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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

SEPTEMBER TERM, 1897—JANUARY TERM, 1898.

VOLUME LIII.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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In behalf of the people of Nebraska.

64046

THE SUPREME COURT

OF

NEBRASKA.

1897–98.

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*Term expired January 5, 1898.
†Became Chief Justice January 6, 1898.
‡Elected November 2, 1897, and took his seat January 6, 1898.

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CHARLES L. HALL.....Lincoln.
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C. R. SCOTT.....Omaha.
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WM. MARSHALL.....Fremont.

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Eighth District—

R. E. EVANS.....Dakota City.

Ninth District—

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Tenth District—

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

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

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H. M. SULLIVAN.....Broken Bow.

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H. M. GRIMES.....North Platte.

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(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.)

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1897.

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.

F. G. KEENS V. BUFFALO COUNTY ET AL.

FILED DECEMBER 9, 1897. No. 7663.

Review: PROCEEDINGS BEFORE COUNTY BOARD: EVIDENCE. Where error proceedings present no question, except one of fact, and there existed no means by which the evidence upon which such question was determined by an inferior board or tribunal could be preserved upon the hearing before it, the finding of such board or tribunal must be affirmed.

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

R. A. Moore, for plaintiff in error.

Norris Brown, contra.

RYAN, C.

This cause was brought into this court upon the petition in error of F. G. Keens for the reversal of a judgment of the district court of Buffalo county affirming the action of the board of county commissioners of said county with reference to the assessment of said Keens in the year 1893. The record of the county board recites the proceedings with reference to the subject-matter just indicated, as follows:

"Consideration of the matter of the assessment of F. G. Keens being in order, his attorney, Mr. Moore, being present, stated that his client, Mr. Keens, would come before the board to be questioned relative to off-set claimed by him, but that he refused to bring books or papers or other evidence to substantiate his word in the matter.

"Moved by Stuckey and seconded by Hoag that this board refuse to allow the prayer of F. G. Keens in the matter of his assessment on the ground that there is not sufficient evidence before them on which to act, and that this board have requested said Keens to appear with his books and his witnesses and be examined under oath as to the nature, extent, and character of said alleged indebtedness, and he refused to do so. Ayes and nays being called for resulted as follows: Ayes—Aron, Brady, Bennett, Collard, Day, Deets, Elliott, Ferris, Fisher, Hoag, Ihde, Johnson, Lambert, Lunger, Mohring, Mortimer, McNeal, Pickett, Pokorny, Richards, Salisbury, and Stuckey; total, 23. Nays—Bowie and Millett; total, 2. Absent—Towers, Fritz, and Jones. Mr. Moore, as attorney for Mr. Keens, then stated that he should take the matter of his assessment to the district court on writ of error."

From this record it seems that the plaintiff in error failed before the board of county commissioners because he adduced no evidence to sustain his claim for the reduction of his assessment. In the record there are found

copies of three affidavits certified by the county clerk of Buffalo county as having been filed and offered as evidence before the board. The proceedings sought to be reviewed were had July 16, 1893. At that time there was no provision for the settlement of a bill of exceptions in matters heard by a board of county commissioners, and therefore no means existed for preserving the evidence upon which questions of fact, by such board, had been determined. (*Hopkins v. Scott*, 38 Neb., 661.) The district court for this reason could not consider these affidavits, and, upon the record of the county board, could not do otherwise than sustain its action. The judgment of that court is therefore

AFFIRMED.

JOHN H. WRIGHT V. FRANK MORSE.

FILED DECEMBER 9, 1897. No. 7649.

1. **Review:** CONFLICTING EVIDENCE. The verdict of a jury reached on consideration of merely conflicting evidence will not be disturbed in the supreme court.

2. **Evidence:** OFFER TO COMPROMISE. An offer to compromise a matter in dispute cannot be given in evidence against the party by whom such offer was made.

3. **Execution Sale:** PURCHASE FOR DEFENDANT'S BENEFIT: RIGHTS OF BUYER. Where a party purchased property at an execution sale and paid the purchase price therefor, at the request of the execution defendant to whom such property was subsequently delivered, such party is entitled to recover the amount of such payment from the execution defendant, even though the execution sale, in law, was unauthorized and void.

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

H. M. Uttley, for plaintiff in error.

John H. Mosier, contra.

RYAN, C.

This action was brought in the county court of Boyd county, wherein the plaintiff Morse recovered judgment, from which Wright appealed to the district court of said county, wherein a judgment, similar to that appealed from, was rendered, upon the verdict of a jury. By his petition in error Wright seeks the reversal of this judgment.

By his petition in the district court Morse alleged that, upon the oral request of Wright, Morse had attended a certain sale of cattle upon an execution against Wright; had purchased said cattle for the sum of $128, which he had paid, and that Wright, though he had received the said cattle from Morse, had refused to reimburse Morse as said Wright had agreed to when the aforesaid request to purchase was made. The answer of Wright put in issue the averments of the petition and contained averments that the execution sale was a nullity for reasons which hereafter shall be more fully stated. It admits of some doubt whether or not Morse, by his own testimony given in chief, sustained all the averments of his petition, but from a consideration of all the evidence the jury was justified in finding the verdict which it returned. Plaintiff in error complains because he was not permitted on cross-examination of Morse to show that Morse had offered to accept one-half the amount he had paid on his bid if Wright would pay that sum to him. This was evidently an offer to compromise and was properly excluded. It is also urged as error that the trial court refused to permit Wright to show that the court by which judgment had been rendered against him for the satisfaction of which the cattle were sold to Morse had no legal existence at the time such judgment was rendered. We agree with the district court that, if Morse bought the cattle upon the procurement of Wright, it was immaterial whether the sale was authorized by law or not. Morse, as the jury found, upon conflicting evi-

dence, purchased these cattle at this sale purely to subserve some unexplained purpose of Wright, and Wright cannot complain that the sale, technically, was without authority of law. Wright in his testimony admitted that, even after the sale had been made, he directed Morse to give his check for the purchase price, but required that it should be made non-negotiable, due in ten days, and that, meantime, payment thereof should be forbidden. From Wright's own testimony it further appears that he himself gave notice not to pay the check, as he claims in pursuance of the advice of one or more lawyers whom he had consulted. Morse, after this, voluntarily paid the amount of his bid to the constable who had conducted the sale on the execution against Wright, and we cannot say that Morse was without justification in doing this, for neither the neighborly sympathy, nor the contract undertakings, disclosed in the trial of this case, required of Morse that he should, as a matter of accommodation, engage in litigation for the benefit of Wright. We have found no error in the record and the judgment of the district court is

AFFIRMED.

WILLIAM J. MAXWELL V. FRANK L. GREGORY.

FILED DECEMBER 9, 1897. No. 7620.

1. **Vendor and Vendee:** FAILURE TO MAKE TITLE: REPAYMENT OF PURCHASE MONEY. A party who, under the terms of an executory written contract, is conditionally entitled to receive a good title to real property, upon its being made certain that the other party cannot make such title, may recover such payments as he has meantime made pursuant to the terms of the contract to which he is a party.

2. ——: ——: ——: EVIDENCE. It is not competent for a defendant sought to be compelled to make restitution as above indicated, to show his own solvency, or that he has been empowered by virtue of negotiations with the holders of the outstanding title to make a good and sufficient warranty deed, no such ability or readiness having been averred in his answer.

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

The facts are stated in the opinion.

B. N. Robertson, for plaintiff in error:

A court of equity will allow a reasonable time to perfect a title, and when valid, in the absence of fraud, will compel the vendee to accept it. (See *Frost v. Brunson*, 6 Yerg. [Tenn.], 35; *Bryant v. McCollum*, 4 Heisk. [Tenn.], 520; *Elliott v. Blair*, 5 Cold. [Tenn.], 193.)

Where the vendor is complainant it is not necessary for him to show that he was able to give a good title at the time of making the agreement to sell or at the time of the commencement of the suit. It will be sufficient if he can give a perfect title at the time of the decree. (*Coffin v. Cooper*, 14 Ves. [Eng.], 205; *Hepburn v. Auld*, 5 Cranch [U. S.], 262; *Brown v. Haff*, 5 Paige Ch. [N. Y.], 235; 28 Am. & Eng. Ency. Law, 74; *Jenkins v. Fahey*, 73 N. Y., 355.)

Lake, Hamilton & Maxwell, contra:

Under an agreement by the vendor of lands to execute a good and sufficient conveyance the purchaser may demand a clear title, as well as that it be assured to him by proper covenants. (*Davis v. Henderson*, 17 Wis., 108; *Taft v. Kessel*, 16 Wis., 291; *Davidson v. Van Pelt*, 15 Wis., 375; *Bateman v. Johnson*, 10 Wis., 1; *Falkner v. Guild*, 10 Wis., 563.)

A purchaser under an executory contract may recover the money paid without alleging or proving readiness to perform on his part, where the vendor is unable to perform. (*Clark v. Weis*, 87 Ill., 438; *Runkle v. Johnson*, 30 Ill., 328; *Miner v. Hilton*, 44 N. Y. Supp., 155; *Wright v. Dickinson*, 11 Am. St. Rep. [Mich.], 602; *Linton v. Allen*, 28 N. E. Rep. [Mass.], 780.)

RYAN, C.

Frank L. Gregory filed his petition in the district court of Douglas county alleging that William J. Maxwell, pretending and representing himself to be the owner in fee of lot 3, block 21, in West Omaha, had sold said lot to said plaintiff and had entered into a written agreement with said plaintiff evidencing such sale. By the terms of this agreement, pleaded in the petition, Maxwell agreed to sell to Gregory the whole of the lot above described for the consideration of $1,500, of which consideration $500 was to be paid at the date of the delivery of the contract, which was June 2, 1887, and the balance in three equal annual payments to be made June 1 of each of the years indicated. By this contract Gregory was required to pay and discharge all taxes and assessments imposed on said property from the date of said agreement, within three months from such times as the same should fall due. There was contained in this contract the following provisions: "Forthwith after second payment of said purchase money, taxes, and interest as aforesaid, time being of the essence of this contract, the party of the first part [Maxwell] agrees to execute, or cause to be executed, to the party of the second part a good and sufficient warranty deed for the said lot three, to be delivered on the surrender of the duplicate contract." The petition contained averments that, at the date of the contract, Gregory, relying upon the representations of Maxwell that he could and would make good title, had paid the sum of $500 as required, and in 1888 and 1889 had paid taxes and assessments to the amount of $30.47; that on August 10, 1893, he had tendered to Maxwell the sum of $1,599.52, the amount due under the contract, and requested that a deed be executed in accordance with the provisions of said contract whereby Maxwell had bound himself to make such conveyance. It was alleged that Maxwell had not made the conveyance demanded, and was unable to do so by reason

of the fact that he was the owner of but one-half of the lot bargained to be conveyed, as had been adjudicated by a court having jurisdiction of the subject-matter and of the parties, of whom said Maxwell was one. The prayer of the petition was for the recovery of the payments above described as actually having been made and received on the faith of the provisions of said contract, with seven per cent per annum interest thereon from the several dates when the said payments respectively had been made, and for the enforcement of a lien for said amount prayed, against the interest of Maxwell in the real property described in the contract between Maxwell and Gregory. In his answer Maxwell admitted the execution of the contract, but denied that he had made any false representations in respect thereto. He further averred that Gregory, at the time of the making of the written contract described in the petition, had full knowledge of the condition of the title of Maxwell and of the adverse claims of other parties to the lot which was the subject-matter of said contract and of the nature of such claim of adverse title as set forth in the pleadings and decree in Maxwell against Higgins et al., the case to which Gregory had referred in his petition. It was further answered that more than four years had elapsed before this action was begun and that, therefore, the statute of limitations had fully barred it. In the answer it was also alleged that, notwithstanding the duty of Gregory under the provisions of said contract to pay taxes and assessments, he had failed to make such payments, to which failure was attributable the sale of said lot for taxes and in pursuance of such sale the issuance of a tax deed which remains outstanding. There was also a denial of each averment of the petition which had not been admitted in an earlier part of said answer. A reply in denial of each averment in the answer completed the issues upon which a trial was had to the court. There was a judgment as prayed by Gregory, for the reversal of which Maxwell prosecutes these proceedings in error.

In effect, this action was one brought by Gregory for the recovery of money which he had paid on an executory contract which Maxwell, the other party thereto, was unable to carry out. Under these circumstances Gregory was justified in rescinding, and upon such rescission was entitled to recover what he had been compelled to pay in performance of the conditions which by the terms of said contract had been imposed upon him and by the default of the other party had been rendered unavailing, with interest. (*Clark v. Weis*, 87 Ill., 438; *Miner v. Hilton*, 44 N. Y. Supp., 155; *Wright v. Dickinson*, 67 Mich., 580; *Linton v. Allen*, 154 Mass., 432.) On the trial there was an offer to show that Maxwell was able to obtain credit for the sum at least of $10,000. We cannot conceive how this fact, if established or conceded, impaired the right of Gregory to a return of his money with seven per cent interest thereon. It was also attempted to be shown that Maxwell had negotiated with the parties who had prevailed against him with reference to the undivided one-half of the lot he had agreed to sell to Gregory. Following this offer the following question was propounded to Maxwell: "You may state now whether or not these negotiations have given you full power to execute a warranty deed to this lot three to plaintiff." This was answered in the affirmative, but on motion the answer was stricken out. By this ruling the court gave it to be understood that in the decision of the case presented no consideration would be given to the fact that, by virtue of negotiations between Maxwell and the holders of the outstanding title adverse to his claim of title, Maxwell had been given power to execute a warranty deed to Gregory. In this view the court was right. No offer to convey had been made in the answer, neither had there been an averment of a willingness to make a conveyance. The question and its answer did not imply that Maxwell had obtained the outstanding title and was therefore prepared to perform. They elicited merely the

fact that Maxwell's late adversaries had given him power to make a warranty deed to Gregory. If by this it was meant that Maxwell, as the agent of these parties, or as their attorney in fact, had power to execute the deed in question, this would not meet the requirements of the contract with Gregory. The question simply called for Maxwell's conclusion as to whether the negotiations conferred power upon him to execute a warranty deed, and hence the answer elicited no material fact. By these considerations we are led to the conclusion that the court properly refused to consider this question and answer.

It is urged that Gregory acquiesced in the delay necessary to settle the litigation between Maxwell and Higgins. An examination of the evidence discloses the facts that he was ready to perform at any time, and repeatedly signified this willingness to Maxwell and Maxwell's agent in this matter, but was put off from time to time by one excuse and another until the final adjudication was had in the case of Maxwell against Higgins. The plaintiff in error cannot be heard to found objections upon this forbearance for his own benefit and at his own instance.

There was no attempt whatever to show the existence of any tax deed, so that we are not called upon to discuss questions which the existence of such a title under the circumstances pleaded in the answer might have raised. The judgment of the district court is

AFFIRMED.

JOSEPH BRINCKLE V. NELLIE STITTS.

FILED DECEMBER 9, 1897. No. 7662.

1. **Assignments of Error:** MOTION FOR NEW TRIAL. Errors in a petition in error must be assigned separately and this rule is not complied with by an assignment that there was error in overruling the motion for a new trial where such motion embraces several distinct complaints of errors.

2. **Instructions:** EXCEPTIONS: REVIEW. Where a party did not except to the refusal of the trial court to give an instruction requested by such party he cannot be heard to complain of the refusal in the supreme court.

3. **Review:** EXCLUSION OF EVIDENCE: BILL OF EXCEPTIONS. Error alleged as to the exclusion from the jury of the whole or a part of an alleged book of original entries cannot be considered in the supreme court when the book is not to be found in connection with the bill of exceptions.

4. **Depositions:** OBJECTION TO ANSWER. An answer to an interrogatory in a deposition contained both competent and incompetent testimony. *Held*, That an objection was properly sustained to the entire answer.

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

John D. Carson, for plaintiff in error.

Charles H. Sloan, contra.

RYAN, C.

This was an action for compensation for personal services rendered for plaintiff in error by the defendant in error. There was a verdict as prayed to the amount of $200, for which amount, with costs, a judgment was duly rendered by the district court of Fillmore county. In the petition in error there was no assignment as to the sufficiency of the evidence to sustain the verdict. It is true this was made the ground of one of the several complaints urged in the motion for a new trial, and in the petition in error the overruling of the motion for a new trial in a general way was assigned as error. This, however, presented no question as to any one of the several errors alleged in the motion for a new trial. (*City of Chadron v. Glover*, 43 Neb., 732; *Glaze v. Parcel*, 40 Neb., 732; *Stein v. Vannice*, 44 Neb., 132; *Sigler v. McConnell*, 45 Neb., 598; *Conger v. Dodd*, 45 Neb., 36.)

It is urged in argument that the district court erred in its refusal to give the fourth instruction asked by the

plaintiff in error. There was no exception to this ruling; hence we cannot determine whether or not there was error in such refusal. It is urged that an alleged book of original entries was improperly excluded from the consideration of the jury. Unfortunately, this book does not appear in connection with the bill of exceptions, and we therefore cannot determine whether or not there was error in excluding portions of it.

The final assignment is that there was error in excluding as evidence the answer to the fourth interrogatory in the deposition of J. F. Steenrod. In this answer there was some competent testimony, but this was in connection with testimony which was clearly incompetent. The district court therefore properly excluded the entire answer of the witness.

There was assigned no other error, and it follows that the judgment of the district court is

AFFIRMED.

JOSEPH W. SHABATA ET AL. V. JOHN R. JOHNSTON ET AL.

FILED DECEMBER 9, 1897. No. 7615.

1. **Appearance:** JURISDICTION. A defendant who has voluntarily submitted his person to the jurisdiction of a district court cannot afterwards be heard by answer to question such jurisdiction.

2. **Banking Corporations:** EVIDENCE OF EXISTENCE. A finding adverse to the contention that a banking corporation had ceased to exist by lapse of time will be sustained where, on each side, the evidence is of like character with a preponderance in favor of the finding rather than against it.

3. **Set-Off.** A claim on the part of a defendant, which he will be entitled to set off against the claim of a plaintiff against him, must be one upon which such defendant could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff.

4. **Joint Assignments of Error.** A joint assignment of errors, in a petition in error made by two or more persons, which is not good as to all who join therein must be overruled as to all.

5. **Bills and Notes:** RIGHTS OF PURCHASERS. Where, upon a sufficient consideration moving to himself, a party has given his promissory note to the cashier of a bank to take up the indebtedness of another person due to said bank, such maker will be held liable to one who subsequently purchases said note, even after due; not necessarily because of any right to protection on account of being such purchaser, but because the note could be enforced by the bank for whose benefit it was originally made.

6. ———: ———: ASSETS OF INSOLVENT BANK. In an action by the purchaser of a note sold to him by the receiver of an insolvent bank under an order of court directing such sale, the fact that the entire capital stock of such bank was held by its cashier at the time of the making of such note, or thereafter, constitutes no defense.

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

The opinion contains a statement of the case.

Hastings & McGintie, Hall & McCulloch, F. I. Foss, and *W. R. Matson,* for plaintiffs in error:

The court erred in excluding evidence to sustain the allegations of the answer that the court was without jurisdiction. (*Coffman v. Bradhoeffer,* 33 Neb., 279; *Carlisle v. Corran,* 2 S. W. Rep. [Tenn.], 26.)

The court erred in not considering that the notes sued on were long overdue and were taken subject to all preexisting equities and defenses. (*Sturges v. Bank of Circleville,* 11 O. St., 153; *Haughton v. First Nat. Bank of Elkhorn,* 26 Wis., 663; *Merchants Bank v. Rudolf,* 5 Neb., 527; *First Nat. Bank of Cedar Rapids v. Erickson,* 20 Neb., 580; *Myers v. Bealer,* 30 Neb., 280; *Clute v. Frasier,* 58 Ia., 268.)

The agreement between Foss on the one side and Stevens and Johnston on the other, that a note should be executed for the full amount of another's indebtedness to the bank and signed by Stevens and Foss as a matter of accommodation to the bank, may be shown by parol evidence. (*Edney v. Willis,* 23 Neb., 56; *Davis v. Neligh,* 7 Neb., 78; *Bridge v. Johnson,* 5 Wend. [N. Y.], 355; *Morgan v. United States,* 113 U. S., 500; *Speck v. Pullman Pal-*

ace Car Co., 121 Ill., 57; *Simons v. Morris*, 53 Mich., 155; *Wood v. McKean*, 64 Ia., 18.)

The court erred in not finding that the charter of the State Bank had expired and that it was not a corporation. (*Louisville Banking Co. v. Eisenman*, 21 S. W. Rep. [Ky.], 531; *Swift v. Smith*, 65 Md., 428.)

The corporation was extinct. (*Sturges v. Vanderbilt*, 73 N. Y., 384; *People v. Walker*, 17 N. Y., 503; *Greeley v. Smith*, 3 Story [U. S. C. C.], 657; *Eagle Chair Co. v. Kelsey*, 23 Kan., 632; *Krutz v. Paola Town Co.*, 20 Kan., 397; *Merrill v. Suffolk Bank*, 31 Me., 57; *Bank of Mississippi v. Wrenn*, 3 S. & M. [Miss.], 791.)

No title passed to the purchaser of the note until the performance of the condition on which it was held. (*Patrick v. McCormick*, 10 Neb., 1; *Roberson v. Reiter*, 38 Neb., 198; *Cincinnati, W. & Z. R. Co. v. Iliff*, 13 O. St., 235; *Worrall v. Munn*, 5 N. Y., 229; *Fairbanks v. Metcalf*, 8 Mass., 230; *Southern Life Ins. & Trust Co. v. Cole*, 4 Fla., 359; *Bank of Healdsburg v. Bailhache*, 65 Cal., 327; *Andrews v. Thayer*, 30 Wis., 228.)

A receiver is not a *bona fide* holder of negotiable instruments. (*Bates v. Wiggin*, 37 Kan., 44; *In re North American Gutta Percha Co.*, 17 How. Pr. [N. Y.], 549; *Lorch v. Aultman*, 75 Ind., 162; *Pittsburgh Carbon Co. v. McMillin*, 119 N. Y., 46; *Hope Mutual Life Ins. Co. v. Taylor*, 2 Rob. [N. Y.], 278; *Litchfield Nat. Bank v. Peck*, 29 Conn., 384.)

The rule of *caveat emptor* applies to receivers' sales. (High, Receivers, sec. 199*b*; Beach, Receivers, sec. 734; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq., 549; *In re Third Nat. Bank*, 9 Biss. [U. S.], 535; *Alexander v. Relfe*, 74 Mo., 495; *Pringle v. Woolworth*, 90 N. Y., 511; *Barron v. Mullin*, 21 Minn., 374; *Foster v. Barnes*, 81 Pa. St., 377; *Manning v. Monaghan*, 23 N. Y., 544; *Arnold v. Weimer*, 40 Neb., 216.)

Charles Offutt, contra:

Defendants entered a general appearance, and proof of

want of jurisdiction was properly excluded. (*Aultman v. Steinan*, 8 Neb., 109; *Raymond v. Strine*, 14 Neb., 236.)

References as to question of escrow: *Wier v. Batdorf*, 24 Neb., 86; *Scott v. State Bank*, 9 Ark., 36; *Massmann v. Holscher*, 49 Mo., 87; *Henshaw v. Dutton*, 59 Mo., 139; *Jones v. Shaw*, 67 Mo., 667; *Walker v. Crawford*, 56 Ill., 449.

References to question of consideration and as to inadmissibility of evidence to show conditions on which the note was held: *Adams v. Wilson*, 12 Met. [Mass.], 138; *Barlow v. Ocean Ins. Co.*, 4 Met. [Mass.], 270; *Russell v. Cook*, 3 Hill [N. Y.], 504; *Yates v. Donaldson*, 61 Am. Dec. [Md.], 290; *Renwick v. Williams*, 2 Md., 356; *Jones v. Berryhill*, 25 Ia., 289; *Thompson v. Shepherd*, 12 Met. [Mass.], 311; *Allen v. First Nat. Bank*, 17 Atl. Rep. [Pa.], 886; *Kaserman v. Fries*, 33 Neb., 427; *Hubbard v. Marshall*, 50 Wis., 322; *Dickson v. Harris*, 60 Ia., 727; *Brouwer v. Appleby*, 1 Sandf. [N. Y.], 158; *Gillett v. Ballou*, 29 Vt., 296; *Brown v. Hull*, 1 Denio [N. Y.], 400; *McSherry v. Brooks*, 46 Md., 103; *Brown v. Spofford*, 95 U. S., 480; *Burnes v. Scott*, 117 U. S., 582.

The pretended escrow agreement was insufficient in law. Even if established it would constitute no defense. Whatever rights the receiver had passed to plaintiff. That plaintiff's purchase was made after maturity is immaterial. Set-off cannot be pleaded against the receiver. (*Harrington v. Connor*, 51 Neb., 214; *Barker v. Lichtenberger*, 41 Neb., 751; *Koehler v. Dodge*, 31 Neb., 337; *State v. Commercial State Bank*, 28 Neb., 677; *State v. Exchange Bank of Milligan*, 34 Neb., 198; *State v. Commercial & Savings Bank*, 37 Neb., 174; *Eastern Bank v. Capron*, 22 Conn., 639; *Haxtun v. Bishop*, 3 Wend. [N. Y.], 13; *Hayes v. Kenyon*, 7 R. I., 136; *Gillet v. Philips*, 13 N. Y., 114; *Alexander v. Relfe*, 74 Mo., 516; *Button v. Hoffman*, 61 Wis., 20; *Winona & St. P. R. Co. v. St. Paul & S. C. R. Co.*, 23 Minn., 359; *Baldwin v. Canfield*, 26 Minn., 43; *Millsups v. Merchants & Planters Bank*, 13 So. Rep. [Miss.], 903; *Louisville Banking Co. v. Eisenman*, 21 S. W. Rep [Ky.], 531; *Swift v. Smith*, 5 Atl. Rep. [Md.], 534; *Pitts-*

burgh Carbon Co. v. McMillin, 119 N. Y., 46; *Foley v. Holtry*, 41 Neb., 563; *In re Penn Bank*, 25 Atl. Rep. [Pa.], 310; *Tuckerman v. Brown*, 33 N. Y., 297.)

RYAN, C.

In the district court of Douglas county there were commenced two actions, in each of which John R. Johnston and Frank H. Connor, receiver of the State Bank of Nebraska at Crete, Nebraska, were plaintiffs. In one of these Joseph W. Shabata and Fayette I. Foss were the defendants, and in the other Mr. Foss was the sole defendant. They were tried to the court upon evidence, a large part of which was applicable to both cases. There was a judgment against Mr. Foss and Mr. Shabata in the sum of $3,014.34 in one case, and against Mr. Foss in the other case in the sum of $11,638.89. To review these judgments separate petitions in error have been filed, but both are argued and submitted as in one case. We shall not discuss whether the court by the service of its summons obtained jurisdiction of the defendants, for there was a voluntary submission to such jurisdiction before its existence was denied by the answer.

The action against Shabata and Foss was instituted upon a promissory note alleged to have been made by the former to the latter and by the latter indorsed, "Demand and notice waived, F. I. Foss," and transferred to the State Bank of Nebraska. John R. Johnston, by purchase of the assets of the aforesaid bank from its receiver, became the owner of this note and thereon brought suit against the maker and the indorser above indicated. It was contended by the defendants in the district court in both actions that the State Bank of Nebraska had originally been organized to exist twenty years and that this period having expired, the bank had ceased to exist, and that, therefore, John R. Johnston, by his purchase of the two notes, had obtained no title. In the first place we note that there was introduced in evidence no copy

of the original articles of incorporation of the bank in question. By oral evidence it was sought to be shown the ultimate fact above stated as to the organization of the bank; but by testimony of the same character it was shown that by an amendment of the articles of incorporation of this bank the period of its existence was extended so as to cover the transactions involved in this litigation. This latter testimony is corroborated by a copy of a record of the proceedings of the stockholders of said State Bank whereby an amendment extending the term of the existence of said bank was adopted, and it was shown that this amendment had been filed as required by law before the transactions under review took place. Not only was this the case, but it was shown, without question, that the bank had been adjudged insolvent; that a receiver therefor had been appointed, who had duly qualified, and under the direction of this court had sold the assets of the said bank to John R. Johnston, by whom, as such purchaser, the suits had been brought on the notes involved in these proceedings. In this condition of affairs it was proper to find that the transfer vested title in Johnston.

It is complained that the court did not find that Johnston as the purchaser of overdue paper did not stand in the same position as did George D. Stevens to whom Foss transferred the note of Shabata. There could be no question, from a consideration of the evidence, that the district court was fully justified in assuming that a concession of this position would not aid the defendants. It may be conceded, as Mr. Foss testified, that this note was originally placed in the bank with the express understanding between Foss and the cashier that an attorney's fee due Foss from J. R. Johnston and said cashier would be adjusted at a subsequent time instead of being deducted from the amount for which the note was given, but this is immaterial, for, on Mr. Foss' own statement, this fee was not owing to him by the bank. It is, however, insisted that this attorney's fee was properly

pleaded as a set-off to the right of Johnston to recover on this note against Foss. We shall assume, for the purposes of this case, that when Johnston brought suit on the note against Foss as an indorser, Foss might properly plead as a set-off against Johnston whatever right he had to recover attorney's fees due him from Johnston. It was shown, without leaving room for doubt, that, at the time the services as an attorney are claimed to have been rendered for Johnston, Foss was a member of the firm of Dawes & Foss, under articles of agreement which required payment of such fees to be made to said firm as such. Had an action been begun against Johnston it must have been on behalf of the firm of Dawes & Foss, for it was due to that firm and not to an individual member thereof. Since Foss could not have maintained an action in his own name for his own benefit for this attorney's fee, he could not plead and establish it as a set-off against a cause of action held by Johnston against him. (*Simpson v. Jennings*, 15 Neb., 671; *Wilbur v. Jeep*, 37 Neb., 604; *Burge v. Gandy*, 41 Neb., 149; *Richardson v. Doty*, 44 Neb., 73.)

It is complained that the district court excluded proof that the words "demand and notice waived" were not on the note of Shabata when Foss placed his indorsement thereon. There was no motion for a new trial filed by Shabata. The petition in error was filed by Shabata and Foss jointly. The assignment that the waiver of demand and notice was not on the note when it was indorsed and that Foss never consented to those words being placed over his indorsement was one which was available to Foss alone. It has been repeatedly held by this court that a joint assignment of errors in a petition in error, made by two or more persons, which is not good as to all who join therein must be overruled as to all. (*Gordon v. Little*, 41 Neb., 250; *Harold v. Moline, Milburn & Stoddard Co.*, 45 Neb., 618; *Small v. Sandall*, 45 Neb., 306.) This assignment, therefore, raises no question which we can consider. The trial was to the court;

hence the assignments with reference to the admission of incompetent evidence in either of the two cases under consideration will not be considered. This principle is so well settled in this court that it requires no citation of authorities to secure its recognition.

In the case against Mr. Foss alone the recovery was sought upon a promissory note for $10,000, dated June 17, 1892, due three months after date, with interest at ten per cent per annum from maturity, payable to George D. Stevens. It has already been stated how Mr. Johnston became the owner of this note. There is no merit in the contention that Mr. Johnston should have been held to have taken this note subject to whatever defenses existed in favor of the maker against the original payee, for we are satisfied that the district court was justified in finding that this note was enforceable against Foss even in favor of the bank for which Stevens was acting in taking and indorsing it. Mr. Foss had been president and Mr. Stevens cashier of this bank when there had been suffered to accumulate the indebtedness of $10,037 against a customer of the bank. The directors were dissatisfied with this transaction, and it was agreed that Foss and Stevens should take up this claim by giving their note for $7,500, and accordingly the $10,037 note with its chattel mortgage security was assigned to Foss and Stevens. There were renewals of the $7,500 note during the period of several years, sometimes the payment of interest being made, but more often being included in the renewals. There was not an entire uniformity observed in these renewals as to the relations of the parties thereto; hence it was we find that the note sued on was made by Foss & Stevens, whose liability thereon to the bank was apparently that of an indorser. This fact, however, in no degree tended to constitute a defense in favor of Foss in this action.

It was pleaded and sought to be proved that the entire capital stock of the State Bank of Nebraska at Crete was in fact owned by George D. Stevens, and, therefore,

it was urged in argument this action should have been treated as though the rights of the bank with respect to this note had never existed. It was disclosed by the evidence that at the time the indebtedness was assumed by Mr. Foss and Mr. Stevens, then respectively president and cashier of the bank, its capital stock was held by various parties, and, as already indicated, its affairs were supervised by its directors—at least to the extent of requiring Mr. Foss and Mr. Stevens to assume the payment of an indebtedness, which, as managing officers of the bank, they had permitted to arise. At the time this liability was assumed the capital stock of the bank was not held by Stevens. If he ever acquired control of all the stock, it was after the indebtedness under consideration had been assumed by himself and Mr. Foss. For the purposes of this case we shall assume that the acquisition of the entire capital stock by Stevens and his wife in fact vested the complete ownership of it in Stevens. When this ownership was acquired he, with Mr. Foss, was owing the bank nearly, if not quite, $10,000, and, it seems, the bank was insolvent. If the result now contended for should be sanctioned under these circumstances, the rule would be recognized that the cashier of an insolvent bank, by acquiring its capital stock, could prevent the collection from himself of any amount which he might owe the bank, even though such indebtedness might have arisen from his own dereliction in the performance of his duties as such cashier. In the case under consideration the bank was placed in the hands of a receiver because of its insolvency. His duties were on behalf of the creditors of the bank, and except for the purpose of treating its capital stock as a means of collecting funds for the payment of the creditors of the bank if resort thereto should be necessary, he had no concern with such capital stock. Certainly, under orders of the court by which he had been appointed as in this case, he had power to sell the assets of the bank, thereby conferring on purchasers the right to enforce

payment of evidences of indebtedness to the bank purchased, by suits in their own names. In actions of this class it is entirely immaterial how, or by whom, the capital stock of the insolvent bank is owned. Even in actions to recover an ordinary indebtedness this defense pleaded has been held unavailable. (*Harrington v. Connor*, 51 Neb., 214.)

This disposes of all the errors of which complaint is made, except an assignment that the findings are not sustained by sufficient evidence. As there is no good ground for this contention the judgment of the district court is

AFFIRMED.

RAGAN, C., dissenting.

JAMES H. MCMURTRY V. COLUMBIA NATIONAL BANK OF LINCOLN.

FILED DECEMBER 9, 1897. No. 7664.

1. **Execution:** APPRAISEMENT: REVIEW. This court will not review the appraisement made of real estate sold on execution, for the purpose of determining whether such appraisement is too high or too low, unless objections on that ground be made and filed in the court from which the execution issued, before the sale occurred, and such objections be ruled upon by said court.

2. ———: SALE: REVIEW. Evidence examined and *held* to sustain the finding of the district court that the execution creditor had not caused the real estate in controversy to be levied upon and sold contrary to a valid agreement existing between himself and the execution defendant.

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

Field & Brown, for plaintiff in error.

Brown & Leese, contra.

RAGAN, C.

This is a proceeding in error to review a judgment of the district court of Lancaster county confirming an execution sale of real estate.

1. The first assignment is that the value placed upon the property by the appraisers was very much less than its fair value. We cannot review this assignment for the reason that no objections to the appraisal were made and filed in the court from which the execution issued, before the sale occurred. (*Overall v. McShane*, 49 Neb., 64, and cases there cited.)

2. The plaintiff in error insisted in the court below, as a ground for setting aside the sale, that the execution creditor had caused the real estate to be seized and sold contrary to a valid agreement existing between himself and the plaintiff in error, in and by which, for a certain consideration, execution was not to issue until after a year from the date of said agreement; and that the execution on which the sale in controversy was made was issued before the expiration of the year, in violation of the terms of such agreement. The plaintiff in error now insists that the district court erred in finding and holding that no such an agreement existed. To sustain his contention as to said agreement the plaintiff in error filed in the court below his affidavit. The execution creditor in answer to this filed his affidavit, in which he does not deny the making of the agreement claimed by the plaintiff in error, but alleges that it has no reference to the property in controversy here, and specifically points out what property was embraced within that agreement. These two affidavits constitute all the evidence on the subject. We cannot say that the district court reached the wrong conclusion from the evidence before it, and its judgment is

AFFIRMED.

JOHN A. WAKEFIELD ET AL., APPELLEES, V. THEODORE L. VAN DORN ET AL., IMPLEADED WITH FRED MENGEDOHT, APPELLANT.

FILED DECEMBER 9, 1897. No. 7658.

1. **Mechanics' Liens:** FORECLOSURE: PARTIES. Where two contractors furnish labor and material towards the erection of an improvement on real estate in pursuance of separate contracts with the owner therefor, and one of said contractors files his claim for a lien under the statute, and then brings suit to have established and foreclosed such lien, the other contractor is a proper and necessary party to such suit, although at the time the action was brought he had not filed his claim for a lien.

2. ——: ——: ——: DECREE. And the decree rendered in such case is, as to the contractor not made a party, a nullity; and, after completing his contract and complying with the statute, he may bring suit to have established and foreclosed a lien against the real estate upon which the improvement was erected.

3. ——: ——: ——: ESTOPPEL. And in case he does so, the fact that the first suit was pending, to his knowledge, at the time he filed his claim for a lien under the statute does not estop him from maintaining the action.

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

Joel W. West, for appellant.

Gregory, Day & Day, and *Montgomery & Hall, contra.*

RAGAN, C.

This is an appeal by Fred Mengedoht from a decree of the district court of Douglas county awarding John A. Wakefield a contractor's lien upon certain real estate for labor and material furnished by him for the erection of an improvement thereon in pursuance of a contract therefor with one Theodore Van Dorn, the then owner of said real estate. Mengedoht now owns the said real estate. While Van Dorn was the owner of said real estate he undertook the erection of extensive

buildings thereon, and in the execution of such project he made a contract with one Specht to furnish certain labor and material towards the construction of said improvement. Van Dorn also made a contract with Wakefield to furnish the labor and material for the erection of another part of said improvement. Within four months of the date of furnishing the last item of labor or material by Specht he took the steps required by statute to obtain a contractor's lien against the real estate, and subsequently brought suit to have established and foreclosed his lien. Wakefield was not made a party to this action, although his contract with Van Dorn antedated the bringing of the Specht suit; and he began furnishing labor and material towards the construction of the improvement before the Specht suit was brought, and completed his contract, and filed in the office of the register of deeds an itemized account of the labor and material which he had furnished toward the improvement in pursuance of his contract with Van Dorn, and claimed a lien upon the premises while the Specht suit was pending. The Specht suit proceeded to decree in his favor. The real estate of Van Dorn was appraised, advertised, and sold, Mengedoht becoming the purchaser. Some time after this sale was confirmed Wakefield brought the present action to have established and foreclosed a lien against the premises for the labor and material which he had furnished Van Dorn toward the erection of the improvement on said real estate. As a defense to this action Mengedoht interposed the bringing of the Specht suit; that at that time Wakefield had not filed any claim for a lien upon the premises in the office of the register of deeds; that when he did file his claim for a lien the Specht suit was pending, was notice to him, and that he was bound by the decree in that action and estopped from now asserting a lien upon the premises involved in that decree. This is the argument relied upon here by Mengedoht for a reversal of the decree appealed from. We think the contention is unten-

able. Since Wakefield, in pursuance of a contract with the owner, began the furnishing the labor and material towards the erection of this improvement prior to the date of the bringing of the Specht suit, his lien, when finally perfected, dated back and attached to the real estate on the date when he furnished the first labor or material. (*Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207.) Wakefield, then, was a proper and necessary party to the suit brought by Specht to foreclose his mechanic's lien; and as he was not made a party he was not affected or bound by the decree rendered in the Specht case. (*Steigleman v. McBride*, 17 Ill., 300; *Kelly v. Chapman*, 13 Ill., 530; *Whitney v. Higgins*, 10 Cal., 547; *Jones v. Hartsock*, 42 Ia., 147.) But it is said that Specht, at the time he brought his suit, did not know that Wakefield had furnished any labor or material towards the erection of the improvement; and that, as he had filed no claim in the office of the register of deeds for a lien upon the premises, Specht had no means of ascertaining that Wakefield had a claim upon these premises or a right to perfect a lien against them. The answer to this argument is that Specht was bound to know, at the time he brought his suit, of the claims of all the parties for liens against the premises for labor and material furnished in the erection of the improvement, whether such parties had at that time filed claims for their liens or not. If one mortgage be given to secure the payment of two negotiable promissory notes and the mortgagee assign one of these notes to one person and the other note to a second person and the second person brings suit to foreclose the mortgage for the collection of the note held by him, he is bound to know of the existence of the assignee of the first note and make him a party to the suit or the decree will be void as to such assignee. (*Studebaker Bros. Mfg. Co. v. McCargur*, 20 Neb., 500.) We do not think Wakefield was obliged to intervene in the Specht suit, though he may have had actual knowledge of its pendency at the time he filed his claim for a lien,

nor do we know of any principle of law upon which it can be held that his failure to do so estops him from maintaining his present action.

AFFIRMED.

FRANK B. SHELDON, RECEIVER, APPELLANT, V. JAMES D. RUSSELL ET AL., APPELLEES.

FILED DECEMBER 9, 1897. No. 7625.

Fraudulent Conveyances: EVIDENCE: LIENS ON INSURANCE POLICY: REVIEW. The record examined, and *held* that the findings made and the decree rendered are the only ones that could have properly been made and rendered under the evidence in the case.

APPEAL from the district court of Nemaha county. Heard below before BABCOCK, J. *Affirmed.*

W. H. Kelligar, F. B. Sheldon, and *E. O. Kretsinger,* for appellant.

T. Appelget, G. B. Beveridge, A. W. Field, and *E. P. Brown, contra.*

RAGAN, C.

Frank B. Sheldon, as receiver of the State Bank of Johnson, Nebraska, brought this suit in equity in the district court of Nemaha county alleging in his petition, in substance, that Russell & Holmes, copartners, were indebted to the bank of which he was receiver; that said indebtedness had been reduced to judgment, execution issued and return unsatisfied; that the judgment remained wholly unpaid, and that Both Russell and Holmes were insolvent. The petition then alleged that on a certain date Russell & Holmes became the owners of a paid-up life insurance policy for $5,000, which had been issued to one Hickman, and at the same time became the owners

of certain promissory notes of said Hickman, calling for a large sum of money; that these notes and this insurance policy were assets of the said copartnership of Russell & Holmes. The petition then alleged that Russell & Holmes, or one of them, wrongfully converted the Hickman insurance policy and notes to his own use and had made a pretended assignment of them to the Farmers & Merchants National Bank of Auburn, Nebraska, and that subsequently said Russell & Holmes, or one of them, had fraudulently assigned said Hickman notes and insurance policy to the First National Bank of Lincoln, Nebraska. The petition contained the usual allegations that these assignments to the banks were fraudulent and made for the purpose of defrauding the creditors of Russell & Holmes and prayed that the assignment might be set aside, and that the said insurance policy and the notes might be decreed assets of the firm of Russell & Holmes, sold, and the proceeds applied to the payment of the receiver's judgment against them. Both said banks and Hickman appeared and answered this petition, and from the decree rendered by the district court the receiver has appealed.

The district court found that Hickman was largely indebted at one time to Russell & Holmes, as an evidence of which he executed to them the notes mentioned by the receiver in his petition, and to secure the payment of these notes he assigned them the insurance policy in controversy; that Russell & Holmes subsequently became largely indebted to the Bank of Auburn, as evidence of which they executed to said bank their notes, and to secure their payment Russell & Holmes assigned to that bank the Hickman notes, together with the insurance policy which secured their payment; and that Russell & Holmes were also largely indebted to the First National Bank of Lincoln, and to secure the payment of that debt they made another assignment of this insurance policy. From these findings the court decreed that Hickman had the legal title to the insurance

policy, but that the Bank of Auburn had a first lien thereon to secure the debt of Russell & Holmes to it; that the First National Bank of Lincoln had a second lien upon the insurance policy to secure what Russell & Holmes owed it, and that the receiver was entitled to the equities of Hickman in the insurance policy. These findings and this decree are the only ones that could have properly been rendered under the evidence in the record. The decree of the district court is

AFFIRMED.

ERNEST VAN SKIKE V. DARIUS C. POTTER ET AL.

FILED DECEMBER 9, 1897. No. 7667.

1. **Physicians and Surgeons:** CONTRACTS WITH PATIENTS: EVIDENCE. The evidence examined and *held* to sustain the findings of the jury that defendants did not contract with plaintiff to effect for him a permanent cure; did not contract to visit and treat him until he was cured; that defendants were not guilty of negligence in the treatment given the plaintiff nor in adopting and pursuing the method of treatment followed by them.

2. ———: DEGREE OF SKILL REQUIRED. The law does not require of a surgeon absolute accuracy either in his practice or his judgment. It does not hold him to the standard of infallibility, nor require of him the utmost degree of care or skill, but that in the practice of his vocation he shall exercise that degree of knowledge and skill ordinarily possessed by members of his profession.

3. ———: MALPRACTICE: PLEADING AND PROOF. A petition alleged that defendants agreed to visit and treat plaintiff until he recovered. The answer was a general denial. The defendants were permitted to testify that, at the date of their last visit to plaintiff, they informed him that they should not return unless they should be requested so to do; that they received no such request and did not revisit plaintiff. *Held,* That this evidence was relevant under the pleadings.

4. **Jurors:** QUALIFICATION: EXAMINATION. In a suit against a surgeon for damages for alleged negligence in operating upon and treating plaintiff's fractured kneecap, the district court refused to permit persons called as jurors to answer, on their *voir dire* examination, whether they were members of any church organization or secret

society. *Held*, That it does not appear, nor can it be inferred from any fact in the record, that the district court abused its discretion or erred in its ruling in this matter.

5. ———: ———: ———. A litigant has the right to examine a person called as a juror for the purpose of ascertaining whether or not there exist grounds for challenging such person for cause; but what questions may be asked such a person, or what range or scope such an examination may take, is a matter committed to the sound discretion of the trial court; and its ruling will not be disturbed unless there has been an abuse of discretion to the prejudice of the party complaining.

6. ———: ———: ———. A juror's *voir dire* examination set out in the opinion, and *held* that the district court did not err in overruling the plaintiff's challenge lodged against him on the ground of his bias and prejudice.

7. **Physicians and Surgeons**: MALPRACTICE: EVIDENCE. In a suit for damages against a surgeon for alleged negligence in operating upon and treating plaintiff's fractured kneecap, text-books on surgery, though standard authority on the subject, cannot be read to the jury as independent evidence of the opinions and theories therein expressed or advocated.

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

The opinion contains a statement of the case.

F. I. Foss, J. D. Pope, Biggs & Thomas, and *W. R. Matson,* for plaintiff in error:

Defendants did not plead that they were discharged. Evidence that the physicians were discharged is not admissible under a general denial. (1 Ency. Pl. & Pr. 849, 850; *Burlington & M. R. R. Co. v. Kearney County,* 17 Neb. 511; *Peet v. O'Brien,* 5 Neb. 362; *Haggard v. Hay,* 13 B. Mon. [Ky.] 175; *Clark v. Finnell,* 16 B. Mon. [Ky.] 329; *Francis v. Francis,* 18 B. Mon. [Ky.] 57; *Curtis v. Richards,* 9 Cal. 33; *Schenk v. Evoy,* 24 Cal. 104; *Lewis v. Coulter,* 10 O. St. 451; *Atchison & N. R. Co. v. Washburn,* 5 Neb. 125; *City of Lincoln v. Walker,* 18 Neb. 244; *Quick v. Sachsse,* 31 Neb. 312; *City of South Omaha v. Cunningham,* 31 Neb. 316; *Smith v. Wigton,* 35 Neb. 460; *Staley v. Housel,* 35

Neb. 160; *Powder River Live Stock Co. v. Lamb*, 38 Neb. 340; *Dinsmore v. Stimbert*, 12 Neb. 434.)

Standard books on medicine and surgery were erroneously excluded from the evidence. (Code of Civil Procedure, sec. 342; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578; *McCandless v. McWha*, 22 Pa. St. 261; *Carpenter v. Blake*, 60 Barb. [N. Y.] 488; *Bowman v. Woods*, 1 Greene [Ia.] 441.)

The court erred in refusing to require jurors upon their *voir dire* to answer questions as to membership in secret societies and church organizations. (12 Am. & Eng. Ency. Law 350; *City of Boston v. Baldwin*, 139 Mass. 315; *Commonwealth v. Moore*, 143 Mass. 136; *Donovan v. People*, 28 N. E. Rep. [Ill.] 964; *Lavin v. People*, 69 Ill. 303; *Monaghan v. Agricultural Fire Ins. Co.*, 18 N. W. Rep. [Mich.] 797; *Pinder v. State*, 8 So. Rep. [Fla.] 837; *Pearcy v. Michigan Mutual Life Ins. Co.*, 111 Ind. 59; *People v. O'Neill*, 16 N. E. Rep. [N. Y.] 68; *People v. Keefer*, 56 N. W. Rep. [Mich.] 105; *Owens v. State*, 32 Neb. 167; *People v. Wheeler*, 55 N. W. Rep. [Mich.] 371; *Omaha S. R. Co. v. Craig*, 39 Neb. 601; *Haugen v. Chicago, M. & St. P. R. Co.*, 53 N. W. Rep. [S. Dak.] 769.)

References as to degree of skill required and as to liability of physicians and surgeons: *Lynch v. Davis*, 12 How. Pr. [N. Y.] 323; *Carpenter v. Blake*, 60 Barb. [N. Y.] 488; *Dale v. Donaldson*, 48 Ark. 188; *Ballou v. Prescott*, 64 Me. 305; *Potter v. Virgil*, 67 Barb. [N. Y.] 578; *Barbour v. Martin*, 62 Me. 536; *Bemus v. Howard*, 3 Watts [Pa.] 255; *Gates v. Fleischer*, 67 Wis. 504; *Hibbard v. Thompson*, 109 Mass. 286; *Wilmot v. Howard*, 39 Vt. 447; *O'Hara v. Wells*, 14 Neb. 403; *Graves v. Sautway*, 6 N. Y. Supp. 892; *Carpenter v. Blake*, 10 Hun [N. Y.] 358; *Becker v. Janinski*, 15 N. Y. Supp. 675.

An error of judgment may be so gross as to be inconsistent with reasonable care, skill, and diligence. (*West v. Martin*, 31 Mo. 375; *Howard v. Grover*, 28 Me. 97.)

Physicians and surgeons engaged in practice as partners are all liable for malpractice by a member of the

firm. (*Hyrne v. Erwin*, 55 Am. Rep. [S. Car.] 15; *Whittaker v. Collins*, 34 Minn. 299.)

Norval Bros., George W. Lowley, D. C. McKillip, and *J. L. McPheely, contra:*

Evidence that the physicians stated they would not again visit plaintiff unless requested to do so, that they did not receive such request, and did not revisit him, was admissible under the pleadings. (*Omaha & R. V. R. Co. v. Wright*, 49 Neb. 456; 8 Ency. Pl. & Pr. 218, 226, 250; *Smith v. Phelan*, 40 Neb. 765.)

References as to qualification of jurors and as to correctness of the rulings on challenges: *People v. Thiede*, 39 Pac. Rep. [Utah] 845; *People v. Cotta*, 49 Cal. 168; *People v. Fong Ah Sing*, 70 Cal. 8; *People v. McGonegal*, 32 N. E. Rep. [N. Y.] 616; *Spies v. Illinois*, 123 U. S. 131; *State v. Pike*, 49 N. H. 399; *Scott v. Chope*, 33 Neb. 95; *Basye v. State*, 45 Neb. 261; *Detroit W. T. R. Co. v. Crane*, 50 Mich. 182; *Brumback v. German Nat. Bank*, 46 Neb. 540; *Blenkiron v. State*, 40 Neb. 664; *McLain v. Morse*, 42 Neb. 52; *Van Etten v. Test*, 49 Neb. 725; *Wilcox v. Saunders*, 4 Neb. 570; *Garneau v. Palmer*, 28 Neb. 307.

Text-books on medicine and surgery are not books of science, nor competent as evidence. (*Union P. R. Co. v. Yates*, 79 Fed. Rep. 584; *Collier v. Simpson*, 5 Car. & P. [Eng.] 73; *Ashworth v. Kitridge*, 12 Cush. [Mass.] 193; *Ware v. Ware*, 8 Me. 42; *State v. O'Brien*, 7 R. I. 336; *People v. Hall*, 48 Mich. 482; *Gallagher v. Market Street R. Co.*, 67 Cal. 13; *Epps v. State*, 102 Ind. 539; *Commonwealth v. Wilson*, 1 Gray [Mass.] 337; *Melvin v. Easley*, 1 Jones [N. Car.] 386; *Payson v. Everett*, 12 Minn. 216; *St. Louis, A. & T. R. Co. v. Jones*, 14 S. W. Rep. [Tex.] 309; *People v. Donald*, 12 N. W. Rep. [Mich.] 669; *McKinnon v. Bliss*, 21 N. Y. 210; *Morris v. Harmer*, 7 Pet. [U. S.] 558; *Bogardus v. Trinity Church*, 4 Sand. Ch. [N. Y.] 633; *Missouri v. Kentucky*, 11 Wall. [U. S.] 395; *Boehringer v. Richards Medicine Co.*, 29 S. W. Rep. [Tex.] 508; *City of Bloomington v. Shrock*, 110 Ill. 219.)

RAGAN, C.

On July 4, 1890, Ernest Van Skike, while playing baseball, fractured his kneecap. For negligently treating this wound he sued Drs. Potter & Reynolds in the district court of Seward county for damages. The trial resulted in a verdict and judgment in favor of the doctors, to reverse which the plaintiff below has filed here a petition in error.

1. The first assignment of error is that the verdict is not sustained by sufficient evidence. The undisputed facts in the case are that plaintiff's kneecap was fractured at Cordova, Nebraska. One Dr. Doty was immediately called, dressed the wound, and put the plaintiff's leg in a temporary splint; and he was then taken to Beaver Crossing, which appears to have been his home. That night Dr. Greedy was called to treat the plaintiff's wound. He applied adhesive plasters to the knee, put it in roller bandages and a fracture box, and continued to visit and treat the plaintiff. On July 7 the defendants, with Dr. Greedy and at his request, called to see the plaintiff, and made an examination of the plaintiff's wound, and one of the defendants then expressed the opinion that a necessary, or at least a proper, method of treating the plaintiff's wound would be to make incisions in the skin and flesh of the knee and wire the two pieces of the fractured kneecap together with silver wire. On July 10 the defendants, in company with Dr. Greedy and a man named Evans, visited the plaintiff and performed an operation upon his knee. They subjected the plaintiff to the influence of chloroform, made incisions in the skin and flesh covering the kneecap, exposed the same, drilled holes in the two fractured parts thereof, and wired them together with a silver wire. While one of the defendants was drilling a hole in one of the pieces of the kneecap, a movement of the plaintiff's leg occurred, causing the drill to break, leaving the point thereof in the bone. The broken point of this

drill was, by the defendants, left imbedded in the knee-cap. The defendants visited the plaintiff on July 14, 22, 25, and on August 1, but did not return after the last date. The plaintiff, however, did not recover until after the spring of 1891, at which time other surgeons performed another operation upon his knee. At the time this suit was brought, and at the time the trial occurred, the muscles of the plaintiff's leg and thigh were shrunken, and his knee-joint enlarged and stiff. In other words, the plaintiff appears to be permanently injured, and his claim in this suit is that his permanent injury is the result of the negligent treatment given his wound by the defendants.

Under the assignment that the verdict is not sustained by sufficient evidence a specific argument of the plaintiff is that, in consideration of a certain reward promised the defendants, they undertook and promised not only to treat his fractured knee but to effect a perfect cure thereof, so that he should have as healthy a limb and as perfect use thereof as he had prior to the time the injury occurred. The evidence on the part of the plaintiff tends to sustain his contention. The defendants, however, deny that they entered into any contract with the plaintiff in and by which they guarantied to cure him, and the evidence on their behalf tends to support their theory. We cannot say that the jury's finding that the defendants did not undertake or agree to effect a permanent and complete cure of the plaintiff is unsupported by the evidence.

Another special argument of the plaintiff, under the assignment being considered, is that the defendants undertook and promised the plaintiff after performing the operation upon his knee on July 10 to continue to visit him and treat him until he should recover. The evidence on behalf of the plaintiff tends to sustain this contention. The defendants, however, deny that they made such an agreement, and allege that they made no agreement whatever with the plaintiff as to how often or how

long they should visit and treat him, but that they did visit him in connection with Dr. Greedy, examined and treated his wound until and including August 1, at which time they informed the plaintiff that in their opinion he was doing well, and their further visits would be unnecessary, and that they should not return again unless he or Dr. Greedy should request them; and that they were never requested to visit the plaintiff after said August 1. The evidence of the defendants tends to support their contention in this respect, and again we cannot say that the jury's finding in favor of the defendants on this question is not supported by sufficient evidence.

As a part of the assignment under consideration, a third special argument of the plaintiff is that the defendants were guilty of negligence in adopting and pursuing the method of wiring the plaintiff's fractured kneecap together with silver wire; and the finding of the jury that the defendants were not guilty of negligence in adopting and pursuing the method they did lacks evidence to support it. On behalf of the plaintiff numerous physicians and surgeons testified as experts that the method adopted and pursued by the defendants in setting the plaintiff's kneecap—that is, by wiring the fractured portions together—was not the proper method. On the other hand, the defendants themselves and the physicians and surgeons called as experts in their behalf testified that the method adopted and pursued by the defendants in treating the plaintiff's kneecap was a proper and safe one. In other words, as is usual, the experts for the plaintiff agreed with his contention and the experts on behalf of the defendants agreed with their contention. Whether the method adopted and pursued by the defendants was the proper one was a question of fact for the jury, and they, upon conflicting evidence, have acquitted the defendants of negligence in adopting and pursuing the method they did, and we cannot say that they reached the wrong conclusion.

Another special argument is that the finding of the jury that the defendants were not guilty of negligence in leaving the broken drill in the bone lacks evidence to support it. Whether leaving this broken drill in the bone was negligence or not was likewise a question of fact for the jury, and the evidence of the surgeons and experts who testified for the plaintiff tends to show that leaving this broken drill in the bone was not good surgery. The evidence of the defendants on the point under consideration was, in substance, that after the operation of wiring the fractured kneecap was completed the plaintiff was suffering greatly; that the temperature of his body was abnormally high, and his pulse abnormally rapid, and that the knee was highly inflamed; that it was impossible to remove the drill point without breaking the bone; that the drill point as well as all other instruments used in the operation had been antisepticized, and it was the unanimous opinion of all surgeons and physicians who testified in behalf of the defendants that under the circumstances the leaving of the drill point in the bone was proper. We cannot say that the jury was wrong in agreeing with the defendant's theory.

A final special argument, under the assignment that the verdict is not sustained by sufficient evidence, is that the defendants were guilty of negligence in not advising the plaintiff of the fact that the drill had been broken and the point left in the bone of his kneecap. This, like the other questions discussed, was a question of fact for the jury. When the defendants found themselves confronted wth the emergency it was a question of professional judgment whether the plaintiff should be advised of the presence of this drill point in his kneecap. It was undoubtedly the honest opinion of the defendants that the plaintiff would receive no harm from the presence of this drill point in his kneecap, and they may have been of opinion that his ignorance of the presence of the drill point could do him no harm while if he knew the fact his anxiety upon the subject might work him an injury.

The jury have found, and the evidence sustains the finding, that the defendants in keeping the plaintiff ignorant of the presence of the drill point in his kneecap were, in good faith, exercising their best professional judgment, and when they did this they cannot be held, as a matter of law, to have been guilty of negligence, though it afterwards turned out that they were mistaken as to the effect that the drill point in the bone would have upon the plaintiff's knee. The law does not require of a physician or surgeon absolute accuracy either in his practice or his judgment. The law does not hold physicians and surgeons to the standard of infallibility, nor does it require of them the utmost degree of care or skill of which the human mind is capable; but that, while in the practice of their vocation, they shall exercise that degree of knowledge and skill ordinarily possessed by members of their profession. (*O'Hara v. Wells*, 14 Neb. 403; *Hewitt v. Eisenbart*, 36 Neb. 794; *Griswold v. Hutchinson*, 47 Neb. 727.)

2. A second assignment of error is that, on the trial below, the defendants were permitted to prove that they were discharged by the plaintiff from further attendance upon him without such discharge being specially pleaded. After a careful perusal of the entire record we have failed to find that any such an issue as a discharge was presented to the district court or that the defendants were permitted to prove a discharge by the plaintiff. The plaintiff alleged in his petition that he had employed the defendants to treat him until his injury was healed. This allegation the defendants met with a general denial. On the trial the plaintiff introduced evidence which tended to support the allegation of his petition, and the defendants were permitted to deny this and to state at what times they visited the plaintiff, and the last time they visited him, to-wit, August 1, and that they then told the plaintiff that they should not return again unless he or Dr. Greedy, his attending physician, should so request them, and that

after that time they were never requested, either by the plaintiff or Dr. Greedy, to revisit the plaintiff. This evidence was all relevant under the issues made by the pleadings.

3. A third assignment of error relates to the refusal of the district court to permit persons called as jurors to answer on their *voir dire* examination certain questions. The plaintiff's counsel propounded to such persons the following questions: "Do you belong to any religious society? Do you belong to any secret society?" Counsel for the defendants objected to these questions and the court sustained the objections, and it is now insisted that in so doing the court committed an error. To sustain their contention counsel cite us to the following authorities:

Donovan v. People, 28 N. E. Rep. [Ill.] 964. In that case the trial judge refused to permit the counsel for the defendant to subject the persons called as jurors to any examination whatever, saying: "Except you examine the jurors for cause through the mouth of the court you cannot examine them at all." The case cited is not in point.

Another case is *Lavin v. People,* 69 Ill. 303. Counsel for the defendant in that case asked the persons called as jurors on their *voir dire* whether they were members of a temperance society or connected with any society or league organized for the purpose of carrying on prosecutions under the temperance laws of the state. The defendant was about to be put on trial under an indictment charging him with selling intoxicating liquors contrary to the statutes of the state, and the supreme court held, and we think properly, that the district court erred in refusing to permit the question asked to be answered.

Another case cited is *Pearcy v. Michigan Mutual Life Ins. Co.,* 12 N. E. Rep. [Ind.] 98. This was a suit upon a life insurance policy, and one of the persons called as a juror was asked on his *voir dire* whether he held a policy issued by the defendant company, and answered "No."

It afterwards turned out that the juror had insured his life in the defendant company for the benefit of his wife, and the court held that the defeated party by reason of this false answer of the juror was entitled to a new trial.

Another case cited is *People v. Wheeler*, 55 N. W. Rep. [Mich.] 371. In this case the people prosecuted Wheeler for keeping a saloon open on Sunday, and a juror testified on his *voir dire* that he had always been "down on liquor selling," and that when sitting as a juror in a case where a liquor seller was interested as a defendant or a witness he had a prejudice against such person. Wheeler then challenged this juror for cause. The trial court overruled the challenge and the supreme court reversed the judgment for that reason.

We are unable to see that these cases are authority for the contention of the plaintiff here. In this case was involved, neither directly nor indirectly, any religious or secret society, and we are unable to understand what useful or just purpose of the plaintiff could have been subserved by permitting the jurors to state whether or not they were members of a church organization or a secret society. It is true that a litigant has the right to examine a person called as a juror for the purpose of ascertaining whether or not there exists grounds for challenging such person for cause. But what questions may be asked such a person, or what range or scope such an examination may take, is a matter committed to the sound discretion of the trial judge. No rule can be laid down that would be a safe guide in all cases; and the scope of such an examination, and the pertinency of the questions propounded, are to be determined from the nature of the case on trial. (*Basye v. State*, 45 Neb. 261.) We must not be understood as holding that in no case is it proper to ask a juror on his *voir dire* whether he belongs to a church organization or a secret society. All we decide here is that the district court did not abuse its discretion in this case in refusing to permit the per-

sons called as jurors to state whether they belonged to any secret society or church organization.

4. Another assignment of error argued relates to the action of the district court in overruling a challenge for cause submitted by the plaintiff to one Fuller who was called and examined as a juror, the contention of the plaintiff being that Fuller's examination disclosed that he was biased or prejudiced in favor of the defendants. Fuller stated that he was a married man having a wife and one child; that he was then, and had been for ten years, residing on a farm in Seward county; that he was acquainted with the defendants, but not with the plaintiff; that he was not present at the former trial of this case; that he had heard something about the case from parties who were present at the former trial; that these parties pretended to relate the facts to some extent; that from what he had heard he had not formed or expressed any opinion as to the merits of the case; that the facts related to him made no impression upon his mind, and would not influence his verdict in the present trial; that one of the defendants had been his family physician before his, Fuller's, marriage. The other had been his physician since he was married, but neither of the defendants was his physician at this time. He was then asked by plaintiff's counsel this question:

Would the fact that Dr. Reynolds has been your family physician, and Dr. Potter since you were married, have any effect upon you, if you sit as a juror in this case?

A. It might.

Q. If, after you had all the evidence, the fact of your acquaintanceship with them might be overcome by the same, might it not?

A. It might; yes.

The plaintiff's counsel then challenged the juror for cause. The challenge was resisted by the defendants and their counsel propounded to him the following questions:

Q. Notwithstanding this statement that you have heard, you have formed or expressed no opinion?

A. I have expressed no opinion.

Q. Formed no opinion?

A. I don't think I have formed any opinion.

Q. Have you any opinion now as to the rights of the parties?

A. No; I have not.

Q. Have you any bias or prejudice for or against either of the parties?

A. No; I have not.

Q. Notwithstanding your acquaintance with the defendants in this action, can you render a fair and impartial verdict upon the evidence (the testimony) of the court?

A. I believe I could.

Q. And the fact that you are acquainted with Drs. Reynolds & Potter and that you have employed them in your family, would not interfere with your rendering a fair and impartial verdict on the evidence, would it?

A. Well, I don't hardly believe it would. I believe I said once that it might, but I don't believe it would.

At this point the court took the juror in hand and the following occurred:

Q. You say they are your family physicians at this time?

A. They are not.

Q. How long since either of them was employed by you?

A. About eighteen months.

Q. Have they or either of them been employed frequently by you in your family?

A. Up to that time all the medical assistance we needed.

Q. Your relations were very friendly with them?

A. Yes, sir.

Q. Well, now, what do you say? Would the fact that they have been your family physicians,—would that fact

of your relations with them,—have any influence on your verdict in this case?

A. I believe not.

And thereupon the court overruled the challenge. We do not think the examination of this juror disclosed that he was biased or prejudiced either against the plaintiff or in favor of the defendants, and therefore we think the court did not err in overruling the challenge.

5. On the trial the plaintiff offered in evidence extracts from certain standard text-books on surgery. These offers of evidence the district court excluded, and this ruling is the next assignment of error argued. These text-books were offered "for the purpose of showing the practice of reducing fractures of the patella,—simple transverse fractures,"—"and for the purpose of showing that the authors of the books offered in evidence condemn the practice of wiring, and that it should never be resorted to except in cases where the chances of life are equal to that of death, that it is dangerous, and that the results following in the greater portion, and in far more than a majority of the cases, have proved fatally, and of very bad results." It is to be noted that these text-books were offered for the purpose of showing that in the opinion of their authors the wiring of a fractured kneecap was not good surgery. They were not offered for the purpose of fortifying an opinion which had been expressed by an expert upon the witness stand and whose opinion was predicated upon the text-books offered, nor were they offered for the purpose of showing that they contradicted the opinion expressed by such expert. But they were offered as independent evidence to sustain the plaintiff's contention that the wiring of the fractured kneecap by the defendants was not good surgery and therefore negligence. Was this evidence competent? We think that the great weight of authority, both English and American, is to the effect that text-books on surgery, though standard authority, are not competent, independent evidence.

In *Union P. R. Co. v. Yates*, 79 Fed. Rep. 584, it was distinctly held that medical books could not be read to the jury as independent evidence of the opinions therein expressed. The opinion is by Thayer, circuit judge, and, like all that eminent jurist's opinions, it is an able and exhaustive one. Most, if not all, the authorities on the question are cited and reviewed; and we cannot better express our own views on the subject under consideration than to quote that opinion. The learned judge said: "The authorities, both English and American, are practically unanimous in holding that medical books, even if they are regarded as authoritative, cannot be read to the jury as independent evidence of the opinions and theories therein expressed or advocated. One objection to such testimony is that it is not delivered under oath; a second objection is that the opposite party is thereby deprived of the benefit of a cross-examination; and a third and perhaps a more important reason for rejecting such testimony is that the science of medicine is not an exact science. There are different schools of medicine, the members of which entertain widely different views, and it frequently happens that medical practitioners belonging to the same school will disagree as to the cause of a particular disease, or as to the nature of an ailment with which a patient is afflicted, even if they do not differ as to the mode of treatment. Besides, medical theories, unlike the truths of exact science, are subject to frequent modification and change, even if they are not altogether abandoned. For these reasons it is very generally held that when, in a judicial proceeding, it becomes necessary to invoke the aid of medical experts it is safer to rely on the testimony of competent witnesses who are produced, sworn, and subjected to a cross-examination, than to permit medical books or pamphlets to be read to the jury." We cheerfully yield to this case as authority. But it is said in this connection that this evidence was admissible by virtue of section 342, Code of Civil Procedure of this state, which

provides that "historical works, books of science or art, and published maps or charts when made by persons indifferent between the parties are presumptive evidence of facts of general notoriety and interest." This is the exact language of section 1906 of the Code of Civil Procedure of the state of California, and in *Gallagher v. Market Street R. Co.*, 6 Pac. Rep. 869, this provision of the Code was construed, and it was held that, by the adoption of this section of the Code, the legislature intended to extend the common-law rule of evidence rather than restrict it, but that the extension was limited by the phrase "facts of general notoriety and interest." The court said: "What are facts of general notoriety and interest? We think the terms stand for facts of a public nature, either at home or abroad, not existing in the memory of men, as contradistinguished from facts of a private nature, existing within the knowledge of living men, and as to which they may be examined as witnesses. It is of such public facts, including historical facts, facts of the exact sciences, and of literature or art, when relevant to a cause, that, under the provisions of the Code, proof may be made by the production of books of standard authority. * * * But medicine is not considered as one of the exact sciences. It is of that character of inductive sciences which are based on data which each successive year may correct and expand so that what is considered a sound induction last year may be considered an unsound one this year, and the very book which evidences the induction, if it does not become obsolete, may be altered in material features from edition to edition, so that we cannot tell, in citing from even a living author, whether what we read is not something that this very author now rejects." We conclude, therefore, that textbooks on surgery, though of standard authority, are not competent evidence except as to matters of general notoriety or interest within the meaning of said section 342 of our Code.

6. A final assignment of error argued relates to the

action of the district court in giving and refusing to give certain instructions. The charge of the court is quite lengthy, and it seems to have been prepared with great care, and correctly laid down the law applicable to the facts in evidence in the case on trial. It would subserve no useful purpose to set out the instructions about which complaint is made; and it must suffice to say that after a careful examination of the record we are of opinion that no error, of which the plaintiff has a right to complain, was committed by the district court either in giving or refusing to give instructions. The judgment of the district court must be and is

AFFIRMED.

NORVAL, J., not sitting.

BANKERS LIFE INSURANCE COMPANY, APPELLANT, V. A. M. ROBBINS, EXECUTOR, APPELLEE, ET AL.*

FILED DECEMBER 9, 1897. No. 7628.

1. **Life Insurance:** ACTION ON POLICY: VENUE. A cause of action, or some part thereof, on a life insurance policy arises, within the meaning of section 55 of the Code of Civil Procedure, in the county where the insured died.

2. ———: ———: ———. A life insurance company created under the laws of this state is situated, within the meaning of section 55 of the Code of Civil Procedure, in any county of the state in which it maintains an agent or servant engaged in transacting the business for which it exists.

3. **Principal and Agent:** EVIDENCE OF RELATION. Whether the relation of principal and agent exists between two parties is generally a question of fact, and, while it is not necessary to prove an express contract between the parties to establish such relation, either that must be done, or the conduct of the parties must be such that the relation may be inferred therefrom.

4. ———: ———: INSURANCE COMPANIES. Section 8, chapter 16, Compiled Statutes, declares what conduct on the part of a person shall be conclusive evidence of the fact that he is an agent of a foreign insurance company. The section has no application to an agent of an insurance company created under the laws of this state.

*Rehearing allowed.

5. ———: ———: ———. The fact that a bank collects and remits to a domestic insurance company premiums due from its policyholders, but transacts, and is authorized to transact, no other business for the insurance company, is not evidence which will, of itself, sustain a finding that such bank is the agent of such insurance company within the meaning of section 74 of the Code of Civil Procedure.

6. **Void Judgment:** INJUNCTION: PLEADING AND PROOF. A party against whom a judgment has been rendered by default, which judgment is void for want of jurisdiction over the person of the defendant, is not entitled to an injunction to restrain the enforcement of such judgment unless he makes it appear, both from his pleadings and proof, (1) that he has a meritorious defense to the cause of action on which the judgment is based; (2) that he has no adequate remedy at law; and (3) that his plight is in nowise attributable to his own neglect.

7. **Adequate Remedy at Law.** An adequate remedy at law within said rule is one that is as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

8. ———. The remedies at law available to the appellant, the adequacy of such remedies, and whether the plight of appellant was due to his own negligence, discussed in the opinion.

APPEAL from the district court of Lancaster county. Heard below before STRODE, J. *Reversed.*

See opinion for statement of the case.

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

Service of summons in Valley county was not made upon any agent of the insurance company. There is no evidence that the company ever had an agent in that county, but the contrary is affirmatively shown. The judgment in the district court of Valley county is void. (*Encwold v. Olsen*, 39 Neb. 59; *Chambers v. Bridge Manufactory*, 16 Kan. 270; *Caruthers v. Hartsfield*, 3 Yerg. [Tenn.] 366; *Ridgeway v. Bank of Tennessee*, 11 Humph. [Tenn.] 523; *Bond v. Wilson*, 8 Kan. 228; *Starkweather v. Morgan*, 15 Kan. 274; *Glass v. Smith*, 66 Tex. 548; *Rickets v. Hitchens*, 34 Ind. 348; *Dobson v. Pearce*, 12 N. Y. 156.)

Relief should be granted when a judgment is shown to be void. (*Blakeslee v. Murphy*, 44 Conn. 188; *Brickley*

v. Heilbruner, 7 Ind. 488; *Grass v. Hess*, 37 Ind. 193; *Chambers v. Hodges*, 23 Tex. 110; *Cooke v. Burnham*, 32 Tex. 129; *Glass v. Smith*, 66 Tex. 548; *Collins v. Fraiser*, 27 Ind. 477; *McNiell v. Edie*, 24 Kan. 108.)

Appellant in this action pleaded a sufficient defense to the alleged cause of action in which the void judgment was rendered. The fact that assured, in violation of the policy, concealed the danger to which he was exposed, was sufficient to avoid the contract of insurance. (*North American Fire Ins. Co. v. Throop*, 22 Mich. 146; *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co. of the City of New York*, 17 Wend. [N. Y.] 359; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; *Swift v. Massachusetts Mutual Life Ins. Co.*, 63 N. Y. 186; *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352; *Goddard v. Monitor Mutual Fire Ins. Co.*, 108 Mass. 56; *Kelsey v. Universal Life Ins. Co.*, 35 Conn. 225; *Ring v. Phœnix Assurance Co.*, 145 Mass. 426; *Jennings v. Chenango County Mutual Ins. Co.*, 2 Denio [N. Y.] 75; *Brady v. United Life Ins. Ass'n*, 60 Fed. Rep. 727; *McFarland v. St. Paul Fire & Marine Ins. Co.*, 46 Minn. 519; *Singleton v. St. Louis Mutual Ins. Co.*, 66 Mo. 63; *Smith v. National Benefit Society*, 123 N. Y. 85; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341.)

A. M. Robbins and *Reese & Gilkeson, contra:*

The original action was properly brought in Valley county, and that was the proper place to bring the action. (Code of Civil Procedure sec. 55; *Union Central Life Ins. Co. v. Pyers*, 36 O. St. 544; *Bruil v. Northwestern Mutual Relief Ass'n*, 39 N. W. Rep. [Wis.] 529; *Insurance Co. of North America v. McLimans*, 28 Neb. 657; *Harvey v. Parkersburgh Ins. Co.*, 16 S. E. Rep. [W. Va.] 580.)

There was proper service in Valley county upon agents of the company. (Compiled Statutes, ch. 16, sec. 8; *State v. United States Mutual Accident Ass'n*, 31 N. W. Rep. [Wis.] 229; *Southwestern Mutual Benefit Ass'n v. Swenson*, 30 Pac. Rep. [Kan.] 405; *Voorhees v. People's Mutual Ben-*

efit Society, 48 N. W. Rep. [Mich.] 1087; *Pacific Mutual Life Ins. Co. v. Williams*, 15 S. W. Rep. [Tex.] 478; *Southern Ins. Co. v. Wolverton Hardware Co.*, 19 S. W. Rep. [Tex.] 615; *Reyer v. Odd Fellows' Fraternal Accident Ass'n*, 32 N. E. Rep. [Mass.] 469; *Gibson v. Manufacturers' Fire & Marine Ins. Co.*, 10 N. E. Rep. [Mass.] 730; *St. Louis & S. F. R. Co. v. Deford*, 16 Pac. Rep. [Kan.] 442; *State v. Northwestern Endowment & Legacy Ass'n*, 22 N. W. Rep. [Wis.] 135; *State v. Farmer*, 5 N. W. Rep. [Wis.] 892; *State v. Farmers & Mechanics Mutual Benevolent Ass'n*, 18 Neb., 276.)

The petition for injunction does not state facts sufficient to constitute a cause of action, but does show that appellant had an adequate remedy at law. (*Hurlburt v. Palmer*, 39 Neb. 158; *Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb. 897; *Marine Ins. Co. v. Hodgson*, 7 Cranch [U. S.] 332; *Mastick v. Thorp*, 29 Cal. 447; *Englebrecht v. Shade*, 47 Cal. 627; *Hopkins v. Keller*, 16 Neb. 571; 1 High, Injunction secs. 29, 125, 129, 131; *Patterson v. Hill*, 16 N. W. Rep. [Ia.] 599; *Horn v. Queen*, 4 Neb. 108; *Pope v. Hooper*, 6 Neb. 178; *Kittle v. Wilson*, 7 Neb. 76; *Pilger v. Torrence*, 42 Neb. 903; *Paul v. Davidson*, 43 Neb. 505; *Massachusetts Benefit Life Ass'n v. Lohmiller*, 74 Fed. Rep. 23; *Woodward v. Pike*, 43 Neb. 777; *Langley v. Ashe*, 38 Neb. 53; *Norwegian Plow Co. v. Bollman*, 47 Neb. 186; *San Antonio & A. P. R. Co. v. Cockvill*, 10 S. W. Rep. [Tex.] 702.)

Receipt and retention of premiums after loss constitute a waiver of forfeiture of the policy. An insurer cannot hold the fruits of a fraudulent transaction and at the same time plead the fraud of insured. (*Rice v. New England Mutual Aid Society*, 146 Mass. 248; *McGurk v. Metropolitan Life Ins. Co.*, 56 Conn. 528; *Billings v. German Ins. Co.*, 34 Neb. 502; *Farmers Union Mutual Ins. Co. v. Wilder*, 35 Neb. 573; *Zell v. Herman Farmers Mutual Ins. Co.*, 44 N. W. Rep. [Wis.] 829; *Smith v. St. Paul Fire & Marine Ins. Co.*, 13 N. W. Rep. [Dak.] 355.)

There was no competent evidence that statements in

assured's application for insurance were untrue, or that the risk was hazardous. (*Fraternal Mutual Life Ins. Co. v. Applegate*, 7 O. St. 297; *Washington Life Ins. Co. v. Haney*, 10 Kan. 403; *Rawls v. American Life Ins. Co.*, 36 Barb. [N. Y.] 357; *John Hancock Mutual Life Ins. Co. v. Daly*, 65 Ind. 6.)

RAGAN, C.

The Bankers Life Insurance Company is a corporation created and subsisting under and by virtue of the laws of this state, having its domicile and principal place of transacting its business in the city of Lincoln, in Lancaster county. In October, 1891, it insured the life of John C. Morrow in the sum of $5,000, payable on his death to his wife, Anna B. Morrow. Morrow at this time was a resident of Valley county, Nebraska, in which county he subsequently died. In the district court of said county Mrs. Morrow brought suit on said insurance policy against the insurance company, and a summons was issued for the insurance company and delivered to the sheriff of said county for service. This summons said sheriff duly returned, reciting that he had served it upon the insurance company in said Valley county by delivering a true copy thereof to one J. L. McDonough, the agent of said insurance company in said county, and that he had served it upon the insurance company in said Valley county by delivering a true copy of said summons to J. A. Patton, the cashier of the Ord State Bank, situate in said county, the chief officer of said bank not being found in the county, and said bank being then and there the agent of said insurance company. The insurance company made no appearance whatever to this action. In November, 1892, the district court of said Valley county rendered a judgment by default in favor of Mrs. Morrow, and against the insurance company, on said insurance policy. Subsequently Mrs. Morrow died testate, and A. L. Robbins was appointed her executor; and, subsequent to this, Robbins caused an

execution to be issued on said judgment and placed in the hands of the sheriff of Lancaster county, and the insurance company thereupon instituted in the district court of said Lancaster county this action against the sheriff of said county and Robbins, the executor, to enjoin the collection of said execution and the enforcement of said judgment on the ground that the district court of Valley county had no jurisdiction over the person of the insurance company and that the judgment was therefore absolutely void. The trial in the district court of Lancaster county resulted in a dismissal of the insurance company's action and it appeals.

1. Since the insured died in Valley county the cause of action upon the insurance policy, or some part thereof at least, arose in that county within the meaning of section 55 of the Code of Civil Procedure. (*Union Central Life Ins. Co. v. Pyers*, 36 O. St. 544; *Bruil v. Northwestern Mutual Relief Ass'n*, 39 N. W. Rep. [Wis.] 529.) And since the insurance company was a corporation created by the laws of this state, if it was situate in said Valley county within the meaning of said section 55 of the Code of Civil Procedure, then the action of Mrs. Morrow on the insurance policy was properly brought in Valley county, and the insurance company was situate in Valley county within the meaning of said section 55 of the Code of Civil Procedure, if, at that time, it had and maintained in said county a place of business and an agent or servant engaged in conducting and carrying on the business for which it existed. (*Fremont Butter & Egg Co. v. Snyder*, 39 Neb. 632.) And if McDonough, or the State Bank of Ord upon whom the summons was served, or either of them, was then and there the agent or servant of the insurance company in and for said Valley county, engaged in, and conducting and carrying on, the business of the insurance company, the summons was properly served upon such agent or agents, the court had jurisdiction of the insurance company, and its judgment was not void.

2. The evidence in the record shows without dispute that at the time this summons was served upon McDonough he was not, and had never been, the agent of the insurance company. He had never taken an insurance application for it, nor had he ever claimed to be the insurance company's agent. At the time Morrow's policy of insurance was applied for an agent of the insurance company was in Valley county and McDonough introduced this agent to a number of persons in that county, and the insurance company desired McDonough to act as its agent in that county, but he never agreed to so act, and he was never appointed by the company, nor did he ever do anything for it from which his agency could possibly be inferred. Whether the relation of principal and agent exists between two parties is generally a question of fact; and while it is not necessary to prove an express contract between the parties to establish such relation, either that must be done, or the conduct of the parties must be such that such relation may be inferred therefrom. Here the record discloses affirmatively that no express contract existed between these parties that would create such a relation, and there is a total want of evidence from which such a relation might be inferred. The district court of Valley county then obtained no jurisdiction over the insurance company by the service of this summons upon McDonough.

3. This brings us to the contention of the appellee that the Ord State Bank was the agent of the insurance company. At all times after Morrow's insurance policy was issued the insurance company would transmit to the Ord State Bank the calls or assessments for the premiums due from its policy holders living in Valley county, at the same time notifying the policy-holder that he could pay his premium, or call, to the Ord State Bank, and that that institution would give him a receipt for such call or premium. The insurance company, when transmitting these calls for premiums to the bank, would forward to it receipts for the policy-holder for the premium, instruct-

ing the bank that when the premium was paid, and it delivered the receipts, to countersign the same. Numerous policy-holders—among them Morrow himself—paid their premiums to this bank under this arrangement between it and the insurance company, and the bank accounted to the insurance company for the premiums thus received. This is the only business or service performed by the bank for the insurance company; and the contention of the appellee is that the conduct of the insurance company and the bank in the matter of the collection and remittance of these premiums is evidence which establishes that the relation of principal and agent existed between them, and that the bank was an agent of the insurance company upon whom service of summons might be had, within the meaning of the statutes of this state. In support of its contention that the bank was such agent of the insurance company the appellee contends that inasmuch as the bank was collecting and remitting the premiums on calls which the insurance company forwarded its policy-holders, section 8, chapter 16, Compiled Statutes, made the bank an agent of the insurance company upon whom service of summons might be had. This chapter 16, Compiled Statutes, is entitled "Corporations," and the first 14 sections of it deal with insurance companies. The first section provides that every insurance company incorporated under the laws of this state shall make specific statements to the auditor of public accounts, which statements shall contain a list of its assets and liabilities, the names of its officers and agents, and their place of residence, etc. The second section makes it the duty of such an insurance company to make these statements to the auditor semi-annually and prescribes what the statements shall contain. The third section denounces a penalty against the president and secretary of any such an insurance company that shall fail to comply with the act. The fifth section of the act provides that no agent of any insurance company created under the laws of any other state or ter-

ritory shall take any risk or transact any business of insurance in the state without first procuring a certificate of authority from the auditor of public accounts, and before he shall be entitled to such a certificate such an agent shall furnish the auditor with a statement under oath, signed by the president or secretary of the foreign insurance company, showing certain things enumerated in the section. Section 6 of the act provides, in substance, that no agent of any insurance company created under the laws of any foreign government other than one of the states of the nation shall transact any business in this state without first procuring a certificate of authority therefor from the auditor of the state, and then the section prescribes what such an agent shall do in order to obtain such a certificate. Section 7 of the act provides for an annual renewal of the statements required to be made to the auditor. Section 8 of the act relied upon by appellee provides that: "Any person or firm in this state who shall receive or receipt for any money on account of or for any contract of insurance made by him or them * * * or who shall receive or receipt for money from other persons to be transmitted to any such company or individual aforesaid, for a policy or policies of insurance or any renewal thereof, * * * or who shall in anywise directly or indirectly make or cause to be made any contract or contracts of insurance for or on account of such company aforesaid, shall be deemed to all intents and purposes an agent or agents of such company and shall be subject and liable to all the provisions of this chapter." Section 10 of said act denounces a penalty of a fine of $1,000, or imprisonment in the county jail for thirty days, or both, for violation of the act. Now it is quite evident that this section 8 simply declares what conduct on the part of a person shall be evidence of the fact that he is an agent of a foreign insurance company. The section was designed to aid the state in prosecuting agents of foreign insurance companies for transacting the business of insurance in this state without first hav-

ing procured from the auditor of this state a certificate of authority therefor. It was never designed nor intended by the legislature by this section that it should apply to an agent of an insurance company created under the laws of this state. We conclude, therefore, that if the fact that a bank collects and remits to a domestic insurance company premiums due from its policy-holders is, of itself and alone, evidence which would sustain a finding that the relation of principal and agent exists between the parties in such sense that such an insurance company might be properly served with summons by leaving a copy of summons with such agent, this result does not flow from, or depend in any manner upon, said section 8.

Counsel for the appellee have cited us to numerous cases which they claim hold that this said section 8, or statutes in all respects similar, apply alike to persons or banks acting for foreign and domestic insurance companies. It is not necessary to review these authorities. Not one of them is in point. They are all cases in which some person or some bank had received or collected and remitted premiums due a foreign insurance company from its policy-holder; and the court simply held, in accordance with the plain provisions of the statute, that the receiving and receipting for the premium by the bank or person, and transmitting the money received to the insurance company, made such bank or person an agent of such foreign insurance company upon whom a service of summons might properly be had. Among the cases cited is *Southwestern Mutual Benefit Ass'n v. Swenson*, 30 Pac. Rep. [Kan.] 405.

4. A further contention of the appellee in support of the validity of the judgment of the district court of Valley county is that, independently of said section 8, chapter 16, the Ord State Bank was an agent of the insurance company within the meaning of section 74, Code of Civil Procedure. This section is as follows: "When the defendant is an incorporated insurance company, and an

action is brought in a county in which there is an agency thereof, the service may be upon the chief officer of such agency." The argument is that the conduct of the bank in receiving, receipting for, and transmitting the premiums due the insurance company from its policy-holders, with the knowledge and consent of the insurance company, made the bank the agent of the insurance company within the meaning of said section 74. We cannot agree to this contention. It is true that the bank, in doing what it did, was acting as the agent of the insurance company, but it was a special agent for a special purpose. It was not transacting for the insurance company the business for which the insurance company was organized, to-wit, the taking of risks, the issuance of policies, or the renewal of policies. If the insurance company had sent a call against the policy-holder to an attorney in Valley county for collection, that attorney, while engaged in attempting to collect this call or premium, would have been an agent of the insurance company; but he would have been a special agent, and we do not think any one would contend that the insurance company might be brought into the district court of Valley county and subjected to its jurisdiction by a service of summons upon such an attorney as its agent. To sustain his contention that the bank was an agent of the insurance company, within the meaning of said section 74 of the Code, or was situate in said Valley county at the time of the service of the summons upon the bank within the meaning of section 55 of the Code, appellees rely upon *Fremont Butter & Egg Co. v. Snyder*, 39 Neb. 632. But that case is distinguishable from the one at bar. In the Butter & Egg Case the corporation was a domestic one, with its principal place of business in Dodge county. It was a trading corporation engaged in buying, packing, and shipping butter and eggs. It rented a building and had a place of business in Saunders county. It had a man named Darrah there in its employ who was buying and shipping butter and eggs for it and

drawing on it for what he paid out on its behalf. Snyder & Co. sued the corporation in Saunders county, and one contention of the corporation was that the district court of Saunders county had no jurisdiction over it, as it could not be sued in that county, its principal place of business being in Dodge county. But this court said, construing section 55 of the Code, that it was situated where it had and maintained a place of business and servants, employés, and agents engaged in conducting and carrying on the business for which it existed. If the Ord State Bank at the time it was served with summons as the agent of the insurance company had been engaged in soliciting insurance the case would be an authority in point. We reach the conclusion that the Ord State Bank, at the time of the service upon it of the summons of the Valley county district court, was not the agent of the insurance company; that the district court of Valley county, by the service of such summons, acquired no jurisdiction over the insurance company, and that the judgment pronounced by it was and is absolutely void.

5. But it does not necessarily follow because this judgment is void for want of jurisdiction over the insurance company that the latter is entitled to an injunction to restrain its enforcement. Injunction suits to restrain the enforcement of judgments have been many times before the courts, as will be seen from an examination of the following cases out of the many in the books: *Horn v. Queen*, 4 Neb. 108; *Scofield v. State Nat. Bank*, 9 Neb. 316; *Colby v. Brown*, 10 Neb. 413; *Young v. Morgan*, 13 Neb. 48; *Gould v. Loughran*, 19 Neb. 392; *Johnson v. Van Cleve*, 23 Neb. 559; *Proctor v. Pettitt*, 25 Neb. 96; *Winters v. Means*, 25 Neb. 241; *Lininger v. Glenn*, 33 Neb. 187; *Janes v. Howell*, 37 Neb. 320; *Langley v. Ashe*, 38 Neb. 53; *Norwegian Plow Co. v. Bollman*, 47 Neb. 186; *Hendrickson v. Hinckley*, 17 How. [U. S.] 442; *Knox County v. Harshman*, 133 U. S. 152; *Massachusetts Benefit Life Ass'n v. Lohmiller*, 74 Fed. Rep. 23; *Fickes v. Vick*, 50 Neb. 401; *Losey v. Niedig*, 52 Neb. 167. Without attempting to review

all or any of these cases we think they are authority for the following rule: A party against whom a judgment has been rendered by default, which judgment is void for want of jurisdiction over the person of the defendant, is not entitled to an injunction to restrain the enforcement of such judgment unless it appears, both from his pleadings and proof, (1) that he has a meritorious defense to the cause of action on which the judgment is based; (2) that he has no adequate remedy at law; and (3) that his plight is in nowise attributable to his own neglect. The eminent counsel who represents the appellant in this case concedes that the rule in many jurisdictions, and in this, is that an injunction will not be granted to restrain the collection of a judgment void for want of jurisdiction over the defendant thereto, unless such defendant makes it appear that he had a meritorious defense to the cause of action on which the judgment is based. But the counsel says that the court has fallen into an error in establishing this rule, and that he is satisfied, if we will review the authorities and reconsider the principles upon which those cases rest, we will overrule them. We have re-examined these authorities and reconsidered the principles upon which they rest and instead of departing from the rule announced by them, we feel satisfied in adhering to it.

One reason for the rule is that equity will not do a useless thing, and it would subserve no useful purpose to set aside a judgment void for want of jurisdiction, if the party asking this had no defense to the action upon which it was based.

Another reason for this rule is that it is not enough that the judgment assailed be unlawful. It must be against conscience as well. We now proceed to apply the rule just stated to the case at bar, and the first inquiry is whether the appellant has made it appear from the pleadings and evidence that he had a meritorious defense to the cause of action upon which this judgment is based. The district court found that the

appellant had such a defense. This finding is based upon the evidence in the record that Morrow, at the time he made application for and received the insurance policy involved herein, was at enmity with certain persons who had threatened to take his life, and he was then in constant fear and expectation that these parties would murder him; that he fraudulently concealed these facts from the insurance company and thereby induced them to take the risk upon his life which they would not have taken had they been advised of the facts, and that Morrow came to his death at the hands of these parties who had threatened his life. It is true that the finding of the district court is that the appellant had made out a *prima facie* defense. This was all the district court was required to and probably all he should have found on the subject. It was not his duty to go into the merits of the alleged defense of the insurance company any further than to ascertain that the appellant had made out a *prima facie* valid defense, and that it was urging the same in good faith. (*Western Assurance Co. v. Klein*, 48 Neb. 904.) We conclude, therefore, that the finding of the district court that the appellant, both by his pleading and evidence, had made a *prima facie* meritorious defense to the cause of action upon which the void judgment was based is correct.

A second question under the rule is, had the appellant a remedy at law? The insurance company knew that Mrs. Morrow had sued it in Valley county and obtained this information before the time fixed for it to answer by the summons issued in that case. It might have appeared specially in that court and objected to its jurisdiction on the ground that the summons had not been served upon it in that county, nor upon any one who was its agent. After the judgment was rendered it might have prosecuted an error proceeding therefrom to this court, and we think it might have moved the court, under section 602 of the Code of Civil Procedure, to set the judgment aside. If the execution issued on

the judgment had been levied upon its personal property, the insurance company might have replevied the same. If the execution had been levied upon its real estate, it might have resisted a suit in ejectment brought by the purchaser at the execution sale. Here, then, is not only a remedy but several remedies at law. But were these remedies adequate ones within the meaning of the rule and the law? In *Welton v. Dickson*, 39 Neb. 707, this court, following the rule laid down by the supreme court of the United States in *Watson v. Sutherland*, 72 U. S. 74, said: "It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." If the insurance company, on being informed that it had been sued in Valley county, had appeared specially in that court, objected to its jurisdiction over it, and put in the proof that it has in this case, then, had the district court ruled in favor of its jurisdiction, the insurance company might have prosecuted an error proceeding to this court, which would have resulted in a dismissal of the action brought in Valley county. But if the insurance company was not situated in and had no agent in Valley county, within the meaning of sections 55 or 74 of the Code of Civil Procedure, it was entitled to have the suit against it tried in the district court of Lancaster county; and while by appearing specially in Valley county and objecting to the jurisdiction of the court and prosecuting a proceeding in error, if unsuccessful, to this court, it would have obtained the same result that it seeks to obtain by this injunction proceeding, still we do not think the insurance company's remedies by special appearance or motion under section 602 of this Code were adequate ones. A remedy is not adequate, within the meaning of this rule, which compels the citizen to go from the county of his residence into a foreign jurisdiction in which he has never been present and in which he has never been lawfully summoned. The right of the

insurance company to be sued in the county where its principal place of business was located, or in some county in which it was situated or had an agent, was and is a legal right; and it is a strained construction of language to say that because a litigant may go into a foreign jurisdiction and enter a special appearance to an action, that that remedy is adequate, when, beside the costs, expenses, and time spent in attending court in the foreign jurisdiction, he is compelled to surrender valuable legal rights. The insurance company might have taken this judgment to the supreme court on error proceeding at any time within one year after its rendition, but that remedy would not have been adequate, because the record discloses on its face that the insurance company had been duly summoned in Valley county, and in that proceeding it could not have introduced evidence to show that it in fact had no agent or agency in that county upon whom service of process could be made. Had the insurance company waited until the sheriff levied upon its personal property and replevied it, or had it waited and resisted an ejectment suit by the purchaser of its real estate at execution sale, then the record discloses that it would have had no redress for the costs expended by it in prosecuting the replevin action or in resisting the ejectment suit, as the appellees were wholly insolvent. In this connection we deem it proper to say we do not think that the provisions of section 602 of the Code contemplate a void judgment, but one which is voidable by reason of some fraud or irregularity. Such a construction indeed has by the supreme court of the state of Iowa been placed upon a section of the Iowa Code identical with said section 602. (See *Leonard v. Capital Ins. Co.*, 70 N. W. Rep. [Ia.] 629.) Yet, while we think that the provisions of said section of the Code specially apply to voidable judgments, we do not doubt that one against whom a judgment has been rendered, which is void for want of jurisdiction over it, may have such judgment set aside under the

third subdivision of said section of the Code, as having been irregularly obtained. Our conclusion is, that while the insurance company had a remedy at law, such remedy was not an adequate one; that in order to avail itself of some of these remedies it would have been compelled to sacrifice other legal valuable rights; and to have resorted to others it would have suffered damages for which it could have received no redress.

A final inquiry under the rule is whether the plight or condition in which the insurance company finds itself is in anywise attributable to its own neglect. We do not think it is. It is true that while it had been advised that it had been sued in Valley county it made no move to defend itself; but we are clearly of opinion that this was neither negligence nor evidence of negligence. It was a state corporation domiciled in Lancaster county; and by the very law of its creation could be sued only in that county, unless it had voluntarily established a place of business or appointed an agent in some other county for the transaction of its business. It was not guilty of negligence in failing to take notice of rumors, or even correct information, that it had been sued in a jurisdiction in which it did not reside, in which it was not suable, and in which it had no agent on whom service of process could be made. It was compelled to presume that the district courts knew the law of the land and it had the right to suppose that they would rule in accordance with that law.

The decree of the district court is reversed and a judgment will be entered here decreeing the judgment of the district court of Valley county to be absolutely void for want of jurisdiction over the person of the defendant therein, and perpetually enjoining the appellees and those claiming under them from enforcing, or attempting to enforce, the collection of such judgment.

DECREE ACCORDINGLY.

JOHN P. HIGGINS, APPELLEE, V. KENT K. HAYDEN, RECEIVER, APPELLANT.

FILED DECEMBER 9, 1897. No. 7622.

1. **Banks and Banking**: BILL OF EXCHANGE: COLLECTION: TITLE. Evidence examined and *held* to show that a bill of exchange, drawn to the order of a bank by its customer, the amount of which was placed to the customer's credit, became the property of the bank, and was not entrusted to it merely for collection.

2. ———: INSOLVENCY: TRUSTS: PLEADING. A petition seeking to charge a trust on property in the hands of the defendant, the receiver of an insolvent bank, may allege that the bank obtained the property as bailee, and at the same time charge that it was obtained by fraudulent concealment of insolvency, and relief may be granted on the latter ground, although the former be not proved.

3. ———: ———: FRAUD: DEPOSITS. Where a bank remains open and holds itself out as ready to transact business, this is an implied representation of solvency, and for its officers to then receive a deposit, knowing it to be hopelessly insolvent, is a fraud.

4. ———: ———: ———: ———: RESCISSION. The depositor under such circumstances may rescind the contract of deposit and recover back the thing deposited, while it or its proceeds may be distinguished in specie, and before they have become commingled with the general assets of the bank.

5. ———: ———: ———: ———: EVIDENCE. Certain stipulations in the record *held* to justify a finding that the proceeds of the deposit in question had been preserved separate, and not commingled with the general assets.

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

The opinion contains a statement of the case.

Cobb & Harvey and *G. M. Lambertson*, for appellant:

The draft was not deposited for collection but for credit, and the only relation between the parties is that of debtor and creditor. (*National Commercial Bank v. Miller*, 77 Ala. 168; *St. Louis & S. F. R. Co. v. Johnston*, 27 Fed. Rep. 243; *Ditch v. Western Nat. Bank*, 10 Banking L. J. 354.)

The alleged insolvency of the bank affords the plaintiff no ground of action. (*Redington v. Roberts*, 25 Vt. 686; *Patton v. Campbell*, 70 Ill. 72; *Smith v. Smith*, 21 Pa. St. 367; *Nichols v. Pinner*, 18 N. Y. 295.)

The court erred in rendering judgment for interest. (*White v. Knox*, 111 U. S. 784.)

A. G. Greenlee, contra:

The draft remained the property of the appellee, as did also the proceeds. (*Freeholders v. State Bank*, 32 N. J. Eq. 467; *Hazlett v. Commercial Nat. Bank*, 19 Atl. Rep. [Pa.] 55; *National Gold Bank & Trust Co. v. McDonald*, 51 Cal. 64; *Scott v. Ocean Bank*, 23 N. Y. 289; *Beal v. City of Somerville*, 50 Fed. Rep. 647.)

The bank did not become the owner of the draft in controversy for the reason that it was hopelessly insolvent at the time, and was known to be so by the president who received this draft. Its receipt for any purpose was such a fraud upon the appellee as would prevent the bank from acquiring title. (*Williams v. Lowe*, 4 Neb. 394; *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 576; *Wilson v. Coburn*, 35 Neb. 530.)

The appellee is entitled to interest from the time receiver obtained the money. (*Thompson v. Gloucester City Savings Institution*, 8 Atl. Rep. [N. J.] 97; *Moors v. Washburn*, 34 N. E. Rep. [Mass.] 182; *Judd v. Dike*, 15 N. W. Rep. [Minn.] 672.)

IRVINE, C.

The plaintiff, Higgins, was a customer and depositor of the Capital National Bank of Lincoln, and on the morning of January 19, 1893, drew a bill of exchange on George Burke & Frazier, of South Omaha, for $2,000, to the order of the bank, and tendered it to the teller, saying that he had checks outstanding which would overdraw his account and that he desired credit for the draft. The teller referred him to the president of the

bank, who at first hesitated to allow credit for the draft, but on plaintiff's informing him of the outstanding checks agreed to do so, saying: "Well, we will give you credit for it, but if Burke & Frazier don't pay it you will be overdrawn just the same. We will take care of your checks." Thereupon a deposit slip was made out, which, with the draft, was handed to the teller, who then gave plaintiff credit on his pass-book for $2,000. Plaintiff's account was that morning overdrawn $5.15. Plaintiff, on obtaining the credit, drew a check for $10, which was cashed, and during the day a check previously drawn for $1,000 was presented and paid,—all against the credit obtained by the draft. The bank was at the time irretrievably insolvent and its president knew that fact. It remained open and transacted business until the afternoon of January 21, but did not open thereafter and was soon placed in the custody of a receiver. On the 20th and 21st there were certain small deposits and checks by the plaintiff, the net effect of which was to leave the bank indebted to the plaintiff at the time of its failure in the sum of $998.20. The bank on receiving the draft had immediately sent it to the South Omaha National Bank, its correspondent. It was accepted, and on the 21st paid to the South Omaha bank, and its amount was then credited by the South Omaha bank to the Lincoln bank. On the failure of the Lincoln bank the plaintiff undertook to arrest the proceeds of the draft, to the extent of the Lincoln bank's debt to him, in the hands of the South Omaha bank. This sum was held by the South Omaha bank for some months and was finally paid to the receiver under some arrangement whereby it was to be held by him to await the result of this case, which was then begun by the plaintiff against the receiver to charge a trust upon the fund. The finding and judgment of the district court were in favor of the plaintiff and the receiver appeals.

The case was presented upon the principal theory that the draft had been entrusted to the Lincoln bank merely

for collection, and that it remained the plaintiff's property, subject only to a lien in favor of the bank for the sums advanced on the faith thereof. We think the proof failed to support this theory. The evidence shows, without contradiction, that the plaintiff had drawn checks to the amount of more than $1,000 against an already overdrawn account, and that he realized the necessity of securing a credit at the bank which would protect them. The bank received the draft with the distinct understanding that a credit was to be given which had already been drawn against, it paid outstanding checks in pursuance of that understanding and cashed a check contemporaneously with the deposit. The conduct of the parties is entirely inconsistent with the theory of a bailment for collection. It establishes as clearly as evidence could that the draft was drawn for the benefit of the bank and in consideration of an immediate credit of its face value.

The petition, however, contained averments of the bank's insolvency and of its president's knowledge thereof, and that the draft had been procured through the president's fraudulent concealment of the bank's condition, and relief was asked also on that ground. Appellant urges that the latter theory is inconsistent with that already discussed, and that the plaintiff cannot be heard to urge it in connection therewith. We do not think that the two theories are inconsistent. One may, with perfect consistency, say, "You obtained my property as bailee for a special purpose, and you shall not claim it for your own," and at the same time say, "You obtained possession of my property by fraud, and whether it was by bailment or sale I wish to rescind the contract and recover the property." The bill in the case of *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566, was framed in a very similar manner. The circuit court held that the two theories were inconsistent (27 Fed. Rep. 243), but the supreme court of the United States reversed the decree of the circuit court and granted relief on both grounds, holding that the pleading was regular.

Where a bank remains open, holding itself out as ready to transact business, this is an implied representation of solvency, and for it to receive a deposit when its insolvency is known to its officers is a fraud upon the depositor. (*St. Louis & S. F. R. Co. v. Johnston, supra; Cragie v. Hadley*, 99 N. Y. 131; *Anonymous*, 67 N. Y. 598; *American Trust & Savings Bank v. Gueder & Paeschke Mfg. Co.*, 150 Ill. 336; *Peck v. First Nat. Bank*, 43 Fed. Rep. 357; *Wasson v. Hawkins*, 59 Fed. Rep. 233.) The depositor may, therefore, at his election, rescind the contract of deposit and recover back the money or property, but he must do so before the deposit has become commingled with the general assets of the bank. (*Wilson v. Coburn*, 35 Neb. 530.) Had in this case such a commingling taken place?

The South Omaha bank was a regular correspondent of the Lincoln bank and did not remit collections made for it in specie or as distinct remittances. It credited the Lincoln bank with funds as they were collected, and transferred balances on orders of the Lincoln bank in round sums as they accrued and the Lincoln bank demanded. When the draft was received by the South Omaha bank the account of the Lincoln bank seems to have been overdrawn, as appears from a memorandum on the letter acknowledging the draft. On the morning of January 21, there was to the credit of the Lincoln bank $1,025.05. The $2,000 draft was paid that day and passed to its further credit, and there was an additional credit of $1,751.04, making a total credit of $4,776.09. The Lincoln bank that day drew $3,000, leaving a balance in favor of the Lincoln bank at the time of the failure, of $1,776.09. This was certainly evidence tending, at least, to show that there had been a commingling of the proceeds of the draft with the funds of the Lincoln bank, by using such proceeds at least in part for the payment of drafts of that bank. This would seem to follow from the rules laid down in a somewhat similar case by the supreme court of the United States. (*Com-*

mercial Nat. Bank v. Armstrong, 148 U. S. 50.) We are, however, embarrassed in the consideration of this question by certain stipulations appearing in the bill of exceptions. At the commencement of the trial it was stipulated "that the money in controversy was in the hands of the South Omaha National Bank at the time of the failure of the Capital National Bank, and the appointment of a receiver thereof, and was remitted by the said South Omaha National Bank to the receiver on or about the 19th day of July, 1893, and that the fact that the money was so transferred from the possession of the South Omaha National Bank to the possession of the receiver shall not affect or prejudice the rights of the plaintiff to the same." Giving this stipulation its reasonable effect, it would seem to recognize that the specific money collected on this draft was retained by the South Omaha bank, and that it was still retained separately by the receiver in such manner as to protect the rights of plaintiff. Nevertheless, at the close of the bill of exceptions we find counsel for the receiver making the following statement: "It is stipulated that the meaning of the words 'money in controversy' as used in the stipulation at the beginning of this case has reference to the balance due the Capital National Bank from the South Omaha National Bank at the date of its remittance to the receiver of the Capital National Bank. The defendant does not admit, however, that said sum is a part of the money collected, but claims and reserves the right to show by competent testimony that it was mingled with other funds of the Capital National Bank prior to the date of its remittance to the receiver." This was followed by a statement by counsel for the plaintiff, after a formal objection to the introduction of a statement of the account between the two banks which was of no consequence on this issue because it disclosed no dates of payments, that "the reservation of the defendant in the stipulation having been made after the case was tried and argued, the plaintiff will ask leave, if he

so desires, to introduce testimony upon the matters set forth in the reservation." It will be observed that the modification of the stipulation had in view, not the substitution of other facts by agreement for those stipulated, but that it seemed to contemplate merely the withdrawal of any estoppel from proving the facts in this very vital respect to be contrary to those stipulated, that plaintiff did not resist the modification so claimed, but merely claimed the right to himself introduce evidence on the issue so injected. So far as appears from the record neither side availed itself of the privilege of offering further proof, and a reasonable construction of the record is that the stipulation was to stand, except as the defendant by further proof, which it does not appear he adduced, should rebut one feature thereof. In this light it was proper for the district court to consider the stipulation as of full effect in establishing that the fund had been preserved separate by the collecting agent, and that it had gone to the receiver under an agreement to continue its separate custody.

Finally it is contended that the district court erred in allowing interest under the circumstances. In the absence of statute this contention would have much force, but the point has heretofore been determined adversely to the defendant upon a construction of our statute. (Compiled Statutes, ch. 44, sec. 4; *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786.)

AFFIRMED.

UNITED STATES NATIONAL BANK OF OMAHA V. J. H. GEER ET AL.*

FILED DECEMBER 9, 1897. No. 7607.

1. **Negotiable Instruments:** INDORSEMENT: TITLE: INTENT. The question whether title passes to a negotiable instrument delivered to a bank under a restrictive but ambiguous indorsement, without an

*Rehearing allowed.

express contract, but in pursuance of an established usage, is one of fact rather than law, and depends on the intent of the parties.

2. ———: ———: FORM: PAROL EVIDENCE. As between the immediate parties the form of an indorsement is not conclusive, but the nature of the contract may be proved by parol evidence.

3. ———: SALE: BAILMENT. Evidence examined, and *held* to show a sale of the instrument in controversy, and not a bailment for collection.

4. **Sales:** FRAUD: RESCISSION: BANKS: INSOLVENCY. The right to rescind a sale for fraud is lost if not exercised before the vendee transfers the property to an innocent purchaser for value. This rule applies to an attempt to recover a chose in action sold to an insolvent bank in ignorance of its insolvency, as against the claims of a transferee from the bank who has parted with value on the faith of the bank's title.

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

J. C. Cowin and *W. D. McHugh*, for plaintiff in error.

References: *Metropolitan Nat. Bank v. Loyd*, 25 Hun [N. Y.] 101, 90 N. Y. 530; *First Nat. Bank of Elkhart v. Armstrong*, 39 Fed. Rep. 231; *Cragie v. Hadley*, 99 N. Y. 131; *Ayers v. Farmers & Merchants Bank*, 79 Mo. 421; *Wasson v. Lamb*, 120 Ind. 514; *Titus v. Mechanics Nat. Bank*, 35 N. J. Law 588; *Strong v. King*, 35 Ill. 1; *In re State Bank*, 56 Minn. 119; *Holmes v. First Nat. Bank of Lincoln*, 38 Neb. 326.

O. H. Scott and *Cobb & Harvey*, *contra.*

References: *National Bank v. Burkhart*, 100 U. S. 692; *Barnard v. Kellogg*, 10 Wall. [U. S.] 390; *Beal v. City of Somerville*, 50 Fed. Rep. 650; *Manufacturers Nat. Bank v. Continental Bank*, 148 Mass. 553; *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566; *Moors v. Goddard*, 147 Mass. 288; *Fifth Nat. Bank v. Armstrong*, 40 Fed. Rep. 46; *St. Louis & S. F. R. Co. v. Johnston*, 27 Fed. Rep. 243, 133 U. S. 566; *Hoffman v. First Nat. Bank of Jersey City*, 46 N. J. Law 605; *Levi v. National Bank of Missouri*, 5 Dill. [U. S.] 107; *Balbach v. Frelinghuysen*, 15 Fed. Rep. 683; *Branch*

v. United States Nat. Bank, 50 Neb. 470; *First Nat. Bank of Chicago v. Reno County Bank*, 3 Fed. Rep. 257; *Freeman's Nat. Bank v. National Tube Works Co.*, 151 Mass. 413; *Blaine v. Bourne*, 11 R. I. 119; *City Bank of Sherman v. Weiss*, 67 Tex. 331; *White v. Miners Nat. Bank*, 102 U. S. 659; *Peck v. First Nat. Bank*, 43 Fed. Rep. 357.

IRVINE, C.

This was an action by the United States National Bank of Omaha to recover the amount of a certificate of deposit for $5,500 issued by the defendants Geer and Mease, partners in the banking business at Nelson under the name of the Commercial Bank, to the order of the defendant Craven, by him indorsed and transferred to the defendant the First National Bank of Hebron. It is claimed by the plaintiff that the certificate was by the Hebron bank sold and transferred to the Capital National Bank of Lincoln and by the Lincoln bank to the plaintiff. The Hebron bank, by its answer, asserts ownership in itself, claiming that the Lincoln bank received the certificate merely as the agent of the Hebron bank, for the purpose of collection, and that the indorsement being restrictive, the Lincoln bank could not and did not pass title to the Omaha bank. The right to the certificate as between these two parties is the only matter in contest, there being no issues affecting the other defendants except such as may be incidental to the controversy indicated. The district court found in favor of the Hebron bank and entered judgment accordingly.

Similar questions have been presented to the courts with such frequency and such variety of detail that there now appear in the books an array of opinions which would be hopelessly confusing were they to be considered as tending to establish general rules of law for determining such questions. They range all the way from those holding that, as between the parties even, title passes by the legal import of words used by way of indorsement, regardless of intent, to those practically resting the mat-

ter on the presumed motive of the indorser, disregarding entirely the form of the transaction and the contractual intent. While intermediate to these extremes are found many cases presenting marked resemblances to that before us, and solved in different ways by different courts, we are saved the necessity of an analysis of such cases for the purpose of inducing therefrom a general rule of law, by attention to a very simple proposition recognized in effect by counsel on both sides. A moment's reflection will show that the question is not what legal relations result from a deposit for collection alone, or from a sale or discount, but it is whether this was such a deposit or a sale; that is, whether title passed. The solution of this question rests in determining the common intent of the parties,—a question of fact and not of law. Among the cases expressly or by clear implication treating the question as one of fact are *Metropolitan Nat. Bank v. Loyd*, 25 Hun [N. Y.] 101, 90 N. Y. 530; *Titus v. Mechanics Nat. Bank*, 35 N. J. Law 589; *In re State Bank*, 56 Minn. 119; *Fifth Nat. Bank v. Armstrong*, 40 Fed. Rep. 46; *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566.

There is no conflict in the evidence. Such doubts as exist arise as to inferences from facts proved, and not as to the existence of those facts. For ten years preceding the events in controversy the Hebron bank and the Lincoln bank had a continuous course of dealings with one another, the Hebron bank keeping an account with the Lincoln bank, and remitting to it from time to time drafts, checks, and other instruments, which were either at once or upon collection placed to the credit of the Hebron bank. It is said that the banks were not "correspondents," but, so far as the evidence discloses, the only difference between their relations and those of banks confessedly occupying the relation in contemplation by witnesses who use that somewhat ambiguous term was that while the Hebron bank drew drafts for general banking purposes upon its correspondents at Omaha, and eastern cities, it drew against its credit at the Lincoln

bank only for the purpose of transferring funds to its so-called correspondents, and not in favor of its customers generally. So far as the treatment of paper sent by the Hebron bank was concerned, there was no difference between its relations with the Lincoln bank and with its Omaha correspondent. We mention this fact merely because in argument some stress seems to be laid on the supposed difference in relations. There is no room for doubt that the motive which influenced the Hebron bank to maintain the account at Lincoln was to secure an economical method of collecting its "foreign paper," or, more accurately, to secure an economical and speedy method of realizing cash, or a credit equivalent thereto, upon such paper. The motive of the Lincoln bank appears only by inference. It collected paper at par, except where it was itself subjected to expense in favor of third parties, and then charged against the paper only the expense so incurred. It paid the Hebron bank interest on daily balances. It seems quite clear that its motive, therefore, was to obtain the temporary use of the property of the Hebron bank so entrusted to it, for banking purposes. Paper remitted was divided into two classes, styled by most of the witnesses "cash items" and "collections," by officers of the Hebron bank as "sight items" and "time items." It is certain, however, that the latter nomenclature was inaccurate, as the distinction was only partly based on the time of payment. In the "cash items" were included all instruments presently payable on solvent banks and between individuals of known solvency. Other paper belonged to the collection class. The classification was determined by the character of the paper and not by the form of indorsement or the terms of the transmitting letter. Thus the form of indorsement on both classes seems to have been "Pay to the order of R. C. Outcault, Cash., for account of First National Bank of Hebron, Nebr." In remitting, printed forms were used, bearing after the address the words "Enclosed please find for collection and ——." The blank was

usually filled with the abbreviation "Cr." All witnesses agree that the language so employed was not regarded as of any significance in determining the disposition of the paper. If the paper fell within the "collection" class it was noted on the Hebron bank's collection register as having been sent, and its number on that register was noted on the blank with which it was transmitted. On receipt by the Lincoln bank it was entered on the latter's collection register, and the Hebron bank was by mail notified that it had been received and would obtain "prompt attention." When collected it would be credited to the Hebron bank, and the latter notified of the fact. The Hebron bank would then charge its amount to the Lincoln bank. If the paper was a "cash item," the Hebron bank would charge it to the Lincoln bank at once on remitting it, the Lincoln bank would credit it to the Hebron bank immediately on its receipt, and notify the Hebron bank that it had been so credited. No further notice would be sent the Hebron bank unless the paper should be dishonored, in which event its amount would be charged to the Hebron bank and the latter so notified, the paper being returned. Interest was paid on the general balance, including as it did those cash items which had been credited upon their receipt but not yet collected. It would seem that by the custom of banks in such cases, when a credited item is dishonored, interest thereon is charged to the remitting bank from the time credit was given, and that the Lincoln bank was authorized by such custom to so treat the Hebron bank, but it would also seem that such right was never in fact exercised. During the period referred to certain notes of the Hebron bank were rediscounted by the Lincoln bank, and some of these not being paid at maturity, the Lincoln bank exercised, and the Hebron bank acknowledged, the right to immediately charge them back to the Hebron bank in the same manner as dishonored "cash items." The balance at any time to the credit of the Hebron bank was subject to be drawn upon, including that amount

representing credited but uncollected cash items. The officers of the Hebron bank testify that they habitually refrained from so drawing until a reasonable time should elapse for the collection of such items, and that they regarded the privilege of sooner drawing as an act of courtesy and not a legal right; but there can be little doubt that both banks regarded the apparent balance as an available fund and that abstention from drawing by the Hebron bank, prior to the collection of items, was an act of convenience or prudence on its part, rather than the recognition by it that the apparent credit was premature.

On January 20, 1893, the Hebron bank, being then the owner of the certificate of deposit in controversy, remitted it with other items to the Lincoln bank. It was indorsed in the usual manner, "for account of" the Hebron bank, and was transmitted as usual "for collection and credit." It was treated by both banks as a "cash item" in the manner above described. On sending it the Hebron bank charged it to the Lincoln bank, and on receiving it the Lincoln bank credited it to the Hebron bank and notified the latter of that fact. It was received by the Lincoln bank on the 21st and the same day transmitted to the plaintiff, the Omaha bank, under substantially similar circumstances, and in pursuance of similar usages and a similar course of dealing. The Lincoln bank charged it to the Omaha bank and the latter credited it to the Lincoln bank. On the morning of the 21st the account of the Lincoln bank was overdrawn with the Omaha bank some $1,900. Including the amount of the certificate, credits were that day given the Lincoln bank amounting to over $18,000. The Omaha bank that day paid out on checks and drafts of the Lincoln bank nearly $17,000. It thus appears that the whole of the credit obtained by the certificate was the same day exhausted by payments actually made in favor of the Lincoln bank. The Lincoln bank was hopelessly insolvent, to the knowledge of its officers, and was closed on the afternoon of the 21st, never to reopen. On the 23d the

certificate was presented to the Nelson bank and payment refused because of the claim interposed by the Hebron bank. Perhaps certain other facts of which the court takes notice are of some import. Nelson, where the certificate was payable, is in the county adjoining that in which Hebron is located, to the west, and the two towns are connected by a line of railroad. Lincoln is a considerable distance to the northeastward of both towns, and Omaha is still farther northeast. It is not claimed that the diversion of paper from its natural geographical course is in itself any proof that it is being transmitted for other purposes than collection, but the fact that the Hebron bank found it profitable to send the paper through such a course indicates that the purpose of the Lincoln bank was to use the paper otherwise than as a direct collecting agent, and throws some light on the understanding of both parties as to what such use might be.

Certain aspects of the foregoing facts tend, it is argued, to stamp the transaction as one between a principal, the Hebron bank, and its agent for collection. One of these features is that the Lincoln bank was not what is known as a correspondent of the Hebron bank. As already indicated, we cannot conceive that any importance attached to this distinction, whatever it may be, because there can be no doubt that their arrangements contemplated the establishment of the relationship of debtor and creditor at one time or another, with reference to this particular instrument or its proceeds. Next it is argued that the arrangement between the banks was for a collection agency and that therefore the transaction should be treated in the nature of a collection. The motive of the Hebron bank in entering into its relations with the Lincoln bank was, as stated, undoubtedly to obtain the speedy conversion of foreign paper into cash or its equivalent, but, that this object was not intended to be effected by the specific collection and remission of each instrument forwarded, is attested by every transac-

tion between the two banks for a period of many years. It was probably immaterial to the Hebron bank whether it collected the paper through an agent for its own benefit, or in effect sold it and at once obtained credit therefor, and in any event the motive of the Hebron bank is not the controlling circumstance. It is perfectly clear that the real understanding between the banks was that the paper should become that of the Lincoln bank, to handle in its own way and for its own benefit, else we must suppose that it was acting in responsible business matters wholly gratuitously. Nor can we see that the practice and conceded right of the Lincoln bank, to charge back dishonored items, can be of any great weight in determining the nature of the contract. The Hebron bank was responsible as indorser on all such paper, and it seems to have been the practice of the Lincoln bank to take the necessary steps to charge the Hebron bank as such. That liability alone justified the Lincoln bank in charging back dishonored paper against any credit then existing. It is argued that the credit given on receipt of cash items was, because of such practice, provisional only and insufficient to bind either party; but it was so far absolute as to permit the Hebron bank to draw against such credit,—in other words, to enforce payment by the Lincoln bank,—and seems only to have been conditional in the sense that any purchase of negotiable paper is conditional when based on a responsible indorsement, and with the understanding that in case of dishonor the holder will look immediately to the indorser. Nor was the form of indorsement, under all the facts of the case, indicative of a transfer for collection merely. It is probably true, and we consider the case on this theory, that it was so restrictive as to charge the Omaha bank with notice of a reserved title in the indorser if title were reserved. But, whatever may be the law elsewhere, it is the law of this state that as between the immediate parties the true relationship may be shown, notwithstanding the form or terms of the indorsement itself.

(*Roberts v. Snow*, 27 Neb. 425; *Dusenbury v. Albright*, 31 Neb. 345; *Salisbury v. First Nat. Bank*, 37 Neb. 872; *Holmes v. First Nat. Bank*, 38 Neb. 326; *Corbett v. Fetzer*, 47 Neb. 269.) This being so, when we consider the uniform course of business between these parties, it seems that the real significance of the language of this indorsement was to pass the certificate, not for collection merely, but as the property of the Lincoln bank for the purpose of its amount going forthwith to the credit of the Hebron bank on the account kept therewith. The form of the transmitting letter certainly tends toward a remittance for collection, but in view of the admitted fact that all classes of paper were remitted under this same form and that they were differently treated under this same instruction, we cannot permit this fact to control the more emphatic language conveyed by the acts of the parties. Stress is also laid on a note appearing on the printed form whereon acknowledgments were made by the Lincoln bank of the receipt and credit of such items. This was as follows: "This bank, in receiving collections elsewhere than in Lincoln, acts as your agent, and assumes no responsibility beyond that of due diligence on its part." But this somewhat vague notice applies by its terms to "collections" only, and the blank bore upon it a separate column for collections, on which this certificate did not appear, this, like all "cash items" appearing in a column headed "credited." Thus the notice referred to made even more distinct the practical difference between the two classes of items and showed, if it showed anything, that the "cash items" were not received for collection. On the other hand, there are certain facts which to our mind unmistakably stamp the transaction as a sale, and none is inconsistent with that theory. That there were two classes of items the classification being based manifestly on the practicability of immediately converting the paper into cash, or using it as such, without subjecting it to a process of collection, and that this instrument was treated by both parties as belonging

to the cash class; that credit was immediately given before the Lincoln bank had disposed of the paper or collected its proceeds; that interest was paid upon this credit, and that it was subject to draft, all these facts point toward a sale. Mere book-keeping, it is true, does not control the question. Charges and credits may be made merely for convenience in book-keeping; but when the evidence shows that they were not so made, that they were not made at all with items confessedly held for collection, and that when made as to other items, such entries were accompanied by such results as the payment of interest and the honoring of drafts, the matter is no longer one of book-keeping, but is essential to the transaction itself. It is inconceivable that the Lincoln bank would collect gratuitously and pay interest on paper which it did not own, and before it was collected, for the privilege of performing this gratuitous service. It is absolutely certain that the Lincoln bank undertook such service, so advanced credit and paid interest, for the privilege of using the paper for its own purposes and its own profit, as it did in this case by selling it to the Omaha bank, and that the Hebron bank perfectly understood that this was the object and that such paper was so treated. In the light of the usage of the banks the contract was in effect this: The remittance by the Hebron bank was a proposal to sell the certificate for its face, the Lincoln bank to immediately place so much at the disposal of the Hebron bank and to pay interest thereon until the Hebron bank should demand the money or its equivalent; the Hebron bank assuming the ordinary liability of an indorser with the express understanding added thereto that such liability should be subject to immediate enforcement in case of dishonor, by charging the amount against the credit maintained in the Lincoln bank. The mailed acknowledgment was an acceptance of that proposal. No clearer case of a transfer of title could well be contrived. For reasons stated at the outset we do not consider cases

adjudicated elsewhere as of any force in determining the facts of this case, but it is believed that all the cases holding under somewhat similar circumstances that title did not pass, present such differences in the facts as to render them readily distinguishable. For instance, in what is perhaps the strongest case cited, *Beal v. City of Somerville*, 50 Fed. Rep. 647, there was no agreement, express or implied, that the checks deposited should be treated as cash or that the credit given might be drawn against. Interest was not paid. Other cases treat an indorsement "for collection" as controlling, and incapable of being extended by extrinsic evidence. Others neglect the fundamental rule that a deposit generally creates simply the relation of debtor and creditor, and is not a bailment.

It is suggested that as the Lincoln bank was at the time insolvent to the knowledge of its officers, it was incapable of taking and consequently transmitting title. This is stating the rule too strongly. The rule invoked is only the application of the general law of fraud in sales induced by false representations, keeping the bank open and holding it out as ready to transact business being an implied representation of solvency. A sale made to such a bank would not be void. It would be, at the most, voidable at the option of the vendor or depositor, and could not be avoided after the rights of innocent third parties had attached. As already intimated, the indorsement may have been so restricted that the Omaha bank could not claim as an innocent purchaser if title had not in fact passed to its vendor, but title did pass and the Lincoln bank owned the certificate unless and until the Hebron bank rescinded the sale. Before this happened it could, and did, pass title to a stranger who parted with value therefor, and it was then too late for the Hebron bank to assert its right to rescind.

REVERSED AND REMANDED.

WILLIAM H. TRITES ET AL. V. HITCHCOCK COUNTY.

FILED DECEMBER 9, 1897. No. 7647.

1. **Res Judicata:** PROCEEDINGS OF COUNTY BOARD: CLAIMS. A county board, in examining the reports and adjusting the accounts of a county officer, acts ministerially, and an adjustment so made is no bar to an action subsequently brought to recover moneys unlawfully withheld by the officer; but such a board, in auditing and allowing claims, under the power conferred by Compiled Statutes, chapter 18, article 1, section 37, acts judicially, and its judgment is conclusive unless reversed in appellate proceedings.

2. ———: ———: ———: PLEADING. An answer, the nature of which is stated in the opinion, *held* to sufficiently plead an adjudication against the county by the allowance of a claim by the board in its judicial capacity.

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

J. W. Cole and *W. S. Morlan*, for plaintiffs in error.

L. H. Blackledge and *R. O. Adams, contra.*

IRVINE, C.

This was an action by Hitchcock county upon the official bond of Trites, who was formerly treasurer of that county. On the trial, after the county had rested, the court sustained an objection to the introduction of any testimony on behalf of the defendants on the ground that the answers stated no defense. This was logically followed by instructing the jury to return a verdict in favor of the county for the amount by it claimed. These rulings were manifestly erroneous as to the sureties defending, who by their answer merely admitted the election and qualification of Trites, the making and approval of the bond, and denied all other allegations of the petition. Trites and the sureties joined, however, in the motion for a new trial, and also in the petition in error, so that there can be no reversal because of the error

affecting the sureties alone unless the rulings complained of were erroneous as to Trites also. The petition, as a breach of the bond, alleged that during Trites' incumbency of the office he, as such officer, received $9,150 from the sale of refunding bonds; that he claimed, as commission for selling said bonds, the sum of $306.60, and held out from the sum so by him received said sum of $306.60, and that he had neglected and refused to pay over to the county said sum. Trites, in his answer, denied that he ever took, received, held out, or otherwise failed to account to the plaintiff for said sum; that he kept, or retained, said sum as fees, commission, or salary, and averred that during his incumbency regular settlements were made as required by law; that at each of said settlements he faithfully and fully accounted for every dollar that came into his hands as treasurer, not in any instance taking, claiming, or deducting any fees, salary, or commission, but that in each instance all fees, salary, or commissions by him received were first audited and allowed by the plaintiff. Further, Trites averred that he had been appointed by the commissioners of the county to negotiate the bonds described in the petition, and that he had fully accounted for and paid into the treasury all the proceeds of the sale of said bonds, without reservation or deduction; that subsequently, and with full knowledge of all the facts, the commissioners allowed and paid to Trites the sum sued for, as salary or commission for his services, and that no appeal was taken from said allowance and payment. The sufficiency of this answer must be determined in the light of a rule now well settled in the jurisprudence of the state. A county board, in examining the reports and approving the accounts of a county officer, acts ministerially, and an adjustment so made is no bar to an action subsequently instituted to recover moneys unlawfully withheld by the officer; but such a board in auditing and allowing claims, under the power conferred by Compiled Statutes, chapter 18, article 1, section 37, acts

judicially, and its judgment is conclusive, unless reversed in appellate proceedings. The cases establishing and illustrating the foregoing propositions are collated in the recent case of *Hazelet v. Holt County*, 51 Neb. 716. A case applying them to a state of the pleadings somewhat similar to the present is *Gage County v. Hill*, 52 Neb. 444. The answer, while unnecessarily involved and somewhat verbose, and while lacking much in accuracy of statement, nevertheless fairly pleads that Trites did not withhold the money sued for, but that he, on the contrary, fully accounted therefor, and that what he received was in pursuance of the allowance to him of a claim interposed therefor, and passed upon by the board in its judicial capacity. Trites' answer, therefore, presented a defense, and the district court erred in refusing to permit evidence to be introduced thereunder.

REVERSED AND REMANDED.

PAXTON & GALLAGHER ET AL., APPELLANTS, V. JONATHAN J. SUTTON ET AL., APPELLEES.

FILED DECEMBER 9, 1897. No. 7563.

Homestead Exemption. A debtor may acquire a homestead, and hold it exempt from execution for debts created before its acquisition, but not then reduced to judgment, and this although the homestead was obtained by exchange for property which was liable for the payment of such debts.

APPEAL from the district court of Chase county. Heard below before WELTY, J. *Affirmed.*

Howard M. Kellogg and *Alfred W. Agee*, for appellants.

References: *Riddell v. Shirley*, 5 Cal. 488; *Randall v. Buffington*, 10 Cal. 491; *Pratt v. Burr*, 5 Biss. [U. S.] 36; *Bugg v. Russell*, 75 Ga. 837; *Wedgewood v. Withers*, 35 Neb. 583.

A. B. Taylor, contra.

A homestead is not liable for debts contracted before the homestead was purchased. (*Hanlon v. Pollard*, 17 Neb. 368; *Palmer v. Hawes*, 50 N. W. Rep. [Wis.] 341; *Jacobi v. Parkland Distilling Co.*, 43 N. W. Rep. [Minn.] 52; *Dortch v. Benton*, 3 S. E. Rep. [N. Car.] 638; *Tucker v. Drake*, 11 Allen [Mass.] 145; *O'Donnell v. Segar*, 25 Mich. 367; *North v. Shearn*, 15 Tex. 174; *Cipperly v. Rhodes*, 53 Ill. 346; *Culver v. Rogers*, 28 Cal. 521; *Randall v. Buffington*, 10 Cal. 491; *Backer v. Meyer*, 43 Fed. Rep. 702; *Kelly v. Sparks*, 54 Fed. Rep. 70; *Woodward v. People's Nat. Bank*, 31 Pac. Rep. [Colo.] 184; *Hines v. Duncan*, 79 Ala. 112.)

IRVINE, C.

Jonathan J. Sutton was engaged in the mercantile business at Aurora, in Hamilton county. On February 21, 1893, he was indebted to the plaintiffs in divers amounts for goods sold to him to replenish his stock. On that day he exchanged his stock of goods for 160 acres of land in Chase county. The title to 80 acres was taken in himself and to the remaining 80 in his wife. On March 6, 1893, he removed upon the land and has since been occupying it as a homestead. The plaintiffs very promptly reduced their claims to judgment, and on March 6. filed transcripts of their several judgments in the office of the clerk of the district court of Chase county. They then caused executions to be levied upon the land and afterwards filed the petition in this case, alleging that by reason of the conveyance to Mrs. Sutton and the claim of homestead the land could not be sold to advantage, and praying that their levies be declared valid and the land subjected to the payment of the judgments. The pleadings and admissions made on the trial left, so far as the homestead was concerned, really no contested issue except whether the purpose of Sutton in

making the exchange was to defeat his creditors. There was a finding for the defendants and judgment of dismissal. The court found that the land did not exceed $2,000 in value, so that it was exempt from judgment liens and execution or forced sale unless the special circumstances prevented the operation of the exemption privilege as to these judgments. It is contended that the sole object of Sutton in exchanging his goods for the land and removing upon it was to obtain the benefit of the exemption laws and thereby defeat his creditors. We shall assume that this was shown. Did it constitute such a fraud upon creditors as to estop him from asserting his homestead exemption?

In this state the homestead exemption may be claimed as well against debts existing when the homestead was acquired as against those created thereafter. (*Hanlon v. Pollard*, 17 Neb. 368.) The statute makes no distinction between the two classes of debts and the courts cannot create any. The right here depends upon the situation when judgment is recovered and not when the debt is created. (*Bowker v. Collins*, 4 Neb. 494; *Hanlon v. Pollard, supra.*) The homestead exemption cannot be claimed as against a judgment recovered before the land became a homestead, because in that case the lien of the judgment had attached, and the acquisition of a homestead character does not displace existing liens. And the law generally is so where the statute does not, as many statutes do, except pre-existing debts from the operation of the exemption. It follows that it is the legal right of a debtor to acquire a homestead, and in order to do so he must usually devote to that purpose money or property that is not exempt. Credit is extended or should be extended with a view to that right. If such be the debtor's absolute right then it would seem that his motive is immaterial. As in the case of the alienation of exempt property, it is held that such alienation cannot be set aside as fraudulent, because it cannot operate as a fraud; so here, if the right exists to pur-

chase exempt property with non-exempt, such purchase cannot operate as a fraud upon creditors. For similar reasons the appropriation of all a debtor's property to pay a favored creditor is not a fraud upon the others except as the statute makes an actual fraudulent intent invalidate the transaction. The fact that the debt was incurred in the purchase of a part of the goods from the sale of which the exempt property was acquired does not affect the case, unless indeed the goods were bought with the intention of not paying for them and of converting them into exempt property for the purpose of accomplishing that object. In that case the goods might be reclaimed if the fraud were seasonably discovered, and it may be that if not discovered until after their exchange, the property for which they were exchanged might then be charged with the debt. Such a case would not be unlike that of one's stealing property and then claiming it as against the owner. But this case presents no such state of facts. It is true that it appears that a small part of the goods out of which some of the debts arose was not delivered until a few days after the sale of the stock, but these goods were not bought in contemplation of the sale or with the intent to defraud, so far as the evidence discloses.

A few cases are opposed to the views we have expressed,—notably *Pratt v. Burr*, 5 Biss. [U. S. C. C.] 36. The reasoning of that case would, however, defeat the exemption as against any pre-existing debt, and is based, as in other cases taking a similar view, on the injustice and apparent immorality of a claim of exemption under such circumstances. Such cases neglect the fundamental principle that the courts cannot set aside valid legislative acts or engraft amendments upon them merely because the judges deem the legislation unwise or even unjust. In all cases of exemptions the creditor suffers because the legislature has deemed the importance of protecting the family in its home and sustenance to be greater than that of enforcing the payment of debts.

The great weight of authority is, however, in accordance with the opinion we have indicated. In *Comstock v. Bechtel*, 63 Wis. 656, the question was squarely presented whether a conversion of non-exempt property into exempt, for the sole purpose of placing it beyond the reach of creditors, would subject the latter property to the payment of debts existing at the time of the conversion, and the court held that it would not, that the property from its character remained exempt and the only remedy of the creditor was by attacking the sale of the non-exempt property. *Cipperly v. Rhodes*, 53 Ill. 346, was a case like the one before us, even to the fact of the conveyance of the homestead to the wife, and the homestead was held exempt because "it was not a fraud on creditors to buy a homestead which would be beyond their reach." So in *Jacoby v. Parkland Distilling Co.*, 41 Minn. 227, the debtor's right was in such case affirmed, because "he is merely exercising a right which the law gives him, and subject to which every one gives him credit." Michigan holds to the same effect, the court saying: "There may be a moral wrong in thus keeping property from creditors, but if so it is one which the statute, on grounds of public policy and to prevent distressing families, has sanctioned in allowing the exemption, and therefore is not legally a fraud." (*O'Donnell v. Segar*, 25 Mich. 367.) And in California, after one decision indicating a contrary view, it is now settled that one may apply non-exempt property to the discharge of incumbrances on a homestead, and claim the whole homestead as exempt. (*Randall v. Buffington*, 10 Cal. 493; *In re Henkel*, 2 Sawyer [U. S. C. C.] 305.) The law is thus stated by Foster, J., in *Kelly v. Sparks*, 54 Fed. Rep. 70: "It seems to be well settled on principle and the preponderance of authority that an insolvent debtor, knowing himself to be insolvent, may acquire a homestead for himself and family, and hold the same exempt from his creditors, although purchased with non-exempt assets, and that fraud cannot be imputed to such an act.

* * * Credit is given the debtor in full view of this comprehensive exemption." (See, too, *First Nat. Bank v. Glass*, 79 Fed. Rep. 706.)

In the view we have taken of the question discussed it follows that all the land would have been exempt if title had been taken in Sutton. He therefore had the right as against creditors to convey or cause to be conveyed a portion thereof to his wife, as the homestead can be claimed from the property of either. (Compiled Statutes, ch. 36, sec. 2.) It is unnecessary, therefore, to consider the special attack and special defense with reference to her right.

AFFIRMED.

PROVIDENT LIFE & TRUST COMPANY, APPELLANT, V. DANIEL KENISTON ET AL., APPELLEES.

FILED DECEMBER 9, 1897. No. 9273.

Receivers: APPOINTMENT. An application for the appointment of a receiver is addressed to the sound discretion of the court, and where, under all the circumstances of a given case, it appears that a greater injury would ensue from the appointment than from permitting the possession of the property to remain undisturbed, a receiver will not be appointed.

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

Lake, Hamilton & Maxwell, for appellant.

Gregory, Day & Day, contra.

IRVINE, C.

The plaintiff, the Provident Life & Trust Company, obtained a decree foreclosing a mortgage made by the defendant Keniston. At the sale the plaintiff became the purchaser. Keniston appealed from the order of confirmation and his appeal is still pending. After that

appeal had been perfected the plaintiff applied to the district court for the appointment of a receiver of the premises in controversy. The district court denied the application, and this is an appeal by the plaintiff from the order denying it. The case has been advanced in order that the appeal, if well taken, might not be unavailing.

The grounds upon which the application was based were that the property was insufficient in value to pay the mortgage debt with accruing interest and costs, and that the defendants were permitting taxes to become delinquent and had suffered the premises to be sold for taxes. We need not inquire into the first matter. The sale determined the amount to be realized by plaintiff in its capacity of mortgagee. As such it would be entitled to the purchase price, in case of final confirmation, and no more, whatever might be the value of the property. While resisting the setting aside of the sale it could not be heard to say that such sale was bad and that therefore it should be reinstated in its position as an unsatisfied mortgagee, and that the property on a resale would be insufficient to satisfy its debt. The second ground was fully proved and would ordinarily, perhaps, be sufficient to justify the appointment of a receiver on application of the purchaser, where the order of confirmation has been superseded. But the evidence in this case was, we think, sufficient to sustain the action of the trial court in refusing to interfere with defendant's possession. The premises are occupied as a homestead by Keniston and his family, and while we do not determine that this fact would alone in all cases be sufficient to prevent the appointment of a receiver, still it will readily be conceded that it is in all cases a circumstance proper for the consideration of the court in determining whether one should be appointed. To interfere thus summarily with the possession of real property, before the final determination of a cause, is always a somewhat severe, though sometimes a necessary, exer-

cise of judicial power. Certainly the court should be more reluctant to so interfere where a homestead and a home are thereby destroyed, than where its action involves only the disturbance of purely selfish business interests, capable of monetary admeasurement. Such a rule is dictated at once by considerations of humanity, public policy, and well-defined equitable principles. In addition to this there was testimony, contradicted it is true, but sufficient to sustain a finding to that effect, that the property in controversy was situated in a locality where there was very little demand for property of such character, that it was doubtful if it could be rented, and that if rented at all it would not bring more than $25 per month, and at that rate it would be necessary for the lessor to pay the water rents and keep the building in repair; that the hazards of such an administration of the property would cause a depreciation thereof greater than the probable income from rents which might be received, and that Keniston had kept the premises in perfect repair and had exercised great care in the preservation thereof. An application for a receiver is addressed to the sound discretion of the trial court, and while by the statutes and by force of adjudicated cases the exercise of that discretion is to a certain extent governed by general rules, still in each case the particular circumstances must be regarded, and if, considering all the circumstances, "the case be such that a greater injury would ensue from the appointment of a receiver than from leaving the property in the hands now holding it, or if any other considerations of propriety or conveniency render the appointment of a receiver improper or inexpedient, none will be appointed." (*Vose v. Reed,* 1 Woods [U. S. C. C.] 650.) In the light of the foregoing rules and of that aspect of the evidence most favorable to the defendant, which we must here accept in view of the finding below, the district court did not err in refusing plaintiff's application.

AFFIRMED.

ARTHUR PERRY ET AL. V. GERMAN-AMERICAN BANK.

FILED DECEMBER 21, 1897. No. 7431.

1. **Conversion:** EVIDENCE. Evidence examined and *held* to sustain the finding adverse to the contention of plaintiffs in error.

2. **Trial:** LEADING QUESTIONS. It is within the discretion of the district court in a proper case to allow leading questions, and the exercise of such discretion, in the absence of an apparent abuse thereof, is not the subject of review on appeal. (*St. Paul Fire & Marine Ins. Co. v. Gotthelf*, 35 Neb. 351.)

3. **Evidence:** TELEGRAM: PRESUMPTION OF DELIVERY. A similar presumption of delivery results from the entrusting to a telegraph company for transmission of a message properly addressed to that which follows from the posting of a letter for transmission by the United States mail.

4. ——: ——: ——. Such presumption results from the office of a telegraph company to the public, which, in this state, is that of a carrier of intelligence with rights and duties analogous to those of carriers of goods and passengers. (*Western Union Telegraph Co. v. Call Publishing Co.*, 44 Neb. 326.)

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

I. R. Andrews, for plaintiffs in error.

J. J. McCarthy, contra.

POST, C. J.

The defendant in error, hereafter called the bank, on May 28, 1893, at the village of Emerson, advanced to one Johnson the sum of $1,200, wherewith to purchase certain cattle. On the same day the cattle above mentioned were by Johnson shipped to South Omaha, consigned to the plaintiffs in error, who were engaged in business as commission men and live stock brokers, and at the same time, as security for the money so advanced, Johnson drew against the proceeds of the said cattle a sight draft, of which the following is a copy:

"GERMAN-AMERICAN BANK,
"$1,200.00. EMERSON, NEB., May 29, 1893.
"At sight pay to the order of German-American Bank twelve hundred and no 100 dollars, and charge to the account of G. G. JOHNSON.
"To Perry Bros. & Co., South Omaha, Neb."

On the upper margin of said draft was written the following words: "21 head cattle shipped May 28, 1893, from Emerson, Neb." It should in this connection be noted that May 28, the day of the foregoing transactions, was Sunday; hence the draft was made to bear date of the 29th. On the 28th the bank, for its further protection, forwarded to plaintiff in error the following telegraphic message:

"EMERSON, NEB., May 28, 1893.
"*To Perry Bros. & Co.:* We have draft on you from G. G. Johnson, twelve hundred dollars, for 21 head cattle shipped to-day. GERMAN-AMERICAN BANK."

The foregoing message was received at South Omaha at 3:50 P. M. on Sunday, the 28th, and delivered to plaintiffs in error on the day of its receipt or the following day. Johnson accompanied the cattle in question from Emerson to South Omaha, where he arrived Sunday night, and the next morning about 7 o'clock notified plaintiffs in error of the arrival of the cattle. He also at the same time, as appears from his testimony, personally notified plaintiffs in error that "there was a draft of $1,200 on the cattle," which he directed the latter to pay and place the balance of the proceeds of said consignment to his credit. Plaintiffs in error, in the course of their business, sold said cattle, and received the proceeds therefor about 3 o'clock P. M. on Monday, the 29th, but credited the entire amount thereof to Johnson upon an open account for advancements previously made, and refused payment of the draft of the bank when presented in due time. The bank, in an action for the refusal of plaintiffs in error to accept its said draft, and for the

conversion of its aforesaid security, recovered judgment in the district court for Douglas county, and which is presented for review by means of this proceeding.

It is first argued that the record fails to disclose a pledge of the cattle in controversy to the bank as security for the money advanced. That contention is without merit. Both Johnson and Moseman, the cashier, testified, in substance, that the bank was to have a lien upon the cattle and the proceeds thereof for the money advanced by it.

It is next complained that the court erred in permitting the bank, over the objection of plaintiffs in error, to ask the witnesses Johnson and Mead certain leading questions. The allowing of leading questions is, as a general rule, within the discretion of the trial court, and its judgment in that regard is not, in the absence of an abuse of discretion, the subject of review on appeal or proceedings in error. (*St. Paul Fire & Marine Ins. Co. v. Gotthelf*, 35 Neb. 351.)

Lastly, it is contended that the district court erred in giving instruction No. 6, relating to the presumption arising from the transmission of the telegram above mentioned. It was by the paragraph complained of in substance charged that the plaintiffs in error having themselves produced the message, which was shown to have been received at South Omaha on the afternoon of the 28th, it is presumed to have been delivered in season, that is, previous to the sale of the cattle on the afternoon of the 29th, and that the burden is upon the plaintiffs in error of proving the contrary. There is certainly no error in the instruction of which plaintiffs in error can complain. There is, indeed, a decided preponderance of authority in favor of the proposition that a similar presumption of delivery results from the entrusting to a telegraph company for transmission of a message properly addressed as that which follows from the posting of a letter duly addressed and stamped for transmission by means of the United States mail. (*Oregon*

Steamship Co. v. Otis, 100 N. Y. 446; *Commonwealth v. Jeffries*, 7 Allen [Mass.] 548; Wharton, Evidence sec. 76; Gray, Communication by Telegraph sec. 136.) Such presumption results naturally, if not necessarily, from the relation of telegraph companies to the public, which, in this state at least, is held to be that of public carriers of intelligence with rights and duties analogous to those of carriers of goods and passengers. (*Western Union Telegraph Co. v. Call Publishing Co.*, 44 Neb. 326.) Plaintiffs in error, in appropriating the price of the cattle sold, claimed to act under and by virtue of a previous understanding with Johnson whereby the proceeds of all stock consigned to them by the latter should be applied in satisfaction of the balance owing by him. But conceding the existence of an agreement such as alleged, the plaintiffs in error have, without objection, been permitted to retain the proceeds of the cattle over and above the claim of the bank. In other words, they have enforced their claim to the extent of Johnson's interest in the property, which, in view of the facts in evidence, is all they are entitled to demand. What would have been their rights in the premises had the sale and appropriation of the proceeds of the cattle been consummated by them in ignorance of the claim of the bank, we are not called upon to consider, since there is in this record abundant evidence to support the finding against them upon that issue. The judgment is clearly right and must be

AFFIRMED.

J. W. TOMBLIN V. JONATHAN HIGGINS.

FILED DECEMBER 21, 1897. No. 7629.

Usury: ACTION FOR INTEREST. The defense of usury is available in an action by a national bank for the recovery of unpaid interest where the rate contracted for by it is in excess of that prescribed by the act of congress. (*Norfolk Nat. Bank v. Schwenk*, 46 Neb. 381.)

ERROR from the district court of Furnas county. Tried below before WELTY, J. *Affirmed.*

W. S. Morlan, for plaintiff in error.

J. H. Broady, contra.

POST, C. J.

This cause was commenced in the county court of Furnas county, where the plaintiff in error sued to recover from the defendant in error as maker of a promissory note for $500, bearing date of March 14, 1891, and payable March 14, 1892, with interest from date, to the order of "J. W. Tomblin, Pt." A trial upon issue joined resulted in a judgment for the defendant, from which an appeal was prosecuted to the district court, where, to the petition in the usual form in like actions, an answer was interposed in which it was alleged that the First National Bank of Arapahoe was the real party in interest, and that in the execution and delivery of the note in suit, as well as in the several antecedent transactions furnishing the pretended consideration therefor, the plaintiff acted as the trustee for said bank. Said allegation was accompanied by a statement in detail of the transactions between the defendant and the bank, resulting in the execution of this note, which are in brief the loaning by the latter to the former of a large sum of money at a usurious rate of interest, the renewal from time to time of the notes given therefor at a usurious rate of interest, and the payment upon said notes and renewals thereof of a sum largely exceeding the money loaned. It was further expressly charged that the note in suit was given for usurious interest which had accrued on the original loan and renewal notes given therefor, and for no other or different consideration whatever. The plaintiff replied, (1) denying the allegations of the answer except such as were therein confessed; (2) alleging that the note in suit was given for a part of the balance found

to be due from defendant upon final settlement previously had of all matters of difference between the parties. A trial was had of the issues thus presented in the month of October, 1893, resulting in a verdict for the plaintiff, which was, however, set aside on motion of the defendant. Subsequently the plaintiff, by leave of court, filed an amended petition alleging the execution of the note to him as agent and president of the bank above named and in its behalf. To this petition the defendant answered, (1) admitting the execution of the note, and, in effect, denying the other allegations thereof; (2) alleging the usury of the original loan and renewals thereof, including the note in suit; (3) alleging that the bank, if the party in interest in said transaction, is now estopped to assert any right in that behalf, for the reason that said note was taken by said bank in the name of plaintiff with the fraudulent purpose of evading the penalty imposed by act of congress for the taking or reserving of usurious interest by national banks. In the reply subsequently filed, after a denial of the new matter in the answer, it is alleged, in substance, that the security held by the bank for the indebtedness of defendant being deemed insufficient, an arrangement was made whereby the notes representing such indebtedness should be reduced to the extent of $500, and a new and separate note executed for that amount that pursuant to such agreement the note in suit was executed as payment *pro tanto* and the sum of $500 credited upon defendant's notes so held by the bank. A second trial was had to the court without the assistance of a jury, resulting in a finding and judgment for the defendant, from which the plaintiff prosecutes error to this court.

It is, in the view we take of the record, necessary to notice a single one of the several questions argued by counsel, viz., that of the consideration for the note which is the subject of this controversy. If, as contended by defendant, the sole and only consideration therefor is interest on his apparent indebtedness to the bank, being

a balance of principal and interest of a loan confessedly usurious, it follows that the judgment should be affirmed, since the utmost that can be claimed in behalf of the plaintiff under the averments of his pleadings, is that he stands as the representative of the bank. It has been settled by repeated decisions of this court that the plea of usury is good in an action by a national bank as to unpaid interest where the contract rate exceeds that prescribed by the national banking act. (*Hall v. First Nat. Bank of Fairbury*, 30 Neb. 99; *McGhee v. First Nat. Bank of Tobias*, 40 Neb. 92; *Norfolk Nat. Bank v. Schwenk*, 46 Neb. 381.)

The evidence bearing upon the question under discussion is somewhat confusing, and involves transactions so numerous and intricate as to render even the briefest possible synopsis thereof impracticable in this connection. There certainly is evidence tending to sustain the contention that the note represents interest on the usurious loan, and positive proof that it is otherwise without any consideration whatever. We are unable to perceive any sufficient ground for interference with the finding of the district court.

JUDGMENT AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. ANGELINE STEEAR.

FILED DECEMBER 21, 1897. No. 7665.

1. **Carriers:** LOSS OF BAGGAGE: EVIDENCE: CHECKS. A check for baggage is *prima facie* evidence that the baggage it represents has been delivered to the issuing company by the person to whom the check is issued. The introduction of the check in evidence is such proof of the fact of the delivery of the baggage as to cast the burden on the party contesting the fact of proving to the contrary or showing the nondelivery.

2. **Conflicting Evidence:** REVIEW. The finding of fact by a trial court based on conflicting evidence will not be disturbed on error to this court unless clearly wrong.

ERROR from the district court of Clay County. Tried below before HASTINGS, J. *Affirmed.*

The opinion contains a statement of the case.

J. W. Deweese, L. G. Hurd, and *F. E. Bishop,* for plaintiff in error:

A passenger's check for baggage is only *prima facie* evidence that the carrier received the baggage, and may be rebutted by proof that the carrier did not, in fact, receive it. (*Ringwalt v. Wabash R. Co.*, 45 Neb. 760; *Marquette, H. & O. R. Co. v. Kirkwood*, 45 Mich. 51; *Isaacson v. New York C. & H. R. R. Co.*, 16 Am. & Eng. R. Cas. [N. Y.] 193; *Michigan Southern & N. I. R. Co. v. Meyres*, 21 Ill. 631; *Chicago, R. I. & P. R. Co. v. Clayton*, 78 Ill. 616.)

The carrier is not liable, as the evidence shows that the loss was due to the agents of the passenger. (*Ringwalt v. Wabash R. Co.*, 45 Neb. 760; *Missouri P. R. Co. v. McFadden*, 154 U. S. 155.)

Thomas H. Matters, contra.

References: *Davis v. Michigan S. & N. I. R. Co.*, 22 Ill. 278; *Thornton Check v. Little M. R. R. Co.*, 2 Disn. [O.] 238; *Davis v. Cayuga & S. R. Co.*, 10 How. [N. Y.] 330; *Atchison, T. & S. F. R. Co. v. Brewer*, 20 Kan. 669; *Dill v. South Carolina R. Co.*, 62 Am. Dec. [S. Car.] 407.

HARRISON, J.

This action was commenced by the defendant in error to recover damages which she alleged were occasioned by the loss, by the company, of her valise and its contents, of which the company had taken possession and charge as a part of her baggage, she being at the time a passenger, by its line of road, on a trip from Chicago,

Illinois, to Inland, Nebraska. The company defended on the ground that it had never received the valise, and, from a judgment in favor of defendant in error for the value of the valise and its contents, has prosecuted error proceedings to this court. The trial was to the court without a jury.

The defendant in error, who, it appears, in October, 1893, was journeying from some place in Michigan to her home in Inland, Clay county, this state, detailed in a portion of her evidence that on October 12, 1893, she started from Muskegon, Michigan, and went to St. Joe, Michigan; from there she travelled by boat to Chicago. She had with her a trunk and the valise, or, as she styled it, a "satchel." It is of the non-delivery to her by the company of the latter that she complains in this suit. She further stated as follows:

Q. State what you did with the trunk and satchel.

A. In the morning after I got to Chicago, I went out of the cabin, and there was a man sitting there with a lot of checks upon his arm. I was going to the fair, and I did not want to carry the satchel; so I went to him and I asked him if I could not have that satchel checked with my trunk, and transferred to the Union Depot. He said I could. I asked him how long I could leave it there. He said I could leave it there a month if I wanted to, but I did not leave it there that long.

Q. Well, state what you did.

A. I sat the satchel down in front of him and he put a check upon it and then he said show me your trunk. I showed him my trunk and he put a check upon that, and he gave me two checks. This was Thursday morning. On Saturday I went to the Union Depot to get my baggage to get it checked to Inland. When I went there, and they asked me to show my ticket and show my check, I gave them the two checks. He went off and then came back and gave me two checks for Inland.

Q. How long was he gone?

A. I cannot tell. It was quite a while. I should think maybe half an hour; maybe longer.

Q. Is that one of the checks he gave you (offering check to witness)?

A. Yes, sir; it looks like it.

(The plaintiff offers the check in evidence, being No. 42017.)

Q. When did you arrive in Chicago?

A. On the 12th, in the morning.

Q. When did you check your baggage at the depot?

A. On Saturday.

Q. What month was that?

A. October.

Q. What day of the month,—about how many days after you arrived in Chicago?

A. It was three days. It was the third morning.

Q. When did you arrive at Inland?

A. I arrived there the 17th day of October.

A witness for the company stated, as a portion of his evidence, that during October, 1893, he was in the employ of the McBride Express Company in charge of one of its wagons in Chicago, and undertook to transfer the trunk and valise of defendant in error from the "Graham & Morton Dock" to the Chicago, Burlington & Quincy Railroad Depot, issuing to her check numbered 590, evidencing the delivery to the express company, and its possession, of the valise. This witness also said that when he finally arrived at the depot, he did not have the valise, and thought he had lost it,—had left it at some other than the proper place. He had made several stops to deliver baggage on the way from the dock to the depot. In the deposition of the baggage-master at the Union Passenger Depot in Chicago,—the depot used by the plaintiff in error company,—he testified that he issued the check which the defendant in error had at the time of the trial; that he did it without the baggage then in his possession, giving it in exchange for check 590 of the McBride Express Company which the defend-

ant in error delivered to him. In this connection we will revert to the evidence of the expressman in which occurred the following passage:

Q. What, if anything, did you say to the party in charge at the Union Passenger Station when you delivered the other baggage on that day?

A. At first I didn't notice this valise was short, and the baggageman told me how many pieces I had. The baggageman asked me where the valise was, and I looked all over, and I could not find it; and I told the baggageman I would go along to some other depots, that maybe I left it by mistake. So I did. I went to all the other depots and I could not find it.

From this it appears that the baggage-master asked the expressman for a valise of the existence of which it is not disclosed by the evidence he had any prior knowledge,—which seems at least somewhat unlikely. Three days later, notwithstanding this information which it is claimed had been imparted to, and received by, the baggage-master, he delivered to defendant in error a check of the company evidencing to her, and to all others, that the valise was in the possession of the company. The check delivered to the defendant in error was evidence of the delivery of the baggage it represented to the company, and, when introduced in evidence, established, *prima facie*, the fact of the delivery of the valise to the company, and threw the burden of proof on the company to show a non-delivery. (*Atchison, T. & S. F. R. Co. v. Brewer*, 20 Kan. 669; *Chicago, R. I. & P. R. Co. v. Clayton*, 78 Ill. 616; 4 Lawson, Rights, Remedies & Practice par. 1951, and cases cited; *Davis v. Michigan S. & N. I. R. Co.*, 22 Ill. 278.) The check is *prima facie* evidence of receipt and non-delivery. (3 Am. & Eng. Ency. Law [2d ed.] 580, and cases cited in note 3; *Cleveland, C., C. & St. L. R. Co. v. Tyler*, 35 N. E. Rep. [Ind.] 523; 3 Wood, Railway Law sec. 403; Thompson, Carriers 514; *Oakes v. Northern P. R. Co.*, 26 Pac. Rep. [Ore.] 230.) In the case at bar the check proved, *prima facie*, the receipt of the valise by

the company, and the evidence introduced to show the contrary was in direct conflict therewith; and it was for the trier of facts to weigh and determine which should be given the greater credence. In view of all the evidence we cannot say the conclusion reached was manifestly wrong; hence it will not be disturbed. (*Steinkraus v. Korth*, 44 Neb. 777; *Thompson v. Field*, 45 Neb. 146.) The judgment of the district court is

AFFIRMED.

HENRY OTIS V. HANS CLAUSSEN.

FILED DECEMBER 21, 1897. No. 7660.

1. **New Trial:** ASSIGNMENTS OF ERROR: REVIEW. If a motion for a new trial assigns several grounds for a new trial, an assignment in a petition in error that the court erred in overruling the motion for a new trial is too general and indefinite to present anything for consideration or review. (*Sigler v. McConnell*, 45 Neb. 598.)
2. **Replevin:** COSTS: RULINGS ON EVIDENCE: REVIEW. Alleged errors of the trial court in the admission and exclusion of evidence examined and the actions of the court in regard to the assigned particulars *held* not erroneous, or not prejudicially so.

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

John Barsby and *John D. Carson*, for plaintiff in error.

Charles H. Sloan, contra.

HARRISON, J.

In an action of replevin by the defendant in error in the district court of Fillmore county, he asserted the special ownership and right to the immediate possession of a span of mules by virtue of a chattel mortgage executed and delivered to him of date September 12, 1888, by one D. C. McLeese. The plaintiff in error admitted the execution and existence of the mortgage under which

defendant in error claimed ownership of the property, the right to possession of which was in dispute in the suit, but pleaded that, long prior to the commencement of this action, by an agreement or transaction between D. C. McLeese and defendant in error, the note, the payment of which the mortgage was given to secure, was satisfied and the lien of the mortgage became inoperative; also, that subsequent to the agreement, the effect of which was the release of the mortgage to defendant in error, the property was mortgaged to Aultman, Miller & Co., and in default of payment of the debt secured by the mortgage to Aultman, Miller & Co. the mortgage was foreclosed and at the sale the property was purchased by the plaintiff in error, who was in possession of the property under the title or ownership acquired by such purchase. A trial of the issues resulted in a verdict and judgment for defendant in error, and the cause has been removed to this court by error proceedings on the part of the unsuccessful party in the trial court.

The petition in error contains three assignments as follows:

"1. The court erred in excluding from the jury the bill of sale from D. C. McLeese to John Barsby, marked 'Exhibit F' in the bill of exceptions.

"2. The court erred in admitting to the jury the transcript of proceedings in the case of Hans Claussen against Henry Thompson had before J. E. Curtis, justice of the peace in and for Fairmont township, Fillmore county, Nebraska, and marked 'Exhibit 4' in the transcript.

"3. The court erred in overruling the motion for a new trial.

The motion for a new trial contained several grounds for a new trial. This being true, the third assignment of error is too general and indefinite to present anything for review. (*City of Chadron v. Glover*, 43 Neb. 732; *Sigler v. McConnell*, 45 Neb. 598.)

One assignment of error relates to the exclusion from evidence of an offered bill of sale which purported to

convey the property in dispute from D. C. McLeese to John Barsby, executed of date subsequent to the alleged transaction between McLeese and defendant in error, by which it was claimed the mortgage or lien of defendant in error was satisfied, and also after the date of the mortgage to Aultman, Miller & Co., to which reference has hereinbefore been made. It is stated that the object of this offer was to show that it was the understanding of the parties thereto that the mortgage to defendant in error had been, in effect, canceled by the transaction which, it was pleaded, had occurred between defendant in error and McLeese. It appears from the evidence that Barsby was present at the time of the alleged agreement between McLeese and defendant in error, to which we have just referred, and was assigned the duty of attending to the fulfillment of some of its conditions. It is further contended that it would have appeared, had the evidence been admitted that the bill of sale had been recorded, that the defendant in error was charged with, or had full knowledge of, its existence, and was estopped to assert any rights in the property. The bill of sale, while it may have embodied some idea or understanding of the immediate parties to it, could not, and did not, show any ideas of the defendant in error, and, in the sense or import claimed for it, could have no force or effect as to him or his rights in or to the property. He was in no manner or degree a party in or to its execution and delivery, and could not be charged by it in the ideas or understandings embodied in it; nor was there anything in the fact of the existence of the bill of sale or the defendant in error's knowledge of its existence which could in any manner or to any extent work an estoppel as against his assertion of his rights, if any, he still had under and by virtue of the mortgage of the property to him. There was no error in the exclusion from the evidence of the offered bill of sale; hence the first assignment of error must be overruled.

Of the matters which it was set forth in the answer

were included in the agreement between defendant in error and McLeese by which it was claimed the former's rights under his mortgage were extinguished, was one in reference to a bill of costs in a case before J. E. Curtis, justice of the peace, which, it was also pleaded, D. C. McLeese agreed to assume as his debt and pay. The bill of costs referred to was charged against the defendant in error and the transcript from the justice docket which was admitted in evidence had in, or on it, a short statement that the costs had been paid by Hansen, the defendant in error. This was not evidence competent in this action to prove the payment of the costs in that action by Hansen. The statement, as it appeared in the transcript, could not bind plaintiff in error or have any force or effect as to him or his rights; hence could not be received here to affect him or such rights. As between the justice and the defendant in error, the entry in the docket, as shown by the transcript, might have possessed some significance, but it was not substantive evidence in this case as against plaintiff in error that such costs had been paid, and by defendant in error; hence the evidence should have been excluded, but the error of its admission was harmless, for the defendant in error had testified that he had paid these costs and the testimony was not disputed.

This disposes of all of the assignments of error, and it follows from the conclusions announced that the judgment of the district court will be

AFFIRMED.

EDWARD JOHNSON V. STATE OF NEBRASKA.

FILED DECEMBER 21, 1897. No. 9383.

1. **Information:** VERIFICATION: OBJECTION. It is too late to object to the verification of an information after the accused has been arraigned, and pleaded not guilty, unless such plea has been withdrawn.

2. ———: PARTICIPANTS IN CRIME: DEFENDANTS. All participants in a crime may be jointly charged in the same information, or they may be informed against separately, as the prosecutor may elect. It will not defeat a criminal prosecution for the evidence to show that all perpetrators of the crime were not made defendants.

3. Criminal Law: SUFFICIENCY OF EVIDENCE. To warrant a conviction in a criminal prosecution it is not essential that the evidence adduced on the trial should exclude every possible hypothesis but the guilt of the accused.

4. ———: INSTRUCTIONS. Mere non-direction by the trial court will not work a reversal where proper instructions covering the point were not requested.

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

I. J. Dunn, for plaintiff in error.

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

NORVAL, J.

The defendant was tried upon an information charging him with the felonious breaking and entering, in the night-season, the dwelling of one Charles E. Taylor with the intent to steal, and also with the larceny therefrom of, one church communion set and other chattels belonging to said Taylor. The trial resulted in a conviction of the crime of burglary.

The information was verified before the deputy clerk of the district court, and a motion to quash the information on that ground was denied by the court, which ruling is assigned for error. The objection to the verification is not available, for the reason the motion to quash was filed and presented after the accused had been arraigned and his plea of not guilty to the charges in the information had been entered, without a withdrawal of such plea. (*Davis v. State,* 31 Neb. 247; *Hodgkins v. State,* 36 Neb. 160; *Bailey v. State,* 36 Neb. 808; *Korth v. State,* 46 Neb. 631; *Davis v. State,* 51 Neb. 401.)

Complaint is made of the giving of the seventh paragraph of the court's charge, which was in this language:

"You are instructed that if you find from the evidence that there were others connected with or participated in the burglary jointly with the defendant, then you would be warranted in finding the defendant guilty. The evidence must satisfy you that the defendant is guilty individually or in conjunction with others, and that there is no other reasonable hypothesis that any other person or persons committed the crime."

The information charges that the defendant committed the burglary and larceny, while the evidence adduced on the trial tended to show that he was aided and assisted in the commission of the offenses by at least one other person. It is argued that the instruction was erroneous in that it authorized a conviction of the defendant without the other participant in the crimes being made a co-defendant with him; in other words, that under an information charging one person with a burglary, there can be no conviction unless the evidence discloses that the defendant alone perpetrated the offense. To this doctrine we cannot yield assent. When two or more persons jointly participate in a crime, they may be prosecuted therefor together under one information or indictment, or they may be informed against separately, in the discretion of the prosecutor; and it will not defeat a criminal prosecution that the evidence shows all participants in the crime were not made defendants. (1 Bishop, Criminal Procedure sec. 463.) In *Walbridge v. State,* 13 Neb. 236, it was decided that to justify a conviction upon circumstantial evidence, the proofs must be so conclusive as to leave no reasonable doubt that the accused and no other person committed the offense. But that case does not hold there can be no conviction unless it is established by the evidence that the defendant alone committed the crime charged, without the assistance of any one else. The question we are now considering was not involved or determined in *Wal-*

bridge v. State, supra, and counsel for the defendant is in error in supposing that it has any bearing upon the point under consideration. The seventh instruction correctly stated the law, and there was no error committed in refusing the first request to charge tendered by the defendant, since it enunciated principles confessedly in conflict with the rule laid down in the instruction quoted above.

It is next insisted that it was prejudicial error to refuse to give to the jury the second instruction tendered by the defendant, which is as follows:

"2. You are instructed that if the facts and circumstances of the case, as detailed by the witnesses upon the stand, can be accounted for or explained upon any other hypothesis than the guilt of the defendant, then your verdict should be not guilty."

This instruction was faulty, because it did not contain the word "reasonable" preceding the word "hypothesis." The defendant was not entitled to an acquittal merely because the evidence or criminating circumstances may have been explained upon some possible theory of innocence of the accused of the crime charged. In *State v. Mathews,* 66 N. Car. 106, it is said: "The rule * * * requiring proof beyond a reasonable doubt does not require the state, even in a case of circumstantial testimony, to prove such a coincidence of circumstances as excludes every hypothesis except the guilt of the prisoner. The true rule is that the circumstances and evidence must be such as to produce a moral certainty of guilt, and to exclude any other reasonable hypothesis." In line with that case are *State v. Schoenwald,* 31 Mo. 147; *People v. Murray,* 41 Cal. 66; 1 Bishop, Criminal Procedure sec. 1077. All the law required to authorize a conviction of the prisoner was that the facts should be consistent with his guilt and inconsistent with any other reasonable or rational conclusion, and this is true though circumstantial evidence is relied upon to establish guilt. The above request to charge, had it been given, would have per-

mitted an acquittal upon mere conjecture, or some ill-supported theory that the defendant may be innocent of the crime charged, which is not the law.

Objection is made because the jury were not instructed upon the law of circumstantial evidence. As no proper request to charge upon that point was submitted to the court below by the prisoner, he cannot urge the non-direction of the court as a ground for reversal. (*Hill v. State*, 42 Neb. 503; *Housh v. State*, 43 Neb. 163; *Pjarrou v. State*, 47 Neb. 294.)

It is also insisted that the evidence is insufficient to sustain the verdict, because, it is alleged, that it was not shown the accused broke and entered the dwelling-house in question in the night-season. This contention is devoid of merit. Charles E. Taylor, the prosecuting witness, testified, and his testimony is uncontradicted, that he locked the doors of his residence and left the house after dark between 6 and 7 o'clock P. M. of January 17, 1897, and returned home with his wife about 10 o'clock the same night, when it was discovered that the dwelling had been broken into and burglarized during his said absence. This testimony, not having been contradicted, was ample to justify the jury in finding that the crime was committed in the night-time. The defendant was not prejudiced by the trial court asking the witness Charles Orleans whether his place was a repository for articles stolen by Johnson, inasmuch as the witness answered the interrogatory in the negative. Moreover, without this question and answer, the previous examination of the witness might have left an impression on the minds of the jurors that Orleans had been secreting stolen chattels for the defendant. He was accorded a fair and impartial trial. The judgment is

AFFIRMED.

SARPY COUNTY STATE BANK, APPELLANT, V. H. M. HINKLE & SON ET AL., APPELLEES.

FILED DECEMBER 21, 1897. No. 7528.

Chattel Mortgages: SALE OF PROPERTY: PROCEEDS: LIENS ON SURPLUS: ATTACHMENT. The decree of the court below is without evidence to support it.

APPEAL from the district court of Sarpy county. Heard below before BLAIR, J. *Reversed.*

H. C. Lefler, and *Kennedy, Gilbert & Anderson*, for appellant.

W. W. Morsman, contra.

NORVAL, J.

There is no controversy over the material facts in this case, which may be summarized as follows: On July 17, 1893, the defendants H. M. Hinkle & Son were engaged in the mercantile business at Springfield, Sarpy county, and were indebted in large sums to numerous creditors, among others the plaintiff and appellant herein, the Sarpy County State Bank, and the defendants Cyrus K. Spearman, McCord-Brady Company, and the Kilpatrick-Koch Dry Goods Company. On said date H. M. Hinkle & Son, being indebted to Spearman in the sum of $3,870, to secure the payment thereof executed and delivered to said Spearman a chattel mortgage on their stock of merchandise, which mortgage was duly filed for record at 5:30 o'clock in the afternoon of the same day, and Spearman took immediate possession of the mortgaged chattels. Subsequently, on the same day, the said H. M. Hinkle & Son executed another mortgage upon the same goods, in favor of plaintiff, the Sarpy County State Bank, to secure the payment of a *bona fide* indebtedness of $1,394, which mortgage was delivered to the bank, and by it filed in the office of the county clerk of Sarpy county

on July 18, 1893. Afterwards, on the same day, the said mortgagees executed two chattel mortgages upon the same goods, one to McCord-Brady Company and the other to the Kilpatrick-Koch Dry Goods Company. McCord-Brady Company repudiated the mortgage given to it, and on July 20, 1893, sued out a writ of attachment against said H. M. Hinkle & Son, and caused the sheriff to levy the same upon said stock of goods, which at the time was in the possession of Spearman, under his said chattel mortgage. The property was likewise seized upon other writs of attachment. Spearman thereupon replevied the goods from the sheriff, and after obtaining possession thereof sold the property under the terms of his mortgage, realizing therefrom the sum of $1,559.11, above the amount of his lien and the costs and expenses of the sale. The Kilpatrick-Koch Dry Goods Company intervened in the replevin suit and made claim to the property by virtue of its chattel mortgage. Upon the trial of the cause Spearman obtained judgment against the sheriff, and the dry goods company recovered judgment against Spearman in the sum of $1,559.11. The sheriff prosecuted error to this court, where the judgment was affirmed. (See *Whitney v. Spearman*, 50 Neb. 617.) The present action was brought by the Sarpy County State Bank against H. M. Hinkle & Son, Cyrus K. Spearman, the Kilpatrick-Koch Dry Goods Company, McCord-Brady Company, and other creditors of said H. M. Hinkle & Son, plaintiff praying a decree establishing its said mortgage as the first and best lien upon the surplus funds in the hands of Spearman, notwithstanding the said judgment in favor of the Kilpatrick-Koch Dry Goods Company; that Spearman be required to pay the surplus funds in his hands, or so much thereof as shall be necessary to satisfy the amount of plaintiff's mortgage, with interest and costs; and that, pending this suit, the Kilpatrick-Koch Dry Goods Company be restrained from enforcing its judgment against Spearman; and that the latter be enjoined from paying said judgment, until

the rights and equities of plaintiff can be determined by the court; and for such further or other relief as the court shall deem just and equitable. McCord-Brady Company and the Kilpatrick-Koch Dry Goods Company filed separate answers to the petition, but Spearman and the other defendants made default. There was a reply filed to each of said answers, and upon the trial the court dismissed the petition of plaintiff and dissolved the restraining order. Plaintiff appeals.

It is very plain that the decree of the court below cannot stand. Plaintiff had a lien on the property second only to Spearman's mortgage, and it is evident that plaintiff, under the undisputed facts, was entitled to a decree against the latter for the amount of surplus remaining in Spearman's hands after satisfying the amount of his mortgage debt. It is true that in the replevin suit the Kilpatrick-Koch Dry Goods Company obtained a judgment against Spearman for this identical money, but that is of no importance here, since the bank was not a party to the replevin litigation, and is not in the least affected by the judgment entered therein. As between the bank and the dry goods company their rights are to be determined as though the judgment in favor of the latter in the replvin action had never been obtained. H. M. Hinkle & Son were justly indebted to the bank in $1,394, and to secure the payment thereof the mortgage in question was executed and recorded prior, in point of time, to the mortgage given to the dry goods company. Plaintiff has a first lien, for the amount of its debt remaining unpaid, upon the surplus money in the hands of Spearman, and the dry goods company is entitled to a lien upon said surplus, subject to the lien of plaintiff. The decree is reversed and the cause remanded to the district court with directions to render a decree in accordance with this opinion.

REVERSED AND REMANDED.

HENRY LUBKER ET AL. V. GRAND DETOUR PLOW COMPANY.

FILED DECEMBER 21, 1897. No. 7610.

1. **Judgment:** FINDING: EVIDENCE. Judgment based upon a finding without sufficient evidence to sustain it is merely erroneous, but not void.
2. **Pleading and Proof:** VARIANCE: REVIEW. There must exist a material variance between the allegations and the proof to work a reversal of a cause.

ERROR from the district court of Platte county. Tried below before SULLIVAN, J. *Affirmed.*

Albert & Reeder, for plaintiffs in error.

McAllister & Cornelius, contra.

NORVAL, J.

The Grand Detour Plow Company filed a petition in the court below against Henry Lubker, W. J. Welch, and Gus R. Krause to obtain the revivor of a certain dormant judgment recovered before one John Rickley, a justice of the peace in and for Columbus township, in Platte county, a transcript of which judgment had been duly lodged in the office of the clerk of the district court of said county. The answer was a general denial, and on the hearing an order of revivor was entered.

It is insisted that the judgment sought to be revived is void upon its face. The transcript of said judgment shows that it was recovered upon a promissory note signed "Krause, Lubker & Welch." The summons issued in the case by the justice was served on William J. Welch, Gus R. Krause, and Henry Lubker, the persons who were the defendants in the court below in the proceedings to revive, and the justice entered judgment against them, and not against the firm of which they were members. It may be that the justice erred in entering judgment against the defendants, upon the mere production of the note, without additional proofs show-

ing that they were members of the firm who executed the obligation sued on. There may not have been sufficient evidence before the justice to authorize the finding, but if that be the case it does not render the judgment void. At most it is an error for which, in a proper proceeding, a reversal might have been obtained. Furthermore, the transcript of the justice's docket shows that the defendants have recognized the validity of the judgment by paying $34 thereon within a year after its rendition.

The only other ground urged for a reversal is that the finding of the district court is without evidence to support it. The transcript of the justice's judgment was introduced on the hearing, which agreed with the averments of the petition for revivor as to date, amount, and the names of parties, plaintiff and defendants, as well as the name of the justice who pronounced the judgment. There were variances between the allegations and the proofs in the following respects: The petition alleged that the judgment sought to be revived was recovered before John Rickley, a justice of the peace of the city of Columbus, Platte county, and that a transcript of the same was filed in the office of the clerk of the district court on November 11, 1887, while the transcript received in evidence is indorsed as having been filed November 29, 1887, and is of a judgment rendered by John Rickley, a justice of the peace of Columbus township, Platte county. The variance in the two particulars stated relates to matters not of sufficient importance to require a reversal of the cause, since the judgment sought to be revived was otherwise definitely described in the petition. The defendants could not have been misled. No objection to the admission of the transcript was raised in the court below. Had the point now urged been made at the time of the trial doubtless the defect would have been remedied. The order reviving the judgment is

AFFIRMED.

THOMAS E. WILSON, COUNTY CLERK OF GAGE COUNTY, ET AL. V. STATE OF NEBRASKA, EX REL. JAMES PLASTERS.

FILED DECEMBER 21, 1897. No. 7567.

1. **Counties:** ALLOWANCE OF CLAIMS: ITEMS. A claim against a county cannot be audited and allowed in advance of the furnishing of the items or the rendition of the services therein charged.

2. ———: ———: COUNTY BOARD. A county board may not delegate to its chairman and clerk the power to audit claims against the county.

3. ———: ———: WARRANTS. It is only after the allowance of a claim upon the treasury of a county that a warrant in payment thereof may be properly drawn.

ERROR from the district court of Gage county. Tried below before BABCOCK, J. *Reversed.*

R. W. Sabin and *J. A. Smith*, for plaintiffs in error.

George A. Murphy, contra.

NORVAL, J.

James Plasters was the duly appointed and qualified deputy county clerk of Gage county, and acted as such during the month of January, 1894, from the 4th day of said month. On the 1st day of the month following he filed in the office of the county clerk a bill for his services as deputy during the preceding month, at the rate of $800 per annum, to-wit, in the sum of $75.08, and demanded of the respondents Thomas E. Wilson and Edward B. Sherman, respectively the county clerk and the chairman of the board of supervisors of said county of Gage, that they countersign and issue to him a warrant on the county general fund for the amount of said bill. Respondents having failed and refused to comply with said demand, relator instituted this action for a peremptory writ of mandamus commanding them to issue a warrant in his favor, in the sum last aforesaid,

for his salary as deputy county clerk. To obtain a reversal of the judgment of the court below rendered in favor of the relator is the purpose of this proceeding.

By section 42, chapter 28, Compiled Statutes 1893, each county clerk of a county containing a population of over 25,000 inhabitants may be allowed one deputy at a salary of $1,000 per annum, which compensation, it seems, said section requires to be paid out of the fees of the office. After the adoption of said section the legislature of 1893 passed sections 46*d* and 46*e* of said chapter 28 (Session Laws 1893, ch. 18, secs. 1, 2), which read as follows:

"Sec. 46*d*. That in all counties in the state of Nebraska having twenty-five thousand (25,000) inhabitants or over, the county clerk shall be supplied by the board of county commissioners or supervisors with the help necessary for the use of such office, said clerk or help to be paid in the manner hereinafter provided.

"Sec. 46*e*. The salary of such clerks or assistants shall be fixed, allowed, and paid monthly, by the county commissioners or supervisors out of the general fund of the county."

It is under and by virtue of the foregoing provisions that relator claims the right to have his salary paid out of the county general fund. Respondents argue that a deputy county clerk is not a "clerk" or "assistant" within the purview of said sections, and further, that said sections are obnoxious to various constitutional provisions, and therefore void. In our view it is unnecessary at this time to pass upon any of those contentions, since relator is not entitled upon his own showing to the relief demanded. This claim against Gage county for salary has never been allowed by the county board thereof. Not until after a claim is duly audited and allowed is the county clerk and chairman of the county board authorized to draw and issue a warrant therefor. (Compiled Statutes, ch. 18, art. 1, secs. 33, 37. See also section 46*e* quoted above.)

Relator relies upon the following resolution adopted by the board of supervisors of Gage county on July 15, 1893, which was several months before the services were rendered, or the appointment of relator as deputy county clerk was made:

"WHEREAS, Owing to the fact of the infrequent meeting of the board of supervisors, it works a great hardship upon the various employés of the county officers, in getting their pay, who are entitled to receive it from the general fund of the county, by reason of having to discount their accounts and time in advance, in order to get their salaries to live upon, be it therefore

"*Resolved,* That the chairman of the board of supervisors and the clerk of said board are hereby empowered to issue monthly warrants for the amounts due those employés of the various offices of the county who are entitled to receive their pay from the general fund of the county commencing on the first day of August, 1893.

"This applies also to the janitor, county superintendent, and the county attorney at such times that their salaries are due. This resolution does not apply to the salaries of any employés who do not receive their salaries from the general fund of the county.

"*Provided,* That no warrants as aforesaid shall be drawn by the chairman for any salaries unless the same is fixed by the statute or has been fixed by this board."

The foregoing falls very far short of meeting the requirements of the statute relating to the auditing and adjusting of claims by county boards. The law does not contemplate the auditing of a demand until after the items or services therein charged have been actually furnished or rendered. Manifestly such is the import of said section 37. Moreover, a county board cannot delegate to its chairman and clerk, jointly or singly, the power to examine and pass upon claims against the county, any more than the board can confer the authority to do so upon the sheriff or the janitor of the court house. The action upon a claim must be by the county board

when in lawful session. We must not be understood as deciding that the board of supervisors of a county may not refer claims to a committee composed of one or more of its members for investigation and report; but in such case the board itself must take final action thereon by adopting or rejecting the report or recommendation of the committee. For the reasons stated the writ should have been denied. The judgment is

REVERSED.

GERTRUDE T. EDNEY ET AL. V. JAMES E. BAUM ET AL.

FILED DECEMBER 21, 1897. No. 9188.

Executors and Administrators: REVOCATION OF LETTERS: EFFECT ON ACTION. Where the letters of an administrator or executor have been revoked, such *quondam* personal representative has no standing in the supreme court to question the correctness of a judgment rendered by the district court in an action wherein he was a party when such revocation took place.

ERROR from the district court of Lancaster county. Tried below before HALL, J. *Proceeding in error dismissed.*

Richard Cunningham and *Lamb & Adams*, for plaintiffs error.

Burr & Burr and *C. E. Magoon, contra.*

RYAN, C.

On questions differing widely from those now presented an opinion has been filed in this case. (*Edney v. Baum*, 44 Neb. 294.) After the case had been remanded to the district court of Lancaster county an amended petition was filed in which "Gertrude T. Edney and Patrick Cavanaugh, as executors of the last will of James A. Edney, deceased," alone were named as plaintiffs.

The defendants were James E. Baum, David Baum, and Daniel Baum. The relief prayed was a judgment for the amount of damages alleged to have been sustained by the estate of James A. Edney by reason of the fraudulent representations of the value of certain lots made by defendants, whereby said personal representatives of James A. Edney had been induced to accept said lots as part payment for a certain stock of goods constituting a part of said estate, which stock, by said executrix and executor, had been sold to the defendants. While the jury were deliberating upon the verdict to be rendered upon the issues which had been joined between said litigants the defendants by their supplemental answer alleged that before the trial had begun the said executrix and executor had been finally discharged upon their petition, whereby there had been a representation and showing made by them that the estate of their testator had been fully settled. There was a prayer for a dismissal of this action and that it might be abated. On April 6, 1896, being the day on which the above described supplemental answer was filed, there was returned a verdict for the plaintiffs in the sum of $3,000, and, within three days thereafter, the defendants filed their motion for a new trial. In October, 1896, there was filed by plaintiffs in said court a paper described as "Reasons why motion for new trial should not be granted." In this paper the objections to sustaining the motion for a new trial were that the discharge of the executrix and executor had been made improvidently and against the wishes of said executrix and executor. The district court filed its special findings on December 11, 1896, and thereon dismissed the action because of the discharge of said personal representatives of James A. Edney and because the petition failed to state a cause of action. As the conclusion reached with reference to the first of these propositions must dispose of this proceeding in this cause, we shall refrain from the expression of any opinion with reference to the merits of the second. Upon

the issues of fact presented by the supplemental answer there was a finding by the district court adversely to the contentions of the plaintiff. No bill of exceptions was settled, for which reason this finding must be recognized as conclusive. In this proceeding, therefore, we are bound to assume that the proper probate court, acting within the scope of its powers and with jurisdiction of the subject-matter, regularly entered an order whereby the executrix and executor of the estate of James A. Edney were discharged. The consequences of this discharge must now be considered and determined.

Section 336, chapter 23, Compiled Statutes, provides: "When an executor or an administrator shall die, be removed from office, or resign, or when his letters shall be revoked, during the pendency of any suit in which he is a party, the suit may be prosecuted by or against the executor or administrator appointed in his place, if any shall be appointed, in like manner as if it had originally been commenced by or against such last executor or administrator." The defendants in error have insisted very strenuously in argument that the removal of the executrix and executor caused an abatement of the action, but it will be noticed upon a careful consideration of the language just quoted that no such result is therein contemplated. This is significant in view of the sections of the Code of Civil Procedure, which we shall now consider. It is provided in section 45 that "An action does not abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, during its pendency, if the cause of action survive or continue. In the case of the marriage of a female party, the fact being suggested on the record, the husband may be made a party with his wife; and, in the case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest." Sections 466 and 467 of said Code provide that actions may be revived in the names of the representatives and successors of

plaintiffs within a year from the time the order of revivor might first have been made, and not later without the consent of the opposite party. The provisions of section 468 are as follows: "When it appears to the court by affidavit that either party to an action has been dead, or where a party sues or is sued as a personal representative, that his powers have ceased for a period so long that the action cannot be revived in the names of his representatives or successor, without the consent of both parties, it shall order the action to be stricken from the docket." We have referred to the above statutory provisions, not for the purposes of determining whether or not the action of the district court was in accordance with the provisions of the statute, but to illustrate our views, which are, that by the removal of the executrix and executor the action did not, *ipso facto*, abate, but remained in suspension until there should appear a party authorized to take further steps for its prosecution. While this condition of suspension existed there was no power in the *quondam* executrix or executor to prosecute error proceedings to this court, nevertheless we are asked by these very representatives to recognize them as still existing parties and at their instance to set aside an order of which they alone complain. This we are powerless to do, for the very obvious reasons that the district court, in the proper exercise of its jurisdiction, found as a fact that these alleged personal representatives had ceased to be such,—a conclusion we are bound to assume was correct, because we have not presented to us the evidence on which it was reached. From these considerations it results that as no order granting or denying relief on the application of these alleged personal representatives as plaintiffs in error can be made, their petition in error must be, and accordingly it is,

DISMISSED.

ANDREW L. UNDELAND ET AL. V. FRANK S. STANFIELD ET AL.

FILED DECEMBER 21, 1897. No. 7674.

1. **Chattel Mortgages:** FORECLOSURE SALE: RIGHTS OF BIDDERS. One who claims an interest in chattels by virtue of his bid therefor upon the foreclosure of a mortgage thereon by sale at public auction cannot be heard to question the regularity of a subsequent sale of the same chattels rendered necessary by his own refusal, by payment, to make good his bid.

2. **Amendment of Pleading During Trial.** It is within the discretion of the trial court to allow an amendment of a petition in the course of a trial where such amendment does not change the original cause of action stated by the plaintiff.

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

Weaver & Giller, for plaintiffs in error.

Lawrence Rath and *Charles Offutt*, *contra.*

RYAN, C.

This was replevin for the possession of certain barber's supplies, tools, etc., which had been mortgaged by the firm of A. L. Undeland & Co. to various parties to whom that firm was indebted. As a purchaser under the foreclosure of certain of these mortgages, Frank S. Stanfield, originally as owner, began this action in the district court of Douglas county. Subsequently, with leave of said court, Stanfield amended his petition so as to claim the replevied property as owner and as agent and custodian of one Annie Bradbury, who, as was alleged, had a special interest in, and by reason thereof was entitled to the immediate possession of, said property. The nature of this special interest claimed for Annie Bradbury will appear in the further statement of the facts of this case. The firm of A. L. Undeland & Co. was composed of Andrew L. Undeland and Nels.

Steffenson. This firm executed the chattel mortgages at the dates, for the several amounts, and to the respective parties, following, to-wit: January 15, 1894, to Theodore A. Kochs, for $250; January 16, 1894, to Mrs. Annie Bradbury, for $265; January 17, 1894, to E. E. Bruce & Co., for $71.54; January 19, 1894, to Graef Cutlery Co., for $365.25; January 19, 1894, to J. B. Williams Co., for $118.12. On January 19, 1894, the mortgage to Theodore A. Kochs was assigned to Mrs. Bradbury and at some time in January, 1894, the mortgage to E. E. Bruce & Co. was assigned to Frank S. Stanfield. These two parties therefore were the owners of the mortgages to secure the aggregate amount of $586.54. On January 17, 1894, Stanfield went into possession of the mortgaged property upon the request of Mrs. Bradbury and continued in such possession until the date of the sale hereinafter described. On February 20, 1894, pursuant to the foreclosure notices which had been duly published by Mrs. Bradbury in her own right and as assignee and by Frank S. Stanfield as assignee, the mortgaged property was offered for sale. By this time other mortgages had been filed of record. There was competitive bidding until the final bid was made by Jacob B. Emminger of $1,925 for the whole of the property mortgaged. In satisfaction of this bid Emminger refused to pay more than $704, insisting that this would be sufficient to discharge the mortgages advertised for foreclosure, and all proper and reasonable costs attendant upon the sale, and even this offer was coupled with the requirement that the mortgages should be assigned to the bidder. After an hour and probably more spent in attempting to obtain payment of the bid above described the agent of the parties foreclosing declared that the bid not being complied with was rejected and forthwith again offered the property for sale, and there being no other bidder, it was struck off to Stanfield for $1,300. Emminger thereupon, with the aid of Undeland, Weaver, and Giller, took possession of the property which he claimed to have pur-

chased and this replevin suit was brought against these parties to recover the possession to which Stanfield claims to be entitled by virtue of his bid on behalf of himself and Mrs. Bradbury.

The arguments of Mr. Emminger will now be considered separately. He urges that, as the excess above the mortgages held by Stanfield and Mrs. Bradbury was payable to the mortgagors, he should not have been required to pay the amount of his bid. One matter of dispute between Stanfield and Emminger when the latter refused to make good his bid was that the expenses of foreclosure, as estimated by Stanfield, were not approved by Emminger as being necessary as to two items and were not reasonable as to a third. As a mere purchaser these matters were no concerns of Emminger. His proposition was to take the property at the price fixed by himself, and if he wished to get this property there was but one thing for him to do, and that was, to pay what by his bid he had offered. He undertook to justify his refusal not only on the above ground, but also because, as he claimed, Stanfield was not financially responsible for the sum of $1,925. Mr. Emminger had no justification for offering to pay this sum unless he intended to pay it if accepted, and having made the bid, it was no concern of his whether Stanfield would account faithfully to his principal or not. Again, Mr. Emminger insists that the sale to Stanfield was made after 4 o'clock, and, therefore, no title thereby was vested in Stanfield. Emminger is in no position to raise this question. He, at least, has no title, and his dispossession of Stanfield by force gave him no rights by virtue of possession. The other plaintiffs in error in the district court filed as their answer a disclaimer of title and denied that they ever had been in possession of the goods in controversy. They, therefore, cannot be heard at this late stage of the proceedings to urge that Stanfield should not be entitled to possession because of irregularities in the sale, even if we should concede that the sale to Stanfield was

irregular,—a concession not necessary to be taken into account.

The amendment did not change the cause of action and was, therefore, permissible. (*Stratton v. Wood*, 45 Neb. 629.) There is found no error in the record and the judgment of the district court is

AFFIRMED.

GRANITE STATE FIRE INSURANCE COMPANY V. BUCKSTAFF BROTHERS MANUFACTURING COMPANY.

FILED DECEMBER 21, 1897. No. 7765.

1. **Insurance:** PROOF OF LOSS: CLASSIFICATION OF PROPERTY. The general allegation in a petition that certain insured property, otherwise fully described, was real property, does not require that the insured, in making proofs of loss in an action on a policy, should show that the property was real property and totally destroyed and thereupon rely upon the provisions of the valued policy law; but he may show the value as it was just before the fire, and its value just after, as affording data for the assessment of his damages, without attempting to classify the property as real or personal.

2. ——: VALUE OF PROPERTY: EVIDENCE. Where there was evidence which showed that the property had been totally destroyed and that its value before such destruction was of a certain amount, the jury was justified in accepting this testimony as the basis for a recovery by the plaintiff, notwithstanding the fact that there was evidence contradictory of each of these propositions.

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

Sylvester G. Williams and *Stevens, Love & Cochran*, for plaintiff in error.

Charles O. Whedon, contra.

RYAN, C.

On October 14, 1892, the Buckstaff Brothers Manufacturing Company, a corporation, effected an insurance of

its property with the Granite State Fire Insurance Company. The three several items insured, as well as the insurance thereon, were described in the policy as follows:

"$1,000 on the following property hereinafter described and situated on block 105, Lincoln, Nebraska, to-wit:

"$225 on its one-story gravel and board roof buildings, all adjoining and communicating and occupied by the assured as a boiler and engine house, brick machinery room, clay mixing rooms, and dry tunnels building; $13,500 total insurance permitted on above item;

"$75 on boilers, foundations, settings, and iron smoke stack, engines, foundations and settings, pumps and all their immediate connections while contained therein; $4,500 total insurance permitted on above item;

"$700 on fixed and movable machinery of all kinds (except engines, boilers, and pumps), shafting, belting, gearing, hangers, pulleys, conveyers, brick machines, clay crushers, pug mills, iron cars, trucks, tracks, pallets, blowers and fans, tools, implements, millwright work, steam and water pipes, while contained therein; $42,000 total insurance permitted on above item."

On February 16, 1893, while this policy was in force, the property insured was greatly damaged and, as insisted by the insured, was totally destroyed. In an action brought on this policy in the district court of Lancaster county there was a judgment upon a verdict for the total insurance, $1,000, with interest at seven per cent per annum from the date of the loss.

In the petition in the district court there were the allegations: "That on the date last aforesaid and continuously from that time (October 14, 1892) to the time of the fire and the loss hereinafter mentioned said property was used for the purpose of manufacturing brick, and said property was real property and was all used by the plaintiff in the process and business of manufacturing brick at the time of the fire hereinafter mentioned and prior

thereto, and said property constituted a brick manufactory when burned." Plaintiff in error, all through the trial, insisted, and now insists, that the averment that the property destroyed was real property necessarily so qualifies the right to recover that no recovery could be had for the loss of personal property. In the petition the property alleged to have been destroyed was described in the same language employed in the policy descriptive of that insured. Plaintiff in error asked the district court to instruct the jury that there was no dispute as to the amount payable under the first item in the policy, provided the insurance company was liable. We shall therefore omit further reference to this item. In his testimony J. A. Buckstaff, president of the defendant in error, said that the entire property was destroyed, was burned up, that everything combustible was burned except a part of the shed over a part of the kilns, and that the fair market value of the second item just before the fire was $7,000, and of the third item was $46,000. There was no effort made by the company of which Mr. Buckstaff was president to describe what parts of the second item were personal, as distinguished from real property, neither was there such an effort with reference to the constituent parts of the third item. The contentions of the plaintiff in error that a recovery could be had for only so much of the loss as affected real property is with respect to an immaterial matter. If the insured had shown that the entire property covered by the policy was real property and had been totally destroyed, he might have rested upon the presumption raised by statute that the value fixed in the policy was the amount for which a recovery should be had. But this right did not prevent the insured from showing, as independent facts, the actual losses, whether to real or personal property, and this we think was done by the above evidence to such a degree of certainty that the jury was warranted in acting upon it notwithstanding testimony of a contradictory character. The amount of

concurrent insurance, including that evidenced by the policy issued by the plaintiff in error, was $49,500. The loss, if we accept Mr. Buckstaff's testimony as correct, was $53,000. The fact of concurrent insurance, therefore, did not serve to prevent a recovery for $1,000, the total amount of the insurance under the policy of plaintiff in error, with interest thereon.

It is urged that there should have been submitted to the jury 24 requests for special findings. It has been held by this court, repeatedly, that the submission of interrogatories, for the purpose of eliciting special findings, is largely a matter of discretion resting with the trial court. (*Floaten v. Ferrell*, 24 Neb. 353; *Nebraska & Iowa Ins. Co. v. Christiensen*, 29 Neb. 581; *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb. 356; *Hedrick v. Strauss*, 42 Neb. 485.) We have not been able to see in what respect there was an abuse of the discretion of the trial court in its refusal to require the jury to make the special findings requested.

It is not necessary to review the alleged errors in overruling challenges to proposed jurors, for the answers of each, on his *voir dire* examination, fully justified the trial court in its assumption that the proposed juror could determine this case independently of ideas entertained with reference to another case, arising out of the same fire, in which some of the proposed jurors had served as jurors.

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

AFFIRMED.

PROVIDENCE-WASHINGTON INSURANCE COMPANY V. BUCKSTAFF BROTHERS MANUFACTURING COMPANY.

SPRING GARDEN INSURANCE COMPANY V. BUCKSTAFF BROTHERS MANUFACTURING COMPANY.

WESTERN ASSURANCE COMPANY V. BUCKSTAFF BROTHERS MANUFACTURING COMPANY.

COMMERCIAL UNION ASSURANCE COMPANY V. BUCKSTAFF BROTHERS MANUFACTURING COMPANY.

FILED DECEMBER 21, 1897. Nos. 7669, 7670, 7671, 7672.

Insurance: PROOFS OF LOSS: CLASSIFICATION OF PROPERTY: VALUE.

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

Sylvester G. Williams and *Stevens, Love & Cochran,* for plaintiffs in error.

Charles O. Whedon, contra.

RYAN, C.

The four cases above described were submitted on the record and argument in *Granite State Fire Ins. Co. v. Buckstaff Brothers Mfg. Co.,* 53 Neb. 123. It being conceded that the decision in the case last named must determine the result in each of said four cases, the judgment in each is likewise

AFFIRMED.

MARY ANDRESEN, ADMINISTRATRIX OF THE ESTATE OF DORA WITTE, V. LEDERER & STRAUSS.

FILED DECEMBER 21, 1897. No. 7653.

1. **Courts:** POWER TO CORRECT RECORDS. A court of record has the inherent power to correct its own records, even after an appeal, so that such amended record may show correctly the history of the proceedings in the district court before the appeal therefrom.

2. ——: ——. A trial court, after an appeal has been perfected therefrom, has no power to so correct its records, that, in fact, a modification of the judgment already appealed from shall be effected. NORVAL, J., dissenting.

3. **Amendment of Records:** REVIEW. The ruling of the district court in this case is reversed in view of the fact, on the one hand, that, if the amendment reciting that the judgment was "upon agreement of parties" was tantamount to a substantive order after appeal it was void and should not have been considered by the district court, and if, on the other hand, it was a mere recitation of events which had occurred during the progress of the trial in the county court, the district court should not have held the appeal necessarily to have been vitiated by the amendment, as it did by dismissing the appeal because of the recitation of such amendment. NORVAL, J., dissenting.

ERROR from the district court of Lancaster county. Tried below before HALL, J. *Reversed.*

Bochmer & Rummons and *W. E. Stewart,* for plaintiff in error.

Roscoe Pound and *Burr & Burr, contra.*

RYAN, C.

These error proceedings are prosecuted for the reversal of an order of the district court of Lancaster county whereby was sustained a motion of Lederer & Strauss to dismiss an appeal from the allowance in favor of said Lederer & Strauss of a claim recited in the transcript as having been heard "upon agreement of parties" in the county court of said county. The history of the case in the county court is as follows: On December 4, 1893, the

claims of the State Savings Bank, John L. Carson, and Lederer & Strauss, respectively, against the estate of Dora Witte came on in said county court for hearing. The claimants were represented by counsel, and the administratrix of the estate of Dora Witte, with her counsel, also appeared. The record recites the same proceedings to have been had on each claim, but, as we are now considering that of Lederer & Strauss alone, the portion of the history pertaining thereto in the various stages of the case will be stated. In the record of the county court it is recited that "Upon consideration of the agreement of parties the court finds," etc. The allowance thus appears to have resulted from, and to have been founded upon, the agreement of the parties concerned, made in open court while this claim was under consideration. On January 6, 1894, the administratrix of the estate of Dora Witte filed her motion in the county court asking that the record above referred to be amended so as to conform to the facts as she alleged them to be. This motion was, on the date last mentioned, sustained, and accordingly the record was thereupon made to recite that the order of allowance of date December 4, 1893, had been entered "upon consideration of the evidence introduced." While an appeal from the allowance of this claim was pending in the district court upon the record of the county court in the condition indicated, Lederer & Strauss, having notified the said administratrix that application would be made, presented in the county court, on February 20, 1894, a motion asking, in effect, that the record on the hearing of the claim in that court might be restored to the conditions existing before the amendment procured by the administratrix had been made. This was sustained and accordingly the record was again made to show that the allowance of the claim was "upon agreement of parties." Before another move was made in the county court the last of its amendments was, upon suggestion of a diminution of the record, allowed to be filed in the district court. Very soon

thereafter Lederer & Strauss filed a motion to dismiss the appeal from said district court because the judgment appealed from had been rendered by agreement of parties. This motion was sustained. There was another ground stated in the motion which need not be considered, for the reason that the ruling of the district court must be justified, if at all, upon the ground above stated.

It has been held that the district courts of this state have power to correct at a subsequent term of court any errors or defects which may have occurred through the mistake or neglect of the clerks of said district courts so as to make the judgment entry correspond to the judgment actually rendered. (*Brownlee v. Davidson*, 28 Neb. 785; *Hoagland v. Way*, 35 Neb. 387; *School District v. Bishop*, 46 Neb. 850; *Wachsmuth v. Orient Ins. Co.*, 49 Neb. 590.) It scarcely admits of doubt, under the authorities cited and the current of decisions of the courts of this country, that this power to make amendments may be exercised without reference to the mistake or inaccuracy having arisen through the carelessness of a clerk. As a general rule, this right of amendment continues even after an appeal has been taken for a review of the judgment rendered by a court of record. (*Welch v. Damon*, 11 Gray [Mass.] 383; *De Kalb County v. Hixon*, 44 Mo. 341; *Jones v. St. Joseph Ins. Co.*, 55 Mo. 342; *Gamble v. Daugherty*, 71 Mo. 599; *City Bank v. Exchange Bank*, 97 N. Y. 645; *Guernsey v. Miller*, 80 N. Y. 181; *Chichester v. Cande*, 3 Cowen [N. Y.] 42; *Chestnutt v. Pollard*, 77 Tex. 87; *Cowan v. Ross*, 28 Tex. 228; *McNairy v. Castleberry*, 6 Tex. 286; *Kelly v. Chicago & N. R. Co.*, 70 Wis. 335; *State v. Supervisors of Delafield*, 69 Wis. 264.) The correctness of this rule, as an abstract proposition, is attended with no difficulty; but, as with many others, the difficulty arises when we attempt to treat it as of universal applicability. There is recognized by the courts another rule of very general applicability, and that is, that when an appeal is taken, all power of the court appealed from, to

change its judgment or modify its orders, ceases to exist until the cause or some part of it is remanded by the appellate court. When there arises a conflict in the operation of these rules it is often difficult to formulate any general proposition fairly deducible from the adjudicated cases. In Iowa it has been held that if a defective return of service of the original notice, answering the purpose of our summons, had been amended before an appeal had been perfected, the decree was binding, but that, if the amendment was made after appeal from the court whose jurisdiction had been determined by the appeal, the amendment was void. (*McGlaughlin v. O'Rourke*, 12 Ia. 459.) This inflexible rule was invoked and rigidly enforced in *Levi v. Karrick*, 15 Ia. 444, and *Turner v. Bank*, 30 Ia. 191. In *Carmichael v. Vandebur*, 51 Ia. 225, it was held that where an appeal had been taken, the jurisdiction of the trial court was suspended so that it had no power to entertain a motion to correct an error in its proceedings.

In *Chestnutt v. Pollard*, 77 Tex. 86, it was said by Gaines, J., delivering the opinion of the court: "It is true that after an appeal or writ of error has been perfected, the district court has no further jurisdiction in the cause until it be remanded; but a court has authority, upon proper proof, to correct its minutes at any time so as to make them present a faithful record of its action. (*Cowan v. Castleberry*, 6 Tex. 286; *Russell v. Miller*, 40 Tex. 495.)" In this case the correction in the trial court was the substitution of the correct number of the case wherein the decree had been rendered for an incorrect number which originally had been therein inserted. This false number was the sole ground for the contention that the decree had, in reality, not been rendered in the appealed case. The authority of this case is, however, greatly impaired by the fact that it was held that the amendment not being misleading in view of the fact that otherwise than by number the case was sufficiently identified, the correction was with reference to an im-

material matter. As we understand the opinion in *Gerard v. State*, 10 Tex. App. 690, the amendment consisted in giving the names of twelve jurors, the record before correction having named but eleven. In this opinion there was used this language: "We cannot consider for any purpose the attempted correction of the record, made subsequently to the perfection of the appeal and after the jurisdiction had attached on appeal. After an appeal has been taken and the jurisdiction of the appellate court has attached, the case has passed out of the jurisdiction of the trial court and it can make no further order in the case. The effect of an appeal is to suspend and arrest all further proceedings in the case in the court in which the conviction was had until the judgment of the appellate court is received by the court from which the appeal was taken." The value of this case as a precedent is greatly impaired by the fact that it was held that other portions of the record probably sufficiently disclosed that there were twelve jurors, though in giving a list of them there were but eleven persons named as having served as such. We have found no other adjudicated case bearing upon this question in the courts of Texas, and must therefore leave the question in that state in the unsatisfactory condition above indicated.

In *De Kalb County v. Hixon, supra*, the syllabus, which reflects correctly the only point determined, was in this language: "Where, a cause having been appealed to the district court, the record showed a dismissal as to a certain defendant, but no final judgment, and a writ of *certiorari* in the cause showed that the judgment had been ordered, but the clerk had omitted to enter it of record, the court below properly ordered its records amended *nunc pro tunc*, so as to show that final judgment followed the order of dismissal. The court had lost jurisdiction of the case, but not of its records."

In *Kelly v. Chicago & N. W. R. Co.*, 70 Wis. 335, the trial court, upon its own motion, on November 30, 1883, had

ordered "That the said special verdict be and the same is hereby set aside as inconsistent and a retrial ordered." After this order had been entered an appeal was taken, and, still later the trial court, on motion of plaintiff, amended the above portion of the order by inserting the words "and contrary to the evidence," immediately following the word "inconsistent." Lyon, J., prefaced the opinion of the court which he delivered with these remarks: "It was competent for the defendant to appeal from the order of November 30, 1885, before the same was corrected. It did so appeal and it has the right to have its appeal determined as the order then was, without regard to the subsequent correction thereof. It was so held under very similar circumstances in *State v. Supervisors of Delafield*, 69 Wis. 264." It would seem from this adjudication to be the rule that the trial court has no right to prejudice an appeal already perfected by the insertion in its record of an amendment importing that a trial had been had in such a manner as to imply, for the first time, that questions of fact had been considered in that court. We presume this holding was influenced by a consideration of the well recognized presumptions which obtain in favor of the correctness of findings of fact made upon the evidence offered by the parties. An illustration of the hopelessness of an attempt, upon principle, to reconcile the decisions of the courts of this country with regard to what is permissible as showing merely what was done in the trial court as distinguished from what was tantamount to an order involving the retention by that court of jurisdiction after an appeal perfected therefrom, the *National City Bank v. New York Gold Exchange Bank*, 97 N. Y. 645, may profitably be examined in connection with *State v. Delafield, supra.* The case between the two banks was determined upon a motion to amend a return, and it was held that an amendment of a record which merely recited that the judgment had been reversed by inserting after the word "reversed" the qualifying words "upon questions of fact and law" was

such an amendment as could properly be made in the trial court after an appeal from its judgment, and that a motion to correct the return to show the amendment with a view to its consideration by the appellate court should be sustained. This was in direct conflict with the holding of the supreme court of Wisconsin in *State v. Supervisors of Delafield, supra,* and, on principle, cannot be reconciled with the views entertained by the courts of Iowa and Missouri, and probably Texas.

In the supreme court of California a case resembling that under consideration was determined. (*San Francisco Savings Union v. Myers,* 72 Cal. 161.) The syllabus of this case was as follows:

"1. A motion was made to dismiss the appeal on the ground that the judgment appealed from was entered upon the mutual consent of the parties. The only evidence of consent contained in the transcript consisted of a written indorsement made in the margin opposite to the copy of the judgment as follows: 'Indorsed in lead pencil on the back of the original judgment is the following: Agreed to. Pillsbury & Blanding, Lewis Shearer, William F. Herrin.' The answer of the appellant was subscribed, 'Wallace, Greathouse and Blanding,' as his attorneys, for whom, after the entry of the judgment, was substituted Edward Lynch, by whom the notice of appeal was signed. Held, that the motion should be denied.

"2. The superior court cannot deprive the supreme court of jurisdiction of an appeal from a judgment by amending it while the appeal is pending."

With reference to the first paragraph of the syllabus above quoted it is quite evident that the court proceeded upon the theory that the facts recited did not justify the assumption that any agreement had been made. A portion of the language of the opinion should be read with reference to the subject-matter of the final paragraph, for by that means we are enabled more satisfactorily to realize the attitude of the supreme court of California

with respect to the question we now have under consideration. Referring to a former motion to dismiss on the ground described in the first paragraph of the syllabus, the opinion proceeded thus: "It is urged, however, that the new motion is based upon evidence of facts not presented nor relied upon when the former motion was made. The only new fact submitted on the hearing of the present motion is that, after the order denying the former motion to dismiss, the court below, on application of plaintiff, amended, or attempted to amend, the judgment appealed from by inserting therein, 'Pillsbury and Blanding, attorneys for the defendant, M. L. McDonald, * * * agreeing thereto.' If it be conceded the court below had power to amend the judgment, the amended judgment was substituted for the original, and, from the time of its entry, became the 'final judgment' in the superior court. We think it very plain that the superior court cannot deprive this court of jurisdiction of an appeal from a judgment by amending the judgment while the appeal is pending here." It is clear from the final paragraph of the syllabus, considered in connection with the language of the court above quoted, and the order which denied the motion to dismiss the appeal, that the supreme court of California was of the opinion that the insertion in the records of the superior court of words showing that the judgment appealed from had been entered by agreement had no effect upon such appeal, and that the amendment in question was not a mere correction of the recitations of a record, but was rather a prejudicial attempted modification of the judgment which had already been appealed from, which should not be tolerated in the appellate court. As we have already intimated, it is not difficult to formulate abstract general rules, which, applied to many cases, operate very satisfactorily. The difficulty is in the universal application of these rules, especially where, as in this case, they seem to conflict. The district court was evidently of the opinion that the amendment in the county

court, whereby the transcript from that court of record was made to show that the hearing had been entirely upon the agreement of parties, was more than a mere amendment of a recitation of facts which had transpired, for the motion to dismiss the appeal because of the judgment being founded upon such an agreement was by said district court sustained. If the district court correctly assumed that it should dismiss the appeal because the amendment was one which destroyed the right to a hearing in the appellate court, this amendment was in its effect more than a mere correction of the record to show the history of the case in the trial court, consequently the order dismissing the appeal must be reversed, for, under all the authorities, an attempted exercise of jurisdiction by the trial court after an appeal from that court cannot be suffered to prejudice the rights of the appellant. On the other hand, if, in fact, the amendment accomplished no more than correctly to recite what had transpired during the trial, and in no degree impaired the rights of the appellant to be heard in the district court on the record in the condition it was when the appeal was taken, then the district court erred in holding the amendment of such controlling force that, upon its being shown to exist, the appeal must be dismissed. In any event, therefore, the judgment of the district court must be, and accordingly it is,

REVERSED.

MARY ANDRESEN, ADMINISTRATRIX OF THE ESTATE OF DORA WITTE, V. JOHN L. CARSON.

FILED DECEMBER 21, 1897. No. 7652.

Courts: POWER TO CORRECT RECORDS: APPEAL.

ERROR from the district court of Lancaster county. Tried below before HALL, J. *Reversed.*

Boehmer & Rummons and *W. E. Stewart*, for plaintiff in error.

J. H. Broady, contra.

RYAN, C.

This case involves the identical questions involved in *Andresen v. Lederer*, 53 Neb. 128, and none others, and, accordingly, the judgment of the district court in this case is

REVERSED.

NORVAL, J., dissenting.

JOHN LENZEN V. JOHN A. MILLER.

FILED DECEMBER 21, 1897. No. 7334.

1. **Payment:** APPLICATION. Where a debtor remits money to his creditor without a request or instruction on what particular debt to apply the same, the creditor may apply the money upon any debt of his debtor which he chooses.

2. **Action on Notes:** EXCESSIVE VERDICT: REMITTITUR. Verdict of the jury *held* to be excessive and remittitur ordered.

REHEARING of case reported in 51 Neb. 855. *Judgment below held excessive, and remittitur ordered.*

Leslie G. Hurd, for plaintiff in error.

C. L. Richards, S. W. Christy, and *Stewart & Munger*, *contra.*

RAGAN, C.

This is a rehearing of *Lenzen v. Miller*, 51 Neb. 855. Of the arguments relied on here for reversing the judgment of the district court, we shall notice only two,—that the verdict is not sustained by sufficient evidence, and the

amount awarded by the jury to the plaintiff below is excessive.

1. This suit was brought by Miller against Lenzen to recover on three promissory notes bearing date January 17, 1876. The defense of Lenzen, so far as material here, was the statute of limitations. Miller claimed in avoidance of this defense that Lenzen had paid him various sums of money on these notes from the year 1879 to 1891, both inclusive, part of which money so paid had been indorsed on the notes and the last indorsement made within five years before the suit was brought. Lenzen's answer to this was that the moneys remitted by him to Miller were so remitted with instructions by him to Miller to apply the remittances on an account which he owed Miller, and had owed him since the year 1866. Miller's rejoinder to this was that at no time did Lenzen ever instruct him, Miller, that the moneys remitted were to be applied on the account and in fact gave him no instructions at all, and that as Lenzen owed him an account, and also owed him the notes, he applied the moneys received from Lenzen on the notes in suit. This statement serves to illustrate the theory upon which the case was presented to the jury. The finding of the jury in favor of Miller embraces a finding that Lenzen did not direct Miller on what debt to apply any remittances of money made to him; and this is the finding which plaintiff in error insists is not supported by the evidence. We think it is. Miller testified positively that from the year 1879 to 1891, both inclusive, Lenzen remitted him by checks and drafts, and sometimes by private parties, various sums of money, aggregating $1,330; that at no time did Lenzen ever direct, advise, or request him, Miller, to credit the remittances made to him upon any particular debt owing to Miller by Lenzen. Lenzen, while on the stand in his own behalf, failed to testify that he ever at any time directed or instructed Miller to apply the remittances of money made to him on the account owing to him; but he did

testify that, as he was owing him an account, he made the remittances to him that he did for the purpose of having them applied on the account; that, as a matter of fact, he had forgotten the existence of the notes. Here then is sufficient evidence to sustain the finding of the jury that the remittances or payments of money made to Miller by Lenzen were so made without instructions as to where Miller should apply them, and, as the remittances were so made, Miller might apply them as he pleased,—either upon the notes or the account of Lenzen.

We understand the rule to be that, where a debtor remits money to his creditor without request or instruction on what particular debt to apply the same, the creditor may apply the remittances upon any debt of his debtor which he chooses. (*State v. Hill*, 47 Neb. 456; *Crane v. Keck*, 35 Neb. 683.) But if the evidence in the bill of exceptions was not sufficient to sustain the finding of the jury under consideration, we would probably be unable to disturb that finding for the reason that the bill of exceptions discloses that the deposition of one Christie was read to the jury on behalf of Miller, and this deposition is not in the bill of exceptions brought here. It is said in *Storz v. Finkelstein*, 48 Neb. 27, that this court would not weigh the evidence to ascertain if it sustained a verdict when the bill of exceptions discloses that a deposition introduced in evidence and read upon the trial had been omitted therefrom.

2. Defendant in error has offered to file a remittitur from the judgment, and on this offer we have looked into the bill of exceptions solely for the purpose of ascertaining how much such a remittitur should be on defendant in error's testimony alone, and we now proceed to inquire. The principal of the three notes sued on is $1,500. Computing simple interest at 10 per cent per annum on these notes from their date, January 17, 1876, to November 8, 1893,—the first day of the term of court at which the judgment at bar was rendered,—we find the

time to be 17 years 9 months and 21 days, and the interest $2,671.25, or a total of $4,171.25. Miller testified on the stand in behalf of himself that from 1879 to 1891, both inclusive, he had received from Lenzen $1,330 to apply on these notes; that when he received the payments from Lenzen he entered them in an account-book, and, at his convenience, thereafter he indorsed the payments on the notes in suit; that he never received any instructions from Lenzen to apply any of these payments on his account; that the moneys remitted to him by Lenzen were remitted to him for the purpose of being applied upon the notes; and Miller does not testify that he ever applied one cent of the $1,330 received from Lenzen upon the account owing to him by Lenzen. For some reason, not disclosed by the record, Miller indorsed on these notes $790 only of the moneys received from Lenzen. He did indorse or attempt to indorse $375 of the moneys on a note which Lenzen owed his, Miller's, wife. What disposition Miller made of the remaining $165 is not disclosed by the record; but we think that Miller must be charged with the full amount of money which he admits and swears Lenzen remitted to him, which he received, and which he says was remitted to him to be applied upon the notes. This $1,330 with interest amounts to $2,194.80, which, deducted from the principal and interest of the notes in suit, leaves $1,976.45; but the verdict was for $3,704.11, or $1,727.66 too much. The defendants in error may, within thirty days from this date, and as of the date of the judgment, remit $1,727.66 therefrom, and, if they do so, the judgment of the district court for the remainder will be affirmed. If not, the judgment will be reversed and the cause remanded.

JUDGMENT ACCORDINGLY.

BERNARD SICKEL ET AL. V. JOHN S. BISHOP, ADMINISTRATOR.

FILED DECEMBER 21, 1897. No. 7696.

1. **Action on Note:** EVIDENCE OF RELEASE OF SURETY: VERDICT FOR PLAINTIFF. Evidence examined, and *held* to sustain the finding of the jury.
2. **Review:** ASSIGNMENTS OF ERROR: SET-OFF. Under an assignment that "the verdict is not supported by sufficient evidence" this court cannot deduct from the award made by the jury the amount of a counter-claim or set-off existing in favor of the defendant, and against the plaintiff, where the same was not interposed as a defense to the action.

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

Don L. Love, for plaintiffs in error.

John S. Bishop, contra.

RAGAN, C.

In the district court of Lancaster county John S. Bishop, administrator, sued Bernard Sickel and Luther P. Ludden upon a promissory note. Bishop had a verdict and judgment, and Sickel and Ludden bring the same here for review on error.

1. One argument relied upon here for a reversal of the judgment is that the verdict of the jury is not sustained by sufficient evidence. The execution and delivery of the note are admitted. It seems that the consideration for the note was some personal property sold by Bishop's intestate to Sickel, and Ludden signed the note as surety. Ludden's defense was that some time after the note was given a chattel mortgage was executed to Bishop on the property for which the note was given, and that Bishop agreed that in consideration of the securing of the note by this mortgage Ludden should

be released from the note. The evidence on behalf of Ludden tended to support his defense, while the evidence on behalf of Bishop tended to overthrow such defense. In other words, the evidence on the issue was conflicting, and all we can say upon the subject is that the finding of the jury that Ludden had not made out his defense has sufficient evidence for its support. The defense of Sickel was that he surrendered the mortgaged property to Bishop upon an agreement, then and there made between them, that Bishop should take the property in discharge of the debt evidenced by the note. The evidence on behalf of Sickel tended to support this defense, while the evidence on behalf of Bishop tended to overthrow it. Here again the evidence was conflicting; but it supports the finding of the jury that Sickel had not established his defense.

2. Another argument made here is that the award made by the jury to Bishop is excessive. This contention of plaintiff in error is based upon another contention of his,—that Bishop seized and sold the property which was mortgaged to secure the payment of the note sued upon, and that the note should be credited with the value of that property. The answer to this contention is that if the fact existed, it was a matter of defense for the plaintiffs in error, and they should have filed a counter-claim or set-off for the value of such property. No such an issue as this is made in the pleadings or was litigated on the trial, and, under an assignment that "the verdict is not supported by sufficient evidence," we cannot reduce the award made by a jury by the amount of a counter-claim or set-off which existed in favor of the defendant against the plaintiff when it was not interposed as a defense to the action. The judgment of the district court is right and is

AFFIRMED.

JOHN WARLIER V. CHARLES WILLIAMS ET AL.

FILED DECEMBER 21, 1897. No. 9120.

1. **Injunction:** REMEDY AT LAW. A litigant cannot successfully invoke the extraordinary remedy of injunction to enforce a legal right unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate,—*i. e.* that the pursuit of those remedies, or some of them, will not afford him as prompt and efficacious redress as the remedy by injunction.

2. ———: TRESPASS: EJECTMENT. A plaintiff is not entitled to a mandatory injunction to remove from his real estate one who has without color of title unlawfully and forcibly entered and wrongfully remains thereon, though such trespasser be insolvent.

ERROR from the district court of Burt county. Tried below before FAWCETT, J. *Affirmed.*

McCoy & Olmsted, for plaintiff in error.

H. E. Carter, contra.

RAGAN, C.

In the district court of Burt county John Warlier brought this suit in equity against Charles Williams and others, alleging, in substance, in his petition that he was the owner, and in the actual possession, of a certain tract of land described in said petition; that, at the time of the conveyance of said land by the government of the United States to his grantor, the Missouri river constituted one of its boundaries; that the tract conveyed by the United States government since that time had been enlarged by accretions from said river; that the parties made defendants, against his protest and without any right or color of title or authority, had forcibly entered into possession of the lands formed by said accretion; had "squatted" thereon; and, at the bringing of the suit, were using and cultivating said lands and appropriating to themselves the crops grown thereon; that said defendants and each of them were wholly insolvent; that if they were permitted to remain in possession of said

land for ten years they would acquire title thereto by adverse possession. The prayer was that the defendants might be enjoined from continuing in possession of said lands. To this petition the district court sustained a general demurrer and dismissed Warlier's action, and he brings this judgment here for review on error.

This proceeding is, in effect, an application to a court of equity for a mandatory injunction to remove the defendants in error from the real estate of the plaintiffs in error upon which they have forcibly and wrongfully entered and are wrongfully occupying. Counsel for the plaintiff in error has cited us to numerous cases which he claims sustain his right to this extraordinary remedy; but an examination of all these cases discloses that not one of them is in point. A litigant cannot successfully invoke the extraordinary remedy of injunction to enforce a legal right unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate,—that is, that the pursuit of those remedies, or some of them, will not afford him as prompt and efficacious redress as the remedy by injunction. This we understand to be elementary law. (*Richmond v. Dubuque & S. C. R. Co.*, 33 Ia. 422; *Jerome v. Ross*, 7 Johns. Ch. [N. Y.] 315; Pomeroy, Equity Jurisprudence secs, 221, 275, 1346, 1347, 1357.) Now the facts stated in the petition of the plaintiff in error show simply this: That the defendants in error have forcibly entered upon and are occupying his real estate. The plaintiff in error has the legal title and is in possession of this real estate. He might then institute against these defendants in error an action of forcible entry and detainer under chapter 10 of the Code of Civil Procedure, section 1020 of which expressly provides that such an action may be brought against a defendant who is a settler or occupier of lands without color of title and to which the complainant in the forcible detainer suit has the right of possession. Here, then, is a plain statutory remedy for the

wrong of which the plaintiff in error complains in this action. Is this remedy an adequate one? The statute provides that this action of forcible entry and detainer may be brought before a justice of the peace after giving the parties in possession of the lands three days' notice to quit; that no continuance for more than eight days shall be granted in the case unless the party made defendant shall give bond for the payment of rent, and if the judgment shall be entered in favor of the plaintiff, a writ of restitution shall be awarded in his favor, unless appellate proceedings are taken by defendants, in which case they shall give a bond to pay a reasonable rent for the premises while they wrongfully detain the same. This remedy is not only an adequate one but it is a summary and a speedy one. The relief demanded by the plaintiff in error in this injunction proceeding is the ousting of the plaintiff in error from his real estate so that he may have the exclusive possession of it. A judgment and a writ of restitution in a forcible entry and detainer suit would afford him the same and a more speedy redress than a proceeding by injunction. But it is said by the plaintiff in error that he is entitled to pursue the injunction remedy because of the insolvency of the defendants in error. This argument, as applied to this case, is untenable. If the defendants in error are insolvent, then the plaintiff in error has no redress for the costs and expenses that he may incur in prosecuting either an injunction suit or a forcible entry and detainer suit. Another argument is that the proceeding by injunction will avoid a multiplicity of suits. This argument we also think untenable. We do not understand the mere fact that there exist divers causes of action which may be the foundation of as many different suits between the parties thereto is a ground upon which equity may be called upon to assume jurisdiction and settle all such matters in one suit. (Chief Justice Beck in *Richmond v. Dubuque & Sioux City R. Co., supra.*) The district court was right and its decree is

AFFIRMED.

WALLIE GILLICK ET AL. V. WILSON WILLIAMS ET AL.

FILED DECEMBER 21, 1897. No. 9121.

Injunction: REMEDY AT LAW. On the authority of *Warlier v. Williams*, 53 Neb. 143, the decree of the district court is affirmed.

ERROR from the district court of Burt county. Tried below before FAWCETT, J. *Affirmed.*

McCoy & Olmsted, for plaintiffs in error.

H. E. Carter, contra.

RAGAN, C.

The facts in this case are in all respects the same as in *Warlier v. Williams*, 53 Neb. 143, and, on the authority of that case, the decree of the district court in this is

AFFIRMED.

A. L. BAKER V. ELIZA E. SAVIDGE ET AL.

FILED DECEMBER 21, 1897. No. 7621.

Action by Vendee After Eviction: LIABILITY OF VENDOR. No cause of action arises in favor of a grantee of land, who has been evicted under title paramount, against his vendor who made no covenants or representations as to title and was guilty of no fraud.

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

Lynn, Sullivan & Foley and *J. Fowler*, for plaintiff in error.

R. B. Daley and *W. E. Gantt, contra.*

IRVINE, C.

This is a proceeding in error to review a judgment recovered by Eliza E. Savidge and D. J. Savidge against

A. L. Baker. The bill of exceptions was at a former term quashed, so that we can consider no questions requiring an examination of the evidence. The argument of plaintiff in error, while chiefly addressed to the evidence, is, however, equally applicable to the sufficiency of the petition,—a question always open for consideration. We do not think that the petition states a cause of action, and the judgment must for that reason be reversed.

The petition, in brief, alleges that the Savidges were the owners of certain land in Dakota county and conveyed it by warranty deed to Baker. In consideration of said conveyance Baker agreed to convey to Eliza Savidge certain lots in South Sioux City by good and sufficient warranty deed with the usual covenants and agreements in such deeds contained. At the time of the exchange of deeds Baker represented to plaintiffs that he held a deed to the lots from certain persons named Clark, which deed contained the usual covenants of warranty, which deed had been by the Clarks placed in the hands of defendant with authority to insert the name of any grantee to whom he might wish to convey the property, and that it would save expense and convey as good title as a deed from Baker himself, to insert plaintiffs' names in the Clark deed. Plaintiffs accepted said deed, gave Baker possession of their land, and entered into possession of the South Sioux City lots. The Clarks did not have a good title to the lots, but plaintiffs were later dispossessed of six of them by persons claiming under title paramount. The Clarks are insolvent.

This is clearly not an action for breach of covenant. There was no covenant by the defendant. While it is charged that his first agreement was to convey by warranty deed, it is then pleaded in effect that the contract was changed in this particular and the deed and covenant of third persons were taken in lieu of defendant's. For the same reason there is pleaded the breach of no implied covenant. Whether or not covenants are ever

implied under our forms of conveyancing, it is quite evident that none can be implied against a party who was not a party to the conveyance. There is not pleaded any contract to furnish a good, a marketable, or any particular title. As finally stated, the contract was merely to exercise a sort of power of appointment, possessed by holding the "blank deed" from the Clarks, in favor of plaintiffs. It appears affirmatively that the contract was in this respect fully complied with. It is not charged that the representations made as to Baker's authority to fill the blank and deliver the deed were not true. These are the only representations pleaded. It is not alleged that Baker represented that the Clarks had good title; nor is it pleaded that Baker represented them to be solvent, so that the allegation that they were insolvent is immaterial; nor can the action be treated as one for money had and received. The transaction was an exchange and not a sale, and there is no attempt to rescind. Moreover, the consideration did not fail. The contract was for a conveyance of the lots, with covenants of warranty by the Clarks. This plaintiffs obtained. For all that appears they were fully aware of the condition of the title and were buying on the hazard of sustaining it. At all events they got just what they contracted for, according to the averments of their petition, and have no cause of action against Baker from the bare fact that they were evicted, in the absence of fraud or some covenant or agreement on his part whereby he would be charged.

REVERSED AND REMANDED.

EX PARTE TRESTER.

FILED DECEMBER 21, 1897. No. 9493.

Criminal Law: FAILURE TO FILE INFORMATION: DISCHARGE OF PRISONER. One who has been admitted to bail after a preliminary examination on a criminal charge, and who becomes a fugitive, is

not, after his return or apprehension, entitled to be discharged because no information was filed against him at the term at which he was recognized to appear, and while he was a fugitive.

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

Macfarland & Altschuler and *C. H. Bane*, for petitioner.

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

IRVINE, C.

William P. Trester was convicted in the district court of Cherry county of an assault with intent to kill, and sentenced to imprisonment in the penitentiary for a term of three years. Application was thereafter made to the district court of Lancaster county for a writ of habeas corpus, directed to the warden of the penitentiary, it being alleged that the confinement of Trester was unlawful, because no indictment was found or information filed against him at the term of the district court to which he was bound to appear, and none until the second term thereafter. The district court held adversely to the contention of the prisoner and remanded him to the custody of the warden. From this order error is prosecuted.

The case was heard upon an agreed statement of facts, from which it appears that on March 26, 1896, Trester, as the result of a preliminary examination, was held to appear before the district court of Cherry county at the term thereof to be held April 20, 1896. He was then released upon bail, and, about the first of April, became a fugitive, and remained such until in January or February, 1897, when he voluntarily returned. During his absence two terms of court had been held. He was informed against soon after his return and apprehension, and proceeded against thereafter with due dispatch. At

the April term, 1896, to which he had been recognized to appear, his recognizance was forfeited.

The statutes upon which the prisoner bases his claim to be discharged are sections 389 *et seq.* of the Criminal Code, being chapter 38 thereof, and sections 583 and 585, being a portion of the law relating to prosecutions by information. Section 389 is to the effect that "Any person held in jail charged with an indictable offense shall be discharged if he be not indicted at the term of the court at which he is held to answer," with certain exceptions then stated. Section 390 provides for the discharge of one committed to prison if he be not brought to trial before the end of the second term after indictment, and section 391 for the discharge of one who has given bail if not brought to trial before the end of the third term after indictment found. Section 392 excepts from the operation of the two preceding sections cases where the court shall be satisfied that the state, after reasonable exertions, has been unable to secure material evidence which there is just ground to believe may be secured at the succeeding term. Sections 390 and 391, in addition, each contains an exception of cases where the delay happens on the application of the prisoner. It will hardly be controverted that these provisions do not promulgate any general policy on behalf of the public interest for the speedy prosecution and termination of criminal proceedings, but they are enactments for the benefit of the accused, for the purpose of securing to him his constitutional right to a speedy trial, and their provisions are therefore leveled against delays occasioned by the inaction of the state's officers. He would be a bold defender, more to be commended for zeal than discernment, who would contend that one who breaks jail, or violates his recognizance by flight, could claim the protection of either section, if the indictment had been found before his escape. There can be no doubt that these provisions are applicable, under the present law, to prosecutions by informa-

tion, but they are not applicable to cases where the accused is a fugitive and out of reach of the court while the successive terms elapse. They do not by any analogy aid this applicant. Section 389 requires in certain cases the indictment to be found at the term at which the accused is held to appear, but the terms of the law extend only to cases where the accused has been held in jail. There is reason for a distinction in this respect, and for requiring a more speedy prosecution of one committed to jail than of one released on bail; but without deciding that the section is applicable only to prisoners, or rather without deciding that aside from this section the same diligence is not in ordinary cases required where the accused has been admitted to bail, we think it clear that one admitted to bail cannot, on fleeing from justice, take advantage of the failure of the state to proceed against him in his absence. The letter of the statute does not extend to him, and he is certainly not within its spirit. In *Ex parte Two Calf*, 11 Neb. 221, there appears in the syllabus a statement so general that it gives color to the prisoner's contention in this behalf, but on reading the opinion it will appear that the relators were held in jail, so that the statute was in terms applicable. That also was the state of facts in *State v. Miller*, 43 Neb. 860, and the opinion and syllabus are in that case carefully confined to cases where the accused is held in jail. Neither case is then authority in support of relator's argument.

Section 583 makes it the duty of the county attorney to make examination of the facts connected with any case of preliminary examination, where the offender shall have been committed to jail or recognized or held to bail, and if he shall determine that an information ought not to be filed, to subscribe and file with the clerk a statement containing his reasons in fact and in law for not filing an information, "and such statement shall be filed at and during the term of court at which the offender shall be held for his appearance." It is then provided

that if the court shall not be satisfied with the reasons so filed the prosecutor shall be directed to file an information and bring the case to trial. The plain object of this section, enacted as a part of the act permitting prosecution by information, was to preserve a method whereby a fruitless or improper prosecution might be discontinued before information filed. Such a step might frequently be necessary, as, for instance, where, after the examination required to be made into the law and the facts, the prosecuting attorney finds he cannot make or advise another to make the oath whereby an information must be verified. The requirement that the statement must be filed at the term to which the offender is held to appear gives countenance to the argument that in ordinary cases an information must be filed at that term, but it is far from conclusive on that point, and in any event it affords no argument in favor of the duty of a prosecutor to so proceed against one who has become a fugitive, who is not being held in custody or restrained by the requirements of bail, and who is not seeking but evading the action of the court.

Section 585 enacts that no information shall be filed against any person who has not had or waived a preliminary examination, but provides as an exceptional case that informations may in such cases be filed against fugitives from justice. This only establishes the right to file an information against a fugitive from justice without a preliminary examination. The object was, as appears from the closing clauses of the section, to so permit for the purpose of aiding in process for extradition. The statute is permissive and not mandatory, and had that for its object and not the enforcement of the prosecutor to proceed by information against all fugitives.

None of the statutes relied upon by the relator entitles him to the right claimed, and it is one which he plainly does not possess in the absence of statute.

AFFIRMED.

CLEMENT L. HART ET AL. V. MEAD INVESTMENT COMPANY.

FILED DECEMBER 21, 1897. No. 7661.

1. **Action on Bond:** ANSWER: CONDITIONAL SIGNING. In a suit on a bond, an answer pleading that a defendant signed on condition that others named should also sign before the bond should be delivered and that such others did not sign, is insufficient unless it further alleges that plaintiff had notice of the condition.

2. ———: ———: DEFENSE NOT PLEADED. One of several defendants, sued on a bond, obtaining a favorable verdict on the ground that her signature had been secured by fraud, the other defendants, against whom verdict is at the same time rendered, cannot be heard to complain of the judgment because the release of the successful defendant also released them, they not having pleaded the invalidity of her obligation as a defense for themselves.

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

D. L. Cartan, E. C. Page, Estabrook & Davis, and *J. E. Nevin,* for plaintiffs in error.

William A. Redick, contra.

IRVINE, C.

In the district court the defendant in error recovered judgment against the plaintiffs in error on a bond signed by the plaintiffs in error and one Carrie Parker, and conditioned for the payment of any deficiency judgment which should be rendered the Mead Investment Company against a corporation known as the Northside Building Association, in a foreclosure suit pending at the time the bond was made. Broadly stated, the defense relied on by the plaintiffs in error was that they had each signed the bond on condition that others should sign, and that the condition was not complied with. The district court peremptorily directed a verdict against Hart, Sherman, Nevin, and Parrott. As to defendant Riley the case was submitted to the jury on certain issues, including that

presented by the defense alluded to. The defendant Carrie Parker had apparently, although her answer does not appear in the record before us, interposed a separate defense that her signature had been procured by fraud, and that issue was also submitted to the jury and by it determined in her favor.

While there are in the petition in error numerous special assignments, the case is argued only on the broad ground that the court erred in directing a verdict in favor of the plaintiff against the four defendants above named, and erred in permitting a verdict to be returned against Riley.

From the pleadings as well as from the evidence it appears that the defendants were, or were alleged to be, stockholders or members of the Northside Building Association, which had given to the plaintiff a mortgage on a number of lots in Omaha, to secure the payment of a debt on which there remained due about $15,000. Suit was pending to foreclose this mortgage and an arrangement was made whereby the greater part of the debt was secured on other property or paid, and all the mortgaged property released except two lots. As to these lots the foreclosure was to proceed to decree and sale without the interposition of any defense or exercise of the right of stay, and the building association agreed, in the terms of the contract, to "procure the execution and delivery to second party, by Charles R. Sherman, and C. L. Hart and others, of a bond in the sum of $1,500, conditioned for the payment of any deficiency arising upon said sale, within ninety days from the entry of judgment for said deficiency." The theory of the defense was that all the members of the building association were to join in the bond. The defendants other than Riley pleaded that the condition was not complied with, in that one Livingston did not sign. Riley claimed that the condition was further unperformed in that one Meadimber did not sign. The district court in directing the verdict seems to have proceeded on the theory that

such a defense as the one urged is available only to sureties, and that by the terms of this bond all the defendants except Riley were principals. It is argued that the rule on which the defense is based is not restricted to sureties, and that even if it were, it appears from the face of the bond that the obligation was in the nature of a guaranty of the debt of the building association, and that therefore the defendants would fall within the rule. It would be fruitless to enter into an examination of the questions argued, so far as they relate to these propositions, because in the condition of the pleadings and evidence the judgment was on other grounds correct. The answers are substantially, and in their essential portions verbally, alike. They aver that the building association through its officers came to the defendants with a copy of the contract for a settlement and presented a bond; that the defendants examined these papers, "and upon consideration of the performance of the conditions of said contract, by the parties thereto, and upon the consideration of the signing of said bond by all of the persons named in the body of the bond, this defendant consented, at the request of said Northside Building Association, to sign the document referred to." Further, that the defendants, when they signed said bond, did so "upon the consideration and with the express understanding that one John R. Livingston, named in the bond, would also sign the said bond." To render the defense sought to be interposed available the plaintiff must have had notice of the condition that the bond was not to be delivered until signed by others. (*Cutler v. Roberts*, 7 Neb. 4; *Owen v. Udall*, 39 Neb. 14; *Mullen v. Morris*, 43 Neb. 596; *Brumback v. German Nat. Bank*, 46 Neb. 540.) There is really no distinction in this respect between a bond complete on its face and one bearing in its body the names of persons who have not signed it. In the latter case it has been sometimes held that the fact that names appear in the body of the bond which are not signed thereto is notice to the

plaintiff of the condition attached to its delivery, but this is merely an evidential fact and does not change the rule of law. In *Mullen v. Morris, supra,* it was held that such an incomplete bond is *prima facie* good, that the burden remains on the defendants to establish the conditional delivery. There is in none of the answers any allegation that the plaintiff knew of the condition. Indeed, from the manner of pleading, the inference is that the understanding was between the defendants and the building association alone, and that the plaintiff had no part therein. If we look at the evidence we find sufficient, aside from the fact that the name of Livingston appeared in the body of the bond, to justify submitting to the jury the question of plaintiff's knowledge; but, on the other hand, it is more than doubtful whether there was sufficient to go to the jury on the question of the condition itself. It seems rather that the signing by all the members of the association was a matter insisted upon at first by the plaintiff itself for its own better security, than that any of the defendants attached any condition of that character to his signing, or regarded it as a matter affecting materially his own interest.

It is also contended that, inasmuch as it has been determined by the verdict that Carrie Parker's signature was procured by fraud, all the others are released. It is on this point sufficient to say that none of the plaintiffs in error pleaded any defense of that character.

AFFIRMED.

HERMAN OLDIG V JOHN L. FISK.

FILED DECEMBER 21, 1897. No. 7631.

1. **Ejectment:** ADVERSE POSSESSION: PLEADING: EVIDENCE. In ejectment evidence to prove adverse possession is admissible under a general denial of plaintiff's title.

2. ———: ———: EVIDENCE. The purchase or attempted purchase of an outstanding title by one in adverse possession, and before the expiration of the statutory period, is not alone sufficient to break the continuity of possession or divest it of its adverse character, although the occupant may believe that he is thereby acquiring the true title. RAGAN, C., dissenting.

3. ———: ———: ———. One who claims under a tax deed or by adverse possession does not, by causing to be recorded the patent from the United States to another, acknowledge title paramount in that other.

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

C. Hollenbeck and *Frick & Dolezal*, for plaintiff in error.

N. H. Tunnicliff and *Elmer E. Thomas, contra.*

IRVINE, C.

This action was ejectment by Fisk against Oldig for eighty acres of land in Douglas county. At the close of the evidence, by agreement of the parties, the jury was discharged and the cause submitted to the court, which entered judgment for the plaintiff on special findings of fact. With regard to the point chiefly controverted these findings are as strongly in favor of the defendant in error as the evidence warrants, and we accept them as affording a proper basis for the examination of the case. From them it appears that in 1857 the land in controversy was pre-empted by Fisk, and a patent was thereafter issued to him. In 1871 Wilson Reynolds obtained a tax deed to the land and thereafter received other tax deeds. Oldig claims under Reynolds. Possession was taken under the tax deeds and the court found that the defendant, Oldig, and his grantors had held adverse possession for more than ten years prior to the beginning of the action, except for the fact that in 1889, and before the bar of the statute had become complete, Reynolds, being then in possession, employed a man named Price to search for the patentee and purchase

from him; that Price produced a deed purporting to be executed by Fisk, and Reynolds paid Price $900 therefor. In so doing Price believed that he was dealing with Fisk and acquiring his title to the premises. While it is not so specially found, it was clearly proved that the deed obtained by Price was a forgery.

Defendant in error contends that the defense of adverse possession was not open to the plaintiff in error, for want of a sufficient plea. We shall not examine into the sufficiency of the special plea interposed, because we think that evidence of adverse possession was admissible under the general denial of Fisk's title. True, the statute of limitations, as a general rule, must be pleaded to be made available, but there are two reasons why that rule is not applicable to the defense of adverse possession in an action of ejectment. The first is that sections 626 and 627 of the Code provide specially for the pleadings in actions of ejectment, and as to the answer it is enacted that it shall be sufficient to deny generally the title alleged in the petition. Under such a denial it has always been here held that the defendant may show any facts negativing the plaintiff's right of possession. (*Franklin v. Kelley*, 2 Neb. 79; *Dale v. Hunneman*, 12 Neb. 221; *Staley v. Housel*, 35 Neb. 160; *Wanser v. Lucas*, 44 Neb. 759.) The other reason is that adverse possession is more than a defense of the statute of limitations. Such possession, for the statutory period, not only bars the remedy, but it vests in the occupant an absolute title to the land. In support of that rule we have a long and unbroken line of decisions, beginning at least as early as *Gatling v. Lane*, 17 Neb. 77, and extending down to *Fink v. Dawson*, 52 Neb. 647. Proof of adverse possession goes therefore directly to disprove plaintiff's title, and is admissible under the general issue. (*Fink v. Dawson*, *supra*; *Hogan v. Kurtz*, 94 U. S. 773; *Kyser v. Cannon*, 29 O. St. 359; *Donahue v. Thompson*, 60 Wis. 500; *Miller v. Beck*, 68 Mich. 76; *Stocker v. Green*, 94 Mo. 280; *Trowbridge v. Royce*, 1 Root [Conn.] 50; *Wade v. Doyle*, 17 Fla.

522.) What has been said is not opposed to the case of *Alexander v. Meyers*, 33 Neb. 773, which was a suit to foreclose a lien and, therefore, did not present a similar question.

The record then presents, and succinctly presents, the question whether an attempt by one in the adverse possession of land, and before the statutory period has expired, to purchase from the true owner, operates to divest his possession of its adverse character. Title by adverse possession is acquired by ten years' open, continuous, exclusive occupancy under claim of ownership. Whatever may be the law elsewhere, here that claim need not be well founded in law or in fact, it need not be under a *bona fide* belief that it is well founded, it need not even be under color of title. (*Omaha & Florence Land & Trust Co. v. Hansen*, 32 Neb. 449; *Lantry v. Wolff*, 49 Neb. 374; *Gatling v. Lane*, 17 Neb. 80.) Accordingly it has been held that one in adverse possession does not impair his right to rely upon the statute, by purchasing the land at tax sale and taking and recording a tax deed, and that such acts do not create a break in the running of the statute. (*Griffith v. Smith*, 27 Neb. 47.) This rule was followed in *Omaha & Florence Loan & Trust Co. v. Hansen, supra*, the court saying: "Neither does the purchase of a tax deed break the continuity of possession. (*Griffith v. Smith*, 27 Neb. 47.) Cases may be found which hold that the purchase of such title breaks the continuity. We cannot agree, however, that such is the case. A party in possession of land as owner certainly has a right to protect that possession by the purchase of any outstanding claim or lien against the property. There is not thereby any break in the possession, nor does the adverse occupant rely upon his purchased title in preference to the one which he previously possessed. He joins the two together and possesses whatever title both may give him." These decisions logically, if they do not in direct terms, control the present case. They have stood unquestioned for some years and may justly be regarded

as founding a rule of property. They certainly should not be departed from in the absence of the most convincing reason, or controlling necessity.

Rather than there being such reason, we think that principle and precedent both favor the rule expressed in the cases cited. While there is some conflict of authority it is to be observed that the cases holding that the benefit of the statute is lost by the purchase or attempted purchase of an outstanding title, are uniformly based on the rule that any act recognizing a superior title in another, at least before the bar of the statute has become complete, defeats its operation. This court has several times enforced that rule, as in *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371, where a railroad company sought the benefit of the statute after having, while in possession, but within ten years, instituted condemnation proceedings against the true owner, thus by a solemn admission of record acknowledging his title. In *Roggencamp v. Converse*, 15 Neb. 105, the occupant, claiming the protection of the statute, had taken a lease from the true owner and thereby not only recognized his title but estopped himself from denying it. The general rule cannot be doubted. The error is not in declaring that rule, but in applying it to the facts before us. A vendee is not estopped to deny his vendor's title. In the purchase of an outstanding title there is nothing inconsistent with the former claim of ownership. It is generally conceded that one may purchase an outstanding title to "buy one's peace" or prevent threatened litigation. There is no room to distinguish in this behalf, between litigation threatened by word of mouth, and litigation threatened by the fact that the title is outstanding,—a constant menace from the very fact of its existence. As in adverse possession the motive of the occupant is immaterial, and the claim of ownership need have no legal foundation, there is no reason why one may not at any time buy in an outstanding title and protect oneself against the probability of disastrous litigation. The

fact that one believes the outstanding title to be superior so long as he does not yield thereto cannot affect the question, because the character of one's possession depends upon the fact of a claim of ownership and not its real or supposed validity. In buying what is outstanding there is nothing partaking of the nature of an acknowledgment of the superiority of that title or an abandonment of one's former claim. The old title is not conveyed away or lost. Such an act admits, and admits only, that the occupant deems it worth while to get rid of the outstanding title and unite it to the one under which he has been holding. It does not prove, and alone it does not even tend to prove, a change in the character of the possession or a recognition of a title paramount. In support of these views are the following cases, many of them being cases where the outstanding title was bought while the statute was running, and none recognizing any distinction between that case and one of a purchase after the expiration of the statutory period: *Jackson v. Newton*, 18 Johns. [N. Y.] 355; *Northrop v. Wright*, 7 Hill [N. Y.] 476; *Chapin v. Hunt*, 40 Mich. 595; *Mather v. Walsh*, 107 Mo. 121; *Dean v. Goddard*, 55 Minn. 290; *Clark v. Peckenpaugh*, 46 Ill. 11; *Elder v. McClaskey*, 70 Fed. Rep. 529; *Jackson v. Given*, 8 Johns. [N. Y.] 137*; *Cannon v. Stockmon*, 36 Cal. 535; *Hayes v. Martin*, 45 Cal. 559; *Singer Mfg. Co. v. Tillman*, 21 Pac. Rep. [Ariz.] 818; *Johnstone v. Scott*, 11 Mich. 232; *Headrick v. Fritts*, 93 Tenn. 270; *O'Neal v. Boone*, 53 Ill. 35; *Owens v. Meyers*, 20 Pa. St. 134.

It appears that while the patent was issued to Fisk in due season after his pre-emption, he did not receive it from the land office, and that Reynolds, in 1890, obtained it from the land office and caused it to be recorded. It is claimed that this was a recognition of Fisk's title, or at least that it is evidence tending to show such recognition. It must be remembered that Reynolds entered under a tax deed and that his claim of title was based thereon. In order, then, to lay a foundation for such a

claim, Reynolds must show that the land was subject to taxation, and this must be by showing that the legal or equitable title had passed out of the United States. Furthermore, in order to found a claim of title by adverse possession, it was necessary to show title out of the United States. The recording of the patent was consequently an act going as much to support the original claim of title, as in support of that supposed to have been derived from Fisk.

REVERSED AND REMANDED.

RAGAN, C., dissenting.

The general rule is said to be that any act of recognition or acknowledgment of a superior title in another, during the period of adverse possession, will amount to an interruption of the continuity of possession, and defeat the operation of the statute. (See the rule stated and the authorities collated in 1 Am. & Eng. Ency. Law [2d ed.] p. 838.) The precise question here then is, what act, or what conduct on the part of an adverse occupant, is such a recognition or acknowledgment of the paramount title as will stop the running of the statute of limitations in favor of such adverse occupant? In the case at bar, the evidence shows conclusively that Reynolds, while holding the real estate adversely before the statute had run so as to complete his title, voluntarily offered and attempted to purchase the paramount title to this real estate from Fisk, the owner thereof. The authorities hold that such conduct on the part of an adverse holder is evidence which will support a finding that at that time the occupant, then at least, was not occupying adversely to the holder of the paramount title. See *Lovell v. Frost*, 44 Cal. 471, where it was distinctly held: "If a party in possession of land offers to purchase it from the true owner, and this offer is made, not merely to buy an outstanding or adverse claim in order to quiet his possession or protect himself from litigation, the offer is a recognition of the owner's title, and will stop

the running of the statute." To the same effect see *Litchfield v. Sewall*, 66 N. W. Rep. [Ia.] 104, and cases there cited, in which it is said: "It seems to be well settled that an offer by defendant to purchase the property, which he is holding adversely from the plaintiff, within the statutory time, is a clear recognition of plaintiff's title, and will interrupt the running of the statute."

At the time Reynolds made this attempt to purchase Fisk's title, the statute had not so run as to perfect his own title to the real estate by the adverse occupancy thereof. Clearly, then, Reynolds was not trying to buy an outstanding or adverse claim existing against this real estate in order to quiet his possession to the same or protect him from threatened litigation in reference thereto. He believed, if he did not know, that the paramount legal paper title was in Fisk, and he desired to acquire it so as to vest in his grantee, Oldig, a perfect title to the real estate. The fact that, after receiving and recording the forged deed, he procured the patent issued by the United States to Fisk from the land office and caused it to be spread upon the records is another circumstance which tends at least to show that, at that time and from that time, he was not occupying adversely to the Fisk title but in subordination thereto. The district court concluded from Reynolds' conduct in attempting to purchase the real estate from Fisk that from that time forth he did not claim title to the real estate as against Fisk, nor hold possession nor occupy the same adversely to him, and we think the evidence sustains this conclusion. The judgment of the district court should be affirmed.

CORDELIA W. HARMON, ADMINISTRATRIX, ET AL., APPELLEES, V. CITY OF OMAHA ET AL., APPELLANTS.

FILED DECEMBER 22, 1897. No. 7676.

1. **Void Taxes:** INJUNCTION. "A party who is not guilty of laches may invoke the aid of a court of equity to restrain the collection of a void tax or assessment." *Morris v. Merrell*, 44 Neb. 423, followed.

2. **Taxation:** SPECIAL ASSESSMENTS: CITIES. Where special taxes or assessments against property to pay expenses of improving the streets of a city are void, they cannot be enforced solely on the ground of the benefits of the improvements to the owners of the abutting lots or lands.

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

W. J. Connell and *E. J. Cornish*, for appellants.

Charles S. Elgutter, contra.

HARRISON, J.

On June 1, 1892, the council of the city of Omaha passed an ordinance by which there was created improvement district No. 470, in said city. The district included a portion of Ninth street from the point of intersection of it and Pacific street and extending north to the alley, or to where, in fact, it abutted the tracks and grounds of the Union Pacific and Burlington railroads. On July 2, 1892, the portion of Ninth street to which we have just referred was, by ordinance then enacted, ordered paved with Colorado sandstone, and between May 10 and June 10, 1893, the work of paving was done under contract with the city authorities. Subsequently, and during the year 1893, a special assessment and levy of taxes were made on the properties included in the district to raise the funds to pay for the paving and curbing. This action was instituted in the district court of Douglas county by the appellees of the property

owners in said district to enjoin the collection of the taxes, and from a decree in their favor the city and its officer necessarily involved in the action have appealed to this court.

It was alleged in the petition filed for appellees in the district court, "That no petition praying for said improvement aforesaid signed by the owners of the lots or land abutting upon said street within said improvement district, and representing a majority of the feet frontage thereon, as provided by the laws of the state of Nebraska governing cities of the metropolitan class, has ever been presented or submitted to the city council of the city of Omaha. * * * And plaintiffs further allege that the said mayor and city council were without jurisdiction, and without power or authority of any kind to levy on the property of these plaintiffs, described as aforesaid, the alleged taxes for paving and curbing of said Ninth street, levied as aforesaid, and that said alleged taxes were null and void." The answer of appellants denied the allegations of the portion of the petition which we have quoted, and alleged that "These defendants, further answering said petition, allege that said paving in said district was done with the knowledge and consent and by the permission and authority of the owners of the lots and real estate in said paving district and without objection or protest on the part of said plaintiffs, or either of them, and without objection on the part of any owner of any lot or real estate in said paving district. The said defendants further say that the paving done in said district specially benefited said lots to the full amount, and more than the amount, of the said special assessment levied thereon to cover the cost of said paving." To this answer, so far as is disclosed by the record, there was no reply. The decree rendered in the cause, after the statement that the cause "came on to be heard on the petition, answer, and the evidence and argument of counsel," continues as follows:

"That no petition of the owners of the lots and lands

abutting upon that part of Ninth street within said improvement district No. 470 representing a majority of the feet frontage was ever made, presented, or filed with the mayor or city council asking or requesting to have said street improvement district created or said part of Ninth street in said district paved. The court further finds that said plaintiffs had personal knowledge of the doing of said work of paving at and before the commencement thereof and while the same was being done, and made no objection or protest to said paving being done to the authorities of said city by written protest or otherwise.

"The court further finds that the only protest ever made to or filed with the city authorities of the city of Omaha relating to said paving were the protests filed with the city council, sitting as a board of equalization, of which copies have been introduced in evidence.

"The court further finds, as a matter of law, that by reason of no petition having been made or filed by the owners of the lots and real estate abutting upon said part of Ninth street in said district representing a majority of the feet front thereon asking or petitioning to have said paving done, the said defendant, the city of Omaha, by its mayor and council, were without jurisdiction to do said paving or to levy a special tax or assessment on said lots or real estate to cover the costs of said paving, and that for such reason the said special taxes in plaintiffs' petition described are null and void."

It was adjudged that the assessments and taxes were null and void, and appellants were perpetually enjoined from their enforcement or any attempt at their collection.

Counsel for appellants, in the brief filed, state: "We have, * * * in this case but one question, to-wit, Can a property owner who knows that a city of the metropolitan class is about to pave a street in front of his premises stand by while said improvement is being constructed, making no complaint or protest of any kind to

the city until his property is about to be assessed to raise funds to pay the costs of said improvement, and then, for the first time, with full knowledge of all the proceedings from the beginning, admitting that the special benefits to his property by reason of said improvement equal or exceed the amount assessed against his property, obtain a decree in a court of equity enjoining the collection of said taxes and canceling the same, without offering to do equity by paying an amount equal to the special benefits received, not to exceed the amount assessed against his property?" In regard to the character or quality of the assessment and levies of taxes, a question which arises as a part or element of the main question, the authority to make such street improvements and levy the taxes on abutting lots or lands to pay the expenses of the same was conferred in section 69 of chapter 12*a* of Compiled Statutes 1891, one of the sections of the act passed for the government of cities of the metropolitan class, and, prior to its exercise by the officers of the city, there must have been presented to them a petition by the owners of the majority of the feet frontage of the lots or land abutting on the street praying or requesting that the improvements be made. Without the petition the officers could not move in the premises,—could not order the improvements and levy taxes on the abutting properties for the payment of the whole of the expenses. (*Von Steen v. Beatrice*, 36 Neb. 421; *State v. Birkhauser*, 37 Neb. 521.) There was no such a petition asking for the improvements in district 470 on the portion of Ninth street included in such district; hence the officers were not warranted in the exercise of the authority, the order for the improvements was illegal, and the levy of taxes based thereon was void. It is a familiar rule that enactments by which authority for special assessments or levies of taxes is conferred are to be strictly construed. It is also a familiar doctrine that in order to sustain such assessments, the record must affirmatively show a compliance with all the conditions essential to a valid exercise of

the taxing power. (*Smith v. City of Omaha*, 49 Neb. 883; *Hutchinson v. City of Omaha*, 52 Neb. 345; *Steuberg v. State*, 50 Neb. 128.) The proceedings being without the condition necessary at their inception, they were without authority and the taxes levied were void. (*Hurford v. Omaha*, 4 Neb. 352; *Hanscom v. Omaha*, 11 Neb. 44; *Von Steen v. Beatrice, supra; State v. Birkhauser, supra; State v. Irey*, 42 Neb. 186; *Touzalin v. Omaha*, 25 Neb. 824; *McGavock v. Omaha*, 40 Neb. 85; *Hutchinson v. City of Omaha, supra.*)

It is said in the opinion in the case of *Mulligan v. Smith*, 59 Cal. 206, wherein a question similar to the one we are now discussing was under consideration: "Now the statute made the petition an essential initiative of the proceedings," and further: "When, therefore, the legislature prescribed that a petition from the owners of a majority in frontage of the property to be charged with the cost of the improvement was necessary to set the machinery of the statute in motion, no step could be taken under the provisions of the statute until the requisite petition was presented. It was the first authorized movement to be made in the opening of the avenue. When taken, officers who were to constitute and organize a board of public works were authorized to organize. Until it was taken they had no such authority. They could not legally act at all; or if they acted their proceedings would be unauthorized and void. The presentation of the petition required by the statute was therefore essential. It was, as other courts in construing similar statutes have expressed it, a jurisdictional fact that may not be presumed or inferred, upon which rested all the subsequent proceedings authorized by the statute." (See also *Steckert v. East Saginaw*, 22 Mich. 104; *Tone v. Columbus*, 39 O. St. 281; *Zeigler v. Hopkins*, 117 U. S. 684; *City of Dallas v. Ellison*, 30 S. W. Rep. [Tex.] 1128.)

Reverting now to the main proposition argued for appellants that appellees were not entitled to a decree

enjoining the collection of the taxes because they did not take some action before the improvement of the street, it may be said that the finding of the court that the appellees "had personal knowledge of the doing of said work of paving at, and before, the commencement thereof and while the same was being done," is a fair conclusion on the subject drawn from the facts which appear in the record. Was this sufficient to preclude them from obtaining relief by injunction against the enforcement of the void taxes or to bar them of such relief until the payments of the benefits, if any, which accrued to their properties from the improvement of the streets?

In *Steckert v. East Saginaw City, supra,* it was stated that knowledge of the proceedings and of the improvements and of the illegality of the proceedings which rendered the assessments void did not estop the parties or bar them of the relief prayed, an injunction against the collection of special taxes levied to pay the expenses of paving a street, and this was applicable relative to parties who had signed the petition by which the improvement was requested. To the same effect see *City of Dallas v. Ellison, supra.*

In the decision in the case of *Tone v. Columbus, supra,* it was stated: "In regard to proceedings by public officers, preliminary to levying a special assessment for the improvement of a public highway, it is only when the duty to speak is imperative, that mere silence on the part of a land owner will operate as an estoppel. (Cooley, Taxation, 573; *Counterman v. Dublin Township,* 38 O. St. 515.) To sustain an estoppel because of omission to speak, there must be both the opportunity and the duty to speak; the party maintaining silence must be in a situation to know that some one was relying thereon, and acting, or about to act, as he would not have done had he spoken and asserted his right. (*Viele v. Judson,* 82 N. Y. 32.) We think the true rule is this: When the improvement is of a public street upon which the own-

er's property abuts, before the duty to speak can be said to exist, which is so imperative that if he keeps silent then, he shall not afterwards be heard, it must be shown:

"First—That he knew the improvement was being made. (*Teegarden v. Davis*, 36 O. St. 601; *Stephan v. Daniels*, 27 O. St. 544.)

"Second—That he had knowledge that the public authorities intended and were making the improvement upon the faith that the cost thereof was to be paid by the abutting property owners and that an assessment for the purpose was contemplated. (*Hagar v. City of Burlington*, 42 Ia. 661.) Because cities may improve the public streets out of the general fund and without a special assessment.

"Third—That he knew of the infirmity or defect in the proceedings, under which the improvement was being made, which would render such assessment invalid and which he is to be estopped from asserting. 'At least, in the absence of any evidence of previous knowledge on his part of their unlawful action, he is in time with his protest, when they proceed to deprive him of his rights under such proceedings.' (Cooley, J., 22 Mich. 104; *Davenport C. R. Co. v. Davenport Gas Light Co.*, 43 Ia. 301.)

"Fourth—Some special benefit must have accrued to the owner's property distinct from the benefits enjoyed by the citizens generally. (*Stephan v. Daniels*, 27 O. St. 544; 30 Ind. 194.)" (See also *City of Terre Haute v. Mack*, 38 N. E. Rep. [Ind.] 468.)

In this state the rule has been stated thus: "A party who is not guilty of laches may invoke the aid of a court of equity to restrain the collection of a void tax or assessment." (*Morris v. Merrel*, 44 Neb. 423; *Hutchinson v. City of Omaha*, 52 Neb. 345; *Touzalin v. City of Omaha, supra; Bellevue Improvement Co. v. Village of Bellevue*, 39 Neb. 876; *Thatcher v. Adams County*, 19 Neb. 485.)

The appellees had knowledge of the commencement and progress of the work, and, doubtless, must be

charged with knowledge of the provisions of the law under which it was being done; but it will not do to say that they will be charged with notice of the illegal actions of the city officers in relation to the improvements because of the fact that the work was ordered done without the petition required by the statute on the subject, and of this latter it is not of the record that they possessed actual knowledge. It must rather be said that they were warranted in assuming, in the absence of actual information that the officers would and were acting and proceeding legally in all respects as required by statute and to rest their rights on such assumption, and in so doing they were not guilty of laches. This being true, they were entitled to call for the aid of the court in the restraint of the enforcement of the void taxes, and this without prior payment or tender of alleged benefits to their properties. Where special taxes or assessments against property for the payment of expenses of the improvement of streets of a city are void they cannot be enforced solely on the ground of the benefits received by the owners of the abutting lots or lands. (*Buckley v. City of Tacoma*, 37 Pac. Rep. [Wash.] 441.)

Under the facts as they appear in the record before us, the appellees were entitled to the relief afforded them in the decree of the district court. The decree is right and is

AFFIRMED.

PHILETUS PECK V. REUBEN R. TINGLEY ET AL.

FILED DECEMBER 22, 1897. No. 7538.

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

2. **Partnership Note:** EVIDENCE. A note executed by a member of a firm or partnership in the firm name, where it does not appear on its face to have been executed by the firm in any other capacity

than as a principal debtor, and the partnership is a commercial one, is presumptive evidence that the note is the note of the partnership, and shows a valid claim against it.

3. **Conclusion of Witness on Vital Issue:** ERROR. A portion of the evidence examined, *held* objectionable and erroneously admitted.

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

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

C. E. Tingley and *E. J. Burkett*, *contra.*

HARRISON, J.

This action was commenced in the district court of Lancaster county by Reuben R. Tingley of the defendants in error against E. W. Hovey, Fred A. Hovey, and Philetus Peck to recover the amount alleged to be his due on a promissory note of date September 22, 1896, for the sum of $1,200, and having thereon the signatures of E. W. Hovey and Hovey & Peck. It appears that E. W. Hovey was the father of Fred A. Hovey and Philetus Peck the father-in-law; that at the time the note in suit was executed there was a partnership doing business in Lincoln under the firm name and style of Hovey & Peck, of which firm Fred A. Hovey and Philetus Peck were members, the former the active managing member and in charge of the business. Answer was filed for some of the parties whom it was sought to charge with the payment of the debt evidenced by the note, that of Philetus Peck being the only one which needs any particular notice, as he is the only party actively prosecuting error proceedings from the adverse judgment of the district court. His answer was as follows:

"Comes now the above named defendant, Philetus Peck, and having obtained leave of court to file this, his second amended answer herein, answering for himself alone to the petition of the plaintiff, says that he has not sufficient knowledge whereon to base a belief as to the

truth of the allegations contained in plaintiff's petition, and therefore denies the same.

"And by way of first defense herein, this answering defendant avers that at the date mentioned in plaintiff's petition, upon which date plaintiff claims the said note was executed, this answering defendant, together with the defendant Fred Hovey, were a copartnership duly organized and formed under the laws of the state of Nebraska, having their principal place of business in the city of Lincoln, Nebraska, and were at that time carrying on their partnership business. That said partnership was formed for the sole purpose of carrying on the general business of wholesale and retail dealers in stoves, farm implements, hardware, and other goods of a like character, and for no other purpose whatsoever; and that neither of the partners, by terms of the said partnership agreement, had the power or right to pledge the credit of the said partnership for any other purpose than that of carrying on its said business as aforesaid; and that the signing of notes by the said partnership for purposes other than the purchase of goods necessary and usual for the carrying on of their said business, as hereinbefore set out, was expressly prohibited by the terms of the partnership agreement; and that neither the said copartnership nor this answering defendant at any time received any benefit from, or consideration for, the said pretended signature to the said pretended note set out in plaintiff's petition; and that the said pretended note, and the pretended signature of Hovey & Peck thereto, was not made for the purpose of carrying on the mercantile business of the said Hovey & Peck, and that no person whomsoever had any authority whatever to sign the said name of Hovey & Peck to the said pretended note, and of all of which said matters and facts the said plaintiff had full and complete notice at the time of the delivery to him of the note set out in his petition.

"By way of further defense this answering defendant

avers that at the time of the pretended execution of the pretended note set out in plaintiff's petition, he was, and for a long time past had been, a resident of the state of California, of all of which matters and facts the plaintiff at the time of the delivery to him of the said pretended note well knew; and that he never heard of the pretended execution of the said pretended note until after this action was brought, and at no time between the time the said pretended note set out in plaintiff's petition became due, until after the beginning of this action upon the said pretended note, did this answering defendant have any knowledge or notice whatsoever of the existence of any such pretended note."

To this answer the reply was a general denial of all the new matter therein, and further as follows:

"Plaintiff especially denies that the signing of said note by Hovey & Peck was without consideration, but avers that said loan was made for the express benefit of said firm, in that prior to April, 1885, said firm of Hovey & Peck was indebted to P. P. Mast & Co. on an overdue account amounting to about $1,736.50. In order to save said firm from suit on said account, defendant E. W. Hovey became surety for said firm of Hovey & Peck for said amount and secured said debt by giving a mortgage on his farm and home to said P. P. Mast & Co. At the time of making said loan and giving said note sued on in plaintiff's petition, said debt was not yet paid, and plaintiff avers that the proceeds of said loan for which said note was given went to pay off said indebtedness of Hovey & Peck to P. P. Mast & Co., which was secured by said mortgage on defendant E. W. Hovey's farm, or to make necessary improvements upon said farm so that said defendants Hovey & Peck would not be pushed for said indebtedness, the real facts of which this plaintiff is ignorant.

"Plaintiff further especially denies that defendant Philetus Peck was without knowledge of the firm's liability on said note in question before action thereon

was commenced, but avers that all the defendants herein were duly notified of said note upon the day said note became due and payable."

Of the issues there was a trial to the court and a jury, resulting in a verdict and judgment for Reuben R. Tingley.

Some objections to paragraphs of the trial court's charge to the jury are presented in the argument in brief filed for plaintiff in error. In the motion for a new trial the portions of the charge to the jury which it was desired to assail as erroneous were grouped in one assignment. Of one of these it is stated in the brief that it was proper and correct, with which statement we will not take issue. This being determined, we need give the objections to these paragraphs of the charge no further consideration. (*Graham v. Frazier*, 49 Neb. 90; *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb. 68; *Denise v. City of Omaha*, 49 Neb. 750.)

It is urged that the trial court erred in refusing at the close of introduction of evidence in chief for defendant in error to instruct the jury, at request of counsel for plaintiff in error, to return a verdict in his favor. We do not think the trial court erred in its ruling on the request of counsel. At the time it was made the note in suit had been received in evidence, and was shown to have been executed by a member of a firm. There was nothing on its face from which it appeared that it purported to be executed by the firm of Hovey & Peck in any other capacity than as a principal debtor. This being true, and the partnership being a commercial one, in the business of which it is usual or at times necessary to borrow money and to issue notes, the presumption arose and prevailed that the note was the note of the partnership, given for a partnership debt, and was a valid claim against the partnership. (*Schwank v. Davis*, 25 Neb. 196; *Whitaker v. Brown*, 16 Wend. [N. Y.] 507; *Van Dyke v. Seelye*, 52 N. W. Rep. [Minn.] 215.)

Reuben R. Tingley, while testifying in his own behalf,

was told by his counsel, "You may state to the jury, in your own language, for what purpose and on what consideration that note was given." (The reference in the foregoing was to the note in suit.) To this an objection was interposed, which was overruled, when counsel for Tingley said, "Just state the facts." Mr. Tingley then said, "Well, the consideration was to Hovey & Peck." This was immediately objected to; but the objection was overruled. In this we think the trial court erred. The matter of the consideration for the execution and delivery of this note, to whom it moved or by whom received, was a vital question of the issues, and one on which the evidence was conflicting and somewhat evenly balanced. The allowance of this statement by the witness may have furnished the turning point for the jury. The testimony was but a conclusion and of a nature to directly affect the rights of plaintiff in error, and its admission prejudicial. It follows that the judgment of the district court will be reversed and the cause remanded.

REVERSED AND REMANDED.

HOLT COUNTY V. BARRETT SCOTT ET AL.

FILED DECEMBER 22, 1897. No. 7483.

1. **County Treasurer:** ADDITIONAL BOND: COUNTY BOARD. By Compiled Statutes, chapter 10, section 21, a county board is empowered, according to circumstances, to require the treasurer either to give an additional bond, or to give additional sureties on the subsisting bond.

2. ———: ———: SURETIES. Sureties executed a county treasurer's bond with the above provision in contemplation and forming a part of their contract, and they are not released from liability on the bond by the board's requiring additional sureties.

3. **Evidence of Admitted Facts:** REVIEW. It is not error to exclude from evidence a written instrument, the making and contents whereof are admitted by the pleadings.

4. **Qualification of Officer:** OFFICIAL BOND: APPROVAL. To entitle one elected to an office requiring an official bond to be inducted into office, his bond must be approved and filed for record before his induction, and within the time fixed by statute.

5. ———: ———: ———. While the rule last stated prevails in actions in which it becomes necessary for the claimant of the office to prove his strict legal title to the office to show that he is the officer *de jure*, such as actions of quo warranto, or to recover the fees from a party who, during the term for which the officer was elected, held the office as a *de facto* officer, and received such fees, in actions on official bonds for alleged breaches of the conditions thereof, a very different doctrine prevails and is applicable.

6. **Official Bonds:** APPROVAL: LIABILITY OF SURETIES. The requirements of the statutes in regard to approval of official bonds is for the benefit and convenience of the public, and not directly for the treasurer or his sureties; and, where the bond has been executed and delivered within the time prescribed by the law, though not approved, or not until a date after the time prescribed, and by virtue of the bond and its delivery the treasurer has obtained possession of the office, and received the fees and emoluments thereof, the sureties cannot escape liability for any breaches of the conditions of the bond by their principal, because the bond was not approved or not so until a date without the time prescribed by law.

7. ———: ———: ———. The official bond of a county treasurer with the oath indorsed thereon was filed within the statutory limit for such act. It had not then been approved, and was not approved until a date beyond the limit prescribed. He entered upon the duties of the office and during the time he continued therein, received the fees and emoluments appertaining thereto. In an action on the bond for an alleged breach of its conditions, *held*, that the fact of the lack of approval at the time prescribed by law was not matter of forceful defense for the sureties on the bond.

8. **Officers:** QUALIFICATION. One who holds and performs the duties of an office and receives the fees and emoluments thereof by virtue of an election or appointment thereto or under color of right, is a *de facto* officer and not a mere intruder.

9. **County Treasurer:** APPROVAL OF BOND: SURETIES. A person who was holding the office of county treasurer, and was re-elected, or elected for a second and the succeeding term, filed a bond with the oath of office indorsed thereon within the time fixed by law. The bond then, however, lacked approval, and was not approved until a date without the time fixed by law for such action. The treasurer continued in the office. *Held*, That he was in the office as of the new term under color of right, and was an officer *de facto*, and the sureties on the bond were precluded or estopped from denying that he was in possession of the office of the second term and *de jure*.

10. ———: ———. The fact that an official bond has been approved does not of itself constitute or evidence the delivery and acceptance of the bond.

11. ———: ———: RELATION. *Quære:* Are approval, taking and subscribing the oath of office indorsed on the bond, and its filing for record constituent elements of its delivery, the filing being the dominant one; and if it is within the limit of time prescribed by statute, and the approval of a later date, and beyond that of the limit, does the approval relate back to the filing?

12. **Principal and Surety:** BONDS. The decision in the case of *Cutler v. Roberts*, 7 Neb. 4, examined and distinguished.

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

The facts are stated in the opinion.

H. E. Murphy and *M. F. Harrington*, for plaintiff in error.

References: *Manley v. City of Atchison*, 9 Kan. 364; *Supervisors of Richmond County v. Wandel*, 6 Lans. [N. Y.] 33; *Sullivan v. State*, 23 N. E. Rep. [Ind.] 150; *State v. Lincoln County*, 18 Neb. 283.

John H. Ames, E. F. Pettis, E. M. Bartlett, John C. Watson, H. M. Uttley, and *R. R. Dickson, contra.*

In support of arguments in favor of the contentions that the bond was properly excluded as evidence against the sureties, and that the court properly directed a verdict for defendants, reference was made to the following cases: *State v. Lansing*, 46 Neb. 514; *United States v. Le Baron*, 19 How. [U. S.] 73; *Broome v. United States*, 15 How. [U. S.] 143; *Bruce v. State*, 11 Gill & Johns. [Md.] 382; *Winneshiek County v. Maynard*, 44 Ia. 15; *Young v. State*, 7 Gill & Johns. [Md.] 253; *State v. Jarrett*, 17 Md. 310; *Davis v. Haydon*, 3 Scam. [Ill.] 35; *State v. Cosgrove*, 34 Neb. 386; *State v. Lynn*, 31 Neb. 770; *McMillin v. Richards*, 45 Neb. 786; *Commonwealth v. Yarbrough*, 2 S. W. Rep. [Ky.] 68; *Commonwealth v. Magoffin*, 25 S.

W. Rep. [Ky.] 599; *Mayo v. Renfroe*, 66 Ga. 408; *City of Chicago v. Gage*, 95 Ill. 593; *Archer v. State*, 74 Md. 443; *Harwood v. Marshall*, 9 Md. 103; *County Commissioners of Dorchester County v. Meekins*, 50 Md. 45; *McPherson v. Leonard*, 29 Md. 377; *Thomas v. Owens*, 4 Md. 220; *United States v. Boyd*, 15 Pet. [U. S.] 187; *Gunther v. State*, 31 Md. 29; *Union Bank of Maryland v. Ridgely*, 1 Harr. & G. [Md.] 231; *State v. Wayman*, 2 Gill & Johns. [Md.] 279; *Falconer v. Shores*, 37 Ark. 386; *State v. Carneall*, 10 Ark. 156; *Basham v. Commonwealth*, 13 Bush [Ky.] 36; *Rounds v. City of Bangor*, 46 Me. 541; *Blake v. Sturtevant*, 12 N. H. 569; *Rounds v. Mansfield*, 38 Me. 586; *Wood v. State*, 40 S. W. Rep. [Ark.] 87.

HARRISON, J.

This action was instituted for the county of Holt on what was claimed to be the bond of Barrett Scott, as treasurer of said county. It was alleged in the petition that at a general election held on a stated day of November, 1891, Barrett Scott was duly elected county treasurer of Holt county for the term of two years, the term having its inception on the first Thursday after the first Tuesday of the month of January, 1892; that on December 29, 1891, Barrett Scott, as principal, and his co-defendants, as sureties, executed and delivered the bond in suit, and that the principal on the same day was duly qualified or took the oath of office. It was further averred that the bond was approved March 1, 1892; that Scott, on the day designated by law for the commencement of the term of office of county treasurer, assumed such office, and entered upon the discharge of the duties thereof, in which he continued until August 18, 1893, on which date the office was assumed by one R. J. Hayes, who had been duly appointed Scott's successor. The default alleged, or breach of the conditions of the bond, was that the principal therein had failed to account for and pay over and had converted funds of the county which he had received as its treasurer in the sum of

$90,000. There was an answer filed for the principal in the bond, but against him the county recovered a judgment of which there is no complaint here, and his plea may be passed without further notice. The co-defendants, the sureties, all joined in a plea of their defenses, except Joseph S. Bartley, for whom there was filed a separate answer. The answer of all the sureties except Bartley admitted the allegation of the petition relative to the election of Barrett Scott to the office of county treasurer of Holt county, and it was alleged for each of these answering defendants that Barrett Scott, soon after his election, prepared and presented to them, respectively, a bond similar to the one declared upon in the petition in the action, and requested them to sign the same as his sureties, with which request they complied of date December 17, 1891, and then delivered the instrument to the principal therein; that Barrett Scott had been and was, during the term terminating in January, 1892, the county treasurer of Holt county, and his selection for the office at the election in November, 1891, entitled him to become his own successor, and it was of the duties of the county board to approve any bond he might present prior to the inception of the term of office, if approved at all, and before approval to require and compel an accounting for and production of all funds in his hands as treasurer or with which he was then chargeable; that the board wholly failed to perform its duty in either particular, which operated to discharge the answering defendants, since they had executed the bond with a full reliance on the strict performance by the board of such duties; and, further, that the failure to approve the bond before the time by law fixed for the commencement of the term of office operated a vacancy of the office; also, if said bond ever became of effect, Barrett Scott was ordered, on March 1, 1892, removed from the said office, and a vacancy in said office declared to exist, and, if any responsibility had attached to defendants by reason of

their executing the bond, it then wholly ceased. It was further averred that the board, with full knowledge that Barrett Scott had failed to account for the funds received during his first term as county treasurer, had not compelled an accounting, but had wholly failed so to do, allowed him to retain the office, perform its duties, and collect moneys, and on March 1, 1892,—long after the proper time for such action,—fraudulently approved the bond, with the intention then entertained of thereby rendering the defendants responsible for the past acts of the principal in the bond. The answer of Bartley, in addition to pleas similar to those contained in the pleading of his co-defendants, alleged that at some date in the month of February, 1892, the county board had a pretended accounting with Barrett Scott, at which certain moneys and property were produced and represented as belonging to Holt county, which in truth and in fact were not the moneys and property of said county,—all of which facts were then known by the board; and that, regardless of such facts and its knowledge thereof, the board, on March 1, 1892, approved the bond; that the defendant signed the bond in good faith and in ignorance of the facts set forth in this portion of his plea, and also of the further fact that Barrett Scott had not fully adjusted the accounts and charges of his first term; that in so signing the bond the defendant relied on the county board to compel the proper adjustment of the accounts and charges of the prior term of office of the treasurer, which duty was wholly neglected and purposely disregarded by the board. It was also of Bartley's answer that during the month of July, 1892, the board, without the knowledge or consent of the answering defendant or his co-defendant sureties, procured two persons to then sign said bond as additional sureties (the persons so signing are not parties to this suit); that such signing constituted a material alteration of the bond, and operated a release of defendants from liability on the bond. There were in the answers for all

defendants general and special denials of the execution of the bond, of the principal therein having ever taken the office for the second term; also, of any failure on his part to fully perform any and all duties of the office. Just how much force and significance, in view of some express or implied admissions of the answers, such denials possessed, we need not now notice or discuss. The replies were general denials.

The trial of the issues was before a jury. The signature of the principal on the bond was identified and the instrument offered in evidence. An objection was made, but the bond was received as against the principal and ruling was withheld as to the other defendants. During the further course of the trial all further objections to the admission of the bond on the ground of lack of proof of the signatures of the sureties was cured by an admission as to each and all of them, but the bond was not then admitted as against the sureties. What was the final action in this regard we will relate in what we conceive to be its proper connection. During the further progress of the trial there was offered for the county evidence of the acts of the county board, Barrett Scott, and some other parties who, in one way or another, became participants in the matter of the office of county treasurer at that time. Such evidence tended to show that the bond in suit had been delivered to the county clerk and by him filed; that, probably some weeks after the expiration of Scott's first term as county treasurer, there was an attempted adjustment of the accounts and affairs of the office between him and the board, when (this was during the month of February, 1892) it was discovered that Scott was chargeable with $70,000.04; that there was on hand a very small sum in cash or money, and the balance was claimed by Scott to be on deposit in certain banks, of which he at the time furnished a list by which was shown the amount asserted as on deposit in each of the banks named in the list. This was not satisfactory to the board, and a production

of the funds was insisted upon. To comply with this demand Scott requested ten days, which was granted by the board, and the treasurer did, at the time designated, have in the vault of the office an amount of money which, combined with a sum represented by a receipt from the state treasurer, made the amount with which he was then chargeable. Some considerable time afterward the board again demanded that the treasurer produce the money, and allow it to be again counted by the board or its committee appointed for the purpose, but this was met with a refusal or a failure to comply.

On March 1, 1892, the bond in suit was approved, and on the same day Scott was charged in impeachment proceedings before the board, and on the fourth day of the same month was adjudged guilty, and his removal from office decreed or ordered. This action of the board was reviewed in the district court in error proceedings, and on March 31 was reversed, so far as the record before us discloses. (And we will say here that in reference to any fact at this time we but state what the record now presented shows.) Scott continued in the possession and performed the duties of the office. No further steps were taken until July 14, 1892, at which time, by resolution of the board, the insufficiency of the treasurer's bond was declared, and he was ordered "to give additional freehold sureties for the better protection of the taxpayers." In an attempted compliance with this order, on or about July 16, Barrett Scott procured William McWhorter and Milo Pickering to sign the bond. After this a committee appointed by the board, presumably after an examination of the bond and an inquiry of the financial responsibility of the proffered additional sureties, reported on August 31 that the bond was still insufficient. It was then ordered that Scott be required to have his bondsmen certify on his bond to the amount of $200,000. On September 1 the board, by resolution then carried, declared that after ten days' notice Scott had failed to give sufficient sureties, and

the office of treasurer was vacant. An appointment was then made, and, to the extent we are informed by this record, the appointee gained possession of the office in August, 1893, by the aid of the courts. There was also evidence received which tended to prove the treasurer's failure to account for the funds of the county in a stated sum. When, at the close of the introduction of its evidence in chief, the plaintiff rested, the objection for the defendants, the sureties, to the admission of the bond was renewed and sustained. A motion was then made for the sureties that a verdict in their favor be directed. This was done. Such a verdict was rendered and judgment entered thereon.

The assignments of error have for their burden the exclusion of the bond from evidence, and the giving the peremptory instruction. One—probably the main—ground of the objection to the introduction of the bond in evidence was that there was a variance between the instrument declared upon and the one the county offered, and it is apparent, from what occurred and what was said by the court at the time, that this was the ground on which the objection was sustained. The difference between the bond stated in the petition and the one offered was that on the latter appeared the two names written thereon in July, 1892. It is contended that these additional sureties were not disapproved or rejected, were in fact accepted, or became responsible as bondsmen, which rendered the bond offered essentially different from the one on which the petition was based. The facts, as they are before us, will not bear out this contention. The action of the board on September 1, 1892, after these names had been added to the bond, in declaring the office vacant was a clear and direct refusal of the parties as additional sureties. A rejection or disapproval of the sureties rejects the bond, or bars its becoming of force. (*Apthorp v. North*, 14 Mass. 166; *State v. Fredericks*, 8 Ia. 553; *Marshall v. Hamilton*, 41 Miss. 229.) Was the signing of these two names on the bond,

under the circumstances of such signing, a material alteration, or even a spoliation? It is not claimed that the defendants had knowledge of this action, or consented to it. It is provided in section 21 of chapter 10, Compiled Statutes: "The county commissioners of any one of the counties of this state may require the county treasurer to give additional freehold sureties whenever in the opinion of a majority of said commissioners the existing security shall become insufficient, and said commissioners are hereby also authorized and empowered to demand and receive from said county treasurer an additional bond as required by law, with good and sufficient freehold security in such sum as said commissioners or a majority of them may direct, whenever in their opinion more money shall have passed or is about to pass into the hands of said treasurer than is or would be recovered by the penalty in the previous bond, and if any county treasurer shall fail or refuse to give such additional security or bond for and during the time of ten days from and after the day on which said commissioners shall have required said treasurer so to do, his office shall be considered vacant, and another treasurer shall be appointed agreeably to the provisions of law." The board was empowered by this provision to require additional sureties to the bond then in existence, or to demand an additional or new bond to be executed and delivered to them. This provision was of the law at the time the bond was executed, and entered into it, and became a part of the contract evidenced by it, as much and as fully as if it had been of its written terms, hence the order that additional sureties be given was but the exercise by the board of one of their rights authorized by the contract, and the signing by the two additional sureties was not a material alteration of the bond, and certainly not a spoliation. It must be concluded from what has been said on this branch of the case that these parties, being rejected as sureties, never became liable as such. Their names had been signed to the instru-

ment legally or pursuant to authorization by law. The effect of the instrument in suit was not changed; and the bond offered and that declared on in the petition were, in legal effect, the same; and the bond should not have been excluded on the ground or for the reason given for such action. At first glance it might be said that the decision in the case of *Stoner v. Keith County*, 48 Neb. 279, seems to express a doctrine contrary to the views just stated on the subject of the additional names on the bond, but on looking into that case it will be discovered that the additional sureties had been adjudged liable on the bond by the district court. Whether they had been approved or rejected did not appear, and the case was tried in the district court and presented in this court on the theory that such signers had rendered themselves liable, and were so unless certain subsequent occurrences had worked their discharge; and further, that the first signers were released by the addition of the other names was a conceded fact, from all of which it is clear that the subject herein discussed was not then presented or involved.

We will turn now to the answers, and what they established in relation to the bond and its execution. We have hereinbefore stated that there were in them denials of the execution of the bond and of its being of the meaning and effect pleaded in the petition. Notwithstanding these denials, a careful reading of the answers convinces us that there are contained in each of them statements which are admissions of these facts. It is unnecessary to quote from the pleadings in question. Their true import, when they are subjected to a critical inspection, is unmistakable, and fully supports the conclusion which we have just announced. This being true, these questions in regard to the bond, the execution and text of the bond, were not in issue,—were admitted facts, hence it was not error to exclude the bond from evidence.

It remains to consider the other ground of alleged

error,—the giving of the peremptory instruction. This action was but a sequel to the exclusion of the bond from evidence, and followed it as a matter of course; and, as we have seen, the reason which moved the trial court to reject the bond was not a true one, and, if it was all the reason which existed for the court's directing the verdict, the judgment would be reversed; but, if there was anything in the case which, though not assigned as a basis for what the court did, was sufficient to sustain such action, the judgment should not be reversed. There was but one of the main and determinable issuable matters which, at the close of the evidence in chief on behalf of the plaintiff as to proof, was left in such condition as would warrant the action of the court in giving the peremptory direction in regard to the verdict. The one matter to which we refer was in relation to the approval of the bond. It did appear that the bond was filed December 29, 1891; that Scott had qualified, and his oath of office was indorsed on the instrument as filed. These things were done within the time prescribed by law for their doing, but the approval was without the fixed time. It will now be in order to notice particularly some of the provisions of our statute with reference to official bonds, more especially the portions which relate to the approval of such instruments. Section 1 of chapter 10 of the Compiled Statutes provides that all officers designated therein, including county officers, shall, before entering upon their respective duties, take and subscribe an oath of which the form is given, which shall be indorsed on their bonds if the officers are required to give bonds. Section 5 of the chapter is as follows: "Official bonds, with the oath indorsed thereon, shall be filed in the proper office within the times as follows: Of all officers elected at any general election, on or before the first Thursday after the first Tuesday in January next succeeding the election." By section 7 it is provided that all bonds of county officers, except commissioners and supervisors, shall be

approved by the county board, and, except the bonds of the county clerk and members of the county board, shall be filed and recorded in the office of the county clerk. In section 11 it is provided that "the approval of each official bond shall be indorsed upon such bond by the officer approving the same, and no bond shall be filed and recorded until so approved." Section 15 reads as follows: "If any person elected or appointed to any office shall neglect to have his official bond executed and approved as provided by law, and filed for record within the time limited by this act, his office shall thereupon *ipso facto* become vacant, and such vacancy shall thereupon immediately be filled by election or appointment as the law may direct in other cases of vacancy in the same office." Section 17 reads: "When the incumbent of an office is re-elected or reappointed he shall qualify by taking the oath and giving the bond as above directed; but when such officer has had public funds or property in his control, his bond shall not be approved until he has produced and fully accounted for such funds and property; and when it is ascertained that the incumbent of an office holds over by reason of the non-election or non-appointment of a successor, or of the neglect or refusal of the successor to qualify, he shall qualify anew within ten days from the time at which his successor, if elected, should have qualified." Barrett Scott had been treasurer by election for the term of two years immediately prior to the term which the bond in suit was given to entitle him to enter upon and hold. He had been elected for the second term. Of what is required of a re-elected officer in regard to qualifying, giving bond, etc., it was announced by this court in *State v. Lansing*, 46 Neb. 514, that "sections 7, 15, and 17, chapter 10, Compiled Statutes, should be construed together, and when so construed the effect of section 17 is to require one who has been re-elected or reappointed to an office to qualify therefor by taking the oath and filing the bond, where a bond is required, in the same

manner and within the same time as one for first time elected." Section 15, herein quoted, was construed in that decision and by its requirements relative to execution, approval, and filing official bonds was held to create a condition precedent to the right of a person elected or appointed to be inducted into office; and the provision was also held to be self-executing and on failure of compliance therewith by the elected or appointed person, the right to the office was extinguished or lost, and the office vacant and subject to be at once either filled by appointment or election as by law in each case provided. The decision in that case, also that in *McMillin v. Richards*, 45 Neb. 786, *State v. Cosgrove*, 34 Neb. 386, and *State v. Lynn*, 31 Neb. 770, are cited as establishing that the bond of an officer has no force or validity unless approved by the person or persons and in the manner prescribed by law, in any and all cases where approval is required. Whatever may be our ultimate conclusion relative to the exact question herein involved and for discussion, we cannot agree that the cases last referred to reached the length claimed. The cases of the *State v. Lansing*, *State v. Cosgrove*, and *State v. Lynn* were all applications for writs of quo warranto, the object aimed at in each case being to oust a party from an office, and, in such cases, the party whose right to hold the office is attacked, in order to retain the office, must show strict compliance with the conditions precedent required to entitle him to enter upon and hold the office. All such cases are distinguishable from actions on official bonds. As was well stated in *State v. Lansing*, 46 Neb. 522: "Actions upon bonds given out of time and direct proceedings to oust an officer for failing to qualify according to law present very different questions for consideration." And on page 520: "There is another class of cases which were suits on official bonds tendered and approved after the statutory time. The best considered of these cases hold the bond valid, not because the statute fixing the time was directory merely, but because the officer became a *de facto* offi-

cer or because the officer and his sureties were estopped from asserting the invalidity of the bond, they having tendered it and it having been accepted, and the officer having acted under it." The case of *McMillin v. Richards, supra*, was an action by the plaintiff to recover the fees and emoluments of the office of county treasurer of a county in this state, which it was claimed had been received by the defendant during his incumbency of said office as treasurer *de facto*. It was therein held that the plaintiff, in order to recover, must have proved that he possessed the full legal title to the office, had fulfilled all the requirements of the law necessary to constitute him on officer *de jure*. That case clearly presented different questions governed by different reasons and principles than appear in an action like the case at bar on an official bond.

The direct question to which our attention will now be given is, did the bond in suit, by reason of its non-approval within the time prescribed by statute, remain inoperative, and never become of any force or effect? If so, the obligation of the sureties had no life, did not charge them, and the peremptory instruction to the jury was correct. We will here again call to notice the rule that, when these parties defendant herein signed this bond as sureties, they did it, or it must be presumed or considered that they acted, in contemplation of all the laws then existing which were applicable to and governing transactions of the nature of the one in hand, and with knowledge that all such laws and rules of law entered into and became a part of the contract, which, by the signing, they indorsed as their agreement.

Turning now to some of the regulations prescribed by the statutory law in regard to official bonds, and to which we have hereinbefore called attention, in what position does a fair and reasonable construction and enforcement of them place these defendants? Section 15 clearly makes it the duty of the prospective officer to have his bond approved and filed. His neglect to per-

form these duties operates his forfeiture of the right to claim or hold the office. It cannot, by any process of true reasoning, be said to apply to the bond, and render it any the less effective or operative, if it ever became so. The latter was not its intention, and is not of its import. It was not intended to and does no more than prescribe what shall be done by the prospective officer, and assign the results of a neglect on his part to do what is required. The other sections to which we have hereinbefore referred, in relation to approval of the bond, are of the duties of certain of the county officers, and doubtless of the ones to whom it is allotted that they shall approve such bonds as the one in suit; also of the officer whose duty it was to file and record it after its approval; it may be said that they were derelict in the performance of their duties, or the bond would not be in its present condition; but can or does the fact that they were negligent, render the obligation signed by the sureties of none avail where it has been delivered, and the principal has assumed the office, the proper and faithful performance of the duties of which it was designed to secure? We think not. These provisions relative to approval of the bond were not for the benefit of the sureties of bonds, but for the convenience and better security of the public and the parties who may be directly interested. The sureties had signed the bond and delivered it to the principal therein for the purpose for which it was used, and they have no reasonable or tenable ground for complaint in that some matters which were not of their concern, or not to be exercised in their behalf, were neglected and not observed. Nor do we think, by adopting this view, we do not administer the law with fairness and with as nearly equal justice to all as may be. The sureties executed the bond and gave it to the principal to be delivered to the county, by which act he was to obtain and hold possession of the office, and receive and enjoy its fees and emoluments. The principal delivered the bond, neglecting a prescribed duty,—that of procur-

ing it to be approved. He took possession of the office and received and enjoyed its fees and privileges, and it is asserted much more. Whether the last is true or not, we, in the present hearing, have no concern, and need not definitely determine or discuss. To hold that the bond became of effect on its delivery and the assumption of the office by its principal signer, is to do no more than enforce the contract, to require of the sureties what they had in contemplation when they executed and gave the bond to their principal, and by so holding we but do justice to the other party to the bond,—the public, nominally the county. It certainly seems right and consistent with fairness to adopt the course which will be just to all and inflict no injustice on any.

Our conclusion is not new or novel, or unsupported by the opinions of other courts and of text writers. Provisions which require the approval of official bonds are for the benefit of the obligee who alone can take advantage of a failure to observe them. Such failure is never ground upon which the obligor or his sureties can escape liability after a breach of the conditions of a bond. (4 Am. & Eng. Ency. Law [2d ed.] 669; Murfree, Official Bonds sec. 48; Mechem, Public Officers sec. 313.) "Approval being thus for the protection of the public only, it is well settled that where, by virtue of the bond, the officer has been inducted to the office his sureties cannot escape liability for his defaults because the bond was not approved by the proper officer, or was not approved at all." The case of *People v. Johr*, 22 Mich. 462, was an action against Johr and his sureties on his bond as treasurer of a county in Michigan to recover damages for alleged breach of the bond in not accounting for and paying over moneys received for sales of lands for taxes. The law required the execution and approval of the bond as conditions precedent to the officer's right to make the sales. The bond, as in the case at bar, was excluded from the consideration of the jury in that case for the reason that it was not executed and approved as re-

quired by statute. In the opinion in the supreme court on error it was said: "It is doubtless true that, without the approval of the prosecuting attorney and the other circuit court commissioner, the auditor general might have refused the bond, and declined to allow the county treasurer to make the tax sales, and it may be admitted that, as between the auditor general and the people, it was his duty to have done so, and to have appointed another person to make the sales. But the precise question here is whether the county treasurer, who, on the faith of this bond, was allowed to make the sale and receive the money, or his sureties, can now be heard to make the objection that the bond executed by them and accepted and received by the auditor general as and for the bond required by the statute, and on the faith of which he has allowed the treasurer to sell the lands and receive the money, was not approved by all the officers whose approval it was the duty of the treasurer to have obtained. For whose benefit, and for what purpose, did the statute require the approval by the officers mentioned? Certainly not for the benefit or protection of the county treasurer or his sureties, but solely for the security and protection of the public, that the state might not be in danger of losing the public funds by insufficient sureties. And, after the county treasurer and his sureties have had all the benefits they could possibly have enjoyed had the approval been obtained, it is not for his sureties even—much less for him—to object that the state or its officers should have exercised more caution in ascertaining their sufficiency as sureties; for this, upon final analysis, is the whole force of the objection, the bond itself, in all its provisions, being in strict compliance with the statute. Such, we think, must be the result both upon logical and legal principles. It is so well settled as long ago to have become a maxim of law, that any one may waive the benefit of a provision of a law, or a contract introduced for his own benefit. * * * And though, as between the people of the

state and the auditor general, the latter may have had no right to waive the required approval of the sureties in this case, yet, when the people in their corporate capacity sue upon the bond, under the circumstances of this case, there is no principle of justice or common sense, and we are aware of no principle of law, which prohibits them, so far as the defendants are concerned, from waiving the approval, or which can give the defendants the right to insist upon it for the purpose of defeating their liability. * * * We think, therefore, the bond in this case, as between the people and the defendants, is to be treated in all respects as a statute bond, and that the circuit court erred in excluding it from the jury." (See also *McCracken v. Todd*, 1 Kan. 148; *Auditor v. Woodruff*, 2 Ark. 79; *Marshall v. Hamilton*, 41 Miss. 229; *Stevens v. Treasurers*, 2 McCord [S. Car.] 67; *People v. Edwards*, 9 Cal. 286; *Sprowl v. Lawrence*, 33 Ala. 674; *Jones v. State*, 7 Mo. 46; *Apthorp v. North*, 14 Mass. 166; *State v. Fredericks*, 8 Ia. 553; *Boone County v. Jones*, 54 Ia. 699; *Mendocino County v. Morris*, 32 Cal. 145; *State v. Hampton*, 14 La. Ann. 736; *Young v. State*, 7 Gill & J. [Md.] 253; *Dutton v. Kelsey*, 2 Wend. [N. Y.] 615; *Skelinger v. Yendes*, 12 Wend. [N. Y.] 306; *Ring v. Gibbs*, 26 Wend. [N. Y.] 502.) Some of the cases cited may not be in all respects entirely in point, but such as are not support the doctrine. It may be said, if we give full force to the decision in *State v. Lansing, supra*, that Barrett Scott did not possess a full indefeasible title to the office, since his bond had not been approved. If this be conceded, he was a *de facto* officer, demanded, obtained, and held the office by reason of his election thereto. He was not a mere intruder, but was acting under color of right, and in this action his sureties are estopped. They cannot be heard to assert that he was no officer. In *Jones v. Scanland*, 6 Humph. [Tenn.] 195,—an action upon an official bond,—it was said: "Although the election of a person as sheriff was void, and his induction into office illegal by reason of his having then been a defaulter to the treas-

ury, and he did not thereby become sheriff *de jure*, yet he became sheriff *de facto*, and those who voluntarily bound themselves for the faithful performance of his duties, as sureties, cannot absolve themselves from their obligation by insisting that he was no sheriff." In the case of *State v. Rhoades*, 6 Nev. 352, it was announced: "Where a state treasurer, re-elected in 1866, accepted a new commission, and took a new oath, and continued to discharge the duties of the office, but failed to file a new official bond within the time prescribed by law, held, that he was an officer *de facto*, and holding as of the new term; and that the sureties on the new bond afterwards filed were estopped from denying that he was holding as of the new term *de jure*. * * * A person discharging the duties of a public office under color of right is an officer *de facto* and not a mere intruder. * * * Where a person discharges the duties of an office as an officer *de facto* and not as a mere intruder he and his sureties are estopped by the recitals in his official bond from denying that he is entitled to the office." After quoting at length from a number of authorities, it is said in the opinion: "These authorities are squarely opposed to the ground taken here that the failure to execute the bond within the statutory time released the sureties. They have precluded themselves from saying that the person for the faithful discharge of whose official acts they became sureties was not of right entitled to perform such acts. The authorities cited on behalf of defendants are not adverse to this conclusion. It will be found upon examination, either that the person for whom the bond was given was a mere intruder, not deemed an officer *de facto*, and consequently not estopped from showing that he was not an officer either in fact or of right, or where the bond was given under circumstances rendering it utterly null, but still free from all elements estopping the parties to it from showing such to be the case. Bonds like this are sustained upon a strong current of authorities holding that a per-

son being an officer *de facto* is not permitted to show or rely upon the fact that he was not an officer *de jure*, for the purpose of attacking or setting aside anything which he may have done in his official capacity. And upon like reason his sureties are also estopped. Where there is no element of estoppel, or the reason for the rule does not exist, of course it should not be applied. The absence of the circumstances constituting an estoppel is the distinguishing feature between the cases cited for the defendants and those sustaining the conclusion at which we have arrived." (See also *Green v. Wardwell*, 17 Ill. 278; *City of Chicago v. Gage*, 95 Ill. 625; *Nunn v. Goodlett*, 10 Ark. 89; *Stevens v. Treasurers*, 2 McCord [S. Car.] 67; *Boone County v. Jones*, 54 Ia. 699; *Plymouth v. Painter*, 17 Conn. 585; *Pier County v. Hannam*, 3 Barn. & Ald. [Eng.] 266; *Bucknam v. Ruggles*, 15 Mass. 180; *People v. Collins*, 7 Johns. [N. Y.] 549; *Monteith v. Commonwealth*, 15 Grat. [Va.] 172; *State v. Bates*, 36 Vt. 387; *Town of Lyndon v. Miller*, 36 Vt. 329; *Marshall v. Hamilton*, 41 Miss. 229; *Norris v. State*, 22 Ark. 524; *People v. Jenkins*, 17 Cal. 500; *People v. Slocum*, 1 Ida. 62; *Ford v. Clough*, 8 Me. 334; *Reed v. Hedges*, 16 W. Va. 194.) For decisions of this court in which the doctrine of estoppel is recognized and held applicable to sureties on bonds see *Gudtner v. Kirkpatrick*, 14 Neb. 347; *Adams v. Thompson*, 18 Neb. 541; *Dunterman v. Storey*, 40 Neb. 447; *Flannagan v. Cleveland*, 44 Neb. 58.

In the case of *Cutler v. Roberts*, 7 Neb. 4, it was held: "A statutory bond must conform substantially to the requirements of the statutes in respect to its penalty, conditions, form, and number of sureties. The statute in such case enters into and forms a part of the contract, and a surety may insist, as a defense in an action on such a bond, signed by but one surety where two are required, that he is not liable thereon, the bond not being perfect on its face, unless he waive the defect." The facts of the case were, in substance, as follows: A judgment in an action on a promissory note was rendered

against one John Rouse. In an effort to stay an execution of the judgment, the debtor procured a bond to be signed by one surety who, when he signed it, told Rouse that the law required two sureties on such a bond. Rouse promised to get the signature of another surety on the bond but did not do so. He sent the bond to the probate judge before whom the judgment had been obtained, who, on its receipt, did not approve it, but marked it filed of the date received. An execution was procured to issue for the enforcement of the judgment and levied on property of the debtor, and in an action to restrain the officer from selling the property, the doctrine, a statement of which we have quoted, was announced. The law in force then in regard to stay bonds was as follows: "On all judgments for the recovery of money only, except those rendered in any court on appeal or writ of error thereto, or against any officer or person or corporation or the sureties of any of them, for money received in a fiduciary capacity, or for the breach of any official duty, there may be stay of execution, if the defendant therein shall, within twenty days from the rendition of judgment, procure two or more sufficient freehold sureties to enter into a bond, acknowledging themselves security for the defendant for the payment of the judgment, interest, and costs," etc. The court stated in its opinion written by MAXWELL, J.: "The law in such a case enters into and forms a part of the contract, and a surety may insist as a defense, in an action on a bond signed by but one surety, that he is not liable thereon, the statute being notice to all parties concerned that two sureties were required, unless the surety waived the condition prescribed by the statute,"—from which it appears that the decision was in part, at least, based on the ground that the provision of the statute, by which two sureties were required to make the instrument a statutory bond, was one for the protection and benefit of a surety thereon and with which he could demand a compliance. The case is not an authority which can govern or influence

in a determination of the questions in the case at bar, for reasons: First, the provision herein invoked by the sureties relative to approval of bonds is not designed for the security or benefit of a surety or the sureties, as was the one involved in that case. Second, in the case at bar the purposes for which the bond was executed and delivered were accomplished; hence the consideration passed. In that case, from the very nature of the object sought to be attained by the execution and delivery of the bond, it could not be effected by the bond as filed, nor could its filing produce or induce such conditions as would work an estoppel of the surety to plead or assert the nonoperativeness of the bond. The fact that the bond under consideration in the case of *Cutler v. Roberts* was never approved was not noticed further than to merely state it in the opinion, and it was not an element of the basis for the decision. In the case of *United States v. Maurice*, 2 Brock [U. S.] 96,—an action on an official bond decided by Chief Justice Marshall as circuit judge, —which, while probably not strictly in point in the case at bar, is quite so, and supports the rules herein announced, there will be found some very instructive and wholesome reading on the subjects herein involved.

There is another branch of the question which we think deserves notice. It may be urged that, as there was no approval of the bond in time, there was no acceptance of it by the county, hence it is not binding on the sureties. This is not tenable. The law contemplates that the officer will have the bond approved and afterward filed and recorded. If he secured its approval, and did not file it or deliver it, it would be no more binding because of the approval than it would without it. The approval does not work the acceptance of the bond. It purports to evidence an investigation by the proper person or persons into the reliability and responsibility of the signers of the bond, and the other matters as to which an examination usually does, and always should, precede the approval; and if the bond is approved, this

fact also shows that the investigation has disclosed everything to be satisfactory, but the approval does not constitute or evidence a delivery and an acceptance.

There is another argument which might be urged as establishing the validity and potency of the bond in suit, viz., that, when filed in time, as was this one, a later approval relates back to the time of filing, and will be considered as done of that date. This is on the ground that where there are several acts which may be said to be concurrent, required to be done to make or complete a matter or thing, then the dominant act in this case,—the delivery,—shall be preferred, and to it the other acts have relation. Supporting this doctrine are *State v. Tool*, 4 O. St. 553; *Drew v. Morrill*, 62 N. H. 23. This point was not discussed by counsel and as to whether it should prevail or not, we will merely indulge in a query; but if there ever were cases in which the doctrine of relation should be invoked and apply, it is probably in actions of the nature of this.

It follows from the conclusions herein stated that the sureties were not entitled to the peremptory instruction. It should not have been given. The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

IRVINE, C., dissenting.

While concurring for the most part in the opinion of the court, I cannot concur in the conclusion that the bond sued on became operative, and desire, as briefly as possible, to express my views on the two principal points on which the court bases that conclusion. I understand the court to hold, in the first place, that the approval of an official bond, at least within the time limited by law, is not essential to the consummation of the contract between the obligors and the public; and, in the second place, that because Scott was suffered to assume the duties and receive the emoluments of the office, and be-

came a *de facto* officer, the sureties are estopped to deny his title to the office.

It is not, in my opinion, necessary to consider whether, under any circumstances, an official bond can become operative until it has been approved. Many cases, it is true, proceed upon the theory adopted in the opinion of the court, that provisions for approval are solely for the benefit of the public, and may be waived, and that therefore the sureties cannot set up a want of approval as a defense. On the other hand other cases hold that where an approval is required, it is the act, or one of the acts, designated by law as requisite to an acceptance, and that in the absence of approval there has been no acceptance and therefore no technical delivery. (*United States v. Le Baron*, 19 How. [U. S.] 73; *Bruce v. State*, 11 Gill & J. [Md.] 382; *State v. Jarrett*, 17 Md. 310; *Crawford v. Meredith*, 6 Ga. 552; *Commonwealth v. Yarborough*, 2 S. W. Rep. [Ky.] 68; *Commonwealth v. Magoffin*, 25 S. W. Rep. [Ky.] 599.) It may be added that every utterance of this court in the past, and several have been very direct and emphatic, favors this view. (*State v. Lynn*, 31 Neb. 770; *State v. Cosgrove*, 34 Neb. 386; *McMillan v. Richards*, 45 Neb. 786.) However, treating that as an open question, or as one which should be resolved in favor of the county's contention, it must be conceded that by force of our statutes the approval of the bond within the time limited is essential to entitle the person elected or appointed to enter upon the office. The cases last cited certainly are authority for that statement, and the case of *State v. Lansing*, 46 Neb. 514, is absolutely conclusive of the question. So long as that case stands without being expressly overruled there can be no doubt on the subject. The opinion of the court recognizes this principle, and thereby admits that Scott lost all title to the office when the Thursday after the first Tuesday in January passed without an approval of the bond. Scott nevertheless remained for ten days a *de jure* officer, holding over under his first election because his successor had

not qualified, and then lost even that title through his failure to requalify under the tenure so acquired. (*State v. Cosgrove, supra.*) Thereafter he was at most a *de facto* officer. It follows that he never occupied the office under his election, by virtue of the right acquired by that election, or for the term contemplated by that election. Being already in office he there remained, solely because the county board neglected to perform its duty by choosing his successor, and subject to be by that board at any minute summarily ousted. The bond had been by the sureties executed in due season, and had by Scott been presented to the county authorities in due season. This is an important and perhaps a controlling fact, the legal effect of which the opinion of the court entirely ignores. The bond contained no recitals except that Scott had been elected for the term mentioned, and its condition is for the faithful performance of the duties of the office. It contemplates that he should hold the office under the election recited, and for the term fixed by law, that he should, in a word, hold as treasurer *de jure*, as it was practicable for him to do when the bond was made. It was not conditioned for his good conduct as an officer holding over his former term, or as a *de facto* officer by sufferance of the county board. (*Winneshiek County v. Maynard*, 44 Ia. 15.) It was given for one purpose, and by the opinion of the court it is made to bind the sureties for an entirely different purpose. The condition of the bond, when read in the light of the facts existing when it was executed, and of the law, was that Scott should faithfully discharge the duties of his office as the county treasurer of Holt county elected for the term of two years beginning the Thursday after the first Tuesday in January, 1892. The court holds the sureties liable upon a bond conditioned for the faithful discharge of the duties of county treasurer, provided the county board should wrongfully suffer him to remain in office, or if by hook or crook he could manage to remain there. It will not do to say that the end in view was his acting

as county treasurer, and that it made no difference by what right or in what absence of right he so acted. The sureties are entitled to have their contract construed as it is and not as the court may think they would, under other circumstances, have been willing to make it. Moreover it by no means follows, because a man is willing to become surety for the acts of a *de jure* officer, that he is willing to stand responsible for the acts of one who intrudes himself into an office and may at any moment be unceremoniously evicted,—one charged with all the burdens of a *de jure* officer, but entitled to none of his rights. I think the bond is void, not directly for the reason that it was not approved in time, but because for that reason Scott lost all title to the office, and the event never occurred whereby, according to the terms of the contract and the contemplation of the parties, it was to be rendered operative.

Passing now to the other point referred to, the supposed estoppel of the sureties, I cannot see upon what fact that estoppel can be predicated. If the bond had recited facts inconsistent with the averment of Scott's forfeiture of the office, then an estoppel would arise by deed. If there were any covenant on the subject a liability might arise thereon. If the sureties, after Scott lost his right to office, had done any act furthering his claim or inducing the county to admit him into or retain him in office, an estoppel might arise *en pais*. But there was, as already said, no recital in the bond except of Scott's election, and the sureties are not seeking to controvert that fact. There was no covenant binding them for anything but a lawful holding. No fact had occurred when they signed the bond or when it was presented to the county, whereby Scott's right had been defeated or impaired. After the act of forfeiture they did no act recognizing his continued right or inducing the county to recognize it. I can understand that the defendants would be estopped to assert any fact contrary to recitals or covenants contained in the bond, and I can understand

that they might be estopped, even in the absence of express recitals, to assert any defect in Scott's title existing at the time the bond was signed or presented. So if the bond had been presented after the time limited by law for Scott's qualification it may be that the sureties could not thereafter allege the forfeiture of right as a defense, at least if the facts creating the forfeiture were known to them, or if Scott had been permitted to enter upon the office in reliance upon the waiver of the irregularity by the defendants. But to create an estoppel by deed there must be some recital or covenant contrary to the fact which it is sought to establish by proof; and to create an estoppel *en pais* there must have been some act or omission of duty, in reliance whereon the other party has altered his position to his disadvantage, so that it would be inequitable to permit the fact to be shown. In this case there is not the semblance of any one of these essential elements. The court, on the other hand, seems to raise the estoppel from the fact that after the defendants had in good faith presented the bond for a timely approval, the county board neglected its duty and permitted Scott to wrongfully hold office; to raise it from facts occurring after the sureties had done all their part in making the contract, and facts in which they had no part and over which they had no control. The judgment of the court, it seems to me, substitutes for the contract of the parties one made for them without their consent or authority by other persons. It holds them liable, not for the misconduct of Scott as an elected treasurer, but for his misconduct as an intruder, and in effect adds to that liability a responsibility for the negligence of the county board. Finally, it estops them by recitals and covenants they did not make, and by facts not only unknown to them but nonexistent at the time of the contract and created by the adverse party and not by them.

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

COMMERCIAL INVESTMENT COMPANY V. JOHN M. PECK ET AL.

FILED DECEMBER 22, 1897. No. 7517.

Payment of Mortgage Debt to Clerk of Court: FORECLOSURE. After the commencement of an action to foreclose a real estate mortgage for the entire debt, but before judgment, the mortgagors, in vacation, without an order of court or plea, deposited with the clerk of the court the full amount of the mortgage debt and all costs. The clerk embezzled the money and absconded. *Held*, That the clerk did not receive the money by virtue of his office, but in his individual capacity as the mere agent of the mortgagor, and that such deposit of the money did not extinguish the mortgage. IRVINE and RAGAN, CC., dissenting.

ERROR from the district court of Dawes county. Tried below before BARTOW, J. *Reversed.*

W. W. Wood and *Stewart & Munger*, for plaintiff in error.

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

NORVAL, J.

The action was to foreclose a real estate mortgage for the entire amount of the debt. The mortgagors, after the service of a summons upon them, in vacation, and without the knowledge and consent of the mortgagee or its attorney, paid to the clerk of the district court the full amount due on the mortgage, and all costs. No entry of such payment was entered by the clerk upon the books of his office, nor did he pay the money to the plaintiff or its attorney, but embezzled the same and absconded. Subsequently a decree of foreclosure was entered, the defendants being in default of an answer, an order of sale was issued, and the mortgaged premises were sold thereunder. Neither the plaintiff nor its attorney was apprised of the deposit with the clerk until after the sale, when, for the first time, the defendants

ascertained that the clerk had embezzled the money, and that a decree of foreclosure had been entered in the cause. At a term subsequent to the rendition of the decree, the court, on application of the defendants, vacated the decree and set aside the sale, which order is here for review.

We are unable to assent to the proposition that the clerk, by virtue of his office, was authorized to receive the money in this case, and that the payment thereof constituted a payment "into court" and extinguished the mortgage debt. The legislature of this state has provided (Code of Civil Procedure, sec. 889): "The clerk of each of the courts shall exercise the powers and perform the duties conferred and imposed upon him by other provisions of this code, by other statutes, and by the common law. In the performance of his duties he shall be under the direction of his court." The clerk of the district court of Dawes county did not receive the money under and by virtue of any order of the court below requiring the payment to be made, for the very obvious reason no such order was ever entered. Moreover, the money was not received by the clerk during term time, or under such circumstances as to admit of an inference that the payment was made under the court's direction; but the clerk received the money in vacation and without the sanction of the court, either expressed or implied. At common law, payment to the clerk in vacation during the pendency of an action, before judgment and without an order of court, of the amount due plaintiff, was not authorized, and no statutory enactment in this state can be found which empowers a clerk of the district court to receive money under the circumstances disclosed by this record. The law did not constitute the clerk the agent of this plaintiff to receive the amount of its mortgage. After judgment, a clerk of court may receive payment, even in the absence of any express statute upon the subject. (*McDonald v. Atkins*, 13 Neb. 568; *Moore v. Boyer*, 52 Neb. 446.) The authority

of a clerk of a court to receive payment of a judgment in his office existed at common law, and has been recognized by long usage. The official power of the clerk is circumscribed by the extent of his duties, and he ceases to act by virtue of his office whenever he steps beyond the boundary of his power. It was no part of the official duty of the clerk to receive the money from these mortgagors. He did not act officially, but in his individual capacity as the mere agent of those who entrusted him with the money. (*Durant v. Gabby*, 2 Met. [Ky.] 91; *Baker v. Hunt*, 1 Wend. [N. Y.] 103; *Currie v. Thomas*, 8 Porter [Ala.] 293; *Windom v. Coates*, 8 Ala. 285; *Ball v. Bank of State*, 8 Ala. 590; *Governor v. Read*, 38 Ala. 253; *Alexandria v. Saloy*, 14 La. Ann. 326; *Hammer v. Kaufman*, 39 Ill. 87.)

In *Mayzk v. M'Ewen*, 2 Bailey [S. Car.] 28, it was decided that where money is paid to a clerk of the court he receives it as the private agent of the party making the payment, unless accompanied by a plea of tender, or the deposit has been made in pursuance of an order of court to do so.

In *Keith v. Smith*, 1 Swan [Tenn.] 92, it was ruled that money paid into court is unavailing as a tender if not made upon an order of court authorizing it to be done.

In *Hammer v. Kaufman*, 39 Ill. 87, it was held that a clerk of court is not, by virtue of his office, authorized to receive money as a deposit except by order of the court; that money paid to him without such order may be withdrawn by the depositor at any time before the other party has manifested a willingness to accept it, or the court has recognized it as a fund at its disposal, and that in case the money is lost by the clerk the one making the deposit must sustain the loss, instead of the person for whose benefit the money was received.

In *Levan v. Sternfeld*, 55 N. J. Law 41, it was decided that payment of money to a clerk of court after the commencement of an action and before judgment, without a rule, may be disregarded by the party for whom the same

was deposited. Reed, J., in the course of his opinion, says: "Now, the money paid into court in this case, so far as the record shows, was not paid in under any rule. The clerk has no authority to receive money without a rule of court. (1 Sellon, Practice sec. 18, p. 277; *Baker v. Hunt*, 1 Wend. [N. Y.] 103.) The doctrine is obviously sound, therefore, which is said by Campbell in a note to *Rucker v. Palsgrave*, 1 Campbell [Eng.] 557, to have been laid down by Lord Ellenborough, that if, after action brought, the moneys sought to be recovered are paid without a rule of court, the plaintiff must have a verdict."

Currie v. Thomas, 8 Porter [Ala.] 293, was a suit upon a promissory note where the defendant pleaded that a prior suit had been brought on the same note, and that he had paid the full amount due thereon to the clerk of the court. It was held that payment to the clerk did not prejudice the plaintiff. The court in disposing of the question observed: "There are several stages in the proceedings of a case, in which the clerk of a court is by law authorized to be the holder of the moneys which may be paid into court. Thus, on plea pleaded, when the cause of action is admitted to a partial extent, and denied as to the residue. So in the case of a tender. So, also, when money is paid into court in satisfaction of a judgment. In all these cases, however, the money is presumed to be brought before the court, and as it can have no custody of money, it of necessity remains with the clerk, as the fiduciary of the court. But independent of statutory enactments no case is remembered in which money can be lawfully paid to the clerk in vacation, or in any other manner than as the officer of the court in term time, and the receipt of which is always shown by some record of the court, or some proceeding yet on paper, but progressing to a record. To permit this officer to receive demands which have not been reduced to judgment would bring about consequences of a most mischievous tendency, unless received at a time when he

is presumed to be under the immediate control of the court,—that is, in term time,—and then only in those cases where the performance becomes a duty imposed by the peculiar organization of the court."

After diligent search we have been unable to find a single authority which sustains the proposition that the deposit of the money with the clerk under the admitted facts disclosed by this record extinguished the indebtedness, or that plaintiff must look to the clerk for its money.

Section 856 of the Code of Civil Procedure declares that "whenever a petition shall be filed for the satisfaction or foreclosure of any mortgage, upon which there shall be due any interest or any portion or installment of the principal, and there shall be other portions or installments to become due subsequently, the petition shall be dismissed upon the defendant bringing into court, at any time before the decree of sale, the principal and interest due with costs." This section is not applicable here for more reasons than one. In the first place, the mortgage sought to be foreclosed herein is not embraced within the provisions of the law, since the whole indebtedness was past due, and no portion or installment could mature subsequent to the bringing of the suit. Again, the money was not paid "into court," but was deposited with the clerk, in vacation, without any rule or order of court permitting it to be done, and payment was not accompanied by an answer pleading the same. Under the authorities already alluded to, such order or plea was necessary to make the payment available. The clerk in receiving the deposit was the private agent of the mortgagors, and the loss must fall upon them. It follows that the court below erred in treating the mortgage debt as paid, and in vacating the decree of foreclosure and setting aside the sale. Decree reversed and action dismissed.

REVERSED AND DISMISSED.

HARTFORD FIRE INSURANCE COMPANY V. ANNA F. COREY ET AL.

FILED DECEMBER 22, 1897. No. 7650.

1. **Continuance.** The overruling of an application for continuance of a cause, based on the absence of a witness, is without prejudice when the person whose presence was desired was in court during the trial, placed on the witness stand, and was examined by the parties.

2. ———: AFFIDAVITS: REVIEW. Affidavits used in the court below on the hearing of a motion for continuance are not available on review, unless embodied in a bill of exceptions.

3. ———: PLEADING: LACHES. A defendant who, by leave of court, has been permitted to answer after the time fixed therefor by statute, is in no position to object to the case being placed on trial on the ground that the plaintiff has not replied, no order in reference to a reply having been made by the court.

4. **Leave to File Pleadings:** LACHES. The granting of permission to file a reply out of time, or during the trial, rests largely in the legal discretion of the trial court.

5. **Costs:** MOTION TO RETAX: REVIEW. A motion to retax costs is essential to obtain a review of a mistake, neglect, or omission of the clerk of the trial court in the taxation of costs, but such motion is unnecessary where the court has determined that a party is liable for certain costs and rendered judgment against him therefor. *Burton v. State*, 34 Neb., 125, followed.

6. ———: ATTORNEY'S FEES: INSURANCE: PLEADING. Where an attorney's fee is sought to be recovered in an action upon an insurance policy issued under the valued policy act of 1889, the same should be demanded in the petition, and the matter presented to the trial court. *German Ins. Co. v. Eddy*, 37 Neb., 461, followed.

7. ———: ———: ———: ———. In case an attorney's fee is not specifically prayed for in the petition, but the same is demanded in writing by plaintiff at the time of the rendition of the judgment, such act will be treated as an amendment of the prayer of the petition.

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

Fyke, Yates & Fyke and *T. P. Lanigan*, for plaintiff in error.

M. B. Gearon, J. R. Hanna, and *T. J. Doyle, contra.*

NORVAL, J.

Action by Anna F. Corey and Dora Corey upon a fire insurance policy. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant prosecutes error.

Immediately preceding the trial the defendant below applied for a continuance in order to procure the attendance of one Ethel Corbett as a witness, which application was denied. Complaint is now made of this ruling. The record discloses that the person above named was present at the trial, was placed upon the witness stand, and examined by plaintiff below and cross-examined by defendant. The court also informed counsel for the company that they might make Miss Corbett a witness for the defense, and when she was excused from the stand the court asked: "Do any of the parties want this witness any further during the trial?" To this inquiry counsel for plaintiffs and defendants, respectively, replied in the negative. It is obvious that there was no error commited in refusing to postpone the trial to procure the attendance of Miss Corbett.

After the impaneling of the jury the defendant a second time sought a continuance of the cause until the next term of court because of the absence of George Brewer, which motion was denied. This decision cannot be reviewed, for the reason the affidavit filed in support of the motion has not been embodied in the bill of exceptions. It is an inflexible rule that affidavits used in the trial court are not available in this court, unless preserved by means of a bill of exceptions. (*Ray v. Mason,* 6 Neb. 101; *Walker v. Lutz,* 14 Neb. 274; *Tessier v. Crowley,* 16 Neb. 372; *Graves v. Scoville,* 17 Neb. 593; *Burke v. Pepper,* 29 Neb. 320; *Strunk v. State,* 31 Neb. 119; *Korth v. State,* 46 Neb. 631; *Minick v. Minick,* 49 Neb. 89.)

On the answer day, which was March 4, 1895, the de-

fendant filed a general demurrer to the petition, which was overruled on the third day thereafter, and on application of the defendant it was given until the morning of March 8 to answer. On request for further time to plead, it was ordered that answer be filed by the coming in of the court on the morning of March 9, at which time a general denial to the averments of the petition was filed. Two days later, the day on which the trial began, an amended answer was filed, by leave of court, which pleaded affirmative matters as a defense. It is insisted that the defendant was forced to trial before the statutory time for making up the issue had elapsed. The argument is based upon the false assumption that the statute relating to the period in which a reply shall be filed in a cause is applicable to the facts disclosed by this record. A demurrer wholly frivolous and intended for the evident purpose of delay was filed on the day which the statute designated for answering. Subsequent to the overruling of this demurrer, a general denial was filed, which formed the issues of fact to be tried, and no reply was necessary. That the court in its discretion subsequently allowed an amended answer to be filed raising other and different issues, did not give the defendant the right to object to the case being placed on trial at the time it was heard because the plaintiffs had not replied, since no order in reference to a reply had been made by the trial court. Plaintiffs did not ask that time be fixed in which they should plead, and defendant was in no position to insist that time should be given them for that purpose.

Complaint is made because the court allowed a reply traversing the averments of the amended answer to be filed after the selection of the jury. The granting of permission to reply out of time, or during the trial, rests largely in the legal discretion of the trial court. (*Storz v. Finklestein*, 48 Neb. 27, and cases cited.) No abuse of discretion in the ruling just indicated is perceptible. No continuance was asked, or suggested, by the defendant

on the ground that it had been taken by surprise by reason of the filing of the reply.

At the rendition of the judgment, on written motion of plaintiff, an attorney's fee of $200 was allowed them by the court and taxed as part of the costs, which action is assailed on the ground that an attorney's fee was not specially asked in the petition, the prayer being merely for a judgment in a sum certain as damages, and for costs. It is true no motion to retax the costs was made in the trial court, but that does not foreclose a review of the decision of the court under consideration. It has been frequently asserted that a motion to retax costs in a trial court and a ruling thereon are essential to review the taxation of costs. This rule, however, cannot be invoked in this case, for the obvious reason that a retaxation of the costs is not sought on account of any mistake, neglect, or omission of the clerk of the district court, but the action of the court itself is assailed in allowing an attorney's fee. As was said by POST, J., in the opinion in *Burton v. State*, 34 Neb. 127, where the identical question was involved and decided: "Ordinarily the taxing of costs is a clerical act performed by the clerk and the presumption is that the action of the clerk has not been called to the attention of the court; hence this court will not, as a rule, review an order taxing costs until a motion to retax has been made and the trial court given an opportunity to correct the errors, if any have been made. In this case the court has considered the question of the liability of plaintiff in error and deliberately determined that he is liable for costs of prosecution. Here the reason of the rule is wanting. It would be an idle and useless form to ask the court to correct on the theory of a mistake or inadvertence of the clerk that which the record shows to have been a deliberate act of the court." In actions like the present one the statute makes it the duty of the court, and not the clerk, to determine the amount of attorney's fees which shall be paid by the insurer to the insured. The clerk

is the mere arm of the court, and could not of his own accord allow an attorney's fee in the case. It requires judicial action. The court below has spoken. It awarded an attorney's fee to plaintiffs, and determined the amount thereof, and to review its decision upon the question no motion to retax was necessary. This view is contrary to *Insurance Co. of North America v. Bachler*, 44 Neb. 549; but the discussion in the opinion in that case upon the question was not necessary to a decision, because the order of the court allowing an attorney's fee was not assigned as error in the petition in error, which omission alone was sufficient reason for the refusal of this court to review the ruling of the trial court upon the subject of attorney's fees.

The policy declared on insured plaintiffs below against loss or damage by fire in the sum of $2,000 upon their two-story frame hotel building situate in the town of Greeley. The insured building having been wholly destroyed by fire, without the criminal fault of the insured, plaintiffs, under the valued policy law, were entitled to recover the amount of insurance named in the policy, and in addition thereto a reasonable sum, to be fixed by the court, as an attorney's fee. (Compiled Statutes, ch. 43, secs. 43, 45; *German Ins. Co. v. Eddy*, 37 Neb. 461; *German Ins. Co. v. Gustin*, 40 Neb. 828.) In the first of those cases it was said that attorney's fees in an action on a policy issued under the valued policy act of 1889, must be demanded in the petition, and the question of allowance of such fees be presented to the trial court and a ruling obtained thereon in order to present the question in the appellate court. That case having been unchallenged for so long a time, should be adhered to. It is not in conflict with *Insurance Co of North America v. Bachler*, 44 Neb. 549, but harmonizes therewith, as an examination of the transcript of the Bachler case reveals that the petition therein specially prayed for the allowance of an attorney's fee. In *Hanover Fire Ins. Co. v. Gustin*, 40 Neb. 828, the question whether the petition on

a valued policy must ask for an attorney's fee was not presented, considered, or decided. In the case at bar the petition on the face disclosed that the suit was upon an insurance policy covering real estate, and it is in said pleadings averred that a complete loss of the property has been sustained without the criminal fault of the insured. These averments being sustained by the proofs adduced on the trial, upon a recovery by plaintiffs, the law authorized the court to award them a reasonable sum as an attorney's fee to be taxed as costs. The court below has complied with the plain requirements of the law. It is true the allowance of such fees was not specifically asked in the prayer to the petition, but at the time of the rendition of the judgment on the verdict, plaintiffs, by written request, demanded that they be awarded an attorney's fee in the sum of $300, to be taxed as a part of the costs as provided by statute. This was, in effect, and should be so treated, as an amendment of the prayer of the petition. So regarded, the case at bar is within both the letter and spirit of the decision in the *Eddy Case*. There being no prejudicial error in the record, the judgment is

AFFIRMED.

P. C. DURFEE V. STATE OF NEBRASKA.

FILED DECEMBER 22, 1897. No. 9469.

1. **Criminal Law**: REFUSAL TO APPOINT COUNSEL FOR ACCUSED: REVIEW. The action of the trial court in overruling a motion for the assignment of counsel to defend a prisoner cannot be reviewed here, where the evidence adduced on the hearing was not preserved by a bill of exceptions.

2. **Bill of Exceptions**: RECORD OF VOIR DIRE EXAMINATION. The certificate of the trial judge to a bill of exceptions "that the foregoing is all the evidence offered by either party on the trial of the cause" is not sufficient to embrace the *voir dire* examination of a juror, or the evidence adduced on the hearing of a challenge to the whole panel or array of jurors.

3. **Intoxicating Liquors:** UNLAWFUL SALE: EVIDENCE. In a prosecution under section 20, chapter 50, Compiled Statutes, for keeping intoxicating liquors for sale in violation of law, the possession of such liquors by the accused is presumptive evidence of guilt in the district court, as well as before the examining magistrate, unless the accused "shall satisfactorily account for and explain the possession thereof, and that it was not kept for an unlawful purpose."

ERROR to the district court for Furnas county. Tried below before NORRIS, J. *Affirmed.*

L. H. Alberti and *McClure & Anderson,* for plaintiff in error.

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

NORVAL, J.

This was a prosecution under section 20, chapter 50, Compiled Statutes, for unlawfully keeping for purpose of sale, without a license, certain intoxicating liquors. The accused was convicted, and from the sentence imposed upon him, error is prosecuted to this court.

Application was made to the district court for the appointment of counsel to defend the accused, which request was denied. A reversal cannot be had on account of this ruling for several reasons: First—The assignment of counsel to make the defense was based upon the alleged poverty of the accused. The bill of exceptions contains no evidence tending to establish that he had neither money, property, nor funds with which to employ or secure counsel to make his defense. So far as this record discloses it may have been proven to the satisfaction of the court below that the prisoner possessed ample means with which to procure the assistance of an attorney. It is true the transcript contains an affidavit of poverty, but it cannot be considered, since it is not incorporated in the bill of exceptions. (*Minick v. Minick,* 49 Neb. 89; *Rosecrans v. Asay,* 49 Neb. 512; *First Nat. Bank of Madison v. Carson,* 48 Neb. 763; *Hudson v. Pennock,* 48 Neb. 359.)

Second—The accused does not appear to have been prejudiced by the ruling, inasmuch as the record discloses that he was assisted in making his defense by three able lawyers. Third—The statute has made no provision for the assignment of counsel for pauper or indigent prisoners in prosecutions for misdemeanors. (Criminal Code, sec. 437.)

The accused challenged the entire panel or array of petit jurors for the term of court at which he was tried, on the ground that they were not apportioned among the several precincts of the county as provided by law, which motion was overruled, as were likewise the several challenges of jurors for cause made by the accused. Those rulings are now complained of but they are not available, because the evidence adduced regarding said matters is not properly preserved by the bill of exceptions. What purports to be the *voir dire* examination of the jurors, the challenge to the array, and certain affidavits and certificates of the county clerk, are included in the bill of exceptions, but they are not authenticated by the certificate of the trial judge. He merely certifies "that the foregoing is all the evidence offered or given by either party on the trial of the cause." This is insufficient to show that the bill of exceptions contained either the testimony on the hearing of the challenge to the panel, or the *voir dire* examination of the jurors. Those matters did not occur during, but preceded, the trial.

The giving of the following instruction is alleged as error:

"7. You are instructed under the statute governing this case, and heretofore quoted to you in these instructions, it is only necessary for the state to show that the defendant had the liquors described in the information, or some of them, in his possession. After this has been shown by the prosecution, the law presumes that such liquors were kept in violation of the law, unless the defendant satisfactorily accounts for, and explains, the possession of such liquors; and if the prosecution has shown that the liquors, or any of them, described in the

information were found in the possession of the defendant, as alleged in the information, the burden of proof is then upon the defendant to satisfactorily account for and explain his possession of such liquor or liquors."

Three criticisms upon this instruction are made by counsel, viz.: (1.) That section 20, chapter 50, Compiled Statutes, shows that the legislature intended that the presumption of guilt arising from the possession of intoxicating liquors should be indulged alone before the examining magistrate, and such presumption does not obtain in the district court. (2.) The instruction is erroneous because it shifts the burden of proof from the state to the accused. (3.) The instruction is in conflict with number 5 given by the court on its own motion. The first two objections, for convenience, will be considered together.

Section 20 of said chapter 50 provides: "Hereafter it shall be unlawful for any person to keep for the purpose of sale without a license any malt, spirituous, or vinous liquors in the state of Nebraska; and any person or persons who shall be found in possession of any intoxicating liquors in this state with the intention of disposing of the same without license in violation of this chapter, shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be fined or imprisoned as provided in section 11 of this chapter." The section, after providing for the filing of a complaint for a violation of its provisions, the issuing of a warrant for the search of the premises, and for the arrest of the person described in such complaint and warrant, and what the officer shall do under the writ, declares that "the possession of any of said liquors shall be presumptive evidence of a violation of this chapter and subject the person to the fine prescribed in section 11, unless after examination he shall satisfactorily account for and explain the possession thereof, and that it was not kept for an unlawful purpose." The instruction criticised correctly stated the effect of the foregoing provisions of the law under which

the prosecution was instituted. The legislature has made the keeping of intoxicating liquors for sale, without a license, a crime, and has declared that the possession of such liquors shall be presumptive evidence of guilt; and, the statute not having designated any particular forum wherein such presumption shall obtain, it is manifest that the statutory presumption of guilt arising from the possession of intoxicating liquors should be indulged in the district and supreme courts, as well as upon the preliminary hearing before the examining magistrate. The presumption, however, is not conclusive, but may be overcome if the accused shall satisfactorily account for and explain the possession of the liquors, and show they were not kept for an unlawful purpose. The effect of the statute under consideration was to cast the burden upon the person having intoxicating liquors in his possession to establish that they were not kept for sale in violation of law; and the jury were properly so advised. *Robb v. State*, 35 Neb. 285, has no bearing upon the question. That was a prosecution for larceny in which the trial court charged that "the possession by an accused person of property proved to have been recently stolen is sufficient to fasten the guilt of its larceny upon the accused *prima facie* and calls upon him to prove the innocence of his possession." This instruction was held erroneous for the reason it failed to state that it is only when the possession is unexplained that the inference of guilt may be indulged, and because it also casts the burden of proof upon the accused. There exists in this state no statute relating to larceny which makes the possession of stolen property presumptive evidence of the theft, or which requires the accused "to satisfactorily account for and explain the possession thereof and that he did not steal the property." The decision mentioned does not conflict with the views already expressed.

Instruction No. 7 in no manner conflicts with the principles announced in the fifth paragraph of the charge of the court, but one is in perfect harmony with the other.

It is finally insisted that there was reversible error in giving the instruction which is in the following language: "The jury are instructed that it is not incumbent on the state to prove any specific sale to any individual on any particular date, but that the jury may consider any evidence of sale together with any other circumstances which tend to prove that the defendant was keeping in his possession in the building charged in the information either beer or whiskey, with the intent of disposing of the same without first having procured a license for the sale of the same, if any such facts are proved. And you are further instructed that if you find from all the facts proved, if any such is proved, that the defendant was on the 25th day of December, 1895, keeping in his possession in the building described in the information in this case either beer or whiskey, with the intention of disposing of the same without a license, then and in that case you will find the defendant guilty as charged in the information." A single infirmity is imputed to the foregoing, which is that it directed the jurors they were not, in arriving at their verdict, confined to evidence alone, but might consider any fact or circumstance within their own knowledge which would aid them in reaching a conclusion that the accused was guilty. This criticism is very unfair. The language of the instruction will not justify the inference that the jury were warranted in going outside of the evidence adduced on the trial in deciding upon the prisoner's guilt or innocence. On the contrary, the trial court, in the language employed, confined the jury to the considering of the evidence in the case.

No reversible error appearing on the record, the judgment is

AFFIRMED.

GEORGE W. HAYWOOD, APPELLANT, V. WILLIAM MARSHALL, APPELLEE.

FILED DECEMBER 22, 1897. No. 7682.

Aliens: COUNCILMEN OF CITY: QUALIFICATIONS: ELECTIONS: CONTEST. In cities of the second class of less than 5,000 inhabitants it is required that a councilman shall be an elector of this state. *Held*, That while a mere declaration of intention to become a citizen conformably with the naturalization laws of the United States may, under the constitution of Nebraska, constitute a resident alien an elector, provided other required conditions exist, yet that, by implication, this status cannot be extended to the son of such alien merely because the declaration above referred to was made before such son had attained his majority.

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

J. H. Haldeman, for appellant.

A. M. Russell, contra.

RYAN, C.

On April 24, 1894, George W. Haywood filed in the county court of Cass county a petition in which he alleged that he was an elector and resident of Weeping Water, a city of the second class having less than 5,000 inhabitants, situated in said county; that this action was brought on behalf of said Haywood and the other qualified electors of said city; that on April 3, 1894, a municipal election had been held in said city at which William Marshall, the defendant, John Donelan, and J. H. Haldeman had been candidates against each other for the office of councilman for the second ward of said city; and that the result of said election was that said Marshall had received 43 votes, Donelan had received 27 votes, and Haldeman had received 24 votes, and accordingly a certificate of election had been issued to said Marshall. These averments were admitted by the an-

swer, but in said answer there was a denial of the following allegations of the petition: "5. Plaintiff further alleges that the defendant was before, and on said election day was, and since then has been, a foreigner, a subject of Great Britain, and not a citizen of the United States, and he is ineligible to hold the office of councilman of the second ward in said city." Following the above and other averments, which need not be described because no effort was made to establish them by proof, there was a prayer for the issuance of a writ of ouster against the defendant; that his election might be declared void, and for other proper relief and costs. There was a judgment for the defendant on a trial in the county court, and upon appeal in the district court there was a like judgment which is presented for consideration in this court. The pleadings in the district court were like those already described as having been filed in the county court. The trial in the district court began with the following stipulation, to-wit: "It is admitted that William Marshall, the contestee, is the son of John Marshall; that John Marshall came to this country from Great Britain in the year 1872, and that the contestee at that time was an infant minor of the age of nine years; that the father, John Marshall, declared his intentions to become a citizen of the United States October 17, 1875, and has since that time resided in Cass county, state of Nebraska, exercising the rights of an elector in Cass county, and state of Nebraska, where he has resided all of said time; that they have never been elected or held any office in the state of Nebraska except William Marshall the office of councilman for which he is now contesting; and that he was elected as a councilman from the second ward of the city of Weeping Water, Cass county, Nebraska, in April, 1894, and that, as such councilman, he took the oath of office and entered into the duties of such office. It is admitted further that the contestee, William Marshall, has never declared his intention to become a citizen of the United States, he having relied upon the

fact that he was a minor when he came to this country." There was other evidence, but it was not of a nature which would present a question other than that indicated by the above stipulation.

In a simpler form than already made use of, this question may be said to depend upon the facts that John Marshall, a citizen of Great Britain, in 1872, brought with him to this country his son, the contestee, who was then but nine years of age. In 1875 the father declared his intention to become a citizen of the United States, and, although he has ever since resided in this state and exercised the rights of an elector, he has never taken any further step with reference to becoming such a citizen. The son, William Marshall, has, since becoming of age, exercised the rights of an elector, but whether rightfully or not depends upon the correctness of the assumption on which he acted. This assumption involves the sole question presented, and that is, whether or not the mere declaration of the father, during the minority of his son, of an intention to become a citizen of the United States constituted such son an elector when he attained his majority. By section 3, article 1, chapter 14, Compiled Statutes, it is required that a councilman in a city of the class in which Weeping Water is embraced shall be an elector. Section 1, article 7, of the constitution of this state is in this language: "Every male person of the age of twenty-one years or upwards belonging to either of the following classes, who shall have resided in the state six months, and in the county, precinct, or ward for the term provided by law, shall be an elector: First, citizens of the United States; second, persons of foreign birth who shall have declared their intention to become citizens conformably to the laws of the United States on the subject of naturalization, at least thirty days prior to an election." John Marshall never became a citizen of the United States; hence the status of his son, dependent upon the alien father becoming a citizen under the federal naturalization law, is a matter of no

importance. Upon the taking of the first step toward becoming a citizen, an alien is declared by our constitution to be an elector, and, as such elector, under the laws of this state, he may enter upon the discharge of the duties of councilman of a city of the class in which Weeping Water is included, if elected to such office. If John Marshall had been elected, he could have served as councilman, because he had declared his intention to become a citizen of the United States, but without more, this declaration is not effective to constitute his son such an elector, for there exists neither a constitutional nor a statutory provision to that effect. The judgment of the district court, therefore, must be, and accordingly it is, reversed and the cause is remanded for further proceedings not inconsistent with the views above expressed.

REVERSED AND REMANDED.

ISAAC R. ALTER ET AL. V. BANK OF STOCKHAM ET AL.

FILED DECEMBER 22, 1897. No. 7189.

1. **Sale of Cattle:** EVIDENCE OF FALSE WEIGHT. Evidence examined, and *held* not to support the finding of the jury that plaintiffs in error had falsely weighed certain cattle sold one of the defendants in error. NORVAL, J., and IRVINE and RYAN, CC., dissenting.

2. **Fraud.** Fraud is not to be presumed; it must be proved.

3. ———: EVIDENCE. If, from the entire evidence on the subject, good faith or an honest mistake may be as rationally and reasonably inferred as fraud, then the law leans to the side of innocence.

4. ———: ———. Direct evidence is not essential to establish fraud. It may be inferred from circumstances; but such inference must not be guesswork or conjecture, but the rational and logical deduction from the circumstances proved.

5. **Equity:** QUESTIONS OF FACT FOR JURY. A district court while sitting as a court of equity is clothed with the inherent power to submit to a jury any question of fact in the case.

6. **Actions:** FORMS: PLEADING. To maintain a civil action under our

Code, it is not essential that the action be denominated either an action at law or in equity, nor that it be given any particular name. If the litigant pleads the facts, and they constitute a cause of action or defense, the courts are bound to award the relief due.

7. **Chattel Mortgages:** SALE OF CHATTELS: CONVERSION BY MORTGAGOR: TRUSTS: REMEDY OF MORTGAGEE. Evidence examined and *held* that the district court erred in dismissing the action of the plaintiffs in error.

8. ———: ———: ———: ———: ———. Where a mortgagor of chattels converts the same into cash, at their full value, and deposits the money with his agent, who has notice of the mortgage lien, an action will lie at the suit of the mortgagee against such agent, for the proceeds of such property; and the fact that the mortgagee did not pursue and seize the mortgaged property does not, of itself, afford such agent a defense to such action.

REHEARING of case reported in 51 Neb. 797. *Reversed.*

Hainer & Smith, for plaintiffs in error.

A. W. Agee and *H. M. Kellogg*, *contra.*

RAGAN, C.

This is a rehearing of *Alter v. Bank of Stockham*, 51 Neb. 797. In their petition in the district court Alter & Glover alleged the sale by them on September 26, 1889, of 309 head of cattle, to one Wiens, at an agreed price of $8,500; that, as an evidence of said indebtedness, Wiens executed to Alter & Glover his note for said sum of money drawing interest at the rate of ten per cent from date, and due April 1, 1890, and secured the payment of the same by a chattel mortgage upon all said cattle; that said chattel mortgage was duly filed in the office of the county clerk of Hamilton county, soon after its execution,—that being the county in which Wiens lived and kept said cattle; that there was due and unpaid on said note $1,606.65, with interest at ten per cent per annum from May 21, 1890; that Wiens subsequent to the purchase of said cattle executed to said bank two chattel mortgages covering the same cattle; that said mortgages were taken by the Bank of Stockham subject to Alter &

Glover's mortgage; that on January 8, 1890, the bank took possession of 41 head of said mortgaged cattle, shipped them to Martin Bros., commission merchants in South Omaha, Nebraska, and caused them to be there sold on the open market, and the net proceeds of said sale,—$1,330,—to be deposited to its credit in a bank there; that, on March 8, 1890, the Bank of Stockham took possession of 127 head of the cattle, on which Alter & Glover held a mortgage, shipped them to South Omaha, Nebraska, to said Martin Bros., caused the cattle to be there sold in the open market, and the proceeds of said sale, amounting to $4,907.55, to be deposited to the credit of the Bank of Stockham in the Union Stock Yards Bank of South Omaha, and the said Bank of Stockham converted to its own use the said proceeds of $4,907.55, except the sum of $2,000 of said proceeds, which it then and there remitted, or caused to be remitted, to Alter & Glover to apply on the Wiens note; that the shipments and sales of the Wiens cattle made by the Bank of Stockham on January 8 and March 9, 1890, were made without the knowledge or consent of plaintiffs; that they had demanded of the Bank of Stockham a return of said cattle or a delivery of the proceeds of their sale, or so much thereof as would satisfy their mortgage debt against Wiens; that the Bank of Stockham had refused to deliver the cattle or pay over the proceeds, or any portion of them, but had retained said proceeds and had converted them to their own use; that since the sale of the cattle the plaintiffs had been unable to discover their whereabouts, and unable to pursue them, and subject them to the payment of their mortgage debt; that the Bank of Stockham, at the time it received and converted the proceeds of the cattle sold in January and March, 1890, to its own use, did so with the intent to defraud the plaintiffs out of their lien on said cattle, and took the proceeds of said sale and retained them, with full knowledge of plaintiffs' lien on the cattle. The petition then alleged the insolvency of Wiens, and

prayed that an account might be taken of the amount due them on the Wiens note and mortgage; that the priorities of liens of the plaintiffs and the Bank of Stockham should be determined by the court; that the amount found due the plaintiffs and Wiens might be adjudged a first lien upon the mortgaged property, and that the Bank of Stockham might be decreed to hold the proceeds of the sale of the cattle in trust for the use and benefit of the plaintiffs and decreed to pay the same over to the plaintiffs. The answer of the Bank of Stockham, so far as material here, was a general denial of the averments of Alter & Glover's petition, coupled with the averment that Alter & Glover, from the proceeds of the sale of a part of the mortgaged cattle shipped and sold by them in May, 1890, had realized more than sufficient to pay the amount of their mortgage debt. Wiens intervened in the action and filed an answer in the nature of a cross-petition, in which he alleged that he purchased the 309 head of cattle from Alter & Glover, and gave his note for $8,500 for the purchase price; that Alter weighed these cattle, announcing the weights to be 364,330 pounds, or an average of 1,179 pounds per head; and that he, Wiens, relied on the honesty of Alter in weighing the cattle, and that the latter falsely and fraudulently weighed them; that their total weight did not exceed 287,080 pounds, or an average of 929 pounds each; that the actual value of the cattle, had they been correctly weighed, was $6,688.38; and that the note was given for $1,811.62 too much. The answer then alleged that what was justly due on the note had been paid, and the debt overpaid $454.85, for which sum Wiens asked a judgment against Alter & Glover. The trial resulted in the district court pronouncing two judgments: (1.) That there was due to Alter & Glover from Wiens on his note $828.91,—about one-half of what Alter & Glover claimed was due upon it; and this judgment was based upon the finding of the jury that Alter & Glover falsely weighed the cattle at the time they sold them to Wiens. (2.) The

second judgment pronounced by the court was one dismissing the plaintiffs' action against the Bank of Stockham. It is to reverse both these judgments that Alter & Glover have prosecuted here a petition in error.

1. Is the finding of the jury that Alter & Glover falsely weighed these cattle at the time they were sold by them to Wiens supported by sufficient evidence? Wiens, to sustain his contention that the cattle were falsely weighed, introduced evidence which showed, or tended to show, the following state of facts: He purchased the cattle from Alter & Glover September 26, 1889. At that time the cattle were at a railway station some miles from the city of Grand Island. The cattle were then driven to Grand Island, and there weighed on the scales in the stock yards of the Union Pacific Railway Company. Wiens and his son were both present at the scales while the cattle were being weighed, though Alter did the actual weighing, calling off the weights of each bunch to Wiens. Wiens, after receiving the cattle, on that day or the next, drove them to his farm in Hamilton county, where he kept them in lots, or in a field, fed them an abundance of hay and corn, and furnished them plenty of water. In other words, he took proper care of the cattle, and properly fed them and watered them. On January 8, 1890, 41 head of the cattle were shipped to South Omaha, and there sold, and these cattle there weighed 48,800 pounds at that time. On March 9, 1890, 127 head of the cattle were shipped to South Omaha, and sold, and there at that time weighed 153,100 pounds; and on May 21, 1890, 126 head of the cattle were shipped to South Omaha, and there sold, and these cattle there at that time weighed 154,840 pounds. In other words, 309 head of the cattle purchased of Alter & Glover at the time of their purchase weighed 364,330 pounds, and 294 head of the same cattle, when sold in January, March, and May, 1890, weighed only 356,740 pounds, or 7,590 pounds less than all the cattle weighed at the time they were purchased; that the scales on which the cattle

were weighed in Omaha were of the Fairbanks manufacture, were in good order, and weighed correctly, and the party who weighed the cattle there weighed them honestly. Wiens also introduced the evidence of a number of farmers and cattle feeders, who testified as experts, to the effect that they were acquainted with these cattle, saw them at the time Wiens was feeding them, and that in their opinion the cattle had gained in weight after Wiens purchased them, and that taking into consideration the character of the cattle, the care taken of them by Wiens, and the feed which they had consumed, these cattle should have gained, and did probably gain, from the time they were purchased by Wiens until they were shipped, an average of 250 to 300 pounds per head. On behalf of Alter & Glover, the evidence tended to show that they were in the business of buying and selling cattle, and had been for some years prior to the time they sold these cattle to Wiens; that they had sold him cattle the year previous to this sale, and that those cattle, after being fed some months by Wiens, had showed a gain in weight; that Alter himself personally weighed these cattle to Wiens, and that he honestly and correctly noted the weight of each bunch of cattle, and honestly and correctly reported the weight of each bunch to Wiens; that Wiens and his son were both present at the time the cattle were weighed,—each one of them being within a few feet of the scale beam and each one of them having the opportunity to see for himself what weight the scale indicated for each bunch of cattle weighed out; that these cattle were known as "Southwestern cattle," or "half-breeds,"—some of them being "scalawags;" that they were very wild; that in driving them from Grand Island over to Wiens' farm in Hamilton county 30 head of them escaped, some of which were never recovered; that, after Wiens had put the cattle into his feed lots on his farm, they broke out of it, broke into a field of corn, and he permitted them to remain in that cornfield; that he dehorned something over 200 of these cattle, and

would have dehorned the remainder if they had not been so wild he could not catch them; that cattle so wild as these did not fatten and gain in flesh so readily as tame or domestic cattle; that the cattle were liable to be foundered and injured so as not to fatten when allowed to run in a field of corn, as by so doing they were liable to eat too much, and that the dehorning of cattle had a tendency to prevent their fattening and gaining in weight. Alter & Glover also showed that these 309 head of cattle sold Wiens were part of a bunch of 616 head of cattle; that they had sold 307 of this bunch to a man named Nordgreen, while they were at the railway station, some distance from Grand Island, and that they divided these cattle into two equal bunches, as near as might be, before Wiens' cattle were weighed and delivered; that the 307 head of cattle taken by Nordgreen, after remaining for two weeks on a grass pasture, were brought into Grand Island, weighed upon the same scales that Wiens' cattle were weighed on, and the 307 head of Nordgreen cattle weighed 363,650 pounds, or that Nordgreen's cattle weighed 680 pounds less than Wiens' 309 cattle; that Wiens never made any complaint about the weight of these cattle until after this suit was brought, and that a large number of these cattle, when sold in Omaha, were very lean.

Our opinion is that the evidence does not sustain the finding made by the jury that Alter falsely weighed these cattle, or any of them, when he sold them to Wiens. It is not claimed or pretended by anybody that there was any mistake made; that the scales at Grand Island were not good scales, and in good order; but the jury finds from the evidence, which we have just quoted, that Alter falsely weighed these cattle, and committed a crime. Fraud is not to be presumed. It must be proved; and, while it may be established by circumstantial evidence, yet if the reasonable inference from all such evidence does not preponderate toward the conclusion of fraud, then such evidence will not sustain such finding. In

other words, if, from the entire evidence on the subject, good faith or an honest mistake even may be as rationally and reasonably inferred as fraud, then the law leans to the side of innocence. While, to prove fraud direct evidence is not essential, and the inference of fraud may be drawn from facts and circumstances, such inference must not be the guess-work or conjecture of a jury, but the inference must be the rational and logical deduction from the facts and circumstances from which it is inferred. There is just as much evidence in this record to convict the man who weighed these cattle at Omaha of fraud in weighing them as there is to convict Alter of a fraud, and the evidence will not sustain the conviction of either of them of that offense. We reach the conclusion therefore that the judgment pronounced by the district court in favor of Alter & Glover against Wiens must be reversed because the finding on which it is based is unsupported by sufficient evidence.

2. There was much contention in the district court—and the contention is renewed here—as to whether the petition of Alter & Glover states a cause of action at law or in equity; and plaintiffs in error complain here because the district court submitted to a jury the issues of fact made by the pleadings. It is insisted here by the plaintiffs in error that their petition is one in equity for an accounting of the amount due them from Wiens on their mortgage debt, and to hold the Bank of Stockham liable to it as trustee. On the other hand the bank contends that the action was one at law, being simply a suit for conversion of the proceeds of the sale of the Wiens cattle. Under our Code there is but one form of action, namely, a civil action; and the distinction heretofore existing between actions at law and actions in equity, so far as the form of such actions is concerned, is abolished. But, if the action of Alter & Glover is one in equity, we cannot reverse the judgment of the district court solely because of the fact that it submitted questions of fact to a jury. A chancellor was always invested

with the discretion to submit to a jury issues of fact and the Code has not deprived the courts, when sitting as courts of equity, of that discretion, and the district courts of the state, while sitting as courts of equity, are vested with the discretion to submit to a jury any disputed question of fact. We cannot conceive how a district court can in any case commit a reversible error simply by submitting a question of fact to a jury. It is wholly immaterial whether the petition of Alter & Glover here be one in equity or one at law. The Code requires the pleader to state the facts which constitute his cause of action or defense, and if he state these facts,—not conclusions,—and they constitute a cause of action or defense, the law will award him the relief to which he is entitled, whether the facts make a case in equity or at law. The litigant does not need to designate his action one for conversion, or to give it any name. If the pleading states the facts, and the proof sustains the plea, the court is bound to afford the relief due, whether the action be one which at common law was known as an "action of conversion," or whether it be of such a character that no name can be found for it in the books of pleading and practice.

3. This brings us to the consideration of the judgment of the district court dismissing Alter & Glover's action against the Bank of Stockham. After Alter & Glover had put in their evidence, the district court instructed the jury to return a verdict in favor of the Bank of Stockham, which it did, and thereupon the court entered a judgment dismissing Alter & Glover's action against that bank. The evidence introduced by Alter & Glover against the Bank of Stockham was as follows: The deposition of one Sears, a bookkeeper for Martin Bros., commission merchants of South Omaha. He testified:

Q. You may state if they [Martin Bros.]received any cattle for sale during the month of January, 1890, from one Wiens.

A. Yes, we received two loads of cattle on January 8 from Wiens.

Q. What was done with those cattle?

A. They were sold there at South Omaha.

Q. What disposition was made of the proceeds of the sale of those cattle?

A. The proceeds were deposited in the Union Stock Yards Bank of South Omaha, to the account of the Bank of Stockham, to the credit of Wiens, amount, $1,330.

Q. You may state whether any cattle was received by them [Martin Bros.] from Wiens during the month of March, 1890.

A. Yes; we received six loads on March 8, 1890; six car loads.

Q. What was done with the proceeds of the sale?

A. The proceeds were disposed the same as those of January 8; deposited in the same manner. The amount was $4,907.55.

Q. You may state whether this deposit was made by the direction of Wiens.

A. Yes, sir.

Q. Do you remember whether Mr. Wiens was present at the time of these sales, or either of them?

A. He was present at one of them, and I think he was at both, but I am not positive.

Another deposition read in Alter & Glover's behalf was that of William Wallace, cashier of the Omaha National Bank, of Omaha. He testified as follows:

Q. You may state whether the Bank of Stockham had an account with the Omaha National Bank during the months of January and March, 1890.

A. It had.

Q. You may state whether any deposits were made to that account by the Union Stock Yards Bank of South Omaha during the month of January, 1890.

A. Yes, sir.

Q. Are you able to state the date of such deposit?

A. Yes, sir.

Q. What date?

A. January 9, 1890.

Q. What was the amount of the deposit made to the credit of the Bank of Stockham by the Union Stock Yards Bank on the 9th of January, 1890?

A. $1,330.

Q. You may state whether that deposit was made for the credit or for the account of anybody else besides the Bank of Stockham.

A. It was not.

Q. State whether or not a deposit was made in your bank by the Union Stock Yards Bank during the month of March, 1890.

A. There was.

Q. You may give the date and the amount of that deposit.

A. March 10, $4,907.55.

Q. Was this deposited for the credit of any other person or firm?

A. No, sir.

Q. You may state if this account was subject to check by any other person or corporation except the Bank of Stockham.

A. No.

Q. Does the Bank of Stockham still keep an account with your bank?

A. Yes, sir.

Q. Was the money so deposited on the 9th of January and the 10th of March subject to its check, the same as other funds in your hands?

A. Yes, sir.

Q. State whether or not this money was deposited to any special account with that bank or to its general credit.

A. It was deposited to its general credit.

Cross-examination:

Q. State whether it was drawn upon by that bank, the same as any other money deposited to its credit.

A. Just the same as any other moneys.

Q. This money that was placed to their credit in Jan-

uary, 1890, was sent to the Omaha National Bank by some bank in South Omaha, was it?

A. Yes, sir.

Q. What bank was it that sent it?

A. Union Stock Yards.

Q. And it was the same with the deposit that was made on the 10th of March?

A. Yes, sir.

Q. Just sent to your bank by the Union Stock Yards of South Omaha?

A. Yes.

Q. To be placed to the credit of the Bank of Stockham?

A. Yes, sir.

Another deposition read on behalf of Alter & Glover was that of Carson, assistant cashier of the Union Stock Yards Bank of South Omaha. He testified as follows:

Q. You may state whether any moneys were deposited by them [Martin Bros.] with you for the credit of the Bank of Stockham during that month.

A. On the 8th of January they deposited with us to be remitted to the Omaha National Bank, to the credit of the Bank of Stockham, $1,330 for the use of Wiens.

Q. They deposited money with you for them with instructions to remit to Omaha for the credit of that bank?

A. Yes sir; on March 8th they deposited with us, to be remitted to the Omaha National Bank, $4,907.55, for the credit of the Bank of Stockham, and the use of Wiens.

We think the district court was mistaken in concluding from this evidence that Alter & Glover had no cause of action against the Bank of Stockham. None of this evidence was disputed. Wiens was indebted to Alter & Glover. To secure that indebtedness the latter held a chattel mortgage upon Wiens' cattle. The Bank of Stockham held mortgage liens against the same cattle which were, by their terms, made subject to Alter & Glover's mortgage, and the Bank of Stockham at all

times had notice of the existence of Alter & Glover's lien upon the Wiens' cattle. Wiens, the mortgagor, shipped these cattle to South Omaha and sold them at their full value in the public markets and thereby dissipated and destroyed, or at least deprived the mortgagees of, the subject-matter of the property covered by their mortgage and paid the proceeds of the sale over to the Bank of Stockham. This proof followed the allegations of Alter & Glover's petition, and established, as plain as anything could be established, that the Bank of Stockham had in its possession when this suit was brought, the proceeds of the sale of the Wiens cattle, upon which cattle Alter & Glover had a first mortgage lien, the mortgagor having converted the mortgaged property into money. The bank introduced no evidence, nor did it attempt to introduce any evidence, to show that it had any right, title, or claim to the proceeds of the sale of these cattle by reason of any fact whatsoever. So far as the record shows the bank held the moneys as the agent or bailee or debtor of Wiens, and, without doubt, Wiens could not hold the proceeds of the sale of these cattle as against the claim of Alter & Glover; and, if he could not hold them, his bailee could not. *Cone v. Ivinson*, 33 Pac. Rep. [Wyo.] 31, is a case almost identical with the one at bar, and in that case it was held that where a mortgagor of chattels sells the mortgaged property and pays the proceeds thereof to his creditor, the creditor at the time having knowledge of the existence of the chattel mortgage, such creditor was liable to the mortgagee for the proceeds of the sale of the mortgaged property. That case was decided on May 19, 1893. A rehearing was granted and the case was reconsidered and another opinion written adhering to the former conclusion, and reported in 35 Pac. Rep., 93. But the principle of the Wyoming case has been much extended by this court in *Cady v. South Omaha Nat. Bank*, 46 Neb. 756. In that case the owner of some cattle shipped them to a commission merchant in South

Omaha for sale. The commission merchant sold the cattle and deposited the proceeds to his own credit in a bank in South Omaha, with which he was doing business, the bank at the time having no knowledge or notice of the relation existing between the commission man and the owner of the cattle; and yet the court held that, irrespective of the question of notice, the bank held the proceeds of the sale of the cattle in trust for their owner. We are not deciding that the action of Alter & Glover is an action at law for conversion as against the Bank of Stockham, nor that it is a bill in equity seeking to have the Bank of Stockham declared a trustee and to hold the proceeds of the sale of the Wiens cattle in trust for Alter & Glover. What we do decide, and all we decide, is that from the uncontradicted evidence it appears that the mortgagor converted the mortgaged property into money and placed it in the hands of his agent, the Bank of Stockham, it then and there knowing of the existence of Alter & Glover's lien upon the cattle; and, as against the mortgagees, Wiens himself was not entitled to such proceeds; that the bank, on the evidence in this record, has no better title to the money than Wiens had, and is liable and should account to Alter & Glover for such proceeds, whether such a result will have the effect of making the action at bar one at law or in equity.

The judgment of the district court in favor of the Bank of Stockham and against Alter & Glover, and the judgment in favor of Alter & Glover and against Wiens, and each of them, are reversed and the cause remanded.

REVERSED AND REMANDED.

RYAN, C., adheres to the views already expressed.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. OLIVER EMMERT.

FILED DECEMBER 22, 1897. No. 7578.

1. **Railroad Companies:** EMBANKMENTS: NEGLIGENCE: TIME ACTION ACCRUES. Where an injury to the crops and lands of one is caused by the negligent construction of a railway embankment, which arrested and held upon said lands the flood waters of a natural stream, such party's cause of action accrues at the date of the injury and not at the date of the negligent construction of the improvement.

2. ———: ———: INJURY TO CROPS: MEASURE OF DAMAGES. In such case the injured party's measure of damages to his crops is their fair value at the time of their destruction; and his measure of damages as to his land is the difference in its value immediately before and after such flooding.

3. **Surface Water.** This court does not attempt a definition of surface water. Whether or not it is such should be determined from the facts of the case in which the question is presented.

4. ———. The flood water of the Nemaha river involved in this case *held* not to be surface water, but a constituent part of such stream, —a natural water course.

5. **Special Damages:** PLEADING. Special damages to be recovered must be specially pleaded.

6. **Waters:** DAMAGES: EVIDENCE. The ruling of the district court in the admission and rejection of evidence as to the plaintiff's measure of damages examined and *held* prejudiciously erroneous.

7. ———: ———: PLEADING. An allegation that the plaintiff's farm has been damaged by the construction of a railway embankment near thereto, because the farm has thus come to be known in the neighborhood as one liable to overflow, does not state a cause of action.

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

The opinion contains a statement of the case.

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

The railroad company acquired the right to build its railroad where it did, and constructed it in a manner

proper for railroad purposes. The injuries complained of resulted from surface waters, and the company did not incur liability for the damages. (*Bunderson v. Burlington & M. R. R. Co.*, 43 Neb. 545; *Missouri P. R. Co. v. Lewis*, 24 Neb. 848; *Hannaher v. St. Paul, M. & M. R. Co.*, 37 N. W. Rep. [Dak.] 717; *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb. 406; *Hoard v. City of Des Moines*, 17 N. W. Rep. [Ia.] 527; *McCormick v. Kansas City, St. J. & C. B. R. Co.*, 57 Mo. 438; *Bell v. Norfolk S. R. Co.*, 36 Am. & Eng. R. Cas. [N. Car.] 652; *Chicago & A. R. Co. v. Benson*, 20 Am. & Eng. R. Cas. [Mo.] 102; *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo. 271; *Moyer v. New York C. & H. R. R. Co.*, 88 N. Y. 355; *Johnson v. Chicago, St. P., M. & O. R. Co.*, 80 Wis. 641; *Shelbyville & B. T. Co. v. Green*, 99 Ind. 205; *Wilson v. Bumstead*, 12 Neb. 1; *Ogburn v. Connor*, 46 Cal. 346; *McDaniel v. Cummings*, 23 Pac. Rep. [Cal.] 797; *Collier v. Chicago & A. R. Co.*, 48 Mo. App. 399; *Taylor v. Fickas*, 64 Ind. 173; *Baltimore & O. R. Co. v. Sulphur Springs Independent School District*, 2 Am. & Eng. R. Cas. [Pa.] 169.)

In building embankments on the right of way, railroad companies have the rights of a land owner with reference to obstructing surface water, and may obstruct the flow upon their land, or turn the water back onto the land of others, without incurring liability for damages. (*O'Brien v. City of St. Paul*, 25 Minn. 331; *Hogenson v. St. Paul, M. & M. R. Co.*, 31 Minn. 226; *Pye v. City of Mankato*, 36 Minn. 373; *Alden v. City of Minneapolis*, 24 Minn. 262; *Chicago, K. & N. R. Co. v. Steck*, 33 Pac. Rep. [Kan.] 601; *Missouri P. R. Co. v. Renfro*, 34 Pac. Rep. [Kan.] 802; *Missouri P. R. Co. v. Keys*, 40 Pac. Rep. [Kan.] 277; *Brown v. Winona & S. W. R. Co.*, 55 N. W. Rep. [Minn.] 123; *New York C. & St. L. R. Co. v. Speelman*, 40 N. E. Rep. [Ind.] 541; *Edwards v. Charlotte, C. & A. R. Co.*, 18 S. E. Rep. [S. Car.] 58; *Champion v. Town of Crandon*, 84 Wis. 405; *Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb. 904; *O'Connor v. Fond du Lac, A. & P. R. Co.*, 52 Wis. 526; *Walker v. Old Colony & N. R. Co.*, 103 Mass.

10; *Gould v. Booth*, 66 N. Y. 62; *Pflegar v. Hastings & Dakota R. Co.*, 28 Minn. 510; *Omaha & R. V. R. Co. v. Moschel*, 38 Neb. 281; *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb. 90; *Bell v. Norfolk S. R. Co.*, 36 Am. & Eng. R. Cas. [N. Car.] 651; *Blakeley v. Chicago, K. & N. R. Co.*, 25 Neb. 207.)

Plaintiff's cause of action, if he has any, arose at the time the road was built, and is, therefore, barred by the statute of limitations. (*Chicago & E. I. R. Co. v. Loeb*, 27 Am. & Eng. R. Cas. [Ill.] 415; *Chicago & A. R. Co. v. Maher*, 91 Ill. 312; *Kansas P. R. Co. v. Mihlman*, 17 Kan. 224; *Smith v. Point Pleasant & O. R. R. Co.*, 23 W. Va. 451; *Powers v. City of Council Bluffs*, 45 Ia. 652.)

There were erroneous admissions of evidence as to the measure of damages. (*Drake v. Chicago, R. I. & P. R. Co.*, 17 Am. & Eng. R. Cas. [Ia.] 49; *Ward v. Chicago, M. & St. P. R. Co.*, 63 N. W. Rep. [Ia.] 1104; *Fremont, E. & M. V. R. Co., v. Marley*, 25 Neb. 145; *Sullens v. Chicago, R. I. & P. R. Co.*, 74 Ia. 666; *Gentry v. Richmond & D. R. Co.*, 16 S. E. Rep. [S Car.] 893; *Chase v. New York C. R. Co.*, 24 Barb. [N. Y.] 273.)

Reavis & Reavis and *C. Gillespie, contra.*

References: *Drake v. Chicago, R. I. & P. R. Co.*, 19 N. W. Rep. [Ia.] 215; *O'Connell v. East Tennessee, V. & G. R. Co.*, 4 Am. R. & C. Rep. [Ga.] 448; *Fremont, E. & M. V. R. Co. v. Crum*, 30 Neb. 70; *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138; *Omaha & R. V. R. Co. v. Standen*, 22 Neb. 343.

RAGAN, C.

The Nemaha river is one of the natural water courses of the state, and drains a large area of territory. When floods or freshets occur the channel of this river overflows, and the stream then becomes very much widened, extending and flowing at such times from the foot-hills upon one side to the foot-hills upon the other side of the river's valley. In the valley of this river, in Richardson county, is situate the farm of Oliver Emmert. In 1883

the Chicago, Burlington & Quincy Railroad Company, hereinafter called the railroad company, constructed a road at right angles across the valley of this river near said Emmert's farm. For the purpose of laying its ties and track thereon, the railroad company across this valley constructed an embankment of earth, and left no openings or culverts in the same through which the waters of this river, when out of its banks, might flow as they did prior to the construction of such embankment. In 1889 and 1892 freshets occurred, the channel of the river overflowed, and the waters spread out over the valley. The embankment arrested their progress, turned them back, and held them upon the lands of Emmert,—situate just up the river from the embankment,—and destroyed, as he alleges, his grass crops and pasture, a crop of standing corn, and permanently injured or depreciated in value his farm. To recover compensation for these injuries, he sued the railroad company in the district court of Richardson county, alleging that the railroad company, in omitting to construct culverts or openings in its embankment for the passage of the waters of the river in times of flood, had been guilty of negligence that had caused the injury to his property. The trial resulted in Emmert's obtaining a verdict and judgment, to review which the railroad company has instituted in this court error proceedings.

1. As already stated the embankment was constructed in 1883. The injuries sued for occurred in 1889 and 1892, and one proposition relied upon here for a reversal of the judgment of the district court is that Emmert's cause of action arose at the time of the negligent construction of the embankment, or more than four years before the bringing of this action, and hence was barred when brought. This precise question was presented to this court in *Fremont, E. & M. V. R. Co. v. Harlin*, 50 Neb. 698, and we there held that the cause of action arose when the injury sued for occurred, and not at the time of the completion of the improvement negligently constructed

which caused the injury. The authorities bearing upon the question under consideration are somewhat extensively examined in that case and we see no reason for not adhering to the conclusion then reached.

2. Another contention of the railroad company is that its embankment was properly constructed for railroad purposes; that the overflow or flood water of this river was surface water; and, if Emmert was damaged by the construction of the embankment at the place and in the manner that it did, the railroad company is not liable therefor, as it owed no duty to an adjoining proprietor as to the manner in which it should exercise its right to build its railroad and protect its property from such surface water. But is the assumption of the railroad company that the flood or overflow water of this river was surface water, correct? It must be conceded that many cases hold the flood or overflow of a natural stream is surface water. See the rule stated and the authorities collated in 24 Am. & Eng. Ency. of Law [1st ed.], p. 903. But we are by no means satisfied with the doctrine of these cases nor with the reasoning on which they are based. Though they are in the majority, we do not think they are right. We shall not attempt to lay down a rule as a guide in all cases for determining whether waters are surface waters. Whether water is, or is not, surface water within the meaning of that term, must be determined from the peculiar facts in the case in which the question is presented. But to say that the flood or overflow water of this Nemaha river, when out of its banks, and flowing from foot-hill to foot-hill, is not a part of the river itself, not part of the natural water course, but mere surface water, is to contradict ordinary common sense. In one sense of the word, all the water of this river was at one time, perhaps, surface water. When this water was falling upon the watershed of this stream, when it was millions of aqueous threads, flowing toward the stream covering the surface of the watershed, then it was surface water; but when

it reached the stream, became a part thereof, whether the stream was then flowing between its ordinary banks and in its ordinary channel, or whether it had extended beyond its channel, and was flowing from one foot-hill to the other, then this water ceased to be surface water and became a constituent part of the natural stream.

In *Crawford v. Rambo*, 44 O. St. 282, the supreme court of Ohio, in discussing the question under consideration, said: "It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any one time constitutes the water of the river at such time; and the land over which its current flows must be regarded as its channel, so that, when swollen by rains and melting snows, it extends and flows over the bottoms along its course, that is its flood-channel, as when by drought it is reduced to its minimum, it is then in its low-water channel. Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows and continues to be such until it reaches some well-defined channel in which it is accustomed to, and does, flow with other waters, whether derived from the surface or springs; and it then becomes a running water stream and ceases to be surface water." To the same effect see *Byrne v. Minneapolis & St. L. R. Co.*, 38 Minn. 214; *O'Connell v. East Tennessee, V. & G. R. Co.*, 4 Am. R. & C. Rep. [Ga.] 449; *Sullens v. Chicago, R. I. & P. R. Co.*, 38 N. W. Rep. [Ia.] 545; *Moore v. Chicago, B. & Q. R. Co.*, 39 N. W. Rep. [Ia.] 390. These cases express our views and we cheerfully yield to them as authority on the subject under consideration.

But it is said that in *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb. 406, this court committed itself to the doctrine that the flood or overflow water of a natural stream was surface water. But counsel are mistaken. RYAN, C., speaking for the court in that case used this language:

"The evidence in the case under consideration fails to show that the water complained of was a part of Yankee creek before crossing the right of way now occupied by the defendant's embankment, though there is evidence from which it might be inferred. It seems, too, that it was ultimately discharged into the Nemaha river independently of Yankee creek. * * * It does not satisfactorily appear from the evidence that it was a part of the flood water of Yankee creek; neither is it shown that but for the railroad embankment it would have sought an outlet by way of that creek. This water, therefore, under any of the definitions above given, was but surface water * * *." Further, the commissioner says: "Our conclusions are that the district court correctly concluded from all the evidence adduced on the trial of this case that the water, the flow of which was interfered with by the railroad embankment, was surface water. It flowed in no defined water course and overflowed only when there were extraordinary freshets. It was not shown that in its undiverted course it originated from or returned to the channel of Yankee creek. Its existence was directly traceable to falling rains. Its course was along the valley but not as a part of the stream." We reach the conclusion, therefore, that the flood or overflow waters of the Nemaha river that were arrested and turned back in 1889 and 1892 by the embankment of the railroad company were not surface waters but were a part of the water of the Nemaha river,—a natural stream.

3. Another error assigned and argued by the railroad company here relates to the rule as to the measure of damages enforced by the trial court. Emmert's proper measure of damages under the issues made by the pleadings as to his crop of corn, was the fair value of the corn destroyed at the time of its destruction. The measure of damages for the grass pasture destroyed was the fair value of the timothy and clover constituting the pasture at the time of its destruction; and the measure of his

damages as to the injury caused to his real estate by the embankment turning back and holding thereon the flood waters, was the difference in the fair market value of his real estate immediately before and immediately after such event. (See *Fremont, E. & M. V. R. Co. v. Crum*, 30 Neb. 76; *Kansas City & O. R. Co. v. Rogers*, 48 Neb. 653; *Fremont, E. & M. V. R. Co. v. Harlin*, 50 Neb., 698.)

On the trial Emmert was asked, and over the objections of the railway company answered, questions as follows: "Q. What was the use of that meadow,—the pasture land,—that year worth to you? State in round numbers what loss it was to you,—the loss of your pasture that year." To which he answered that he was compelled to procure other pasture that year for his stock and that he considered the loss was at least $150. "Q. In its matured state, as you had it before the fall of 1889, what was the actual value of that meadow to you?" To which he answered that it was worth $10 an acre. These questions all called for incompetent and irrelevant evidence under the issues. In his petition Emmert made no claim for any special damages, but claimed damages generally for the destruction of his corn and timothy and clover growing upon the lands on which the embankment of the railroad company held the flood-waters of the river. The question was not what the use of the meadow or the value of the meadow was to Emmert, but the question was: What was the actual fair value of this crop of timothy and clover at the time it was destroyed, and what was the fair value of the crop of corn destroyed? As to the depreciation in value of the land caused by the embankment's arresting the flood waters of the river the petition alleged "that said plaintiff has been further damaged in the sum of $2,000 by reason of the depreciation of the market value of said farm in this: that in consequence of such overflow in the year 1889, and the flooding of his farm by said railroad grade holding and damming the water back upon it, and by subsequent overflows of like character, his said farm has

come to be known in the neighborhood as one liable to overflow, and consequently has lessened the market value of the land two-fifths of its value before it was flooded by said negligently constructed railroad, in August, 1883." This allegation of the petition did not state a cause of action. Under this allegation Emmert was not entitled to introduce any evidence to show that his real estate had been damaged or depreciated in value by the construction of this embankment; yet Emmert was, on the trial, over the objection of the railway company, permitted to testify that, after the recession of the high waters, the land was left wet and in a bad condition to cultivate; that the use of it in the year following the flood was of less value by one-half than it was previous to the flood; that the crops grown on the premises in the year succeeding the flood were only half the value they would have been had the flood not been there; that this value amounted to five dollars an acre. The admission of all this evidence was error, as it violated the rule of damages applicable to the case. We cannot say that the admission of this evidence was not prejudicial to the railroad company, as under it the jury may have, and probably did, charge the railroad company with the sum of money which Emmert testified he was compelled to pay for having his cattle pastured during the autumn succeeding the flooding of his land in August, 1892. The jury may have and probably did estimate the value of the crop grown on the premises in the year succeeding the flood of 1892, and concluded that crop was not worth as much by $5 an acre as it would have been had the lands of Emmert not been overflowed in that year. As already stated, Emmert was not suing for any of these things. He alleged generally in his petition his ownership of these lands; that on part of the land was a crop of growing corn, and on other parts of the land there was a pasture composed of timothy and clover, and that these grasses and this corn crop in 1889 were destroyed by the holding of the flood waters of the river on his

lands by the railroad company's embankment. What he had been compelled to pay or had paid for pasturing his cattle by reason of the presence of the water on his lands in 1889 was not an issue in the case. Whether the crop succeeding the flood of 1889 and 1892 was as good as it would have been had such an overflow not occurred, was not an issue in the case. We are constrained to say that we think the admission of this evidence was prejudicially erroneous. The judgment is reversed and the cause remanded to the district court with instructions to grant the railroad company a new trial.

REVERSED AND REMANDED.

NEBRASKA LOAN & TRUST COMPANY, APPELLANT, V. LINCOLN & BLACK HILLS RAILROAD COMPANY, APPELLEE.

FILED DECEMBER 22, 1897. No. 7958.

Eminent Domain: REVIEW OF PROCEEDINGS: ERROR AND APPEAL. The method of bringing to this court for review judgments of the district court in proceedings by railroads for the exercise of the right of eminent domain is by petition in error and not by appeal.

APPEAL from the district court of Howard county. Heard below before KENDALL, J. *Appeal dismissed.*

J. B. Cessna, W. H. Thompson, John A. Casto, and *George F. Work,* for appellant.

O. A. Abbott, J. W. Deweese, and *F. E. Bishop, contra.*

IRVINE, C.

The Lincoln & Black Hills Railroad Company instituted proceedings in Howard county for the appropriation of land of the Nebraska Loan & Trust Company. From the report of the appraisers an appeal was taken

to the district court. Within six months after the rendition of judgment in the district court a transcript of the proceedings was lodged in this court, but more than a year has elapsed and no petition in error has been filed or summons in error issued. It is plain that the case is here, if at all, by appeal and not on error. The railroad company now interposes objections to the jurisdiction, presenting the question whether an appeal lies from the district court to this court in such cases.

For many years it has been generally assumed that cases of this character, being legal rather than equitable in their nature, should be brought here on error and not by appeal. At the same time there is no constitutional inhibition against providing for an appeal in such cases, and the Nebraska Loan & Trust Company contends that the legislature has provided such a remedy. The question is one of technical rather than substantial importance, in view of the equal advantages now afforded by the two methods of review. The statute, after providing how condemnation proceedings by railroad companies shall be instituted, appraisers appointed, damages ascertained and reported to the county judge, and for an appeal from the report of the appraisers to the district court, further provides that "either party may appeal from the decision of the district court to the supreme court of the state, and the money so deposited shall remain in the hands of the county judge until a final decision be had, subject to the order of the supreme court." (Compiled Statutes, ch. 16, sec. 97.) This section was adopted as a portion of the first statute regulating railroads, approved February 8, 1864. (Session Laws, p. 130.) It has remained in this respect unchanged, except by the substitution of "state" for "territory" and "county judge" for "probate judge." It is by virtue of the use of the word "appeal" in this section that appellant here claims the right.

It has frequently been remarked that the word "appeal" is used in many different senses, owing to the di-

versity of statutes regulating appellate procedure. In at least four senses has it been used in this state with reference to proceedings in the supreme court alone. In one sense, and a very frequent one, it denotes all kinds of proceedings for the review of cases,—all proceedings commonly known as appellate. (*Vide* 2 Am. & Eng. Ency. Law 425, and all the English dictionaries.) In its special and technical sense it designates the particular form of review, dependent upon statute for its existence (*Wilcox v. Saunders*, 4 Neb. 569; *State v. Ensign*, 11 Neb. 529; *State v. Bethea*, 43 Neb. 451), whereby a case is transferred, after decision, to a higher court for a re-examination of the whole proceeding, and final judgment or decree in accordance with the result of such re-examination. (*State v. Doane*, 35 Neb. 707; *Western Cornice Mfg. Co. v. Leavenworth*, 52 Neb. 418.) In the latter sense, as applied to proceedings in this court, it can now only refer to the technical appeal provided for by the present "Title 21" of the Code of Civil Procedure. Unless in the statute under consideration it was used in this sense, this case is not properly before us. To determine the question an examination of the history of the various laws on the subject is necessary.

The first territorial legislature, as its first act, adopted portions of the statutes then in force in Iowa. Among these provisions, appearing as section 552, was the following: "From the decision of the district court an appeal lies to the supreme court." Immediately following, but under a separate caption, were a number of sections providing the manner, time, and effect of taking such appeal, very different from the law now in force. This was the only method of review except by *certiorari* then provided, and the only one known in civil cases until 1858. This was not our present technical appeal, whereby equity cases are reviewed, but a general and exclusive method of review. In 1858 a Code of Civil Procedure was adopted which, with amendments by subsequent legislatures, forms our present code of practice.

Title 16 of that Code provided for proceedings in error, and evidently contemplated making that the sole method of review by the supreme court. A number of the former provisions were then expressly repealed and there was also a general repealing clause, against which there was then no inhibition. Throughout the history of the territory the distinction between law and equity was observed in regard to procedure, and February 15, 1864, there was approved an act to regulate the practice in chancery. Section 45 of that act provided for the appeal of chancery cases, and the following sections regulated the time, manner, and effect of such appeals. These provisions were carried into the Revised Statutes of 1866 as Title 24 of the Code. They were repealed in 1867 (Session Laws, p. 71) by the act whereby the distinctions were abolished between actions at law and suits in equity. Thus we see that the general appeal provided for in 1855 had been superseded in 1858 by the creation of proceedings in error, and while the sections following the caption line and providing not for the right but the method of appealing seem not to have been expressly repealed, the Code of 1858 rendered them obsolete. (*Irwin v. Calhoun*, 3 Neb. 453.) No such thing as an appeal was thereafter known to our law until February 15, 1864, when a new kind of appeal was created for chancery cases alone. The repeal of this law, in 1867, entirely abolished appeals to the supreme court. (*Irwin v. Calhoun, supra.*) There again followed a period wherein appeals did not exist, until March 3, 1873, when the present law was passed, providing for appeals in equity cases, and which has been inserted into the Code as Title 21, in place of the long obsolete sections regulating the manner of proceeding in the early form of appeals, adopted from Iowa. (*Wilcox v. Saunders*, 4 Neb. 569.) In the two cases last cited will be found interesting reviews of the legislation we have been considering, by judges who were for the most part personally cognizant of its history.

The section which it is claimed gives the right of ap-

peal in this case was, it will be observed, enacted at a time when for six years no appeals to the supreme court had been known to the law, and a week before the same legislature created anew the right to appeal, and confined it to chancery cases. It follows then that the word "appeal" in the proviso quoted could not have referred to the present technical appeal, which was not created until nine years thereafter, and then confined to equity cases; nor to the early appeal provided for in 1855, for that method had been for six years superseded; nor again did it anticipate and contemplate the appeal provided for one week later, else that appeal would not, by the terms of the statute, have been restricted to chancery cases. A retrospective glance will show that appellate procedure was still in a formative state and had not in the minds of the legislature yet assumed a fixed character. The word used could not have referred to any special method of review then known, and must have been used in its broad sense for the purpose of conferring generally the right to a review by the supreme court, leaving the practice and method of review to be determined by the legislation in force at the time of any particular proceeding. So interpreted we have no hesitation in saying that under present statutes the method must be by petition in error. The action is essentially legal and is not within the cases which the act of 1873 permits to be brought here by appeal.

It is contended that a technical appeal must have been contemplated by the final clause of the statute, whereby the condemnation money is to be held by the county judge "until a final decision be had, subject to the order of the supreme court." This can mean no more than that the money is to be held subject to the final decision as ordered by the supreme court; but if it be true as claimed that it contemplates the entry of a final judgment by the supreme court, this is insignificant, because section 594 of the Code, inasmuch as error was to be made the only method of review, expressly provided that

in error cases the supreme court may itself enter the judgment the district court should have entered.

APPEAL DISMISSED.

RAGAN, C., not sitting.

PHILIP M. CRAPO V. H. C. HEFNER ET AL.

FILED JANUARY 3, 1898. No. 7704.

Notes: RATES OF INTEREST. Where a note or bond provides for interest at a lawful rate from date until maturity, and for a higher lawful rate thereafter, the latter provision is not in the nature of a penalty, but is authorized by section 3, chapter 44, Compiled Statutes, and accordingly enforceable in an action on the contract. (*Havemeyer v. Paul*, 45 Neb. 373.)

ERROR from the district court of Lancaster county. Tried below before HALL, J. *Reversed.*

Samuel J. Tuttle, for plaintiff in error.

W. E. Stewart and *E. H. Wooley*, *contra.*

POST, C. J.

There is presented by the record of this case a single question, viz., the rate of interest recoverable upon the note in suit, which in terms provides for interest at seven per cent per annum, payable annually, with the further proviso that "this note is to draw nine per cent interest per annum after default in payment of principal or interest." There was due at the commencement of the action, in addition to the principal note of $3,000, one interest coupon for $210, which also provided for interest at the rate of nine per cent after maturity. The district court allowed interest at seven per cent only and denied the plaintiff's prayer for the higher rate contracted for after default, and which is the ruling now assigned as error.

The precise question here involved was, in *Havemeyer v. Paul*, 45 Neb. 373, determined adversely to the ruling of the district court. It was in the case cited held, overruling *Richardson v. Campbell*, 34 Neb. 181, that where a note provides for a lawful rate of interest from date until maturity and a higher lawful rate thereafter, the latter provision is not in the nature of a penalty, but is authorized by section 3, chapter 44, Compiled Statutes, and accordingly enforceable in an action on the contract. It follows from the reasoning in that case that the judgment of the district court must be reversed and the cause remanded.

REVERSED.

GUY MATHEWS V. H. B. MULFORD.

FILED JANUARY 3, 1898. No. 7436.

1. **Bill of Exceptions:** ALLOWANCE: LACHES. The fact that the party excepting was diligent, and the delay in serving a bill of exceptions was caused by the official reporter's default in preparing a transcript of the testimony, does not authorize the submission of the bill after the expiration of the time fixed by law and the order of the court.

2. **New Trial:** BILL OF EXCEPTIONS: NEGLECT OF STENOGRAPHER. A court of equity will grant a new trial in a proper case where a party has been deprived of a bill of exceptions by reason of the inability of the stenographic reporter to furnish a transcript of the testimony in time.

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

Smith & Sheean, for plaintiff in error.

I. R. Andrews, contra.

POST, C. J.

This action was instituted in the court below by Guy Mathews, an infant, by Mellon L. Mathews, his

next friend, to recover for personal injuries. At the close of plaintiff's testimony the jury, under the directions of the court, returned a verdict for the defendant, and to reverse the judgment entered thereon is the purpose of these proceedings.

The cause was tried at the September, 1893, term of the district court of Douglas county, which adjourned *sine die* on January 5, 1894. Forty days from the rising of the court was allowed for the preparation and service of a bill of exceptions. The trial judge extended the time an additional forty days. The official stenographer furnished the plaintiff with a transcript of the evidence on May 29, 1894, with his certificate attached to the effect that owing to the large amount of official business in his hands, he was unable sooner to complete the transcript of the evidence. The proposed bill of exceptions was served upon counsel for defendant two days later, which was considerably more than eighty days from the rising of the court. The draft of the bill was returned to plaintiff with the indorsement thereon objecting to the allowance thereof on the ground that the same was not served in time. The bill was allowed by the trial judge, subject to the foregoing objections. Under the foregoing facts can the bill of exceptions be considered for any purpose? Plaintiff argues the affirmative of the proposition and cites in support of his contention *Richards v. State*, 22 Neb. 145. The cases are substantially alike, but the opinion in *Richards v. State, supra*, upon the question before us was in express terms overruled in *Horbach v. City of Omaha*, 49 Neb. 851, in which last case it was decided that a bill of exceptions not presented to the adverse party within the time fixed by law and the order of the court cannot be considered, over objection, notwithstanding the delay in the presentation was caused solely by the default of the official reporter in preparing a transcript of the evidence. Following that decision the bill of exceptions must be disregarded. The remedy, if any, is by application to a court of equity for a new trial.

(*Curran v. Wilcox*, 10 Neb. 449; *Holland v. Chicago, B. & Q. R. Co.*, 52 Neb. 100.) Being unable without a consideration of the testimony to determine whether any error was committed in directing the verdict, the judgment is

AFFIRMED.

NICHOLAS HALMES, APPELLANT, V. GEORGE E. DOVEY, APPELLEE.

FILED JANUARY 3, 1898. No. 7565.

Review: CONFLICTING EVIDENCE. Decree appealed from *held* to be sustained by sufficient, although conflicting, evidence.

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

Byron Clark, for appellant.

A. N. Sullivan, contra.

POST, C. J.

This was an action in the district court for Cass county, the purpose of which was to compel the defendant Dovey to execute an alleged agreement for the release of certain lands from the operation of a judgment previously recovered by him against one Thomas, the plaintiff's grantor. A final hearing in the district court resulted in a finding and decree adverse to the plaintiff's contention, and from which an appeal has been prosecuted in this court.

Appellant frankly concedes that the evidence, so far as it relates to the principal question at issue, viz., the agreement alleged as the foundation of the action, is conflicting and irreconcilable, but seeks to prove that the finding is so decidedly against the weight of the evidence as to require a reversal of the decree upon that ground,

while counsel for appellee, with equal plausibility, defends the finding as the logical and necessary result of the proofs adduced. It is clear, from a reading of the entire record, that the case is governed by the rule many times asserted by this court, viz., that a judgment or decree, unless manifestly wrong, will not be disturbed although the evidence may seem sufficient to support a finding for the adverse party. A statement of the evidence would in this connection be without profit to any of the parties concerned and will accordingly not be attempted.

DECREE AFFIRMED.

PATRICK D. MCCORMICK, ADMINISTRATOR, V. MRS. S. A. MCCORMICK.

FILED JANUARY 3, 1898. No. 7689.

Executors and Administrators: ALLOWANCE OF CLAIMS: ORDERS: RECORDS. The order of allowance of a claim against an estate by the county court, and its entry thereof, examined, and *held* sufficient, both in form and substance; and further, that the entry was not fatally defective by reason of its lack of the signature of the county judge.

ERROR from the district court of Sarpy county. Tried below before BLAIR, J. *Reversed.*

J. J. O'Connor and *I. J. Dunn,* for plaintiff in error.

Anthony E. Langdon and *Martin Langdon, contra.*

HARRISON, J.

From the record filed in this matter, we discover that during the year 1891 Margaret L. McKenna, of Sarpy county, this state, died intestate. Application was made to the county court by the defendant in error, mother of the deceased, for the appointment of an administrator

of the estate, and she named in her petition Daniel Morrison for such position. Clement L. McKenna appeared and requested the appointment of Patrick D. McCormick. This request was granted, and, in August, 1892, McCormick was appointed administrator, and was allowed one year within which to settle the estate. By order of the court, duly published, creditors were allowed six months within which to present claims for adjustment, and September 20, 1892, October 28, 1892, and December 26, 1892, were designated as the days for hearing and adjustment of claims. On September 20, of the days fixed by such order, the defendant in error presented a claim against the estate; and of what was done in regard to her claim the record discloses as follows: On the back of the claim was indorsed: "Allowed Sept. 20, 1892. Edward B. Hoyt, Co. Judge." And in the files of the county court there appeared what was headed a "Schedule of Claims," one of which was:

Claimant.	Amount of claim.	Nature of account.	When allowed.
Mrs. S. A. McCormick.	$739.50	.....	Sept. 20, 1892.

There was a column in which as to the other claim (there was but one other scheduled) there appeared the amount allowed. Of the claim here in question there was no entry in said column.

Of the exhibits in the record presented to this court was this:

"Copy of Entry Book C, page 446. Exhibit C.

"In the Matter of the Estate of Maggie McKenna. Schedule of Claims Allowed by the Court. September 20, 1892.

"F. A. Harrison, legal notice..... $6 00
"Mrs. S. A. McCormick, as per bill on file..... 739 50
"Allowed September 20, 1892..... 739 50

During the month of January, 1894, on an application for the purpose on behalf of defendant in error, a citation was issued to the administrator by which he was required to appear and show cause why he did not, or should not, pay the claim of defendant in error. The administrator appeared and made a showing in the matter, a hearing was had, and the matter taken under advisement. A short time afterward, and seemingly before the decision in the submitted controversy, there was filed for defendant in error a motion that the court correct or amend the docket entry of the allowance of her claim. Of this motion there was a hearing, after which it was overruled. The court in its decision on the motion made findings in effect that the claim had never been allowed, and that no hearing had ever been had thereon, and ordered a hearing on the claim, fixed a time within which it was to be done, and appointed commissioners to examine and adjust it. On error to the district court of Sarpy county, the order of the county court was reversed, and the journal entry states further of what was done: "It is ordered that this cause be remanded for further proceedings by said court in accordance with law, and that the motion and application be sustained and a judgment entered *nunc pro tunc*, as of the 20th day of September, 1892." The matter is presented here in error proceedings on the part of the administrator.

As we view the questions raised, their proper solution requires a reference to, and application of, some of the statutory provisions relative to the county court and its jurisdiction in the settlement of estates of deceased persons. It is directed in the chapter which regulates the settlement of such estates that a time shall be fixed within which claims against the estate must be presented for adjustment; also that times and places shall be designated for examining and passing on claims of which notice shall be given in the prescribed manner. It is also provided that the judge of the county court

shall examine, adjust, and allow or reject claims. (See Compiled Statutes 1891, ch. 20.) In the chapter relative to county courts, the section in regard to the probate books which was in force at the times of the occurrences out of which arose this controversy, was as follows: "The probate books shall consist of a record, entry, estate, and fee book, which shall be kept as follows: 1. The record book shall contain a full record of all wills, testaments and codicils, and the probate thereof, all letters testamentary, of administration and guardianship, and all bonds of executors, guardians and administrators. The original papers shall be filed and preserved in the office. 2. There shall be entered in the estate book all inventories, appraisements, sale bills, and other exhibits and reports received by the court, relative to the settlement or disposition of estates, showing the amount of all such estates, as shown by such instruments. 3. The entry book shall contain a fair statement of all the matters, controversies, and suits that may have arisen for decision and adjudication before said court, with the names of the parties, dates of each entry, and the judgment or opinion of the court, and all orders thereof, and a full record of all determinations of the district or supreme court upon appeal or petition in error in such matters, controversies, and suits. 4. The fee book shall contain an exact account of all fees allowed and paid in each case, showing the names of the persons receiving the same, and for what such fees were paid." (See Compiled Statutes 1891, ch. 20, sec. 32.)

It is conceded that the entry in book "C," which we have hereinbefore set forth in terms, was in the handwriting of the judge who was in office at the date it states the account or claim was allowed (he had died before this proceeding was instituted), and we think it may be said, from what appears in the record, and it is not controverted, that this entry, such as it was, appeared in the proper book for such an entry,—in what is designated by the section of the statutes just quoted

as the "entry book." If so, was it such an entry as constituted the claim an allowed one? We think the answer must be in the affirmative . All the preliminaries prescribed in the statute, such as fixing the dates for the presentment and adjustment of claims, publication of notice, etc., had been observed and fulfilled. The entry on the record, while lacking in some recitals such as the appearances of parties and the hearing and contest over the claim, if any, was sufficient to show an allowance of the claim and was complete as an allowance in fact, and also as an entry of the act. (*Yeatman v. Yeatman*, 35 Neb. 422.) That the county judge did not sign the record of the order of allowance did not invalidate or render the allowance of no force. The lack of the signature is not fatal. (*Scott v. Rohman*, 43 Neb. 618.) It follows that the judgment of the district court by which the adjudication of the county court was reversed will be affirmed and the order to the county court to make a *nunc pro tunc* entry of the order of allowance of the claim will be

REVERSED.

ALICE V. ANDERSON V. JERUSHA E. STORY, GUARDIAN.

FILED JANUARY 3, 1898. NO. 7728.

1. **Review:** JURISDICTION: CONSENT. If there is a lack of jurisdiction of the subject-matter, acquiescence or consent of the parties that it be assumed will not confer it, and an appeal in the case or proceeding from the adjudication therein vests no jurisdiction in the appellate tribunal.

2. **Courts:** ACCOUNTS OF FOREIGN GUARDIAN: JURISDICTION. A guardian appointed by a surrogate of a county in New York after removal to this state, and residence here by herself and the ward, applied to a county court of this state to be allowed to render an account as guardian, and to be discharged. The application was acted upon by the county judge, and the guardian presented her report and account. The ward appeared and contested the allowance of portions of the account, without objection or challenge to the jurisdiction of the court. *Held*, That the

county court had no jurisdiction of the subject-matter, and consent or acquiescence of the parties did not give it, and the district court to which an appeal was taken acquired no jurisdiction.

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

Abbott, Selleck & Lane, for plaintiff in error.

Abbott & Abbott, contra.

HARRISON, J.

It appears herein, from a statement in one of the briefs, which is stated in the other to be substantially correct, that the defendant in error was, during a few months of the year 1874, and prior thereto, the wife of John H. Underwood, who died during the year 1874 in Virginia, where he and his wife were then residing. The plaintiff in error, the daughter of the couple, was born about three months after the death of the father. Soon after the birth of the daughter, the mother removed to Chautauqua county, New York, and there applied to the proper court to be, and was, appointed guardian of her child and its estate. This was done of date May 6, 1876. The defendant in error received as such guardian some $482, the child's share of its father's estate. After about seven years of widowhood, the defendant in error was married to Andrew J. Story, and some three years afterward they removed to Saline county, this state. The daughter, soon after she became of age, was married to one Perry Anderson. The defendant in error had never accounted as guardian, and the daughter, after her marriage, urged that such an accounting be made. After some attempted settlements of the matter, but without anything definite being accomplished, during the year 1892, the defendant in error filed what was styled a petition in the county court of Saline county, in which the facts relative to her appointment as and acts as guardian were set forth, and in which she prayed

as follows: "Your petitioner prays that you will request the honorable county judge of said Chautauqua county, New York, to certify all the proceedings heretofore and in said matter to the county court of said Saline county, Nebraska, to the end that said matter may be finally settled where the jurisdiction thereof is vested by reason of the residence of all the parties interested therein. And your petitioner will ever pray," etc. The county judge of Saline county sent the following to the surrogate of Chautauqua county, New York: "The county judge of Saline county, Nebraska, to the Hon. judge of Chautauqua county, New York, greeting: Whereas, Mrs. Jerusha E. Story (formerly Underwood), now resident of this county, has filed her petition in this court, a copy of which is hereto attached, setting forth that in the year 1876 she was duly appointed guardian of Alice Underwood (now by marriage Anderson), by the then judge of your court, and that herself and ward and all persons interested have since become, and now are, *bona fide* residents of this county; and that said matter of guardianship has never been settled, and praying that said matter may be removed to this court for final settlement because of the residence of all parties within the jurisdiction of this court: Now, therefore, you are hereby respectfully requested to transmit to this court, at your convenience, a certified transcript of all the proceedings had in said matter in your court, together with a certified copy of the bond, to the end that final settlement of the matter may be made. All unpaid fees will be collected and transmitted to your court with receipt for transcript." Pursuant to the request, the surrogate forwarded the papers in the guardianship matter to the judge of the county court of Saline county. The county judge then made an order that the accounting be had and heard on September 9, 1892, at a stated hour, and caused a copy of the order to be published. The ward (the plaintiff in error) appeared and contested the matter to the extent of certain allowances which

the guardian in her report claimed to be her due. After a hearing on the matter it was adjudged that the guardian was not entitled to the credits claimed in her report or account, and, further, that she had received the sum of $481.95; and it was "ordered by the court that said guardian pay to said minor the sum of $481.95, and, upon complying with the order of this court, she will be discharged from said trust and her letters of guardianship cancelled and annulled." The matter was, on behalf of Mrs. Story, appealed to the district court where, as the result of a trial to the court, it was disposed of as follows: "And the court being fully advised in the premises finds for the guardian Jerusha E. Story, and finds that she is entitled to have her account for the maintenance of said ward allowed out of said ward's estate. It is therefore considered by the court that the guardian Jerusha E. Story, be, and she is hereby, discharged, and that she have and recover of and from Alice U. Anderson her costs expended in this court." The matter is presented to this court in error proceedings on the part of the ward.

It is stated in one of the briefs that all parties acquiesced in the jurisdiction of the county court of Saline county, and that no question is raised touching such jurisdiction; but however this may have been, it is clear that the county court of Saline county, though it had jurisdiction of probate matters and of the matters of guardianships, did not have jurisdiction to entertain an accounting by a guardian appointed by a surrogate court of New York to hear and adjudicate the matters arising on such accounting, and to discharge or refuse to discharge the guardian. This was all clearly without its jurisdiction, and acquiescence or consent of the parties could not and did not confer jurisdiction, if it did not exist. If the county court had no jurisdiction, the appellate courts obtained none. (*Brondberg v. Babbott*, 14 Neb. 517; *Union P. R. Co. v. Ogilvy*, 18 Neb. 638; *Moise v. Powell*, 40 Neb. 671; *Johnson v. Parrotte*, 46 Neb. 51;

Keeshan v. State, 46 Neb. 155; *Steuberg v. State*, 48 Neb. 299.) As the county and district courts were without jurisdiction in the matter, their adjudications were void and of none effect. The judgment of the district court is reversed and a dismissal of the matter will be entered.

REVERSED AND DISMISSED.

BENJAMIN D. MILLS V. STATE OF NEBRASKA.

FILED JANUARY 3, 1898. No. 9234.

1. **Information:** COMPLAINT: VARIANCE. In a prosecution by information, the complaint and information must charge the same offense, but it is sufficient if the charge in the information is substantially the same as that alleged in the complaint. If this is so, a plea of no preliminary examination on the ground of a variance between the complaint and information is without force. (*Cowan v. State*, 22 Neb. 519; *Hockenberger v. State*, 49 Neb. 706.)

2. ———: ———: ———. If the identity of the offense charged is preserved, the statement of it in the information or counts thereof may be varied from that of the complaint to meet a possible state of the proof.

3. ———: UNCERTAINTY: EMBEZZLEMENT. The word "embezzle" includes within its import the "conversion to his own use" as alleged in an information against one accused of embezzlement, and it does not constitute an information fatally defective, for uncertainty as a plea, that the two are joined by the copulative "and." The same is also true of the first and any other word or set of words used to express a manner of the commission of the crime.

4. **Embezzlement:** INFORMATION: ALLEGATION OF VALUE. In an allegation of an information of the crime of embezzlement it was stated that the embezzlement was of the sum of $6,000 in money. *Held*, To be a sufficient expression of the value, the presumption being that it was lawful money.

5. ———: PUBLIC MONEY: OFFICERS AND OTHERS. By section 124 of the Criminal Code, any person who advises, aids, or participates in the embezzlement of public money by the officer or person charged with the collection, receipt, safe-keeping, transfer, or disbursement of such money is himself guilty of embezzlement. The words "any person" refer to all, and are not confined in

meaning to a person or persons or officer or officers in some manner intrusted with the collection, handling, or care of public money.

6. **Instruction Defining Crime.** An instruction which consisted of quotation of the main portions of the section of the Criminal Code under which the prosecution was instituted *held* not improper or misleading.

7. **Instructions:** CRIMINAL LAW: CIRCUMSTANCES. An instruction in this cause in regard to consideration of circumstances *held* proper, and when construed with the other instructions not misleading.

8. ———: REVIEW. Instructions to the jury are to be considered together and construed as a whole; and if, so considered and construed, they are correct, it is sufficient.

9. ———: EMBEZZLEMENT: EVIDENCE. Certain instructions examined and *held* applicable to the evidence herein, and proper.

10. ———: NON-DIRECTION: REVIEW. Mere non-direction does not furnish sufficient reason for reversal on review unless proper instructions have been requested and refused. (*Hill v. State*, 42 Neb. 503; *Pjarrou v. State*, 47 Neb. 294.)

11. **Embezzlement:** EVIDENCE: RECEIPT. Objections to the admission of evidence examined and *held* properly overruled.

12. **New Trial:** NEWLY-DISCOVERED EVIDENCE. To entitle a party to a new trial on the ground of newly-discovered evidence, it must appear that the applicant for the new trial could not with reasonable diligence have discovered and produced such evidence at the trial. (Criminal Code secs. 490, 492.)

13. **Embezzlement:** CONVICTION. Evidence *held* sufficient to sustain the verdict.

ERROR to the district court for Harlan county. Tried below before THOMPSON, J. *Affirmed.*

The facts are stated in the opinion.

James McNeny and *Thomas Darnall*, for plaintiff in error:

The court erred in overruling the plea in abatement as to the fourth count in the information. For the crime sought to be charged therein the plaintiff in error had neither had nor waived a preliminary hearing. There was a fatal variance between the complaint and

the information. (*Yaner v. People*, 34 Mich. 286; *People v. Jones*, 24 Mich. 214; *People v. Fairchild*, 48 Mich. 31; *People v. Wallace*, 94 Cal. 497; *People v. Parker*, 91 Cal. 91.)

The first count of the information is invalid for uncertainty. (*United States v. Cruickshank*, 92 U. S. 558; *State v. Benjamin*, 49 Vt. 101; *Commonwealth v. Chase*, 125 Mass. 202.)

The first count of the information is insufficient because it fails to state the value of the money alleged to have been embezzled. (*Bork v. People*, 16 Hun [N. Y.] 476; *State v. Stimson*, 4 Zab. [N. J. Law] 9; *Commonwealth v. Smith*, 1 Mass. 245.)

It is absolutely essential to establish the principal's guilt, beyond a reasonable doubt, before the accessory can be convicted. (*Ogden v. State*, 12 Wis. 592; *Pettes v. Commonwealth*, 126 Mass. 242; *Hatchett v. Commonwealth*, 75 Va. 925; *Goins v. State*, 46 O. St. 457; *Ulmer v. State*, 14 Ind. 52; *Buck v. Commonwealth*, 107 Pa. St. 486.)

The evidence does not establish the crime of embezzlement against the principal, and plaintiff in error was not lawfully convicted. (*Hamilton v. State*, 46 Neb. 284; *Fitzgerald v. State*, 50 N. J. Law 475; *People v. Royce*, 106 Cal. 173; *Chapin v. Lee*, 18 Neb. 440; *Fleener v. State*, 58 Ark. 98; *Commonwealth v. Este*, 140 Mass. 279; *State v. Hebel*, 72 Ind. 361; *State v. Munch*, 22 Minn. 75; *People v. Galland*, 55 Mich. 628.)

The fourth count of the information does not state facts sufficient to constitute a crime under the laws of the state. Stripped of its legal phraseology, this count simply charges plaintiff in error with having borrowed the money of the county treasurer, knowing the same to be the money of Harlan county. Is this an offense within the meaning of the statute? We contend it is not. (*State v. Teahan*, 50 Conn. 100; *Commonwealth v. Kimball*, 21 Pick. [Mass.] 373.)

Instruction No. 8 was erroneous in directing the jury

that guilt could be established not only by direct evidence, and other competent evidence, but by "circumstances." (*Long v. State*, 23 Neb. 33; *Thompson v. State*, 30 Ala. 28.)

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

References: *State v. King*, 81 Ia. 587; *Rhodes v. State*, 27 N. E. Rep. [Ind.] 866; *United States v. Bryne*, 44 Fed. Rep. 188; *State v. Fain*, 106 N. Car. 760; *State v. Knox*, 17 Neb. 683.

HARRISON, J.

The plaintiff in error was by an information filed in the district court of Harlan county charged in the seven counts thereof with the crime of embezzlement. After some preliminary pleas were heard and decided in accordance with motions presented and sustained, the objects of which were that the state be required to elect on which count or counts of the information it would stand and proceed with the prosecution, the state elected to proceed under the first and fourth counts. The plaintiff in error pleaded not guilty, and a trial resulted in his conviction and sentence to a term of imprisonment in the penitentiary, and to pay a fine in double the amount which by the verdict he was adjudged guilty of embezzlement. The prosecution was instituted for an alleged violation of the provisions of section 124 of the Criminal Code, which, to the extent we need notice it, is as follows: "If any officer or other person charged with the collection, receipt, safe-keeping, transfer, or disbursement of the public money, or any part thereof, belonging to the state, or to any county, or precinct, organized city or village, or school district in this state, shall convert to his own use, or to the use of any other person or persons, body-corporate, association or party whatever, in any way whatever, or shall use by way of investment in any kind of security, stock, loan, property, land, or mer-

chandise, or in any other manner or form whatever, or shall loan, with or without interest, to any company, corporation, association, or individual, any portion of the public money, or any other funds, property, bonds, securities, assets, or effects of any kind, received, controlled, or held by him for safe-keeping, transfer, or disbursement, or in any other way or manner, or for any other purpose; or, if any person shall advise, aid, or in any manner participate in such act, every such act shall be deemed and held in law to be an embezzlement of so much of the said moneys or other property, as aforesaid, as shall thus be converted, used, invested, loaned or paid out as aforesaid, which is hereby declared to be a high crime, and such officer or person or persons shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money or other property so embezzled as aforesaid." It was charged in the first count of the information: "That Ezra S. Whitney, late of said county, on the 31st day of December, 1894, in the county of Harlan, state of Nebraska, being an officer, to-wit, being the county treasurer for the said county of Harlan, being charged as such officer with the collection, receipt, safe-keeping, transfer, and disbursement of the public moneys belonging to said county, certain of said moneys, to-wit, six thousand dollars of the public moneys belonging to said county, did unlawfully and fraudulently embezzle and convert to his own use, which said moneys had come into the possession and custody of the said Ezra S. Whitney, by virtue of his said office, and in his discharge of the duties thereof. And before said embezzlement, conversion, and felony was committed as aforesaid by the said Ezra S. Whitney, to-wit, on the 31st day of December, 1894, in the county of Harlan aforesaid, one Benjamin D. Mills unlawfully, purposely, fraudulently, corruptly, and feloniously did then and there procure, advise, incite, aid, and abet the said Ezra S. Whitney in

the perpetration of said embezzlement and conversion in the manner and form aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska." And in the fourth: "That the said Ezra S. Whitney, late of said county, on the 31st of December, 1894, in the county of Harlan, and state of Nebraska, being an officer, to-wit, being the county treasurer for the said county of Harlan, and being charged as such officer with the collection, receipt, safe-keeping, transfer, and disbursement of the public moneys belonging to said county, certain of said moneys, to-wit, six thousand dollars of the public moneys belonging to said county, did unlawfully and fraudulently loan and convert to the use of the said Benjamin D. Mills, which said money had come into the possession and custody of the said Ezra S. Whitney by virtue of his said office, and in his discharge of the duties thereof, and had been received and was controlled and held by him, the said Ezra S. Whitney, for safe-keeping, transfer, and disbursement, as county treasurer as aforesaid. And the said Benjamin D. Mills, then and there being, did then and there, unlawfully, knowingly, and feloniously, advise and procure the said Ezra S. Whitney, county treasurer as aforesaid, to loan him, the said Benjamin D. Mills, said six thousand dollars of said public money, and the said Benjamin D. Mills, did then and there receive from and of Ezra S. Whitney, treasurer of said Harlan county as aforesaid, said six thousand dollars, he, the said Benjamin D. Mills, then and there well knowing the same to be the public money of said Harlan county, received and held as aforesaid, with intent to embezzle and convert to the use of him, the said Benjamin D. Mills, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Nebraska."

By plea in abatement the point was raised and presented in the trial court that the fourth count contained a charge of a crime which was not alleged in the com-

plaint filed in the examining court; hence the plaintiff in error had never had or waived a preliminary examination on such accusation. There were four counts in the complaint filed with the justice of the peace, and when arrested and taken before the justice, the plaintiff in error waived an examination. The first count of the complaint, after statements that Ezra S. Whitney was county treasurer of Harlan county, Nebraska, and of his duties in regard to collection, disbursement, etc., of the public moneys, charged that he did fraudulently, unlawfully, and feloniously convert to his own use and embezzle the sum of $700 of said public money, and that Benjamin D. Mills, plaintiff in error, unlawfully, purposely, fraudulently, corruptly and feloniously did procure, advise, incite, aid, and abet the said Ezra S. Whitney in the perpetration of said embezzlement and conversion. The second count was in substance the same, except as to the amount alleged to have been embezzled, which was $600; also the third, except as to amount, which was stated to be $6,000; and likewise the fourth, except in it the sum was fixed at $11,190. The fourth count in the information filed in the district court, it will be borne in mind, charged the conversion of the public money, in the sum of $6,000, to the use of Benjamin D. Mills, and that it was by his advice and procurement that it was done. Under the system of prosecution by information it may be said the complaint and information should charge the same offense; but it may be added, when it appears that the charge in the complaint is substantially the same as that set forth in the information, the plea of the want of a preliminary examination, or a variance between the complaint and the information is unavailing. (*Cowan v. State*, 22 Neb. 519; *Hockenberger v. State*, 49 Neb. 706.) In the case of *State v. King*, 81 Ia. 587, wherein the defendant had been treasurer of a county in Iowa and was indicted for embezzling the funds of the county, it was charged in the pleading, after the usual averments, that he "did * * *

embezzle and convert to his own use without authority of law," a stated sum; that "he did * * * convert said money to his own use by expending the same in his private business, and by permitting persons, whose names are to this grand jury unknown, to use and expend said money in their private business transactions, and by using said money to pay his own private debts." The court in review, in passing on the question of whether the indictment was bad for duplicity, observed: "We are of opinion that the indictment is sufficient. The gist of the offense is the wrongful conversion of the public money, and it is wholly immaterial and mere surplusage to state whether the defendant used it in paying his debt, in purchasing property, had it on deposit in bank, carried it on his person, or loaned it to others; and the fact that three different modes of concealing the money are set forth in the indictment is wholly immaterial." The case of *State v. Spaulding*, 24 Kan. 1, is one in which the defendant was convicted in the trial court of the crime of embezzlement. It is stated in one paragraph of the headnotes: "A preliminary examination was had upon a complaint charging defendant with the embezzlement, as city clerk, of certain moneys of the city of Leavenworth. Afterward an information was filed containing several counts, each charging the embezzlement of the same moneys at the same time, and as the property of the same party, but differing in this: that one charged him with embezzling as clerk, another as agent, another as servant, and so on. Held that a special plea that defendant had had no preliminary examination, except upon the charge of embezzlement as clerk, and that, therefore, all the other counts should be stricken out, was properly overruled." And in the body of the opinion it was said: "In reference to these counts, it will be noticed that they charge the embezzlement of the same money, at the same time, and as the property of the same party. The only difference between them is in the relation which the defendant is charged to have sus-

tained to the party whose money was embezzled. In one he is called an officer,—its clerk; in another, an agent; in another a bailee, and so on. It is the same act—the same wrong—which is complained of in each count." In the case at bar, the fourth count of the information charged the embezzlement of the same money, of the same party, and at the same time as did the complaint, the sole difference being the manner or method alleged of the commitment of the crime. It was not a charge of a different offense, but the allegation of the manner in which the crime was committed was varied,—no doubt, to meet a possible contingency in the evidence. This was allowable. (*State v. Spaulding, supra*; 1 Wharton, Criminal Law [6th ed.] secs. 424, 425; 7 Ency. Pl. & Pr. 446.)

It is urged that the first count of the information is bad for uncertainty, in that it states that Ezra S. Whitney "did * * * embezzle and convert to his own use the public moneys of the county." It is claimed that this alleges the crime to be charged, generally by the use of the term "embezzle," and specifically by the use of the words "convert to his own use." Of the form and substance of the charge in the first count of the information, it may be said: "Embezzle includes in its meaning appropriation to one's own use, and, therefore, the use of the single word embezzle, in the indictment or information, contains within itself the charge that the defendant appropriated the money or property to his own use." (*State v. Wolff*, 34 La. Ann. 1153; *Hamilton v. State*, 46 Neb. 284.) "Embezzlement" includes "conversion to his own use," and it is proper to use them, in a charge of the crime, connected by the copulative "and." The same is also true of other words included in the term "embezzle." (7 Ency. Pl. & Pr. 448.) That in proof of this charge it might be shown that the money was also converted to the use of another party, would not be repugnant. It might be to the use or benefit of the person holding the office, and also to the benefit of another. In

this there would be no inconsistency. It would be but one manner of the commission of the crime charged. (*State v. Manley*, 17 S. W. Rep. [Mo.] 800.) We do not think it can, with soundness, be asserted that the allegations of the count under consideration did not inform the party to be charged, of the crime, with sufficient clearness to enable him to prepare his defense. It was sufficiently definite if it did this.

It is also claimed that the first count of the information is defective because it does not state in specific terms the value of the money averred to have been embezzled. The point here raised has been determined by this court adversely to the contention of counsel for plaintiff in error. In the case of *State v. Knox*, 17 Neb. 683, in considering the sufficiency of the charge of the crime of embezzlement of money, in a complaint, it was said of one of the objections: "That an allegation of value is indispensable. This would be necessary if property or bank bills, not a legal tender, had been embezzled; but, where the allegation is the embezzling of $35 in money, the amount designated expresses the value, the presumption being that it was lawful money." (See *Bartley v. State*, 53 Neb. 310; *Hildreth v. People*, 32 Ill. 36. See also 7 Ency. Pl. & Pr. 432.) The charge in the case at bar was of the embezzlement of a stated number of dollars, and was sufficient.

It is insisted that the fourth count of the information does not state facts sufficient to constitute a crime under the laws of the state. If it does so, it is under the provisions of section 124 of the Criminal Code, a portion of which we have hereinbefore quoted. The argument for plaintiff in error is based, in part at least, on the proposition that this count of the information charges no more than that Mills borrowed the money of the county with knowledge that it was the county's money, and that this is not an offense; and proceeding from this standpoint, among other matters urged in support of the position

taken, states that section 124 of our Criminal Code is largely copied from an act of congress passed in 1846, and that it is a significant fact that the original act of congress has since been amended to include a borrower of public money, from which the conclusion is drawn that the act as originally passed did not include such a party; hence, the amendment; and the further conclusion is drawn in argument that our section, being largely a copy of the original act of congress, cannot, or should not, be construed to include the borrower. We will say here that we can by no means agree that the fourth count of the information charges against the plaintiff in error a mere naked borrowing of the money of Harlan county from its treasurer with knowledge that it belonged to the county. It charges an embezzlement of such money, its misappropriation or unlawful and felonious conversion, and that plaintiff in error did advise and procure the same, or in other words, actively participated by words or deeds in the act charged. But leaving this, at least for the present, if not entirely, we will turn to another phase of the question.

Section 124 of the Criminal Code embodies many of the constituent elements of the act of congress to which reference has been made; but it bears a strong resemblance to, and is, in fact, with some few necessary changes and omissions,—the first to meet a difference in conditions and political subdivisions in this state,—a reproduction of section 15 of an act passed by the legislature of the state of Ohio, April 12, 1858. (2 Swan & Critchfield Revised Statutes 1606, sec. 15.) In the case of *Brown v. State*, 18 O. St. 496, which was a prosecution instituted for an alleged violation of the provisions of said section 15, the indictment contained six counts, of which the first and second were abandoned. On the trial of each of three of the other counts it was charged that the treasurer of one of the Ohio counties had converted the money thereof to the use of Brown, and that Brown aided in the act; and, in each of two of them, that he

also participated in the act. In one count it was charged that Brown, by and with the assistance of the treasurer, took the money of the county from the treasury, it being then in the possession of the treasurer. Brown was convicted, and on review in the supreme court it was held: "By the act of April 12, 1858 (2 Swan & Critchfield Revised Statutes, 1606, sec. 15), the party advising, aiding, or participating in an embezzlement of public money, by an officer or person intrusted with it, is himself guilty of embezzlement, although he be not himself an officer, or person intrusted with public money. * * * The crime of advising, aiding, or participating in an embezzlement by a public officer is made by said act a distinct and substantive offense, and the party guilty of it may be put upon his trial and convicted, before the conviction of the embezzling officer." And it was stated in the opinion: "In the first place, it is claimed that the indictment is bad as to Brown, because it does not allege that he was a public officer or person intrusted with public money. The argument seems to be that, as the statute declares the aider or participator guilty of embezzlement, it must refer to, and mean, a person having charge of the public money, or in some way connected with its keeping or control; otherwise, it is said, he could not be guilty of embezzlement. We do not so understand the statute. It is true that the statute makes the act of aiding or participating in embezzlement itself an act of embezzlement. But that is a mere statutory name for the offense. The statute defines two substantive offenses. One is the conversion of public money by the party intrusted with it. The other is the advising, aiding, or participating in the act of conversion by any person. Each act is declared by the statute to be an 'embezzlement' and a 'misdemeanor,' in as unequivocal and direct language as could be employed for the purpose. Its plain declaration is, that 'any person' who advises, aids, or participates in the conversion of public money by a party intrusted therewith, is himself guilty of embezzlement." In section 124 it is

stated: "If any person shall advise, aid, or in any manner participate." This clearly includes all persons—officers or others—intrusted with the custody or care of money or any other funds. The count contained a sufficiently definite and specific charge of an embezzlement as set forth in the section 124 of the Criminal Code; hence it stated a crime known to our law.

It is asserted that instruction numbered 3, especially when that which immediately followed it was read in connection with it, was erroneous and prejudicial. Number 3 was a quotation of almost the whole of section 124 of the Criminal Code, inclusive of the portion in which it is recited that if certain facts are proved of the acts, or failures to act, of the officer or persons who have the collection, care, and disbursement of public money, they shall constitute *prima facie* evidence of the embezzlement. Whether the quotation, in an instruction, of a section or a part or parts of it, in order to convey to the jury knowledge of certain matters stated therein, is the best or proper method to accomplish such purpose, we are not called upon to decide; but there were some statements in the section copied in the instruction, of which it was necessary the jury should have correct information, and the manner in which it was given doubtless served the purpose; but it is urged that all that portion which relates to the acts, or failures to act, of officers, and their weight as evidence had application to the treasurer and no direct application to plaintiff in error or his acts. This is no doubt true; but that Whitney, the treasurer, had been guilty was a necessary portion of the proof in the establishment of the charge against the plaintiff in error; hence it was not improper to instruct the jury in regard to the portion of section 124 relative to evidential matters. But it is further complained that the jury should have been specifically charged, that this portion of the instruction must not be applied to the branch of the case which related directly to plaintiff in error, and the proof as to him, where it was without direct reference to or

connected with that in regard to the treasurer. It might have been better so to do, but it was not requested to be done by counsel for plaintiff in error. But, regardless of this fact, the matter given in the instruction to which objection is urged was plain in its import and not obscure in its designation of the persons as to whom it was pertinent; and we cannot believe that the jury can have been misled or confused by it, or that it was in any degree harmful to the rights of the plaintiff in error.

It is complained that the eighth paragraph of the instructions was erroneous and misleading. It was as follows: "The court further instructs the jury that while they must be convinced of the guilt of the defendant beyond a reasonable doubt, from the evidence, in order to warrant a conviction, still the proof need not be direct testimony of persons who saw the offense committed. The acts constituting the crime may be proved by circumstances and any other competent evidence." It is said in argument that the effect of this was to allow the jury to consider any circumstances regarding the alleged offense, whether shown in evidence or not. It was proper to instruct the jury in this case relative to the significance or weight to be given to any pertinent circumstances of which there was proof. Whether the instruction was carefully prepared and worded in the particular portion indicated by the objection, we need not determine. In an instruction which preceded this one in the order of giving, and also in one which followed it, the jury was specifically directed that it must be governed by what had appeared in evidence in the cause, in view of which we cannot believe that the jury was misled by any statement contained in paragraph 8.

Objections are urged against paragraphs 9 and 10 of the charge to the jury. The first of these was devoted to stating certain questions to which the jury was to seek answers in the evidence, and if in the affirmative, the verdict of guilty was to follow, and if in the negative as to either of the stated propositions, the verdict was

directed to be, "Not guilty." This instruction referred to the first count of the information. The one numbered 10 was much the same in terms except that it was framed with reference to the fourth count of the information. It is possibly true that either of these paragraphs of the instructions, detached from the others, and so read and construed, may be in some respects and in some degree defective. Indeed, it is questionable whether instructions framed as questions—as were these—to be answered by the jury, and in the event of one answer the jury instructed to return a verdict of guilty or, on an opposite finding, the opposite verdict, are in cases of this nature proper, or should be given; but these, when read and construed in connection with the others given, could not have prejudiced the rights of the plaintiff in error. Of the failure to state in them that the findings must be from the evidence, it may be said that it is not necessary, though it may be better, that this should be stated in every instruction, or in every proposition. It is sufficient if the jury are informed that all the findings must be from the evidence. This was done in the instructions in this case.

It is claimed that instruction number 12 was erroneous and wholly unwarranted. It reads as follows: "You are instructed that before you can find defendant Benjamin D. Mills guilty of the offense charged in the information, you must find from the evidence beyond a reasonable doubt that said sums were not deposited in said bank under the depository bond, or if so deposited they, or some of them, were drawn out of said depository by said Benjamin D. Mills upon the checks of Ezra S. Whitney, as treasurer of said Harlan county." When this is read in connection with the one which immediately precedes it in the charge to the jury, in which the jury was informed of the provision of the law in regard to banks furnishing bonds and being designated by the county boards as depositories for county funds, and in the light of the evidence relative to the subject, it is

apparent that the reference in instruction numbered 12 was to a bank or banks so designated, and the import of its reference to said banks is clear and pertinent. It is further insisted that this instruction was erroneous, in that it told the jury that, as one of the elements of the guilt of plaintiff in error, if it appeared that the money had been deposited in a designated bank, it must further appear that it was drawn therefrom by plaintiff in error by means of checks of Ezra S. Whitney as county treasurer of Harlan county, in that it did not refer to the fact that the money might have been drawn out of the bank or banks of deposit on checks issued to pay debts of the county evidenced by its warrants. This portion of the instruction would have been prejudicially erroneous if there had been any evidence to the effect that the money was drawn in payment of debts of the county, or rather if there had not been such a condition of the proof in the case as precluded any idea, or even an inference, that any of this money was drawn for payment, or paid on properly evidenced or any indebtedness of the county. In view of the status of the evidence on this point, there was no available error in giving the instruction.

Complaint was made of the giving of the fourteenth paragraph of the charge to the jury, which reads as follows: "You are instructed that the receipts and other writings introduced in evidence in this case are *prima facie* evidence of the receipt of the money, and are not conclusive, and may be qualified and explained by other competent evidence; and in determining the truth in relation thereto you will take into consideration all the evidence introduced bearing upon this point." It is insisted that there were some of the writings to which this paragraph of the instructions evidently referred, which could not be considered as, in any manner or degree, tending to establish the guilt of the plaintiff in error. If competent to be in evidence,—and we must presume in this discussion that they were,—they must have been so as matters of proof. In the whole case it must be

borne in mind that to establish the commission of the crime with which the plaintiff in error was charged, it was also necessary to show that Treasurer Whitney had been guilty of embezzlement; and these writings were, some of them, doubtless introduced in the branch of the proof which had a direct bearing on the question of Whitney's commission of the crime, and were thus a portion of the proof on the charge against the plaintiff in error, and it was proper to instruct the jury in regard to them; but it is further urged that the jury was told by this paragraph what weight might be accorded these items of the proof, and the burden was cast on the plaintiff in error of qualifying or explaining them. The court in the instruction did no more than inform the jury of the significance of the evidence to which reference was made, merely stated its effect, and that it was not conclusive in its nature, and might be qualified or explained. There was nothing unfair or erroneous in such action. It was entirely proper. Without such an instruction, the jury might, to the prejudice of the plaintiff in error, have considered these matters as conclusive; nor did the court by its instructions cast the burden on the plaintiff in error of qualifying or explaining these evidential writings. He stated that it might be done by other competent evidence, not from any particular person or source, but that came into the cause from any source. This was the true meaning of the instruction and it was without error.

It is urged that the court wholly failed to instruct the jury in regard to one material fact,—an element of the crime charged. We think a close scrutiny of the whole of the instructions will disclose that this criticism is not wholly merited. There are portions of them where some reference to it would have been proper, and should have been made; but, in view of the state of the evidence relative to the fact, the failure, where it occurred in the instructions, could have no other effect than a non-direction. It devolved upon the counsel for plaintiff in error

to prepare and submit proper instructions, failing in which there is no ground for reversal. (*Pjarrou v. State*, 47 Neb. 294; *Hill v. State*, 42 Neb. 503; *Johnson v. State*, 53 Neb. 103.) It may be further said that in regard to the fact as to which it is claimed there was a failure to instruct, there was no dispute or conflict in the evidence. while not admitted it was established and undisputed; hence there could have been but one finding as to it if based on the evidence, and if there was error in the failure to instruct, it was without prejudice.

It is assigned for error that the trial court admitted in evidence a receipt for $6,000, which appears in the record as Exhibit F. The ground of the complaint is that it was not properly identified,—that it was not shown that it was written or signed by plaintiff in error whose receipt on its face it purported to be. During the trial there was produced an envelope which was fully identified as having been received by the treasurer by mail through the post office, and its enclosures, one of which was a letter, was fully identified as being the handwriting of the plaintiff in error. The other enclosure was the receipt in question. The letter was as follows:

"STATE BANK OF REPUBLICAN CITY, NEB.

"Correspondents: American Exchange National Bank, N. Y.; Merchants National Bank, Omaha, Neb.; First National Bank, Lincoln, Neb.

"REPUBLICAN CITY, NEB., Jan. 2, 1894.

"*E. S. Whitney, Treas., Alma, Neb.*—DEAR SIR: Herein I hand you rect. for the $6,000. I do not believe we had better put this on deposit for it will raise such a howl as we never heard.

"Yours as ever, MILLS."

The address to Treasurer Whitney on the envelope was shown to be the handwriting of the plaintiff in error. The receipt read:

"STATE BANK OF REPUBLICAN CITY, NEB.

"Dec. 30, 1894.

"Received of E. S. Whitney, treas., six thousand dollars to hold for deposit. B. D. MILLS.

"$6,000."

From all this it appears that the letter was written to the treasurer by plaintiff in error addressed by him and received by the treasurer through the post office. The letter had the receipt enclosed with it, and it was referred to therein and recognized by the writer of the letter, the plaintiff in error, as his receipt. This, we think, constituted a sufficient identification for its reception in evidence.

For the plaintiff in error there was presented a motion for a new trial, one of the grounds of which was newly-discovered evidence. This branch of the motion was supported by affidavit. There were filed for the state some affidavits to controvert the facts presented for plaintiff in error in the affidavit in support of the motion. The motion was overruled, and such action, as to this branch thereof, is assigned for error. After an examination of these affidavits, we cannot say the court erred. Its reason for overruling the motion is not in the record, but in view of all the facts as set forth in the several affidavits, it cannot be said that there was newly-discovered evidence which plaintiff in error could not with reasonable diligence have discovered and produced at the trial. This must appear. (See Criminal Code, secs. 490, 492.)

It is also urged that the evidence was wholly insufficient to sustain the verdict. It would serve no useful purpose to quote it at length or summarize it in a statement here. After a careful examination of it we must say that while, from it, it might be said that the money alleged to have been the subject of embezzlement may have, a portion or all of it, gone into the hands and care of the plaintiff in error for the probable purpose of being deposited in the bank, a designated depository for such

funds, it is clear that subsequently this purpose was changed, and the money of the county was, in direct violation of the law on the subject (Criminal Code, sec. 124), allowed by the treasurer to be retained by the plaintiff in error for use, and not for deposit, and this by and through the advice and procurement of the latter. That such subsequent action by which the money was so retained by plaintiff in error was in pursuance of an agreement to such effect, between the parties, we think the evidence warranted such conclusions, and, if so, it was sufficient to sustain the verdict rendered. It follows from the conclusions herein reached that the judgment must be

AFFIRMED.

CHARLES B. CONGDON ET AL., APPELLEES, V. NERIAH B. KENDALL ET AL., APPELLEES, AND E. P. ALLIS & COMPANY, APPELLANTS.

FILED JANUARY 3, 1898. No. 7604.

1. **Mechanics' Liens:** MATERIALS: PLACE OF DELIVERY: TIME TO FILE CLAIM. Under a contract to make certain machinery and deliver it "free on board of cars" at a designated place for a stipulated sum, the machinery is furnished, within the meaning of our mechanics' lien law, when it is delivered in accordance with the contract on board the cars at the place named, without expense to the purchaser; and to obtain a lien therefor, the claim for a lien must be filed within four months from that time. (*King v. Ship-Building Co.*, 50 O. St. 320.)

2. ———: ———: ———: ———. The time for so perfecting the lien cannot be extended by the manufacturer supplying gratuitously certain brushes in place of defective ones previously furnished and charged for.

APPEAL from the district court of Lancaster county. Tried below before STRODE, J. *Affirmed.*

Ames & Pettis, for appellants.

References: *Merriam v. Hartford & N. H. R. Co.*, 20 Conn.

354; *Packard v. Getman*, 6 Cow. [N. Y.] 757; *Buckman v. Levi*, 3 Camp. [Eng.] 414; *Frith v. Barker*, 2 Johns. [N. Y.] 327; *Foster v. Dohle*, 17 Neb. 631; *Marriner v. Paxton*, 17 Neb. 634; *Irish v. Pheby*, 28 Neb. 231; *Weir v. Barnes*, 38 Neb. 875; *Pond Machine Tool Co. v. Robinson*, 37 N. W. Rep. [Minn.] 99; *McIntyre v. Trautner*, 63 Cal. 429; *Hubbard v. Brown*, 90 Mass. 590; *Watts-Campbell Co. v. Yeungling*, 125 N. Y. 1; *Badger Lumber Co. v. Mayes*, 38 Neb. 830.

Ricketts & Wilson and *S. L. Geisthardt, contra.*

NORVAL, J.

Kendall & Smith being the owners of a flouring mill at Woodlawn, this state, on May 10, 1893, executed a mortgage thereon to C. B. Congdon & Co. to secure a sum of money certain. Prior to the making of the mortgage Edward P. Allis & Co. furnished Kendall & Smith machinery for the reparation and reconstruction of said mill, and subsequently a claim for a mechanic's lien was filed in the office of the register of deeds of Lancaster county. The decree was entered in the court below foreclosing the mortgage. The court refused Allis & Co. a mechanic's lien upon the ground that the claim for the lien was not filed within four months from the furnishing of the machinery. The sole contest in this court is between Congdon & Co. and Allis & Co., and if the claim of the latter for a mechanic's lien was not filed within the statutory period, the decree should be affirmed; otherwise it should be reversed.

In November, 1892, Allis & Co., manufacturers of mill machinery at Milwaukee, Wisconsin, entered into a contract with Kendall & Smith, under which the machinery in question was furnished. The contract contained, among other things, the following provision: "The foregoing list of items comprises all that we are to furnish to you delivered free on board cars, at our shop in Milwaukee, Wis., for the sum of five thousand five hundred dollars," etc. There is in the record testimony tending

to show, and the trial court found, that the last portion of the machinery was delivered by Allis & Co. on board of cars, at their shops, to the Chicago & Northwestern Railway Company in Milwaukee on January 21, 1893. The machinery reached Woodlawn on the first day of the following month and was placed in the mill. The claim for a lien was not filed until May 23, 1893.

It is argued by appellants that the machinery was not delivered on board the cars to the railway company until January 23, 1893. The evidence discloses that the cars were loaded and placed in the hands of the carrier by Allis & Co. on Saturday, January 21, and the railway company on the same day executed and delivered to the consignors receipts for the goods. It is true the bills of lading for two of the cars bear date of January 23, 1893, from which fact it is argued that the machinery was not furnished until that time. The loaded cars were in the actual charge of the carrier on January 21, received by it for the purpose of forwarding and delivering the goods at the place of destination. The title passed to Kendall & Smith on said date, since the delivery to the carrier was delivery to the vendees. This is the effect of the decision in *Union P. R. Co. v. Metcalf*, 50 Neb. 452, where it was held that a consignor was not entitled to sue a carrier for a failure to deliver goods in the absence of an averment that he was the owner of the goods, was liable for their loss or had sustained special damages. (*McKee v. Bainter*, 52 Neb. 604.)

In *Swanke v. McCarty*, 51 N. W. Rep. [Wis.] 92, the court uses this language: "Indeed, it is elementary that, where the vendor is bound to send the goods to the purchaser, delivery to a common carrier is a delivery to the purchaser himself, the carrier being, in contemplation of law in such cases, the bailee of the person to whom, not by whom, the goods are sent, the latter, when employing the carrier, being regarded as the agent of the former for that purpose." While the decisions upon the subject are not in accord, the weight of the authority sustains the

proposition contained in the foregoing quotation, where there is no agreement to deliver the goods to vendee at place of destination. (Benjamin, Sales, secs. 181, 693; *Kelsea v. Ramsey*, 26 Atl. Rep. [N. J.] 907; *Leggett v. Collier*, 56 N. W. Rep. [Ia.] 417; *Barr v. Borthwick*, 25 Pac. Rep. [Ore.] 360; *Sarbecker v. State*, 65 Wis. 174; 21 Am. & Eng. Ency. Law 497, 499, 529; *Kessler v. Smith*, 44 N. W. Rep. [Minn.] 794; *Sullivan v. Sullivan*, 70 Mich. 583; *Falvey v. Richmond*, 13 S. E. Rep. [Ga.] 261; *Bacharach v. Chester Freight Line*, 19 Atl. Rep. [Pa.] 409.) Had the agreement of the manufacturers been to deliver the machinery free on board cars at Woodlawn, a different rule might obtain.

The claim of Allis & Co. for a mechanic's lien was not filed within four months from the delivery of the machinery to the carrier, but was filed within that period from the arrival at Woodlawn. The question is presented whether, within the meaning of the mechanic's lien law, the machinery was furnished as of the date of its delivery to the carrier. Upon principle we do not see how it can be otherwise. Allis & Co., under the contract with Kendall & Smith, had nothing to do with the machinery after its delivery for shipment on board of cars in Milwaukee, and it is plain that the title to the property vested in the vendees immediately upon such delivery to the transportation company. The legal effect is precisely the same as if Kendall & Smith had personally received the machinery from Allis & Co. at their shop in Milwaukee, in which case there could be no doubt that, as between the vendors and vendees, the machinery would be regarded as furnished on the day of its delivery in Milwaukee, for the purpose of fixing the time within which the lien of the manufacturers should be filed. Of course, no mechanic's lien attaches where the materials for which the lien is claimed do not enter into the improvement. As between a lienor and a subsequent purchaser of the premises, or mortgagee in good faith, the time when the materials are delivered upon the premises

would be regarded the time when the lien attached. (*Badger Lumber Co. v. Mayes*, 38 Neb. 830.) The question here is whether Allis & Co. are entitled to a lien upon the property as against Kendall & Smith. If no such right to a lien exists it is patent there is no priority of liens to be adjudicated.

In *Great Western Mfg. Co. v. Hunter Bros.*, 15 Neb. 32, this court decided that the delivery of machinery to a common carrier in Kansas, to be used in a building in Nebraska, was the furnishing and delivery of such machinery within the meaning of our mechanics' lien law. (See *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 170; *Thompson v. St. Paul City R. Co.*, 45 Minn. 13; *Fagan & Osgood v. Boyle Ice Mach. Co.*, 65 Tex. 324.)

The precise question here involved was decided by the supreme court of Ohio in *King v. Cleveland Ship Building Co.*, 50 O. St. 320. The statute of that state is similar to our own. A mechanic's lien was claimed for an engine built by the vendor and delivered on board the cars at Cleveland for shipment to the purchaser at Middleport, under a contract requiring the vendor to deliver the engine "f. o. b." cars in Cleveland. The validity of the lien was contested on the ground that it was not perfected within four months from the time the engine was delivered on the cars ready for shipment. It was decided that when the delivery on the cars was complete the engine was furnished within the purview of the statute, and the claim for lien must be filed within four months from that time, or the right to a lien will be lost.

The case of *Pond Machine & Tool Co. v. Robinson*, 37 N. W. Rep. [Minn.] 99, is not in point because the question here involved was not decided.

In the case at bar Allis & Co. agreed to construct the machinery and deliver the same free of expense on board of the cars at Milwaukee. They fully complied with the contract and furnished the machinery within the contemplation of the statute the moment the delivery on the cars was complete, and the time in which to perfect the lien commenced to run from that date.

It was disclosed that after the machinery was set up in the mill certain brushes furnished under the contract proved to be defective and Allis & Co. supplied others in lieu thereof without additional charge or cost to Kendall & Smith. It is urged that the furnishing of these brushes extended the period for perfecting the lien. The articles mentioned were furnished gratuitously for the purpose of making good their contract, and did not operate to extend the time for filing the lien. (*Woman's Association v. Harrison*, 120 Pa. St. 28; *Harrison v. Woman's Association*, 19 Atl. Rep. [Pa.] 804; *McKelvey v. Jarvis*, 87 Pa. St. 414; *King v. Cleveland Ship Building Co.*, 50 O. St. 320.) The decree refusing Allis & Co. a lien is

AFFIRMED.

EZRA S. WHITNEY V. STATE OF NEBRASKA.

FILED JANUARY 3, 1898. No. 9250.

1. **Embezzlement:** INFORMATION: ALLEGATION OF OWNERSHIP. The information, with sufficient particularity, avers that Harlan county, in this state, was the owner of the money alleged to have been embezzled by the defendant.

2. **Criminal Law:** EVIDENCE: ORDER OF INTRODUCTION. The order in which testimony shall be introduced rests largely in the discretion of the trial court.

3. **Review:** TRIAL: EVIDENCE. Error cannot be predicated on the admission of testimony, where the fact sought to be established by it is subsequently admitted during the trial upon the record by the parties.

4. ———: ———: RECORD. Error in the proceedings of a trial will not be presumed, but must affirmatively appear from an inspection of the record.

5. **Embezzlement:** EVIDENCE. Under section 124 of the Criminal Code the failure and refusal of a county treasurer to promptly pay to his successor in office any of the public moneys in his hands is *prima facie* evidence of embezzlement.

6. **Secondary Evidence:** FOUNDATION. Secondary evidence of the contents of an instrument is admissible upon proof that it once ex-

isted, and was last seen in the possession of the adverse party, where he under oath on the trial has denied the existence of such instrument.

7. **Statutes:** DEPOSITORIES: EMBEZZLEMENT. The act of the state legislature providing for the deposit of state and county funds in banks (Session Laws 1891, p. 347, ch. 50) did not repeal section 124 of the Criminal Code relating to the embezzlement of public moneys.

8. **Embezzlement:** DEPOSIT OF PUBLIC FUNDS. The mere depositing of county funds in depository banks by a county treasurer in strict compliance with the requirements of section 6, chapter 50, Laws 1891, is not an embezzlement of such funds by the treasurer.

9. **Instructions:** REASONABLE DOUBT. Instructions set out in the opinion defining a reasonable doubt *held* correct.

10. ———: HARMLESS ERROR. A conviction will not be reversed for the giving of an instruction, though erroneous, where the defendant was not prejudiced thereby.

11. **County Treasurers:** ACCEPTANCE OF CHECK. An incoming county treasurer accepting a bank check in payment of public funds due from his predecessor is chargeable with the amount of such payment, where the check is surrendered by the incoming officer to the bank which issued it, the amount deposited therein in open account under the depository law, other deposits of county funds are likewise made therein from time to time, checks against the account drawn by the treasurer aggregating a sum in excess of said first deposit are honored and paid by the depository bank, and said acts have been ratified by the county.

12. **Instructions:** REPETITIONS. It is not error to refuse an instruction where the substance thereof is contained in some paragraph of the charge already given.

13. **Embezzlement:** EVIDENCE. Evidence *held* sufficient to authorize a conviction for the crime of embezzlement.

14. **Criminal Law:** ACCOMPLICE: STATE'S EVIDENCE. The fact that an accomplice turns state's evidence and testifies to such facts as are within his knowledge, under and in pursuance of a promise of immunity from punishment made by the prosecuting officer, without the consent or advice of the court, does not constitute a legal defense to a prosecution against such accomplice.

ERROR to the district court for Harlan county. Tried below before THOMPSON, J. *Affirmed.*

The facts are stated in the opinion.

John Everson, William O. Woolman, and *D. S. Hardin,* for plaintiff in error:

The information does not sufficiently describe the owner of the money alleged to have been embezzled. (*State v. Potter,* 28 Ia. 554; *Smith v. State,* 21 Neb. 556; *Ex parte Eads,* 17 Neb. 145; *Grant v. State,* 17 So. Rep. [Fla.] 225.)

The court erred in making improper remarks concerning evidence. (*Bowman v. State,* 19 Neb. 527; *State v. Tickel,* 13 Nev. 502; *People v. Bonds,* 1 Nev. 33; *Crutchfield v. Richmond & D. R. Co.,* 76 N. Car. 320; *People v. Wood,* 27 N. E. Rep. [N. Y.] 362; *Sharp v. State,* 51 Ark. 147; *State v. Jacob,* 8 S. E. Rep. [S. Car.] 698; *State v. Stowell,* 60 Ia. 535; *State v. Harkin,* 7 Nev. 377.)

The court gave an erroneous instruction containing an improper definition of a reasonable doubt. (*Cowan v. State,* 22 Neb. 520.)

The motion to suspend sentence on the ground that the prosecuting attorney promised accused immunity from punishment upon his giving state's evidence in another prosecution, should have been sustained. (*Camron v. State,* 32 Tex. Crim. Rep. 180; *United States v. Ford,* 99 U. S. 594; *Newton v. State,* 15 Fla. 610; *State v. Graham,* 41 N. J. Law 15.)

C. J. Smyth, Attorney General, and *Ed P. Smith, Deputy Attorney General, contra:*

In failing to assail the information by motion and in pleading not guilty, accused waived the alleged defect in the description of the owner of the money embezzled. (*Korth v. State,* 46 Neb. 631.)

The records of the treasurer's office were properly admissible in evidence as tending to prove facts therein stated, and not as admissions on part of accused. (*Strong v. State,* 75 Ind. 440; *State v. Ring,* 29 Minn. 78; *People v. Flock,* 59 N. W. Rep. [Mich.] 237; *Stanley v. State,* 88 Ala. 154; *Osborn v. State,* 27 N. E. Rep. [Ind.] 345.)

Embezzlement consisting of a continuous series of acts committed at different times, but with a common purpose, may constitute a single offense. (*Bolln v. State*, 51 Neb. 581, and cases cited.)

Presumption that the entire amount was embezzled at the close of the second term: *Heppy v. Johnson*, 73 Cal. 270; *Stoner v. Keith County*, 48 Neb. 279.

The depository law did not repeal section 124 of the Criminal Code relating to embezzlement of public money. (*Korth v. State*, 46 Neb. 631.)

A reasonable doubt was correctly defined in the instructions. (*Willis v. State*, 43 Neb. 102; *Lawhead v. State*, 46 Neb. 607; *Langford v. State*, 32 Neb. 782; *Barney v. State*, 49 Neb. 515; *Polin v. State*, 14 Neb. 540; *Davis v. State*, 51 Neb. 301.)

Accused was properly chargeable with the amount of the check received from his predecessor. (*Bush v. Johnson County*, 48 Neb. 1; *State v. Hill*, 47 Neb. 456.)

NORVAL, J.

Ezra S. Whitney was convicted of embezzlement of public money of Harlan county, while he was the treasurer thereof, and sentenced to a term of two years and six months imprisonment in the penitentiary, and that he also pay a fine in double the sum embezzled. The information alleges that the defendant, "Ezra S. Whitney, was the county treasurer of Harlan county, Nebraska, from the 5th day of January, 1894, to the 9th day of January, 1896, and as such officer was charged with the collection, receipt, safe-keeping, transfer, and disbursement of the public moneys of Harlan county, Nebraska; that the said Ezra S. Whitney, on the 8th day of January, 1896, in said county and state, then and there being, and then and there, as such officer, being charged with the collection, receipt, safe-keeping, transfer, and disbursement of the public money of Harlan county, did then and there unlawfully and feloniously convert to his own use and embezzle a large sum of said

money, to-wit, eleven thousand one hundred and ninety dollars, belonging to Harlan county, which said money had then and there come into the possession and custody of the said Ezra S. Whitney by virtue of said office and the discharge of the duties thereof."

The first point made by the defendant is that the information does not allege the money embezzled belonged to Harlan county, this state, and therefore no crime is charged. This objection is exceedingly hypercritical. Undoubtedly an indictment or information cannot be aided by intendment, nor can omissions be supplied by construction. But every act essential to constitute the crime must be averred. Tested by this rule the crime of embezzlement is charged. Stripped of its legal verbiage, the information plainly alleges that the defendant was the county treasurer of Harlan county, Nebraska, and as such officer was charged with the collection, receipt, safe-keeping, transfer, and disbursement of the public money of such county, and did embezzle and convert to his own use $11,190 of the moneys of said county which he had collected by virtue of his said office. The words "said money," as used in the information, refer to the public funds belonging to the county of Harlan, in this state, which it was alleged it was the duty of the defendant to collect and disburse, and which had theretofore come into his possession and custody by virtue of his said office. It is alleged with sufficient particularity that the money converted and embezzled was owned by Harlan county, Nebraska, and the information, therefore, is not defective in substance.

Error is assigned in the admitting in evidence of Exhibit 2. This paper was on file in the county clerk's office of Harlan county, and purports to be a statement made by the defendant, as county treasurer, showing the receipts and disbursements of the treasurer's office for a specified period, together with the amount of public money in his hands to the credit of the several funds at the close of business on January 8, 1896, the date of

the expiration of the defendant's official term. The first objection urged against the admission of this document is that no legal foundation for its introduction had been made. Samuel Roberts, the county clerk of Harlan county, produced the exhibit, and testified that he had frequently seen the defendant write; was familiar with his writing, and that the document objected to was in the handwriting of the accused. Other or further identifying proof was not required.

Another objection urged against the reception of said exhibit in evidence is that the *corpus delicti* had not been proved, and that the admissions or statements of the defendant cannot be received to establish that the offense charged has been committed. Whether the rule contended for is applicable in a prosecution for embezzlement where it is sought to introduce the official reports made by the accused in pursuance of law may well be doubted. But it is unnecessary to decide the question at this time, because the defendant was not in the least prejudiced by the receipt in evidence of Exhibit 2. The order in which parties shall introduce their proofs rests largely in the discretion of the trial judge. (*Basye v. State*, 45 Neb. 261; *Consaul v. Sheldon*, 35 Neb. 247; *McCleneghan v. Reid*, 34 Neb. 472; *Rema v. State*, 52 Neb. 375.) The record in this case discloses that shortly after the ruling in question was made, the following stipulation, in open court and before the jury, was entered into:

"For the purposes of this action it is admitted that the records in the office of the county treasurer of Harlan county during the term of office of the defendant, Ezra S. Whitney, as treasurer of said county, commencing on the 5th day of January, 1894, and ending on the 8th day of January, 1896, both days inclusive, show that at close of said term of office the said Ezra S. Whitney, as such treasurer, had on hand and in his charge as such treasurer, the sum of forty-six thousand three hundred seventy-three dollars and thirty-seven cents ($46,-

373.37), and that he has turned over and paid thereon to his successor in office since January 8, 1896, the sum of seventeen thousand six hundred fifty-three dollars and thirty-three cents ($17,653.33), and to the state treasurer the sum of four thousand four hundred twenty-six dollars and twenty-one cents ($4,426.21)."

The foregoing was an admission of record of the very matter sought to be established by Exhibit 2, viz., that the defendant had in his hands, as treasurer, at the close of his term of office, public funds aggregating the sum of $46,373.37; hence no prejudice resulted in allowing the contents of said exhibit to go to the jury. (*Lamb v. State*, 40 Neb. 312; *Rightmire v. Hunteman*, 42 Neb. 119; *McGavock v. City of Omaha*, 40 Neb. 64; *Hickman v. Layne*, 47 Neb. 177.)

The following question was put by the state to D. A. McCulloch, one of the witnesses for the prosecution, and who succeeded the defendant as county treasurer: "Q. Along in June or July, 1895, sometime, did you have a conversation or hear a conversation or statement made by Mr. Whitney in regard to some money that could not be accounted for?" The defendant objected "as incompetent, irrelevant, immaterial, no proper foundation made, the *corpus delicti* in this action not having been proven, or the fact that there is a shortage in the county treasurer's office." The court thereupon made this statement: "The court admits this upon the account that the attorney for the defense in stating his case to the jury admitted that the books showed a shortage." To this language the defense excepted, and the witness answered, "I did." Complaint is made of permitting said question to be asked and answered, and the quoted remarks of the trial judge are assailed. The question propounded was in its nature merely preliminary, and did not seek to elicit any substantive fact bearing upon the guilt or innocence of the accused, and the answer being within the range of the question was not prejudicial to the rights of the defendant. Moreover, the em-

bezzlement of the money of Harlan county was subsequently established by the stipulation or admission already set forth, in connection with other evidence. Whether the remarks of the trial judge were prejudicial is not disclosed. If counsel for the prisoner made the statement imputed to them, then the language of the court was pertinent and proper, otherwise it was prejudicial in its character. To have the point established the defendant should have had the opening statement of his counsel preserved in a bill of exceptions, or at least had set forth therein what remarks, if any, were made by counsel to the jury relating to the shortage of the defendant in his accounts with the county. Error is never presumed, but must affirmatively appear from an inspection of the record, is a familiar doctrine, and is quite applicable here. It is for the person who desires a ruling or any fact preserved by a bill of exceptions to procure one to be settled and allowed.

The witness D. A. McCulloch, over the objection of the defendant, was allowed to state that Mr. Whitney informed him that the books were correct, and that he did not have the money or cash to put up which the books called for. C. A. McCloud, who checked up the books of the defendant, testified substantially to a similar conversation and admission of the defendant. It is urged that these admissions should have been excluded, inasmuch as the *corpus delicti* had not been then established. This seems to have been a frequent objection urged during the progress of the trial of the cause, and, if we understand counsel correctly, it is still insisted that the crime of embezzlement has not been proven in this case. The contention is devoid of merit. Prior to the time the objected testimony was received, it had been stipulated or admitted in open court that the records in the county treasurer's office disclosed that the defendant, when he turned over his office to his successor, was chargeable with $46,373.37; that he paid to his successor $17,653.21, and to the state treasurer $4,426.21.

There was evidence tending to show that no other payments have been made by the defendant; that he had at the close of his term on deposit in the State Bank of Republican City, a county depository, county funds to the amount of $14,153.27. Thus it was in evidence that the accused had not accounted to his successor for all the public funds in his hands, and a *prima facie* case of embezzlement was made out against Whitney. (*Bolln v. State*, 51 Neb. 581.) It was, therefore, competent for the state to prove defendant's voluntary admission as to the fact of there being a shortage.

It is insisted that the court erred in requiring the defendant to answer the following question, propounded by the state on cross-examination: "Now, commencing January 1, 1893, what did you put in the bank?" The criticism is that it called for facts which antedate any time that could be charged in the information, and was barred by the statute of limitations. However well taken may have been the objection to the question, the criticism does not apply to the answer of the defendant to the interrogatory. This prosecution was instituted on June 4, 1896, and the first deposit of money in the bank, which the defendant testified to, was made on June 21, 1893, or less than three years preceding the prosecution.

The defendant was a witness in his own behalf, and on his examination in chief he testified to the depositing at various times county funds in the State Bank of Republican City, which was an approved depository bank with a bond of $25,000, and under the law entitled to have on deposit at any time county moneys not to exceed $12,500; and that he deposited moneys of the county in the bank largely in excess of the lawful limit. On cross-examination the defendant, over objections of his counsel, was asked this question: "Why did you put so much money in this depository?" The defendant answered, "Why, I don't know that I can give any explanation why I put so much there." The question was within

the limit of proper cross-examination, and was competent as bearing upon the question of intent or motive which actuated the accused at the time he placed the funds in the bank.

It is urged that the court erred in allowing James A. Cline to testify, on rebuttal, to the contents of a certain deposit slip purporting to be evidence of the deposit of $6,000 by the defendant in the State Bank of Republican City. The objection to the ruling of the court is that no foundation for the introduction of secondary testimony had been laid. Mr. Cline, as one of the state bank examiners, examined the affairs of the State Bank of Republican City, and for the purpose of verifying the account between the said bank and defendant as county treasurer, in January, 1895, called upon the latter and asked to see his pass-book. Mr. Cline testified that the request was complied with, and in the pass-book was the deposit slip in dispute, that the witness made a copy thereof, left the original with the defendant, and had not seen it since. The accused, while on the witness stand, denied the existence of such a deposit slip and of all knowledge thereof. This laid sufficient foundation for the admission of parol proof of the contents of the paper.

Complaint is made of the giving of the third paragraph of the court's charge to the jury, which is a copy of section 124 of the Criminal Code, and under the provisions of which law this prosecution was brought and conducted. It is argued that said section was repealed by the legislative enactment entitled "An act to provide for the depositing of state and county funds in banks." (Session Laws 1891, ch. 50; Compiled Statutes, ch. 18, art. 3, secs. 18-23.) The identical point was made and decided adversely to the contention of the defendant, in *Korth v. State*, 46 Neb. 631. With the conclusion therein reached we are content.

It is urged that the giving of the entire section was prejudicial error, because it makes the commission of

any one of several specific and different acts a crime, while the defendant is charged with the felonious conversion of the funds of Harlan county to his own use, and in no other way. The section defines a single crime, although it specifies various modes in which the offense may be committed. No prejudice could have resulted in repeating this section to the jury, for by the fourteenth paragraph of the charge they were, in plain and unequivocal language, told that unless the prosecution established by the evidence beyond a reasonable doubt that Whitney converted the money of the county to his own use there must be an acquittal. So that, instead of the jury being turned loose in the field of conjecture, as argued by the counsel for the defense, they were confined in their investigation to the identical charge set up in the information. A verdict of guilty could not have been returned, without disregarding the instructions, even had the proofs shown, which they did not, that the money of the county was embezzled in some other mode or manner than that described in the information.

Instruction No. 5 is an exact copy of section 6, chapter 50, Laws 1891, and relates to the deposit of county funds in depository banks. By the fourth instruction the jury were directed, in substance, that the depositing of moneys in a county depository in compliance with the provisions of section 6 of said depository law did not constitute embezzlement. Instead of the accused being prejudiced by the instruction, the direction of the court ought to, and doubtless did, inure to his benefit. It was shown that several thousand dollars of money of Harlan county were deposited from time to time, by the defendant, in certain depository banks in strict compliance with the law. Had it not been for instructions 4 and 5 the jury might have concluded that the defendant was guilty of the embezzlement of the money which he had lawfully placed in the depository banks.

The court gave the following instructions on the subject of a reasonable doubt:

"8. You are instructed that a reasonable doubt is an actual, substantial doubt arising from the evidence or want of evidence in the case.

"9. That by reasonable doubt is not meant that the accused may possibly be innocent of the crime charged against him, but it means some actual doubt having some reason for its basis. A reasonable doubt that entitles to an acquittal is a doubt reasonably arising from all the evidence, or want of evidence, in this case. The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the reason and understanding of ordinarily prudent men with a conviction on which they would act in the most important concerns or affairs of life."

The foregoing states the law correctly. Instructions, either in the identical language, or in substance the same, have been approved by this court in the following cases: *Polin v. State*, 14 Neb. 540; *Langford v. State*, 32 Neb. 782; *Lawhead v. State*, 46 Neb. 607.

The tenth instruction ennunciated that to warrant a conviction the guilt of the accused need not be established by direct evidence, but that the acts constituting the crime might be proven by circumstances and other competent testimony. The criticism made against this instruction is that there is no circumstantial evidence in the case. No witness testified to having seen the defendant embezzle the money or convert it to his own use. But many facts and circumstances are disclosed by the bill of exceptions from which the inference could be very properly drawn that the defendant committed the crime charged in this information. It was therefore not erroneous to instruct the jury on the law of circumstantial evidence.

By the eleventh paragraph of the charge the jury were told that if the defendant, as county treasurer, deposited in a depository bank, subject to check, moneys

in excess of the amount allowed by law, that fact alone would not establish that he was guilty of the crime charged; but the depositing of county funds in the bank in violation of the law might be considered, in connection with all the other evidence adduced, for the purpose of ascertaining whether or not the defendant was guilty of the crime of embezzlement. This instruction was quite favorable to the accused, since it was established beyond dispute that the defendant had deposited in at least one of the depository banks county funds in excess of the statutory amount. The instruction fell far short of authorizing a verdict of guilty, in case the jury found that he had violated the depository law. On the contrary, the triers of fact were expressly cautioned that the mere depositing of public funds in violation of said law would not alone establish that the defendant embezzled the money, but that the fact of such illegal deposit of funds might be considered in arriving at a verdict. If the instruction was bad, it was not an error of which the prisoner had any ground to complain. (*Debney v. State*, 45 Neb. 856.)

In instruction No. 12 the court informed the jury that the presumption was that the defendant deposited the money of the county as required by the depository law, and unless they found beyond a reasonable doubt that he did not so deposit said moneys, "but converted the same to his own use or benefit as alleged," they should find him not guilty. The defendant has no substantial foundation for complaint in the giving of this instruction. It was clearly expressed that the presumption was the defendant had performed his duty as a treasurer. How the jury could have been misled by the failure to use the words "in the information," following the words "as alleged" in the latter part of the paragraph, we fail to comprehend. It was not relegated to the domain of conjecture to ascertain what the court intended, but that the jury, possessing ordinary intelligence, must have readily understood that the court had reference to

the charge of embezzlement set forth in the information.

The eighteenth instruction is excepted to, which is in the language following: "You are instructed that if you find from the evidence that Ezra S. Whitney, as treasurer of Harlan county, received a check from his predecessor for $7,000 on the State Bank of Republican City, and that Mr. Whitney deposited the same in said bank, and it was afterwards credited to Harlan county on open account under the depository law as herein mentioned, and the county of Harlan accepted a credit on its open account for such amount against said bank, this made the bank Harlan county's debtor for such sum, and should be charged the same as if the sum had been received by the treasurer in money instead of a check, and then deposited upon such account in said bank."

In January, 1892, the defendant received from his predecessor, the former treasurer of Harlan county, a check on the State Bank of Republican City for $7,000, in lieu of cash, for that amount of county funds; this bank was shortly thereafter designated as a county depository, and on January 11, 1892, the defendant surrendered said check to the bank and received credit as treasurer for the amount thereof, on open account. Other county funds were deposited in said depository bank from time to time by this defendant, and which sums were credited in like manner in the same accounts. Checks were also drawn by the defendant against the account aggregating more than $7,000, which were honored and paid by the said depository bank. At the close of defendant's term as county treasurer he had a balance to his credit in said bank, subject to check, of over $1,500 in excess of the amount which the bank was entitled to receive of county moneys under the depository law. The theory of the defendant was that inasmuch as no money was received from his predecessor in office, but a check, and that the same was deposited the day preceding the approval of the bond of the bank as a de-

pository of county funds, the amount of said $7,000 could not be taken into account. In the light of these contentions and the facts already detailed, the instruction we are now considering was timely and proper. If the contention of the defendant was sound, then the defendant did not have moneys of the county on deposit in the State Bank of Republican City at any one time in a sum in excess of $12,500, the limit allowed by the statute as a depository bank. The amount of the $7,000 check was not only deposited to the credit of the county on the account, but more than said sum was thereafter drawn by the defendant, as county treasurer, from said bank upon his checks against said account. Under the circumstances disclosed by this record the defendant was required to account to the county for said sum of $7,000 to the same extent as though he had received that sum in lawful money from his predecessor instead of by means of a bank check. (*State v. Hill*, 47 Neb. 456; *Bush v. Johnson County*, 48 Neb. 1.) The defendant concedes, under the cases cited, that he was liable on his bond for the amount of said check, but he argues that he is not guilty of the embezzlement thereof. A ready answer to this is that the state makes no claim to the contrary. This prosecution is not based upon the conversion of any portion of the moneys represented by said $7,000 check. The state gives him credit for the amount thereof on the accounting. The prosecution is for the embezzlement of other funds of Harlan county.

Instructions 19 to 24, inclusive, are assigned for error, but we fail to see anything in them which justifies comment, much less reversal.

Objection is made to paragraph 27 of the instructions, which reads: "You are instructed as a matter of law if the money or any part thereof mentioned in the information is shown by the evidence, beyond a reasonable doubt, to have been received by the defendant and by him appropriated to his own use and benefit, or that he, by his acts, deprived the county of Harlan of such money

by the misappropriation of the same in manner and form as alleged, then he is guilty of the crime charged; and unless you do so find you should find him not guilty." Substantially the same criticism is offered upon the foregoing as was urged against the 11th paragraph of the instructions already alluded to, namely, that the omitting from the instructions the words "in the information" after the word "alleged" made the instruction misleading. Stated differently, it permitted the jury to return a verdict of guilty if the accused in any way misappropriated the money, whether it was converted to his own use or not. By the first paragraph of the charge the jury were explicitly advised of the acts which the information alleged the defendant had committed, or the manner of the conversion of the money. So the jury must have understood that the phrase in instruction 27, "in manner and form as alleged," had reference solely to the mode of conversion set forth in the information, and that there could be no conviction unless it was established beyond a reasonable doubt that the prisoner converted to his own use and benefit the moneys of Harlan county; that there should be an acquittal if the county was deprived of the money in any other manner.

The defendant asked a peremptory instruction to return a verdict of not guilty. It was conceded this request was presented upon the theory that section 124 of the Criminal Code had been repealed by the enactment of the depository law. As we have already determined adversely to this contention, the tendered instruction need not be further considered.

The defendant requested this instruction, which was refused:

"7. The jury are instructed that if you find from the evidence that an amount of money in excess of the amount allowed by law to be deposited in the State Bank of Republican City, Nebraska, the public money of Harlan county, was so deposited by the defendant, Ezra S. Whitney, in said bank, and that the board of super-

visors of said county requested additional security to secure the deposit of said sums, and afterwards accepted additional security from said bank or its bondsmen to secure the same, in such case the defendant could not be guilty of embezzling such sums or any part thereof; unless you further find from the evidence, beyond a reasonable doubt, that the said defendant withdrew a part of said moneys and converted the same to his own use."

This instruction lays down a monstrous doctrine. The substance of it all is that if the defendant embezzled the money of the county when he deposited in the bank an amount in excess of the sum authorized by law, he is not liable therefor criminally, in case the county authorities subsequently accepted security for the sum so embezzled. This is not, and never was, the law. The fact that a person who has stolen money afterwards returns the same to the owner, or gives security for its payment, will not relieve him from criminal liability. So if the owner of a stolen horse should follow the thief and recover the horse, or payment of the value of the animal, it would not defeat a criminal prosecution against the thief. The same principle governs the case at bar. (*People v. Royce*, 106 Cal. 175; *Thalheim v. State*, 38 Fla. 169.) The criminal law was not enacted for the purpose of enforcing civil liabilities, as the instruction requested implies. Whether or not Harlan county has been successful in collecting or securing the payment of the money which the defendant is charged with having embezzled is of no consequence in this case. Two instructions requested by the defendant were given, while the others refused were fully covered by the charge of the court. It was not error to decline to repeat those which were rejected. (*Olive v. State*, 11 Neb. 1; *Korth v. State*, 46 Neb. 631.)

Another argument is that the verdict is without sufficient evidence to sustain it. The state established beyond question that the defendant, at the close of his official term, was chargeable with the sum $46,373.82, of which $12,500 was lawfully on deposit in the State Bank

of Republican City, and for which last named sum the defendant is entitled to receive credit. When he turned the office over to his successor he had in his hands, exclusive of said bank deposit, the sum of $33,873.37, which was unaccounted for. The defendant has since paid on account thereof $17,653.33 to his successor in office, and to the state treasurer the further sum of $4,426.21. No other payments have been made by the defendant. The evidence shows that the amount of his shortage still existing is over $11,000, and that he is guilty of embezzlement of more than that amount of the moneys of Harlan county. Instead of there being a total lack of proof to sustain the finding of the jury, the evidence contained in the record is ample to support the verdict.

It is finally insisted that the court below erred in not suspending the sentence. The application in that regard was made after the return of the verdict and before judgment had been entered thereon, being based upon an alleged agreement between the defendant and the prosecuting officer whereby the former, in consideration that he was not to be prosecuted, was to testify on behalf of the prosecution in the case of the State against Benjamin D. Mills, then pending in the district court of Harlan county, for the embezzlement of the same money described in the information herein. The application was supported by affidavits, and resisted by counter-affidavits filed by the state. The counter-showing is sufficient to exonerate the county attorney from having made the agreement alluded to. It is undisputed, however, that some such arrangement was made by the accused with the attorney who was employed by the county as special counsel for the state in the two cases, and that thereafter Whitney, in pursuance thereof, testified on behalf of the state in the prosecution against Mills. In Texas an agreement to turn state's evidence made by the defendant with the prosecuting attorney alone is enforceable if the accused had testified thereunder in good faith. (*Bowden v. State*, 1 Tex. App. 137; *Hardin v. State*, 12 Tex.

App. 186; *Camron v. State*, 32 Tex. Crim. Rep. 180.) But this rule does not prevail generally elsewhere. The practice which usually obtains in case of a contract with a prisoner for immunity from prosecution for his offense, entered into with the prosecuting attorney, with the consent of the trial court, is to either enter a *nolle prosequi* or continue the cause to permit the defendant to apply for a pardon. The decided weight of authority sustains the doctrine that an agreement to turn state's evidence made with the prosecuting officer alone, without the court's advice or consent, affords the defendant no protection in the event he is placed on trial in violation of the agreement. (*United States v. Ford*, 99 U. S. 594; *State v. Graham*, 41 N. J. L. 15; *People v. Peter*, 48 Cal. 250; *State v. Lyon*, 81 N. Car. 600.) The rule last stated meets our approval. That the defendant kept his agreement and testified in the case against Mills to such facts as were within his knowledge constitutes no legal defense to this prosecution. The judgment of conviction is

AFFIRMED.

JOSEPH H. MILES ET AL. V. STATE OF NEBRASKA, EX REL. THOMAS MCLANE.

FILED JANUARY 3, 1898. No. 7609.

1. **Intoxicating Liquors:** REVOCATION OF LICENSE. A city council of a city of the second class having less than 5,000 inhabitants, when authorized by ordinance so to do, has the power to entertain a complaint for the revocation of a liquor dealer's license on the ground that he had sold intoxicating liquors to minors and habitual drunkards, and, upon due notice to the licensee of such proposed action, and proof that the complaint was true, to revoke such license, notwithstanding the holder thereof had not been convicted of the violation of the law pertaining to the sale of intoxicating liquors.
2. **Mandamus:** REVIEW OF ORDER REVOKING LICENSE. Mandamus will not lie to review the decision of a city council in revoking a liquor license, where it has not exceeded its jurisdiction, although such order may be clearly erroneous.

ERROR from the district court of Richardson county. Tried below before BABCOCK, J. *Reversed.*

Edwin Falloon, for plaintiffs in error.

Isham Reavis, contra.

NORVAL, J.

On May 13, 1893, the relator, Thomas McLane, was granted a license by the city of Falls City to sell malt, spirituous, and vinous liquors for the municipal year, which license was revoked and canceled by the mayor and city council on March 24, 1894. Thereupon he instituted this action for mandamus to compel the respondents to restore said license, alleging in his application as grounds therefor that relator had never been convicted of the violation of any law or ordinance, and therefore the revocation of the license was without authority and void. The respondents answered the application, alleging the passage, approval, and publication of ordinance No. 64 of the city of Falls City, entitled "An ordinance to regulate the license and sale of malt, spirituous, and vinous liquors," etc., and that said ordinance contained among other provisions the following: "That whenever it shall be brought to the notice of the city council, by affidavit filed with the city clerk, or otherwise, that any person holding a license or permit under the provisions of this ordinance has violated any of the provisions of this ordinance, it shall be the duty of the city to at once proceed and give such person not less than three days', nor more than ten days', notice of the time and place where said matters will be considered by said city council, and if upon such hearing the council shall be satisfied that a violation of this ordinance has been committed by the person so charged, then the council shall revoke, cancel, and annul the license held by such party, and upon such hearing said council may examine

witnesses under oath in said matter, and may consider such other evidence as may be offered by either party. Every person licensed as herein provided who shall give or sell any malt, spirituous, or vinous liquors, or any intoxicating drinks, to any minors shall, upon conviction thereof, be fined in any sum not less than $25 nor more than $100." That in addition to the above provisions said ordinance prohibited, under fine, any licensed person from selling to an habitual drunkard, keeping the bar obstructed from the public view, and allowing his saloon to remain open after 11 o'clock P. M.; that said city has ordinances against gambling and houses of prostitution. The answer further averred that on March 21, 1894, one W. E. Noonan filed a complaint in writing under oath with the city clerk of said city, charging, among other things, substantially that relator knowingly, during the existence of his license, sold intoxicating liquors to habitual drunkards and to certain named minors; that relator procured and permitted prostitutes to remain in his saloon, on certain specified dates, where evil disposed persons were permitted to resort to commit adultery and fornication; that he obstructed the bar from public view; permitted persons to become grossly intoxicated in his place of business, and allowed the saloon to remain open after 11 o'clock at night. It is also alleged in the answer that on March 21, 1894, notice was personally served on relator to appear before the city council March 24, 1894, at 8 o'clock P. M. and show cause why his license should not be revoked; that at the appointed time he personally appeared, a hearing was had, and upon a consideration of the evidence the said city council found the charges in said complaint of Noonan to be true, and by resolution unanimously adopted, the ayes and noes being called, revoked and annulled relator's license. A general demurrer to this answer was filed, which the court below sustained, and awarded a peremptory writ of mandamus as prayed. Respondents bring the case for review.

By section 25, chapter 50, Compiled Statutes, the power

to license, regulate, and prohibit the traffic in intoxicating liquors in cities of the class to which Falls City belongs is confided in the corporate authorities of all such cities, and in granting licenses they are required to comply with and observe all of the provisions of said act. Section 5 of said chapter declares that "Any license granted under this chapter may be revoked by the authority issuing the same whenever the person licensed shall, upon due proof made, be convicted of a violation of any of the provisions of this act." The contention of relator is that, under the provision just quoted, respondents had the power to revoke his license upon the single ground that relator had violated some provisions of said act, and not then until there had been first a conviction in some court of competent jurisdiction. The legislature has made the conviction of the licensee of any violation of the laws of the state pertaining to the sale of intoxicating liquors a sufficient ground for a revocation of the license, and it is made the imperative duty of the body or board which granted the license to annul the same, when the fact of such conviction is duly certified to it, without giving notice of such proposed action to the licensee. (*Martin v. State*, 23 Neb. 371.) But the above provision of said section 5 does not preclude the proper city or village authorities from revoking a liquor license upon other sufficient grounds. The statutes have empowered cities of the second class having less than 5,000 inhabitants, in their corporate capacities, to enact ordinances licensing, regulating, and prohibiting the sale of any intoxicating liquors. (Compiled Statutes, ch. 14, art. 1, sec. 69.) In pursuance of the power thereby conferred ordinance No. 64 of the city of Falls City was adopted, which provides, in effect, that when an affidavit is filed with the city clerk charging that a licensed liquor dealer has violated any of the provisions of said ordinance, not less than three nor more than ten days' notice shall be given to the licensee of the time and place where the complaint will be investigated, and if the city council upon such hearing

"shall be satisfied that a violation of this ordinance has been committed by the person so charged, then the council shall revoke, cancel, and annul the license held by such party." The provision conferred power upon the city council to revoke a liquor license upon charges preferred, was ample authority for the proceedings taken to cancel relator's license, and justified the revocation of his license without the prior conviction of the licensee.

We do not perceive anything in *Martin v. State, supra,* in conflict with the conclusion already expressed. In that case the license was revoked without a hearing before the council, on the ground that the licensee had been convicted before a police magistrate of selling intoxicating liquors on Sunday in violation of law. There was no necessity for a trial in that case. All the city council had to do was to revoke the license in obedience to the positive requirements of the law. Here there had been no prior conviction of relator of the commission of any offense whatever, so his license could be forfeited only upon a charge duly made and established by the proofs that he had broken some condition or restriction upon which the license was issued. The city council having been given jurisdiction by said ordinance over proceedings to revoke licenses to liquor dealers, and the complaint to the council being sufficient, its decision cannot be reviewed by mandamus. (*State v. Laflin,* 40 Neb. 441; *State v. Cotton,* 33 Neb. 560.)

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

JOSEPH S. BARTLEY V. STATE OF NEBRASKA.

FILED JANUARY 3, 1898. No. 9347.

1. **Indictment and Information:** MOTION TO QUASH. On a motion to quash an information, the district court will not inquire into the validity of the warrant of arrest issued by the examining magistrate.

2. **Criminal Law:** ABATEMENT: EMBEZZLEMENT. In a prosecution for the crime of embezzlement, the pendency against the accused of a former information in the district court of another county charging him with the embezzlement of the same property within that county, is no ground for abatement.

3. ———: INFORMATION: DEMURRER TO COUNT. Error cannot be predicated upon the overruling of a demurrer to a count in the information, where a *nolle prosequi* is subsequently entered to such count.

4. ———: ———: CAPTION: VENUE. An information, in the caption and venue of which a given county and state are named, which charges that the defendant "in the county aforesaid, then and there being in said county," did commit a given crime, sufficiently alleges that the offense was committed in the county stated in the caption and venue.

5. ———: ———: VENUE. The place of the commission of an offense charged in one of the counts of the information is sufficiently set forth by averment that the defendant, "in the county aforesaid," did commit the acts constituting the offense, when in a former count the county and state are definitely stated.

6. ———: ———: ELECTION AS TO COUNTS. An election by the prosecutor to proceed alone under one count does not so far take the other counts out of the information as to destroy the effect of a reference to them as to time and place.

7. **County Attorney:** RIGHT TO INSTITUTE CRIMINAL PROCEEDING. A county attorney of the proper county may institute a criminal proceeding against a state treasurer for the embezzlement of the moneys of the state, notwithstanding such prosecutor had received no direction from the auditor of public accounts to take such step.

8. **Embezzlement:** INFORMATION. An information for embezzlement is sufficient if it sets forth the crime in the language of the statute creating it, without averring the particular acts in which the offense consisted.

9. ———: ———: STATE TREASURER. An indictment against a state treasurer, which charges the embezzlement to his own use of a certain sum of money belonging to the state, is sufficient without

an allegation that a demand for the money was made upon him by his successor in office.

10. **Information:** ELECTION AS TO COUNTS. Where different felonies of the same general character or grade are charged in different counts of an information, it is within the discretion of the trial court to require the prosecutor to elect as to counts. (*Korth v. State*, 46 Neb. 632.)

11. ———: ———. No election is required between counts charging the same offense.

12. **Jury:** CHALLENGE: REVIEW. Error cannot be predicated upon the overruling of a challenge to a juror for cause, where the record fails to disclose that the complaining party exhausted his peremptory challenges.

13. **Embezzlement:** CONVICTION: EVIDENCE. The evidence in the case is sufficient to sustain a conviction for the embezzlement of the moneys of the state.

14. **Negotiable Instruments:** WARRANTS. Warrants drawn by the auditor of public accounts upon the state treasury are not negotiable instruments.

15. **Banks and Banking:** PAYMENT OF CHECK: CREDIT. The giving of credit as a deposit for the amount of a check, by the bank upon which it is drawn, is, in contemplation of law, a payment of the check in money, to the same extent as though the currency had been paid over the counter on the check and immediately redeposited by the payee.

16. **Embezzlement:** EVIDENCE: STATE TREASURER. A state treasurer who, for an unauthorized purpose, draws a check on a state depository bank having money of the state therein, which he delivers to the payee with intent to defraud the state, and the bank on presentation of the check places the amount thereof to the credit of a third party whom the payee represents in the transaction, and at the same time charges the account of the state with a like sum, is guilty of the embezzlement of the money of the state, within the meaning of section 124 of the Criminal Code.

17. **Evidence:** EMBEZZLEMENT: CORRESPONDENCE. Where a state treasurer employed a bank to negotiate the sale of a warrant which was the property of the state, the correspondence of such bank necessary to effect such sale is admissible in evidence in a prosecution of the treasurer for embezzlement of the amount subsequently used to take up such warrant, where there exists such a relation between the sale and the payment of the warrant that the motive in the latter transaction is illustrated by the facts incident to the former.

18. **Officer:** EMBEZZLEMENT: ESTOPPEL. In a prosecution for embezzlement, one who has filled out his entire term of office cannot be

heard to urge as a defense that when the embezzlement took place he was not an officer *de jure*. It is immaterial in such case whether he was an officer *de jure* or *de facto*.

19. **Evidence:** EXPERT ACCOUNTANT: BOOKS. In a prosecution for embezzlement or other crime, where the books, records, papers, and entries are voluminous and of such a character as to render it difficult for the jury to arrive at a correct conclusion as to amounts, an expert accountant may be allowed to examine such books, etc., and testify as to the result of his examination, when such books, etc., are in the court room subject to inspection by the accused.

20. **Instructions:** CONSTRUCTION. Instructions must be construed together, and if then they correctly announce the rule applicable to the issues and evidence, they will be upheld, even though a single paragraph, standing alone, might be faulty.

21. ———: REASONABLE DOUBT. *Held*, That the instruction defining a reasonable doubt did not deny to the accused the benefit of a reasonable doubt arising from the lack of evidence in the case, and that it was not error to state in such instruction: "You are not at liberty to disbelieve as jurors if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered."

22. ———: ———. The court charged the jury that: "The law raises no presumption against the defendant. On the contrary, the presumption of law is in favor of his innocence. This presumption of innocence continues through the trial until every material allegation in the information is established by the evidence to the exclusion of all reasonable doubt." *Held*, Equivalent to the rule that the presumption of innocence is a matter of evidence, to the benefit of which the accused is entitled.

23. **Embezzlement:** MONEY: FINDING OF VALUE. In case of conviction under an information charging the embezzlement of money, a verdict finding the amount of money embezzled to be a specified number of dollars is a sufficient finding of value.

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

The facts are stated in the opinion.

Charles O. Whedon and *T. J. Mahoney*, for plaintiff in error:

The warrant under which the arrest was made was invalid and the information should have been quashed.

(*Rafferty v. People*, 69 Ill. 111; *Garcia v. Sanders*, 35 S. W. Rep. [Tex.] 52.)

The plea in abatement should have been sustained on the ground that another criminal action charging defendant with the same offense was pending in another county. (*State v. North Lincoln S. R. Co.*, 34 Neb. 634; *Monroe v. Reid*, 46 Neb. 331; *Gamsby v. Ray*, 52 N. H. 513; *Commonwealth v. Churchill*, 5 Mass. 174; *Coaldale Brick & Tile Co. v. Southern Construction Co.*, 19 So. Rep. [Ky.] 45; *Parker v. Colcord*, 2 N. H. 36; *Demond v. Crary*, 1 Fed. Rep. 480; *Curtis v. Piedmont Lumber, Ranch & Mining Co.*, 13 S. E. Rep. [N. Car.] 944.)

The information fails to allege that the warrant was lawfully issued or that it was of any value, and is therefore insufficient. (*State v. Babcock*, 22 Neb. 38; *State v. Moore*, 37 Neb. 507.)

The information is defective in failing to allege that the warrant was issued upon a proper voucher. (*State v. Moore*, 36 Neb. 579; *Moore v. Garneau*, 39 Neb. 511.)

The count upon which defendant was convicted does not mention the county wherein the crime was alleged to have been committed, and the count naming the county was abandoned. The state and county are mentioned in the caption, but the caption is no part of the information. The information is therefore insufficient, and will not support a conviction. (*People v. Jewett*, 3 Wend. [N. Y.] 319; *State v. McCarty*, 54 Am. Dec. [Wis.] 150; *Commonwealth v. Stone*, 3 Gray [Mass.] 453; *Rose v. State*, 1 Ala. 28; *State v. Freeman*, 21 Mo. 481; *Mitchell v. State*, 8 Yerg. [Tenn.] 514; *English v. State*, 4 Tex. 125; *Allen v. State*, 5 Wis. 329; *State v. Emmett*, 23 Wis. 632; *McCoy v. State*, 22 Neb. 418.)

An information must charge explicitly all that is essential to constitute an offense and cannot be aided by intendment. (*Smith v. State*, 21 Neb. 552; *Commonwealth v. Smart*, 6 Gray [Mass.] 15.)

Whatever is to be proven must be pleaded in the information. (*State v. Hebel*, 72 Ind. 361; *State v. Hayes*, 78 Mo. 307.)

The manner in which the money was used should have been stated for the purpose of showing whether the use was illegal. The charge that defendant converted the money to his own use was a legal conclusion rather than a statement of fact. (*State v. Brandt*, 41 Ia. 593; *State v. Parsons*, 54 Ia. 405; *Hoyt v. State*, 50 Ga. 313.)

No demand is alleged in the information, and for that reason it fails to show an improper neglect or refusal to pay. (*State v. Munch*, 22 Minn. 67; *Bolln v. State*, 51 Neb. 581.)

The indictment contained several counts for the same act and the prosecuting attorney should have been compelled to elect. (*State v. Lawrence*, 19 Neb. 307; *Aiken v. State*, 41 Neb. 263; *Blodgett v. State*, 50 Neb. 121.)

Challenges to jurors having opinions as to defendant's guilt should have been sustained. (*Curry v. State*, 4 Neb. 545; *Carroll v. State*, 5 Neb. 31; *Olive v. State*, 11 Neb. 1; *Cowan v. State*, 22 Neb. 519; *Miller v. State*, 29 Neb. 437; *Owens v. State*, 32 Neb. 167.)

The misconduct of the prosecuting attorney in referring, in presence of jurors, to attempts at bribery is ground for reversal. (*Thompson v. People*, 4 Neb. 531.)

References to error in the conduct of the trial judge in asking questions and in making remarks during the trial: *State v. Harkin*, 7 Nev. 377; *State v. Ah Tong*, 7 Nev. 148; *Hudson v. Hudson*, 16 S. E. Rep. [Ga.] 349; *Fager v. State*, 22 Neb. 340; *Chicago, R. I. & P. R. Co. v. Archer*, 46 Neb. 914.

The evidence was insufficient to sustain a verdict against defendant, and the motion to direct a verdict in his favor was erroneously overruled. (*State v. McFetridge*, 84 Wis. 473; *State v. Hill*, 47 Neb. 456; *Suydan v. Merrick County*, 19 Neb. 159; *Miller v. Wheeler*, 33 Neb. 765; *Miller v. State*, 16 Neb. 179; *Commonwealth v. Shepard*, 83 Mass. 575; *Hamilton v. State*, 60 Ind. 193; *Pryor v. Commonwealth*, 2 Dana [Ky.] 298; *Garner v. State*, 5 Yerg. [Tenn.] 160; *Thalheim v. State*, 20 So. Rep. [Fla.] 938; *Commonwealth v. Merrifield*, 4 Met. [Mass.] 468;

Lewis v. State, 28 Tex. App. 140; *Commonwealth v. Howe*, 132 Mass. 250; *Carr v. State*, 16 So. Rep. [Ala.] 155; *Territory v. Marinez*, 44 Pac. Rep. [Ariz.] 1089; *Queen v. Brady*, 26 U. Can. Q. B. 13; *Tucker v. State*, 16 Ala. 670; *Lindsay v. State*, 19 Ala. 560; *State v. Copp*, 15 N. H. 212; *State v. McDonald*, 24 Pac. Rep. [Mont.] 628; *Turley v. State*, 3 Humph. [Tenn.] 323; *Jordt v. State*, 31 Tex. 571; *Banks v. State*, 28 Tex. 644; *Johnson v. State*, 11 O. St. 324.)

The state treasurer's bond, not having been approved within the time fixed by statute, was erroneously admitted in evidence. (*State v. Lansing*, 46 Neb. 514.)

The treasury warrant introduced in evidence was different from that copied in the information and should have been excluded. (*State v. Owen*, 73 Mo. 440; *Sharley v. State*, 54 Ind. 168; *Haslip v. State*, 10 Neb. 590; *Prehm v. State*, 22 Neb. 676; *Williams v. People*, 101 Ill. 382.)

The depository bond of the Omaha National Bank was erroneously admitted in evidence. It was not executed according to the requirements of statute. (*Richardson v. Woodruff*, 20 Neb. 137; *Reed v. Merriam*, 15 Neb. 325; *Sutton v. Stone*, 4 Neb. 319; *Hendrix v. Boggs*, 15 Neb. 469; *Baldwin v. Merriam*, 16 Neb. 199; *Shelley v. Towle*, 16 Neb. 194; *Sullivan v. Merriam*, 16 Neb. 157; *Seaman v. Thompson*, 16 Neb. 546; *Bendexen v. Fenton*, 21 Neb. 184; *Gue v. Jones*, 25 Neb. 634; *Adler v. Green*, 18 W. Va. 201; *Easton v. Ormsby*, 27 Atl. Rep. [R. I.] 218; *Williams v. State*, 6 L. R. A. [Fla.] 821; *Chilton v. People*, 66 Ill. 501.)

Because the jury did not ascertain and declare in their verdict the value of the property embezzled, the court had no authority to render a judgment. (*Armstrong v. State*, 21 O. St. 357; *Highland v. People*, 1 Scam. [Ill.] 391; *Sawyer v. People*, 3 Gil. [Ill.] 54; *Tobin v. People*, 104 Ill. 565; *Thompson v. People*, 125 Ill. 256; *Shines v. State*, 42 Miss. 331; *Ray v. State*, 1 G. Greene [Ia.] 316; *State v. Redman*, 17 Ia. 329; *Locke v. State*, 32 N. H. 106; *McCoy v. State*, 22 Neb. 418; *McCormick v. State*, 42 Neb. 866; *Fox v. Phelps*, 17 Wend. [N. Y.] 400; *State v. Doepke*, 5 Mo. App. 590; *Cannon v. State*, 18 Tex. App. 172.)

The seventeenth instruction was erroneous because it gave undue prominence to the testimony of one class of witnesses. (*Markel v. Swobe*, 11 Neb. 213; *Kersenbrock v. Martin*, 12 Neb. 376; *City of Lincoln v. Beckman*, 23 Neb. 677; *First Nat. Bank of Denver v. Lowrey*, 36 Neb. 290; *Rising v. Nash*, 48 Neb. 597.)

By the twenty-first instruction the jury was told that a reasonable doubt must be one arising from a candid and impartial investigation of all the evidence in the case. This is not a correct statement of the law. A doubt may arise from want of evidence. (*Carr v. State*, 23 Neb. 749; *Cowan v. State*, 22 Neb. 519; *Childs v. State*, 34 Neb. 236; *Garrison v. People*, 6 Neb. 274; *Long v. State*, 23 Neb. 33.)

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

The warrant of arrest contained a sufficient recital of the substance of the offense. (*State v. Hallback*, 18 S. E. Rep. [S. Car.] 919; *Gay v. De Werff*, 17 Ill. App. 417; *Murphey v. State*, 55 Ala. 252; *Rhodes v. King*, 52 Ala. 272; *Jennings v. State*, 13 Kan. 80.)

If the warrant of arrest was defective accused should have moved to quash it before proceeding further. He waived any defect in the warrant. (*Redmond v. State*, 12 Kan. 138; *Alderman v. State*, 24 Neb. 97; *State v. Downs*, 8 Ind. 42.)

The pendency of an information in one court is no ground for a plea in abatement to another information in the same court, or another court of concurrent jurisdiction, for the same cause. (*Commonwealth v. Drew*, 3 Cush. [Mass.] 282; *Hardin v. State*, 22 Ind. 349; *Commonwealth v. Murphy*, 11 Cush. [Mass.] 472; *Commonwealth v. Berry*, 5 Gray [Mass.] 93; *O'Meara v. State*, 17 O. St. 87; *Smith v. Commonwealth*, 104 Pa. St. 339; *Eldridge v. State*, 9 So. Rep. [Fla.] 448; *Commonwealth v. Cody*, 42 N. E. Rep. [Mass.] 575.)

The reference in the third count of the information to the county already named in the first count and in the

caption sufficiently designated the county wherein the offense was committed, though a conviction under the first count was abandoned. (*Rema v. State*, 52 Neb. 375; *Smith v. State*, 21 Neb. 552; *Moore v. Fedewa*, 13 Neb. 379; *Alderman v. State*, 24 Neb. 97; *Mount v. State*, 14 O. 295; *State v. McKee*, 1 Bailey [S. Car.] 651; *United States v. Farring*, 4 Cranch [U. S. C. C.] 465; *United States v. Shoemaker*, 2 McLain [U. S.] 114; *Reynolds v. State*, 3 Kelly [Ga.] 53; *Commonwealth v. Wade*, 17 Pick. [Mass.] 395; *Evans v. State*, 24 O. St. 209; *Fisk v. State*, 9 Neb. 63; *Boles v. State*, 13 Tex. App. 650; *Hutto v. State*, 7 Tex. App. 44; *Wills v. State*, 8 Mo. 45; *Commonwealth v. Clapp*, 16 Gray [Mass.] 237; *Phillips v. Fielding*, 2 H. Bl. [Eng.] 131; *Rex v. Dent*, 1 C. & K. [Eng.] 249; *United States v. Hendric*, 2 Sawyer [U. S.] 477; *State v. Nelson*, 29 Me. 329; *State v. McAllister*, 26 Me. 374.)

The information alleges all the statutory ingredients of the offense charged, and the objection that it does not state the facts showing the alleged conversion is without merit. (*Whitman v. State*, 17 Neb. 224; *Smith v. State*, 4 Neb. 277; *Wagner v. State*, 43 Neb. 5; *Hodgkins v. State*, 36 Neb. 160; *State v. Jamison*, 74 Ia. 602; *Claassen v. United States*, 142 U. S. 140; *Hoyt v. State*, 50 Ga. 313; *Gibbs v. State*, 41 Tex. 491; *Reed v. McRill*, 41 Neb. 207; *Sanford v. Jensen*, 49 Neb. 766.)

Before resting its case the state elected as to counts. There was therefore no prejudicial error in the order overruling accused's motion to require plaintiff to elect. (*Korth v. State*, 46 Neb. 631.)

Accused's peremptory challenges not having been exhausted, error, if any, in overruling challenges to jurors was without prejudice. (*Brumback v. German Nat. Bank of Beatrice*, 46 Neb. 540; *Jenkins v. Mitchell*, 40 Neb. 664.)

References in reply to charges of misconduct on part of the prosecuting attorney: *Vaughn v. Crites*, 44 Neb. 812; *Gandy v. State*, 13 Neb. 445; *Hoover v. State*, 48 Neb. 184.

The motion to direct a verdict for defendant was prop-

erly overruled. (*State v. Harwood*, 36 Kan. 237; *Stevens v. Parks*, 73 Ill. 388; *Oddie v. National City Bank of New York*, 45 N. Y. 735; *State v. Krug*, 12 Wash. 288; *People v. McKinney*, 10 Mich. 54; *Commonwealth v. Moore*, 44 N. E. Rep. [Mass.] 613; *People v. Bringard*, 39 Mich. 22; *State v. Baumhager*, 28 Minn. 226; *State v. Palmer*, 40 Kan. 474.)

The official bond was competent evidence. (*Commonwealth v. Logue*, 160 Mass. 551; *State v. Goss*, 69 Me. 22; *State v. Minns*, 26 Minn. 183.)

Admission of the treasury warrant in evidence was not prejudicial error. (*Davis v. State*, 51 Neb. 301.)

There was no error in admitting in evidence certain pages of the book of account of the Omaha National Bank. (*Bunker v. Shed*, 49 Mass. 150; *Nicholls v. Webb*, 8 Wheat. [U. S.] 326; *Nourse v. McCay*, 2 Rawle [Pa.] 70; *Mathias v. O'Neill*, 94 Mo. 520; *Imhoff v. Richards*, 48 Neb. 590; *Larabee v. Klosterman*, 33 Neb. 150.)

There was no error in admitting the depository bond in evidence. (*Luce v. Foster*, 42 Neb. 818.)

The books, records, and other public documents kept in the office of the state treasurer, and the official statement filed by him with the auditor of public accounts are competent evidence to prove the receipts and disbursements of such officer. (*State v. Ring*, 29 Minn. 78; *Humphrey v. People*, 18 Hun [N. Y.] 393; *People v. Flock*, 59 N. W. Rep. [Mich.] 237; *Stanley v. State*, 88 Ala. 154; *Osborne v. State*, 27 N. E. Rep. [Ind.] 345; *Strong v. State*, 75 Ind. 440; *Coleman v. Commonwealth*, 25 Gratt. [Va.] 865.)

It was proper to permit the expert accountant to testify to the result of his examination of the books of the state treasury. (*State v. Findley*, 101 Mo. 217; *Hollingsworth v. State*, 111 Ind. 289; *Masonic Mutual Benefit Society v. Lackland*, 97 Mo. 138.)

The statement in the verdict of the amount of money embezzled was a sufficient finding as to value. (*State v. Hood*, 51 Me. 363; *Cook v. State*, 49 Miss. 8; *State v. White*, 25 Wis. 359; *Schoonover v. State*, 17 O. St. 294; *Smith v.*

State, 60 Ga. 430; *Commonwealth v. Butler*, 144 Pa. St. 568; *State v. Knox*, 17 Neb. 683; *Gady v. State*, 83 Ala. 51.)

Other references: *Norris v. State*, 25 O. St. 217; *Connor v. State*, 29 Fla. 455; *Commonwealth v. Taylor*, 105 Mass. 172; *Commonwealth v. Wood*, 142 Mass. 459; *Commonwealth v. Karpowski*, 167 Pa. St. 225; *State v. Moore*, 50 Neb. 88; *Willis v. State*, 43 Neb. 102; *Roberts v. People*, 9 Colo. 458; *Hemingway v. State*, 8 So. Rep. [Miss.] 317; *State v. Cowan*, 74 Ia. 53.

NORVAL, J.

The defendant, Joseph S. Bartley, was convicted in the district court of Douglas county of embezzlement of moneys belonging to the state while he was the treasurer thereof. Besides a fine in double the amount found by the jury to have been embezzled, a term of twenty years in the penitentiary was the punishment imposed, and to obtain a reversal of said judgment and sentence is the purpose of this proceeding.

The information filed in the court below by the county attorney was in eight counts, the first and second of which charged the embezzlement of a certain warrant, drawn by the auditor of public accounts upon the state treasury for the sum of $180,101.75. The remaining six counts set forth, in different forms, the embezzlement on the 2d day of January, 1897, of $201,884.05 of the moneys belonging to the state, which defendant received by virtue of his said office of state treasurer. At the close of the testimony for the state, the county attorney entered a *nolle prosequi* as to the first two counts of the information, and upon the trial the accused was found guilty under the third count, but was acquitted as to all the other counts upon which the prosecutor elected to rely for a conviction.

At this time it is not deemed essential to mention the various pleas, motions, and demurrers filed preceding the selection of the jury, or to give a history of the trial, or any statement of the facts revealed by the record.

Such matters will be stated as we proceed with the investigation of the grounds urged for a reversal, at least so far as the same may seem necessary to an understanding of the propositions argued.

The first contention made in the brief of counsel for the accused is that the information under which the conviction was obtained should have been quashed, because of the alleged invalidity of the warrant on which the arrest was made. The original complaint was filed with the police judge of the city of Omaha, and the warrant in question was issued thereon, which recited that a complaint had been made under oath before said judge charging that "Joseph S. Bartley, on or about the 25th day of April, A. D. 1895, within said county and within the city of Omaha, did commit the offense of embezzlement." The argument is that the warrant of arrest does not recite the substance of the accusation against the prisoner as required by section 288 of the Criminal Code, and therefore is void. The warrant of arrest was not assailed before the magistrate, but the defendant waived a preliminary examination, and entered into a recognizance for his appearance in the district court to answer the charges preferred against him in the complaint. Objection to the sufficiency of said warrant was made for the first time in the trial court after the filing of the information therein by the county attorney. The question with which we have to deal is not whether the warrant of arrest should have been quashed on a proper objection before the magistrate, but whether the defects in said warrant have been waived by the failure to seasonably take advantage of the same. There is no room for doubt that if the warrant of arrest was bad, the defect was not available to the defendant after he waived his preliminary examination, and had entered into a recognizance for his appearance in the district court. He was not thereafter held by the writ, as that instrument had already performed its office, but stood upon his recognizance. Whether this warrant of arrest was good

or bad was not a proper subject of inquiry in the district court. (*Alderman v. State*, 24 Neb. 97; *State v. Downs*, 8 Ind. 42; *Williams v. State*, 88 Ala. 80; *State v. Stredder*, 3 Kan. App. 631; *State v. McManus*, 4 Kan. App. 247.)

In the first case cited this court decided that the district court, upon a motion to quash an information, will not inquire into the validity of the complaint upon which the preliminary examination before the magistrate was had, the crime alleged being the same. The court in the opinion say: "We know of no rule of law which would entitle a person accused of a crime to attack the complaint upon which his preliminary examination was had, after the return of the indictment or information. So far as the power of the court to hold its jurisdiction over him is concerned, the complaint had served its purpose, and could not then be made the subject of attack." It follows from the doctrine enunciated in that case that the defects in this warrant, which might have been fatal if seasonably presented before the magistrate, but which were not there raised, are not available in the district court on motion to quash the information. The two cases cited by counsel for the accused are not in point. They tend to support the proposition that the warrant is fatally defective, but have no bearing whatever upon the question whether such objection can be urged for the first time on motion to quash the information.

The record discloses that the defendant was arraigned before the county court of Lancaster county on the 19th day of April, 1897, upon a complaint charging the accused with the embezzlement of the same auditor's warrant and identical moneys mentioned in the information herein; that the defendant waived examination and entered into a recognizance for his appearance before the district court of said county at the next term thereof; that a transcript of the proceedings was lodged in the office of the clerk of said court on the following day, where on May 27 the information was filed by the county attorney, who on the same day entered a *nolle prosequi;*

that the transcript of the proceedings before the police judge of the city of Omaha was filed in the district court of Douglas county on April 29, and that the information upon which the accused was tried was filed therein by the county attorney on May 15. A plea in abatement was filed on May 27, the county attorney replied thereto, and the plea in abatement was overruled by the trial court, which decision we are called upon to review.

In civil cases the rule is that the pendency of a former suit between the same parties may be pleaded in abatement where the judgment in such action would be a bar to a judgment in the second suit brought in another court of concurrent jurisdiction. (*State v. North Lincoln S. R. Co.*, 34 Neb. 634; *Monroe v. Reid*, 46 Neb. 316.) The attorney general argues that this doctrine is not extended to prosecution for crimes. A former indictment or information pending in the same court for the same criminal offense constitutes no ground of abatement. In *O'Meara v. State*, 17 O. St. 515, Welch, J., observed: "It is insisted, in the first place, that the indictment under which the defendant was convicted is a nullity because of the pendency of a former indictment for the same offense, at the time it was found. We know of no such law. The last indictment is as valid as the first. Two indictments for the same offense are often pending at the same time. The state can only proceed upon one of them, but may elect upon which it will proceed. Of course, the right of election implies that both are good and lawful indictments." Chief Justice Shaw, in delivering the opinion of the court in *Commonwealth v. Drew*, 57 Mass. 279, used this language: "It appears to us to be a settled rule of law, that the pendency of one indictment is no good plea in abatement to another indictment for the same cause. Whenever either of them—and it is immaterial which—is tried, and a judgment rendered on it, such judgment will afford a good plea in bar to the other, either of *autrefois convict* or *autrefois acquit*. But where it is found that there is some mistake in an indictment, as a wrong

name or addition, or the like, and the grand jury can be again appealed to, as there can be no amendment of an indictment by the court, the proper course is for the grand jury to return a new indictment, avoiding the defects in the first; and it is no good ground of abatement, that the former has not been actually discontinued, when the latter is returned." The authorities are quite uniform in holding that the pendency of a former indictment for the same offense in the same court is no ground for abatement. (Wharton, Criminal Pl. & Pr. sec. 452; *Dutton v. State*, 5 Ind. 533; *Hardin v. State*, 22 Ind. 347; *Smith v. Commonwealth*, 104 Pa. St. 339; *Commonwealth v. Murphy*, 65 Mass. 472; *Commonwealth v. Berry*, 71 Mass. 93; *Commonwealth v. Cody*, 42 N. E. Rep. [Mass.] 575; *Eldridge v. State*, 9 So. Rep. [Fla.] 448; *State v. Security Bank*, 51 N. W. Rep. [S. Dak.] 337; *State v. Curtis*, 23 Kan. 386; *State v. Hastings*, 86 N. Car. 596; *State v. Lambert*, 9 Nev. 321; *Bailey v. State*, 11 Tex. App. 140.)

Counsel for the accused insist the doctrine that a former indictment in the same court is no ground for abatement is not applicable to prosecutions for the same offense in two courts having concurrent jurisdiction thereof. We think this is true. Undoubtedly, where two courts have concurrent jurisdiction of a crime, the court first obtaining jurisdiction acquires exclusive control to the exclusion of the other. (Wharton, Criminal Pl. & Pr. sec. 452, and cases there cited.) It logically follows that the pendency of a prior indictment or information in another court having jurisdiction of the identical offense may be pleaded in abatement of the second prosecution. (See 1 Wharton, Criminal Law sec. 521; *State v. Tisdale*, 2 Dev. & Bat. [N. Car.] 160.) The justices and district courts have concurrent jurisdiction of misdemeanors committed in their respective counties. Therefore, if an indictment should be returned by the grand jury to the district court charging the defendant with an assault and battery and during the pendency thereof, and before trial, the defendant should be arrested upon a com-

plaint filed before a justice of the peace of the same county charging him with the commission of the identical offense, there is no reason why the pendency of the indictment should not be ground for abating the prosecution before the justice. Both tribunals have concurrent jurisdiction of the same criminal act. The complaint and information filed against Bartley in Lancaster county charged the crime of embezzlement as does the information herein, but the same criminal acts were not alleged. The jurisdiction of the district courts of Lancaster and Douglas counties is not concurrent in criminal actions, in such a sense as to give each original jurisdiction over offenses committed in either county. It is clear the pendency of the criminal action against the defendant in the Lancaster district court was not a bar to this prosecution. Manifestly this is true, both upon reason and authority. Neither a conviction nor acquittal of the offense charged in one information would have constituted a bar to the prosecution under the other information, since in one the venue was laid in Douglas county, while in the other the offense is stated to have been committed in Lancaster county. This being true, unquestionably the fact that an information was pending against the accused in Lancaster county for the embezzlement of the same auditor's warrant and moneys of the state described in the information herein would not abate this prosecution. The authorities cited by counsel for the defendant are easily distinguishable. All are civil cases except *Commonwealth v. Churchill*, 5 Mass. 174, which last case states that the pendency of a prior information or indictment for a crime will not abate a subsequent prosecution for the same offense.

It is argued that the court below erred in not sustaining the demurrer interposed to the first count of the information, which charged the embezzlement by the defendant of a certain warrant drawn by the auditor of public accounts upon the state treasury. This ruling is not available, since it was not prejudicial to the rights of

the accused, owing to the fact that the county attorney at the close of the state's testimony entered a *nolle prosequi* as to the first and second counts of the information. (*Davis v. State*, 51 Neb. 301.)

It is suggested, if the demurrer had been sustained, no evidence in support of the first count of the information would have been adduced. Doubtless this is true; but the admission of the testimony with respect to the warrant was equally competent to establish the charge contained in the count of the information under which the conviction was had, since the embezzlement of the moneys therein mentioned is predicated upon the fact that the accused paid said warrant out of the moneys belonging to the state. The facts surrounding the issuance of this warrant, and the disposition thereof by the defendant, were admissible to show the guilty intent of the accused in the commission of the crime of embezzling the money which was used to pay the warrant, as will hereafter more fully appear. (*Commonwealth v. Shepard*, 83 Mass. 575.)

It is strenuously insisted that the third count of the information,—the one upon which the accused was convicted,—is fatally defective, inasmuch as the county and state in which the embezzlement was committed are not mentioned in said count. It is therein averred: "That the said Joseph S. Bartley, on the 2d day of January, A. D. 1897, in the county aforesaid, then and there being in said county," etc. These words unquestionably referred to the county of Douglas named in the venue at the top of the information, and set forth in the first count thereof. This is conceded by counsel for the accused, but they argue that such reference is not permissible, because the venue—"The State of Nebraska, County of Douglas, ss."—is no part of the information, and that, the prosecutor having entered a *nolle* as to the first count, such count cannot be considered for any purpose, but the information must be treated precisely the same as though the first count never had been inserted.

Whether the caption is or is not a part of an information, it is unnecessary to determine. The venue given at the top of this information, it is very evident, was made a part thereof by reference had thereto in the third count of the information. This doctrine was recognized and applied, with respect to a criminal complaint before a justice of the peace, in *Rema v. State*, 52 Neb. 379. (See *Rivers v. State*, 144 Ind. 16; *State v. Assmann*, 46 S. Car. 554.) Moreover, the third count of the information with sufficient particularity designates the county where the offense charged was committed, when read in connection with the first count of the information, where it is specifically alleged that the offense therein described was committed in the county of Douglas, in the state of Nebraska, no other county being referred to in the information. In the third count the averment is "In the county aforesaid, then and there being in said county." This clearly indicates that the embezzlement stated in said count was committed in the same county mentioned in the first count, to-wit, Douglas county, in this state. It was unnecessary that the venue should have been therein more distinctly laid. Where an information contains two or more counts, in the first of which the county and state are specifically stated, it is sufficient to allege in the other counts that the offense therein set forth was in the county aforesaid committed. (Criminal Code, sec. 412; *Fisk v. State*, 9 Neb. 62.)

The fact that the county attorney entered a *nolle prosequi* as to the first count is not important. That act did not have the effect to strike said count from the information or record. The entering of the *nolle*, after the commencement of the trial, was equivalent to an acquittal of the offense charged in the first count; but the count still remained a part of the information, and it was competent, if it could, to supply the deficiencies, or aid the allegations, in the other counts. (*Fisk v. State*, 9 Neb. 62; *Evans v. State*, 24 O. St. 208; *Commonwealth v. Clapp*, 82 Mass. 237; *State v. McAllister*, 26 Me. 374; *State v. Nelson*,

29 Me. 329.) In *Wills v. State*, 8 Mo. 52, the indictment contained two counts, on the first of which a *nolle prosequi* was entered, and the time of committing the offense was only shown by reference to that count. It was held that said count was not stricken, and a conviction could be properly had upon the second, although, without reference to the first, it was defective. To the same effect are *Hutto v. State*, 7 Tex. App. 44; *Boles v. State*, 13 Tex. App. 650.

Section 4, article 3, chapter 83, Compiled Statutes, declares: "It shall be the duty of the auditor: * * * Seventh. To direct prosecutions in the name of the state for all official delinquencies, in relation to the assessment, collection, and payment of the revenue, against all persons who by any means become possessed of public money or property, due or belonging to the state, and fail to pay over or deliver the same, and against all debtors of the state." The proposition is advanced that this information is bad because it does not allege that the prosecution was instituted under the direction of the auditor of public accounts. To this we cannot agree. The statute makes it the duty of a county attorney to prosecute all criminal actions in his county, as well as to file in the district court all informations for crimes; and he may institute criminal proceedings against a public officer who is guilty of some official delinquency relating to payment of the revenues, whether directed by the auditor to do so or not. It will not do to say that the county attorney cannot institute such a prosecution until he has been so directed by the auditor. The most that can be claimed for the provision of the statutes already quoted is that it is the duty of the county attorney to institute and prosecute a criminal action against a public officer who has made default in the assessment, collection, or payment of the public revenues, and not that the county attorney is powerless to take any steps towards instituting criminal prosecution against a defaulting state treasurer until after the audi-

tor has given him instructions to act. The state was not required to prove that this prosecution was brought by direction of the auditor; hence, it was wholly unnecessary for the information to aver such fact.

The count under which the conviction was obtained is assailed on the ground that the particular acts constituting the embezzlement of the moneys of the state are not therein alleged. The offense is set forth in the information in the language of section 124 of the Criminal Code, which creates the crime of embezzlement by a public officer, and provides the punishment therefor. This was sufficient. It was not necessary for the prosecutor to set out the evidence relied upon to sustain a conviction, nor allege the particular act or acts in which the crime consisted. (*Whitman v. State*, 17 Neb. 224; *Hodgkins v. State*, 36 Neb. 160; *State v. Jamison*, 74 Ia. 602; *Claassen v. United States*, 142 U. S. 140; *Gibbs v. State*, 41 Tex. 491; *Bennett v. State*, 62 Ark. 516; *State v. Isensee*, 12 Wash. 254.) The three authorities cited by the defendant do not support a contrary doctrine, as a cursory examination will disclose.

Hoyt v. State, 50 Ga. 313, was a prosecution for embezzlement. The indictment charged the defendant with the fraudulent conversion to his own use of certain moneys of the state of Georgia without detailing the manner by which the embezzlement was committed, and the court in passing upon the sufficiency of the averments held that "an indictment charging a defendant with having received a certain amount of money to be applied for the use or benefit of the bailor, with an allegation that on a certain day the defendant fraudulently converted a specific portion thereof to his own use, is not demurrable on the ground of its being general, vague, and indefinite, and that it does not put the accused on notice of what he is called on to answer."

In *State v. Brandt*, 41 Ia. 593, the question involved was whether an indictment which charged the crime of em-

bezzlement in the language of the statute was sufficient. The court was equally divided in opinion.

In *State v. Parsons*, 54 Ia. 405, an indictment for embezzlement of public money was held bad, under the statutes of Iowa, because it omitted to charge that the defendant had failed to account for the money. The question we have been considering was not decided in that case.

State v. King, 81 Ia. 587, was a conviction of a county treasurer for the embezzlement of county funds. The indictment therein, in addition to charging that the defendant did "unlawfully and feloniously embezzle and convert to his own use, without authority of law," the money which he had received by virtue of his office, averred that he committed the crime by expending the money in his private business, and by permitting others to use and expend it in their private business transactions, and by using the money to pay the defendant's own private debts. It was urged that each of those acts constitutes a separate offense, and that the indictment was therefore bad for duplicity, as charging three distinct crimes. The supreme court held otherwise, saying: "We are of the opinion that the indictment is sufficient. The gist of the offense is the wrongful conversion of the public money, and it is wholly immaterial and mere surplusage to state whether the defendant used it in paying his debts, in purchasing property, had it on deposit in bank, carried it on his person, or loaned it to others, and the fact that three different modes of concealing the money are set forth in the indictment is wholly immaterial." We do not entertain the least doubt that the information in the case at bar is not defective, because the evidential facts constituting the crime are not alleged.

The objection that the information is bad, inasmuch as it does not aver that a demand had been made upon the accused for the money which came into his custody by virtue of his office of state treasurer, is without merit. It might be different if the information had been framed

upon the theory that the defendant was guilty of the crime of embezzlement by reason of his having failed to account and pay over the public moneys, which came into his hands, to his successor. This prosecution is conducted upon the specific charge that the defendant converted and embezzled to his own use during his official term certain of the moneys of the state; therefore no demand upon him for the money by his successor was necessary to be alleged, or proven upon the trial. We quite agree with the attorney general wherein he says: "If a demand were necessary, then a prosecution could not be maintained until demand was made, and compliance with the demand, within a reasonable time, would defeat the prosecution. On this theory the treasurer of the state could do with the money of the state what he pleased,—could invest it in mines, or on the board of trade,—and be guilty of no crime, provided he accounted for the money within a reasonable time after demand. The statute says otherwise; and there is no warrant either in the statutes or decisions for a theory so pernicious." The question under consideration was not passed upon in *Bolln v. State*, 51 Neb. 581. *State v. Munch*, 22 Minn. 67, cited by counsel for defendant, does not support their contention, but is in harmony with the conclusion we have reached. There were two indictments before the court in that case. In one, the defendant, as state treasurer, was charged with the embezzlement and conversion to his own use, of certain moneys belonging to the state of Minnesota, which he had received by virtue of his office. This indictment was sustained, although it contained no averment of a demand. The other indictment charged an embezzlement by reason of the failure of the defendant to pay the money over to his successor in office, and was held defective because it did not allege that a demand for the money had been made upon the defendant by the successor in office.

Another contention is that the trial court erred in not requiring the county attorney to elect, before entering

upon the trial, upon which of the several counts of the information he would rely for a conviction. In *Korth v. State,* 46 Neb. 631, it was ruled that where different felonies of the same general character or grade are charged in separate counts of an information it is within the discretion of the trial judge to require the state to elect among the several counts, and his ruling in that regard will not be molested, unless there has been an abuse of discretion. In the case at bar, as in the one to which reference has just been had, the county attorney made his election as to counts after the testimony for the state had been introduced. No abuse of discretion or prejudicial error is perceptible. The prosecutor elected to rely upon the six counts relating to the embezzlement of money, and, they having charged the same offense, he was not obliged to elect among them. (*Candy v. State,* 8 Neb. 482; *Furst v. State,* 31 Neb. 403; *Aiken v. State,* 41 Neb. 265; *Hill v. State,* 42 Neb. 503; *Hurlburt v. State,* 52 Neb. 428.

Alfred D. Cox, W. F. Church, Fred A. Tompkins, and George S. Mack were severally challenged by the defendant for cause, as being incompetent to serve as jurors, which challenges were overruled by the court, and the rulings are assigned for error. The question of the competency of the persons named to sit as jurors we are relieved of the necessity of considering, since the record fails to disclose that the accused exhausted all of his peremptory challenges. If he was not required to exhaust his peremptory challenges to exclude them from the panel, he was not prejudiced by the overruling of his challenge for cause. (*Bohanan v. State,* 15 Neb. 209; *Palmer v. People,* 4 Neb. 68; *Jenkins v. Mitchell,* 40 Neb. 664; *Blenkiron v. State,* 40 Neb. 11; *Brumbach v. German Nat. Bank of Beatrice,* 46 Neb. 540.)

Error is alleged in the overruling of the motion of the defendant, made at the close of the testimony advanced by the state, to direct a verdict of not guilty. For convenience this ruling will now be considered in connection

with the assignment that the proofs are insufficient to sustain the verdict.

There is no controversy as to the facts. During the two years immediately preceding the 6th day of January, 1897, the defendant was state treasurer, and exercised the duties of said office. The Omaha National Bank had been designated, under the laws of the state, for the depositing of the public funds, and the defendant kept on deposit in said bank, in pursuance of law, certain of the money which came into his hands by virtue of his office. The legislature at the session thereof held in 1895, for the purpose of making good to the state sinking fund the amount of loss it had sustained by reason of the failure of the Capital National Bank of the city of Lincoln, passed a law appropriating out of the state general fund the sum of $180,101.75, which appropriation is in the language following: "For state sinking fund, one hundred eighty thousand and one hundred and one and seventy-five one-hundredths ($180,101.75) dollars, to reimburse said fund for same amount tied up in Capital National Bank." (Session Laws 1895, ch. 88, p. 404.) Immediately upon the approval and taking effect of said appropriation, the defendant on the 10th day of April, 1895, made out in his own name, and presented to the auditor of public accounts, a voucher for the sum of money so appropriated for the replenishing of the state sinking fund, and caused the state auditor to issue on that date a warrant upon the state treasury for the payment of $180,101.75, which the defendant countersigned as state treasurer, the warrant being in words and figures following:

"$180,101.75. STATE OF NEBRASKA. No. 95,241.

"OFFICE OF THE AUDITOR OF PUBLIC ACCOUNTS,

"LINCOLN, NEBR., Apr. 10, 1895.

"Treasurer of Nebraska,

"Pay to J. S. Bartley ....., or order, one hundred eighty thousand one hundred one & 75-100 Dollars. For

to Reimburse State Sinking Fund. In accordance with legislative appropriation approved April 10th, 1895; and charge General Fund.

"Countersigned: EUGENE MOORE,
"J. S. BARTLEY, *Auditor of Public Accounts.*
"*State Treasurer.* P. O. HEDLUND,
"*Deputy.*"

This warrant was delivered to the defendant on the day it bears date, and he at once registered the same in the proper book in his office for payment, but omitted to enter upon said book, in the proper column, the name of the person presenting the warrant for payment. Almost immediately thereafter the defendant indorsed his name upon the back of said warrant, and placed the same in the hands of the Omaha National Bank, or J. H. Millard, its president, for negotiation, and the latter, as agent for the defendant, sold the same to the Chemical National Bank of New York city for the face value. Pursuant to the directions of the defendant, the Omaha National Bank opened an individual account with him, and entered therein a credit to defendant on the 26th day of April, 1895, for the amount of the proceeds of said warrant. This money was subsequently drawn out of the bank on the personal checks of the defendant. In November, 1896, the warrant was transmitted by the Chemical National Bank to the Omaha National Bank for collection. It was called for payment in order of registration, and on the 2d day of January, 1897, the defendant went to the city of Omaha, and into the Omaha National Bank, drew his check as state treasurer against the depository account of the state in said bank for the sum of $201,884.05, payable to the order of J. H. Millard, Pt., and delivered said check to the bank in payment of said auditor's warrant, which instrument he then and there received, and at the same instant of time the account of the state was charged on the books of said bank with the amount of said check, and the Chemical National Bank was credited with a like sum.

The state relies for a conviction upon the redemption and payment of said auditor's warrant by the defendant out of the public funds of the state on deposit in the Omaha National Bank. The theory of the attorney general is that the warrant was void and therefore the state treasurer had no right or authority to redeem it. On the other side, it is insisted that the instrument was a valid and binding obligation of the state, which the law required the defendant to pay upon the receipt by him of sufficient funds for that purpose. In our view it is wholly immaterial whether the warrant in question was valid or void. If invalid, the defendant was not justified in paying it out of the money of the state under the circumstances disclosed by this record. It is argued, if it was not a valid instrument, it never has been paid. That the state is minus $201,884.05 by the transaction is an assured fact. Whether the state may or may not be able to recover the money from the Omaha National Bank, the Chemical National Bank, or any other corporation or person, is not material to the present inquiry. Doubtless, it is the duty of a state treasurer to pay, when he has available funds, a legal warrant drawn upon the treasury by the proper officer, to the person entitled thereto, and cannot be convicted of embezzlement for having done so. Had the defendant paid the warrant in question to the proper person, the case would present an entirely different aspect. The appropriation upon which the warrant was drawn was not made in favor of the defendant individually. The purpose of the legislature in passing the act was to transfer from the state general fund the sum appropriated to the state sinking fund, to reimburse the latter to the extent it had been depleted by the collapse of the Capital National Bank, and not to pay any debt it owed the defendant or to make a present to him of the said sum. The warrant did not belong to him, notwithstanding it was drawn payable to himself in his individual capacity, but he received it officially, in trust for the state, for and on behalf of the state sinking fund, as he

well knew. The title to the warrant never vested in him, and he could not transfer to another by indorsement that which he never possessed. He could not divest the title of the state in the warrant by the sale thereof to the Chemical National Bank, since he possessed no power to sell or negotiate the instrument. Nor was the bank an "innocent purchaser" within the meaning of that term as applied to commercial paper, inasmuch as the warrant disclosed on its face the purpose and object for which it was drawn, and the bank was bound to know at its peril that the defendant had no title to the instrument. Moreover, warrants issued upon the state treasury by the auditor of public accounts are not negotiable instruments, in the sense that the indorsee thereof may become a *bona fide* purchaser. (*School District v. Stough*, 4 Neb. 357; *Union P. R. Co. v. Buffalo County*, 9 Neb. 452; *Burlington & M. R. R. Co. v. Clay County*, 13 Neb. 370; *State v. Sabin*, 39 Neb. 570; *State v. Cook*, 43 Neb. 318.) The foregoing authorities hold that school district orders and county warrants are not negotiable instruments, and, upon principle, warrants drawn by the state auditor are within the same category. Therefore, it cannot be successfully asserted that the state was required to pay the warrant to the indorsee, as the latter was not an innocent holder. The defendant had actual knowledge of the facts surrounding the issuance and attempted transfer of the warrant. He knew that it was the property of the state, and that he was not legally or morally required to pay the money called for therein to any person other than himself. When the money was in the treasury to meet this warrant, his sole duty in the premises was to take the money out of the general fund and turn the same into the sinking fund,—credit one fund with the amount, and charge the other fund with a like sum. He knowingly disregarded his duty in the premises, paid the money to a party not entitled thereto, and defrauded the state to the extent of the sum so paid. This constituted an embezzlement of the public moneys. (*Bork v. People*, 1 N. Y. Cr. Rep. 368.)

We know judicially that the state, on April 1, 1891, issued 190 relief bonds, each of the denomination of $1,000, payable in five years; that the money belonging to the permanent school fund of the state was invested in those bonds; that the same were retained by the state treasurer for safe-keeping, and that six of them were actually redeemed, paid, and canceled by the defendant as state treasurer on October 31, 1896. Suppose these bonds had been stolen from the treasury, and subsequently paid by defendant to the holder thereof, or defendant had sold the bonds after their maturity to the Omaha National Bank, applied the proceeds to his own use, and subsequently redeemed the same by taking the money out of the state treasury and paying the face of the bonds and accrued interest to said bank; could there be a shadow of doubt that the defendant would have been guilty of the embezzlement of the money of the state, notwithstanding the bonds were legal and binding instruments? We think not. There is no difference between the supposed cases and the one at bar, providing the warrant in question was paid with the moneys of the state, which proposition will now receive attention.

As already stated, the accused was convicted of embezzling a certain sum of public money. Section 124 of the Criminal Code, under the provisions whereof this prosecution was instituted, expurgating all words that are not essential to the present inquiry, provides that "If any officer * * * shall convert to his own use * * any portion of the public money, or any other funds, property, bonds, securities, assets, or effects of any kind, received, controlled, or held by him for safe-keeping, transfer, or disbursement, * * * every such act shall be deemed and held in law to be an embezzlement of so much of the said moneys or other property, as aforesaid, as shall thus be converted, used," etc. At the bar, as well as in the briefs of counsel, the proposition was argued with marked ability whether or not the word "money," as employed in said section is a generic or

specific term. For the purposes of this case, we shall assume that the construction of the statute contended for by the defendant is the proper one, namely, that the term "money" was used by the legislature in a specific sense. In other words, it means legal-tender coin, and also paper issued by the government, or by banks by lawful authority, and intended to pass and circulate as money. It is insisted on behalf of the accused that, under the foregoing definition, he did not embezzle money—actual coin or currency—belonging to the state. It is true the state had no specific coins or currency in the possession of the Omaha National Bank, as it had made no special deposit of money in said bank. The state, at the time of the delivery of the check in question to the bank, had on deposit therein, under the depository law, money in excess of the amount found by the jury to have been embezzled, which constituted the bank the debtor of the state to that amount. (*State v. Bartley*, 39 Neb. 353; *In re State Treasurer's Settlement*, 51 Neb. 116.) It was conceded on the argument by counsel for the accused that if the latter had drawn from the depository bank the actual cash and then redeemed the warrant therewith, proof thereof would be sufficient to sustain the charge of embezzlement of money. As we view it the legal effect of the transaction, as it actually occurred, is not materially different. The defendant, as state treasurer, drew his check upon the Omaha National Bank for $201,884.05, payable to the order of the president thereof, and delivered the same to the payee, which, in connection with the acceptance of the check by the bank, the entry of the transaction upon the books thereof, and the surrender of the warrant to the defendant, constituted a segregation or separation of the amount of dollars expressed in the check from the general mass of money in the bank as the portion belonging to the state, and passed the title to the latter. In contemplation of the parties, and in the eye of the law, the segregation was as full and complete as though Mr. Mil-

lard, the president of the bank, upon the delivery of the check to him had stepped into the vault, counted out $201,884.05, placed it upon the counter, charged the state with that amount on the bank books, credited the Chemical National Bank with a like sum, delivered the warrant to the defendant, and then returned the money to the vault from whence it came; or as if the check had been made payable to the defendant's own order, by himself presented to the paying teller at the bank for payment, who selected from the mass of money in the bank the sum represented by the check, placed the same in a pile on the counter, and then, by direction of the defendant, applied the same in payment of the warrant. To constitute embezzlement it was not necessary that the defendant himself should have acquired the physical or manual possession of the money. He, by his check, authorized and directed the bank to pay the money called for therein to "J. H. Millard, Pt." The bank was thereby empowered to select and transfer the money to the payee, which in contemplation of law it did, although there was no actual handling of a dollar in the entire transaction. In the language of Morse, Banks and Banking, sec. 451: "A credit given for the amount of a check by the bank upon which it is drawn is equivalent to, and will be treated as, a payment of the check. It is the same as if the money had been paid over the counter on the check, and then immediately paid back again to the acount or for the use for which the credit is given." (See *Oddie v. National City Bank of New York*, 45 N. Y. 735.)

State v. Baumhager, 28 Minn. 226, was a conviction of the crime of embezzling public moneys intrusted to the defendant as county treasurer. The only proof to sustain the charge was that the defendant had $5,000 of county funds in his hands; that he caused the county auditor to give him credit on the auditor's books for the amount of a county order which had been redeemed by the defendant's predecessor in office, although he had never returned it to the auditor or obtained credit there-

for. There was no evidence of an actual conversion by the defendant, nor that there was a shortage in his accounts as county treasurer. The proofs were held sufficient to sustain the conviction.

State v. Palmer, 40 Kan. 474, was a prosecution for obtaining moneys under false pretenses. The evidence disclosed that one Critwell drew his check on a certain bank in favor of the defendant for $75; that the latter presented the check, and the bank paid it out of moneys deposited by Critwell, and charged the same to his account. This was held to be the obtaining of the money of the prosecuting witness, although he had no specific money on deposit in the bank. It is true the defendant then obtained physical possession of the money. But suppose, instead of receiving the actual cash, he had deposited the check and received credit for the amount on the books of the bank; proof of the commission of the offense of obtaining money under false pretenses would have been none the less complete, since the check was authority to the bank to segregate the amount of the money called for from the funds of the bank, and, when made, such portion at the same instant became the specific property of the prosecuting witness. Likewise, the very moment the money represented by the check drawn in payment of the warrant in question was separated from the general mass of money in the Omaha National Bank, the title to the money thus segregated passed from the bank to the state for an instant of time.

Roberts v. People, 9 Colo. 458, was a conviction for obtaining the moneys of Arapahoe county under false pretenses. The proofs showed that the defendant procured a false claim against the county to be audited, and a warrant drawn on the treasury for the same, which was paid. There was no evidence to show that the defendant presented the warrant for payment or received the money thereon. The court held this omission immaterial, saying: "It was not necessary that defendant should himself present it to the treasury in order to realize the money,

or in order that the county should be defrauded of its money by the acts of the defendant."

In *People v. McKinney*, 10 Mich. 54, the doctrine was announced and enforced that any act by a state treasurer, by which the money of the state should be abstracted from the treasury, or diverted from its proper use, with intent to apply it to his benefit, constitutes the crime of embezzlement. The contention was that the defendant was not present when the misappropriation took place. Christiancy, J., as the mouthpiece of the court, used this language: "The whole force of this objection, therefore, rests upon the assumption that the treasurer could perform no act by which the money could be thus abstracted or converted to his own use or benefit, unless at the time of the act he were personally present where the money happened to be. This assumption is so manifestly unfounded in law or fact, as to require no comment." (See in this connection *People v. Bringard*, 39 Mich. 22.)

Bork v. People, 16 Hun [N. Y.] 476, was a conviction of the defendant for embezzlement of $1,000 of the money of the city of Buffalo, in his hands as treasurer of said city. Smith, J., delivering the opinion of the court, observed: "The funds which the treasurer is alleged to have embezzled in the present case may have been a mere credit in a bank, and not money at all, and yet if he treated the credit as cash in his hands belonging to the city, proof that he embezzled it would support an indictment for embezzling money. The rule requiring certainty in an indictment is not to be so applied as to defeat the ends of public justice."

A case precisely in point is *State v. Krug*, 12 Wash. 288, which was a prosecution for the embezzlement of the moneys of the city of Seattle by the treasurer thereof. The evidence disclosed that the defendant, as such officer, drew a check for $10,000 in favor of one Fuhrman upon a bank having funds of the city on deposit in excess of said amount. The payee presented the check and received in payment thereof New York exchange. The

bank charged on its books the money to the city, and lessened its credit in said sum. The jury were instructed that the transaction constituted a payment of money, and that they should construe the check or instrument merely as the instrumentality by which the money of the city was transferred from the possession of the defendant. In reviewing the instruction, the supreme court in the opinion say: "Under these facts the appellant claims there was only an exchange of credits and no money was paid. The instruction of the court is based upon the theory that, in contemplation of law at least, this was money. It would be a travesty upon the administration of the law, if treasurers who are the custodians of the funds of the people should be allowed to escape the penalty of embezzlement by any such subterfuge as this theory would protect. * * * The practical result of the transaction in this case was that, when this check was given to Fuhrman, and was paid to Fuhrman by the New York exchange, and that amount charged to the account of the city, the city of Seattle had its account decreased to the amount of the check, and it was just as much a disposition of that $10,000 by the treasurer as though he had gone to the bank and got the money himself, and paid it to Fuhrman, or had loaned him that amount of money out of specie which he received, before it had been taken to the bank." Argument is unnecessary to show that the principle enunciated in that decision, if followed, controls the case at bar.

An examination of the authorities relied upon by counsel for defendant reveals that they do not support their contention. Without unduly extending this opinion, we can do no more than to make a brief reference to the leading cases cited by them.

In *Hamilton v. State*, 60 Ind. 193, it was held that proof of the larceny of national bank notes did not sustain the charge of the larceny of a certain sum "of lawful money of the United States." In *Tracy v. State*, 46 Neb. 361, this court held the contrary to be true.

In *Williams v. State*, 12 S. & M. [Miss.] 58, it was decided that a charge for betting money was not sustained by proof of the betting of United States treasury warrants. Of the same import are *Pryor v. Commonwealth*, 2 Dana [Ky.] 298; *Garner v. State*, 5 Yerg. [Tenn.] 158.

In *Carr v. State*, 16 So. Rep. [Ala.] 155, a banker was indicted for the embezzlement of a certain special deposit of money, and it was ruled that the averment was not sustained by proof of the embezzlement of a bank check.

Thalheim v. State, 20 So. Rep. [Fla.] 948, was a prosecution for the embezzlement of money. It was held that assets generally and property generally were not included in the term "money."

In *Banks v. State*, 28 Tex. 644, it was decided that proof of the theft of a mare would not sustain an indictment for larceny of a "horse," since the statute of Texas did not employ the word "horse" in a generic sense. Of like purport are *Turley v. State*, 22 Tenn. 323; *Jordt v. State*, 31 Tex. 571.

In *Commonwealth v. Hawe*, 132 Mass. 250, the indictment was for obtaining a certain sum of money by false pretenses, which charge, it was ruled, was not sustained by proof of obtaining a certificate of deposit of a bank. Had the certificate been presented to the bank and paid, the case might have some bearing upon the question here.

Lindsay v. State, 19 Ala. 560, is to the point that an indictment for selling whiskey is not supported by proof of the sale of any other kind of liquor.

Lewis v. State, 28 Tex. App. 140, was a prosecution for the misappropriation of public money. It was held that the term "money" within the meaning of the Criminal Code, is "legal-tender metallic coins, or legal-tender currency of the United States." In the preceding discussion we have assumed that to be the rule in this state.

Both upon reason and authority we are constrained to hold that the charge of embezzlement of money contained in the third count of the information herein is sustained by the evidence adduced, and that it was not error to decline to direct a verdict of not guilty.

It is insisted that there was error in the admission of evidence of certain letters between the president of the Omaha National Bank and the president of the Chemical National Bank of New York. The earliest portion of this correspondence was a letter from the president of the Omaha National Bank inclosing the auditor's warrant in question, offering to accept therefor its proceeds on the basis of a rate of interest at 6 per cent, if a greater rate would not be allowed. The answer to this letter was dated April 23, 1895. It advised the president of the Omaha National Bank of a credit of said bank with the Chemical National Bank of the sum of $180,550.77, as the proceeds of the sale of said warrant, pursuant to the offer contained in the letter of Mr. Millard. Mr. Balch, the assistant cashier of the Omaha National Bank, testified that he saw the defendant at that bank about 5 o'clock in the evening of the same day, or of the one immediately preceding that, on which he saw the letter first above referred to, and that between the day the warrant was sent to New York and the time the advice of the credit was received witness had a conversation with defendant, in which the former asked the latter what disposition should be made of the proceeds of the warrant when the Omaha National Bank got returns on it, and that defendant replied to open an account and pass it to his own individual credit. The witness further testified that, when the credit was given for the proceeds of the warrant by the Chemical National Bank, he carried out the instructions of defendant and placed the said proceeds to the personal credit of the latter on the books of the Omaha National Bank. A copy of his personal account was introduced in evidence, which showed the credit was given as above indicated. It is unnecessary to go further into details to show that there was sufficient evidence to justify the conclusion that in disposing of the warrant Mr. Millard, the president of the Omaha National Bank, and the bank itself, were the agents of defendant. The evidence above and herein-

after detailed are portions of the proofs which established a common purpose between the defendant and his agency in Omaha, which was the sale of the warrant to the Chemical National Bank. Whatever correspondence was necessary and proper for the consummation of this common design was admissible against the defendant, the party at whose instance we must assume, from the evidence, this correspondence was carried on. (*Brown v. Horr*, 21 Neb. 113.) This principle we think none the less applicable because the transaction entered into with a common purpose was not the ultimate fact sought to be established, but was relied upon to show the motive with which a subsequent act growing out of and intimately connected with it, was done.

It is strenuously insisted that the county attorney unnecessarily made public, in the presence of members of the regular panel of jurors in open court, the alleged fact that there had been an attempt to bribe jurors to find in favor of the accused, and that from this prejudice must have been sustained by the defendant. From the affidavits submitted by defendant it might be concluded that the county attorney did make the statement attributed to him. On the other side, there were affidavits which corroborated the affidavit of Mr. Baldrige, the county attorney, to the effect that his statement in open court was as follows: "I have been informed by a juror on the regular panel that he has been approached by some outside party with a view to influencing his verdict in a case for trial in this court. I deem it my duty to bring this matter to the attention of the court in order that the court may make whatever order it deems necessary or proper in the premises, and that such punishment may be meted out to the guilty party as the court thinks warranted." As to whether there was the alleged misconduct of the county attorney, or whether his conduct was as proper as above indicated, was a question of fact, which, upon conflicting evidence, was settled adversely to the accused. Under such circumstances the ruling

of the trial court will not be disturbed. (*Lindsay v. State*, 46 Neb. 177; *Grossman v. State*, 46 Neb. 21; *McMahon v. State*, 46 Neb. 166; *Carleton v. State*, 43 Neb. 373.)

The trial court upon consideration of conflicting evidence concluded that there had been no misconduct on the part of alleged detectives in shadowing or in attempting to communicate with or influence jurors while in charge of a bailiff of the court, and the principle just invoked must likewise preclude a consideration of the question of fact.

In respect to rulings of the court in denying the demand of the defendant that one of the detectives should be compelled to submit to an oral examination in open court touching the matters of fact just considered, and the denial of the demand that the county attorney should answer orally with reference to alleged interviews concerning the conduct of the trial and other like matters, in some of which it was claimed the presiding judge had taken part, it is not deemed necessary to indulge in an extended discussion, for rulings of a like nature have been sustained by this court in *Kountze v. Scott*, 52 Neb. 460, and in *Hamer v. McKinley-Lanning Loan & Trust Co.*, 52 Neb. 705.

In the progress of the examination of Mr. Millard, the president of the Omaha National Bank, he was interrogated with reference to the check drawn by Bartley on said bank for the amount which by the information he was charged with embezzling. In this connection the testimony and conduct complained of, omitting objections and the rulings thereon, were as follows:

"Q. You may state, Mr. Millard, how long that check was in your possession at that time?

"A. I don't think it was ever in my possession,—personal possession.

"Q. How long was it in the bank?

"A. I think it was there two days.

"Q. Do you know what became of it afterwards?

"A. It was returned to Mr. Bartley.

"Q. And that was how long ago?

"A. I would think about two months, or possibly three months ago—perhaps two and a half months ago.

"Q. Did Mr. Bartley come for it at that time to the bank?

"A. No, sir.

"Q. Have you seen the check since?

"A. No, sir.

"Mr. Baldrige: I want to make in open court a formal demand upon the defendant and his attorneys to produce——

"Mr. Whedon: I object to any proceedings of this kind in the presence of the jury. There is no law for it and it is unprofessional.

"Mr. Baldrige: The state in this case——

"Mr. Whedon: I object to any demand being made in the presence of this jury during the trial.

"By the court: The jury may retire to my room in charge of the bailiff. [Jury retired.]"

It is unnecessary to describe what transpired during the absence of the jury from the court room, and we shall, therefore, transcribe from the bill of exceptions the description of the proceedings, in the presence of the jury as we assume, when Mr. Millard, again having been called to the witness stand, was testifying with reference to this check. This part of the record is as follows:

"Mr. Baldrige: I want to say that the state proposes to offer in evidence a notice given by the state of Nebraska to the defense to produce the check about which the witness is interrogated.

"Mr. Whedon: I move to strike out of the testimony and out of the record the statement of counsel, following the ruling of the court on the objection made by counsel, and except to the statement that has been made as improper and irrelevant.

"By the court: The objection overruled and the motion to strike out overruled.

"Mr. Mahoney: The defendant excepts.

"By the court: Before the witness answers I want to ask counsel for the state if they have the check in their possession.

"Mr. Baldrige: No, sir; we have not.

"Mr. Whedon: The defendant objects to this testimony and questions of the court and to the giving of testimony by Mr. Baldrige, on the ground that the counsel for the state's names are not upon or indorsed on the information as witnesses, and they are not competent to testify in the case, and move the court to strike out the testimony, for the reason counsel is not sworn to give the testimony.

"By the court: Objection overruled. It is not a matter of evidence. It is a question for the court's benefit. The jury will not consider any statement between counsel and the court in any manner in forming their verdict.

"Mr. Mahoney: The defendant excepts."

In a later stage of the trial the notice to produce the aforesaid check was offered in evidence in the presence of the jury, and an objection thereto was sustained, whereupon Mr. Baldrige said: "The offer was made generally and more particularly for the purpose of advising the court of the fact that due notice had been served upon the defense requesting them to deliver over to the state for their use in the trial the checks and papers set out in the paper marked 'Exhibit 12.'

"Mr. Mahoney: Defendant objects to putting into the record any offer of an offer and objects to incorporating into the record the statement of counsel of the purpose of the offer, the offer being of a written instrument and defendant moves to strike out what the county attorney has placed in the record.

"The court: The objection to the offer is sustained. The document may be retained as a paper of the files and may be filed in the case, but not received as a matter of evidence. The motion to strike out is overruled. Defendant excepts."

This portion of the record has been copied for the rea-

son that, perhaps, an attempt to describe it in a narrative form might work an injustice, for we confess our inability to imagine in what respect the accused could have been prejudiced by what was said or done. It is disclosed by the bill of exceptions that secondary evidence descriptive of the check in question was offered, and it seems to us that in the preliminary steps leading thereto there was no misconduct on the part of counsel for the state or of the presiding judge. Whatever unfavorable inference to the accused could have been drawn by the jury from the transaction before them was corrected by the admonition that the jury were not to consider any statements between counsel and the court in any manner in forming their verdict. (*Thalheim v. State*, 20 So. Rep. [Fla.] 945; *Hoover v. State*, 48 Neb. 184.)

There were monthly statements made by the treasurer during defendant's term to the auditor of public accounts offered in evidence, with respect to one of these, defendant's deputy was asked what, if any, means Bartley would have for knowing the correctness of the report as to its details. To this question Mr. Baldrige objected and remarked: "Mr. Bartley might know everything that was in that report; he is the treasurer and is presumed to know it. If he does not he himself should say so." To this last remark Mr. Mahoney objected and excepted as improper, whereupon the court said: "It is improper and that language should not be indulged in in any manner or form as to what the defendant ought to say." It may be conceded that the remark was improper and yet this was just how it was characterized by the court in its remark to the jury, and we cannot assume that this suggestion was ignored. It would unnecessarily prolong this opinion to attempt to describe the several instances wherein it is insisted that the court improperly propounded questions to witnesses under examination. It must suffice to say that each of these alleged infractions of propriety has been carefully considered, and that we have found nothing which justifies an inference that

from the course criticised in this respect any prejudice could have resulted to the accused.

It is urged that there was error in the admission in evidence of the official bond of defendant, for the reason the instrument in question, to render it valid, should have been approved on or before January 3, 1895, whereas in fact there was no approval till six days beyond said statutory limit. In support of this contention there is cited the case of *State v. Lansing*, 46 Neb. 514. In the case cited the contention was between parties each of whom claimed that he was county judge of Lancaster county. Lansing, the incumbent, was in possession, and it was asserted in the information, wrongfully so, for the reason that the mandatory requirement of the statute with reference to the approval of his bond had not been complied with. The statutory provision relied upon to sustain this contention was section 15, chapter 10, Compiled Statutes, which is in this language: "If any person elected or appointed to any office shall neglect to have his official bond executed and approved as provided by law, and filed for record within the time limited by this act, his office shall thereupon *ipso facto* become vacant, and such vacancy shall thereupon immediately be filled by election or appointment as the law may direct in other cases of vacancy in the same office."

At the general election following that at which Lansing had been elected to the office of county judge for which he had failed to qualify, it was assumed that the office was vacant and the relator was accordingly nominated to fill this vacancy and received the highest number of votes cast for that office. The action in which the opinion of this court in *State v. Lansing, supra,* was filed was therefore one in which the title to the office was the subject-matter in dispute. Whether there was a vacancy by reason of Lansing's failure to qualify was the pivotal question, and it was held that this failure was a fatal defect in his title. In the case at bar no one ever questioned the right of the defendant to hold the office

of state treasurer for the term for which he was elected. That term, with all its honors and emoluments he has enjoyed, and after its expiration there is for the first time raised a question whether his incumbency was rightful, which question is raised by himself when charged with malfeasance in the performance of its duties. That the opinion of this court in *State v. Lansing, supra,* has no tendency to support this contention of the defendant requires no elaboration to render perfectly clear. Whether defendant was an officer *de jure* or *de facto,* he was required to perform the duties which the law imposed upon him with integrity and loyalty to the state, and his failure in this respect should subject him to punishment regardless of his technical right to be inducted into office. (*State v. Goss,* 69 Me. 22; *State v. Mims,* 26 Minn. 183; *People v. Cobler,* 108 Cal. 538; *State v. Findley,* 101 Mo. 217.)

It was urged that there were material variances between the auditor's warrant which, it was charged, had been embezzled, and that which was offered in evidence. These alleged variances were that the warrant offered in evidence had certain figures in the upper left hand corner, and on its face the words: "Paid Jan. 2, 1897. State of Nebraska. Treasurer's office," and on the back the words: "Presented and not paid for want of funds and registered for payment Apr. 10, 1895. Number 27932. J. S. Bartley, State Treasurer, Lincoln, Nebraska." As to the counts whereby was charged the embezzlement of the warrant a *nolle* was entered, so that these alleged variances became immaterial. The figures consisted of two amounts which added together made up the amount with the embezzlement of which Mr. Bartley was charged. The other alleged variances were placed upon the warrant by defendant, in one instance at least, and if not by himself the other was stamped upon the face of the warrant by one of the employés in his office. In neither case was there what would amount to a spoliation and the warrant therefore was competent evidence

of the facts in proof of which it could be considered by the jury, and these have already been sufficiently noted.

On several of the exhibits offered in evidence there were stamped the words: "Otto Helbig, accountant. Examined. 501 Tacoma Bldg., Chicago." These were explained by Mr. Helbig to have been placed upon the several exhibits to show that in making up his statement of the condition of the office of state treasurer he had used the information conveyed by such exhibits. The exhibits themselves contained statements made by defendant as treasurer and only these were submitted to the jury. The words stamped by Mr. Helbig were not given in evidence, consequently they could not have operated to the prejudice of the accused.

For the defense, Mr. Bartlett, the deputy treasurer, testified on his direct examination that the keeping of the books in the treasurer's office was under his supervision and that the manner in which the sinking fund account was carried was in pursuance of the direction of defendant. On cross-examination Mr. Bartlett testified as follows:

Q. The check referred to was the check in payment of the warrant, was it not?

A. Yes, sir.

Q. But my question is as to the proceeds of the warrant when it was sold.

A. I never knew it was sold. * * *

Q. When did you first know that the warrant was sold?

A. Not until I wrote the stub for the payment of the warrant.

It is complained that the question and answer last quoted were not in the line of cross-examination. We think otherwise. The item referred to was one which under certain conditions, according to the evidence of Mr. Bartlett, would have been entered in the sinking fund account. It did not there appear, and it was proper to ask Mr. Bartlett why the account showed no pro-

ceeds of the sale of the warrant and in this connection when he first learned of the fact of the sale. His answer was that he learned of this sale on or about the date of the check, which was January 2, 1897, and this certainly was a circumstance proper to be considered by the jury in connection with his direct examination which showed that his entries were in accordance with the directions of defendant.

It is insisted there was error in permitting E. E. Balch, assistant cashier of the Omaha National Bank, on cross-examination, to answer that prior to the date of the check designated as "Exhibit 49" all the money realized from the sale of the warrant in New York had been drawn out of the Omaha National Bank by defendant. This check bore the date of June 4, 1896. Of the same date was a deposit slip showing a deposit by defendant of his individual check to the credit of himself as treasurer in the sum of $50,000. As this check corresponded with that designated as "Exhibit 49" it was not an abuse of discretion for the court to permit the cross-examination of the witness to anticipate a possible argument founded on the above noted coincidences by his testimony that the proceeds of the sale of the warrant, previous to June 4, 1896, had been withdrawn from the bank by defendant. In this connection it is proper to remark there was no abuse of discretion in admitting in evidence, for the purposes first indicated, the portion of the general fund account of Mr. Bartley with the Omaha National Bank of date about June 4, 1896, and certain exhibits connected with the same subject-matter. (*People v. McKinney*, 10 Mich. 54.)

Exhibit 35 was a statement showing the receipts and disbursements of the state treasury in June, 1896, filed in the department of the auditor of public accounts of the state of Nebraska. This statement was signed "J. S. Bartley, State Treasurer." It was urged that there was error in refusing to permit the deputy treasurer to testify whether or not this statement was prepared by the sub-

ordinate force in the treasurer's office. It is not claimed that any of these items in fact was incorrect, and therefore there was no admission by which the defendant would not be bound as well when written by a clerk as when written by himself. If there had been any claim of mistake or oversight this might be different. But even then, when it had been shown that the statement had been signed by defendant, it devolved on him to rebut the presumption that the statement was correct.

We cannot understand what proper purpose could have been subserved if the defendant had been permitted to prove the usual media by which remittances were made to the state treasurer by county treasurers. It seems to be intimated in argument, as we understand it, that if it had been permitted to be shown that these were usually in drafts, checks, etc., that this fact might have justified the deposit in banks other than depositories. The statute on this subject prescribes where deposits must be made and must govern, and no excuse can dispense with its provisions.

Mr. Helbig, an expert accountant, on rebuttal, was permitted to testify that he had made an examination of the books of the treasurer's office, and that from the examination he had ascertained the amount of the general fund on hand at different times, as well as the several amounts of expenditures and disbursements therefrom, together with other items as to various other accounts disclosed by said books. He further testified that all the said books, together with the memoranda he had consulted in connection with them, were present in the court room at the time his testimony was given. Thereupon the court permitted the witness to testify with reference to the conditions above indicated, and this, it is insisted, was prejudicial error. In his discussion of exceptions to the rule requiring the production of the best evidence, Prof. Greenleaf said: "A further relaxation of the rule has been admitted, where the evidence is the result of voluminous facts or of the inspection of many

books and papers, the examination of which could not conveniently take place in court." (1 Greenleaf, Evidence sec. 93.) This exception has been recognized in *Masonic Mutual Benefit Society v. Lackland*, 97 Mo. 137, and in *State v. Findley*, 101 Mo. 217, and by the supreme court of Oregon in *State v. Reinhart*, 38 Pac. Rep. 822. In *Hollingsworth v. State*, 111 Ind. 289, it was held that in a prosecution for embezzlement, or other crime, where the books, records, papers, and entries are voluminous and of such a character as to render it difficult for the jury to arrive at a correct conclusion as to amounts, expert accountants may be allowed to examine such books, etc., and testify to the result. No adjudicated case in opposition to this exception to the general rule requiring the production of the best evidence has been cited, and we are satisfied that where, as in this instance, the sources from which the expert accountant derived his knowledge were present in the court room subject to inspection he was properly permitted to testify as he did with reference to what was shown by such books and documents.

In the act entitled "An act to provide for the depositing of state and county funds in banks" (Session Laws 1891, p. 347) it was provided that the depository bond should be, in substance, of the form set out in said act. This form closed with the words: "Sealed with our seals and dated the —— day of ——, A. D. ——." There was no seal opposite the signatures to the depository bond which was given by the Omaha National Bank, from which consideration it is urged that the bond was invalid, and therefore the bank was not legally a depository. In this case this failure to attach seals is unavailable to defendant, for whether the seals are essential and whether from the want of them the bank was not entitled to receive state deposits are immaterial matters. If defendant entertained doubts as to whether the bank was in fact a depository he might have been justified in satisfying himself upon that point before making deposits, but he cannot now be heard to stultify himself

by asserting when the matter becomes a collateral issue that he deposited the money of the state during his term of office in a bank wherein by law he was forbidden to make such deposits.

We pass to the consideration of the instructions given and refused. It is insisted the trial court erred in its third paragraph of the charge in saying to the jury that the information charged the defendant with the embezzlement of certain public money in the county of Douglas. This contention is predicated upon the fact that the counts relating to the misappropriation of the money contain no specific statement that the crime was committed in Douglas county. The place of the offense, as shown elsewhere in this opinion, was sufficiently averred by proper and suitable reference to the first count of the information and the venue, in each of which the county of Douglas is set forth, and that such reference was permissible even though a *nolle* to the first count of the information had been entered. This is a sufficient answer to the foregoing criticism made upon the instructions.

Objection is made to the eighth instruction, which reads: "The state having entered a *nolle* of the first and second counts of the information you will not consider the testimony relative to the warrant, known as 'Exhibit 4,' or any transaction concerning the same, except only and for the purpose of showing the criminal intent of the defendant of and concerning the charge of the embezzlement of the $201,884.05." No error prejudicial to the accused is perceptible in the foregoing language of the court. It contained no assumption that the defendant acted with a criminal intent, but advised the jury, and properly so, that they might consider the evidence of and concerning the warrant for the purpose of ascertaining whether the defendant was actuated by a guilty intent or motive in appropriating the money alleged to have been embezzled. The evidence tended to show that the negotiation of the warrant and the subsequent payment thereof were parts of the same common design

and purpose, parts of the same transaction, although not transpiring at the same time, and when construed together make manifest the purpose of the defendant to misappropriate to his own use the money of the state. (*People v. Cobler*, 108 Cal. 538.)

The eleventh instruction reads thus: "If you find from the evidence that the Omaha National Bank executed a bond to the state of Nebraska, asking to be designated as a state depository of public money of the state, and that such bond was approved by the governor, secretary of state, and attorney general, then you should find the Omaha National Bank was a state depository of the current funds of the state." It is argued that this instruction is faulty because the jury were not advised as to the form of the bond necessary to be given by the Omaha National Bank to constitute it a state depository. If the defendant desired the jury instructed on that point he should have tendered one to the trial judge. Mere non-direction of the court is no ground for reversal. (*Hill v. State*, 42 Neb. 503; *Housh v. State*, 43 Neb. 163; *Pjarrou v. State*, 47 Neb. 294.)

By the twelfth instruction the jury were told that: "The term 'conversion of money' means an unauthorized assumption and exercise of the right of ownership over the moneys belonging to another, and the alteration of its condition to the exclusion of the owner's right; and such conversion must be with the intention to use or dispose of the said moneys for the benefit of the person converting it, or to the benefit of some other person or corporation than the owner thereof; and it would be a conversion in law even though the party intended at the time of the appropriation at some future time to repay the money so appropriated." The only criticism upon the language is the use of the words "appropriation" and "appropriated." The prefix "mis" should have preceded each of those words in order to have made the expression technically accurate. We are, however, satisfied that the omission thereof was not prejudicial to

the accused, since the instruction as a whole when read in connection with the remainder of the charge made plain to the jury that there could be no conviction unless there was a misappropriation of the public money,—in other words, that the appropriation must have been wrongful. It is a rule of universal application that instructions must be considered together, and if then they correctly announce the rule, they will be upheld. (*Davis v. State*, 51 Neb. 301; *Ford v. State*, 46 Neb. 390; *Carleton v. State*, 43 Neb. 373.)

The thirteenth instruction requires no discussion, since it raises the question whether to prove the offense charged it was necessary that specie should have been received on the check given in payment of the auditor's warrant. The instruction is in harmony with the views expressed in another part of this opinion upon the motion to direct a verdict and the sufficiency of the evidence to sustain the conviction. Further elaboration of the point would be superfluous.

It is urged that the court erred in assuming in the tenth, eleventh, and fifteenth paragraphs of the charge the validity of the depository law. An elaborate argument is made in the briefs against the validity of that piece of legislation on grounds other than those heretofore considered by this court. We must be excused from entering upon a discussion of the subject at this time, as the defendant is in no position now to assert that the public moneys of the state were not rightfully on deposit in the Omaha National Bank. He recognized the validity of the statute by placing the moneys of the state in said bank, and it would indeed be a reproach upon the law to permit him to assail the depository law in a prosecution for the embezzlement of the public funds so deposited by him. It was the money of the state that went into the bank, and it was likewise the money of the state that paid the check, whether the bank was a lawful state depository or not.

Complaint is made of the fourteenth instruction. It,

in effect, told the jury that if the defendant disposed of the warrant in question, or caused it to be done, or secured credit for the same, in his individual capacity and for his own use, or for the use of any other person except the state, and if, as state treasurer, he paid the warrant with state funds, that would constitute embezzlement of the money with which the warrant was paid. The argument is that the warrant was valid, and it was the duty of the defendant to pay it in the order of registration. The position is unsound as we have already demonstrated, at least to our own satisfaction. It is further said this instruction authorized the jury to find the defendant guilty of embezzling the warrant, although the counts charging the misappropriation of that instrument had been *nolled*. There is no merit in this contention. If certain facts were established, it permitted a conviction for the conversion of the money alone.

The fifteenth instruction is in this language: "If you find from the evidence that the Omaha National Bank was a state depository, and if you further find the defendant drew a check upon said bank against the funds of the state therein deposited to the credit of the state, and that said check was paid at said bank, that would constitute a taking of public money of the state by the defendant at the bank, whether the defendant was present at the time of payment of the check or not; nor would it be material whether the check was drawn in favor of the defendant or not, or by whom presented." It is suggested by counsel that under this instruction it would be a conversion by defendant, had a check drawn by him in his official capacity on said bank, but not delivered, been stolen from the defendant, the name of the payee forged thereon, and then presented to and paid by the bank. If there were any evidence tending to show any such state of facts there might be some foundation for the criticism directed against the instruction. But no such testimony was admitted on the trial, while it was established beyond dispute that the defendant in

person presented the check to the bank for payment. The instruction, therefore, could not have misled the jury by reason of the matter suggested, nor because it stated that it was immaterial whether defendant was present or not when the check was paid. Moreover, we do not think it was necessary for the defendant to have been in Douglas county when the check was presented and paid to make the offense complete in that county. Had he sent the check by mail or messenger to take up the warrant, still the misappropriation of the funds would have taken place in that county on the payment of the check there. (*People v. McKinney*, 10 Mich. 54; *Norris v. State*, 25 O. St. 217; *Commonwealth v. Taylor*, 105 Mass. 172; *Commonwealth v. Wood*, 142 Mass. 459; *Commonwealth v. Karpowski*, 167 Pa. St. 225.)

The sixteenth instruction is not incoherent, but is logical and easily understood. The seventeenth instruction related to the testimony of expert accountants, the substance thereof being that the testimony of such witnesses should be given such weight as the jury considered them entitled to. This was not giving undue prominence to the testimony of that class of witnesses.

The twenty-first instruction is criticised, which reads as follows: "'A reasonable doubt,' as used in these instructions, to justify an acquittal, must be a reasonable one arising from a candid and impartial investigation of all the evidence in the case. A doubt produced by an undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt, and the juror is not allowed to create sources of materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to a possible state of facts differing from those established by the evidence. You are not at liberty to disbelieve as jurors if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. If after a careful and impartial examination and consideration of all the evidence

in the case you can say that you feel an abiding conviction of the guilt of the defendant and are fully satisfied to a moral certainty of the truth of the charge made against him, then you are satisfied beyond a reasonable doubt." Two objections are urged against the above instruction, first, that the opening sentence incorrectly states the law. True, the accused had the right to the benefit of any doubt arising from the want of evidence in the case. This was not taken from him in the instruction quoted. The court did not say that a reasonable doubt, to authorize an acquittal, must be one arising from the evidence alone, but merely told the jury that to produce an acquittal it must be a reasonable doubt arising from a candid and impartial investigation of all the evidence in the case. If the jury did that, it would reveal to them any lack of evidence to sustain a conviction, and if any such want of evidence was found there could be no conviction. The other criticism is upon the language: "You are not at liberty to disbelieve as jurors if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered." An expression almost in the foregoing language was approved in the celebrated case of *Spies v. People*, 122 Ill. 1, and *Nevling v. Commonwealth*, 98 Pa. St. 322, and by this court in at least two cases, *Willis v. State*, 43 Neb. 102, and *Davis v. State*, 51 Neb. 301. With those decisions we are content. A discussion of the subject anew would be profitless.

The court declined to give the second instruction requested by the accused, which is as follows: "You are instructed that the law presumes the defendant innocent in this case and not guilty as charged in the information. This presumption of innocence is not a mere form, which may be disregarded by the jury at pleasure, but it is an essential, substantial part of the law of the land binding on you as jurors in this case. You are to regard this presumption of innocence in this case as a matter of evidence in favor of the defendant, to the benefit of which

he is entitled during your entire deliberations." The request is in accord with the holding in *Long v. State*, 23 Neb. 33, where it was stated, following *Garrison v. People*, 6 Neb. 285, that the legal presumption of innocence was a matter of evidence to the benefit of which the accused was entitled. The same principle embraced in this request was laid down in the sixth instruction given in the case at bar by the court on its own motion, which reads thus: "The law raises no presumption against the defendant; on the contrary, the presumption of law is in favor of his innocence. This presumption of innocence continues through the trial until every material allegation in the information is established by the evidence to the exclusion of all reasonable doubt." (*Garrison v. People, supra.*) The instruction in that case to which the defendant took exception read: "And if after you shall have carefully examined the evidence in this case, you shall be able to reconcile it with the innocence of the prisoner, it will be your duty, as no doubt it will be your pleasure, to acquit him." This court held that the language quoted fully recognized the rule that the legal presumption of innocence is a matter of evidence. The twenty-first instruction in the case at hand is no less favorable to the accused than the one requested by him; hence he was not injuriously affected by the refusal to give the instruction tendered.

Defendant's tenth instruction was framed upon the theory that to constitute embezzlement the accused must have obtained the actual physical possession of the money misappropriated. The fallacy of this proposition has already been shown.

The fourteenth and fifteenth instructions refused were to the effect that the auditor's warrant introduced in evidence was a valid instrument and that the defendant could not be convicted of the crime of embezzlement of the money used in payment of such warrant. This doctrine being opposed to the views we have expressed upon another question in the case, the requests were properly refused by the trial court.

It was not error to refuse the other requests of the defendant to charge, since, in so far as they stated the law correctly, they were fully covered by the instructions given. This rule that it is not error to refuse to repeat instructions has been so frequently stated by this court as to make unnecessary the citation of the authority to sustain the proposition.

It is finally insisted that the jury did not ascertain and state in their verdict the value of the money embezzled, and, therefore, the finding was insufficient upon which to base the judgment and sentence. Section 488 of the Code of Criminal Procedure declares: "When the indictment charges an offense against the property of another by larceny, embezzlement, or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare in their verdict the value of the property stolen, embezzled, or falsely obtained." The foregoing provision makes it mandatory upon the jury, in case of conviction of either of the offenses named in the section, that they fix and return in their verdict the value of the property stolen, embezzled, or falsely obtained. (*McCoy v. State*, 22 Neb. 418; *McCormick v. State*, 42 Neb. 866; *Fisher v. State*, 52 Neb. 531.) The jury in the case at bar, after finding the defendant guilty as charged in the third count of the information, did ascertain and declare "the amount embezzled to be $15188.445," which was a substantial compliance with the requirements of the statute. The meaning of the verdict returned cannot be misunderstood. The accused was convicted upon the charge of embezzling a specified sum of money, and the finding by the jury of the amount embezzled is equivalent to an ascertainment of its value. The words "amount" and "value" when applied to money are synonymous terms. Therefore, when the jury determined the amount of money embezzled, they also ascertained its value.

In *Grant v. State*, 55 Ala. 201, it was ruled that in a prosecution for the embezzlement of money no averment or proof as to the value thereof is necessary, since the

court will take judicial notice that the same is worth its face value. To the same effect are *Duvall v. State*, 63 Ala. 12; *Gady v. State*, 83 Ala. 51; *State v. Barr*, 38 Atl. Rep. [N. J.] 817.

In *Hildreth v. People*, 32 Ill. 36, the defendant was prosecuted for larceny of $1,270 in current bank bills. The jury returned the following verdict: "We, the jury, find the defendant guilty of larceny, of twelve hundred and seventy dollars, as charged in the indictment." It was there argued, as here, that the verdict was defective, because the value of the money was not ascertained by the jury. The court, in the opinion, say: "It is true the verdict does not, in terms, find the value of the money stolen. But it finds that he was guilty of stealing a certain number of dollars, and as dollars indicate a fixed and precise value, the verdict is as certain in that respect as if they had found the worth of the money. The indictment charges that the defendant stole so many dollars in bank bills, and the jury find that he was guilty of the larceny of that number of dollars. This was, although not strictly in form, sufficient in substance."

A question quite analogous to the one under discussion was before the court in *State v. Knox*, 17 Neb. 683, where it was decided that a complaint for the embezzlement of $35 of the public moneys was sufficient, although it contained no specific allegation of value. The court, in speaking of the contention that an averment of value was indispensable, observed: "This would be necessary if property, or bank bills not a legal tender, had been embezzled; but where the allegation is the embezzling of thirty-five dollars in money, the amount designated expresses the value, the presumption being that it was lawful money." The same principle must control here. Money is the standard or measure of values; therefore, when a specified number of dollars or amount of money is stated or given, that sum is presumed to represent the value thereof. The legal effect of the verdict is the same as if the jury had said they found the value of the money

embezzled to be $151,884.45. It is somewhat informal, nevertheless it is sufficient in substance. An examination of the authorities cited upon this point by counsel for the defendant will show that not one of them can properly be enrolled in support of the proposition that this verdict is not sufficient, since in none of the cases was either the amount or value of the property ascertained and stated by the jury in their verdict.

We have scrutinized this record, and given the questions thereby presented the most careful investigation at our command, and the conclusion is irresistible that no reversible error is disclosed. The judgment is accordingly

AFFIRMED.

IRVINE and RAGAN, CC., expressing no opinion.

ANDREW HOEFER V. JULIUS A. LANGHORST.

FILED JANUARY 3, 1898. No. 7694.

Review: PLEADING AND PROOF: VARIANCE: FACTORS AND BROKERS. Where the claim of an agent for compensation was for finding a purchaser for the land of the defendant ready and willing to purchase, and, without objection, proof was made of the ability to purchase, as well as of the alleged readiness and willingness, the variance cannot be urged as error for the first time in the supreme court.

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

H. D. Travis, for plaintiff in error.

A. N. Sullivan and *J. H. Haldeman, contra.*

RYAN, C.

The defendant in error recovered judgment against the plaintiff in error for the sum of $150, with interest as

prayed, in the district court of Cass county. The claim on which the judgment was rendered was for procuring a purchaser of certain land of plaintiff in error in accordance with an agreement so to do made by the defendant in error, for which service the sum of $150 was to be paid by the plaintiff in error. The evidence justified the jury in finding that the service rendered was that defendant in error had procured a purchaser, ready and able to buy the land which the plaintiff in error had authorized defendant in error to sell. It is true it was merely alleged in the petition that the party procured as a purchaser was ready and willing to purchase on the required terms, but, on the trial, there was no objection to proof being made of the ability, as well as of the alleged readiness and willingness of the proposed purchaser. It is now too late to raise this question of a variance for the first time. It is possible that this might have been raised upon one or more of the instructions, if the assignments with respect to them had been so made as to admit of the consideration of the instructions independently of each other; but these assignments were as to groups, in each of which there was an instruction not open to criticism. We cannot, therefore, inquire whether or not other instructions were faulty.

The verdict was sustained by the evidence, and the judgment of the district court is therefore

AFFIRMED.

STATE OF NEBRASKA, EX REL. ROCK COUNTY, V. GEORGE N. SHELDON ET AL.

FILED JANUARY 3, 1898. No. 9685.

Counties: TAXES: DISCRETION OF COUNTY BOARD: MANDAMUS. Where county authorities have levied taxes to provide for the current expenses of a certain year to the constitutional limit, courts have no authority to control the action and discretion of such county board. Following *Young v. Lane*, 43 Neb. 813.

ERROR from the district court of Rock county. Tried below before KINKAID and WESTOVER, JJ. *Affirmed.*

J. A. Douglas, for plaintiff in error.

E. M. Davisson, contra.

RYAN, C.

In the district court of Rock county there was denied a mandamus to compel the county commissioners of Brown county to levy a tax on the taxable property in Brown county of sufficient amount to pay an existing judgment in favor of the former county against the latter. This proceeding presents for review the correctness of this action of the district court.

It was stipulated that certain portions of the alternative writ and certain parts of the answer were true. Thus there were established the following facts: The judgment of which satisfaction is sought by means of the writ prayed was affirmed in the supreme court in May, 1897, and in January of said year no amount was included in the estimate of expenses for that year for the payment of said judgment, neither was there any levy for that purpose. The amount of revenue which will be realized from the taxes levied by the respondents in and for the year 1897, for ordinary expenses of Brown county, is insufficient to meet and pay the current expenses of said county for the year 1897 and also pay any part of said judgment. The assessors' books of Brown county show that the total taxable property of Brown county is $543,024. The respondents have already made a levy on said taxable property in the sum of one and one-half dollars on each hundred dollars valuation. The case of *Young v. Lane,* 43 Neb. 813, is determinative of this case, for therein it was held that where county authorities have levied taxes to provide for the current expenses of a certain year to the constitutional limit, courts have no authority to control the action and dis-

cretion of such county board. The stipulation admits the levy to this limit, which, by section 5, article 9, of the constitution of this state, is $1.50 on each $100 valuation. The judgment of the district court is therefore

AFFIRMED.

JOHN D. TUTT, APPELLANT, V. GEORGE C. HAWKINS, APPELLEE.

FILED JANUARY 3, 1898. No. 7719.

Elections: BALLOTS: INTENTION OF ELECTOR. The intention of an elector must be ascertained from his ballot, and any inaccuracies in the preparation of such ballot cannot be urged for the first time after an election, to defeat the clearly expressed intention of the voter.

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

Matthew Gering, for appellant.

A. J. Graves, contra.

RYAN, C.

There was filed in the office of the clerk of the district court of Cass county a petition in which the plaintiff John D. Tutt alleged that at the municipal election held in the city of Plattsmouth on April 3, 1894, the whole number of votes cast for councilman of the Fifth ward was 194, of which 79 were for William Slater, 49 were for George C. Hawkins, the contestee, 40 were for said John D. Tutt, and 26 were for Edwin Bates; that upon a canvass of said votes made by the city council of said city William Slater and George C. Hawkins were declared elected. It was futher alleged in the petition that the whole number of votes counted for councilman to fill

a vacancy was 66, of which Tutt received 40 and Edwin Bates 26. By the answer of the contestee it was asserted that the votes cast for councilman for the Fifth ward were not canvassed with reference to filling a vacancy, but it was alleged that the four candidates were competitors for the office of councilman for said ward, without reference to whether the candidacy was for the entire or for the unexpired term, and that, relying upon precedent, the candidate receiving the highest number of votes held the full term and the candidate receiving the next highest vote held the unexpired term. We need not consider the issues at greater length, for the question to be determined is whether or not it was proper to follow the alleged precedent. The official ballot with reference to councilman for the Fifth ward was printed as follows:

"Edwin Bates (to fill vacancy)	Republican
"George C. Hawkins	Republican
"Wm. Slater	Democrat
"J. D. Tutt (to fill vacancy)	Democrat"

It was correctly recited in the petition that Hawkins received 49 while Tutt received but 40 votes; but a reference to the form of ballot cast shows that the electors were not voting for them as rivals for the same office. The intention of the voter must be gathered from the ballot which he actually casts and cannot be defeated by evidence that the ballots were not prepared in accordance with the intention of a political convention by which one of the nominations was made. After an election held without objection to the form of the ballot it is too late to question the result. (*State v. Norris*, 37 Neb. 299.) The district court erred in reaching the conclusion which it did and its judgment is accordingly reversed.

REVERSED AND REMANDED.

W. W. HOUSE v. W. F. WREN ET AL.

FILED JANUARY 3, 1898. No. 7738.

Review: SUFFICIENCY OF EVIDENCE. The judgment in this case, being sustained by sufficient evidence, is affirmed.

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

J. L. Caldwell, for plaintiff in error.

William G. Clark, contra.

RYAN, C.

This was an action of replevin by plaintiff in error as owner, for the possession of a horse, against the defendants in error holding possession by virtue of a chattel mortgage made by one R. D. Plowman to W. F. Wren. There was a conflict in the evidence as to the correctness of the respective theories advanced by the parties. By the plaintiff's evidence it was made to appear that, accompanied by Mr. Plowman, plaintiff had purchased the horse and given his note therefor. It was rather unfortunate for this theory that Plowman's name was affixed to this note before that of House. It was testified by House, however, that this signature of his was merely as surety, and that the possession of the horse taken and held by Plowman was solely as his bailee. Opposed to this there was evidence which justified the conclusion that the purchase was by Plowman and that the horse, therefore, was his to mortgage and dispose of as he saw fit. The trial was to the court. The judgment was adverse to House, and as it did not lack the support of sufficient evidence it must be, and accordingly is,

AFFIRMED.

CONWAY & KNICKERBACKER V. WILLIAM H. MAGILL, SHERIFF, ET AL.

FILED JANUARY 3, 1898. No. 7705.

Sheriff's Liability for Failure to Make Levy: ACTION: EVIDENCE. In order for an execution or attachment creditor to recover his debt against a sheriff, because of the latter's failure to seize under the writ sufficient property of the debtor to satisfy the same, the burden is upon such creditor to plead and prove that, during the life of the writ, his debtor was possessed of property liable to be seized under the writ, and that the sheriff negligently failed to seize such property.

ERROR from the district court of Brown county. Tried below before BARTOW, J. *Affirmed.*

Macfarland & Altschuler and *J. C. McNerney,* for plaintiffs in error.

P. D. McAndrew, contra.

RAGAN, C.

G. A. Sargent & Co. was a copartnership engaged in mercantile business at Ainsworth, Nebraska, and indebted for goods purchased of Conway & Knickerbacker. On the 29th of November, 1892, before the county judge of Brown county sitting as a justice of the peace, Conway & Knickerbacker brought suit against Sargent & Co. and caused an attachment to be issued and delivered to the sheriff of said county commanding him to seize a sufficient amount of the goods and chattels of Sargent & Co. to satisfy the claim of Conway & Knickerbacker in the sum of $180 and the probable costs of the suit, not to exceed $50. Under this order of attachment the sheriff seized the property of the attachment defendants, which the appraisers appointed by the sheriff then and there appraised and valued at $240.79. On the 23d of December, 1892, the attached property was sold at public vendue by the sheriff to satisfy the attachment and brought

the sum of $143. Conway & Knickerbacker then instituted this suit in the district court of Brown county against William Magill, the sheriff thereof, and the sureties on his official bond to recover the balance due them from Sargent & Co., basing their action against the sheriff upon his alleged neglect to seize sufficient property of Sargent & Co. to satisfy their, Conway & Knickerbacker's, debt, Sargent & Co. being then and there possessed of sufficient property which could have been seized by the sheriff on the attachment writ. The trial in the district court resulted in a verdict and judgment for the sheriff and his sureties, and Conway & Knickerbacker bring the same here for review on error.

There is not in the record one syllable of evidence which shows or tends to show that Sargent & Co. were possessed of any property of any name or description which the sheriff could have seized on the attachment writ save and except the property he did seize. In order for an execution or attachment creditor to recover his debt against a sheriff because of the latter's failure to seize under the writ sufficient property of the debtor to satisfy the same, the burden is upon such creditor to plead and prove that during the life of the writ his debtor was possessed of property liable to be seized under the writ and that the sheriff negligently failed to seize such property. The judgment of the district court is

AFFIRMED.

WEBER BROTHERS V. EDWARD WHETSTONE.

FILED JANUARY 3, 1898. No. 7683.

1. **Instructions:** REQUESTS: REVIEW. Before error can be predicated upon the failure of a district court to instruct the jury on some particular feature of a case the party complaining must have by a proper instruction requested the court to instruct upon such feature.

2. **Animals:** AGISTER'S LIEN. One who feeds and takes care of live stock in pursuance of a contract therefor with the owner has a lien on such stock to secure his recompense for such feed and care. (Compiled Statutes, ch. 4, art. 1, sec. 28.)

3. ——: ——. An agister cannot be deprived of his lien upon live stock except by his voluntary relinquishment thereof or by such conduct on his part as estops him from asserting it.

4. ——: ——. The taking by the owner of live stock from the possession of his agister without the latter's consent does not divest his lien.

5. ——: ——. If a lien exists against live stock for its feed and care a purchaser of such stock is charged with notice of such lien. That he purchased such stock for value without actual notice of such lien affords him no protection against the same.

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

C. Dana Sayrs and *John S. Murphy*, for plaintiffs in error.

E. S. Ricker, contra.

RAGAN, C.

This is an action in replevin brought in the district court of Dawes county by Weber Bros. for certain cattle. The defendant Edward Whetstone claimed that he was entitled to possession of the cattle and had an agister's lien thereon to secure a compensation of $20 agreed to be paid him by the owner of the cattle for herding, feeding, and caring for the same. The trial resulted in a verdict and judgment in favor of Whetstone, and Weber Bros. prosecute error.

1. The first argument is that the court erred in giving to the jury the following instruction: "The jury are instructed that, as a general rule of law, the purchaser of personal property in good faith for value, where delivery of the property accompanies the purchase, is protected against the claims of third parties, but that the owners of stolen property have a right to pursue the same and recover it wherever and in whomsoever's possession it

may be found, regardless of the circumstances under which such possession may have been acquired. So, if property rightly in the possession of any person, and where the law makes such possession the basis of a lien, is, over his protest and forcibly, taken from him,—not necessarily with force and arms, but in such a manner as the person in possession could not prevent,—the possessor's right would not thereby be lost; and under such a statute as the one quoted from in Number 5 of these instructions, purchasers would be put upon inquiry before they can be protected as innocent purchasers from the assertion of such lien." The criticism upon this instruction is the reference of the court therein to the rights of the owner of stolen property to reclaim it. Counsel correctly say that there was no evidence in this case that any of the property in controversy had been stolen. The evidence shows that the owner of these cattle employed Whetstone to herd and take care of them and for that purpose put them in his possession and agreed to pay him for herding them $20; and while the cattle were so in Whetstone's possession the owner sold them to a man named Hubbard, and he, with force and arms, or at least over the objection and protest of Whetstone, took the cattle out of the latter's possession and sold and delivered them to Weber Bros. On the trial Weber Bros. contended that they were purchasers of the cattle without notice of Whetstone's lien and, therefore, entitled to take the cattle discharged from said lien. In view of this evidence we think that while the instruction may be open to the criticism made upon it by counsel, their clients could not have possibly been prejudiced by it.

2. A contention of the plaintiffs in error on the trial was that Whetstone by his conduct had estopped himself from asserting his lien upon these cattle as against the plaintiffs in error; and another argument here is that the court erred in not giving to the jury an instruction on the law of estoppel as applied to the facts of this case.

A sufficient answer to this argument is, if counsel desired an instruction given to the jury on the question of estoppel, he should have prepared and presented to the court an instruction on that feature of the case with the request that it be given. Not having done this, he cannot now be heard to insist that the court erred because it neglected to give such an instruction. (*German Nat. Bank v. Leonard*, 40 Neb. 676; *Barr v. City of Omaha*, 42 Neb. 341.)

3. A third argument is that the court erred in refusing to give to the jury the following instruction: "The court instructs the jury that if they find from all the evidence that the firm of Weber Bros. purchased the cattle in question on the 11th of October, 1894, without notice of any lien that the defendant Edward Whetstone had upon said cattle, if any he had, then you will find for the plaintiffs and return a verdict in their favor." Whetstone having herded, fed, and cared for these cattle in pursuance of a contract with their owner, and being in possession of the cattle for such purpose under such contract, and having performed the contract, or a part of it, was vested by statute (Compiled Statutes, ch. 4, art. 1, sec. 28) with a lien upon the cattle to secure his compensation for their care, and any one who dealt with those cattle or purchased them was bound to take notice of this lien; and Hubbard, when he purchased the cattle of their owner, took the cattle charged with that lien. They were then in the actual possession of Whetstone, and when Hubbard sold them to Weber Bros., the latter took them charged with Whetstone's lien. True, at that time they were not in the actual possession of Whetstone, but had been taken from him that day by Hubbard by force. The rule of *caveat emptor* applies to one who purchases personal property, and though such purchaser may pay a valuable consideration for such property and at the time have no knowledge that another has a lien upon it for its feed or care, he cannot protect himself as against an agister's lien simply because he is an inno-

cent purchaser of the property without notice of the lien. The agister cannot be deprived of his lien except by his voluntary relinquishment of it or by some act or omission upon his part which would estop him from asserting it as against a purchaser. He does not lose his lien upon the property simply because of the fact that it is taken from his possession without his consent and sold to another who has no notice of the lien. (*Kroll v. Ernst*, 34 Neb. 482.)

The court did not err in refusing to give the instruction, and its judgment is right and is

AFFIRMED.

EMILY MOTLEY, APPELLANT, V. GEORGE MOTLEY ET AL., APPELLEES.

FILED JANUARY 3, 1898. No. 7736.

1. **Dower:** RIGHTS OF WIDOW. The statutes of the state expressly provide how a widow may be lawfully barred of dower in the lands of which her husband died seized, and this bar is made to depend upon her voluntary act.

2. ———: EFFECT OF HUSBAND'S DEBTS: DESCENT. The lands of an intestate descend to his heirs subject to his unsecured debts; but his widow's dower estate in such lands is not incumbered with such debts.

3. ———: RIGHTS OF WIDOW. The lands of a husband during his life are subject to his wife's inchoate right of dower therein; and, at the instant of his death intestate, the law transmutes the inchoate dower lien into an absolute dower estate, subtracts it from the lands of the intestate and vests the right thereto in his widow.

4. **Administrator's Sale:** DOWER. The sale of the lands of his intestate by an administrator, made in pursuance of a license therefor to pay debts allowed against his estate, does not, of itself, divest the widow's dower estate in such lands.

5. ———: ———. A sale of lands by an administrator to pay the debts of his intestate is a judicial sale, and the doctrine of *caveat emptor* applies to a purchaser thereat.

6. ———: ———: NOTICE TO PURCHASER. Where the record of a proceeding, which resulted in a district court's licensing an admin-

istrator to sell the lands of his intestate, discloses that such intestate left a widow, this is, of itself, notice to a purchaser at such sale of such widow's dower estate in such lands.

7. ———: PARTIES TO PROCEEDING: DOWER: ESTOPPEL. A widow made party to a proceeding by her husband's administrator to sell the lands of which he died seized to pay debts allowed against his estate does not estop herself from claiming her dower estate in the lands sold solely because she neglected to appear in such proceeding.

8. ———: ———: ———: ———. Nor does she estop herself from claiming her dower estate in such lands because she attended the administrator's sale, made no objections thereto, and neglected to advise the bidders thereat that she had a dower estate in such lands.

9. ———: ———: ———: ———. Nor is such widow estopped from claiming her dower estate in the lands so sold because she received a part of the proceeds of such sale as her "distributive share of such estate;" such payment not having been made to nor received by her in lieu of her dower estate.

APPEAL from the district court of Adams county. Heard below before BEALL, J. *Reversed.*

See opinion for references to authorities.

Batty, Dungan & Burton, for appellant.

Capps & Stevens, contra.

RAGAN, C.

John Motley died intestate in Adams county seized in fee-simple of certain real estate situate therein, leaving a widow and four children. In pursuance of a license granted therefor by the district court of said county Motley's administrator sold such real estate for the purpose of paying the unsecured debts of the intestate which had been proved and allowed against his estate in the county court of said county. Subsequently Emily Motley, the widow, brought this proceeding, under the statute, in the county court of said county to have her dower assigned in the lands of which her husband died possessed. The county court rendered a judgment assign-

ing Mrs. Motley her dower, from which George Motley, the purchaser of the real estate at the administrator's sale, appealed to the district court. The action was there tried to the court without the intervention of a jury and resulted in a judgment dismissing Mrs. Motley's action. This judgment of the district court is now before us for review.

1. In support of the judgment of the district court it is insisted that the sale of the lands to pay debts made by the administrator of itself divested the widow's dower. Section 1, chapter 23, Compiled Statutes, provides: "The widow of every deceased person shall be entitled to dower or the use during her natural life of one-third of all the lands whereof her husband was seized of all [an] estate of inheritance at any time during the marriage unless she is lawfully barred thereof." Other sections of this statute prescribe what causes shall operate to bar the widow of dower in the lands of which her husband was seized during the coverture. Section 2 of the chapter provides that if the husband exchange lands of which he is seized for other lands, his widow shall not have dower in both tracts, but may elect to take her dower out of either tract, provided she begins proceedings to have her dower assigned in one tract or the other within one year after her husband's death; and if such a proceeding is not brought within such time, she shall then have dower only in the land received by her husband in the exchange. Section 3 bars the widow of dower in lands mortgaged by her husband prior to the marriage as against the mortgagee and those claiming under him. Section 4 bars the widow of dower in lands purchased by the husband during coverture and mortgaged to secure the purchase money, as against such mortgagee and those claiming under him, even though she may not have united in such mortgage. Section 12 provides that a married woman residing in this state may bar her right of dower in the land of her husband by joining in a conveyance thereof and acknowledging the same. Section

13 provides that a woman may be barred of her dower in the lands of her husband by a jointure settled on her with her consent before the marriage, provided such jointure consists of a freehold estate in lands for the life of the wife at least to take effect in possession or profit immediately on the death of the husband. Section 15 provides that if any pecuniary provision shall be made for the benefit of an intended wife, and in lieu of dower, and assented to by her in the manner provided by statute, this shall bar her right of dower in the lands of her husband. Section 17 provides that if lands be devised to a wife, or other provision be made to her in the will of her husband, then she may elect to either take under the will or to claim her dower, but she cannot have both; and by accepting the benefits of the provisions of the will she forfeits her right of dower.

These statutes expressly provide how a widow may be lawfully barred of her dower; and it is to be observed that no one of these provisions deprives a widow against her consent of dower in the lands of which her husband died seized; but her loss of dower is made to depend upon her voluntary act. The statute does not prescribe, either expressly or by implication, that the sale by an administrator of his intestate's lands for the payment of his debts shall have the effect of divesting the widow's dower in such lands; and while the lands of an intestate descend to his heirs subject to his debts (Compiled Statutes, ch. 23, sec. 30), and the title which the heirs take to such lands may be divested by a sale thereof for the payment of the debts of the intestate allowed against his estate by the county court, the dower of the widow in such lands does not come to her charged or incumbered with such debts or claims. On the death of her husband her inchoate right of dower, which up to that time was a mere lien charge or incumbrance upon the real estate of the husband, ceased to be such lien or charge, and became an estate, carved out of the lands of the intestate and exempted during her life from the payment of the

ordinary unsecured debts of the intestate. This dower estate the moment it existed became the widow's property; it was not liable for and could not be sold without her consent for the payment of her husband's debts. The language of our statute is not that a widow shall be entitled to dower in the lands of which her husband died seized, but that she shall have dower in all the lands of which her husband was seized as an estate of inheritance at any time during the coverture. This is the law of most of the states of the Union, and in construing this statute the courts are all agreed that, when the lawful marriage of a man and woman and the ownership of real estate by the former concur, an inchoate dower right at once attaches; that this is in the nature of a charge or incumbrance upon the real estate; and, when such right has once attached, it remains and continues a charge upon the real estate, unless released by the voluntary act of the wife or be extinguished by operation of law; and upon the death of the husband the inchoate right is merged into a dower estate. And the authorities are agreed that a judicial sale made of the husband's real state during his lifetime for some obligation of his not secured by a lien upon the real estate in which the wife had joined does not extinguish the wife's inchoate dower, and upon the death of her husband the widow is entitled to her dower estate in the lands so sold. (*Sisk v. Smith*, 1 Gil. [Ill.] 503; *Grady v. McCorkle*, 57 Mo. 172; *Blevins v. Smith*, 16 S. W. Rep. [Mo.] 213; *Vinson v. Gentry*, 21 S. W. Rep. [Ky.] 578; *Porter v. Lazear*, 109 U. S. 84; *Butler v. Fitzgerald*, 43 Neb. 192.) Had the lands involved in this action been sold on execution during the life of the intestate to satisfy the debts for which his administrator sold, such a sale would not have divested the wife's inchoate dower rights nor barred the widow's dower in the lands. How then can it be said that the sale of these lands by the intestate's administrator to pay the latter's debts, of itself, took away the widow's dower in such lands? It is true that the administrator was licensed by

the district court to sell the land of the intestate to pay his debts, but the district court by this license or order did not attempt to authorize the administrator to sell the dower estate of the widow in said lands. We need not inquire whether the district court had such authority; it is sufficient that nowhere in any paper in the proceedings of the administrator's sale is the dower estate of the widow referred to.

As we have already seen, the dower estate of the widow was not liable for the debts of the husband which had been allowed against his estate by the county court; and no statute of the state authorizes the district courts, when granting a license to sell the real estate of the intestate to pay his debts, to include therein the widow's dower. Indeed, it is clear from a reading of the statute on the subject of the sale of lands for the payment of the debts of an intestate (Compiled Statutes, ch. 23) that these statutes contemplate only the sale of the intestate's interest in the lands of which he died seized. But his interest in those lands, even during his lifetime, was subject to his wife's inchoate right of dower, and, at the instant of his death, the law transmuted the inchoate dower lien into an absolute dower estate, subtracted it from the lands of the intestate, and vested the right thereto in his widow. By section 82 of said chapter it is provided that such a license may be so framed as to authorize the sale of the reversion of the dower of the widow, and if not so framed, that such reversion may be sold after the expiration of the widow's life estate. In the case at bar the administrator described the lands of which the intestate died seized, procured a license for their sale to pay his debts, and sold them without any more specific description. Nowhere in the proceedings was it stated, in so many words, that he was selling merely the interests of the intestate in those lands; that he was or was not attempting to sell the dower estate of the widow in those lands, nor that he was or was not selling or attempting to sell the reversion of the dower of

the widow. We are not called upon at this time to say whether the purchaser at this administrator's sale acquired the fee-simple title to all these lands subject to the dower estate of the widow therein, or whether such purchaser acquired the fee-simple title to only two-thirds of such lands; but we are quite clear that the administrator was not authorized by the district court to sell the dower estate of the widow in the lands of his intestate and that the widow's dower in these lands was not affected by that sale. We have not been cited to any case, nor have we been able to find one, which holds that a sale made by an administrator of his intestate's lands to pay ordinary unsecured debts proved against his estate bars the widow of the intestate from dower. So far as we have examined the cases the uniform holding is the other way. (See, among others, *Kent v. Taggart*, 68 Ind. 163; *Elliott v. Frakes*, 71 Ind. 412; *Armstrong v. Cavitt*, 78 Ind. 476; *Compton v. Pruitt*, 88 Ind. 171; *House v. Fowle*, 29 Pac. Rep. [Ore.] 890; *Whiteaker v. Belt*, 36 Pac. Rep. [Ore.] 534; *Toledo, P. & W. R. Co. v. Curtenius*, 65 Ill. 120.)

2. A second argument of the purchaser at the administrator's sale in support of the judgment of the district court is that he is an innocent purchaser of this real estate without notice of the rights of the widow to a dower estate in these lands; that when he purchased them at the administrator's sale he believed he was acquiring a perfect title to all the lands described in the license granted by the district court to the administrator. But the administrator's sale was a judicial sale. It was made and approved by authority of the district court of the county where the lands were situate, and the doctrine of *caveat emptor* applies to a purchaser of lands at a judicial sale. The purchaser was bound to take notice of the authority of the administrator, and this authority was to sell only the interest which the intestate had at his death in the lands sold. He was purchasing real estate, and it was his duty to examine the title and he had no right to rely upon statements of the adminis-

trator, if any were made, as to the character of the title which he was selling. But the record of the proceedings under which the administrator sold disclosed upon its face that John Motley had died intestate, seized of certain lands in Adams county; that he left a widow and certain children and that the administrator was making the sale of these lands to pay debts allowed by the county court of Adams county against the intestate's estate. The purchaser at this administrator's sale was charged with notice of all that this record discloses, and it was of itself notice that this widow had a dower estate in the lands which were being sold. (See *Norton v. Nebraska Loan & Trust Co.*, 35 Neb. 466; *Butler v. Fitzgerald*, 43 Neb. 192; *Whiteaker v. Belt*, 36 Pac. Rep. [Ore.] 534.)

3. The widow of the intestate was made a party to the proceedings of the administrator for the sale of these lands. Notice, as required by the statute, was served upon her to appear and show cause, if any she had, why such license should not be granted, but she made no appearance whatever to that proceeding. Another argument of the purchaser at this administrator's sale, in support of the judgment of the district court, is that the widow cannot now maintain this action to have her dower assigned, inasmuch as she neglected to appear in the district court in the proceeding by the administrator to sell the lands of her husband and set up her dower estate in that proceeding. We do not think any adjudicated case can be found which will sustain this contention. The writer at least, after a patient and protracted search, has been unable to find any such case. Whether the district court is invested with jurisdiction to assign dower in any case we do not determine, but certainly that was not the object of the proceedings by the administrator in seeking a license to sell the real estate of his intestate. The application of the administrator in that proceeding alleged the death of his intestate, described certain lands of which he died seized, that certain claims had been proved against his estate in the county court,

and that the personal estate of the intestate was insufficient to pay these allowed claims and the expenses of administration, and prayed the district court for a license to sell the intestate's real estate to pay those claims. If the widow had appeared in that proceeding it would have been no defense to the application for her to allege that she had a dower estate in those lands. Such an answer would have stated no defense to the application of the administrator. The only defense that could have been made to the application would have been one which traversed some of its allegations; and, if we consider that the widow by not appearing confessed the allegations of the administrator's petition, it was not a confession that she had no dower estate in this real estate, but a confession that she had no cause to urge why the license should not be granted as prayed. And when the district court found that the allegations of the application of the administrator were true and adjudged that the license should be granted as prayed, he neither found nor adjudged that the widow of the intestate had no dower estate in the lands licensed to be sold. On the other hand, the application of the administrator and the evidence introduced by him in support of it informed the district court that the intestate had left a widow, and that was of itself notice to the court granting the license to sell that the widow had a dower estate in these lands; and it would be doing an injustice to the intelligence of the court to indulge the presumption that by granting the license to sell he adjudged that the widow had no dower estate therein or that he intended to include in such license the widow's dower estate.

The question as to whether a widow is barred from prosecuting an action for the assignment of dower in lands which had been sold under a judicial proceeding to which she was a party, but made no appearance, was presented to the supreme court of Illinois in *Shaeffer v. Weed*, 3 Gil. 511, in 1846, Abraham Lincoln appearing for the widow. Shaeffer had furnished material and labor

towards the erection of an improvement on the husband's real estate during the latter's lifetime. After the husband's death he brought suit to have established and foreclosed a mechanic's lien upon the real estate for the labor and material furnished the husband. To this proceeding the widow was made a party, but she did not appear in the action; and it was insisted that the judgment rendered in that proceeding upon her default estopped or barred her right of dower in the lands involved in that proceeding. The contention, however, was overruled.

A statute of the state of Illinois provided that one who had mortgaged his real estate should be deemed to have waived or released his homestead right in the real estate therein if there was inserted in the mortgage the following: "Hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this state." A man and his wife executed a mortgage upon their homestead, but the mortgage did not contain the release of the homestead right as provided by statute. Suit was brought to foreclose this mortgage. The husband and wife were made parties and duly served with process, but made default. A decree of foreclosure was entered, the real estate sold, and the sale confirmed. In *Hoskins v. Litchfield*, 31 Ill. 137, the supreme court of Illinois held that the husband and wife were not barred from asserting their homestead rights in the mortgaged premises because of their failure to appear and set up that right in the foreclosure proceeding, and that the decree pronounced in that action did not have the effect to take away the homestead right of the husband and wife. The court said: "This mortgage as to homestead right is like a mortgage in which the wife has not released her right of dower, when sought to be enforced in defiance of that right. Suppose in such a case the wife were made a party to a bill to foreclose a mortgage, without any averment that any right of dower existed or that the wife had released her dower, and a decree passed

against the husband and wife, foreclosing the mortgage and ordering a sale of the premises. No one would contend that the right of dower would be affected by such decree, or that a sale under it could convey the premises freed from the right of dower, for the simple reason that the law has provided a different and an only mode for the release of dower." To the same effect see *Moore v. Titman*, 33 Ill. 357, where it was held that the right secured by the homestead act can only be lost by release or abandonment in the mode pointed out by statute. A mere failure to claim the right by answer or cross-bill in a suit to foreclose a mortgage wherein the right is not released, will not have the effect to bar the right or be considered as a relinquishment of the benefits of the statute. A decree by default and a sale thereunder will not operate to bar the right. To the same effect see *Mooers v. Dixon*, 35 Ill. 208; *Wing v. Cropper*, 35 Ill. 256.

In *Grady v. McCorkle*, 57 Mo. 172, the owner of real estate entered into a contract to convey the same and died. After his death the contractee brought suit against his widow and heirs for the specific performance of this contract. The widow was duly served with process in that suit, but made no appearance therein, and a decree of specific performance was entered as prayed by the contractee. Subsequently the widow instituted a proceeding to have her dower assigned in this real estate and the contractee interposed the decree entered in the specific performance suit as a bar to the widow's claim for dower; but the court held: "In a suit for specific performance of a contract to convey land, brought against the widow and heirs of the owner, where the dower of the widow is not in any manner determined or litigated, or drawn in question by the proceedings, a decree for plaintiff will not estop the widow from afterward recovering her dower." The statute of Missouri, like ours, provided that the widow should be endowed with a third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the

marriage. Construing this statute the court said: "The right of dower attaches whenever there is a seizin by the husband during the marriage, and, unless it is relinquished by the wife in the manner prescribed by law, it becomes absolute at the husband's death. After the right of dower has once attached, it is not in the power of the husband alone to defeat it by any act in the nature of an alienation or charge. It is a right in law, fixed from the moment the facts of marriage and seizin concur, and becomes a title paramount to that of any person claiming under the husband by subsequent act." Discussing the effect of the decree in the specific performance suit the court said: "The whole object, extent, and scope of that proceeding was to have the agreement and undertaking of William Grady specifically performed. The rights against the widow and heirs were precisely the same as they would have been against William Grady, had he been alive and made a party to the suit. But a suit against him would not have affected his wife's right to dower without any concurring act on her part. * * * The question of the plaintiff's right of dower was neither raised nor decided and was not made a subject of adjudication in the suit for specific performance. The plaintiff did not answer, and although she was perhaps properly made a party, my conclusion is that she is not barred from claiming her dower interest in the land—she having done nothing to relinquish the same."

A case exactly in point here is *Compton v. Pruitt*, 88 Ind. 171. In that case an administrator was licensed to sell the lands of his intestate to pay debts proved against his estate. His widow was made a party to this proceeding, but did not appear therein. The widow then brought suit to have her dower assigned and the proceedings of the administrator by which the lands of the intestate were sold and conveyed were pleaded in bar of the widow's action; but the court overruled the plea and summed up its conclusion in the syllabus as follows: "An administrator cannot, without a widow's consent,

sell her interest in lands of which her husband died seized, to make assets to pay debts. If a widow be made defendant to a proper petition to sell such lands, her default gives no power to sell her interest, and a purchaser does not acquire even color of title against her, and any attempt to sell her interest is a nullity." The court said: "In this case the petition [that is, of the administrator for leave to sell to pay debts] stated that the decedent died seized of the land, etc., leaving a widow. That was equivalent to a statement that only two-thirds of it was liable to be made assets. It notified the court and all parties in interest to that effect as fully as if the language * * * stated expressly that the land to be sold was two-thirds of the land described. So the notice of the application to sell stated that the administrators had filed their petition to sell the real estate of the decedent, nothing more. Such a petition and notice did not inform the widow of an intended attack upon her rights and she was guilty of no laches in failing to appear in the proceeding. She had a right to presume that the land liable to be made assets was the only subject of the petition and against such a petition she had no defense." To the same effect see *Elliott v. Frakes*, 71 Ind. 412.

In *Merchants Bank v. Thomson*, 55 N. Y. 7, it was held: "Where the wife of a mortgagor has not joined in the mortgage and has an inchoate right of dower in the mortgaged premises, the making of her a party to an action of foreclosure without allegations in the complaint that the mortgage is prior, superior, or hostile to her interest does not affect that interest, nor does the general clause in the judgment foreclosing defendants of all right in the premises."

In *Parmenter v. Binkley*, 28 O. St. 32, D. and M. instituted proceedings to foreclose a mortgage executed by B. alone, making B.'s wife a party. The wife did not answer or appear in the case. A decree of foreclosure was rendered and the land sold, and the court held that the foreclosure proceeding did not bar B.'s wife of her right of dower in the land sold.

Hooper v. Castetter, 45 Neb. 67, was a suit brought to foreclose a mortgage executed by both husband and wife. The mortgagor and his wife were made parties and duly served with process, but made no appearance to the action. Certain judgment creditors of the mortgagor were also made parties. They filed answers setting up their judgments and claiming that they were liens upon the mortgaged real estate subject to the mortgage. The court so found and decreed. The land was sold and after the mortgage was discharged there was a surplus paid into court. The judgment creditors claimed that this surplus should be applied on their judgments. The mortgagor and his wife claimed that they were entitled to the surplus in lieu of their homestead. It was contended in that case that the mortgagor and his wife were estopped from claiming the surplus proceeds of the sale because of their failure to set up their homestead rights in the foreclosure suit; but this contention was by this court overruled, and it was held that the question of the homestead rights of the mortgagor was not involved nor litigated in the foreclosure suit, and that the decree rendered in that suit was not a bar to the mortgagor's application to have the surplus paid to him in lieu of the homestead.

4. A fourth argument of the purchaser is that the widow has estopped herself by her conduct from now claiming her dower estate in the lands in controversy. The averment of the purchaser's answer on this subject is as follows: "That said plaintiff [that is, the widow] was present in person and attended the sale of said real estate and heard the bids made therefor and knew what said real estate sold at and never at any time made any objections thereto." The evidence sustains this averment of the answer. But the widow has not estopped herself from claiming her dower estate, because she attended the administrator's sale and made no objections thereto. The administrator was not selling or attempting to sell her property. She had no objection to the

sale of her husband's interest in the lands of which he died seized, and therefore she kept silent. It was not her duty to speak and advise the bidders at that sale of the laws of the state. The bidders, as well as the widow, were bound to know those laws. The answer of the purchaser does not allege, nor do the proofs show, that he was induced to purchase this real estate because of anything done or omitted to be done by the widow. His sole complaint is that she kept silent. But a complete answer to this is that she did not keep silent under circumstances when it was her duty to speak.

Scribner, discussing the question under consideration and citing the authorities, says: "Where the widow has done nothing to mislead the purchaser, and the circumstances are such that she is not required by good faith to disclose her claim, her mere silence in regard to it does not affect her right. Thus, her failure to give notice of her claim when the land in which she has dower is advertised for sale is no bar to her recovery. So, where lands are sold by a commissioner under an order of court, obtained by the widow as administratrix, but nothing is said or done to induce the belief that she will waive her dower, a simple omission on her part to announce at the sale that the land will be sold subject to her dower will not estop her from asserting that right. * * * In order to constitute an *estoppel in pais* not only must the widow by her words or conduct have caused the purchaser to believe that he would acquire a title discharged from dower, but he must also have acted upon that belief in making his purchase and paying the purchase money." (2 Scribner, Dower [2d ed.], p. 271.)

The same question was presented in *House v. Fowle*, 29 Pac. Rep. [Ore.] 890, and there the court said: "A widow is not estopped to assert her dower in land sold by order of court to satisfy decedent's debts because she assured the purchaser that the title was good and did not intimate her intention to claim the same—her dower. * * The defendant's next contention is that under the par-

ticular facts in this case the plaintiff is estopped from claiming her dower. The facts relied upon to create the estoppel are fully set out in the defendant's answer, but we think they are entirely insufficient. It may be conceded, and no doubt is true, that the defendant acted in the most perfect good faith. There is nothing shown indicating bad faith on either side. The defendant was chargeable with notice of what the statutes contain and of the nature of the title he would acquire at such sale. In addition to this the rule of *caveat emptor* applies to all judicial sales in this state. It was the defendant's privilege and his duty to investigate the title before the sale and for that purpose to employ such assistance as he might deem necessary; but he did not resort to the usual methods to ascertain the state of the title. An unlearned woman, unacquainted with the forms of conveyancing or the methods of business, could not be regarded as a safe guide or source of information from whom the true state of the title could be learned. It will be noticed that the defendant did not ask the plaintiff at either of the conversations he had with her whether she had or claimed any interest in the lands as dower or otherwise. What she told him was that the title was good. That statement was literally true, but it is not equivalent to the statement that she had no dower in the land and that if he would purchase at the sale he would acquire a fee-simple title free from all incumbrances. It does not anywhere appear that the defendant relied upon the statements or representations of the plaintiff and was thereby induced to make the purchase." To the same effect is *Whiteaker v. Belt*, 36 Pac. Rep. [Ore.] 534.

The question under consideration was presented to the supreme court of Illinois in *Toledo, P. & W. R. Co. v. Curtenius*, 65 Ill. 120, and the court said that a widow was not estopped from asserting her claim for dower because she had consented to and advised a guardian's sale of the real estate of which her husband died seized.

The cases cited by the purchaser here do not sustain his contention that the widow in this action by her conduct has estopped herself from claiming her dower estate. In the first case, *Smiley v. Wright*, 2 O. 506, the widow was not only present at the administrator's sale, but she expressly and publicly asserted that the sale of the lands about to be made would include her dower interest. The license to sell in that case provided that the lands should be sold subject to her dower estate, and after the sale had begun she caused it to be suspended in order that the administrator might announce her agreement that the sale should include her dower estate. The sale was then resumed, and in consequence of this agreement upon her part the bids for the real estate were largely increased and the administrator, with the consent of the widow, then and there attempted to sell, and did sell, her dower interest in her presence; and under these circumstances the court held that she could not afterwards claim her dower in the lands as against the purchaser at that sale. The other case cited by the purchaser here is *Pepper v. Zahnsinger*, 94 Ind. 88. In that case the administrator, who had been licensed to sell the real estate of his intestate to pay debts, was requested, in writing, by the widow to sell her dower estate at the same time that he sold the estate of his intestate. He did so, and then paid to the widow in lieu of dower one-third of the entire proceeds of the sale and the court held that the widow was estopped from afterwards claiming her dower estate. But the facts of these two cases are far away from the facts of the case at bar. They were doubtless correctly decided, but they do not support the contention here that the widow has estopped herself from claiming dower solely because she was present at the administrator's sale and kept silent in regard to her dower estate in the lands being sold.

5. The final contention of the purchaser here is that the widow is estopped from claiming her dower estate because she received a part of the proceeds of the land

sold by the administrator in lieu of her dower estate. This is the allegation of the answer, but it is wholly unsustained by the proofs. The only evidence offered to sustain this allegation is that the administrator, on a final settlement and distribution of the assets of the estate, paid to the widow, by order of the county court, $117.01 1-3, and that this sum was receipted for by the widow as her distributive share of her husband's estate. There is not a word in the record which shows that this money was paid to this widow in lieu of her dower estate, or that she accepted it as such. On the contrary, the undisputed evidence is that this payment was made to and received by the widow in full of her distributive share of her husband's estate, not in lieu of her (dower) estate, or in consideration of her release or conveyance of her (dower) estate. On the coming into the county court of the administrator's final report it appeared that, after the payment of all the claims allowed against the estate of the intestate, and the costs and expenses of administration, there remained in his hands a small sum of money. It was out of this residue that the administrator paid, by order of the county court, the $117 to the widow. With the question as to whether this payment was legally made we are not concerned, as we are not reviewing the judgment of the county court. If that tribunal regarded the surplus in the administrator's hands as part of the personal effects of the intestate, though it arose from the sale of his real estate, and considered that the widow was entitled to a child's share of such residue, the county court may have been mistaken, as the intestate's real estate belonged to his heirs, subject to his debts, and after they had been discharged by sale of the real estate, the surplus remaining from the proceeds of such sale may have belonged to the heirs and not to the widow; but that is a matter between the heirs and the widow. The fact that the widow received a part of the residue of the proceeds of the sale of her husband's real estate is no defense to the purchaser here

against the widow's claim for her own estate. Furthermore, this payment to the widow was made long after the purchase of the real estate at the administrator's sale, and we are not informed by the record, nor are we able to conjecture, how the purchaser was induced to change his status and buy this land by a payment made to, and accepted by, the widow after the purchase. In order to estop the widow from claiming her dower estate as against the purchaser he must show that he was induced to change his status by something that she did or omitted to do. If the county court, the administrator, and the heirs erroneously supposed, on final settlement of the estate, that the widow was entitled to part of the money remaining in the administrator's hands, and on that supposition that money was paid to her, how can the purchaser claim that he was induced to make the purchase he did by this conduct of the widow, administrator, heirs, and county court after he made his purchase? The precise question under consideration was presented to the supreme court of Indiana in *Compton v. Pruitt*, 88 Ind. 171, and the court held that the receipt by the widow of part of the proceeds of the sale of lands made by the administrator to pay the debts of the intestate, such payment to the widow having been made as her distributive share of her husband's estate, did not estop her from claiming her dower in the lands sold.

We reach the conclusion that in the case at bar the widow has been illegally and unjustly denied her dower estate in the lands of her deceased husband. The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

JAMES PALMER V. MRS. P. L. CARPENTER.

FILED JANUARY 3, 1898. No. 7721.

1. **Usury:** ACCOMMODATION NOTE: RENEWAL. Where one executes his negotiable note payable to the order of a debtor and delivers it to him as an accommodation, and the debtor indorses and delivers the note to his creditor in payment of a usurious note due the creditor from the debtor, such accommodation note is not a renewal of the usurious note; and, in a suit on the accommodation note against the maker, he cannot interpose, as a defense thereto, the usurious contract existing between the creditor and debtor.

2. **Lost Instruments:** RECOVERY: INDEMNITY. Where a negotiable promissory note payable to order is lost before its maturity, never having been indorsed or transferred, the execution of an indemnity bond by the owner to the maker is not an essential prerequisite in order to a recovery upon such note.

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

Joshua Palmer and *Abbott & Abbott*, for plaintiff in error.

John B. Scott and *John D. Pope, contra.*

RAGAN, C.

In the district court of Saline county Mrs. P. L. Carpenter recovered a judgment on a promissory note against James Palmer and the latter has filed here a petition in error to review that judgment.

1. There is little if any dispute as to the material facts of the case and they are briefly as follows: Joshua and James Palmer were brothers and Joshua became largely indebted to Mrs. Carpenter for money borrowed for which he executed to her his note and by the contract between them Joshua was to pay interest on the money borrowed at the rate of 18 per cent per annum.

In 1890 Joshua and Mrs. Carpenter had a settlement and at that time Joshua paid to her quite a large sum of money and still owed her $300. To pay this sum Joshua

induced his brother James to execute his note for $300 drawing interest at 10 per cent per annum payable to the order of Joshua Palmer, and he indorsed and delivered this note to Mrs. Carpenter and she accepted the same in payment of the debt which he owed her.

When the $300 note became due $100 was paid thereon and James Palmer then executed his two notes of $100, each drawing 10 per cent interest, payable to the order of Mrs. Carpenter, and delivered them to her and she surrendered the $300 note. One of these $100 notes matured on January 1, 1893, and appears to have been paid. The other matured on January 1, 1894. This is the note on which this suit is based. Mrs. Carpenter lost this note before its maturity, but it had never been indorsed nor transferred to any one by her.

In the district court James Palmer set out the usurious loan of money made by Mrs. Carpenter to his brother Joshua, the amount of money that had been paid by Joshua on that loan, and claimed that by reason of the usurious nature of that contract and payments made thereon Joshua had been discharged, and that therefore there was nothing due on the note sued upon, his contention being that the note sued upon was in effect a renewal of the usurious note given by his brother Joshua to Mrs. Carpenter, and that therefore he might successfully interpose the usurious nature of that contract as a defense to the action upon this note.

The district court took a different view of the matter, and it is this action of the court of which James Palmer first complains. The district court was right. The $300 note executed by him to his brother and by the latter indorsed and delivered to Mrs. Carpenter was not a renewal of the note which Joshua Palmer had given to Mrs. Carpenter, but was indorsed by Joshua Palmer to Mrs. Carpenter and accepted by her in payment and discharge of the usurious note, and it operated to pay that usurious debt. (*Culver v. Wilbern Bros.*, 48 Ia. 26.)

Since, therefore, this suit was not upon a usurious contract, nor upon any renewal of such contract, the defense of usury to the action was not available to James Palmer. James Palmer was not a party nor a privy to the usurious contract existing between his brother and Mrs. Carpenter.

2. A second complaint of James Palmer is that the district court permitted Mrs. Carpenter to recover a judgment on the lost note without first executing and delivering to him an indemnity bond to protect him from loss and damage by reason of the loss of the note sued upon. But this note was a negotiable note, payable to the order of Mrs. Carpenter, lost before maturity, and had never been indorsed or transferred by her. Under these circumstances is the execution of an indemnity bond by the owner of the note an essential prerequisite to a recovery thereon?

In *Mowery v. Mast*, 14 Neb. 510, it was said that where a negotiable note was lost after maturity a recovery might be had thereon without the execution of an indemnity bond.

In *Means v. Kendall*, 35 Neb. 693, it was said: "Where a negotiable note is lost before it becomes due the court will require the plaintiff to give an indemnifying bond to the maker as a condition of recovering judgment; but where the instrument is lost after it becomes due no bond ordinarily would be required." But the opinion does not disclose whether the lost note sued upon was lost before or after maturity, and the case can be regarded as an authority only for the proposition that an indemnity bond is not necessary to recovery upon a negotiable promissory note lost after its maturity, not having been previously indorsed or transferred. The question was again presented to the court in *Kirkwood v. First Nat. Bank*, 40 Neb. 484, where the authorities upon the subject were reviewed at some length, and the conclusion was there reached that where an instrument negotiable by delivery is lost before maturity a bond of

indemnity should be required as a condition for recovery thereon; but where it was clearly shown that the instrument was payable to order and not indorsed, or that it was lost after maturity, no indemnity bond should generally be required. This case, we think, controls the decision of the case at bar, and following it we hold that where a negotiable promissory note payable to order is lost before its maturity, never having been indorsed or transferred, the execution of an indemnity bond by the owner to the maker is not an essential prerequisite in order to a recovery upon such note.

The judgment of the district court is

AFFIRMED.

MARSHALL FIELD ET AL. V. D. A. LUMBARD ET AL.

FILED JANUARY 3, 1898. No. 7729.

Replevin: JUDGMENT: BOND: LIABILITY OF SURETIES. Where, in a replevin suit, the defendant recovers and judgment is entered absolutely for the value of the property, and not in the alternative, for a return, or its value if a return cannot be had, the sureties on the replevin bond are not liable for the satisfaction of such judgment.

ERROR from the district court of Dodge county. Tried below before MARSHALL, J. *Affirmed.*

Montgomery & Hall and *Fred W. Vaughan,* for plaintiffs in error.

W. J. Courtright, contra.

IRVINE, C.

This was an action on a replevin bond, in which a judgment of dismissal was obtained by the defendant. In the replevin action there had been a finding or verdict for the defendants therein, but the judgment was for the

value of the property only, and not in the alternative, for a return thereof or its value, as the statute requires; and the defendant herein, the surety on the bond, asserted that he was discharged because of this irregularity. A consideration of this question renders unnecessary an examination of the other questions involved.

It was in one case suggested, without decision, that the provision for an alternative judgment is solely for the benefit of the defendant, and that the plaintiff cannot on that account complain. (*Goodman v. Kennedy*, 10 Neb. 270.) That suggestion was contrary to two prior decisions, holding the requirement mandatory. (*Hooker v. Hammill*, 7 Neb. 231; *Moore v. Kepner*, 7 Neb. 291.) The doctrine of the earlier cases has since several times been reaffirmed. (*Singer Mfg. Co. v. Dunham*, 33 Neb. 686; *Manker v. Sine*, 35 Neb. 746.) It must now, therefore, be taken as established that the requirement is mandatory, and that either party may insist upon its observance. It was further held in *Goodman v. Kennedy* that before the plaintiff can be heard to complain that the judgment was absolute, he must make it appear that a return is practicable. This case was cited on this point in the recent case of *Eickhoff v. Eikenbary*, 52 Neb. 332, but the point was not there considered necessary to a decision, and was guarded accordingly. In *Manker v. Sine* the burden of proof was otherwise stated, and it was made the duty of the defendant to show that a return could not be had. In the case before us nothing appears to show whether or not a return could be had; but we do not think it necessary here to determine where, in a suit between the parties, the burden of proof lies; because, where the action is against the surety on the bond, other principles govern. If, in the original action, the burden is upon plaintiff, it must be because the information and means of proof lie especially in his possession,—a consideration which does not apply to his surety. In *Dorrington v. Meyer*, 8 Neb. 211, it was held that the sureties cannot complain because the judgment is not in the alternative.

The opinion treats this point very briefly, giving as a reason that the sureties may appear in the replevin suit and have judgment properly entered, and if they fail to do so they are bound. The question recurred in *Lee v. Hastings*, 13 Neb. 508, and the judgment was reversed apparently for the reason that the replevin judgment was not in the alternative. In *Lee v. Hastings* the parties to the replevin suit stipulated for an absolute judgment, but this was not considered as distinguishing the case from *Dorrington v. Meyer*, because the argument seems rather to have been that the stipulation had the opposite effect, for the court said: "Even where such a stipulation is entered into it does not preclude the necessity for a formal judgment in the form required by statute." The decision was reasoned wholly on the theory that the statute formed a part of the obligation and that the sureties were entitled to have their contract construed according to its terms; that their liability could not be enlarged by any disregard of the requirements of the law. The same judge wrote both opinions, and in *Lee v. Hastings* he says that *Dorrington v. Meyer* "has no application to the facts of this case." As the difference was clearly not found in the fact that there was a stipulation in the later case, we can only account for that language by supposing that the fact that the bond in *Dorrington v. Meyer* was given, and perhaps the replevin judgment there considered was rendered, before the enactment of the statute requiring an alternative judgment, was what controlled the court in the former case. In that view *Lee v. Hastings* rules this case without any conflicting case to embarrass us; in any other view *Lee v. Hastings* must be treated as having overruled *Dorrington v. Meyer*, and so governing the present case, as being the later expression. Moreover, we think the doctrine of *Lee v. Hastings* the better. As there said, the sureties contract with a view to an alternative judgment if the plaintiff should be unsuccessful. They are discharged, *pro tanto* at least, by a return of the property if the judgment be regular; but

if the judgment be absolute, a return of the property would not satisfy it, and their liability would be thereby increased. Nor do we think that it is their duty to appear in the replevin suit and see that the judgment is proper. It is rather the duty of the defendant therein to see that the judgment is such that it will protect him, than for the sureties, who are not parties, to appear and see that it is of such a character that it will bind them. *Eickhoff v. Eikenbary*, above referred to, is not opposed to this view. It was there held that the execution need not be in the alternative, because the statute does not so provide, and because it is the plaintiff's affirmative duty to return the property. The sureties can nevertheless insist that the judgment, by following the statute, makes it possible for the plaintiff to perform that duty and so satisfy the judgment. The judgment of the district court being in accordance with this opinion, it is

AFFIRMED.

PHŒBE REBECCA ELIZABETH ELWINA LINTON ET AL., APPELLEES, V. JOHN WHITTAKER COOPER ET AL., APPELLANTS.

FILED JANUARY 3, 1898. No. 7646.

1. **Conveyances:** ACKNOWLEDGMENT. As between the parties an acknowledgment is not essential to the validity of a conveyance, unless the property be a homestead, or for the purpose of barring dower.

2. ———: ———: MARRIED WOMEN. A conveyance by a married woman of her separate property, not her homestead, is valid between the parties although not acknowledged.

3. **Evidence:** CONVEYANCES: ACKNOWLEDGMENT. A valid acknowledgment permits a conveyance to be received in evidence without further proof; but one not acknowledged may be received in evidence if its execution and delivery be otherwise proved.

4. **Husband and Wife:** MORTGAGES: CONSIDERATION. A married woman may pledge her separate estate to secure an indebtedness of her husband, but there must be a new consideration to sustain a mortgage to secure his antecedent debt.

5. ——: ——: ——. The making of further advances to the husband is a sufficient consideration to sustain a mortgage by the wife of her separate property to secure an antecedent debt. In such case the repayment of the subsequent advances does not discharge the mortgage.

6. **Mortgages:** CONSIDERATION: EVIDENCE. Evidence examined, and *held* to conclusively show a delivery of the mortgage in suit, and a valid consideration therefor.

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

Charles A. Goss and *John L. Webster*, for appellants.

John T. Cathers and *William A. Redick*, *contra.*

IRVINE, C.

This action was begun by Phœbe Rebecca Elizabeth Elwina Linton, and her husband, Adolphus Frederick Linton, against John Whittaker Cooper and others, composing the firm of Brown, Janson & Co., bankers in London, the object being to have declared void and canceled a mortgage to secure £10,000, purporting to have been made by the Lintons to Brown, Janson & Co. on fifty acres of land in Omaha, and also a deed purporting to convey certain other lands in Omaha, from the Lintons to Brown, Janson & Co. Brown, Janson & Co. answered, and by cross-petition sought the foreclosure of both instruments, alleging that the deed had been executed to secure the payment of a debt. On the trial the plaintiffs dismissed their petition, and the defendants abandoned all claim under the deed, so that the case proceeded as one by the defendants against the plaintiffs to foreclose the mortgage on the fifty acres. There was a finding for the plaintiffs, and a decree denying foreclosure and cancelling the mortgage. The defendants appeal.

Although both in the district court and in this the burden lies upon the defendants to establish the mortgage, the case can be best developed by stating the defenses relied on by the plaintiffs. These, while volu-

minously pleaded, may be briefly analyzed as follows: (1) That the mortgage was never delivered; (2) that it was not acknowledged according to law; (3) that, if given at all, it was to secure only the past due indebtedness of Mr. Linton, and covered the separate property of Mrs. Linton, and was without consideration as to her.

Mrs. Linton is of American birth, the daughter of John Borland Finlay. Mr. Linton is a British subject; and the two seem to reside in England, although their letters in evidence are dated from London, Brighton, Ostend, and Aix-la-Chappelle. Mrs. Linton is the owner in her own right of a considerable amount of property in and about Omaha, including the fifty acres in controversy. Mr. Linton had an account, in 1889, with the banking firm of Brown, Janson & Co., the defendants. On the face of this account he was in October of that year in debt to the bank in a large sum, apparently something over £12,000. An effort is made to show that at least £10,000 of this debt was not really his, but that of Coates, Son & Co. We need not pay much attention to this branch of the case. In the light most favorable to Mr. Linton it would seem to be a debt for which both he and Coates, Son & Co. were liable, and the only question would be which is the principal debtor and which the surety. There is in the record a judgment at law in England from which it appears that Linton has been adjudicated the debtor of the bank to the amount claimed. It is the theory of the defendants that the mortgage was delivered October 21, 1889, to cover the existing indebtness of Linton to the bank, together with future advances. The mortgage is dated April 15, 1889. It is clear that it was not originally executed for the purpose of covering this debt, but was, on the contrary, executed with a view to obtaining other advances from the bank for different purposes. The negotiations for this loan resulted in its rejection by the bank, and the mortgage was returned to Mr. Linton without delivery. How it again got into the possession of the bank raises the cru-

cial question in the case so far as it concerns the delivery of the mortgage. Mr. Cooper seems to have transacted all the business on behalf of the bank; he was present at the trial, and we have his testimony. According to him, Mr. Linton, being heavily indebted, as already stated, and desiring further advances, offered to give security in the form of this mortgage. Mr. Cooper desired some assurance from Mrs. Linton that the arrangement was satisfactory to her. The conversation on this subject occurred October 18, 1889. Accordingly, Mr. Linton returned on October 21, bearing the following letter, which, it is admitted, was signed by Mrs. Linton:

"CABARSTON HOUSE, Oct. 18th, '89.

"SIR: My husband tells me that you are under the impression that I have trustees in America. The only one I have is for the property left me by my mother, which is all in Pennsylvania, and is now being contested, as I am advised by counsel that he has no right to hold the property, as the will was invalid. The whole of the Linton estate in Omaha belongs to my husband and myself. My husband has my authority to make arrangements with your bank about the property, and any arrangement made by him I will agree to. I am *not* an *American*, as Mr. Van Wagner stated, but a *British subject*, and all documents signed by me must be judged by the *English courts* alone.

"Believe me, truly yours,

ELWINA LINTON."

Relying on this letter Mr. Cooper accepted the mortgage on October 21, and on the faith thereof made a further advance to Mr. Linton of £3,800. These facts are denied by the Lintons. In order to explain their theory it is necessary briefly to recur to the former transactions. They claim that after the former negotiations had failed, the mortgage was returned to Mr. Linton. Colonel Finlay was during the summer in England; Linton was about, in his presence, to destroy the mortgage, when

Finlay dissuaded him. Negotiations were then in progress looking towards a loan of £50,000 on the security of Mrs. Linton's American property; abstracts and other documents had been placed in the hands of a Mr. Van Wagner, an American lawyer in London, for the purpose of procuring from him an opinion as to title, and as to the form of the securities, and Colonel Finlay desired to submit this mortgage to Mr. Van Wagner to ascertain whether is was in proper form for the securities which it was contemplated giving. An opinion was rendered by Mr. Van Wagner to Messrs. Janson, Cobb, Pearson & Co., solicitors, of London, and the papers returned to them. The mortgage in question happened thus to come into the hands of these solicitors, who represented Brown, Janson & Co., and in some way passed from them to the bank. A great deal of the evidence is devoted to tracing the mortgage between the time of its execution, in April, and the 21st of October. We need not inquire very closely into this, because we take it that although the mortgage was originally intended for another purpose and was not in fact delivered for its original purpose, still, if it came properly into the hands of Brown, Janson & Co. in October by delivery by the mortgagors with the intention of having it operate as security as alleged by the bank, it would be a valid instrument for that purpose. Mrs. Linton testified that she never authorized such a delivery. Mr. Linton testified that he never so delivered it. Ordinarily this would create such a conflict in the evidence that we would not be at liberty to disturb the finding of the trial judge thereon,—the credibility of witnesses being generally a matter for the determination of the triers of fact in the district court. This rule is not, however, so rigid as to compel us to accept the statement of a witness in the district court, where it is absolutely demonstrated to be false or mistaken. We would not be compelled to approve a finding that two and two make five, or that on a certain morning the sun rose in the west, although some witness may have

so testified and honestly believed it to be the fact. The letter already quoted goes far to show that Mrs. Linton did at the time intend that the mortgage should be delivered, and that she granted to Mr. Linton full authority in the premises. This letter is explained by both on the theory that they had in view the consummation of the larger loan, and that the letter referred to those negotiations and not to this mortgage. Their subsequent conduct conclusively repels that theory.

Before referring to the evidence as to subsequent events it may be proper to say that the plaintiffs contend that the subsequent conduct of Mr. Linton could in nowise tend to bind Mrs. Linton. Whether this is true, in view of the very broad and general authority conferred by the letter of October 18, we need not inquire. Mr. Linton's subsequent conduct and admissions were admissible in evidence for the purpose of impeaching his own testimony if for no other purpose. On December 19 he addressed to Coates, Son & Co. a letter, in which he says: "If you will get me a loan of say £20,000, with which I can pay off my loan of Brown, Janson & Co. of £10,000 (of San Sebastians and £16,000 mortgages on the Omaha property), I will, besides handing you the above security, give you a further collateral security of," etc. There was executed in April not only the £10,000 mortgage, but also another of £6,000 not involved in this case, and the "£16,000 mortgages on Omaha property" could only have referred to these two. February 3, 1890, he addressed to Mr. Shard, of the firm of Janson, Cobb, Pearson & Co., a letter, in the course of which he says: "My only objection to your putting the mortgage of the Omaha property on record is that it will destroy or interfere with our position there, as we have never had a mortgage on the property before, and it is only necessary for the bank to receive payment or further cover. It does seem to me important that mortgage should not be upon record unless we are unable within the next few days to settle with the bank." Some time, apparently

near the end of February, he again addressed Mr. Shard a letter, in which he says: "I am sorry you did not understand me about the mortgage on the Omaha property. I have no objection to giving a new one properly dated. My wife thought Cooper wanted to take the Omaha property for the stocks." In March another letter to Mr. Shard says: "I sent you a wire this morning about the Omaha mortgage. My wife is of opinion that Colonel Finlay would raise trouble if it is recorded. The mortgage was to have been for advances to be made. You cannot use it at present as cover." During the whole interval there was continued correspondence between him and Janson, Cobb, Pearson & Co. Letters on both sides referred to this mortgage as a subsisting incumbrance, and this last letter contains the first protest by Mr. Linton on the subject. We are not certainly unreasonably reluctant to accept Mr. Linton's bare denial on the trial, in the face of these contemporaneous documents. With Mrs. Linton the case is no better. On April 2, 1890, Mr. and Mrs. Linton executed to Cooper and others a deed absolute in form on their property in Omaha, being the deed referred to in the statement of the case, and nowhere is the evidence of the defendants contradicted that the purpose of this deed was to replace the mortgage in suit. At the same time they wrote a letter intended to operate as a defeasance, beginning "We having to-day executed an absolute conveyance to three of your partners on three pieces of land at Omaha, it is understood that such land is to be held by you as security for all moneys at any time owing by us, or either of us, to you." On the 20th of May, 1890, the Lintons joined in a mortgage to Greenwell & Co., which, it recites, shall "charge the property heretofore described subject to a mortgage already existing thereon in favor of Messrs. Brown, Janson & Co., bankers of London, England, dated the 15th April, one thousand eight hundred and eighty-nine, for securing £10,000 and interest." This was followed by a covenant "that the aforesaid premises are unincumbered except as to the

above mentioned mortgage of the 15th of April, one thousand eight hundred and eighty-nine, to Messrs. Brown, Janson & Co. for £10,000." This mortgage to Greenwell & Co., it seems, was afterwards avoided by decree of the district court of Douglas county; but counsel err in assuming that the avoidance of the mortgage destroyed its probative force. It could not in any event operate as an estoppel in favor of Brown, Janson & Co. Whether valid or not, it was nevertheless a solemn and distinct admission by Mrs. Linton of the validity of the mortgage in suit. Somewhat later Brown, Janson & Co. instituted bankruptcy proceedings against Mr. Linton, and concerning these proceedings Mrs. Linton wrote them from Ostend August 6, 1891, a long letter, in the course of which she says: "The bank in London have two securities registered in Omaha against my estate, the two documents are for about £16,000. Mr. Shard holds the deeds of my property." In the face of these repeated admissions, formal and informal, it is impossible to believe that the mortgage did not pass into the hands of Brown, Janson & Co. with the intention on the part of both Mr. and Mrs. Linton to make it a valid security. In justice to the trial court we should say that the opinion of the district judge discloses that his decision was not based on any finding that the mortgage was not delivered, but was, on the contrary, based on his views as to the sufficiency of the consideration. The decree contains a finding that it was not delivered, and this finding must be, and is, accepted in the review of the case. The statement as to the opinion is made as a matter of fairness to the judge, and not as influencing our decision.

The mortgage was acknowledged before an official describing himself as consular agent. It is contended that such an official has no authority to take an acknowledgment, and that the deed being that of a married woman, a legal acknowledgment is necessary to its validity. In support of that proposition we are cited to numerous

authorities* in other states where the subject is governed by statutes not like ours, and which are therefore inapplicable. We are also cited to *Roode v. State*, 5 Neb. 174. In that case it was said that an instrument purporting to be the deed of a *feme covert* without her acknowledgment is void as to her. The deed there involved purported to be the conveyance of her husband and her name seems to have been inserted in it for the sole purpose of barring dower. For that purpose an acknowledgment is necessary. (Compiled Statutes, ch. 23, sec. 12.) An acknowledgment is also essential for the purpose of conveying a homestead. (Compiled Statutes, ch. 36, sec. 4.) For other purposes an acknowledgment is not in this state necessary as between the parties to an instrument. (*Stevenson v. Craig*, 12 Neb. 464; *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192; *Kittle v. St. John*, 10 Neb. 605; *Weaver v. Coumbe*, 15 Neb. 167; *Connell v. Galligher*, 39 Neb. 793; *Horbach v. Tyrrell*, 48 Neb. 514.) Except in the special instances referred to, the office of an acknowledgment is twofold merely: to entitle the instrument to record, and to permit its admission in evidence without further proof of its execution. (*Burbank v. Ellis*, 7 Neb. 156; *Horbach v. Tyrrell, supra.*)

It is argued that without an acknowledgment the mortgage should not have been received in evidence; but the statute merely makes a proper acknowledgment sufficient proof to admit the instrument, and it does not make that method of proof exclusive. An unacknowledged instrument, as shown by the cases already cited, may be received in evidence, provided its execution and delivery be proved, as they were in this case. The married woman's act (Compiled Statutes, ch. 53, sec. 2) provides that a married woman "may bargain, sell, and convey her real and personal property, and enter into any contract

**Clark v. Graham*, 6 Wheat. [U. S.] 577; *Runfelt v. Clemens*, 46 Pa. St. 455; *Warren v. Brown*, 25 Miss. 73; *Clark v. Thompson*, 12 Pa. St. 274; *Graham v. Long*, 65 Pa. St. 385; *Tully v. Davis*, 30 Ill. 103; *Myers v. Boyd*, 96 Pa. St. 427; *Rogers v. Adams*, 66 Ala. 600; *Dewey v. Campau*, 4 Mich. 565; *Buell v. Irwin*, 24 Mich. 145; *Keller v. Moore*, 51 Ala. 340.

with reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real or personal property." Under the authorities cited there can be no doubt then that the deed or mortgage of a married woman of her separate estate is valid between the parties although not acknowledged. The validity of this acknowledgment is, therefore, not a question necessary to be decided.

We now come to the question of the consideration. The condition of the mortgage names no time for the payment of the debt. It may be assumed that it was due presently, or upon demand, and that there was, therefore, no consideration by way of extending time on the antecedent debt of the husband. The defendants contend, however, that on the faith of the mortgage there was an advancement made upon its delivery of £3,800, and that there were two other comparatively small loans made at a later period. The plaintiffs show conclusively that at the time of the delivery of the mortgage Mr. Linton's current account was overdrawn about £2,300 and that, of the £3,800 passed to Linton's credit on the delivery of the mortgage, £2,300 was absorbed in covering this overdraft. This, without an extension of time, was not a new consideration. They further contend that of the remaining £1,500, £1,000 represented the profits accruing to Linton from a sale that day made of stock held by him in the Imperial Bank of Persia; that £500 was the result of a discount or purchase of a "sold note" of Coates, Son & Co. of stock in the Pahang Exploration Company; that of the two later advances one was a similar transaction in the stock of the United States Debenture Corporation, and the other in shares of the Canadian Meat Company. There is evidence fairly tending to sustain all these assertions, and they meet but a qualified denial from Mr. Cooper. It must, however, be remembered that if the mortgage was delivered at all, it was as a general cover for past debts and future advances; and every one of the subsequent transactions is of such a character that it is

hardly probable that the bank would enter into it with a man already deeply in debt to them, as was Mr. Linton, without further security than the items to which they severally relate. The Persian stock transaction was this: Linton was about to go on the Continent and desired to dispose of the Persian stock before he went, as it was then at a considerable premium. It was ascertained that he could close it out at a profit of £1,250. Brown, Janson & Co. desired to make the sale for him, as they had arrangements by which they could divide the commissions with the brokers, and thus realize a profit to themselves. Linton proposed that they give him credit for £1,000 and accept the remaining £250 as the commission to be so divided. This was done, and the £1,000 immediately passed to his credit. While this was perhaps a very short loan, it was, in effect, a discount of his profits, because it was done before the sale was made and the proceeds realized. With regard to the "sold note," the transaction was that the sold note was immediately delivered and its amount placed to Linton's credit. It would seem from the evidence that it was not realized on by Brown, Janson & Co. for some weeks, and was then short a few pounds of the amount advanced. The Debenture Company transaction seems to have been an absolute loan to Linton on behalf of a friend with the understanding that the shares bought with the money should be deposited as collateral. Linton says he does not know whether this was done. The Canadian Meat Company item was a similar transaction. Thus, while Brown, Janson & Co. obtained, or were to obtain, other security for each of these items, they were all, in effect, advances, and, as we said, such advances as would hardly be made on behalf of a man who already owed more than £12,000 largely unsecured. The security afforded by the £10,000 mortgage was the inducement to make these advances, according to the testimony of Cooper, and even according to Linton there must have been some close connection between them, because in spite of the efforts

of his counsel to draw out from him his story with regard to the £1,000 and £500 of October 21 as separate transactions, his mind worked in such a manner that he kept reverting to Cooper's demand for a letter from Mrs. Linton authorizing him to act with reference to the Omaha property, and he over and over again states the facts in regard to the procurement of that letter as if they were inseparably connected in his mind with the procuring of the advances. The law on the subject is not difficult. It is settled that a married woman may become surety for her husband, and that a present advance or the extension of an antecedent debt is a sufficient consideration for her so doing. (*Stevenson v. Craig, supra; Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123; *Smith v. Spaulding*, 40 Neb. 339; *Briggs v. First Nat. Bank of Beatrice*, 41 Neb. 17; *Watts v. Gantt*, 42 Neb. 869.) But there must be a new consideration if the mortgage be given to secure an antecedent debt. (*Kansas Mfg. Co. v. Gandy*, 11 Neb. 448.)

The trial court seems to have viewed the facts as we do, but proceeded on the theory that a subsequent payment had been made sufficient to discharge any indebtedness created at the time, or after the mortgage was given; that it was therefore discharged. In this we think there was error. It would seem that the rule for the application of payments, where no direction is given by the debtor and no special application has been made by the creditor, is directly contrary to that applied by the trial judge; and payments should be applied first to the satisfaction of the earlier debits. (NORVAL, J., in *State v. Hill*, 47 Neb. 456.) But irrespective of this, there was a confusion by the trial judge between the consideration for giving the mortgage and the debt secured thereby. The debt secured was the whole of the debt of Linton to the bank, past and future, to the extent of £[illegible],000. The new consideration was present and future advances, and the repayment of such present and future advances did not defeat the consideration which had by such advances

already been executed, nor did it discharge the mortgage. To reduce this transaction to its simplest form will at once elucidate our meaning. If A owes B $100, which is not secured, and if C agrees that if B will lend A a further sum of $5, C will pledge his property as security for the $100 already owed, the further advance is a new consideration which will sustain the pledge, which can then only be discharged by the repayment of the $100.

There is a final contention that no part of the consideration passed to Mrs. Linton, and that the contract was not made with reference to her separate estate. No discussion is needed to dispose of this argument. The cases already cited show that she need not be a party to the consideration, and the mortgage itself was an express charge on her separate estate.

The judgment of the district court is reversed, and the case is remanded with directions to take an account of the amount due from Linton to the bank, and enter a decree of foreclosure for an amount in money of the United States equivalent to that debt, but not exceeding £10,000, with interest at six per cent from October 21, 1889.

REVERSED AND REMANDED.

FRED RADZUWEIT, APPELLEE, V. JOHN B. WATKINS ET AL., APPELLANTS.

FILED JANUARY 3, 1898. No. 7681.

1. **Judgments:** EQUITABLE RELIEF. A court of equity, in granting relief against judgments, is not restricted to cases where the court entering the judgment complained of was without jurisdiction, but will extend its assistance in cases where jurisdiction was obtained, but the defendant, without fault or negligence on his part, but by accident or misfortune, was prevented from making his defense, provided it be further shown that he had a good defense to the merits.

2. ———: ———. Where judgments were rendered in the county court and transcripts thereof filed in the district court and the lands of the defendant were levied upon and advertised for sale, all before he learned of the pendency of the suit and when he had a good defense to the merits, *held*, that the remedy by proceedings in the county court to vacate the judgments under section 602 of the Code was inadequate and injunction a proper remedy.

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

Lake, Hamilton & Maxwell, for appellants.

C. A. Baldwin, contra.

IRVINE, C.

Radzuweit, by this suit, sought to restrain the defendants from enforcing against him two judgments recovered by the defendants Watkins and Hoagland against Radzuweit and one Zimmatt in the county court of Douglas county. The district court granted a perpetual injunction, and the defendants appeal. They do not contend that the evidence did not tend to establish such allegations of the petition as were put in issue, but they assert that the petition itself was insufficient to warrant the relief granted. We need not, therefore, inquire beyond the averments of the petition and their legal sufficiency.

The petition alleges, in substance, that on March 21, 1893, Watkins and Hoagland began two suits against plaintiff and A. Zimmatt and C. Zimmatt in the county court of Douglas county, each suit being to recover on certain promissory notes alleged to have been made by the Zimmatts and Radzuweit to Watkins and Hoagland. A summons was issued and returned as personally served on A. Zimmatt and not served on C. Zimmatt, and as served on Radzuweit by leaving a copy of the same at his usual place of residence. Thereafter in due time a default was taken as to Radzuweit and judgment entered in both cases against him April 7, 1893. Thereafter, on

April 11, transcripts of said judgments were filed in the office of the clerk of the district court, writs issued thereon and a lot belonging to Radzuweit levied upon and advertised for sale to satisfy the judgments. The petition further alleges that Radzuweit did not execute the notes, did not authorize any one to execute them on his behalf, and did not know of their existence until he learned that the lot was advertised for sale to pay the judgment. At the time the actions were begun Radzuweit was absent from home from early in the morning until late at night and he did not know that there had been such service, did not know that his name was on the notes, did not know that he had been sued, did not know that judgment had been rendered until three days before this suit was begun, and after the lot had been advertised for sale, when a neighbor called his attention to the published notice. This petition certainly alleges a good defense to the law actions and shows that plaintiff had no actual knowledge of the proceedings in time to interpose that defense. It also shows that he was personally guilty of no negligence. It is, however, contended that the service of summons was in law good, and equivalent to a personal service, and that being so equity can afford no relief. There can be no question that the service was good and conferred jurisdiction upon the county court. The return was that a copy had been left at Radzuweit's usual place of residence and the petition does not deny, but rather admits, that the return was true. The right of a court administering equity to prevent the enforcement of a judgment is not, however, confined to cases where the judgment was void for want of jurisdiction. It extends to all cases where the defendant in the law action, without negligence or fault of his own, was prevented from making his defense, and where he has a good defense which would, had it been interposed, have prevented the judgment, and where relief cannot be had at law or in the original action. In other words, it is sufficient to show that the judgment is inequitable and that

the defendant has been at no fault and has no other remedy.

In *Horn v. Queen*, 4 Neb. 108, and 5 Neb. 472, a summons issued by a justice of the peace had been served by leaving a copy at the defendant's residence. He was then absent, but returned on the return day. He was then taken sick and was unable to attend to business affairs for twenty days. He had a defense to the action. It was held that he had shown grounds for the interposition of equity. Here there was no doubt as to the jurisdiction of the court. In the first report MAXWELL, J., said: "And in general the absence of a party from unavoidable circumstances, where it is apparent he had a defense to the action, will be sufficient to authorize a new trial," and that where it would have been proper for the law court to grant a new trial, if it still had authority to do so, it is proper for a court of equity to interfere after that authority has lapsed. In the second report GANTT, J., said: "When a party, from some unavoidable circumstance, and without any laches or want of reasonable diligence on his part, is prevented from appearing and making his defense to a suit, courts will relieve him upon being satisfied that there is reasonable ground to believe injustice has been done to him by a trial in his absence."

In *Young v. Morgan*, 9 Neb. 169, relief was also given where there was no question of jurisdiction involved, but where the defendant had allowed the case to go by default because he supposed it to be founded on a note which he owed, whereas it turned out to be based on a note similar thereto but forged.

In *Morse v. Engle*, 28 Neb. 534, a doctrine was announced which seems to be directly opposed to the foregoing cases and which if adhered to would doubtless govern this case in favor of the defendants. There the original action had been against a husband and wife, and it was asserted that the summons, left at the residence, had been received by the husband and secreted, and that the wife was kept in ignorance thereof. It was

held that this afforded no ground for relief, the court saying that the service was in accordance with the statute, and that where this is so "nothing connected with or incident growing out of such service can be held to be an unavoidable casualty or misfortune preventing the party from defending." It will be seen at once that the attention of the court was there drawn to the legal sufficiency of the service. The service being good, the court held there could be no relief, overlooking entirely the well known and almost elementary rule that although jurisdiction is complete, relief may be had where by fraud, accident, or even mistake, and without fault of the defendant, an unjust judgment has been rendered. In *Holliday v. Brown*, 34 Neb. 232, *Morse v. Engle* was reviewed, and while the court there again seems to have lost sight of the rule that to authorize relief the jurisdiction of the court in the original case need not necessarily be involved, and although *Holliday v. Brown* has been much criticised and is peculiarly reasoned on another point, it may justly be regarded as having practically overruled *Morse v. Engle.*

It is also contended that Radzuweit had his remedy by proceeding, under section 602 of the Code, in the county court to vacate the judgments, and for that reason is not entitled to relief in this action. But before he knew of the proceedings at all the county court judgments had been entered by transcripts in the district court, his land had been levied upon and was about to be sold. Merely proceeding in the county court to have the judgments there vacated would not dispose of the record in the district court and would not prevent the sale of his land. The remedy under section 602 was not adequate and injunction was, under the circumstances, the proper remedy.

AFFIRMED.

J. D. MACFARLAND V. WEST SIDE IMPROVEMENT ASSOCIATION.

FILED JANUARY 3, 1898. No. 7635.

1. **Corporations:** STOCK: LIABILITY OF SUBSCRIBER. The capital stock of a corporation must be fully subscribed before an action will lie against a subscriber to recover assessments thereon, unless by law or charter provision the corporation is permitted to proceed with its main design with a less subscription. (*Livesey v. Omaha Hotel Co.*, 5 Neb. 50.)

2. ———: ———: ———: ESTOPPEL. A subscriber may, however, by his conduct, either waive or estop himself from setting up such a defense.

3. ———: ———: ———. One who acts as treasurer of a corporation, receives payment of assessments from other subscribers, himself pays certain assessments, and disburses the funds of the corporation in carrying out its main object, is estopped to set up that the stock has not all been subscribed, although at the time of such acts he was ignorant of the deficiency.

4. ———: KNOWLEDGE OF AGENT: LIABILITY OF PRINCIPAL. One elected treasurer of a corporation, who with the consent of its promoters permits an agent to perform all the active duties of the office, but in the name of the treasurer, is responsible for the consequences of the agent's acts as if they were his own, and is charged with notice of all facts learned by the agent by reason of his performance of such duties.

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

A. G. Greenlee and *Lambertson & Hall*, for plaintiff in error.

Ricketts & Wilson, contra.

IRVINE, C.

The West Side Improvement Association recovered a judgment against Macfarland for certain unpaid assessments on shares of its capital stock alleged to have been by him subscribed. While several defenses were pleaded, the questions here presented relate only to one,

—that the full amount of the capital stock, as fixed by the articles of incorporation, had not been subscribed. The capital stock was fixed at $200,000, and only a little more than $100,000 was subscribed. The general principle is well settled that a subscription does not become obligatory until the whole amount has been subscribed, unless the law or some provision of the articles permits the corporation to begin its effective work at an earlier stage. (*Livesey v. Omaha Hotel Co.*, 5 Neb. 50; *Hale v. Sanborn*, 16 Neb. 1; *Hards v. Platte Valley Improvement Co.*, 35 Neb. 263.) Everywhere a qualification is recognized in connection with this rule, and that is, that a subscriber may, by his conduct, lose the right to insist on its observance, and the crucial question here is whether Macfarland has so conducted himself as to lose that right. There is but little conflict in the evidence on this point. Macfarland subscribed for stock to the amount of $2,500, and paid two small assessments thereon. He was chosen treasurer of the corporation, and about that time was informed by some of its promoters that his services were desired in that capacity, and that he had been, or would be, elected. He did not desire the office, and so stated. He was then president of the First National Bank of Lincoln, and one Miller was a subordinate officer of the bank. Macfarland conceived that the corporation desired that the bank should have its account, and informed the promoters that if such was their wish Mr. Miller would take care of the money; that he, Macfarland, found his time fully occupied. He then said to Mr. Miller that he had been elected treasurer and had no time to attend to the business, and that if Miller would do so he might have any compensation that might accrue. Several witnesses testify to these conversations, and their accounts vary so slightly that the differences are clearly attributable to differences in the habits of expression of the witnesses, so that it would be dangerous to attribute any special force to the form of words employed by any one of them.

From the testimony of all, the inference, evidently drawn by the trial court, is readily deducible that Macfarland did not decline the office, but accepted it with the understanding that Miller was to perform its active duties, receiving any compensation it might afford. Clearly, under such circumstances, Macfarland became the responsible officer, charged with whatever duties the office entailed, and trusting to Miller as his own agent, not that of the corporation, for the performance of those duties. Just here a matter of importance in the case, but presenting no legal difficulty, may appropriately be disposed of. Miller, being Macfarland's agent, Miller's acts as treasurer were in law those of Macfarland, and Miller's knowledge, acquired through his performance of those acts, is to be imputed to Macfarland himself. An account was opened with the bank in the name of Macfarland as treasurer. A note, made by some of the promoters, was discounted at the bank to obtain money to begin the work of the corporation, and its proceeds were credited to Macfarland in that account. Assessments were made on the capital stock received by Miller, and also deposited in this account. Among them were the two payments made by Macfarland himself. The object of the corporation was to erect buildings for and maintain a normal school near Lincoln. With the money so obtained the corporation proceeded to erect a large building, and for many weeks Miller, by checks drawn in the name of Macfarland, disbursed money in the payment of vouchers which showed on their face that they were for expenses incurred in the building operations. Macfarland was thus charged with notice that the corporation was proceeding with its main object. He did not know, and it does not appear that Miller knew, that the full amount of capital stock had not been subscribed.

It will be seen that Macfarland participated in the acts of the corporation by holding the office of treasurer, receiving subscriptions, and disbursing money for the purpose of carrying out its main object. Such participa-

tion is generally said to waive the requirements of full subscription, or else to estop a subscriber from insisting thereon. The language of the cases has often been in this respect ambiguous, yet it is here very important to ascertain whether the liability arises in such case from waiver or by estoppel. If from waiver, which has in this connection been defined as the intentional relinquishment of a known right (*Livesey v. Omaha Hotel Co., supra*), Macfarland is not here precluded from making the defense, because he was ignorant of the deficiency in the subscriptions. We think that the loose use of language in the adjudicated cases has been due to a consciousness in the minds of the judges that the defense might be lost either by waiver or estoppel, and because it has not, in most cases, been necessary to distinguish between them, knowledge of all the facts and circumstances creating an estoppel concurring. There can be no doubt that a subscriber may waive the defense. So, too, when there has been no waiver because of ignorance of material facts, he may so conduct himself as to raise an estoppel. In *Musgrave v. Morrison*, 54 Md. 161, it was held that active participation in proceeding with the work of the corporation charged a subscriber, irrespective of his knowledge that the whole capital had not been subscribed. An instructive case is that of *President v. McConaby*, 16 S. & R. [Pa.] 140. The case antedates any we have seen cited directly on the subject, but the principle involved is the same. There a subscriber defended on the ground that the charter had been obtained by means of fictitious subscriptions for part of the stock. The court held that so far as the fraud was upon the state, the state alone could be heard to complain of it, and that so far as it affected the defendant, he could not be heard to complain if he had acted upon the charter, advertised the election of officers, and assisted, as the court says, "in putting the charter in motion;" that if he so acted, he was bound, although ignorant of the fictitious character of the subscriptions. We find nothing really opposed

to this view. While many cases speak of knowledge as an essential, they are cases where there was knowledge, or where the conduct of the subscriber had not been such as to create an estoppel *in pais*. While Macfarland undoubtedly acted in good faith, and without any intention of deceiving others, and while it is not shown that any particular person was induced to alter his position because of Macfarland's acts, still it is evident that every subscription paid, every obligation assumed by the corporation, every hour's work upon the building, was the resultant of the combined acts of defendant and other officers, who by proceeding held out the corporation as fully organized, with a lawfully available capital. The fact that others may have been induced to act is sufficient. (*Masonic Temple Ass'n v. Channell*, 43 Minn. 353.) It would be manifestly impossible in most cases to show that any particular subscriber had paid, or that any particular person had contracted with the association on the faith of the defendant's acts alone, and yet it is clear that his acts combined with others' influenced every dealing with the corporation. Although he was ignorant of the deficiency in subscriptions, he was ignorant when he might have known, and must bear the consequences. Any other rule would be highly inequitable.

Other questions argued are either rendered immaterial by the conclusion reached on this, or are so distinctly corollary thereto that they do not require separate notice.

Submitted with the case on its merits is a motion to strike from the record certain portions of the bill of exceptions. This motion is aimed at matter inserted by the trial judge in pursuance of an order made by this court remanding the record for the trial judge's action according to the facts. (*Macfarland v. West Side Improvement Ass'n*, 47 Neb. 661.) The proceedings seem to have been in accordance with the opinion and direction of this court as there expressed, and the motion is therefore overruled. The judgment of the district court is

AFFIRMED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1898.

PRESENT:

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

THOMAS DOWNS V. JAMES B. KITCHEN.

FILED JANUARY 19, 1898. No. 7758.

Negligence: DANGEROUS BUILDING: LIABILITY OF OWNER. Following *Kitchen v. Carter*, 47 Neb. 776, the judgment of the district court is affirmed.

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

Connell & Ives, for plaintiff in error.

George E. Pritchett and *J. C. Cowin*, *contra.*

PER CURIAM.

The facts in this case are substantially the same as those in *Kitchen v. Carter*, 47 Neb. 776, and upon the authority of that case the judgment of the district court in this is

AFFIRMED.

M. F. LAMASTER, APPELLEE, V. C. C. ELLIOTT AND WILLIAM BARR, APPELLANTS.

FILED JANUARY 19, 1898. No. 7496.

1. **Receivers:** JOINT OWNERS OF PROPERTY: ILL WILL. That there exists a feeling of ill will or hostility or a disagreement between joint owners of property is not sufficient to warrant a court in appointing a receiver to take charge of the property unless such fact prevents a beneficial use of the property or practically operates an exclusion of one of the joint owners from the benefit and use of the property.

2. ——: ——. *Held*, That the facts as established by the findings of the referee herein and the further finding of the court did not disclose such a condition of affairs in regard to property owned jointly by two of the parties hereto as to warrant the decree of the court appointing a receiver thereof.

3. **Costs:** MOTION TO RETAX: REVIEW. If the question of the liability of the respective parties to an action to pay costs therein is one which was directly considered and determined by the trial court, no motion in that court to retax costs is necessary to entitle a party to have a judgment against him for the costs or any part thereof reviewed in this court.

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

Morning & Berge, for appellants.

Mockett & Polk, contra.

HARRISON, C. J.

It appears that during the year 1894 M. F. Lamaster was the owner of lot 6, block 58, in the city of Lincoln, and William Barr owned the adjoining lot 5. On these lots stood a brick building, one-half on each lot, of which Barr owned the portion erected on his lot and Lamaster the part of the building which was on his lot. The building had two large rooms on the ground floor, one on each lot. There was a common stairway running up immediately over the division line to floors above, of which there were two, each divided into a number of rooms, and each

floor having a common hall in the center. The building was heated with steam, and in the basement of the building, placed immediately over the dividing line of the lots, was the furnace and boiler of the heating apparatus, the whole of such apparatus being owned jointly or in common by the owners of the building. It was put into the building by the parties under an agreement that each should pay one-half the expense in all respects of its operation at all times and to be equally interested and represented in such operation. One C. C. Elliott claims that during the year 1894, and prior to the time that artificial heat was required for that year, he entered into a contract with the owners of the building by which he was to attend to the heating apparatus during the years 1894 and 1895. On November 22, 1894, Lamaster commenced this action, alleging in his petition that Elliott had not been employed by him, nor had he joined in hiring Elliott nor consented that he be employed, but that Barr had employed Elliott against the wishes and contrary to his, Lamaster's, protests; he also pleaded that Elliott was incompetent and had failed to properly attend to the heating apparatus, by reason of which the rooms belonging to Lamaster had not been heated properly, but had been cold and uncomfortable and rendered almost untenable; that Elliott was insolvent. It was also pleaded that Lamaster and Barr were unable to agree on a person who should be employed to attend to the heating apparatus. It was of the prayer of the petition that a receiver be appointed to take charge and employ a competent person to operate the heating apparatus until such time as the differences between the owners should be adjusted; also, that Elliott be restrained from operating the heating apparatus and that Barr be restrained from further retaining Elliott in his employ for such purpose, and, also, from the employment of any other person for the work except as might be ordered or directed by the court. A temporary restraining order was granted and issued. Separate answers were filed for ap-

pellants, in each of which the allegations of appellee's petition were denied and it was alleged that the hiring of Elliott was participated in and was the act of both Barr and Lamaster; that he was a competent man for the work and was doing it properly, and that the trouble was occasioned by the fact that Elliott had rented rooms of Barr in the building to be heated and was occupying the same with his family. For the appellants there was filed a motion that the restraining order be dissolved. After issues were joined the court appointed Hon. M. B. Reese referee to hear the testimony and to make and report findings of fact and conclusions of law to the court. By stipulation of parties the testimony was presented in the form of affidavits. After a full hearing the referee reported as follows:

"First—That the said Barr and Lamaster are each the separate and several owners of lots 5 and 6, and of their buildings thereon, but which buildings constitute one block, known as the Barr-Lamaster Block, the said William Barr being the owner of lot 5 and the plaintiff being the owner of lot 6, in block 58, in the city of Lincoln.

"Second—That each building is furnished and provided with a system of pipes and radiators, used for the purpose of supplying said buildings and the different rooms thereof with heat by steam, but that the steam for both is supplied from one boiler.

"Third—That the furnace and boiler provided and used for generating steam are owned by the said plaintiff and the said William Barr in common, and that each of them have the right to the use of the same; and that the furnace and boiler have been provided for the joint use of both in furnishing steam and heat for said buildings, and that the rights of both in and to said furnace and boiler are equal.

"Fourth—That it is necessary for the accommodation of the owners and tenants of said building that during the winter season of the year some competent person be employed to operate said furnace and boiler.

"Fifth—That the defendant C. C. Elliott is a capable engineer and is competent to operate said furnace and boiler, and has a certificate of qualification issued to him by competent authority of the city of Lincoln.

"Sixth—That the said C. C. Elliott was employed for the season of 1894-5 by William Barr to take charge of the said heating apparatus, and that such employment was with the knowledge and (originally) the consent of plaintiff, and that he has never been discharged by the act of both Barr and Lamaster, and that at the time of the commencement of this suit he was engaged in the discharge of the duties of his employment; that on the 22d day of September, 1894, the notice set out in plaintiff's petition signed by plaintiff was caused to be served upon him by plaintiff.

"Seventh—That sufficient heat has not been furnished the occupants of the Lamaster side of said block at all times, but the proof is unsatisfactory as to the cause of the failure or who was at fault.

"Eighth—That the furnace and boiler are capable of furnishing sufficient heat for the block if they and the radiators are properly managed.

"Ninth—That the said defendant C. C. Elliott has wrongfully excluded plaintiff from exercising the necessary acts of ownership over said furnace and boiler and other portions of his property in the basement of the said building and has prevented him from entering therein and thereto, and that plaintiff should be permitted to have free access to the same.

"Tenth—That there is at present no necessity for the appointment of a receiver.

"CONCLUSIONS AT LAW.

"First—That as to the defendant William Barr this action should be dismissed.

"Second—That as to the defendant C. C. Elliott a perpetual injunction should be awarded restraining and enjoining him from interfering with or preventing plaintiff

from exercising acts of ownership over and having access to his property, including the furnace and boiler and other property in connection therewith or owned by plaintiff, but not to restrain the said Elliott from discharging his said duties as engineer of said building.

"Third—That the costs in this case should be equally divided between the plaintiff and the defendant C. C. Elliott, each one paying one-half.

"To all of which the plaintiff excepts, and to that part awarding an injunction against C. C. Elliott he excepts."

For the appellants a motion was made for confirmation of the report of the referee and judgment in accordance therewith. To the report the appellee made many objections and urged exceptions. The court, on hearing of the motion for confirmation and the exceptions, overruled the exceptions to the fifth and seventh findings of fact and sustained the exception to the tenth and also sustained the exceptions to the first and third conclusions of law and as was stated in the decree, "In all other respects and in the fifth, sixth, and seventh findings of fact, the said referee's report is by the court duly confirmed, as supported by the evidence and the law." It was further stated in the decree: "From the evidence the court finds that between the plaintiff and defendant Barr exists a feeling of ill will and hostility that renders impossible any unity of action in the control and management of their joint property, the heating plant in the Barr-Lamaster Block, located on lots 5 and 6, block 58, in the city of Lincoln, and that for the proper use of said heating plant to warm the separate property of each, said Barr and said Lamaster, a necessity does now exist for the appointment of a receiver over their said joint property, the said heating plant." A receiver was appointed to take charge of the heating apparatus, Elliott was reinstated in his position, the restraining order was vacated, and the costs of the cause, including fees of referee, were adjudged to be paid one-half by Lamaster and one-half by Barr. From the judgment Barr has appealed to this court.

It is urged that the facts established were insufficient to warrant the decree by which a receiver was appointed and placed in charge of the property. By reverting to the findings of fact reported by the referee, and to which the court overruled exceptions, it appears that Elliott was competent and qualified to perform the work for the doing of which he had been employed; that his employment was by the joint owners of the property; that though sufficient heat had not at all times been furnished in the rooms of the Lamaster portion of the building, the proof did not satisfactorily disclose the cause or who was in fault. Courts are very slow to interfere between joint owners of property, joint tenants, or tenants in common. It has been said that where the facts constitute a clear case of the use and enjoyment of the property by one to the entire exclusion of another a receiver will be appointed, not, however, when the appointment will subject the co-tenant to inconvenience and expense, without corresponding benefit to the complainant. (*Low v. Holmes*, 17 N. J. Eq. 148; Beach, Receivers [2d ed.] sec. 494; 20 Am. & Eng. Ency. Law 52-53.) The court in this case made a finding additional to the ones made and reported by the referee to the effect that there existed a feeling of ill will and hostility between the joint owners of the property so intense that it prevented any unity of action in the control and management of the property. Conceding this conclusion to be a sound one, without discussing it or the evidence on which it was based, it was not sufficient to warrant the court in placing a receiver in control of the property unless such fact operated the exclusion from the property or its use and enjoyment of one of the joint owners, and unless this feeling was the cause of the failure of Lamaster to enjoy the use and benefit of the heating apparatus,—and we must here remember that there was the finding of fact approved by the court that there was no satisfactory proof of the cause of the failure of the apparatus to properly heat all the building and that the proof did not disclose who was at

fault. Clearly there was no such condition of facts as warranted a court in interfering with the rights of the joint owner to wrest the property from the possession of both and place it in the hands of a receiver when the finding of facts showed that it could not be said that there was any fault of the joint owner, a cause of the complainant's trouble. The decree herein was unsupported by the facts as established by the findings and must be reversed.

In the district court there was a motion by Barr and Elliott that judgment be rendered on the findings of fact and conclusions of law, from which it may be said that said parties had nothing to urge against such a judgment being entered; and without an examination of any of the questions which might be presented relative to all portions of such a decree being warranted by the facts, no objections having been made other than have been settled herein, a decree will be entered in accordance with the conclusions announced in the report of the referee. It is, however, urged that relative to the costs the decree must remain as announced by the district court, inasmuch as the appellants presented in such court no motion to retax the costs. In the case of *Burton v. State*, 34 Neb. 125, in regard to a similar contention, it was stated: "It is urged by the county attorney in his brief that a motion to retax costs was necessary in order to give plaintiff standing in this court. We cannot agree with this view. Ordinarily the taxing of costs is a clerical act performed by the clerk, and the presumption is that the action of the clerk has not been called to the attention of the court; hence this court will not, as a rule, review an order taxing costs until a motion to retax has been made and the trial court given an opportunity to correct the errors, if any have been made. In this case the court has considered the question of the liability of plaintiff in error and deliberately determined that he is liable for the costs of prosecution. Here the reason of the rule is wanting. It would be an idle and useless

form to ask the court to correct on the theory of a mistake or inadvertence of the clerk that which the record shows to have been the deliberate act of the court." The matter of the costs in the case at bar is within the doctrine announced in that case, from which it follows that no motion to retax was necessary. (See, also, *Hartford Fire Ins. Co. v. Corey*, 53 Neb. 209.)

Judgment of the district court reversed and judgment ordered as hereinbefore stated.

JUDGMENT ACCORDINGLY.

JAMES CARRALL ET AL. V. STATE OF NEBRASKA.

FILED JANUARY 19, 1898. No. 9574.

1. **Summoning Jurors.** The provisions of section 664 of the Code of Civil Procedure in regard to summoning jurors, "Whenever at any general or special term or at any period of a term for any cause there is no panel of * * * petit jurors," are broad enough to cover and include any and all possible reasons for which at any term of a court there may be no panel of jurors present for the trials of causes.

2. ——: CRIMINAL CASES. The provisions of the section to which reference has just been made are applicable in relation to jurors for trials of criminal causes. (Criminal Code, sec. 466.)

3. ——: ——. During the pendency of a term of district court, for which no panel of jurors had been provided for service by the proper officers, a crime was committed and an information filed by the county attorney charging parties with the commission of the crime and the accused were brought before the court for trial. *Held*, To be a condition of affairs within the import of section 664 of the Code of Civil Procedure, and the action of the trial court in ordering jurors summoned as prescribed in said section was proper.

4. **Names.** The names "Mrs. Fred Steinburg" and "Mrs. Fred Steenburg," the first indorsed on an information as the name of a witness, and the second appearing in testimony as her name, are *idem sonans*.

5. **Witnesses:** NAMES: INFORMATION. It is allowable, though probably not the best practice, to indorse the name of a married woman on an information as a prospective witness in a criminal case by

the use of her husband's surname and prefixed thereto the appellative abbreviation "Mrs." and the Christian name or names of her husband or the initial letter or letters thereof.

6. ———: ———: ———. The law does not recognize other than the one or first Christian name, but where a person as a matter of fact has a second or middle Christian name and is commonly known or identified by the use of such middle Christian designation, if his wife's purposed use as a witness in a criminal cause is evidenced by an indorsement of her husband's surname and the abbreviation "Mrs.," together with the middle Christian appellation of the husband, it is sufficient where it does not appear or there is no complaint that the accused person was misled thereby or lacked information of what person was to be produced as a witness.

7. ———: ———: ———. The main purpose of the requirement that the names of witnesses be indorsed on the information in a criminal action is to convey to the accused information or knowledge of the identity of witnesses to be produced on behalf of the state at the trial.

8. **Harmless Error:** EVIDENCE. The admission of immaterial testimony is not sufficient ground for the reversal of a judgment where not prejudicial to the rights of the complaining party.

9. **Instructions:** REASONABLE DOUBT. A portion of an instruction, worded as follows: "You are not at liberty to disbelieve as jurors if you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered,"—*held* not objectionable and erroneous when read and construed with the further portions of the same instruction and the other paragraphs of the charge in that the first sentence did not read, "You are not at liberty to disbelieve as jurors if from the evidence you believe as men," instead of as it did with the omission of the reference to the evidence.

10. **Burglary:** INSTRUCTION: DEFINITION. The statute defining burglary states, among other things, "If any person shall * * * willfully, maliciously and forcibly break and enter," etc. If in an instruction, in which it is purposed to embody a statement of the elements which constitute the crime and necessary to be proved, the word "maliciously" in reference to the breaking and entering is omitted, it is sufficient if other words, or another word, identical in meaning or expressing the same meaning be used.

11. **Instructions:** REPETITIONS. It is not error to refuse to give instructions if their substance is embodied and given in the charge to the jury.

12. ———: REVIEW. The actions of the trial court in refusing to give certain requested instructions examined and approved.

13. **Burglary:** EVIDENCE. The evidence *held* sufficient to sustain the verdict.

ERROR to the district court for York county. Tried below before SEDGWICK, J. *Affirmed.*

M. S. Gray and *F. C. Power*, for plaintiffs in error.

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

HARRISON, C. J.

In an information filed in the district court of York county the plaintiffs in error were charged with the commission of the crimes of burglary and larceny, and on trial were convicted and sentenced to terms of imprisonment in the penitentiary. To obtain a reversal of the judgment, error proceedings have been prosecuted to this court in their behalf.

The crime of which the plaintiffs in error were convicted was alleged to have been committed in the nighttime of the 22d day of May, 1897. The term of court during the continuance of which they were tried had its commencement on April 19, 1897. The information against these parties was filed June 28, 1897. No regular panel of jurors had been drawn or summoned for service during the term of court. The time of the term was apparently, probably according to prior expectation or arrangement, being devoted to the disposition of causes in which the services of jurors were not required. When the information was presented in this cause of the commission of the crime subsequent to the time the court convened it became necessary, if the accused were to be tried during the existing term of court, that a jury be provided for the trial. To meet this exigency the court by order directed the sheriff to summon jurors, the number being fixed at twenty-four. The sheriff complied with the order and the attendance of the required jurors was procured. To a trial by this special panel the ac-

cused interposed objections, which were overruled, and they were placed on trial before a jury selected from the jurors summoned in the manner we have indicated.

As one of the assigned errors it is urged that the jurors were not procured for service in a method provided by law; that this branch of the proceedings of the trial of the accused was without warrant of law, was irregular; hence the judgment should be reversed. It is not claimed that the jury was unfair, or that any degree of prejudice resulted to the rights of the parties through the selection of the jurors in the way stated; but whether that there is no such complaint might be to any extent governing in the question we need not in this cause and do not determine. It may be solved on another ground. In section 466 of our Criminal Code it is provided: "In all [criminal] cases, except as may be otherwise expressly provided, the jury summoned and impaneled according to the provisions of the laws in force relating to the summoning and impaneling of juries in other cases shall try the accused." And in section 664 of the Code of Civil Procedure: "Whenever the proper officers fail to summon a grand or petit jury, or when all the persons summoned as grand or petit jurors do not appear before the district courts, or whenever at any general or special term or at any period of a term for any cause there is no panel of grand or petit jurors, or the panel is not complete, said court may order the sheriff, deputy sheriff, or coroner to summon without delay good and lawful men. having the qualifications of jurors, and each person summoned shall forthwith appear before the court, and if competent, shall serve on the grand jury or petit jury as the case may be, unless such person may be excused from serving or lawfully challenged." The provisions of this section are broad enough to cover and include any and all possible reasons for which at any term of court there may be no panel of jurors present for the trial of causes, and the contingencies of the present case are entirely within its scope. The term was convened and progressed

without a panel of jurors, the acts which constituted the alleged crime were committed and the information of them presented to the court after the commencement of its term, and the cause brought before the court was one the disposition of which demanded a jury. There being none, the court could exercise the power granted it by the section we have quoted. (*People v. Coughlin*, 11 Western Rep. [Mich.] 556, 35 N. W. Rep. 72; *Bennett v. Tintic Iron Co.*, 34 Pac. Rep. [Utah] 61; *Smith v. Bates*, 28 S. W. Rep. [Tex.] 64; *Western Union Telegraph Co. v. Everheart*, 32 S. W. Rep. [Tex.] 90; *St. Clair v. United States*, 14 Sup. Ct. Rep. 1002; *Smith v. State*, 21 Tex. App. 277; *Ohio & M. R. Co. v. Trapp*, 30 N. E. Rep. [Ind.] 812; *State v. Page*, 12 Neb. 386.) The argument that this construction of this section of the statute clothes the district courts with great or too much power might have force or effect if addressed to the legislature, the lawmakers; but where the language is as direct and unambiguous in its import as is employed in this section, courts may not construe it and give it a different meaning to avoid a possible difficulty, or abuse of its grant or power. Moreover, it is not to be presumed that the district courts, or the judges thereof, will abuse any of the powers conferred on them, but rather that they will use them as intended by the legislators.

It is of the assignments that the trial court erred in allowing one of the witnesses called for the state to testify, for the reason that her name was not indorsed on the information. The name of this witness, as it appeared on the back of the information, was as follows: "Mrs. Fred Steinburg." The court reporter has given it in his notes "Mrs. Fred Steenburg." Whether this is a mistake in the spelling of the name by the county attorney in the indorsement on the information or of the reporter we cannot say. It is not disclosed by the record. But, however this may be, we think the two words may be fairly said to be *idem sonans*. (See 16 Am. & Eng. Ency. Law 112, and note.) As an exposition of the doc-

trine of *idem sonans* in regard to names in a warrant we will quote from the decision in the case of *People v. Gosch*, 46 N. W. Rep. [Mich.] 101, as follows: "It is also claimed that the warrant was void for the reason that it did not properly name the respondents. In the warrant the first name of Gosch was spelled 'Amel' instead of 'Amiel,' and the name of 'Brearly' was spelled therein 'Brailey.' This claim is scarcely worthy of notice. The names are *idem sonans*." The name of this witness, as appears from the record, is "Alena Mary Steenburg," and her husband's name "Paul Fred Steenburg." The statute requires the "names of witnesses" to be indorsed on the information. (Criminal Code, sec. 579.) It is argued that "Mrs. Fred Steinburg" was not the name of the witness, and this being the name written on the instrument was insufficient,—did not fulfill the requirements of the law. It must be said that in a strict sense or meaning this was not the name of the witness. A married woman takes her husband's surname, and by a social custom which so largely prevails that it may be called a general one she is designated by the use of the Christian name or names, if he has more than one, of the husband, or the initial letter or letters of such Christian name or names of the husband, together with the appellative abbreviation "Mrs." prefixed to the surname, and all married women, there may be possibly a few exceptions, are better known by such name than their own Christian name or names used with their husband's surname, and their identification would be more perfect and complete by the use of the former method than the latter. That knowledge of the identity of the witnesses to be produced against him be conveyed to the accused person is the main object to be accomplished by the indorsement of the names of witnesses on the information. This is the aim and purpose of the law by which such act is required. (*Stevens v. State*, 19 Neb. 647; *Parks v. State*, 20 Neb. 515; *State v. Everett*, 45 Pac. Rep. [Wash.] 150.) To comply with the strict letter of the

law the names of witnesses should be indorsed on the information, and it would no doubt be better practice for county attorneys to follow the law as strictly as possible; but we think it allowable to give notice that a married woman will be called as a witness for the state, that her name be indorsed on the information as was the one in the case at bar. It is further urged in this connection that the name of the husband of this witness was "Paul Fred Steenburg" and that the law disregards all Christian names except the first; hence in law the husband's name was Paul Steenburg, and indorsing his surname with the prefixes "Mrs. Fred" was not a compliance with the statutory requirement, because it was not, strictly speaking, her name, nor was "Fred" in law recognized as of her husband's name. The evidence disclosed that the husband was known as "Fred Steenburg," and the wife, in her testimony, when being interrogated directly on this point, stated that her name was "Mrs. Fred Steenburg," from which it appears that the indorsement on the information was of her a sufficient identification, one which met the purpose of the statute, notwithstanding the law does not recognize a second or other than first Christian name. This appellation "Fred" was that by which the husband was known and identified, and it indicated the wife when applied to her in the manner of its indorsement with the other name and term on the information. Had it appeared that the accused were misled and thereby lacked information of one of the witnesses to be produced at the trial by the state, or that any prejudice had in fact resulted to their rights by reason of the form of this indorsement of the witness, a different question would be presented; but this is not even claimed in argument.

It is argued that there was error committed in the admission of the testimony of E. J. Wightman, called as a witness by the state. This witness was cashier of the First National Bank at York, Nebraska, and testified in regard to the manner in which silver moneys were

placed in rolls or packages in said bank and in what amounts, etc. It further appeared in evidence that the money alleged to have been stolen by the accused in the course of the charged burglary consisted in the main of silver and had been sent by the First National Bank of York to the bank which suffered the loss, and in rolls or packages as described by this witness. The evidence of this witness on the subject indicated, if in any sense improper, was but immaterial, and we do not believe it can have been in any degree prejudicial to the accused; hence it furnishes no ground for a reversal of the judgment.

It is urged that the court erred in giving instruction numbered 16 of its own motion. This was an instruction relative to a reasonable doubt. The portion of it to which objection is urged reads as follows: "You are not at liberty to disbelieve as jurors if you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered." A similar instruction, substantially the same as this, was approved in *Barney v. State*, 49 Neb. 515; *Willis v. State*, 43 Neb. 102. (See also *Bartley v. State*, 53 Neb. 310.) In some of the instructions approved in the cases cited there was a variation in the wording from the one in the case at bar and in some the words "if from the evidence" appeared in the one sentence as follows: "You are not at liberty to disbelieve as jurors if from the evidence you believe as men." In the case at bar they were not used, but in other portions of the instructions that all findings or beliefs of the jurors must be from the evidence was strongly stated, and must, we think, have been so impressed on the minds of the jurors that the omission of the words to which we have referred in the particular connection stated could not have misled the jury or worked any prejudice to the rights of the accused. The practical effect of the instruction on the minds of the jurors, when considered in connection with other instructions on the same and other subjects, must have been

as if these words had been inserted in the portion of the instruction where it is urged they should have been.

In the section of the statute defining burglary it is stated: "If any person shall, in the night season, willfully, maliciously, and forcibly break and enter." Instruction number 4, given in the case at bar, was a statement of the material elements of the crime charged, of which proof was necessary before a conviction could result, and it omitted the word "maliciously" in reference to the breaking and entering. In the instruction it was said of the breaking and entering, that they must be "willfully, feloniously, and forcibly." The words used fully expressed and included the meaning of the word "maliciously," and this being true, the instruction was sufficient. This is within the doctrine approved by this court relative to a statement in a charge of a crime in an indictment, and it is equally applicable to a statement in an instruction descriptive of a crime. (*Whitman v. State*, 17 Neb. 224; *Hodgkins v. State*, 36 Neb. 160; *Wagner v. State*, 43 Neb. 1.) And what was further stated in the opinion in the case last cited is equally applicable here, viz.: "This is especially true in view of section 412 of the Criminal Code, providing that no indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stayed, arrested, or in any manner affected for any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." It follows that the objection to this instruction is unavailing.

The refusal of the court to give an instruction numbered 3, requested by counsel for the accused, is assigned for error. While the precise words of one portion of this instruction were not used in the charge to the jury, its substance and the idea to be conveyed by it were given in effect by paragraphs numbered 9, 10, and 11 thereof.

Of the argument in regard to the refusal to give the requested instructions 7 and 9, it suffices to say that the principles embodied therein, or the essential elements of

the instructions, were included in portions of the charge of the court.

Instruction numbered 8, of the refusal to give which error is urged, was defective, in that it wholly ignored the proposition that the jury must be governed by the evidence, and its refusal was not an error.

In view of the verdict returned there was no prejudicial error in refusing to give the requested instruction numbered 9½.

Instruction numbered 13, requested for the accused, was to the effect that the evidence was insufficient to warrant a verdict of guilty of larceny, and that numbered 14 was, to the same effect, relative to the charge of burglary, and they were properly refused. It is insisted that the evidence was insufficient to sustain the verdict, which must be viewed as one of guilty of the charge of burglary. The evidence was in its nature circumstantial and, when carefully analyzed, is sufficient and satisfactory as to every element charged, and ample to support the verdict. It follows that the judgment of the district court will be

AFFIRMED.

JAMES H. PERKINS ET AL. V. CHARLES TILTON.

FILED JANUARY 19, 1898. No. 7742.

1. **Rulings on Evidence:** REVIEW: OFFER OF PROOF. An offer to prove, to lay the foundation for the proper presentment of error in the exclusion of proposed testimony as answer to a question to which an objection is sustained, must be of matter which would have been admitted as relevant, responsive, and pertinent in answer to the rejected interrogatory.

2. **Exchange of Realty:** JOINDER OF PARTIES: REVIEW. Error assigned of the giving of an instruction examined and the action of the trial court approved.

3. ———: ———. *Held*, That the plaintiffs in error were properly joined as defendants in the action.

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

W. S. Morlan, for plaintiffs in error.

J. W. Cole, contra.

HARRISON, C. J.

On October 5, 1891, the defendant in error was the owner of a tract of land in the state of Illinois, and James H. Perkins, of plaintiffs in error, was the owner of the northwest quarter of a section of land situate in Hitchcock county, this state, and his wife, Ann Perkins, owned five quarter-sections of adjoining land. The whole tract of six quarter-sections constituted one farm. On the date stated a contract was entered into between the parties for the exchange of the two tracts of land. The negotiations for the trade and the contract with which they closed were between James H. Perkins and the defendant in error, Ann Perkins not then actively or personally appearing in the transaction or in any manner participating except as she may have been represented by her husband, and we must conclude that she was so represented, for she claimed, and in this suit claims, the benefits and rights conferred by the transaction. After the consummation of the exchange the defendant in error instituted this action to recover the value of certain improvements which he asserted plaintiffs in error wrongfully removed from the farm in Nebraska; an amount of taxes due on said farm which he alleges plaintiffs in error agreed to, but failed to pay; also a sum which he claimed his due by reason of a shortage in the number of acres of land contracted to be conveyed and the number of acres actually transferred to him. The contract of the parties appears to have been evidenced by a written instrument, but this had been lost, destroyed, or could not be produced. A trial of the issues resulted favorably to the defendant in error,

and the cause is presented here for review in error proceeding on behalf of James H. Perkins and Ann Perkins.

There are but three assignments of error noticed in argument, the first of which relates to the trial court's action in excluding testimony. During the examination of James H. Perkins he was interrogated at some length in relation to a trip which he had made with defendant in error from Nebraska to the land in Illinois and what he did and saw while in Illinois, and in this connection was further questioned, with the results as follows:

Q. What, if any, acquaintance did you have with this man before you went there?

A. Not any.

Q. What acquaintance had you with that part of the country?

A. None at all.

Q. When you got there what kind of weather was it?

A. Dry.

Q. What, if any, did Mr. Tilton represent to you as to quality and value of the land?

To the question last quoted an objection was interposed, which was sustained. There was then for the plaintiffs in error an offer to prove, which of type-written matter occupies some two and one-half pages of the paper ordinarily used, and which, in substance, embodied an offer to prove, that of date December 17, 1891, and between defendant in error and Ann Perkins, there was a modification, verbally, of the contract for the exchange of the land; also certain statements then made by defendant in error to Ann Perkins in regard especially to the value of the land in Illinois which she claims were false, but were guarantied by him to be true; and further, of certain representations in relation to the quality and value of said land made to James H. Perkins and by him conveyed to Ann Perkins which were false; and further, that the whole of these matters were relied upon by Ann Perkins and she was thereby induced to make

the exchange of lands. It was of the evidence that the contract provided that James H. Perkins should go to Illinois and see the land there, and if after an examination he was satisfied with it, the trade should be concluded. Whether this was of the contract or not, Perkins did, almost immediately after it was made, October 5, 1891, go in company with defendant in error to the land in Illinois and examined it, returned therefrom to his home, and the trade was afterward completed. This examination was for himself and his wife, the parties concerned. With this fact in view and an application of the rules of law which would govern and settle the question of the relative positions and rights of the parties, there was little, if any, of the offer to prove which could have been admitted in answer to the question propounded as either responsive or in any degree material or relevant. This being true, the offer of proof was as if none had been made and the record of the action of the court in not allowing the question to be answered presents no noticeable error. (*Dunphy v. Bartenbach*, 40 Neb. 143.)

Another assignment of error which is urged in argument is in relation to the third instruction requested for defendant in error and given. The record is not in a very satisfactory condition wherein it refers to the instructions. Under the heading of "Instructions asked by plaintiff" (defendant in error) there are three paragraphs numbered, presumably, by the person who prepared the copy of the record for this court as follows: 1st, 3rd, 5th. These designations were evidently made with the typewriter. The one designated "3rd" has also with a lead pencil been marked "2," and the one numbered "5th" has been marked with lead pencil "3." We are not certain as to which marking we should accept as the true one, but without stopping to decide this matter, accepting the conclusion which we must that this was a contract for the benefit of plaintiffs in error jointly and by which they were jointly bound to defendant in

error, it is not material which of the numbered instructions we consider as the "3rd" and its giving assigned for error, for, in this view of the contract and the relations in which by its terms the parties were placed, either paragraph was properly given.

What we have just said in regard to the contract also disposes of the third branch of the argument, which is a contention that the plaintiffs in error were not jointly or equally bound by the contract, but only to the extent it involved the land belonging to each or any matters or things pertaining thereto, and that they were improperly joined in this action. The land of the plaintiffs in error was all contracted to be exchanged as one piece for the benefit of the two parties and on the same terms as to both and such terms equally binding on each and both. It follows that the judgment of the district court will be

AFFIRMED.

CHARLES E. PERKINS, TRUSTEE, APPELLANT, V. EDWARD POTTS, APPELLEE.

FILED JANUARY 19, 1898. No. 9235.

Landlord and Tenant: ATTORNMENT TO STRANGER: ADVERSE POSSESSION. The conclusions and decision announced on the former hearing in this cause (52 Neb. 110) approved and followed.

REHEARING of case reported in 52 Neb. 110. *Reaffirmed.*

Warren Pratt and *T. M. Stuart*, for appellant.

Dryden & Main, contra.

HARRISON, C. J.

This cause was appealed to this court from an adjudication in the district court of Buffalo county of the

matters in controversy and submitted under the provisions of rule 2 (44 Neb. ix), and the judgment of the district court was affirmed. A motion for a rehearing was filed and sustained and the case has been again presented and submitted. The opinion of the court rendered on the former hearing was written by Commissioner RAGAN and is reported in 52 Neb., 110.

It appears that the appellant was, on November 1, 1887, the owner of a tract of land in Buffalo county, this state, and on said date, by written contract with one Kilgore, agreed to sell to Kilgore the tract of land. The land was to be paid for at a date fixed in the contract of sale at ten years subsequent to the date of the contract, and it was further provided that there should be annual payments of interest on the principal sum, the consideration for the sale, from the inception of the agreement to its fixed termination. It was further of the contract that the vendee should pay the taxes which might be assessed against the land. The payments provided for were to be made according to the terms of the contract; if not, a forfeiture of the vendee's rights thereunder was to ensue. There were assignments of the contract by the vendee and assignees until by assignment the appellee claimed to be entitled to the benefit of its provisions. January 30, 1896, one Knox was in actual possession of the land as lessee of the appellee, and on said day an agent of appellant went to the land and induced Knox to accept a lease thereof from the appellant. Knox remained on the land and during the farming season of 1896 raised a crop of grains thereon. After the maturity of at least some of the crops, the appellee took into his possession and removed from the land 120 bushels of oats which had been grown on the land during that season. To recover these the appellant commenced an action of replevin, and also this action in the district court of Buffalo county, stating in the petition in this that he was the owner in fee of the land and in possession thereof, also the owner of the crops grown thereon du-

ing the year 1896, and that appellee had wrongfully entered upon the premises and taken therefrom the grain before mentioned; that it had been replevied and the action of replevin was pending; also that it was threatened by appellee that he would again go upon the premises and take therefrom all crops grown during the year 1896, which threats would be executed unless appellee was restrained; and further that appellee was insolvent. The prayer of the petition was that appellee be perpetually enjoined from entering upon said premises and doing any of the threatened and purposed acts. The district court dismissed the petition. For a more extended statement see the opinion in 52 Neb. 110.

This court in the decision formerly rendered held:

"1. One who takes possession of real estate as the tenant of another cannot hold said real estate adversely to his lessor without first having actually or constructively surrendered the premises to him.

"2. Where a tenant in possession without his landlord's consent attorns to a third party,—the latter not having acquired the interest of the landlord in the real estate either by grant or operation of law,—the possessory rights of the landlord are not thereby affected, as such an attornment is void.

"3. The vendee of an executory contract for the sale of real estate by virtue of such contract entered into possession, made certain improvements upon the premises, and partly performed his contract of purchase. Afterwards the vendee, while in default in the performance of his part of the contract of purchase, leased the premises to a tenant for one year, and put him in possession. The vendor by reason of the default of the vendee, and in pursuance of the provisions of the contract of sale, declared the same forfeited, and demanded possession of the premises from the vendee. The possession was not surrendered, and thereupon the vendor went upon the premises, and induced the tenant, without the vendee's knowledge or consent, to accept a lease from

him (the vendor) for said premises. The vendee forcibly entered and removed part of the crops grown by his tenant, and threatened to enter and remove the remainder, and the vendor applied to the district court for a perpetual injunction to restrain the vendee's entrance upon the premises. Held, that the application was properly denied."

We have carefully re-examined the questions upon the determination of which the appellant's right to institute and successfully maintain this action depends, and are strengthened in the views we before entertained and which were embodied in the opinion heretofore rendered. That the appellant induced Knox, the tenant of appellee in the manner disclosed by the facts herein, to receive a lease of the land he occupied from the appellant, to attorn to him, did not give appellant any greater possession of the premises than he possessed before such act, and did not dispossess the appellee. The possession of the lessee, Knox, remained the possession of his landlord to whom he first attorned, of whom he had received the possession which he had never abandoned or surrendered. Change of possession of lands cannot be so readily and easily effected. Where a tenant disclaims holding under his landlord and attorns to a stranger the attornment is void and does not operate a dispossession of the landlord. (*Blue v. Sayre*, 2 Dana [Ky.] 213; *Rogers v. Boynton*, 57 Ala. 501; *Springs v. Schenck*, 6 S. E. Rep. [N. Car.] 405; Taylor, Landlord & Tenant [7th ed.] sec. 705.) "A tenant cannot repudiate the title of the landlord under whom he originally entered, and claim to hold the premises under another, until he has first surrendered possession to his original landlord. It is not enough that he has abandoned the premises for a time, and afterwards entered under the new title, unless he has given notice of such abandonment to the original landlord." (*Juneman v. Franklin*, 3 S. W. Rep. [Tex.] 562.) As supporting the first portion of the doctrine announced, there is cited: *Rector v. Gibbon*, 4 Sup. Ct. Rep. 606; *Killoren v.*

Murtaugh, 5 Atl. Rep. [N. H.] 769, and note; *Pengra v. Munz*, 29 Fed. Rep. 830. Approving and applying the doctrine announced in *Rector v. Gibbon*, see *Goode v. Gaines*, 12 Sup. Ct. Rep. 839. "A tenant cannot defeat the possession of his landlord by merely going out of the house, taking a lease from another, who claims title thereto, and going back professedly under the new lease." Such action did not end the landlord's possession and give the other party of whom the later lease was accepted possession. (*State v. Howell*, 12 S. E. Rep. [N. Car.] 569.) "Where, under a contract for the sale of land, the vendor executes to the vendee the usual bond for titles, and delivers to him the possession of the premises, even if the latter fail to pay the purchase-money at maturity, he may, nevertheless, retain possession, either by himself or his tenant, until such time as he shall be legally evicted therefrom by the vendor; and the tenant who enters under the vendee cannot, without first surrendering his possession to the latter, attorn to the vendor upon any supposed right of the latter, without the consent of the vendee to rescind the contract of sale." (*Broxton v. Ennis*, 22 S. E. Rep. [Ga.] 945.) The further conclusion of the former opinion follows that a resort to action of injunction was not allowable to determine the conflicting claims of the parties to the possession of the premises.

The counsel for appellant in the brief filed in support of the motion for a rehearing requested that certain other questions be at this time decided, though the court might conclude to adhere to the opinion formerly rendered as to the points therein considered. This we would be pleased to do, but their discussion and determination here would scarcely be proper or pertinent since they are not directly involved, and in a contest between the parties in another form of action they might be involved. The decree of the district court is

REAFFIRMED.