we cannot encourage every effort to eliminate the testimony of alleged experts from the consideration of juries, but this is entirely too radical.

By a motion for a new trial instruction numbered 4 is complained of as given by the court, while in the petition in error the instruction criticised is numbered 3 as given by the court. We can therefore consider neither.

The other instructions complained of are grouped in the motion for a new trial and likewise in the petition in error in such a manner that certain propositions argued cannot be considered. The judgment of the district court is

AFFIRMED.

AULTMAN, MILLER & COMPANY, APPELLEE, V. M. D. WELCH ET AL., APPELLANTS.

FILED SEPTEMBER 16, 1896. No. 6800.

Review: BILL OF EXCEPTIONS. In the absence of a bill of exceptions there must be an affirmance of the decree sought to be reviewed, when there is presented by the record no question aside from the sufficiency of the evidence to sustain it.

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

Walter J. Lamb, for appellants.

Cavanagh, Thomas & McGilton, *contra*.

RYAN, C.

There was filed in this case, in the district court of Douglas county, a petition wherein the plaintiff, Aultman, Miller & Co., alleged that in the year 1889 one of the defendants, Stephen D. Long, a retail dealer in farming implements in Hildreth, Nebraska, procured to be issued by the Farmers & Merchants Insurance Company a policy of insurance upon his general stock of farming implements to the amount of $1,000; that prior to the issue of said policy said plaintiff had sent to said Long to be sold on commission certain farming implements of the value of $796.37, which also were included in the policy; that while said policy was in full force all the aforesaid

farming implements were destroyed by fire; that an adjustment of the loss was made with said insurance company by which only a percentage of the losses suffered was actually covered; that the loss of the commission goods entrusted to Long for sale was included in the above adjustment, notwithstanding which fact Long assigned the right to collect the entire adjusted loss to M. D. Welch in trust for himself and various creditors of the said Long; that after the assignment of said policy the insurance company paid to Welch $1,250, the entire adjusted amount of the loss; that Welch, before suit begun, had paid out the entire $1,250 to various creditors of Long with knowledge of the rights of plaintiff, and that Long was insolvent. The prayer of the petition was that the parties who had been paid in excess of the percentage which they had been entitled to receive from Welch should be adjudged to pay to plaintiff the amount of the percentage in each instance which plaintiff of right should have received upon a just apportionment, and for general equitable relief. The above is, in general terms, a description of the petition, in which there is not attempted anything like technical exactness, for the reason that such exactness is not essential, neither is any description of the subsequent pleadings required further than to say that there were such, by which issues were duly joined with respect to the matters described in the petition. There was a decree by which the relief prayed in the petition was granted, and from this decree the defendants appeal.

The averments of the petition were such that upon proper proof of them the plaintiff was entitled to the relief prayed. Whether or not such proof was made we are without means of determining, for there is in this case no bill of exceptions by which was preserved the evidence upon which the court acted in entering the decree which was entered. There is presented upon the record no other question which we can consider, and the judgment of the district court must be affirmed.

That there may be no misunderstanding of the order whereby was overruled a motion to strike from the files the agreed statement of facts, upon which appellants seem to rely as answering the purposes of a bill of exceptions, it is proper to say that the original agreed statement was filed in the office of the clerk of the district court, and that, therefore, being properly a part of the transcript of the record, it could not be stricken from the files. When it is urged that in this court that it should be accepted as evidence, there is presented for the first time the objection that it cannot be considered as such, because not preserved by a bill of exceptions.

AFFIRMED.

EDWIN DAVIS, SR., v. EMERSON BENEDICT.

FILED SEPTEMBER 16, 1896. No. 6770.

Landlord and Tenant: EXPENSES OF IMPROVEMENT: EVIDENCE: ADMISSIBILITY OF LEASE. By the terms of a lease the lessee was required during the term to pay for all necessary expenses and improvements. The lessee procured to be made certain repairs during the term by one who sought to recover against the lessor, as principal, upon a contract for repairs alleged to have been made with the lessee acting as agent for the lessor. *Held*, That there was error in excluding from consideration as evidence the lease, which tended to sustain the theory of the defendant.

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

John W. Lytle, for plaintiff in error.

Bradley & De Lamatre, contra.

RYAN, C.

On April 24, 1889, Edwin Davis leased a livery and feed barn in Omaha to Charles J. Mentor for a term of

ten years, commencing May 1, immediately following the date of the lease. In this lease it was provided that during its existence Mentor was required to make all repairs and improvements which should be necessary or which he should desire at his own expense and pay a monthly rental of $250 per month. In November, 1891, it became necessary to cement the floor and a portion of the walls of one room to prevent leakage, and this was done by Emerson Benedict, who in this action, first brought before a justice of the peace of Douglas county, sought to recover compensation for his services and outlay in that behalf. On appeal to the district court of said county there was a verdict and a judgment thereon in the sum of $168.48 against Davis, who by proceedings in error seeks the reversal of this judgment.

The averments of the petition were that Davis, by his agent, Mentor, agreed that plaintiff, Benedict, should furnish the material for and do the labor necessary for the sum of $180, which sum was to be paid by Mr. Davis upon completion of the work. These allegations were followed by averments of the due performance of the work contracted for and of non-payment. The prayer was for judgment for $180 and interest from completion of the job. The answer specifically denied the agency of Mentor, and in general terms denied each other averment of the petition. On the trial the pivotal question was whether or not Mr. Davis had authorized Mr. Mentor on his behalf to contract with Mr. Benedict. This authority Mr. Davis strenuously denied. Mr. Benedict testified that his employment was by Mr. Mentor, who claimed that he had authority from Mr. Davis to contract in his name for the improvements. The testimony of Mr. Mentor was that he obtained a bid to be made by Mr. Benedict for doing the proposed work; that he submitted this bid, with others, to Mr. Davis, who selected and directed that the bid of Mr. Benedict should be accepted. After the approval of the bid of Mr. Benedict, Mr. Davis asked Mr. Mentor who was going to pay, and being an-

swered that Mr. Mentor ought not to, Mr. Davis replied that it was not his business to do it. Between these parties it was finally agreed that Mr. Davis would pay $150 and Mr. Mentor would pay $30. Continuing his testimony, on cross-examination Mr. Mentor said: "Well, he [Davis] told me, he says, 'I will give you a note the first of the month for this amount of money and you take it to your bank and get the money and give it to Mr. Benedict and when it comes due I will pay it to the bank.' " Being asked whether in employing Mr. Benedict this witness was acting as agent for Mr. Davis, he said: "He authorized me to see what I could get the work done for."

Q. To see what you could get the work done for?

A. I don't know whether it was for me or for himself. I don't know as the word "you" or "me" was used.

Q. Who was to pay Mr. Davis for the work?

A. Why I answered that question just a moment ago, that he was to give a note for $150 when the work was done.

Q. How was that note to be paid? Was it to be taken out of the rent?

A. Why I don't think he said anything about the rent. I think he said he wanted all the rent money to use for another purpose,—that he could not pay any that month.

Q. He was to give you a note on the first of the month for thirty days?

A. Sixty days, and I was to get the money. * * *

Q. Did Mr. Davis have an understanding with you that he was to pay you in place of paying Mr. Benedict?

A. I think he was to pay me the $150 on the first of the month,—that is, with either the money or the note.

Q. You were then to pay Benedict?

A. Yes, sir; I was to give him that right away.

Q. Did Davis authorize you to get the work done?

A. Yes, sir.

Q. Authorized you to get the work done?

A. Yes, sir.

Q. For him?

A. I suppose it was to benefit his property. * * *

Q. Did you have a conversation with him in which he says "I won't have anything to do with anybody except you?"

A. Well, I think he did say he didn't want every Tom, Dick, and Harry running after him; that he thought I should see that the work was being done.

Q. And pay for it?

A. Well, he was to pay me for it, that was the understanding.

In view of the very unsatisfactory nature of the testimony of Mr. Mentor, it seems to us that the court should have allowed the lease to be put in evidence, for thereby it would have been shown that each month there was due from Mr. Mentor to Mr. Davis the sum of $250, and that in addition to these payments Mr. Mentor was required to make all necessary repairs and improvements at his own expense. In the absence of countervailing proof, that afforded by this lease would have been sufficient to justify the jury in concluding that Mr. Mentor procured the improvements to be made at his own individual expense, and in view of the testimony of Mr. Mentor himself, it is not clear that the arrangement between Mr. Davis and Mr. Mentor was entirely without reference to their relations as fixed by the terms of the lease. The district court gave the following instruction:

"6. If you believe from the evidence that the defendant only promised Mentor to pay him, Mentor, or to deduct from rent a portion of the cost of the work, and that it was agreed that the defendant should not be liable to the contractor, then your verdict should be for defendant."

This instruction recognized a contingency which some of the evidence has tended to establish, and as to which, as has been suggested, the terms of the lease might have aided the jury. For the reasons given it seems to us that the lease should have been permitted to go to the jury as

evidence, and there was error in excluding it. The judgment of the district court is therefore

REVERSED.

C. W. BARKLEY ET AL. V. WINFIELD S. LEITER.

FILED SEPTEMBER 16, 1896. No. 6761.

Replevin: EVIDENCE: DIRECTING VERDICT. In a replevin action, the plaintiff without question having shown that he was in the undisputed possession of the replevied goods under claim of ownership, it devolved upon the adverse parties, if they would justify under a distress warrant, to introduce competent evidence of its existence, and there being an entire failure in this respect, the district court properly instructed the jury to find for the plaintiff.

ERROR from the district court of Seward county. Tried below before BATES, J.

C. E. Holland, for plaintiffs in error.

Norval Bros. and *George W. Lowley*, *contra*.

RYAN, C.

The defendant in error was licensed to carry on his business in the city of Seward as an auctioneer for the period of one year, commencing with February 13, 1892. Within ten days after the issue of the above license certain merchandise which the defendant in error had in his possession was taken from him, and this he replevied from the plaintiffs in error. We learn from the oral testimony that G. W. Fuller was at that time mayor of the city of Seward, and that C. W. Barkley was its treasurer, William Allen was its marshal, and C. E. Holland its attorney, and were therefore made defendants in the district court of Seward county. The evidence very strongly tended to show that the merchandise seized

was owned by the defendant in error. Without question it was in his possession. It is urged in argument that these goods were owned by a Mr. Liberman, who ought to have paid for the privilege of auctioneering them, advertised, as the sales were, by the ringing of bells. An ordinance of the city of Seward introduced in evidence required such payment to be made, and plaintiffs in error insist that the claim that Leiter was the owner of the goods was a mere pretext and that Leiter was using his license as an auctioneer merely to protect Liberman from the payment of the special tax above indicated, which applied to transient vendors of goods. As has already been stated, Leiter made strong proof of his ownership of the merchandise. His possession is not questioned. It devolved upon the adverse parties to show that this possession was interrupted by virtue of a superior right of some kind. It seems their authority in this respect was claimed to be a distress warrant, but, unfortunately, neither the distress warrant nor the marshal's return thereon was offered in evidence. Mr. Holland, it is true, testified that the warrant was lost, but there was no effort to supply secondary evidence of its contents. Whether or not this alleged warrant was properly issued we are without the means of determining, for we have no competent proof that it ever existed. As the plaintiffs in error failed to justify their disturbance of the admitted possession of the defendant in error, the district court very properly instructed the jury to find as it did, and the judgment rendered upon the verdict is

AFFIRMED.

NORVAL, J., not sitting.

ADDISON E. CADY, APPELLANT, V. SOUTH OMAHA NATIONAL BANK, APPELLEE.

FILED SEPTEMBER 16, 1896. No. 6173.

Trust Funds: BANK DEPOSITS: ACCOUNTING: RIGHTS OF COMMISSION MERCHANTS. The reasoning and conclusions of the original opinion in this case, as reported in 46 Neb., 756, considered and approved on this rehearing.

REHEARING of case reported in 46 Neb., 756.

See opinion and former report for statement of the case.

John C. Watson and *Frank T. Ransom*, for appellant.

Charles Offutt, for appellee:

The alleged defect in the answer was waived by appellant. He offered and introduced in the trial court the evidence which sustained the defense. He made no objection in the trial court to the evidence there introduced by appellee in support of the defense. He made no objection in the trial court that the answer was insufficient, and made none in this court. (*Omaha Belt R. Co. v. McDermott*, 25 Neb., 714; *Elsanger v. Grovijohn*, 29 Neb., 139; *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb., 542; *Chamberlain v. Brown*, 25 Neb., 434; *Oberfelder v. Kavanaugh*, 29 Neb., 430; *Wasatch Mining Co. v. Crescent Mining Co.*, 148 U. S., 293; *Tyng v. Commercial Warehouse Co.*, 58 N. Y., 308; *Humphries v. Spofford*, 14 Neb., 488; *Homan v. Steele*, 18 Neb., 652; *Donovan v. Fowler*, 17 Neb., 247; *Hassett v. Curtis*, 20 Neb., 162; *Despatch Line v. Glenny*, 41 O. St., 166.)

Conceding that the proceeds of the shipment to Fitch were trust funds, the bank cannot be held to account by the *cestui que trust* unless it received and applied such funds with knowledge of the appellant's claim thereto. (2 Pomeroy, Equity Jurisprudence [ed. 1886], sec. 1048;

Stephens v. Board of Education, 79 N. Y., 183; *Burnett v. Gustafson*, 54 Ia., 88.)

The opinion in 46 Neb., 756, is in conflict with a former decision of this court. (*Hurlburt v. Palmer*, 39 Neb., 158.)

RYAN, C.

An opinion was heretofore filed in this case, which was reported in 46 Neb., 756, *et seq.* A motion for a rehearing having been sustained and additional arguments heard, the criticisms of the former opinion will now be considered. It is insisted that the principle upon which the former opinion in this case proceeded had been repudiated in *Hurlburt v. Palmer*, 39 Neb., 158. This principle was by counsel stated in that case as follows: "Every dollar which Virgin obtained from Palmer, Richman & Co. which was not invested in stock and which was by him diverted to his personal use was fraudulently obtained and fraudulently used, so far, at least, as Virgin was concerned. It is elementary that a person obtaining property by fraud acquires no title to it, but it is held by him, and by all persons claiming under him with notice, in trust for the original owner. So long as the property can be identified in its original or in a substituted form, it belongs to the original owner if he elects to claim it; and if it passes into the hands of an innocent purchaser for value the title of the defrauded owner, at his option, at once attaches to the avails so long as their identity is preserved, no matter how many transmutations of form the property has passed through. So long as the trust property can be traced and followed into other property into which it had been converted, that remains subject to the trust. The product or substitute has the nature of the original imparted to it." This statement of a general principle, as such, is no doubt correct. In it there is no attempt to determine what might be the limitations upon the rights of the defrauded owner as against one who, deceived by appearances made possible by the conduct of said owner, in good faith had acquired

title to the misappropriated fund. In like manner, in the opinion already filed in this case there was no attempt to state limitations or qualifications of the general rule that the plaintiff is entitled to recover from defendant his money, which it wrongfully applied upon the indebtedness of Fitch to it; indeed, this fact was carefully indicated in the opinion criticised, by the following language: "It may, for the purpose of the present inquiry, be conceded that payment by the bank of the money in controversy upon Fitch's checks, in good faith, relying upon his apparent title thereto, without notice of the appellant's rights in the premises, would be a complete justification,—in short, that appellant, having clothed Fitch with the apparent ownership of said fund, is now estopped as against the bank to question his authority to check it out." In the case of *Hurlburt v. Palmer* the principle quoted from the brief of the counsel was not repudiated, but was held inapplicable to the facts presented, which were that the money sought to be recovered from the bank had been loaned by plaintiff to Mr. Virgin to enable him to purchase stock for shipment to plaintiff as his commission merchant, and had been used by Virgin in paying his already existing indebtedness to the bank. This was a loan, and the commission firm, while it extended credit upon the faith of the expectation that the stock to be purchased would be shipped to it for sale in South Omaha, the transaction was none the less a loan, consequently there was no room for the inference of a trust relationship or the application of the doctrine invoked in this case.

There was filed in this court on March 20, 1896, an amended answer, in which there were averments that the appellee received from Fitch the money claimed by appellant without knowledge that the credit given Fitch on the faith of the weight tickets was based upon sales of stock of appellant, and never knew that appellant claimed any interest in this deposit until long after appellee had paid it out on checks of Fitch. This unau-

thorized amended answer, by which for the first time there was an attempt to plead matters of estoppel, cannot be considered as a pleading. If such an issue could be for the first time tendered in this court, it would logically follow that additional evidence must be admitted to sustain this issue, and, practically, this court might be required to try the case as though it had never been tried in the district court. The statement above made of the purport of this amended answer is a fair epitome of one of the contentions made upon the rehearing. As was indicated by the former opinion, the narrowness of the issues tried in the district court does not admit of the consideration of this alleged matter of estoppel. Counsel, however, has been so earnest in his argument that this court has committed a grave mistake, to the serious prejudice of his client, in this particular case and all others in its line of business, that we shall consider these contentions beyond the field of investigation covered by the former opinion. On page 760 of that opinion there was given a summary of the account of Mr. Fitch with the appellee. The first item was of the date September 26, a balance of $35.36. By reference to the condition of this account on September 25 we find that the balance was $976.44, in red ink, which, the evidence shows, meant that Fitch was overdrawn to that amount; that is, owed it to the bank on his account with it. As stated in the former opinion, there were drawn out on September 26 two items of $10 in the aggregate, which increased the overdraft to $986.44. The deposit on the same day, which included the proceeds of the sale of the stock consigned by appellant, was $1,021.80. This left a credit in favor of Fitch of $35.36, the first item in the summary heretofore given. As this summary extends to and includes October 2, it will not be restated. The balance on the day last named was $16.41. On the day following Fitch drew out $10. On October 4 he deposited $1,127.16 and drew out $17.55, leaving a balance in his favor of $1,116.02. On October 5 Fitch deposited

$1,996.47 and drew out $3,100.91, leaving still to his credit $11.58. On October 6 Fitch deposited $567.82 and drew out $395.40, leaving a balance to his credit of $184. On the 8th day of October Fitch drew out $94.70, leaving a balance of $89.30 to his credit. On October 12 he drew out $89, which left to his credit thirty cents, which he drew out on the 27th, and with this his account closed. It might have been more artistic to have stated these transactions in the form of an account, but this would not have rendered it so clear as does the above method, that, after the appellee had credited Fitch with the proceeds of the sales of appellant's consignment, Fitch was never permitted to draw any part of these proceeds. The money paid for the stock of appellant still remains in the bank, and the doctrine of estoppel could not be invoked, even if the pleadings permitted of our consideration of that question.

It was shown by the former opinion, in the light of adjudicated cases, that the doctrine of a trust was properly applicable to the facts of this case. Upon further investigation we find that the same principle has been applied in *First Nat. Bank of Central City v. Hummel*, 14 Colo., 259, and *Hutchinson v. President and Directors of Manhattan Co.*, 29 N. Y. Supp., 1103. The case of *Clemmer v. Drovers Nat. Bank*, 41 N. E. Rep. [Ill.], 728, decided by the supreme court of Illinois June 5, 1895, is strikingly like the one at bar in all respects, even to the details of the weight tickets forming the basis of the credit which the bank gave the firm of brokers and afterward applied on an existing indebtedness. The decree of the circuit court, which gave the same relief as is sought in this case, was affirmed. The case just cited, as well as that of *Union Stock Yards Bank v. Gillespie*, 137 U. S., 411, cited in the former opinion, sustain the position taken in the former opinion, and as no case at variance has been cited by counsel or found by ourselves, we cannot believe, as insisted by counsel, that we have introduced an innovation which will most disastrously affect the banking business

of this state. The judgment of the district court is reversed, with the same direction as was given in the former opinion.

REVERSED.

IRVINE, C., not sitting.

RAGAN, C., dissenting.

MISSOURI PACIFIC RAILWAY COMPANY V. JOHN F. TIETKEN.

FILED SEPTEMBER 16, 1896. No. 6714.

Carriers: SHIPPERS OF LIVE STOCK: PASSES: PERSONAL INJURIES: NEGLIGENCE: LIABILITY OF CARRIERS. A shipper of live stock who receives from the railroad company undertaking the transportation of such stock a free pass, to enable him to care for his stock in transit, assumes such risks and inconveniences as necessarily attend upon caring for such stock, and, modified accordingly, the liability of the railroad company to such shipper for personal injuries by him sustained, by reason of the negligence of its employes, is that of a common carrier for hire.

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

The facts are stated by the commissioner.

C. W. Seymour, *David Kelso*, *James W. Orr*, and *B. P. Waggener*, for plaintiff in error:

There is no allegation of negligence in the petition which would entitle the plaintiff to recover. (*Hunter v. Cooperstown & S. V. R. Co.*, 112 N. Y., 371; *Solomon v. Manhattan R. Co.*, 103 N. Y., 437; *Lake Shore & M. S. R. Co. v. Pinchin*, 13 N. E. Rep. [Ind.], 677; *Renner v. Northern P. R. Co.*, 46 Fed. Rep., 344; *Owen v. Hudson R. R. Co.*, 35 N. Y., 518; *Memphis & C. R. Co. v. Copeland*, 61 Ala., 376; *Stilson v. Hannibal & St. J. R. Co.*, 67 Mo., 671; *Lewis*

v. Baltimore & O. R. Co., 38 Md., 588; *Haldan v. Great Western R. Co.*, 30 U. C. C. P., 89; *Pennsylvania R. Co. v. Henderson*, 43 Pa. St., 449; *Southern R. Co. v. Kendrick*, 40 Miss., 374; *Toledo & W. R. Co. v. Goddard*, 25 Ind., 200.)

The petition shows on its face that the plaintiff below was guilty of contributory negligence such as would preclude his recovery. (*McCorkle v. Chicago, R. I. & P. R. Co.*, 61 Ia., 555; *Bailey v. Cincinnati, N. O. & T. P. R. Co.*, 20 S. W. Rep. [Ky.], 198; *Chicago & N. W. R. Co. v. Scates*, 90 Ill., 586; *Phillips v. Rensselaer & S. R. Co.*, 49 N. Y., 177; *Morrison v. Erie R. Co.*, 56 N. Y., 302.)

By the plaintiff's own pleading he shows that his own act was the proximate cause of the injury, and he fails to allege in his petition, as is required in such cases, that what he did in the matter was done in a careful and prudent manner, with due regard to his own safety. (*Hoth v. Peters*, 55 Wis., 405; *Mad River & L. E. R. Co. v. Barber*, 5 O. St., 541; *Robinson v. Gary*, 28 O. St., 241; *Baltimore & O. R. Co. v. Whitacre*, 35 O. St., 627; *Kennon v. Gilmer*, 4 Mont., 433; *Durrell v. Johnson*, 31 Neb., 796; *City of Lincoln v. Walker*, 18 Neb., 244; *Batterson v. Chicago & G. T. R. Co.*, 49 Mich., 184; *Johnson v. Boston & M. R. Co.*, 125 Mass., 79; *Morrissey v. Eastern R. Co.*, 126 Mass., 377; *Pennsylvania R. Co. v. Sin Clair*, 62 Ind., 301; *Kansas P. R. Co. v. Pointer*, 14 Kan., 38; *Jeffersonville, M. & I. R. Co. v. Goldsmith*, 47 Ind., 43; *Gregory v. Cleveland, C., C. & I. R. Co.*, 14 N. E. Rep. [Ind.], 228; *Savannah & W. R. Co. v. Meadows*, 10 So. Rep. [Ala.], 141; *Mobile & O. R. Co. v. Stroud*, 64 Miss., 784.)

In support of an argument in favor of the contention that the verdict is against the weight of evidence and not supported by the evidence reference is made to the following cases: *Omaha & R. V. R. Co. v. Crow*, 47 Neb., 84; *Ft. Scott, W. & W. R. Co. v. Sparks*, 55 Kan., 288.

The verdict of the jury is against the instructions of the court and the judgment should be reversed. (*Meyer v. Midland P. R. Co.*, 2 Neb., 319; *Aultman v. Reams*, 9 Neb., 487.)

John C. Watson and *Charles A. Robbins, contra:*

It is culpable negligence on the part of a railroad company for its officers to induce a passenger to leave or board a train while it is in motion. Where a passenger is called upon to act in a sudden emergency, he should not be held to the most rigid accountability for his action. He has a right to assume that it is safe to leave or board a train, when told to do so by those in charge of it. (*Bucher v. New York C. & H. R. R. Co.*, 98 N. Y., 128; *Filer v. New York C. R. Co.*, 49 N. Y., 47; *McIntyre v. New York C. R. Co.*, 37 N. Y., 287; *Lent v. New York C. & H. R. R. Co.*, 120 N. Y., 467.)

There are numerous well-considered cases which hold that it is not negligence for a passenger to leave or board a moving train, where such act is made necessary by the negligence of the railroad company. (*Cumberland Valley R. Co. v. Maugans*, 61 Md., 53; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St., 292; *Swigert v. Hannibal & St. J. R. Co.*, 75 Mo., 475; *Doss v. Missouri, K. & T. R. Co.*, 59 Mo., 27; *Wyatt v. Citizens R. Co.*, 55 Mo., 485; *Loyd v. Hannibal & St. J. R. Co.*, 53 Mo., 509; *Toledo, W. & W. R. Co. v. Baddeley*, 54 Ill., 19; *Foreman v. Missouri P. R. Co.*, 23 S. W. Rep. [Tex.], 422; *Johnson v. West Chester & P. R. Co.*, 70 Pa. St., 357.)

The passenger had a right to expect that the defendant had employed a skillful conductor, who would not expose passengers to dangerous risks, and who had sufficient experience and knowledge in his business to correctly advise and direct passengers as to the proper time and manner of alighting safely from the train. (*Lambeth v. North Carolina R. Co.*, 66 N. Car., 494; *Curtis v. Detroit & M. R. Co.*, 27 Wis., 158; *Swigert v. Hannibal & St. J. R. Co.*, 75 Mo., 475; *McIntyre v. New York C. R. Co.*, 37 N. Y., 287; *Lent v. New York C. & H. R. R. Co.*, 120 N. Y., 467; *Pennsylvania R. Co. v. McCloskey*, 23 Pa. St., 526; *Olson v. St. Paul & D. R. Co.*, 48 N. W. Rep. [Minn.], 445.)

A drover traveling on a pass, such as was given in

this case, for the purpose of taking care of his stock on the train, is a passenger for hire. The carrier cannot, by conditions in such pass, limit its common law liability for injuries received by him resulting from its negligence. (*New York C. R. Co. v. Lockwood*, 84 U. S., 359; *Flinn v. Philadelphia, W. & B. R. Co.*, 1 Houst. [Del.], 469; *Carroll v. Missouri P. R. Co.*, 88 Mo., 239; *Orcutt v. Northern P. R. Co.*, 45 Minn., 368; *Cleveland, P. & A. R. Co. v. Curran*, 19 O. St., 1; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St., 315; *Ohio & M. R. Co. v. Selby*, 47 Ind., 471; *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind., 126; *Lawson v. Chicago, St. P., M. & O. R. Co.*, 64 Wis., 447; *Missouri P. R. Co. v. Ivy*, 71 Tex., 409.)

It is not negligence for a passenger to go or remain upon a car, not intended for the use of passengers, in violation of the rules of the railroad company known to the passenger, where those in charge of the train know of the presence of the passenger in such forbidden place, and make no objection thereto. (*Creed v. Pennsylvania R. Co.*, 86 Pa. St., 139; *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St., 239; *Pennsylvania R. Co. v. McCloskey*, 23 Pa. St., 526; *Jacobus v. St. Paul & C. R. Co.*, 20 Minn., 125; *Dunn v. Grand Trunk R. Co.*, 58 Me., 187; *Caldwell v. Murphy*, 1 Duer [N. Y.], 233; *Carroll v. New York & N. H. R. Co.*, 1 Duer [N. Y.], 571; *Washburn v. Nashville & C. R. Co.*, 3 Head [Tenn.], 638.)

The conductor's conduct was negligent. (*Swigert v. Hannibal & St. J. R. Co.*, 75 Mo., 475; *Alexander v. Chicago, R. I. & P. R. Co.*, 43 Ia., 276.)

RYAN, C.

In this action, which was brought in the district court of Otoe county, plaintiff recovered judgment on the verdict of a jury in the sum of $2,500. He alleged in his petition that about October 9, 1890, he shipped over the defendant's road certain live stock from Scio to Chicago; that the train by which the shipment was made stopped at Weeping Water and, as plaintiff was informed by the

conductor, twenty minutes would be allowed plaintiff for obtaining a meal; that before said twenty minutes had expired said conductor suddenly and excitedly called out to plaintiff that he must immediately get on the train or be left; that said train was at the time moving slowly and that plaintiff, by reason of believing, relying upon, and attempting to obey the order of said conductor, attempted to board said train moving at a rate of speed unknown to plaintiff, and that, owing to the wrongful acts and negligence of the defendant, plaintiff was thrown in such a manner that the wheels of the cars of said train passed over plaintiff's right foot, necessitating its amputation, and over the large toe of the left foot, whereby its amputation was also rendered necessary. These averments were supplemented by averments of the damage caused which the defendant had refused to pay. By its answer the railroad company denied the above averments and charged that the injuries of plaintiff were attributable to his own negligence. This charge of negligence was denied by plaintiff in his reply.

The questions presented by these error proceedings are, first, was the railroad company guilty of negligence, and second, was the defendant in error guilty of contributory negligence? It has been repeatedly held by this court that issues as to negligence and contributory negligence, where the evidence is so conflicting that from it different minds might draw different conclusions, must be determined by the jury. (*Chicago, B. & Q. R. Co. v. Wilgus*, 40 Neb., 660; *Omaha & R. V. R. Co. v. Morgan*, 40 Neb., 604.) As the jury found in favor of the defendant in error, we shall assume as established such pleaded facts as the evidence upon his behalf justified the jury in finding, without undertaking to set out the proofs submitted in rebuttal.

The defendant in error, when he made his shipment at Scio, received from the railroad company a contract which entitled him to free transportation in the caboose of the train whereby said shipment was made, that he

might in transit give his stock such attention as circumstances might demand. Indorsed on this contract were the following provisions: "We, the undersigned persons in charge of the live stock mentioned in the within contract, in consideration of the free pass granted us by the Missouri Pacific Railway Company, and of the other covenants and agreements contained in said contract, including the rules and regulations at the head hereof and those printed on the back hereof, all which for the consideration aforesaid are hereby accepted by us and made a part of this, our contract, and all the terms and conditions of which we hereby agree to observe and be severally bound by, do hereby expressly agree that during the time we are in charge of said stock, and while we are on our return passage, we shall be deemed employes of said company for the purposes in said contract stated, and that we do agree to assume, and do hereby assume, all risks incident to such employment, and that said company shall in no case be liable to us for any injury or damages sustained by us during such time for which it would not be liable to its regular employes." Notwithstanding the above quoted language the defendant in error was, for certain purposes, a passenger. His contractual right was to proceed upon the freight train upon which his cattle were being shipped. His duty was to care for his stock in transit, and his rights and privileges were limited by the necessity of traveling upon the aforesaid freight train and by the requirement that he must care for his stock. (*Omaha & R. V. R. Co. v. Crow*, 47 Neb., 84.) It was not inconsistent with any undertaking or obligation of the defendant in error for him to stop at a lunch stand to obtain a necessary meal, as was done in this case with the approval of the conductor. The theory of the defendant in error, in support of which there was such evidence that we cannot ignore the action of the jury thereon, was that while the defendant in error was eating, the conductor, in a hurried and excited manner, called out to him that he must immedi-

ately get on board the train or, if he did not, he would be left at Weeping Water and could not accompany his stock; that at once the defendant in error accordingly hurried to the train, which was moving, as the defendant in error thought, at a low rate of speed; that the part of the train which he reached was quite a distance ahead of the caboose; that by reason of the increase of the rate of speed of the train and the certainty that the caboose when it reached defendant in error would be moving quite rapidly, and because of the urgent directions of the conductor to get aboard at once, the defendant in error, that he might not lose his right of free transportation with his stock, was induced to climb the ladder on the side of the nearest freight car, but that by the slipping of the feet of the defendant in error he was thrown to the ground in such a way that the injury in his petition described was unavoidable. It is vigorously insisted that it was negligence, *per se*, for the defendant in error to attempt to climb the side of a freight car moving as was the one he attempted to board. The evidence adduced by the plaintiff in error very strongly tended to show that it was a very hazardous undertaking for one who did not understand his business, as it was expressed, to attempt the performance of the feat indicated, and this proposition is now asserted and reasserted in argument. We may therefore confidently assume that if the conductor urged the defendant in error to take this very course, the railroad company should not now be heard to assert that this was not negligence on the part of its conductor. It was testified by defendant in error that the train seemed to him to be moving at such a rate of speed that he could with safety to himself catch hold of the ladder and climb up the moving box car, and that he was impelled to do this by the peremptory directions given him by the conductor. It is evident from the verdict that these statements were accepted by the jury as truthful. While it has been held by this court that the acceptance of the right to ride upon the same train with

his stock free of charge for the purpose of giving such stock necessary attention, of necessity imposes upon the owner the incurring of such risks and inconveniences as result from such undertakings on his part, it has never been held that in other respects railroad companies as common carriers are exonerated from responsibilities with respect to this class of passengers. By an instruction as favorable to the railroad company as could reasonably be asked the jury was told that ordinarily it is negligence for a passenger to attempt to board a moving train and that it is not sufficient to rebut such presumption of negligence to show that the trainmen acquiesced or directed him to make the attempt.

It is complained by the railroad company in connection with the above propositions that though the court instructed the jury that to excuse such an act and free the plaintiff from the charge of contributory negligence there must be a coercion of circumstances which did not leave the passenger in the free and untrammeled possession of his faculties, and that the mere fact that unless he so boarded the train it would proceed without him was not sufficient to justify making the attempt, nevertheless the jury found against the railroad company, whereby it is evident that this instruction was disregarded. It has already been noted that the defendant in error was ignorant of the danger attendant upon an attempt by an unskilled person to board a freight car moving at the rate at which the one he attempted to board was moving and that this danger was one well known to railroad men. Moreover, the evidence, accepted by the jury as true, established the fact that notwithstanding these conditions the conductor directed the defendant in error to make the hazardous experiment, which he did make with very disastrous results to himself. There was evidence on behalf of plaintiff in error that the conductor did not direct the defendant in error to attempt to climb upon the freight car, but that it was a brakeman who informed the defendant in error that

the train was moving and that he must not longer remain at the lunch stand. It was evidently with reference to the theory of plaintiff in error that whatever directions the defendant in error received were from a brakeman and not from the conductor, that there was embodied in the above instruction the proposition that to rebut the presumption of contributory negligence it was not sufficient to show that the trainmen acquiesced or directed defendant in error to make the attempt to board the moving freight car. As to the proposition that as a justification of this attempt there must be a coercion of circumstances which does not leave the passenger in the free and untrammeled possession of his faculties, it is probable that the court meant merely what would have been expressed if instead of "faculties" the word "judgment," or some equivalent term, had been employed. While this word was not happily chosen, we cannot believe that it was misleading to the prejudice of plaintiff in error. The coercion which tended naturally to induce the attempt to climb upon the moving freight car was not embraced in the instruction which it is insisted the jury ignored, for, aside from the enumerated acquiescence and direction of trainmen and the prospect that the train would leave the defendant in error if he failed to board the moving car, there was the authoritative command of the conductor to do what is now condemned. It is not impossible that to this authority ordinarily recognized there was superadded considerable weight by the provisions of the contract of shipment, among which was one that during the time defendant in error was in charge of his stock he should be deemed an employe of the railroad company. It is not perceived why it must be assumed that the jury ignored the instruction under consideration by returning the verdict which it did in this case. Under the circumstances, by other instructions it was properly submitted to the jury to determine as a question of fact whether or not the defendant in error had been guilty of contributory negligence in yielding

obedience as he did to the command of the conductor. We have not overlooked the fact that by the conditions of the contract of shipment it was provided that the shipper assumed all risks incident to his being an employe and that the company could be held liable only for such injuries or damages as it would as to a regular employe. In *Chicago, R. I. & P. R. Co. v. Witty*, 32 Neb., 275, it was held that a common carrier of live stock cannot by contract with a shipper relieve itself, either in whole or in part, from liability or loss resulting from its negligence. The liability in that case was with reference to the freight transported; but we can see no reason why the principle is not applicable to an incidental right,—that of being transported safely while caring for stock in transit. In so far as the shipper is required to assume risks incidental to taking care of his stock he of necessity waives his right to be treated as an ordinary passenger, but this waiver ought never to be extended to negligence on the part of the company to perform its duties proper under the circumstances as a common carrier. The judgment of the district court is

AFFIRMED.

PAT RILEY V. HERMAN LIDTKE.

FILED SEPTEMBER 16, 1896. NO. 6805.

1. **Husband and Wife**: SERVICES OF WIFE. The services which are due to the husband from his wife, and for the loss of which he may recover, are such duties and services as reasonably devolve upon her by reason of the marriage relation.

2. ———: ———. The performance of laundry work and sewing for others than her own family are not duties which devolve upon the wife by reason of the marriage relation.

3. ———: ———: NEGLIGENCE: DAMAGES: RECOVERY BY HUSBAND. If through the negligence of another the wife be injured and thereby rendered unable to perform her household duties, and her husband

is put to expense in having these duties performed by another, he may recover such necessary expense from the parties inflicting the injury.

4. ———: ———: ———: ———. Earnings acquired by the wife as a laundress and seamstress for others than her family do not belong to the husband, but are the sole and separate property of the wife, and in a suit by the husband for the loss of services of his wife such earnings cannot be considered in estimating his damages.

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

Clark & Allen, for plaintiff in error.

Frank Dean and *W. D. Guttery*, *contra*.

RAGAN, C.

Herman Lidtke sued Pat Riley in the district court of Saunders county for damages. Lidtke alleged in his petition that on the 14th of March, 1890, while his wife was driving south in a carriage upon a public highway in said county, at a place where it was practicable, from the nature of the ground, for the driver of a carriage to turn to the right of the beaten track, she met Riley driving north on the highway in a carriage, and that he negligently neglected to turn his team to the right of the center of the road and the center of the beaten track thereof; the carriages of the two parties collided and his, Lidtke's, wife was thrown from her carriage, permanently injured, and by reason of the injuries had become an incurable invalid and unable to perform her work and duties as a wife, whereby he had been deprived of her services and companionship and put to great expense for her medical treatment, nursing, and medicines, to his damage. Lidtke had a verdict and judgment, to reverse which Riley has prosecuted here a petition in error.

On the trial to the jury Lidtke's wife, against the objection of Riley, was permitted to testify as follows:

Q. What was your occupation prior to the time of the injury, aside from housekeeping?

A. Making dresses.

Q. What did you do with your earnings from that labor?

A. I used them for my household.

Q. Then your earnings were not kept apart from your husband; you made a common interest?

A. No.

Q. Do you mean to say that you and your husband kept everything in common for the general good of the family?

A. Yes, sir.

Q. About what were your annual earnings from that source, Mrs. Lidtke, or say your weekly earnings?

A. Outside of the household, about $3 a week.

Mrs. Lidtke was also permitted, over the objection of Riley, to testify that prior to her injury she had been in the habit of doing laundry work for other families than her own, by which labor she earned about $1 per week, and that her earnings from this source were also applied to the support of her family.

Section 4, chapter 53, Compiled Statutes, provides: "Any married woman may carry on trade or business and perform any labor or services on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name." Lidtke's claim for damages in this action is based upon his contention that he had, through the injury of his wife, been deprived of her services and companionship and been put to expense in furnishing her nursing and medical treatment. By virtue of the provisions of the statute just quoted Lidtke was not entitled to what his wife earned as laundress or seamstress. By virtue of the marital relation a husband is entitled to such ordinary household services as his wife may render, and if, through the negligence of another,

the wife be injured and thereby unable to perform her household duties, and her husband is put to expense in having these duties performed by another, he may recover such necessary expense from the party inflicting the injury. But by virtue of the statute quoted above a husband is not entitled to what his wife may earn as a seamstress or laundress. The earnings of Mrs. Lidtke derived from those services were her sole and separate property, and the court erred in permitting this evidence, as it left the jury at liberty to take into consideration the amount of such earnings in fixing the damages the husband had sustained. By admitting this evidence the court, in effect, told the jury that the earnings received by Mrs. Lidtke as a seamstress or laundress belonged to her husband. The statute quoted above does not deprive the husband of his right of action for the loss of the services of his wife, but such services do not include sewing and washing for other than the husband's family. The services which are due to the husband from his wife, and for the loss of which he may recover, are such duties and services as reasonably devolve upon her by reason of the marriage relation. (*Omaha & R. V. R. Co. v. Chollette*, 41 Neb., 578.) The fact that Mrs. Lidtke, prior to her injury, had been accustomed to apply her earnings as a seamstress and laundress towards the support of her and her husband's family—that is, that she had been accustomed to give such earnings to her husband—did not make the evidence competent. To do laundry work and sewing for others than her own family was not a duty which was owing to her husband by reason of the marriage relation, and she might at any time cease to perform such labors without neglecting her duties as a wife. Had she been uninjured and continued to do laundry work and the work of a seamstress, she was under no legal obligation to continue to apply the earnings from those sources towards the support of her husband and family. The law presumes that a wife performs the duties and renders the services towards her family which grow out of

the marriage relation, and that she will continue to do so, but because a wife at one time gives to her husband for the support of the family the earnings which she derives from the performance of duties outside of those devolving upon her by reason of the marriage relation, the presumption cannot, therefore, be indulged that she will continue to do so. For the error of the court in admitting the evidence quoted above, this judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

WILLIAM CAMPBELL V. FARMERS & MERCHANTS BANK OF ELK CREEK, NEBRASKA.

FILED SEPTEMBER 16, 1896. No. 6791.

1. **Review:** TIME TO FILE PETITION IN ERROR. To invest this court with jurisdiction to review on error a judgment of the district court, a petition in error must be filed with the clerk of this court within one year after the date of the rendition of the judgment sought to be reversed.

2. **Appeal and Error.** An appeal does not lie to the supreme court from the judgment of a district court rendered in an action purely legal in its nature. This court can only review such judgment in a proceeding in error.

3. **Corporations:** REORGANIZATION: CORPORATE DEBTS. The purchase of part of the assets of a copartnership or corporation by a new corporation, organized by the members of the old corporation or copartnership, does not raise a conclusive presumption against the new corporation that by its purchase it assumed or became liable for the debts of the old corporation or copartnership, notwithstanding the fact that the new corporation engaged in and continued to carry on the business in which the old corporation or copartnership had been engaged. Such facts at most raise a rebuttable presumption that the new corporation assumed the liabilities of the old corporation or copartnership. (*Reed Brothers Co. v. First Nat. Bank of Weeping Water*, 46 Neb., 168.)

4. **Partnership.** A partnership is a distinct entity, having its own property, debts, and credits, and, for the purposes for which it was organized, it is a person, and as such is recognized by the law.

5. ———: PREFERRING CREDITORS. A copartnership, even though in failing circumstances, has the right to pay a part of its creditors in full to the exclusion of others, provided such payments are made with an honest purpose.

6. **Fraud.** In this state the question of fraudulent intent is always a question of fact and not a question of law. (Compiled Statutes, ch. 32, sec. 20.)

7. **Partnership:** LIABILITY FOR DEBTS: EVIDENCE. Evidence examined, and *held* to sustain the finding of the district court that the defendant in error had not assumed the liabilities of a copartnership, a part of whose assets it had purchased.

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

The opinion contains a statement of the case.

J. H. Broady and *W. H. Kelligar*, for plaintiff in error:

The transfer is void because it assumed to be a preference of creditors of the old bank, which was made solvent by the transaction, as subsequent events demonstrated. (*State v. Commercial State Bank*, 28 Neb., 677; *Lyons v. Perry Stove Mfg. Co.*, 24 S. W. Rep. [Tex.] 16; *Sawyer v. Hoag*, 17 Wall. [U. S.], 610; *Hibernian Ins. Co. v. St. Louis & New Orleans Transportation Co.*, 13 Fed. Rep., 516; *Ingwersen v. Edgcombe*, 42 Neb., 740; *Tillson v. Downing*, 45 Neb., 549.)

For the purposes of plaintiff's case the new bank is the old bank and the identity is complete, and a right to recover at law obtains. (*City Nat. Bank of Poughkeepsie v. Phelps*, 97 N. Y., 44; *Eans v. Exchange Bank*, 79 Mo., 182; *Hughes v. School District*, 72 Mo., 643; *Metropolitan Nat. Bank v. Claggett*, 141 U. S., 520; *Michigan Insurance Bank v. Eldred*, 143 U. S., 293; *Reed v. First Nat. Bank of Weeping Water*, 46 Neb., 168.)

If the identity was not preserved, the taking of the assets of the old bank by the new bank rendered the latter liable to the creditors of the old bank, and, therefore, liable to plaintiff. (*Continental Nat. Bank v. National Bank of Commonwealth*, 50 N. Y., 575; *Blair v. Wait*, 69 N. Y., 113;

1 Beach, Equity Jurisprudence, secs. 284, 286; *Jansen v. Williams*, 37 Neb., 869.)

J. Hall Hitchcock and *E. W. Thomas, contra:*

A cashier cannot pay his private debts out of the funds of the bank. The law will not permit an agent's private interest to come between his principal and himself. (*West St. Louis Savings Bank v. Shawnee County Bank*, 5 Otto [U. S.], 557; *Lee v. Smith*, 84 Mo., 304.)

Bank officers cannot bind the bank by an unlawful act, nor outside the line of business of the bank. Like other agents, a bank cashier must act within the scope of his authority, to bind his principal, unless his acts are ratified, and it cannot be claimed that the unlawful acts of the cashier were ever ratified in this case, as all the testimony shows that no other person connected with the bank knew anything about the transaction until long after the bank was closed. (*Kennedy v. Otoe County Nat. Bank*, 7 Neb., 59; *Merchants Bank v. Rudolf*, 5 Neb., 527; *Rich v. State Nat. Bank*, 7 Neb., 201; *Miller v. McIntyre*, 6 Pet. [U. S.], 61; *United States v. Dunn*, 6 Pet. [U. S.], 51; *Bank of Metropolis v. Jones*, 8 Pet. [U. S.], 12; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y., 291; *Franklin Bank v. Steward*, 37 Me., 519; *Washington Bank v. Lewis*, 22 Pick. [Mass.], 24; *Harper v. Calhoun*, 7 How. [Miss.], 203; *Wyman v. Hallowell*, 14 Mass., 58*; *Lloyd v. West Branch Bank*, 15 Pa. St., 172; *Merchants Bank v. State Bank*, 10 Wall. [U. S.], 675; *Bank Commissioners v. Bank of Buffalo*, 6 Paige Ch. [N. Y.], 497.)

RAGAN, C.

In the district court of Johnson county William Campbell sued the Farmers & Merchants Bank of Elk Creek, Nebraska. Campbell in his petition alleged for a first cause of action that the defendant was a banking corporation, organized under the laws of the state, doing business at Elk Creek, Nebraska; that it was the successor of the Bank of Elk Creek, at that place; that on the 20th

of December, 1890, he deposited $3,000 with the Bank of Elk Creek, for which that institution issued to him a certificate of deposit; that on the 28th of April, 1892, the Farmers & Merchants Bank was organized as the successor of the Bank of Elk Creek; that said last named bank then ceased to do business and the Farmers & Merchants Bank began business as its successor; that on the said 28th of April, 1892, the Farmers & Merchants Bank took and converted to its own use in its banking business the resources of the Bank of Elk Creek; that on the 20th of December, 1892, the Farmers & Merchants Bank took up the certificate of deposit which had been issued by the Bank of Elk Creek and issued to plaintiff two others in its place; that at the time of the conversion of the assets of the Bank of Elk Creek the Farmers & Merchants Bank assumed the liabilities of said Bank of Elk Creek, and that the Farmers & Merchants Bank was indebted to it for the amount called for by said two certificates. For a second cause of action the petition of Campbell, in addition to the averments already stated, claimed a judgment against the bank for the sum of $1,000 and interest on a certificate of deposit issued on the 3d of April, 1892, by the Bank of Elk Creek to Campbell's wife, and by her assigned to him. A jury was waived and the issues tried to the court, which found in favor of Campbell and against the bank on the first cause of action, and against Campbell and in favor of the bank on the second cause of action. To reverse the judgment dismissing his second cause of action Campbell has prosecuted to this court a petition in error and the Farmers & Merchants Bank is here only as defendant in error.

1. The transcript of the proceedings in the court below was filed in this court within six months after the date of the rendition of the judgments, but the bank has never filed in this court a petition in error. This court, then, is without jurisdiction to review on error the judgment pronounced against the bank. (Code of Civil Procedure, sec. 592; *Wistedt v. Beckman*, 37 Neb., 499.) But counsel

for the bank seem to be of opinion that this is an equity proceeding and insist, as the transcript of the proceedings had below was filed here within six months after the date of the rendition of the judgment complained of, that the supreme court can review the judgment on appeal. But we think the proceeding is one purely legal in its nature, and which calls for the exercise of none of the equity powers of the court. Campbell by his action seeks an ordinary money judgment against the new bank, because, as he alleges, that bank was the successor of the Bank of Elk Creek, the original debtor—that is, that the Bank of Elk Creek had merely changed its name without destroying its identity; and on the further ground that the new bank had assumed the obligations of the old one. We cannot, therefore, disturb the judgment rendered by the district court in favor of Campbell and against the Farmers & Merchants Bank on the first cause of action set out in Campbell's petition.

2. The argument made by Campbell for a reversal of the judgment of the district court pronounced against him is that the finding of the court on which such judgment was based is not supported by sufficient evidence. There is little, if any, material conflict in the evidence. It shows that from April, 1885, until April, 1892, one Russell and one Holmes were copartners; that they were engaged in conducting a banking business at Elk Creek, Nebraska; that such copartnership business was carried on under and by the name of the Bank of Elk Creek, hereinafter called the old bank; that while said copartnership business continued the old bank issued the certificate of deposit made the subject of this action; that some time in April, 1892, some fourteen gentlemen, a number of them being depositors of the old bank and one of them being Holmes, of the old copartnership, organized the defendant in error, hereinafter called the new bank, a corporation for the purpose of conducting a banking business at Elk Creek, Nebraska; that on the 28th of April, 1892, the stockholders of the new bank met in

the office of the old bank and certain negotiations then took place between the stockholders of the new bank and Holmes, representing the old bank, which resulted as follows:

The old bank sold to the new bank its furniture and fixtures at the price of.....	$1,292 22
Cash in its vaults.....	570 90
Money on deposit in a bank at Lincoln.....	300 00
Money on deposit in a bank at Omaha.....	7 97
Overdrafts due it from its customers.....	1,993 40
And notes belonging to it of the value of....	11,302 71

In consideration of this the new bank agreed to pay the following liabilities of the old bank:

Deposits subject to check.....	$3,102 02
Unremitted collections made.....	3,000 00
A claim in favor of a man named Bagley....	2,224 00
Overdrafts made by the old bank against its correspondents	1,637 80
Outstanding certificates of deposit.....	5,536 38

At the time this transfer or sale took place the old bank had notes on hand belonging to it of the face value of $31,703.11. In other words, the new bank by the deal did not acquire all the property of the old bank, but it had notes remaining belonging to it of the face value of $20,403.40, after delivering to the new bank the assets transferred to it. The agreement of the new bank was to pay the deposits, the unremitted collections, the Bagley claim, and overdrafts unconditionally according to what the books showed they were, and to pay the certificates of deposit to the extent of $5,503.38 as they were presented. The evidence further shows that the new bank made all the payments as it agreed; that it did not pay the certificate of deposit sued for by Campbell here because at the time it was presented it had paid out and took up certificates of deposit due from the old bank more than it had promised to pay. The pleadings do not allege that this transfer was fraudulent, nor do the facts

stated in the pleadings, if proved, warrant such an inference, and there is no evidence in the record but that the entire transaction between the old and the new bank was in good faith. The evidence sustains the finding of the court that the new bank did not assume and promise to pay the claim of Campbell sued for in this action; that the banking business conducted and carried on by the new bank after the 28th of April, 1892, was not a continuation of the banking business of the old bank; that while the new bank began doing a banking business on the 28th of April, 1892, and conducted such business in the former banking house of the old bank, the new bank is not identical with the old one.

But it is insisted on argument here that if the identity between the old and the new bank is not preserved, that the taking of the assets of the old bank by the new one rendered the new bank liable to the creditors of the old bank, and to sustain this contention we are cited, among other authorities, to *Reed Brothers Co. v. First Nat. Bank of Weeping Water*, 46 Neb., 168. That case holds: "Where a partnership engaged in a general mercantile business, in straitened and failing circumstances, incorporated, and the assets and business of the partnership were transferred or assigned to the corporation and appropriated to its objects and purposes, the business of the partnership being continued by the corporation, the corporation was presumptively liable for the partnership debts." But the facts in that case are not like the facts in the case at bar. Here the copartnership, the old bank, so far as the record shows, was not in straitened or failing circumstances, nor were all the assets of the old bank transferred to the new one, nor was the new bank in fact the old bank under a different name. Furthermore, if the facts in this record are sufficient to raise the presumption that the new bank, by taking what assets it did of the old one, assumed the payment of the debts of the old bank, then the answer is that such presumption is entirely overthrown by the evidence. The testimony is overwhelming and uncontra-

dicted that the new bank assumed of the liabilities of the old one those already stated, and no more. There are authorities which hold that where the stockholders of a corporation organize a new one and appropriate all the assets of the old corporation and continue its business, such acts afford conclusive evidence that the new corporation by its conduct assumed the liabilities of the old one. Such are *Hibernia Ins. Co. v. St. Louis & New Orleans Transportation Co.*, 13 Fed. Rep., 516; *Brum v. Merchants Mutual Ins. Co.*, 16 Fed. Rep., 140; *Slattery v. St. Louis & New Orleans Transportation Co.*, 4 S. W. Rep. [Mo.], 79. But we have not been cited to any authority, nor have we been able to find a case which holds that the purchase of part of the assets of a copartnership or corporation by a new corporation organized by the members of the old corporation or copartnership raises a conclusive presumption against the new corporation that by its purchase it assumed and became liable for the debts of the old corporation or copartnership, notwithstanding the fact that the new corporation engaged in and continued to carry on the business in which the old corporation or copartnership had been engaged.

Another argument is that the act of the old bank in transferring a part of its assets to the new one was void, because the effect of the transaction was to prefer and pay in full some of the creditors of the old bank. We are not aware of any law which denies to a copartnership the right to prefer its creditors, provided such preference is made and accepted in good faith and for a valuable consideration. A partnership is a distinct entity, having its own property, debts, and credits, and, for the purposes for which it was organized, it is a person, and as such is recognized by the law. (*Roop v. Herron*, 15 Neb., 73.) And a copartnership, even though in failing circumstances, has the right to pay a part of its creditors in full to the exclusion of others, provided such payments are made with an honest purpose. (*Dietrich v. Hutchinson*, 20 Neb., 52; *Richards v. Leveille*, 44 Neb., 38; *Ætna Ins. Co. v. Bank*

of Wilcox, 48 Neb., 544.) Another answer to this contention is that the pleadings in this case do not attack this transfer as fraudulent in fact. In this state the question of fraudulent intent is always a question of fact and not a question of law, as has been many times decided. (Compiled Statutes, ch. 32, sec. 20; *Goldsmith v. Erickson*, 48 Neb., 48.) And had an issue been made that the transfer was fraudulent in fact, the evidence would not support a finding that the transfer from the old to the new bank was made with any sinister intent whatever.

3. As already stated, the evidence disclosed that the new bank not only paid all the debts of the old one which it assumed, but that it paid out several thousand dollars to the creditors of the old bank which it did not assume; and a final argument is that the new bank, by making these payments, lulled Campbell into a feeling of security until the new bank had suspended payment, and that, therefore, the new bank is now estopped to deny its liability. But the answer to this is that the record does not disclose that Campbell or his assignor neglected to present the certificate of deposit to the new bank prior to the time it was presented because of the fact that he was aware that the new bank was paying the debts of the old one; nor is any such an issue as this made in the pleadings in this case; and finally, the evidence discloses beyond all controversy that the cashier of the new bank betrayed his trust and, without the knowledge, consent, or authority of the new bank or its directory, made payments on the debts of the old bank in excess of the amount assumed by the new one, out of the assets and moneys of the new bank. The judgment of the district court is right and is

AFFIRMED.

HOME FIRE INSURANCE COMPANY OF OMAHA V. JOACHIM BREDEHOFT.

FILED SEPTEMBER 16, 1896. No. 6727.

1. **Compromise and Settlement:** ACTIONS: BAR: FRAUD. Where a creditor accepts from his debtor a part of an unliquidated demand against him in full settlement and compromise thereof, such act is a defense and bar to an action by the creditor against the debtor for the original demand, unless it be pleaded and proved that the settlement was procured by fraud, mistake, or duress.

2. ———: ———: ———: ———. The burden of showing that a settlement was procured by fraud is on the party alleging it.

3. ———: ———: ———: ———: EVIDENCE. Evidence examined, and *held* insufficient to sustain the finding of the jury that the compromise and settlement pleaded by the plaintiff in error in bar to the action was procured by fraud.

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

Jacob Fawcett and *Greene & Breckenridge*, for plaintiff in error.

E. F. Warren and *John C. Watson*, *contra*.

RAGAN, C.

In the district court of Otoe county Joachim Bredehoft recovered a judgment against the Home Fire Insurance Company of Omaha, Nebraska, on an ordinary fire insurance policy, to reverse which judgment the insurance company prosecutes to this court a petition in error.

Of the arguments made by plaintiff in error for a reversal of this judgment we notice only one, namely, the sufficiency of the evidence to sustain the verdict of the jury. To the action of Bredehoft the insurance company interposed three defenses: (1) That Bredehoft had represented and warranted to the insurance company at

the time he obtained the policy in suit that he was the owner in fee-simple of the real estate on which the insured building stood and the owner of the household and kitchen furniture; that these representations were false; that at the time of making them the title to said real estate was held by Bredehoft's wife, as was also the title to the household goods; (2) that at the time Bredehoft made application for and received the insurance policy made the subject of this suit all the property covered by the policy in suit was already insured in the name of Bredehoft's wife by the Continental Insurance Company; (3) that the insurance company and Bredehoft, before the bringing of this suit, had settled and compromised the differences existing between them by the insurance company paying Bredehoft the sum of $200, the full amount of his insurance on household goods, in full settlement of all his claims against the insurance company under the policy in suit; that he had accepted and retained said sum in compromise and settlement of his claims against the insurance company under the policy sued on. To the third defense Bredehoft replied that the $200 received by him were for his loss on the insured personal property, and that if the insurance company had receipts or releases exonerating it from liability to pay the loss sustained upon the dwelling house, such receipts and releases were procured by fraud and fraudulent concealment on the part of the insurance company and received by him, Bredehoft, in ignorance of the terms of such release. We pass no opinion whatever upon the merits of the first two of said defenses interposed by the insurance company to this action, nor upon the sufficiency of the evidence to sustain the finding made by the jury so far as those two defenses are concerned.

Our inquiry is limited to the questions whether the evidence sustains the finding of the jury (1) that no compromise and settlement were made as pleaded by the insurance company between it and Bredehoft; (2) and whether such compromise and settlement, if made, were obtained

by mistake, fraud, or deceit practiced by the insurance company or someone representing it. The evidence in the record is uncontradicted that the insurance company paid to Bredehoft $200, and that he signed and delivered to it a receipt reciting that he had received said sum of money in full of all his claims against the insurance company under the policy in suit, and that he has hitherto retained said sum of money and never at any time offered to return it, or any part of it, to the insurance company. The money was paid to Bredehoft by means of a draft drawn to his order. Attached to the draft was a receipt which recited that the draft, when paid, "will be in full satisfaction of all claims and demands upon said company for loss and damage by fire * * * to property, consisting of household goods and frame dwelling." Bredehoft indorsed this draft and at the same time signed his name to the receipt attached thereto, and received the money for which the draft called. On the same date he signed another receipt, which recited that the sum of money received by him was in full satisfaction of all claims against the insurance company for loss and damage by fire to his household goods and frame dwelling. He also signed another written paper, which recited that he had received the $200 from the Home Fire Insurance Company in full of the damage done to his household goods. This paper also recited that the farm and the insured building thereon belonged to his wife and had been by her mortgaged to the Lombard Investment Company, and a policy of insurance taken out in the Continental Insurance Company in his wife's name covering both the house on the land and the household goods, and that his taking out insurance on this same property in the Home Fire Insurance Company was an oversight on his part and that none of the property insured by him in the Home Fire Insurance Company was his, except the household goods, and that the Home Fire Insurance Company was not liable for loss on the building on the real estate and that he made no claim against

it for the loss on the dwelling house. About the same time Bredehoft and his wife signed another paper, and swore to it before a justice of the peace, in which it was recited that the personal property was that of Joachim Bredehoft and not the property of the wife. Bredehoft also testified that he was a German and could not read nor write the English language. He also testified that he did not "understand" at the time he received this $200 from the insurance company that he was settling his claims against the Home Fire Insurance Company for the loss of the dwelling-house. He admitted the signing of the receipts and papers alluded to above, and further stated that he did not know whether these receipts and papers of settlement were read over to him at the time he signed them or not. On the other hand, the evidence is very strong to the point that all these papers were correctly read over to Bredehoft and their contents and meaning explained to him before he signed them and received the money. But the important thing to be borne in mind is that it nowhere appears in the evidence that these papers and terms of settlement were not read over and explained to Bredehoft before he signed them and received the money, nor is it claimed or pretended that they were misread to him. If there was any evidence in the record that these papers and receipts of settlement and compromise were wrongfully read over and explained to Bredehoft and he was misled thereby, then we have not the slightest doubt but that the evidence would sustain the finding of the jury.

In *Slade v. Swedeburg Elevator Co.*, 39 Neb., 600, it was held: "A compromise of honest differences, whereby a less sum than that claimed has been paid and accepted in full of plaintiff's claim, bars the right of plaintiff to insist upon a recovery of the amount originally claimed by him." And in *Treat v. Price*, 47 Neb., 875, it was said: "The rule that when a certain sum is due from one to another, the payment of a lesser sum is no discharge as to the remainder, notwithstanding an agreement to that

effect is founded upon the fact that the later agreement is without consideration." It was further held in that case: "Such rule does not apply where the amount due is disputed or unliquidated." In the case at bar the insurance company refused to pay any part of the loss, alleging as an excuse therefor that Bredehoft had represented and warranted to it, and thereby induced it to issue its policy, that he was the owner in fee-simple of the real estate and the owner of the household goods insured; that such representations were false; and that at the time of obtaining the policy from the Home Fire Insurance Company the property which it insured was already insured, and that by the terms of its contract of insurance its policy was void by reason of the existence, without its knowledge or consent, of the former insurance. Bredehoft, on the other hand, was claiming the entire insurance on the dwelling-house and the household furniture. Here, then, was a dispute existing between these parties. It may be that the reasons alleged by the insurance company as a reason for its not paying the policy, if true, would not have afforded it a legal defense to Bredehoft's action. But the record justifies us in saying that these reasons were put forward by the insurance company in good faith. In other words, a difference of opinion existed between these parties as to whether anything was due from one to the other, the insurance company claiming that it was not liable for anything under the policy, and this claim was not a mere pretext conjured up by the insurance company for the purpose of compelling a settlement or compromise. The claim of Bredehoft was settled and compromised by the insurance company paying the loss on the household goods and Bredehoft waiving his right of action against the insurance company for the loss sustained on the building. The evidence does not show that this settlement or compromise was procured by fraud, by mistake, or by undue influence. It does not show that at the time Bredehoft received this money and signed the settlement papers

they were not read over and explained to him, nor does it show that they were wrongfully read or wrongfully explained to him. The evidence, therefore, does not sustain the finding of the jury that no compromise and settlement as pleaded by the insurance company were made, if the jury made such finding, nor does the evidence sustain the finding of the jury that the compromise and settlement pleaded and proved were procured by fraud, deceit, mistake, or misrepresentation of any kind. The verdict lacks evidence to sustain it. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

JAMES THOMPSON V. JOHN THOMPSON ET AL.

FILED SEPTEMBER 16, 1896. No. 6850.

1. **Wills:** EXECUTION: SUBSCRIBING WITNESSES. Section 127, chapter 23, Compiled Statutes, construed, and *held* (1) not to require the words composing the name of an illiterate testator to be written at the end of his will, either by himself or by some person by his direction; (2) if the testator, being of sound mind and with the intention of making a will, voluntarily made a mark, cross (X), or other character, which he intended and adopted as and for his signature, it satisfied the statute as to signing; (3) not to require the witnesses to a will to subscribe it at the express request of the testator.

2. **Trial:** SPECIAL INTERROGATORIES: FAILURE OF FOREMAN TO SIGN ANSWERS: OBJECTIONS: REVIEW. Where special interrogatories are submitted to a jury, and by it answered and returned into court with their general verdict, and received and recorded therewith without objection, it is too late afterwards to insist that the court erred in receiving and recording the special interrogatories because not signed by the foreman of the jury.

3. **Wills:** TESTAMENTARY CAPACITY: UNDUE INFLUENCE. Evidence examined, and *held* to sustain the finding of the jury that the testator at the date of the execution of the will was of sound mind, and that he was not induced to execute the will by an undue influence which controlled his volition and destroyed his free agency.

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

The facts are stated by the commissioner.

Samuel J. Tuttle, for plaintiff in error:

The will was not properly executed. (*Greenough v. Greenough*, 11 Pa. St., 489; *Barr v. Graybill*, 13 Pa. St., 396; *Waite v. Frisbie*, 47 N. W. Rep. [Minn.], 1069.)

The will was not attested as required by statute. (*Swift v. Wiley*, 1 B. Mon. [Ky.], 114; *In re Downie's Will*, 42 Wis., 66; Jarman, Wills, 207, note 7; *Hall v. Hall*, 17 Pick. [Mass.], 373.)

References as to questions of testamentary capacity and undue influence: 1 Jarman, Wills, 68, note *c*; *Buttin v. Barry*, 1 Curt. [Eng.], 614; *Harvey v. Sullens*, 46 Mo., 147; *Tyler v. Gardiner*, 35 N. Y., 559.

The failure of the foreman of the jury to sign the answers to the special interrogatories makes the judgment erroneous. (Code of Civil Procedure, secs. 291, 292; *Sage v. Brown*, 34 Ind., 464; *Doom v. Walker*, 15 Neb., 339.)

Sawyer, Snell & Frost, contra:

Plaintiff in error having failed to object to the receiving of the general verdict and special findings at the time they were returned by the jury, cannot now object that they were not properly authenticated. (*Vater v. Lewis*, 36 Ind., 288; *McElfresh v. Guard*, 32 Ind., 414.)

The will was properly signed, attested, and witnessed. (*Vernon v. Kirk*, 30 Pa. St., 222; Beach, Wills, sec. 28; Schouler, Wills [2d ed.], secs. 303, 306, 347; *Will of Susan Jenkins*, 43 Wis., 610; *Everhart v. Everhart*, 34 Fed. Rep., 85; *Jackson v. Jackson*, 39 N. Y., 159; *Allaire v. Allaire*, 8 Vroom [N. J. Law], 312; *In re Lewis*, 7 N. W. Rep. [Wis.], 834; *McCurdy v. Weall*, 7 Atl. Rep. [N. J.], 566; *Tappen v. Davidson*, 27 N. J. Eq., 459; *In re Nelson's Will*, 36 N. E. Rep. [N. Y.], 3.)

RAGAN, C.

This is a proceeding in error to reverse a judgment of the district court of Lancaster county affirming a judgment of the county court of said county admitting to probate a paper purporting to be the last will and testament of John Thompson, Sr. The concluding portion of the will in controversy is in words and figures as follows:

"In testimony whereof, I hereunto set my hand and seal, and publish and declare this to be my last will and testament, in the presence of the witnesses named below, this 19th day of December, in the year of our Lord eighteen hundred and eighty-eight.

"JOHN THOMPSON, SR. His X mark.

"Signed, sealed, published, and declared by the said John Thompson, Sr., as and for his last will and testament in the presence of us, who, in his presence and at his request, have subscribed our names as witnesses hereto. This will is written with a typewriter upon two sheets of paper. A. J. SAWYER.

"A. L. FROST."

It appears from the evidence that the Hon. A. J. Sawyer at the date of the execution of the will in controversy was a practicing attorney at law, having an office in the city of Lincoln; that on the date of the will the testator came to Mr. Sawyer's office and informed him that he wished to make his will, wished Mr. Sawyer to draw it, and explained to him what he wished it to contain; that thereupon Mr. Sawyer dictated the will to a stenographer, and after it had been printed upon a typewriter he read the will over to the testator. It further appears from the evidence that the testator was illiterate and unable to sign his name, and someone, presumably Mr. Sawyer, wrote the words "John Thompson, Sr., his mark." The testator then took hold of the pen-holder, Mr. Sawyer also having hold of it, and made the charac-

ter or cross (x) between the words "his" and "mark," and in the testator's presence and in the presence of each other Mr. Sawyer and A. L. Frost subscribed the will as witnesses. Section 127, chapter 23, Compiled Statutes, provides: "No will made within this state, except such nuncupative wills as are mentioned in the following section, shall be effectual to pass any estate, whether real or personal, nor to charge, or in any way affect the same, unless it be in writing and signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses; and if the witnesses are competent at the time of attesting the execution of the will their subsequent incompetency, from whatever cause it may arise, shall not prevent the probate and allowance of the will, if it be otherwise satisfactorily proved."

1. The first argument relied on here for a reversal of this judgment is that the testator by making "his mark" did not sign the will within the meaning of the statute just quoted; or, to express it differently, that a testator cannot sign his will by merely making "his mark." To sustain this contention we are cited to *Greenough v. Greenough*, 11 Pa. St., 489, *Asay v. Hoover*, 5 Pa. St., 21, and *Grabill v. Barr*, 5 Pa. St., 441. If it can be said that these cases are authority for the contention of counsel, is is sufficient to say that they have been expressly overruled by the supreme court of Pennsylvania in *Vernon v. Kirk*, 30 Pa. St., 222. But so far as we have been able to examine the authorities, they are all to the effect that a testator who is, by reason of illiteracy, unable to write his name may make a valid will by signing it with a mark or cross.

In Jarman, Wills [6th Am. ed.], p. 125, it is said: "Where a testator is unable to write, from ignorance, perhaps a mark is to be preferred to a signature by the hand of another, as being the more usual mode of execution by illiterate persons; for in regard to this and all other par-

ticulars the prudent course is to make the execution of the will conform as much as possible to the testator's ordinary mode of executing instruments." To the same effect see Beach, Wills, sec. 28.

In Schouler, Wills [2d ed.], sec. 303, it is said: "To write out one's own name in full is doubtless the safest course, as well as the most natural; for such compliance best indicates a rational mind, free will, and physical power at the date of execution. But, undoubtedly, the making of his mark by the testator will satisfy the statute; and that, too, as various cases rule, notwithstanding he was able to write at the time. Thus has it been held in cases arising under the statute of frauds; and those decisions apply equally to the statute of Victoria, which is expressed in language almost identical, as also to most American Codes. Other modes of signature are permitted besides. Accordingly the will has been upheld where the testator made a mark, with his hand guided or not guided by another; or where the testator wrote only his initials; or where his full signature was effected by the aid of another person, who guided his hand; or where he stamped his name; or where only the Christian name was signed; provided that in all such cases the testator's knowledge and free consent and completed testamentary purpose accompany the act, which here is an act of signature by himself."

"If an illiterate but intelligent testator makes cross strokes with his pen upon the paper the act of signature is his own; and so, too, where the hand of a testator who is physically unable to subscribe without assistance is guided by another. Wherever, in truth, the act is the testator's own act, *animo testandi*, though with the assistance of another, it is not necessary to prove any express request for assistance on his part. And under any circumstances, a testator signs his will where he makes the physical effort and performs the act, even though his hand be steadied or guided by another, if something is produced upon the paper sufficient to identify his signa-

ture, and his own purpose to sign accompanied the action, while he was assisted and not controlled." (Schouler, Wills [2d ed.], sec. 306.)

Construing a statute of Wisconsin almost identical with ours quoted above, the supreme court of that state held: "If the testator's name is, in his presence and by his express direction, signed to the will by another person, or if the testator affixes his mark thereto, that is a sufficient sign." (*Will of Susan Jenkins*, 43 Wis., 610.)

Construing a statute of Massachusetts similar to the Nebraska statute quoted above, the supreme court of that state held: "Affixing a cross by a testator to his will as and for his signature is a sufficient signing." (*Nickerson v. Buck*, 12 Cush. [Mass.], 332.)

2. Another argument is that the judgment is wrong because the evidence does not show who wrote the words "John Thompson, Sr., his mark," at the end of the will. But the statute is not to be so construed as to require the words composing the name of the illiterate testator to be written at the end of the will, either by himself or some other person by his direction; nor is it absolutely essential to the validity of the will of an illiterate testator that the words composing his name should be written at the end of the will. If the testator, being of sound mind and with the intention of making a will, voluntarily made a mark, cross, or other character which he intended and adopted as and for his signature, it satisfied the statute. The words, "John Thompson, Sr., his x mark," found at the end of the will under consideration meant and were intended only to mean that the cross or character was John Thompson, Sr.'s, signature. The pronoun "his" being the old form, for which we have substituted the apostrophe and the letter "s," so that the expression "John Thompson, Sr., his x mark," is the equivalent of "this mark (x), or this cross (x), is John Thompson's signature."

3. Again, it is argued that the judgment must be reversed because the evidence does not show that the witnesses to the will subscribed it at the request of the testator. The

answer to this argument is that no such requirement is found in the statute. An analysis of the statute discloses that, aside from nuncupative wills, a will to be effectual to pass an estate must be in writing; must be signed by the testator, or be signed by some person in his presence and by his express direction; must be attested and subscribed in the presence of the testator by two or more competent witnesses. The will under consideration was executed in exact conformity to the statute.

4. A fourth argument is that the evidence does not support the finding made by the jury in the district court, that the testator, at the date of the execution of the will was of sound mind, and that he was not induced to execute the will by an undue influence which controlled his volition and destroyed his free agency. On the contrary, we are of opinion that the evidence sustains the finding of the jury. It appears, indeed, that the testator was an old man, somewhat weak, perhaps, both in body and mind, but it is very doubtful if the evidence in this record would sustain a special finding that at the time he executed the will he was of unsound mind, or that he was induced to execute the will by any undue influence whatever.

5. In the district court the jury, in addition to a general verdict, was required by the trial court to answer certain special interrogatories. These they answered and returned into court with their general verdict, but the special interrogatories were not signed by the foreman of the jury. It is now insisted that the court erred in rendering judgment because the answers to the special interrogatories were not signed by the foreman of the jury. There are two answers to this argument. In the first place, there is entire harmony between the general verdict and the special interrogatories, and if the court erred in receiving the special interrogatories, unsigned as they were by the foreman of the jury, it was error without prejudice; and in the second place, the general verdict and the special interrogatories were returned into court

by the jury and received and recorded without any objection or protest from any one. If the plaintiff in error desired to object to the receipt and recording of the special interrogatories as returned by the jury because they were not signed by the foreman, he should have made the objection to the trial court at the coming in of the verdict. It was too late to make it afterwards. The judgment of the district court is right and is in all things

AFFIRMED.

JOHN G. SMITH V. FRANKLIN COUNTY.

FILED SEPTEMBER 16, 1896. No. 6660.

Sheriffs' Fees: MILEAGE. For conveying insane patients to the hospital a sheriff is entitled to mileage at the rate of five cents per mile, and not at the rate of ten cents per mile. *Porter v. Merrick County*, 42 Neb., 397, followed.

ERROR from the district court of Franklin county. Tried below before BEALL, J.

A. H. Byrum, for plaintiff in error.

H. Whitmore, contra.

RAGAN, C.

This record presents a single question, namely: To what fees or mileage is a sheriff entitled for conveying insane patients to the hospital? This court has passed upon the question since the case at bar was tried, and held: "For conveying insane patients to the hospital a sheriff is entitled to mileage at the rate of five cents per mile, and not at the rate of ten cents per mile." (See *Porter v. Merrick County*, 42 Neb., 397.) This was the view taken of the law by the district court in the case under consideration, and its judgment is

AFFIRMED.

LANCASTER COUNTY BANK, APPELLEE, V. JOHN J. GILLILAN ET AL., APPELLANTS.

FILED SEPTEMBER 16, 1896. No. 6628.

1. **Bill of Exceptions:** SUBMISSION TO ADVERSE PARTY. A proposed bill of exceptions is not submitted to the adverse party or his attorney of record, within the meaning of the statute, by leaving it at the office of the attorney in his absence.

2. **Voluntary Assignments:** RIGHTS OF ASSIGNEE. Except as authorized by statute, the assignee under a voluntary assignment for the benefit of creditors may not assert rights beyond those which the assignor might assert in the absence of the assignment, the assignee, except as otherwise provided, representing the assignor and not the creditors.

3. ———: ———: CHATTEL MORTGAGES. Therefore, the holder of an unrecorded chattel mortgage from the assignor has a right to the mortgaged property superior to that of the assignee, unless the case is one where the statute expressly confers upon the assignee the powers of a creditor.

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

The facts and issues are stated by the commissioner.

R. J. Greene, for appellants Gillilan and Lee & Becker:

A voluntary assignment creates a trust for the benefit of the creditors, and the assignee is clothed with power which could not be exercised by the assignor. The assignee took the property discharged of any claim of the appellee, and the appellants Lee & Becker, who bought the property from the assignee, are entitled thereto as against the claim of the appellee. (*Commercial Nat. Bank v. Nebraska State Bank*, 33 Neb., 305; *Lininger v. Raymond*, 12 Neb., 170; *Smith v. Jones*, 18 Neb., 481; *Bingham v. Jordan*, 1 Allen [Mass.], 373; *Travis v. Bishop*, 13 Met. [Mass.], 304; *Denny v. Lincoln*, 13 Met. [Mass.], 200; *Briggs v. Parkman*, 2 Met. [Mass.], 258; *Hanes v. Tiffany*, 25 O. St., 552; *Lindemann v. Ingham*, 36 O. St., 10; *Gibson v. Warden*, 14 Wall. [U. S.], 244; *Stewart v. Platt*, 101 U. S.,

731; *Kilbourne v. Fay*, 29 O. St., 264; *Becker v. Anderson*, 11 Neb., 498; *Earle v. Burch*, 21 Neb., 709; *Conway v. St. Joseph Iron Co.*, 33 Neb., 455; *Houk v. Condon*, 40 O. St., 569; *Sayre v. Hewes*, 32 N. J. Eq., 652; *Brothers v. Mundell*, 60 Tex., 240.)

R. D. Stearns, for appellant Houtz:

Where, by statute, a prior unrecorded mortgage is made absolutely void as against a subsequent *bona fide* mortgage, the latter takes priority over the former, though neither of them is recorded. (*Bank of Farington v. Ellis*, 30 Minn., 270; *De Coursey v. Collins*, 21 N. J. Eq., 357; *Coster v. Bank of Georgia*, 24 Ala., 37.)

One claiming under an unrecorded chattel mortgage has the burden of proving that a subsequent mortgagee, claiming under a mortgage duly recorded, had notice of the existence of the unrecorded prior mortgage when the subsequent mortgage was executed. (*Kelly v. Shepherd*, 4 S. E. Rep. [Ga.], 880; *Simpson v. Harris*, 31 Pac. Rep. [Nev.], 1009; *Karst v. Gane*, 32 N. E. Rep. [N. Y.], 1073; *Gandy v. Dewey*, 28 Neb., 175.)

A chattel mortgage executed even a day before a voluntary assignment for the benefit of creditors, to one who is ignorant of an intent to make such assignment, is valid. (*Van Patten v. Burr*, 7 N. W. Rep. [Ia.], 522; *Bierbower v. Polk*, 17 Neb., 268; *Sweetser v. Camp*, 29 N. W. Rep. [Mich.], 507.)

Walter J. Lamb, for appellee:

Neither the assignee nor the creditors of the assignor are creditors within the recording acts. Our recording acts as relating to creditors do not refer to general creditors at large, but only to creditors who have judgments and specific liens on the property by levy. (*Ransom v. Schmela*, 13 Neb., 77; *Farmers & Merchants Bank v. Anthony*, 39 Neb., 343; *Brothers v. Mundell*, 60 Tex., 240; *Grace v. Wade*, 45 Tex., 527; *Jones v. Graham*, 77 N. Y., 628; *Stewart v. Beale*, 7 Hun [N. Y.], 411.)

The assignee under a voluntary assignment is not a purchaser, mortgagee, or creditor. A chattel mortgage not filed is in all respects valid as against the assignee under a voluntary assignment. (Burrell, Assignments, sec. 391; Bishop, Insolvent Debtors, sec. 292; *Frow v. Downman*, 11 Ala., 880; *Grangers Life Ins. Co. v. Kampers*, 73 Ala., 325; *Kirk v. Roberts*, 31 Pac. Rep. [Cal.], 620; *Einstein v. Shouse*, 5 So. Rep. [Fla.], 380; *Seay v. Bank of Rome*, 66 Ga., 615; *Fouche v. Brower*, 74 Ga., 251; *Willis v. Henderson*, 4 Scam. [Ill.], 13; *Meyer v. Evans*, 66 Ia., 179; *Rumsey v. Town*, 20 Fed. Rep., 560; *Sandwich Mfg. Co. v. Wright*, 22 Fed. Rep., 632; *Hairgrove v. Millington*, 8 Kan., 480; *Bridgeford v. Barbour*, 80 Ky., 529; *Billings v. Collins*, 44 Me., 271; *Deering v. Cobb*, 74 Me., 332; *Taylor v. Taylor*, 74 Me., 582; *Chace v. Chapin*, 130 Mass., 128; *Hathaway v. Fall River Bank*, 131 Mass., 14; *Clark v. Flint*, 22 Pick. [Mass.], 231; *Pierson v. Manning*, 2 Mich., 453; *Lentz v. Flint & P. M. R. Co.*, 53 Mich., 444; *Flower v. Cornish*, 25 Minn., 473; *Gayden v. Tufts*, 10 So. Rep. [Miss.], 53; *Heinrichs v. Woods*, 7 Mo. App., 236; *Jacobi v. Jacobi*, 14 S. W. Rep. [Mo.], 737; *Hach v. Hill*, 14 S. W. Rep. [Mo.], 740; *Drew v. Drum*, 44 Mo. App., 25; *Shaw v. Glen*, 37 N. J. Eq., 32; *Milton v. Boyd*, 22 Atl. Rep. [N. J.], 1078; *Millhiser v. Erdman*, 98 N. Car., 292; *Van Husen v. Radcliff*, 17 N. Y., 580; *Jones v. Graham*, 77 N. Y., 628; *Kitchen v. Lowery*, 27 N. E. Rep. [N. Y.], 357; *Helms v. Gilroy*, 26 Pac. Rep. [Ore.], 851; *Gammons v. Holman*, 11 Ore., 284; *Knowles v. Lord*, 4 Whart. [Pa.], 499; *Mellon's Appeal*, 32 Pa. St., 121; *Hawks v. Pritzlaff*, 7 N. W. Rep. [Wis.], 303; *Baumbach v. Miller*, 30 N. W. Rep. [Wis.], 850; *Kloeckner v. Bergstrom*, 30 N. W. Rep. [Wis.], 118; *Keller v. Smalley*, 63 Tex., 512; *Stewart v. Platt*, 101 U. S., 731.)

Under the general assignment law of Nebraska the assignee stands in the place of the assignor, and has no rights against secured creditors beyond those of his assignor, except, perhaps, those specially given by statute. (*Housel v. Cremer*, 13 Neb., 298; *Norton v. Pilger*, 30 Neb., 860; *Salladin v. Mitchell*, 42 Neb., 861.)

References as to when the assignee may recover under the statute: *Brown v. Farmers & Merchants Bank*, 36 Neb., 434; *Rumsey v. Town*, 20 Fed. Rep., 560; *Kitchen v. Lowery*, 27 N. E. Rep. [N. Y.], 357; *Travis v. Bishop*, 13 Met. [Mass.], 304; *Chace v. Chapin*, 130 Mass., 128; *Jewett v. Tucker*, 139 Mass., 566; *Clark v. Flint*, 22 Pick. [Mass.], 231.

IRVINE, C.

With the submission of this case on its merits there is also submitted a motion to quash the bill of exceptions. It seems from the record that on the 16th of September, 1893, and within the time fixed for submitting the bill of exceptions, a draft thereof was left at the office of the appellee's attorney, but not delivered to the attorney himself. It would also seem that the proposed bill of exceptions did not come into the actual possession of the attorney until after the expiration of the time allowed; and it was by him returned, with an objection that it had not been served within time. When the matter was submitted to the trial judge he indorsed on the bill the following: "If service of a bill of exceptions at the usual place of business of the attorney of a party to a suit be sufficient service under section 311 of the Code, then the within bill was presented in time. If such service be not sufficient under said section, then within bill was not presented within eighty days from adjournment of court *sine die*. Question is reserved for decision of supreme court." At the same time, however, the judge made the following order: "The within is all the evidence offered and given by both parties upon the trial of this cause, and on the application of the defendant herein this bill of exceptions is allowed by me and ordered to be made a part of the record in this case, subject to the decision of the supreme court upon question whether served in time." One argument advanced in support of the motion to quash is that the order allowing the bill, being conditional, does not amount to a settlement of the bill. We

think, however, that it should be treated as if it were unconditional. There is no provision in our law whereby a district judge may certify a question to the supreme court for decision. He must decide all matters properly presented, and the jurisdiction of this court is to review such decisions, and not to pass upon controverted questions in the first instance. Every decision of the district court is made "subject to the decision of the supreme court," if the parties desire and take proper steps to pursue their remedy. Where a district judge is in doubt as to his authority to settle a bill of exceptions, it is generally proper for him to allow it, so that if a review is desired it may be had speedily on motion, and without resort to an independent action, as is necessary in case of a refusal. We therefore treat the judge's order as one allowing the bill, and his certificate as a finding of the facts.

Section 311 of the Code provides, among other things, that the party excepting shall reduce his exceptions to writing "and submit the same to the adverse party or his attorney of record for examination and amendment if desired." The question is therefore presented whether leaving the proposed bill at the office of the attorney of record is a "submission" thereof to such attorney within the meaning of the statute. The question is a new one in this court, and our attention has not been directed to any adjudications elsewhere under similar statutes. It has been several times said that the object of the statute in requiring a submission to the adverse party or his attorney is to obtain an accurate bill. (*Uhling v. Schellenberg*, 12 Neb., 609; *Howard v. Lamaster*, 13 Neb., 221.) In *Fitzgerald v. Brandt*, 36 Neb., 683, there were several appellees, whose interests were diverse. The proposed bill of exceptions was left at the office of the attorneys for one appellee, and the others were notified that the bill had been left there for their examination and would so remain for the time allowed by law. It was held that this was not a submission within the statute. A summons may be

served by leaving a copy thereof at the usual place of residence of the defendant, and there are other cases where service may be made otherwise than by delivery personally to the party to be served; but such substituted service is valid only because made so by statute, and there can be no doubt that, in the absence of a statute to the contrary, service upon a person means personal service, and nothing else. This statute provides that the proposed bill may be submitted to the adverse party or his attorney of record, but provides for no other manner of service. As has been said, the object of the requirement is to obtain an accurate bill, by giving to the adverse party an opportunity to examine the proposed bill and suggest amendments. The statute permits only ten days for this purpose. Practicing attorneys cannot always be in their offices, and to hold that a proposed bill is properly submitted by leaving it at the office of the attorney during his absence might frequently operate to deprive him of the opportunity of examination and suggesting amendments. There is no provision by which this period of ten days may be extended. On the other hand, the statute allows the party proposing the bill fifteen days from the rising of court in which to submit the bill. (Code, sec. 311; *First Nat. Bank v. Bartlett*, 8 Neb., 319.) This time may be extended by the court to forty days from the adjournment of the term, and, upon showing of diligence, the judge may extend the time for another period of forty days. It would seem, therefore, as if it were the intention of the legislature to allow to the appellant or plaintiff in error ample time to properly submit the bill, and to require prompt action by the adverse party upon its submission. An inability to submit the bill to the adverse party or his attorney, on account of absence of the latter, the party proposing the bill having been diligent, would undoubtedly be good cause for extending the time, and the rights of both parties would thereby be saved; whereas giving the statute such a construction as would be required to sustain this bill would in many cases de-

prive a party, successful in the district court, of his right to suggest amendments. Opposing the construction we have indicated is the fact that contingencies may arise where it becomes impossible to submit the bill within the longest period allowed by statute if personal service is required. The adverse party may be a non-resident. His attorney of record may be absent for a very extended period. Such contingencies are, however, so remote that the legislature has evidently failed to provide therefor, and they are so remote that the court, in order to meet them, should not adopt a construction of the statute which would be disastrous to the rights of the parties under situations frequently arising. The motion to quash the bill is sustained.

The action was by the Lancaster County Bank against John J. Gillilan, W. G. Houtz, G. M. Lee, C. F. Becker, and Theodore Horn. Gillilan was the assignee of Horn under a voluntary assignment for creditors. The Lancaster County Bank held a note, secured by a chattel mortgage, executed by Horn prior to the assignment. Houtz held a subsequent mortgage on the same property. Lee and Becker were purchasers of a portion of the property from the assignee. The action was to foreclose the bank's mortgage. The mortgage of Houtz was executed more than a year after the mortgage to the bank, but was recorded before the bank's mortgage. The court, in response to the issues joined, found that Houtz's mortgage had been executed and filed for record by Horn of his own motion, purporting to secure a debt many times greater than the amount actually due, and that it was executed for the purpose of hindering and delaying the plaintiff in the collection of its debt. The bill of exceptions having been quashed, we must accept this finding as conclusive and as justifying the decree of the court annulling Houtz's mortgage as against the plaintiff. Other findings were that the mortgage to the bank was made August 19, 1890, in good faith and for the purpose of securing a *bona fide* debt; that it was not filed for record

until October 30, 1891. On the same day, but several hours later, Horn's assignment was executed and filed. It was further found that the sale by the assignee to Lee and Becker was made long after the filing of plaintiff's mortgage, and the pleadings admit that Lee and Becker had actual notice of the mortgage at the time of their purchase. Gillilan and Lee and Becker claim the property on the ground that the mortgage not having been filed for record until after the assignment was made, the assignee, and consequently his vendee, have a superior right. The question is therefore presented whether, under section 14, chapter 32, Compiled Statutes, an unrecorded mortgage, if made in good faith, is valid as against the assignee under a voluntary assignment for creditors. Section 14 is as follows: "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditor of the mortgager, and as against subsequent purchasers and mortgagers in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk of the county where the mortgager executing the same resides, or in case he is a non-resident of the state, then in the office of the clerk of the county where the property mortgaged may be at the time of executing such mortgage, and such clerk shall indorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons; and such mortgage or instrument may be so filed, although not acknowledged, and shall be valid as if the same were fully spread at large upon the records of the county." That such mortgage is valid as between the parties thereto is not open to doubt. (*Becker v. Anderson*, 11 Neb., 493; *Sanford v. Munford*, 31 Neb., 792.) The statute makes such unrecorded mortgage void only against the creditors of the mortgagor and against subsequent purchasers and

mortgagees in good faith. It is not contended that the assignee is a subsequent purchaser or mortgagee in good faith; but it is contended that the assignee so far represents creditors that he may assert their rights under the statute. Were the question one of first impression, the writer would be very strongly of the opinion that the assignment being for the benefit of creditors, it should be construed as placing at the disposition of creditors all property which could in any manner be subjected to the payment of their claims; and that for the purpose of so applying assets the assignee should be treated as the representative of creditors and authorized to assert all their rights. It must, however, be conceded that at the time of the passage of our present assignment law, in 1883, it was the generally established doctrine that a voluntary assignee is the representative, not of creditors, but of the assignor; that he takes the property of the assignee subject to all equities existing against it; and that he can assert, in the absence of statutory authority, no other or greater rights than the assignor might himself have asserted if the assignment had not been made. A review of the cases would not be sufficiently profitable to justify the expansion of the opinion which would be necessary for that purpose. Many of them are cited in the briefs. The authorities are not entirely uniform; but where the courts have held that an assignee is entitled to property as against a mortgage good between the parties, the reason has usually been found in some particular language of acts with relation to the execution or recording of mortgages. Thus, in Massachusetts it was held that an unrecorded chattel mortgage of property, the possession of which had not been delivered to the mortgagee, was not valid against the assignee in insolvency of the mortgagor; but this was under a statute providing that such mortgages "shall not be valid against any person other than the parties thereto." (*Bingham v. Jordan*, 83 Mass., 373.) It needs no argument to point out the distinction between a statute declaring unrecorded mortgages void as against

all persons except parties thereto, and one declaring them void merely as against creditors and subsequent purchasers and mortgagees in good faith. Still, under a statute similar to that of Massachusetts, the supreme court of Rhode Island held that an assignee in insolvency was not a "person other than the parties" to the mortgage within the meaning of the statute, and that the mortgage prevailed as against the right of the assignee. (*Wilson v. Esten*, 14 R. I., 621.) Aside from such exceptional cases as those to which we have alluded, the decisions have been quite uniform that the assignee takes only the rights of the assignor, and in the absence of statutory authority can assert no greater rights. This was the rule under the last federal bankruptcy act. (*Stewart v. Platt*, 101 U. S., 731.) We begin, then, with the proposition that at the time our assignment law was adopted the almost uniform rule was in favor of the mortgagee as against the assignee. The language of our assignment law is partly taken from the last federal bankruptcy act, and in other respects it is largely modelled upon assignment laws of other states. It is necessary to presume, therefore, that the legislature, in adopting the act, had in view the construction placed by courts of other jurisdictions upon similar acts. The legislature must also be presumed to have had in view the decisions of this court on the general subject. In 1877 there had been passed "An act relating to voluntary assignments for the benefit of creditors, and to assignees therein named, and the settlement of their accounts." (Session Laws, 1877, p. 24.)

In *Lininger v. Raymond*, 12 Neb., 167, goods had been attached in the hands of an assignee by creditors who justified the attachment on the ground that the assignment was fraudulent. Four days prior to the assignment the assignor had delivered promissory notes to a creditor in payment of a debt much less than the face of the notes. The court held that this did not invalidate the assignment. Discussing the question, it was said: "The assignee is a trustee for the creditors. Under such an as-

signment he may sue for and recover any money or property belonging to the trust estate, no matter where the same may be." This language was used *arguendo*, the position of the court being that although the turning over of notes to the creditor prior to the assignment may have been open to attack, the assignee might make the attack and it would not avoid the assignment. The question being as to the validity of the assignment, this expression was clearly *obiter*, and was in no sense an adjudication that the assignee might maintain such an action.

In *Housel v. Cremer*, 13 Neb., 298, a mortgagee replevied property from the assignee. The assignee claimed that the mortgage was fraudulent. The court held distinctly that the assignee represented simply the assignor, and not his creditors, and that he could not defeat the mortgage on the ground that it was fraudulent as to creditors. The question was there squarely involved and it was said by LAKE, C. J., commenting on the statement in *Lininger v. Raymond, supra*, that the assignee is a trustee for the creditors: "That the very reverse of this is the correct rule in the case of a voluntary assignment is shown by an almost unbroken line of decisions in the courts of this country, as well as of England. * * * Where an insolvent makes a fraudulent transfer of property to defraud his creditors, so as to deprive himself of the right to reclaim it, he cannot by a merely voluntary assignment give the assignee that right." This case was decided in 1882 and was followed in 1883 by the passage of our present assignment law. Therefore, when the assignment law of 1883 was passed it had once been said by the court that the assignee is a trustee for creditors, and, in effect, that he might assert their rights; but this was an *obiter dictum* and had been expressly and very emphatically overruled in a case presenting the question.

The true rule being thus established, the legislature within a year passed the present assignment law, and had it been the intention of the legislature to so change the law as to give effect to the rule in *Lininger v. Raymond*

and to abrogate the rule in *Housel v. Cremer*, apt language would certainly have been used for that purpose. It clearly was the intention of the legislature to in some respects modify the general doctrine as established by *Housel v. Cremer*. Thus, in section 30 of the assignment law (Compiled Statutes, ch. 6) it is provided that if the assignor shall have made any fraudulent conveyance of his property, or any conveyance of the same for his own benefit, the assignee shall, upon the direction in writing of a majority in number of the creditors, owning two-thirds in amount of all the claims proved against the estate, begin and maintain an action for the purpose of setting said conveyance aside; and in such action he shall have all the rights and be entitled to all the remedies of a judgment creditor of the assignor. It was clearly not the intention then of the legislature to give the assignee a general power to assert the rights of creditors. By the express terms of the act he may only attack a fraudulent conveyance when authorized in writing by the required number of creditors. Again, by section 42, if a person, being insolvent or in contemplation of insolvency, within thirty days before the making of an assignment makes a sale, assignment, transfer, or other conveyance of any part of his property to one who has then reasonable cause to believe him insolvent, or in contemplation of insolvency, and that such sale or conveyance is made with a view to prevent the property from going to the assignee, such conveyance shall be void and the assignee may recover the property or the assets of the insolvent. Here, again, there is no general power to assert the rights of creditors; and a single class of conveyances merely is declared void in such a manner as to permit the assignee to attack them. So, too, by section 43, if a person, being insolvent, or in contemplation of insolvency, within thirty days before the making of an assignment with a view to giving a preference procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or convey-

ance, the person receiving the same having reasonable cause to believe the assignor insolvent, or in contemplation of insolvency, and that such conveyance is made in fraud of the law, the same shall be void and the assignee may recover the property or its value. Here, again, is a single class of controversies opened up by statute to attack by the assignee. There are no other similar provisions; and having in view the generally established rule in other jurisdictions as to the capacity and power of the assignee, and the fact that this court had within a year, in the clearest terms, established in this state the rule that the assignee represents merely the assignor, and may not assert rights peculiar to creditors, we reach almost the certainty of a mathematical demonstration that the legislature, by extending in three peculiar cases the powers of the assignee beyond those which the assignor possessed, did not intend to extend them generally, or to give to the assignor the rights of creditors, except in the cases specially provided.

If doubt remained as to the legislative intent, light is thrown upon it in another direction. Some of the few cases extending to assignees the authority generally to assert the rights of creditors do so upon the ground that from the time of the assignment the property is *in custodia legis*, and creditors are no longer in position to assert their rights on their own behalf. Unless, it is argued, and with some force, the assignee shall be permitted to assert for them what they can no longer assert for themselves, by reason of the assignor's act, their remedy is lost. A somewhat similar position was taken by this court in a very different transaction in *Union P. R. Co. v. Douglas County Bank*, 42 Neb., 469. But by section 33 of the assignment law, notwithstanding the assignment or the fact that a creditor has proved his claim, such creditor may pursue any remedy at law or in equity for the collection of his claim against the assignors or any of their estate or property. So that our assignment law does not in anywise impair the rights of creditors to proceed on their

own behalf, and the argument referred to is, under our law, entirely without force.

A few cases other than those already cited seem to have some bearing on the question and should be considered. Thus, in *Smith v. Jones*, 18 Neb., 481, it was said that where a firm is insolvent its property is a trust fund for the benefit of its creditors; and further, that while in England assignments do not create a trust, in this country it is generally held that a voluntary assignment for the benefit of creditors, if valid, is not a mere agency of the debtor, but creates trust relations; and that the assignee can maintain an action to protect the trust estate. Two observations are to be made in regard to this case. In the first place, it involved a construction, not of the present assignment law, but of the assignment law of 1877, the assignment in question having been made under the former act. It was decided after the passage of the present act, and therefore the legislature could not have been influenced, in passing the present act, by anything in that case. In the second place, the question involved was nothing like that here presented. The title to real estate had been taken in the name of one of two partners, but it had been purchased by partnership funds for partnership purposes. It had been seized on attachment by an individual creditor of the partner in whose name the legal title stood, and the action was to enjoin the confirmation of a sale made, to have the sale set aside and the property applied to the payment of firm debts; in other words, it was, in effect, an action to declare a trust in favor of the assignors, and thereby to enforce a right which they themselves would have had in the absence of the assignment. The decision did not extend to the assignee any power peculiar to creditors and not possessed by the assignors themselves. In *Commercial Nat. Bank v. Nebraska State Bank*, 33 Neb., 292, the doctrine was again asserted that a voluntary assignment creates a trust for the benefit of creditors, and the language in *Lininger v. Raymond, supra*, to that effect was quoted with approval,

without notice of the fact that it had long before been distinctly overruled. The language was not particularly pertinent to the cause, because the right of the assignee was sustained, not on the ground that it was greater than the assignor's right, but because of section 38 of the assignment law, which gives the assignee power in his own name to sue for and recover all property which the assignor could have claimed. So far, then, we have one distinct adjudication under the former law, that the assignee may not assert a claim peculiar to creditors, and some *obiter dicta* intimating that he may, the conclusion in each of the latter cases being drawn from the premise that the assignment creates a trust. That process of scholastic reasoning whereby a name is attached to a particular act or transaction, and then the particular act is lost sight of and a deductive process pursued, based on a syllogism wherein the name selected fulfills the office of a middle term, is always more or less dangerous, and the error into which courts have been led by such a juggling with the term "trust" or "trust fund" admirably illustrates the danger referred to. Such terms are too indefinite to be safely used in such a manner.

In *Brown v. Farmers & Merchants Banking Co.*, 36 Neb., 434, it was said by POST, J., commenting on *Housel v. Cremer*, that "The proposition that the assignee represents the assignor only would not be strictly accurate as applied to the assignment law of 1883." But this was by no means a declaration that the proposition is not true of the act of 1883 except where that act declares to the contrary. The right was there asserted under section 42, already referred to, and in cases within that section, as said in *Brown v. Farmers & Merchants Banking Co., supra*, the assignees' rights are similar to those of a judgment creditor. They are similar because those sections make them so; and that was the effect of the decision.

In *Salladin v. Mitchell*, 42 Neb., 859, it was again said by POST, J., that the conclusion of the court in favor of a right of set-off by a depositor in an insolvent bank

against a debt due to the bank was based on the rule that the assignee "succeeded to the rights of the insolvent banking company as they existed at the time of the assignment, and no other or greater rights."

In *Becker v. Anderson*, 11 Neb., 493, it was held that where a chattel mortgage was void as against creditors, the mortgaged property became assets in the hands of an executor of the mortgagor. This case was based solely upon the authority of *Kilbourne v. Keller*, 29 O. St., 264. Ohio is one of the states which have held that an assignee represents creditors; but in *Kilbourne v. Keller* there was a very cogent dissenting opinion. In *Becker v. Anderson* the mortgagee was himself one of the executors, and the suit was by creditors, and it was not the executors who were attacking the mortgage. Therefore, it is not very clear how the question was considered involved in the case. That the case was not in all respects carefully considered is evident from the fact that in *Marsh v. Burley*, 13 Neb., 261, an important point in *Becker v. Anderson* was expressly overruled, the same judge writing the opinion in both cases, and saying in *Marsh v. Burley* that the statement in *Becker v. Anderson* had been made inadvertently. *Becker v. Anderson* was also decided prior to *Housel v. Cremer*, and if the conclusion in *Becker v. Anderson* is in conflict with that which we have reached, it is also in conflict with *Housel v. Cremer* and was overruled by that case. But whether or not *Becker v. Anderson* is logically opposed to our conclusion we need not determine, because the question now before us is one of statutory construction. The object is to ascertain the intent of the legislature, and we base the construction given the statute on the principle that the legislature in enacting it did so in view of the construction which had then been placed by this court and others upon similar statutes.

There are other cases in which language appears which, taken by itself, might seem to relate to the question; but the facts of the cases render the subjects treated so remote from this question that it would be

useless to refer to the cases. Our conclusion is that, except as authorized by the statute, the assignee may not assert rights beyond those which the assignor might have asserted. The judgment of the district court was in accordance with this conclusion and it is therefore

AFFIRMED.

WILLIAM BARTRAM ET AL., APPELLANTS, V. A. J. SHERMAN, APPELLEE.

FILED SEPTEMBER 16, 1896. No. 5866.

Conflicting Evidence: REVIEW. This case presenting no questions except of fact determined by the trial court on conflicting evidence, the judgment of the district court is affirmed.

APPEAL from the district court of Gage county. Heard below before HASTINGS, J.

Griggs, Rinaker & Bibb, for appellants.

Alfred Hazlett and *Fulton Jack, contra.*

IRVINE, C.

A former appeal in this case was dismissed for want of a final judgment. (*Bartram v. Sherman*, 46 Neb., 713.) Thereafter a final judgment was rendered dismissing the case in accordance with a general finding for defendant, and the appeal has been refiled. We can discover no questions presented by the record except questions of fact determined by the trial court on substantially conflicting evidence. In accordance with the uniform holding of this court, the judgment must therefore be affirmed.

Perhaps a further statement is required in one particular. The controversy depends largely on the location of a quarter-section corner. It is contended that the uncon-

tradicted testimony shows that the government monument was located in accordance with the claims of plaintiff, and that this should control, although the government survey resulting in its location was erroneous. It is true that the witnesses agree that a certain stone was found at the corner as the plaintiffs claim it is situated, and that no stone was found at the point where the defendant claims the corner is situated. The stone referred to was, however, of a different character than that described by the field notes of the government survey, and there was sufficient evidence from this, and also from its not being where the true monument should have been found, to sustain a finding that the stone was not a monument.

AFFIRMED.

M. E. HERBERT V. HENRY WORTENDYKE ET AL.

FILED SEPTEMBER 16, 1896. No. 6759.

1. **Action Against Officer:** FORUM OF JURISDICTION. Section 54 of the Code, providing that an action against a public officer, for an act done by him under color of his office, must be brought in the county where the cause, or some part thereof, arose, applies to actions against such persons begun after their terms of office have ceased and they have removed to another county.

2. **Objections to Jurisdiction:** ANSWER. Objections to the jurisdiction which do not arise upon the summons, the indorsement, or service thereof, or upon the face of the petition, may be raised by answer in connection with matter in bar. *Hurlburt v. Palmer*, 39 Neb., 158, followed.

3. ———: ———: AUTHORITY FOR APPEARANCE. The filing of a paper authorizing certain attorneys to appear for defendant and defend the action, after the filing of an answer pleading want of jurisdiction, does not waive such plea.

4. **Trover and Conversion:** NON-APPEARANCE: DEFAULT: REVIEW. A verdict for defendants in an action of trover is contrary to law when such defendants have not appeared and their default has been entered.

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

John H. Ames and *E. F. Pettis*, for plaintiff in error.

J. C. Johnston, contra.

IRVINE, C.

The plaintiff in error was plaintiff in the court below and the only attack he makes upon the judgment there in favor of the defendants is that it is contrary to the law and the evidence. The action was brought against Wortendyke, Spelts, Layne, and Irvine to recover damages for the conversion of certain chattels. Only Wortendyke and Spelts answered. By their answer they allege that on a certain day said chattels being then in the lawful possession of Layne, in Seward county, they were stolen by some person unknown; that Wortendyke was a justice of the peace for C precinct, Seward county, and that Spelts was a constable for said precinct. They then allege the making and filing before Wortendyke of a complaint under oath and the issuing by Wortendyke of a search warrant in pursuance thereof; that said warrant was delivered to Spelts, who took the chattels thereunder, and that afterwards upon the order of Wortendyke he delivered said chattels to Layne; that neither of the said defendants took such chattels except while acting in his official capacity by virtue and under color of his office in Seward county, and that none of the acts complained of in plaintiff's petition was done and performed in Lancaster county, and that the district court of Lancaster county has no jurisdiction of the case. In addition to these averments defendants justify their acts under the record pleaded, and generally deny the averments of the petition. The proof shows that the acts of Wortendyke and Spelts in the premises were, as pleaded by them, done under color of their offices, if not by virtue

thereof. Section 54 of the Code of Civil Procedure provides: "Actions for the following causes must be brought in the county where the cause or some part thereof arose: * * * An action against a public officer for an act done by him in virtue or under color of his office, or for a neglect of his official duty," etc. This case would seem clearly to fall within the statute quoted, and the whole transaction having occurred in Seward county the action should have been brought there.

It is contended, however, that the proof shows that prior to the commencement of the action both Wortendyke and Spelts had removed to Lancaster county; that the object of the statute is to protect public officers from actions brought elsewhere than where their official acts are performed; and that where the action is brought after they have ceased to be officers, it is not within the reason of the statute and may be maintained in the county of their residence. This doctrine receives some color from the case of *Hopkins v. Haywood*, 13 Wend. [N. Y.], 265, which is cited by the plaintiff in error. In that case an action was brought against a constable for not returning an execution. It was claimed that this was an action for a penalty or forfeiture within the meaning of a statute requiring such actions to be brought "in the county of which he was an officer." The court first doubted whether this was an action for a penalty or forfeiture, and then quite clearly demonstrated that it was not. Another statute required actions against public officers for acts done by them by virtue of their offices to be brought in the county where the fact complained of happened; but the court held that this statute applied only to affirmative acts and not omissions, and was therefore not applicable to the case. The court then proceeded to argue that under the New York law, if suit could not be brought in the county of the officer's residence, he could not be sued at all, as he could not be reached by summons. This difficulty is not presented in this state, because by section 65 of our Code, where the action is

rightly brought in any county, a summons may be issued to any other county. The New York court seems to have based its conclusion largely upon the ground urged by the plaintiff in error, that when officers change their residence and move into another county the reason of the statute "ceases to a great extent." But by reason of section 65 of our Code affording a remedy which could not be had in New York, the reason of the New York court for holding the statute inapplicable here ceases altogether.

It is further contended that the defendants waived their objection to the jurisdiction by pleading generally to the merits. It was held in *Kane v. Union P. R. Co.*, 5 Neb., 105, that the voluntary appearance and pleading to the merits by one sued for acts done under color of his office waives objections to the jurisdiction of the court. We may assume that that case correctly holds that section 54 of the Code relates to jurisdiction of the person and not to jurisdiction of the subject-matter, and that such an action is transitory in its character notwithstanding the section referred to; but so far as the case holds that pleading to the merits waives the question of jurisdiction, it has been overruled by *Hurlburt v. Palmer*, 39 Neb., 158. In that case the whole subject was very carefully considered and the elaborate discussion of authorities by Commissioner RYAN renders any further consideration here unnecessary. *Hurlburt v. Palmer* was followed and reaffirmed in *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897. It is established by these cases, in accordance with the plain language of sections 94 and 96 of the Code of Civil Procedure, that where a want of jurisdiction does not appear on the face of the record it may be pleaded by answer in connection with pleas in bar. Here the petition was one in trover, and the facts disclosing the want of jurisdiction did not appear on the face of the record. About seven months after the answer was filed there was filed the following: "We hereby authorize Bush and Comstock to appear for us in the above entitled action as our attorneys and to take

charge of, manage, and defend the same in our behalf." This was signed by Wortendyke and Spelts. It is contended that this waived the question of jurisdiction. It was not strictly an appearance but a power of attorney to make an appearance. But aside from that, if want of jurisdiction of the person may be averred by answer in connection with pleas at bar, it follows that one has the right at the same time to defend to the merits and to the jurisdiction, and we cannot see that this paper was any more a general appearance than appearing at the trial and defending to the merits. For the foregoing reasons we think the district court of Lancaster county was shown by the evidence to be without jurisdiction so far as Wortendyke and Spelts were concerned. The verdict and judgment were therefore sustained by the evidence in this respect, and comment on the merits of the case would be useless and perhaps prejudicial.

The verdict and judgment were generally for all the defendants. As to Layne and Irvine, it was contrary to law. They made no appearance and their default had been entered. No issues were therefore presented entitling them to a judgment. The plaintiff was on their default entitled to an assessment of damages and judgment against them. As to Layne and Irvine, the action was purely one in trover and not within the provisions of section 54, and the court therefore had jurisdiction in their case. The judgment as to Wortendyke and Spelts is affirmed, and as to Layne and Irvine it is reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

JOHN J. SCHOTT, APPELLANT, V. L. P. DOSH ET AL., APPELLEES.

FILED SEPTEMBER 16, 1896. No. 6629.

Deeds: QUITCLAIM DEEDS: REGISTRATION: QUIETING TITLE. The holder of a quitclaim deed, properly recorded, who purchases in good faith and without notice of a prior unrecorded conveyance, takes the title in preference to the grantee under such unrecorded conveyance.

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

See opinion for references to authorities.

John H. Ames and *E. F. Pettis*, for appellant.

Montgomery & Hall, contra.

IRVINE, C.

This action was by Schott against L. P. Dosh, J. R. Dosh, and James K. O. Sherwood, to quiet title to land described as the west one-half of section 31, township 3 north, of range 8 west, in Nuckolls county. The only defendant to answer, and the only one referred to in the decree, is Sherwood, and it is not necessary to consider any rights except those existing as between him and the plaintiff. It is conceded that a patent was issued conveying the land in controversy to George L. Bittenger. The plaintiff claims under a deed from Bittenger and wife to him, dated June 23, 1870. This deed was not, however, recorded until June 23, 1890, and was not even then entitled to record for want of a certificate of acknowledgment. Sherwood deraigns his title as follows: A quitclaim deed from Bittenger and wife to L. P. Dosh, dated August 22, 1882, recorded September 19, 1882. Warranty deed from L. P. Dosh and wife to J. R. Dosh, dated Oc-

tober 27, 1882, recorded November 20, 1882. Warranty deed from J. R. Dosh and wife to Sherwood, dated January 13, 1883, recorded April 24, 1885. Subsidiary to the latter chain of conveyances are certain tax deeds, followed by conveyances to L. P. Dosh and Sherwood by the grantees named therein. While these tax deeds are material on the question of evidence hereinafter discussed, it is conceded that they are on their face void and may be excluded in tracing the title. On appropriate pleadings, the answer of Sherwood praying for cross-relief, the court found generally in favor of Sherwood and entered a decree quieting title in him. From this the plaintiff appeals.

The questions presented by the record are as follows: First—Does a quitclaim deed, properly recorded, in favor of one who purchases in good faith and without notice of a prior unrecorded conveyance, take precedence of such conveyance? Second—If so, does the evidence in this case sustain the finding of the trial court that Sherwood was such a *bona fide* purchaser without notice? Third—If the first question should be answered in the negative, are subsequent grantees under deeds of warranty subject to outstanding equities because of a remote quitclaim deed in their chain of title? On the authority of *Snowden v. Tyler*, 21 Neb., 199, the case might probably be solved in favor of the defendant on the last question, regardless of the others; but for several reasons we shall consider the first two stated. One reason is that while the first question has several times been brought to the attention of the court, the cases have always been complicated by facts which have rendered an authoritative decision impossible, and the *dicta* which have been expressed have not served to remove the generally prevailing doubt on this question of very apparent practical importance. The second reason is that in many, and in fact all the earlier, cases holding that the grantee under a quitclaim deed is not in such case entitled to protection the reason given is that such a deed does not purport to convey the fee or

even limit the estate, but merely to release any claim which the grantor may have. If this reason be well founded, then it seems illogical to hold that a remote grantee obtains any greater title than the immediate grantee, both claiming through a deed which purports to convey the same interest. We shall direct our attention, therefore, to the first question, and in the first place to a consideration of the former expressions of this court.

In *Lincoln Building & Savings Association v. Hass*, 10 Neb., 581, it was said: "The effect of this quitclaim deed was only to pass the naked legal title, and changed no equities of the parties." A consideration of the case discloses that no interest whatever appeared of record or otherwise in the grantor, a deed whereby it was intended to convey an interest by mistake omitting the land in controversy from the description. The question was between the grantee under the quitclaim deed and a mortgage from the same grantor. No protection was claimed under the recording acts and the decision was wholly foreign thereto. We refer to the case only because it is cited in argument, and because it has been several times cited as supporting the doctrine that the grantee under a quitclaim deed is not protected.

In *Hoyt v. Schuyler*, 19 Neb., 652, it was held that there was a record of the prior deed sufficient to impart notice. It was also stated that it neither was alleged in the petition nor claimed in the brief that the appellant was a *bona fide* purchaser. Therefore, the following statement of the court was merely *obiter*, that "the form of the conveyance repels the inference of a *bona fide* purchaser;" as was also the further statement that the plaintiff "merely took the interest of Carter, and as he had previously conveyed all his right, title, and interest in the lot, the grantee under the second deed took nothing." Nevertheless, the court, evidently for the purpose of preventing these *obiter dicta* from being taken as announcing an absolute rule, added that "a party who claims title under a quitclaim deed from one who had formerly conveyed his

title to another, and the effect of which will be to deprive the first grantee of his title, must make a clear case of *bona fides* on his part before his title will be sustained."

In *Snowden v. Tyler*, 21 Neb., 199, remote grantees under a deed of quitclaim were protected. It was claimed that the quitclaim deed passed no title and that therefore none passed under deeds from the grantee therein. The court said: "The rule, no doubt, is that a person who purchases of another real estate, and receives a quitclaim deed only therefor, is bound to inquire and ascertain at his peril what outstanding equities exist, if any, against the title. * * * We are not prepared to hold, however, that a quitclaim deed, where the grantor has already conveyed, will not in any case convey title. * * * It is the policy of the law that titles to real estate shall become matters of certainty as far as possible, and that one who acts in good faith in purchasing, and pays the value of the property, shall be protected in his purchase." The court therefore put the protection of remote grantees not upon the illogical ground that while a quitclaim deed purports to and does only pass the grantor's estate, the magic of a covenant of warranty in a subsequent deed will enlarge that estate beyond what the first deed purports to convey, but the conclusion was placed upon the logical ground that one who finds a complete chain of conveyances to his grantor, without apparent defects and without notice of outstanding equities, and who pays value, will, under the recording acts, be protected. This logic applies as well to immediate grantees as to a remote grantee.

In *Lavender v. Holmes*, 23 Neb., 345, the subject was again considered, many of the cases reviewed, and the conclusion reached that "while we concede it to be the general rule as stated by the authors above cited, that a purchaser who acquires title by a quitclaim deed is not a *bona fide* purchaser without notice of existing equities, yet we think it is sufficiently shown that there are exceptions to this rule, and that this case falls within the ex-

ception." This was not, however, a case involving a construction of the recording acts.

In *Pleasants v. Blodgett*, 32 Neb., 427, the language already quoted from *Hoyt v. Schuyler, supra*, to the effect that a conveyance by quitclaim "repels the inference of a *bona fide* purchaser," was repeated; but the holding of the court was that the grantee had actual notice of the adverse claim. This was also the doctrine of the court on the rehearing of the same case (39 Neb., 741).

A case much relied on by the appellant is *Bowman v. Griffith*, 35 Neb., 361; but a careful examination of the case convinces us that it is entirely without application. It is true that one of two reasons given for not holding that an estoppel *in pais* existed against a grantor was that the grantee had accepted a quitclaim deed; but no question was involved of the construction of the recording act, and the reasons for enforcing an estoppel *in pais*, which would produce an effect equivalent to a covenant for title, are quite different from those which control the construction of the recording act. The case was very complicated in its facts, and we cannot hope to state it more briefly than it is stated in the lucid language of the author of the opinion. Space does not permit that we should repeat this statement to show the inapplicability of the case. Suffice it to say that the question there presented was whether one who had accepted a deed containing recitals showing that it was made to correct a former deed purporting to convey land which had in fact been conveyed to another person, could set up title as against that other person, and contrary to the terms of the deed which he had accepted.

The foregoing review we think shows that while the court has expressed itself to the effect that a quitclaim deed passes no more than the grantor's present interest, this expression has been used to state a general truth and not as a construction of the recording act, and that so far as concerns the rights of a grantee under a quitclaim deed by virtue of the recording act, the court, while inti-

mating that the tender of a quitclaim deed puts a purchaser on inquiry, has nevertheless always intimated that on proof of *bona fides* he is entitled to protection; and in one case, at least, has afforded him protection.

Cases elsewhere are conflicting. In some states it is held that a quitclaim deed conclusively charges the grantee with notice of outstanding equities, including prior unrecorded conveyances. (*Smith's Heirs v. Branch Bank at Mobile*, 21 Ala., 125; *Leland v. Isenbeck*, 1 Ida., 469; *McAdow v. Black*, 6 Mont., 601; *Snow v. Lake*, 20 Fla., 656.) To these may be added some others, but they require comment. *Woodfolk v. Blount*, 3 Hayw. [Tenn.], 146, frequently cited as sustaining that view, really leaves the question undecided. In *Bragg v. Paulk*, 42 Me., 502, the conveyance was a mortgage to secure a past debt, and the court held that this did not constitute a purchase for a valuable consideration. *Marshall v. Roberts*, 18 Minn., 405, was based on the construction of a peculiar statute, and Oregon having adopted the same statute (*Baker v. Woodward*, 12 Ore., 3), follows the Minnesota case in its construction. The effect of the Minnesota decision was, however, to induce the legislature to amend the statute; and since the amendment the Minnesota court has held that a quitclaim deed stands on the same footing as any other conveyance. (*Strong v. Lynn*, 38 Minn., 315.) In South Dakota the author of the principal opinion announces the rule that a quitclaim deed charges a purchaser with notice; but Judge Corson dissented on this point, and Judge Kellam only concurred on the ground that there was actual notice. The court was composed of but three judges. (*Parker v. Randolph*, 59 N. W. Rep. [S. Dak.], 722.) In Michigan the court was once evenly divided on the question, Chief Justice Cooley and Judge Sherwood holding that the quitclaim deed afforded protection, Judges Campbell and Champlin holding that it did not. (*Deveaux v. Fosbender*, 57 Mich., 579.) Recently, however, an unanimous court has adopted the view of Judges Campbell and Champlin. (*Peters v. Cartier*, 80

Mich., 124.) Texas, after much vacillation and without any careful discussion of the authorities elsewhere, has adopted a similar view, but restricted it closely to a technical release as distinguished from a deed of bargain and sale without covenants. (*Richardson v. Levi*, 67 Tex., 359.) Nearly all the recent cases adopting the view which we have been discussing cite the case of *Johnson v. Williams*, 37 Kan., 179. This case cited most of the authorities then existing, and held that one who claims under a quitclaim deed is not a *bona fide* purchaser with respect to outstanding equities shown by the records, or which are discoverable by the exercise of reasonable diligence on making proper examination and inquiries. It admitted that a purchaser under a quitclaim deed may be a *bona fide* purchaser with reference to a prior unrecorded deed of which he has no notice.

On the other hand, the following cases hold, and we think with better reason, that there is no distinction as to the form of conveyance; that in this country and in modern times a deed of quitclaim is not merely a release, but operates to pass the grantor's title, even to one who could not at common law accept a release; that the recording acts draw no distinction; that under them the question is not under what form of conveyance one claims, but whether one is a *bona fide* purchaser, and that, therefore, the holder of a quitclaim deed is entitled to the same protection as one under a deed of bargain and sale or containing covenants of warranty: *Moelle v. Sherwood*, 148 U. S., 21; *Wilhelm v. Wilken*, 44 N. E. Rep. [N. Y.], 82; *Graff v. Middleton*, 43 Cal., 341; *Bradbury v. Davis*, 5 Colo., 265; *Brown v. Banner Coal & Coal Oil Co.*, 97 Ill., 214; *Chapman v. Sims*, 53 Miss., 154; *Willingham v. Hardin*, 75 Mo., 429; *Cutler v. James*, 64 Wis., 173. In several of the states the cases cited overrule earlier cases holding the contrary view. The tendency of the decisions is uniformly in favor of the quitclaim deed, except in Iowa, where it was formerly held that the holder thereof was protected and it is now held that he is not. (*Pettingill*

v. Devin, 35 Ia., 344; *Steele v. Sioux Valley Bank*, 79 Ia., 339.)

The question has been so much discussed that any extended inquiry into the reasons would not be novel. Those given in support of the rule denying quitclaim deed protection are two in number. The first we have already alluded to:—Such a deed does not purport to convey any definite estate, but merely the grantor's interest. This reason refers back to the obsolete doctrine of common law releases. In modern law it is not supposed in any case that a grantor is conveying more than he owns. Our statute provides that every conveyance shall pass all the grantor's interest, unless a contrary intent can be reasonably inferred from the terms used. (Compiled Statutes, ch. 73, sec. 50.) There is nothing, therefore, in the fact that a grantor only purports to convey his interest which should charge a purchaser with notice of a prior unrecorded conveyance. The other reason given is that the fact that the grantor declines to warrant the title is enough to arouse suspicion. This may or may not be true according to circumstances. So far as the reason has any force generally it seems to be fairly met by the suggestion of Mr. Rawle in his work on Covenants for Title, that the fact that a personal covenant is required is itself a circumstance casting suspicion upon the title conveyed. A conveyance by quitclaim is by no means uncommon in modern times when there are no outstanding equities; and it is certainly a conceivable case that a man may be willing to accept such a conveyance, for the very reason that he is confident that he obtains a perfect title which would render covenants of no service. Aside from the foregoing reasons for denying a quitclaim deed protection, the cases holding that doctrine nearly all depend for their support upon certain *dicta* in the supreme court of the United States, notably the case of *May v. Le Claire*, 11 Wall. [U. S.], 217. Judge Brewer, in the district court for this district, in the absence of a direct adjudication by this court, felt constrained to follow these

dicta in *Hastings v. Nissen*, 31 Fed. Rep., 597; but in *Sherwood v. Moelle*, 36 Fed. Rep., 478, a case precisely like that before us, and involving some of the same conveyances, he resolved it in favor of Sherwood, intimating a doubt as to the general application of the old rule, but basing his decision on the ground that *Snowden v. Tyler*, *supra*, protected a remote grantee. This case went to the supreme court of the United States (148 U. S., 21), and was there affirmed, Judge Brewer concurring, on the broad ground that the receipt of a quitclaim deed does not prevent a party from becoming a *bona fide* holder, and that the previous *dicta* of the court were not sound in principle.

Section 45, chapter 73, Compiled Statutes, defines a purchaser as embracing "every person to whom any real estate or interest therein shall be conveyed for a valuable consideration." The term "deed" is defined in section 46 as embracing every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except last wills, and leases for one year or for a less time. The recording act (Compiled Statutes, ch. 73, sec. 16) provides that deeds shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and such deeds, mortgages, or other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages, and other instruments shall be first recorded. In view of the definitions given of "deed" and "purchaser," we cannot hold that section 16 does not apply to the grantee under a quitclaim deed without a judicial amendment of the plain language of the statute.

This brings us to the question of fact. Does the evidence sustain the finding that Dosh was an innocent purchaser from the patentee? We have no hesitation in

saying it does. The evidence discloses that before Bittenger obtained a patent for the land he went to Pennsylvania, where he made a sale of it to Schott. The conveyance to Schott was not recorded and the land remained wild and unoccupied until shortly before this action was commenced. Taxes accumulated and the land was sold therefor to one Furst. A tax deed was issued to him. Several years thereafter Furst conveyed to Dosh, Dosh paying him $1,350 for the land. At this time it was stipulated that the land was worth $1,440. Dosh testifies that before he purchased he went to Nuckolls county and looked at the land, which was at that time open, unoccupied prairie. He also examined the record as to the title and found the patent title in Bittenger, whom he found afterwards and from whom he obtained a quitclaim deed for $100. He had theretofore made his contract with Furst. Dosh lived in Iowa, where tax titles were regarded as good, and supposed the title he had acquired from Furst was good. He paid Bittenger for his title because he thought he would perfect thereby his title to the land and make it more readily salable. It is argued that his testimony as to finding the title in Bittenger is false, because the patent of Bittenger was not recorded in Nuckolls county at that time. It will be observed, however, that he does not testify that he ascertained the title solely from the county records of Nuckolls county. His testimony is that he went to Nuckolls county to look at the land and found it unoccupied, and that he examined "the records," without saying what records, and found the patent title in Bittenger. He was not cross-examined upon this, and we cannot presume that he committed perjury merely because the Nuckolls county records did not then disclose title in Bittenger. It appeared from them at that time that the title was in the United States, and an examination of the records of the land office would have disclosed title in Bittenger, as Dosh testified he found it. The maxim that ignorance of the law excuses no one, is not so broad in its application that a mistake

of law cannot be shown in evidence for the purpose of ascertaining the state of one's mind or one's motive. At the time in question the effect of a tax deed in this state was doubtful. Dosh, living in Iowa, might, as he testifies he did, place more reliance on the tax title than the law of this state warranted. He paid almost the full value of the land to the tax purchaser. There would be nothing in the fact that the patentee, who had apparently neglected the land for twelve years, was willing to convey to him for a small sum, which would be calculated to apprise him of a prior unrecorded conveyance. Especially is this true in view of the fact that by proper litigation between him and the patentee he would be entitled to subrogation at least to the whole tax claim; and the existence of the outstanding tax title which he bought would sufficiently account, if investigation were necessary, for the tender to him of a quitclaim deed instead of one with covenants of warranty. It would tax the patience of any one at all familiar with the history of such transactions in this state to argue that there was anything unusual, suspicious, or calculated to inform a person of outstanding equities, in the fact that a deed of quitclaim was tendered under such circumstances. The evidence is in these respects uncontradicted. The court found that Dosh was an innocent purchaser. On apparently the same state of evidence on some of the same conveyances the supreme court of the United States unanimously held the same. We cannot disturb the finding and we think it is right.

It is suggested at the close of the brief of the appellant that the trial in the district court was formal only and that the judgment "was in fact, though not of record, entered practically by consent, so as to make a record reviewable by this court." We must, however, give the finding of the trial court the effect which the record entitles it to. If it is true that the finding was made practically by consent, as the appellant states, the record should have so disclosed, and that would have precluded

the plaintiff from any right to review. Not so appearing of record, we must presume the judgment was the deliberate judgment of the trial court, on the issues joined.

AFFIRMED.

JOHN B. MERRILL ET AL. V. EQUITABLE FARM & STOCK IMPROVEMENT COMPANY.

FILED SEPTEMBER 16, 1896. No. 6697.

1. **Bill of Exceptions:** AUTHENTICATION OF DOCUMENTS. To authenticate a document attached to a transcript as the bill of exceptions settled in the case a certificate of the clerk, under the seal of the district court, identifying the document as the original, or a copy of the bill of exceptions, is essential.
2. **Instructions:** EXCEPTIONS: REVIEW. The propriety of an instruction cannot be reviewed unless the record discloses that the giving of the instruction was excepted to by the complaining party.
3. **Pleading:** JUDGMENT: REVIEW. When the sufficiency of a petition is not attacked until after judgment, all reasonable intendments should be indulged in support of the judgment.

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

R. C. Noleman, for plaintiffs in error.

Simonson & Sullivan and *Grimes & Wilcox*, *contra*.

IRVINE, C.

This was an action of replevin by the Equitable Farm & Stock Improvement Company, limited, against John Merrill and Gilbert & Grow to recover certain cattle. From a judgment for the plaintiff the defendants prosecute these proceedings.

All the assignments of error except one relate to rulings on the evidence. For the most part the brief of the

plaintiffs in error merely recites the assignments of error without discussion, and without stating in what respect the rulings are deemed erroneous. These assignments cannot in any event be considered, however, because what purports to be the bill of exceptions is not accompanied by any certificate of the clerk of the court authenticating it as either the original bill or a copy thereof.

One error assigned is that the court erred in sustaining plaintiff's motion to instruct the jury to bring in a verdict for the plaintiff. This we cannot review, because it does not appear that any exception was taken to the action of the court on the trial of the case.

It is suggested in the brief that the petition does not state a cause of action. The amended petition on which the case was tried, after alleging the corporate capacity of the plaintiff, proceeds: "Plaintiff has a special ownership in and is entitled to the immediate possession of the following described goods and chattels, and was entitled to the possession of the same at the time this action was commenced, to-wit: Nineteen head of steers, from twelve to eighteen months old, of different color, branded figure 4 on the right side, and one yearling steer, branded flat-iron on the right side, all of the value of $300; that said description with reference to the age of said cattle is correct, with reference to their ages at the time this action was commenced; that plaintiff's ownership in and right to the possession of said cattle is by virtue of two certain chattel mortgages, copies of which are hereto attached, marked Exhibits A and B, and made a part of this petition." The petition then proceeds with the usual averments of unlawful detention and damage. The mortgages attached cover large numbers of cattle, and each contains a clause extending the mortgage to the increase of the cattle. The argument against the sufficiency of the petition is, first, that a mortgage on property not in existence at the time the mortgage is made is void; and second, that there is no averment in the petition that the cattle claimed are the increase of cattle specifically de-

scribed in the mortgage. We need not consider the former question. The mortgages were each made June 19, 1889. The record does not disclose when the action was commenced. In one mortgage there are described fifty-four calves, all branded figure 4 on the right side, and in the other mortgage there are described thirty-two cows, twenty-nine of which have calves by their side, and the cows are branded flat-iron on the right side. The ages of the steers claimed in the petition are fixed with reference to the time the suit was begun, and the record not disclosing when this was, the descriptions in the mortgage which we have referred to are applicable to property claimed in the petition. All reasonable intendments should be in favor of the petition when first attacked after judgment.

JUDGMENT AFFIRMED.

LIVINGSTON LOAN & BUILDING ASSOCIATION, APPELLANT, v. W. W. DRUMMOND ET AL., APPELLEES.

FILED SEPTEMBER 16, 1896. No. 6771.

1. **Corporations:** ATTACK UPON ORGANIZATION. One who has entered into a contract with a body of men acting as a corporation cannot, when sued on such contract, be heard to plead the want of legal organization of such corporation.

2. **Building and Loan Associations:** INTEREST: CONSTITUTIONAL LAW. The act of 1873 (General Statutes, 207) providing for the incorporation of building and loan associations, and, among other things, exempting such associations from some features of the general interest laws, is not violative of that section of the constitution which prohibits the legislature from passing any local or special law regulating the interest on money, or granting to any corporation, association, or individual any special privilege, immunity, or franchise.

3. **Statutes:** SPECIAL LEGISLATION. An act is general and not special if it operates alike on all persons or localities of a class, or who are brought within the relations and circumstances provided for, the

classification so adopted by the legislature having a basis in reason and not being purely arbitrary.

4. ———: BUILDING AND LOAN ASSOCIATIONS: LOANS: USURY. The act referred to authorized associations created thereunder to collect money by stated dues, fines, interest, and by premiums bid by members for the right of precedence in taking loans. It also provided that the dues, fines, and premiums, although in excess of legal interest, shall not be construed to make the loan usurious. *Held*, That interest might be reserved at the highest rate permitted by law on the face of the loan, although the premium was deducted from that amount and the difference only paid the borrower.

5. ———: ———: ———: ———. In ascertaining the amount due on such a loan the borrower is entitled to a credit of the present value of the stock at the time of foreclosure, as well as to a fair and reasonable credit on account of unearned premium, and by-laws fixing the terms of ascertaining such credit will be enforced where not unconscionable.

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

Matthew Gering, for appellant.

E. H. Wooley, contra.

IRVINE, C.

The plaintiff in this action sought to foreclose a mortgage executed by Drummond and his wife to secure the payment of a bond for $2,000, bearing ten per cent interest. The defenses interposed were three: First, that the corporation was not legally organized; second, that Drummond was insane at the time of making the contract; third, usury. There was no finding by the trial court on the issues raised by the first defense; but the defense was wholly without merit and the appellant has no ground of complaint. It is provided by section 144, chapter 16, Compiled Statutes: "No body of men acting as a corporation under the provisions of this subdivision shall be permitted to set up the want of legal organization as a defense to any action brought against them as a corporation; nor shall any person sued on a contract made with such corporation, * * * be permitted to set up the

want of legal organization in defense of such action." Drummond and his wife in their answer admitted the execution of the bond and mortgage which formed the basis of the action, and they are thus brought within the provisions of the statute cited. It has often been asserted by this court, even in cases where this statute was not in terms applicable, that the validity of a corporation may be attacked only by the state in a direct proceeding for that purpose, and this principle has been enforced in a case precisely like the one before us. (*Lincoln Building & Savings Association v. Graham*, 7 Neb., 173.) As will shortly appear, the association is in this case claiming the benefit of a statute relating to a particular kind of corporation, and it follows that such benefit could not be claimed unless the corporation brought itself within that class, and also brought the transaction within the class of transactions to which the benefit is accorded. But the defense here sought to be interposed was not that the corporation, if it existed as such at all, was not within the class created by the statute, or that it was not acting as such. The defect alleged was merely that the articles of association were not signed by a sufficient number of incorporators. This amounted to a denial of the general corporate existence, and is within the principle referred to. There was not a particle of evidence introduced in support of the second defense, so that may be passed. We are, therefore, brought to a consideration of the plea of usury. On this the court found for the defendants.

The plaintiff is a building and loan association organized and conducting its business in so familiar a manner that it is hardly necessary to enter into details with regard either to its constitution or the terms of this particular contract. It is sufficient to say that the scheme was the usual one whereby stock was issued (in this case at a par valuation of $200 per share) payable $1 on each share monthly. The funds thus realized were let out at interest to the highest bidder, the amount paid for a

preference in obtaining loans being designated as a "premium." The borrowers were confined to the stockholders, and a borrower, in addition to securing his loan upon real estate, was required to hypothecate his stock as further security. Payments were made upon the stock as before, and in addition thereto he paid his interest monthly in advance, and was also subject to certain fines for delinquency in payments. Prior to 1873 there was no law specially authorizing such corporations. In that year an act was passed (General Statutes, p. 207), in terms authorizing the incorporation of such associations. The first section of this act was as follows: "That any number of persons, not less than five, may associate themselves together and become a corporation, as is provided in chapter 25 of the Revised Statutes, commencing at section 123 of said chapter, under the title of 'Corporations,' for the purpose of raising money to be loaned among the members of such corporation, for use in buying lots or houses, or in building or repairing or removing incumbrances from houses; and such corporation shall be authorized and empowered to levy, assess, and collect from its members such sums of money, by rates of stated dues, fines, interest on loans advanced, and premiums bid by members for the right of precedence in taking loans, as the corporation, by its by-laws, shall adopt; also to acquire, hold, incumber, and convey all such real estate and personal property as may be legitimately pledged to it on such loans, or may otherwise be transferred to it in the due course of its business; *Provided*, That, the dues, fines, and premiums so paid by members of such corporation, although in excess of twelve per cent per annum on loans taken by them, shall not be construed to make the loans so taken usurious; *And provided, also*, That no person shall hold more than ten shares in any such association in his own right, each share not to exceed two hundred dollars." The law so stood until 1891, when another act was passed (Session Laws, 1891, ch. 14) providing much more in detail for the organization and government of such corpo-

rations. This corporation was organized under the act of 1873, and the contracts in question were all entered into before the act of 1891 was passed.

As appellant claims some rights under the theory of a ratification by the law of 1891, and the operation of a doctrine of relation with reference thereto, it is best at this point to dispose of these questions. The constitution of the United States prohibits a state from passing any law impairing the obligations of a contract. It therefore follows that the contractual rights of the parties, which were fixed prior to the enactment of the law of 1891, are not in anywise affected thereby. The case must stand entirely upon the law as it stood when the contract was made, and under no theory whatever could a subsequent act of the legislature be permitted in the slightest particular to affect contractual obligations as fixed by the law at the time they were entered into. *Lincoln Building & Savings Association v. Graham, supra*, held, with regard to just such a contract, that express provisions of the law of 1873 by which it was sought to remove the taint of usury from past transactions were unconstitutional, and that the law could not be given a retroactive effect. We therefore dismiss all consideration of the act of 1891.

The appellees base their principal argument upon an attack on the constitutionality of the law of 1873. It is claimed that it is an infringement of section 15, article 3, of the constitution, which prohibits the legislature from passing local or special laws regulating the interest on money, or granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise. The constitution of 1866, which was in existence when the law of 1873 was enacted, contained no such inhibition; and we do not wish to be understood, in considering the merits of the arguments presented, as holding that a law valid under the constitution as it existed when the law was enacted is rendered nugatory by the subsequent adoption of a constitution containing nothing repugnant to the substance of the law, although it may

contain provisions which would prohibit the passage of any future law of similar character. As the conclusion we have reached would sustain the law under consideration even had it been passed after the adoption of our present constitution, we do not consider the question suggested. Examining the law with reference to the provisions of the present constitution, we do not think that it is a local or special law. It has been very often decided by this court that if a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, it is not objectionable as wanting uniformity of operation, or as being in the nature of special legislation. (*State v. Berka*, 20 Neb., 375; *State v. Graham*, 16 Neb., 74; *McClay v. City of Lincoln*, 32 Neb., 412; *State v. Robinson*, 35 Neb., 401; *Hunzinger v. State*, 39 Neb., 653; *Van Horn v. State*, 46 Neb., 62.) To this general statement it is perhaps necessary to add a qualification. The legislature may not arbitrarily and without any possible reason create a class to be affected by legislation where the result would be an infringement upon the constitutional prohibition. This feature is very ably considered in the case of *Vermont Loan & Trust Co. v. Whithed*, 2 N. Dak., 82, and has been adverted to in this state in *McClay v. Lincoln, supra*, and in *Low v. Rees Printing Co.*, 41 Neb., 127. But subject to that qualification a law is not special when it applies to all citizens and persons who may be brought under the circumstances affected thereby; and in this case we cannot see that the classification is arbitrary and without reason. The act provides for a certain class of corporations having definite objects in view. Their loans are made on a particular kind of security. Payment is provided in a special manner. The borrowers are always members of the association. We must take notice of the fact that, wisely or unwisely, for many years many states, and England as well, have pursued a policy of encouraging the operation of such associations as facilitating the building of homes for the people, and the public

policy thereby involved would justify the legislature in its wisdom in classifying loans for such purpose, and made in such ways, as a group by themselves and subject to different restrictions and privileges than those applying to loans generally. In other states having similar constitutional provisions such legislation has, on the ground hereinbefore indicated, been uniformly, so far as we can ascertain, sustained. (*Vermont Loan & Trust Co. v. Whithed, supra; People's Building & Loan Association v. Billing*, 62 N. W. Rep. [Mich.], 373; *Holmes v. Smythe*, 100 Ill., 413; *McLaughlin v. Citizens Building, Loan & Savings Association*, 62 Ind., 264.) *Gordon v. Winchester Building & Accumulating Fund Association*, 12 Bush [Ky.], 110, is a case which has sometimes been cited as denying the constitutionality of the law relieving such associations from the operation of the general usury law, but the act under which the privilege was claimed was not a general law permitting such corporations and extending privileges to them generally, but it was a special act incorporating the particular corporation in question, and extending to it alone an exemption from the usury law.

For the purpose of brevity we content ourselves on the subject of the constitutionality of the act of 1873 with the foregoing observations. *Lincoln Building & Savings Association v. Graham, supra*, is not applicable to this case, because it related to a contract made before the act of 1873 went into effect. That case, however, does settle definitely for this state the much controverted question as to whether such a transaction as that in controversy is a loan, or an advancement on the stock, and it holds it to be a loan. (See, also, *Randall v. National Building, Loan & Protective Union*, 42 Neb., 809, 43 Neb., 876.) Therefore, the very numerous cases discussing the last question suggested, as well as those equally numerous discussing the question of usury where no express statute exists exempting such corporations from the operation of the general usury laws, are wholly inapplicable. This statute does in terms to a certain extent exempt such cases from the

operation of the general laws relating to interest. It is not a special or local law regulating interest on money or granting to a corporation a special privilege, immunity, or franchise, and is not invalid for any of the reasons suggested.

It is suggested in the briefs that the decision of the district court went upon the ground that the premium was deducted from the face of the loan, the highest rate of interest allowed by law being reserved on the whole face of the loan, and that while the statute may permit the taking of premiums it does not permit the charging of interest upon such premiums. The loan was for $2,000. The premium bid was $360. One thousand six hundred and forty dollars were advanced, and the bond was made for $2,000, with interest at ten per cent per annum. It is clear, therefore, that if the right to charge interest upon the premium is not given by statute, this particular loan was usurious. The question thus presented is by no means clear, and the authorities are divided. Ohio, in 1867, passed a statute so nearly like our act of 1873 as to compel the inference that ours was modelled upon the former. Construing this statute the supreme court of Ohio held (*Forrest City United Land & Building Association v. Gallagher*, 25 O. St., 208) that while the statute forbade considering the fines, dues, and premiums as equivalent to interest so as to render the contract usurious, it nevertheless did not permit charging interest upon the premium. The case has been followed in Ohio by several others. Such also is the law of Iowa. (*Hawkeye Benefit & Loan Association v. Blackburn*, 48 Ia., 385.) The principle which seems to govern these cases is that the exception to the usury law accorded to building and loan associations by statute should be strictly construed, and we are of the opinion that public policy requires that such exceptions should not be extended by unnecessary implication. This principle of strict construction was also approved in *Pfeister v. Wheeling Building Association*, 19 W. Va., 676. On the other hand, it has been elsewhere held that where

the taking of premiums is not illegal the reserving of interest thereon is proper. (*Citizens' Mutual Loan & Accumulating Fund Association v. Webster*, 25 Barb. [N. Y.], 263; *Bowen v. Lincoln Building & Loan Association*, 28 Atl. Rep. [N. J.], 67.) We are not bound by the construction placed upon the statute by the Ohio court, because the first case so construing it was not decided until after our legislature adopted the statute. The construction given the same statute by the courts of a sister state would, in any event, however, be entitled to great respect; and we would follow it here but for what we deem to be the superior reasoning of the courts of New York and New Jersey. If the right to reserve a premium be admitted, it follows that the premium may be made presently payable or payable in the future; and if made payable in the future, then we can see no reason why interest may not be reserved upon it. There are two ways of looking at this transaction. It may be considered as a loan of $1,640 with credit given for the premium of $360 until the maturity of the loan. In that event the reservation of interest upon $2,000 would be free from objection. Or, it may be considered as a loan of $2,000, out of which the borrower immediately pays the premium. So regarded, interest on $2,000 is merely interest upon the actual loan. While we think the statute should in this respect be given so strict a construction as not to unnecessarily extend it beyond its terms, we can see no reason for allowing the premium and refusing interest upon it, where the terms of the loan are as they were here. It follows that the transaction was not usurious.

In computing the amount due, general indications of the views of the court were given in *Randall v. National Building, Loan & Protective Union*, 43 Neb., 876. The borrower is entitled to have all payments made by him credited upon the loan, and this the association in this case offered to do. He is also entitled, under the by-laws of this association, and the offer made by it in its pleadings, to a credit of one-eighth of the premium for each year

remaining which the loan would in its regular course have to run according to the computations of the association; that is, it was calculated that the series of stock would mature in eight years, and the by-laws therefore provided for a settlement on that basis. This was a part of the contract between the parties and it does not seem unconscionable. Furthermore, we do not think that the borrower is necessarily restricted, in his credit upon the principal, to the amounts paid by him in the way of dues. As we have said, the law is settled for this state that the transaction is a loan. The stock is pledged as collateral security. While ordinarily a creditor, holding a real estate mortgage and also chattel security, may proceed to exhaust either, it is clear that the by-laws of this association contemplate in the case of winding up a loan that the stock shall be extinguished in the process. It follows from this that the association absorbing the stock should allow a credit not merely for the amount of payments made on it, but for its present value at the time of foreclosure. We cannot at this time enter into greater detail. The question litigated was that of usury, and an accounting on the basis of a valid contract was not entered into in fact, although the basis therefor appears in the evidence. This accounting can best be had in the district court, the judgment of which is reversed and the cause remanded with directions to award a decree of foreclosure on the basis of a legal transaction, and in accordance with the principles here expressed.

REVERSED AND REMANDED.

WILLIAM D. BECKETT V. STATE OF NEBRASKA.

FILED OCTOBER 6, 1896. No. 8008.

1. **Contempt:** PROCEEDINGS: REVIEW. Proceedings for contempt of court are, in this state, in their nature criminal, and governed by the strict rules applicable to prosecutions by indictment; hence presumption and intendments will not in such cases be indulged in order to sustain judgment of conviction. (*Hawes v. State*, 46 Neb., 149.)

2. ———: ———: ———. Where, although the alleged contemptuous acts are committed *in facie curiæ*, and, therefore, punishable summarily without the formality of a trial or hearing, witnesses are by the court called and examined touching the transaction involved, the prosecution will, for the purpose of review by means of proceedings in error, particularly where the record is ambiguous, be construed as one for a constructive contempt, in which the accused is entitled to be heard in his own defense.

ERROR to the district court for Douglas county. Tried below before SCOTT, J.

Read & Beckett and *H. J. Davis*, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day, Deputy Attorney General*, for the state.

POST, C. J.

The first and most serious difficulty encountered in this cause is to determine the character of the proceedings below, which resulted in the conviction of the plaintiff in error on the charge of contempt of court. The recitals of the judgment appear to sustain the contention of the attorney general, in behalf of the state, that the prosecution was for an offense committed in the presence of the court and, therefore, a direct contempt. On the other hand, the evidence in the bill of exceptions tends quite as strongly to sustain the claim of the plaintiff in error, that the proceeding was for a constructive contempt and triable as such. Four witnesses were called, and, in answer

to interrogatories by the court, gave evidence in detail concerning the conduct alleged as the foundation for the prosecution, one of whom, Mr. Britt, thus graphically relates what transpired on that occasion.

"Court was in session. Mr. Beckett [plaintiff in error] was there, and Mr. Keller and Mr. Wilgocki, and they were talking about the injunction in the Poor Farm case—talking for some time, and the court stated that he had decided not to grant the order, and Mr. Beckett stated that the court had informed him that before he would do so, he would hear him. The court said that was not so, and Mr. Beckett said it was so. The court repeated again that it was not so, and Mr. Beckett rose to his feet and slammed his fist on the table and said it was so—that he had said so. The court rose to his feet and told him he would not allow anybody to insult him in his own court room and ordered him to leave the court room. Mr. Beckett said he would not leave the court room, and started toward the court. The court then ordered the bailiff to take him from the room, and Mr. Savage [the bailiff] started to do so. He grabbed hold of Mr. Beckett and they struggled for a moment or two and Mr. Keller interfered and separated them and told Mr. Beckett to leave the room, and held Mr. Savage away from him. Mr. Beckett left the room, and that was about all that occurred."

The Court: "What did you see in regard to Mr. Beckett trying to get at the court with clutched fist?"

Answer: "When the court ordered him to leave the room he started right directly toward the court with his fist clenched. It looked as though he meant to do him harm."

Upon the conclusion of the testimony adduced at the instance of the court leave was sought by the plaintiff in error to introduce evidence in his own behalf, which request was denied and which ruling is now assigned as error.

This court has long recognized the distinction between

proceedings for direct contempts and for those acts which, although not committed in the presence of the court, tend to embarrass or prevent the due administration of the law and which are known as constructive contempts. The offense in the one class of cases, being committed *in facie curiæ*, is punishable without indictment or information, and without the formality of a trial or hearing of any kind, while in the other class of offenses a formal charge is required, with an opportunity for the accused to be heard in his own behalf. (See *Gandy v. State*, 13 Neb., 445; *Cooley v. State*, 46 Neb., 603.) If, therefore, this proceeding was one for a constructive contempt,—if the finding and judgment complained of are predicated, not upon what was seen and heard by the judge himself, but upon the testimony of witnesses to the transaction,—it was error to deny the hearing demanded. We understand the attorney general to concede that if the conduct alleged was by the district court treated as a constructive contempt, the effect of the ruling assigned is to deprive the accused of a substantial right, and is accordingly indefensible in this proceeding.

The judgment is, however, defended upon the ground that the prosecution was in fact for a direct contempt, and that evidence was received merely to preserve a record of the transaction involved for the enlightenment of the public and in vindication of the judge's action in the premises. But that view of the record should, we think, be rejected for two reasons: (1.) Proceedings for contempt are in their nature criminal and governed by the strict rules applicable to prosecutions by indictment; hence presumptions and intendments will not in this class of cases be indulged in order to sustain judgments of conviction. (*Hawes v. State*, 46 Neb., 149, and cases cited.) (2.) Assuming a proposition not decided, viz., that the foregoing contention finds support in the recitals of the transcript, such recitals are foreign to, and contradictory of, the record proper. That the record made by the trial court imports absolute verity for the purpose of appeal or re-

view by means of petition in error, is elementary law; but that rule, for obvious reasons, embraces such matters only as are pertinent to the controversy below, and has never, so far as we are advised, been held applicable to matters wholly foreign to the issues or to entries non-judicial in character, whether made voluntarily by the clerk or under the direction of the judge.

But we are, to amplify within logical bounds the argument of the attorney general, asked to sanction the proposition that the swearing and examining of witnesses in open court was, in this case, a solemn farce, and that the sole purpose of such judicial mimicry was to justify, through the medium of the press, a finding and judgment uninfluenced in the slightest degree by the evidence thus received,—an assumption as unjust to the learned district judge as the motive thereby implied would be unusual and reprehensible. Granting, as has been said, that the record is ambiguous in respect to the character of the proceeding below, we prefer, instead of the alternative mentioned, to adopt that construction which, although leading to a reversal of the judgment, imputes to the trial court an orderly disposition of the business before it, in accordance with judicial methods. It is probable that the record, which evinces a less degree of care in its preparation than might be expected in view of the source from whence it comes, fails to fairly indicate the position of the district court; but, upon the case here presented, the accused should, we think, have been permitted to purge the contempt, which the proof certainly tends to establish, and the denial of that right is error requiring a reversal of the judgment.

REVERSED.

JAMES LORIUS ET AL. V. ALLEN ABBOTT.

FILED OCTOBER 6, 1896. No. 6740.

1. **Justice of the Peace:** JURISDICTION: TITLES AND BOUNDARIES: EVIDENCE. The obvious purpose of the constitutional and statutory limitations upon the powers of justices of the peace concerning actions on contracts for real estate is to exclude from the cognizance of such officers proceedings involving a determination of the title or boundaries of land, and not to render inadmissible, in actions within their jurisdiction, deeds, contracts, and other evidences of title.

2. ———: ———: LIQUIDATED DAMAGES: ACTIONS. A county judge, in the exercise of the authority conferred upon him as a justice of the peace, has jurisdiction of actions to recover liquidated damages upon the failure of the defendant to convey real estate in accordance with the terms of the agreement which is the basis of such proceeding.

3. **Contract to Convey Land:** LIQUIDATED DAMAGES. Agreement alleged as the cause of action examined, and *held* not a mere penalty, but a provision for liquidated damages upon the default of the promisor.

ERROR from the district court of Loup county. Tried below before THOMPSON, J.

A. S. Moon, for plaintiffs in error.

A. M. Robbins and *C. I. Bragg*, *contra*.

POST, C. J.

This cause was commenced before the county judge of Loup county in the exercise of his jurisdiction as a justice of the peace. It was by the plaintiff therein, Abbott, defendant in error, alleged that one of the plaintiffs in error, Lorius, on the 12th day of April, 1892, by written indenture undertook within thirty days from said date to convey to him, the said Abbott, certain real property situated in said county, and in default thereof the latter was to have the use and control of the premises therein de-

scribed for the year 1892 and until the month of March, 1893, "the same being compensation as damages to said Abbott for the failure of said Lorius to execute said deed;" that Lorius having failed and refused to convey in accordance with the terms of his undertaking, conspired with his co-defendant, Van Rheen, to cheat and defraud the plaintiff by keeping the latter out of possession of the said premises, and that in the execution of such fraudulent purpose he conveyed said premises by deed to the said Van Rheen, who was a party to the fraud alleged and who received such conveyance, and went into possession of said property with notice of the plaintiff's rights in the premises. The foregoing allegations are accompanied by a prayer for judgment in the sum of $——, the rental value of said premises for the year 1892. The defendants appeared before the county judge and objected to his jurisdiction over the subject of the action, which having been overruled, they interposed separate motions to strike the bill of particulars, on the ground that it failed to state a cause of action, which motions were also overruled and a trial had, resulting in a judgment for the plaintiff therein against both defendants. Said cause was afterward, by means of the petition in error of the said defendants, removed into the district court for Loup county for review, where, upon a final hearing, the said proceeding was dismissed, and which is the ruling now assigned as error.

In section 16, article 6, of the constitution we find the following provision relating to the jurisdiction of county courts: "They shall not have jurisdiction in criminal cases in which the punishment may exceed six months' imprisonment or a fine of over fine hundred dollars; nor in actions in which title to real estate is sought to be recovered, or may be drawn in question; nor in actions on mortgages or contracts for the conveyance of real estate." By section 2, chapter 20, Compiled Statutes, entitled "Courts," it is declared that "county judges in their respective counties shall have and exercise the ordinary

powers and jurisdiction of justices of the peace, and shall in civil cases have concurrent jurisdiction with the district court in all civil cases in any sum not exceeding one thousand dollars." Section 18, article 6, of the constitution, defining the jurisdiction of justices of the peace, provides that "no justice of the peace shall have jurisdiction of any civil case where the amount in controversy shall exceed two hundred dollars; nor in a criminal case where the punishment may exceed three months' imprisonment, or a fine of over one hundred dollars; nor in any matter wherein the title or boundaries of land may be in dispute." The Civil Code, section 907, declares: "Justices [of the peace] shall not have cognizance: * * * Fifth—In actions on contracts for real estate. Sixth—In actions in which the title to real estate is sought to be recovered or may be drawn in question, except," etc. We conclude from a consideration of the facts alleged that this is not an action upon a contract for the conveyance of real estate, within the meaning of either the constitutional or statutory provisions above quoted. The obvious purpose of the limitations therein, so far as they relate to contracts concerning real estate, is to exclude from the cognizance of county courts and justices of the peace actions involving a determination of the title or boundaries of land, and not to render inadmissible, as affecting the right of possession merely, deeds and other evidence of title. (*Galligher v. Connell*, 23 Neb., 391.)

It is unnecessary to determine in this connection whether, upon the refusal of the defendant below, Lorius, to convey, the instrument set out operated as an executed lease of the premises therein described or as an executory agreement to lease, since in either case the gravamen of the action is the breach by said defendant of an undertaking which contemplated the relation of landlord and tenant, and the damage sought is the rental value of said premises for the stipulated period of one year. It is not unlike an action against a landlord for refusing to put the tenant in possession of the demised

premises which by implication admits the title of the former. Nor did the introduction in evidence by the plaintiff below of the agreement for the conveyance of the land operate to deprive the county judge of jurisdiction of the action. In *Mushrush v. Devereaux*, 20 Neb., 49, which was for the recovery of money paid upon an agreement for the sale of land after a refusal to convey, it was argued that inasmuch as the plaintiff was unable to make out his case without the introduction in evidence of the agreement in question, the justice of the peace was without jurisdiction of the action; but it was held, notwithstanding such fact, that the suit was for money had and received and, therefore, cognizable by the county judge in his capacity as a justice of the peace. The ground of the decision in that case is apparent from the concluding language of the opinion, viz.: "The plaintiff's case, therefore, depending not upon his refusal or failure to comply with the terms of his contract, upon which the advance payment was made, the county judge was not ousted of jurisdiction to try the action by reason of the constitutional provision cited or the provisions of statute in pursuance thereof." This case is within the reasoning there employed and must be governed thereby.

It is insisted that the condition of the contract for the use by the plaintiff of the property therein mentioned is in the nature of a penalty and that, in the absence of an allegation of actual damage, the county judge erred in refusing to strike the bill of particulars; but to that proposition we cannot agree. The stipulation in question is entirely free from doubt or ambiguity, and is susceptible of a single interpretation, viz., that the provision therein for the benefit of the plaintiff below was intended to be the measure of his damage upon the breach of the contract by the defendant. The judgment is right and will be

AFFIRMED.

WEST POINT WATER POWER & LAND IMPROVEMENT COMPANY V. STATE OF NEBRASKA, EX REL. P. M. MOODIE, COUNTY ATTORNEY.

FILED FEBRUARY 4, 1896.* No. 6064.

1. **Mills and Mill-Dams:** WATER-COURSES: FISHWAYS. Persons erecting and maintaining dams for milling purposes in the streams of this state do so with the implied obligation to maintain adequate fishways for the passage of fish from the lower to the higher level of such streams and their tributaries.
2. **Powers of State:** POLICE POWER. The reserved powers of the state, including the police power, are inalienable, and cannot be surrendered or bartered away by the legislature.
3. **Water-Courses:** PRESERVATION OF FISH. The preservation of the fish in the streams of the state is a proper function of government.
4. **Mandamus:** MILL-DAMS: FISHWAYS. The duty enjoined upon the owner of mill-dams to construct and maintain fishways (see Criminal Code, sec. 87*a*) is designed to promote the public welfare, and may be enforced by *mandamus* on the relation of the county attorneys of the several counties.

ERROR from the district court of Cuming county. Tried below before NORRIS, J.

The opinion contains a statement of the case.

J. C. Crawford, for plaintiff in error.

In the argument reference was made to the following cases: *State v. Franklin Falls Co.*, 6 Am. Rep. [N. H.], 513; *Ryan v. Brown*, 100 Am. Dec. [Mich.], 154; *City of Janesville v. Carpenter*, 20 Am. St. Rep. [Wis.], 123; *Jones v. Pettibone*, 2 Wis., 308*; *Arnold v. Elmore*, 16 Wis., 509*; *Yates v. Judd*, 18 Wis., 118*; *Walker v. Shepardson*, 4 Wis., 495; *Wisconsin River Improvement Co. v. Lyons*, 30 Wis., 61; *Delaplaine v. Chicago & N. W. R. Co.*, 42 Wis., 214; *Cohn v. Wausau Boom Co.*, 47 Wis., 314; *Stevens Point Boom Co. v. Reilly*, 46 Wis., 237; *Hazeltine v. Case*, 46 Wis., 391.

*Publication withheld pending rehearing. See following case, 49 Neb., 223.

M. McLaughlin, also for plaintiff in error.

P. M. Moodie, contra:

Plaintiff in error owns its mill-dam on the condition that it will provide a fishway whereby all fish may readily pass over or around it. (*Holyoke v. Lyman*, 15 Wall. [U. S.], 500; *Town of Stoughton v. Baker*, 4 Mass., 522*; *Burnham v. Webster*, 5 Mass., 266; *Nickerson v. Brackett*, 10 Mass., 212; *Cottrill v. Myrick*, 12 Me., 229; *Vinton v. Welsh*, 9 Pick. [Mass.], 92; *Commonwealth v. Chapin*, 5 Pick. [Mass.], 204.)

The legislature has no right to bind itself not to exercise its powers for the preservation of a common right. (*Stone v. State of Mississippi*, 101 U. S., 814; *Boston Beer Co. v. State of Massachusetts*, 97 U. S., 25; *Boyd v. State of Alabama*, 94 U. S., 645; *Metropolitan Board of Excise v. Barrie*, 34 N. Y., 657.)

The plaintiff in error could acquire no prescriptive right, as against the public, to maintain a mill-dam without a fishway. (*Parker v. People*, 111 Ill., 581.)

POST, C. J.

This was an application for a writ of *mandamus* to the district court for Cuming county on the relation of P. M. Moodie, as county attorney, to require the respondent therein, plaintiff in error, to construct a suitable fishway whereby fish may readily pass over or around a dam maintained by said respondent in the Elkhorn river. An answer was filed by the respondent, in which is contained the following admission: "It admits that the respondent owns and maintains a mill-dam across said Elkhorn river at or near the city of West Point and within said county of Cuming, and that the said respondent has never provided, and has not at the present time, a suitable fishway, nor any fishway whatever, whereby fish may pass over or around said mill-dam." The other allegations of the an-

swer are, in substance, that the land upon which said dam is situated is private property; that the construction of said dam was authorized by the territorial legislature in the year 1867, and that the respondent has acquired the right to maintain it as at present constructed by adverse user; that the Elkhorn river is a private, unnavigable stream, and to require the respondent to construct a fishway would be to damage its property, within the prohibition of the state constitution. To this answer a demurrer was interposed by the relator and sustained by the court. The respondent refusing to plead further, a peremptory writ of *mandamus* was awarded against it in accordance with the prayer of the petition, and the cause removed into this court for review by the respondent.

The provision of statute relating to the subject involved is found in section 1 of the act amendatory of prior acts, approved April 4, 1887 (see Criminal Code, sec. 87*a*), viz.: "It shall also be unlawful for any person, association of persons, or corporation to place or establish any obstruction across any stream of water in this state that shall prevent the free passage of fish along said stream; *Provided*, That all persons, associations of persons, or corporations erecting, owning, or maintaining a mill-dam across any stream in this state shall, at his or its own expense, construct and at all times maintain, subject to the approval of the fish commission, a suitable and substantial fishway whereby all fish passing along said stream can readily pass over or around said dam. Public waters, within the meaning of this section, shall embrace all lakes, ponds, rivers, creeks, bayous, and streams, except private artificial ponds or ponds subject to the exclusive dominion of a single ownership." (Session Laws, 1887, p. 662, ch. 107, sec. 1.) The courts of this country have frequently been called upon to give effect to acts of this character and have, it is believed, in every instance sustained the power of the legislature over the subject. (See *Hooker v. Cummings*, 20 Johns. [N. Y.], 90; *Town of Stoughton v. Baker*, 4 Mass., 522; *Burnham v. Webster*, 5 Mass.,

266; *Commonwealth v. McCurdy*, 5 Mass., 324; *Nickerson v. Brackett*, 10 Mass., 212; *Commonwealth v. Chapin*, 5 Pick. [Mass.], 199; *Vinton v. Welsh*, 9 Pick. [Mass.], 92; *Commonwealth v. Essex Co.*, 13 Gray [Mass.], 248; *Cottrill v. Myrick*, 12 Me., 229; *Weller v. Snover*, 42 N. J. Law, 341; *Parker v. People*, 111 Ill., 581; *Holyoke Water-Power Co. v. Lyman*, 15 Wall. [U. S.], 500.) In the case last cited, which involved a statute of Massachusetts after which ours appears to have been modeled, the subject was considered in all its phases, resulting in the conclusion that while a grant authorizing the use of the water of a stream for mill purposes is a vested right, such right is subject to legislative control, and that one erecting a dam in a stream annually frequented by fish, does so under the implied obligation to maintain sufficient openings to permit the passage of fish at all proper seasons. In that case Mr. Justice Clifford, after citing with approval the opinion of Chief Justice Shaw in *Commonwealth v. Essex Co.*, *supra*, says: "From the earliest times the right of the public to the passage of fish in rivers and the private rights of riparian proprietors, incident to and dependent on the public right, have been subject to regulation of the legislature; that the mode adopted by the legislature, whether by public or private acts, to secure and preserve such rights, has been by requiring, in the erection of dams, such sluices and fishways as would enable these migratory fish, according to their known habits and instincts, to pass from the lower to the higher level of the water occasioned by such dam, so that, although their passage might be somewhat impeded, it would not be thereby essentially obstructed." And in *Commonwealth v. Chapin*, *supra*, the same principle is recognized by Chief Justice Parker in the following language: "This common law right of several fishery, in the owners of lands bordering on rivers not navigable, is subject to a reasonable qualification, in order to protect the rights of others, who in virtue of owning the soil have the same right, but might lose all advantage from it if their neighbors below them,

on a stream or river, might with impunity wholly impede the passage of fish into the lakes or ponds, where they, by instinct, prepare for the multiplication of the species. This restriction is founded upon that universal principle of every just code of laws, *sic utere tuo ut alienum non lædas.*" *State v. Franklin Falls Co.*, 49 N. H., 240, to which we are referred in support of the opposing view, is not authority for the contention of the plaintiff in error. Indeed, it may be said to sustain the doctrine of the cases above cited, since the propositions therein asserted are (1) that the maintaining, in an unnavigable river, which is the outlet of a large inland lake, of a dam without a fishway so as to obstruct the passage of fish from the sea to the lake, is indictable at common law; (2) no right will be acquired as against the state by the obstruction of a public fishery for more than twenty years under a claim of right, where such obstruction originated without right.

Regarding the plaintiff in error's reliance upon a prescriptive right to maintain its dam without making provision for the passage of fish, and upon the fact that the construction of the dam was authorized by the territorial legislature, it is sufficient that the reserved powers of the state, including the right to conserve and promote the public welfare at the expense of private interests, denominated the police power, is inalienable, and cannot be surrendered or bartered away by the legislature. (*Parker v. People, supra; Alger v. Weston*, 14 Johns. [N. Y.], 231; *People v. Morris*, 13 Wend. [N. Y.], 329; *Metropolitan Board of Excise v. Barrie*, 34 N. Y., 657; *Stone v. Mississippi*, 101 U. S., 814.)

Lastly, it is urged that the law recognizes no common right of fishery in the streams of this state; that such right belongs exclusively to the owners of the soil; that it is, in short, a private right only, in which the state is not interested, and that the writ of *mandamus* should not, therefore, have been allowed on the relation of the county attorney. In *Attorney General v. Albion Academy*, 52 Wis., 469, the rule is thus stated: "'The question whether the

attorney general can sue, or whether the suit must be brought by some private party, depends upon whether the injury sought to be redressed is public in its nature, affecting public interests, or whether it is merely private, affecting private rights and interests only. In the latter case the attorney general cannot sue; in all others he can. In case of a wrong which is also a public as well as a private injury, the attorney general may sue in respect to the public injury, although a private person may also sue in respect to his private injury.' " And, as said by this court in *Smiley v. MacDonald*, 42 Neb., 5, the test of public utility is whether the particular regulation involved has some relation to the public welfare and whether such is in fact the end sought to be attained. That the declared purpose of the act, viz., the preservation of the fish in our streams, is a proper function of the state government as tending directly to promote the public welfare, is a proposition distinctly recognized by authority, including the cases above cited. The provision for the construction of fishways must therefore be regarded as a duty enjoined upon persons and corporations maintaining dams in the streams of the state, in the interest of the public at large. It follows that the writ was properly allowed on the relation of the county attorney, and that the judgment of the district court should be

AFFIRMED.

WEST POINT WATER POWER & LAND IMPROVEMENT COMPANY V. STATE OF NEBRASKA, EX REL. P. M. MOODIE, COUNTY ATTORNEY.

FILED OCTOBER 6, 1896. No. 6064.

1. **Pleading:** JUDGMENT. "It is a well established rule of pleading, under the Code as well as at common law, that a judgment upon demurrer must be against the party whose pleading was first defective in substance, and that a demurrer searches the entire record

and must go against the first error." (*Hower v. Aultman*, 27 Neb., 251; *Oakley v. Valley County*, 40 Neb., 900.)

2. **Water-Courses:** FISHWAYS: CONSTITUTIONAL LAW: STATUTES. The legislature of the year 1875 passed a law entitled "An act to prohibit the catching of game fish in certain cases." (See Session Laws, 1875, p. 23.) The act referred to was the subject of amendment and repeal by the legislative body which convened in 1879, the title of the amendatory act being as follows: "An act to amend sections one, two, and three of an act entitled 'An act to prohibit the catching of game fish in certain cases.'" (Session Laws, 1879, p. 71.) During a session of the legislature convening in 1887 an act was passed under the following title: "An act to amend section one of 'An act to amend sections one, two, and three of an act entitled "An act to prohibit the catching of game fish in certain cases."'" (Session Laws, 1887, p. 662, ch. 107.) Among other things, this latter act made it obligatory upon persons or corporations owning, erecting, or maintaining a mill-dam across any stream of water in the state to construct and keep suitable fishways for the passage of fish over and around the dam. *Held*, That the portion of the act last referred to which prescribed the duty of construction, etc., of a fishway was a subject not expressed in the title of the act, and hence the act, to the extent it was attempted to legislate therein upon such subject, was within the constitutional inhibition that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." This is equally true whether the act be viewed as an amendatory one, as it is purported to be, or as an independent act, complete within itself.

REHEARING of preceding case, 49 Neb., 218.

J. C. Crawford and *M. McLaughlin*, for plaintiff in error.

P. M. Moodie, *contra*.

HARRISON, J.

In this, an action instituted in the district court of Cuming county, the relator, the county attorney of said county, asked the issuance of a writ of *mandamus* ordering the respondent to make and keep a suitable fishway for the passage of fish over and around a mill-dam owned and maintained by it in the Elkhorn river. To an answer filed by the respondent, the relator filed a general demurrer, which was sustained and, the respondent electing not to plead further, a peremptory writ of *mandamus*

was granted and issued against it, as prayed in the application or petition. The case was presented to this court for review by the unsuccessful party in the district court. The result of a hearing here was the affirmance of the action of the district court. For opinion then announced see preceding case, 49 Neb., 218. A motion for rehearing was filed and, on consideration, granted, and the cause has been again submitted to this court for examination and decision.

At this hearing a question was raised and discussed which was not presented, and to which no reference was made at the former hearing, viz., that the act of the legislature, under the provisions of which this action was instituted, and by which it is claimed the duty was cast upon the respondent of performing the acts sought to be required by this proceeding, was unconstitutional, as violative of that portion of our constitution wherein it is prescribed that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." (Constitution, sec. 11, art. 3.) To determine this question it will be necessary to examine the course of legislation on the subject involved in the action, to review the history of the act or acts of the law-making body, which it is urged the respondent had failed to fulfill.

The original enactment was passed during the year 1875 (see Session Laws, 1875, p. 23), and was entitled "An act to prohibit the catching of game fish in certain cases." Section 1 was as follows: "That it shall be unlawful to catch, interfere with, or destroy by the use of any seine, dip-net, set-net, trammel-net, or basket, any black bass, willow bass, pickerel, pike, trout, jack-salmon, perch or any other game fish, in any lake, pond, slough or other body of water lying in whole or in part within the state of Nebraska, which does not at all seasons of the year have a natural inlet and outlet from and into some river, creek or other stream of water, without first having obtained the consent of the owners of the land upon which is situated any such lake, pond, or

slough as aforesaid." Section 2 provided the penalty or punishment to be adjudged against any person doing any of the things prohibited by the act, and section 3 gave justices of the peace jurisdiction of all cases arising under the provisions of the act.

The foregoing act was the subject of repeal and amendment in 1879 (see Session Laws, 1879, p. 71), the title to the repealing act being as follows: "An act to amend sections one, two, and three of an act entitled 'An act to prohibit the catching of game fish in certain cases.'" In section 1 of this amendatory act it was made unlawful for any person or persons to catch, kill, injure, or destroy any fish in any river, creek, brook, stream, lake, pond, bayou, or other body of water in this state with a seine, trammel-net, gill-net, pound net, basket, or weir, or in any other manner, except with a hook and line, spear and fork, and made unlawful for any person to set or drag a seine or net, or any of the prohibited appliances for catching fish, in any of the designated waters, and authorizing any person finding any of them so set to take them up, and provided that the act shall not be construed to prohibit the owners of private ponds or streams from taking fish therefrom in any manner they choose. Section 2 provided: "It shall be unlawful for any person or persons to injure, disturb, or destroy any hatching-box, hatching-house, or pond used for hatching or propagating fish, or to injure or destroy or disturb any spawn, or fry, or fish in any hatching-box, hatching-house or pond or stream; *Provided,* That the fish commissioners of this state may take, or cause to be taken, any of the fish named in this section for the purposes of propagation, or stocking the waters of this state." And in section 3 it was stated: "It shall be unlawful for any person or persons to catch, injure, kill, or destroy any California salmon, land-locked salmon, trout, shad, white-fish, or carp, which shall have been planted or placed in any waters of this state by the fish commissioners, or by private persons." By each section the punishment for the acts prohibited by its

terms was provided, and by section 4 the sections of the act of 1875 were repealed in terms.

During the legislative session of 1887 an act was passed which purported to amend section 1 of the amendatory act of 1879 (see Session Laws, 1887, p. 662) with the following title: "An act to amend section one of 'An act to amend sections one, two, and three of an act entitled "An act to prohibit the catching of game fish in certain cases."'" Section 1 of this act of 1887 made it unlawful for any person to catch, kill, injure, or destroy any fish in any public water in this state or in the Missouri river along the eastern boundary of this state, in any manner except by the use of hook and line, and the use of seines, nets, and other devices other than the hook or line were prohibited and made unlawful. It was further provided, among other things: "It shall also be unlawful for any person, association of persons, or corporation to place or establish any obstruction across any stream of water in this state that shall prevent the free passage of fish along said stream; *Provided*, That all persons, associations of persons, or corporations erecting, owning, or maintaining a mill-dam across any stream in this state shall, at his or its own expense, construct and at all times maintain, subject to the approval of the fish commission, a suitable and substantial fishway whereby all fish passing along said stream can readily pass over or around said dam. Public waters, within the meaning of this section, shall embrace all lakes, ponds, rivers, creeks, bayous, and streams, except private artificial ponds, or ponds subject to the exclusive dominion of a single ownership. Every violation of any provision of this section shall be a misdemeanor, and every person, association, or corporation convicted of an offense under this section shall pay a fine of not less than twenty-five (25) dollars and costs of prosecution, or imprisonment in the county jail not less than ten days or until such fine and costs are paid. * * * Each day any mill-dam or other obstruction shall be continued without such fish-

way shall be deemed and taken as a separate offense under this act."

It needs no discussion or argument to establish that the subject-matter of the portion of the act of 1887, just quoted, which refers to and prescribes the duty of persons or corporations owning, erecting, or maintaining a mill-dam across any stream of water in the state to construct and keep a suitable fishway for the passage of fish over or around the dam is not included or expressed in the title of the act, which, in its words and substance, is as follows: "An act to prohibit the catching of game fish in certain cases," as it appeared entitling and governing the subject-matter of the original enactment and was retained and used throughout the course of the amendments attempted by the legislative body. The portion of the act of 1887 alluded to is clearly foreign to the subject of the title of either the original or amendatory acts, and hence void and of none effect, and this is equally true whether the acts in question be in view either as independent acts on the subject of the title, complete in themselves, or as amendatory as the last in point of time purported to be.

It will be remembered that the judgment in the cause in the district court was based upon a ruling sustaining a general demurrer to the answer of respondent. "It is a well established rule of pleading, under the Code as well as at common law, that a judgment upon demurrer must be against the party whose pleading was first defective in substance, and that a demurrer searches the entire record and must go against the first error." (*Hower v. Aultman*, 27 Neb., 251, and cases cited. See, also, *Oakley v. Valley County*, 40 Neb., 900.) The petition in this case being a statement of a cause of action having its source or basis in a statute in itself unconstitutional, and therefore void, did not state a cause of action, and, applying the rule of pleading just referred to, the judgment should have been favorable to the respondent and not the petitioner; hence the former affirmance by this court of the

judgment of the district court must be set aside, the judgment of the district court reversed, and, as there can be no amendment of the petition which will be of any avail, the action will be dismissed. The questions which were considered and decided at the former hearing of the cause in this court are unnecessary to a final determination and disposition of the case and need not now be reexamined.

REVERSED AND DISMISSED.

OMAHA CONSOLIDATED VINEGAR COMPANY, APPELLANT, V. JOSEPH BURNS, APPELLEE.

FILED OCTOBER 6, 1896. No. 5473.

1. **Contract to Sink Tubular Well:** CONSTRUCTION: SUPPLY OF WATER. The contract upon which the cross-petition in this action declared construed, and *held* to be an agreement under which the defendant was to sink a tubular well of prescribed dimensions, until a flow of two thousand gallons of water per hour was obtained, not to extend, however, beyond a depth of five hundred feet, at any ascertained or fixed compensation for such further extension, and not in any event to extend beyond a depth at which the company, the employer, should give the defendant notice to quit work.

2. ———: TERMINATION: AMOUNT OF RECOVERY. The cross-petition declared on a completed contract. During the progress of the work under the contract the company notified the defendant to stop any further work on the well. With the requirements of such notice the defendant complied. *Held*, That under the pleadings he could recover the contract price for the number of feet of the well then completed as to dimensions, casing, etc., in accordance with the contract, and for no more.

3. ———: SUPPLY OF WATER. The contract in question did not provide that any specific quantity or flow of water should be obtained as a condition precedent to or upon which depended defendant's right to compensation for such labor as he performed or materials he furnished in the completion of any portion of the well according to contract, and further, in this connection, that the contract was enforceable notwithstanding its omission in respect to the condition to which reference has just been made.

4. ———: ———. *Held*, That under the facts and circumstances shown

in evidence, the contract by virtue of which defendant demanded a recovery was binding on the company against which the claim was sought to be established.

5. **Mechanics' Liens:** TUBULAR WELLS. The account for labor performed and materials furnished in sinking a tubular well affords no foundation for a claim for a mechanic's lien on the premises on which the improvement is made.

6. ———: ———. The former opinion in this case, to the extent the construction given the contract between the company and defendant differed and was in conflict with the construction herein adopted, is reversed.

REHEARING of case reported in 44 Neb., 21.

Mahoney & Smyth, for appellant.

Charles Offutt, contra.

HARRISON, J.

The defendant in this action filed a mechanic's lien in the proper office in Douglas county against the property of plaintiff, the account on which the claim of lien was predicated being for work performed and material furnished in and about the sinking of a "tubular" well in the property of plaintiff company in Omaha. This action was instituted by the plaintiff company, the object being to secure the cancellation of the lien, or its removal as an alleged cloud on the company's title to the property. The defendant filed a cross-bill, or petition, in which he asked that the amount due him from the plaintiff might be ascertained and adjudged, and his lien therefor foreclosed, etc. To this cross-petition the company pleaded and of the issues there was a trial, the result of which was favorable to the defendant. The company appealed to this court, and on hearing of the case here the judgment of the district court was reversed. (See 44 Neb., 21.) A motion for rehearing was filed and allowed, and the case has been again submitted for decision. There was a sufficiently full statement of the issues, and such facts as were and are necessary to an understanding of the case,

in the former opinion, to which we refer the reader for such statement, not deeming a repetition necessary here. The contract by virtue of which the defendant alleged he did the work and furnished the materials was as follows:

"JOSEPH BURNS: Please sink a tubular well of seven-inch lap welded iron pipe at our vinegar factory in Omaha, and continue sinking the same until you get a water supply of 2,000 gallons of water per hour, unless sooner stopped by us. You to furnish all pipe, points, and working barrel and valves, together with plunger rods and all other material necessary to construct and complete the well in a first-class manner to the surface of the ground, and on completion of the work we agree to settle for the same at the rate of ($5.00) five dollars per foot, one-half to be paid in cash and the balance to be paid by our note for ninety days, without interest. We will furnish, at our own expense, the pump, or whatever we may decide to use to raise the water with. It is the understanding of this that you pay all bills for labor and material necessary to complete the work as above, for the above prices, and should the well have to be sunk below 250 feet, then the price shall be six dollars per foot below the first 250 feet, or for the second 250 feet, or any part thereof that it may be necessary to sink the well to obtain the necessary amount of water; and it is further understood that in no case shall the well be sunk deeper than five hundred feet (500) deep, at this price, from the surface of the ground. It is the understanding that when the well is complete as above it shall be paid for as first mentioned, namely, one-half cash and balance in note as above."

The former opinion, in part, hinged upon the construction therein given to the contract we have just quoted. As we read it, we are forced to conclude: First—That the defendant could, or would, fulfill it (this being the point which we now desire to settle) by sinking the well to such depth as to obtain a continuous flow of 2,000 gallons of water per hour. Second—That the depth could

not be extended beyond 500 feet under the existing contract, this because the contract did not provide for the payment of any consideration for any further prosecution of the work, and there were other facts in evidence which, we believe, fully support this conclusion. Third—That defendant was to stop whenever notified to do so by the company.

Pursuant, presumably, to the right given it by the contract to stop the sinking of the well at such time as it desired, the company served defendant with the following notice:

"*To Joseph Burns, His Agents, Assigns, and Employes:* It is provided in our contract of September 11th that you shall sink a tubular well of seven-inch lap pipe, welded iron pipe, at our vinegar factory at Omaha, and continue sinking the same until you get a supply of 2,000 gallons of water per hour, unless sooner stopped by us.

"We now exercise our right to stop you in accordance with said contract, and hereby notify you to forthwith cease work upon said well, to remove your machinery and tools from our property, and vacate our premises at once.

"J. H. BARRETT,
"*President.*"

At the time of the service of this notice the well was completed, as to dimensions and being properly cased, to a depth of 145 feet, and had proceeded beyond this some 375 feet. A portion of this latter distance pipe had been used but five inches in diameter, and a part four inches. In the former opinion the contract was construed as providing that the defendant was to obtain a continuous flow of 2,000 gallons of water per hour, and if he failed to do so within five hundred feet, to receive nothing for what he had done under the contract. We feel forced, at this time, to adopt a somewhat different conclusion in the one particular, *i. e.*, in respect to the flow of water. Doubtless the primary and moving purpose of the company's entering into the contract was to obtain

the water, and not an unsatisfactory or insufficient flow thereof. But if it was the intention to provide in the contract that a prescribed quantity or yield of water should result from the labors of defendant, or he should receive no compensation, the contract made did not express or carry out the intention. A contract may be executed, and they have been, binding the party sinking the well to furnish a satisfactory or definitely stated quantity of water, or get no, or a reduced, compensation for the labor performed. It is true that such a contract contains a possible hardship on the contractor, but to this it must be answered that it is a contract to perform a something which necessarily, as an inherent element, has this uncertainty or contingency, and if he voluntarily enters into the contract he assumes the risks and possible hardships incident thereto. Having done so, if the contingency becomes a certainty, a fact, he must bear the result. (*Jackson v. Cresswell*, 61 N. W. Rep. [Ia.], 383.) The rule is equally forcible as to the other contracting party, in this case the company, if the agreement is executed without provision that a specific flow of water shall be obtained, as was this one; then the labor and materials must be paid for as per contract, be the flow of water little or much. The recovery in the action was asked by the defendant on an allegation in the cross-bill of a performance of the contract on his part according to all its terms and conditions. At the time he was notified by the company to quit work on the well, as we have before stated, he had completed 145 feet in strict compliance with the terms of the agreement, and more than 300 feet additional partially. He was entitled, as we view the contract under the pleadings, to payment for the 145 feet at $5 per foot, or $725. The trial court, as to the remaining 350 feet of the 500 feet which it had concluded the defendant was, by the terms of the contract, to sink the well, unless sooner stopped, received evidence of what would be the reasonable value of the work and materials necessary to finish the well from the dimensions of five

and four inches in diameter, which such further portions of it had when the work was stopped, to what the agreement contemplated and demanded, and deducting the amount thus obtained from the sum which the number of feet, if completed according to contract, would have cost at the contract price, gave the defendant judgment for the balance. The defendant sought, in the evidence adduced on his part, to support three theories in relation to this smaller portion of the well. One that, under his definition of a tubular well, it might, under certain conditions, as detailed in the evidence, be completed and fulfill the contract and yet be, a great portion of it, not more than five inches in diameter, or four, or even less. Another that it was entirely proper to proceed from the 145-foot point, or any other, in fact, with the smaller pipe, and afterwards, as was his purpose if he thought it necessary, draw out the smaller pipe, make the hole larger, as required by the contract, and let down pipe of the contract dimensions. It was in evidence that defendant stated, at times when the work was in progress, when objections were made by some officers of the company to the use of the small pipe, that he was merely prospecting for water. The trial court adopted the theory that putting in the small pipes was a proper manner of proceeding with the work; that it was a completion of the well to the extent it had progressed, within the terms of the contract, and hence allowed compensation therefor, as we have hereinbefore outlined. This, we must conclude, was wrong. Under the pleadings the defendant could recover for only so much of the well as had been fully completed according to the contract. If he desired to do some prospecting or searching for water he could do so, and might, in so doing, perform labor, the results of which could afterwards be utilized in completing portions of the well to comply with the contract. It is of the evidence introduced in defendant's behalf that as soon as the small pipes were withdrawn the hole would at once, partially or wholly, fill with sand and other substances, as the case might be,

to what extent could not, with any certainty, be asserted. Certainly, then, evidence of what would be the recoverable value of completing the well must, of necessity, be as variable and uncertain as the conditions under which it would have to be performed, and could not be accurately estimated so as to furnish a reliable measurement on which to base a deduction from the fixed contract price, and say that we were requiring ascertained compensation from the company, a price specified by the agreement for finished work, under a pleading of a completed contract. Cases may arise, and probably have arisen, where the contract and the evidence will furnish and have presented such conditions as afforded opportunity for the application of the rule, or one similar to that indicated and for which contention was made, but it can have no bearing in this case. The articles of incorporation which had been adopted by the company were introduced in evidence, and in the seventh paragraph thereof it was provided as follows: "The affairs of this corporation shall be conducted by a board of directors of five members, who shall elect a president, vice president, and secretary, who shall also be treasurer; they shall appoint such superintendents, agents, and managers as they shall from time to time deem necessary for the transaction of the business of this corporation, and a person learned in the law as attorney and counsel thereof; they shall also have power to adopt a code of by-laws if they deem it necessary."

It is urged that there was no evidence of authorization by the board of directors of the making of the contract under which the defendant claims, or any right or power delegated to the president by which he could enter into any such agreement for the company so that it would be the contract of the organization. The company, so far as is shown by the articles of incorporation and the evidence, was not one having a seal. The contract was not required to be made by seal. It was admitted in the pleadings filed by the corporation, in answer to defendant's

cross-petition, that J. H. Barrett, who signed the contract, was the president of the company at the time of signing, and that he signed it as such president. The services to be performed were such as were then demanded, and thoroughly fit and suitable in and about the business in which the corporation was engaged. The defendant went on the premises of the company with the necessary machinery and implements to perform his part of the contract, began it, and continued it almost without ceasing, night and day, during three months or more, and in the work was directed and consulted with by the different officers of the company, and by and for the company was notified, in the manner provided for in the contract, to stop the work which he was doing under it, and moreover the company is here in this suit claiming relief under and by virtue of the terms and provisions of the agreement. There is sufficient here to constitute the contract binding on the company, whether it was so in its inception or not, which we do not here decide.

By the decree of the trial court the defendant was allowed a lien on the premises of the corporation, under the provisions of chapter 54, Compiled Statutes, entitled "Mechanics' and Laborers' Liens," for the amount adjudged due of his account. The first section of the chapter to which we have referred is as follows: "Any person who shall perform any labor, or furnish any material or machinery or fixtures, for the erection, reparation, or removal of any house, mill, manufactory, or building or appurtenance, by virtue of a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such house, mill, manufactory, building, or appurtenance, and the lot of land upon which the same shall stand." It is the established doctrine of this court that this section shall be given a liberal construction, so that, whenever practicable thereunder, the mechanic, laborer, or furnisher of materials may be afforded a remedy for the enforcement of the accounts due them. But the improve-

ment for which the account in suit accrued was for the sinking of the well and casing it, an improvement which may be said to have been in the soil and cannot, by any liberality in the construction, however great, be brought within the meaning of the words "perform labor, or furnish any material or machinery or fixtures, for the erection * * * of any house, mill, manufactory, or building or appurtenance," etc., and the filing of the claim, etc., established no lien.

The former opinion, insomuch as it conflicts with this one, is overruled. The defendant may, within forty days, file a remittitur of the sum of $1,430.50 of the amount adjudged due him by the decree of the district court, as of the date of such decree. If he does so the decree will be set aside to the extent of its allowance of a mechanic's lien, and, as thus modified, it will be affirmed, and a decree will be entered in this court canceling the lien of record. If the remittitur is not filed the decree of the district court must in all things be reversed.

JUDGMENT ACCORDINGLY.

JOHN THAMS, APPELLANT, V. GEORGE H. SHARP ET AL., APPELLEES.

FILED OCTOBER 6, 1896. No. 6689.

1. **Evidence:** DEEDS: TRANSCRIPT OF RECORD. A certified transcript of the record of a deed duly recorded may be read in evidence with like force and effect of the original deed, whenever the original is shown to be lost or not belonging to the party seeking to use it, nor within his control. (Compiled Statutes, ch. 73, sec. 13.)

2. **Deeds:** EVIDENCE OF FORGERY. Evidence in the case considered, and *held* sufficient to sustain the finding of the trial court that the deed purporting to have been made by P. T. to J. R. A. was genuine and not a forgery.

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

Simpson & Sornborger, for appellant.

References as to competency of certified copy of record of deed: 1 Wharton, Evidence [3d ed.], sec. 141; *Edwards v. Noyes*, 65 N. Y., 125; *Krise v. Nelson*, 66 Pa. St., 258; *Potts v. Coleman*, 5 So. Rep. [Ala.], 782; *Loftin v. Loftin*, 1 S. E. Rep. [N. Car.], 837; *Allen v. Read*, 17 S. W. Rep. [Tex.], 115; *Overand v. Menczer*, 18 S. W. Rep. [Tex.], 301; *Dickinson v. Breeden*, 25 Ill., 168; Newell, Ejectment, 464; *Phillips v. Bishop*, 35 Neb., 487.

C. C. McNish and *A. R. Oleson, contra.*

NORVAL, J.

This action was instituted in the court below by John Thams against George H. Sharp and Andrew R. Graham to quiet title to the southwest quarter of section 20, township 29, range 2 west of the 6th P. M., and to cancel of record certain deeds covering the lands mentioned. The defendant Graham filed an answer and cross-petition, setting up therein title to the premises in himself and praying that the same may be quieted in him. Plaintiff replied by a general denial. There was a trial on the merits, which resulted in a decree for Graham, from which this appeal is taken, plaintiff claiming that the findings of the trial court are unsupported by the evidence.

A patent was issued for the lands in dispute by the United States to one Peter Thams, of Clinton county, Iowa, on April 1, 1872, which patent was duly recorded. On July 29, 1891, the said Peter Thams, his wife joining with him, conveyed the lands by warranty deed, duly acknowledged, to his brother, the plaintiff herein, which deed was filed for record on August 17, 1891. The defendant Graham also claims to be the owner of the lands through certain conveyances, the following being his chain of title: A warranty deed purporting to have been made by Peter Thams, to one John R. Armstrong, of Elk-

hart, Indiana, acknowledged before I. N. Whittam, a notary public, on May 6, 1872, recorded May 15, 1872; warranty deed from the widow and heirs of John R. Armstrong, deceased, to George H. Sharp, dated September 21, 1891, recorded September 26, 1891; quitclaim deed from George H. Sharp and Winifred C., his wife, to Andrew R. Graham, bearing date September 25, 1891, recorded May 17, 1892. It will be observed that each party claims title through Peter Thams as the common source. Plaintiff alleges and claims that the deed purporting to have been executed by Peter Thams to Armstrong was forged. The decision in this case turns upon the fact whether that deed is genuine or fictitious.

Peter Thams, plaintiff's grantor and the person who acquired the title to the 160 acres from the United States, testified positively that he never signed or acknowledged the Armstrong deed and is not acquainted with the person certifying to the acknowledgment; that he first learned of its existence about two years prior to the trial; that he never conveyed these lands to any person other than John Thams, the plaintiff; that he paid the taxes on the real estate for several years between 1872 and 1890, and that he always spelled his surname "T-h-a-m-s," and never with the letter "e" preceding the letter "s." The above is the substance of the evidence upon which the plaintiff relies in making out his case, with the exception as to the way the grantor's name is spelled in the deed to Armstrong, which will be presently stated. The record shows that John R. Armstrong died at his home in Elkhart, Indiana, several years since. It was proven upon the trial by the testimony of his widow and other members of his family that his valuable papers at the time of his death were kept at his home in a bureau drawer; that subsequently on the removal of the family to another state the contents of the bureau, including the said papers of the deceased, were dumped upon the floor, where the papers were left, and that the controverted deed cannot now be found, although diligent search therefor has

been made. The deed was recorded in the deed records of Knox county, and plaintiff introduced in evidence a certified transcript of the record. This shows that in the body of the deed and in the certificate of acknowledg ment, as well as the signature of the grantor, his surname is spelled "T-h-a-m-e-s." While the incorrect spelling of the grantor's name thus indicated tends to corroborate the testimony of Peter Thams, it is not necessarily conclusive upon the question whether the deed was forged. (*Rogers v. Manley*, 49 N. W. Rep. [Minn.], 194.) It is probably true that the testimony adduced by the plaintiff would have warranted a finding and decree in his favor; but that alone will not authorize a reversal. It must also appear that the decree was not supported by sufficient evidence, which plaintiff insists that the record shows. As tending to establish that Peter Thams conveyed the lands to Armstrong, there is the record of such conveyance, and in addition thereto the testimony by deposition of I. N. Whittam, the notary public before whom the acknowledgment of the conveyance purports to have been taken, to the effect that Peter Thams, at and prior to the date of the deed, resided in Cedar Rapids, Iowa, the latter being engaged in the saloon business on Second street, not far distant from witness' office; that Thams went before Whittam and acknowledged the deed in question, about twenty or twenty-one years prior to the date of his testifying, and that he has a personal recollection of taking the acknowledgment and making the deed. It was shown beyond dispute that Peter Thams, plaintiff's grantor, resided in Cedar Rapids at the date of the disputed deed, and about that time Armstrong was also in the same city, he and Peter Thams both stopping at the same hotel, and the latter obtaining from Armstrong the right for the state of Wisconsin in a patent brick making machine. There was testimony given by disinterested witnesses tending to show that Peter Thams traded land for the patent right, which he denies, claiming that he paid a money consideration. A. R. Oleson

testified that in December, 1892, he met Peter Thams at Aspen, Colorado, and conversed with him at the time the deposition of the latter was taken in this case, but which was not read on the trial, and that during the conversation Peter Thams stated that he did not know the said John R. Armstrong and never had any dealings whatever with him. Much stress is laid by plaintiff upon the fact that Peter Thams paid the taxes upon the land for several years following the recording of the Armstrong deed. It is unusual for a grantor to continue paying taxes upon the property after he has parted with the title. The only explanation for his doing so in this case to be found in the record is the fact that Thams soon became dissatisfied with his bargain for the patent right, and within a month or two after he obtained it he went to Elkhart, Indiana, and saw Mr. Armstrong for the purpose of having the sale rescinded, but was unsuccessful in his attempt. The evidence to establish the execution of the deed was as complete as could have been expected under the circumstances. It was made more than twenty years before the trial, the original was lost or destroyed, the grantee dead, and there was no subscribing witness. A certificate of acknowledgment of a conveyance of land in proper form is evidence of its execution and acknowledgment, although not conclusive. The certificate can be impeached only by clear and convincing proof of its falsity. (*Phillips v. Bishop*, 35 Neb., 487; *Barker v. Avery*, 36 Neb., 599.) In this case the certificate is corroborated by the officer who made it.

It is argued that the certified transcript of the record of the deed was not competent evidence of the execution of the original until the existence and genuineness of the deed itself is established, and authorities are cited to the effect that to make a copy of a lost instrument admissible the existence and execution of the original as a genuine document must be proved. A sufficient answer to this argument is that after plaintiff himself had placed in evidence the copy of the recorded deed defendant

introduced sufficient evidence of the prior existence and genuineness of the original deed. With such proof, if not without it, under section 13, chapter 73, Compiled Statutes, the transcript of the record was competent evidence. That section authorizes the record of a deed duly recorded, or certified transcript of the same, to be read in evidence with like force and effect of the original deed whenever the original is shown to be lost, or not belonging to the party seeking to use the same, nor within his control. The evidence was sufficient to justify the finding of the court below, that the deed was executed by Peter Thams, the original patentee. The decree is

AFFIRMED.

STATE BANK OF LUSHTON V. O. S. KELLEY COMPANY.

FILED OCTOBER 6, 1896. No. 6353.

1. **Chattel Mortgages.** Under section 14, chapter 32, Compiled Statutes, a mortgagee in good faith is one who takes a chattel mortgage to secure a debt actually and justly owing to him, whether pre-existing or not, without actual or constructive notice of prior equities against the mortgaged property.
2. ———. *Tootle v. First Nat. Bank of Chadron*, 34 Neb., 863, distinguished.

MOTION by defendant in error for a rehearing of case reported in 47 Neb., 678. *Motion overruled.*

F. C. Power, for the motion, cited: *Tootle v. First Nat. Bank of Chadron*, 34 Neb., 863; *People's Savings Bank v. Bates*, 120 U. S., 556; 1 Cobbey, Chattel Mortgages, sec. 129.

NORVAL, J.

This is an application for a rehearing of the case reported in 47 Neb., 678, upon the single ground, namely,

that this court erred on holding in the former opinion that a person who takes a chattel mortgage to secure a pre-existing debt can be a mortgagee in good faith within the meaning of the statute. That a mortgage upon chattels given to secure a pre-existing demand will protect the mortgagee as fully as though a new consideration had been paid, is not a new doctrine in this state. It was laid down in 1882 in *Turner v. Killian*, 12 Neb., 580, and has been reasserted in the following cases: *Beagle v. Miller*, 37 Neb., 855; *Chaffee v. Atlas Lumber Co.*, 43 Neb., 224. The decisions of other courts upon the question are conflicting, a large number holding that a chattel mortgage securing a debt previously incurred is subject to all the equities existing between the mortgagor and third parties having prior interest in the property. This rule the writer might be inclined to adopt if the question was not foreclosed by the adjudications in this state, which have been so long acquiesced in as to become a rule of property, not to be set aside by the courts.

It is insisted that *Tootle v. First Nat. Bank of Chadron*, 34 Neb., 863, is in conflict with the decisions cited above. We do not think so. In that case Yates purchased the property on credit, through false representations, and then mortgaged the property to the bank to secure a prior indebtedness. The vendors rescinded the sale on the ground of fraud, which this court held they had the right to do against every person except a *bona fide* purchaser for value without notice of the fraud, and that the bank was not entitled to the protection afforded an innocent and good-faith purchaser of property from a fraudulent vendee. The chattel mortgage to the bank merely created a lien on Yates' interest in the property, subject, however, to be defeated by the vendor's rescinding the sale. The title of the mortgagor having failed, there was not anything to which the mortgage could attach. The case, undoubtedly, would have presented stronger equities had the mortgage been taken by the bank in good faith, without notice of the fraud of Yates, to secure a debt at the

time created. Moreover, the plaintiff in that case was not claiming the property as a creditor, purchaser, or mortgagee, but as absolute owner; hence, section 14, chapter 32, Compiled Statutes, had no application and was not involved in that case, nor was it construed. In the case before us the mortgage of Peter Peters to the State Bank of Lushton secured a debt which he then owed it, the time of payment was extended to a future date, and the security was taken by the bank without any notice of the existence of the mortgage in favor of O. S. Kelley Co. This constituted the bank a mortgagee in good faith within the contemplation of the statute. The motion for a rehearing is denied.

MOTION OVERRULED.

POST, C. J., not sitting.

CITY OF OMAHA V. FANNIE E. RICHARDS, ADMINISTRATRIX.

FILED OCTOBER 6, 1896. No. 6581.

1. **Municipal Corporations:** NEGLIGENCE: PONDS: DEATH OF CHILD. *Held*, That the city is liable for the death of a boy ten years old, by drowning, caused by falling from a section of wooden sidewalk which he was using as a raft upon a pond of water within the corporate limits, a part thereof being in a public street and part upon private property, it being shown that such accumulation of water was occasioned by the negligence of the city in grading said street and constructing a storm sewer therein.

2. ———: ———. Whether the deceased was guilty of contributory negligence was a question of fact, to be determined by the jury from the evidence adduced.

3. **Instructions:** EXCEPTIONS. An exception to the "giving of instructions 3, 4, 5, 6, 7, 8, and 9, contained in the general charge of the court, and to the giving of each said instructions," is a separate and specific exception to each of said paragraphs of the charge, and is, therefore, sufficient.

4. ———: ———. *Brooks v. Dutcher*, 22 Neb., 644, and *Walker v. Turner*, 27 Neb., 103, in so far as they state a contrary doctrine, overruled.

5. **New Trial:** ASSIGNMENTS OF ERROR. The assignment in the motion for a new trial relating to the giving of instructions *held* sufficient.

6. **Municipal Corporations:** LIABILITY FOR NEGLIGENCE: STREETS. The third and sixth paragraphs of the charge, set out in the opinion, correctly state the rule as to the liability of a city for failure to keep its streets in safe condition for the use of the public, and are applicable to the case made by the pleadings and evidence.

7. **Instructions.** A party cannot complain of an instruction in harmony with one requested by him.

8. **Assignment of Error:** EVIDENCE. An assignment in a petition in error that the court erred in admitting testimony is too indefinite.

9. **Damages for Causing Death of Child.** A verdict for $2,850 *held* not excessive.

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

The opinion contains a statement of the case.

W. J. Connell and *E. J. Cornish*, for plaintiff in error:

We contend that at the time of the drowning, Twenty-fifth street, at the point near where the accident occurred, was actually closed to public travel by reason of the existence of a pond of water, and the deceased, according to the undisputed proof of this case, at such time not only was not in the use of the street for any lawful or proper purposes, but was not in any manner using said street; that the street, at the place referred to, being closed to public travel, the city owed no duty to the deceased to protect him from drowning while using the pond of water for the purposes of swimming, boating, or fishing, either on the street or on private property. (*Charlebois v. Gogebic & M. R. Co.*, 51 N. W. Rep. [Mich.], 812; *Omaha & R. V. R. Co. v. Martin*, 14 Neb., 295; *Westfall v. Board of Water Commissioners*, 53 N. W. Rep. [Mich.], 161; *Goeltz v. Town of Ashland*, 44 N. W. Rep. [Wis.], 770; *Sweeny v. Old Colony & N. R. Co.*, 10 Allen [Mass.], 368; *Schmidt v. Bauer*, 22 Pac. Rep. [Cal.], 256; *Benson v. Baltimore Traction Co.*,

26 Atl. Rep. [Md.], 975; *Nolan v. New York & H. R. R. Co.*, 4 Atl. Rep. [Conn.], 110; *Murphy v. City of Brooklyn*, 23 N. E. Rep. [N. Y.], 888.)

Breckenridge & Breckenridge and *L. F. Crofoot, contra:*

The city was negligent and is liable for damages. (*Brennan v. City of St. Louis*, 92 Mo., 482; *Pyle v. Richards*, 17 Neb., 180; *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138; *McClure v. City of Red Wing*, 28 Minn., 186; *City of Chicago v. Keefe*, 114 Ill., 222; *City of Chicago v. Hesing*, 83 Ill., 204; *Village of Carterville v. Cook*, 129 Ill., 152; *City of Galveston v. Posnainsky*, 62 Tex., 118; *City of Indianapolis v. Emmelman*, 108 Ind., 530; *Nichols v. City of St. Paul*, 44 Minn., 494; *City of Plattsmouth v. Mitchell*, 20 Neb., 228.)

The damages assessed by the jury are not excessive. (*Barry v. Edmunds*, 116 U. S., 565; *Ross v. Texas & P. R. Co.*, 44 Fed. Rep., 44; *Johnson v. Chicago & N. W. R. Co.*, 64 Wis., 425; *Schrier v. Milwaukee, L. S. & W. R. Co.*, 65 Wis., 457; *Union P. R. Co. v. Dunden*, 37 Kan., 1; *Czezewzka v. Benton-Bellefontaine R. Co.*, 25 S. W. Rep. [Mo.], 911.)

NORVAL, J.

This is an action by Fannie E. Richards, as administratrix of the estate of George Bertram Weston, deceased, against the city of Omaha, William J. Connell, and William E. Clark to recover damages for the death of plaintiff's intestate. The death of Weston was caused by drowning in a pond of water in the corporate limits of said city. A general demurrer to the petition was filed by the defendants Connell and Clark, which was sustained by the court and the action dismissed as to them. This judgment was affirmed at the January term, 1895. (*Richards v. Connell*, 45 Neb., 467.) The city filed an answer to the amended petition, to which the plaintiff replied by a general denial, and the issues tendered by the pleadings were tried to a jury, which resulted in a verdict and judgment for the plaintiff in the sum of $2,850. The city has brought the record to this court for review.

The first ground relied upon for a reversal is that the verdict is not sustained by sufficient evidence and is contrary to law. The only testimony in the case was that introduced by the plaintiff. There is no controversy regarding the facts, except in one particular, which will be referred to hereafter. South Twenty-fifth street, in the city of Omaha, runs north and south and is a public thoroughfare. Lots 40 and 41, in Hickory Place, an addition to said city, front upon the east side of said street and at the time of the drowning were owned by W. J. Connell. Lot 59, in Redick's Second Addition to said city, owned by W. E. Clark, adjoins Mr. Connell's lots on the north and likewise abuts upon said street. A large draw or ravine intersected the street opposite the above described premises, owned by Connell and Clark, respectively. A long time prior to June 29, 1891, the city raised the grade of the street, but not for the entire width thereof, where it crosses the ravine, by the construction of an embankment in such a manner as to leave no sufficient outlet for the surface water which accumulated in said draw upon the lots aforesaid and the east side of said street. A storm sewer had been constructed in the street several feet below the surface thereof, but it had no catch basin or other opening, except a manhole, to drain the water. This manhole was near the west line of the street, and was constructed so high above the ground as to prevent the drainage of the surface water at that point into the sewer. On the date aforesaid, and at divers times prior thereto, there had been allowed to accumulate and remain in said draw, on the eastern portion of said street, a large pond or body of water, which extended to and upon the said lots of Connell and Clark. On said date plaintiff's intestate, a lad about ten years old, and a number of boys went upon a section of a wooden sidewalk which had been constructed along the west side of said street, but which had become detached and was then floating upon the water, and used the same for a raft, for pleasure and amusement, and while so doing young

Weston fell therefrom into the water and was drowned. The witnesses do not agree as to the exact place where he lost his life, one of them, at least, testifying that it was in the water on said street, while the inference can be drawn from the testimony of other witnesses that the drowning was on the property adjacent to said street. The witnesses, however, all agree that there was but a single body of water where the accident occurred, and that the raft conveyed the deceased from the street to the adjacent premises, there being no fence or barriers to indicate the east line of the street. This pond was only a short distance from the Mason public school building. No safeguards or danger signals had been put out. It is argued that the foregoing facts create no liability against the city. It is the settled doctrine in this state that it is the duty of a municipal corporation to keep its streets in a reasonably safe condition for use by the public, and if it negligently fails so to do it is liable for the damages resulting therefrom, unless contributory negligence is shown. The city attorney, in his brief, admits such to be the law, and he further concedes that the better and safer rule is that a child using a public street for the purpose of play and amusement is entitled to the same protection as is afforded a person using the street in the ordinary modes of travel. And there can be no doubt of it. As was said by Chief Justice Scholfield, in delivering the opinion of the court in *City of Chicago v. Keefe*, 114 Ill., 222, which was an action to recover for the death of a child, who died from an injury received while rolling a hoop on a defective sidewalk in one of the streets of that city: "There is no limitation in the statute that the streets shall be kept in repair 'for travelers.' They are to be kept in repair as streets, and, by necessary implication, for all purposes to which streets may be lawfully devoted. We assume as self-evident that, with us, streets are open to the use of the entire public as highways, without regard to what may be the lawful motives and objects of those traversing them, that those using them for recreation, for pleasure,

or through mere idle curiosity, so that they do not impinge upon the rights of others to use them, are equally within the protection of the law while using them, and hence equally entitled to have them in a reasonably safe condition with those who are passing along them as travelers, or in the pursuit of their daily avocations. * * * In crowded cities their use for pleasure, and sometimes even for the promotion of health, may be regarded as a public necessity. On like principle, why may they not be used by children in play and amusement, so long as the rights of others being on or passing along the street shall not be prejudiced thereby? We can perceive no reason. Such use is certainly the universal custom." In passing upon a motion for a rehearing the court, in the opinion, say: "A child may lawfully be upon the sidewalk for pleasure only,—that is to say, for play,—and the city owes the same duty to have a sidewalk in a reasonably safe state of repair, in respect of it, that it does in respect of those who are on the sidewalk passing to or returning from their places of business or abode."

A case quite analogous in principle to the one at bar is *City of Chicago v. Hesing*, 83 Ill., 204. That was an action to recover damages for the death of a child about four years old. The third paragraph of the syllabus reads thus: "It is gross negligence on the part of a city to leave a ditch, filled with water, about five feet deep, in a public and frequented street bordering on a sidewalk without any guards to prevent children from falling into the same, and if a child is drowned by falling into the same the city will be liable." The same principle was held and applied in *Village of Carterville v. Cook*, 129 Ill., 152; *Brennan v. City of St. Louis*, 92 Mo., 482; *City of Indianapolis v. Emmelman*, 108 Ind., 530; *Nichols v. City of St. Paul*, 44 Minn., 494; *Hawley v. City of Atlantic*, 60 N. W. Rep. [Ia.], 519; *Reed v. City of Madison*, 83 Wis., 171; *City of Pekin v. McMahon*, 39 N. E. Rep. [Ill.], 484; *Gibson v. City of Huntington*, 38 W. Va., 177.

As to the authorities cited by the city attorney, it is

sufficient to say that they are not based upon facts similar to those before us, hence an extended review would be useless. It was the duty of the city to have constructed the sewer and street in question in such a manner as to provide a proper and adequate outlet for the water that might have been reasonably expected to come down this ravine. In failing to do so the city authorities were guilty of negligence. That such negligence was the direct and proximate cause of the death of young Weston is established to a moral certainty. It is quite immaterial whether he was drowned in the water in the street or on the adjacent premises, in close proximity to the street, since the negligence of the city caused the accumulation of the water, consisting of a single body extending nearly one-fourth the distance across the street to the abutting properties, and further, that the raft containing the deceased floated from the street upon properties abutting thereon. Whether the deceased was guilty of such contributory negligence as to defeat a recovery was for the jury to determine from all the facts and circumstances. The same degree of care and judgment could not be expected of a boy of his age as of an adult person. The facts, as disclosed by this record, are ample to sustain the verdict.

Complaint is made in the brief of the city of the third, sixth, and seventh instructions contained in the charge of the court. Plaintiff below contends that these instructions cannot be considered, for the reason no proper exceptions were taken in the trial court. The record shows the following exception: "And now comes the said defendant, the City of Omaha, before the jury has retired to consider their verdict, and objects and excepts to the giving of instructions 3, 4, 5, 6, 7, 8, and 9 contained in the general charge of the court, and objects and excepts to the giving of each of said instructions." An exception to instructions *en masse* is insufficient unless they are all erroneous. (*Redman v. Voss*, 46 Neb., 512, and cases there cited.) But this case is not within the rule. The excep-

tion is to each of the paragraphs of the charge specified, and not a general exception to the giving of all of them. It was held in *Aultman v. Martin*, 49 Neb., 103, that an assignment in a motion for a new trial that "the court erred in giving instructions 2, 3, 5, 6, 7, and 8 and each of them, asked for by plaintiff," was sufficiently specific. The same principle applies in the matter of exceptions to the giving and refusing of instructions. It is true *Brooks v. Dutcher*, 22 Neb., 644, and *Walker v. Turner*, 27 Neb., 103, cited by plaintiff, sustains his contention that the exception above set out is not sufficient to allow an examination of the instructions, but those cases upon the question of practice under consideration were expressly disapproved in *Aultman v. Martin, supra*, and will not be followed.

The plaintiff below also contends that error cannot be predicated upon the giving of the instructions, because the assignment in the motion for a new trial relating thereto is insufficient. It is as follows: "Error of the court in giving of the instructions contained in the general charge of the court, numbers 3, 4, 5, 6, 7, 8, and 9, and of giving of each of said instructions." This is not merely an assignment to the instructions *en masse*, but to each one specifically, and is therefore sufficient. (*Aultman v. Martin*, 49 Neb., 103.)

The third, sixth, and seventh paragraphs of the charge of the court, of which the city complains, are as follows:

"3. If you find from all the evidence in the case that the city, prior to the accident which resulted in the loss of the life of said Weston, had taken charge of and had performed work and labor upon Twenty-fifth street so as to open the same up for use and travel thereon by the public at and along where the accident occurred, then it was the duty of the city under the law to use all reasonable care and diligence in keeping and maintaining said street thereafter so as to keep said street in a safe condition for the use of the public, and any negligence on the part of said city to so keep said street in a safe condition

at all times thereafter for the use of the public would render the city liable if because of such failure an injury results to any one who has occasion to use said street."

"6. You are further instructed that it is in law the duty of the city to so construct its streets as to make the same safe for the traveling public, and also that children may be upon the same with safety.

"7. If you find from all the evidence in the case, and by a preponderance thereof, that because of the negligence of the city in not providing suitable escapes for the water ordinarily flowing down the ravine and creek, or either said water was allowed and permitted to accumulate at the point where said accident occurred, and also upon Twenty-fifth street, making said Twenty-fifth street unsafe for children to be upon said street, then the fact, if it be a fact, that said accumulation of water extended also upon property not in said street would not be material, and it would not be material whether said Weston was in fact drowned in the water in the street or on property adjacent to said street, providing the water in the street and on the adjacent property where such drowning may have occurred constituted one body of water, and provided such drowning was caused by the negligence of the city as hereinbefore explained."

It is conceded by the city that the first two instructions quoted correctly state the law as to the duty of the municipal authorities to keep the streets in safe condition for the use of the public. The only complaint made is that they are not applicable to the facts in the case. This criticism is not merited. The negligence imputed to the city consisted in allowing this pond of water to accumulate in a public street used as a thoroughfare without providing any barriers or signals of danger, and it was entirely proper for the court to inform the jury as to the duty of the city in keeping its streets in safe condition for the use of the public. It was negligence on the part of the city to leave the pond of water unguarded, knowing that children would be attracted to such a place.

These instructions were entirely proper. The part of the seventh instruction criticised is the statement therein that "it would not be material whether said Weston in fact drowned in the water on the street or on property adjacent to said street." This language correctly stated the rule of liability as applicable to the case made by the proofs, according to the authorities. It would have been different if the pond had been entirely upon private property and not in close proximity to a street. In such case there would be no liability upon the city, since it would have been guilty of no breach of duty. It is undisputed that this pond of water extended into the street, and the city cannot escape liability merely because the drowning occurred upon the adjacent premises. A reversal cannot be had for the giving of the language quoted for another reason. The city requested, and the court gave, an instruction of like import, although couched in different language, which reads as follows: "You are instructed, gentlemen of the jury, that it is immaterial whether the deceased, George Bertram Weston, came to his death by falling off the raft he was floating upon the private property of Mr. Connell or within the limits of Twenty-fifth street." A party cannot complain of an instruction in harmony with one requested by him. (*Campbell v. Ormsby*, 65 Ia., 518; *Dawson v. Williams*, 37 Neb., 1.)

The refusal to give each of the sixteen instructions requested by the city are assigned as error. It is needless to incumber this opinion by setting out the requests to charge. We have examined all of them and find that so far as they stated correct principles of law and were applicable to the evidence, they had been covered by the instructions given. Many of the requests were incorrect, and especially is this true of the first and third. By the first the court was asked to peremptorily instruct the jury to return a verdict for the city; and by the third, that there could be no recovery if the deceased came to his death by drowning upon the private property of Mr. Connell. The error in these requests has been sufficiently

indicated by the views already expressed. The requests were all rightly refused.

It is insisted that the court erred in permitting the plaintiff to prove notice to the city of the accident by the introduction of a paper which had appended thereto the name of the plaintiff in typewriting, and also in the admission of certain testimony of the plaintiff. The assignment in the petition is insufficient to present these matters for review, the assignment being in this language:

"28. Error of the court, during the trial, in the admission of testimony over the objections and exceptions of plaintiff in error."

This is too general. Errors must be specially assigned in a petition in error or they will not be considered. (*Smith v. Mason*, 45 Neb., 610, and cases there cited.)

It is finally urged that the damages are excessive. We decline to interfere with the verdict on this ground. No precise rule for ascertaining damages in such cases can be stated. The amount of compensation must be determined from the facts and circumstances of each particular case. Under the evidence adduced, the amount awarded by the jury is not so excessive as to call for interference. Verdicts for much larger sums in actions for the death of a child have been frequently sustained by the courts. See cases cited in brief of plaintiff below. The judgment is

AFFIRMED.

C. R. BOATRIGHT V. J. C. ENEWOLD.

FILED OCTOBER 6, 1896. No. 8025.

Duress: SATISFACTION OF JUDGMENT: EVIDENCE. Evidence examined, and *held* to fail to show that the satisfaction of the judgment complained of was procured by duress.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J. Heard on motion of de-

fendant in error to dismiss the proceeding on the ground that the judgment complained of has been satisfied. *Dismissed.*

W. W. Morsman and *Will H. Thompson*, for the motion.

Cooper & Montague, contra.

RYAN, C.

By his motion the defendant in error seeks to procure a dismissal of this proceeding for the alleged reason that there has been, since the pendency of this action in this court, a settlement of its subject-matter. Plaintiff in error asserts that the payments were made and received under such duress that his right to a review of the judgment of the district court should not be prejudiced. There were submitted two affidavits on the hearing, one of which was on behalf of the defendant in error, the other on behalf of the plaintiff in error. From a consideration of both these affidavits we are able confidently to state the following facts as indisputably established: On March 16, 1895, the defendant in error recovered a judgment against the plaintiff in error in the sum of $143.67 and costs. By virtue of this judgment C. W. Lyman was duly garnished as a debtor of plaintiff in error after error proceedings had been commenced in this court, but before a supersedeas bond had been filed. After the filing and approving of such a bond, however, the plaintiff in error made various unsuccessful efforts to procure a release of the garnishee, who, during these proceedings, had made answer that he owed the plaintiff in error the sum of $250. These efforts were grounded upon an assumption by the plaintiff in error that a supersedeas bond having been given, the garnishment was vacated and, therefore, that the plaintiff in error was entitled to the aforesaid sum of $250. Neither the district court of Douglas county, wherein the garnishment proceedings were had, nor, subsequently, could the gar-

nishee, be convinced of the soundness of the contention of plaintiff in error, for which reasons he was not able to possess himself of the money in the hands of the garnishee. In this condition of affairs, on the 16th day of December, 1895, the district court of Douglas county, by consent of the parties, ordered Lyman to pay into court the amount owing by him to the plaintiff in error, with the provision that upon such payment he should be discharged. In said order it was further provided: "Of the said sum of money to be paid into court by the garnishee, one hundred and thirty-five dollars ($135) to be paid by the clerk to the plaintiff or his attorneys, and the remainder, one hundred and fifteen dollars ($115), to be paid to the defendant or his attorneys, each party herein to pay his own costs." Whatever of difference there exists between the parties is as to the intended and the necessary effect of this order and the receipt by each party of the amount provided by the order to be paid to him by the clerk.

It is asserted in the affidavit filed on behalf of the defendant in error that the object intended by all parties and actually effected was the settlement and discharge of the judgment against the plaintiff in error, together with all rights in respect to such judgment, including that of its review in this court by this proceeding. The contention of the plaintiff in error is stated in his affidavit as follows: "Affiant believed, and had reason to believe, that unless he made some arrangement with reference to his said money in the hands of said Charles W. Lyman, garnishee, he would be in great danger of losing such money; that by reason of said garnishment proceedings and his fear of losing the whole of said money, affiant, under protest, consented to the making of said order disposing of said money as therein provided for; that when affiant consented that said one hundred and thirty-five dollars ($135) mentioned in said order be paid by the clerk of said court to the plaintiff or his attorneys, affiant did not consent to such order with the purpose or

intent of satisfying or paying such judgment, but said consent to said order was made for the reasons hereinbefore indicated." As the plaintiff in another part of his affidavit stated that the order of the court was made by consent of parties, and as the order itself so recited, the assertion that this consent was under protest was entitled to no consideration except perhaps as applied to an undisclosed condition of the mind of the plaintiff in error.

It is very clear from the above quotation from the affidavit of plaintiff in error that the considerations which induced his assent were, first, that he was in danger of losing the money owing him by the garnishee, and second, the pendency of the garnishment proceedings. It is just as clear, however, from his own above quoted language that this assent was only to the entry of the order. When this order was complied with by the payment ordered to be made into court there was, by the terms of the order, an end of the garnishment, because thereby the garnishee was to be discharged, and this payment and discharge of necessity ended all reasons for fearing a loss of the money. When this order had been made and the money thereunder had been paid into court, it was entirely optional with plaintiff in error to receipt for the money which the clerk was authorized to pay him or to refrain from so doing. He elected to receive it. On the other hand, the defendant in error was fully authorized to receive his portion, and did so by a receipt which recited that thereby there was a full satisfaction of the judgment. This was dated December 16, 1895, the day on which this order was made. It will be observed that while the judgment had been for $143.67 and costs, this order, beside ignoring all rights to interest from the date of the judgment, required payment of but $135, or $8.67 less than the judgment, and required the judgment creditor to pay one-half the costs. As already indicated, plaintiff in error confined the statements of his affidavits to the considerations which influenced him to consent to the making of the order and made no such

statement as to influences with reference to transactions subsequent to the entry thereof. It would, therefore, be extending his language by construction to assume that the actual receipt of the money payable to him by the terms of the order was influenced by considerations of the existence of the garnishment or by his fear that he would lose his money. The payment of costs imposed by the terms of the order upon the defendant in error, and by him submitted to, was to the amount of $37.05, of which plaintiff in error received the benefit. In view of this fact and the further fact that the amount necessary to satisfy the judgment itself was reduced, we might properly conclude that the purpose of the consent order was correctly stated by the defendant in error. There certainly exists no sufficient grounds for assuming that the satisfaction of the judgment was brought about by duress. The motion to dismiss the error proceedings is therefore sustained.

DISMISSED.

HERMAN KOUNTZE ET AL. V. GEORGE R. SCOTT ET AL.

FILED OCTOBER 6, 1896. No. 6792.

Attachment: TRANSFER OF DEBTOR'S PROPERTY. A debtor who had transferred all his interest in property subsequently attached, to one who is not a party to the attachment suit, cannot, in his own name and right, be permitted, on motion for a dissolution of the attachment, to establish the validity of his transfer.

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

W. C. Le Hane and *George A. Murphy*, for plaintiffs in error.

Samuel Rinaker, *R. S. Bibb*, and *G. M. Johnston*, *contra*.

RYAN, C.

On June 12, 1893, Walter W. Scott and the firm of Scott Bros. executed a note for $3,000 to the Nebraska National Bank of Beatrice. Before maturity this note was transferred as collateral security to the plaintiffs in error. When this note fell due it was not paid, and subsequently an action, aided by an attachment, was begun for its collection in the district court of Gage county. A motion to dissolve this attachment was made by the defendants on the ground that the facts set forth in the affidavits for attachment were not true, and because such facts as were set forth in said affidavits were not sufficient to warrant the issuance of an attachment. No reliance seems to have been placed upon the last ground alleged, hence we shall consider only the first.

From the affidavits submitted by both parties it is left clear beyond question that the firm of Scott Bros. was originally made up of George R. Scott and Walter W. Scott; that this firm was engaged in the undertaking and retail furniture business at Beatrice; that the interest of George R. Scott in property of said firm and in its business was transferred to Walter W. Scott; that afterward, on July 10, 1893, all the merchandise, book accounts, and business of Walter W. Scott were sold and transferred to parties of whom none are joined, by intervention or otherwise, in this action. The motion of Scott Bros. and Walter W. Scott to dissolve the attachment was sustained, and the attachment plaintiffs, by their petition in error, present this ruling for our consideration. That very unsatisfactory results might be reached if the practices adopted in this case are to be sanctioned, is illustrated by the fact that it now appears by an affidavit in this case that one of the parties to whom the transfer was made by Walter W. Scott, in his own name, at some time began an action for damages against the sheriff of Gage county by reason of his wrongful levy of the attachment under consideration. If Walter W. Scott, in his

own name, herein may urge the rights of his transferee to procure a release of the attached goods, when the overruling of such motion can in no way affect the rights of such transferee, there is in effect given the transferee this safe remedy, in addition to the right, which is unquestioned, to replevy the goods or to sue for their value independently of this action. It was in view of this possible result that the rule was first laid down in *McCord v. Krause*, 36 Neb., 764, that as between plaintiff and defendant alone, upon motion to dissolve an attachment of the chattels mortgaged, the defendant can be heard only because of his residuary contingent interest which may remain after the said mortgages are satisfied. This principle was subsequently enforced in *Landauer v. Mack*, 43 Neb., 430, and in *Darst v. Levy*, 40 Neb., 593. It is urged, however, that in *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb., 863, this court has acted upon a modification of the rule above stated. What was actually held in the case last cited cannot be better expressed than by this language, quoted from the opinion: "The plaintiff in error contends that Bremers had no standing in court to move for the discharge of the attachment, and that the judgment should be, for that reason, reversed. This contention is based upon the fact that the goods had been sold before the motion was filed, and had realized sufficient to pay the mortgages; that, therefore, no interest was left in Bremers, residuary, contingent, or otherwise. It must be remembered, however, that the plaintiff did not attach these goods. It suffered them to remain in the possession of the mortgagees and contented itself with garnishing the latter. This garnishment was founded upon the allegation that the mortgagees had property of Bremers in their possession. If, therefore, no interest remained in Bremers, then the plaintiff gained nothing by this garnishment. In other words, the plaintiff, relying upon its garnishment to reach the proceeds of the sale of the goods, cannot be heard to urge, contrary to the jurisdictional facts necessary to support

the garnishment, that Bremers was without interest therein." Another case cited as recognizing a modification of the rule laid down in *McCord v. Krause*, *supra*, is *Standard Stamping Co. v. Hetzel*, 44 Neb., 105. In this case Frank J. Hetzel and Levi G. Hetzel were joined as defendants, and in the petition it was alleged that these brothers constituted a partnership firm, to which, in fact, the goods were sold, though ostensibly purchased by L. G. Hetzel. There was an attachment of merchandise as the property of both defendants. The motion to dissolve the attachment was by Frank J. Hetzel, in his own name. There was, therefore, a motion by a proper party to the record, who claimed the attached property as his own. In the opinion the feature which distinguished the case relied on from the one at bar was pointed out in the following language: "There was introduced a great deal of evidence which tended, unexplained and uncontradicted, to show that Levi had fraudulently transferred his property to Frank. If the goods had been attached in the hands of Frank, as in reality the property of Levi, placed in Frank's hands for the purpose of defrauding the creditors of Levi, this would have been competent. But such was not the case; the property was attached as that of both Levi and Frank. It was, therefore, necessary, in view of the plaintiff's averment that the goods were in reality sold to both, though the transaction was with Levi alone, in his own name, to show that there existed a privity between Frank and Levi in order to sustain the attachment, sued out and levied as it was. Upon consideration of all the evidence adduced there was no sufficient proof to satisfy the court that, in purchasing, Levi acted for Frank, either as a partner or otherwise, hence it resulted that in so far as Frank's interests were concerned the attachment was properly dissolved." From the above review of *Kilpatrick-Koch Dry Goods Co. v. Bremers* and *Standard Stamping Co. v. Hetzel* it clearly appears that this court has not receded from the proposition which heretofore has been laid down in *McCord v. Krause.*

In the case at bar, as has already been pointed out, there is illustrated the danger of departing from that rule and allowing an attempt to sustain a sale to be made by one who, upon his own showing, has no interest in the attached property. The order of the district court whereby the attachment was dissolved is therefore reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

LOUIS SCHIELDS ET UX. V. JOHN A. HORBACH.

FILED OCTOBER 6, 1896. No. 6777.

1. **Deeds:** WITNESSES. Conveyances of real estate executed within this state, conveying real estate situate within this state, are required to be witnessed. (Compiled Statutes, ch. 73, sec. 1.)

2. ———: FOREIGN ACKNOWLEDGMENT: EVIDENCE. A deed for lands situate in this state, executed in the state of Kansas and acknowledged there before a notary public, who attached his official seal to the certificate of acknowledgment, is presumed to have been executed in accordance with the laws of the state of Kansas, and, though not witnessed, is entitled to be recorded and read in evidence in this state without other proof that the grantors therein actually executed and delivered the deed.

3. **Landlord and Tenant:** ADVERSE POSSESSION. A tenant by simply "holding over" after the expiration of his lease does not hold adversely. Until he surrenders possession of the leased premises, or by some unequivocal act notifies the landlord that he no longer holds under the lease, he cannot claim that his possession is adverse.

4. **Trial:** EVIDENCE. A court is not obliged to submit to a jury for its consideration evidence not applicable to any issue made by the pleadings in the case.

5. **Landlord and Tenant:** ORAL CONTRACT TO PURCHASE: POSSESSION. Where a tenant in possession orally contracts for the purchase of the leased premises, his subsequent possession will be presumed to be under the lease, unless it be clearly shown that he holds under the contract of purchase. (*Bigler v. Baker*, 40 Neb., 325.)

6. **Homestead:** CONVEYANCE. Prior to the enactment of the homestead

law of 1877 the failure of the wife to join in a conveyance of the homestead, the title to the same being in the husband, did not render such conveyance void.

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

John P. Breen, for plaintiffs in error.

Lake, Hamilton & Maxwell, contra.

RAGAN, C.

This is an action of ejectment brought in the district court of Douglas county by John A. Horbach against Louis Schields. At her request Dorothy Schields, wife of Louis Schields, was made a party defendant to the action. At the close of the evidence the jury, in obedience to an instruction of the court, returned a verdict in favor of Horbach, upon which judgment was rendered, to reverse which Schields and wife prosecute to this court petitions in error.

One link in Horbach's chain of title was a deed from one Griffith. This deed was executed in the state of Kansas and acknowledged there before a notary public, who attached his seal of office to the certificate of acknowledgment. The deed was not witnessed, and it is now insisted that the court erred in permitting this deed to be read in evidence because it was not witnessed. Conveyances of real estate situate within this state, executed in this state, are required to be witnessed (Compiled Statutes, ch. 73, sec. 1); and it is provided by sections 4 and 5 of said chapter that (section 4) a deed, "if executed and acknowledged or proved in any other state, territory, or district of the United States, it must be executed and acknowledged or proved either according to the laws of such state, territory, or district, or in accordance with the law of this state, and such acknowledgment shall be made before and certified by any officer authorized by the laws of such state, territory, or district to take and cer-

tify acknowledgments, or by a commissioner of deeds appointed by the governor of this state for that purpose." (Section 5:) "In all cases provided for in section 4 of this chapter, (if such acknowledgment or proof is taken before a commissioner appointed by the governor of this state for that purpose, notary public or other officer using an official seal) the instrument thus acknowledged or proved shall be entitled to be recorded without further authentication." In *Hoadley v. Stephens*, 4 Neb., 431, this court, in construing said sections before the same were amended in 1887, held: "Where a deed is executed and acknowledged in another state before a commissioner of deeds of this state, a notary public or other officer using an official seal, the law presumes a compliance with the law of the place of execution and no further authentication is necessary." (*Green v. Gross*, 12 Neb., 117; *Galley v. Galley*, 14 Neb., 174; *Dorsey v. Conrad*, 49 Neb., 443.) The deed in controversy here being for lands situate in this state, and having been executed in the state of Kansas and acknowledged before a notary public there, who attached his official seal to the certificate of acknowledgment, must be presumed to have been executed in accordance with the laws of the state of Kansas. It was therefore entitled to be recorded and to be read in evidence without other proof that the grantors therein actually executed and delivered the deed.

The court having directed a verdict in this case if the evidence in the record would sustain a finding in favor of Schields and wife, or either of them, the judgment must be reversed. To the action of Horbach, Schields and wife admitted that they were in possession of the premises sued for, and pleaded that they had been occupying said premises as their homestead since the year 1863; that in the year 1864 Horbach executed and delivered to Louis Schields a contract for the purchase of certain real estate, being a tract of three and one-fifth acres, the land sued for herein being a part thereof; that the purchase price was $1,600; that Schields made pay-

ments upon this contract at various times from its date until January, 1873, which payments amounted to very nearly the purchase price; that in January, 1873, while Louis Schields was intoxicated, Horbach fraudulently procured a surrender to him of said contract of purchase; that after Horbach fraudulently obtained possession of said contract of purchase they had continued to occupy said property as their homestead; made valuable improvements thereon under a parol agreement with Horbach that he would carry out the original contract of purchase of said premises when the purchase price should be fully paid and that they had fully paid the purchase price and made valuable improvements upon the land. But the answer of Schields and wife does not state when the alleged parol agreement with Schields was made. They further averred that their possession of the real estate sued for, since the year 1878, had been notorious and adverse to Horbach. In addition to a general denial of the allegations of this answer, Horbach, in reply thereto, pleaded former adjudication of all the matters set up in the answer and the statute of limitations.

Horbach, on the trial, introduced in evidence the pleadings and judgment in an action in which Louis Schields was plaintiff, and he, Horbach, was defendant. This suit was brought in the district court of Douglas county on the 14th of April, 1887, by Schields, against Horbach. In his petition in the action of 1887 Schields alleged that he was in possession of the said three and one-fifth acre tract of land; that he was in possession thereof by virtue of a contract of purchase existing between him and Horbach dated in November, 1863; that prior to January, 1873, he had made large payments upon the purchase price of said land and that on the 14th of January, 1873, he and Schields had a settlement and it was then found that he, Schields, was indebted to Horbach in the sum of $383.65; that on said date Horbach induced him, Schields, to surrender said contract of purchase and

to take a lease of the real estate; that he, Schields, did so in consideration that Horbach would give him a writing to the effect that all money theretofore paid by him, Schields, as rent for said real estate should be applied on the original purchase, and when the money so paid, together with what Schields might afterwards pay, should equal the contract price of the land; that then Horbach would execute to him, Schields, a deed therefor; that on the 15th of January, 1873, in pursuance of this arrangement, Horbach did execute to him, Schields, a writing to the effect "that if the sum of $1,946, being the amount then due, with interest, should be paid by Schields to Horbach at a certain date, then Schields" was to acquire of said Horbach title to said property. Schields further alleged that he had fully paid the amount of money which he was to pay Horbach under this contract, and that Horbach had refused to make him a deed. He further alleged that Horbach had only a legal title to the real estate and was threatening to take possession of the property and lease it to other parties, and he prayed that the contract of purchase of the land from Horbach, dated January 15, 1873, might be decreed in full force and effect and valid and that Horbach might be enjoined from taking possession of any part of said property. To this petition Horbach answered that on the 1st of January, 1864, Schields had entered into possession of the premises under a lease for a term of three years and had built a small dwelling house on a portion of the land; that there was afterwards an agreement entered into between himself and Schields, in and by which Schields had the option of purchasing the leased premises on October 1, 1864, on condition that he paid a certain sum of money for the land by that date, but he denied that Schields had ever made payment as promised, in whole or in part. Horbach further alleged that on the 14th of January, 1873, he had a settlement with Schields; that such settlement was voluntary and was full and complete between the parties, and that in the settlement all prior leases

and agreements of every kind relating to this land were surrendered by Schields and he then and there took a lease for the premises from Horbach for one year; that in the settlement there was found to be due him, Horbach, from Schields, $385.65, for which sum Schields executed his note due in one day after date, with interest. Horbach further alleged in his answer that on the 15th of January, 1873, he made to Schields a written proposition in and by which he gave him the option to purchase the premises on the express condition that he would pay up his note of $385.65, with interest, in six months from that date, and should pay during the year 1873, an additional sum of half the price named in said option, and pay the taxes on said real estate; but he averred that Schields had never accepted such proposition to purchase said real estate by the payment of any part of said note or interest within the time required or by paying any part of the purchase price fixed on said land at any time. Schields' reply was a general denial. On the trial of this case, in 1887, the district court found the issues in favor of Horbach and dismissed Schields' petition, and from this judgment he prosecuted to this court a petition in error, and the judgment of the district court was affirmed in *Schields v. Horbach*, 30 Neb., 536. It will thus be seen that Schields claimed in his action of 1887 that he was in possession of the premises sued for in this case under and by virtue of a contract of purchase of the same made between him and Horbach; while Horbach claimed that Schields was in possession as tenant, and the judgment pronounced in the action of 1887 is conclusive evidence that Schields was in possession of the property in controversy here as tenant of Horbach as late, at least, as the 14th of April, 1887. But it is to be observed that Schields and wife now allege in their answer that the settlement of January, 1873, and the surrender at that time of the contract of purchase held by Schields, which contract had been given to him in 1864, were all procured by fraud, and they now claim that they have been in pos-

session under the original contract of 1864 since that time.

It is to be said of this defense of Schields and wife that the pleadings and evidence of the suit of 1887 introduced in evidence here conclusively establish (1) that the contract of purchase of 1864 held by Schields was voluntarily surrendered by him in January, 1873, and he then entered possession of the premises as the tenant of Horbach; (2) that the option to purchase the premises given to him on that date was never accepted by him and that he never held possession of said premises under said option, but held as Horbach's tenant.

But Schields and wife allege in their answer that they have been in the notorious and adverse possession of these premises since January, 1878. As we have already observed, the pleadings and judgment of the action of 1887 put in evidence afford unimpeached and unimpeachable evidence that Schields was in possession of this property as late as the 14th of April, 1887, as tenant, and not holding possession adverse to Horbach; and the undisputed evidence in this record further shows that in January, 1878, Schields leased the property in controversy here from Horbach for three years, or until January 1, 1881. He seems to have been holding over under that lease since January 1, 1881, until the bringing of this suit, October 17, 1891; but as he took possession as tenant of Horbach, his simply holding over after the expiration of his lease, without more, will not have the effect of making him hold adversely to his landlord; until he surrendered possession of the premises under his lease, or by some unequivocal act notified Horbach that he no longer held possession of the premises under the lease, but claimed possession adverse to him, he was not holding adversely. In *Mattis v. Robinson*, 1 Neb., 3, it was held that before a tenant could be permitted to assail his landlord's title he must surrender the possession acquired under his lease. (*Thrall v. Omaha Hotel Co.*, 5 Neb., 295.) In *Lausman v. Drahos*, 10 Neb., 172, it was held

that a tenant in possession under a lease could not purchase the premises at a judicial sale and assert the title acquired thereby adverse to his landlord without first surrendering his lease or notifying his landlord that he claimed adversely by virtue of the title acquired at the judicial sale. In any view, then, that we may take of the evidence, it shows beyond dispute that as late as April 14, 1887, Schields' possession of the premises in controversy was not a possession adverse to that of Horbach. (See, also, *Johnson v. Butt*, 46 Neb., 220.)

It is also insisted that the judgment must be reversed because on the trial of this action Horbach testified that in October, 1879, he notified Schields to come in and pay his rent, and at that time he told him if he would move the house he was then occupying on the premises to another part thereof,—to that part of the premises embraced in this suit,—put it on a brick foundation, put it in a tenantable condition, and, when the house was thus repaired, pay him, Horbach, the amount which he, Schields, owed him, that when he laid the three and one-fifth acre tract of land out into lots he would deed the property in controversy to his, Schields', wife; that Schields moved the house and put it on the real estate in controversy here, but that he never accepted the proposition made him by paying the amount due. To this argument it is to be answered, first, that no such issue as this was made by the pleadings in the case under consideration, and in the absence of such an issue, had the court been trying the case himself, he was not bound to consider this evidence; and as the case was tried to a jury, the court was not obliged to submit to the jury for their consideration the evidence not applicable to any issue in the case.

But this testimony only amounts to this: That in October, 1879, Schields was in possession of the premises as Horbach's tenant, and Horbach made a verbal promise to convey him the premises upon certain conditions, with which he, Schields, never complied. The making of the

proposition by Horbach to Schields did not change the relation existing between the parties, did not make Schields any the less the tenant of Horbach, nor did not make his possession of the property adverse to Horbach, and after he had moved the house and gone into possession thereof, he was not occupying it under the proposition that he might purchase it, but occupying it as Horbach's tenant. This very point was decided in *Bigler v. Baker*, 40 Neb., 325, where the court said: "It is a well established rule that where one is in possession as tenant at the time he contracts for the purchase of the demised premises, his subsequent possession will be presumed to be under the lease, unless it be clearly shown to result from the subsequent agreement." But this case is cited by counsel for Schields and wife as an authority for their contention that the evidence quoted above shows that Schields and his wife, in October, 1879, began occupying the premises under a parol contract of purchase; but the case is not authority for the contention of counsel. In that case the occupant of the land took possession of the land under a parol agreement for the purchase of the same. Here Schields was already in possession as tenant, and the relation of landlord and tenant continued to exist, notwithstanding that he had an option to purchase.

Another argument made here for a reversal of the judgment is that Dorothy Schields, the wife of Louis Schields, has been actually occupying the premises sued for, with her family and husband, since 1864; that she was not a party to the settlement made between Horbach and Schields in January, 1873, whereby Schields surrendered the contract of purchase that he held for the land and became Horbach's tenant for the same, and that, therefore, notwithstanding the surrender of the contract of purchase, her homestead rights in the premises were not thereby affected. But a contract with reference to a homestead is to be governed by the law in force on the subject of homesteads at the date of such contract. (*McHugh v. Smiley*, 17 Neb., 620.) So much of the home-

stead law of this state as is applicable to this case, in force in January, 1873, is as follows: "A homestead consisting of any quantity of land, not exceeding one hundred and sixty acres, and the dwelling-house thereon and its appurtenances, to be selected by the owner thereof, and not included in any incorporated city or village, or instead thereof be, at the option of the owner, a quantity of contiguous land, not exceeding two lots, being within an incorporated town, city, or village * * * owned and occupied by any resident of the state being the head of a family, shall not be subject to attachment, levy, or sale, upon execution or other process issuing out of any court in this state, so long as the same shall be owned and occupied by the debtor as such homestead." (General Statutes, 1873, p. 616, sec. 525.) Construing this statute, this court, in *Rector v. Rotton*, 3 Neb., 171, said: "The legislature never intended by this statute to assume a guardianship over the owner of a homestead and render him disqualified to make valid contracts respecting it. It imposes no restraint upon him whatever in this respect. Even the wife, when the title is in the husband, has no power to prevent him from making such disposition of it as he may think best. It is true that in some states it is otherwise, and the wife is required to give her written assent before the husband can alienate or in any manner deprive the family of the benefit of the homestead when once acquired. But in this state the legislature has not as yet thought proper to invest the wife with any such authority over the property of the husband." (*State Bank of Nebraska v. Carson*, 4 Neb., 498.) Whatever might be our opinion of the question under consideration as an original proposition, the decision just quoted from has become a rule of property and we cannot disturb it, and we must accordingly hold that prior to the enactment of the homestead law of 1877 the failure of the wife to join in a conveyance of the homestead where the title to the same was in the husband did not render such conveyance void. It is probable that this construction of the home-

stead law of 1866 led the legislature in 1877 to provide that a conveyance of the homestead, to be valid, must be executed by both husband and wife. The judgment of the district court is

AFFIRMED.

YANKTON, NORFOLK & SOUTHWESTERN RAILROAD COMPANY V. STATE OF NEBRASKA ET AL.

FILED OCTOBER 6, 1896. No. 6845.

1. **Bill of Exceptions:** AUTHENTICATION. 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 case, in order that the matters therein may be considered by this court. (*Wax v. State*, 43 Neb., 18.)

2. **Costs:** TAXATION: REVIEW. In order to review the question of taxation of costs a motion to retax must be made in the trial court and a ruling obtained thereon by that court. (*Real v. Honey*, 39 Neb., 516.)

3. **Trial:** VERDICT: OBJECTIONS TO FORM. Objections to the form and terms of a verdict should be made in the court below, at the time of its rendition, in order to be available on error to this court. (*Roggenkamp v. Hargreaves*, 39 Neb., 540.)

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

E. A. Houston, for plaintiff in error.

A. A. Welch, *W. D. Funk*, and *S. Draper*, *contra*.

RAGAN, C.

This is a proceeding in error by the Yankton, Norfolk & Southwestern Railroad Company against the state of Nebraska to reverse a judgment of the district court of Knox county, pronounced against it in favor of the state, for damages sustained by the latter by reason of the ap-

propriation by the railway company, for railway purposes, of certain of its lands in said county.

1. The first assignment of error relates to the action of the district court in the admission of certain testimony, but we are unable to review this assignment, for the reason that we have before us no bill of exceptions. There is in the record a paper purporting to be a bill of exceptions, but it is not certified by the clerk of the district court as being either the original bill of exceptions or a copy thereof. In *Wax v. State*, 43 Neb., 18, it was held: "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." (See, also, to the same effect, *Aultman v. Patterson*, 14 Neb., 57; *Flynn v. Jordan*, 17 Neb., 518; *Hogan v. O'Niel*, 17 Neb., 641.)

2. The second assignment of error is that the court erred in taxing the costs of the action to the plaintiff in error. The judgment of the district court is in the usual form,—that the plaintiff below have and recover of the defendant below a named sum, with costs, taxed at $——. The record does not disclose what the costs were. So far as the record shows, the railroad company made no motion in the court below to retax these costs. If any reason existed why the party who recovered in the court below should not recover his costs, that fact should have been made to appear to the trial court by motion to retax, and if the railroad company was dissatisfied with the ruling of the court on that motion it should have taken an exception to such ruling and presented it here. In *Real v. Honey*, 39 Neb., 516, it was held: "In order to review the question of taxation of costs, a motion to retax the costs must be made in the trial court and a ruling obtained thereon by that court." To the same effect, see *Ins. Co. of North America v. Bachler*, 44 Neb., 549.

3. The third assignment of error relates to the form of the verdict on which the judgment sought to be reversed

was rendered. We have failed to discover any material defect in this verdict affecting the validity of the judgment. No objection to the reception and recording of the verdict was made at the time it was returned into the trial court, and after the verdict was received without objection it was then too late to urge, either upon the trial court or this court, objections to the form of the verdict. See *Roggenkamp v. Hargreaves*, 39 Neb., 540, where it was held: "Objections to the form and terms of a verdict should be made in the court below at the time of rendition in order to be available on error to this court." To the same effect, see *Brumback v. German Nat. Bank of Beatrice*, 46 Neb., 540; *Jones v. Driscoll*, 46 Neb., 575.

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

AFFIRMED.

HALL COUNTY V. WELCOME SMITH.

FILED OCTOBER 6, 1896. No. 6828.

Final Order: REVIEW. To obtain a review of a case in this court there must be a final order or judgment on the merits of the action in the court below.

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

Charles G. Ryan, for plaintiff in error.

M. Randall, *contra*.

RAGAN, C.

On the 14th day of July, 1892, the county board of Hall county disallowed a claim filed against said county by Welcome Smith. Smith perfected an appeal from this order to the district court, where a motion was made by

the county to dismiss the appeal. This motion the court overruled, and the county has prosecuted here a petition in error to reverse what it calls the judgment of the district court.

The action of the district court in the premises is set out in the record in the following language: "This day this cause came on for hearing on motion of the defendant to dismiss the within entitled cause and the appeal taken in the same, for the reason that the said appeal was not filed, taken, and completed within the time as by law required, and was argued by counsel, and the court, being fully advised in the premises, overruled the same, to which ruling and decision of the court the defendant duly excepted at the time; and the said defendant appearing no further in the case, and electing to plead no further, the court finds that there is due the plaintiff from the defendant the sum of $12.60, and that defendant pay the costs of this suit, taxed at $——." It will thus be seen that there is here no final judgment of the district court of Hall county. To obtain a review of a case in this court there must be a final order or judgment on the merits of the case in the court below. (Code of Civil Procedure, sec. 581; *Nichols v. Hail*, 5 Neb., 194; *Sprick v. Washington County*, 3 Neb., 253; *Riddle v. Yates*, 10 Neb., 510.) The only jurisdiction we have in the matter is to dismiss the petition in error, which is accordingly done.

DISMISSED.

HARRISON, J., not sitting.

NYE & SCHNEIDER COMPANY, APPELLANT, V. RICHARD FAHRENHOLZ, APPELLANT, ET AL., IMPLEADED WITH A. R. OLESON, APPELLEE.

FILED OCTOBER 6, 1896. No. 8483.

1. **Judicial Sales:** NOTICE. A purchaser at a judicial sale is charged with notice of the proceedings leading to the sale, including the appraisement.

2. ———: APPRAISEMENT. Appraisers in judicial sales act judicially; and the parties, including the purchaser, are in collateral proceedings bound by the appraisement.

3. ———: ———: LIENS: FORECLOSURE. Where a lien junior to that foreclosed was erroneously, by the appraisers, treated as a senior lien, and its amount deducted from the value of the property in making the appraisement, the purchaser bidding only two-thirds of the appraised value after deducting such lien, and the holder of such junior lien not being a party to the suit, such purchaser cannot be heard, in a subsequent suit to foreclose such lien, to say that it was junior to that under which he bought.

4. ———: LIENS: FORECLOSURE. In such a suit the holder of what was the junior lien is entitled to a decree of foreclosure, and is not compelled to redeem.

5. ———: ———: ———. In such case the former owner of the equity, who is personally liable for both debts, has such an interest that he may insist upon the subjection of the property to the payment of the lien.

APPEAL from the district court of Stanton county. Heard below before EVANS, J.

Munger & Courtright, for appellants.

A. R. Oleson, contra.

IRVINE, C.

This case has been submitted under rule 2, upon an agreed printed abstract. The facts are that one Colton, who had been the owner of the southeast quarter of section 15, township 23, range 3, in Stanton county, in 1889 contracted to sell the same to one Lindner. March 3,

1892, Lindner assigned the contract of sale to Fahrenholz, executing a mortgage on the premises to Lindner to secure the purchase money of the assignment. Between March 19 and October 15, 1892, the Nye & Schneider Company sold building material to Fahrenholz for the construction of a dwelling-house on the land, and subsequently perfected a mechanic's lien thereon. The land was then subject to three incumbrances: First, the unpaid purchase money due on the contract between Colton and Lindner; second, the mortgage from Fahrenholz to Lindner; third, the plaintiff's mechanic's lien. Lindner had sold his note and mortgage to one Schock, who, in 1893, began a suit to foreclose the mortgage; but he failed to make the Nye & Schneider Company a party to the action. He obtained a decree of foreclosure and there was a sale made thereunder to Oleson. The sheriff having made application to the county clerk for a certificate of incumbrances, the clerk certified as incumbrances against the land the contract, mortgage, and mechanic's lien referred to. The sheriff and appraisers in making the appraisement deducted from the gross value of the land not only the amount due on the Colton contract, but also the amount due on the mechanic's lien as a prior incumbrance, although the lien was in fact junior to the mortgage which was being foreclosed. Oleson purchased at a sum only a few cents greater than two-thirds the appraised value with the mechanic's lien deducted as a prior incumbrance. The Nye & Schneider Company afterwards began this action, not to redeem from the Lindner mortgage, but to foreclose its lien, making Fahrenholz, Colton, and Oleson defendants. The defendant Fahrenholz answered setting up practically the same facts as the plaintiff, and joining in the plaintiff's prayer that the land be subjected to the payment of the mechanic's lien. The district court sustained a demurrer to this answer and, on the trial of the issues between the other parties, found that the plaintiff's lien was junior to the mortgage which formed the basis of the decree under

which Oleson bought, and accordingly refused the plaintiff a decree of foreclosure, but offered to permit a redemption. The plaintiff declined to redeem and the court entered a judgment of dismissal.

As to the plaintiff, the question presented is the correctness of the court's holding that it was not entitled to foreclosure. We think, upon the record made, this holding was erroneous. The appraisement in the foreclosure case was clearly erroneous in treating the lien at that time as a senior incumbrance, and on motion in that case undoubtedly the appraisement might have been set aside and corrected. To be sure the purchaser was not before the sale in a position to attack the appraisement; but it is highly probable that on becoming the purchaser he was in such a position that he might have made an application to the court, which would have given him relief. That question is not, however, before us, because the appraisement stood without question, Oleson became the purchaser, the sale was confirmed, and the property conveyed to him without any objection to the appraisement, so far as the record discloses. Appraisers at such sales under our law act judicially (*Sessions v. Irwin*, 8 Neb., 5; *Vought v. Foxworthy*, 38 Neb., 790); and the purchaser at a judicial sale is charged with notice of the condition of the title and of the appraisement. (*Norton v. Nebraska Loan & Trust Co.*, 35 Neb., 466, 40 Neb., 394.) In the case cited it was held that the purchaser was not justified in relying on statements made to him by the sheriff and clerk, because he was bound to take notice of the record. We think it follows from these principles that the appraisement, unless set aside, becomes conclusive, and a portion of the terms of the sale; that, therefore, Oleson expressly bought subject to the mechanic's lien, and cannot be heard now to assert that his purchase was on terms different from those shown by the record. He contends that the necessary facts do not exist to raise an estoppel *in pais;* but this is not a case of estoppel *in pais.* If it is an estoppel at all it is one of record. Indeed, we re-

gard the question as having been settled by the case of *Koch v. Losch*, 31 Neb., 625. It was there held that where a mortgage had been deducted in making an appraisement, the purchasers at the sale were thereafter estopped from denying the validity of the mortgage. It is argued that that case is distinguishable from the present case, because here the purchaser is not disputing the validity of the lien, but merely its priority. We can, however, see no distinction in principle. The principle of the Koch case is that the purchaser is bound by the terms of the sale, and this principle applies as well against disputing the priority of liens, whether established by the decree or the appraisement, as the validity of the liens.

We think, also, that the demurrer to the answer of Fahrenholz should have been overruled. The property was originally subject to both liens. Because the mechanic's lien was deducted in making the appraisement, the land was sold at a less sum than it would have brought had the lien not been deducted. The result of this was a deficiency judgment against Fahrenholz on the mortgage for an amount just so much greater than it otherwise would have been. He is still personally liable to the plaintiff for the debt creating the mechanic's lien, and we think he has such an interest in the controversy as to entitle him to insist upon subjecting the property to the lien. It is argued that he was a party to the foreclosure case and cannot be heard to dispute that record; but he is not disputing it. He is insisting that this case be adjudicated in accordance with the record and that Oleson shall not dispute it.

The judgment of the district court is reversed and the cause remanded, with directions to take an account of the amount due on the mechanic's lien and to enter a decree of foreclosure accordingly.

JUDGMENT ACCORDINGLY.

ROBERT L. BUTLER V. LYNN M. GREENE.

FILED OCTOBER 6, 1896. No. 6837.

1. **Pledges:** LIABILITY OF BAILEE. The pledgee of chattels to secure the payment of a debt is a bailee and not the owner of the property, and he is responsible as bailee after as well as before the maturity of the debt.

2. **Review:** INSTRUCTIONS: HARMLESS ERROR. A defendant against whom judgment has been rendered cannot complain because the court instructed the jury to deduct from the damages recoverable by plaintiff the amount of a set-off not pleaded by defendant.

3. **Bailment.** A special contract of bailment prevails in determining the liabilities of the parties, as against general principles of law applicable in the absence of express agreement.

4. **Pledges:** LIABILITY OF BAILEE. A bailee who contracts to keep the property in a particular place is not discharged from damages resulting from his failure to do so because he was compelled to remove it by the owner of the place designated.

5. **Arbitration and Award.** A party to an arbitration may revoke the submission before an award is made, and where the submission provides for a written award, a revocation may be made after the arbitrators have individually communicated to strangers their respective views, but before they have signed any award.

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

J. S. Stull and *Davidson & Giffen*, for plaintiff in error.

G. W. Cornell, contra.

IRVINE, C.

The principles applicable to this case are simple, although its investigation has been somewhat difficult because of the immense mass of wholly irrelevant testimony which was introduced without objection, and which, under section 309 of the Code of Civil Procedure, should never have been made a part of the bill of exceptions. The action was by Greene against Butler to recover the value of a watch and chain which had been

pledged by Greene to Butler for the payment of a debt, and which, it was alleged, had been lost through the negligence of Butler. From a verdict and judgment in favor of Greene, Butler prosecutes error. We take up the assignments referred to in the brief in the order in which they are discussed.

The first question discussed seems to refer to the assignment that the verdict is not sustained by the evidence. The undisputed facts are that Greene borrowed $30 from Butler and pledged his watch and chain as security for the debt. Butler placed the watch in the safe and vault of the Bank of Johnson, where it remained for some weeks. The officers of the bank then insisted upon its removal, when Butler removed it and carried it on his person for some time and then placed it in a pocket of a summer suit which he deposited at the bottom of a trunk in a room which he and another occupied as a bedroom. Both occupants of the room were bachelors and usually absent during the day. The watch and chain were stolen from the trunk. There is evidence tending to show that one door of the room was not kept locked. It also appears that the room was frequented by a number of Butler's acquaintances. An attempt was made to show that it was used as a resort for gamblers; but the most that can be said of the testimony in this respect is that Butler and his friends at times resorted to the room for the purpose of playing cards for small stakes. Enough does appear, however, to indicate that a number of persons at times had access to the room, and Butler himself testifies that while he kept the watch there he looked for it every day, because, as he says, there were suspicious characters about, and one of the persons whom he deemed suspicious was his room-mate. The case was submitted to the jury on the theory that Butler was required to use ordinary care in keeping the watch, and we think there is enough in the evidence to sustain a finding that it was lost through his failure to exercise such ordinary care.

A great point was made, both in the introduction of evidence and in the argument here, on the terms of the loan, as to time. The contention of Butler is that the loan was made for thirty days and the watch was not stolen until it had been in his possession some four months, payment not in the meantime having been made or tendered. It is claimed that there is no evidence sufficient to overcome that offered by defendant in regard to the time for which the loan ran. We do not think this question at all material. It cannot be, and is not contended, that Butler became the owner of the watch on the maturity of the loan. Whether or not the loan was overdue, he was still the bailee of the watch and required to exercise such care as a person of reasonable prudence would exercise under the circumstances.

It is next contended that there was error in assessing the amount of recovery. The value of the watch and chain, as fixed by the evidence, was at least $150. The verdict was for $120.54. It is argued that the defendant did not claim a set-off for his debt and that the verdict therefore discloses that the jury was not governed by the evidence. The court, in stating the measure of damages, instructed the jury if they found for the plaintiff, to deduct the indebtedness from the value of the watch. This was evidently done by the jury. It is true no set-off was pleaded, and under the rule in *Kitchen Hotel Co. v. Hammond*, 30 Neb., 618, the instruction was erroneous. It submitted to the jury a consideration of a set-off not pleaded. But the defendant cannot complain. The verdict was, by this instruction, made less than the plaintiff was entitled to recover in case the jury found in his favor under the pleadings in the case. The defendant was in nowise prejudiced.

It is also claimed that the court gave undue prominence to the plaintiff's case by instructing the jury particularly as to what it should consider in returning a verdict for the plaintiff, by way of ascertaining damages, without making a corresponding statement in case the

finding was for the defendant. This assignment is entirely without merit. It is the duty of the court to instruct as to the measure of damages, and where no set-off or counter-claim is pleaded this must refer to the contingency of a finding for the plaintiff.

The fifth instruction is complained of. By this the court stated to the jury "that a pledge of personal property passes to the pledgee merely the possession with a right of retainer until the debt is paid for which the article pledged is given as security; and it is the duty of the pledgee to safely keep the property pledged without using it unless such use is necessary to its preservation." It would have been better had this instruction not been given—the others fully covered the case; but we do not think that there was any prejudicial error in giving it. Standing alone, it would be erroneous as implying that the pledgee was an insurer of the property. But over and over again in the other instructions the jury was told that the defendant was only liable for a failure to exercise ordinary care, and we do not think that it was possible that the words "safely keep" in this instruction could have so overcome the idea so often expressed in the other instructions as to convey any notion that the defendant was liable except for a failure to use ordinary care. Another complaint made of this instruction is that it tells the jury that it is the duty of the pledgee to keep the property without using it unless its preservation requires such use. It is true there is no direct evidence that the loss of the watch was due to defendant's carrying it on his person; but it is undoubtedly true as a general principle that a pledgee has no right to use the pledged property unless the character of the property is such as to render its use necessary for its preservation. There is testimony in the case, as we have said, showing that for some time Butler carried the watch on his person, and while it was not lost while so carrying it, the display made of the watch, and it may be here remarked that the defendant took great pains to show that he had

carried it publicly, may have induced its theft. The proof was that Butler's contract was to keep the watch in the vault of the bank, and he having contracted to do so, and instead thereof having carried it publicly on his person, and thereafter left it within the reach of thieves, we do not think that there was any prejudicial error in this portion of the instruction.

Complaint is also made of the sixth instruction, whereby the jury was told that if there was an express contract to keep the watch and chain in the vault of the bank until the debt was paid, the defendant was bound to keep within the terms of his agreement. In connection with this, complaint is also made of the fourteenth instruction, whereby, among other things, it was said that if the defendant took the watch and chain out of the vault of the bank because the cashier told him to do so, and thereafter put it in an unsafe place and did not take such care as an ordinarily prudent person usually takes of his own goods, and by reason of such want of care the property was stolen, then the verdict should be for the plaintiff. We cannot conceive how the defendant was prejudiced by these two instructions, which properly go together. If the defendant contracted to keep the watch in the vault of the bank, and if it was lost by reason of his failure to do so, he was liable without regard to the general principles of the law of bailment. He had made a contract and he was liable for all damages resulting from his failure to perform it. If he had no right to keep the watch in the vault, that was his affair and not the bailor's. The contract was not to keep the watch in the vault if the bank permitted it, but it was absolute; and it was the pledgee's business to see that he had authority to keep it there. If he had not, he should not have made the contract. But the instructions of the court relieved him from this liability, and, taken together, were to the effect that although he broke his contract in this regard he was still not liable unless he failed to exercise ordinary care. This was more favorable to the defendant than the law warranted.

It is pleaded as a defense that the matter in controversy had been submitted to arbitration and an award had been made whereby the defendant had been discharged from liability. The reply in this respect admitted that there had been a submission, but pleaded that it had been revoked before any award was made. The court instructed the jury that the evidence failed to establish an award and that all evidence on that issue should be disregarded. It is complained that this instruction was erroneous, because it did not confine the question to the single issue presented as to the revocation of the award. We think, however, that on the uncontradicted evidence the court was justified in granting this peremptory instruction. It appears that there was a submission to three arbitrators; that they took testimony and separated. There was thereafter no consultation with all three present, but by desultory conversations among them it was ascertained that two arbitrators favored the defendant and one the plaintiff. Some time thereafter a written award was made, two arbitrators signing a finding for the defendant and the third expressing his dissent and finding for the plaintiff. All witnesses, however, agreed that before the award was signed the plaintiff revoked the submission and served notice of the revocation on the defendant and on each arbitrator. The written agreement for a submission provided for a written award. It is elementary law that a submission may be revoked before the award, and it is also elementary that there is no award as long as the matter rests in the breasts of the arbitrators. It is true that there is evidence tending to show that after the arbitrators had ascertained their mutual opinions no secret was made thereof and their individual views were disclosed to inquirers. It is not shown, however, that they had been communicated to Greene, except that one arbitrator had told him that the award would be against him and that he wanted to present authorities to one of the other arbitrators. There is no evidence which would jus-

tify a finding that the three arbitrators had formally concluded their efforts and had made any announcement of their conclusion. It was just as if jurymen, after being permitted to separate, had made known their individual views. Under the agreement the award was to be written. The revocation was prior to the written award, and it was also prior to any definite and conclusively expressed decision of the arbitrators. The plaintiff was not bound by it.

JUDGMENT AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. JAMES B. HEADRICK.

FILED OCTOBER 7, 1896. No. 7518.

1. **Appeal From Justice Court:** AMOUNT OF CLAIM: CONSTITUTIONAL LAW. Sections 985 and 1017, Code of Civil Procedure, denying appeals from judgments of justices of the peace where the amount claimed does not exceed $20, are not repugnant to sections 6 and 24 of the bill of rights. (*Moise v. Powell*, 40 Neb., 671.)
2. ———: ———: ———. Nor is the denial of the right of appeal in such case violative of section 3 of the bill of rights, prohibiting the taking of private property without due process of law.

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

A. G. Greenlee and *J. W. Deweese*, for plaintiff in error.

Mockett & Polk, contra.

POST, C. J.

This proceeding originated before a justice of the peace for Lancaster county, where defendant in error claimed the sum of $20, the value of certain live stock killed through alleged negligence in the management of an engine upon plaintiff in error's line of road in said

county. There was a jury trial, resulting in a verdict and judgment for the plaintiff therein, from which an appeal was by the defendant below taken to the district court, where, upon the motion of the former, the appeal was dismissed and which is the ruling now assigned as error.

It was held in *Moise v. Powell*, 40 Neb., 671, that the provisions of sections 985 and 1017, Code of Civil Procedure, denying appeals from judgment of justices of the peace where the amount claimed does not exceed $20, are not repugnant to sections 6 and 24 of the bill of rights. We are, however, asked to re-examine the subject and overrule the doctrine of that case for reasons hereafter stated.

It is argued, first, that the remedy by proceedings in error in the class of cases contemplated is inadequate, since, as held in *Chicago, B. & Q. R. Co. v. Goracke*, 32 Neb., 90, the law has conferred upon justices of the peace authority to certify exceptions to their rulings upon questions of law only, and unless the remedy by appeal exists as in other cases, the right reserved by the constitution to be heard in the court of last resort is indeed a barren one. But the reasoning employed, although plausible, is by no means convincing. It has frequently been said that the remedy by appeal is a purely statutory right and exists only when specially conferred (*State v. Ensign*, 11 Neb., 529; *Bevins v. Ramsay*, 11 How. [U. S.], 184; *People v. Trezza*, 128 N. Y., 529; Elliott, Appellate Procedure, sec. 97, and cases cited); and where, in an action following the common law, the constitution guaranties the right to a hearing in a court possessing appellate jurisdiction only, but without regulating the procedure therefor, and the statutory provision is inadequate for the purpose, the remedy is, without doubt, by means of the ancient common law writ of error. (2 Ency. of Pleading & Practice, 27, and cases cited.) The question presented is not the adequacy of the statutory remedy in the case at bar by proceedings in error, but the authority to prose-

cute an appeal under the provisions of the Code which in terms denies such right. Any course of reasoning upon the subject leads to the result reached in *Moise v. Powell*,—a conclusion to which we are, as the result of a second examination, satisfied to adhere.

The statute under consideration is assailed on the further ground that it contemplates the taking of property without due process of law, and is accordingly in conflict with section 3 of the bill of rights. The term "due process of law" has been often defined as such an exertion of the powers of government as are sanctioned by the settled maxims of the law and under such safeguards for the protection of individual rights as those safeguards prescribed for the class of cases to which the one in question belongs. (Cooley, Constitutional Limitations, 355.) It has never been construed as the right to be heard in the court of last resort, or even according to the course of the common law, but is satisfied by a proceeding applicable to the subject-matter and conformable to such general rules as affect all persons alike. The remedy in this case, by trial of the issues of fact to a jury selected in accordance with a general law applicable to all cases of the class to which it belongs, and the right to be heard in the court of last resort upon questions of law presented at the trial and certified by the justice, certainly satisfies the constitutional requirement of due process of law. The judgment of the district court is right and will be

AFFIRMED.

FRANK KASPER V. ANTON WALLA.

FILED OCTOBER 7, 1896. No. 6695.

Conversion of Mortgaged Chattels: MEASURE OF DAMAGES. The measure of damage in an action by the mortgagee for the conversion of mortgaged chattels is the amount of the plaintiff's mortgage, not exceeding the value of the property converted.

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

Edward W. Simeral, for plaintiff in error.

Capek & Piatti and *R. V. Montague, contra.*

POST, C. J.

This was an action by the plaintiff below, Walla, for the conversion by the defendant therein, Kasper, of a certain printing press, printing material, type, and office furniture in which the former had a special interest by reason of a chattel mortgage executed by one Hospodsky. The facts out of which the controversy arose are as follows: Some time previous to the alleged conversion Kasper and Hospodsky purchased from Walla the presses, type, material, and office furniture of the *Nova Vlast*, a newspaper published in the Bohemian language, for the consideration of $800, of which one-half was paid in cash by the former, and the balance represented by the unsecured notes of the latter. Hospodsky subsequently executed to Walla a chattel mortgage upon his undivided half interest in the property so purchased, for $340, as security for the notes mentioned. Kasper, who had in the meantime added to the stock above described property of like character purchased on his own account, sold the entire plant to one Rosisky, receiving in payment therefor certain shares of the capital stock of the Pokrok Zapadu Printing Company, of which the said Rosisky was president and manager. Thereupon, as above stated, this action was instituted by Walla and prosecuted to judgment in his favor, and which has been removed into this court for review.

It is first alleged that the district court erred in admitting proof of the amount and value of the stock of the Pokrok Zapadu Company received by Kasper in exchange for the property mentioned. A question to which prominence was given at the trial was whether the transaction

above mentioned with Rosisky as the representative of the Pokrok Zapadu Company included the entire plant of the *Nova Vlast*, or Kasper's interest only. The latter having testified in his own behalf that the consideration for the shares of stock received by him was his interest in the presses, type, and furniture, the plaintiff was, by way of cross-examination, permitted to show the value of such stock. The value of the consideration given by the defendant was, to say the least, one of the circumstances accompanying and tending to explain the disputed transaction, and was accordingly admissible for that purpose.

The only other assignment of error relates to the giving of instruction No. 5 by the court on its own motion, to-wit:

"5. If you find for the plaintiff, the measure of his recovery will be the market value of the property converted by defendant at the time of such conversion, with interest thereon from the date of such conversion to the 6th day of February, 1893, providing the amount you find was the value of the property at the time of conversion, with interest added, does not exceed the amount you find due plaintiff on his notes, interest added as above explained, and providing further, that the value of the property must be the fair market value of the property at the time of the conversion, not what it did in fact sell for, unless you find that the price at which it sold was the fair market value in the market for such property. In other words, if you find for the plaintiff, your verdict should be for the plaintiff for such an amount as you find due him from Hospodsky on the mortgage and notes, but the same must be within and not greater than the fair market value of the property as shown by the evidence."

This instruction, it is argued, authorizes a recovery for the amount of the mortgage described without regard to the value of the property converted. But the language there employed does not, in our judgment, admit of any such interpretation. Taken together, the several paragraphs correctly state the measure of damage, viz., the

amount of plaintiff's mortgage, provided the amount due thereon does not exceed the value of the property converted.

There is no error in the record, and the judgment will be

AFFIRMED.

JOHN STOUGH V. WILLIAM L. OGDEN.

FILED OCTOBER 7, 1896. No. 6713.

1. **Alteration of Instruments:** TIME. Whether an alteration apparent from the face of a note was made at, or subsequent to, the time of its execution is a question of fact for the jury, and it is not in such case error to receive in evidence the note sued on, upon proof by the payee that the alleged alteration was made previous to its receipt by him, on the day of its date, from one of the joint makers thereof.

2. **Witnesses:** CROSS-EXAMINATION: DISCRETION OF COURT. The law has conferred upon the trial court some discretion in determining the limits within which the cross-examination of witnesses may be allowed, and its action in that respect will not, in the absence of an abuse of discretion, be the subject of review by this court.

3. **Review:** INSTRUCTIONS. Where several instructions are grouped in one assignment of the motion for a new trial or petition in error, they will be examined no further than to determine that a single one thereof was rightly given or rightly refused.

ERROR from the district court of Dixon county. Tried below before NORRIS, J.

Gantt & Welty, for plaintiff in error.

J. J. McCarthy, *A. E. Barnes*, and *Marsh & Henderson*, *contra*.

POST, C. J.

This was an action by William L. Ogden in the district court for Dixon county against S. P. Mikesell, S. K. Bittenbender, and John Stough upon a promissory note for

$6,000, bearing date of September 5, 1889, payable to the order of the said Ogden one year after date, with interest at the rate of eight per cent per annum, payable semi-annually. Separate answers were interposed to the petition below, and a trial had, resulting in a verdict and judgment for the plaintiff against the several makers of the note described, from which Stough alone prosecutes error to this court.

The answer of the defendant last named states two defenses, viz.: (1.) That said note was, as the plaintiff well knew, executed by said defendant as surety only and for the accommodation of the Ponca Milling Company, a corporation, and that payment thereof was for a valuable and sufficient consideration by the plaintiff extended from time to time after its maturity without the consent of the answering defendant. (2.) Said note has, without the consent of the defendant, been materially altered since its execution and delivery, by the insertion therein of the prefix "semi" immediately preceding the word "annually," thus making the interest in terms payable semi-annually, whereas the note as executed provided for interest payable annually. The jury, as we have seen, found against the contention of the defendant with respect to both defenses, and we cannot, upon the record, say that the verdict is unwarranted by the evidence. Referring to the second defense it is sufficient to say that Mr. Mikesell, who prepared the note for the signatures of the makers, testifies positively that the alleged alteration was made by him previous to the signing by either of the parties thereto. He is, it is true, contradicted by his co-defendants, but the issue of fact thus made was fairly submitted to the jury, whose finding thereon must be accepted as conclusive. The verdict was right also upon the other issue tendered by the answer, since the evidence fails to sustain the allegation that the note in suit was executed by the defendant as surety for the Ponca Milling Company. True it was in one sense for the accommodation of the milling company, for the rea-

son that the proceeds thereof were devoted to its benefit; but it is also true that Mr. Ogden, the plaintiff, refused to make any advancement upon the credit of that corporation, and expressly stipulated that the loan in question should be made upon the personal credit of the defendants, who are as to him principals, whatever may be their relations toward the corporation named as the result of that transaction.

It is argued that the trial court erred in receiving in evidence the note sued on, without first requiring an explanation of the alleged alteration, which, as we have seen, is the insertion in writing of the prefix "semi" in the printed form employed for that purpose. The plaintiff had, however, testified that he received the note on the day of its date from Mr. Bittenbender, one of the makers thereof, and that it was in the same condition when offered in evidence as when received by him. This evidence certainly tended to prove that the alleged alteration was made by the makers themselves at the time of the execution of the note, and was sufficient, *prima facie*, to rebut any presumption to the contrary arising from its appearance. The court did not, therefore, err in receiving the note in evidence, the question of the alleged alteration being in the end one of fact for the jury upon all of the evidence adduced. (*Goodin v. Plugge*, 47 Neb., 284.)

The plaintiff below, in his examination in chief, answered in response to an interrogatory by his attorney, that he had on one occasion, by appointment, met the defendants, when the latter all examined the note; that no objection was made thereto by any one present, and that all agreed that he, plaintiff, should have his money, but could not unite upon the means of paying it. On cross-examination he was asked the following question: "Was his [Stough's] attention in any manner drawn to these changes in the note?" to which an objection was interposed and sustained on the ground that it "was assuming something not in evidence." The examination might properly have been allowed, although its exclusion can-

not be said to be error calling for a reversal of the judgment. There had, up to that time, been no proof of any alteration of the note subsequent to its execution by Stough, and there is nothing in the record to indicate the purpose of the question, and its exclusion under the circumstances is not prejudicial to the defendant.

It is next argued that the court erred in allowing the plaintiff, upon cross-examination of the defendant Stough, to inquire into the affairs of the milling company. The examination may, it is conceded, have been unnecessarily protracted, but there was no such an abuse of discretion as to warrant a reversal upon that ground.

The remaining questions all relate to instructions given and refused, and are assigned in the motion for a new trial as follows:

"5. The court erred in refusing to give the second, third, fourth, fifth, sixth, ninth, eighth, first, and seventh instructions asked by the defendant.

"6. The court erred in giving the third, fourth, fifth, and sixth instructions asked by the plaintiff."

It has been repeatedly held by this court that where several instructions are grouped in one assignment of the motion for a new trial, or petition in error, they will be examined no further than to determine that a single one thereof was rightly given or rightly refused. It is not claimed, and cannot be claimed, that the district court erred in refusing all of the instructions enumerated in the fifth assignment, or in giving those enumerated in the sixth assignment. Indeed, the charge, as a whole, stated the law quite as favorably to the defendant as he was entitled to in view of the case as made by the pleadings and proofs. There being no error of record, the judgment will be

AFFIRMED.

ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY V. JAMES G. MEEK ET AL.

FILED OCTOBER 7, 1896. No. 6806.

1. **Depositions:** NOTICE. Section 378, Code of Civil Procedure, requires notice of the taking of depositions (unless taken under a special commission) to be served upon the adverse party, his agent or attorney of record, or left at his usual place of residence.

2. ———: ———: SERVICE ON STATION AGENT. Service in such case upon a station agent, who is not the attorney of record of the adverse party, a railroad company, whose employment in nowise relates to the particular controversy, and who is without authority to accept or waive service in its behalf in any suit or proceeding to which it may be a party, does not satisfy the requirement of the statute. (*Atchison, T. & S. F. R. Co. v. Sage*, 49 Kan., 524.)

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

A. A. Hurd, Searle & Coleman, G. R. Peck, and *W. Littlefield,* for plaintiff in error.

Buck & McConnell, contra.

References: *Porter v. Chicago & N. R. Co.*, 1 Neb., 15; *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb., 552; *Katzenstein v. Raleigh & G. R. Co.*, 78 N. Car., 286.

POST, C. J.

This is a petition in error and brings up for review a judgment of the district court for Nuckolls county whereby the defendants in error, as plaintiffs below, were permitted to recover on account of the imputed negligence of the plaintiff in error, defendant below, as a common carrier while engaged in transporting certain cattle from Osceola, in the territory of New Mexico, to Superior, in this state, whereby certain of said cattle were killed and others permitted to escape. The answer contains a denial of the negligence charged and an allegation that

for a valuable and sufficient consideration the plaintiffs below executed certain agreements, in writing, the effect of which was to limit the liability of the defendant railroad company as a common carrier, and whereby the said plaintiffs expressly assumed all risk of damage on account of the loss or escape of said cattle from any cause whatever, except the willful acts of the defendant's agents or servants. The reply is a general denial of the allegations of the answer.

Of the several questions raised by the assignments of error and discussed by counsel for the respective parties we shall, for reasons hereafter appearing, notice one only, viz., that relating to the refusal of the district court to suppress the deposition of Samuel S. Rogers, taken at Wilcox, in the territory of Arizona, and the subsequent admission in evidence of said deposition over the objection of the defendant company. The materiality of such evidence to the issues presented is apparent from the fact that the witness above named superintended the assorting and loading of the cattle in question, some twenty cars in all, and testified to their age, condition, and value at the time and place of shipment. He also accompanied one consignment of said cattle from New Mexico to their destination at Superior, and testified to certain acts by the servants of the defendant company while *en route* now relied upon to sustain the allegation of negligence. The ground of the objection to said deposition is that the only notice of the taking thereof was served upon one Taylor, the defendant's station agent at Superior, who was not the agent or attorney of record of the defendant company within the meaning of section 378 of the Code of Civil Procedure, and was not at the date of such service authorized to accept or waive service of any notice whatever in said cause, or in any suit or action in which said defendant was or might be a party. There was, it should be observed, no appearance by the defendant at the taking of said deposition, and no waiver in its behalf of the notice prescribed by law. The question, therefore, dis-

tinctly presented by this record is the sufficiency of the service so made. We here quote section 378, above referred to, adopting the punctuation employed in the Revised Statutes of 1866 and the General Statutes of 1873, rather than that of the Compiled Statutes, in which a comma has by the compiler or compositor been inserted after the word "agent": "Prior to the taking of any deposition, unless taken under a special commission, a written notice, specifying the action or proceeding, the name of the court or tribunal in which it is to be used, and the time and place of taking the same, shall be served upon the adverse party, his agent or attorney of record, or left at his usual place of abode," etc. (Revised Statutes, 1866, p. 456, sec. 378; General Statutes, 1873, p. 588, sec. 369.) The authority to use depositions rests, in this state, altogether upon the statute, and a substantial compliance therewith is essential to their validity as evidence. (*Cool v. Roche*, 15 Neb., 25.) By the phrase "agent or attorney of record" is not meant any representative of the party to be served, without regard to the nature or scope of his authority. The section quoted, on the contrary, evidently contemplates personal service upon the adverse party or his representative for the purpose of the particular action or proceeding. The precise question here involved was presented in *Atchison, T. & S. F. R. Co. v. Sage*, 49 Kan., 524, a well considered case under a statute in all respects identical with ours, and the reasons therein stated for the conclusion adverse to the ruling now complained of are so entirely satisfactory that we here quote from the opinion of Johnston, J., who said, referring to the provision under consideration: "This statute provides for a notice to be served upon the adverse party where such party is a natural person, or upon 'his agent or attorney of record.' It manifestly does not contemplate that it may be served upon any attorney or any agent of a party who may be found in any part of the state, and who may have no connection with the litigation, but it evidently must be served upon some one authorized to represent the adverse

party in the action, as shown by the record. It surely does not mean an agent living in a remote part of the state, who has been employed for another purpose, who has no knowledge of, or authority in, the case, and who could not, in many instances, under the limited time prescribed by the statute, communicate with the adverse party, so that he might have sufficient time for preparation and to attend upon the taking of the deposition."

An argument in favor of the sufficiency of the service in this case is predicated upon the assumed analogy of the notice prescribed for the taking of depositions to the original summons; but that argument is without force in view of section 73 of the Code, authorizing service of summons against a corporation "upon the president * * * or other chief officer; or if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent," etc. Section 68*a* of the Kansas Civil Code provides: "Every railroad company or corporation * * * is hereby required to designate some person residing in each county into which its railroad line * * * may or does run, or in which its business is transacted, on whom all process and notices issued by any court of record, or justices of the peace of such county, may be served;" while another section provides that if any railroad company shall fail to designate some person in the manner and for the purpose prescribed, such process may be served upon any freight agent, ticket agent, or station-keeper of such corporation in the county. It was in *Atchison, T. & S. F. R. Co. v. Sage, supra,* held that notice of the taking of depositions is not a process issued by the court, and, therefore, not within the letter or spirit of the Code. We have been referred to no statute which can be invoked to sustain the ruling assigned, and our examination of the subject has failed to disclose any authority for the service of the notice in question upon the defendant's station agent. It follows that the district court erred in refusing to suppress the deposition mentioned, and in receiving the testimony of the witness therein named over

the objection of the defendant company, for which the judgment must be reversed and the cause remanded.

REVERSED

RAGAN, C., not sitting.

FIRST NATIONAL BANK OF PLATTSMOUTH ET AL., APPELLEES, V. WILLIAM TIGHE ET AL., APPELLANTS.

FILED OCTOBER 7, 1896. No. 6846.

1. **Deeds as Mortgages:** TITLE: RIGHTS OF GRANTOR. The legal title to real estate is vested in the grantee by a deed thereof absolute in form and import of its terms, executed by a competent grantor, although such instrument may be in fact a mortgage, or given as security for the payment of the debt of the grantor to the grantee. There remains in the maker of the conveyance but the right to demand, on payment of the indebtedness so secured, and receive, a reconveyance of the title, and in order that he may be again invested with the title to the property a reconveyance is necessary.
2. **Judgment Liens.** A judgment in the district court is not a lien upon the judgment debtor's equitable interest in real estate. (*Nessler v. Neher*, 18 Neb., 649.)
3. **Executions:** LIEN ON EQUITABLE INTEREST IN LAND. The equitable interest of a judgment debtor, if not coupled with possession, cannot be subjected to the payment of the debt by levy of execution thereon and sale under such levy. To make it available for such purpose the aid of the courts must be invoked by proper proceedings. (*Shoemaker v. Harvey*, 43 Neb., 75.)

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

E. H. Wooley, for appellants.

Beeson & Root, contra.

HARRISON, J.

This action was instituted in the district court of Cass county by the plaintiffs to obtain an injunction restrain-

ing the defendants from selling or causing to be sold under the levy of a writ of execution certain real estate specifically described in the petition filed. In the pleading presented on the part of plaintiffs there was alleged the existence of the First National Bank of Plattsmouth as a corporation organized under the laws of the United States; that the defendant William Tighe was the duly elected, qualified, and acting sheriff of Cass county; that on or about the 1st day of March, 1886, one William R. Murray was indebted to the bank and conveyed to it in satisfaction of the indebtedness a quarter section of land situated in Cass county and the continued ownership of the land by the bank from then until the month of March, 1892, at which time it was stated to have been sold to Ed. A. Oliver and Fred Ramge, co-plaintiffs in the suit; the payment by them of the purchase money in cash, their entry into possession of the land, and the retention of the title in the bank as security for the deferred payment of the balance of the amount of the purchase price. It was further pleaded that at the May, 1890, term of the district court in and for Cass county William Porter obtained a judgment against William R. Murray in the sum of $2,841.44 and costs, and on November 10, 1892, Porter assigned to Calvin H. Parmele, his co-defendant in this action, a one-half interest in the judgment, and that they caused an execution to issue for the enforcement of the judgment, which writ was delivered to the sheriff, William Tighe, for service and by him levied upon the aforesaid land as the property of William R. Murray. It was also pleaded that a sale was threatened to be, and would be, made under the levy of the execution, unless restrained by the order of the court, and the lack of any adequate remedy at law. The prayer was for a temporary order of injunction to restrain the defendants from proceeding under the levy, or in the enforcement of the judgment against the particular real estate involved, and that on the final hearing such order should be made perpetual. The amended answer of defendant, the one

to be considered at this time, contained admissions of the allegations of the petition as to the corporate character of the bank; that defendant Tighe was sheriff of the county, the recovery of the judgment by Porter against Murray, the assignment of the one-half interest therein to Parmele, the issuance of the execution thereon, and its delivery to the sheriff and levy by him on the lands as belonging to the judgment debtor, Murray, and the proposed sale thereunder; that the bank had received a conveyance of the land in form and terms absolute, but alleged it was in truth and in fact a mortgage, was given as security for the payment of a loan of money by the bank to Murray, and that at the time of its execution and delivery the grantor had received from the bank a defeasance; that the conveyance to the bank remained as just indicated until March 19, 1892, at which time Murray executed and delivered to the bank a deed of quitclaim of the said land. It was further pleaded in the amended answer that in a prior action by William R. Murray and the bank, plaintiff in this case, against William B. Porter, Deborah H. Porter, Jane R. Porter, and others it had been alleged in the pleading therein filed by the bank that the first conveyance to it by Murray was in effect a mortgage; that the judgment debtor remained in the actual possession of the land, and had the exclusive use and control thereof, up to the time he made the deed of quitclaim to the bank. There was also a denial of each and every allegation of the petition not specifically admitted in the answer. To the amended answer the plaintiffs interposed a general demurrer, which, on hearing, was sustained. The defendants elected to stand upon their amended answer and to plead no further, and judgment was rendered in favor of plaintiffs.

The apellants complain of the ruling of the trial judge sustaining the demurrer to the answer, and the resulting judgment. It was admitted by the answer that the land had been conveyed to the bank by a deed absolute in form and terms. Such a conveyance, though in fact

made as security for a debt, transfers to the grantee the legal title to the real estate embraced in the instrument of conveyance. All that remains in the grantor is the right, on full payment of the debt, to demand and receive a reconveyance of the title to the property, and a reconveyance is necessary. (*Gallagher v. Giddings*, 33 Neb., 222; *Baird v. Kirtland*, 8 O., 21; *Hughes v. Davis*, 40 Cal., 117; 1 Jones, Mortgages, sec. 339; *Kemper v. Campbell*, 44 O. St., 210; *Loring v. Melendy*, 11 O., 355.) The right or interest remaining in Murray, the grantor and also the judgment debtor, was merely an equitable one, and the judgment rendered subsequent to the conveyance to the bank did not become a lien on it. "A judgment in the district court is not a lien upon an equitable interest in real estate of the debtor." (*Nessler v. Neher*, 18 Neb., 649, and cases cited.) It appears from the allegations of both petition and answer that at the time of the levy of the writ of execution the judgment debtor was not in possession of the land and had conveyed his interest to the bank by quitclaim deed, hence he had no further right in the land, either legal or equitable, and if the quitclaim deed had not been made, the equitable interest, without possession, could not have been made the subject of a successful levy of an execution. It could only have been made available for the payment of the judgment through the aid of a proceeding in court for that purpose. (*Shoemaker v. Harvey*, 43 Neb., 75, and cases cited; *Loring v. Melendy*, 11 O., 355; *Morris v. Way*, 16 O., 469; *Kemper v. Campbell*, 44 O. St., 210.)

The foregoing conclusions render it unnecessary to examine any of the other questions discussed in the brief of appellants, and it follows that the judgment of the district court must be

AFFIRMED.

STATE OF NEBRASKA, EX REL. COUNTY COMMISSIONERS OF BROWN COUNTY, V. C. F. BOYD.

FILED OCTOBER 7, 1896. No. 6080.

1. **Mandamus:** COUNTY CLERK: TURNING OVER FUNDS. A *mandamus* will issue even after the expiration of the term of office of a county clerk to compel him to perform the duty of reporting all the fees of his office, also to pay into the treasury of the county any excess above the amount he was entitled by law to retain.

2. ———: STATUTE OF LIMITATIONS. "A proceeding by *mandamus* is barred by the statute of limitations at the expiration of four years from the time the right to the writ accrued." (*State v. King*, 34 Neb., 196.)

3. **County Clerk:** EXCESSIVE FEES: MANDAMUS: TIME. The requirements of the law in regard to a fee book to be kept by the county clerk, and the reports of his fees, to be regularly made to the county board, combined with the provisions of the statute in respect to the amount to be charged in each instance as a fee, and the fact that what has been done by him for which a fee should be charged and collected appeared of record, are sufficient to charge the board with notice of any discrepancy between the amounts of the fees of the officer reported by him as collected and the true amounts; from which it follows that the right of action to enforce the duty of making a true report for any current year, and to pay any excess of fees into the county treasury, would accrue at the time the report was due, or made in an incomplete or defective form, and this would be the rule if the rendering of an incomplete or false report be considered in the nature of a fraud on the board, to which it must be presented.

4. **Limitation of Actions:** FRAUD. "An action for relief on the ground of fraud may be commenced at any time within four years after the discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to such discovery." (*Gillespie v. Cooper*, 36 Neb., 775.)

ORIGINAL application for *mandamus* to compel the respondent to report and enter upon the county fee books the amount of fees earned by him as county clerk of Brown county, and pay the balance due the county into the treasury. *Writ denied.*

J. S. Davisson, *P. D. McAndrew*, and *C. H. Bane*, for relators.

L. K. Alder and *Munger & Courtright*, *contra*.

HARRISON, J.

In this, an application to this court for a writ of *mandamus*, the prayer of the petition filed reads as follows:

"Wherefore your relators, as the agents of the county of Brown, pray that a peremptory writ of *mandamus* issue to C. F. Boyd, as county clerk of Brown county, Nebraska, commanding him, the said respondent, for the years 1888 and 1889, to forthwith report and enter upon the respective fee books of said county all the fees so earned by him, the said C. F. Boyd, as county clerk and *ex officio* clerk of the district court of Brown county, Nebraska, for the years 1888 and 1889, and ending on January 7, 1890, including the fees not heretofore reported by said respondent, as set out in this petition; and that the said respondent be required and commanded to pay over the excess not heretofore reported by him, viz., fourteen hundred and twenty-two and 53-100 ($1,422.53) dollars, into the treasury of Brown county, and for the costs of this action."

The case was submitted on the following motion and stipulation:

"Comes now the respondent and moves the court for judgment dismissing this action, and for costs, and for reasons therefor presents that the pleadings and stipulation of facts filed herein show the following: (1) That this action is barred by the statute of limitations; (2) that respondent has duly entered on his fee book and duly accounted for each and every item of fees actually received or collected by him; (3) that all matters in controversy were each finally adjudicated before the board of county commissioners of Brown county and no appeal taken therefrom."

Among the defenses claimed by respondent to this action he presents most prominently three, as follows:

"First, that the statute of limitations has run against this action; second, a final adjudication before the board of county commissioners; third, the petition charges the respondent with all the fees earned, while respondent contends that he is only bound to account for those actually received."

Any one of these defenses, if decided by the court in favor of respondent, will be decisive, practically speaking, of the entire action; and for the purposes of having them passed upon by the court at the present time the parties hereto stipulate as follows:

"1. The pleadings filed in this case are made a part of this stipulation, and the facts admitted by said pleadings are to be considered in connection with this stipulation of facts.

"2. It is admitted that respondent was the duly elected, qualified, and acting county clerk and *ex officio* clerk of the district court for the two-year term commencing January 7, 1888, and ending January 7, 1890.

"3. That no cause of action exists against respondent for the second year of his term, being from January 7, 1889, to January 7, 1890, for the reason that he did not receive or earn the minimum fees allowed him for said year.

"4. It is admitted that during the year 1891 plaintiff employed a person (claimed by relators and denied by respondent to have been an expert) to examine the records of the respondent's office for said official year of 1888; that said examiner made a report in July, 1891, showing a shortage in accounts of respondent for said year in the sum of $861.09; that said estimate of the shortage was based entirely on what the records show to have been earned, as figured upon his basis of charges, regardless of what was actually charged and collected.

"5. It is admitted that respondent faithfully accounted for all the fees entered upon his fee book.

"6. It is admitted that respondent at all times kept a fee book, and that said fee book, together with all other records of said office, was at all times open to the inspection of the board of county commissioners of Brown county, and all other persons whomsoever.

"7. It is admitted that at the end of each quarter of each official year the respondent presented a quarterly report of his fees to the board of county commissioners of said county, each of which reports corresponded with his fee book, and that each of said reports was by the said board of county commissioners, within a short time thereafter, examined and approved.

"8. It is admitted that on January 10, 1889, respondent made an annual report for said official year of 1888 to the board of county commissioners of said county, which report was as follows:

Receipts first quarter.....	$441 70	
Receipts second quarter.....	353 00	
Receipts third quarter.....	479 95	
Receipts fourth quarter.....	409 35	
Receipts for abstracts.....	162 44	
Salary as clerk of board.....	400 00	
Making total receipts for the year.....		$2,246 44
Salary as register of deeds.....	$1,500 00	
Making tax list 1888.....	341 70	
Clerk hire.....	665 35	
		2,507 05
Balance due for making tax lists.....		$260 61

"That said report was on said day examined by the board of county commissioners, in regular session assembled, and by them approved; that on said day respondent filed a bill for the balance due him under said report of $260.61, which bill was, on January 22, 1889, by the county commissioners of said Brown county duly audited and allowed to respondent, and a warrant ordered drawn on the treasurer of said county for said sum in payment

of said balance due to respondent, and said warrant was so drawn and by the treasurer of said county paid to respondent; that no appeal from the allowance of said bill or from the allowance of said annual report, or from the allowance of any quarterly report for any quarter of said year, was ever taken.

"9. The respondent admits that the relators and their predecessors in office did not actually know until July, 1891, that respondent was only entering on his fee book the items of fees actually received, and that they obtained this information in July, 1891, from the report of the expert above mentioned. But it is admitted by both parties hereto that relators and their predecessors in office had the same opportunities for examination of the records by themselves, or by any one employed by them, at all times theretofore, and that respondent did not misrepresent or conceal such custom.

"10. It is admitted that respondent entered on his fee book and duly accounted for each and every item of fees actually collected or received for the official year of 1888.

"11. This stipulation is entered into for the sole and only purpose of forming a basis for a motion for judgment on the pleadings and this stipulation, to be filed by the respondent. If the court decides any one of the three propositions of law above mentioned in favor of respondent, the writ of *mandamus* is to be denied and cause dismissed at the cost of relators. If the court overrules said motion, the cause shall proceed to trial, and neither party shall be bound by any statement or admission contained in this stipulation."

The first question presented by this stipulation and motion is whether the cause of action is barred by the statute of limitations. It was stipulated that the respondent did not receive or earn, during the second year of his term of office, the minimum amount of fees which he would have been entitled by law to retain. (See paragraph 3, copy of stipulation herein.) It is the account of the fees of respondent as county clerk during the year 1888, and the

acts and omissions of the parties concerned, which we are now to examine and consider, and determine whether the present action arose in favor of the relators against respondent, and if so, when it accrued. A *mandamus* may be issued even after the expiration of the term of office of a county clerk to compel the performance of his duty of reporting all the fees of the office, and to pay into the treasury of the county any excess of such fees above the amount of which he was entitled by law to retain. (*State v. Shearer*, 29 Neb., 477.) It may be considered as settled that the action is a proper one, and we will turn to the question of when the right of action accrued.

In section 42 of chapter 28 of the Compiled Statutes it is provided that every county clerk whose fees shall, in the aggregate, exceed the sum of fifteen hundred dollars per annum, shall pay such excess into the treasury of the county in which they hold their respective offices. There are further provisions by which clerks and other officers are allowed a larger amount per annum in counties in which the population is more than a certain stated number; also, provisions are made for the allowance of deputies or assistants in certain cases; but we are not concerned with any except the first provision to which we have just alluded. By section 43 of the same chapter the duty is cast on each officer named in section 42 to make a report, under oath, to the board of county commissioners on the first Tuesday of January, April, July, and October of each year, which must show the different items of fees received during the time covered by each report, from whom, at what time and for what service, the total amount of fees received by the officer since the last prior report, and also a report showing the amount received for the current year. Section 44 is as follows: "Each of the officers named in section 1 of this act shall keep a book, which shall be provided by the county, and which shall be known as the fee book and shall be a part of the records of such office, and in which shall be entered each and every item of fees collected, showing in separate columns

the name of the party from whom received, the time of receiving the same, the amount received, and for what service the same was charged."

It is claimed by relators that the items of fees which were not entered by respondent in the fee book and shown by his reports were all items of which there should have been entries in the fee book during the year 1888. If so, then the right of relators to demand that they be so entered accrued not later than the time when the report was made for the current year, which presumably, and certainly to fulfill the intent of the law and the law-makers, would be made up from the fee book and show the account therein contained, either in full or in a condensed or abridged form. That the right to the action then accrued, and the action not having been commenced within four years from that time, was barred by the statute of limitations. In the case of *State v. King*, 34 Neb., 196, an action in which it was sought to obtain a writ of *mandamus* to compel the respondent, who had been treasurer of the county, but whose term had expired, to pay into the treasury of the county a certain sum of money which it was alleged he had retained of the funds of the office in excess of the amount to which the law entitled him, it was held: "A proceeding by *mandamus* is barred by the statute of limitations at the expiration of four years from the time the right to the writ accrued;" and in the body of the opinion, written by NORVAL, J., it was said: "It was the duty of the respondent, immediately upon the expiration of his term of office, to pay over to his successor in office all moneys then in his hands belonging to Gage county, and upon his failure so to do a cause of action accrued in favor of the county. It will be observed that the petition was filed in the court below more than four years after the expiration of the respondent's term of office and after the accruing of the alleged cause of action. The case, therefore, falls directly within the rule laid down by this court in *State v. School District*, 30 Neb., 520, where it was held that the statute of limitations applies to the proceed-

ing by *mandamus*, and that such an action is barred at the expiration of four years."

But it may be claimed that the presentation of the alleged incomplete reports, which, it will be borne in mind, corresponded in all things to what appeared in the fee book in its entries, etc., for the respective periods covered by the reports, operated as a fraud on the relators, hence the statute of limitations did not begin to run until the fraud was discovered, in accordance with the terms of section 12 of the Code of Civil Procedure, wherein it is provided, among other things, as follows, referring to the time within which actions can be brought: "Within four years, * * * an action for relief on the ground of fraud, but the cause of action in such case shall not [be] deemed to have accrued until the discovery of the fraud." That it was not discovered until in July, 1891, when they ascertained it from the report of the expert who had been employed for the purpose and who had examined the books and papers of the county clerk's office in use during the year 1888, the year in question, of the respondent's term as such officer. This seems hardly an action which comes within the meaning of the terms of the section of the Code which we have just quoted, *i. e.*, "An action for relief on the ground of fraud," but allowing it to be such, the stipulation shows that the estimate of the shortage was based entirely upon what the records of the office showed to have been earned, figured on the basis of the charges which the expert who examined the books determined should have been made by the respondent for the different duties of the office which the books disclosed had been performed by him, regardless of what the respondent had actually charged and collected. And from the pleadings it appeared that the alleged shortage was, in part at least, composed of sums which, the relator claims, should have been charged for services, in addition to what the respondent had charged and collected for such services as shown in the fee book and also in the quarterly reports to the board of such items. The statute

in regard to fees prescribed the true amounts to be charged, and they were known to the relators, or must be presumed to have been known. The fee book and reports showed the services had been performed, all of which, to the extent such items are included in the estimated shortage, was sufficient to call the attention of the board, to give it notice of any discrepancy between the charges as made by respondent and entered on the books, and as they should have been according to statute. In regard to any services which had been rendered, and for which no charges appeared in the fee book or reports, the matters to which they were referable were of record and open to the examination and inspection of the relators; hence of them they had constructive notice. This was such knowledge of the facts as to be called a "discovery of the facts," within the meaning of the statute, and this cause of action accrued and the statute began to run at the time the relators became possessed of such knowledge. "An action for relief on the ground of fraud may be commenced any time within four years after a discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery." (*Parker v. Kuhn*, 21 Neb., 413; *Hellman v. Davis*, 24 Neb., 793; *Wright v. Davis*, 28 Neb., 479; *Gillespie v. Cooper*, 36 Neb., 775; *Norris v. Haggin*, 28 Fed. Rep., 275.)

There are other questions presented, but as the conclusions reached effectively dispose of the action, and for such reason that it may be said that the other questions, which present the cause on its merits, are not necessarily or properly before the court, since any litigation of them in this action was barred by the statute of limitations, we deem it proper not to discuss them at this time. It follows from the views herein expressed that the application for the writ must be denied and the action dismissed at costs of relators.

DISMISSED.

MCCORMICK HARVESTING MACHINE COMPANY V. JULIUS SEEMAN.

FILED OCTOBER 7, 1896. No. 6785.

1. **Review:** CONFLICTING EVIDENCE. A verdict rendered upon conflicting evidence will not be disturbed if there is sufficient evidence to sustain it.
2. **Witnesses:** CREDIBILITY. The trier or triers of a cause cannot disregard other testimony of a witness because the witness, while testifying, made a misstatement of a material fact, unless the false statement was willfully and intentionally made.
3. ——: ——. It is for the jury to determine whether a false statement by a witness was willful and intentional, or made through mistake and honestly.

ERROR from the district court of Phelps county. Tried below before BEALL, J.

W. P. Hall, Hall, St. Clair & Roberts, and *J. R. Patrick,* for plaintiff in error.

A. J. Shafer and *S. A. Dravo, contra.*

HARRISON, J.

In this action the McCormick Harvesting Machine Company sought a recovery against Julius Seeman in the sum of $70 and accrued interest thereon, alleged to be due the company as a part of the purchase price in the sale by it to the defendant of a harvester and binder. The defendant admitted the sale to him of the machinery, and that he executed and delivered to the company, at the time of the purchase, three promissory notes evidencing the consideration moving to it in the transaction, two of which were for the sum of $100 each and one for $70, but claimed to have paid in full the amounts due the company by the three notes given at the time he bought the harvester and binder. A trial in the district court resulted favorably for the defendant, hence the pre-

sentation of the case to this court by error proceedings on the part of the plaintiff.

It was admitted, or shown and not controverted, that the amount due on each of the $100 notes had been paid, and as to the note in suit it was sought to be established by the evidence adduced on behalf of defendant that at the time the first note of the three (which was one for $100) became due, it was paid by defendant at a bank in Holdrege, to which it had been sent by the company for collection, and that the original $70 note was also then in the bank, and the officer of the bank, to whom the money in payment of the $100 note was handed by defendant, intending to stamp the $100 note "paid," by mistake did so mark or stamp the $70 note; that to correct this another note in the sum of $70, as to dates of execution and payment, and in its terms identical with the original one, was written and signed and pinned to the original, and the two retained by the bank for the company; that at the time of the maturity of the $70 note, or probably a few months after its maturity, some eighteen months or two years after the date of the payment of the first of the three notes, when it was claimed in evidence the mistake in the stamping occurred, the defendant testifies that he paid the $70 note, but was only given the original and the duplicate was then retained by the company, and this suit afterwards instituted to recover its amount. On the other hand, the evidence introduced on the part of the company was directed to an attempt to prove that the notes, when executed, were sent to the plaintiff or to one of its officers, and thence forwarded to the banker in Holdrege, with orders to obtain others, or duplicates, of the defendant, the originals to be delivered to him, this being considered desirable because of some irregularities or mistakes appearing on the face of the originals; and the evidence on the part of the company was further to the effect that the $70 of the price of the machine had never been paid by the defendant. The evidence in respect to the vital

points involved in the suit was directly conflicting, but there was sufficient to support the verdict rendered, hence it will not be disturbed.

It appears that this cause was first commenced before a justice of the peace, and from the judgment rendered was, by appeal, removed to the district court; that in the justice court the defendant, to defeat a recovery, claimed that he never signed the note in suit; that it was a forgery, and so testified. At the trial in the district court he stated that when he was sued before the justice of the peace, he, knowing that he had paid the machine note in the sum of $70 and in the time which had intervened between giving the duplicate and the date this suit on it was brought, had forgotten the circumstance of its execution and honestly concluded that it was a forgery and that he had never signed it; but at some date subsequent to the trial had before the justice of the peace, and while the case was pending in the district court, to which it had been appealed, he met and had a conversation with a brother who was present when the note in suit was made, and also when the original, of which it was a duplicate, was paid, and after his brother had recalled to his, defendant's, mind some of the facts in regard to the execution of the duplicate note, he remembered the fact of signing it and the attendant circumstances, and knew that he had been mistaken in the conclusion that the duplicate or second $70 note was a forgery, and his evidence in the trial before the justice of the peace, that he never executed it, erroneous. He further testified that his former belief that he had not signed the note in suit, though erroneous, was an honest and unintentional mistake, arising in his lack of remembrance of signing the note coupled with the fact that he had paid the original; that the two together led him to the conclusion, false though it was, to which he gave evidence before the justice of the peace. The defendant and his brother each stated, when testifying, that when the note in suit was made it was written by the banker to whom

the payment was then being made, of the amount due on one of the notes for the sum of $100. This it was subsequently, and during the course of the trial, admitted was not true; that the duplicate was not drawn by him as had been stated. It is strenuously insisted that the defendant having, both in the trial before the justice of the peace and in the district court, stated what was afterwards conceded by him to be contrary to the facts, and his brother, during the trial in the district court, having also made erroneous statements in regard to fact, the jury should have disregarded the whole of the evidence of each of them; and if it had done so the verdict was without any support in the evidence, and the jury not having performed its duty required by the existing conditions, it is for us to determine that the evidence of defendant and his brother should have been rejected, and there being no other evidence in support of the theory or defense of payment, to set aside the judgment and verdict as not sustained by the evidence. To this we cannot agree. The rule is that a misstatement of fact, to warrant a jury in disregarding other evidence of the witness, must be in regard to a material fact in the issues of the case on trial, and it must be willfully and intentionally made. The facts as to which the defendant and his brother made erroneous statements were such as to which there might be an honest mistake on the part of the witnesses in their belief, hence arose their apparent untrue evidence. Their credibility and whether the false statements were willful and intentional were matters for the determination of the jury, and its solution of these questions, as embodied in the verdict, must stand. There are no other alleged errors argued in the briefs, and as such as were urged have been declared ineffective the judgment of the district court must be

AFFIRMED.

ELI PLUMMER ET AL. V. DE FOREST E. GREEN, TRUSTEE.

FILED OCTOBER 7, 1896. No. 6736.

1. **Evidence:** ADMISSIBILITY OF NOTE AND CHATTEL MORTGAGE: FRAUD. A negotiable promissory note imports, or is, *prima facie* evidence of a consideration, and when such a note and the accompanying chattel mortgage securing its payment are properly identified they may be received in evidence, and this is true in an action in which their validity is attacked on the ground of fraud, as against the rights of the creditor of the maker.

2. **Note and Mortgage From Guardian to Ward.** A guardian of a minor may execute and deliver to the ward, or a trustee for the ward, a note and mortgage to evidence an indebtedness of the guardian to the estate of the ward, and such instrument will be valid and binding notwithstanding the fact that the guardian, as such, had theretofore given a bond to the proper court. The note and mortgage are but additional and further security, beyond the bond, for the payment of the money to the ward's estate.

3. ———: RIGHTS OF CREDITORS. The delegation of the trust by the guardian to the payee of the note and mortgage, in and of itself, was without effect on the rights of the creditors, and hence was an action on the part of the guardian of which the creditors could not complain.

4. ———: PAYMENTS: EVIDENCE: CONVERSION. Evidence was offered to show that the amount of the indebtedness evidenced by the note and mortgage given by the guardian to the trustee for the wards had been considerably lessened by payments made to the wards' estate by the guardian, which, on objection, was excluded. The action was one for recovery of the creditors for the conversion of the property included in the mortgage. *Held*, That the trustee could not recover any sum in excess of the amount due on the mortgage, hence the evidence offered was competent and should have been admitted.

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

The opinion contains a statement of the case.

Mockett, Rainbolt & Polk and *Reese & Gilkeson*, for plaintiffs in error:

Where a transfer to a relative deprives creditors of payment for goods sold to the transferrer, it devolves

upon the transferee to prove the actual consideration paid, and the *bona fides* of the transaction. (*Bartlett v. Cheesbrough*, 23 Neb., 767; *Carson v. Stevens*, 40 Neb., 112; *Plummer v. Rummel*, 26 Neb., 142; *First Nat. Bank v. Bartlett*, 8 Neb., 319; *Aultman v. Obermeyer*, 6 Neb., 260; *Thompson v. Loening*, 13 Neb., 387.)

The office of trustee cannot be delegated, as it is one of personal confidence. (Flint, Trustees, sec. 151; *Trutch v. Lamprell*, 20 Beav. [Eng.], 116; *Beckman v. Bonsor*, 23 N. Y., 298.)

Charles O. Whedon, contra:

A negotiable promissory note imports a consideration and may be given in evidence without proof as to what the consideration actually was. (*Search v. Miller*, 9 Neb., 26; Edwards, Bills & Notes [2d ed.], 76; Chitty, Bills, 80; *Burnham v. Allen*, 1 Gray [Mass.], 496.)

Whoever alleges that a promissory note is without consideration has the burden of proof. (*Flint v. Phipps*, 16 Ore., 437; *Cagle v. Lane*, 49 Ark., 465; *McCormick Harvesting-Machine Co. v. Jacobson*, 42 N. W. Rep. [Ia.], 499; *Andrews v. Hayden*, 11 S. W. Rep. [Ky.], 428; *Cunningham v. Hoff*, 118 Ind., 263.)

HARRISON, J.

This action was instituted by De Forest E. Green, as trustee for Gertie, Beryl, and Joe Roberts, minors, against Eli Plummer, Rosa A. Perry, and John Fitzgerald, partners doing business at Lincoln under the firm name of Plummer, Perry & Co., to recover the damages alleged to have been caused by the conversion by the firm of certain property belonging to the plaintiff. It was pleaded in the petition, in substance, that there had been executed and delivered to De Forest E. Green, as trustee for said minors, by one G. B. Britton, on July 10, 1891, a promissory note in the sum of $1,037.50, and as security for the payment of the indebtedness evidenced by the note a chattel mortgage on a stock of groceries

and store furniture and fixtures, all in a building in the city of Lincoln; that the mortgage was duly filed on the day of its execution, and possession of the property covered by it was taken on the 13th of July, 1891; that after all the foregoing had occurred the defendant firm converted the whole of such property to its use, to the damage of plaintiff. The answer contained a general denial and a justification of taking the property, in that it was under a writ of attachment in favor of the firm heretofore stated. The chattel mortgage was stated to be an assignment for the benefit of creditors generally. It was further pleaded that the minors were the children of the mortgagor, G. B. Britton, and she had been duly appointed their guardian; that such appointment was made by the district court of Montgomery county, Iowa, and was in full force and effect at the time the note and mortgage were executed under which plaintiff herein claimed to hold the possession of the property alleged to have been converted; that G. B. Britton had given bond for the faithful performance of all her duties as guardian, and to account for and pay over all moneys of her wards coming into her hands, or control, as such guardian; that the minors were not creditors of G. B. Britton, and that the mortgage was an attempted transfer of the property to the plaintiff as their trustee, and was made with the intent to cheat and defraud the creditors of G. B. Britton. It was further stated that any and all property in her hands left to said minor children was placed there by the district court of Montgomery county, Iowa, and that said minor children could in nowise be creditors of said G. B. Britton; that said pretended transfer by said pretended chattel mortgage was made with intent to cheat and defraud, hinder and delay the creditors of said G. B. Britton. The reply contained an admission that said G. B. Britton had been the owner of the property involved, also that defendants, through the sheriff, took possession of the property under an order of attachment issued in an action by them against G. B. Britton, and a general

denial of each and every other allegation of the answer. As a result of a trial of the issues plaintiff was awarded a verdict and judgment, to reverse which is the object of the pending error proceedings on behalf of defendants.

It appears from the evidence that Mrs. G. B. Britton was the mother of the minors and had, by the district court of Montgomery county, Iowa, been duly appointed their guardian, had filed the bond required by law, which had been approved, and pursuant to such appointment, and in the course of her duties as guardian, had become possessed of certain money belonging to her wards, which she had used for her own business purposes,—"borrowed," she expressed it in her testimony. On July 10, 1891, Mrs. Britton was in business in Lincoln; had and was conducting there a grocery or general store, in which, owned by her and in her possession, was the property, the seizure of which under the writ of attachment is the basis of the complaint in this action. On the date mentioned she claims, actuated by a desire to secure to and for the benefit of her children the repayment of the amount of money which she, as their guardian, had received for them and had herself used, she executed and delivered to the plaintiff, as trustee for the children, the note and mortgage by virtue of which plaintiff claimed the property. It further appears that plaintiff took possession of the property, stock of goods, etc., on the day the mortgage was executed and delivered to him, and was in possession thereof at the time the writ of attachment was levied, July 13, 1891. On the part of the plaintiff the signature to the note and mortgage were proved, or the instruments were identified and offered in evidence. Objection to their reception was interposed, and it was urged then, and is now, that it devolved upon the plaintiff to show an indebtedness existing, which the note and mortgage were given to evidence, —to show the consideration. The note imported a consideration and was *prima facie* evidence of a consideration (*Search v. Miller*, 9 Neb., 26); and when the note and

mortgage had been identified they were competent as evidence and it was not error to receive them.

It is insisted that, the guardian having given bond, the responsibility or liability for any default in the care of the funds of her wards would arise under the terms of that instrument and could only be recovered in an action thereon. With this argument we cannot agree. The note and mortgage were but further and additional security for the amount in the care of the guardian, and for which she was personally responsible. If she desired to give this additional security it was perfectly competent for her to do so, and the instruments executed in pursuance of her purpose were valid. The fact that she had, theretofore, given the bond as guardian could in no manner or degree bear upon or influence the question of the validity of the note and mortgage. (*Jennings v. Jennings*, 37 Pac. Rep. [Cal.], 794.)

It is also urged that the guardian held the money in trust for her wards and could not delegate the trust, and by so doing shift the responsibility of the care of the trust or relieve herself of liability for any default in its execution or any loss which might have occurred. (1 Perry, Trusts [3d ed.], sec. 402.) The transfer of the title to the trust funds and the power to collect them, by the guardian, to the plaintiff in this case did not concern the defendants, and was something of which they could not complain in an action to recover from them property which had been subjected to the payment of the money due the wards, and which defendants had converted to their own use.

Evidence was offered on behalf of defendant in an effort to prove that the amount of the funds belonging to the minors, as evidenced by the note given to plaintiff as their trustee, had been considerably lessened by payments made by the guardian subsequent to the time the note was executed. This class of evidence was objected to by counsel for plaintiff and was excluded by the court. In this we think the trial judge erred. The plaintiff was

not entitled to recover of defendants, if anything, more than was due from Mrs. Britton to her wards; hence evidence which tended to show the true amount of such indebtedness was competent and material and its exclusion prejudicial to the rights of plaintiffs in error. There was a number of offers of the sort of evidence alluded to, and we will not notice them in detail or refer to them particularly. The exclusion of the evidence was prejudicial error and calls for a reversal of the judgment.

REVERSED AND REMANDED.

DEMPSTER MILL MANUFACTURING COMPANY V. FIRST NATIONAL BANK OF HOLDREGE.

FILED OCTOBER 7, 1896. No. 6733.

1. **Fraudulent Conveyances:** PREFERRING CREDITORS. An insolvent debtor has the right to pay or secure a creditor to the exclusion of others, and the intention to defraud cannot be inferred from the mere fact that such preference was given.
2. **Review:** INSTRUCTIONS. An allegation of error as to the giving of a group of instructions is insufficient, unless all the instructions included in such group are erroneous.
3. **Evidence:** LOST DOCUMENTS. Parol testimony is not admissible to prove the contents of a written document until its absence is accounted for.

ERROR from the district court of Phelps county. Tried below before BEALL, J.

G. Norberg and *C. C. Flansburg*, for plaintiff in error.

Rhea Bros. and *W. P. Hall*, *contra.*

NORVAL, J.

On, and for some time prior to, December 18, 1891, J. G. Moore & Co. were engaged in the windmill and

pump business at Holdrege, and on said date they executed a bill of sale to the First National Bank of Holdrege of all the firm property, consisting of the stock on hand, horses, etc., for the expressed consideration of $3,538.94. The bank at once took possession of the property and caused the bill of sale to be recorded. The next day the Dempster Mill Manufacturing Company commenced an action in the county court of Phelps county against said J. G. Moore & Co., and an order of attachment was issued in the case and placed in the hands of the sheriff, who executed the same by levying upon a portion of the property covered by the said bill of sale. The bank thereupon brought replevin against the sheriff for the recovery of the property. Subsequently the attaching creditor was substituted as defendant. From a verdict and judgment in favor of the bank the defendant prosecutes error.

The assignments relied upon for a reversal of the judgment may be classified as follows:

1. The verdict is contrary to the law and the evidence.
2. Erroneous rulings of the court upon the admission and exclusion of testimony.
3. Errors in the instructions.

Under the first head it is argued that the transfer of the property to the bank by Moore & Co. was fraudulent and void as to the creditors of the latter. The evidence introduced by the plaintiff tends to establish that when the bill of sale in question was executed Moore & Co. were indebted to the bank in about $2,600; that the consideration for the transfer of the stock of goods, horses, notes, and accounts was the said indebtedness, $257 paid at the time by the bank to Moore & Co. and the assuming by the bank the following debts of Moore & Co., viz.: Cooper & Cole Bros. for $622.20; Nate Brown in the sum of $59; Bogue & Co. for $89, and W. P. Hall for $6. The said several amounts assumed have been paid by the bank. It was also shown that prior to the sale George W. Updike, the president of the bank, and one Rathburn

made an examination of the stock of goods and the horses and estimated their value at $1,800 or $2,000, and they valued the notes and accounts at $1,345. The evidence is conflicting as to the actual value of the property covered by the bill of sale when the transfer was made; but that on behalf of the bank was sufficient to authorize the jury in finding that the consideration for the purchase was fair and adequate, and that the sale was made in good faith and with no intention on the part of the officers of the bank to defraud the creditors of Moore & Co. If any reliance can be placed upon the testimony of plaintiff's witnesses, the sole purpose of the purchase was to obtain payment of a *bona fide* debt due. That by the transfer other creditors of Moore & Co. were prevented from securing or collecting their claims does not stamp the transaction as fraudulent. A failing debtor has the right to pay or secure a creditor to the exclusion of others, and the intention to defraud will not be inferred from the mere fact that a preference was given. (*First Nat. Bank of Denver v. Lowrey*, 36 Neb., 290; *Jones v. Lorce*, 37 Neb., 816; *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 800; *Farwell v. Wright*, 38 Neb., 451; *Hewitt v. Commercial Banking Co.*, 40 Neb., 820; *Meyer v. Union Bag & Paper Co.*, 41 Neb., 67; *Hunt v. Huffman*, 41 Neb., 249; *Chaffee v. Atlas Lumber Co.*, 43 Neb., 224.)

Complaint is made of the action of the court in giving instructions 4, 6, and 13 requested by the plaintiff below. As no exception was taken to the fourth instruction at the time it was given, error cannot be predicated thereon in this court. (*Omaha Fire Ins. Co. v. Berg*, 44 Neb., 522.) It follows that the other instructions cannot be reviewed, since the record discloses that both in the motion for a new trial and in the petition in error the assignment was to the instructions *en masse*. (*Diers v. Mallon*, 46 Neb., 126; *Kaufmann v. Cooper*, 46 Neb., 645; *McCormal v. Redden*, 46 Neb., 776.)

It appears that one Nate Brown made an invoice of the property at the request of an officer of the bank in De-

cember, 1891, and placed the value at $4,854. The same person was one of the appraisers in this case to determine the valuation of the property for the purpose of fixing the amount of the bond to be given by the plaintiff, and he also testified by deposition on behalf of the defendant that the value of the stock of goods was the same as stated in the inventory mentioned above. The court permitted John Craig, over the objection and exception of the defendant, to testify to the valuation given in the appraisement, and that he had compared the same with the invoice made by Brown, and that the value of the property in this suit was put down in the appraisement at the sum of $4,300, while the same articles were invoiced at $1,380. Manifestly the testimony of the witness Craig was incompetent, and the objection to its introduction should have been sustained. The appraisement was the best evidence to prove its contents, but it was not introduced, nor was any attempt made to lay the foundation for secondary evidence. It is true the appraisement is part of the record, but in not such a sense as to make it part of the proofs upon the trial, unless offered and received as evidence, which, as already stated, was not done. Again, the purpose of the testimony of Craig was to impeach or contradict the defendant's witness Brown upon the question of value, and that, too, without laying any foundation therefor, by calling Brown's attention to the appraisement and giving him an opportunity to explain, if he so desired. The theory of the defendant was that the bill of sale was fraudulent, and testimony was introduced to show that the consideration for the transfer was so grossly below the value of the property as to render the sale void as to creditors of Moore & Co. There being such a decisive conflict in the evidence as to the actual value of the property, the testimony of Craig could not have been otherwise than prejudicial to the defendant, and its admission is error, for which the judgment must be reversed and the cause re-

manded, without considering the other assignments of error based upon the rulings during the trial.

REVERSED AND REMANDED.

RAGAN, C., not sitting.

STATE OF NEBRASKA, EX REL. CITY WATER COMPANY, V. CITY OF KEARNEY ET AL.*

FILED OCTOBER 7, 1896. No. 8728.

1. **Statutes:** AMENDMENTS. It is the settled law of this state that where it is sought to amend a legislative enactment the amended law must be set out in the new act and, in addition, contain a provision for the repeal of the old law so amended.

2. ———: SUBDIVISIONS: AMENDMENTS. The amendment of a subdivision of a section of a designated statute is not unconstitutional merely because the amendatory act does not contain the entire section as amended. It is a sufficient compliance with the requirements of the constitution if the new act contains the subdivision as amended and a repealing clause.

3. ———: ———: ———. The legislative enactment approved March 2, 1885, entitled "An act to amend subdivision 1 of section 69 of chapter 14 of the Compiled Statutes" (Session Laws, 1885, p. 161, ch. 19), does not conflict with section 11, article 3, of the constitution, providing that "no law shall be amended unless the new act contains the section or sections so amended," etc.

4. ———: TIME OF GOING INTO EFFECT. Under the constitution of this state, a statute which contains no emergency clause does not become operative until three calendar months after the adjournment of the session of the legislature at which it is passed.

5. ———: AMENDMENTS: CONSTITUTIONAL LAW. Though there be apparent confusion in the application of an act to an existing statute sought to be amended thereby, the amendatory act will not be declared unconstitutional where the intention of the legislature is not doubtful and the amendment is consistent with the title and subject-matter of the original law.

6. ———: ———: ———: CITIES AND VILLAGES. *Held*, That the act approved March 10, 1885, to amend section 69 of an act entitled

*For opinion on rehearing see *post*, p. 337.

"'An act to provide for the organization, government, and powers of cities and villages,' approved March 1, 1879" (Session Laws, 1885, p. 162, ch. 20), does not conflict with section 11, article 3, of the constitution, though an act was passed with an emergency clause on March 2, 1885, amending a subdivision of said section 69.

7. ———: CONSTRUCTION. Specific provisions of a statute relating to a particular subject will prevail over general provisions in the same enactment.

8. **Taxation**: WATER COMPANIES: CITIES. Under subdivision 15, section 69, chapter 14, Compiled Statutes, 1885, a tax not exceeding five mills on the dollar of the assessed valuation could be levied by a city of the second class or village "to pay for water furnished such city or village under contract."

9. **Constitutional Law**: CONTRACTS. The legislature is powerless to pass a law impairing the obligation of contracts.

ORIGINAL application for *mandamus* to compel the mayor and council of the city of Kearney to make an appropriation and levy a tax to pay for water furnished by relator to the city. *Writ allowed.*

Marston & Marston, for relator.

William Gaslin, *contra.*

NORVAL, J.

This is an original application for a peremptory writ of *mandamus* to require the mayor and council of the city of Kearney to make an appropriation and levy a tax sufficient to pay for water furnished by the relator to the city. There is no controversy over the facts, which, so far as may be necessary to an understanding of the questions involved, may be summarized as follows: On the 18th day of August, 1886, the city of Kearney, by ordinance duly passed, published, and approved, granted to the American Water-Works & Guarantee Company the privilege of constructing and operating in the city, for the term of twenty-five years, a system of water-works, and also contracted with said company for the rent of fire hydrants during said period and for supplying water to the city. By the terms of the ordinance and contract

the company was to put in for the use of the city forty-five fire hydrants, and it agreed to pay as rent therefor at the rate of $66 2-3 each per annum for the said term of twenty-five years, payable semi-annually, on the first day of January and July in each year. It was further provided that the city should have the right to require said company, or its assigns, from time to time to make extensions of the pipe system of said water-works and to erect upon such extensions additional hydrants at the rate of one to every 400 feet of such extension, the city to pay rent for the use of such additional hydrants at the rate of $40 per annum for the unexpired term of said franchise. Subsequently, in September, 1886, the said American Water-Works & Guarantee Company assigned all its franchises, rights, privileges, and interests obtained in, under, and by virtue of said contract and ordinance to the relator, and the latter constructed said water-works in accordance with, and pursuant to, said ordinance and contract, and the same were accepted by the city on the 3d day of March, 1887, and from thence hitherto relator has furnished the supply of water as by said ordinance and contract required. It also appears that the pipe line of said system of water-works, in pursuance of said ordinance, has been extended from time to time, and likewise the number of fire hydrants has been increased to 106, in addition to the original forty-five, through all of which relator has supplied water to the city up to the present time in compliance with said contract. The municipal authorities of the city of Kearney have levied and collected taxes upon the taxable property in said city sufficient to pay, and have paid, for all water supplied the city prior to the year 1896. There are no available funds in the treasury of the city to pay for the water furnished and to be furnished during the present municipal year, and the city council, being in doubt as to its power or right in the premises, has failed and refused to make any levy to raise funds with which to pay the indebtedness. At the time the water-works

were erected a levy of five mills upon the assessed valuation of the taxable property of said city was ample to pay the hydrant rental, but owing to the increase in the number of hydrants as aforesaid, it will now require a levy of about nine mills on the dollar of the assessed valuation to raise a sufficient amount to pay for the water furnished the city by the relator during the ensuing year.

The question presented for consideration is as to the power of the city of Kearney to levy a tax for the purpose indicated, and the determination thereof necessitates an examination and consideration of the various legislative enactments bearing upon the subject.

The legislature in 1879 passed an act entitled "An act to provide for the organization, government, and powers of cities and villages." (Session Laws, 1879, p. 191; Compiled Statutes, 1881, ch. 14.) This act conferred no power or authority upon cities containing less than 15,000 inhabitants to contract for water or to levy a tax to pay for the same. In 1881 various sections of said law were amended, among others sections 1 and 69. The amended section 1 declared all cities, towns, and villages containing more than 1,500 and less than 25,000 inhabitants to be cities of the second class and to be governed by said original law, unless a village government should be adopted. (Session Laws, 1881, p. 163.) Section 69 of said act of 1879 contained thirty-six consecutively numbered subdivisions, and the legislature of 1881, in amending said section, engrafted onto subdivision 15 thereof a provision empowering cities of the second class and villages "to make contracts with, and authorize, any person, company, or corporation to erect and maintain a system of water-works and water supply, and to give such contractors the exclusive privilege, for a term not exceeding twenty-five years, to lay down in the streets and alleys of said city water mains and supply pipes, and to furnish water to such city or village and to the residents thereof, under such regulations as to price, supply,

rent of water meters as the council or board of trustees may from time to time prescribe by ordinance for the protection of the city, village, or people." (Session Laws, 1881, p. 176.) While the foregoing provision gave to cities of the class of Kearney the power to grant a franchise to individuals or corporations to erect water-works and to contract for the furnishing to the municipality of water, neither it nor any other statute then in force contained any specific provision for the levying of a tax to pay for the water so furnished.

The next session of the legislature, held in 1883, passed an act entitled "An act to amend section 69, chapter 14, entitled 'Cities of the Second Class and Villages.'" (Session Laws, 1883, p. 117, ch. 15.) By this act it was sought to amend said section 69 and thereby remedy the defects or omission indicated above, but the act of 1883 is invalid, because it contained no provision for the repeal of the original section attempted to be amended, as required by section 11 of article 3 of the constitution. Under the decisions of this court, said act of 1883 was invalid, since it contained no repealing clause. (*Lancaster County v. Hoagland*, 8 Neb., 38; *Ryan v. State*, 5 Neb., 276; *City of South Omaha v. Taxpayers' League*, 42 Neb., 671.)

An attempt was made at the session of the legislature in 1885 to amend subdivision 1 of section 69 of the act of 1879 by passing the following:

"An act to amend subdivision 1 of section 69 of chapter 14 of the Compiled Statutes.

"*Be it enacted by the Legislature of the State of Nebraska:*

"Section 1. That subdivison 1 of section 69 of chapter 14 of the Compiled Statutes be amended to read as follows:

"Section 1. To levy taxes for general revenue purposes not to exceed ten mills on the dollar; to levy taxes not to exceed ten mills on the dollar for water-works, for fire protection, domestic purposes, and for sewerage; to levy taxes not to exceed three mills on the dollar for lighting

the streets, alleys, public grounds, and public buildings with gas, such levy to be made in any one year on all property within the limits of said cities and villages taxable according to the laws of the state of Nebraska, the valuation of such property to be ascertained from the books or assessment rolls of the assessors of the proper precinct or township; *Provided*, That no such taxes shall be levied for water-works, sewerage, or gas, or any contract shall be entered into by such city or village for a water supply, gas, or sewerage, unless the same shall have been submitted to the legal voters of such city or village at a regular or special election and carried by a majority of all the voters voting on such proposition at such election.

"Sec. 2. Subdivision 1 of said section 69, as now existing, is hereby repealed.

"Sec. 3. Whereas an emergency exists, therefore this act shall take effect and be in force from and after its passage.

"Approved March 2, A. D. 1885." (Session Laws, 1885, p. 161, ch. 19.)

It will be observed that the foregoing provides for the levying of a tax not exceeding ten mills for water supply and sewerage, in case the municipal authorities have been first empowered so to do by the requisite vote of the qualified electors. Therefore, if the said act of March 2, 1885, is constitutional and was in force at the time of entering into the contract in question by the city of Kearney, there is no room for doubt that a sufficient levy can be legally made to pay the rental of hydrants for the current year. The first inquiry is whether said legislation was enacted in the constitutional mode. It cannot escape notice that the title to the act only indicates a purpose to amend one of the thirty-six subdivisions of section 69, and the body of the statute is no more comprehensive in its scope than the title in that respect. While the act under consideration is amendatory of said

section 69, it does not contain the entire section thereby amended, but merely the subdivision charged. This does not contravene the provision of section 11 of article 3 of the constitution, which declares: "No law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." In amending statutes it is necessary that all parts of the amended law should be set forth in the new act, and the old statute so amended repealed. The constitution requires that the section as amended shall be set out. This court has more than once held that the word "section," as employed in the constitutional provision above quoted, refers to a subdivision of a legislative enactment, and that a law to amend a certain subdivision of a section which contains the subdivision so amended is not inimical to said clause of the constitution. (*State v. Babcock*, 23 Neb., 128; *Fenton v. Yule*, 27 Neb., 758; *Baird v. Todd*, 27 Neb., 782; *State v. Partridge*, 29 Neb., 158; *State v. Bemis*, 45 Neb., 724.) Those cases are directly in point, and fully sustain the validity of the act of March 2, 1885.

It is argued by the city attorney that said law was not in force at the time the franchise was granted, but had been repealed by the legislature on March 10, 1885. On that day section 69 of the act of 1879 was amended, and the original section in express terms repealed. (Session Laws, 1885, p. 162; Compiled Statutes, 1885, ch. 14.) Subdivision 15 of said section 69, as amended on March 10, 1885, confers authority upon cities of the class to which Kearney belongs, and villages, *inter alia*, "to make contracts with and authorize any person, company, or corporation to erect and maintain a system of waterworks and water supply, and to give such contractors the exclusive privilege, for a term not exceeding twenty-five years, to lay down in the streets and alleys of said city water mains and supply pipes, and to furnish water to such city or village and the residents thereof, and under such regulations as to price, supply, rent of water meters

as the council or board of trustees may from time to time prescribe by ordinance for the protection of the city, village, or people. * * * And levy and collect a general tax in the same manner as other municipal taxes may be levied and collected for the purchase of steam engines, and for the purchase, erection, or construction and maintenance of such water-works, or to pay for water furnished such city or village under contract, to an amount not exceeding five mills on the dollar in any one year, on all the property within such city or village as shown and valued upon the assessment rolls of the assessor of the proper precinct or township, in addition to the sum authorized to be levied under subdivision one of this section, and all taxes raised under this clause shall be retained in a fund known as 'Water Fund.'" (Session Laws, 1885, p. 167, ch. 20.) Subdivision 1 of this section provides for levying a tax not exceeding ten mills for general revenue purposes alone, so that the only express power given for imposing a tax to pay for a water supply is to be found in the language above quoted, which limits the rate authorized to be levied to five mills on the dollar "to pay for water furnished such city or village." This last act contained no emergency clause, hence it did not take effect until three calendar months after the adjournment of the session of the legislature for that year, so that the act of March 2 was in force and not superseded until that period. (Constitution, art. 3, sec. 24; *Roesink v. Barnett*, 8 Neb., 148; *McGinn v. State*, 46 Neb., 427.)

But it is insisted by counsel for relator that said act of March 10 is invalid because it indicated a purpose to amend "section 69 of the act of 1879," which did not then exist, and for the further reason the repealing clause attempted to repeal a section not then in force. The title is, "An act to amend section sixty-nine (69) of an act entitled 'An act to provide for the organization, government, and powers of cities and villages,' approved March 1, 1879." (Session Laws, 1885, p. 162, ch. 20.) The repeal-

ing clause designates section 69 in the same way. The argument against the invalidity of the act of March 10 is based upon the fact that section 69 of the law of 1879 was amended and the original section repealed, as already alluded to, by the legislature in 1881, and hence the title and repealing clause, in referring to 69 of the act approved March 7, 1879, as the section to be amended and repealed, was misleading. It has been held by this court that where the amendment to a statute is plain, and the intention of the legislature is so distinctly pointed out that there is no difficulty in ascertaining to what law it was intended to apply, it will not be held invalid merely because the section number of the original law and the amendment are apparently somewhat confusing. Thus, in 1879 the legislature passed an act entitled "An act concerning counties and county officers" (Session Laws, 1879, p. 353), which was carried into the Compiled Statutes of 1881 and 1885 as chapter 18. On March 30, 1887, a bill was passed and approved by the governor to amend section 25 of said chapter, which contained an emergency clause and repealed the original section. On the next day an act was passed to amend subdivision 2 of said section 25 and section 26, the title to the bill being "An act to amend the second division of sections 25 and 26, chapter 18, of the Compiled Statutes of 1885," etc. (Session Laws, 1887, p. 355, ch. 28.) The validity of this last enactment was called in question in *State v. Babcock*, 23 Neb., 128, upon the same ground now urged against the act of March 10, 1885, but the objection was overruled. The court in the opinion say: "Two questions are presented by the record: First, does section 25, as amended on the 30th day of March, 1887, take the place of section 25, chapter 18, Compiled Statutes of 1885? Second, is the amendment of section 25, passed and approved March 31, 1887, in conflict with section 11, article 3, of the constitution? As to the first proposition, the amendment took immediate effect upon its passage and was in force when the act referred to amending the second division of sec-

tion 25, chapter 18, was passed and took effect. It is true that the amendment did not date in the year 1885, but this would lead to no confusion, because the chapter amended is found in the compilation of 1885. This court has held heretofore that all that the law requires is that the amendatory statute shall be definite and certain as to the statute amended and germane to the title of the original act. And that may be accomplished as well by designating the chapter in the Compiled Statutes as by referring to the act by its title. The legislature alone decides upon the title of an act or an amendment thereto, and it will not be declared unconstitutional unless it is clearly so. (*Dogge v. State*, 17 Neb., 143.) In our view, therefore, the section intended to be amended is clearly pointed out, and is not void as being within the constitutional inhibition." The same doctrine was held and applied in *Fenton v. Yule*, 27 Neb., 758; *Baird v. Todd*, 27 Neb., 782; *State v. Partridge*, 29 Neb., 158. In the light of those adjudications we must hold that the act of March 10, 1885, under consideration, was not invalid by reason of its title or repealing clause, and that it repealed the act of March 2 of the same year. It follows that on the 18th day of August, 1886, the time the contract was made for the erection of the Kearney water-works, the city possessed the power to levy a tax not exceeding five mills on the dollar in any one year to pay for water supplied to the municipality under said contract. It is true subdivision 2 of said section 69 as amended by the act of March 10, 1885, contains a clause authorizing cities and villages "to levy any other tax or special assessment authorized by law," yet this general provision must give way to the special provision relating to levying a tax to pay for water furnished the city under contract. (*McCann v. McLennan*, 2 Neb., 286; *Albertson v. State*, 9 Neb., 429; *Richardson County v. Miles*, 14 Neb., 311.)

There is another piece of legislation yet to be noticed. On March 31, 1887, the legislature so amended said section 69 as to authorize a levy not exceeding seven mills

to pay for water supplied the city under contract. (Session Laws, 1887, p. 291.) This law was not upon the statute books when the ordinance of the city of Kearney granting the franchise in question was adopted, but section 69, as amended on March 10, 1885, was at that time in operation, which limited the rate of taxation to meet the contracted liability to five mills on the dollar for a single year. The law in force at the time of making the contract entered into and formed a part thereof. The subsequent amendment of 1887 does not purport to have a retrospective effect. It operates only prospectively; that is, it applies to contracts for water-works entered into subsequent to the legislation. The legislature could no more diminish the rate of taxation to pay for water supply, as to existing contracts, than it could increase the rate for that purpose. In either case such legislation would impair contractual rights, which is inhibited by the constitution. The amendment of said section 69 in 1887, we are, therefore, constrained to hold, had no retroactive effect, and did not take away the power of the city of Kearney existing at the time of its passage to meet the obligations into which it had theretofore entered. The proposition is too plain to call for the citation of authorities to sustain it.

It is developed by the record before us that after the amendment to section 69 on March 31, 1887, the system of water-works was enlarged by the extension of pipe lines and the putting in of 106 additional hydrants. It is insisted that the contract to pay for the forty-five original hydrants is governed by the act of March, 1885, and the council should levy a seven-mill tax under the act of 1887, if that amount be necessary, to pay the rental on the 106 additional hydrants. The answer to this contention is that the original ordinance granting the franchise in express terms required the extension to be made, and the putting in of additional hydrants and the amount of rental to be paid therefor by the city. All the water was supplied to the city under one contract entered into

prior to the act of 1897; hence the limit of taxation to pay for the use of any of the hydrants is not controlled by said law, but by the statute in force when the franchise was granted.

Another suggestion contained in the brief of counsel for relator is that "by making the original contract, by requiring extensions, by accepting the works and using the water supply for ten years under the several acts and amendments granting enlarged powers and extended privileges, the city promised to discharge its duties, and by accepting the benefits of these several acts of the legislature, and of the contracts made under them, the city must be held to do equity and pay its obligations." Municipal officers can only exercise such powers as are conferred by statute. They cannot ratify an unauthorized act so as to make it valid. The city council of the city of Kearney could not by any acts of ratification bind the city to levy a tax in excess of the rate provided by law. (*Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla*, 40 Neb., 775.) This is a legal action, and relator can thereby enforce merely its legal or statutory rights. The equitable doctrine invoked by the relator, that the city must pay for the benefits received, and the authorities cited in the brief in support thereof, are not applicable to the case before us.

It is suggested by the respondents that had only a five-mill tax been levied annually in the past to pay the water rental, then the writ should be granted for that sum to pay for the water during the present year; but that as from 1888 to 1892, inclusive, a levy of seven mills annually was made, and a levy of nine mills was imposed for the years 1893, 1894, and 1895, and paid, instead of the legal limit of five mills, the relator has received already an amount in excess of what it is entitled to under the law, more than sufficient to pay the hydrant rental for the year 1896, and the writ should accordingly be denied. The argument is somewhat novel, but it lacks merit. The levies made and the amounts paid in excess

of law clearly constitute no defense to this application. A peremptory *mandamus* will issue requiring the levy of five mills on the dollar of the assessed valuation of the property in the city of Kearney to pay the rental of hydrants for the use of the city.

WRIT ALLOWED.

STATE OF NEBRASKA, EX REL. CITY WATER COMPANY, V. CITY OF KEARNEY ET AL.

FILED FEBRUARY 16, 1897. No. 8728.

1. **Statutes:** CONSTRUCTION. A legislative enactment will be construed to operate only prospectively, unless the intent of the legislature to the contrary is plainly expressed.

2. ———: MUNICIPAL CORPORATIONS: TAXES: WATER COMPANIES. *Held*, That that portion of the act approved March 31, 1887, entitled "An act to amend section 69 of article 1 of chapter 14 of the Compiled Statutes of Nebraska, and to repeal said section" (Session Laws, 1887, p. 291, ch. 12), which provides that a city of the second class or village may enact an ordinance providing for the levying of a tax not exceeding seven mills on the assessed valuation in any one year "to pay for water furnished such city or village under contract" has no retrospective operation.

REHEARING of case reported in 49 Neb., 325.

Marston & Marston and *Kennedy & Learned*, for relator.

William Gaslin, *contra*.

NORVAL, J.

An opinion was filed in this case October 7, 1896, the same being reported in 49 Neb., 325. On application of relator a rehearing was granted and the cause has been again submitted for adjudication.

In 1886 the city of Kearney granted a franchise to the American Water-Works & Guarantee Company for the construction and operation of a system of water-works in

said city for a specified period, and at the same time contracted with said company for supplying water to the city during said period at a certain sum each for the use of 45 hydrants. The contract also reserved to the city the right to require an extension of the pipe lines at any time by the company and an increase in the number of hydrants, and fixed the sum to be paid as rental for the same. In pursuance of this provision, 106 additional hydrants were placed in 1888. The law in force governing cities of the class to which Kearney belonged at the time the franchise was granted authorized such city to contract for the furnishing of water to the municipality, but limited the levy of tax which could be imposed for the payment of water furnished the city "to an amount not exceeding five mills on the dollar in any one year," etc. (Session Laws, 1885, p. 168, ch. 20, sec. 3; Compiled Statutes, 1885, ch. 14.) Subsequently, but before the 106 additional hydrants were put in, the legislature of 1887 so amended the law as to permit the levy of a tax not exceeding seven mills in any one year to pay for water supplied the city under contract. (Session Laws, 1887, p. 291, ch. 12.) A levy of five mills on the dollar on the present assessed valuation of the taxable property of the city of Kearney being insufficient to pay relator the amount due it annually for hydrant rentals, it was insisted on the former hearing that the writ should issue commanding a seven-mill levy, instead of five mills, at least to pay the rental on the 106 hydrants constructed in 1888. This contention was denied in the former decision for the reasons that the legislation of 1887 relating to the levy of taxes for water supply was not applicable, since it did not operate retrospectively, but prospectively merely, and that the amendment of 1887 could not apply to contracts for water rentals made prior thereto, as to do so would impair the obligation of contracts. Those propositions alone and their application to the case at bar we are now asked to consider.

It is a well recognized rule in the construction of stat-

utes that a law will not be given a retrospective operation, unless that intention has been manifested by the most clear and unequivocal expression. (*Smith v. Auditor-General*, 20 Mich., 398; *City of Oakland v. Whipple*, 44 Cal., 305; *In re Tuller*, 79 Ill., 99; *City of Chicago v. Rumsey*, 87 Ill., 348; *Tenney v. Foote*, 95 Ill., 99; *People v. Peacock*, 98 Ill., 172; *Fuller v. City of Grand Rapids*, 40 Mich., 395; *Borrman v. Schober*, 18 Wis., 459.) We do not understand that counsel for relator question the soundness of the foregoing principle, but they deny that it has any application to the case in hand; that the levy of a seven-mill tax can be enforced without giving the amendment of 1887 a retrospective operation. This argument is predicated upon the fact that the system of water-works was extended, and the 106 additional hydrants were furnished, subsequent to the 1887 amendment, which in our view was and is wholly an unimportant feature of the case. The important and controlling consideration is, When was the contract entered into under which the enlargement of the system of water-works was made? The ordinance granting the franchise was passed in 1886, and it, in plain and unequivocal language, provided for the extension of the system and for the construction of additional hydrants whenever the city deemed the same necessary, and it likewise fixed the price that the city should pay for the same. The municipal authorities exercised this privilege reserved to the city, and the additional supply of water was furnished, it is true, after the amendment of 1887; nevertheless all the water was supplied the city,—that before, as well as the quantity after, 1887,—under and in pursuance of a single contract—one entered into before the amendment of 1887 was adopted. There is absolutely no language in said amendment from which any inference can be fairly drawn that it was the design of the legislature that its provisions should have any retroactive effect, or should apply to taxes levied in payment for water furnished under existing contracts. Had the 106 additional hydrants been put in under a new and

independent contract entered into after the amendment of 1887, then there might be force to the argument on behalf of the relator that said amendment controls the tax levy. But such was not the case, and hence a levy of five mills is the maximum limit that can be imposed, at least without further legislative authority.

The conclusion reached makes it unnecessary to determine whether it is within the power of the legislature to authorize an increased levy of taxes to pay for water supplied under existing contracts. The question does not arise in the case, and the language employed in the former opinion upon that subject is mere *obiter*, and is accordingly withdrawn. The judgment heretofore entered herein is adhered to.

FORMER JUDGMENT SUSTAINED.

GEORGE OSBORN, APPELLANT, V. VILLAGE OF OAKLAND ET AL., APPELLEES.

FILED OCTOBER 7, 1896. No. 8416.

Quo Warranto: MUNICIPAL CORPORATIONS. An information in the nature of *quo warranto*, and not a bill for injunction, is the appropriate remedy to test the legal existence of a municipal corporation.

APPEAL from the district court of Burt county. Heard below before POWELL, J.

M. R. Hopewell and *E. R. Duffie*, for appellant.

J. G. Arthur, *Ira Thomas*, and *W. G. Sears*, *contra*.

NORVAL, J.

The village of Oakland was incorporated in 1881, and since which time the village organization has been maintained without any attempt to form or perfect a city

government, until March 14, 1896, when the board of trustees, both by resolution and ordinance duly adopted, declared said village of Oakland to be a city of the second class, and the municipality was divided into two wards and the boundaries thereof defined. The board of trustees having threatened to call an election to be held on the first Tuesday in April, 1896, for the election of city officers, this action was instituted to enjoin the calling or holding of such proposed election. The petition sets up the foregoing facts, and further alleges that Oakland contains less than 1,000 inhabitants. A demurrer to the petition was sustained, and the action dismissed. Plaintiff appeals.

Section 1, article 1, chapter 14, Compiled Statutes, 1895, declares that "all cities, towns, and villages containing more than one thousand and less than twenty-five thousand inhabitants shall be cities of the second class and be governed by the provisions of this chapter, unless they shall adopt a village government as hereinafter provided." By the foregoing provision each village in this state containing the population required by statute is a city of the second class without any action on the part of the municipality, and it is the duty of the board of trustees to divide the territory embraced therein into not less than two wards, and call an election at the proper time for the election of city officers. (*State v. Palmer*, 10 Neb., 203; *State v. Holden*, 19 Neb., 249; *State v. Babcock*, 25 Neb., 709.) It follows that if Oakland has a population of over one thousand inhabitants, it is a city of the second class; otherwise not.

It is patent that the object and purpose of this proceeding is to test the corporate existence of Oakland as a city of the second class, and the question presented is whether injunction is the appropriate action. It is a general rule, supported by the decisions of this and other states, that equity will not grant a party relief by injunction, where he has a plain and adequate remedy at law. It is likewise a well established doctrine in this

country that *quo warranto* is the proper remedy to inquire whether a municipal corporation was legally created, as well as to oust persons exercising the privileges and powers of corporate officers when the municipal corporation has no legal existence. (*State v. Uridil*, 37 Neb., 371; *State v. Dimond*, 44 Neb., 154; *State v. Mote*, 48 Neb., 683; High, Extraordinary Legal Remedies [3d ed.], sec. 684.) An information in the nature of a *quo warranto*, and not a bill for injunction, is the appropriate remedy.

In 2 High, Injunctions, sec. 1261, it is said: "Equity is averse to interference by injunction with the formation of local governments or municipalities in accordance with law. And where proceedings are being had under the laws of a state for the incorporation of a village, property owners within the proposed village limits will not be permitted to enjoin such organization because the territory in question does not contain the requisite population, or because complainants would thereby be subjected to burdens of local government largely disproportionate to the benefits accruing therefrom, or upon the ground of informality in the proceedings. Nor will the relief be allowed in such case upon the application of the attorney general, in behalf of the people of the state. And a bill for an injunction cannot be maintained to have declared null and void proceedings for the incorporation of a village under an act of legislature for the incorporation of villages, the appropriate remedy in such a case being by proceedings in the nature of a *quo warranto*." (See Beach, Injunctions, sec. 1305; *Willis v. Stapels*, 30 Hun [N. Y.], 644; *State v. Minnerly*, 6 T. & C. [N. Y.], 318; *People v. Clark*, 70 N. Y., 518; *Lane v. Morrill*, 51 N. H., 422.) Although it is not sought to thwart the formation of a city government for Oakland, the principle underlying the above authorities is decisive of the case before us, since the purpose is to prevent the election of officers to manage the affairs of the municipality on the ground that it has no corporate existence.

The decisions of this court cited by plaintiff do not sus-

tain his contention that injunction is the proper action. Doubtless, an injunction will lie, in a proper case, to restrain a municipal officer from performing an act in violation of law, but that is no reason why an injunction against such an officer may be resorted to, when the sole object or purpose to be accomplished is to test the validity of the corporation. In the one case a remedy at law is afforded, while in the other equity alone can grant speedy and adequate relief.

It is claimed that equity will enjoin the action of municipal officers from acting in excess of the corporate power. Undoubtedly, as a general rule, this is true; but if Oakland contains more than 1,000 inhabitants it is an incorporated city, and it was the duty of the defendant to call an election for city officers. To determine that the defendants were about to proceed unlawfully in calling the proposed election would require us to judicially ascertain whether Oakland is a village or city, and that cannot be done in this form of action. The judgment dismissing the petition is right, and it is

AFFIRMED.

ALBERT W. COX, ADMINISTRATOR, V. JOHN YEAZEL ET AL.

FILED OCTOBER 7, 1896. No. 6685.

1. **Executors and Administrators:** ACTIONS. Generally, an action to recover a debt payable to a deceased intestate must be brought by the administrator of the estate.

2. ——: ——. Such an action cannot be maintained by the heirs at law, unless there be no demands against their decedent ancestor and there has been no administration, or the administration has been closed.

3. ——: ——. The right of a foreign administrator to sue in this state is recognized by chapter 23, section 337, Compiled Statutes.

4. ——: ——: EVIDENCE. *Held*, That the verdict of the jury is unsupported by the evidence.

ERROR from the district court of Adams county. Tried below before BEALL, J.

Batty & Dungan, for plaintiff in error.

Tibbets, Morey & Ferris and *Bedford Brown, contra:*

This action is properly brought by plaintiffs below. They have legal capacity to bring this suit. Where an estate has been administered and all claims against it paid, and only one claim outstanding in its favor, which the administrator is unwilling to sue, and which for a number of years he fails and neglects to protect, the heirs can bring the suit. (*Fretwell v. McLemore*, 52 Ala., 124; *Salter v. Salter*, 98 Ind., 522; *Sanders v. Moore*, 12 S. W. Rep. [Ark.], 783; *Vanderveer v. Alston*, 16 Ala., 494; *Plunkett v. Kelly*, 22 Ala., 655; *Frowner v. Johnson*, 20 Ala., 477; *Marshall v. Crow*, 29 Ala., 278; *Amis v. Cameron*, 55 Ga., 449; *Needham v. Gillette*, 39 Mich, 574; *Foote v. Foote*, 61 Mich., 181; *Kilcrease v. Shelby*, 23 Miss., 161; *Watson v. Byrd*, 53 Miss., 480; *Ricks v. Hilliard*, 45 Miss., 359; *Wright v. Smith*, 19 Nev., 143; *George v. Johnson*, 45 N. H., 456; *Hibbard v. Kent*, 15 N. H., 516; *Woodman v. Rowe*, 59 N. H., 453; *Begien v. Freeman*, 75 Ind., 398; *Holzman v. Hibben*, 100 Ind., 338; *Lewis v. Lyons*, 13 Ill., 117; *Abbott v. People*, 10 Ill. App., 62; *McCleary v. Menke*, 109 Ill., 294; *Walworth v. Abel*, 52 Pa. St., 370; *Weaver v. Roth*, 105 Pa. St., 408-413; *Patterson v. Allen*, 50 Tex., 23; *Webster v. Willis*, 56 Tex., 468; *Taylor v. Phillips*, 30 Vt., 238; *Babbitt v. Bowen*, 32 Vt., 437; *Richardson v. Cooley*, 20 S. Car., 347; *Randel v. Dyett*, 38 Hun [N. Y.], 347; *Wood v. Weimar*, 104 U. S., 787; *Cooper v. Davison*, 5 So. Rep. [Ala.], 650; *Carter v. Owens*, 41 Ala., 217; *Sullivan v. Lawler*, 72 Ala., 68; *Thomas v. White*, 14 Am. Dec. [Ky.], 56; *Gilbert v. Thomas*, 3 Ga., 575; *Worthy v. Johnson*, 52 Am. Dec. [Ga.], 401; *Patton v. Gregory*, 21 Tex., 513; *Roger v. Kennard*, 54 Tex., 36; *Hargroves v. Thompson*, 31 Miss., 211; *Dorshcimer v. Rorback*, 23 N. J. Eq., 46; *Hubbard v. Ricart*, 23 Am. Dec. [Vt.], 202.)

NORVAL, J.

The case is substantially this: That in 1877 James Yeazel resided in Champaign county, Illinois, and being the owner of considerable real estate in said county, he negotiated a loan, secured by a mortgage thereon, for $5,000, of which sum he loaned $3,000 to his son, Abraham Yeazel, who then resided in this state, to enable the latter to engage in the business of banking. No note was taken for the $3,000 sent to Abraham Yeazel, yet the latter at various times paid interest on the money, and otherwise acknowledged the validity of the indebtedness, but never paid the principal to his father. In 1879, James Yeazel having become financially involved conveyed his lands to his said son Abraham, who then resided at Hastings, for the purpose of placing the same beyond the reach of the creditors of the father. There was no consideration whatever for this conveyance. In 1881 Abraham Yeazel borrowed $8,000 and secured the payment thereof upon the land so conveyed to him, and out of the proceeds arising from this loan the $5,000 mortgage and accrued interest was paid off and canceled, and a judgment recovered against James Yeazel by an Illinois bank was paid, and the balance of the $8,000, amounting to over $1,000, was paid over by the mortgagee to Abraham Yeazel, who retained the same. In 1886 about 100 acres of the land was sold, and $3,000 of the consideration was applied on the mortgage last aforesaid, a new note for $6,000, secured by a mortgage on the remainder of the land, was executed by Abraham Yeazel, and the balance of the $8,000 loan was paid off. Various other sums of money, it is claimed, were loaned by James Yeazel to his said son which were never paid back. On December 5, 1887, Abraham Yeazel and wife conveyed the unsold portion of the land, subject to the $6,000 mortgage, to John Yeazel in trust for the children of the said James. In January, 1888, the said James Yeazel died intestate, leaving, him surviving, ten children and heirs at

law. One White was duly appointed administrator by the probate court of Champaign county, Illinois, and various claims were allowed against the estate. Subsequently, the estate was declared insolvent. Shortly thereafter White resigned, and one Patrick Richards was appointed administrator *de bonis non*, who qualified as required by law. In 1888 an action was brought by certain of the heirs of James Yeazel in the circuit court of Champaign county to obtain a partition of said real estate, against the resident heirs of the deceased and the administrator *de bonis non*, but Abraham Yeazel was not a party to the litigation. Pending the action certain of the creditors of the deceased intervened, and filed creditors' bills praying that the deeds from James to Abraham, and from Abraham and wife to John, be set aside as fraudulent as to said creditors, and that the real estate be subjected to the payment of their claims. The prayer of the intervenors was granted, and the lands were sold in accordance with the decree. In 1890 Abraham Yeazel died, leaving, him surviving, his widow and a minor child. The widow was appointed administratrix of his estate by the county court of Adams county, and subsequently Albert W. Cox was appointed administrator *de bonis non* of the estate of Abraham Yeazel, deceased. On January 8, 1891, the defendants in error, as heirs of said James Yeazel, deceased, filed in the county court of Adams county a claim against the estate of Abraham Yeazel, deceased, for the sum of $6,000 on account of moneys so loaned by James to Abraham. Objections to the allowance of the claims were made, and upon the hearing on the testimony adduced by the claimants alone, the county court disallowed the claim. From this order of disallowance the claimants appealed to the district court, where they filed a petition setting up therein, *inter alia*, the matters already detailed. The administrator demurred to the petition upon the following grounds:

1. Plaintiffs have no legal capacity to sue.

2. Several causes of action are improperly joined.
3. Misjoinder of parties plaintiff.
4. The petition does not state a cause of action.
5. The several causes of action are barred by the statute of limitations.

The demurrer was overruled by the court, an answer was filed alleging the same defenses interposed by the demurrer, and others which need not be stated here. Claimants filed a reply, and upon a trial of the issues to a jury a verdict was returned against the estate of Abraham Yeazel for $5,215.54, upon which judgment was subsequently rendered. The administrator has brought the record to this court for review.

Many interesting legal propositions are discussed in the briefs of counsel, but the most important controverted question presented by the record, and the controlling one in the case, is whether the heirs of James Yeazel can maintain an action to recover the moneys in question. It must be conceded, we think, that two suits cannot be successfully prosecuted to collect the same,—one by the heirs of the decedent and another by the personal representative. The question arises, then, in whose favor does the right of action exist? The title to the debt or chose in action did not vest in the heirs of James Yeazel immediately upon his death, but passed to his administrator, who is entitled to all the personal property, rights, and credits of the deceased. They are assets in his hands, chargeable first with the payment of the debts of the estate and costs and expenses of administration. It is only the residue of the personalty remaining after such debts and expenses are paid that descended to the heirs or distributees. (*Gilkey v. Hamilton*, 22 Mich., 283; *Babcock v. Booth*, 2 Hill [N. Y.], 181; *Valentine v. Jackson*, 9 Wend. [N. Y.], 302; *Rockwell v. Saunders*, 19 Barb. [N. Y.], 473; *Laurence v. Wright*, 40 Mass., 128; *White v. Ray*, 4 Ired. [N. Car.], 14; *Beecher v. Buckingham*, 18 Conn., 110; *Neale v. Hagthorp*, 3 Bland Ch. [Md.], 551.) If, then, the title to the personal assets of James Yeazel vested in his admin-

istrator, for the purpose of collecting and disposing of the same for the benefit of the creditors and heirs or distributees, it necessarily follows that the administrator, and not the heirs, is the proper party to bring this action to recover the debt in question.

The rule is thus stated in Schouler, Executors & Administrators [2d ed.], sec. 239: "The title of the executor or administrator, as representative, extends so completely to all personal property left by the decedent as to exclude creditors, legatees, and all others interested in the estate. They cannot follow such property specifically in the hands of others, much less dispose of it; but the executor or administrator is the only true representative thereof that the law will regard. The legal and equitable title to all the personal property of the deceased, including choses in action and incorporeal rights, vests in fact in the executor or administrator as against all others, during the suitable period for administration, and he holds this property as a trustee and proper representative of all parties interested therein." And at section 276 the same author says: "A payment made by a debtor of the estate to anyone, even to the residuary legatee or next of kin, is a mispayment, and from such person the representative may recover."

The following authorities, in addition to those already cited, sustain the doctrine that the heirs cannot maintain this action: 7 Am. & Eng. Ency. of Law, secs. 232, 258, 307, 360; 2 Woerner, American Law of Administration, sec. 322; *Haynes v. Harris*, 33 Ia., 516; *Rhodes v. Stout*, 26 Ia., 313; *Baird v. Brooks*, 21 N. W. Rep. [Ia.], 163; *Richardson v. Vaughan*, 23 S. W. Rep. [Tex.], 640; *Varner v. Johnston*, 17 S. E. Rep. [S. Car.], 483; *Highnote v. White*, 67 Ind., 596; *Finnegan v. Finnegan*, 125 Ind., 262; Schouler, Executors & Administrators, secs. 239 to 276; *Beattie v. Abercrombie*, 18 Ala., 9; 3 Wait, Actions & Defenses, 238, 442; *Webster v. Tibbits*, 19 Wis., 438; *Linsenbigler v. Gourley*, 56 Pa. St., 166; *Pope's Heirs v. Boyd*, 22 Ark., 535; *Lemon's Heirs v. Rector*, 15 Ark., 436; *Snow v. Snow*, 49 Me.,

159; *Cheely v. Wells*, 33 Mo., 106; *Ketchum v. Dew*, 7 Cold. [Tenn.], 532; *Pritchard v. Norwood*, 30 N. E. Rep. [Mass.], 80; *Morse v. Clayton*, 13 S. & M. [Miss.], 373; *Hollowell v. Cole*, 25 Mich., 345; *Woodin v. Bagley*, 13 Wend. [N. Y.], 453; *Marshall v. King*, 24 Miss., 85; *Allen v. Simons*, 1 Curtis [U. S. C. C.], 122; *Miller v. Eatman*, 11 Ala., 609; *Murphy v. Hanrahan*, 50 Wis., 485; *Bradford v. Felder*, 2 McCord Ch. [S. Car.], 168; *Cochran v. Thompson*, 18 Tex., 652; *Smith v. Denny*, 37 Mo., 20; *Leamon v. McCubbin*, 82 Ill., 263; *Newman v. Schwerin*, 61 Fed. Rep., 865; *Hazelton v. Bogardus*, 8 Wash., 102; *Longacre v. Stiver*, 35 N. E. Rep. [Ind.], 900; *Eisenbise v. Eisenbise*, 4 Watts [Pa.], 134; *Barlow v. Nelson*, 32 N. E. Rep. [Mass.], 359; *Palmer v. Green*, 63 Hun [N. Y.], 6; *Brunk v. Means*, 11 B. Mon. [Ky.], 214.

The syllabus of *Hollowell v. Cole*, 25 Mich., 345, reads as follows: "A son and sole heir of a decedent, upon whose estate an administrator has been appointed and qualified, and has not been discharged, has no authority to enforce collection, in his own name, of a claim which had existed in favor of said decedent during her lifetime, against the estate of another decedent."

Counsel for plaintiffs below concede the general rule to be that the heirs cannot sue for assets belonging to an estate of an intestate, but that such action must be brought by the administrator. They insist, however, that this rule has a general recognized exception, that when it is shown that the estate owes no debts and that no letters of administration have been granted, the title to the personal property and choses in action passes to the heirs and they may sue to recover the same, and distribute the assets among themselves without the expense of administration. That such doctrine exists and is abundantly sustained by the authorities, cannot be doubted. Where there are no liabilities or debts against the estate of an intestate, there is no necessity for increasing the expense of administration, and in such case the heirs may maintain an action to recover a debt owing the estate. But the rule invoked by counsel is not appli-

cable to this record. The petition, as well as the proof, shows that when the claim was filed by the heirs against the estate of Abraham Yeazel, there was a qualified and acting administrator of the estate of James Yeazel, deceased. His estate had not been fully settled, nor is it alleged that even the costs of administration have been paid; hence, the administrator, and not the heirs, had the right to recover the debts due his intestate. The fact that more than a year subsequent to the bringing of this action the administrator *de bonis non* was discharged is unimportant and has no bearing upon the issues. The case must be determined upon the rights of the parties when the proceedings were instituted. At that time the heirs had no right of action. The fact that they afterwards acquired title to the assets of their father, if it be a fact, by the discharge of the administrator *de bonis non*, could not help them in this action. They could no more maintain a suit by reason of an after-acquired title or right than could a plaintiff recover upon a promissory note to which he had no title when he brought his action thereon, but which obligation he subsequently purchased from the original owner. If the administrator *de bonis non* of the estate of James Yeazel failed, neglected, and refused to take any steps to collect this claim, as is now insisted, the heirs should have had him removed before bringing this suit. If the claim was lost by his neglect, they have their remedy against him upon the bond. It is true, no administrator of the estate of James Yeazel, deceased, was ever appointed in this state, but this cannot aid the plaintiffs below, since the right of a foreign administrator to sue in this state is recognized by statute. (Compiled Statutes, ch. 23, sec. 337.)

It is argued that the question whether the heirs have the right to prosecute the suit is not before us for review, since, after demurring to the petition on the ground that plaintiffs have no legal capacity to sue, the defendant did not stand upon his demurrer, but filed an answer. Conceding that answering and going to trial constituted

a waiver of the first ground of demurrer, the defendant did not thereby waive the fourth objection therein stated, namely, that the petition fails to state a cause of action in favor of the plaintiffs. This defect or objection is always available, and is not lost by answering after the overruling of a demurrer. The petition on its face, as well as the evidence adduced, discloses that an administrator *de bonis non* of the estate of James Yeazel had been appointed and qualified prior to the filing of this suit and that he had not been discharged. So that the petition and the proofs make out a cause of action in his favor, and not any liability in favor of the heirs. See authorities heretofore cited. The verdict is therefore contrary to the evidence. The conclusion reached makes it unnecessary to consider the other points argued in the brief. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN RATH V. HENRY ZEMBLEMAN.

FILED OCTOBER 7, 1896. No. 6811.

Surface Water: DRAINAGE: DAMAGES: TRIAL: ADMISSIONS. In an action for damages alleged to have been caused by the drainage of surface water from a pond on defendant's land into a draw, by which said water was conducted to and across the land of plaintiff, an admission by plaintiff that the draw was a natural waterway and had, since his ownership of the land claimed to have been damaged, been such a waterway, and that the water generally from that portion of the country had flowed through this ravine, precluded the possibility of a recovery of damages for the destruction of the grass in the bed of such draw on his premises caused by the additional flowage resulting from the aforesaid drainage.

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

John Barsby, for plaintiff in error.

Charles H. Sloan, contra.

RYAN, C.

This action was brought by the plaintiff in error for the recovery of damages which he alleged he had sustained by the defendant draining a pond in such a manner that the water therefrom ran across the premises of the plaintiff. Between the drained land and that alleged to have been injured there was a meandering draw of the length of between three and four miles. After a rainfall the flowage of water through this draw, it was alleged, was increased to and through the plaintiff's land, whereby on one occasion his hay in such draw was destroyed. For its value this action was brought before a justice of the peace of Fillmore county, from whose judgment there was an appeal to the district court, wherein there was a verdict and judgment in favor of the defendant.

On the trial it was admitted by the plaintiff, in open court, that the draw through which the water flowed from the defendant's land to and across plaintiff's, was a natural waterway running from Clay county, and that it had been such ever since plaintiff had occupied his premises, and that the waters from that country were drained through this ravine or draw and ran down through plaintiff's land. In view of the holdings of this court since the trial of this case, announced in *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897, *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb., 406, *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb., 526, *City of Beatrice v. Leary*, 45 Neb., 149, and *Jacobson v. Van Boening*, 48 Neb., 80, the plaintiff in no event could have recovered damages in the face of his admissions as to the flowage and the character of the waterway which it followed. The judgment of the district court is, therefore,

AFFIRMED.

FARMERS LOAN & TRUST COMPANY v. Z. T. FUNK.

FILED OCTOBER 7, 1896. No. 6820.

1. **Constitutional Law:** CORPORATIONS: LIABILITY OF STOCKHOLDERS. The provisions of section 7, article 11, of the constitution of Nebraska, designated "Corporations," that "every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder," are enforceable without special supplementary statutory enactments.

2. **Corporations:** LIABILITY OF STOCKHOLDERS: ACTION BY CREDITOR. The special individual liability of a stockholder in a banking corporation or institution, superadded to his ordinary liability by the above quoted section of the constitution, is for the creation of a trust fund for the benefit of all creditors of the banking corporation or institution in which stock is held, and an action to render available such liability must be prosecuted by one creditor of such corporation or institution for the benefit of all other creditors, or by the receiver of such corporation or institution when there is a receiver.

3. **Banks and Banking:** LIABILITY OF STOCKHOLDERS: ENFORCEMENT. The requirements of section 4, article 11, designated "Miscellaneous Corporations," of the constitution, that, before enforcement of individual liability of stockholders, there must be judicially ascertained the indebtedness proposed to be enforced, and that the assets of the corporation be first exhausted, *held* applicable to the stockholder's liability in banking corporations or institutions described by section 7 of the same article.

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

The facts are stated by the commissioner.

M. J. Sweeley and *P. D. McAndrew*, for plaintiff in error:

The following section of the constitution is self-executing: "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so

held, for all its liabilities accruing while he remains such stockholder; and all banking corporations shall publish quarterly statements under oath of their assets and liabilities." (Constitution, sec. 7, art. 11, under "Miscellaneous Corporations"; *State v. Weston*, 4 Neb., 216; *Willis v. St. Paul Sanitation Co.*, 50 N. W. Rep. [Minn.], 1110; *Thomas v. Owens*, 4 Md., 189; *Reynolds v. Taylor*, 43 Ala., 420; *Miller v. Marx*, 55 Ala., 352; *People v. Hoge*, 55 Cal., 612; *Hentig v. James*, 22 Kan., 326; *Fowler v. Lamson*, 34 N. E. Rep. [Ill.], 932.)

By filing its claim with the receiver, plaintiff did not lose its right to proceed against the stockholders. (*Shellington v. Howland*, 53 N. Y., 371; *Sleeper v. Goodwin*, 67 Wis., 579; *First Nat. Bank of Barre v. Hingham Mfg. Co.*, 127 Mass., 563; 2 Beach, Private Corporations, sec. 658.)

The action was properly brought by plaintiff as a creditor in its individual capacity. (2 Morawetz, Private Corporations, sec. 869; 1 Cook, Stock & Stockholders, sec. 218; Thompson, Liability of Stockholders, sec. 341.)

Plaintiff concedes that this suit might have been brought in equity. Had that been done it should have been for the benefit of all the creditors, and perhaps against all the stockholders, but it contends that it had its election, and when the action is at law it must be by a single creditor and against a single stockholder. (1 Cook, Stock & Stockholders, sec. 220; *First Nat. Bank of Barre v. Hingham Mfg. Co.*, 127 Mass., 563; *Mason v. Alexander*, 44 O. St., 318; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. [N. Y.], 479; *Flour City Nat. Bank v. Wechselberg*, 45 Fed. Rep., 547; *Norris v. Johnson*, 34 Md., 485; *Abbey v. Grimes Dry Goods Co.*, 24 Pac. Rep. [Kan.], 426; *Flash v. Conn*, 109 U. S., 371; *Kennedy v. Gibson*, 8 Wall. [U. S.], 498; *Casey v. Galli*, 94 U. S., 673; *Hatch v. Dana*, 101 U. S., 213; *Terry v. Little*, 101 U. S., 216; *Fuller v. Ledden*, 87 Ill., 310; *McCarthy v. Lavasche*, 89 Ill., 270; *Hull v. Burtis*, 90 Ill., 213; *Culver v. Third Nat. Bank of Chicago*, 64 Ill., 528; *Freeland v. McCollough*, 43 Am. Dec. [N. Y.], 685, note and cases cited.)

Plaintiff was not compelled to reduce its claim to judgment and exhaust the assets of the bank as conditions precedent to suit. (*Terry v. Anderson*, 95 U. S., 632; *Mills v. Scott*, 99 U. S., 29; *Hatch v. Dana*, 101 U. S., 213; *Marine & River Phosphate Mining & Mfg. Co. v. Bradley*, 105 U. S., 175; *McDonnell v. Alabama Gold Life Ins. Co.*, 5 So. Rep. [Ala.], 120; *Flour City Nat. Bank v. Wechselberg*, 45 Fed. Rep., 547; *Abbott v. Aspinwall*, 26 Barb. [N. Y.], 202; *Perkins v. Church*, 31 Barb. [N. Y.], 84; *Paine v. Stewart*, 33 Conn., 516; *Munger v. Jacobson*, 99 Ill., 349; *Kincaid v. Dwinelle*, 59 N. Y., 548; *Toucey v. Bowen*, 1 Biss. [U. S.], 81; *Kennedy v. Gibson*, 8 Wall. [U. S.], 498; *Moses v. Oconee Bank*, 1 Lea [Tenn.], 398; *Morgan v. Lewis*, 17 N. E. Rep. [O.], 558.)

R. M. Logan, contra:

An action at law cannot be maintained by a creditor against an individual stockholder to enforce the statutory liability for corporate debts; but if such an action will lie, plaintiff must reduce its claim to judgment and exhaust the assets of the bank as conditions precedent. (*Coleman v. White*, 14 Wis., 762; *Sleeper v. Goodwin*, 31 N. W. Rep. [Wis.], 355; *Harris v. First Parish of Dorchester*, 23 Pick. [Mass.], 112; *Smith v. Huckabee*, 53 Ala., 191; *Baker v. Atlas Bank*, 9 Met. [Mass.], 182; *Crease v. Babcock*, 10 Met. [Mass.], 525; *Spear v. Grant*, 16 Mass., 9; *Spence v. Shapard*, 57 Ala., 598; *Judson v. Rossie Galena Co.*, 38 Am. Dec. [N. Y.], 569; *Briggs v. Penniman*, 18 Am. Dec. [N. Y.], 454; *Morgan v. New York R. Co.*, 40 Am. Dec. [N. Y.], 244; *Wright v. McCormack*, 17 O. St., 86; *Umsted v. Buskirk*, 17 O. St., 113; *Brown v. Hitchcock*, 36 O. St., 667; *Pollard v. Bailey*, 20 Wall. [U. S.], 520; *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb., 175.)

J. A. Gallaher, also for defendant in error.

References: *Belknap v. North American Life Ins. Co.*, 11 Hun [N. Y.], 282; *Cole v. Knickerbocker Life Ins. Co.*, 23 Hun [N. Y.], 255; *Paulsen v. Van Steenbergh*, 65 How. Pr.

[N. Y.], 342; *Stewart v. Lay*, 45 Ia., 604; *Allen v. Clayton*, 63 Ia., 11; 2 Morawetz, Corporations, sec. 748.

RYAN, C.

By its petition filed in the district court of Brown county plaintiff alleged that on the 23d of June, 1892, it deposited in the Ainsworth State Bank $5,000, for which there was issued by the bank its certificate of deposit payable four months after date, with eight per cent per annum interest; that, with the exception of two payments, in the aggregate amounting to $3,040, said certificate was unpaid, and that after said issue of its certificate of deposit said bank had failed and become insolvent, and that by reason of such failure and insolvency plaintiff was unable to enforce or collect said claim from said bank. The sole defendant was Z. T. Funk, against whom the following were the only allegations contained in the petition, to-wit: "That on the 23d day of June, 1892, and at the time the liability of said bank to plaintiff was incurred, as hereinbefore alleged, the defendant, Z. T. Funk, was a stockholder in said Ainsworth State Bank and at said time held therein one share of stock of the total par value of one hundred dollars." Following the above described and quoted allegations there was a prayer for judgment in the sum of $100 and interest against Mr. Funk. There were, in effect, denials of the averments of the petition, followed by allegations that for the State Bank of Ainsworth a receiver had been appointed before this action was brought, and that plaintiff, on the 9th day of January, 1893, had filed the claim sued on in this action and that said claim was still in the hands of said receiver pending adjudication by him. It was also answered that there were sufficient assets to pay the bank's indebtedness which the receiver was endeavoring to collect, and that no suit could be maintained till the assets of the bank were exhausted, and that neither a judgment had been rendered nor an execution issued against said bank when this action was brought.

By reply there was a denial of each averment of the answer except that a receiver had been appointed for the bank, which alleged fact was admitted. On the trial the proofs were that the assets of the bank had not been exhausted and the receiver, being sworn as a witness, in his testimony estimated that when realized said assets would enable him to pay about ten per cent of the indebtedness of the bank. It was further shown that no judgment had been rendered and of course no execution had ever been issued against the bank on plaintiff's claim. There was a judgment in the district court for the defendant and this error proceeding is prosecuted by the plaintiff for its reversal.

In regard to the necessity of a judgment to establish the amount of its claim against the bank plaintiff insists that it was sufficient for this purpose to file its claim with the receiver of the bank. The interest which this contention might elicit is wholly destroyed by the consideration that by its reply plaintiff denied certain averments of the answer, among which was one that his claim was filed as the plaintiff now in argument assumes it was. What effect this filing would have had in a proper case we cannot therefore determine.

In *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb., 175, there was quoted section 4, article 11, of the constitution of this state, of which the provisions are as follows: "In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and, after the corporate property shall have been exhausted, the original subscribers thereof shall be individually liable to the extent of their unpaid subscription and the liability for the unpaid subscription shall follow the stock." Following the above quotation was this language: "The word 'ascertained' in this provision we take to mean 'judicially ascertained,' and to 'judicially ascertain' the amount due from a corporation to a creditor means to have the finding and judgment or decree of a court as to such amount. Such

an ascertainment of a debt due from a corporation could be ascertained, and ascertained only, within the meaning of this constitution, in a suit brought by a creditor of a corporation against it, not against the stockholders thereof, nor against the stockholders and corporation jointly. The expression in the constitutional provision just quoted above, 'that after the corporate property shall have been exhausted,' means exhausted by judicial proceedings; that is, when executions issued on judgments or decrees rendered against corporations shall be returned unsatisfied. This constitutional provision is the supreme law of the land and we are not at liberty nor desirous of evading it or construing it away. We think, therefore, that the creditors of a *de jure* corporation have no right of action against the stockholders thereof until they have reduced their claims against the corporation to judgment and until an execution issued upon such judgment has been returned wholly or in part unsatisfied. It follows from this that a creditor's cause of action against the stockholders of a corporation under said section 136 would not accrue until such creditor had sued the corporation for the corporate debt, obtained a judgment thereon, and an execution issued on such judgment had been returned, at least in part, unsatisfied."

Counsel for plaintiff concede that the above construction is proper as applied to section 136, chapter 11, General Statutes, 1873, which prescribed a penalty for failure to publish notice of incorporation, but criticises the general language used as to the ascertainment of the amount due and exhausting the corporate property, as not being applicable to banking corporations. It is also insisted by plaintiff that the receiver was not the proper party to bring this action, and that any creditor of the bank, for himself alone, to the extent of his being such a creditor, had a right of action against any shareholder to an amount equal to the par value of such shareholder's stock in the bank. In line with its above noted criticism of the language quoted from *Globe Publishing Co. v.*

State Bank of Nebraska it is argued that neither judgment nor issue and return of execution was an indispensable condition precedent. These questions we shall now consider as general propositions, in view of the facts already stated.

Section 7, article 11, designated "Corporations," of the constitution is in this language: "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held, to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder, and all banking corporations shall publish quarterly statements under oath of their assets and liabilities." The liability of a stockholder, individually, for an amount equal to the par value of his stock requires no supplementary statutory legislation to render it effective and we must therefore enforce this liability under constitutional provisions, statutory enactments, and legal principles of general application. (*State v. Weston*, 4 Neb., 216; *In re Petition of Attorney General*, 40 Neb., 402.)

At common law, stockholders in a corporation proper were not personally liable for its debts. Quite early in the history of this country there were frequently inserted in the charters of corporations provisions fixing the individual liability of stockholders in certain contingencies. When there were presented cases in which it was sought to render effective these special provisions, the courts differed among themselves as to the nature of this liability, the character of the fund arising from it, the persons entitled to sue, and the manner in which the action should be brought. These four matters of difference, on examination, will be found to depend on one question, and that is whether this liability is to be deemed to have been created for the purpose of raising a trust fund for the payment of the debts of the corporation, or whether it created the relation of debtor and creditor directly between a creditor of the corporation and one of its stock-

holders. If the fund derived from this liability should be deemed a trust fund of the nature suggested, it naturally resulted that an equitable action was recognized as proper, with its concomitants of parties, beneficiaries, and relief. One of the first cases involving these questions was one which is regarded as the leading case in favor of the view that an action at law by a corporation creditor would lie to charge a stockholder personally. (*Bank of Poughkeepsie v. Ibbotson*, 24 Wend. [N. Y.], 473.) The liability sought to be enforced in this case was for all debts due and owing by the company at the time of its dissolution. Nelson, C. J., in delivering the opinion of the court, said: "It has been repeatedly held that the dissolution here spoken of, in order to subject the shareholder, may be shown short of judicial proceedings for that purpose. Having ceased to act, and being without funds and indebted, it is to be deemed dissolved so far as to give the remedy to the creditor. (19 Johns R., 456; Hopk., 300; 8 Cowen, 387.) This dissolution *sub modo* being proved, the liability of the stockholder, as declared by the act, becomes absolute; and I see no valid objection to the enforcement of it in a court of law." Later in this opinion it was said: "It was made a question in the several cases above referred to whether the suit in equity could be maintained, on the ground of a remedy at law; the answer given confirms the view we have taken—it is that the creditor is entitled to contribution from all stockholders if requisite to the satisfaction of his debt, and that numerous suits might become necessary. To avoid this he may resort to that court. The creditors, if more than one, may also, it seems, if they apprehend a deficiency in the fund, enforce in equity a *pro rata* distribution. (8 Cowen, 392.) But it must be at their election." It is clear that the circumstance that no judicial proceeding was necessary to entitle a creditor of the corporation to proceed against one of its shareholders somewhat influenced the court, in the above case, to hold that a suit at law might be maintained by the creditor against the

stockholder. Moreover, it is clear that the liability of the stockholder to the corporation creditor was regarded as primary and not in any degree secondary. These considerations govern the cases which support the view that an action at law may be maintained by a corporation creditor against one of the stockholders to enforce an individual liability imposed by the statute. (*Vick v. Lane*, 56 Miss., 681; *Fuller v. Ledden*, 87 Ill., 310; *Norris v. Johnson*, 34 Md., 485; *Grund v. Tucker*, 5 Kan., 70.) It is noticeable that while these courts have said that an action at law may be prosecuted by an individual creditor against a stockholder, it has never been denied that a proceeding in equity might be maintained—indeed, in nearly all the cases this right of election is expressly recognized.

It has been held by other courts that the liability of the individual stockholder could be made available only in a court of equity. (*Pollard v. Bailey*, 20 Wall. [U. S.], 526; *Hornor v. Henning*, 93 U. S., 228; *Allen v. Arnold*, 31 Atl. Rep. [R. I.], 268; *Umsted v. Buskirk*, 17 O. St., 113; *Crease v. Babcock*, 10 Met. [Mass.], 525; *Tradesman Publishing Co. v. Knoxville Car-Wheel Co.*, 32 S. W. Rep. [Tenn.], 1097; *Coleman v. White*, 14 Wis., 762.)

The case of *Mills v. Scott*, 99 U. S., 25, was cited by plaintiff as sustaining his contention that an action might be brought at law by an individual creditor of a corporation against one of its stockholders. A reference to the opinion shows that this action was brought agreeably to the construction of the statutes of Georgia adopted by the supreme court of that state, and that the author of the opinion deferred to that construction, remarking, however, that "Such liability may undoubtedly be enforced by a suit in equity, and in many cases such proceeding would seem to be the only appropriate one, as was held in this court in *Pollard v. Bailey*, 20 Wall., 520." (See, also, *Terry v. Tubman*, 92 U. S., 156.)

In *Hornor v. Henning*, 93 U. S., 228, there was under consideration an act of congress providing for the forma-

tion of corporations within the District of Columbia in which was the provision that "If the indebtedness of any company organized under this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company." In this case there were cited, with approval, *Pollard v. Bailey* and *Terry v. Tubman* in support of the proposition that the action should be in equity, and we therefore assume that such is the holding of that court when not controlled by state statutes and the construction thereon placed by state courts.

From the opinion of Brickell, C. J., in *Smith v. Huckabee*, 53 Ala., 191, is quoted the following language: "The members of a private corporation, not being personally liable for corporate debts, the capital of the corporation was the source of its credit. This capital, as a fund for the payment of corporate debts, embraced all the property, real and personal, of which the corporation has the beneficial ownership. The subscriptions of the several members to its capital stock, or the acquisitions from the use of the capital, were alike liable for the payment of corporate debts. A subscription for stock converts the subscriber into the debtor of the corporation to the amount subscribed, and in the event of the insolvency of the corporation can in equity be condemned to the satisfaction of creditors. In a court of equity 'the stock and other private property of corporation is deemed a trust fund for the payment of the debts of the corporation; so that the creditors have a lien or right of priority of payment on it in preference to any of the stockholders of the corporation. Therefore, if a corporation is dissolved the contracts of such corporation are not thereby deemed extinguished, but they survive the dissolution of the corporation.' (2 Story, Equity Jurisprudence, sec. 1252; *Wood v. Dummer*, 3 Mason [U. S.], 308; *Mumma v. Potomac Co.*, 8 Pet. [U. S.], 281; *Curran v. State of Arkansas*, 15 How. [U. S.], 304; *Paschall v. Whitsett*, 11 Ala., 472; *Allen*

v. Montgomery R. Co., 11 Ala., 437.) When the legislature imposed on the members of the corporation, in the event of its dissolution, a personal liability for corporate debts to the extent of their stock, it was a mere increase of the security for such debts. It was not intended to exempt from or diminish the liability of the fund, which a court of equity regarded as pledged to the payment of corporate debts. To this fund was superadded the personal liability of the members and whatever should be realized therefrom. In a court of equity only was the capital of the corporation treated as a trust fund and subjected to the payment of corporate debts. If the fund could be reached at law by legal process against the corporation, the remedy at law was adequate, and equity would not interfere. Then, legal priorities, dependent on legal remedies, would prevail. One creditor might obtain a preference in payment over another. When, however, a resort to equity became necessary as the court proceeded upon the ground of a trust attaching to all corporate debts alike, equality was equity, and no legal diligence would entitle one creditor to priority over another." Later in this opinion Brickell, C. J., said: "The liability is single, distinct in amount,—can it be split up into as many several causes of action as there may be creditors? That an entire or single cause of action may not be divided or split into several, is an elementary principle. The liability arises only on the dissolution of the corporation. Until the dissolution it is contingent. That is the event rendering it capable of enforcement. On that event it accrues for the debts of the corporation, limited to the extent of the stock. If a suit is maintainable, which creditor shall be entitled to priority, he who first commences suit or he who, by superior diligence, first obtains judgment? Can the stockholder, after a dissolution of the corporation, when its credit is impaired, avail himself of its condition to pay such creditors as he may choose to prefer and thereby absolve himself from a liability due alike to all creditors? If he is

liable to a suit at law at the instance of any corporate creditor how can this right be denied him? Can he speculate in the debts of the dissolved corporation and avail himself of such debts as he may purchase as a set off to his liability? To what extent can the set-off be allowed—for the nominal value of the debts, or the sum he paid for them? Suppose the corporation really indebted to him at its dissolution, can he set off such debt against the action of a creditor pursuing a right not derived from the corporation and which the corporation never had capacity to enforce because it was not due to it? The statutory liability is an additional security for the corporate debts, springing up on the dissolution of a corporation, to which the legislature intended the principle that equality is equity should be applied. Any creditor of the corporation suing for himself and on behalf of all other creditors, can in equity enforce it. In such suit all rights and equities can be fully adjusted and every creditor receive satisfaction of his debt to the extent to which he is entitled. A court of law is incapable of this adjustment and therefore the remedy is in equity only."

In *Wilson v. Book*, 43 Pac. Rep., 939, the supreme court of Washington had under consideration the following provisions of the constitution of that state, to-wit: "Each stockholder of any banking * * * corporation * * * shall be individually and personally liable, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation accruing while they remain such stockholders, to the extent of the amount of their stock therein, * * * in addition to the amount invested in such shares." In the opinion this language was used: "The liability is not on, but for, the contract, debt, or agreement. That the liability so provided is in addition to that flowing directly from the holding of stock which has not been fully paid for. The latter, in event of the insolvency of the corporation, is held to be a trust fund for creditors and there is no good reason why the same should not be held as to the former.

No satisfactory reason can be given for holding one to be a trust fund and the other not to be. There is no principle by which the two classes of liability can be distinguished, further than that one is primary and the other secondary; for while it is true that one can be enforced by the corporation itself and the other only by creditors, yet they were both created for the benefit of the corporation in carrying on its business and to secure to creditors the payment of its obligations. If the liability which is clearly primary must be treated as a trust fund for the benefit of all of the creditors of the corporation, greater reason exists why a liability which is secondary only, and created entirely for the benefit of the creditors, should likewise be treated as such trust fund. There is nothing in our constitution which defines the method by which this liability shall be made available; hence the method must be determined by the courts, and their aim should be to prescribe one which will accomplish the object of the provision with the least inconvenience to the creditors without unnecessary annoyance to the stockholders. A method which would allow a single creditor to maintain an action at law against one or more of the stockholders for his own benefit would be so unjust to other creditors and might result in such annoyance to the stockholders that only the most positive language would justify the courts in holding that the liability might be thus enforced. So to hold would enable one creditor to obtain more than his share of the fund which should be derived from this liability. Not only would such a holding allow a creditor to do this, but under it a stockholder could be subjected to a separate suit at the instance of each one of the creditors of the corporation. * * * The object of this provision was to furnish to creditors of certain corporations security which those of other kinds did not have. Stockholders of such corporations assumed a liability not imposed upon those of other kinds. But there is no good reason for holding that this liability made them active parties to the contracts of the

corporations. The creditors as a body will be as well, if not better protected if it is held that the stockholders are only sureties, and have a right to demand that the creditors shall first attempt to enforce their claims against the principal."

These free quotations have been made from *Smith v. Huckabee* and from *Wilson v. Book*, because, uninfluenced by statutory or constitutional provisions, each distinguished court entitled to the credit of one of these adjudications has concluded that the liability of the stockholders ought to be enforced as a secondary liability by a single action in equity for the benefit of all the creditors of the corporation. In the first of these cases there was considered the liability of a stockholder in any corporation; in the last it was shown that the same rules should obtain with respect to a stockholder's liability created by a constitutional provision most strikingly resembling our own. The reasoning of these cases is with reference to the rights both of the creditor and the oftentimes unfortunate stockholder, and, in view of these rights as defined, we can readily understand the purpose of the provision of section 4, article 11, designated "Miscellaneous Corporations," of the constitution of this state, that "In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock," supplemented, where banking institutions are concerned, by the provisions of section 7, that "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held, to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder." In each case the special individual liability is to be used as a trust fund for the benefit of the

creditors of the corporation, as pointed out in *Wilson v. Book*, and the method by which that fund is to be created is clearly indicated by the constitutional provisions just quoted.

In argument it was stated that there could be no question of the proposition that a receiver could not maintain an action for the benefit of the creditors of the bank, and in support of this proposition there were cited Morawetz, Corporations, section 869, and Cook, Stock & Stockholders, section 218. A reference to the authorities cited by these text-writers discloses the fact that the author, in each instance, founded this proposition on the decisions of those courts which hold that the liability of an individual stockholder is to the creditors of the corporation, and, therefore, not enforceable as a trust fund for the benefit of all creditors of the corporation. It would logically result from these premises that a receiver could not bring an action against the stockholders, for, according to this theory, the actions must be by creditors as such in their own right. Even in this, however, there is not a uniformity of views, for the action in *Stewart v. Lay*, 45 Ia., 604, was by a receiver, although the supreme court of that state, under special statute, holds that the action must be at law. The proper view to be taken of this proposition is so well expressed in *Wilson v. Book, supra*, that we quote therefrom the following language: "If the liability is secondary and for the benefit of all the creditors, it is a trust fund for the purpose of satisfying their claims. All the other property of an insolvent corporation is a trust fund for the same purpose, and there is no reason why trust funds for a single purpose, though derived from different sources, should not be collected and administered in the same proceeding. It is conceded that the appointment of a receiver for an insolvent corporation is the commencement of a proceeding to enforce liabilities of one kind, the proceeds of which will constitute a trust fund for the benefit of creditors, and there is no good reason why another should be commenced to

accomplish the same purpose as to liabilities of another kind. The receiver, when appointed, takes possession of all the property of the corporation for the benefit of all its creditors, and it should be held that he has the right, under the direction of the court, to enforce every liability of whatever nature which the court may find necessary to fully protect the rights of the creditors. In this way all creditors will share alike and the entire affairs of the corporation, including the adjustment of the liabilities of its stockholders, will be subject to the control of the court in a single action and unnecessary delay and expense prevented." The right of the receiver to enforce the liability of individual stockholders on behalf of the creditors is based, in the above opinion, on the fact that such liability is enforced for the realization of a trust fund for the benefit of all creditors of the corporation. As has already been noted, we cannot determine what effect should be held to follow the filing and allowance of a claim, so that this discussion by plaintiff of the necessity of a receiver applies only to the contention of the defendant, that the receiver, when there is one, can alone enforce the payment of the individual liability of a stockholder.

It follows from the views expressed that plaintiff, as a creditor of the State Bank of Ainsworth, had no right to maintain an action at law in his own right against the individual stockholder of the bank merely as such, for the collection of an amount equal to the par value of his stock. The judgment of the district court is therefore

AFFIRMED.

MARGARET Y. HENDRIX V. JOSEPH BARKER ET AL.

FILED OCTOBER 7, 1896. No. 6718.

1. **Vendor and Vendee:** EQUITY. In an executory contract for the sale of real estate equity treats the vendor as the trustee of the purchaser and the purchaser as the trustee of the purchase money for the vendor. This rule rests upon the doctrine that equity considers that done which ought to be done.

2. ———: CONTRACT: LIEN FOR PURCHASE MONEY. In an executory contract for the sale of real estate the title retained by the vendor is security for the payment of the unpaid purchase money.

3. ———: ———: ———: FORECLOSURE. In such a contract the vendor, upon default made by the vendee, may treat the contract as an ordinary real estate mortgage and foreclose it as such.

4. ———: ———: ———: ———: DECREE. Where a suit is brought by a vendor to foreclose an ordinary contract for the sale of real estate as a mortgage the character of the decree to be rendered must be determined by the particular facts and circumstances in the case and the equitable rights of the parties.

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

Warren Switzler, for plaintiff in error.

B. N. Robertson, contra.

RAGAN, C.

On the 15th of March, 1887, Joseph and George Barker, as parties of the first part, and Margaret Y. Hendrix, as party of the second part, entered into a contract in writing, in and by the terms of which Barker agreed to sell and convey to Hendrix certain real estate situate in the city of Omaha. Hendrix on her part agreed to pay for said real estate $2,700, a part of which was paid on the date of the execution of the contract, and the remainder to be paid in installments of $500 on the 15th day of March of the years 1888, 1889, 1890, and 1891, the deferred installments to draw interest at the rate of eight

per cent per annum. The contract provided: "And the said party of the second part does hereby * * * covenant, promise, and agree to and with the said parties of the first part * * * to pay the residue of the consideration price for said premises." There was also in said contract the further provision: "These presents are upon the express condition that in case of the failure of the said party of the second part * * * to perform all or either of the covenants and promises on his part to be performed, then said parties of the first part * * * shall have the right to declare this contract void and thereupon to recover * * * all the interest which shall have accrued upon this contract up to the time of declaring it void as rent for the use and occupation of said premises, to hold and retain the moneys paid on this contract by said party of the second part as liquidated damages and to take immediate possession of the premises." Mrs. Hendrix failed to make some of the payments due from her to Barker according to the terms of said contract and thereupon the Barkers brought a suit in the district court of Douglas county against Hendrix to foreclose this contract as an ordinary mortgage. In their petition the Barkers prayed for an accounting between themselves and Hendrix and for a decree that unless the amount found due should be paid within a day fixed the interest of Hendrix in said real estate might be sold to make and raise the sum found due, and in case said real estate failed to sell for a sufficient amount to pay the debt found due to them from Hendrix that they might have a deficiency judgment against her for the remainder. The only defense interposed by Hendrix to this action, if it can be called a defense, was that she claimed she was entitled to forego all claim against the Barkers for payment that she had made upon the contract, and that they should take possession of the real estate and be discharged of any liability to convey it to her. The court, however, treated the contract as an ordinary real estate mortgage upon the premises and made a find-

ing that in default of the payment of the sum found due within a certain date that the interest of Hendrix in the land should be appraised, advertised, and sold to make and raise said sum of money. From this decree Hendrix has prosecuted to this court a petition in error.

1. The counsel for Mrs. Hendrix states his contention here as follows: "The plaintiff in error contends that the court erred in not entering a decree of strict foreclosure as provided by the contract entered into by the parties and erred in entering a decree ordering a sale of the premises over the offer of the plaintiff in error to submit to a forfeiture and strict foreclosure." But the contract between the parties does not provide that Mrs. Hendrix at her option may waive her claim against the Barkers for any payments that she has made on the contract and by releasing them from any obligations to convey the real estate to her be thereby discharged and released from the contract. For the court to have entered such a decree in this case would have been for the court to make a contract for the parties instead of enforcing one made by themselves. The contract does provide that in case Mrs. Hendrix should make default in any of the payments promised by her to be made on the contract, that then the Barkers, at their option, may declare the contract at an end, recover from Mrs. Hendrix the interest accrued on the deferred payments to the date of declaring the contract at an end and retain as liquidated damages all payments made by Mrs. Hendrix on the contract and take possession of the premises. Had the Barkers exercised or attempted to exercise this option it may be that Mrs. Hendrix would be entitled to be discharged from all further liabilities under the contract. But they did not exercise this option or attempt to. We are not prepared to say, notwithstanding the terms of the contract, that had the Barkers attempted to exercise their option that a court of equity at the instance of Mrs. Hendrix and on her offering to comply with the contract would not have interposed and stayed the forfeiture.

But that question is not before us. The character of the decree to be rendered in such a case as this must be determined by the particular facts and circumstances in each case, regard being had to the equitable rights of the parties in the particular case. (*Gardels v. Kloke*, 36 Neb., 493.) Whatever other rights or remedies the Barkers may have had under this contract, we are very clear that the rights and equities of Mrs. Hendrix have not been destroyed or infringed by the decree complained of. It is a well established principle that, where a contract is made for the sale of real estate, equity treats the vendor as the trustee of the purchaser for the land, and the purchaser as the trustee of the purchase money for the vendor. This doctrine rests upon the equitable doctrine that equity considers that done which ought to be done. (*Dorsey v. Hall*, 7 Neb., 460; *Gardels v. Kloke*, 36 Neb., 493; *Church v. Smith*, 39 Wis., 492; *King v. Ruckman*, 21 N. J. Eq., 599; 1 Pomeroy, Equity Jurisprudence [2d ed.], sec. 368; *Fitzhugh v. Maxwell*, 34 Mich., 138.)

2. All the authorities agree that in an executory contract for the sale of real estate the vendor retains the legal title to secure the payment of the unpaid purchase money. In *Church v. Smith*, 39 Wis., 492, the court says: "The vendor of land by an ordinary land contract holds the legal title as security for the unpaid purchase money. (*Sparks v. Hess*, 15 Cal., 186.) And in *Graham v. McCampbell*, 33 Am. Dec., 126, the supreme court of Tennessee says: "We are not able to draw any sensible distinction between the cases of a legal title conveyed to secure the payment of a debt and a legal title retained to secure the payment of a debt. In both cases courts of chancery consider the estate only as security for the payment of the debt, upon the discharge of which the debtor is entitled to a conveyance in the one instance and a reconveyance in the other."

3. And the authorities are harmonious that in an executory contract for the sale of real estate the vendor, upon default made by the vendee, may treat the contract

as an ordinary real estate mortgage and foreclose it as such. In *Fitzhugh v. Maxwell*, 34 Mich., 138, the court said: "A contract for the sale of land conveys to the vendee an equitable title, and the only principle upon which the vendor may sue for his money, and at the same time seek security against the land, is the one which recognizes the analogy to a vendor's lien in cases where the legal title has been conveyed; and the vendee's title can only be divested by a sale. The claim of a vendor in a land contract is but an ordinary money debt secured by the contract, and his proceedings to enforce the lien upon the land should be governed by the analogies of proceedings to enforce other equitable liens and be executed by a sale to satisfy the amount due." In *Gardels v. Kloke*, 36 Neb., 493, this court distinctly held: "An action will lie to foreclose the rights of a purchaser in a contract for the sale of real estate, and the court by its judgment may direct the purchaser to comply with the terms of the contract within a reasonable time, to be named by the court, or order the premises sold and the proceeds applied to the payment of the judgment." (*Vail v. Drexel*, 9 Ill. App., 439.) In *Sparks v. Hess*, 15 Cal., 186, the court said the position of a vendor in an executory contract for the sale of real estate is similar to that of a party executing a conveyance and taking back a mortgage. He "may sue at law for the balance of the purchase money or file his bill in equity for the specific performance of the contract and take an alternative decree that if the purchaser will not accept a conveyance and pay the purchase money the premises be sold to raise such money and that the vendee pay any deficiency remaining after the application of the proceeds arising upon such sale." (*Gaston v. White*, 46 Mo., 486.) The decree of the district court is right and is in all things

AFFIRMED.

VICTOR G. LANTRY V. ALFRED F. WOLFF.

FILED OCTOBER 7, 1896. No. 6803.

1. **Ejectment:** EVIDENCE. A plaintiff in ejectment, to recover, must show a legal estate to the premises for which he sues, but the evidence of this legal estate need not be a perfect legal paper title.

2. **Adverse Possession.** The title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continued, notorious, and adverse possession thereof, claiming title to the same against all persons, for ten years.

3. ———: EVIDENCE. It is not essential that the claim of right or title to the land by the adverse occupant should be a valid legal claim in order that the statute may run in his favor. The facts of the continuous possession, its adverse character, and the claim of the occupant to be the owner of the premises are the essential things to vest a title to real estate by occupancy thereof.

4. ———: ———: TACKING POSSESSION. If the adverse possession of the occupant is a continuation of the possession of a prior adverse possessor claiming title, and such occupant claims title from such prior possessor, then the possession of the occupant may be tacked to that of such prior possessor.

5. **Ejectment:** EVIDENCE. A plaintiff in ejectment must recover upon the strength of his own title, but this does not mean that he is required to prove a title as against the whole world; it is sufficient if he prove title good as against the defendant. *Carson v. Dundas*, 39 Neb., 503, followed.

6. **Adverse Possession:** EVIDENCE. Evidence examined, and *held* to sustain the finding of the district court that defendant in error had acquired the legal title to the real estate in controversy by reason of the adverse occupancy thereof under claim of ownership by him and his grantors for ten years prior to the date the plaintiff in error acquired any interest in, or possession of, said premises.

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

Charles A. Goss, for plaintiff in error.

Curtis & Shields and *G. W. Shields*, *contra*.

RAGAN, C.

This is an action in ejectment, brought in the district court of Douglas county by Alfred F. Wolff against Vic-

tor G. Lantry, to recover the possession of "lot 128, in the city of Florence, known as the 'Mormon Grant.'" Wolff had a verdict and judgment, and Lantry brings the judgment here for review.

The only argument relied upon here for a reversal of the judgment is that the finding of the court, to whom the case was tried without a jury, is not supported by sufficient evidence. The evidence in the record shows that on the 7th of April, 1856, the Florence Land Company conveyed the real estate in question to Brigham Young, "trustee, in trust for the Church of Jesus Christ of Latter-Day Saints." On the 14th of October, 1872, the county treasurer of Douglas county executed a treasurer's or tax deed of the lot to Ellen M. Piper. On the 16th of September, 1874, Piper, under and by the name of Wood, conveyed the lot to William Tubb. Tubb resided upon this lot, cultivated it, and paid the taxes upon it until April 30, 1879, claiming title to the same by virtue of his deed from Wood. On the 30th of April, 1879, Tubb died intestate, leaving no heirs in this country. At the time of his death, and for some years before, his stepdaughter, Mrs. Sarah Foster, was residing with him on the property, and on his deathbed he said to her that she should have what he had when he died, and asked her if she would see that his debts were paid. She told him that she would, and he then said, "After they are paid, do what you like with the rest." Mrs. Foster, in pursuance of this, remained in actual possession of the premises after the death of Tubb, claiming to be the owner of them by virtue of the conversation, just quoted, with Tubb during his last sickness, until the 3d of April, 1881, when she sold and conveyed the property to Mary Dunk. Mrs. Dunk and husband occupied the premises until the 25th of January, 1882, when they sold and conveyed them to William Reeves. He remained in occupancy of the premises until the 12th of July, 1884, when he sold and conveyed them to John F. Behm. Behm remained in the occupancy of the premises until the 10th of August, 1885,

when he sold and conveyed them to Mary Mack, and she and her husband occupied the premises and cultivated them until the 9th of September, 1886, when they sold and conveyed them to Wolff, the defendant in error. Wolff took the actual possession of the premises and leased them to one Larsen on the 25th of March, 1887, for two years. To establish his title and right to the possession of the premises, Wolff relied upon the actual, open, notorious, exclusive, and adverse possession thereof by himself and grantors, claiming ownership for more than ten years; and we are of opinion that the evidence just quoted abundantly sustains his claim and justified the finding of the district court.

It is true that a plaintiff in ejectment, to recover, must show a legal estate to the premises for which he sues (Code of Civil Procedure, sec. 626); but the evidence of this legal estate need not be a perfect legal paper title. The title to land becomes complete in an adverse occupant when he and his grantors have maintained an actual, continued, notorious, and adverse possession thereof, claiming title to the same against all persons, for ten years. (*Horbach v. Miller*, 4 Neb., 31; *Parker v. Starr*, 21 Neb., 680; *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb., 371.) In *Tex v. Pflug*, 24 Neb., 666, it was held: "If one by mistake inclose the land of another and claim it as his own to certain fixed monuments or boundaries, his actual and uninterrupted possession for the statutory period will work a disseizin and his title will be perfect." (*Levy v. Yerga*, 25 Neb., 764; *Obernalte v. Edgar*, 28 Neb., 70.) In *Meyer v. City of Lincoln*, 33 Neb., 566, it was held that where a person had been in the actual, exclusive, and uninterrupted possession of a portion of a public street under a claim of right thereto for ten years, the title to such part of the street had vested absolutely in such occupant. (*Lewis v. Baker*, 39 Neb., 637.)

It is not essential that the claim of right or title to the land by the adverse occupant should be a valid legal claim in order that the statute may run in his favor.

The facts of the continuous possession, its adverse character, and the claim of the occupant to be the owner of the premises are the essential things to vest a title to real estate by occupancy thereof. (*Gatling v. Lane*, 17 Neb., 77.) It is quite immaterial, then, whether the statement made by Tubb to Mrs. Foster amounted to a devise or a gift to her of the land in question, and whether by such statements she acquired any valid title whatever to the property. The important facts are that she believed that Tubb had given her the real estate; that she took and remained in possession thereof by virtue of such statements and claimed title to the same as against the world.

In the case at bar the possession of Mrs. Foster to this land should be tacked to that of Tubb, since she came in claiming under Tubb, and her possession of the property was connected with, and was a continuation of, the possession of Tubb. (*Stettnische v. Lamb*, 18 Neb., 619.) And since Tubb took possession of the land on the 16th of September, 1874, and until his death actually occupied, paid taxes upon it, claimed to own, and held possession adverse to all the world, the statute began to run in his favor from the date of his possession; and as Mrs. Foster's possession was with claim of title and adverse, and she claimed title from Tubb, the statute was not interrupted, and it follows that, if Lantry took possession of the real estate in question at the time he claims he did, in 1888, Wolff's title had at that time been perfected by the statute of limitations. Lantry's claim of title is this: In the year 1886 he became interested in the land through "a deal" which he had with a man named John Taylor, president of the Mormon church, and trustee in trust for the Mormon church; that about the close of the year 1886, or early in the year 1887, he made a "deal" with the church through its president, Taylor, or Staynor, its agent, for the property in controversy; that he made a payment upon this property; that in 1887 John Taylor sent him a deed for the property, which he declined to accept because of the manner of its execution; but in

1888 he took possession of this property. At that time, however, Wolff was in possession of the property through his tenant, Larsen, as already stated, but it seems that while the lot was in cultivation and fenced no one was actually living upon it at the time Lantry took possession.

Lantry put in evidence a quitclaim deed to the premises, dated January 27, 1888, made by one John Stalon to one Eldridge, but the evidence does not show that Stalon was ever in possession of the property, or that he ever had any claim or any title to it whatever. On the 28th of June, 1888, Eldridge quitclaimed the property to Lantry, and on the 28th of September, 1892, Wilford Woodruff, "trustee in trust for the Church of Jesus Christ of Latter-Day Saints," executed and delivered a quitclaim deed of the property to Lantry; but the record does not disclose that Young as trustee had ever conveyed to Woodruff as trustee, nor was any attempt made to show that Woodruff had succeeded Brigham Young as trustee of the property. A plaintiff in ejectment must recover, of course, upon the strength of his own title, but this does not mean that the plaintiff is required to prove a title to the real estate as against the whole world. It is sufficient if he prove a title good as against the defendant. (*Carson v. Dundas*, 39 Neb., 503.) We conclude, therefore, that the evidence supports the finding of the district court that prior to the time that Lantry claims to have acquired any interest in this property, or claims to have been in possession thereof, a perfect legal title thereto had vested in Wolff because of the open, notorious, exclusive, and adverse possession of the property under claim of ownership thereto of Wolff and his grantors for more than ten years. The judgment of the district court is

AFFIRMED.

FARMERS & MERCHANTS BANK OF ELK CREEK, NEBRASKA, ET AL. V. FARMERS & MERCHANTS NATIONAL BANK OF AUBURN, NEBRASKA.

FILED OCTOBER 7, 1896. No. 6779.

1. **Principal and Agent:** DISAFFIRMANCE. A principal must disaffirm the unauthorized act of his agent within a reasonable time after such act comes to his knowledge, or he will be bound thereby.

2. ———: ———. A principal will not be permitted to adopt the beneficial part of an unauthorized contract made by his agent and reject the remainder.

3. ———: ———: TIME. A principal sued upon an unauthorized contract made by his agent may on the trial of the case disaffirm the agent's act, if at that time such act is first brought to his knowledge.

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

J. Hall Hitchcock and *E. W. Thomas*, for plaintiffs in error.

Davidson & Giffen, contra.

RAGAN, C.

On and prior to April 28, 1892, one Russell and one Holmes were copartners and conducting a banking business at Elk Creek, Nebraska. This copartnership will hereinafter be called the "Elk Creek Bank." While the Elk Creek Bank was doing business it borrowed of the Farmers & Merchants National Bank of Auburn, Nebraska, hereinafter called the "Auburn Bank," $1,000, for which it executed and delivered to the Auburn Bank its note, and secured the payment of the same by the deposit with the Auburn Bank of certain bills or notes belonging to it, the Elk Creek Bank. About the 28th of April, 1892, a corporation, the Farmers & Merchants Bank of Elk Creek, Nebraska, hereinafter called the

"Farmers Bank," was organized for the purpose of conducting a banking business at Elk Creek, Nebraska. It bought a part of the assets of the Elk Creek Bank, including its furniture and fixtures, and conducted its banking business in the banking house formerly occupied by the Elk Creek Bank, and Holmes became the cashier of the Farmers Bank. On the 24th of January, 1893, the cashier of the Farmers Bank, without the authority or knowledge of the Farmers Bank, caused the Auburn Bank to surrender to the Farmers Bank the note of the Elk Creek Bank and the collateral pledged to secure its payment, and in lieu of said note and collateral Holmes executed and delivered to the Auburn Bank the note of the Farmers Bank for $1,000, due six months after date. About the 1st of March, 1893, the Farmers Bank suspended business and its effects were placed in the hands of a receiver by an order of this court, and thereupon the Farmers Bank as principal and a number of gentlemen as sureties made and delivered to the attorney general of the state a bond conditioned if the supreme court would make an order discharging said receiver that they would pay all the debts of the Farmers Bank within six months after March 1, 1893. This court made the order discharging the receiver, and the note held by the Auburn Bank remaining unpaid, it brought suit on said bond to recover the amount due it on said note. A jury was waived by the parties and the case tried to the court, which made a finding for the Auburn Bank, upon which judgment was rendered, to reverse which the Farmers Bank and the sureties on the bond aforesaid have prosecuted to this court a petition in error.

The only assignment of error argued in the brief is that the finding on which the judgment of the district court was based is unsupported by sufficient evidence. The uncontradicted evidence is that the debt sued for was not originally the debt of the Farmers Bank, but the obligation of the Elk Creek Bank, and that the cashier

of the Farmers Bank, in taking up the note of the Elk Creek Bank and giving the obligation of the Farmers Bank therefor, was unauthorized and without authority; but the learned district judge was of opinion that the Farmers Bank had ratified the act of its cashier and, therefore, was liable in this action, and whether the evidence is sufficient to sustain this finding is the only question presented by this record. The rule is that a principal must disaffirm the unauthorized act of his agent within a reasonable time after such act comes to his knowledge or he will be bound thereby, and a principal will not be permitted to adopt that part of a contract made by his agent which is beneficial to him and reject the remainder. (*Esterly Harvesting Machine Co. v. Frolkey*, 34 Neb., 110; *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb., 68.)

The evidence in the record shows, without conflict, that the Auburn Bank, to secure the payment of the note of the Elk Creek Bank, held a number of collateral notes; that when the cashier of the Farmers Bank caused the surrender to it of the note held by the Auburn Bank, he took up these collateral notes and, after canceling the original note of the Elk Creek Bank and delivering the note of the Farmers Bank in its stead, he turned over said collateral notes to the Farmers Bank and that it has since retained them. As already stated, all these acts were without the knowledge or consent of the Farmers Bank, and in performing them Holmes as cashier exceeded his authority. It does not clearly appear when the Farmers Bank first became aware of the transaction made the subject-matter of this suit; but if it was not aware of the action of its cashier before, it learned at the time of the trial for what purpose the note in suit had been given by its cashier, and it then learned that the collateral notes pledged to secure the note of the Elk Creek Bank had been turned over to it, the Farmers Bank, and that they were still in its possession. It was not too late even then for the Farmers Bank to disaffirm

the act of its cashier if it at that time first became aware of such act; and if it then desired to disaffirm the act of its cashier, it should on the trial have amended its answer and set out what Holmes had done, that his acts were unauthorized, and that it had then for the first time discovered that it held the collateral notes which had been surrendered by the Auburn Bank and returned or offered to return them or their proceeds to the Auburn Bank. Not having done this, or attempted to do it, we are of opinion that the district judge was right and that the Farmers Bank, by retaining the collateral surrendered by the Auburn Bank at the time the note in suit was given to it, thereby ratified the act of its cashier, and the judgment is

AFFIRMED.

J. H. TILDEN V. S. H. STILSON.

FILED OCTOBER 7, 1896. No. 6729.

1. **Chattel Mortgages:** ASSIGNMENT OF NOTE: PRINCIPAL AND AGENT. A sale and transfer of a negotiable note secured by mortgage operates as an assignment of the mortgage, and the transferee is not bound by the subsequent contracts of the original mortgagee with reference to the mortgaged property, in the absence of a relationship of principal and agent between them.

2. **Replevin:** DEMAND: COSTS. A defendant in replevin who unsuccessfully seeks to establish a right of possession in himself is liable for costs, although no demand was pleaded or proved.

ERROR from the district court of Hamilton county. Tried below before BATES, J.

Howard M. Kellogg and *A. W. Agee*, for plaintiff in error.

P. Likes and *Whitmore & Carr*, *contra*.

IRVINE, C.

One John Hiatt, June 1, 1889, executed to J. D. Ferguson, Jr., a chattel mortgage on two mules and certain

other property to secure a negotiable promissory note. August 17, 1889, he, with Jerome Hiatt, executed to the Westinghouse Company another chattel mortgage on the same mules, together with other property, a portion at least of which was not included in the Ferguson mortgage. Hiatt also, at other times, contracted to sell certain corn,—a portion to Stilson and a portion to W. H. Ferguson,—the purchasers making certain payments thereon in advance. The Ferguson mortgage, among other things, covered growing corn which J. D. Ferguson claimed was the same corn which W. H. Ferguson and Stilson claimed under the contract of sale. Tilden, as agent for the Westinghouse Company, took possession of the mules and other property under that mortgage. Stilson, claiming to have purchased the J. D. Ferguson mortgage, brought this action in replevin to recover the mules. At the close of the testimony the court directed a verdict for the plaintiff. The defendant brings the case here by proceedings in error, claiming, in the first place, that the peremptory instruction to find for the plaintiff was erroneous.

In addition to the foregoing facts, it appeared that before the J. D. Ferguson note matured it was transferred, for value and by general indorsement, to the Farmers & Merchants Bank of York. About the 1st of January, 1890, the note not having been paid, J. D. Ferguson took steps to enforce the mortgage. He seems to have replevied the corn, and finding Tilden in possession of the mules under the Westinghouse mortgage, he made an arrangement with Tilden whereby Tilden should proceed to sell the mules under that mortgage. In the meantime J. D. Ferguson was to exhaust the other property covered by his mortgage, and if it proved insufficient to discharge the debt, then Tilden was to apply so much of the proceeds of the sale of the mules as might be necessary to supply the deficiency. Thereafter Stilson, finding his and W. H. Ferguson's claim to the corn jeopardized by the J. D. Ferguson mortgage, took up the note secured

by said mortgage, paying to the Farmers & Merchants Bank what was due thereon, the officer transacting the business for the bank indorsing the note, and at the same time writing the words "without recourse" above what had been the general indorsement of Ferguson. Tilden proceeded to sell the mules under process foreclosing the Westinghouse mortgage, and became himself the purchaser at the sale, knowing at that time that Stilson was claiming under that mortgage. It was immediately after this sale that the action was instituted.

It is claimed by the plaintiff in error that the cause should have been submitted to the jury at least on the issues as to whether the J. D. Ferguson note had in fact been sold to the bank, and if so, whether Ferguson had authority from the bank to make the agreement with Tilden which the proof shows was made. We do not think, however, that the evidence was of such a character as to warrant a submission of these issues to the jury. We cannot find that the evidence of the sale of the Ferguson note to the bank is in anywise impeached or contradicted. Nor can we find that there is any evidence that Ferguson had any authority from the bank to waive its rights. It is true the evidence shows that Mr. Williams, who was conducting the business of the bank, was aware that Ferguson was seeking to subject the property to the payment of the mortgage. The bank being aware of this and not interfering, it would doubtless be bound by his acts in foreclosing the mortgage. But it does not appear that the bank knew anything about Ferguson's agreement to permit the mules to be retained and sold by Tilden. If Ferguson had authority from the bank to foreclose the mortgage, this would not imply authority to surrender the bank's right of possession to a junior mortgagee and so, in effect, waive the bank's prior lien upon the property, in exchange for a personal remedy for an accounting against the junior mortgagee. The transfer of a note secured by chattel mortgage, as in the case of a real estate mortgage, operates as an assignment of the

mortgage itself. (*Harman v. Barhydt*, 20 Neb., 625.) By the transfer of the note to the bank, the bank became the owner of the mortgage, and thereafter its rights could not be impaired by the acts of the original mortgagee, except in so far as an agency existed between them. The case is analogous in principle to *Eggert v. Beyer*, 43 Neb., 711, and *Stark v. Olsen*, 44 Neb., 646, where it was held that the payment of negotiable notes secured by real estate mortgage to the original payee did not, as against a *bona fide* holder of the notes for value, operate to discharge the mortgage. Ferguson's acts were therefore entirely without authority from the then holder of the mortgage, and did not estop either the bank or Stilson, its assignee, from asserting its prior right of possession.

It is also argued that, no demand upon Tilden having been proved, the defendant's motion to tax the costs against the plaintiff should have been sustained. When a defendant in replevin asserts ownership or right of possession in himself, the plaintiff cannot be subjected to the costs of litigating the issue thus thrust upon him, and in such case he is entitled, upon a verdict in his favor, to judgment for costs. (*Homan v. Laboo*, 1 Neb., 204; *Pyle v. Warren*, 2 Neb., 241; *Aultman v. Steinan*, 8 Neb., 109; *Rodgers v. Graham*, 36 Neb., 730.)

JUDGMENT AFFIRMED.

DEERE, WELLS & COMPANY V. EAGLE MANUFACTURING COMPANY ET AL.

FILED OCTOBER 7, 1896. No. 6683.

1. **Review**: INTERVENTION: DENIAL OF RIGHT: NEW TRIAL. A motion for a new trial is not necessary to obtain a review, on error, of an order refusing to permit a third person to intervene in an action, such refusal being based on a consideration of the petition alone, without issues joined or trial.

2. **Attachment:** PRIORITY OF LIENS: INTERVENTION. Writs of attachment having been levied in different actions on the same property, the plaintiff in the later case may intervene in the earlier case on proper showing, not to defend the principal action or to move to discharge the attachment, but to have the relative priority of the levies adjudicated.

3. ———: PROCEDURE: WAIVER. While the defendant in an attachment case may waive mere irregularities, he cannot, as against junior attaching creditors, waive a substantial departure from the mode prescribed by law for giving effect to the attachment, nor can he waive defects which prejudice the substantive rights of such creditors.

4. **Suit on Claim Not Due:** ATTACHMENT. The institution of an action before the claim is due, and the issuing and levying of an attachment without obtaining an order therefor from a court or judge authorized to issue the same, is a substantial defect of which junior attaching creditors may take advantage.

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

Campbell & Wallis and *Harl & McCabe*, for plaintiff in error.

References: *Osborn v. Moncure*, 3 Wend. [N. Y.], 170; *Hartley v. Case*, 1 Car. & P. [Eng.], 555; *Davis v. Eppinger*, 18 Cal., 379; *Matthews v. Densmore*, 43 Mich., 461; *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb., 137; *Swift v. Crocker*, 21 Pick. [Mass.], 241; *Harris v. Tenney*, 20 S. W. Rep. [Tex.], 82; *Claflin v. Feibleman*, 10 So. Rep. [La.], 862; *Speyer v. Ihmels*, 21 Cal., 280; *Horn v. Volcano Water Co.*, 13 Cal., 62; *New Orleans Canal & Banking Co. v. Beard*, 16 La. Ann., 345; *Jacobs v. Hogan*, 85 N. Y., 243; *New Orleans Canal & Banking Co. v. Stafford*, 12 How. [U. S.], 450; *Freeman v. Howe*, 24 How. [U. S.], 450; *Buck v. Colbath*, 3 Wall. [U. S.], 334.

Willis E. Reed, contra.

References: *Harrison v. King*, 9 O. St., 388; *Ward v. Howard*, 12 O. St., 158; *Rudolph v. McDonald*, 6 Neb., 164; *Ashton v. Jones*, 14 Neb., 429; *Lunt v. Adams*, 17 Me., 230; *Veazie Bank v. Winn*, 40 Me., 62; *Staples v. Franklin Bank*,

1 Met. [Mass.], 43; *Levy v. Millman*, 7 Ga., 167; *Danforth v. Carter*, 1 Ia., 546.

IRVINE, C.

The Eagle Manufacturing Company originally brought this action against Hollingshead & Young to recover on certain promissory notes. At the commencement of the action a writ of attachment was issued and levied on property of defendants. Hollingshead & Young in the first place filed an answer denying that any of the notes was due at the commencement of the action. They subsequently, however, withdrew this answer and entered into a stipulation whereby the plaintiff was permitted to take judgment. The day this stipulation was filed Deere, Wells & Co. filed a petition of intervention, alleging that they had commenced certain actions against Hollingshead & Young and caused attachments to be levied upon a portion of the property held under the plaintiff's writ. They furthermore alleged that no part of plaintiff's claim was due when plaintiff's attachment was issued and no order of attachment had been made or allowed by any judge or court; wherefore they claimed that the attachment of the plaintiff was void as against them. The prayer was that their liens be adjudged superior to that of plaintiff, that the plaintiff's attachment be dissolved, and they permitted to defend. The court denied their application to intervene, and from this order they prosecute error.

It is contended that they cannot be heard because their motion for a new trial was overruled with their own consent and was overruled in vacation. The first point is wholly without merit. The record shows not that the motion was overruled by consent of the intervenors, but that it was submitted in vacation with their consent and was by the court overruled. But the point is not material, because in such a case a motion for a new trial is not necessary. No trial was had. The court denied the intervenors the right to be heard in the action.

The order was the same in effect as if a demurrer to a petition had been sustained and the action dismissed. No motion for a new trial is necessary to obtain a review of such an order. (*O'Donohue v. Hendrix*, 13 Neb., 255.)

On the right to intervene the following statutory provisions demand consideration: Section 50*a* of the Code of Civil Procedure (Session Laws, 1887, p. 655, ch. 100, sec. 2) provides as follows: "Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the state of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences." Section 50*c* (Session Laws, 1887, p. 656, ch. 100, sec. 4) is as follows: "The intervention shall be by petition, which must set forth the facts upon which the intervention rests, and all the pleadings therein shall be governed by the same rules as obtain in regard to other pleadings provided for by the code. But if such petition is filed during term, the court shall direct the time in which answers thereto shall be filed." Section 232 is as follows: "Where several attachments are executed on the same property, or the same persons are made garnishees, the court, on the motion of any of the plaintiffs, may order a reference to ascertain and report the amounts and priorities of the several attachments." It would seem from these provisions that a second attaching creditor has such an interest in the disposition of the attached property as to secure him a hearing in some manner and at some stage of the proceedings. Unfortunately the adjudicated cases tell us more frequently what is not the proper time or the proper procedure than what is.

In *Rudolf v. McDonald*, 6 Neb., 163, a case decided prior to the intervention act already cited, it was held that objections to the form of the affidavit could not be taken advantage of by a subsequent attaching creditor after judgment. This was clearly right. The objection was technical merely, was one which the defendant could waive, it was not made until after judgment, when it was too late for the defendant to move to discharge the attachment, and it related to a matter which in nowise affected the substantive rights of junior creditors.

In *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb., 137, it was merely held that a general creditor has no such interest as to give him a right to intervene.

Ohio has a statute similar to section 232 of our Code. In *Harrison v. King*, 9 O. St., 388, a third person asked to be made a defendant on the ground that he had procured an attachment to be levied on the same property; that the plaintiff's claim would exhaust the property and that there was a valid defense to the claim of plaintiff, the nature of which he did not disclose. It was held that the intervenor was properly dismissed from the action. It was said that other creditors having orders of attachment levied upon the property must be heard as to any question of priority in the satisfaction of their respective judgments, and that such questions could be properly settled upon motion. In view of this statement we think the action of the court must have been based on the ground that the intervenor was attempting to defend the main action and that he had no right to do so; and not upon the ground that he had no right, on application, to have his priority determined. It will be observed that his application did not attack the validity of the attachment proceedings. Neither did he charge collusion or fraud between the plaintiff and defendant to procure the attachment or to bring about a judgment, and he did not even disclose a defense.

In *Ward v. Howard*, 12 O. St., 158, a subsequent attaching creditor had intervened and moved to discharge the

attachment. It was held error to permit him to do so, because his rights were not so broad as those of the defendant, and he could not assail the attachment for mere irregularities. But again in that case it was recognized that in some manner and at some stage of the proceedings other attaching creditors have a right to contest the priority of the attachment. It was suggested that ordinarily such a contest should not be permitted until by judgment the different creditors have established their rights against the debtor; but it was added that cases may properly arise requiring the claim or priority of some party to be adjudged anterior to his judgment against the defendant. In some states the right of intervention is in such a case specially guaranteed by statute. The necessity of some means whereby in a summary manner the conflicting claims of the different attachment creditors may be determined, and fraud, collusion, and abuse of process frustrated; and the fact that the courts in general have permitted such summary remedies to be pursued is well stated and illustrated in Drake on Attachment, section 272, *et seq.*

In determining the question here presented we must bear in mind that the attachment is a proceeding ancillary to the principal action. With the latter strangers to the action have no concern. In the attachment, however, strangers having an interest in the property, or a lien thereon, may be vitally interested. Such a stranger should not be permitted to interfere with the rights of the parties to prosecute and defend the principal action. When their interests require they must be permitted in a proper manner to assert their claim to the property attached. Again, as held in *Ward v. Howard* and in *Rudolf v. McDonald, supra,* the right of a subsequent attaching creditor to oppose a prior attachment is not so broad as that of the defendant. Mere irregularities, which do not affect the substantive rights of other creditors, the defendant may waive. It is different, however, when such substantive rights are affected by the prior attach-

ment or by the acts of the defendant. It is universally held that subsequent attaching creditors may have relief against a prior attachment procured by fraud or collusion with the defendant; and it is also the rule that while the defendant may waive mere irregularities, he may not as against other creditors waive substantial departures from the legal mode prescribed for enabling a party to obtain the benefit of an attachment. (Drake, Attachment, section 262.) It is clear on principle that the institution of an action before the claim is due, without pursuing substantially the steps provided by law in such a case, operates to secure an undue preference over creditors who proceed regularly. If, as was here alleged, the action was brought before the claim was due, and the attachment levied without any order of a court or judge allowing the writ to issue, this was more than a mere irregularity in the proceeding; it was a substantial defect to the prejudice of intervenors' rights. (*Swift v. Crocker*, 21 Pick. [Mass.], 241; *Davis v. Eppinger*, 18 Cal., 379.)

The right of intervenors to assert the priority of their claim and establish it as against the plaintiff is therefore clear. The only question is as to the procedure for that purpose. It may be that an independent action would lie. Many cases so hold. But we do not think that such a course was necessary. As shown in the passage cited from Drake on Attachment, the policy of the courts has generally been to permit a more direct and speedy adjudication of conflicting claims. Section 232 of the Code expressly recognizes such direct procedure. It would seem from that section that the application should be by motion. If so, it must be in some of the attachment cases, and if in any, it is clearly most properly in that in which the property was first seized or in that whose priority is attacked. Determined by either rule this is in this instance the proper case in which to make the application. It is true that the intervenor here styles his pleading, not a motion, but a petition of intervention. The name he gives it is not, however, material. It al-

leges facts sufficient to call into action the power of the court, by a reference or othewise, to determine the question of priority; and it is therefore a sufficient application for that purpose. It is true that the intervenors prayed for a dissolution of the attachment and permission to defend the action; and that they had no right either to defend the action, as such, or to insist on an absolute discharge of the attachment. There was, however, a prayer to have the intervenors' lien adjudged superior to that of plaintiff. This was a proper prayer, and the fact that too much was asked did not justify the district court in denying what the intervenors were entitled to. The judgment of the district court is reversed and the cause remanded with instructions to proceed upon intervenors' application to determine the priorities.

REVERSED AND REMANDED.

ABSALOM HENRY, APPELLEE, v. WILLIAM E. WARD ET AL., APPELLANTS.

FILED OCTOBER 7, 1896. No. 6818.

1. **Trial:** BURDEN OF PROOF: HIGHWAYS: INJUNCTION. Generally the burden of proving an issue lies on the party holding the affirmative. Therefore, in an action to restrain county commissioners from removing plaintiff's fences from land claimed by the commissioners to be a highway, the plaintiff alleging that no highway existed and the defendants alleging that there was a lawfully opened road at the point, the burden was on the defendants to establish the existence of the highway.

2. **Highways:** SECTION LINES: DAMAGES. Under the present law (Compiled Statutes, ch. 78; Session Laws, 1879, p. 120), all section lines are declared to be public roads, but they cannot be opened as such, nor can lands be appropriated therefor, until the steps provided by statute have been taken for opening such roads and ascertaining the damages.

3. ———: ———: STATUTES. The operation of the act of 1873, making section lines in certain counties public highways, was so far modi-

fied by the act of 1879 that section lines not used as roads for five years before the passage of the latter act cannot be opened as such without complying with the requirements of the act of 1879.

4. **Statutes:** TITLES: AMENDMENTS. Where an act has been passed complete in itself, the legislature may, under the title of an act to amend such act, substitute another law of similar complete character, and, so long as its provisions are germane to the title and subject of the act amended, it may be valid, although it may operate incidentally to modify other statutes.

APPEAL from the district court of Dawson county. Heard below before HOLCOMB, J.

E. A. Cook, for appellants.

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

IRVINE, C.

This was an action by Henry, the object of which was to restrain the defendants, the county commissioners and certain road supervisors of Dawson county, from removing fences of the plaintiff along section lines. The issue presented and tried was as to whether or not a public highway existed which was obstructed by plaintiff's fences. There was a general finding for the plaintiff, and an injunction as prayed, and the defendants appeal.

It is admitted by the appellants that the evidence was sufficient to sustain the finding for the plaintiff in so far as there was any claim of a highway by prescription. An inspection of the answer renders it very doubtful whether the defendants claimed a right by dedication. If so, the evidence amply warranted a finding against them on such an issue. The only remaining question, therefore, is whether or not there was an otherwise lawfully opened highway obstructed by the plaintiff's fences. All the evidence introduced went to the question of user. The plaintiff, in his petition, denied the existence of a highway at the point in dispute. The answer denied this averment of the petition, and further pleaded the existence of a highway under the act approved February 24,

1873 (General Statutes, 1873, p. 959). The burden of proof was not upon the plaintiff to establish the negative of the issue thus presented, to-wit, the establishment and opening of a legal highway, and the evidence fails to prove the affirmative of the issue, unless a highway exists by operation of the general law.

Section 46, chapter 78, Compiled Statutes, being a portion of the road law of 1879 (Session Laws, 1879, p. 120), provides as follows: "The section lines are hereby declared to be public roads in each county in this state, and the county board of such county may, whenever the public good requires it, open such roads without any preliminary survey and cause them to be worked in the same manner as other public roads; *Provided*, That any damages claimed by reason of the opening of such roads shall be appraised and allowed, as nearly as practicable, in manner hereinbefore provided; *And provided further*, That the county board, before opening such section line road, shall direct the county surveyor to perpetuate the existing government corners along such line, by planting monuments of some durable material, with suitable witnesses whenever practicable, and make a record of the same." It is no longer open to controversy that this section does not itself operate as an opening of section lines as roads. Whether or not any such road shall be opened rests in the discretion of the board of county commissioners, the question for them to determine being whether or not the public good requires the opening of the road. (*Throckmorton v. State*, 20 Neb., 647.) The owners of land along the route of such road are also protected in their constitutional rights of compensation for land taken or damaged in the opening of such road (*Rose v. Washington County*, 42 Neb., 1; *Oyler v. Ross*, 48 Neb., 211); and in proceeding to open section line roads the statute must be complied with as to giving notice. (*Beatty v. Beethe*, 23 Neb., 210.) The statute merely locates roads along section lines; and it not being shown that any of the necessary steps were taken for opening the road in ques-

tion, no right can be claimed by the defendants under the act of 1879.

It is, however, claimed that the road was established and opened by virtue of the act of 1873 referred to in the answer. The road law existing prior to 1873 appears as chapter 47 of the Revised Statutes of 1866. In 1867 there was passed an act (Session Laws, 1867, p. 45) providing, among other things, that all roads located in compliance with the laws of this state are declared open roads, and the road supervisors shall proceed to remove all obstacles from the same within six months from the passage of the act. The act of 1873 provided that "section lines be and are hereby declared to be public roads and highways" in certain counties named. By the second section of the act it is made unlawful, where lands have been unimproved and unenclosed, to enclose the same without leaving a space of two rods' width on each side of the section line. By the third section "no road hereby established shall be opened until damages shall have been assessed where the same are claimed; *Provided, however*, That application for damages shall be made within ninety days from the passage of this act." The fifth section provides for the vacation of a section line road wherever any portion of the section line "shall be impracticable." By an act of 1875 (Session Laws, 1875, p. 114, sec. 1) "all roads or parts of roads located and established in this state, except such as are located on section lines, that shall not be worked or traveled for a period of six years from the location of said road or roads, the same shall be and are hereby declared vacated." In 1879 there was passed (Session Laws, 1879, p. 120) "An act to amend chapter 47 of the Revised Statutes of 1866, entitled 'Roads.'" This is our present road law, and contains section 46 above quoted. The argument on behalf of defendant is that this act did not operate to repeal the acts of 1873 and 1875, and did not vacate any roads established under the act of 1873, notwithstanding section 3 of that act, which provides that "all roads within the state which have been

laid out in pursuance of any law of this state or of the territory of Nebraska, and which have not been vacated in pursuance of the law, are hereby declared to be public roads; *Provided*, That all roads that have not been used within five years shall be deemed vacated." The evidence is undisputed that this road was not used prior to 1884. We need not closely inquire whether the effect of the acts of 1867 and 1873 referred to was to open all located roads and make them existing open roads, in legal effect, irrespective of user. It may well be doubted whether it was within the power of the legislature, by a declaration of such a character, to condemn private property without compensation unless claims were made for damages within ninety days, according to the act of 1873. We think this earlier legislation, whatever may have been its effect, was superseded by the act of 1879. It is true that the act of 1879 was in form and in title an act to amend chapter 47 of the Revised Statutes of 1866, and did not contain or repeal the acts of 1867 or of 1873. Nor did it in terms repeal the act of 1875, which vacated all roads except section line roads for non-user. But chapter 47 of the Revised Statutes of 1866 was a general statute, covering the whole subject of roads and embracing all the legislation then existing. Under the title of an act to amend that chapter, it was therefore competent for the legislature to include any subject germane to the provisions of the act amended; that is, relating to the general subject of location, opening, maintenance, and vacation of highways within the state. The act of 1879 repeated in the same terms a large portion of chapter 47, Revised Statutes, and it formed a complete law by itself on the subject of highways. The object of section 3 was to remove all uncertainty as to the existence of highways, first, by continuing in existence all theretofore legally laid out and not vacated; and second, by vacating all such highways as had not been used within five years. This road had not been used within five years, and therefore fell within the terms of the proviso of section 3.

Section 40 then re-established all section lines in the state as public highways, with special provisions for opening them and assessing damages. We hold that the effect of the act of 1879 was, therefore, to modify the operation of the acts of 1873 and 1875 in such a way that section line roads, as well as others, which had not been used for five years prior to the passage of the act should thereby become vacated, and to establish, or rather locate, as potential roads all the section lines of the state. But before any such section lines, not remaining established roads by virtue of the old law and user, could be opened or the land appropriated for highway purposes, the requirements of the act of 1879 must be complied with. It follows that the judgment of the district court was right.

AFFIRMED.

NELSON WESTOVER, ADMINISTRATOR, V. WALTER CARMAN'S ESTATE.

FILED OCTOBER 7, 1896. No. 6799.

1. **Executors and Administrators**: FINAL ACCOUNT: RECEIPTS. In the final accounting of an administrator the beneficiaries of the estate are not bound by the terms of receipts presented by the administrator. They may be heard on the accounting to deny the fact that payments were made as shown by the receipts.

2. ——: ——: ——. An administrator presenting in support of his final accounting receipts of a distributee of the estate, such distributee may oppose the allowance of credits thereon on the ground that the receipts were obtained by fraud and payments not made as shown thereby.

3. ——: ——: COMMINGLING FUNDS: INTEREST. An administrator who has mingled the funds of the estate with his own and used them for his own benefit is chargeable with interest thereon.

4. ——: ——: ——: ——. The same rule obtains where he has mingled the funds with those of strangers in his possession and under his control; and where they have been deposited in bank to the credit of such strangers he may be charged with interest al-

though it does not appear that he derived individual benefit therefrom.

5. ——: ——: ——: ——. Evidence examined, and *held* to sustain the action of the trial court in disallowing certain items in an administrator's account and charging him with interest on funds in his possession.

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

James E. Philpott and *E. H. Wooley*, for plaintiff in error.

Ricketts & Wilson and *A. G. Greenlee*, *contra*.

IRVINE, C.

Westover was appointed administrator *cum testamento annexo* of the estate of Walter Carman. It would seem that he was removed, but this fact appears merely inferentially in the record. On the coming in of his account there was a hearing in the county court and certain credits claimed by him were disallowed; and he was charged with interest on moneys in his possession. He appealed to the district court, where a decree was rendered substantially conforming to that in the county court. From this decree he prosecutes error.

In the brief only three items are discussed,—a charge of interest and the disallowance of two groups of vouchers. One of these groups is described as vouchers "5, 6, 8, 18, 19, 26." By the bill of exceptions we are informed that at the commencement of the trial in the district court the plaintiff in error made the statement that "as to the appeal taken from the court below on vouchers 5, 6, 8, 18, 19, 29, and $6.70 of No. 36, amounting to the sum of $123.84, the defendant does not prosecute, but will allow them as found by the court below." In the face of that statement, made of record, we cannot review the finding of the district court on the items so allowed by the appellant. It will be observed that, in the brief, complaint is made of voucher 26, which is not included in the admission of record. It is of the same character and stands

upon the same ground as some of the other items. There is probably an error either in the admission or in the assignment of error; but the voucher referred to being of the same class as others admitted to have been properly disallowed, we shall not disturb the finding of the trial court.

The second class of vouchers rejected and disallowed were certain ones given by the widow of the decedent, purporting to be for money paid by the administrator to her,—two of them for maintenance, two for claims against the estate, and one for her distributive share. These amount to $3,150.89. It is admitted that no money was paid when these vouchers were obtained, nor did they represent money paid in the past. The administrator contends, however, that the widow preferred to have her share in interest bearing securities, and that, therefore, promissory notes of different persons were turned over to her in lieu of money, she knowing and consenting to this arrangement. On behalf of those opposing the allowance of the account, to-wit, the widow and the other distributees of the estate, it is claimed that the vouchers were obtained by fraud, and that neither money nor notes were in fact delivered to her, and the notes which it was proposed to deliver were not the property of the estate and were worthless. The administrator argues, first, that in this proceeding the parties are bound by the terms of the vouchers, and if they are in fact genuine receipts the administrator is in his accounting entitled to credit therefor, leaving the person giving the receipts to a personal action against the administrator; second, that the finding of fact is wrong; and third, that in no event should the administrator be charged with the amount of these vouchers unless the notes are returned. These arguments we shall take up in their order.

We think this is an appropriate proceeding in which to determine the validity of the alleged contract between the widow and the administrator and the fact of its execution. Had the transaction been with a stranger to the

estate, who had not repudiated the contract, there might be force in the suggestion that in the absence of a rescission carried into effect, other parties could not avoid the administrator's contract. But the widow was an heir and legatee under the will; indeed, she was an executor and qualified as such, although the proof shows that Westover, as administrator, actually conducted all the business of the estate. Were she to remain passive and permit Westover's account to be settled on the basis of payments to her as shown by the receipts, it is doubtful whether she would not in a subsequent action be estopped to repudiate the transaction. Her dealings as widow and legatee with Westover were in his representative capacity and were with the estate. A receipt, which is simply a receipt and not a contract, is disputable, and the parties thereto are not concluded by its terms. If the receipts did not represent payments to her, or if they had been obtained by fraud, she was not bound and still had her claim against the estate. The administrator was not discharged from liability on that account; and therefore on his accounting not only the genuineness of the vouchers, but the fact of his having discharged the liability of the estate to the person giving the vouchers, were appropriate subjects of investigation.

We think, also, that the finding of fact was supported by the evidence. There is evidence tending to show that there existed a firm known as Fisher & Westover, comprised of John Fisher and Jennie Westover, Jennie Westover being the wife of the administrator; that the business of this firm was conducted by the administrator; that the moneys accruing to the estate were either carried in his own pocket or deposited to the credit of Fisher & Westover in the bank account of that firm, which was under the control of the administrator. For a long time prior to the alleged settlement with the widow, a large sum of money belonging to the estate had been in the hands of the administrator. The firm of Fisher & Westover was the owner of the notes in controversy. They

were delivered by Westover, with a written guaranty signed by him in the name of Fisher & Westover, to a brother of the administrator, W. H. Westover, an attorney at law. They were turned over to him for the purpose of collection, a large number of them being past due. The evidence also shows that a large number of them were absolutely worthless unless the guaranty of Fisher & Westover made them good. There is also evidence tending to show that Mrs. Carman knew of this arrangement and signed the vouchers knowing that the notes had been assigned to her and placed in the hands of W. H. Westover. She, however, flatly contradicts this and testifies that she never received any of the notes, that she never authorized their delivery to W. H. Westover, and never assented to any such arrangement. On this conflict of the evidence we must sustain the finding of the district court in her favor. No matter what she had agreed to receive in lieu of money, if the notes were not delivered to her or to some person else by her authority, no payment was ever made and no discharge effected, and this without regard to the existence of fraud in the transaction. It is true that there is evidence that she received two small sums of money from W. H. Westover, which were in fact proceeds of the collection of some of the notes. But she testifies that she did not know whence this money was derived. She was an old lady and testifies that prior to her husband's death she was wholly without experience in business affairs. The Westovers were relatives of hers. To constitute a ratification, some act must be done with knowledge of the facts. In other words, the conduct which amounts to a ratification must be such as to imply a consent to and recognition of the act ratified. It would be a harsh rule to hold that an old lady, wholly inexperienced in business, by the mere receipt of a few dollars from a brother of her husband's administrator should be held to ratify a transaction of the character which her testimony shows this to have been.

What we have already said practically disposes of the third argument. If she never received the notes, if they were never in the hands of her agent, she was not bound and it was not within her power to tender them back. It is shown that she did tender a written reassignment. This is all she could do. It is, perhaps, more than she was required to do. It is now claimed that the fact that she tendered a reassignment was an admission that she had received the notes; but we think not. It was at most an offer to restore the administrator to the position he would have been in had it not been for his executed but undelivered assignment of the notes to her.

This brings us to the question of interest. It is a settled principle of law that where an administrator mingles the funds of the estate with his own and uses them for his own benefit, he is chargeable with interest. (*Schieffelin v. Stewart*, 1 Johns. Ch. [N. Y.], 620; *Spear v. Tinkham*, 2 Barb. Ch. [N. Y.], 211; *Perrin v. Lepper*, 72 Mich., 454; *Estate of Clark*, 53 Cal., 355; *McCloskey v. Gleason*, 56 Vt., 264; *Hook v. Payne*, 14 Wall. [U. S.], 252.) It may be said that in this case there is no evidence that the administrator mingled the funds with his own, or that he used them for his individual gain. He himself admits, however, that he mingled them with the funds of Fisher & Westover. The beneficiaries of this estate have nothing to do with that firm and need not look to it for reimbursement. So far as the administrator is concerned, to mingle the funds of the estate with those of a stranger is the same as to mingle them with his own. The moneys were deposited in bank to the credit of Fisher & Westover. They were open to use by that firm, as well as by the administrator himself. The burden did not devolve upon the beneficiaries of showing that the administrator or Fisher & Westover had made a beneficial use of them. On this point the case of *Union Bank v. Smith*, 4 Cr. C. C. [U. S.], 509, is much in point. There it is said: "The list of balances referred to is not a list of balances in the respondent's account, but in the joint account of W. & C.

Smith with the bank. It does not appear who W. & C. Smith were; but if it should appear that they were a mercantile firm, and that the assets were placed in the bank subject to their use and control and mingled with their funds, I should think the respondent was chargeable with interest for the whole time the money was at their disposal, although they might have always had credit enough in bank to answer for it. It was a fund, when thus placed, which either partner had a right to draw out at any time; and it was as much liable to the creditors of W. & C. Smith as to those of S. Robertson, and perhaps more so. If W. & C. Smith had failed indebted to the bank, the bank would have retained it, and it would have been lost to the estate of Robertson. Although W. & C. Smith may not actually have used the money, yet it gave them credit with the bank, so that they might more readily obtain discounts." Many of the cases hold that an administrator mingling the funds with his own is chargeable with compound interest at the highest rate allowed by law. In this case only simple interest at seven per cent was allowed. There was evidence justifying a larger allowance than was made.

AFFIRMED.

JOHN CASEY AND JAMES CASEY V. STATE OF NEBRASKA.

FILED OCTOBER 21, 1896. No. 8421.

1. **Criminal Law:** ACCESSORIES. Section 1 of the Criminal Code is declaratory merely of the common law rule by which an accessory before the fact is defined as one who aids, abets, or procures the commission of a felony by another in his absence, and does not refer to one who, being present at the commission of a crime, aids or assists therein.

2. ———: ———. In those jurisdictions where, as in this state, the rule of the common law has not been relaxed, one charged as a principal only cannot be convicted as an accessory, and one charged

as an accessory before the fact cannot be convicted as a principal offender.

3. ———: ALIBI: PROOF: INSTRUCTIONS. An alibi is a legitimate defense to a criminal charge and should not be disparaged by the trial court, the weight or sufficiency of the evidence for that purpose being a question for the consideration of the jury.

4. ———: ———: ———. It is error to instruct that the accused in a criminal prosecution is required to *prove* an alibi. It is sufficient to entitle him to an acquittal if the jury, from a consideration of all of the evidence, entertain a reasonable doubt of his presence at the commission of the crime charged, whether such doubt arise from a failure of proof on the part of the state, or from evidence submitted by the accused in his own behalf.

ERROR to the district court for Richardson county. Tried below before STULL, J.

The opinion contains a statement of the case.

E. W. Thomas, F. Martin, and *C. Gillespie,* for plaintiffs in error:

One cannot be convicted as a principal in the commission of a crime under a charge of being an accessory before the fact. (*Hill v. State*, 42 Neb., 505; *Walrath v. State*, 8 Neb., 80; *Wagner v. State*, 43 Neb., 2.)

The judgment should be reversed for error in the instruction relating to the alibi. (Wharton, Criminal Evidence [9th ed.], sec. 333; *Wright v. People*, 4 Neb., 410; *Ballard v. State*, 19 Neb., 619; *Wasson v. Palmer*, 13 Neb., 376; *McPherson v. Wiswell*, 19 Neb., 117; *French v. State*, 12 Ind., 670.)

A. S. Churchill, Attorney General, George A. Day, Deputy Attorney General, and *C. F. Reavis,* for the state.

References: *Noland v. State*, 19 O., 131; *Hartshorn v. State*, 29 O. St., 635; *State v. Rowland*, 72 Ia., 327; *People v. Lee Gam*, 69 Cal., 552; *People v. Levine*, 85 Cal., 39; *Martin v. State*, 30 Neb., 507; *Debney v. State*, 45 Neb., 856; *Wright v. State*, 45 Neb., 44; *Tracy v. State*, 46 Neb., 362; *Folden v. State*, 13 Neb., 328; *Dodge v. People*, 4 Neb., 221.

POST, C. J.

At the March, 1896, term of the district court for Richardson county, John Casey and James Casey were convicted upon an information in which the former was charged as principal with the crime of robbery and the latter as an accessory thereto before the fact, and from which judgment they prosecute error to this court. The information mentioned, omitting caption and formal parts, is as follows: "That John Casey, late of the county aforesaid, on the 14th day of January, 1896, in the county of Richardson and state of Nebraska, in and upon one Leonard Jacobus, then and there being, unlawfully, forcibly, and with violence, did make an assault, and him, the said Leonard Jacobus, in bodily fear then and there feloniously did put, and from the person and against the will of him, the said Leonard Jacobus, then and there feloniously, forcibly, and with violence did steal, take, and carry away one United States note, commonly called a 'greenback,' of the denomination of five dollars, and one gent's gold-filled watch of the value of fifteen dollars, the property of the said Leonard Jacobus, with intent then and there to steal, take, and carry away the said property; and that one James Casey, before said robbery was committed, to-wit, on the 14th day of January, 1896, in Richardson county and state of Nebraska, unlawfully, purposely, and feloniously did incite, procure, aid, and abet the said John Casey in committing the robbery aforesaid." Separate motions for a new trial were interposed in the court below, followed by separate petitions in error to this court.

It is first urged in behalf of James Casey that there is an entire failure of proof to sustain the charge upon which he was convicted. Indeed, the proposition is not disputed, and cannot be upon the record before us, that the only evidence connecting him, the said James Casey, with the alleged robbery tends to prove that he was present and participated therein as a principal. The

question is therefore presented whether one charged as an accessory before the fact only can, under our statute, be convicted upon proof of guilt as a principal. It is, of course, understood that our discussion of the subject applies to felonies only, since, under the statute, as at common law, accessories to misdemeanors are unknown, those aiding or abetting in misdemeanors being punishable as principals. (*Wagner v. State*, 43 Neb., 1.) The act of aiding, abetting, or procuring the commission of a felony is, both in this state and in Ohio, from whence our Criminal Code was borrowed, an independent, substantive crime, in nowise dependent for its punishment upon the conviction of the principal. (*Noland v. State*, 19 O., 131.) In *Hill v. State*, 42 Neb., 503, and in *Dixon v. State*, 46 Neb., 298, it was held that sections 1 and 2 of the Criminal Code, defining accessories before and after the fact, are declaratory merely of the common law. In those states where, by statute, the distinction between principals and accessories has been abolished, the accused may be charged either as a principal or an accessory before the fact, or both, at the option of the pleader; but in other jurisdictions, where, as in this state, the rule of the common law has not been relaxed, one not present or actually participating in the commission of the crime alleged, but whose offense consists in the aiding, inciting, or procuring of its commission by the principal offender, should be charged as an accessory before the fact, and since, as has been said, "The law never condemns without accusation, * * * one indicted as a principal in a felony cannot be convicted of being an accessory before the fact, or, indicted as such accessory, cannot be found guilty as a principal felon." (1 Bishop, Criminal Law, sec. 803.) And in *Wagner v. State*, *supra*, IRVINE, C., citing Wharton's Criminal Law, 208, asserts, as a familiar rule, that no conviction as an accessory will lie under an indictment charging one as principal, and *vice versa*. It follows, therefore, that the verdict and judgment is, as to James Casey, unsupported by the evidence, and that

his separate motion for a new trial should have been sustained.

Of the several assignments contained in the petition in error of John Casey, we shall notice but one, viz., the giving of instruction No. 8 by the court on its own motion, as follows: "The evidence produced to establish an alibi should be cautiously received, though when proved it is as strong as any other defense. You must be the sole judges of the weight to be given to the testimony, and in determining the weight to be given it you should take into consideration the interest any witness may have in the issues of this case, the manner in which they have testified, and all the circumstances surrounding their testimony, and if you believe beyond a reasonable doubt, from all the evidence, that these defendants are guilty as charged in the information, then you will so state in your verdict." There was, it should be observed, an attempt on the part of the accused to show that they spent the night in question at their respective homes, and testimony was introduced by them tending to prove that they could not have been present at the time and place of the robbery, which was committed in the waiting room of the Missouri Pacific Railway Company's passenger depot at Falls City, at or about the hour of 2 o'clock A. M. The question or sufficiency of such testimony for the purpose of establishing an alibi is not now before us. The accused were, however, entitled to have it submitted with the other evidence adduced, without disparagement by the court. There are, it must be confessed, precedents for the instructions complained of, but the sound rule is believed to be that the accused in a criminal prosecution is entitled to an acquittal whenever the jury, from a consideration of all of the evidence adduced, entertain a reasonable doubt of his presence at the time and place where the crime is shown to have been committed. (*McLain v. State*, 18 Neb., 154; *French v. State*, 12 Ind., 670; *Albin v. State*, 63 Ind., 598; *Dawson v. State*, 62 Miss., 241; *Johnson v. State*, 17 S. W. Rep. [Tex.], 252; *State v. Howell*,

100 Mo., 628, overruling *State v. Jennings, contra*, 81 Mo., 185; *State v. Taylor*, 118 Mo., 153; 1 Bishop, Criminal Procedure, sec. 1066; Thompson, Trials, secs. 2433 *et seq.*) In *State v. Taylor, supra*, the trial court, on its own motion, gave the following instruction: "If the jury shall find and believe, from the evidence, that at the time the offense charged in the indictment was committed * * * the defendant was at a place other than the place where such offense or crime was committed, the jury will find the defendant not guilty," and refused to charge that the accused was entitled to an acquittal provided the evidence created a reasonable doubt in the minds of the jury of his presence at the time and place in question. But the court, reversing the judgment of conviction, in an exhaustive and valuable opinion by Gantt, P. J., say: "The weight of the evidence tending to prove an alibi is to be determined by the jury, and although it falls short of absolute conviction of its truth, still, if it raises in their minds a reasonable doubt of the presence of the defendant at the commission of the crime, he is entitled to an acquittal; and it is not material whether this doubt arises from a defect of the evidence of the state or the evidence of the defendant in rebuttal. * * * The burden placed upon the defendant to show his presence elsewhere took away the free action of the minds of the jury in forming a reasonable doubt upon the whole evidence, for the simple reason that the evidence which tended to establish his alibi was to be excluded from their consideration on that subject, and to only become available if it established the defense affirmatively." And in *Gravely v. State*, 38 Neb., 871, it was held that the burden in a criminal prosecution never shifts, but, as to all defenses which the evidence tends to establish, rests upon the state throughout, and that the rule thus stated applies not alone to the case made by the state in the first instance, but also to any distinct substantive defense interposed by the accused. The vice of the instruction here assailed is, when tested by the authorities cited, first,

that it discredits a legitimate defense, by advising the jury that the evidence in behalf of the accused should be received with caution; second, in imposing upon them (the accused) the burden of proving the alibi relied upon, instead of directing an acquittal in case the jury were not satisfied, from a consideration of all the evidence, beyond a reasonable doubt of their presence at the commission of the robbery charged. It follows that the judgment of conviction must be reversed and the cause remanded for trial *de novo*

REVERSED.

HENRY MUNDT, EXECUTOR, APPELLEE, V. ANNA HAGEDORN ET AL., APPELLANTS.

FILED OCTOBER 21, 1896. No. 6726.

1. **Homestead:** CONVEYANCE TO WIFE: JUDGMENT CREDITORS OF HUSBAND. A wife, who by *mesne* conveyance from her husband acquires property exempt as the homestead of the family, takes the title thereof unincumbered by judgments against the husband, although the purpose of such conveyance may have been to defraud creditors of the latter. (*Munson v. Carter*, 40 Neb., 417.)

2. ———: VALUE: INCUMBRANCES. Section 1, chapter 36, Compiled Statutes, exempts to those persons within its provisions a homestead not exceeding $2,000 in value over and above incumbrances. The exemption in such case is determined not from the value of the fee-simple title but from the value of the claimant's interest in the premises. (*Hoy v. Anderson*, 39 Neb., 386.)

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

McClanahan & Halligan, for appellants.

Simeon Bloom, *contra*.

POST, C. J.

This was a creditor's bill in the district court for Douglas county by the plaintiff, Henry Mundt, as executor,

etc., of Hans Stoltenberg, deceased, against the defendants, Henry Hagedorn and Anna Hagedorn, husband and wife, and also Matthew E. Munix and Emma D. Munix, husband and wife. It is shown by the petition, and not disputed, that the plaintiff, in his capacity as executor, on the 5th day of January, 1894, recovered a judgment against the said Henry Hagedorn in the sum of $429.35, and costs of suit, taxed at $4, a transcript of which was in due form filed in the office of the clerk of the district court for said county, and that an execution subsequently issued thereon was returned wholly unsatisfied, the defendant therein named being insolvent. It is therein further shown that the said Henry Hagedorn, on the 5th day of February, 1891, for the express consideration of $2,500, conveyed to his co-defendant, Emma D. Munix, who is his daughter, the property in controversy, to-wit, a lot or parcel of land, therein particularly described, 152 feet in length by 64 feet in width, in section 10, township 15, range 13 east, in Douglas county; that on the day last named the said Emma D. Munix and her husband, Matthew E. Munix, by a warranty deed, in due form conveyed said premises to the said Anna Hagedorn, the mother of the said Emma D. Munix and the wife of the said Henry Hagedorn, and that said conveyances, and each of them, were made without consideration and for the sole purpose of defrauding the creditors of the said Henry Hagedorn. The defendants answered separately, Munix and wife denying the fraud alleged and disclaiming title or interest in the premises, while Hagedorn and wife, after a denial in substantially the same terms, charged that the said Anna, on the 20th day of September, 1869, loaned to the said Henry Hagedorn $950; that on the 24th day of August, 1880, she advanced to her said husband the sum of $450, and on October 11, 1880, the further sum of $863, to be, and which in fact was, used and expended in paying for and improving the property therein described; that it was the understanding when said money was so advanced that the deed for said property should be taken

and remain in the name of the said Anna Hagedorn, and that the conveyances above mentioned were made for the purpose of giving effect to the understanding upon which the aforesaid advancements were made, and for no other purpose; that said property has at all times since the purchase thereof, in the year 1869, been occupied by said defendants as a homestead, and that the said conveyances were made subject to a prior mortgage of $1,500. The reply was, in substance, a general denial. There was a hearing before the district court, resulting in a decree in accordance with the prayer of the petition, from which the Hagedorns have prosecuted an appeal to this court.

We quite agree with the district court that the evidence fails to establish a trust in favor of the said Anna Hagedorn, and that her relation to her husband resulting from the advancements mentioned (and as to which there is no substantial controversy) is that of a creditor only. We assume, also, as a proposition fully sustained by the proofs, that the purpose of the said Henry was, by means of the conveyances mentioned, to defeat the claims of other creditors; but can the decree for the plaintiff be defended in view of the other facts disclosed by the record? That the property described has been occupied by the Hagedorns as a homestead for nearly or quite twenty years cannot be disputed, and the existence of a prior mortgage thereon, in favor of James Stuhr, for $1,500, is clearly established by the proofs. Two witnesses were introduced by the plaintiff, one of whom placed the value of the property at $6,400 and the other at $4,000. Defendants were, over their objection, restricted to three witnesses upon that issue, and who placed the value of said property at $2,240, $2,400, and $2,500, respectively.

It is apparent from the record that the district court, for reasons not disclosed, failed to find the value of the property, and that that question is now an open one to be determined upon the proofs adduced, of which a synopsis is given above. A consideration of the subject in the light of the evidence has led to the conclusion that the

property in controversy did not, at the time in question, exceed $3,500 in value, or, in other words, that the interest therein of Henry Hagedorn did not, on the 5th day of February, 1891, exceed $2,000, the value of the homestead exemption secured to him by law. It was held in *Munson v. Carter*, 40 Neb., 417, that a wife who acquires the family homestead by *mesne* conveyance from her husband takes the title thereof unincumbered by judgments against the husband, although the purpose of such conveyance may have been to defraud creditors of the latter. And in *Hoy v. Anderson*, 39 Neb., 386, section 1, chapter 36, Compiled Statutes, was construed as exempting to one within the provisions thereof a homestead not exceeding $2,000 in value over and above liens thereon; in short, that the extent of the homestead exemption is determined, not from the value of the fee-simple title, but from the claimant's interest in the premises. The reasoning of these cases leads to a conclusion adverse to the plaintiff's claim. The decree will accordingly be reversed and the cause dismissed.

REVERSED AND DISMISSED.

A. B. AUSTIN V. TECUMSEH NATIONAL BANK.

FILED OCTOBER 21, 1896. No. 6781.

1. **Corporations:** CORPORATE DEBTS: LIABILITY OF SUCCESSOR. In order to render a newly organized corporation liable at common law for the debts of an established corporation or firm to whose business and property it has succeeded, it should, in the absence of a special agreement, affirmatively appear from the pleadings and proofs that the transaction in question is fraudulent as to creditors of the old corporation, or that the circumstances attending the creation of the new and its succession to the business and property of the old corporation are of such character as to warrant the finding that it is a mere continuation of the former.

2. ———: ———: PLEADING. Petition examined, and *held* not to state

a cause of action against the defendant as successor of the bank of R. & H., a corporation, either at common law, or under the provisions of the national banking act.

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

The facts are stated in the opinion.

T. Appelget and *J. Hall Hitchcock*, for plaintiff in error:

So far as the creditors of the old bank are concerned, there was such a merger as created a legal liability on the part of defendant for the debts of the old bank. (*Metropolitan Nat. Bank v. Claggett*, 141 U. S., 520; *Eans v. Exchange Bank of Jefferson City*, 79 Mo., 182; *Michigan Ins. Bank v. Eldred*, 143 U. S., 293; *Coffey v. Nat. Bank of Missouri*, 46 Mo., 140; *Kelsey v. Nat. Bank of Crawford*, 69 Pa. St., 426; *Thompson v. Abbott*, 61 Mo., 176; *Western Reserve Bank v. McIntire*, 40 O. St., 528; *Hopper v. Moore*, 42 Ia., 563; *Throp v. Wegefarth*, 56 Pa. St., 82; *City Nat. Bank of Poughkeepsie v. Phelps*, 97 N. Y., 44; *Island City Savings Bank v. Sachtleben*, 67 Tex., 421; *Longley v. Longley Stage Co.*, 23 Me., 39; *Hibernia Ins. Co. v. St. Louis & New Orleans Transportation Co.*, 13 Fed. Rep., 516; *Reed v. First Nat. Bank of Weeping Water*, 46 Neb., 168.)

The capital stock of the old bank was a trust fund for the benefit of its creditors, and any diversion of the capital was a fraud upon creditors for which defendant is liable. (*State v. Commercial State Bank*, 28 Neb., 677; *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 24 S. W. Rep. [Tex.], 16, and cases cited; Kerr, Fraud, p. 380.)

The defendant is estopped from denying the validity of plaintiff's claim by its own acts in paying other certificates held by plaintiff of the same character, and by paying the interest on the certificate here sued on, and by telling him the old certificate was just the same as a new one on the new bank. (*Wise v. Newatney*, 26 Neb., 88; *Town of Brookhaven v. Smith*, 118 N. Y., 634; Bigelow,

Estoppel [5th ed.], p. 570; *Ingwersen v. Edgecombe*, 42 Neb., 740; *Tillson v. Downing*, 45 Neb., 549.)

J. H. Ames, C. Gillespie, and *S. P. Davidson, contra:*

The court did right in instructing the jury to find for defendant, for the reason that the petition does not state a cause of action. (*Gibson v. Parlin*, 13 Neb., 292; *Curtis v. Cutler*, 7 Neb., 318; *Bennett v. Rogers*, 12 Neb., 384; *Richardson v. Stone*, 32 Neb., 625; *Smith v. Weage*, 21 Wis., 442; *Armstrong v. Gibson*, 31 Wis., 67; *Burns v. City of Fairmont*, 28 Neb., 866; *Chicago, B. & Q. R. Co. v. Barnard*, 32 Neb., 306; *Manzy v. Hardy*, 13 Neb., 36; *Hiatt v. Brooks*, 17 Neb., 34; *Harrison v. Stipes*, 34 Neb., 431.)

Under the proofs in this case, defendant is not liable on the theory that the property of a corporation is a trust fund for payment of debts. (*Fogg v. Blair*, 133 U. S., 534; *Warfield v. Marshall County Canning Co.*, 72 Ia., 670.)

The doctrine of estoppel has no application under the facts alleged or proved. (6 Wait, Actions & Defenses, p. 691; *Supervisors of Logan County v. City of Lincoln*, 81 Ill., 156; 2 Beach, Modern Equity & Jurisprudence, sec. 1101.)

Fraud was neither alleged nor proved. (*Hamilton v. Ross*, 23 Neb., 630; *Clemens v. Brillhart*, 17 Neb., 335; *Turner v. Killian*, 12 Neb., 580.)

The right of a new corporation, purchasing the assets of one which it succeeds, to hold them free from the obligations of its predecessor, though not often denied, has been expressly affirmed. (*Wyman v. Augusta Bank*, 14 Mass., 58; *Bellows v. Augusta Bank*, 2 Mason [U. S. C. C.], 31; 1 Morawetz, Private Corporations, par. 568, note 2.)

The overwhelming weight of both reason and authority supports the right of corporations to exercise the same freedom in preferring creditors and in holding or disposing of their property as is possessed by individuals. (*Ballin v. Merchants Exchange Bank*, 89 Wis., 278; *Gorder v. Plattsmouth Canning Co.*, 36 Neb., 548; *Catlin v. Eagle Bank of New Haven*, 6 Conn., 233; *Pondville Co. v. Clark*, 25 Conn., 97; *Buell v. Buckingham*, 16 Ia., 284; *Garrett v. Bur-*

lington Plow Co., 70 Ia., 697; *Sargent v. Webster*, 13 Met. [Mass.], 497; *State v. Bank of Maryland*, 6 Gill & J. [Md.], 205; *Planters Bank v. Whittle*, 78 Va., 737; *Hospes v. Northwestern Mfg. Co.*, 48 Minn., 174; *Vail v. Jameson*, 41 N. J. Eq., 648; *Coates v. Donnell*, 94 N. Y., 168; *Dana v. Bank of United States*, 5 Watts & S. [Pa.], 223; *Arthur v. Commercial Bank of Vicksburg*, 9 S. & M. [Miss.], 394; *Town v. Raisin River Bank*, 2 Doug. [Mich.], 530; *Reichwald v. Commercial Hotel Co.*, 106 Ill., 439; *Warner v. Mower*, 11 Vt., 390; *Ringo v. Biscoe*, 13 Ark., 563; *Dabney v. Bank of South Carolina*, 3 S. Car., 124; *Bank of United States v. Huth*, 4 B. Mon. [Ky.], 423; *Reinhard v. Bank of Kentucky*, 6 B. Mon. [Ky.], 252; *Bank of Commerce v. Payne*, 86 Ky., 446; *Gould v. Little Rock R. Co.*, 52 Fed. Rep., 680; *Lippincott v. Shaw Carriage Co.*, 25 Fed. Rep., 577; *Hills v. Stockwell*, 23 Fed. Rep., 432; *Allis v. Jones*, 45 Fed. Rep., 148; *Jones v. Bank of Leadville*, 10 Colo., 464; *Scoville v. Thayer*, 105 U. S., 143; *Twin Lick Oil Co. v. Marbury*, 91 U. S., 587; *County Court of Taylor County v. Baltimore & O. R. Co.*, 35 Fed. Rep., 161; *Stratton v. Allen*, 16 N. J. Eq., 233; *Duncomb v. New York H. & N. R. Co.*, 84 N. Y., 190.)

POST, C. J.

This was an action in the district court for Johnson county against the Tecumseh National Bank to recover the amount of a certificate of deposit for $300 issued by the firm of Russell & Holmes, doing business as bankers in said county. The allegations of the petition below are that the plaintiff therein, who is also plaintiff in error, on the 7th day of November, 1888, deposited with the said firm the sum of $300 and received the certificate of deposit above described; that on the 1st day of June, 1889, the firm of Russell & Holmes went into liquidation and closed its business, and thereafter the Bank of Russell & Holmes, a corporation, organized pursuant to the laws of this state, engaged in the business of banking as the successor of said firm; that the corporation aforesaid was a mere continuation of the firm of Russell & Holmes, and

as such succeeded to its business and assets of every character and assumed its liabilities. The statements therein which it is claimed connect the defendant in error with the indebtedness of Russell & Holmes as copartners, and the Bank of Russell & Holmes, a corporation, are the following: "Plaintiff further alleges that afterwards, to-wit, on or about the 13th day of April, 1890, the Bank of Russell & Holmes went into liquidation and closed its said business and ceased its organization as said Bank of Russell & Holmes, and thereupon, afterwards, to-wit, on or about the 14th day of April, 1890, the defendant was duly organized and created a banking corporation, under and by virtue of the various banking laws enacted by the congress of the United States, known and designated as the 'National Banking Act,' and is at the present time carrying on a general banking business in the city of Tecumseh, under the name and style of the Tecumseh National Bank, as successor to the Bank of Russell & Holmes. Plaintiff further alleges that this defendant, so organized and created a banking corporation as aforesaid, came into possession of and received, as successor to the Bank of Russell & Holmes, the property, assets, emoluments, business, and good-will of the said Russell & Holmes, and also the said sum of $300 deposited by this plaintiff as aforesaid, and this defendant thereupon became liable to the plaintiff for said deposit so received, with interest. Plaintiff further alleges that the business of this defendant was, and is, done and carried on in the same building and the same room previously occupied by the Bank of Russell & Holmes for the transaction of its business, and that all of the owners and officers of the Bank of Russell & Holmes became stockholders of this defendant upon its creation, and as such managed and controlled its business, whereby defendant assumed this indebtedness and became liable therefor. Plaintiff further alleges that the Bank of Russell & Holmes is wholly insolvent, and that it has no money or other property with which to pay those who had formerly made deposits with them and with

Russell & Holmes." The defendant, for answer, admits that it is a national bank, engaged in business as such in the city of Tecumseh as charged, and denies the other allegations of the petition. A trial was had of the issues thus joined, resulting in a verdict for the defendant in accordance with the peremptory direction of the court, upon which judgment was subsequently entered, and which it is sought to reverse by means of this proceeding.

The judgment of the district court appears to rest upon the conclusion that the plaintiff has failed to state a cause of action against this defendant, and our investigation of the subject has led to the same result. It will be observed from a careful reading of the petition that it is not charged that the Bank of Russell & Holmes became a national bank; that said corporation was reorganized under the National Banking Act or otherwise; that its liabilities, or any part thereof, were in fact assumed by the defendant herein, or that the latter did not in good faith, in the usual course of business, purchase and pay for the rights and property therein described. If, therefore, there exists a liability on the part of the defendant for the demand alleged as the cause of action, it is by reason of the fact that it has, by some means not disclosed, acquired the assets, business, and good-will of the Bank of Russell & Holmes, and the further fact that its business was at one time conducted and carried on in the room previously occupied by that corporation, and by men who had been officers and stockholders thereof. True, it is alleged that all the owners and officers of the Bank of Russell & Holmes became stockholders and officers of the defendant upon its creation, but it does not appear that such owners and officers were the holders of the whole, or even a majority of the stock of the last named corporation. For aught appearing to the contrary, the relation of the defendant to the Bank of Russell & Holmes is the not unusual one resulting from the purchase by one state or national banking corporation of the business and assets of another, in consideration whereof

it assumes the liabilities of the latter equal in amount to the property so acquired. Such a transaction transgresses no provision of the state or national banking laws, and will not, in the absence of fraud, subject the purchasing bank to a liability in excess of that expressly assumed.

Our attention has been directed to the provision of the national banking law (Revised Statutes, U. S., sec. 5154) for the reorganization thereunder of banks established pursuant to general law of any state. That provision, it has been said, contemplates a mere transition from one jurisdiction to another by the corporations to which it applies, without abandoning their existence as such, without any change of organization, officers, stockholders, or property, and without interruption of their pending business or contract. (*Scofield v. State Nat. Bank of Lincoln*, 9 Neb., 316; *Coffey v. National Bank of Missouri*, 46 Mo., 140; *City Nat. Bank of Poughkeepsie v. Phelps*, 97 N. Y., 44.) It may, as the result of the foregoing and other decisions of like import, be assumed that a liability would in this instance have been implied from an allegation that the Bank of Russell & Holmes was reorganized pursuant to the statute above cited; but the bank above named, as charged in the petition, went into liquidation, closed its business, and ceased its organization as such on or about the 13th day of April, 1890, and the defendant was thereafter, on or about the 14th day of April, 1890, organized and created a banking corporation. Judge Story, in *Fleckner v. Bank of the United States*, 8 Wheat. [U. S.], 338, referring to the contention that the word "liquidate" meant, not a payment, but an ascertainment of a debt, said: "We think otherwise. Its ordinary sense, as given by lexicographers, is to clear away,—to lessen debts. And in common parlance, especially among merchants, to liquidate a balance means to pay it," and which view accords with the more recent definitions of the term. (*Vide* 13 Am. & Eng. Ency. of Law, 825.) The Bank of Russell & Holmes accordingly, instead of reorganizing as a national bank, proceeded, upon the closing of its busi-

ness, to liquidate its indebtedness, and the fact that its assets and business were subsequently acquired by this defendant will not *per se* operate to charge the latter, as its successor, under the provisions of the national banking law.

We have not overlooked the class of cases, including *Reed v. First Nat. Bank of Weeping Water*, 46 Neb., 168, holding newly organized corporations liable at common law for the debts of established corporations or firms to whose business, property, and franchises they have succeeded. There are to be found in the reports and text-books expressions apparently sustaining the proposition that a corporation which, upon its organization, succeeds to the business and property of another corporation or firm, is, from that fact alone, chargeable with the indebtedness of the latter. It is, for instance, said by Mr. Beach, in his excellent work on the Law of Private Corporations, sec. 360: "Where an old-established corporation sells out to a newly organized one and turns over all of its property, the new company becomes liable upon the debts and contracts of the old." The strict accuracy of that statement may, we think, be doubted, in view of the omission therefrom of any reference to the purpose or character of the transaction contemplated or the consideration therefor. We shall not attempt a review of the cases cited in the note accompanying the foregoing text, or in the briefs submitted herewith. It is sufficient that they may, in our judgment, be thus classified: (1.) Cases in which the liability of the new corporation results, not from the operation of law, but from its contract relation with the old. (2.) Cases like *Hibernia Ins. Co. v. St. Louis & New Orleans Transportation Co.*, 13 Fed. Rep., 516, in which the transfer of the property and franchise amount to a fraud upon the creditors of the old corporation. (3.) Cases where, as in *Reed v. First Nat. Bank of Weeping Water, supra*, the circumstances attending the creation of the new corporation and its succession to the business, franchise, and property of the old are such as to raise

the presumption or warrant the finding that it is a mere continuation of the former,—that it is, in short, the same corporate body under a different name. And the facts upon which such finding or presumption depends will not be presumed, but should affirmatively appear from the pleadings and proofs. The judgment of the district court is right and will be

AFFIRMED.

A. H. ANDREWS & COMPANY V. SCHOOL DISTRICT OF MCCOOK.

FILED OCTOBER 21, 1896. No. 6597.

1. **Pleading:** NAMES OF PARTNERS: DEMURRER. This action was begun in the name of A. H. Andrews & Co., the firm name, without the further statement that the firm was organized to do business in this state, or giving the individual names of the members of the firm. The defect in the petition, in the particular indicated, did not render it, for that reason, open to attack by general demurrer. (*Sanborn v. Hale*, 12 Neb., 318.)

2. **School Districts:** DEBTS: ISSUANCE OF WARRANTS: INTEREST. A school district of the class involved in this action cannot contract an indebtedness for furnishing the school building, and issue, as evidence of that indebtedness, warrants or orders payable to a party or his order at stated intervals after date, with interest at a certain rate provided for in the terms of the instruments. Any such instruments are invalid and uninforceable.

3. ———: ———: PRESENTATION OF CLAIMS: ACTIONS. It is provided in the law enacted for the government of school districts of the class of the one herein sued, "that all accounts shall be audited by the secretary, approved by a committee, to be styled the committee on claims, and no expenditure greater than $200 shall be voted by the board except in accordance with the provisions of a written contract; nor shall any money be appropriated out of the school fund except on a recorded affirmative vote of a majority of the members of the board, and said account and the records of said board in cities of the first class shall at all times be subject to the inspection and examination of the auditor of such city." *Held*, That the presentation of a claim or account to the secretary or committee on claims was not a condition precedent to the commencement of an action thereon.

ERROR from the district court of Red Willow county. Tried below before WELTY, J.

The opinion contains a statement of the case.

Hugh W. Cole and *Stewart & Munger*, for plaintiff in error:

The action could be sustained as an action on the original contract, under the allegation that warrants were issued and payment refused when duly presented. The action could also be sustained on the contract, because the agreement provided for payment in cash or legally issued warrants. (*Paddock v. Symonds*, 11 Barb. [N. Y.], 117; *Goldschmidt v. City of New Orleans*, 5 La. Ann., 436; *Dyer v. Township of Covington*, 19 Pa. St., 200; *Allison v. Juniata County*, 50 Pa. St., 351; *Varner v. Nobleborough*, 2 Me., 121; *Benson v. Carmel*, 8 Me., 110; *State v. Cook*, 43 Neb., 318; *Hitchcock v. City of Galveston*, 96 U. S., 341; *Read v. City of Plattsmouth*, 107 U. S., 568.)

An action will lie on the warrants. (*Heffleman v. Pennington County*, 52 N. W. Rep. [S. Dak.], 851; *Leavenworth County v. Keller*, 6 Kan., 510; *International Bank v. Franklin County*, 65 Mo., 105; *Terry v. City of Milwaukee*, 15 Wis., 490; *Brown v. Town of Jacobs*, 77 Wis., 27; *People v. Clark County*, 50 Ill., 213; *Clark v. Polk County*, 19 Ia., 248; *Board of Commissioners v. Day*, 19 Ind., 450; *Edinburg-American Land & Mortgage Co. v. City of Mitchell*, 48 N. W. Rep. [S. Dak.], 131; *Grayson v. Latham*, 84 Ala., 546.)

The city of McCook can make contracts, contract debts for purposes germane to its business, and issue warrants for the purpose of evidencing the indebtedness. (Tiedeman, Municipal Corporations, sec. 163; 2 Beach, Public Corporations, secs. 776-1361; *City of Lincoln v. Sun Vapor Co.*, 8 C. C. A., 253; *Allen v. City Council of La Fayette*, 89 Ala., 641; *Mullarky v. Town of Cedar Falls*, 19 Ia., 21; *City of Burrton v. Harvey County Savings Bank*, 28 Kan., 390; 1 Dillon, Municipal Corporations, sec. 485; *City of Nashville v. Ray*, 19 Wall. [U. S.], 468.)

The schools of the city of McCook had power to contract the debts without the sanction of the voters. (*Crist v. Township of Brownsville*, 10 Ind., 461; *Sheffield Township v. Andress*, 56 Ind., 157; *Harney v. Wooden*, 30 Ind., 178; *Middleton v. Gruson*, 106 Ind., 18; *Munson v. Minor*, 22 Ill., 594; *Falout v. City of Indianapolis*, 1 N. E. Rep. [Ind.], 392; *State v. City of Omaha*, 7 Neb., 267; *Beverly v. Sabin*, 20 Ill., 357; *School District v. Fogleman*, 76 Ill., 189.)

Where a municipality partially exceeds its power in issuing warrants, the warrants are only void as to the excess, and the petition would state a cause of action for the real amount. (*School District v. Stough*, 4 Neb., 357; *Clark v. Polk County*, 19 Ia., 248; *Young v. Camden County*, 19 Mo., 309; *Johnson v. Stark County*, 24 Ill., 75; *City of Quincy v. Warfield*, 25 Ill., 317; *Mygatt v. City of Green Bay*, 1 Biss. [U. S. C. C.], 292; *Shirk v. Pulaski County*, 4 Dill. [U. S. C. C.], 209; *National Lumber Co. v. Wymore*, 30 Neb., 356; *State v. City of Crete*, 32 Neb., 568.)

A general demurrer is not sufficient to raise the point of a want of legal capacity to sue. (*Sanborn v. Hale*, 12 Neb., 318.)

Though the school district lacked power to act in the manner it did, the law will presume a contract for the value of the furniture. (*Read v. City of Plattsmouth*, 107 U. S., 568; *Chapman v. Douglas County*, 107 U. S., 348; *Clark v. Saline County*, 9 Neb., 516; *City of Lynchburg v. Slaughter*, 75 Va., 57.)

W. S. Morlan, contra:

The petition does not state a cause of action, for the reason that the plaintiff has no legal capacity to sue. (*Burlington & M. R. R. Co. v. Dick*, 7 Neb., 242; *Weisz v. Davey*, 28 Neb., 566.)

Under the allegations of the petition, plaintiff's remedy is *mandamus*. (*State v. Gandy*, 12 Neb., 232; *Maher v. State*, 32 Neb., 354.)

HARRISON, J.

The plaintiff filed a petition in the district court of Red Willow county, in an action commenced by it against defendant, which petition was, in the main portions, as follows:

"1. That the defendant, the school district of the city of McCook, in the county of Red Willow, in the state of Nebraska, is a body corporate, duly organized under the laws of the state of Nebraska, and possesses all the usual powers of a corporation organized for public purposes.

"2. Plaintiff further states that on the 13th day of March, 1888, a petition was presented to defendant corporation, signed by the resident electors of said district, praying that an election be held for the purpose of voting bonds in the sum of $12,000, to be used in purchasing a site, for the erection of a school building thereon, and the furnishing said building. The records of the defendant corporation show the following action, to-wit: 'Moved and seconded, that as a board we approve the petition and take the action as therein prayed for. Carried.' That afterwards, on the 3d day of April, 1888, an election was held in said district for the purpose of voting for or against the issuance of the bonds as prayed for, to-wit, for purchasing site, erecting building, and furnishing same, at which said election more than the requisite number of electors voted in favor of said proposition, and on the 4th day of April the defendant corporation met and declared said bond proposition carried, and ordered the issuance of the bonds.

"3. That said bonds were duly issued and sold by said defendant corporation for the sum of $12,368, and the money held in trust for the purposes for which same was voted by the people."

It was alleged that a site was purchased and the contract made for the erection of the school building, and further: "That on the 17th day of August, 1888, a meeting of the defendant corporation was held for the purpose of

receiving bids for the furniture necessary for the complete furnishing of said school building, and that on the 18th day of August the defendant corporation held a meeting and at said meeting the defendant corporation accepted the bid and proposition of the plaintiff, A. H. Andrews & Co., for furnishing the school furniture for said building, and the proper officers of said board were ordered to sign contracts for same with A. H. Andrews & Co., which was done.

"6. That said bid and proposition is in the possession of the defendant corporation, and plaintiff is unable to set out a copy of same; that under and by virtue of the terms of said proposition and acceptance the plaintiff was to furnish the furniture for said building, and to receive from the defendant corporation payment in cash or legally issued warrants; also, that there should be deducted from the price of the new furniture an allowance which was to be made for old furniture owned by the defendant corporation, which plaintiff was to take in part payment, said new furniture to be furnished as the building was completed.

"7. That the plaintiff furnished to the defendant the following amounts of furniture complained of, which was of the agreed prices, as per proposition and acceptance and contract, as follows, to-wit: $1,135.50, for which payment was received as follows, $401.90 in old furniture and $733.60 in a school order or warrant, which was afterwards issued and delivered to plaintiff by the defendant corporation; $389.70, for which payment was received as follows, $115 in old furniture and $274.70 in a school order or warrant, which was afterwards issued and delivered to the plaintiff by the defendant corporation; $115, for which payment was received in a school order or warrant issued to the plaintiff by the defendant corporation."

It was also pleaded that, on November 19, 1888, there was issued to plaintiff an order on the treasurer of the school district to pay plaintiff or order the sum of $733.60

on November 19, 1891, with interest at seven per cent per annum, to be paid out of the "contingent fund;" also, that there was issued another order on the treasurer of the district in the sum of $115, payable to plaintiff or order, of date August 20, 1891, with interest at seven per cent, and to be paid out of the "fund for supply," and a third order was issued, dated December 8, 1889, in the sum of $274.70, payable to plaintiff or order September 25, 1891, out of the contingent fund, and further:

"11. The plaintiff further alleges that at the time of the making of the proposition by plaintiff to defendant corporation for the furniture and the acceptance of the same by the defendant corporation, to-wit, on the 18th day of August, 1888, at time contract was entered into, there was in the funds voted by the people for the building and furnishing of this building, realized from sale of bonds not otherwise appropriated, more than the sum of $1,618, and more than enough to pay for the furniture purchased by defendant corporation from the plaintiff.

"12. Plaintiff further alleges that there was, at the time of the issuing of the orders heretofore described, in the fund realized from the sale of the bonds voted for the purpose of building and furnishing the building, and is at the present time in said funds, as shown by the records of the defendant corporation, not otherwise legally appropriated, more than the sum of $1,618, out of which the orders issued to plaintiff should be paid.

"13. That the defendant corporation received the furniture (for which the orders were issued in payment in part) and has appropriated same to their own use, claiming same, and that the defendant corporation has at no time rescinded their contract, or offered to do so, and that the defendant corporation is at this time using and occupying said furniture under claim of ownership.

"14. That said orders were duly presented for payment and payment refused, and also refused to register same, and that the defendant corporation refuses to pay same, and that no part of same has been paid, and that there

is now due and owing from the defendant corporation to the plaintiff the sum of $1,123.30, with interest on $736.60 from November 19, 1888, at seven per cent per annum, and interest on $115 from August 20, 1889, at seven per cent per annum, and interest on $274.70 from December 8, 1889, at seven per cent per annum."

The prayer of the petition was for judgment in the aggregate sums alleged to be due on the orders, and that the defendant be directed and ordered to make a special levy for the purpose of paying the indebtedness. The defendant interposed a general demurrer to the petition, which, on hearing, was sustained, and the plaintiff elected to plead no further, but to stand on the petition. The action was dismissed. The plaintiff presents the case here for review.

The action was instituted in the name of A. H. Andrews & Co., without any statement that it was a firm organized to do business in this state, or setting forth the names of the persons composing the company. It is claimed this rendered the petition defective and open to attack by demurrer. The demurrer was general, and the question of the defect, if any, in the pleading could not be raised by general demurrer. (*Sanborn v. Hale*, 12 Neb., 318.)

One of the questions discussed is in regard to the power or authority of the district officers to issue the paper of the district, or orders payable two and three years after date. It has been held by this court that an examination of the course of legislation on the subject of schools and school districts, their officers or governing bodies, warranted the conclusion that any indebtedness incurred for the purposes it is alleged the district here sued became indebted cannot be evidenced by instruments such as are in suit, and, if issued, they are incapable of enforcement. (*School District v. Stough*, 4 Neb., 357.) "If evidences of indebtedness of the nature of that sought to be enforced in this action are to be held valid and binding, it will render wholly inoperative and useless the provisions of the statute regulating and restricting the issuance of bonds by school districts." (*State v. Sabin*, 39 Neb., 570.)

It is urged that the decisions in the cases just cited were in respect to school districts wherein the boards consisted of a director, moderator, and treasurer; that the one against which this action was instituted is what is generally termed a "city district," and governed by a board of education, and that it was erected under provisions of law differing from those enacted for the guidance and control of such districts as were involved in the controversies settled in the cases to which we have referred, and that its board, or officers, possessed larger or greater power and authority in the particulars herein mooted. A consideration of the statutory provisions in force as to the school districts of which McCook was one at the time the order in question was given or issued, satisfies us that the rule announced in *School District v. Stough, supra*, and *State v. Sabin, supra*, is equally forcible and pertinent in this case. It is true some of the details of the business of the district are, in a city district, committed to the care of the board of education which in others are to be first submitted to the approval of the voters; but the borrowing of money for building schoolhouses and buying furniture for them was to be accomplished in the same manner, by the issuance of bonds, under practically the same restrictions and provisions, and we can see and have been furnished with no valid and sufficient reason for holding that the one set of districts could issue evidences of indebtedness such as we now have under consideration, and thus evade or avoid the necessity of obtaining the money by the issuance of bonds as provided by law, while another class of districts could not do so. The intention of the legislature, we think, appears with equal clearness as to each. It was pleaded in the petition, as was hereinbefore set forth, that the money necessary to pay for the furnishing of the schoolhouse had been obtained by the sale of bonds by the district, voted and issued for the purpose, and was in the treasury; that a contract was entered into with plaintiff to provide the furniture, which plaintiff did, at the agreed prices, and that the same was

accepted, appropriated, and used by the defendant. The demurrer admitted the truth of such of the facts as were well pleaded, and they were sufficient to show the existence of a claim in favor of plaintiff for the amount contracted to be paid for the furniture. The contract in this case is one which the board of education could make. It is alleged that the money had been regularly raised and was on hand to pay the indebtedness incurred by reason of the contract. That the means or instruments issued to evidence the indebtedness, or rather the mediums through which the money was to be drawn from the treasury,—for these school orders or warrants amount to nothing more (*State v. Cook*, 43 Neb., 318),—were issued in such form as to be illegal and void, had no effect on the original cause of action. It retained its full force and vitality, and may be enforced in the present case if it was sufficiently pleaded in the petition.

Of the law under which the district of McCook was acting at the times of the transactions, upon the result of which this action is predicated, was the following section: "That all accounts shall be audited by the secretary, approved by a committee, to be styled the committee on claims, and no expenditure greater than $200 shall be voted by the board except in accordance with the provisions of a written contract; nor shall any money be appropriated out of the school fund except on a recorded affirmative vote of a majority of all the members of the board, and said accounts and the records of said board in cities of the first class shall at all times be subject to the inspection and examination of the auditor of such city." (Compiled Statutes, ch. 79, sec. 17, sub. 14.) It is urged that the petition was insufficient, in that it did not contain an allegation that the account or claim for the amount of the purchase price of the furniture had been presented to or audited by the secretary of the school board and approved by the committee on claims, as provided in the section of the law which we have just quoted. The law does not cast upon the claimant, as a duty, the presentation of

his account against the school district to its auditing officer or committee as a condition precedent to the commencement of an action thereon. The requirements of the statute in regard to the auditing of claims apply only as between the school district and the designated officials, and refer only to the duties of the latter. They in no manner or degree affect or bear upon the rights of the claimant, and hence it is not, and was not, necessary in the case at bar to plead that the claim had been presented prior to the institution of the action. (*Dement v. De Kalb County*, 25 S. E. Rep. [Ga.], 382; *Gillett v. Lyon County*, 18 Kan., 410.)

The petition contained a sufficient statement of a cause of action against the district on the claim or account of the furniture purchased; hence the demurrer should have been overruled. It follows that the judgment of the district court must be reversed and the cause remanded.

REVERSED AND REMANDED.

UNION PACIFIC RAILWAY COMPANY V. SAMUEL MONTGOMERY ET AL.

FILED OCTOBER 21, 1896. No. 6840.

1. **Municipal Corporations**: ORDINANCES: PUBLICATION: EVIDENCE. An ordinance of a city of the second class containing over 5,000 and less than 10,000 inhabitants, which carries a penalty for a violation of its provisions, before it becomes effective, must be published for at least one week in a newspaper published within such city, or in pamphlet form for distribution or sale.

2. ——: ——: ——. If published in a daily paper, one insertion is not sufficient, but it must be published in each issue thereof for one week.

3. ——: ——: ——: EVIDENCE. Ordinances of a city of the above class may be proved by the certificate of the city clerk under the seal of the corporation. If the certificate shows that the ordinance was not published for the statutory time, it is not admissible in evidence without further proof.

4. Instructions: EXCEPTIONS. An exception to instructions *en masse* is unavailing unless each paragraph thereof is erroneous.

5. ———: ASSIGNMENTS OF ERROR. An assignment in a motion for a new trial that a group of instructions is erroneous, is insufficient, if one of them was properly given.

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

W. R. Kelly, E. P. Smith, and *John Schomp,* for plaintiff in error.

Mahoney & Smyth, contra.

NORVAL, J.

On the 6th day of April, 1892, one Peter J. McNalley, of the firm of Montgomery & McNalley, dealers in pop, soda, and mineral water, attempted to cross, with a team and wagon, the tracks of the Union Pacific railway at the Q street crossing in South Omaha, and in doing so one of defendant's engines ran into the wagon, demolishing it, destroying a quantity of soda water in bottles. Plaintiffs brought this action to recover damages thereby sustained, alleging that the accident was occasioned by defendant's negligence. The verdict and judgment were in favor of plaintiffs, and the railway company has brought the record here for review.

The first error assigned consists in the admission in evidence of the following copy of an ordinance of the city of South Omaha regulating the rate of speed of railroad engines and trains within the corporate limits, viz.:

"CITY ORDINANCE NO. 87.

"An ordinance regulating the rate of speed of locomotives and railroad trains within the corporate limits of the city of South Omaha.

"*Be it Ordained by the Mayor and Council of the City of South Omaha:*

"Section 1. That the speed of railroad trains and locomotives running through and across the corporate limits

of the city of South Omaha, Nebraska, shall not exceed the rate of ten miles an hour.

"Section 2. That any person or corporation who shall violate section one of this ordinance shall, upon conviction thereof, be fined for each offense in any sum not exceeding one hundred dollars, and costs of suit.

"This ordinance to go into effect and be in force on and after its passage, approval, and publication.

"Approved September 4, 1888. W. S. SLOAN,
"THOMAS HECTOR, *Mayor.*
"City Clerk."

One of the objections to the admission of this ordinance in evidence, and the only one it is deemed necessary to consider, is that its passage and publication were not proved. The only proof offered to show that the ordinance was legally passed by the city council of South Omaha, or that it was duly published, was the following certificate of the city clerk:

"I, Henry Ditzen, clerk of the city of South Omaha, Nebraska, do hereby certify that ordinance 87, a copy of which is on the reverse side hereof, was passed and approved on the 4th day of September, 1881; that said ordinance was published in the South Omaha *Daily Stockman*, a newspaper printed and published in the city of South Omaha, Nebraska, on the 5th day of September, A. D. 1888.

"[SEAL.] HENRY DITZEN,
"City Clerk."

By section 51, chapter 14, article 2, of the Compiled Statutes, relating to cities of the second class having more than 5,000 and less than 10,000 inhabitants, it is provided that "all ordinances of a general nature shall, within one month after they are passed, be published in some newspaper published within the city, or in pamphlet form, to be distributed or sold as may be provided by ordinance; and every ordinance fixing a penalty or forfeiture for its violation shall, before the same takes effect, be published

for at least one week in the manner above prescribed." Subdivision 40 of the next following section declares: "All ordinances of the city may be proved by the certificate of the clerk, under the seal of the city, * * * shall be read and received in evidence in all courts and places without further proof." The provision last quoted authorizes the fact of the passage, approval, and publication of the ordinance of a city of the class to which South Omaha then belonged to be proved or established by the certificate of the city clerk. That the passage and approval of the ordinance in question was sufficiently verified by the certificate of the city clerk given above is not controverted, but it is insisted that such certificate does not disclose that the ordinance was published for the time required by said section 51; and we think this contention is well founded. The ordinance fixes a penalty for its violation, and, under the provisions of said section 51, such an ordinance must be published at least for one week before it could become effective. The certificate of the clerk shows that it was published but once in a daily paper. The publication having been made in a daily paper, it should have been continued in each issue thereof for one week. One insertion alone did not meet the requirements of the statute. (*Lawson v. Gibson*, 18 Neb., 137; *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb., 371.) Had the paper in question been published weekly, then one insertion therein, doubtless, would have been sufficient. (*State v. Hardy*, 7 Neb., 377.)

We are asked to indulge the presumption that the *Daily Stockman*, in which the ordinance was published, was a weekly newspaper. This we cannot do, since its name implies that it was a daily and not a weekly publication.

It is urged that the same presumption prevails in favor of the validity of an ordinance that there is in favor of the validity of a judgment or of an act of the legislature. Grant it. But it will not be presumed that a legislative enactment was duly passed or proved when the contrary appears. So we cannot presume that this ordinance was

published in the mode provided by law, when it is manifest from the certificate of the city clerk that the opposite is true.

It is insisted that there is no proof that South Omaha, in 1888, at the time of the passage of this ordinance, was a city of the second class having more than 5,000 inhabitants, and, therefore, that section 59, article 1, chapter 14, Compiled Statutes, and not said section 51 of article 2 of said chapter, governs as to the publication of said ordinance. No such proof was necessary, since we will take judicial notice of the fact that South Omaha at that time contained the requisite population to be governed by the provisions of said article 2. (*Hornberger v. State*, 47 Neb., 40.)

Another suggestion made is that the first section of the ordinance is valid for the reason one publication is sufficient as to it, since it does not impose a penalty. Doubtless there are ordinances in which parts may be upheld, while others are rejected as invalid. But this ordinance does not belong to that class. The statute expressly requires that an ordinance which prescribes a penalty shall be published in a certain manner and for a specified period. This requirement applies to the whole of such an ordinance, and not merely to the penal portion. Such is the plain import and meaning of the statute. The admission of the ordinance in evidence was a link in the chain of testimony to establish that the defendant negligently operated its engine at an unlawful rate of speed, and its introduction was prejudicial error, because its publication for the required time was not proven.

Complaint is made in the brief of the railway company to the giving of the sixth instruction on the court's own motion, and of the refusing of the defendant's fifth and twenty-second requests to charge. The record shows that the company at the trial excepted to the instructions *en masse*,—those given as well as those refused,—and they were grouped in the assignment in the motion for a new trial. The exception to the instructions is insufficient to

lay the foundation for their review. (*McReady v. Rogers*, 1 Neb., 124; *Strader v. White*, 2 Neb., 360; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 473; *Redman v. Voss*, 46 Neb., 512.) The assignment in the motion for a new trial is bad, inasmuch as there was no error in one or more of the instructions given, and at least one of the group requested was properly refused. (*Diers v. Mallon*, 46 Neb., 132; *Kaufmann v. Cooper*, 46 Neb., 644; *McCormal v. Redden*, 46 Neb., 777.)

There are other errors assigned, based upon the rulings of the court upon the admission and exclusion of testimony, which we need not stop to consider, as they will not likely arise upon the next trial. For the error already indicated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

T. T. WEITZ V. WALTER A. WOOD REAPING & MOWING MACHINE COMPANY.

FILED OCTOBER 21, 1896. No. 6780.

1. **Review:** ERROR FROM COUNTY COURT: MOTION FOR NEW TRIAL. A motion for a new trial is not necessary to obtain a review of a decision of a district court reversing a cause brought to that court on error from a county court.

2. **Bill of Exceptions:** COUNTY JUDGE: ATTACHMENT. Prior to the taking effect of the act of the legislature of 1895 (Session Laws, ch. 72), a county judge had no authority to allow and sign a bill of exceptions preserving the testimony taken upon the hearing of a motion to dissolve an attachment.

3. ———: ———. The clause of the act of 1895, whereby it is made to apply to all cases then pending, cannot be so construed as to cure error in a judgment rendered prior to its passage, such judgment being based on a consideration of a bill of exceptions unautho ized when the judgment was rendered. (*Altschuler v. Snyder*, 49 Neb., 22, followed.)

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

J. Hall Hitchcock, for plaintiff in error.

T. Appelget and *C. Rood, contra.*

NORVAL, J.

This action was instituted in the county court of Johnson county by the Walter A. Wood Reaping & Mowing Machine Company, a corporation, upon a promissory note executed by T. T. Weitz. At the same time a writ of attachment was sued out, and certain chattels of the defendant were attached. A motion was filed by Weitz to discharge the attachment upon two grounds: (1.) The facts stated in the attachment affidavit are insufficient to justify the issuing of the writ. (2.) The affidavit is untrue. This motion was heard on numerous affidavits filed in support thereof, and upon counter-affidavits presented by the plaintiff, and was sustained on May 6, 1893, and the attachment discharged. Thereupon a judgment was rendered against the defendant for the amount due. Plaintiff prosecuted a petition in error to the district court, where the action of the county judge in dissolving the order of attachment was reversed, and the attachment reinstated. The defendant has brought the record to this court for review.

It is urged that the decision of the district court cannot be reviewed because no motion for a new trial was presented or filed. This objection is without merit. Such a motion is not necessary to obtain a review of the judgment of a district court affirming or reversing an order or judgment made by a county court or justice of the peace. (*Newlove v. Woodward*, 9 Neb., 502; *Leach v. Sutphen*, 11 Neb., 527; *Claflin v. American Nat. Bank of Omaha*, 46 Neb., 884.)

The sufficiency of the original attachment affidavit is not now questioned, nor did the county court vacate the attachment because of any defect either in the form or substance of the affidavit upon which the writ was based. The record shows that the attachment was dis-

charged on the consideration of the evidence adduced. The action of the county court in that regard could not be reviewed by the district court, for the reason that neither at the time the motion to dissolve was sustained nor when the order of reversal was rendered, did the county court possess any power or authority to sign a bill of exceptions preserving the evidence submitted on the hearing of such a motion. (*Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520; *Real v. Honey*, 39 Neb., 516; *Donaldson v. Fisher*, 43 Neb., 260; *Donaldson v. Ellsworth*, 43 Neb., 262; *Michigan Stove Co. v. Miller*, 43 Neb., 332; *Altschuler v. Snyder*, 49 Neb., 22.)

The legislature of 1895 (Session Laws, ch. 72) confers authority upon county judges to settle and allow bills of exceptions in cases like the one before us, and the act provides that it "shall apply to all cases now pending or hereafter brought;" but this act does not render the bill of exceptions effective in this case, since the judgment of reversal was rendered prior to the passage of that act. IRVINE, C., in discussing the question in *Altschuler v. Snyder, supra*, uses this apposite language: "The act being remedial in its character should receive a liberal construction; but it is impossible to construe it so liberally as to affect the present case. The question before the district court was whether the county court erred in discharging the attachment. The question before us is whether the district court erred in reversing the order of the county court. At the time the district court made its order there was no authority for a bill of exceptions in such a case; so that it unquestionably did err in refusing to quash the bill and in reversing the order of the county court on a consideration of an unauthorized bill. The judgment of the district court was erroneous when rendered; and it was beyond the power of the legislature to cure the error by subsequent enactment." This decision is decisive of the case before us. The district court erred in considering the evidence submitted on the motion to discharge the attachment, and in reversing the

order of the county court sustaining the attachment. The judgment of the court below is reversed, and the cause remanded with directions to affirm the order of the county court.

REVERSED AND REMANDED.

GEORGE GRAVES V. NORFOLK NATIONAL BANK.

FILED OCTOBER 21, 1896. No. 5941.

1. **Pleading:** ANSWER. A general denial puts in issue all the material averments contained in the petition.

2. **Negotiable Instruments:** EVIDENCE OF INDORSEMENT. *Held,* Upon a re-examination of the evidence, that it fails to support the verdict.

REHEARING of case reported in 45 Neb., 840.

J. F. Boyd and *Allen, Reed & Ellis,* for plaintiff in error.

Powers & Hays, contra.

NORVAL, J.

By this action the Norfolk National Bank sought to recover of George Graves and John M. Leeper, as indorsers, the amount of a promissory note executed by one Ellison and payable to the firm of Graves & Leeper. The principal issue presented by the pleadings was whether George Graves indorsed the note in controversy, or authorized the same to be done, and this question was determined by the jury against him. We are convinced, after a careful examination of the record, briefs, and arguments, that the findings and judgment are unsupported by the evidence adduced on the trial. That Graves neither wrote his name upon the back of the note, nor empowered or directed any one else to do so for him, was established by the uncontradicted proofs. There was

evidence introduced on the part of the bank to show that the name "George Graves" was indorsed upon the instrument by John M. Leeper (after the dissolution of the firm), but this was done without Mr. Graves' knowledge or consent, and not in any way connected with the business of the partnership or in the settlement of its affairs. Conceding that Mr. Leeper might lawfully indorse the firm name upon the note when he transferred it for his own benefit, and not on account, or in behalf, of the late firm, which the record discloses was done, manifestly he possessed no implied authority to indorse the individual name of Mr. Graves, his former partner, so as to bind him thereby in his individual capacity. It is a wholesome rule—one often adhered to by us—that a question not raised or presented in the trial court will be of no avail on review of the record in this court; but this doctrine has no application to the case before us. The answer being a general denial of each averment of the petition, put in issue the genuineness of the indorsement and cast the burden upon the plaintiff to establish the same. (*Donovan v. Fowler*, 17 Neb., 247; *First Nat. Bank of Madison v. Carson*, 30 Neb., 104; *Monitor Plow Co. v. Born*, 33 Neb., 747; *Walton Plow Co. v. Campbell*, 35 Neb., 173.) That the note was not indorsed in the firm name, but purports to have been indorsed by the individuals alone, fully appeared on the face of the petition; hence it required no affirmative allegation in the answer to raise the question as to the form of the indorsement. Not only does the testimony show that Mr. Graves neither wrote his name on the back of the note, nor authorized any one else to do so, but the indorsement in question was never introduced or offered in evidence.

It is urged that the prior course of dealing of the bank with the firm of Graves & Leeper was sufficient to fasten a liability upon Mr. Graves in this case. The facts upon which this contention is based are these: Some time prior to the purchase of the note in dispute the bank, instead of purchasing a note from Graves & Leeper, as inadvert-

ently stated in the former opinion, loaned at one time said firm between $2,000 and $2,500, and to secure the payment thereof the firm deposited with the bank numerous collateral notes, some of which were payable to Graves & Leeper, and others to George Graves and John M. Leeper. A number of said collateral notes were indorsed in the name of the firm, and others "George Graves" and "John M. Leeper," like the note in suit. Whether the mode of indorsement last above stated was the one used upon the notes payable to the firm or on those alone in which the individual members were named as payees, the evidence is conflicting. It is undisputed, however, that, as to all the collateral notes indorsed in the manner claimed by the bank, George Graves placed his own name on the back of each note, and Mr. Leeper likewise wrote his individual name. So no custom was established which authorized Mr. Leeper to write the name of George Graves upon the back of commercial paper, or which justified the bank in purchasing the note in question upon the faith of the indorsement of the name of the defendant Graves. The verdict being unsupported by the evidence, the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

HARRISON, J., not sitting.

JOHN FAGER V. STATE OF NEBRASKA.

FILED OCTOBER 21, 1896. No. 8570.

1. **Criminal Law:** WITNESSES: INDORSEMENT OF NAMES ON INFORMATION. It is within the discretion of the trial judge to permit the names of additional witnesses to be indorsed by the county attorney on the information after the filing thereof and before the trial.

2. ———: ———: EVIDENCE. Evidence contradictory of the statements of a prosecuting witness may be met by statements in rebuttal of such contradictory statements even though the names of the witnesses giving the rebutting testimony may have never been indorsed on the information.

3. ———: DEGREE OF OFFENSE: INSTRUCTION. When the evidence entirely fails to show an offense of a less degree than that charged in the information it is not prejudicial error to omit to give an instruction defining an offense of such less degree.

4. Information: INDORSEMENT OF CRIME CHARGED: REVIEW. It will not be presumed that the indorsement of the words "rape and incest" in connection with the word "information," was prejudicial to the accused when such words aptly summarized the facts stated within the information and the attention of the trial court had been in no way directed to the words complained of.

ERROR to the district court for Lancaster county. Tried below before HOLMES, J.

William Leese, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day, Deputy Attorney General*, for the state.

RYAN, C.

On June 29, 1895, there was duly filed in the district court of Lancaster county an information wherein the plaintiff in error in this court was charged with ravishing and carnally knowing Hattie Fager on the 15th day of March, 1895, she then and there being his daughter, as he well knew. A plea of not guilty was entered to this information, and upon a trial of the issues thus presented the accused was found guilty of the crime charged in the information. In accordance with the express provisions of the statute in such cases he was sentenced to be imprisoned in the penitentiary for the remainder of his life. The first point urged in the brief of the plaintiff in error was that the verdict was not sustained by sufficient evidence. In view of the severity of the punishment fixed by the statute in this class of cases a very careful consideration of the evidence has been made, with the result

that this contention cannot be sustained. It would subserve no useful purpose to review the disgusting details of his crime, and they shall therefore remain unstated.

It is argued that the victim made no resistance or outcry and that, therefore, there was no rape by violence or putting in fear. This conclusion would be justified by the consideration of the evidence of some of the witnesses alone, but it would necessitate the exclusion of the testimony of Hattie herself, for she testified both to resistance and to an outcry. She also testified that immediately after the commission of the offense she informed her mother and her brother of the facts, and the further contention that she did not do this cannot be accepted as incontestably established by the proofs.

Complaint is made that the district court permitted the names of three witnesses to be indorsed on the information before the trial of this case began. The record simply recites the following proceedings, to-wit: "Now on this day came the county attorney on behalf of the state of Nebraska and asks, and is by the court granted, leave to indorse on the information the names of Frank Leighton, Fred Miller, and Henry Miller, and C. I. Woodward as witnesses on behalf of the state of Nebraska." It has been held by this court that it is within the discretion of the trial court to permit the names of additional witnesses to be indorsed by the county attorney on the information after the filing thereof and before the trial. (*Rauschkolb v. State*, 46 Neb., 658.) In view of the fact that no prejudice was shown affirmatively to have resulted from the indorsement complained of, we cannot presume error in the ruling of the trial court as to this matter.

Complaint is made in argument that F. W. Collins and W. H. Woodward were called and examined as witnesses, though their names had never been indorsed on the information. On the trial in the district court the mother of Hattie Fager, on behalf of the accused, testified that Hattie had not complained of the act of her father very

soon after the commission of the alleged crime. This was in direct contradiction of the testimony of Hattie, and, as was shown by the two witnesses last above named, was equally contradictory of statements made to them by Mrs. Fager about the time the prosecution was begun. In *State v. Huckins*, 23 Neb., 309, it was said by this court that the reason of the rule permitting testimony to rebut that to establish the good character of a person accused was that such rebutting testimony was collateral to the main issue and was an issue raised by the accused. The reason of this rule equally justified the ruling of the trial court with respect to the matter under consideration and, therefore, the claim of prejudicial error thereon founded is without merit. There is found in the instructions given no ground for the complaint made by the counsel for the accused; indeed, there was no attempt to point out any such errors except such as we shall now consider.

It is argued that the court should have instructed the jury in such a manner that the accused might have been found guilty of an assault with intent to commit a rape. There was no evidence to justify the giving of an instruction of the nature suggested. The accused was either guilty of the crime charged or he was innocent of any offense whatever under any theory deducible from the proofs, and the instructions suggested could have subserved no purpose except to suggest a compromise verdict—an alternative which juries are, perhaps, sufficiently prone to adopt without suggestion.

It is urged that the accused was prejudiced by the loss of the original instructions. This, we take it from the brief on behalf of the plaintiff in error, was because his counsel was not able to make the above point in his motion for a new trial and his argument thereon. As we have already determined that there was no error in failing to give an instruction defining an assault with intent to commit rape we cannot consistently assume that by the argument of the counsel for the plaintiff in error the

trial court would have been brought to adopt a conclusion differing from our own. The record shows that a true copy was substituted, and of this fact no question has been made either in this court or in the district court; hence it does not appear how the plaintiff could have sustained prejudice from the misplacement of the instructions now complained of.

In the argument there were complaints as to the refusal to give certain instructions, but as these were as fully embodied in the instructions given by the court upon its own motion as the evidence would justify, there was no error in refusing to give the instructions requested.

It is finally complained that there was error in the fact that on the information there was an indorsement of the words "rape and incest," as defining the nature of the offense charged within. No objection was made to this indorsement in the district court, where, without question, due redress would have been afforded upon proper suggestion. As an indorsement epitomizing the contents of the information, however, it was not inapt, and as no complaint was made in the district court, none can be considered in this court. The judgment of the district court is

AFFIRMED.

FRANK M. DORSEY, APPELLEE, V. MARTHA CONRAD ET AL., APPELLANTS.

FILED OCTOBER 21, 1896. No. 6607.

1. **Deeds:** FOREIGN ACKNOWLEDGMENT: EVIDENCE. A deed for lands situate in this state, executed in the state of Iowa, and there acknowledged before a notary public who attached his official seal to the certificate of acknowledgment, is presumed to have been acknowledged in conformity with the laws of that state; and such deed is entitled to record and to be read in evidence without other proof of its execution.

2. ———: EXECUTION. Conveyances of real estate executed within this state, conveying real estate situate within this state, are required to be witnessed. (Compiled Statutes, sec. 1, ch. 73.)

3. ———: FOREIGN ACKNOWLEDGMENT. A deed of land situate in this state, executed in the state of Iowa and acknowledged there before a notary public who attached his official seal to the certificate of acknowledgment, is presumed to have been executed in accordance with the laws of the state of Iowa; and though not witnessed, is entitled to be recorded and read in evidence in this state without further proof that the grantors th rein actually executed and delivered the deed.

4. Alteration of Instruments: TIME. Where a written instrument shows upon its face a material and obvious alteration, the presumption of law is that such alteration was made before the instrument was finally executed and delivered.

5. ———: ———: EVIDENCE. Such an instrument may go in evidence in the first instance, leaving the parties to such explanation of the alteration as they may choose to offer.

6. ———: ———: ———. Whether an alteration or erasure appearing in a written instrument is a material one, is a question of law for the court; but when, by whom, and with what motive, such alteration was made, is a question of fact for the jury or trial court, to be determined like any other question of fact.

7. Limitation of Actions: ACTIONS TO REDEEM LAND: MORTGAGES. An action by an owner of the fee to redeem his land from a mortgage thereof which has been foreclosed, and to which foreclosure proceeding he was not a party, or, if a party, not served with process, may be brought at any time within ten years after his cause of action accrued.

8. ———: ———: ———. Such an action to redeem is barred in the same time in which the statute would bar the right to foreclose the mortgage.

9. Alteration of Instruments: EVIDENCE. *Johnson v. First Nat. Bank of Plum Creek*, 28 Neb., 792, and *Courcamp v. Weber*, 39 Neb., 533, overruled.

10. ———: ———. *Bank of Cass County v. Morrison*, 17 Neb., 341, and *Goodin v. Pluggc*, 47 Neb., 284, reaffirmed.

APPEAL from the district court of Dixon county. Heard below before NORRIS, J.

The facts are stated by the commissioner.

W. E. Gantt, for appellants:

Where alterations are apparent upon the face of an instrument, one offering it in evidence must show that the changes were made at the time the instrument was executed. (1 Devlin, Deeds, sec. 463; 1 Greenleaf, Evidence [14th ed.], sec. 564; *Estate of Nagle*, 134 Pa. St., 31; *Harris v. Bank of Jacksonville*, 22 Fla., 501; *Warder v. Willyard*, 46 Minn., 531; *Slater v. Moore*, 86 Va., 26; *Simpson v. Stackhouse*, 49 Am. Dec. [Pa.], 554; *Bank of Cass County v. Morrison*, 17 Neb., 341; *Neil v. Case*, 25 Kan., 510; *Paramore v. Lindsey*, 63 Mo., 67; *Corcoran v. Doll*, 32 Cal., 89; *Johnson v. First Nat. Bank of Plum Creek*, 28 Neb., 792.)

The acknowledgment does not comply with the law and renders the deed inadmissible. (Martindale, Conveyances [2d ed.], sec. 253, and cases cited in note.)

The record of a deed not properly acknowledged is a nullity and furnishes no notice to a subsequent purchaser. (*Erwin v. Welch*, 10 Neb., 479.)

The deed was inadmissible without proof that the laws of the state where it was executed did not require it to be witnessed. (*Green v. Gross*, 12 Neb., 117; *Evans v. Cleary*, 17 Atl. Rep. [Pa.], 440.)

Redemption under a mortgage is cut off at the expiration of the time the right to foreclose is barred. (*Parker v. Kuhn*, 21 Neb., 413; *McKesson v. Hawley*, 22 Neb., 692; 2 Jones, Mortgages, sec. 1146; *Tastal v. Hall*, 3 Cal., 265; *Espiosa v. Gregory*, 40 Cal., 58; *Cunningham v. Hawkins*, 24 Cal., 403; *Green v. Turner*, 38 Ia., 112; *Smith v. Foster*, 44 Ia., 443; *Fisk v. Stewart*, 4 N. W. Rep. [Minn.], 611; *Jellison v. Halloran*, 46 N. W. Rep. [Minn.], 332; *King v. Meighen*, 20 Minn., 264; *Fletcher v. Dougherty*, 13 Neb., 224; *First Nat. Bank of Sturgis v. Peck*, 8 Kan., 660; *Lausman v. Drahos*, 8 Neb., 457; *Meier v. Meier*, 16 S. W. Rep. [Mo.], 223.)

Wigton & Whitham and *B. W. Wood, contra.*

Neither plaintiff nor his grantor having been made a

party to the suit, the foreclosure proceedings have not taken from them the legal title and right to redeem the premises. (*Dodge v. Omaha & S. W. R. Co.*, 20 Neb., 276; *Merriman v. Hyde*, 9 Neb., 113; Hawes, Parties to Actions, sec. 27.)

The acknowledgment was sufficient. (*Williams v. Frost*, 6 N. W. Rep. [Minn.], 795; *Burbank v. Ellis*, 7 Neb., 157; *Perkins v. Strong*, 22 Neb., 725; *Lewis v. Hinman*, 13 Atl. Rep. [Conn.], 147; *Green v. Gross*, 12 Neb., 124; *Hoadley v. Stephens*, 4 Neb., 435; 1 Devlin, Deeds, secs. 681, 686.)

The deed was properly admitted in evidence. There is nothing suspicious in the alteration. No purpose to defraud can be inferred. Without the acknowledgment, the presumption is that the alterations were made before execution. (*Pereau v. Frederick*, 17 Neb., 118; *Heeter v. Glasgow*, 79 Pa. St., 79; *Bank of Cass County v. Morrison*, 17 Neb., 341; *Little v. Herndon*, 10 Wall. [U. S.], 31; *Neil v. Case*, 25 Kan., 510; *Paramore v. Lindsey*, 63 Mo., 66.)

Only deeds in this state are required to be witnessed. (Compiled Statutes, ch. 73, sec. 1; *Green v. Gross*, 12 Neb., 117.)

The statute of limitations had not run against plaintiff's right to redeem. (*Parker v. Kuhn*, 21 Neb., 413; *Renard v. Brown*, 7 Neb., 449; *McKeighan v. Hopkins*, 19 Neb., 33; *McKeeson v. Hawley*, 22 Neb., 696; *Lowenstein v. Phelan*, 17 Neb., 429; *Wilson v. Richards*, 1 Neb., 342.)

RAGAN, C.

February 14, 1877, James Chamberlain owned a quarter section of land in Dixon county and on said date mortgaged it to the New England Mortgage Security Company to secure a note due February 14, 1882, with interest thereon, payable annually. The note and mortgage provided that if Chamberlain made default for a certain number of days in the payment of any installment of annual interest when due the holder of the mortgage debt might declare the entire mortgage debt due, and upon

such default and the exercise of such election that said mortgage debt should then become due. Chamberlain and wife, in November, 1878, executed and delivered to one Parke a power of attorney and authorized him to sell and convey the real estate which had been mortgaged to the New England Mortgage Security Company, and on November 22, 1878, Parke, the attorney in fact, executed and delivered a deed of the premises mortgaged by Chamberlain to Viola Wigton. Default having been made in the payment of the interest which matured on the mortgage in October, 1878, the mortgage company on December 9, 1878, brought suit to foreclose the mortgage and according to the provisions thereof declared the entire mortgage debt due. Chamberlain and wife were made defendants to this action, but Viola Wigton, the owner in fee of the equity of redemption, was not made a party to the suit. At the time the mortgage company filed its petition to foreclose its mortgage the deed of Viola Wigton had not been filed for record, but was so filed March 4, 1879. The foreclosure proceeding was prosecuted to decree, the lands were appraised, advertised, and sold and purchased by the mortgage company. The appellant, Martha Conrad, claims title to the land through a chain of conveyances from the mortgage company, the purchaser at the foreclosure sale. The appellee, Dorsey, claims title to the land through a chain of conveyances from Viola Wigton. Dorsey brought this action to redeem the real estate from the mortgage made by Chamberlain to the New England Mortgage Security Company. He had a decree as prayed in his petition and Martha Conrad and others have appealed.

1. One link in Dorsey's chain of title is the deed to Viola Wigton from the mortgagors, Chamberlain and wife, made by Charles L. Parke, their said attorney in fact. This deed was executed by the attorney in fact in the state of Iowa and there acknowledged before a notary public, who attached his official seal to his certificate of acknowledgment. The deed recited: "Know

all men by these presents, that James Chamberlain and Julia Chamberlain, husband and wife, by Charles L. Parke, their attorney in fact, all of Dixon county, and state of Nebraska, in consideration," etc., "do hereby sell and convey unto Viola Wigton, and to her heirs and assigns, the following described real estate, situate in the county of Dixon and state of Nebraska, to-wit," etc. The deed was signed "James Chamberlain, Julia Chamberlain, by Charles L. Parke, attorney in fact." The acknowledgment was in words and figures as follows:

"STATE OF IOWA, }
IOWA COUNTY. } SS.

"On this 22d day of November, 1878, before me, Ira S. Richards, a notary public in and for said county, personally came Charles L. Parke, attorney in fact for James Chamberlain and Julia, husband and wife, to me personally known to be the identical person who signed the above deed as grantor, and acknowledged the same to be his voluntary act and deed.

"Witness my hand and seal notarial the date last above written. IRA S. RICHARDS,
"Notary Public, Ia. Co., Ia."

The original power of attorney from Chamberlain and wife to Parke was read in evidence, but there was no testimony, other than that afforded by the deed and its acknowledgment, offered on the trial, that Parker, the attorney in fact, executed the deed.

It is now insisted that the acknowledgment to the deed is so defective as not to entitle the deed to be recorded,—not to entitle it to be read in evidence,—without parol proof that Chamberlain and wife through their attorney in fact, Parke, actually executed the deed, and that as there is no such testimony in the record the decree cannot stand. It is argued that the acknowledgment is simply the personal acknowledgment of Charles L. Parke; that it should have read "personally appeared James Chamberlain and Julia Chamberlain, his wife, by

their attorney in fact, Charles L. Parke;" that he should have acknowledged he executed the same as the act and deed of James Chamberlain and wife therein described. This acknowledgment was taken on the 22d day of November, 1878, as already stated, by a notary public in the state of Iowa, and he attached his official seal to his certificate to the deed. At that time the statutes of this state on the subject of conveyances of real estate provided that if acknowledged or proved in any other state or territory or district of the United States it must be done according to the laws of such state, territory, or district, and must be acknowledged or proved before an officer authorized to do so by the laws of such state, territory, or district, or before a commissioner appointed by the governor of this state for that purpose. In all cases provided for in section 4 of this chapter, if such acknowledgment or proof is taken before a commissioner appointed by the governor of this state for that purpose, a notary public, or other officer using an official seal, the instrument thus acknowledged or proved shall be entitled to be recorded without further authentication. (General Statutes, 1873, ch. 61, secs. 4, 5.) These provisions of the statute were construed by this court in *Hoadley v. Stephens*, 4 Neb., 431, and it was there held: "Where a deed is executed and acknowledged in another state before a commissioner of deeds of this state, a notary public, or other officer using an official seal, the law presumes a compliance with the law of the place of execution and no further authentication is necessary;" and in *Green v. Gross*, 12 Neb., 117, the statute quoted above was again construed and the court held: "When a deed is made in another state, the certificate of acknowledgment of a notary public thereto, duly attested by his official seal, entitles such deed to be recorded without further authentication." To the same effect see *Galley v. Galley*, 14 Neb., 174. The deed in question being for lands situate within this state, and having been executed in the state of Iowa, was by the statute quoted above re-

quired to be executed in conformity to the laws of the state of Iowa, and since it was acknowledged by an officer using an official seal and attested by his seal, the presumption is that the acknowledgment is in conformity to the law of the state of Iowa, and there is no proof in the record to the contrary. The deed was therefore entitled to be recorded and was competent evidence, and the court did not err in so considering it.

2. The deed of the attorney in fact to Viola Wigton as first drawn described the land as being in section twenty-one (21), township thirty-one (31), and range three (3). A pen was subsequently drawn through the word "three" and the word "four" substituted therefor. The evidence does not show when or by whom this erasure or alteration was made; and a second argument of the appellants is that the presumption of law is that the erasure or alteration was made after the execution and delivery of the deed and that therefore the district court had no right to consider this deed as evidence. The question presented is this: An instrument in writing bearing on its face a material and obvious erasure, alteration, or interlineation is offered in evidence; if otherwise competent, does such alteration or erasure render it incompetent evidence until explained? The solution of this question must depend upon the answer to be given another, namely, where a written instrument shows upon its face a material and obvious alteration or erasure, does the law presume such alteration was made before or after the final execution and delivery of the instrument? If the presumption is that the alteration or erasure was made after the execution and delivery of the instrument, then it cannot go in evidence until such alteration or erasure be explained. On the other hand, if the presumption of law be that such alteration or erasure was made before the final execution and delivery of the instrument, then it may be admitted in evidence in the first instance. Unfortunately there is a hopeless conflict among the authorities on this question. We are not able to say on which side is the weight

of authority and shall not attempt a review of the authorities on either side. The common-law rule seems to have been that if a material and obvious alteration appeared in an instrument it would nevertheless, in the absence of evidence on the subject, be presumed to have been made before the instrument was finally executed and delivered. This rule was founded upon the doctrine that the law would never presume fraud or wrong in any person; or, to express it in the language of Lord Campbell, C. J., in *Doe v. Catomore*, 16 Ad. & El. [Eng.], 745, "A deed cannot be altered after it is executed without fraud or wrong, and the presumption is against fraud or wrong."

Gooch v. Bryant, 13 Me., 386, was an action on a note which showed upon its face a material and obvious alteration, but when or by whom made was not disclosed by the evidence. The trial judge ruled that the presumption was that the alteration was made before the execution and delivery of the note. Exception was taken to this ruling and the supreme court of Maine, speaking to the point, said: "There was no other evidence of the alteration of the note than what arose from inspection, from which it appeared that one of the figures in the date had been altered. Of the fact there could be no doubt; but the more important inquiry was when it was done. If altered after the signing and delivery it would vitiate the note; if before, it would not. As to the time, no evidence was offered by either party. The alteration was not in itself proof that it was done after the signature. It might have been made before. If the alteration was *prima facie* evidence that it was done after, it must be upon the ground that such is the presumption of law. But we do not so understand it. It would be a harsh construction, exposing the holder of a note, the date of which had been so altered as to accelerate payment or to increase the amount of interest, to a conviction of forgery, unless he could prove that it was done before the signature. It would be to establish guilt by a rule of law

when there would be at least an equal probability of innocence. But such cannot be the law. It is a question of evidence to be submitted to the jury, as was done in the case before us." To the same effect see *Beaman v. Russell*, 20 Vt., 205.

Paramore v. Lindsey, 63 Mo., 63, was a suit upon a promissory note by an indorsee. The defense was that the note was altered after it was signed and delivered. The alleged alteration consisted in the erasure in the printed form of the words " after maturity." The effect of this was to make the note draw interest from date. The trial court instructed the jury that the presumption of law was that the erasure or alteration appearing on the face of the note was made either prior to or at the time of the execution and delivery of the note; and this instruction on exception was sustained by the supreme court.

In *Little v. Herndon*, 77 U. S., 26, the court said: "A minor objection below was to the admission of one of the patents on the ground of an erasure. The court left the question to the jury, which was quite as favorable a ruling as the defendant could ask. In the absence of any proof on the subject the presumption is that the correction was made before the execution of the deed. * * * A deed cannot be altered after it is executed without a fraud or wrong; and the presumption is against fraud or wrong."

In *Bank of Cass County v. Morrison*, 17 Neb., 341, it was held: "Where a material alteration is apparent on the face of a written instrument offered in evidence, the question as to whether such alteration was made before or after the execution and delivery of such instrument is, in the last instance, one for the jury or trial court. It is like any other fact in the case, to be settled by the trier or triers of facts. Generally in such case the instrument may be given in evidence, and may go to the jury or trier of fact, leaving the parties to such explanatory evidence of the alteration as they may choose to offer." This case was followed in *Goodin v. Plugge*, 47 Neb., 284. These

last two cases we think correctly state the rule, that in the absence of all evidence on the subject the presumption is that a material and obvious alteration appearing upon the face of a written instrument was made before such instrument was finally executed and delivered and that such instrument, if otherwise competent, may, without a prior explanation, be given in evidence. But in *Johnson v. First Nat. Bank of Plum Creek*, 28 Neb., 792, it was held in effect that the presumption of law was that a material alteration appearing upon the face of an instrument offered in evidence was made after the execution and delivery of such instrument, and this case was followed in *Courcamp v. Weber*, 39 Neb., 533.

A re-examination of the question leads us to the conclusion that the decision in *Johnson v. First Nat. Bank, supra*, is erroneous, and it is therefore overruled; and so much of the case of *Courcamp v. Weber, supra*, as follows *Johnson v. First Nat. Bank* is also overruled, and we accordingly hold that where a written instrument shows upon its face a material and obvious alteration, the presumption of law is that such alteration was made before the instrument was finally executed and delivered; and such instrument is not rendered incompetent evidence solely because such alteration appears therein. (See *Stough v. Ogden*, 49 Neb., 291.) The question is a vexed and difficult one, and perhaps as many authorities, and of as great respectability, may be cited on one side thereof as upon the other; but the principle is elementary that the presumption of law is always in favor of honesty and upright conduct, and upon this principle we rest the decision of the point as we have made it and overrule *Johnson v. First Nat. Bank* and *Courcamp v. Weber, supra*, sincerely believing in the correctness of the conclusion reached and assured at least that we are now consistent. The district court, then, did not err in considering and weighing as evidence the deed from the attorney in fact to Viola Wigton. But again, we cannot say that the court was wrong in concluding from the evidence before

it that the erasure was made before the delivery of the deed. The only evidence introduced by the appellants on the subject was that of a so-called expert who testified that in his opinion the alteration or erasure was in a different handwriting from that of the deed; that it had been made with different ink from that in which the deed was written and been made within two or three years immediately preceding the trial, which was in October, 1892. On the other hand was the presumption of law that the erasure or alteration was made before the deed was delivered; and it was also shown that the land was described in the deed as being in range four (4) at the time the deed was recorded, in March, 1879,—about four months after its execution, and about thirteen years prior to the date of the trial.

3. Another link in the appellee's chain of title was a deed from Viola Wigton and husband to one Burton. This deed was not witnessed, and no evidence other than that afforded by the deed itself was offered to show that Wigton and wife in fact executed it. A third contention of appellants is that the decree lacks evidence to support it, as the court had no right to consider the deed as evidence. The deed in question was executed in the state of Iowa, February 28, 1879, acknowledged before a notary public in that state, who attached his seal of office to his certificate of acknowledgment. Deeds which are executed in this state conveying lands situate in this state are by the law required to be witnessed. (See Compiled Statutes, ch. 73, sec. 1.) When this deed was executed sections 4 and 5 of chapter 61, General Statutes, quoted above, were in force. Construing these statutes in *Green v. Gross*, 12 Neb., 117, this court held: "When a deed is made in another state the certificate of acknowledgment of a notary public thereto, duly attested by his official seal, entitles such deed to be recorded without further authentication." (*Hoadley v. Stephens*, 4 Neb., 431; *Galley v. Galley*, 14 Neb., 174.) The deed having been executed in another state for lands situate in this state, and

having been acknowledged before an officer using an official seal, was entitled to record and to be read in evidence without parol proof that it was executed by Wigton and wife. Under the statute then in force it was required to be executed in conformity with the laws of the state of Iowa, and the acknowledgment is *prima facie* evidence at least that it was so executed.

4. The mortgage made by Chamberlain and wife to the Mortgage Security Company matured by its terms February 14, 1882, but by reason of Chamberlain's default in paying his interest was, in accordance with the provisions of the mortgage, declared to be and became due December 9, 1878, and suit was brought to foreclose it on said last date. The sale had under the decree was confirmed December 16, 1879. The present suit was brought November 8, 1888. A final contention of the appellants is that as more than four years intervened between the date the appellee's cause of action accrued and the bringing of this suit, it is barred by the statute of limitations. To sustain this contention we are cited to *Parker v. Kuhn*, 21 Neb., 413, where it was held that "an action by a junior incumbrancer to redeem land sold at execution or judicial sale, being an action for relief other than those specifically mentioned, must be brought within four years after the cause of action shall have accrued." But this case is not in point here. The appellee is not a junior incumbrancer. He is the owner of the fee. An action by an owner of the fee of real estate to redeem his land from a mortgage thereon which has been foreclosed, and to which foreclosure proceeding such owner was not a party or, if a party, not served with process, may be brought at any time within ten years after his cause of action accrues. (Code of Civil Procedure, sec. 6; *McKesson v. Hawley*, 22 Neb., 692.)

But the serious question here is, when did appellants' cause of action accrue? Did it arise when the mortgage debt matured or was declared due, or did it arise at the date of the confirmation of the sale had in pursuance of

the foreclosure proceedings when the relation of mortgagee and mortgagor ceased? It was not expressly decided, but intimated, in *McKesson v. Hawley*, 22 Neb., 692, that the owner's right to redeem from the mortgage accrued on the latter's maturity. In *Wilson v. Richards*, 1 Neb., 342, it was held: "As against the right to redeem a conveyance absolute in its terms, but in fact a mortgage upon unoccupied land, the statute of limitations does not begin to run until tender of the money secured by the mortgage and refusal to re-convey." In *King v. Meighen*, 20 Minn., 264, it was held that until the right to foreclose expires the right to redeem exists. In *Abbe v. Goodwin*, 7 Conn., 377, and in *Moore v. Cord*, 14 Wis., 231, it was held that a mortgagor could not redeem until the mortgage debt had matured. In *Smith v. Foster*, 44 Ia., 442, it was held that "an action to redeem from a mortgage is barred in the same time in which the statute would bar the right to recover the mortgage debt by an action at law." (*Morrow v. Jones*, 41 Neb., 867; *Crawford v. Taylor*, 42 Ia., 260.) We conclude, therefore, that the appellee's cause of action arose when the mortgage matured,—in this case when it was declared due by the mortgagee, December 9, 1878,—and as ten years had not elapsed between that date and the bringing of this suit, the appellee's cause of action was not barred when brought. The judgment of the district court is

AFFIRMED.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY v. G. M. WRIGHT ET AL.

FILED OCTOBER 21, 1896. No. 6480.

1. **Negligence:** PLEADING: EVIDENCE. A general allegation of negligence is good as against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant.

2. ——: ——: ——. Where a pleader relies upon one or more

specific acts or omissions as negligence, then evidence of any act or omission not within some of such specifications is irrelevant.

3. ——: ——: ——. The first and second points of the syllabus of *Omaha & R. V. R. Co. v. Wright*, 47 Neb., 886, disapproved.

REHEARING of case reported in 47 Neb., 886.

J. M. Thurston, *W. R. Kelly*, and *E. P. Smith*, for plaintiff in error.

R. S. Norval, *contra*.

RAGAN, C.

This is a rehearing of *Omaha & R. V. R. Co. v. Wright*, reported in 47 Neb., 886, where will be found a sufficient statement of the facts. Wright and others alleged in their petition: The railway company, "by its agents and employes, while running at a high rate of speed, carelessly and negligently, without using due caution, ran the engine and train of cars connected therewith and attached thereto over and upon the cattle of these plaintiffs." "That the said defendant, carelessly and negligently, by its employes and servants, in operating said train ran their said engine and train in, over, and upon said plaintiffs' stock, when by exercising proper care and skill in the management and handling of its engine and train it could have stopped said train long before striking said plaintiffs' stock." On the trial of the case in the district court the evidence tended to show that the engineer in charge of the train, by the exercise of due care, could have seen the cattle of Wright and others in time to have stopped the train and avoided injuring them; and the court submitted to the jury the question of the defendant's liability under instructions that if the engineer saw the cattle, or by the exercise of due care could have seen them in time to have stopped the train and avoided the accident, the company was liable for his not so doing.

On the former hearing we held that the instructions were correct as abstract statements of law, but reached

the conclusion that the instructions submitted to the jury an issue not made by the pleadings, and for that reason were of opinion that the judgment of the district court should be reversed. A re-examination of the question, however, has led us to a different conclusion. The rule, we think, is this: That a general allegation of negligence is good against a demurrer; and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant; but where a pleader relies upon one or more specific acts or omissions as negligence, then evidence of any act or omission not within some of such specifications is irrelevant. (*Grinde v. Minneapolis & St. P. R. Co.*, 42 Ia., 376; *Garner v. Hannibal & St. J. R. Co.*, 34 Mo., 235; *Schneider v. Missouri P. R. Co.*, 75 Mo., 295; *Mack v. St. Louis, K. C. & N. R. Co.*, 77 Mo., 232; Black, Proof and Pleadings in Accident Cases, sec. 139; *Clark v. Chicago, M. & St. P. R. Co.*, 28 Minn., 69; *Keating v. Brown*, 30 Minn., 9; *Lucas v. Wattles*, 49 Mich., 380; *Ware v. Gay*, 11 Pick. [Mass.], 106; *Smith v. Old Colony & N. R. Co.*, 10 R. I., 22; *House v. Marius*, 100 Cal., 592; *Sullivan v. Missouri P. R. Co.*, 97 Mo., 113; *Pope v. Kansas City Cable R. Co.*, 99 Mo., 400; *Ohio & M. R. Co. v. McCartney*, 121 Ind., 385; *Western R. Co. v. Lazarus*, 88 Ala., 453; *Clark v. Chicago, B. & Q. R. Co.*, 15 Fed. Rep., 588; *Davis v. Guarnieri*, 45 O. St., 471.)

Wright and others, in their petition in the case at bar, charged the railway company generally with negligence, and under these allegations we think that it was competent for them to introduce evidence of the fact, if it was a fact, that the engineer in charge of the train saw, or by the exercise of due care could have seen, the cattle in time to have stopped the train and avoided injuring them. The case is distinguishable from *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 90. In that case Grablin alleged and relied upon five distinct and specific acts of negligence on the part of the railroad company, and it was held that it was error for the trial court to admit in evidence any act or omission of the railway company claimed to be

negligence not within any of the specific acts of negligence pleaded. In other words, where a pleader relies upon certain specific acts or omissions as negligence, he is limited to such specific acts or omissions. If he pleads negligence generally, he may introduce evidence of any act or omission which tends to support his pleading. The first and second points of the syllabus of this case reported in 47 Neb., 886, are disapproved. We have reexamined the entire arguments of the railway company for a reversal of this judgment, but do not deem it necessary to review these arguments here, since we are of opinion that the record discloses no error of the trial court prejudicial to the railway company. The judgment of the district court is in all things

AFFIRMED.

JEROME H. SAGER, CONSTABLE, V. CHARLES E. SUMMERS.

FILED OCTOBER 21, 1896. No. 8563.

1. **Voluntary Assignments**: FAILURE TO WITNESS DEED. A deed of assignment for the benefit of creditors, unless witnessed, is absolutely void.

2. ———: CONSTRUCTION OF STATUTE. The comma after the word "acknowledged" in the fourth line of section 6, chapter 6, Compiled Statutes, is an interpolation.

3. ———: ———: EXECUTION AND ACKNOWLEDGMENT. Said section 6 construed, and *held*, that an assignment for the benefit of creditors, to be valid, must be in writing and executed and acknowledged in the same manner that an ordinary conveyance of real estate is required to be executed and acknowledged to entitle the latter to record.

4. ———. *Deere v. Losey*, 48 Neb., 622, and the second and third points in the syllabus of *Lancaster County Bank v. Horn*, 34 Neb., 742, overruled.

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

The facts are stated in the opinion.

John D. Carson, for plaintiff in error:

The deed of assignment is not witnessed and is, therefore, null and void. (*Harrison v. McWhirter*, 12 Neb., 155; *Green v. Gross*, 12 Neb., 123; *Child v. Baker*, 24 Neb., 188.)

F. B. Donisthorpe, Charles H. Sloan, R. J. Sloan, and *H. P. Wilson, contra:*

The assignment is valid. (*Lancaster County Bank v. Horn*, 34 Neb., 742; *Weaver v. Coumbe*, 15 Neb., 171; *Paulson v. Clough*, 42 N. W. Rep. [Minn.], 398; *Deere v. Losey*, 48 Neb., 622; *Commercial Nat. Bank v. Nebraska State Bank*, 33 Neb., 305.)

RAGAN, C.

On the 10th day of July, 1893, one J. M. Burke, residing in Fillmore county, Nebraska, made an assignment for the benefit of all his creditors to Charles E. Summers, the sheriff of said county. This assignment appears to have been executed in exact conformity to the statutes, except that it was not witnessed. A creditor of Burke's caused an execution to be issued and placed in the hands of one Jerome H. Sager, a constable, who seized a part of the property in the possession of Summers as assignee. Summers replevied the property, and on the trial in the district court he had a verdict and judgment, to reverse which Sager prosecutes here a petition in error.

1. On the trial of the replevin action Summers offered in evidence the deed of assignment executed and delivered by Burke to him. To the introduction of this deed Summers objected on the ground that it was not witnessed. The objection was overruled and the deed read in evidence. This action of the district court is the first assignment of error argued here. The precise question is this: Is a deed of assignment made by an insolvent debtor absolutely void unless witnessed? So much of

chapter 6, Compiled Statutes, as is material here is as follows:

"Section 1. That no voluntary assignment for the benefit of creditors hereafter made shall be valid unless the same shall be made in conformity to the terms of this act.

"Sec. 2. Every such assignment shall be of all the property * * * of the assignor, * * * except so much thereof as may be exempt from * * * execution. * * *

"Sec. 3. Real estate so assigned shall be described in the deed of assignment in such manner as would be requisite in an ordinary deed of conveyance thereof, and real estate claimed to be exempt shall be expressly excepted by a like description."

"Sec. 5. In every such assignment the sheriff and his successor in office of the county in which the assignor resides * * * shall be named as assignee.

"Sec. 6. Such assignment shall be in writing and shall be executed and acknowledged in the manner in which a conveyance of real estate is or shall be required to be executed and acknowledged in order to entitle the same to be recorded," etc.

It is to be observed that section 1 quoted above declares that no assignment for the benefit of creditors shall be valid unless the same shall be made in conformity to the terms of this act. The word "valid" means having force, of binding force; legally sufficient or efficacious; authorized by law. (Anderson's Law Dictionary.) The section, then, is to be construed as if it read: "All voluntary assignments for the benefit of creditors shall be void unless they shall be made in conformity to the terms of this act." The word "made" in the act also requires construction. "To make" is to produce, to create, to execute. (Anderson's Law Dictionary.) The word "made," then, in the section should be construed the same as "executed," and a fair construction of the entire section would read as follows: "Every voluntary assignment for the benefit of creditors hereafter made shall be void unless the same shall be executed in conformity to the terms of this act."

The act requires the observance and performance of several things in the execution of a deed of assignment. The assignment shall be of all the property, both real and personal, of the assignor, except such as is exempt. If the assigned property is real estate it must be described in the deed of assignment in such manner as would be requisite in an ordinary conveyance thereof. The real estate claimed to be exempt must be likewise described. The sheriff and his successor in office of the county in which the assignor resides must be made the grantee in the deed. The assignment must be in writing and it must be executed and acknowledged in the same manner in which the law requires a conveyance of real estate to be executed and acknowledged in order to entitle such conveyance of real estate to be recorded. The act does not expressly say that the deed of assignment shall be delivered to the sheriff, but doubtless this is a fair construction of the act; and in *Wells v. Lamb*, 18 Neb., 352, and in *Wells v. Lamb*, 19 Neb., 355, it was held that a deed of assignment was not executed within the meaning of the statute until the assignor surrendered control over it by delivering it. Conveyances of real estate executed within this state, conveying real estate situate within this state, to entitle them to be recorded, must be witnessed and acknowledged. (Compiled Statutes, ch. 73, sec. 1.)

Our statute relating to assignments for the benefit of creditors was construed by the United States circuit court of appeals in *Summers v. White*, 71 Fed. Rep., 106. The validity of the deed of assignment involved in that case was the one involved here, and the property involved was part of the property sought to be conveyed by the deed of assignment under consideration. The court said: "In view of the mandatory provision found in the assignment law, that assignments shall be executed in the manner that a conveyance of real estate is required to be executed to entitle it to be recorded, and in view of the positive provision found in the act that no assignment shall be valid unless made in conformity to the terms of the act,

we do not feel ourselves at liberty to decide that an assignment is valid in the state of Nebraska although it is not witnessed." We think this a correct construction of the statutes quoted, and we accordingly hold that a voluntary assignment for the benefit of creditors, if unwitnessed, is absolutely void. In *Deere v. Losey*, 48 Neb., 622, we reached a contrary conclusion, but we were led into that error by the punctuation of section 6 of the assignment act found in the Compiled Statutes. In that section the compiler placed a comma after the word "acknowledged," in the fourth line of said section 6. This would justify a reading of that section as follows: "That an assignment for the benefit of creditors, to entitle it to be recorded, must be executed and acknowledged in the manner in which a conveyance of real estate is or shall be required to be executed and acknowledged." But on looking at the enrolled act in the secretary of state's office, and at the section as printed in the Session Laws of 1893 (see Session Laws, 1883, p. 67), it will be observed that the only comma in the first sentence of said section is after the word "writing," which makes the section read, in effect, that a deed of assignment shall be in writing, and shall be executed and acknowledged in the same manner that an ordinary deed of real estate is required to be executed and acknowledged to entitle it, the ordinary deed of real estate, to be recorded. *Deere v. Losey* is, therefore, overruled.

2. But it is said in support of the judgment that an ordinary deed of real estate, or a bill of sale of personal property, actually signed by the grantor and delivered to the grantee, is a good conveyance of the property as between the parties though such conveyance is neither witnessed nor acknowledged; and it is insisted that a deed of assignment made by an insolvent debtor for the benefit of his creditors would therefore also be good as between the parties and those having actual notice thereof. It is true that an ordinary conveyance of real estate, though neither witnessed nor acknowledged, if duly signed by

the grantor and delivered, will pass the legal title to the grantee therein. But this is because no statute requires an ordinary deed of conveyance to be witnessed or acknowledged in order that such conveyance may be valid between the parties. The requirements that a deed shall be witnessed and acknowledged are to enable the deed to be read in evidence without further proof, and to entitle it to be recorded under the registry acts, and the object of recording the deed is to preserve and perpetuate it as evidence and to give notice to the world of the conveyance. (*Burbank v. Ellis*, 7 Neb., 156; *Green v. Gross*, 12 Neb., 117; *Keeling v. Hoyt*, 31 Neb., 453; *Connell v. Galligher*, 39 Neb., 793; *Pearson v. Davis*, 41 Neb., 608, and cases there cited.) But by virtue of the provisions of chapter 73, Compiled Statutes, an ordinary deed of conveyance of real estate, in order to entitle it to be recorded, must be both witnessed and acknowledged; and the assignment law under consideration declares, in effect, that a deed of assignment for the benefit of creditors shall be absolutely void unless it is executed and acknowledged in the same manner that an ordinary deed of real estate would have to be executed and acknowledged in order to entitle the latter to be recorded. In other words, an ordinary conveyance of real estate is not void though not witnessed or not acknowledged, because such deed was a good conveyance between the parties at common law, and no statute exists which makes such a deed void; but the legislature has in express terms declared that a deed of assignment for the benefit of creditors shall be void unless it complies with certain requirements of the insolvent debtor's act.

3. Another argument in support of the judgment is that Summers, the assignee, was in possession of the property in question, and that Sager, the constable, when he seized it on execution actually knew that Summers claimed the property as the assignee of Burke, and, therefore, Sager is in no position to assail the insufficiency of the deed of assignment. This is but a different statement of the ar-

gument already noticed, that the deed of assignment was good between the parties. In other words, that it was voidable, but not void. It seems to have been held in *Lancaster County Bank v. Horn*, 34 Neb., 742, that possession of property by an assignee under a void deed of assignment was good as against an attaching creditor of the assignor, the writer of the opinion saying: "Possession of goods is notice of whatever interest the assignee may possess therein. In the case at bar the assignee was in possession of the goods in controversy, and this was notice to all parties that the possession had been changed, and it was the duty of third parties to inquire by what right the assignee held the same;" and in the second and third points of the syllabus it was said: (2.) "An assignment for the benefit of creditors, as it secures an equitable distribution of the proceeds of the debtor's property among his creditors, will be sustained if possible." (3.) "Where the assignee has taken actual and exclusive possession of the personal property assigned, such possession cannot be disregarded by third parties on the ground of want of notice. The statute merely provides for a registry of the instrument." But all this was *obiter*, as the question in the case was whether the deed of assignment should have been filed in the office of the county clerk or in the office of the register of deeds of Lancaster county. The question in that case, and in this, is not whether the possession of the assignee was notice to the world of his claims to the property; but the question there and here is whether the assignee had any interest in the property; whether the deed under which he claimed had been executed as the law required. There was no question in that case, nor is there any question in this, of equities existing between the parties. The question presented by that case and by this is whether the assignor complied with the law in the execution of his deed of assignment. If he did, it was valid whether the creditors had notice thereof or not. If he did not, it was void, no matter what the knowledge of the creditors of the assignor was, nor

what possession the assignee had of the property. It is not the province of the court, by construction, to read into this statute of insolvent debtors provisions which we might be of opinion would mitigate the harshness of its requirements. Our duty in the premises is to ascertain, if we can, and declare the intention of the legislature. It was perfectly competent for the legislature to declare that a deed of assignment for the benefit of creditors should be void unless it was executed and acknowledged in the same manner as an ordinary conveyance of real estate is required to be executed and acknowledged to entitle the latter to be recorded. Nor is it true that a deed of assignment for the benefit of creditors is to be sustained "if possible." Of course, it is not to be declared void for any mere technical informality; but to be valid, it must be executed in substantial conformity with the law. This assignment law was not designed for the benefit of creditors, but for the benefit of the debtor; and by complying with its provisions he is enabled to impound all his property in the hands of an assignee and deprive his creditors of the power to seize it, as at common law they had a right to do, for the satisfaction of their debts. In other words, the assignment act is a creature of statute, and any one claiming property under it must show at least a substantial compliance with its provisions. The second and third points of the syllabus in *Lancaster County Bank v. Horn*, 34 Neb., 742, are overruled. The deed of assignment offered in evidence in this case was void. The district court erred in admitting it. Its judgment is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

PER CURIAM.*

The conclusion adopted in the opinion filed herein is the proper one, irrespective of the punctuation of section 6, chapter 6, Compiled Statutes. The motion for a rehearing is accordingly denied.

*Order made December 16, 1896, on motion for rehearing.