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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY TERM, 1898.

VOLUME LIV.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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In behalf of the people of Nebraska.

THE SUPREME COURT

OF

NEBRASKA.

1898.

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JUDGES,

T. L. NORVAL,
J. J. SULLIVAN.

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ATTORNEY GENERAL,

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CLERK AND REPORTER,

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B. S. RAMSEY.....Plattsmouth.

Third District—

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A. L. FROST.....Lincoln.
E. P. HOLMES.....Lincoln.

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CHARLES T. DICKINSON.....Tekamah.
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W. W. KEYSOR.....Omaha.
CLINTON N. POWELL.....Omaha.
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W. W. SLABAUGH.....Omaha.

Fifth District—

EDWARD BATES.....York.
S. H. SEDGWICK.....York.

Sixth District—

J. A. GRIMISON.....Schuyler
C. HOLLENBECK.....Fremont

Seventh District—

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Tenth District—

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

Fourteenth District—
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Fifteenth District—
M. P. KINKAID.....O'Neill.
W. H. WESTOVER.....Rushville.

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SUPREME COURT COMMISSIONERS.

(Laws 1893, chapter 16, page 150.)

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

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

SEC. 3. The said commissioners shall hold office for the period of three years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of the supreme court, payable at the same time and in the same manner as salaries of the judges of the supreme court are paid. Before entering upon the discharge of their duties they shall each take the oath provided for in section one (1) of article fourteen (14) of the constitution of this state. All vacancies in this commission shall be filled in like manner as the original appointment. *Provided*, That upon the expiration of the terms of said commissioners as hereinbefore provided, the said supreme court shall appoint three persons having the same qualifications as required of those first appointed as commissioners of the supreme court for a further period of three years from and after the expiration of the term first herein provided, whose duties and salaries shall be the same as those of the commissioners originally appointed. (Amended, Laws 1895, chapter 30, page 155.)

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

JOHN R. SMITH V. HAINES MEYERS.

FILED FEBRUARY 17, 1898. No. 7299.

1. **Pleading:** MOTION TO STRIKE. When a motion to strike matter from a pleading cannot properly be sustained as made, it is not error to overrule it altogether, although a narrower motion might have been well taken.

2. ——: ——: ANSWER: REPLY. A defendant who by answer pleaded new matter, which the court refused to strike out as immaterial, cannot be heard to complain that the court erred in refusing to strike from the reply allegations traversing those of the answer.

3. ——: IMMATERIAL ISSUES: EVIDENCE. A party who has himself tendered an immaterial issue, which the court has refused to eliminate from the pleadings on motion of the other party, cannot be heard to object to evidence relating to that issue on the ground that it is immaterial.

4. **Criminal Conversation:** ACTION: COMPROMISE. There exist in actions for criminal conversation the same rights to compromise and the same privilege with regard to offers to compromise as in other actions.

5. **Married Women:** WITNESSES: PERJURY. It is not the law that a married woman, testifying in the presence of her husband, is not subject to the penalties of perjury, because conclusively presumed to act under his compulsion.

6. **Criminal Conversation.** *Smith v. Meyers*, 52 Neb. 70, reaffirmed.

REHEARING of case reported in 52 Neb. 70. *Reaffirmed.*

Isham Reavis and *C. Gillespie*, for plaintiff in error.

Francis Martin, contra.

IRVINE, C.

This was an action for criminal conversation, resulting in the district court in a judgment for the plaintiff, which was by this court affirmed. (*Smith v. Meyers*, 52 Neb. 70.) A rehearing was granted, and the questions involved have been re-examined.

Perhaps the most vigorous attack is made upon the judgment on the ground that the court erred in overruling defendant's motion to strike out certain portions of the reply. This assignment of error was disposed of in the former opinion very briefly, on the principle that the defendant, by allegations in his answer, had invited the pleading in the reply of the matter at which the motion was aimed. After re-examining the record in the light of the argument on the rehearing, we are entirely satisfied with the conclusion expressed in the former opinion, but deem it best at this time to more particularly state the manner in which the question is presented. The answer contained, in its first paragraph, a denial of all averments in the petition except that of the marriage relation existing between the plaintiff and the person with whom the illicit relations were charged to have been had. In the second paragraph the defendant pleaded that the plaintiff was still living with his wife,

and that he had not therefore been deprived of her society. In the third paragraph it was alleged that "this action of plaintiff is a mere scheme of blackmail to extort money from this defendant upon a false and wicked charge of violating the bed of plaintiff, and is entirely destitute of any other merit; that said plaintiff has demanded money from the defendant as compensation for such pretended wrong, both before and since the commencement of this action, and has offered to sign a paper, and have his wife do likewise, stating the facts set forth in his petition, constituting his pretended cause of action, were false." The plaintiff moved to strike out the second and third paragraphs of the answer, and the court overruled the motion. The plaintiff then replied, admitting that he was living with his wife, and averring that upon the discovery that she had been debauched he left her, but was persuaded to return from consideration of his children; that the action was not a scheme of blackmail, but an honest appeal to the courts; that plaintiff caused certain propositions to be made to the defendant looking to a settlement or compromise, and to avoid the scandal of a public trial; that when plaintiff first learned of the wrong done him, his wife informed him that the illicit intercourse had been accomplished by force, and thereupon plaintiff had consulted the county attorney and requested him to prosecute the defendant for rape, but that officer advised him that it was not likely that such a charge could be substantiated by the necessary evidence; that then plaintiff concluded that if he could obtain sufficient money to take him and his family away from the scene of the offense it would be better to do so, and with that object in view he solicited defendant to furnish him sufficient money to effect that purpose. There were other averments of a similar nature. The motion, to the overruling of which exception was taken, asked that all this reply, except the admission that plaintiff was living with his wife, be stricken out. It may be conceded that the fact that the plaintiff was still living

with his wife was properly pleaded in mitigation of damages, and still further, that the force of this fact was not met or lessened by pleading any particular motive which may have induced the plaintiff to return to her, although the latter contention ill comports with the other, vigorously made by the defendant, that by returning to her plaintiff had condoned the offense, or evidenced his connivance therein, and therefore could not recover. Nevertheless, admitting for this matter all the force that defendant now claims for it, and conceding that the pleading thereof in the answer was correct, and its confession and avoidance in the reply was immaterial, the motion was not only to strike out the matter in reply pleaded in avoidance of the continued cohabitation, but it was directed to all the new matter, including a specific denial that the action was merely a scheme of blackmail. On this point the defendant should have confined himself to his denial of the seduction, or, at the farthest, to a distinct plea of connivance of the plaintiff in the commission of the offense. When he went further than this and undertook to justify by pleading that the plaintiff had proceeded from bad motives, the latter had only one of two courses to pursue—to strike at that portion of the answer as irrelevant, or to meet the issue tendered. He did strike at the averment by motion, and the court, by overruling his motion to strike it out, held that it tendered a material issue. Plaintiff was then compelled to meet it by reply, or else confess matter which the court had determined to be material towards constituting a defense. It would be a strange condition of the law which would deny to a party the right to have an immaterial issue eliminated and at the same time forbid his controverting the facts so remaining in the pleadings against his protest. To reverse a judgment because a party had traversed matter which the court, even erroneously, had held to be material, would subject him at all times to the certainty of an adverse judgment if his opponent were only shrewd enough to plead what was im-

material and to avoid material issues. A portion, at least, of the matter aimed at by the motion being proper for the purpose of traversing matter which the defendant had pleaded and the court adjudged to be material, error cannot be assigned upon the overruling of the motion.

Closely related to this question is the assignment that the court erred in permitting the county attorney to testify that the plaintiff and his wife had requested him to prosecute the defendant for rape. The mere fact was proved. The details were not offered. The defendant had pleaded that the plaintiff and wife were living together, and that plaintiff had asked for money and agreed to retract his charges on payment of the sum demanded. Plaintiff had undertaken to meet this by showing that as his wife first narrated the circumstances to him, the case was one of rape, a circumstance which would explain the continued cohabitation, and rebut the inference of connivance for which the defendant contended. In this aspect the evidence was properly admitted, provided the issue was properly permitted, and we have already held that the defendant after tendering the issue cannot be heard to say that it was immaterial. So far as the evidence, taken with that tending to show an offer to compromise, might tend also to show an attempt to compound a felony, we cannot see how it was prejudicial to the defendant.

Complaint is made of the giving of certain instructions asked by the plaintiff to the effect that parties have a right to compromise their differences, and that if it should be found that an offer had been made solely for that purpose it must be disregarded. It may be as contended that the action is an anomaly and a relic of a primitive civilization. Whether it is better to permit to men the somewhat doubtful satisfaction afforded by a public airing of such a grievance and the solace of a money judgment, or whether, on the other hand, it would be better to leave the parties to the form of redress which would be resorted to in the absence of an action at law,

is a question to be addressed solely to the legislative branch of the government. The law still recognizes such an action, and inasmuch as it is recognized as a civil remedy, we conceive that there exist the same rights of compromise as in other cases. On the one side it was insisted that certain admissions went with the proposal to accept a sum of money in settlement; on the other it was insisted that the offer had been made solely with a view to a compromise. The instructions left to the jury the consideration of any admissions of fact which were made, and withdrew only the offer to compromise provided it should be found that that was the sole object of the offer. In this the defendant has no ground of complaint.

Two instructions were requested by the defendant to the effect that the law so far presumes the wife to be under the control of the husband that, except for homicide and treason, she is conclusively presumed to commit any crime committed in his presence under compulsion by him, and that therefore she could not be convicted of perjury because of her testimony in this case, even if, in the language of the instruction, the action was "a blackmailing scheme, and set up job on the defendant." The language quoted was so undignified, to use no harsher term, that the court was for that reason quite warranted in refusing to give it judicial sanction by incorporating it in its charge. But beyond this, its object was to discredit the wife's testimony by stating that she was not subject to the penalties of perjury because of the presumed coercion of the husband. The general rule stated may have the sanction of age and may have been justified by the social conditions of primitive times, when we are told that the husband might moderately chastise his wife, the only issue in such case being the size of the stick employed for such purpose. We do not care to inquire what real sanction it finds in adjudicated cases—possibly no more than is found for the law of chastisement. Certain it is that such a presumption runs counter to our broad

laws as to the competency of witnesses, and counter to the reason of men, in view of the domestic relations as they now exist, protected by more enlightened custom, and a kindlier law. A wife is no longer a marionette, moved at will by the husband, either in fact or in law; and with the legal recognition of a separate and responsible existence, she must assume some of the burdens of life—among others that of testifying to the truth, under the customary penalties.

Other questions argued are discussed in the former opinion. They have been re-examined, but we have seen no reason to depart from the views therein expressed.

AFFIRMED.

CHARLES E. STEWART V. CLARK E. DEMMING.

FILED FEBRUARY 17, 1898. No. 7782.

1. **Evidence:** PLEADINGS. A party's own pleading in a cause is not substantive evidence in his own favor of the facts therein alleged.
2. **Trespassing Animals:** DAMAGES: INSTRUCTIONS. An instruction set out in the opinion *held* prejudicially erroneous for ambiguity.

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

Griggs, Rinaker & Bibb, for plaintiff in error.

J. N. Rickards and *Rickards & Prout, contra.*

IRVINE, C.

Stewart sued Demming for damages alleged to have been committed by the animals of the latter upon the cultivated land of the former. In the answer there was a counter-claim, apparently for grain sold and delivered and for work done, but which turned out to be in fact for damage claimed by the defendant to have been done to

his crops by the animals of Stewart, defendant proceeding upon the theory that he was waiving the tort and suing in assumpsit. There was a verdict for the defendant and judgment of dismissal.

It would seem that the case had been begun before a justice of the peace and brought to the district court by appeal. The defendant being on the stand as a witness in his own behalf he was shown a paper and asked: "You may state if that is the bill upon which this case was tried in the lower court." He answered in the affirmative, whereupon the paper was offered in evidence, without further proof, and received over the objection of the plaintiff. It appears to be a bill of items of the damages claimed by the defendant upon his counter-claim, and, so far as the proof goes, it seems to have been the bill of particulars of that counter-claim as filed before the justice. There was no proof of the correctness of the items, and the effect of admitting it in evidence was to make an unsworn pleading in the lower court substantive evidence of the facts alleged therein in favor of the party pleading. It requires neither argument nor citations to demonstrate the error of admitting this evidence. It is claimed in support of the ruling that the evidence was merely introductory to further proof which was excluded, and that the exclusion of the other proof cured the error. The further proceedings in this connection were as follows: "You have seen the amended answer that was filed in this court, have you?" "Yes, sir." "Now you may state how the items in that answer correspond with those that we have just offered in evidence." An objection was then sustained and an offer made to prove that the answer, which had been lost, contained the same items as the bill of particulars in evidence. Of course this offer was denied. The answer in the district court was no more substantive evidence of its allegations in favor of the party pleading than the bill in the lower court, and the loss of the answer did not make proof of its contents admissible.

The court instructed the jury upon the measure of damages as follows: "The court instructs the jury that if they believe from the evidence that the defendant's stock trespassed upon the plaintiff's farm and ate up and destroyed the plaintiff's hay and corn as alleged in the petition, and if the jury believe from the evidence that the damages have not been settled or paid for, or such part if any you find has not been paid for, then the jury will find for the plaintiff and assess the amount of his recovery at the market value of such damages at the time the evidence shows the damages, if any, occurred, and not settled for, if any, together with interest thereon at the rate of seven per cent from the 15th day of April, 1891, less the value of said corn claimed for, with interest thereon at seven per cent from the date of the receipt by plaintiff of said corn." The court by this language left to the jury a task as difficult in its interpretation as that of reconciling the conflicting evidence in the case. While we think, after reading the record, that we understand the rule the court was endeavoring to state, it must be admitted that that meaning is derived as much from conjecture as by construction of the language of the instruction, and that twelve men on the jury, unfamiliar with the law on such subjects, would be apt to deduce as many different meanings therefrom. As under the pleadings and the rest of the charge the verdict was probably reached by a balancing of damages on the petition and counter-claim, the ambiguity of this instruction was prejudicial error.

REVERSED AND REMANDED.

WILFORD STANDIFORD, SHERIFF, V. M. H. GREEN & COMPANY.

FILED FEBRUARY 17, 1898. No. 7774.

Trial: JURY: VIOLATION OF INSTRUCTIONS. It is the duty of the jury to find a verdict according to the law as given in the instructions of the court. When they clearly violate this duty, the court should set aside the verdict. (*Aultman v. Reams*, 9 Neb. 487.)

ERROR from the district court of Antelope county. Tried below before ROBINSON, J. *Reversed.*

R. R. Dickson and *N. D. Jackson*, for plaintiff in error.

M. F. Harrington and *John H. Mosier*, *contra.*

IRVINE, C.

One W. A. Westfall was formerly engaged in the mercantile business at Butte, in Boyd county, and being indebted to M. H. Green & Co., he executed to them a chattel mortgage on his stock of goods, ostensibly made to secure notes evidencing that indebtedness. The goods were then attached by Standiford, who was sheriff, at the suit of other creditors of Westfall, and Green & Co. replevied. By agreement of the parties the cause was transferred to Antelope county for trial. There was a verdict and judgment for the plaintiff.

Among the instructions was one given at the request of the defendant, to the effect that if at the time the mortgage was given the plaintiffs and Westfall secretly agreed that possession was to be taken of the goods, that plaintiffs should sell sufficient to satisfy their own claim, and thereafter continue to sell and apply the proceeds to the payment of other debts of Westfall; or if there was a secret agreement that the property left after paying plaintiffs' claim was to be held by them for the benefit of Westfall's creditors, then the mortgage was void and the jury should find for the defendant. No exception was

taken to the instruction. Westfall and his wife both testified that the mortgage was given in pursuance of such an agreement as was outlined in the instruction, and their testimony on this subject is not contradicted. We need not inquire whether the instruction was correct in law. It was given, and it was the duty of the jury to obey it. The verdict was rendered in manifest disregard of the instruction, and is for that reason contrary to law. In *Aultman v. Reams*, 9 Neb. 487, the court said: "Whether right or wrong, it was the duty of the jury to respect and obey the instructions of the court, and for their failure to do so the verdict should have been set aside; and it was error for the district court to refuse to do so." And in *Omaha & R. V. R. Co. v. Hall*, 33 Neb. 229, the following language was used: "It is not necessary to decide, nor do I, whether the law is correctly given in said instructions. It is the duty of the jury in all cases to follow the instructions given them in charge by the court, and if they do not do so, the verdict should be set aside and a new trial ordered."

REVERSED AND REMANDED.

CHARLES H. GOODWIN, APPELLANT, V. LYMAN B. CUNNINGHAM ET AL., APPELLEES.

FILED FEBRUARY 17, 1898. No. 7787.

1. **Mechanic's Lien:** MORTGAGE: PRIORITY. The lien of a mortgage taken while a building is in process of erection on the land mortgaged is subject to mechanics' liens for work commenced, or material the furnishing of which was begun, before the mortgage was recorded.

2. **Transfer of Note:** MORTGAGE. The transfer of a note secured by mortgage carries with it the mortgage, and operates as a transfer thereof, without the necessity of any formal or written assignment.

3. **Mortgages:** FORECLOSURE: PARTIES: RES JUDICATA. A suit was brought to foreclose a senior lien. The original holder of a junior

mortgage was made a party, but the mortgage had been assigned and the assignee was not a party. The assignment was not of record. *Held*, That the decree in that suit did not bar the assignee's rights.

4. **Limitation of Actions.** When a statute confers a right of action not exis ing at common law, and limits the duration of that right, such limitation relates not only to the remedy, but extinguishes the right itself.

5. **Mechanics' Liens:** LIMITATIONS. The provision in the mechanics' lien law, whereby the lien is limited to two years after the filing of the claim, is a limitation upon the existence of the lien, and not merely upon the remedy to enforce it.

6. ——: JUNIOR LIENORS. A junior incumbrancer who was not a party to a suit to foreclose a mechanic's lien will not, after the extinction of that lien by lapse of time, be required to redeem from the purchaser at the void sale as a condition of enforcing his own incumbrance.

APPEAL from the district court of Buffalo county. Heard below before SINCLAIR, J. *Reversed.*

W. L. Hand, for appellant.

Dryden & Main, contra.

IRVINE, C.

July 10, 1890, Cunningham made to the Mutual Loan & Investment Company his promissory note for $2,000 and executed a mortgage securing the same on certain property in Kearney. Almost immediately thereafter the note was indorsed to the Essex National Bank of Haverhill, Massachusetts, and, with the mortgage, delivered to that bank. The bank soon thereafter sold the note and transferred it by indorsement to the plaintiff Goodwin. In April, 1890, one Hibberd, under a contract with Cunningham, had begun the erection of a building on the premises in controversy. November 14, 1890, and within the statutory period, he filed his claim of lien. In such case the mechanic's lien is superior to the mortgage. One dealing with the property is bound to take notice of materials furnished or work done thereon for the erection of

a building, and, provided the lien is perfected by filing a claim within the time fixed by statute after the material has been furnished or the work completed, such lien has priority over a mortgage given after the inchoate lien has attached but before the claim is filed. (*Doolittle v. Plenz*, 16 Neb. 153; *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 207; *Bohn Sash & Door Co. v. Case*, 42 Neb. 281; *Chapman v. Brewer*, 43 Neb. 890.) November 8, 1890, a subcontractor under Hibberd had begun suit to foreclose his lien, making Hibberd a party. The Mutual Investment Company was also made a defendant, but neither the Essex Bank nor Goodwin was a party to that suit. The case proceeded to decree of foreclosure, the decree being rendered September 1, 1891. There was a sale under this decree October 5, 1892, which was confirmed some time later than December 23. The precise date does not appear, nor is it material. The property was bought by Robertson, as trustee for the First National Bank of Kearney. A sheriff's deed was made to him January 4, 1893, and filed for record January 14. At the time the note was sold there was no assignment formally made of the mortgage, but one was executed June 23, 1891, from the investment company directly to Goodwin. This was filed for record October 10, 1892. It will thus be seen that the mechanic's lien was superior to the mortgage, that the holder of the mortgage was not a party to the suit to foreclose, and that there was no assignment of the mortgage on record until after the sale, but that one was recorded before the sale was confirmed, and of course before the sheriff's deed was recorded. April 21, 1893, this action was begun by Goodwin to foreclose the mortgage. Robertson and the First National Bank were made defendants under an allegation that they claimed some interest in the property, but that such interest was junior to that of the plaintiff. Robertson answered setting up Hibberd's lien, its foreclosure, and the sale and purchase by him. Plaintiff replied by denials and by a plea that the lien was barred by the statute, and that

plaintiff's rights had not been barred by the foreclosure suit. No offer to redeem was made. The district court dismissed the case and plaintiff has appealed.

Certain principles, controlling the decision of this case, have become so well established by past adjudications of this court that, except perhaps in one particular, no field remains for the discussion of the questions involved from the standpoint of general legal principles. The decisions referred to have become rules of property, from which it is now too late to depart, whether or not they may be found to always lead to an equitable adjustment of rights. In the first place, where a note is secured by a mortgage, the transfer of the note carries the mortgage with it, and operates *ipso facto* as an assignment of the mortgage itself. (*Webb v. Hoselton*, 4 Neb. 308; *Moses v. Comstock*, 4 Neb. 516; *Kuhns v. Bankes*, 15 Neb. 92; *Studebaker v. McCargar*, 20 Neb. 500; *Burnett v. Hoffman*, 40 Neb. 569; *State Bank v. Mathews*, 45 Neb. 659; *Todd v. Creamer*, 36 Neb. 430; *Cram v. Cotrell*, 48 Neb. 646.) It would seem to follow from this rule, so early established that Judge GANTT, in 1876, while expressing his disapproval thereof, regarded it fixed in the jurisprudence of the state (*Moses v. Comstock, supra*), that as no formal, and even no written, assignment is necessary, none need be recorded to protect the rights of the assignee; and so it has been expressly decided. (*Cheney v. Janssen*, 20 Neb. 128.) That was a suit to foreclose a mortgage, brought by an assignee by indorsement of the notes. In a suit against the original mortgagee, after the notes had been sold, a decree had been rendered canceling the mortgage. It was held that this was no bar, because the assignee was not a party, and a decree of foreclosure was ordered. It is true that it has since been held that where a release of the mortgage has been entered of record by the original mortgagee, a purchaser, without notice of the assignment, takes the land discharged from the lien of the mortgage. (*Whipple v. Fowler*, 41 Neb. 675; *Cram v. Cotrell, supra.*) This line of cases merely indicates a refusal

of the court to extend the doctrine of secret assignments beyond the limits marked by the earlier decisions, and in nowise tends to overrule those decisions. Indeed in *Cram v. Cotrell* their force was recognized, and they were followed. An observance of the principles so far stated renders *Ballard v. Thompson*, 40 Neb. 529, decisive of the remaining questions. In that case there had been an attempt made to make the original mortgagee a party to the suit to foreclose the mechanic's lien, but no summons, issued within two years from the time the claim of lien was filed, was served upon him. As the recording of an assignment is not necessary to require the assignee to be made a party in order to bind him by the decree, the case was therefore the same as this in legal effect. It does not appear in that case that there had been any sale under the first decree, and therefore, the lienor having established his claim within time against the owner, a decree was ordered subordinating that lien to the mortgage. No redemption was offered or required. It follows from the decree there rendered that when the suit to foreclose the junior lien is brought after the statute has barred the mechanic's lien, it is not necessary to offer to redeem from that lien, but that a decree of foreclosure will be allowed without redemption. The reason may be found in the nature of mechanics' liens and in the character of the special limitation with regard to them. The distinction is everywhere recognized between statutes of limitation proper, which bar the remedy but do not extinguish the cause of action, and statutes which terminate the right itself. Of the latter class, it is said, they are more than a statute of limitations. They constitute a rule of property. (*Pulliam v. Pulliam*, 10 Fed. Rep. 76.) To this class belong statutes conferring a right which does not exist at common law, and at the same time fixing a time within which alone the right may be asserted. Such a right "must be accepted in all respects as the statute gives it." (*Taylor v. Cranberry Iron Co.*, 94 N. Car. 525.) The limitation in such case not only "affects the

remedy, but extinguishes the right." (*Cooper v. Lyons*, 9 Lea [Tenn.] 597.) "There is another class of cases in which a cause of action which does not exist at common law is created by the laws of a state. Causes of action of that character only exist in the manner and form and for the length of time prescribed in the statutes of the state which created them." (*Finnell v. Southern K. R. Co.*, 33 Fed. Rep. 427.) "Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right." (*The Harrisburg*, 119 U. S. 199.) This distinction has been recently recognized and enforced by this court with regard to a statute giving a right of action against a county for injuries sustained from defective bridges, and prescribing a very short time within which the action must be brought. (*Bryant v. Dakota County*, 53 Neb. 755.) The peremptory language of the statute with regard to the foreclosure of tax liens has also led to decisions that by the lapse of time not only the remedy is lost, but that the right itself is extinguished, and that no redemption is necessary in order to obtain relief against them when the bar has attached. (*Alexander v. Shaffer*, 38 Neb. 812; *Helphrey v. Redick*, 21 Neb. 80; *D'Gette v. Sheldon*, 27 Neb. 829; *Warren v. Demary*, 33 Neb. 327; *Force v. Stubbs*, 41 Neb. 271.)

Mechanics' liens are the creature of statute. The statute creating them (Compiled Statutes, ch. 54, art. 1, sec. 3) provides that they "shall from the commencement of such labor or the furnishing of such materials for two years after the filing of such lien operate as a lien on the several descriptions of such structures," etc. By section 4 it is provided that "when any suit or suits shall be commenced on such accounts within the time of such lien, the lien shall continue until such suit be finally determined and satisfied." The language of each section refers to the existence of the lien, and not merely to the enforcement thereof, and section 4, expressly continuing the lien

in force pending a suit and until satisfaction, would be unnecessary and meaningless if the limitation in section 3 was only of the remedy and left the lien in existence, but merely incapable of affirmative enforcement. It was at one time held that if a suit were brought against any one within the statutory period, other parties might be brought in after its expiration and the lien enforced against them. (*Manly v. Downing*, 15 Neb. 637.) But that case was long ago expressly overruled, and it is now settled by a long line of decisions that a mechanic's lien cannot be continued in force beyond the statutory period of two years, except as to such persons, including mortgagees, as are made parties to an action to foreclose within that period, and served with summons issued within that time. (*Green v. Sanford*, 34 Neb. 363; *Burlingim v. Cooper*, 36 Neb. 73; *Ballard v. Thompson, supra; Scroggin v. National Lumber Co.*, 41 Neb. 195; *Pickens v. Polk*, 42 Neb. 267; *Monroe v. Hanson*, 47 Neb. 30.) In some of those cases language is used which is customarily employed with reference to limitations of actions proper, but in most of them the language of the statute has been regarded, and reference has been made to the duration of the lien. A possible exception is the case of *Scroggin v. National Lumber Co.*, in which the opinion was written by the present writer. There the question involved was the necessity of pleading the statute, and the requisites of such a plea. Whether such a restriction on the right itself must be specially pleaded, as if it were a limitation of the remedy, is a question not involved in this case; but in so far as the case referred to may imply that the restriction of this statute is merely a limitation of the remedy, it is not in harmony with the current of our decisions or the language of the statute, and must be disapproved. A party seeking relief against a lien which still exists, but which the holder cannot enforce because of the bar against the remedy, must do equity by offering to redeem, or pay what is justly due; but that principle does not extend so far as to require him to pay a former lien which

is absolutely extinguished, and arising out of a debt for which he is not personally responsible.

The judgment of the district court must be reversed and the cause remanded with directions to award a foreclosure.

REVERSED AND REMANDED.

MCCORMICK HARVESTING MACHINE COMPANY V. C. J. COURTRIGHT ET AL.

FILED MARCH 3, 1898. No. 7898.

1. **Sales:** FAILURE TO DELIVER GOODS: RESCISSION. If a contract of sale is entire and indivisible, though it may include the delivery to the purchaser of two or more distinct articles at different dates, a failure as to any one on the part of the seller may afford ground for rescission by the purchaser.
2. **Assignments of Error:** INSTRUCTIONS. Errors in regard to giving instructions must be separately assigned in both the motion for a new trial and petition in error. If in gross in either, and the assignment is determined without force as to one of the enumerated instructions, it will be overruled as to all.
3. **Action on Note for Purchase Price of Harvester:** FAILURE TO DELIVER PORTION OF MACHINE: RESCISSION: VERDICT FOR DEFENDANT. The evidence *held* sufficient to sustain the verdict.

ERROR from the district court of Dawson county. Tried below before NEVILLE, J. *Affirmed.*

Ricketts & Wilson and *E. A. Cook*, for plaintiff in error.

Warrington & Stewart, contra.

HARRISON, C. J.

In this action, commenced in the district court of Dawson county, the plaintiff sought a recovery of defendants of the amount alleged to be its due from them on a promissory note executed and delivered to it December 28, 1892. To the petition filed, the defendants filed an

answer as follows: "That the note sued on in this action was given for part of the purchase price of a McCormick Low-Down Binder, or Bindlochine, which was purchased of the plaintiff by the defendant Courtright; and that at time of the purchase of the said machine the plaintiff, as an inducement to the defendant to purchase the same, promised to furnish and attach to said machine a bundle carrier before the harvesting season of 1893; that the plaintiff failed to furnish said bundle carrier as agreed, and still fails and refuses to furnish the same; that the sale of the said machine and the agreement to furnish and attach the said bundle carrier thereto was one entire contract, and constituted the entire consideration for the note sued on, and one other of like amount; that the defendant after the plaintiff had failed and refused to furnish the said bundle carrier, notified the plaintiff that the said machine was in his possession subject to its order, and demanded a rescission of the said contract, and the return of the said note; and that the plaintiff refused to rescind the said contract and return the said note to the defendants; that said machine is of no use or benefit to the defendant without the said bundle carrier, and that defendant would not have purchased it except for the promise of the plaintiff to furnish the said bundle carrier as aforesaid, and that for the reasons aforesaid the consideration of said note has wholly failed. Defendants therefore pray that said note may be cancelled and held for naught and that they recover their costs." To which there was for the plaintiff the following reply: "The plaintiff, for reply to the answer of the defendants herein filed, denies each and every allegation contained therein except that said note was given in part payment of a binder, and agreed to furnish a bundle carrier as soon as a carrier was made for the kind of machine for which the note was given." As the result of a trial the defendants were accorded a verdict and judgment, to secure a reversal of which the plaintiff has prosecuted an error proceeding to this court.

It is urged that the evidence discloses that the machine in question had been sold to one Thomas McCarty and used by him during one harvest and was by an agreement between him and the defendant Courtright delivered to the latter, who gave the note in suit, and another, to the plaintiff, and that at the same time a note was executed by McCarty and delivered to plaintiff; that by the arrangements then made McCarty was relieved from the indebtedness to plaintiff which had arisen by reason of his purchase of the machine, except in the amount of the note to which we have alluded, and Courtright became the debtor in the amount of the two notes then by him executed and delivered to it. The contention of the plaintiff is that Courtright received the machine, not from it and by reason of purchase from it, but through an arrangement with McCarty by which, in consideration of the delivery of the machine, Courtright assumed and agreed to pay a portion of McCarty's indebtedness to the company, the latter consenting to such adjustment of the matter of the sale of the machine and by request of Courtright and McCarty received the notes of the former, one of them being the basis of this action. It is true the evidence disclosed the sale of the machine to McCarty and his use of it during one season; also that, when McCarty was called upon to settle with the plaintiff for the machine, he reported an arrangement with Courtright to the effect which we have hereinbefore in substance stated; that the notes of Courtright were taken for the plaintiff and the machine delivered to him. Just what relations might be said to have been established between the plaintiff and Courtright by the course of dealings to which we have referred we need not specifically discuss, for the plaintiff in its reply admitted the allegation of defendants' answer that the note in suit was given for part of the price of the machine purchased by Courtright of the plaintiff. The fact being an admitted one, or the effect of the transactions between them having been established by the statements of the parties in the pleadings, is not a subject for further inquiry. .

It is urged that the verdict was unsupported by sufficient competent evidence. The argument here is that the evidence shows that the machine was a complete harvester without the bundle carrier, and that the furnishing of the latter was not by the terms of the contract of sale made such an essential part of the consideration moving to the purchaser that its lack entitled him to a rescission of the sale. An examination of the evidence leads to the conclusion that there is sufficient thereof to support a finding that the contract of sale of the machine was entire and indivisible inclusive of the delivery of the bundle carrier at the time and in the manner asserted by the defendants; and in this connection we will further say that, in event of the non-compliance therewith on the part of the plaintiff, the right to a rescission would exist in favor of the defendant Courtright. (See *Campbell Printing Press & Mfg. Co. v. Marsh*, 36 Pac. Rep. [Colo.] 799, and cases cited.)

It is argued of certain of the instructions of the court to the jury that they were erroneous. The assignment in the motion for a new trial as to the instructions was as follows: "The court erred in giving the fourth and fifth paragraphs of the instructions given by the court on its own motion." The fifth was in the following terms: "If you believe from the evidence that the notes in question were given for the binder, without an accompanying agreement to furnish and attach a bundle carrier by the harvesting season of 1893, then you should find for the plaintiff." It is asserted of this that it was too narrow, in that it limited the right of the plaintiff to recover to the one proposition, and the complaint is that this operated the exclusion of the question of whether the defendant Courtright bought the machine of the plaintiff; and it is asserted in this connection that whether he did so or not was of the issuable matters in the trial. As we have before seen, this was of the admitted facts, and there being no further objections pressed against this instruction, it will be concluded that

there were none others, which leads to the overruling of the assignment to the extent it involves the fifth instruction and of the entire assignment since it was not specific but in gross.

No available errors having been presented, the judgment of the district court will be

AFFIRMED.

FRANK HELLER, APPELLANT, V. CHARLES L. KING, APPELLEE.

FILED MARCH 3, 1898. No. 7902.

Vendor and Vendee: CONVEYANCE OF MORTGAGED REALTY PENDING FORECLOSURE: RIGHT OF GRANTEE TO REDEEM. For land incumbered by mortgage a deed of conveyance was executed by the owner and delivered to a purchaser with the name of the grantee omitted therefrom, in compliance with the request of the latter that the conveyance should be in blank as to the name of the grantee. Afterward an action to foreclose the mortgage was commenced, to which the grantor of the deed was made a party and was duly served with process. The purchaser, subsequent to the service of the process in the foreclosure suit on the grantor in the deed, inserted the name of a third party in the conveyance and delivered it to him. The foreclosure suit was prosecuted to decree, sale thereunder and confirmation thereof, and there was a later conveyance by the vendee to another party. The person who had received the deed with his name inserted in the blanks thereof brought an action to redeem, predicating his claim solely on the title and ownership derived from the delivery to him of said deed. *Held*, That if he acquired the title by the insertion of his name as grantee in the blanks in the conveyance, and its after-delivery to him, it came to him subject to the full operation and effect of the proceedings in the foreclosure suit, and he could not maintain this action to redeem.

APPEAL from the district court of Clay county. Heard below before HASTINGS, J. *Affirmed.*

Joel W. West and *S. W. Christy*, for appellant.

S. P. Davidson, *contra.*

HARRISON, C. J.

It appears herein that John Llewellyn was the owner of the south one-half of section 23, township 5, range 8, in Clay county, this state, which he had incumbered by mortgage. The mortgage by assignment had become the property of one Emily E. Jones, of date November 7, 1889, and subsequent to the execution and delivery of the mortgage to which we have just referred. Llewellyn sold the land to James J. Randall and executed and delivered to him a deed therefor, from which, in compliance with the request of Randall and agreement of the parties, the name of the grantee was omitted, or the instrument as to its grantee was in blank. Randall took possession of the land and leased it to one Elias Wallen, July 1, 1890. Emily E. Jones, as owner and holder of the mortgage on the property, commenced an action by filing a bill in the federal court at Omaha to foreclose the same. Process was issued of which there was personal service on John Llewellyn and his wife and E. Wallen of date July 7, 1890; but no service of this process was had on James J. Randall or his wife, who were of the parties named as defendants in the suit. April 17, 1891, pursuant to application made for an order on non-resident defendants, such order was made, including a requirement of publication for six consecutive weeks succeeding and inclusive of the 16th day of May, 1891, and with the requirement in regard to publication of the order there was a compliance. Such further steps were taken in the action to foreclose as resulted in a decree and a sale of the property to the Valley Loan & Trust Company. The sale was confirmed and deed executed and delivered to the purchaser, by whom the land was at a subsequent date, during February or March, 1894, conveyed to Charles R. King, defendant in the case at bar. The deed to King was recorded March 27, 1894. April 27, 1891, Randall wrote in the blanks in the deed from Llewellyn to him the name of Frank Heller as grantee and delivered the instrument to him, and the deed was on the same day recorded. On

November 23, 1894, Heller filed a petition in the district court of Clay county and commenced this action to redeem. Issues were joined and as the result of a trial the plaintiff was denied the relief sought and has appealed to this court.

That there may be an accurate knowledge and understanding of the position of the plaintiff in this action, we deem it best to notice the allegations of the pleadings relative to the right and title claimed by him, from whom and in what manner they were alleged to have been derived. It was stated in the petition:

"Plaintiff for cause of action states:

"1. That he is the absolute owner in fee-simple to the following described real estate situated in Clay county, in the state of Nebraska, to-wit: The south ½ of section 23, township 5, range 8 west, of the 6th P. M., containing 320 acres, more or less, according to the United States government survey, and that said title was acquired by warranty deed, made, executed, and delivered to plaintiff by John Llewellyn and Catherine Llewellyn, his wife, on the 7th day of November, A. D. 1889; that said real estate is an improved and cultivated farm, having the necessary dwelling-house and out-buildings for the use and occupation of a tenant; that immediately upon the execution and delivery of the deed aforesaid, by John Llewellyn and wife to this plaintiff, plaintiff went into the immediate, actual, and open possession of said real estate, and has ever since been in the actual, open, and notorious possession of the same."

That a deed had been executed by the Llewellyns from which the name of the grantee had been omitted, and that James J. Randall was claiming thereunder ownership of the land in controversy, were set forth in the answer of the defendant. In the reply there was an allegation which probably constituted an admission that such a deed as was pleaded in the answer had been in existence, and by the evidence the fact was fully established, and that it was the conveyance under which the

plaintiff asserted ownership and had been delivered to him as we have related in the statement which we have hereinbefore embodied of some of the salient facts of the groundwork of the litigation. It was neither of pleading nor proof that the alleged transfer to plaintiff was a gift or pursuant to a purchase by him of Randall, Llewellyn, or any other person, or that there had been any consideration of any nature for such transfer. It will be gathered that the plaintiff relied upon a title derived from Llewellyn and not from any rights of Randall's to which plaintiff might, had the pleadings and facts been such as to warrant it, have laid claim to have succeeded by virtue of transfer. He did not plead, prove, or urge any equitable claim or grounds for the relief demanded as distinct from, unconnected with, or aside from the legal title and the ownership of the land conferred on him by the delivery of the deed to which we have directed attention. The legal title to the land undoubtedly remained in Llewellyn until the insertion of the name of the plaintiff as grantee in the blanks in the conveyance and its subsequent delivery to Heller, and if in consequence of his reception of the deed with his name therein as grantee, which was of date April 27, 1891, Llewellyn was divested of the legal title and it vested in the plaintiff, it came to him weighted with and subject to the final effect of the mortgage foreclosure suit, process in which had been duly served on Llewellyn and his wife July 1, 1890, whereby they were summoned to appear as parties to the suit, and the title was freighted or affected with and by the full operation of the proceedings in such action. This being true, whether the title passed to him or not he was in no position to maintain this action to redeem, and the judgment of the district court must be

AFFIRMED.

CITY OF HARVARD V. MARY F. STILES.

FILED MARCH 3, 1898. No. 7817.

1. **Damages:** PLEADING AND PROOF. A recovery may be had under a general allegation of damages for all injuries which necessarily follow as results of the act, the subject of complaint. They need not be specially pleaded, and this is applicable to necessarily resulting permanent effects of the injuries.
2. **Trial:** LEADING QUESTIONS: REVIEW. The extent to which leading questions may be allowed rests in the discretion of the trial court, and the rulings in that respect will not, in the absence of an abuse of discretion, be disturbed by this court. *Baum Iron Co. v. Burg*, 47 Neb. 21, followed.
3. **Rulings on Evidence:** REVIEW. Alleged errors of the trial court in the admissions of evidence examined, and *held* without force.

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

Leslie G. Hurd, for plaintiff in error.

Thomas H. Matters and *Tibbets Bros., Morey & Ferris*, *contra.*

HARRISON, C. J.

The defendant in error commenced this action in the district court of Clay county, alleging in her petition the existence of Harvard as an incorporated city and of location in Clay county; that the city was charged with the duty of keeping its streets in good condition and repair, and further pleaded as follows: "That on or about the 4th day of July, 1894, there was a certain sidewalk located on the west side of Kearney avenue, between North Depot street and Oak street, in said city; that said Kearney avenue is a common thoroughfare in said town, and between the North Depot street and Oak street on the said 4th day of July, 1894, and for some time prior thereto, said walk was out of repair, the boards being loose and the stringers to which the boards were nailed

had rotted away so that it was unsafe for people to travel over said walk. The plaintiff, while going from her home, which is located on the south side of North Depot street and on the east side of Kearney avenue, to the business portion of the city, using ordinary care and without any fault or negligence on her part, fell on said walk by reason of the unsafe condition thereof, and by reason of the same being in an imperfect state of repair. Plaintiff further alleges that said city had, for more than one year prior thereto, had due and timely notice of the imperfect condition of said walk, yet said defendant carelessly and negligently permitted said walk to remain out of repair. Plaintiff further says that by reason of the fall occasioned by the imperfect condition of the walk as above related she was thrown upon the ground, remained unconscious for some time, and sustained injuries, and she has been detained from her work for about four months; and by reason of the injuries aforesaid she has lost the use of her left hand, to the damage of this plaintiff in the sum of $5,000." The city in its answer admitted its incorporation, also the allegations of the petition relative to the location of certain streets and the sidewalks, generally denied all other allegations thereof, and pleaded affirmatively that the sidewalk referred to in the petition was a temporary board walk. This was followed by a description of the material used in the construction of the walk, also statements in regard to the manner in which it had been made, etc.; that defendant in error had frequently passed over the walk and had full knowledge of its condition, and if any injury was sustained by her, it was by reason of her own negligence and the negligence of those who accompanied her at the time of her alleged injury. It was also stated that the city was without notice of defects in the walk, if any existed, and that it had repaired the same at a date a short time previous to that of the asserted injury; that if defendant in error had lost the use of her left hand, the cause was not traceable to any injury she may have

sustained through the imperfect or defective condition of the city's sidewalk, but was attributable to careless and negligent treatment of the injured hand by physicians employed by defendant in error, and by her own failure to properly care for and treat the same. All new matter in the answer was denied in a reply filed for defendant in error, and of the issues thus joined there was a trial, which resulted in a verdict for defendant in error in the sum of $1,750. A motion for a new trial was, on presentation and hearing, overruled, and the court then required the defendant in error to file a remittitur of the sum of $500, which she did. Judgment was then rendered in her favor for $1,200. The city presents the case to this court for review.

Error was assigned and is argued of the giving an instruction numbered 17, a refusal to give an instruction numbered 3 requested for the city, also the admission of testimony in regard to the permanency of the injuries, and of the admission in evidence of the Carlisle tables of the expectancy of life. The ground of the claim of error as to each of the matters specified is that there was no allegation in the petition of a permanent injury. Under the general allegation of damages in a petition, the plaintiff may recover for all the injuries which necessarily resulted from the act complained of, and it is needless to specify them. So damages for the future and permanent effect of injuries, necessarily resulting to the plaintiff, are recoverable under the general *ad damnum* clause and need not be specifically alleged. (5 Ency. Pl. & Pr. pp. 748, 749, and cases cited; *Bank of Commerce v. Goos,* 39 Neb. 437.)

There was in the petition the following allegation, "and by reason of the injuries aforesaid she has lost the use of her left hand." This, it is claimed by counsel for the city, should be construed to mean that the loss of the use of her hand was during the past, while the counsel for defendant in error contends it states a permanent loss of the member. It may bear the former construc-

tion, but we think the latter import arises from its more natural and unstrained construction, and with such interpretation there was an allegation of permanent injury. We reach the conclusion on this branch of the argument that no special allegation of the permanency of the injury was necessary, and if it had been the petition contained it. It follows that all of the objections to which we have referred based on the lack of this allegation in the petition must be overruled.

It is asserted that the petition does not allege that the city had other than actual notice of the condition of the sidewalk and that there is a failure of proof on this point. There was ample evidence of both actual and constructive notice to the city or its officers to demand the submission of the question to the jury and to support a finding on the subject, if one was made. This was sufficient. (*City of York v. Spellman*, 19 Neb. 383; *City of Lincoln v. Smith*, 28 Neb. 762.)

It is urged that it was error to overrule the objections of counsel for the city (we now quote from the brief) "to these questions: Q. What condition was the hand in before you fell, your hand and arm? A. It was in good condition. I was doing all the work myself." And the succeeding questions shown upon pages 9 and 10 and 11 of the record. To the question quoted as it appears in the record on page 10 there was no objection. To the succeeding ones objections were made which were overruled. Considering the portion of the testimony here given in regard to the arm in connection with all the evidence on the subject of the injury to the hand and the character of such injury, it appears that in order to fully explain and establish the useless condition of the hand it became necessary to show the condition of the arm as inseparably connected with that of the hand and necessarily incidental thereto. In this view, which we think the correct one, it was within the issues, and its reception was not error.

It is complained that the court erred in overruling ob-

jections to questions asked witnesses Louis and Mary Haas, such interrogatories to the latter being numbered 24, 26, 29, 30, 37, 39, and 43, and to the former 39, 40, 43, and 63; that they were leading and should have been rejected. We have examined these alleged errors and conclude that the majority, if not all, of the questions were proper, and the evidence given in answer to them not objectionable. In regard to the objection that they were leading, it must be said: "The extent to which leading questions may be allowed rests in the discretion of the trial court, and the rulings in that respect will not, in the absence of an abuse of discretion, be disturbed by this court." (*Baum Iron Co. v. Burg*, 47 Neb. 21; *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448; *German Nat. Bank v. Leonard*, 40 Neb. 676.) There was no abuse of discretion in allowing the questions under consideration and the rulings will stand.

It is stated that the trial court erred in permitting the witness David Stiles, the husband of defendant in error, to answer certain designated questions. These portions of the evidence were not all open to the objections urged against them, and if any of it was erroneously admitted it was not prejudicial.

It is further argued that the judgment is excessive in amount. The jury passed in its verdict on the amount to which defendant in error was entitled and the trial judge caused to be deducted from this $500; and, in view of all the evidence bearing on the subject, we cannot now say that the judgment is, in the sum allowed to be recovered, excessive.

No errors have been suggested which call for a reversal of the judgment and it must be

AFFIRMED.

NOAH S. WALKER, ADMINISTRATOR, APPELLEE, V. JAY T. SMITH, APPELLANT.

FILED MARCH 3, 1898. No. 7890.

1. **Appeal:** RULINGS ON EVIDENCE. "An appeal of an equitable action to the supreme court, pursuant to the provisions of section 675, Code of Civil Procedure, does not present for review the correctness of a ruling of the district court excluding proffered evidence. Such ruling must be presented as prescribed by section 584 *et seq.*" *Ainsworth v. Taylor*, 53 Neb. 484, followed.

2. **Review:** CONFLICTING EVIDENCE. Findings and decree on conflicting evidence, of which there is sufficient to sustain them, will not be disturbed on appeal.

APPEAL from the district court of Buffalo county. Heard below before SINCLAIR, J. *Affirmed.*

Greene & Hostetler, for appellant.

Dryden & Main, contra.

HARRISON, C. J.

In an action commenced by appellee in the district court of Buffalo county to obtain the foreclosure of a real estate mortgage, an answer was filed to his petition, in which there was a plea that the note the payment of which was secured by the mortgage, the basis of the action, was the evidence of a contract of loan which was tainted with the vice of usury. The contention on the part of the principal appellant, the mortgagee, was, in substance, that at the time of the contract between him and the appellee's decedent the latter agreed to make him a loan in a stated sum to be evidenced by a note, and its payment secured by mortgage on the real estate involved herein; that the note and mortgage in suit were executed pursuant to the terms of such agreement, and that as a part of the agreement the appellant was to allow the other party to retain from the amount loaned

the sum of $80 as a "bonus," or as interest, which he did, and that it constituted the contract an usurious one. It is conceded for the appellee that the $80 was retained of the amount evidenced by the note and mortgage as having been loaned; and further, if it was as a bonus or interest, it made the contract usurious. It is, however, contended for appellee that the amount of $80 was retained to pay the expenses of a trip by the mortgagee, prior to completion of the loans from his home in Vermont to Nebraska and return, the purpose of the trip being an examination of the land to be mortgaged and its approval or rejection as a security. A decree of foreclosure was entered in the district court and the matter is presented here by an appeal.

It is urged for the appellant that the court erred in excluding from the evidence the testimony of a witness W. B. Miller, called on behalf of appellant. In a recent case there was under consideration by this court the question of a presentation in an appeal proceeding of alleged errors of the trial court in its rulings, by which proffered evidence was excluded, and it was then said that to secure an examination in this court of such claimed errors on the part of the trial court, there must have been assignments of them in a motion for a new trial by which means the attention of the trial court was directed to them and they must be of assignments in a petition in error in this court. (See *Ainsworth v. Taylor*, 53 Neb. 484.) Following the doctrine then announced, the point urged is not properly presented and cannot be examined.

The only other argument is that the findings and decree of the district court were contrary to the weight of the evidence. The evidence on the contested issue, that of usury, was conflicting, and there was of it sufficient to sustain the findings and decree, and, conformably to the well-established rule, they will not be disturbed. It follows that the judgment will be

AFFIRMED.

ALFRED S. COOLEY, ADMINISTRATOR, APPELLEE, V. A. W. JANSEN ET AL., APPELLANTS.

FILED MARCH 3, 1898. No. 7910.

1. **Homestead:** DESCENT. The title to lands of which a man dies seized, which he has not devised and which during his life and at the time of his death was the homestead of himself and family, vests in the widow for life, and remainder in the heirs, exempt from any liability for the payment of debts existing against either the husband or wife at the time of his death except such as exist or have been created of the kinds and in the manner prescribed in the chapter of the statutes relative to homesteads; and this is true whether she, after the death of the husband, occupies the property as a homestead or not.

2. **Executors and Administrators:** HOMESTEAD. The right of an administrator to possession of the real estate of which his decedent died seized arises from its being subject to payment of debts of the decedent and is not of force relative to a homestead.

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

Daniel F. Osgood, for appellants.

Byron Clark and *E. H. Wooley, contra.*

HARRISON, C. J.

It appears herein that on or about February 2, 1892, Solomon Ward, who was then a resident of Cass county, died seized of the east half of the southwest quarter of section 20, township 11 north, of range 9, and in said Cass county, and on which he with his wife was at the time of his death living as his home and homestead; that he did not devise the same; that he left surviving him a widow and several children. They had executed and delivered to one of the parties in this action a lease of the land described, and he had sublet it to a person, who is also of the parties to the suit. Administration of the estate of the deceased was granted by the county court to the appellee herein. The administrator claimed to

have taken possession of the farm and leased it, and to maintain the right of his lessee to the possession and occupancy of the farm he instituted this action in the district court of Cass county, praying in his petition that the rights of the widow and heirs of the decedent in the land be decreed subject to the rights of creditors of the deceased, and that the party to whom their lessee had sublet the premises might be restrained from interfering with the possession and occupancy of the lessee of the administrator and from committing waste on the land. An injunction was granted, and in the decree made perpetual against some of the appellants.

During the trial it was stipulated of record that the land was the homestead of Solomon Ward and his wife, and was occupied by them as a homestead at the time of his death; that it was then incumbered or mortgaged in the aggregate sum of $2,625, and it was admitted that it was worth not to exceed $3,200. It is of the claim of appellee that if the land was a homestead, its occupancy has been abandoned by the widow, and it has in consequence thereof lost its homestead character. The right of the administrator to possession of the land of his decedent is by reason of its being subject to the payment of the debts of the deceased, and unless it is so subject, the reason for his being accorded the right of possession and control of it during the administration has no existence. It is provided in section 17, chapter 36, Compiled Statutes: "If the homestead was selected from the separate property of either husband or wife, it vests, on the death of the person from whose property it was selected, in the survivor for life and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same except the life estate of the survivor by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife or either of them previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this

chapter." In the case of *Durland v. Seiler*, 27 Neb. 33, it appeared that an application was made by an administrator of an estate for license to sell real estate which his decedent owned at his death, for the payment of debts of the deceased, which was opposed by the widow, who by purchase had acquired all rights of the heirs. The ground of the opposition was that the land sought to be sold was at the death of the decedent the homestead of himself and family. It was held: "Where a homestead was selected or severed from the separate property of the husband, and at the time of his death he resided upon it with his family, the title thereto vested in his wife during her life, exempt from the payment of any debt or liability existing against either the husband or wife at the time of the death of the husband, except such as were valid liens as against the husband at the time of his death." The land in suit descended to the wife and heirs shorn of any liability for the debts of the deceased, and the administrator had no right of possession or other right thereto or therein, and could not make an effective lease of it; hence could not maintain this suit. It follows that the decree of the district court must be reversed, the injunction dissolved, and the action dismissed.

JUDGMENT ACCORDINGLY.

FRED CUMMINGS, APPELLANT, V. A. W. HYATT ET AL., APPELLEES.

FILED MARCH 3, 1898. No. 7773.

1. **Election to Vote Municipal Bonds:** PETITIONERS: MARRIED WOMEN. A married woman who holds lands in fee is a "freeholder" within the meaning of the word as used in section 14, chapter 45, of the Compiled Statutes, relative to the signers of a petition to be presented to the proper board praying the calling of an election and submission to the vote of the electors of certain designated political subdivisions the question of the issuance of bonds in aid of works of internal improvements, it being therein prescribed that the signers shall be "freeholders."

2. ———: APPEAL: PRESUMPTIONS. The cause was submitted to the trial court with the stipulation of record that in regard to the required qualification of two of the signers of the petition the parties knew nothing, and if the determination of the issues must hinge upon whether the two persons were such signers as required by the law, or not, the case should be continued and testimony offered and received on the subject. *Held*, That the record must be considered here on appeal as presented, and, in the absence of proof to sustain the allegations of the petition that these two persons were not freeholders, it must be presumed that they were, and they must be so considered in determining as to the number of proper signers of the petition.

3. **Statutes**: WELFARE OF PUBLIC. "While it is within the province of the judiciary to declare invalid acts evidently not designed to subserve public interest, if the subject-matter of legislation be such that there is any doubt of its character, or if by any reasonable construction it can be held to be for the welfare of the public, the will of the legislature should prevail over any mere doubt of the court." *Board of Directors v. Collins*, 46 Neb. 411, followed.

4. **Irrigation**: EMINENT DOMAIN: CONSTITUTIONAL LAW. The use of water for the purpose of irrigation of arid lands is a public use within the import of the constitution; and that this is true, coupled with the further facts that each person within the range of the operation of an irrigation ditch or canal could by payment of the customary rates command the services of the company owning the ditch and thereby obtain the use of water, and that the nature of the business was such as to make it subject to legislative control, warranted the legislature in designating such ditches or canals "works of internal improvement."

5. **Constitutional Law**: IRRIGATION: TAXATION. The taxation prescribed by statute and necessarily connected with the aid by political subdivisions of the state of a work of internal improvement is not objectionable in that it involves a taking of property for private use or without "due process of law."

APPEAL from the district court of Custer county. Heard below before SINCLAIR, J. *Affirmed.*

H. J. Shinn and *Campbell & Ledwich*, for appellant.

Sullivan & Gutterson, contra.

HARRISON, C. J.

On February 3, 1894, there was organized a corporation of name the Middle Loup Valley and Canal Company. It was set forth in the articles of incorporation

that "The general nature of the business of said corporation shall be to build and operate along the Middle Loup an irrigation ditch or ditches and the necessary branches and laterals, to furnish and sell water along the line of said ditches in Blaine, Custer, and Valley counties." Pursuant to the prayer of a petition filed, the board of supervisors of Custer county called a special election to be held in West Union township of said county for the purpose of a vote being taken on the proposition of the issuance of the bonds of the township to the irrigation company in aid of the construction and operation by it of an irrigation canal or ditch through the township. The election was held in accordance with the call therefor, and the proposition submitted received the requisite number of votes in its favor to work its approval and adoption. The appellant, for himself and others alleged to be similarly interested and aggrieved, filed a petition in the district court of Custer county in which it was stated that the bonds were about to be issued and delivered to the company; and other facts relative to the matter of the issuance of the bonds were pleaded, from all of which it was sought to make it appear that their issuance would be illegal and should be restrained. Issues were joined and a stipulation of the facts entered into by or for the parties and the cause was submitted to the trial court for decision of the questions presented. The findings and judgment were favorable to the company and the plaintiff has perfected an appeal to this court.

It is urged that the petition presented to the board of supervisors, and by which that body was moved to order the special election, was insufficient, in that it was not signed by the number and of such persons as the law prescribed, and this constituted the election unwarranted and illegal, and no authorization for the issuance of the bonds. The law governing the matter of calling such elections required: "A petition signed by not less than fifty freeholders of the precinct, township, or village

shall be presented to the county commissioners, or board authorized by law to attend to the business of the county within which such precinct, township, or village is situated." (Compiled Statutes 1897, ch. 45, sec. 14.) There were sixty-one names signed to the petition which was presented to the board of supervisors and on which it acted in calling the election. Of these the trial court determined nine were not parties who fulfilled the requirements of the law that they be freeholders. In relation to two of the parties whose signatures were attached to the petition there was no evidence as to whether they were or were not freeholders. Of these we will make other mention further on in this opinion. For the present, considering the petition as without them and deducting the nine which the trial court decided should be deducted, we have but fifty names thereto—the exact number required by the law. But it is contended for plaintiff that of these one was the signature of a minor, and though he owned real estate and in the township, he was not a freeholder in the sense of the term as employed in the portion of the statute which we have quoted; that one was the signature of a man who was living with his wife on a tract of land which was their homestead, the title to which was in the wife; that he owned no land or real estate by title in his own name and was not a freeholder; that three of the signers were married women who had title to real estate, each in her own name, but that they were not freeholders. Generally speaking, a freeholder "is one who holds lands in fee, or for life, or for some indeterminate period." (Winfield, Adjudged Words & Phrases.) These married women each held land in fee and there is no good reason for saying that they were not freeholders within the meaning of the term as used in the statute. The law contemplates that the signers shall be fifty freeholders of the political subdivision wherein the property situate shall be affected by the taxation made necessary by the issuance of the bonds, the first step for the issuance of which is the petition so to be

signed. The petition as it sets forth the proposition of which it asks the submission to a vote carries in its terms a notification that it will, if adopted, call for taxation on the property of any owner; hence the married woman, if she signs it, does so with a knowledge that it is a foundation of proceedings which will unavoidably reach her separate estate. The benefit, if any accrues to the public, as it must, is as much to her and her property as to anyone or that of any person. She is as much interested as any land owner and is qualified to sign the petition. We conclude that the three married women, owners in fee of real estate in the township, were freeholders within the import of the word in the section of the statutes to which we have alluded. This has no force as to the meaning of the term "freeholders," where it appears in other sections of the statutes, but is strictly confined to its signification in the one here involved. In relation to the signer of the petition, who was a minor at the time, and the one a man who was occupying property with his wife, which was owned by her and which was their homestead, we are not called upon to discuss or decide whether the trial court was correct or otherwise in its holding that the minor and the man referred to were freeholders within the meaning of the statute, for the reason that the record discloses that there were two of the signers of the petition as to whom the parties stipulated they knew nothing in regard to whether they were freeholders or not; and it was also agreed that if the decision of the case in the trial court was necessarily to hinge upon the question of the two men being qualified to sign the petition the cause should be continued until testimony on the subject might be obtained and offered or introduced. The court made a finding of the requisite number, without any consideration of the two to whom this portion of the stipulation was applicable; but we must consider the petition as it is presented in the record, and cannot give any effect to the agreement to continue the cause for further testimony. The petitioner based his right to an in-

junction in part on the assertion that fifty freeholders had not signed the petition, and it devolved on him to prove his assertions, and any of the signers as to whom there was no testimony offered must be presumed to have been freeholders; they being counted, gives the requisite number fifty, without an examination of the question of the minor's qualification or that of the man who was occupying as a homestead land owned by his wife.

It is contended that the act under which the parties proceeded and succeeded in procuring the authorization of the bonds in question was unconstitutional and void, in that it sought to apply private property to a private use and that the necessary taxation of property in the township to pay the principal and interest of the bonds would work a taking of the property of the citizens without due process of law; that the contemplated improvement or irrigating ditch was not a work for the benefit of the public in such a sense as to warrant it being treated as an internal improvement. There was approved of date February 19, 1877, the following act of the legislature:

"An act to enable corporations formed for the construction and operation of canals for irrigation and other purposes, to acquire right of way, and to declare such canals works of internal improvement.

"Be it Enacted by the Legislature of the State of Nebraska:

"Section 1. Any corporation organized under the laws of this state for the purpose of constructing and operating canals for irrigating or water-power purposes, or both, may acquire right of way over or upon any lands for the necessary construction of such canal, including dams, reservoirs, and all necessary adjuncts to said canal, in the same manner as railroad corporations may now acquire right of way for the construction of railroads, and the provisions of law applicable to acquiring right of way by railroad corporations are hereby declared

to be applicable to corporations for the construction of canals for irrigation or water-power purposes, or both.

"Sec. 2. Canals constructed for irrigating or water-power purposes, or both, are hereby declared to be works of internal improvement, and all laws applicable to works of internal improvements are hereby declared to be applicable to such canals." (Session Laws 1877, p. 168.)

In 1889 the legislature passed an act entitled "An act to provide for water rights and irrigation, and to regulate the right to the use of water for agricultural and manufacturing purposes and to repeal sections one hundred and fifty-eight (158) and one hundred and fifty-nine (159) of chapter sixteen (16) of the Compiled Statutes of 1887, entitled 'Corporations.'" (Session Laws 1889, p. 503.) In section 9, article 2, of the act of 1889 there was re-enacted the section 2 of the act of 1877, which declared the irrigating canals to be works of internal improvement, and so it stood in 1894, when the bonds with which we have to deal herein were voted. The law in force at the time of the adoption by the voters of the proposition to aid the company in the construction and operation of the irrigating ditch provided: "The right of the use of running water, flowing in a river or stream or down a canyon, or ravine, may be acquired by appropriation by any person or persons, company or corporation organized under the laws of the state of Nebraska; *Provided*, That in all streams not more than fifty feet in width, the rights of the riparian proprietors are not affected by the provisions of this act." (Session Laws 1889, p. 503, sec. 1.) And also provided for condemnation proceedings in procuring the right of way for the construction of the ditch through lands.

It is quite clear that the legislatures which passed the acts to which we have referred fully believed that any private property which might by the operation of the provisions of such acts be necessarily appropriated would be to a public and not a private use, for in each act the

works were denominated as of internal improvements, and it was undoubtedly the will of each of the legislatures that they should be so classed and treated. If the legislatures were not clearly wrong, or if there is a doubt on the subject, their will and intent as expressed should prevail. "While all agree that the legislature cannot, without the consent of the owner, appropriate private property to purposes which in no way subserve public interests, the rule is quite as firmly settled that the courts will not interfere by declaring acts invalid simply because they may differ with the lawmaking power respecting the wisdom or necessity thereof. For if, by any reasonable construction, a designated use may be held to be public in a constitutional sense, the will of the legislature should prevail over any mere doubt of the court." (*Board of Directors of Alfalfa Irrigation District v. Collins*, 46 Neb. 411; *State v. Cornell*, 53 Neb. 556.) The use of water for irrigating purposes is a public use. (*Paxton & Hershey Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation & Land Co.*, 45 Neb. 884; *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*, 45 Neb. 798; *Board of Directors of Alfalfa Irrigation District v. Collins*, 46 Neb. 411. See also *Fallbrook Irrigation District v. Bradley*, 17 Sup. Ct. Rep. 56.) It must be concluded that it has been established by both legislative and judicial determination that the use, in contemplation of the law and designated thereby, was a public one, and with the further considerations that all members of the public within the range of the operations of the work might demand and command service by the company by payment of the usual and customary rates for such service, and that the company was of such a nature as would subject it in its transactions to legislative control, it was not improperly classed as an internal improvement and entitled to the rights and privileges of such a work.

The proposition to issue the bonds of the township in aid of the construction, etc., of the irrigation ditch was submitted under the provisions of section 14 of chapter

45 of the Compiled Statutes, which is as follows: "Any precinct, township, or village (less than a city of the second class), organized according to law, is hereby authorized to issue bonds in aid of works of internal improvement, highways, bridges, railroads, court house, jails in any part of the county, and the drainage of swamp and wet lands, to an extent not exceeding ten per cent of the assessed value of the taxable property at the last assessment within such township, precinct, or village, in the manner hereinafter directed, viz.: First—A petition signed by not less than fifty freeholders of the precinct, township, or village shall be presented to the county commissioners, or board authorized by law to attend to the business of the county within which such precinct, township, or village is situated. Said petition shall set forth the nature of the work contemplated, the amount of the bonds sought to be voted, the rate of interest, which shall in no event exceed eight per cent per annum, and the date when the principal and interest shall become due; and the said petitioners shall give bond, to be approved by the county commissioners, for the payment of the expenses of the election, in the event that the proposition shall fail to receive a two-thirds majority of the votes cast at the election. Second—Upon the reception of such petition the county commissioners shall give notice, and call an election in the precinct, township, or village, as the case may be. Said notice, call, and election shall be governed by the law regulating the election for voting bonds by a county." By reference to the other governing provisions, it appears that the proposition must also provide for the whole levy of a tax annually for the payment of the interest on the bonds; and the taxes to pay the interest, and at the proper time to pay the principal sum of the bonds, are to be levied on the taxable property in the political subdivision by the officers or persons regularly charged by law with the duties of levying the general taxes for the county, and in the same manner as such general taxes and subject to the

same scrutiny and objections as to assessment and payment as any general taxes. With reference to the term "due process of law," it has been said by this court in the opinion in the case of the *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, that it is not susceptible of a precise definition; and it was further stated: "However, that of Judge Cooley appears to have proved the most acceptable to the courts of this country, viz., 'Due process of law in each particular case means an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs.'" (*Board of Directors v. Collins*, 46 Neb. 411. See also *Kelly v. Pittsburgh*, 104 U. S. 78.) The use was a public one. The legislature had recognized it, and it had further prescribed that the manner of assessment and taxation should be the general one. In this there was no taking of property without "due process of law." The judgment of the lower court is

AFFIRMED.

FRANK MAXFIELD V. STATE OF NEBRASKA.

FILED MARCH 3, 1898. No. 9525.

1. **Instructions:** REASONABLE DOUBT. An instruction in a criminal prosecution is not erroneous which defines a reasonable doubt as being such a doubt as arises from a candid and impartial consideration of all the evidence in the case, and which would cause a reasonable and prudent man to pause and hesitate in the graver transactions of life, and that a juror is satisfied beyond a reasonable doubt if from a consideration of the entire evidence he has an abiding conviction of the truth of the charge.

2. ———: NON-DIRECTION. Mere non-direction by the trial judge affords no ground for the reversal of a criminal cause unless a proper instruction has been tendered and refused.

3. **Rape:** EVIDENCE. To justify a conviction of rape the proof must reach such a degree of certainty as to exclude a reasonable doubt.

4. ——: ——. A conviction of rape will not be sustained where the testimony of the prosecutrix as to the principal fact relied upon to sustain the charge is not only uncorroborated, but is so contradictory as to be self-destructive.

ERROR to the district court for Hamilton county. Tried below before SEDGWICK, J. *Reversed.*

Hainer & Smith, for plaintiff in error.

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

NORVAL, J.

Frank Maxfield was tried and convicted of the crime of rape, alleged to have been committed upon the person of a girl between sixteen and seventeen years old. His motion for a new trial was denied, and to reverse the judgment and sentence pronounced against him is the object of this proceeding.

Complaint is made of the sixth instruction, which reads as follows:

"6. You are instructed that a doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that were the same kind of doubt interposed in the graver transactions of life it would cause a reasonable and prudent man to hesitate and pause, it is not sufficient to authorize a verdict of not guilty. If, upon consideration of all the evidence, you can say you have an abiding conviction of the truth of the charge, amounting to a moral certainty, you are satisfied beyond a reasonable doubt."

It is argued that the foregoing did not correctly define a reasonable doubt, but required the defendant to establish his innocence before he could claim an acquittal. An instruction in substantially the same language was approved by this court in *Polin v. State*, 14 Neb. 540, and *Willis v. State*, 43 Neb. 102. On the strength of those

decisions, the assignment of error relating to the giving of the instruction quoted is overruled.

The jury, after deliberating upon their verdict for some time, returned into court, when one of their number, in answer to an inquiry made by the presiding judge, stated, "What bothers us most is the competency of the prosecuting witness—what weight we should give conflicting and contradictory evidence—just that alone." Thereupon the court instructed the jury: "You yourselves are the sole judges of the weight of the testimony that has been introduced before you, and in determining what weight to give the testimony of the complaining witness in this case, you should take into consideration her appearance while upon the stand, her apparent interest or lack of interest in the proceeding, if any appear, and her manner of testifying, and, in the light of all her testimony and of the other evidence in the case, you should give to her testimony such weight, and only such weight, as you think under all the circumstances it is entitled to. And if upon consideration of all the evidence in the case and the former instructions of the court you find that all the material allegations of the complaint have been proved beyond a reasonable doubt, you should find the defendant guilty. If you find that the material allegations of the complaint have not been so proved, then you should find the defendant not guilty." It is not argued that the foregoing charge contained any erroneous statement of the law, or that it was not applicable to the case as made by the evidence, but the contention is that the instruction was not responsive to the inquiry made by the juror, and for that reason was misleading and prejudicial. This criticism is unavailing. The doctrine has been repeatedly stated that mere non-direction by the trial court is no cause for the reversal of a criminal cause where there has been no refusal of a proper instruction tendered. (*Hill v. State*, 42 Neb. 503; *Housh v. State*, 43 Neb. 163; *Pjarrou v. State*, 47 Neb. 294.)

Another ground urged for a reversal is that the verdict

is unsupported by the evidence. The accused was married, and on the date of the alleged occurrence resided with his family in the village of Bromfield. Sadie Stevenson, the prosecuting witness, resided with her parents in said village. The crime charged is alleged to have been committed at the house of the defendant between the hours of 1 and 3 P. M. on Sunday, January 31, 1897. The prosecutrix alone gave testimony as to the particular acts constituting the offense, the accused not having taken the stand in his own behalf. She testified that on the date, and between the hours stated, she went to the residence of the accused, and finding no person at the house she started to leave, meeting him at the front gate; that she inquired for his wife, and received as a reply that the latter was out among the neighbors, but would soon return home, and that upon invitation of the accused the prosecutrix went into the house with him. What transpired while they were together must be gathered from the testimony of Sadie Stevenson alone, and her statements are conflicting and irreconcilable. On direct examination she stated that after going into the house she asked if he had a checker-board, which question elicited an affirmative answer; that thereupon, at her suggestion, they played a game of checkers, she being the winner; that at the close of the game he threw her upon the floor, unbuttoned her underclothes and removed them; and, to use her language, "He treated me just like if I was his own woman. He took his parts out and put them in mine," causing her to cry out and scream; that in about half an hour, so she states, "He got me down again and done the same thing over;" that then she put on her coat, and, after accepting from the defendant fifty cents, one-half for winning the game of checkers and the remainder as hush money, returned to her father's house, thence to a neighbor's, where she stayed until the next morning, when she went to school, returning to her home in the evening. On cross-examination the prosecutrix, after stating that it was in the defendant's house when she

first asked as to the time his wife would be at home, and that witness had no other conversation whatever with him, testified in answer to questions as follows:

Q. Now, the matter of having sexual relations was not discussed between you and him?

A. No, sir.

Q. Did he put his hands on you?

A. Yes, sir.

Q. What did he do when he put his hands on you?

A. He got me down.

Q. Where?

A. On the floor.

Q. Now, then, he fooled with you a while?

A. Yes, sir.

Q. And that is really all he did do, isn't it?

A. Yes, sir.

Q. That is all he did?

A. Yes, sir.

Q. Now, as a matter of fact he never consummated sexual relations with you—he simply took liberties with you with his hands?

A. Yes, sir.

Q. That is right?

A. Yes, sir.

Q. On the next Monday morning you saw his wife. didn't you?

A. Yes, sir.

Q. You were at school at that time?

A. Yes, sir.

Q. His wife came to the schoolhouse there and had a conversation with you?

A. Yes, sir.

Q. And she charged you with being too intimate with Frank?

A. Yes, sir.

Q. And you told her you hadn't been?

A. Yes, sir.

Q. You told her that?

A. Yes, sir.

Q. She tried to make you admit that he had done something wrong there at that time and you told her it wasn't so?

A. Yes, sir.

Q. And she threatened to arrest you?

A. Yes, sir.

Q. She went off and filed a complaint?

A. Yes, sir.

Q. After that you went home?

A. Yes, sir.

Q. By this time your father had found out about it?

A. Yes, sir.

Q. And he got very angry?

A. Yes, sir.

Q. And when he told you about it you told him that you hadn't done anything wrong, but he just fooled with you?

A. Yes, sir.

Q. And he took hold of you and threw you down and made you admit the whole thing?

A. Yes, sir.

Q. And he told you you would have to have this man arrested?

A. Yes, sir.

Q. And he insisted on you doing it, and you did do it?

A. Yes, sir.

Q. As a matter of fact this man never consummated sexual relations, but simply fooled with you on that Sunday, isn't it?

A. Yes, sir.

On redirect examination Sadie Stevenson reiterated more than once the statement that the defendant did not have sexual intercourse with her, and that she so informed the defendant's wife, but subsequently, on being further re-examined by Mr. Day, the county attorney, she testified to having had illicit relations with the accused, and that she did not understand all the questions put to her on cross-examination.

Recross-examination:

Q. Before you went on the witness stand you have had a number of talks with Mr. Day?

A. Yes, sir.

Q. And he has been telling you about what he wanted you to swear in the case?

A. Yes, sir.

Q. And he told you that he wanted you to swear that he put his parts in yours?

A. Yes, sir.

Q. And that is the way he told you to state it?

A. Yes, sir.

Q. As a matter of fact, when I examined you with reference to Maxfield fooling with you, you understood just exactly what I was saying to you?

A. Yes, sir.

Q. You were then telling the thing as it was?

A. Yes, sir.

Q. And when you answered him you were telling the thing the way he told you to tell it in court?

A. Yes, sir.

* * * * * * * *

Q. You told your father when he first asked you about it that Maxfield hadn't done anything to you, didn't you?

A. Yes, sir.

Q. Then he took hold of you and threw you down and told you you had to testify to it, or tell it in court, or something like that?

A. Yes, sir.

No other witness called by the state in chief testified to any fact which tended in any degree to establish that a rape was committed upon the prosecutrix. That she visited Maxfield's house during the afternoon of the day in question and remained therein for a time is disclosed by the testimony of Mrs. William Tobey, a witness called and examined by the defense and who resided on the opposite side of the street, a short distance from defendant's home. Mrs. Tobey testified, in effect, that she saw

Sadie Stevenson and defendant go into the house together about 2 o'clock in the afternoon, where Sadie remained about an hour; that witness was during all that time out in front of her own door making molasses candy, and observed a team drive in front of defendant's house and stop; that Maxfield thereupon came out of doors and remained about twenty minutes, and that witness heard no screaming or crying during the time Sadie Stevenson was in the house, although she was in hearing distance. Dr. Case, a graduate of Rush Medical College, and a practicing physician for many years, testified that at the request of the county attorney he made an examination of the person of the prosecuting witness three or four days after January 31, and found the hymen undisturbed in its natural folds and all the parts in normal condition; that he had also examined the privates of the defendant, having treated him for disease of the bladder; and the witness gave it as his unqualified professional opinion that the prosecuting witness never had sexual intercourse with any man; and, furthermore, that it was impossible for her to have had incomplete coition with the defendant without producing certain contusions, the existence of which conditions his examination of her person failed to indicate or disclose. On rebuttal, two physicians called by the state gave it as their opinion that it was possible for a man of mature years to have sexual intercourse with a girl sixteen years old without rupturing the hymen.

It is a well-established principle that in all criminal prosecutions by indictment or information the law surrounds the accused with the presumption of innocence, and he cannot be lawfully convicted unless the evidence adduced on the trial establishes his guilt beyond a reasonable doubt. In the light of this rule can it be truthfully asserted that this evidence was sufficient to justify the verdict? We are all agreed that it is not. The statements of Mrs. Tobey while upon the witness stand, if true, render quite improbable the truthfulness of por-

tions of the testimony of Sadie Stevenson, especially that the latter made any outcry; and no less important in that respect is the evidence of Dr. Case, who made a personal examination of the prosecutrix at the instance and request of the county attorney. If this conviction stands it must be upheld upon the unsupported testimony of Sadie Stevenson as to the principal fact, which is exceedingly unreliable, she having told so many conflicting and contradictory stories concerning the alleged occurrence. More than once she testified that the accused had sexual relations with her on January 31, 1898, and in almost the very next breath she stated he did no such thing, but merely "fooled with her with his hands." When the county attorney was conducting the examination of the prosecutrix her testimony was apparently of a criminating character, but when the questions were put to her by counsel for the accused the answers thereby elicited were entirely of an exculpatory nature. She likewise admitted having told others that the defendant sustained no improper relations with her. There is no corroborative testimony in the record as to the pivotal point in the case and in regard to which her testimony is conflicting. She is corroborated alone as to the fact that the two were together in the house,—that he had the opportunity to criminally assault her. This ordinarily would be sufficient corroboration where the principal fact is established by the testimony of the prosecutrix, and such testimony is clear and explicit and entirely consistent, and not contradictory; but where the testimony of the prosecuting witness bears upon its face evidence of its unreliability to sustain a conviction, there should be some corroboration by other evidence as to the principal fact relied upon to constitute the crime. In view of the contradictory and self-destructive character of the testimony of the prosecuting witness it cannot be said that the guilt of the commission of the crime of rape was established beyond a reasonable doubt. The testimony being

insufficient to sustain a conviction, the verdict and judgment are set aside and the cause remanded for further proceedings in the court below.

REVERSED AND REMANDED.

WILLIAM E. BARKER V. STATE OF NEBRASKA.

FILED MARCH 3, 1898. No. 9720.

1. **Criminal Law**: TRANSCRIPT FOR REVIEW. The transcript in this case shows, with sufficient clearness, that an information was filed against the accused in the court below during the term at which he was required to appear, and that the trial was had upon an amended information presented at a subsequent term of the court.

2. ———: JURISDICTION. The absence of jurisdiction of the district court will not be presumed, but must affirmatively appear from the face of the record.

3. ———: COPY OF INFORMATION. In a prosecution for a felony the accused is entitled, by section 436 of the Criminal Code, to a copy of the amended information, and one day to prepare for trial, but these requirements he may waive.

4. ———: AMENDED INFORMATION: ARRAIGNMENT. A conviction under an amended information charging a felony will not be sustained where the record does not affirmatively disclose that the accused was arraigned, and that he pleaded before trial.

5. **Review**: TRANSCRIPT: ENTRIES ON TRIAL DOCKET. Entries made upon the trial docket of the district court cannot be considered on review for the purpose of ascertaining what were the proceedings in that court.

6. **Criminal Law**: COUNTS: SENTENCE. If a single offense is charged in different counts of an information, and there is a conviction on each count, but one sentence can be imposed.

ERROR to the district court for Dawes county. Tried below before WESTOVER, J. *Reversed.*

J. H. Broady and *Tibbets Bros., Morey & Ferris*, for plaintiff in error.

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

NORVAL, J.

This was a prosecution for the crime of perjury. The amended information contains five counts, each charging the defendant with having on May 21, 1896, willfully, feloniously, and corruptly given certain false testimony in a cause pending in the district court of Dawes county, wherein the accused was plaintiff and the Chicago, Burlington & Quincy Railroad Company was defendant. Upon the trial the accused was found guilty under each count, and was sentenced to the penitentiary for two years on the first count and one year on each succeeding count. The sentences were directed to be carried into execution in their respective order, the one to begin immediately upon the expiration of the next preceding one.

It is urged that no information was filed within the time prescribed by law; hence the district court was without jurisdiction to try and sentence. It is disclosed by the record that the defendant waived a preliminary examination before a justice of the peace on May 27, 1896, and was required to enter into a recognizance in the sum of $800 for his appearance forthwith before the district court of Dawes county, the regular April term thereof being in session. In default of bail a mittimus was issued, and the accused was committed thereunder to the county jail. The information upon which the trial was had was filed on December 2, 1896, a day in the October term of the district court. The argument is that under section 389 of the Criminal Code an information should have been filed at the term of court to which defendant was held to answer, and it was not so filed; hence the defendant was entitled to be discharged, he then being held in the county jail. The clerk of the district court certified up the amended information alone. It does, however, appear from the supplemental tran-

script before us that an information was filed against the defendant in this cause in the court below during the said April term. A copy of such information, it is true, is not contained in the transcript, but the clerk has certified that the original contains the following indorsements:

"THE STATE OF NEBRASKA, }
DAWES COUNTY. }

"I hereby certify that on the 29th day of May, 1896, I served the within notice of information by delivering to William E. Barker in person a true and certified copy of the within information. ARTHUR M. BARTLETT,
"*Sheriff.*

"Arraigned May 29, 1896, at 9:50 o'clock P. M., and entered his plea of not guilty. B. F. CARLY,
"*Clerk.*

"Bail fixed at the sum of $500. W. L. GREEN,
"*Judge.*"

Section 436 of the Criminal Code authorizes a sheriff to serve a copy of an information on the accused, and sections 451 and 452 of said Code require the plea of a defendant of either "guilty" or "not guilty" to an indictment to be entered thereon. But the failure to indorse the plea is not fatal. (*Prewit v. People*, 5 Neb. 380.) Those sections are applicable to informations, and the certified copy of the indorsements of the clerk and sheriff respectively above set forth is sufficient evidence that an information was filed against the defendant as early as May 29, 1896, or two days after the defendant had waived a preliminary examination before the justice. Moreover, the clerk of the trial court certifies that it is an amended information which is included in the transcript and which was filed December 2. The record not only fails to establish that an information was not lodged against the accused in the district court during the term at which he was required to appear, but it repels any such inference. It is clear that the entry by the clerk of the defendant's plea of not guilty upon the back of the first information could not have been made on May 27, 1896,

unless an information had been previously filed. The absence of jurisdiction of the district court will not be presumed, but must affirmatively appear from the face of the record itself.

It is asserted that the court erred in placing the defendant on trial without arraignment, or plea to the amended information. The record shows that the jury was selected to try the cause the same day the amended information was filed, and the journal entry of the proceedings in the court below fails to show that the accused was ever called upon to plead, or that he did plead, to said information; that he stood mute, or refused to plead, and a plea of not guilty was entered for him. Under section 436 of the Criminal Code the defendant was entitled as a matter of right to a copy of the amended information, and one day in which to prepare for trial. (*Zink v. State*, 34 Neb. 37.) But these were rights accorded him by the statute which he could waive, and the presumption is that he has done so, since it does not appear that any objection was made in the district court to proceeding to trial, because of a want of compliance with the above statutory command. The Criminal Code requires, in prosecutions for felonies, that the accused be arraigned, and that his plea to the indictment or information be taken and entered. (Secs. 448-453.) Section 451 provides that when any person upon the arraignment "offer no plea in bar, he shall plead 'guilty' or 'not guilty;' but if he plead evasively, or stand mute, he shall be taken to have pleaded 'not guilty.'" It is obvious that in every case where a trial upon an indictment or information is required, a plea of not guilty must be entered by the court, since this is essential to the formation of the issue upon which the accused is tried. Without such plea being entered of record there was nothing for the jury to pass upon. A conviction of a felony cannot be sustained where the record fails to show that the accused was arraigned, and that he pleaded to the accusation before trial. (*Burley v. State*, 1 Neb. 385; *State v. Williams*, 117

Mo. 379; *Johnson v. People*, 22 Ill. 318; *Aylesworth v. People*, 65 Ill. 301; *Hoskins v. People*, 84 Ill. 87; *Davis v. State*, 38 Wis. 487; *State v. Wilson*, 42 Kan. 587; *Ray v. People*, 6 Colo. 231; *People v. Moody*, 69 Cal. 184; *Grigg v. People*, 31 Mich. 471; 2 Ency. Pl. & Pr. 761.)

The transcript contains a certified copy of the judge's notes made on the trial docket in this cause under date of December 2, as follows: "County attorney asks leave to file a new information. Leave granted. Deft. excepts. Defendant William E. Barker arraigned in open court on new information. Information read to him by county attorney, to which he plead not guilty." Possibly, if there had been indorsed on amended information the plea of the defendant, such entry would have been sufficient to have supplied the omission to incorporate the plea in the journal entry, because the statute authorized and required the plea to be indorsed on the information. But it is clear that such omission is not cured by the foregoing entry appearing on the trial docket. POST, J., in speaking of such entries in *Gage v. Bloomington Town Co.*, 37 Neb. 701, observed: "Although it is customary for the judge to enter in the trial docket or calendar notes or minutes of the orders made, such entries are not made pursuant to the requirement of any statute and are not, strictly speaking, parts of the record of the court. They are rather memoranda for the use of the judge and clerk in making up the record. It is provided by section 27, chapter 19, Compiled Statutes, entitled 'Courts,' that the clerk shall keep a record of the proceedings under the directions of the judge, which shall, when the business of the court does not prevent, be made up before the opening of the next day, and that the first business of each day shall be the reading of the record of the preceding day, and when found correct to be signed in open court. The record therein contemplated, when once made up, is the legal and authentic evidence of the proceedings of the court, and cannot in any appellate proceeding be contradicted or impeached by the entries in

the trial docket." It is firmly established that upon review the journal entries of the trial court are conclusive evidence of its proceedings, and that the minutes upon the trial docket cannot be considered in the appellate court for the purpose of ascertaining what was done in the court below. (*Chicago, B. & Q. R. Co. v. Anderson*, 38 Neb. 112; *Ward v. Urmson*, 40 Neb. 695; *Brown v. Ritner*, 41 Neb. 52; *Weander v. Johnson*, 42 Neb. 117; *Hornick v. Maguire*, 47 Neb. 826; *Church v. Callihan*, 49 Neb. 542.) In *Brown v. Ritner, supra*, it was ruled that entries on trial docket could not be resorted to on review to ascertain what the ruling was on a motion for a new trial, where the journal entry in the cause was silent on the subject. The copy of the journal entry in the case at bar purports to give a correct history of the proceedings in the court below, and cannot be contradicted by reference to the minutes of the judge on the trial docket. If the journal entry is erroneous, the appropriate remedy is to have the proper correction made in the court where the proceedings occurred.

There is another fatal error in the proceedings, which necessitates a reversal. The information, although in five counts, charges a single offense—the commission of perjury on a given date in a certain cause—yet a separate sentence was imposed under each count. This was manifestly erroneous, since a single offense was charged. That a person testifies falsely relative to three matters on the same day, during the trial of the cause, does not constitute three crimes. But one oath was taken and broken by the accused. A single crime was committed, and but one sentence should have been imposed. (*In re Walsh*, 37 Neb. 459; *Griffen v. State*, 46 Neb. 282.) If the only error related to the sentence, the cause would be remanded for proper sentence; but for error committed in proceeding to trial upon the amended information without an arraignment and plea, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN L. HILL V. CAMPBELL COMMISSION COMPANY ET AL.

FILED MARCH 3, 1898. No. 7840.

1. **Trover and Conversion.** One who converts the property of another is liable therefor.

2. ———: CHATTEL MORTGAGES. Every one who aids and assists in the conversion of the chattels of a third person is liable for their value.

3. ———: ———. A mortgagee of chattels, who is out of possession, and not entitled to possession by his mortgage, cannot maintain an action against a stranger for conversion.

4. ———: ———: PLEADING. In an action by a mortgagee of chattels for conversion of mortgaged property he must, in his petition, plead the facts which create his special ownership in the property, and show his right to the possession of the same.

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

McCabe, Wood & Elmer, for plaintiff in error.

Bartlett, Baldrige & De Bord, contra.

NORVAL, J.

Warren Fales resides in Cuming county, and is engaged in the business of raising, feeding, buying, and selling of cattle. He executed and delivered to the plaintiff John L. Hill three chattel mortgages on 219 specifically described steers, then in the possession of Fales, in said county, to secure the indebtedness incurred for the purchase price of the cattle, which mortgages are described as follows: One dated March 15, 1892, to secure $463.96, duly filed for record on the 26th day of the same month; another dated April 6, 1892, for the sum of $2,860.52, which was duly recorded two days later; and the other was given May 21, 1892, for $1,440.82, which was duly filed for record six days after its date. Subsequently, on June 14, 1892, Fales gave to the Campbell Commission Company, of Chicago, one of the defendants

herein, a chattel mortgage on 300 steers, and on November 4, 1892, Fales gave said company a second chattel mortgage on 80 steers. On October 20, 1892, Fales executed and delivered to the defendants Foley & Chittenden, of South Omaha, a chattel mortgage on 170 steers to secure an indebtedness of the mortgagor to said last named firm. The evidence shows the cattle belonging to Fales, and on which he had executed mortgages as aforesaid, were shipped to, and sold by, the Campbell Commission Company as follows: 80 head on January 18, 1893, and 243 head on January 27 of the same year. On the next day 45 steers owned by Fales were shipped to South Omaha and sold by the defendants Foley & Chittenden. Plaintiff contends that the foregoing shipments included 100 steers, upon which he held senior mortgage liens, and that said cattle were sold by defendants without plaintiff's knowledge and consent. This action was instituted in the court below to recover damages for the conversion of cattle covered by plaintiff's mortgages. The defendants recovered verdicts upon the trial, and from the judgment rendered thereon plaintiff prosecutes a petition in error.

The record discloses that at the trial plaintiff, in open court, limited his claim to a recovery to the conversion of cattle by the defendants included in the shipment under the date of January 27, already alluded to. The evidence contained in the bill of exceptions tended to show that said 243 head were shipped to, and sold by, the Campbell Commission Company without plaintiff's knowledge or consent; that he held superior mortgage liens upon a portion of the cattle included in said shipment; that one Clausen, the agent and representative of the Campbell Commission Company, and Foley, of said firm of Foley & Chittenden, procured the cattle to be shipped, assisted Fales in cutting out the 243 steers from the remainder of the herd, in driving them to Pender, and in loading them on the cars at that place for shipment to Chicago. Foley and Fales went with the stock to Chicago, where the

cattle were delivered to, and sold by, the Campbell Commission Company, and the proceeds were applied by the defendants to their own use.

Instructions 5, 6, 9, and 10, given by the court on its own motion, and defendants' eighth request are criticised by counsel for plaintiff. The first four of these are in the language following:

"5. But if you find from a preponderance of the evidence that there was some of the P and K cattle in the shipment of 243 head, you will then further inquire and determine how and under what circumstances, and by whom, the said shipment was made, and you are instructed that if said shipment was made by Warren Fales of his own volition and without insistence or direction from the defendants, or either of them, then the defendants would not be liable in this action and your verdict should be in favor of defendants.

"6. To justify a verdict in favor of the plaintiff it must appear from a preponderance of the evidence that defendants, or one of them, directed and caused said shipment to be made for their own use and benefit and without the consent of the plaintiff, and that there were cattle in said shipment on which plaintiff held a first mortgage lien."

"9. If said shipment of 243 head was made voluntarily by Warren Fales, and not by the direction of the defendants, or either of them, the plaintiff cannot recover in this action.

"10. The fact alone that James Foley assisted in assorting and loading the cattle, and went to Chicago with them, would not justify a verdict against him or any of the defendants. To hold the said Foley or his firm liable it must appear that he was acting in a capacity different from a hired man, or in giving neighborly assistance. It must appear from the evidence that the shipment was made by reason of some direction or control of one or both of the defendants in pursuance of which said Foley acted."

The defendants' eighth request was to the effect that if the mortgagor Fales shipped the cattle of his own volition and that the Campbell Commission Company took no part in procuring the shipment to be made, except as requested by Fales, and that said company acted in good faith in selling the cattle, without any intention to appropriate the cattle, or the proceeds of the cattle, on which plaintiff had a lien, the plaintiff was not entitled to a verdict.

The following propositions are deducible from the authorities:

1. A conversion is any unauthorized act which deprives the owner of his property permanently or for an indefinite time. (*Stough v. Stefani*, 19 Neb. 468.)

2. In an action for conversion the motive which prompted the defendant to dispose of, or appropriate to his own use, the property of plaintiff is an immaterial issue. Whether defendant acted in good faith or not is of no consequence. (*Morrill v. Moulton*, 40 Vt. 242; *Freeman v. Underwood*, 66 Me. 229; *Miller v. Wilson*, 98 Ga. 567; *Union Stock Yard & Transit Co. v. Mallory*, 157 Ill. 554; *Hoffman v. Carow*, 22 Wend. [N. Y.] 285; *Koch v. Branch*, 44 Mo. 542; *Knapp v. Hobbs*, 50 N. H. 476; *Lee v. Mathews*, 10 Ala. 682; *Spraights v. Hawley*, 39 N. Y. 441; *Kimball v. Billings*, 55 Me. 147; *Tobin v. Deal*, 60 Wis. 87; *Platt v. Tuttle*, 23 Conn. 233; *Lee v. McKay*, 3 Ired. [N. Car.] 29.)

3. One who aids and assists in the wrongful taking of chattels is liable for a conversion, although he acted as agent for a third person. (*McCormick v. Stevenson*, 13 Neb. 70; *Stevenson v. Valentine*, 27 Neb. 338; *Cook v. Monroe*, 45 Neb. 349; *Osborne Co. v. Plano Mfg. Co.*, 51 Neb. 502; *McPartland v. Read*, 93 Mass. 231; *Edgerly v. Whalan*, 106 Mass. 307; *Lee v. Mathews*, 10 Ala. 682; *Gage v. Whittier*, 17 N. H. 312; *Kimball v. Billings*, 55 Me. 147; *McPheters v. Page*, 22 Atl. Rep. [Me.] 101.)

Under the foregoing principles each and all of the instructions to which reference has been made were manifestly erroneous. By the fifth, sixth, ninth, and tenth

instructions the jury were advised that there could be no recovery if Warren Fales voluntarily and of his own accord, without the aid and assistance of the defendants, shipped the cattle, even though the Campbell Commission Company sold the cattle on their arrival in Chicago without plaintiff's consent and appropriated the proceeds to their own use. The tenth instruction was faulty because it conflicts with the rule which makes one who abets in a conversion of property liable for its value. The eighth instruction given at the request of the defendants was bad, since it exonerated them from liability if they acted in good faith. If one sells the chattels of another without authority so to do, the act cannot be made any the less a conversion by proving that he acted in good faith, believing himself to be their owner, or was the agent of one whom he regarded to be the owner.

It is argued by counsel for defendants that the amended petition does not state a cause of action; hence no prejudice could have resulted from the giving of the instructions. If plaintiff's pleadings would not have supported a verdict in his favor, had one been returned, it is obvious that he cannot be heard to complain of errors in the charge of the court. It is not claimed by plaintiff that the paper filed by him, which is designated "Amended Petition," states any ground for action, but it is insisted that it is merely an amendment to the original petition, and was not intended to take the place of the latter. This position is undoubtedly sound, and was doubtless so regarded by the defendants in the court below, inasmuch as they answered both the "petition and the amended petition." Construing the original and the amended petitions together, they do not state sufficient facts to authorize a recovery for the conversion of the cattle. Plaintiff alleges the execution by Fales to himself of three chattel mortgages on 219 steers then in the possession of the mortgagor, the recording of the mortgages, that plaintiff had a lien on the property, and that defendants had personal knowledge thereof. There is not

pleaded a single condition contained in any of the mortgages, nor is it alleged that any condition has been broken, or that any portion of the mortgage debt is due. The averment that plaintiff has a lien on the cattle is a mere conclusion of law. The Code requires a pleading to set forth the facts, and not conclusions of law. (*Rainbolt v. Strang*, 39 Neb. 339.) No fact is stated showing that plaintiff had the right of possession of the property in dispute. The petition should have pleaded the facts constituting special ownership and plaintiff's right to possession at the commencement of the action. (*Hudelson v. First Nat. Bank of Tobias*, 51 Neb. 557; *Raymond v. Miller*, 50 Neb. 506.) The last case was an action for conversion by a mortgagee of chattels against a stranger, and the petition was held defective. In the opinion it was said: "It will be observed that there is no averment in the petition to the effect that plaintiffs are the general owners of the chattels in controversy, but that they predicate their right to recover damages for the alleged conversion merely upon a claim of special interest or ownership in the property, arising by virtue of a chattel mortgage. The terms and conditions of the mortgage are not pleaded, nor any facts averred which disclose that any of the stipulations therein contained have been broken, or that anything is due plaintiffs upon the mortgage. * * * Plaintiffs, in order to set forth a cause of action, were required to plead in their petition the facts constituting their special interest in the property, as well as the facts relied upon to entitle them to maintain an action for conversion against the defendants. This they have not done." The following authorities sustain the doctrine that the mortgagee of chattels cannot maintain conversion against one who took wrongful possession of the same, where at such time he was not in possession, nor entitled to the immediate possession of the property: 4 Am. & Eng. Ency. Law 119; 1 Chitty, Pleading 167*, 618*; *Owens v. Weedman*, 82 Ill. 409; *Baker v. Seavey*, 163 Mass. 522; *Bank v. Fisher*, 55 Mo. App. 51; *Chandler v.*

West, 37 Mo. App. 631; *Barnett v. Timberlake*, 57 Mo. 499; *Draper v. Walker*, 98 Ala. 310. The judgment is

AFFIRMED.

GEORGE L. JARRETT, APPELLEE, V. JOHN D. HOOVER ET AL., APPELLANTS.

FILED MARCH 3, 1898. No. 9562.

1. **Judicial Sales:** APPRAISEMENT. After property has been sold under a decree, the appraisement can be assailed only for fraud.

2. ———: ———. The action of appraisers of realty, under an order of sale, in returning the value of the property, in fixing the amount of prior liens at a greater sum, and in finding defendant's interest of no value, is a sufficient compliance with the Code of Civil Procedure (secs. 491*a*-491*c*), requiring the interest of defendant to be appraised at its real value in money.

3. ———: ORDER OF SALE. A decree of foreclosure may be executed without order of sale. If one be issued, it cannot limit the power conferred by the decree.

4. ———: ———: RETURN: TIME. Section 510 of the Code of Civil Procedure, fixing the time within which an execution shall be made returnable, is not applicable to orders of sale issued on decrees of foreclosure.

5. ———: ———: ———. A foreclosure sale will not be set aside merely because the order of sale was not returned within sixty days of its date.

APPEAL from the district count of Madison county. Heard below before SULLIVAN, J. *Affirmed.*

S. O. Campbell, for appellants.

Reed & Gross, contra.

NORVAL, J.

This is the second appearance of this cause in this court. (*Jarrett v. Hoover*, 41 Neb. 231.) The action was to foreclose a mechanic's lien, and upon the former appeal the decree of the district court foreclosing the lien

was affirmed. Subsequently an order of sale was issued by the clerk of the trial court and the premises were sold thereunder, but which sale was set aside on motion of the defendants. On January 27, 1897, a second order of sale was issued upon the decree, the property was appraised, the appraisers certifying: "The interest of John D. Hoover, Jr., *et al.*, defendants, we valued at no dollars;" and in pursuance of proper notice, the real estate was sold on March 1 of that year for the sum of $2,000. The order of sale, with the return of the sheriff indorsed thereon showing his proceedings under the writ, was filed in the office of the clerk of the district court on March 29, 1897. Objections to the second sale were filed, which were overruled, and the sale confirmed. To reverse this last order is the purpose of this appeal.

It is urged that the property was appraised too low, and that certain amounts were deducted by the appraisers as mortgage liens upon the lands, which the court had decreed not to be liens upon the premises. These objections come too late, since they were made for the first time after the sale. Appraisement can be attacked only for fraud, after the property has been sold. (*Vought v. Foxworthy*, 38 Neb. 790; *Smith v. Foxworthy*, 39 Neb. 214; *Ecklund v. Willis*, 44 Neb. 129; *Kearney Land & Investment Co. v. Aspinwall*, 45 Neb. 601; *Overall v. McShane*, 49 Neb. 64; *Griffith v. Jenkins*, 50 Neb. 719; *Hamer v. McFeggan*, 51 Neb. 227; *Omaha Loan & Trust Co. v. Bertrand*, 51 Neb. 508.) If deductions from the gross value of the real estate were improperly made by the appraisers on account of mortgages which were not liens, then the interest of the defendants was appraised too low, and such objection, to be available, should have been filed in the court below before the sale, as no fraud in making the appraisement is established by the evidence.

It is next argued that the defendants' interest in the premises was not ascertained and reported by the appraisers as required by section 491 *et seq.* of the Code of Civil Procedure. This contention is without merit.

They fixed the value of the property at $2,300, ascertained the liens, prior to plaintiff's, to be $10,941.44, and followed this with a finding that "the interest of John D. Hoover, Jr., *et al.*, defendants, we value at no dollars," which was equivalent to a declaration that the defendants' interest in the property had no money value; in other words, that the incumbrances against the land equaled or exceeded the value thereof. But that fact would not defeat a sale.

It is finally insisted there was error in not vacating the sale, because the sheriff did not make return of the order of sale within sixty days from the date thereof, according to the commands of the writ. An execution issued out of a court of record is required to be returned by the officer to the clerk of the court whence it issued within sixty days from the date. (Code of Civil Procedure, sec. 510.) But there is no statute in this state fixing the time within which orders of sale are returnable, and it would be legislation for the courts to hold that said section 510 of the Code is applicable to such writs. By an unbroken line of authorities this court has held that no order of sale need be issued to enforce a decree of foreclosure, but that the decree itself is sufficient authority to the officer or other person designated in the decree to make the sale. (*Rector v. Rotton*, 3 Neb. 171; *Parrat v. Neligh*, 7 Neb. 458; *Fried v. Stone*, 14 Neb. 398, 402; *Wyant v. Tuthill*, 17 Neb. 495; *Johnson v. Colby*, 52 Neb. 327.) In *Fried v. Stone*, *supra*, it was decided that misstatements in an order of sale of the date and amount of the decree did not invalidate the sale. Doubtless, the court rendering the decree may fix the period within which it shall be executed, or the order of sale issued thereon shall be returned. But if no limitation as to time is specified in the decree, the clerk of the court is without authority to designate in the order of sale the date when the writ shall be returned, and if he do so it is of no binding force. It was expressly decided in *Amoskeag Savings Bank v. Robbins*, 53 Neb. 776, that a foreclosure sale will not be set aside

merely because the order of sale was not returned within sixty days of its date. The order confirming the sale is

AFFIRMED.

SULLIVAN, J., not sitting.

CHARLES BARTELS ET AL. V. FREDERICK SONNENSCHEIN ET AL.

FILED MARCH 3, 1898. No. 7781

1. **Review**: FINAL ORDER. To obtain a review there must be a final order or judgment on the merits of the action in the court below.
2. ——: ——. An order overruling a plea in abatement is not a final order.

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

Morris, Beekman & Marple, M. McLaughlin, and *T. M. Franse,* for plaintiffs in error.

J. C. Cowin, J. C. Crawford, and *E. K. Valentine, contra.*

NORVAL, J.

This is the second appearance of the cause in this court. On the first submission the judgment of the trial court was affirmed. (*Sonnenschein v. Bartels,* 37 Neb. 592.) A rehearing was allowed and a second submission was taken, which resulted in a judgment of reversal, and the cause was remanded to the district court for further proceedings. (41 Neb. 703.) The action was for the conversion of a stock of general merchandise. The answer sets up two defenses, the first being matters in abatement to the suit, and the other relating to the merits of the controversy. Upon the second trial in the court below the jury returned two verdicts, one in favor

of the plaintiffs as to the plea in abatement interposed by the defendants, and the other finding for the defendants as to the issues joined on the merits. This last verdict was set aside on motion of the plaintiffs, and the defendants' separate motions for a new trial were overruled, and the judgment was entered that "the defendants and each of them are within the jurisdiction of the court, and that part of the answer filed by the defendants herein, designated and denominated as the first ground of defense, wherein and whereby is pleaded, be, and the same is hereby, dismissed from the case and stricken and eliminated from the answer." The defendants have prosecuted error proceeding to this court. No final judgment has been entered on the merits in the court below, but the action is there pending and undetermined.

The order above set forth is not one to which error will lie until the final disposition of the case by the district court. Had a general demurrer been sustained to the first defense of the answer, or said defense been stricken from the pleading, on motion, the ruling could not be reviewed before final judgment was entered on the merits, and the same is equally true of the order herein assailed. (*School District v. Cooper*, 29 Neb. 433; *Welch v. Calhoun*, 22 Neb. 166; *Brown v. Edgerton*, 14 Neb. 453; *Grimes v. Chamberlain*, 27 Neb. 605; *Bartram v. Sherman*, 46 Neb. 713; *Lewis v. Barker*, 46 Neb. 662; *Hall County v. Smith*, 49 Neb. 274.) For want of jurisdiction the petition in error is

DISMISSED.

HARRISON H. BLODGETT V. JAMES H. MCMURTRY ET AL.

FILED MARCH 3, 1898. No. 7851.

1. **Review:** RULINGS ON EVIDENCE. The exclusion of testimony which does not tend to establish either a cause of action or defense is not ground for reversal.

2. ——: ——: ASSIGNMENTS OF ERROR. An assignment in a petition

in error of "errors of law occurring at the trial" is insufficient to present for review the rulings of the court below on the admission or exclusion of testimony.

3. ——: POINTS NOT ARGUED. Alleged errors not referred to or argued in the briefs are waived.

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

H. H. Blodgett, pro se.

Webster, Rose & Fisherdick, contra.

NORVAL, J.

This action was to recover damages for wrongful interference with the title, not of record, to lot 4, in block 49, in the city of Lincoln, alleged to have been sustained by the execution of a quitclaim deed covering said lot and other property by the defendants to the Omaha & Republican Valley Railroad Company. Verdict and judgment were against the plaintiff, and he has brought the record here for review.

A brief reference to the facts is essential to an understanding of the questions presented. On February 3, 1876, the defendants, by a deed of general warranty, conveyed the lot in controversy to E. Mary Gregory, which deed was not placed upon record. On June 9, 1888, the defendants made and delivered a quitclaim deed to the railroad company for the lot aforesaid. Plaintiff contends that prior to said last conveyance E. Mary Gregory and her husband, J. S. Gregory, for value sold the property to one Joseph Taylor, who, it is alleged, made a deed of quitclaim of the property to the plaintiff on September 3, 1890. This last deed was excluded from the jury, as evidence, on the trial, which ruling is assigned for error. It was properly excluded for two reasons: First, the alleged conveyance of the lots by Gregory to Taylor was denied in the defendants' answer, and the proofs failed to establish that such deed was ever made and delivered. If Taylor had no title to the property, he could convey

none to Blodgett. That is clear. Again, the deed from Taylor was made subsequent to the conveyance to the railroad company, and only purported to quitclaim to plaintiff the grantor's right, title, and interest in the lot itself, and did not assign to the grantee any right of action the grantor may have had against the McMurtrys. To entitle plaintiff to recover it devolved upon him to prove, by competent evidence, that the title to the property was in himself at the time the deed to the railroad company was made, or that the person holding such title assigned to plaintiff the claim against the defendants for compensation. The deed to Taylor did not tend to establish either of these facts, and it was not error to refuse to permit it to go in evidence.

It is next insisted that the court below erred in the exclusion of the following offer made by plaintiff, as shown by the bill of exceptions: "The plaintiff offers to prove that at the time of the transfer in question it was agreed between Mr. Blodgett and Taylor that Mr. Blodgett should have Mr. Taylor's right to the title, as well as any and all damage to the title to the property in controversy—lot 4, block 49,—and that it was the intention of the parties at that time to transfer all right held by Taylor at that time." The exclusion of the foregoing was not specifically assigned as error in the petition in error, the assignment therein being "errors of law occurring at the trial and duly excepted to." This was insufficient to present for review in this court any ruling made in the court below on the admission or exclusion of testimony. (*Murphy v. Gould*, 40 Neb. 728; *Houston v. City of Omaha*, 44 Neb. 63; *Wanzer v. State*, 41 Neb. 238; *Mullen v. Morris*, 43 Neb. 596; *Imhoff v. Richards*, 48 Neb. 590.)

The giving and refusing of instructions are made the basis of two assignments in the petition in error, but such assignments not having been argued in the briefs are deemed waived. (*Peaks v. Lord*, 42 Neb. 15; *Madsen v. State*, 44 Neb. 631; *Glaze v. Parcel*, 40 Neb. 732; *Johnson v. Gulick*, 46 Neb. 817.) The judgment is

AFFIRMED.

STATE OF NEBRASKA, EX REL. DOUGLAS COUNTY, V. J. F. CORNELL, AUDITOR OF PUBLIC ACCOUNTS.

FILED MARCH 3, 1898. No. 9811.

1. **Statutes:** CONSTRUCTION. Special provisions in a statute in regard to a particular subject control general provisions.

2. **Election to Vote County Bonds:** RESULT. Under section 134, article 1, chapter 18, Compiled Statutes 1897, a majority of all the votes cast at the election is sufficient for the adoption of a proposition to issue county funding bonds, where, by their issuance, the amount of the county indebtedness is not increased, and the rate of interest is reduced.

3. **Statutes:** TITLES: AMENDMENTS. Where the title to a bill is to amend a designated section of a law, no amendment is permissible which is not germane to the particular original section proposed to be changed. *State v. Tibbets*, 52 Neb. 228, followed.

4. ——: ——: ——. The amendment to section 134, article 1, chapter 18, Compiled Statutes, made by the legislature of 1883 (Session Laws 1883, p. 191) is germane to the original section, and fairly within the scope of the title of the amendatory act.

ORIGINAL application for mandamus to compel respondent to register funding bonds of Douglas county. *Writ allowed.*

William D. Beckett, for relator.

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

NORVAL, J.

The purpose of this proceeding is to compel the respondent, as auditor of public accounts, to register and certify to the legality of 180 funding bonds of Douglas county of $1,000 each. It is disclosed that the proposition to issue these bonds, for the purpose of funding the outstanding indebtedness of the county, was submitted to the electors thereof at the general election held on November 2, 1897; that the total vote cast at said election was 18,762, of which 12,061 votes were in favor of

the proposition, and against it 3,749 votes; that the valid outstanding indebtedness of the county proposed to be funded by the issuance of said bonds was drawing interest at the rate of seven per cent per annum, and that the bonds in question bear four and one-half per cent interest per annum, and their issuance does not increase the amount of indebtedness of the county. The respondent has refused to register or to certify as to said bonds for the reason he is in doubt whether section 30, or section 134 of article 1, chapter 18, Compiled Statutes, determines the number of votes necessary to authorize the issuance of funding bonds. The proposition for funding the indebtedness of the county did not receive two-thirds of all the votes cast at the election; hence, if said section 30 applies, the bonds failed to receive a sufficient vote in their favor. On the other hand, if said section 134 governs and controls this case, it is conceded the bonds were legally carried, and are entitled to registration as valid obligations of the county, inasmuch as the bond proposition received a majority of all the votes cast at the election.

Said section 30, requiring two-thirds of all the votes cast at an election to adopt a proposition submitted to a vote of the people of a county involving the issuance of bonds is a general provision, and applicable to all kinds of bonds, where there is no special law upon the subject. It is plain that sections 132 to 136, inclusive, of said article 1, chapter 18, Compiled Statutes, in express terms relate exclusively to the subject of funding county indebtedness, and to the issuance of bonds for that purpose. Section 134 provides, *inter alia*, "That where, by the issuance of the proposed bonds, the rate of interest on said indebtedness will be reduced, and the amount of the indebtedness will not be increased, a majority of the votes cast shall be sufficient to adopt the proposition." The foregoing is a specific provision relating solely to a particular subject, namely, the issuing of bonds for the purpose of funding county indebtedness,

and is applicable in all cases where such bonds diminish the rate of interest on the indebtedness, and the amount of the indebtedness is not thereby increased. It is a firmly established rule of construction in this state that special provisions in a statute in regard to a particular subject, control general provisions. This principle was determined in *State v. Cornell*, 53 Neb. 556, where the authorities upon the question are collated.

After the submission of the cause, and the foregoing portion of this opinion had been prepared, a reargument was ordered by the court, on its own motion, upon the proposition whether the proviso clause of said section 134, already quoted, is inimical to that part of section 11, article 3, of the constitution, which provides that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title." Counsel for relator, in compliance with the suggestion of the court, has filed a brief in support of the validity of the law, which he has supplemented with an able oral argument at the bar. Consideration will now be given to the constitutional question already mentioned.

The legislature of 1879 passed a law entitled "An act concerning counties and county officers" (Session Laws 1879, p. 353), which has been carried into the various editions of the Compiled Statutes as article 1 of chapter 18. Sections 132 and 134 of said act are in the language following:

"Sec. 132. The county board of any county in the state of Nebraska are hereby authorized and empowered to issue coupon bonds of such denominations as they may deem best, sufficient to pay the outstanding and unpaid warrants and indebtedness of such county; *Provided*, That the county board of any such county may limit the provisions of this sub-division to any fund or funds of said county; *Provided, further*, That in no event shall bonds be issued to a greater amount than ten per cent of the assessed valuation of such county; *And provided further*, That the county board shall first submit the ques-

tion of issuing said bonds to a vote of the qualified electors of such county.

"Sec. 134. It shall be the duty of the county board of any county issuing bonds under the provisions of this subdivision to ascertain the highest price at which said bonds can be negotiated, and to embrace in the proposition submitted to the qualified electors under this act the minimum price at which said bonds shall be sold; *Provided,* That no bonds issued under the provisions of this subdivision shall be sold for less than eighty-five per cent of their par value."

In 1883 the legislature amended both of said sections, and others, under the title "An act to amend sections 132, 134, 135, 136, and 137 of chapter 18 of the Compiled Statutes, entitled 'Counties and County Officers.'" (Session Laws 1883, p. 191.) The proviso clause of the original section 134 was so amended as to prohibit the sale by county boards of funding bonds at a sum less than their par value, and a second proviso was at the same time added to said section, the one involved herein and already set out, which we again quote: "*And provided further,* That where, by the issuance of the proposed bonds, the rate of interest on said indebtedness will be reduced, and the amount of the indebtedness will not be increased, a majority of the votes cast shall be sufficient to adopt the proposition." That the provision of section 11, article 3, of the constitution of this state requires that the title to an act must fairly express the subject of legislation, is so well established by the decisions of this court as to make a discussion of the subject at this time wholly unnecessary. If the subject-matter of a law is not embraced within the scope of the title adopted by the legislature, the constitutional requirement is violated, and the legislation cannot be upheld. This doctrine is applicable alike to original legislation and amendatory statutes, so that where a title to a bill is to amend an existing section of an act, no amendment can be made which is not germane to such original section.

The decisions of this and other courts so holding were reviewed at length in the opinion in *State v. Tibbets*, 52 Neb. 228. The doctrine stated is not assailed by counsel for relator, but he argues that the amendment to said section 134, made in 1883, is germane to the original section. The writer entertains no doubt that said amendment was entirely germane to said section 132 above set out, and could have been properly attached to said section as an amendment, since that section originally treated of the subject of issuing county funding bonds and expressly provided that the proposition to issue such bonds should be first submitted to the qualified voters of the county for their adoption or rejection. It requires no argument to demonstrate that any legislation fixing the vote essential to authorize the issuance of such bonds, with propriety, could have been engrafted on to said original section 132, by way of an amendment. The question, however, with which we are concerned is not whether the legislature selected the most appropriate section to which to attach the amendment in question, but whether the new legislation was cognate to the subject embraced in said original section 134. An examination of said section discloses that in express terms it required county boards desiring to issue such bonds to ascertain the highest prices at which said bonds can be negotiated, and to embrace in the proposition submitted to the electors the minimum sum at which said bonds should be sold, which provision indicates that, to some extent, section 134, as it originally stood, related to the subject of submitting the proposition to issue county funding bonds to a vote of the electors and the manner of such submission. My associates are of the opinion that the addition of a provision to said section designating the affirmative vote required to authorize the issuance of such bonds, where the indebtedness is not increased by the issuance, and the rate of interest is thereby diminished, is germane to the original subject of legislation, and therefore is not inhibited by section 11, article 3, of the constitution.

To this conclusion the writer, with some misgivings as to its soundness, yields assent, on the ground that a statute will not be declared invalid unless it clearly contravenes the fundamental law. No valid objection to the registration of these bonds having been given by the respondent, a peremptory writ will issue in accordance with the prayer of the petition.

WRIT ALLOWED.

WILLIAM O. GILBERT, ADMINISTRATOR, V. REGINA MARROW.

FILED MARCH 3, 1898. No. 9558.

1. **Practice:** ERRONEOUS ORDERS: LACHES. When an order has been irregularly obtained against a party it is his duty to bring the matter to the attention of the court before proceeding to a trial of the cause.

2. **New Trial:** WAIVER OF ERROR. M. obtained a verdict in her favor, which was set aside without service upon her of notice as required by the rules of the court. She made no complaint during the term, nor until after there had been another trial and an adverse verdict and judgment rendered against her. *Held,* That she had waived her right to complain of the irregularity.

3. **Judgments:** PROCEDURE TO VACATE. A party who seeks the vacation of a judgment after the term at which it was rendered must allege and prove that he has a valid cause of action or defense, and to entitle him to relief the court must adjudge that such cause of action or defense is *prima facie* valid.

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

O'Neill & Gilbert, for plaintiff in error.

Virgil O. Strickler and *Byron G. Burbank, contra.*

SULLIVAN, J.

Regina Marrow sued Emily Hespeler in the district court of Douglas county for an assault and battery. A

trial to a jury, on June 22, 1894, resulted in a verdict in favor of the plaintiff for the sum of $4,000. The defendant filed a motion for a new trial on the day the verdict was returned, and on the following day the motion was granted. The verdict was set aside and a new trial awarded. On October 23, 1894, there was a retrial of the cause, resulting in a verdict for the defendant. On the 17th of the following month, a motion by plaintiff for a new trial being denied, judgment was entered on the verdict. On February 19, 1895, the defendant died and, soon after, William O. Gilbert, the plaintiff in error, was appointed administrator of her estate and the cause revived. On April 25, 1895, the plaintiff filed a motion asking for the vacation of the order entered on June 23, 1894, setting aside the verdict of the jury and granting a new trial, for irregularity in obtaining such order. The alleged irregularity consisted in the failure to give written notice to the plaintiff or her counsel of the hearing of the motion, and in representations made by the attorney for the defendant to the court that such notice had been waived. This motion was heard and overruled on May 21, 1895, the controverted question at the hearing being whether Mr. Strickler, attorney for the plaintiff, was present in court and participated in the proceedings which resulted, on June 23, 1894, in the order vacating the first verdict. It was conceded that the notice required by the rules had not been given. Up to this point all the proceedings in the case were had before the branch of the court presided over by Judge Ambrose. But on May 1, 1896, Judge Ambrose being no longer on the bench, an order was made by Judge Scott granting plaintiff leave to file another motion to vacate the order of June 23, 1894, setting aside the $4,000 verdict. This motion was accordingly filed, and coming on to be heard on May 5, 1896, the court made the following findings of fact: "After argument of counsel the court finds that the order of June 23, 1894, granting a new trial, was made contrary to and in violation of the rules of this court,

to-wit, rules 12, 13, 14, and 27, then in force in this court, and was prejudicial error and irregularly granted by the court and obtained by the defendant, and the court would set aside said order of June 23, 1894, granting said new trial, had this court jurisdiction so to do. The court finds that the plaintiff did not waive any of the rules above mentioned and did not consent to the hearing on said motion of June 23, 1894, and was not personally present at said hearing, and that there was bad faith in granting said order of June 23, 1894, setting aside the verdict of $4,000 and awarding a new trial in violation of the rules of this court. The court finds that the plaintiff would be granted leave to argue and be heard upon the motion for a new trial, filed June 22, 1894, had this court jurisdiction, power, or authority in law to grant such leave." Afterwards, on June 22, 1897, the court having reached the conclusion that it possessed the necessary power, made upon the facts previously found the following order: "This cause coming on to be heard for a final order upon the findings of facts heretofore made herein on the 5th day of May, 1896, and the court being fully advised in the premises, it is ordered, adjudged, and decreed that the motion filed by plaintiff May 4, 1896, be, and the same is hereby, sustained in all things, and that the order made June 23, 1894, setting aside the verdict of $4,000 in favor of the plaintiff and granting a new trial to the defendant Emily Hespeler, is hereby vacated, set aside, and held for naught, and the said verdict for $4,000 in favor of the plaintiff is hereby reinstated in full force and effect; also that the proceedings relating to the second trial, together with the judgment thereon, be vacated, set aside, and held for naught, said judgment being entered on November 17, 1894, against the plaintiff for costs, and that the plaintiff herein have and recover her costs herein, taxed at $——, to all of which the defendant herein, William O. Gilbert, administrator of the estate of Emily Hespeler, deceased, excepts and objects." This is quite a sweeping order to

predicate on the denial of plaintiff's right to have her counsel make a speech on the motion for a new trial which was submitted and sustained on June 23, 1894. Of course, the right to be heard on that motion was a substantial one, and for an unlawful deprivation of it plaintiff had her remedy; but it was her duty to move promptly; she was required to be diligent in presenting her grievance to the attention of the court. Her counsel knew that a new trial had been granted, and he knew the rules of the court which entitled him to notice of the motion. In other words, he knew that the court had proceeded irregularly; he knew what the irregularity was, and was only ignorant of the reason for the court's irregular action. Under these circumstances what duty did the law impose upon him? Might he conceal from the court the fact that the new trial had been granted without notice to him, proceed to a second trial, take advantage of the verdict if it should be in his favor, and destroy it if against him? We think not. Litigants cannot trifle with the court. They must act with candor and in good faith. Finesse and dissimulation will not be tolerated. Had counsel in this case promptly, during the term, challenged attention to the fact that the order in question had been irregularly granted, the matter in controversy could have been settled easily and without evidence. The presiding judge would, no doubt, have had a distinct recollection of what transpired when the motion was submitted, or, if in doubt about the matter, it would have been but slight inconvenience to vacate the order, hear counsel's argument, and then make such further order as the justice of the case required. Instead, however, of pursuing the course indicated, plaintiff waited almost a year—waited until there had been another trial and an adverse verdict and judgment rendered and until the action had abated by defendant's death—before taking any steps to secure a vacation of the irregular order. This remarkable tardiness can be explained only on the theory that she had acquiesced in

the order of the court. It cannot be accounted for on the assumption that she did not sooner know of the reason for the court's irregular action. She could easily have ascertained that reason had she cared to inquire. But she studiously refrained from making inquiry, realizing, of course, that it was the order and not the inducement to it which had bereft her. We think, under these circumstances, the court very properly overruled plaintiff's motion. It is certainly true that she had the statutory right to file a motion to vacate the irregular order at any time within three years from the date on which it was entered; but when, with full knowledge of the facts, she proceeded to a second trial without bringing the matter to the attention of the court, it must be presumed that she waived this right. When, without protesting against the order, she moved for a second verdict she relinquished her claim on the first. (*Ætna Life Ins. Co. v. McCormick*, 20 Wis. 279; *Nichols v. Nichols*, 10 Wend. [N. Y.] 560; *Jenkins v. Esterly*, 24 Wis. 340; *Fletcher v. Wells*, 6 Taunt. [Eng.] 191; *McCormick v. Hogan*, 48 Md. 404.)

The new evidence submitted by the plaintiff on the hearing of the motion before Judge Scott on May 5, 1896, merely tended to impeach certain witnesses who had testified for the defendant before Judge Ambrose on May 21, 1895. In connection with the other evidence it was sufficient to warrant the court in finding as it did that the order of June 23, 1894, was made without notice to the plaintiff or her attorney as required by the rules of court. But in view of the history of the case, as disclosed by the record, neither the evidence nor the findings justify the order of June 22, 1897. That order was not made within the limits of judicial discretion and it must be set aside. There is also another reason for this conclusion. Section 606 of the Code of Civil Procedure is as follows: "A judgment shall not be vacated on motion or petition, until it is adjudged that there is a valid defense to the action in which the judgment is rendered, or, if the plaintiff seeks its vacation, that there is a valid

cause of action; and where a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment." In the case of *Bond v. Wycoff*, 42 Neb. 214, it was held that before the defendant was entitled to have a judgment against him set aside under the provisions of sections 602-611 of the Code, it was necessary for him to allege and prove that he had a valid defense, in whole or in part, to the cause of action stated in the petition. In *Gilcrest v. Nantker*, 47 Neb. 58, it was held that where a defendant petitions for a new trial after the term at which judgment was entered, he must plead facts showing that his defense is meritorious; and in *Thompson v. Sharp*, 17 Neb. 69, it was decided that when the plaintiff applies for a new trial after the adjournment of the term at which judgment was rendered against him, he must make it appear that he has a valid cause of action. But to entitle plaintiff to the order of June 22, 1897, it was not only necessary for her to allege and prove a valid cause of action, but it was also necessary, under the section of the statute just quoted, to secure an adjudication that her cause of action was *prima facie* valid. (*Janes v. Howell*, 37 Neb. 320; *Western Assurance Co. v. Klein*, 48 Neb. 904.) This she failed to do, and such failure would, of itself, require a reversal of the order. (*State v. Duncan*, 37 Neb. 631.) The conclusion thus reached renders unnecessary a decision of other questions argued in the briefs of counsel. A *nunc pro tunc* judgment for $4,000 having been rendered on June 26, 1897, in plaintiff's favor on the first verdict, it is hereby reversed. The order of June 22, 1897, is also reversed and the judgment and orders therein mentioned are reinstated in full force and effect.

JUDGMENT ACCORDINGLY.

JOHN A. HORBACH, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

FILED MARCH 3, 1898. No. 9644.

1. **Municipal Corporations**: NUISANCE: TAXATION: POLICE POWER: STATUTES. A statute authorizing municipal authorities to drain, fill, or grade lots or pieces of ground within the corporate limits "so as to prevent stagnant water, banks of earth, or other nuisance accumulating or existing thereon," and providing for the assessment of the entire expense of the improvement against the property so drained, filled, or graded, is not in violation of the provision of the constitution relating to special taxation for local improvements. The enactment of such a law is a warranted exercise of the police power of the state.

2. **Nuisance**: EXPENSE OF ABATEMENT: TAXATION. But where the owner of the land is en itled, by the terms of the statute, to notice, and an opportunity to do the work himself, the city authorities have no jurisdiction to proceed with the improvement until such notice and opportunity have been given.

3. **Taxation**: QUIETING TITLE. When the statute in such cases requires notice to the owner and no notice is served, an assessment against his property to defray the expense of grading and filling the same is wholly void and will be canceled as a cloud on his title

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

The opinion contains a statement of the case.

Charles A. Goss, for appellant:

Appellant contends that if the city filled or graded said lots, it must have done so by reason of their condition being a nuisance; that as a condition precedent to the city causing the lots to be filled it must have given him notice to fill or grade them; that it never gave him such notice, and therefore the alleged tax is void. (Compiled Statutes 1887, ch. 12*a*, sec. 29; Cooley, Taxation [2d ed.] 365, 609; *First Presbyterian Church v. City of Fort Wayne*, 36 Ind. 338; *In re Appeal of Powers*, 29 Mich. 504; *People v. Sneath*, 28 Cal. 612; *Smith v. Davis*, 30 Cal. 536; *Taylor v. Downer*, 31 Cal. 480; *Johnston v. City of Oshkosh*, 21 Wis.

184; *Kneeland v. City of Milwaukee*, 18 Wis. 431; *Atkins v. Kinnan*, 20 Wend. [N. Y.] 241.)

The special assessment sought to be made in this case is unconstitutional because the section of the charter under which such work is to be done is contrary to the constitution. (Constitution, art. 9, sec. 6; Compiled Statutes 1887, ch. 12*a*, sec. 29; *Hanscom v. City of Omaha*, 11 Neb. 43.)

W. J. Connell, for the city of Omaha.

E. H. Scott, also for the city of Omaha:

The provisions of the statute authorizing the mayor and council to abate a nuisance resulting from stagnant water, by draining, filling, or grading the property whereon such nuisance exists and levying the expense thereof upon such property, are not unconstitutional. (*Bancroft v. City of Cambridge*, 126 Mass. 438; *Farnsworth v. City of Boston*, 121 Mass. 173; *Welch v. City of Boston*, 126 Mass. 442; *City of Charleston v. Werner*, 17 S. E. Rep. [S. Car.] 33; *Smith v. City of Milwaukee*, 18 Wis. 69; *Donnelly v. Decker*, 17 N. W. Rep. [Wis.] 389; *Bradley v. New York & N. H. R. Co.*, 21 Conn. 305; *O'Riley v. Kankakee Valley Draining Co.*, 32 Ind. 169.)

The assessment against property drained of the cost of drainage, when demanded as conducive to public health and to prevent the existence of a nuisance, is not an exercise of the taxing power, but constitutes merely a proper exercise of police power of the state. (*Thompson v. Treasurer of Wood County*, 11 O. St. 678; *People v. Mayor of Brooklyn*, 4 N. Y. 419; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *Ex parte New Orleans Draining Co.*, 11 La. Ann. 338; *Palmer v. Stumph*, 29 Ind. 329; *Anderson v. Kerns Draining Co.*, 14 Ind. 199; *Booth v. Town of Woodbury*, 32 Conn. 128; *State v. Sargent*, 45 Conn. 373; *Austin v. Murray*, 16 Pick. [Mass.] 126; *French v. Kirkland*, 1 Paige Ch. [N. Y.] 117; *Woodruff v. Fisher*, 17 Barb. [N. Y.] 224; *Norfleet v. Cromwell*, 70 N. Car. 634; *State v. City*

Council of Charleston, 12 Rich. [S. Car.] 702; *State v. City of Newark*, 27 N. J. Law 185; Cooley, Taxation [1st ed.] 402, and authorities there cited; *Village of Carthage v. Frederick*, 122 N. Y. 268; *In re Godard*, 16 Pick. [Mass.] 504; *Union R. Co. v. City of Cambridge*, 11 Allen [Mass.] 287; *Kirby v. Boylston Market Ass'n*, 14 Gray [Mass.] 252; *Reinken v. Fuehring*, 6 Am. R. & Cor. Cas. [Ind.] 82; *City of Philadelphia v. Goudey*, 36 W. N. Cas. [Pa.] 246; *Philadelphia v. Glading*, 36 W. N. Cas. [Pa.] 247; *City of St. Louis v. Stern*, 3 Mo. App. 48; *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140; *Commonwealth v. Alger*, 7 Cush. [Mass.] 53, 84; *Chicago B. & Q. R. Co. v. State*, 47 Neb. 549.)

Notice of the proposed abatement of the nuisance was unnecessary. (*Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549; *Baumgartner v. Hasty*, 100 Ind. 575; *Lawton v. Steele*, 119 N. Y. 226; *Dunbar v. City Council of Augusta*, 90 Ga. 390; *Barker v. City of Omaha*, 16 Neb. 271; *Durst v. Griffin*, 31 Neb. 673.)

Ralph W. Breckenridge, for receiver of German Savings Bank:

The city had power and authority to abate the nuisance on the lots in controversy and assess the cost thereof upon the property. (*Smiley v. MacDonald*, 42 Neb. 5; *City Council of City of Charleston v. Werner*, 38 S. Car. 488.)

Notice of the proposed abatement of the nuisance was not necessary. (*North Chicago City R. Co. v. Town of Lake View*, 105 Ill. 207; *King v. Davenport*, 98 Ill. 305; *Wilson v. Town of Philippi*, 39 W. Va. 75.)

W. A. Saunders, also for appellees.

SULLIVAN, J.

An ordinance of the city of Omaha, passed in 1887, declared certain lots owned by John A. Horbach to be a nuisance and directed the board of public works to take the necessary steps to abate such nuisance. This was

done. The lots were filled with earth and a special assessment against them was afterwards made by the city authorities to defray the cost of the improvement. This assessment remaining unpaid, the property was sold and a tax certificate issued to the purchaser, who assigned the same to the German Savings Bank, of which McCague is now receiver. This action was brought in the district court for Douglas county to obtain a cancellation of the tax certificate as a cloud on Horbach's title. But the court on the trial adjudged the certificate to be a valid lien and ordered the lots sold for its satisfaction. Horbach has brought the case here on appeal.

The steps which resulted in the issuing of the tax certificate were taken under section 29 of the charter of 1887, which is as follows: "The mayor and council shall have power to require any and all lots or pieces of ground within the city to be drained, filled, or graded, so as to prevent stagnant water, banks of earth, or any other nuisance accumulating or existing thereon; and upon the failure of the owners of such lots or pieces of ground to fill, drain, or grade the same, when so required, the council may cause such lots or pieces of ground to be drained, filled, or graded, and the cost and expense thereof shall be levied upon the property so filled, drained, or graded, and collected as other special taxes." (Compiled Statutes 1887, ch. 12*a*, sec. 29.) The validity of this section is assailed on the ground that it provides an unconstitutional basis of taxation. The contention is obviously unsound. The charge authorized by the section to defray the expense of draining, filling, or grading lots, the condition of which amounts to a nuisance, is not a "tax" or "assessment" at all within the meaning of those terms as they are used in the constitution. The abatement of nuisances menacing the public health or safety is the main purpose of the law, and its enactment was a warranted exercise of the police power of the state. (*Cone v. City of Hartford*, 28 Conn. 363; *Williams v. Mayor of Detroit*, 2 Mich. 560; *Bancroft v. Cambridge*, 126 Mass.

438; *Booth v. Town of Woodbury*, 32 Conn. 128; *O'Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169; *Reeves v. Treasurer*, 8 O. St. 333; *Donnelly v. Decker*, 58 Wis. 461; *State v. City of Newark*, 27 N. J. Law 185.)

But appellant insists that if the law is valid the city was not justified in proceeding under it without notice to him, and that no notice was ever given. The decree of the district court recites that no written notice or order requiring Horbach to fill or grade the lots was ever served. The language of this finding implies that the court may have reached the conclusion that notice in some other form was given, but after a diligent search we are prepared to say that the record affords no evidential support for that implication. And there can be in this case no presumption of law to supply the want of proof. (*Hutchinson v. City of Omaha*, 52 Neb. 345; *Smith v. City of Omaha*, 49 Neb. 883.) Under the section of the charter above quoted it is quite clear that the power of the city to fill or grade the lots in question at the owner's expense depended upon a previous demand having been made upon him to do the work and a refusal on his part to do it. Demand and refusal were indispensable and prerequisite to the authority of the city to improve the property and charge it with the expense of the improvement. The legislature having prescribed the terms on which the city was authorized to make assessments of this character, the power to make them could be lawfully exercised, only, when there had been a substantial compliance with the statute. This proposition is well established by authority. (*Anderson v. Commissioners of Hamilton County*, 12 O. St. 644; *Milton v. Wacker*, 40 Mich. 229; *Edmiston v. Edmiston*, 2 O. 253; *Fass v. Seehawer*, 60 Wis. 525; *Grace v. Board of Health*, 135 Mass. 490; *Fitchburg R. Co. v. City of Fitchburg*, 121 Mass. 132; *Northampton v. Abell*, 127 Mass. 507; *Hutchinson v. City of Omaha*, 52 Neb. 345; *Johnston v. City of Oshkosh*, 21 Wis. 186.) In the case last mentioned, which involved the validity of an assessment for a local improvement, it was held that,

because there was a failure to comply with the provisions of the statute requiring the owner of the property to be notified and given an opportunity to do the work himself, the tax was unauthorized and wholly void. In the opinion of the court, delivered by Dixon, J., it is said: "Every one having had the slightest experience in such matters knows that the right reserved to owners and occupants to make the improvements themselves is a substantial right and one which cannot be dispensed with without very great danger of oppression and injustice." And in *Fass v. Seehawer, supra*, Lyon, J., speaking of an assessment made without the statutory notice to the property owner and an opportunity to him to do the work himself, uses this language: "No notice being given, the board of public works would be absolutely powerless to make a valid contract to do the work, and thus the very groundwork of a tax to pay for the same would be wanting." Our conclusion is that the city council of Omaha had no authority to grade appellant's lots and was without jurisdiction to levy the assessment in controversy and that such assessment was and is absolutely void.

But it is urged on behalf of appellees that even if the assessment is void no relief can be granted against them in this action without requiring Horbach to first pay the just and reasonable value of the improvement for which the tax was levied. Such is not the law. Against a void special assessment, no question of estoppel being involved, a court of equity will always grant relief without imposing terms. (*Brown v. City of Denver*, 7 Colo. 305; *Hawthorne v. City of East Portland*, 13 Ore. 271; *Bellevue Improvement Co. v. Village of Bellevue*, 39 Neb. 876; *Smith v. City of Omaha*, 49 Neb. 883; *Touzalin v. City of Omaha*, 25 Neb. 817; *Hutchinson v. City of Omaha*, 52 Neb. 345; *Harmon v. City of Omaha*, 53 Neb. 164.)

We have not overlooked the argument of counsel for appellees that this assessment may be sustained under section 30 of the charter of 1887 without proof that any notice was given. Section 30 is as follows: "The mayor

and council shall have power to make regulations to secure the general health of the city; to provide for the prevention, abatement, and removal of nuisances; to make and prescribe regulations for the location, construction, and keeping in order all slaughter houses, stock yards, warehouses, stables, or other places where offensive matter is kept, or is liable to accumulate, whether within the corporate limits or within three miles thereof; and to regulate or prevent the carrying on of any business which may be dangerous or detrimental to the public health or the manufacture or vending of articles obnoxious to the health of the inhabitants; and the mayor and council are hereby authorized to abate and remove any nuisance and the cause thereof in a summary manner at the cost of the owner or occupant of the premises where the nuisance or the cause thereof may be, and for that purpose may enter upon and take possession of any premises or property where such nuisance may exist or be produced, and may collect such cost by civil action in any court of competent jurisdiction, or may assess the same against any such premises or property." (Compiled Statutes 1887, ch. 12*a*, sec. 30.) It will be observed that this section provides for the abatement of nuisances generally, while section 29 has special reference to the abatement of nuisances upon real estate by grading, filling, or draining the same. The latter section having made specific provision for the abatement of nuisances of the kind in question in this case must, under a well settled rule of construction, be held exclusively applicable. (*Merrick v. Kennedy*, 46 Neb. 264; *State v. City of Kearney*, 49 Neb. 325.) The judgment of the district court is reversed and judgment will be entered in this court in accordance with the prayer of the petition.

REVERSED AND DECREE FOR PLAINTIFF.

HARTFORD LIFE & ANNUITY INSURANCE COMPANY V. ELIZA A. EASTMAN.

FILED MARCH 3, 1898. No. 7869.

1. **Insurance:** PAYMENT OF PREMIUMS: WAIVER OF TERMS. Stipulations in a contract of life insurance providing for a forfeiture in case of default by the insured in paying premiums at a place and on a day specified are inserted for the benefit of the company and may be waived by it.

2. ———: ———: ———. Such waiver may be inferred from the acts, declarations, or conduct of the officers or agents of the insurance company charged with the management of its business, and acting within the scope of their authority.

3. ———: ———: ———. A provision in a policy of life insurance requiring payment of assessments in cash at its office in a distant state is waived by habitually accepting good checks in lieu of cash.

4. ———: ———: ———. When an insurance company invites its patrons to use the mails in transmitting premiums and gives express directions in relation thereto, it will warrant an inference that the company intended to accept as payment funds sent to it by mail in time to reach its office in due course, on or before the day such premium would fall due.

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

Warren Switzler, for plaintiff in error.

J. R. Andrews and *H. C. Brome*, *contra.*

SULLIVAN, J.

This proceeding in error is prosecuted to obtain a reversal of a judgment for $2,123.56 rendered by the district court for Douglas county in favor of Eliza A. Eastman against the Hartford Life and Annuity Insurance Company. The action was upon a policy of insurance issued by the plaintiff in error, on the life of George W. Eastman, and payable on his death to his wife, the defendant in error. The policy provided that premiums becoming due should be paid at the office of the company

in Hartford, Connecticut, on or before the 5th day of the month next following the call therefor; and it was further provided that the policy should lapse in case of non-payment of any premium according to the terms of the contract. To secure the reinstatement of a lapsed policy it was necessary for the insured to pay the premium and furnish a health certificate. On December 5, 1893, a premium of $9.94 became due and was unpaid. On the 26th of the same month Eastman died. The company rests its defense to the action on the proposition that the policy had lapsed and was not in force at the time of Eastman's death. The defendant in error contends that the company had waived its right to insist on a strict compliance with the provision of its policy in regard to the payment of premiums. It appears that in 1891 the policy in question was pledged to C. F. Reed, who thereafter paid the premiums by issuing to the plaintiff in error the check of C. F. Reed & Co., drawn on the First National Bank of Omaha and mailed in time to reach Hartford on or before the 5th of the month in which they became due. It further appears that in the years 1889 and 1890 there were five occasions on which payments were not made at the time required by the policy and that in every such case Eastman furnished a health certificate to the company and received from it a reinstatement certificate. On the trial the jury found—and we accept the finding as conclusive of the fact—that on December 1 Reed mailed at Omaha a check, in the usual form, for $9.94, to the insurance company at Hartford, to pay the premium maturing on December 5. This check did not reach its destination until December 9, and the company then declined to accept it and returned it to Eastman with a letter advising him that the policy had lapsed and that he must furnish a health certificate in order to secure a reinstatement. Being then sick, as it seems, Eastman was unable to procure this certificate.

From the foregoing statement it will be seen that the only question in the case is whether the company waived

its right to declare a forfeiture of the policy for non-payment of the last premium on the day it became payable. By the terms of the contract the company was entitled to receive all premiums in cash at its office in Hartford on the day they became due; and for a failure to so pay any such premium the company might rightfully declare a forfeiture. But this provision was inserted in the contract for the company's benefit and might be waived by it. This proposition is abundantly established by authority (11 Am. & Eng. Ency. Law 308); and it is equally well settled that such waiver may be inferred from the acts, declarations, or conduct of the officers or agents of the company charged with the management of its business and acting within the scope of their authority. Any act of the insurer which reasonably indicates a purpose not to insist on a strict compliance with any provision of its policy will be deemed a waiver of the right secured to it by such provision. (*Home Protection Ins. Co. v. Avery*, 85 Ala. 348; *Heaton v. Manhattan Fire Ins. Co.*, 7 R. I. 502; *Pittsburgh Boat-Yard Co. v. Western Assurance Co.*, 118 Pa. St. 415.)

It is conceded that the right to insist on payment in cash of the December premium was waived by the previous acceptance of checks for other premiums; but it is argued quite vehemently that the waiver went no further. We think, however, that it did. The mortuary calls sent out by the company to its patrons instructed them to "register all letters containing currency or postal notes," and to "transmit this notice with remittance for return with payment indorsed." By these notices the company called on its patrons for the payment of maturing premiums and pointed them to the post office as the medium through which payment should be made. It went further. It not only selected the agency, but it gave explicit directions how to use it. It, in effect, said to each of its policy-holders: "On the 5th of next month your premium for the current quarter will be due. Make payment to us through the postal department; and if

your remittance be in the form of currency or postal notes, register your letter containing the same; otherwise you need not do so." Had Eastman, acting on this invitation, sent currency or a postal note instead of Reed's check, it would hardly be claimed that his policy lapsed because his letter was lost or delayed in transmission. Having invited its patrons to use the mails in making payment of their premiums, it is but reasonable and just to infer that the company intended to accept as payment funds sent by mail in time to reach it, in due course, on or before the day such premiums would become due. Eastman, of course, did not send either currency or postal notes, but he did send that which the company had, by its previous conduct, led him to believe would be considered and treated as the equivalent of cash. We think the jury were fully warranted in finding, on the evidence before them, a waiver by the company of the provisions of the policy under which a forfeiture is claimed. Forfeitures are not favored and have often been denied on evidence of waiver or estoppel much less persuasive than that produced on the trial of this cause. (*Appleton v. Phœnix Mutual Life Ins. Co.*, 59 N. H. 541, 47 Am. Rep. 220; *Currier v. Continental Life Ins. Co.*, 53 N. H. 538; *Heaton v. Manhattan Fire Ins. Co.*, 7 R. I. 502; *Hodson v. Guardian Life Ins. Co.*, 97 Mass. 144; *Cotton States Life Ins. Co. v. Lester*, 62 Ga. 247; *Union Central Life Ins. Co. v. Pottker*, 33 O. St. 459; *Meyer v. Knickerbocker Life Ins. Co.*, 73 N. Y. 516, 29 Am. Rep. 200; *Miller v. Eagle Life & Health Ins. Co.*, 2 E. D. Smith [N. Y.] 268; *Ætna Ins. Co. v. Simmons*, 49 Neb. 811; *Home Fire Ins. Co. of Omaha v. Kennedy*, 47 Neb. 138; *Western Home Ins. Co. v. Richardson*, 40 Neb. 1.)

This company has for years collected premiums on the policy in suit, and it should not now be permitted to escape liability because the agency, which was employed at its instance to transmit the premium from Omaha to its office at Hartford, has failed to act with its usual promptness and precision. In the case of *Kenyon v.*

Knights Templar & Masonic Mutual Aid Ass'n, 122 N. Y. 247, a case quite similar in its facts to the one at bar, the court, speaking through Bradley, J., quotes with approval the following language from the case of *New York Life Ins. Co. v. Eggleston*, 96 U. S. 572: "Forfeitures are not favored in the law; and courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action. on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."

But it is urged by the plaintiff in error that the course of dealing between itself and Eastman in the years 1889 and 1890 effectually rebut any inference of a waiver of its right to insist on a forfeiture for non-payment of assessments according to the provisions of the policy. We do not take that view of the matter. Attached to each mortuary call is a blank application for reinstatement which, according to its terms, "is to be signed when payment is past due or when it will not reach home office until past due." On one occasion in 1889 the insured filled out this application and mailed it at Omaha the day before the assessment was due; but there is no instance where such certificate was ever furnished or required when the premium was mailed in time to reach Hartford, in due course, on or before the day it was payable. It does not appear that any of the belated payments made in 1889 and 1890 were mailed with the expectation that they would or could reach their destination within the time required by the contract or the notice issued in pursuance thereof. The judgment of the district court is

AFFIRMED.

CLARK & LEONARD INVESTMENT COMPANY, APPELLEE, V. BELLE V. HAMILTON ET AL., APPELLANTS, ET AL.

FILED MARCH 3, 1898. No. 9435.

1. **Mortgages:** FALSE CERTIFICATE OF SATISFACTION: FORECLOSURE. A certificate of satisfaction issued by the clerk of the district court and recorded by the register of deeds pursuant to sections 83*a* and 83*b*, article 1, chapter 18, Compiled Statutes 1897, does not suspend the execution of a decree for the foreclosure and sale of the land described in such certificate when, in fact, there has been no release, payment, or satisfaction.

2. **Judicial Sales:** RETURN: CONFIRMATION. It is not a valid objection to the confirmation of a judicial sale that the order of sale, under which the sheriff or other officer acted, was not returned within sixty days from the date of its issuance.

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

W. S. Hamilton and *Fritz Westermann*, for appellants.

S. L. Geisthardt, contra.

SULLIVAN, J.

To reverse an order of the district court of Lancaster county confirming a sale of real estate made under a decree of foreclosure Belle V. Hamilton and William S. Hamilton have brought this case here by appeal. Two objections to the confirmation are argued in appellants' brief. We will consider them in the order of their presentation.

The decree of foreclosure was rendered on the 29th day of March, 1893, and on the 29th day of August, 1894, the clerk of the district court issued, and there was filed in the office of the register of deeds of said county on the same day a certificate of satisfaction of the mortgage which was the basis of the decree. This certificate was so issued and filed pursuant to the provisions of section 83*a* and 83*b* of article 1, chapter 18, Compiled Statutes 1897. There was, in truth, no satisfaction of the mort-

gage, and the certificate of the clerk reciting satisfaction was false in fact and improvidently issued. On November 17, 1896, a sale of the mortgaged premises under the decree in question was vacated for alleged irregularity and an order for another sale was entered on the records of the court. This order directs "that said sheriff proceed forthwith again to sell said property pursuant to the terms of said decree under the appraisement as heretofore made by him." Counsel for appellant, in effect, contends that the district court possessed no power to carry its decree into execution until the certificate of satisfaction issued by the clerk and recorded by the register of deeds should be canceled and recalled. We think, however, that the existence of this certificate was not an insuperable obstacle to the enforcement of the decree. It was evidence in the office of the register that the mortgage had been paid, and that was the full extent of its legal efficacy. It could no more suspend the force of the decree than could any other evidence of payment. No precedent has been cited and we know of none which supports appellants' contention. The cases denying the power of the clerk to issue an execution upon a satisfied judgment are entirely wanting in analogy. Upon the records of the district court there is neither actual nor apparent satisfaction of the decree in this case; and the district court, since the alleged satisfaction, has specifically directed the execution of the decree as rendered.

The second objection to the confirmation is based on the failure of the sheriff to return the order of sale within sixty days from the date of its issuance. This objection was properly overruled. In the case of *Amoskeag Savings Bank v. Robbins*, 53 Neb. 776, and also in the case of *Jarrett v. Hoover*, 54 Neb. 65, both decided at the present term, we held that the failure to return an order of sale within sixty days from its date is not a valid objection to the confirmation of a judicial sale. It follows that the judgment of the district court is right and should be

AFFIRMED.

ALEXANDER CALMELET, APPELLEE, V. JACOB SICHL, APPELLANT.

FILED MARCH 3, 1898. No. 9698.

1. **Appeal:** PLEADING. When there is filed in the supreme court on appeal no pleading but a supplemental petition, and the decree discloses the fact that it was rendered upon consideration of a petition and supplemental petition, the decree of the district court will be affirmed.

2. ———: ———. A second appeal to the supreme court is so far independent of a former appeal that pleadings filed in the original appeal cannot be referred to in that subsequently taken, for the purpose of ascertaining what issues had been originally joined and presumably were tried, when there was entered the decree sought to be reversed.

APPEAL from the district court of Otoe county. Heard below before RAMSEY, J. *Affirmed.*

John C. Watson, John V. Morgan, and *John W. Dixon,* for appellant.

Edwin F. Warren, contra.

RYAN, C.

A former judgment in this case was considered and reversed in *Calmelet v. Sichl,* 48 Neb. 505. There has since been entered a decree, from which this appeal is prosecuted. In the record now presented for our consideration there is no pleading, but a supplemental petition, in which there are alleged certain acts of the defendant in defiance and disobedience of an injunction which were destructive of the rights and interests of the plaintiff with respect to real property owned by the latter. There was in this supplemental petition a prayer that a nuisance created by the acts and aggressions above referred to might be abated and, by injunction, prevented in future. The defendant filed a motion to strike this supplemental petition from the files, for the reasons:

"First, it is not a supplemental petition; second, it is not a complete petition in itself. It is not such a petition as plaintiff was given leave of court to file." There was no ruling on this motion, but there was a trial. In the decree it was found that plaintiff "is entitled to the relief prayed for in his petition and supplemental petition filed herein," etc. By this recitation we are advised that in this case there was a petition considered which is not in this record. In *Lowe v. Riley*, 41 Neb. 812, it was held that in this court a bill of exceptions must contain all the evidence upon which questions of fact are to be determined, and that, for the purpose of obtaining such determination, it was not sufficient to refer to another bill of exceptions in an independent case. On the principle involved in *Lowe v. Riley, supra*, it was held in *Lindsay v. State*, 46 Neb. 177, that this court could not be asked to rule upon a question of fact not presented by the record under consideration. Counsel for appellant seem to assume that we can examine the pleadings filed in this court in a former controversy in this same case. The principle above applied forbids this, for the former appeal and this one are as independent of each other in this court as they would be if there was no identity of parties. There is left open to us no other course, and the judgment of the district court is accordingly

AFFIRMED.

LANCASTER COUNTY V. W. A. GREEN ET AL.

FILED MARCH 3, 1898. No. 7885.

1. **County Board: POWERS.** A board of county commissioners, in addition to the powers specially conferred by statute, has such other powers as are incidentally necessary to enable such board to carry into effect the powers granted.

2. ———: ———. The word "necessary" considered and, in respect to the implied powers of boards of county commissioners, *held* to

mean no more than the exercise of such powers as are reasonably required by the exigencies of each case as it arises.

3. Instructions: QUESTION FOR JURY. An instruction which withdrew from a jury the consideration of the necessity of employing brokers to refund county bonds, because in the contract, for the performance of which the recovery was sought against the county, its commissioners had assumed to determine the existence of such necessity, *held* erroneous.

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

A. G. Greenlee and *A. E. Harvey*, for plaintiff in error.

Lamb & Adams, *L. W. Billingsley*, and *R. J. Greene*, *contra.*

RYAN, C.

While there may be room for doubt as to the correctness of our position, we assume that this case was an appeal from the disallowance of a claim by the board of county commissioners of Lancaster county. In the petition filed in the district court of that county the plaintiffs, Green & Van Duyn, alleged that December 27, 1893, they had entered the service of said county as agents to refund certain of its bonds at an agreed compensation of $7,500 if successful; that they had performed their undertaking and were entitled to a balance of $5,500 after crediting the county with a payment of $2,000. By its answer the county joined issue as to the existence of any indebtedness owing by it to the above named plaintiffs. Upon a trial of the issues there was a verdict for the plaintiffs in the sum of $2,046.64, and a judgment thereon was rendered against the county, which prosecutes these proceedings in error.

There was given, among other instructions, the following:

"2. Under the statutory law of this state and the construction thereon placed by the supreme court of Nebraska, the board of county commissioners had lawful authority and legal right to make and enter into said

contract, and employ said Green & Van Duyn as agents to assist said board, if necessity therefor existed, in refunding the bonds of the county at a lower rate of interest. The question of the necessity of said employment of agents to aid the county board in refunding said bonds does not arise, and is not an issue in this case as between the parties to this suit, for the reason that the county board itself in said contract has determined the question, and so in reaching a verdict you will discard the question of necessity of the employment of agents entirely from your consideration."

We shall now consider the two distinct propositions recognized in the above instruction, first, that the board had the authority to enter into the contract if a necessity therefor existed, and, second, that the assumption of the right to enter into the contract by the board was conclusive as to its power in that respect.

By the provisions of section 23, article 1, chapter 18, Compiled Statutes, the management of the county funds and county business, except in certain cases not necessary to consider, was entrusted to this board. With respect to the faithful performance of their duties by the members of the board the same presumptions obtain as are entertained with reference to the discharge of their duties by other officers.

In *Sioux City & P. R. Co. v. Washington County*, 3 Neb. 30, occurs this language: "It was insisted on the argument that the law presumes all officers have done their duty. This is true in some respects, but when the acts of officers who exercise judicial functions of limited jurisdiction are questioned, the rule is well settled that they must not only show they acted within the authority granted, but it must also appear of record that they had jurisdiction. (*Frees v. Ford*, 6 N. Y. 176; *Yates v. Lansing*, 9 Johns. [N. Y.] 437; *Reynolds v. Stansbury*, 20 O. 353; *Wheeler v. Raymond*, 8 Cow. [N. Y.] 314; *Bloom v. Burdick*, 1 Hill [N. Y.] 130.)"

In *State v. Lincoln County*, 18 Neb. 283, it was said: "It

is well settled in this state that counties have no inherent power, and that their commissioners or agents acting for them have only such powers, generally, as are specially granted to them by statute, or such as are incidentally necessary to carry into effect those which are granted." In support of this proposition there were cited *Hallenbeck v. Hahn*, 2 Neb. 397; *Sioux City & P. R. Co. v. Washington County, supra; Sexson v. Kelley*, 3 Neb. 107; *People v. Commissioners of Buffalo County*, 4 Neb. 157; *Hamlin v. Meadville*, 6 Neb. 233; *State v. Buffalo County*, 6 Neb. 460; *McCann v. Otoe County*, 9 Neb. 324; *Walsh v. Rogers*, 15 Neb. 311. In addition to these there might now be cited *Douglas County v. Keller*, 43 Neb. 635, and *Tullock v. Webster County*, 46 Neb. 211. This grant of power must be strictly construed. (*State v. Lincoln County, supra; Sioux City & P. R. Co. v. Washington County, supra; Sexson v. Kelley, supra; People v. Commissioners of Buffalo County, supra; Commissioners of Hamilton County v. Mighels*, 7 O. St. 115; *Treadwell v. Commissioners of Hancock County*, 11 O. St. 190.)

We are not aware of any opinion in which is so thoroughly discussed the force of the word "necessary" as in *McCulloch v. State of Maryland*, 4 Wheat. [U. S.] 315, from which the following language of Marshall, C. J., is quoted:

"Congress is not empowered by it [the constitution] to make all laws which may have relation to the powers conferred on the government, but such only as may be 'necessary and proper' for carrying them into execution. The word 'necessary' is considered as controlling the whole sentence and as limiting the right to pass laws for the execution of the granted powers to such as are indispensable and without which the power would be nugatory; that it excludes the choice of means and leaves to congress, in each case, that only which is most direct and simple.

"Is it true that this is the sense in which the word 'necessary' is always used? Does it always import an

absolute, physical necessity, so strong that one thing to which another may be termed necessary can not exist without that other? We think it does not. If reference be had to its use in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful, or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be unattainable. Such is the character of human language that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that obviously intended. It is essential to just construction that many words which import some thing excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word 'necessary' is of this description. It has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. The comment on the word is well illustrated by the passage cited at the bar from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying 'imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws,' with that which authorizes congress 'to make all laws which shall be necessary and proper for carrying into execution' the powers of the general government, without feeling a conviction that the convention understood itself to change materially the mean-

ing of the word 'necessary' by prefixing the word 'absolutely.' This word then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view."

The holding of this court in *State v. Lincoln County, supra,* was, in effect, that county commissioners of a county, acting for it, have generally only such powers as are specially granted to them by statute or such as are incidentally necessary to carry into effect those granted. The discussion of the word "necessary" above quoted illustrates the sense in which that word as used by this court should be understood. The county commissioners, therefore, are clothed not only with the powers expressly conferred upon them by statute, but they also possess such powers as are requisite to enable them to discharge the official duties devolved upon them by law. It was not practicable in advance to enumerate all the powers which the board of county commissioners might be permitted to exercise. To cover all contingencies very general language was employed, and from these considerations it necessarily results that the question whether or not the board has exceeded its powers must be determined upon the circumstances of each case as it arises. *State v. Board of Commissioners of Lancaster County,* 20 Neb. 419, seems to have been determined upon this theory, but of this there is by no means a certainty, for two of the judges announced that they were willing payment of a certain amount should be made to the relator, but for what reason, or upon what theory, they failed to state.

The first proposition in the instruction quoted was not inconsistent with the line of reasoning which, so far, has been followed. The correctness of the other proposition cannot, however, be so readily conceded. As we have already stated, the powers of the board of county commissioners in many cases could only be conferred in general terms, and whether or not these powers have

been transcended must be determined in view of the facts of each particular case as it arises. In the case at bar the exigency which required the employment of plaintiffs was defined in the contract set out in the petition of plaintiffs, and it was said in the above quoted instruction, that the question of the necessity of employing plaintiffs to aid in refunding the bonds of the county did not arise, for the reason that the county board, in said contract, has determined that question. The bill of exceptions in this case has been quashed, so that we cannot consider the facts established by the proofs, and this consideration should relieve us of the imputation of reflecting upon the conduct or motives of the county commissioners in this case when we say that, by recitation of their powers and of the necessities which require the exercise of them, no board of county commissioners can preclude inquiries into those questions. The second proposition embodied in the instruction under consideration was at variance with the views just stated, and the judgment of the district court is therefore reversed.

REVERSED AND REMANDED.

MARY W. GAYLORD V. NEBRASKA SAVINGS AND EXCHANGE BANK.

FILED MARCH 3, 1898. No. 7854.

1. **Indorsement of Note.** An indorsement of a negotiable promissory note in this language, "Pay to the order of—Mary W. Gaylord," *held* not a general indorsement, nor such an indorsement as would transfer the legal title by a mere delivery of such note.
2. **Note:** ASSIGNMENT. A negotiable promissory note may be transferred by a separate distinct assignment thereof, but in such case the transferee will not be protected as against infirmities or defenses which might be shown as against the assignor.
3. **Estoppel:** QUESTION FOR JURY. An estoppel *in pais*, well pleaded, presents a question of fact, which, as such, should be submitted to the jury for determination.

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

James H. McIntosh, for plaintiff in error.

Silas Cobb, contra.

RYAN, C.

This action was brought by Mary W. Gaylord in the district court of Douglas county against the Nebraska Savings and Exchange Bank for the value of a certain promissory note which plaintiff alleged the bank had wrongfully converted to its own use. This note was dated December 15, 1891, and by its terms was payable to Mary W. Gaylord, or order, December 15, 1896, with interest at the rate of six per cent per annum, evidenced by semi-annual coupons. The defenses of the bank will probably be best understood if there is given a portion of the undisputed history of this note subsequent to its execution.

Ralph E. Gaylord, a member of the firm of Muir & Gaylord, was the only son of Mary W. Gaylord. The note in question was taken by him in settlement of some controversy and was, with a mortgage securing it, sent in a letter to plaintiff January 2, 1892. In this letter, addressed to Mrs. Gaylord in Florida, there was the following language: "Now I want, at the first opportunity, to dispose of this note and mortgage for you so as to lend the money for you at a better rate of interest. I think I can do this soon. That I may have everything ready for this I inclose the bond for your indorsement and an assignment of the mortgage for your signature and acknowledgment. On the back of the note and each coupon you will see the words, 'Pay to the order of.' Please sign your name Mary W. Gaylord on the pencil line drawn under those words, eleven places in all. Also please sign your name to the assignment on the line

marked '×' and have it witnessed and acknowledged before a notary public. * * * I cannot put in the name of the assignee, for I don't know to whom I may sell this." These instructions were complied with in respect to the note at least; and with the indorsements, as indicated, it and the mortgage were returned to Ralph E. Gaylord, at Omaha. The form of indorsement on the bond and on each coupon attached thereto was as follows:

"Pay to the order of
"MARY W. GAYLORD."

There were denials in the answer of the bank, and there were also averments that the firm of Muir & Gaylord acted within the scope of its powers in transferring said note and mortgage to the bank, but there was no evidence to sustain these defenses, and Mrs. Gaylord testified that the above quotation from the letter of her son indicated the only manner in which he, or the firm of which he was a member, was authorized to use the note and mortgage. The answer of the bank, however, contained the following averments: "Further answering defendant says that it did on the 9th day of March, 1892, loan to Muir & Gaylord, F. D. Muir and Ralph E. Gaylord, the sum of eight thousand dollars ($8,000), lawful money of the United States, and did receive from the said Muir & Gaylord, F. D. Muir and Ralph E. Gaylord, their promissory note for the payment of the said eight thousand dollars ($8,000) and interest six months after date. Defendant alleges that it did on the 9th day of May, 1892, loan to the said F. D. Muir and Ralph E. Gaylord the further sum of eight hundred dollars ($800) and receive the promissory note of the said F. D. Muir and Ralph E. Gaylord for the payment of the said eight hundred dollars ($800) and the interest ninety days after date. Defendant further says that at the time of the loan to the said Muir & Gaylord of the said eight thousand dollars ($8,000), to-wit, on March 9, 1892, the said Muir & Gaylord had in their possession under their control the assign-

ment heretofore referred to, duly executed by the plaintiff herein, that they also had in their possession the real estate coupon bond hereinbefore referred to and payable to the order of the plaintiff, and that said bond was at that time indorsed in words and figures following, to-wit, 'Pay to the order of—[signed] Mary E. Gaylord,' and defendant did receive from the said Muir & Gaylord said coupon bond and mortgage, together with the assignment thereof, from said Muir & Gaylord as collateral security to the above notes of the said Muir & Gaylord, as they had a right to do, and the said Muir & Gaylord had full authority and right to assign the same." The averments of the answer were denied in plaintiff's reply. On the trial there was introduced in evidence an assignment signed and acknowledged by Mary W. Gaylord. This was written on a piece of paper separate and distinct from the note and mortgage. The date of the certificate of acknowledgment made by a notary public in Florida was January 8, 1892. This assignment was filed for record in the office of the register of deeds of Douglas county July 10, 1894, and while its primary object seems to have been to transfer the mortgage, there was contained in it an assignment of the note to the Nebraska Savings and Exchange Bank. Mrs. Gaylord testified that when she signed the assignment it was not drawn to the Nebraska Savings and Exchange Bank. This was not contradicted, neither was there any effort to show by whom, or when, the name of the bank was written in. The evidence of the officers of the bank was to the effect that the bank made the two loans pleaded in the answer in reliance upon the note and mortgage which it received as collateral security from Muir & Gaylord when the first of the two loans was made to them. This was the condition of the evidence when the court instructed the jury to find for the defendant, and accordingly there was a verdict and judgment.

In the consideration of this case we shall not attempt to discuss the negotiability of the note, but, for the argu-

ment's sake, will assume that it was negotiable in form. It was held in *Doll v. Hollenbeck*, 19 Neb. 639, where a negotiable promissory note had been assigned by a writing separate and distinct from the note itself, that the assignee was not entitled to protection as a *bona fide* purchaser of negotiable paper transferred before due, and this holding was approved in *Colby v. Parker*, 34 Neb. 510. As between the parties to this action, therefore, this assignment merely operated to transfer the note and mortgage. The indorsement of the note as pleaded in the answer was in this language, "Pay to the order of—[signed] Mary E. Gaylord." It is probable that the transcript incorrectly shows the initial letter as "E" instead of "W," and we shall therefore lay no stress on the variance between the name of the payee and the name as in the answer alleged to have been indorsed. If the indorsement is to be considered as above quoted, it is clear that it is not a general indorsement, but is an indorsement intended, when completed, to be limited to whatever name shall be inserted in the blank. From this incomplete indorsement we must conclude that when the bank took the note as collateral security the payee had not yet determined to whom she would make the transfer. If the bank has correctly pleaded the indorsement according to its understanding it was bound to know when the note was offered to it that the payee had, as yet, neither an intention to name an indorsee nor the design of making a general indorsement. If, however, the indorsement is to be treated as though there was no intention to complete it in the future by inserting the name of the indorsee it would read "Pay to the order of Mary W. Gaylord." To effect a transfer in this view of the indorsement it would be necessary that Mary W. Gaylord should indorse the note anew. Under such circumstances nothing was really effected by the indorsement, for she could equally as well in the same manner transfer the paper as payee. We are therefore of the opinion that the indorsement on the note in the condition

in which it was when by the bank it was received as collateral security did not vest the legal title in the bank. Its rights as transferee depend upon the assignment made separately, and this, as we have already seen, merely operated to transfer the title and not to afford protection as to an innocent purchaser of negotiable paper before due.

The answer of the bank, in so far as it specially pleaded an estoppel as against the plaintiff, has already been quoted. It was proper that this defense should be specially pleaded. (*Nebraska Mortgage Loan Co. v. Van Kloster*, 42 Neb. 746; *Erickson v. First Nat. Bank of Oakland*, 44 Neb. 622; *Gregory v. Kenyon*, 34 Neb. 640; *Scroggin v. Johnson*, 45 Neb. 714.) The testimony of plaintiff, that she did not authorize her son, or the firm of which he was a member, to use the note as collateral security was uncontradicted. Whether or not the bank furnished the money on the faith of this collateral, and whether or not it was deceived into doing so by representations of the agent of plaintiff apparently sanctioned by her acts or negligence, were questions of fact which should have been submitted to the jury. It was erroneous peremptorily to direct a verdict for the defendant, and the judgment of the district court is therefore reversed and this cause is remanded for further proceedings.

REVERSED AND REMANDED.

WESTERN UNION TELEGRAPH COMPANY v. H. L. COOK.

FILED MARCH 3, 1898. No. 7866.

1. **Witnesses:** CROSS-EXAMINATION. The cross-examination of a witness should ordinarily be confined to matters concerning which he has testified in his direct examination.

2. **Telegraph Companies:** NEGLIGENCE. Where a party in good faith

had endeavored to avoid injury attributable to the negligence of a common carrier, it cannot escape liability by showing that such endeavors might have been more judicious.

3. ———: ———. Evidence examined, and *held* to justify a peremptory instruction for plaintiff.

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

Estabrook & Davis, for plaintiff in error.

Paul & Templin, contra.

RYAN, C.

In this case there was a verdict against the Western Union Telegraph Company in compliance with an instruction that such a verdict should be found by the jury. To reverse the judgment rendered upon this verdict the telegraph company has prosecuted an error proceeding to this court.

In the petition filed in the district court plaintiff alleged that he was a real estate agent at St. Paul, in this state, on September 1, 1892; that there had been entrusted to him for sale by S. S. Smith certain lands in Howard county; that the price fixed on said lands by Smith, its owner, was $12,600; that between Smith and plaintiff the agreed compensation of plaintiff for making a sale was five per cent on the first $1,000 and two and one-half per cent on the balance; that through plaintiff's efforts one H. C. Stewart, a resident of Illinois, perfectly able to perform his undertakings, had been induced to purchase the aforesaid land at the price fixed, but instead of making payment of $1,000 as earnest money as required by Smith, proposed to pay $500, and accordingly asked a modification of Smith's terms, and, with matters in this condition, that Stewart returned to his home in Illinois. Plaintiff further alleged that on September 19, 1892, he entrusted to the defendant for delivery to Stewart a telegram in the following language:

"Smith requires one thousand down, balance March 1. Wire answer." This telegram was altered in transmission so that as received by Stewart it read, "Smith requires ten thousand down, balance March first. Wire answer." Plaintiff alleged that this alteration in transmission caused Stewart to answer by telegraph as follows, "Smith's terms not satisfactory," and that owing alone to the above described negligence the consummation of the sale of said land and right to the compensation agreed was prevented. The evidence sustained these averments testified to by plaintiff, except that in the deposition of Mr. Stewart he stated that the agreement between himself and plaintiff contemplated absolutely that but $500 earnest was required. This variance, however, was not material, in so far as the telegraph company was concerned, for its mistake furnished a cause of action as well under one statement as under the other.

C. E. Joy testified that when the telegram was sent to Illinois he was manager of the telegraph company at St. Paul; that he then knew plaintiff and had never since 1890 known of his being engaged in any other line of business than that of real estate agent. On cross-examination this question was propounded to this witness, "Did Mr. Cook, on the 19th of September, have any conversation with you—September, 1892—have any conversation with you at any time?" We think the objection that this was not proper cross-examination was properly sustained. As between the telegraph company and plaintiff it was immaterial whether or not there was a written contract between Mr. Smith and his agent. From Mr. Smith's own testimony it was disclosed that he regarded himself as being bound to pay if a sale had been consummated by Mr. Cook, and accordingly would have paid the agreed compensation in that event. After the telegram was altered in transmission, and the negotiations had been broken off by the answer thereto, Mr. Cook, by correspondence, attempted to induce Mr. Stew-

art to purchase, and was so far successful that Mr. Stewart returned from Illinois to St. Paul, but this was too late, for meanwhile Mr. Smith had sold the land to another person. We are of the opinion that there was no error in refusing to permit a cross-examination which had no other tendency than to show that Mr. Cook's efforts might have been more judiciously directed than they were.

Under the undisputed evidence, the company was liable, and the district court properly so instructed the jury in view of the holdings of this court in *Western Union Telegraph Co. v. Kemp*, 44 Neb. 194, and *Western Union Telegraph Co. v. Wilhelm*, 48 Neb. 910. The judgment of the district court is therefore

AFFIRMED.

UNION PACIFIC RAILWAY COMPANY V. PETER J. MCNALLY.

FILED MARCH 3, 1898. No. 7880.

Publication of City Ordinance. In this case the sufficiency of the publication of an ordinance of South Omaha is presented under the same conditions as were described in *Union P. R. Co. v. Montgomery*, 49 Neb. 429, and the ruling in that case is accordingly followed.

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

W. R. Kelly, E. P. Smith, and *John Schomp,* for plaintiff in error.

Mahoney & Smyth, contra.

RYAN, C.

In this case there was a verdict and judgment against the plaintiff in error for damages under circumstances

very similar to those described in *Union P. R. Co. v. Montgomery*, 49 Neb. 429. There was introduced in evidence an ordinance of the city of South Omaha containing the same provisions as those copied in the opinion in the above entitled case. There was the same objection as to the publication of said ordinance, which was overruled, and this ruling is assigned as error.

In *Union P. R. Co. v. Montgomery, supra*, the certificate as to the publication of the ordinance recited that it "was published in the South Omaha *Daily Stockman*, * * * on the 5th day of September, A. D. 1888." In the case now under consideration the certificate recited that the ordinance "was, on the 5th day of September, 1888, for the period of one day, published in the *Daily Stockman*, a newspaper, on said last named day, within said city of South Omaha." This case is therefore controlled by the reasoning in the case above cited, and accordingly the judgment of the district court herein is reversed.

REVERSED AND REMANDED.

CHARLES L. BENEDICT V. CITIZENS BANK OF PLATTSMOUTH.

FILED MARCH 3, 1898. No. 7920.

Action for Rent: JUDGMENT FOR DEFENDANT. The evidence in this case examined, and found not sufficient to sustain the findings of the district court.

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

Morris, Beekman & Marple and *Hoagland & Hoagland*, for plaintiff in error.

A. N. Sullivan, contra.

RYAN, C.

In this action there was a judgment in favor of the defendant in the district court of Cass county. The subject-matter of the action was the rent of a certain room occupied by the bank between April 1 and December 1, 1893. The lease under which the bank held its possession was of date March 17, 1890, and was for a term of five years. It was executed by J. E. Riley, at that time the owner of the demised property. The provision for payments was in this language: "And the said party of the second part, in consideration of the leasing of the premises as above set forth, covenants and agrees with the party of the first part to pay to said party of the first part, as rent for the same, the sum of $900 per year, payable as follows: the sum of $75 monthly, the first payment to be made on the first day of April, 1890; said rent to be paid at the office of said Citizens Bank by placing said amount to the credit of said lessor on the first day of each month for the month previous." The property, of which the above leased banking room was a part, was subsequently conveyed to the Plattsmouth Investment Company, by which company it was conveyed to plaintiff. There was a difficulty about clearing the title until April 1, 1893, when, this difficulty having been adjusted, the transfer was closed. J. E. Riley, when he made the lease in question, was owing the bank an amount in excess of the entire five years' rent, and the bank, by way of defense, insisted that it was entitled to apply the rent on this indebtedness, and the district court so found. In this finding the court erred. The lease was recorded, it is true, but the above quoted language in no way countenanced the idea that the bank was to apply the monthly payments in extinguishment of rent. On the contrary, the provision that each month's rent was to be placed to the credit of the lessor, who might treat these sums as so much credited to his account as a depositor, to be drawn by means of his checks. If there was any

understanding outside the lease that these payments of rent were to be applied in payment of a debt owing by Riley to the bank, there was no notice of this fact given plaintiff. His purchase was not from Riley, but from Riley's grantee. When he purchased he was entitled to be substituted to the rights of Riley, as defined by the terms of the written lease. The bank has not paid the money. It is simply withholding payment, under claim of right so to do. The judgment of the district court was not sustained by the evidence and accordingly is

REVERSED.

CONTINENTAL BUILDING & LOAN ASSOCIATION OF KANSAS CITY, NO. 2, V. ANDERSON AULGUR.

FILED MARCH 3, 1898. No. 7861.

1. **Review:** EVIDENCE. The evidence examined, and *held* to sustain the finding of the jury.

2. **Principal and Agent:** EVIDENCE. The ruling of the district court in admitting in evidence a receipt for money, given to the defendant in error by a witness and director of plaintiff in error, which tended to contradict the evidence of the witness that in his dealings with defendant in error he was acting on his own behalf and not as plaintiff's agent, reviewed and *held* not erroneous.

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

Cobb & Harvey and *Morning & Berge,* for plaintiff in error.

Charles E. Magoon, contra.

RAGAN, C.

The Continental Building and Loan Association of Kansas City, No. 2, has filed here a petition in error to review a judgment pronounced against it in favor of

Anderson Aulgur by the district court of Lancaster county.

1. The first argument is that the verdict is not sustained by sufficient evidence. Aulgur set out in his petition nine causes of action. It is unnecessary to pay any attention to the ninth cause of action, as the defendant below offered to confess judgment thereon. The other eight causes of action were alike, and, without quoting the petition, they were substantially this: Aulgur was the owner of eight houses and lots in Abbott & Irvine's Addition to the city of Lincoln, had sold these eight properties to eight different persons, and as a part consideration of the purchase price was to accept a note from each vendee of $650, secured by mortgage upon the real estate sold. Aulgur then contracted with the building association, by which it agreed to take the mortgages of Aulgur's vendees. Each vendee executed his note to the building association for $650 and secured the payment of the note by a mortgage upon the property sold to such vendee by Aulgur, and thereupon the building association paid to said Aulgur $575 on each of said mortgages. This suit was brought by Aulgur to recover the $75 which he claims remain unpaid to him from the building association on each of said mortgage debts, or a total amount of $600. The building association answered, first, that it had paid on each of said mortgage loans the $575 and agreed to pay him the remaining $75 on each of said loans when each mortgagor had paid on his loan a sufficient amount of money to reduce it from $650 to $575, and that none of said mortgagors had paid said amount on his loan. The second defense of the building association was that Aulgur's vendees were carpenters and were at work for him, and that he agreed with the building association that instead of paying his vendees for their work he would retain out of their wages sufficient sums of money to pay what would become due on their mortgages and pay these sums to the building association until each mortgagor had reduced his debt to the building asso-

ciation $75, and then it, the building association, would pay said $75 on each of said loans to Aulgur; and that Aulgur neglected to withhold the wages of his men and pay them to it, the building association, and that the mortgagors themselves had not reduced their mortgage debts to $575 each. It will thus be seen that the building association's answer amounted to a confession and avoidance of the cause of action set up by Aulgur in his petition, and the building association assumed the burden of establishing the two defenses pleaded by it. We cannot say that the jury was wrong in reaching the conclusion that the building association had not established either of these defenses. The second defense interposed, to say the least, is very peculiar, and it may be doubted if it amounts to a defense. The nature of the building association's answer disposes of its contention here that there is a variance between the pleadings and proof of Aulgur.

2. The second assignment of error relates to the action of the district court in permitting a receipt to be introduced in evidence on the trial. It appears that whatever agreement was entered into between Aulgur and the building association was made on behalf of the latter by one of its directors, named Ripley, and he testified in the case on the trial on behalf of the building association to the effect that while the building association took mortgages from each of Aulgur's vendees for $650 the company was only to pay down $575 to Aulgur for each of said mortgages, and to pay the remaining $75 on each of said mortgages only when the mortgage debts had been reduced by payments made thereon $75 each; that he was positive that this was the agreement between him and Aulgur, because, as an agent of the building association, he had no authority to pay in cash more for the mortgages purchased. On cross-examination he admitted that he was a director of the association at that time, and was at the time of the agreement between the company and Aulgur. His examination then proceeded as follows:

Q. In what capacity are you employed by them?

A. The question is, what do you mean by capacity?

Q. Don't you know what is meant by capacity?

A. No, sir, I do not; but I can tell you that I am one of the directors of the company.

Q. Yes, sir; what else?

A. What else what?

Q. What else are you in this company?

A. I am not anything, only a man. * * *

Q. You say you were out here examining property. Were you examining property as a director?

A. No, sir; I was examining the property as a man.

Q. Well, as a director of this company?

A. No, sir.

Q. You didn't have any relation with this company at that time?

A. Well, I won't answer that question.

Q. Well, did you examine this property?

A. I examined that property.

Q. What for?

A. I will answer that question when I am instructed to by the court; I don't propose——

The Court: You may answer, Mr. Witness.

The Witness: What is the question?

(Question read.)

A. I examined it to find out its value.

Q. For what purpose did you desire to ascertain its value?

A. To report to the board its value.

Q. To what board?

A. To the board of directors of the Continental Building & Loan Association of Kansas City.

Q. And how many are there in that board?

A. I don't know.

Q. Is there not a committee of that board that passes upon these loans when they are submitted to them? * *

A. Yes, sir; there was at that time.

Q. And of whom did that consist?

A. That consisted of three persons, the president, the secretary, and myself.

Q. When you were dealing with Mr. Aulgur did you deal with him as a director of that company?

A. I did not.

Q. In what capacity did you deal with him?

A. I dealt with him as an individual sent here by the company to examine property and report to the company its value.

Q. You did not deal with him as a director?

A. No, sir.

Q. Do you remember that fact as distinctly as anything else you have testified to?

A. What fact?

Q. That you did not deal with him as a director.

A. I couldn't deal with him as a director. An individual cannot deal with a man as a director. It is an utter impossibility.

* * * * * * * * * *

Q. Did you ever see that receipt before?

A. Yes, sir.

Q. Is that your handwriting?

A. Yes, sir.

The plaintiff then offered, and the court permitted to be read to the jury, the following:

"Rec'd, Lincoln, April 13, 1892, fifty-two dollars, examiner's exp., and fifteen dollars, lawyer fee, on loan for eight houses in Abbott's & Irvine Add.

E. L. RIPLEY,
"Director, Continental B. & Loan Ass'n."

The court did not err in admitting in evidence this receipt. The loan association by its answer admitted the purchase of the Aulgur mortgages at their face value of $650 each; that it had only paid on each of said mortgages $575 and that it still owed Aulgur $75 on each of said mortgages, which sums had not become due under the contract which it made with Aulgur. To prove this

defense the building association put their director and agent, Ripley, on the stand, and he testified, at the behest of the building association, that he was its director and was its agent to contract with Aulgur; that is, the building association, by its pleading and its conduct in putting Ripley upon the stand as its witness, admitted that he had authority to purchase the mortgages at their face value; to pay $575 down on each mortgage and become Aulgur's debtor for the remaining $75 on each mortgage. While the building association concedes that its agent had this much authority, it denies that the agent had authority to pay in cash for the mortgages their face value; and the witness assigns, as a reason why he could not be mistaken as to what the contract between him and Aulgur was, that in all his dealings with Aulgur he was acting as an individual and not as an agent of the company. But the company, by its pleading and conduct in the case, has estopped itself from saying that Ripley was not its agent and authorized to purchase these mortgages from Aulgur; and whether the mortgages were to be paid cash for at the time they were purchased, or to be paid for part in cash and credit given for a part, was a question of fact for the jury; and whether Ripley was authorized to purchase the mortgages for cash was likewise a question for the jury, and this receipt introduced in evidence went to the credibility of this witness' testimony, that in all his dealings with Aulgur he was acting upon his own responsibility and not for the company; and he testified in explanation of the receipt that it was given by him to Aulgur for money which Aulgur paid him for his company, and that the payment grew out of this transaction of the sale of the mortgages in controversy here. In other words, it appears that Aulgur paid to Ripley for the building association, as compensation for examining the mortgaged property, $67. The receipt then was at least an admission of the witness that in his dealings with Aulgur he was acting as the agent of the building association, and in that respect tended to contradict his

testimony that he was not so acting. The judgment of the district court is right and is

AFFIRMED.

EUGENE MILLER V. STATE INSURANCE COMPANY OF DES MOINES.

FILED MARCH 3, 1898. No. 7907.

Limitation of Actions: CONTRACTS: PUBLIC POLICY. The statutes of this state provide in what time actions may be brought; and a contract which provides that no action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time which the statute fixes for bringing an action on such contract or for a breach thereof, is against public policy and will not be enforced by the courts of this state.

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

C. H. E. Heath and *Paul & Templin,* for plaintiff in error.

Long & Mathew, contra:

A special limitation contained in a contract is valid and binding no matter what the general law of limitation may be. (*Hudson v. Bishop,* 35 Fed. Rep. 820; *O'Laughlin v. Union Central Life Ins. Co.,* 3 McCrary [U. S.] 543; *Riddlesbarger v. Hartford Ins. Co.,* 7 Wall. [U. S.] 386; *Davidson v. Phœnix Ins. Co.,* 4 Sawyer [U. S.] 594; *Thompson v. Phœnix Ins. Co.,* 25 Fed. Rep. 296; *Arthur v. Homestead Fire Ins. Co.,* 78 N. Y. 462; *De Grove v. Metropolitan Ins. Co.,* 61 N. Y. 594; *Wilkinson v. First Nat. Fire Ins. Co.,* 72 N. Y. 499; *Allemania Ins. Co. v. Little,* 20 Brad. [Ill.] 431; *Phœnix Ins. Co. v. Lebcher,* 20 Brad. [Ill.] 450; *Humboldt Ins. Co. v. Johnson,* 1 Brad. [Ill.] 309; *Johnson v. Humboldt Ins. Co.,* 91 Ill. 92; *Cornett v. Phœnix Ins. Co.,* 67 Ia. 388; *Garretson v. Hawkeye Ins. Co.,*

65 Ia. 468; *Edson v. Merchants Mutual Ins. Co.*, 35 La. Ann. 353; *Blanks v. Hibernia Ins. Co.*, 36 La. Ann. 599; *Farmers Mutual Fire Ins. Co. v. Barr*, 94 Pa. St. 345; *Waynesboro Mutual Fire Ins. Co. v. Conover*, 98 Pa. St. 384; *Universal Mutual Fire Ins. Co. v. Weiss*, 106 Pa. St. 20; *Underwriters' Agency, v. Sutherlin*, 55 Ga. 266; *Tasker v. Kenton Ins. Co.*, 58 N. H. 469; *Corn City Mutual Ins. Co. v. Schwan*, 1 O. C. C. 192; *Phœnix Ins. Co. v. Underwood*, 12 Heisk. [Tenn.] 424; *Higgins v. Windsor County Mutual Ins. Co.*, 54 Vt, 270.)

RAGAN, C.

Eugene Miller files here a petition in error to review a judgment of the district court of Sherman county dismissing an action brought therein by him against the State Insurance Company of Des Moines, Iowa.

Miller's suit was upon an ordinary insurance policy issued by the defendant in error agreeing to indemnify him for any loss the insured property might sustain by reason of fire or lightning within a certain time. The policy provided that the insurance company should not be liable for any loss thereunder unless a suit for such loss was brought within six months of the date of the loss or damage, any statute of limitations to the contrary notwithstanding. Among other defenses to the action the insurance company interposed that Miller's suit was not brought within six months after the happening of the loss sued for. The case was tried to the court without a jury, and the court found specially as follows: "The court finds, under the pleadings and the evidence, in favor of the plaintiff as to all issues raised by the pleadings, except as to the issue that the action was not brought within six months from the time the cause of action accrued, as provided in the policy, and upon that issue the court finds in favor of the defendant." Upon this finding the court dismissed Miller's action. The statutes of this state provide in what time all actions may be brought, and a contract which provides that no

action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time which the statute fixes for bringing an action on such contract, or for a breach thereof, is against public policy, and will not be enforced by the courts of this state. (*Barnes v. McMurtry*, 29 Neb. 178.) In *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443, such a clause was held to be absolutely void. *Phœnix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb. 21, was a suit on an insurance policy which contained a clause similar to the one in question here. Discussing the validity of such a provision in a contract IRVINE, C., while admitting that a respectable line of authorities supports the validity of such a stipulation, said: "In no case, however, has effect been given to such a provision in this state. Notwithstanding the authorities upon the subject, the writer would hesitate to commit himself to the views that the parties to a contract may bind the courts to a period of limitations other than that prescribed by statute." The court adopts the views of the commissioner as expressed in that case and declines to be bound to a period of limitations fixed by any contract other than the period prescribed by the statute.

The judgment is reversed and the cause remanded with instructions to the district court to enter a judgment in favor of the plaintiff in error upon the special findings made by the court.

REVERSED AND REMANDED WITH DIRECTIONS.

PENN MUTUAL LIFE INSURANCE COMPANY V. JOHN J. CONOUGHY.

FILED MARCH 3, 1898. No. 7913.

1. **Principal and Agent:** ACTION ON CHECK: PLEADING. In a suit against an insurance company on a dishonored check drawn by its general agent against the bank with which he kept an account

as such agent the petition contained two counts. *Held*, That the first count of the petition did not state a cause of action.

2. ——: ——: ——. The Code of Civil Procedure (sec. 92) requires a pleader to state the facts which constitute his cause of action or defense in ordinary and concise language; and the practice of adding a "common count" in a pleading is one not contemplated by the Code.

3. **Money Paid**: PLEADING: EVIDENCE. Evidence examined, and *held* not to sustain the averments of the second "count" of the petition.

ERROR from the district court of Adams county. Tried below before BEALL, J. *Reversed.*

I. J. Dunn, for plaintiff in error.

M. A. Hartigan, contra.

RAGAN, C.

John J. Conoughy, in the district court of Adams county, recovered a judgment against the Penn Mutual Life Insurance Company and one N. J. Schmidt. The insurance company has filed here a petition in error for a review of that judgment.

1. Conoughy in his petition for a first cause of action alleged that the insurance company and Schmidt on the 9th of June, 1893, made and delivered to one McGrath their check in writing payable to his order as follows:

"OMAHA, NEBRASKA, June 9, 1893.

"American National Bank: Pay to the order of F. J. McGrath seventy ($70) dollars.

"N. J. SCHMIDT, *Gen'l Agt.*"

That McGrath afterwards indorsed and delivered the check for value to Conoughy; that he duly presented it for payment, and that it was dishonored; that no part of the check had been paid, and there was due to him, Conoughy, from the insurance company and Schmidt on said check the sum of $70, for which it called, and $2.50 protest fees. This count of the petition does not state a

cause of action against the insurance company. It does not appear upon the face of the check, or by any other averment in the petition, that Schmidt was the general agent of the insurance company, nor for whom he was general agent, and if the language of the petition could be construed as equivalent to an express averment that Schmidt when he drew this check was then and there the general agent of the insurance company, still the petition is fatally defective, because it contains no averment that Schmidt intended to bind his principal by the drawing of this check, nor that it was drawn in connection with his principal's business, nor that he had any authority to bind his principal by the drawing of bills of exchange. So far as the petition discloses, the check sued upon is the individual contract of Schmidt. The words "general agent" following his signature on the check are *descriptio personæ*, and if conjectures and inferences are to be indulged, then, so far as this count of the petition discloses, Schmidt's principal might have been the American National Bank. (*Webster v. Wray*, 19 Neb. 558; *Anderton v. Shoup*, 17 O. St. 125; *Bank v. Cook*, 38 O. St. 442.)

2. For a second cause of action Conoughy alleged "that on the 11th day of June, 1893, this plaintiff lent, expended, paid out, and advanced at the instance and request of the defendants, and for the use and benefit of the said defendants, the sum of $72.50, which said sum and amount they, the said defendants, then and there agreed to pay; that the said defendants have taken, accepted, and received the said sum of money, and have kept, retained, and appropriated the same to their own use and benefit, and though often requested to pay, have failed and refused to do so." We do not approve of this method of pleading. The Code of Civil Procedure (sec. 92) requires a pleader to state the facts which constitute his cause of action or defense in ordinary and concise language, and this practice of adding a "common count" in a pleading is one not contemplated by the Code. However, the aver-

ments on the second count in the petition are wholly unsustained by the evidence. The facts of this case, as disclosed by the record, are as follows: Schmidt, in June, 1893, was the general agent of the insurance company, soliciting insurance for it and collecting premiums on policies issued. The moneys collected by him he deposited to his own credit in the American National Bank, the account being kept in the name of N. J. Schmidt, general agent, the bank knowing that he was the general agent of the insurance company. It appears that Schmidt had power to appoint subagents, and did appoint McGrath, his contract with McGrath being that he, Schmidt, would pay McGrath a salary of $100 per month. McGrath was to solicit insurance for the insurance company and to have a certain commission on the premiums collected. If the premiums on the business done by McGrath in a month amounted to more than $100 the excess was to be paid to Schmidt; if they amounted to less than $100, Schmidt made up the deficiency. To pay McGrath's traveling expenses and enable him to go about the business for which Schmidt had employed him Schmidt drew the check in suit in favor of McGrath, and McGrath induced Conoughy to cash it. When the check was presented for payment it was dishonored. It seems that before this check was presented for payment the bank had paid out to the insurance company on Schmidt's check all the money which Schmidt had on deposit there. The theory of the counsel who represents Conoughy seems to be that the money to the credit of Schmidt in the bank was the money of the insurance company; that the check drawn by Schmidt was the insurance company's check, and that as the company drew its money out of the bank on which it drew the check before the latter was presented, therefore it is liable on this check to Conoughy. But this check was not the insurance company's check. It is not only not a party to the check, but the check was not drawn by its direction or authority or knowledge, nor did it receive any benefit

whatever from the check or its proceeds; and although Schmidt testified in this case that the money he had on deposit in the bank was the insurance company's money, this was a mere conclusion of law on his part and an erroneous one. If the insurance company had drawn its draft against the bank for this money and the bank had paid it, it would have been liable to Schmidt for the money. If the bank had refused to pay the insurance company's check, it would not have been liable for such refusal. The fact that the bank knew that Schmidt was general agent of the insurance company and that he kept his account in the name of N. J. Schmidt, general agent of the insurance company, did not make the money he deposited the insurance company's money, nor compel the bank to take notice of the fact that it was the insurance company's money, nor authorize the bank to pay out that money on the orders of the insurance company. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. GEORGE KELLOGG.*

FILED MARCH 3, 1898. No. 7797.

1. **Master and Servant:** DEFECTIVE APPLIANCES: INJURY TO SERVANT: PLEADING. In a suit for damages by a station agent of a railroad company against it for injuries he had sustained while attempting to set a defective brake on one of its cars the petition does not fail to state a cause of action because it does not aver that the railroad company knew of the defective condition of the brake, or that the brake had been out of repair for such a length of time that the railroad company, by the exercise of ordinary care, could have discovered its defective condition.

2. ———: ———: ———: KNOWLEDGE OF DEFECTS. That the brake became out of repair a short time before the accident, and that the railroad company had no knowledge of its defective condition

*Rehearing allowed.

and could not by the exercise of ordinary care have discovered it before the accident, are matters of defense.

3. ———: ———: ———. It is the duty of a master to furnish the servant tools and appliances reasonably safe and fit for the purposes for which they are designed; and if the master neglects to do this, and the servant is injured without fault on his part, the defect in the instrument or appliance not being obvious, the master is liable.

4. ———: ———. It was the duty of a station agent to set the brakes on cars left at his station, but it was not his duty to inspect the brakes on such cars, nor to repair them if he discovered them out of order. *Held*, That the agent had the right to presume that the car brake was in proper condition and reasonably fit for the purposes for which it was designed.

5. ———: INJURY TO SERVANT: NEGLIGENCE: LIABILITY OF MASTER. It is not the law, except where made so by statute, that a master is liable to a servant for an injury which the latter has received through the negligence of a fellow-servant.

6. ———: ———: ———: ———. If a car inspector, whose duty it is to keep the brakes in repair, neglects that duty, and his co-servant, for instance a station agent, is injured by that neglect, the railway company is liable for such injury; but the reason is that the relation existing between the inspector and station agent is that of vice-principal and servant, the negligence of the inspector being the negligence of the master.

7. ———: FELLOW-SERVANTS. A station agent, whose duty it is to set brakes on cars left at his station, but who is not charged with the duty of inspecting or repairing the brakes, is not a fellow-servant of his co-servant, who is a car inspector and charged with the duty of inspecting and repairing the brakes.

8. **Attorneys.** The rights and duties of counsel employed to conduct litigation considered and stated in the opinion.

9. **Misconduct of Attorney:** REVIEW. A litigant, to take advantage of alleged misconduct of opposing counsel, must call the attention of the trial court to such misconduct at the time it occurs, ask the trial court for protection therefrom, preserve in a bill of exceptions the alleged misconduct, with the ruling of the trial court and the exceptions thereto, and present the record of what occurred and the rulings of the trial court as an assignment of error in the proceeding brought here.

10. ———: ———. This court in an error proceeding does not review the conduct of counsel in the case, but reviews the rulings, orders, and judgment of the district court; and if it did not make or refuse to make an order, in reference to the conduct of counsel, this court cannot make one.

11. **Instructions:** HARMLESS ERROR. The charge of the court reviewed, and *held* erroneous, but not prejudicial.

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

J. W. Deweese, F. E. Bishop, W. S. Morlan, and *W. P. Hall,* for plaintiff in error.

A. J. Shafer, S. A. Dravo, and *Stewart & Munger, contra.*

RAGAN, C.

The Chicago, Burlington & Quincy Railroad Company has filed a petition here to review a judgment of the district court of Phelps county pronounced against it in favor of George Kellogg.

1. The first argument is that the petition does not state a cause of action. Kellogg in his petition, in substance, alleges: That on the 7th of August, 1892, he was a station agent of the railway company at Bertrand, Nebraska; that it was his duty as such agent to set the brakes on cars left by passing trains on the side tracks at that station to prevent the wind blowing the cars off the side track on the main line; that about 10 o'clock in the evening of said date he went upon a car standing on a side track at his station for the purpose of setting the brake thereon, and that as he turned the brake a wire which connected the brake-chain with the brake-rod broke, precipitating him from the car on the bumpers thereof and injuring him; that he had no knowledge of the defective condition of the brake; that the company had negligently permitted this brake to become and remain out of repair, in this, that the chain which connects the brake with the brake-rod should be fastened to the latter by a half-inch iron bolt; that this had been lost out, and some one had connected the rod and chain with a wire which was wholly unfit for that purpose. It is now insisted that this petition does not state a cause of action because it does not allege that the company knew that

the brake was out of repair, had been improperly repaired with a wire, or that it had been in that condition for such a length of time that the company should be charged with notice of its defective condition. We think this argument untenable. It is the duty of a master at all times to furnish his servant with tools and appliances reasonably safe and fit for the purposes for which they are designed; and if a servant, where the defect of an appliance is not obvious, and where he has no knowledge of such defect and is not charged with the duty of knowing of such defect, without negligence on his own part, is injured while attempting to use in the service of the master a tool or appliance designed for the work in hand, the master is liable for such injury. (*Missouri P. R. Co. v. Baxter*, 42 Neb. 793; *Kearney Electric Co. v. Laughlin*, 45 Neb. 390.) If this brake had become defective a short time before the accident, if the master did not know of it, and could not, by the exercise of ordinary care, have discovered it before the accident, those facts were matters of defense for the master. Since it was not the duty of the station agent to inspect this brake nor to repair it if he found it defective, and since he did not know that the brake was out of order, he had the right to presume that it was in proper condition and reasonably fit for the purposes for which it was intended; and the general allegation that the railway company had been guilty of negligence in permitting the brake to become and remain out of repair, coupled with the other allegations of the petition as to the plaintiff's duty, and his want of knowledge of the defective condition of the brake, rendered the petition invulnerable to demurrer. (*Omaha & R. V. R. Co. v. Wright*, 49 Neb. 456.)

2. A second argument is that the judgment cannot stand because Kellogg's injury resulted from the negligence of a fellow-servant. It is true that in the absence of statute the general rule is that a master is not liable to one servant for an injury which he has sustained through the negligence of a fellow-servant. (See the rule stated

and the authorities collated in 7 Am. & Eng. Ency. Law p. 821. See, also, a statement of the rule and a collation of authorities by Allen, J., in *Wright v. New York C. R. Co.*, 25 N. Y. 562.) In this case the evidence shows that the railway company has in its employ at various stations along its road car repairers or inspectors, whose duty it is to inspect the cars of the company, the wheels and brakes and other appliances thereof, and if a brake is found out of order to repair it. The evidence does not disclose that it was the duty of the station agent, Kellogg, to inspect the cars that came to his station, nor, should he discover that a car or an appliance thereof was out of order, that it was his duty to repair it. The evidence further shows that the brake-beam of a freight car is connected with a brake-rod by a chain, and that this chain is connected with the brake-rod by an iron bolt; that the brake which Kellogg was using at the time he was injured had the rod connected with the chain thereof by a wire totally unfit for that purpose. How long this bolt had been missing from the brake-rod the evidence does not show. When, where, or by whom the rod and chain were connected by wire the evidence does not show. The car was traced from the yards in Kansas City to Bertrand, and the car inspectors testified to having inspected it at Kansas City and at various stations along the line from there to Bertrand, and that they did not observe the defective condition of the brake. At the time Kellogg was injured the car had been standing for several days on the side track at his station. From the marks and flattened condition of the wire an inference is justifiable that the wire had been used on the brake for some time before the car reached Bertrand. We do not intend in this case to lay down, or attempt to lay down, any rule for determining when two servants of the same master are "fellow-servants" within the legal definition of that term. In *Union P. R. Co. v. Erickson*, 41 Neb. 1, it was held that a section hand in the employ of the railway company and engaged in keeping the track in repair was not

a fellow-servant with another employé of the company engaged in the business of loading coal on the tenders of the company's engines. In that case Erickson had been injured through the neglect of his co-employé to properly load or store the coal on the engine's tender, and it was said: "Employment in the service of a common master is not alone sufficient to constitute two men fellow-servants within the rule exempting the master from liability to one for injuries caused by the negligence of the other. To make the rule applicable there must be some consociation in the same department of duty or line of employment." In *Union P. R. Co. v. Doyle*, 50 Neb. 545, it was held that a section hand in the employ of the railway company, engaged with other employés of the company who were hauling dirt and gravel with a construction train and ballasting the railway track, was not a fellow-servant of the conductor of such gravel train. In that case it was also held: "Where one of several employés of the same master is a vice-principal as to his co-employés or whether all are fellow-servants, is not always a question of fact, nor always a question of law. Generally it is a mixed question of law and fact and to be determined in any case by the particular facts and circumstances in evidence in the case in which it is presented." In the case at bar, if we are to consider that the verdict of the jury includes a finding that Kellogg, the station agent, was not a fellow-servant of his co-employé, the car repairer or inspector, the evidence in the record justifies that finding; and if from the admitted facts it is for us to say as a matter of law whether the station agent and the car repairer or inspector were fellow-servants, then we answer that they were not. In *Morton v. Detroit, B. C. & A. R. Co.*, 46 N. W. Rep. [Mich.] 111, it was held that a brakeman in the employ of the railway company was not a fellow-servant of another employé of the company whose duty it was to inspect and keep in repair the brakes.

3. Counsel for Kellogg, in his argument to the jury

after the close of the testimony, used the following language: "The defendant company forces its parasites to swear in its behalf. The employés of the defendant are surrounded by superintendents and assistant superintendents, who hold them by the neck and say to them: 'Oh, how easy I can drop you, how easy I can drop you.'" It is now insisted that this was such misconduct on the part of counsel for the plaintiff below as calls for a reversal of the judgment rendered. It must be conceded that counsel permitted his zeal for his client to carry him too far; that the language is totally unwarranted by the record and not within the range of the legitimate inferences and deductions which might be drawn from the evidence; that it was calculated to arouse the passions and prejudices of the jury, too easily excited in cases like this, and instead of assisting them to calmly inquire as to whether the plaintiff below had been injured through the negligence of the railway company, and if so, the extent of such injury and what amount of money would compensate him therefor, and render a verdict accordingly, this language was calculated to inspire the jury with a desire to punish the railway company for the injury which its negligence had inflicted upon the plaintiff. That these poisonous shafts of fiery invective did their work we think is manifest from the amount of the $9,000 verdict which the jury did render. Judgments have been often assailed in this court because of the alleged misconduct of counsel for the parties in whose favor the judgments were rendered. See the following cases: *Bradshaw v. State*, 17 Neb. 147; *Cleveland Paper Co. v. Banks*, 15 Neb. 20; *Fitzgerald v. Fitzgerald*, 16 Neb. 413; *Festner v. Omaha & S. W. R. Co.*, 17 Neb. 280; *Bohanan v. State*, 18 Neb. 57; *Missouri P. R. Co. v. Metzger*, 24 Neb. 90; *McClain v. State*, 18 Neb. 154; *Patterson v. Hawley*, 33 Neb. 440; *Bullis v. Drake*, 20 Neb. 167; *Mehagan v. McManus*, 35 Neb. 633; *Cropsey v. Averill*, 8 Neb. 151; *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27; *Chicago, St. P., M. & O. R. Co. v. Lundstrum*, 16 Neb. 254; *Stratton v. Nye*, 45 Neb.

619; *Roose v. Perkins*, 9 Neb. 304; *Gran v. Houston*, 45 Neb. 813; *Missouri P. R. Co. v. Metzger*, 24 Neb. 90; *Bankers Life Ass'n v. Lisco*, 47 Neb. 340; *Daly v. Melendy*, 32 Neb. 852; *Ashland Land & Live Stock Co. v. May*, 51 Neb. 474; *Angle v. Bilby*, 25 Neb. 595. These cases establish that a lawyer charged with the conduct of a case is invested with certain rights and charged with certain duties. It is his duty to use all honorable means to protect his client's interests; and in argument, within the limits of the evidence and the legitimate deductions and inferences to be drawn therefrom, he may not be limited, but may comment on the conduct and credibility of witnesses and parties to the suit. On the other hand, he must act honorably and fairly with the court, opposing counsel, the jury, and the parties to the litigation. But he may not, in his conduct of the case or in his argument to the jury, go outside the record, the evidence and the legitimate inferences deducible therefrom, and ask questions, make statements or arguments for the purpose of misleading and prejudicing the jury; and if he does so, such misconduct, if properly preserved in the record and assigned here, will cause a reversal of the judgment procured. These cases establish the further proposition that the defeated party in a litigation, in order to take advantage of the alleged misconduct of opposing counsel, must call the attention of the trial court to such misconduct at the time it occurs, ask the trial court for protection therefrom, preserve in a bill of exceptions the alleged misconduct of counsel, with the rulings of the trial court and the party's exceptions thereto, and present the record of what occurred and the rulings of the trial court as an assignment of error in the proceeding brought here. In the case at bar the record discloses that the railway company excepted to the language used by counsel for the plaintiff below. The record does not disclose that the attention of the trial court was called to this language at the time it was used, that the trial

court was asked to cause the counsel to desist from making the argument he did, nor that the court was requested to instruct or admonish the jury to disregard the argument made. In other words, the record does not disclose that the trial court made any ruling whatever upon this conduct of counsel, presumably for the reason that it was not requested to make any, and, therefore, although we think the language used was unjust and prejudicial to the railway company, we cannot reverse this judgment because thereof, since this court, in a proceeding of this kind, does not review the conduct or actions of counsel in the case, but reviews the rulings, orders, and judgment of the district court; and since it did not make an order, nor refuse to make an order, in reference to the conduct of counsel, we cannot make one.

4. The next argument relates to the instructions. At the request of the plaintiff below the court instructed the jury as follows: "Employment in the service of a common master is not alone sufficient to constitute two men fellow-servants within the rule exempting the master from liability to one for injuries caused by the negligence of the other. To make the rule applicable there must be some consociation in the same department of duty or line of employment." The railroad company excepted to this instruction, but the court did not err in giving it, and we only quote it here for the purpose of showing upon what theory the court submitted the case on trial to the jury.

Another instruction given by the court at the request of the plaintiff below, and over the objection of the railway company, was the following: "If you find that the brake on the car in question was repaired in an unsafe manner, and permitted to remain in an unsafe condition through the negligence of some employé of the defendant, on whom the duty of repair and keeping in repair such brake was imposed by the defendant, then under such circumstances the defendant would not be exempt from liability on the ground that such employé was a fellow-servant of plaintiff."

The railway company requested the court to give the following instruction: "If you find from the evidence that the plaintiff was injured as in his petition alleged, and that the defendant railroad company was guilty of negligence, then it is your duty to inquire whether such negligence was on the part of the employés of the railroad company who were fellow-servants of the plaintiff; for if the plaintiff was injured, as in his petition alleged, through the negligence of the employés of the defendant railroad company, who were fellow-servants of the plaintiff, then the plaintiff cannot recover in this action." The court modified the instruction asked as follows: "Provided the fellow-servant referred to herein was not charged by the defendant with the duty of repairing or keeping in repair such appliances;" and as thus modified gave the instruction. The railway company excepted to the refusal of the court to give the instruction as asked and to the giving of it as modified.

It will be observed that the court submitted to the jury as a question of fact whether the plaintiff below, the station agent, was a fellow-servant of his co-employé, the car repairer or inspector. Under the evidence we think the court would have been entirely justified in instructing the jury that the station agent and car repairer were not fellow-servants; but since both parties to this litigation requested that that question might be submitted to the jury, neither of them are in any position to question the ruling of the court in making that submission. It is to be observed, also, that the court told the jury that if the plaintiff's injury was the result of the neglect of the railroad company's car repairer or inspector to repair the brake, and that it was the duty of such inspector to make the repair, then the railway company would be liable for the plaintiff's injury, even if the jury found that the car repairer or inspector and the station agent were fellow-servants.

It must be confessed that these instructions are some-

what confusing. The court nowhere in its charge called the jury's attention to the distinction between co-servants and fellow-servants, but seems to have used the two expressions in the same sense. Of course it is not the law that the railway company is liable for the injury of the station agent if that injury was caused by the neglect of the car repairer or inspector, he then and there being a fellow-servant of the station agent, and in that respect the instructions are erroneous. We do not think, however, that the railroad company was prejudiced by the giving of these instructions, because (1) the evidence conclusively shows that the car inspector or repairer was not a fellow-servant of the station agent; and (2) if the jury had specially found that the two were fellow-servants, the evidence would not sustain the finding, and we therefore presume that the jury found they were not fellow-servants. The effect of the instruction, notwithstanding the language used about fellow-servants, was to tell the jury that if they found that the plaintiff's injury resulted from the negligence of the car repairer or inspector to properly repair the brake and that it was his duty to discover its defective condition and repair it, then the master was liable for the injury. This is the law; but the master's liability in a case like the one at bar does not rest upon an exception to the general rule that a master is not liable to one servant for an injury caused to the latter by the negligence of a fellow-servant. It rests upon the principle that it is the duty of a master to furnish the servant tools and appliances reasonably fit and safe for the performance of the duties required of the servant; and if the master delegates to a servant the selection, inspection, and furnishing of these tools and appliances, such a servant then stands in the place of the master, and such servant's neglect in the premises is the master's neglect; or, applying the rule to the case at bar, the common master delegated to the car inspector the duty of inspecting and repairing these brakes. That

car inspector then in that matter stood in the place of the railway company itself, and the car inspector's relation to the station agent was not that of fellow-servant, but of vice-principal. (See the rule stated and the authorities collated in 7 Am. & Eng. Ency. of Law [1st ed.] 825.) In *Morton v. Detroit, B. C. & A. R. Co.*, 46 N. W. Rep. [Mich.] 111, a brakeman was thrown off a car and killed by the breaking of the chain which connected the brake-rod with the brake-beam. A link in the chain parted, and it appeared that this link had never been welded, but was closed by a "cold shut." In a suit by the brakeman's administrator it was held that the car inspector, whose duty it was to inspect and repair the cars, was not a fellow-servant of the brakeman and that the company was liable. This case and all the other cases just cited rest upon the principle that the car inspector stood in the place of his principal as regards the brakeman. Our conclusion therefore is that the railway company was not prejudiced because of the erroneous features in the instruction given by the court to the jury.

JUDGMENT AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. GEORGE KELLOGG.*

FILED MARCH 3, 1898. No. 8169.

1. **Judges:** INTEREST IN CASES. A judge who presided at the trial of an action and rendered judgment therein is not, from that fact, disqualified by section 37, chapter 19, Compiled Statutes, to hear another suit brought to vacate the judgment in the former one.

2. ———: ———. A judge, to be "interested" within the meaning of said section and therefore disqualified, must be pecuniarily interested, or his interest in the litigation must be such that he will gain or lose something by the result.

*Rehearing allowed.

3. **Witnesses:** EXCLUSION. The practice of causing unexamined witnesses, except those called as experts, to be sequestered, so that they may not hear the testimony of the witness being examined, is a good one, as it tends to elicit the truth and promote the ends of justice.

4. ———: ———. But whether such witnesses shall be sequestered, in any case, is a matter resting in the discretion of the trial court, and, in the absence of a showing that the court abused its discretion to the prejudice of the complaining party, its action in the premises will not be disturbed.

5. **Communication to Jury.** Evidence examined, and *held* to sustain the finding of the district court that no improper communication had been made to the jury, while deliberating on their verdict in the first action, by the officer having them in charge.

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

J. W. Deweese, F. E. Bishop, W. S. Morlan, and *W. P. Hall,* for plaintiff in error.

A. J. Shafer, S. A. Dravo, and *Stewart & Munger, contra.*

RAGAN, C.

In the district court of Phelps county, in an action at law for damages, George Kellogg recovered a judgment against the Chicago, Burlington & Quincy Railroad Company. After the adjournment of the term of court at which such judgment was rendered the railway company brought this suit for a new trial of the law action. The court entered a judgment dismissing the action, and the railway company has filed here a petition in error to review this judgment.

1. The Hon. F. B. Beall was the judge who presided at the trial of the law case, and he also presided at the trial of the case at bar. When this case came on for trial counsel for the railway company objected to Judge Beall hearing it, claiming that he was interested and therefore disqualified from hearing this case. The railway company's objections were overruled and Judge Beall heard and determined the case at bar; and this action is the first

argument made here for a reversal of the judgment. Section 37, chapter 19, Compiled Statutes, provides: "A judge * * * is disqualified from acting as such * * * in any case wherein he is * * * interested." But the word "interested" found in this section of the statute probably means pecuniarily interested, or, at least, it means that a judge, to be disqualified from hearing a case, must be in such a situation with reference to it or the parties that he will gain or lose something by the result of the action on trial. It is not claimed that Judge Beall will gain or lose anything from the result of this action. It is not pretended that he has any pecuniary interest in the matter. The argument seems to be that because he rendered the law judgment he would naturally be desirous that the same should be sustained and that therefore his inclination would be to defeat this suit. It can never be presumed that a judge will permit his desires or inclinations to control his decision in any manner, and that he tried the case and rendered the judgment which it is sought to be vacated by this action does not render him interested and disqualified within the meaning of said section of the statute.

2. Before the court entered upon the trial of this action the railway company moved the court to sequester the witnesses by having them removed to some place where the unexamined witnesses could not hear the testimony of those who were on the stand. The overruling of this motion is the second assignment of error here. The practice is not regulated by statute in this state, except to the extent that magistrates hearing the preliminary examination of one charged with a criminal offense are by the statute invested with discretion to sequester the witnesses. (Criminal Code, sec. 301.) It was held in *Watts v. Holland*, 56 Tex. 54, that a party litigant had the right to cause the unexamined witness to be sequestered during the trial, and that the refusal of the court to make such an order on request was reversible error. In *Southey v. Nash*, 7 Car. & P. [Eng.] 632, Baron Alderson said:

"Either party has a right, at any moment, to require that the unexamined witnesses shall leave the court." In *Binfield v. State*, 15 Neb. 484, it was held that whether in a criminal case the unexamined witnesses should be sequestered was a matter resting within the discretion of the trial court; and the same rule was applied to a civil case in *Halbert v. Rosenbalm*, 49 Neb. 498. In *Johnson v. State*, 2 Ind. 652, the same ruling was made. In *Errissman v. Errissman*, 25 Ill. 136, it was held that the separation of witnesses during their examination was a matter of discretion for the trial court and that its exercise would not be reviewed. We think the practice of causing unexamined witnesses, except those called as experts, to be sequestered so that they may not hear the testimony of the witness being examined is a good one, as it tends to elicit the truth and promote the ends of justice; but we also think that the decided weight of authority, as well as the doctrine of this court, is that whether the witnesses shall be so sequestered is a matter resting in the discretion of the trial court, and, in the absence of a showing that the court abused its discretion in that respect, its ruling in the premises will not be made the ground for reversing its judgment.

3. The third argument is that the finding of the district court on which it based its judgment dismissing this action is not sustained by sufficient evidence. The petition alleged that after the jury trying the law case had been deliberating eighteen hours upon a verdict, the presiding judge, without the knowledge or consent of the railway company, instructed the deputy sheriff, who had the jury in charge, to say to them that he, the judge, was going home that afternoon and would adjourn court before going, and if the jury did not agree before he went home it would have to be locked up for probably a week; that the deputy sheriff communicated this statement of the presiding judge to the jury, and that the jury, for fear of being locked up for a great length of time, very soon thereafter agreed upon a verdict of $9,000, upon which

judgment was rendered. There were other averments in the petition as to the defense which the railway company had to the law action, and when the facts set forth in the petition here first came to its knowledge. It must be confessed that the jurors, after the time it is alleged the learned district judge instructed the deputy sheriff having them in charge to communicate with them, discussed among themselves the probability of their being locked up for a week or such a matter if they did not agree upon a verdict; but the evidence does not show that the deputy sheriff made to the jury the communication which the petition charges he did. He testified on the trial, and while admitting that the judge said to him, in effect, that he should tell the jury that he was going home in the afternoon, and if they did not agree upon a verdict they would be locked up for a week, that he did not make that communication to the jury, or any communication, on the subject, and that the judge, immediately after making this remark to him, called him back and told him to say nothing to the jury except to ask them if they had agreed upon a verdict. One or two of the jurymen testified that the deputy sheriff did say to the jury that if they did not agree upon a verdict before the judge went home they would have to be locked up for a week; but, in addition to the sheriff's denial of having made such a statement, most, if not all, of the other jurymen testified that they heard no such statement made; that they were in a position where they could have heard it had it been made. With the evidence in this condition we cannot say that it does not sustain the finding of the district court. It follows that the decree of the court denying a new trial of the law action is

AFFIRMED.

SARAH A. EAYRS, APPELLANT, ET AL. V. WILLIAM N. NASON, APPELLEE, ET AL.

FILED MARCH 3, 1898. No. 7841.

1. **Judgment:** FALSE RECORD OF SERVICE: CONTRADICTION. Though the record in which a judgment is pronounced discloses upon its face that the court had jurisdiction both of the subject-matter of the suit and of the parties thereto, still a party made liable by such a judgment, who has never appeared in the action, and who was never given legal notice of the pendency of such action, may, in a proper proceeding, either as a cause of action or defense, show that the recitals of the record that he was served with the process of the court are false.

2. ——: ——. ——. Suit was brought to foreclose a real estate mortgage, the owner of the equity of redemption of the land involved made defendant thereto, and constructive service had on him by publication, he being at the time a resident of the state and actually present therein. He did not appear in the action personally or by attorney. After the decree the defendant died. *Held*, That in a suit brought by his heir against the purchaser of the land at the sale under the foreclosure decree, to quiet the heir's title and redeem from the mortgage, that the heir might show that the averments of the affidavit filed to procure constructive service upon his ancestor, that he was then a non-resident of the state and that service of summons could not be made on him in the state, were false.

3. **Privity Between Administrator and Heir.** There is no privity between an administrator and an heir so far as regards the decedent's real estate. *Dundas v. Carson*, 27 Neb. 634, and *Carson v. Dundas*, 39 Neb. 503, distinguished.

4. ——: RES JUDICATA. A judgment dismissing an administrator's action to quiet title is not a bar to a subsequent action, by the heir against the defendant in the administrator's suit, to quiet title to the same real estate, which has descended to the heir from the administrator's intestate.

5. **Limitation of Actions:** PLEADING. When it is not apparent from the face of a pleading that the action or defense is barred by the statute of limitations, then the bar must be raised by plea or it will be deemed waived.

6. ——: ——. But when a pleading discloses upon its face that the action or defense is barred by the statute of limitations, then such bar may be raised by objection that the pleading does not state a cause of action or defense.

7. ——: ——: QUIETING TITLE. Whether the time in which an

action must be brought to quiet title to real estate, where the defendant asserts title thereto by an unrecorded sheriff's deed, which the plaintiff claims is void, is prescribed by section 16 or section 6 of the Code of Civil Procedure, not decided.

8. **Quieting Title**: POSSESSION. Under our Code a party may maintain an action to quiet his title to real estate whether he be in or out of possession and whether his title be a legal or an equitable one.

9. ———: LIMITATION OF ACTIONS. In an action to quiet title the statute of limitations does not begin to run in favor of the defendant until some assertion of ownership or claim to the premises is made by him.

10. **Limitation of Actions**: QUIETING TITLE. Plaintiff's action was to quiet title by having a sheriff's deed held by the defendant decreed void and canceled as a cloud. Neither party was in possession of the real estate. The sheriff's deed had never been recorded. The defendant asserted title under the deed. *Held*, That, so far as the petition disclosed, plaintiff's cause of action accrued at the date the suit was brought.

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

The opinion contains a statement of the case.

C. C. McNish, Brome, Burnett & Jones, and *B. L. White,* for appellant:

Where service by publication has been attempted to be made upon a resident defendant, founded upon a false affidavit of his non-residence, such service does not give jurisdiction over that defendant, and its validity can be inquired into in a direct proceeding between the parties to the judgment founded thereon. (*Kitchen v. Crawford*, 13 Tex. 516; *Snowden v. Snowden*, 1 Bland. Ch. [Md.] 550; *McGavock v. Pollack*, 13 Neb. 535; *Cheney v. Harding*, 21 Neb. 65; *Frazier v. Miles*, 10 Neb. 109; *McGahen v. Carr*, 6 Ia. 331; *Goudy v. Hall*, 30 Ill. 109; *Carleton v. Bickford*, 13 Gray [Mass.] 591; *Shelton v. Tiffen*, 6 How. [U. S.] 163; *Norwood v. Cobb*, 15 Tex. 500; *Dozier v. Hartsfield*, 25 Ga. 90.)

An adjudication against an administrator is not *res judicata* as to the title of the heirs to real estate. (2 Black, Judgments par. 560; Wells, Res Judicata sec. 53.)

This action is not barred by the statute of limitations. (*Heffner v. Gunz*, 12 N. W. Rep. [Minn.] 342; *Feikert v. Wilson*, 37 N. W. Rep. [Minn.] 585; *Miner v. Beekman*, 50 N. Y. 337; *Harrison v. Spencer*, 51 N. W. Rep. [Mich.] 642; *Mutual Life Ins. Co. v. Corey*, 7 N. Y. Supp. 940; *Jackson v. Kinsey*, 7 N. Y. Supp. 808; *Waldo v. Rice*, 14 Wis. 310; *Knowlton v. Walker*, 13 Wis. 295; *Wagner v. Law*, 28 Pac. Rep. [Wash.] 1109; *Bausman v. Kelley*, 36 N. W. Rep. [Minn.] 333; *Stewart v. Thompson*, 32 Cal. 260.)

James W. Carr, contra:

The affidavit for constructive service alleged the non-residence of Eayrs, and was in all respects sufficient to authorize service by publication. The proof of publication was also sufficient, as was shown by the evidence and found by the court. The court therefore had jurisdiction of the property whether the allegation of non-residence was true or not; and the judgment was neither void nor voidable because of a mistake in that respect. (*Miller v. Finn*, 1 Neb. 289; *Atkins v. Atkins*, 9 Neb. 191; *Ogden v. Walters*, 12 Kan. 283; *Boswell v. Sharp*, 15 O. 447; *Dequindre v. Williams*, 31 Ind. 444; *Morgan v. Burnet*, 18 O. 535; 1 Freeman, Judgments secs. 125, 131.)

The action was barred by the statute of limitations. (*McAlister v. Lancaster County Bank*, 15 Neb. 295; *McCormick v. Paddock*, 20 Neb. 486; *Witte v. Gilbert*, 10 Neb. 539; *Doty v. Sumner*, 12 Neb. 378.)

The judgment in the action brought by the administrator to recover the title of the property is a complete adjudication of all of the rights of plaintiffs. (*Dundas v. Carson*, 27 Neb. 634.)

RAGAN, C.

This is an appeal by Sarah A. Eayrs from a decree of the district court of Douglas county dismissing a suit in equity brought by her in that tribunal against William N. Nason.

1. In her petition in the district court the appellant alleged that on the 3d day of June, 1875, her father became the owner of certain described real estate and died subsequently possessed thereof; that the title to said real estate had descended to her as his only surviving heir at law; that during her father's life he became indebted in the sum of $50 to one Fischer, and to secure the payment of this debt he executed to Fischer a mortgage upon said real estate, of which mortgage debt the appellee Nason subsequently became the owner, and brought suit in the district court of Douglas county to foreclose said mortgage, obtained a decree, caused the real estate to be sold, and purchased it at the judicial sale made, and procured from the sheriff a deed for said real estate on the 1st of July, 1881, under which deed the appellee Nason claims title to the real estate in controversy; that said decree of foreclosure and all the proceedings thereunder were void for the reason that the service, and only service, of process had upon appellant's father in said foreclosure suit was by publication; that at the time said service by publication was made appellant's father was a resident of, and actually within, the state of Nebraska, was at that time, and for some time afterwards, insane, and that said service by publication was the only notice that was ever attempted to be given appellant's father of the pendency of the said foreclosure action; and that the sheriff's deed executed to said appellee constituted a cloud upon appellant's title to the real estate. The bill then averred that the real estate in controversy was vacant and unoccupied; that appellant was advised that the appellee had paid certain taxes which had been duly levied and assessed against the real estate, and which taxes, together with the aforesaid mortgage debt and interest thereon, the appellant offered to pay to the appellee. The bill concluded with a prayer that an accounting might be taken of the amount due the appellee for taxes paid on said real estate and for the amount due on said mortgage debt; that appellant might

be permitted to pay the amount found due into court for the benefit of the appellee, and that the title to the real estate might be quieted and confirmed in her. The appellee by his answer admitted that he claimed to own the legal title to the real estate in controversy by virtue of the sheriff's deed executed in pursuance of the decree rendered in the foreclosure proceeding mentioned in the bill. He also averred that he had been in the open, notorious, exclusive, and adverse possession of the real estate described, claiming to own the same for a period of more than ten years; and as a further defense to the action averred that the administrator of appellant's father, in the year 1885, brought suit against him, the appellee, to quiet the title to the real estate in controversy; that he, the appellee, appeared and defended that action; and that judgment was rendered therein dismissing the same, and interposed the judgment in that action as a bar to this. The district court found specially that appellant was the sole surviving heir of James H. Eayrs, who died on the 15th of August, 1877; that he became possessed of the legal title to the real estate in controversy on the 3d day of June, 1875; that on the 23d of June, 1875, James H. Eayrs executed to one Fischer a note for $50 and a mortgage upon the real estate to secure its payment; that on the 18th of December, 1875, the appellee, who was then the owner of the mortgage debt, brought suit in the district court of Douglas county to foreclose the mortgage, obtained a decree, caused the property to be sold and purchased it at the judicial sale, and obtained from the sheriff on the 1st day of July, 1881, a deed for the property; that James H. Eayrs, from the 18th of July, 1875, until the day of his death, in August, 1877, was a resident of, and actually within, the state of Nebraska; that no service of process in the foreclosure proceeding was had upon James H. Eayrs, except service by publication; that a summons was duly issued in that proceeding against James H. Eayrs and returned not found in Douglas county, Nebraska; that the notice of

publication was published in a newspaper in the city of Omaha; that the premises in controversy were on the 25th of June, 1875, and ever since that time have been, vacant and unoccupied; that on the 20th of February, 1885, the administrator of James H. Eayrs brought a suit in the district court of Douglas county against the appellee on the same cause of action on which the appellant has brought this action; that the appellee Nason appeared and defended that action, which resulted in a judgment of dismissal. From these special findings the court concluded as a matter of law (1) that the appellant's action here was barred by the judgment recovered in the action brought by the administrator of appellee's father against the appellee; and (2) that the appellant's cause of action here was barred, when brought, by the statute of limitations.

2. Was the foreclosure decree rendered by the district court of Douglas county in the suit of appellee against appellant's father void? We think it was. Appellant's father, at the time of the institution of that suit and at the time of the pronouncing of that decree, was a resident of, and actually within, the state of Nebraska. The entire tract of land upon which the mortgage was a lien was situate in Douglas county, Nebraska. The action to foreclose the mortgage then could have only been brought in that county. (Code of Civil Procedure, sec. 51.) The appellant's father did not appear in that action, and the only notice that he had of its pendency was a constructive one; that is, service by publication as provided by sections 77 and 78 of the Code of Civil Procedure. Appellant's father was the owner of the legal title to the land upon which the mortgage foreclosed in that suit was a lien, and was therefore a proper and a necessary party to that suit. He was a resident of, and actually present within, the state of Nebraska, and therefore no valid notice of the pendency of the suit could be given him by publication. In such an action as that personal notice of its pendency to one who is a necessary

and proper party defendant thereto must be given by service upon him of a summons, unless such defendant is both a non-resident of the state and absent therefrom or a foreign corporation. The district court had jurisdiction of the subject-matter of the action in the foreclosure case. In that case an affidavit was filed in accordance with section 78 of the Code of Civil Procedure, which recited that the appellant's father owned the real estate on which it was sought to foreclose the mortgage; that he was a non-resident of the state of Nebraska, and that service of summons could not be had upon him in the state. The record then on its face discloses that the court had jurisdiction of the appellant's father; and the decree of the court, though void so far as appellant's father was concerned, for want of jurisdiction over his person, appeared upon the face of the record to be valid. We need neither discuss nor determine how far conclusive and unimpeachable this decree would be if assailed in some purely collateral proceeding, or if called in question against some third party claiming under it. But in the case at bar the validity of the foreclosure decree is now called in question by the heir of the mortgagor not made a party to the suit in which the decree was rendered, or rather not served with process in that suit against the original plaintiff in that foreclosure action; and the decided weight of authority is that though the record in which a judgment is pronounced discloses upon its face that the court had jurisdiction both of the subject-matter of the suit and of the parties thereto, still a party made liable by such a judgment, who has never appeared in the action and who was never given legal notice of the pendency of such action, may in a proper proceeding, either as a cause of action or defense, show that the recitals of the record that he was served with the process of the court are false, and that therefore the judgment, though valid upon its face, was void as to him. (*Mastin v. Gray*, 19 Kan. 458; *McNeill v. Edie*, 24 Kan. 108; *Norwood v. Cobb*, 15 Tex. 500; *Goudy v. Hall*, 30 Ill. 109; *Carleton v. Bickford*, 79 Mass. 591.)

3. Is the judgment pronounced in the suit brought by the administrator of appellant's father against the appellee a bar to the appellant's action here? We do not think it is. There is no privity between the administrator and the heir so far as regards the decedent's real estate. In *Dundas v. Carson*, 27 Neb. 634, and in *Carson v. Dundas*, 39 Neb. 503, it was held that an administrator of a decedent's estate might maintain an action for the recovery and possession of the real property of the decedent necessary for the purposes of administration either against the heirs of the decedent or strangers. But these decisions are based upon section 202, chapter 23, Compiled Statutes, which provides: "The executor or administrator shall have a right to the possession of all the real as well as personal estate of the deceased and may receive the rents, issues, and profits of the real estate until the estate shall have been settled or until delivered over by order of the probate court to the heirs or devisees." At common law an administrator was not entitled to the possession of the real estate and there was no privity between an administrator and an heir affecting the same. (See the rule stated and the authorities collated in 7 Am. & Eng. Ency. Law 270; 2 Black, Judgments sec. 560.) But an action of ejectment is a possessory action; and while, because of the provisions of our statute, an administrator may maintain such an action, it does not follow that he may maintain an action to quiet title to the decedent's estate by removing a cloud therefrom; and we are of opinion that an administrator, in the absence of statutory authority therefor, cannot maintain such an action. That question was presented to the supreme court of Illinois in *Gridley v. Watson*, 53 Ill. 186, and the court held: "The statute gives an administrator no power to engage in litigation to remove clouds upon the title to lands belonging to the estate, and a bill filed by him for that purpose is obnoxious to a general demurrer." To the same effect see *Shoemate v. Lockridge*, 53 Ill. 503. The question was again presented to the

supreme court of Illinois in *Le Moyne v. Quimby*, 70 Ill. 399, and again the court held that an administrator could not file a bill in equity to perfect the title of the real estate of the decedent or relieve it of any burden upon it. The court said: "If the land is incumbered, or there is a cloud upon the title, he [the administrator] cannot apply to a court of equity to relieve it of any burden." We conclude, therefore, that the action of appellant is not barred by the judgment rendered in the suit brought by the administrator of appellant's father against the appellee, and the court erred in so holding.

4. Was this action when brought barred by the statute of limitations? We observe (1) that this finding of the court is not based upon the appellee's answer that he had been in the adverse possession of the real estate for more than ten years before the suit was brought, because the court expressly finds that the real estate, at the date of the decree, and for nearly twenty years prior thereto, was vacant and unoccupied; (2) that the defense of the statute of limitations was not interposed by appellee in his answer. The court then must have reached the conclusion that the action was barred by the statute of limitations from the averments in the petition; that is, that the petition upon its face discloses that the action when brought was barred. When it is not apparent from the face of the petition that the action is barred, the statute of limitations as a defense must be taken advantage of by answer. (*Hanna v. Emerson*, 45 Neb. 708.) On the other hand, where a petition discloses upon its face that the cause of action is barred by the statute of limitations, objection may be made to the petition on the ground that the facts therein averred do not state a cause of action. (*Peters v. Dunnells*, 5 Neb. 460; *Hurley v. Cox*, 9 Neb. 230; *Aultman v. Cole*, 16 Neb. 4.) Since a defendant may avail himself at any stage of the trial of the fact that the petition shows upon its face that the action was barred by the statute of limitations when brought by interposing the objection that the petition

does not state facts sufficient to constitute a cause of acion, the trial court was justified in finding that this action was barred by the statute when brought, if that fact appeared upon the face of the petition itself.

5. What is the cause of action alleged in the petition in this case? Appellant's cause of action is that a sheriff's deed held by the appellee and issued in pursuance of a judicial sale of appellant's real estate is void because of the fact that the decree upon which the sale is based was void for want of jurisdiction of the court over appellant's ancestor, who owned the land at the time the decree was rendered, and was made a party thereto, but not served with process in that case, and did not appear therein; that notwithstanding this decree and the sheriff's deed based thereon are void, the appellee asserts title to appellant's real estate by virtue of such void deed, and she seeks by this proceeding to have this decree and sheriff's deed decreed void and canceled and her title, which is disturbed by this void decree and deed and appellee's assertion of title thereunder, quieted. Appellant's action is an equitable one—an action of which the old chancery courts possessed jurisdiction, and one which is recognized and provided for by section 57, chapter 73, Compiled Statutes. But no court of chancery would have taken jurisdiction of this action, because at common law a plaintiff, to obtain standing in a court of equity to quiet his title to real estate, must have been possessed of both the legal title and possession of the land. Our Code has modified the chancery rule in this respect, and now a party may maintain an action to quiet his title to real estate whether he be in or out of possession and whether his title be a legal or equitable one. (*Forec v. Stubbs*, 41 Neb. 271; *Hall v. Hooper*, 47 Neb. 111.)

6. When did appellant's cause of action accrue? If a defendant is in the adverse possession of a plaintiff's real estate, claiming title thereto, plaintiff's cause of action accrues when such adverse possession begins. (*Stall v. Jones*, 47 Neb. 706.) If the defendant be out of posses-

sion, asserting title or claim to the real estate, the cause of action accrues when such claim or title is asserted. If the conveyance, instrument, or thing on which the assertion of title is based is of record, perhaps the cause of action accrues when such conveyance, instrument, or thing is placed of record. In the case at bar neither the appellant nor the appellee are in possession of the real estate. The appellant claims title to the real estate by descent from her ancestor, who owned the fee, and she asserts as her cause of action that the appellee, by virtue of the aforementioned void sheriff's deed, is claiming and asserting that he has the title to her real estate by virtue of that deed. The appellee admits this charge. So far as the record discloses, this sheriff's deed, though issued nearly twenty years ago, has never been placed of record. Appellant does not aver in her petition when the appellee first began asserting or claiming title under his sheriff's deed, but the averment is that he is now, at the date of filing the petition, claiming and asserting title under the deed. The appellant's action then, so far as the record discloses, accrued at or about the date of the bringing of this suit. As the statute did not begin to run in favor of the appellee until some assertion or claim of ownership to the premises was made by him, the action was not barred. (*Pleasants v. Blodgett*, 39 Neb. 741.) The district court erred in holding that appellant's action was barred by the statute of limitations when brought.

7. We need not determine, then, the question argued in the briefs, as to whether an action to quiet title to real estate must be brought within ten years after the cause of action accrued, according to the provisions of section 6 of the Code of Civil Procedure, or within four years after the cause of action accrued, in compliance with the provisions of section 16 of the Code of Civil Procedure. That question remains undecided in this court, notwithstanding what was said in *Parker v. Kuhn*, 21 Neb. 413; *McKeeson v. Hawley*, 22 Neb. 692; *Baldwin v. Burt*, 43 Neb. 245; *Dorsey v. Conrad*, 49 Neb. 443. The first case

was an action for relief on the ground of fraud. In the second case the action was barred by the ten years' adverse possession of the defendant. The third case was an action by a subsequent mortgagee against a prior mortgagee and a purchaser at a judicial sale of the real estate, made in pursuance of a foreclosure of such prior mortgage, to which proceeding the subsequent mortgagee was not a party, to redeem from such subsequent mortgagee. The fourth case was an action by an owner of real estate to redeem the same from a decree foreclosing a mortgage thereon, to which the plaintiff was not made a party. In any view that we are able to take of this record the decree of the district court is wrong. It is reversed and the cause remanded.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. MRS. C. S. JONES, V. MRS. F. M. WILLIAMS.

FILED MARCH 3, 1898. No. 9609.

Mandamus: ISSUES: TITLE TO OFFICE. In an application for a writ of mandamus the court will not try the title or right of possession to real or personal property, and by allowing the writ make it subserve the purpose of a writ of ejectment or replevin.

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

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

J. H. Broady and *H. A. Babcock, contra.*

J. R. Webster, amicus curiæ.

IRVINE, C.

This was an application to the district court of Lancaster county for a writ of mandamus to compel the respondent to surrender to the relator possession of the institution known as the Home for the Friendless, and the books, papers, and other property attached to and connected with said home, belonging to the state of Nebraska. The district court refused the peremptory writ, and the relator brings the case here by petition in error.

From the alternative writ, the return thereto, and the evidence it appears that in 1876 there was incorporated a "Society of the Home for the Friendless," having for its object the protection and assistance of destitute women and children. For several years it conducted its operations without state aid and without permanent quarters. In 1881 an act was passed (Session Laws, ch. 52, p. 247) establishing a Home for the Friendless, providing for its location, and appropriating $5,000 for the erection of such home. The act (sec. 4) also contained the following provision: "The government of said home shall be by and under the supervision of the Society of the Home for the Friendless; *Provided*, That nothing herein contained shall be so construed as to prevent the board of public lands and buildings from establishing rules and regulations for the government of such home in any manner." According to provisions made in the act the home was located at Lincoln, and land was bought and a building erected, the funds being derived from the appropriation referred to and from a donation made by citizens of Lincoln to secure the location. The title to the land was conveyed by the vendor to "the state of Nebraska for the use and benefit of the Home for the Friendless in the state of Nebraska." A provision of the articles of incorporation of the society was that it should be known by and transact business in the name of the "Home for the Friendless." Thenceforth appropriations have been made by successive legislatures for the maintenance of

the home; but the society has appointed all its officers, has devoted certain means of its own to assist in its maintenance, and has been in fact, through its appointees, in possession of the real and personal property belonging to the home. The respondent has for some time been the superintendent of the home by appointment from the society. In 1897 the legislature passed an act (Session Laws, ch. 37, p. 243) whereby the government of the home is vested in the board of public lands and buildings, and certain other provisions are made for supervision, management, and control by officers deriving their authority from the state. Among these provisions is one that the governor shall appoint the superintendent. In pursuance of the latter act the governor appointed the relator to be superintendent of the home, and this action followed the refusal of the respondent to deliver possession thereof to her.

The foregoing statement, together with the requirement of the alternative writ, are sufficient for a disposition of the case. It will be seen that while the case partakes of the nature of an effort by a newly-appointed officer to require a predecessor to surrender the tangible effects of the office, and that in a case where the right to the office is in dispute, and must be determined in order to grant the writ, the real object of the proceeding does not even end at that point, but seeks the determination of the title to land and personal property used in connection therewith. The rival appointees do not assert title in the same right. One represents the society, and so far as the society has property of its own, is undoubtedly entitled to the possession thereof; the other represents the state, and has, irrespective of the respondent's authority, and conceding it to be perfect as representing her source of power, the right to take possession of the state's property which may be subject to the state's disposal in that manner. The respondent is asserting the society's claim to the property, the relator is asserting the state's. The society asserts that the institution is its property; that

the aid received from the state has been in the form of donations; that its supervision through the board of public lands and buildings has been solely to insure that the donations should not be diverted from their purpose; that while the legal title to the land occupied by the home is in the state, it is so in trust for the society, so expressed in the deed by reference to the corporation by the abbreviated name selected by it for the conduct of its business transactions; that the legal title was so reserved also to protect the state against abuse or nonuser of the society's franchises. The state asserts on the other hand that the act of 1881 established the home as a state institution; that the legal and equitable titles are in the state, and the apparent creation of a trust in the deed was merely a designation of the purpose for which the land was to be used, and not the naming of a *cestui que trust;* that the governmental power heretofore accorded the society was for convenience of administration, and that the society was merely filling a public function; that its power was subject at all times to be divested by new legislation, and that the act of 1897 did divest it and place the government of the state's institution under the control of the state, where it properly belongs.

The office of the writ of mandamus is to compel the performance of an act which the law specially enjoins as a duty arising from an office, trust, or station. (Code of Civil Procedure, sec. 645.) The duty which every man owes of rendering to another that which is his due is not a duty so specially enjoined by law, although the person owing that duty may happen to occupy an office, trust, or station. The restatement of such a truism is only excusable because a frequent recurrence to the principle involved is rendered necessary by the incessant attempts to make this extraordinary writ perform the office of the most ordinary processes of the courts—attempts which the courts, unfortunately, have seemed at times to encourage. In all the instances of the abuse of the remedy we do not think, however, that any case can be found

where, on such an application, the court has tried the title, legal or equitable, to land or personalty, and then, by granting the writ, made it to subserve the purpose of a writ of ejectment or replevin. Yet that is the sole object of this proceeding. The respondent, as officer or agent of the society, is in possession of property of which the society claims the equitable title and the right of possession. The only relief demanded is that she be required to surrender possession of this property to the relator, the officer of the state, which itself claims complete title and right of possession. The issue must be tried in an appropriate action.

AFFIRMED.

STATE OF NEBRASKA, EX REL. SOCIETY OF THE HOME FOR THE FRIENDLESS, V. JOHN F. CORNELL, AUDITOR OF PUBLIC ACCOUNTS, ET AL.

FILED MARCH 3, 1898. No. 9723.

1. **Claims Against State:** APPEAL FROM DECISION OF AUDITOR: MANDAMUS. For the disallowance of a claim against the state by the auditor the law furnishes an adequate remedy by appeal. Mandamus will not issue to compel the auditor to issue a warrant for a claim which he has disallowed, and this whether the reasons given by him for its disallowance be good or bad.

2. **Mandamus:** PARTIES AND CAUSES: JOINDER. In a single proceeding several writs of mandamus, directed to different respondents, requiring the performance of different acts, cannot be granted.

ORIGINAL application for mandamus. *Writ denied.*

J. H. Broady and *H. A. Babcock*, for relator.

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

J. R. Webster, amicus curiæ.

IRVINE, C.

This is an original application for a writ of mandamus, against the auditor of public accounts and the members of the boards of purchase and supplies and public lands and buildings. The application sets out at length the history of the Society of the Home for the Friendless and the legislation with regard thereto, which has been stated briefly, but sufficiently for present purposes, in *State v. Williams*, 54 Neb. 154, decided herewith. It shows that after the passage of the act of 1897, referred to in the case just cited, the relator, in accordance with an established custom in that respect, made and presented to the board of purchase and supplies estimates for the purposes included in the appropriation for the Home for the Friendless to aid in the maintenance of the institution for the quarter commencing October 1, 1897; that said board refused to act on the same; but, that the relator from its own private means maintained the institution, and procured supplies to be furnished and services to be performed to maintain it; that bills and vouchers for supplies furnished said institution and for services of employés, for the preceding quarter, were duly presented to the board of public lands and buildings and that board refused to act thereon; that said vouchers were then presented to the auditor, "who examined and rejected them because not approved by the board of public lands and buildings." The prayer is for a writ of mandamus requiring the auditor to draw his warrants for the bills and vouchers so presented, and in case the court should hold that the action of the boards should first be had, for a writ requiring the board of public lands and buildings to act upon said vouchers, and to examine, audit, and approve the same, and to require the board of purchase and supplies to act upon the estimates for the quarter commencing October 1, 1897. The respondents have demurred to the application.

So far as the case concerns the action of the auditor we

are of the opinion that the writ cannot be allowed on the showing made. The constitution provides (art. 9, sec. 9): "The legislature shall provide by law, that all claims upon the treasury shall be examined and adjusted by the auditor, and approved by the secretary of state, before any warrant for the amount allowed shall be drawn. *Provided*, That a party aggrieved by the decision of the auditor and secretary of state may appeal to district court." The duty so enjoined upon the legislature it has performed by providing adequate machinery for the purpose of enforcing the constitutional intent. (Compiled Statutes, ch. 83, art. 8.) The method by appeal of reviewing the action of the auditor in disallowing a claim is an adequate remedy, and mandamus will not lie to compel the auditor to issue a warrant for a claim which he has disallowed. (*State v. Babcock*, 22 Neb. 38.) The same doctrine was enforced in *State v. Moore*, 37 Neb. 507. In the latter case the doctrine is rather assumed than stated in the opinion of the court, but that the court had the doctrine in view is evident from a perusal of the dissenting opinion of Judge POST. The claims there in question were finally reviewed on appeal. (*Garneau v. Moore*, 39 Neb. 791.) In *State v. Moore*, 40 Neb. 854, a writ was allowed to compel the drawing of a warrant in payment of a specific appropriation made to a county to reimburse it for expenses of an unusual criminal proceeding; but that writ was allowed because in the opinion of the court the appropriation was payable without regard to any examination of items or consideration of legal liability, and the auditor was without any discretion in the matter. Here the claims are beyond question of such character as to require an examination and adjustment. The case is analogous to claims against a county, where the remedy for an improper disallowance is by appeal and not mandamus. (*State v. Churchill*, 37 Neb. 702; *State v. Slocum*, 34 Neb. 368; *State v. Merrell*, 43 Neb. 575.) The writ of mandamus never lies for the correction of errors or review of proceedings of inferior courts, boards, or tribunals.

(*McGee v. State*, 32 Neb. 149; *State v. Cotton*, 33 Neb. 560; *State v. Laflin*, 40 Neb. 441; *State v. Merrell, supra.*) The application in this case is not to require the auditor to examine and pass upon the claims, but it is to require him to draw his warrant in payment therefor, and this upon a showing that he has already disallowed them. It is alleged that he examined them and rejected them because they had not been approved by the board of public lands and buildings, and each voucher attached to the application bears the auditor's indorsement to the same effect. The fact that the auditor in rejecting the claims gave a reason for so doing does not alter the effect of his action as a disallowance. It cannot be said that, because a single reason was assigned for his action, it is a confession that the claims were in other respects valid, and that if the court should find that reason insufficient the writ should therefore issue. That argument might be sound where the application is for a writ compelling the performance of an administrative duty, and where assigning one reason for refusing to perform might be a confession that no other reason existed; but it overlooks the effect of the auditor's judicial, or *quasi*-judicial, act in passing on a claim as an adjudication thereof, conclusive unless appealed from. The fact that a reason, even a wrong one, be given for rendering a judgment, makes it none the less a judgment.

The argument, both at the bar and in the briefs, has been directed entirely to the case against the auditor. The application, in asking three different writs for three different purposes and on as many different grounds, against different respondents, is undoubtedly multifarious, if we may be permitted to borrow from equity that term and apply it to a legal proceeding. Counsel, by restricting their discussion to one branch of the case, evidently recognized the impracticability of determining all the matters alleged in one suit. So far as relief is sought against the board of purchase and supplies, the occasion for the writ seems to have passed. So far as it seeks to

compel action by the board of public lands and buildings, it presents not only a question as to the right of this relator to maintain the action, but it also demands an investigation of the functions of that board, and the relative duties of it and of the auditor, which we do not feel warranted in entering into unless in the light of full discussion, and in a case where such investigation may be necessary and conclusive. As to the board of purchase and supplies and the board of public lands and buildings, the application is dismissed without prejudice; as to the auditor, the demurrer is sustained and the

WRIT DENIED.

O. E. MARTIN V. CHARLES FOLTZ.

FILED MARCH 3, 1898. No. 7912.

1. **Animals:** POUND-KEEPER'S FEES: LIEN. Where a village ordinance provides for impounding animals found running at large, and fixes certain fees which must be paid before the animal will be released, no lien is created for any fees or charges not included within those specified.

2. **Replevin:** JUDGMENT. In replevin, where the plaintiff has taken the property and the verdict is for the defendant, the judgment must be in the alternative for a return of the property or its value if a return cannot be had.

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

A. A. Welch and *O. E. Martin*, for plaintiff in error.

IRVINE, C.

The plaintiff in error was the owner of an animal described in the record as "one red cow, dehorned, with white spot between fore legs." An ordinance of the village of Wakefield, the habitat of this animal, forbade cattle, horses, mules, sheep, and swine to run at large in the

village. The cow transgressed the ordinance, and was, in pursuance of its provisions, taken up by the defendant in error, who was marshal of the village. Several days thereafter the plaintiff tendered to him $2 and demanded the cow. The defendant thought himself entitled to $2.25, and refused to deliver up the cow on payment of any less sum. Then the plaintiff replevied the cow, and thus a dispute about 25 cents reaches us for adjustment, an appeal to the district court having resulted in a judgment for the defendant.

An examination of the record convinces us that there was error in the proceedings and that the judgment must be reversed. The petition was in the ordinary form, claiming a general ownership. The answer, after a general denial, pleaded the ordinance, the official position of the defendant, the taking of the cow, and a lien thereon for $2.25, "fees for impounding, caring for, and advertising said animal under said ordinance." The reply admitted all the averments of the answer except as to the amount of the lien. The ordinance provided that "before the marshal shall deliver any such animal or animals to the owner thereof he shall be entitled to and shall receive the sum of fifty cents per head for all horses, cattle, or mules, and twenty-five cents per head for sheep or swine taken up by him, and twenty-five cents per head for each day or fraction thereof for feeding or taking care of such animals, after the first day." The amount claimed by the defendant included the sum of 25 cents for advertising for the owner to call for the cow. The ordinance provides for no such process. It does provide that if the owner be not known, the marshal shall advertise and sell the animal, as provided by statute in case of estrays; but the time had not elapsed when by virtue of that statute advertising may be begun, nor had any of the preliminary steps required by that statute been taken. (Compiled Statutes, ch. 27.) No rights could therefore be claimed under the statute, either directly or by reason of the attempt of the ordinance to extend its

provisions. The ordinance fixed and limited the charges which could be made, and neither provided for advertising nor for adding a charge therefor to the lien. An instruction limiting the inquiry to the items fixed by ordinance was refused and none was given on the subject. It was error to refuse the instruction.

The judgment was for $2.25 and costs, and not in the alternative as the statute in such cases requires. This was also error. (*Hooker v. Hammill*, 7 Neb. 231; *Moore v. Kepner*, 7 Neb. 291; *Singer Mfg. Co. v. Dunham*, 33 Neb. 686; *Mankar v. Sine*, 35 Neb. 746; *Field v. Lumbard*, 53 Neb. 397.)

REVERSED AND REMANDED.

GEORGE A. HOAGLAND ET AL., APPELLANTS, V. JOSEPH C. GREEN ET AL., APPELLEES.

FILED MARCH 3, 1898. No. 7870.

1. Mortgages: DELIVERY. It cannot be inferred that a mortgage, although left in the custody of the mortgagee, was delivered as to one of two joint mortgagors upon the signing and acknowledgment by him, when it was the manifest intention of the parties that it should not take effect until execution by the other mortgagor.

2. ———: JUDGMENTS: PRIORITY. The general lien of a deficiency judgment rendered not by confession and at a term subsequent to the commencement of the foreclosure suit in which such judgment was rendered is superior to a mortgage or conveyance of the debtor's land executed after the commencement of that term, but before the actual rendition of the judgment.

3. ———: FORMER LIENS: SUBROGATION. The mere fact that with the proceeds of a later mortgage a prior one was paid, for the purpose of removing the lien thereof, affords no ground for subrogating the junior mortgagee to the rights of the former mortgagee upon its being discovered that a lien had arisen intermediate between the two mortgages. *Bohn Sash & Door Co. v. Case*, 42 Neb. 281, followed.

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

Warren Switzler, for appellants.

G. W. Shields, F. C. O'Hollaren, and *J. J. O'Connor*, *contra.*

IRVINE, C.

This was a proceeding in the nature of a creditors' bill to subject certain lots in the city of Omaha to the payment of judgments owned by the appellants against Joseph C. Green. The district court found for the defendants and dismissed the case. The plaintiffs appeal.

In 1891 Hoagland and French obtained a decree foreclosing mortgages on other property of Green. In August, 1892, the mortgaged premises were sold under the decree, leaving a small deficiency on Hoagland's claim and the whole of French's unsatisfied. The September term of the district court opened September 17, and at that term, on October 1, the sale was confirmed. October 8 both Hoagland and French moved for deficiency judgments, which were rendered November 17, still at the September term of court. The French judgment was assigned to the appellant Switzler. At the beginning of the term there was a mortgage on the land in controversy in favor of the Omaha Savings Bank. Subsequently, but before the deficiency judgments were rendered, Green and wife executed three mortgages on the land in controversy, in favor of the Globe Loan & Trust Company. The loan and trust company paid the savings bank's mortgage and a tax lien on the property out of the loan to secure which its mortgages were made, and paid the remainder of the loan to Green. After these mortgages were made and recorded, but before the deficiency judgments were rendered, Joseph C. Green conveyed the land to George H. Green. The ques-

tions presented are whether the judgments are liens binding upon George H. Green, and if so, whether they or the loan and trust company's mortgages have priority.

It is argued that the mortgages were delivered before the term of court opened at which the judgments were rendered and that they are therefore, in any view of the law, superior to the judgments. The facts, as established by uncontradicted evidence, are that arrangements had been made by Green with the loan and trust company for the loan early in September. September 16, the day before the term of court opened, Green came to the office of the company, the mortgages were there drawn, Green signed them and acknowledged them. Several days later Mrs. Green came to the company's office, signed and acknowledged the mortgages, and the notary who took both acknowledgments then certified thereto, dating the certificate as of the day of the wife's acknowledgment. No money was paid by the company until a still later day. From the time of the execution by Green the company retained possession of the instruments. Were the circumstances different the acts of Green in signing and acknowledging and leaving the instruments in the possession of the mortgagee might indicate a delivery on his part on September 16; but when it is considered that the mortgages were drawn by the mortgagee at its office, that the signing and acknowledging both took place there, that the certificates of Green's acknowledgment were not then made out, but evidently purposely withheld until such time as Green's wife might acknowledge, and that no money was paid out until after the latter event occurred, it becomes absolutely certain that the instruments were not deemed complete at the former time, and that they were not intended to then take effect. The bare manual possession by the mortgagee in the interval ceases to be significant. The delivery could not have taken place prior to September 27, when the wife executed the instruments. Section 477 of the Code of Civil Procedure provides: "The lands and tenements of

the debtor within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered; but judgments by confession, and judgments rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered. All other lands, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution." After a thorough consideration and exhaustive discussion of the question it was held that where a mortgage is executed and recorded during the term, but before the rendition of such a judgment as is rendered at a term subsequent to that at which the action was commenced and not on confession, the lien of the judgment is superior to the mortgage. (*Norfolk State Bank v. Murphy*, 40 Neb. 735. See also *Ocobock v. Baker*, 52 Neb. 447.) If the judgments here in question were ordinary judgments in personal actions, there could, therefore, be no doubt as to their priority, both as against the mortgages and the rights of George H. Green. But the argument is that the rule applies only by virtue of a legal fiction whereby judgments are deemed to have been rendered at the first day of the term, and that this fiction cannot apply where the case was not then in a situation that judgment might then have been rendered. Further, that at the beginning of this term the sale of the mortgaged premises, in the case in which the judgments were rendered, had not been confirmed, no deficiency had been ascertained, no judgment could then be rendered for a deficiency; and that for this purpose the action should be deemed commenced at the time the application was made for the deficiency judgments. If this theory were sound it would save the rights of the defendants; but we are constrained to hold that it is not sound, much against the inclinations of the writer, at least, to whom the case appeals as one of unusual hardship.

The theory of the defendants receives support in prin-

ciple from the case of *Withers v. Carter*, 4 Gratt. 407, and one or two later cases in Virginia. But these cases proceeded on common-law grounds and were not controlled by statute as is the case before us. In *Norfolk State Bank v. Murphy, supra*, it is said that our statute is declaratory of the common law, and so it is as to the question there under discussion, and so it is in a broad sense generally; but it does not exactly express the common law rule, and its language must govern rather than common-law precedents contrary thereto. Authority under similar states of the law is rare, if it exists at all. In Kansas it seems to be the practice to render a personal judgment for the whole mortgage debt at the same time foreclosure is decreed, and to then sell the mortgaged property, and if it prove insufficient, to then issue a general execution which may be levied on other property. The Kansas court has held in well reasoned opinions that the statute makes such judgments no different in character or effect from other judgments, and that they become liens upon land other than that mortgaged at the same time as other judgments, and from the first day of the term. (*Lisle v. Cheney*, 36 Kan. 578; *Thompson v. Hubbard*, 44 Pac. Rep. [Kan.] 1095.) In Indiana the same practice prevails and the same view is taken of the nature of such judgments, although there it does not appear that judgments generally relate back to the beginning of the term. (*Fletcher v. Holmes*, 25 Ind. 458.) Our statute, as it existed at the time these judgments were rendered, authorized judgments to be rendered for a deficiency in the case of a mortgage foreclosure, on the coming in of the report of sale, and executions to issue as in other cases. (Code of Civil Procedure, sec. 847.) No intention is expressed that such a judgment in character or effect should differ in any way from other judgments. That statute was passed in 1857, and was, therefore, in force when, in 1858, section 477 was adopted, making the lien of judgments generally relate back to the first day of the term, and making certain exceptions to this rule of which deficiency judgments

are not one. If it had been the intention to except such judgments, the legislature would not have contented itself with merely excepting judgments by confession and those rendered at the same term "at which the action is commenced." The latter language is rendered certain by other sections of the Code which determine when an action is deemed commenced. That phrase cannot, without straining, be made to apply to a motion made in a case which has confessedly been in progress for some time. When the legislature enacts a rule and at the same time excepts certain cases from its operation, the extent of the rule is not open to doubt or to judicial determination. The rule applies to all cases not within the designated exceptions. To engraft upon the statute exceptions other than those specified would be legislation, pure and simple. At the common law judgments by fiction related back to the first day of the term; and after lands came to be subjected to their payment the injustice of the rule as against purchasers became manifest. Thereupon we find parliament, in the famous statute of frauds (29 Car. II, ch. 3, secs. 13-15), enacting, after a recital of the mischief in view, that any judge or officer at the signing of any judgment shall set down the day of the month and year of his so doing, upon the paper book, docket, or record which he shall sign, and that such judgments shall bind purchasers for a valuable consideration only from the time they shall be signed and not from the first day of the term. For nearly two hundred years before our statute was passed the English law had thus protected purchasers; but our legislature saw fit, instead of affording this broad protection, to establish the old rule by statute and to create only limited exceptions thereto. The exceptions do not extend, as was held in the absence of statute, in Virginia, to all cases not in a situation where judgment might be rendered on the first day of the term, because the exception extends only to confessions and to cases commenced at the term at which judgment is rendered. This excludes from the exception

all cases commenced before the opening of the term, and where the answer day does not occur until after the term opens. It cannot be possibly said that such cases are within the exception; but they are cases not in such a condition at the beginning of the term that judgment might be rendered. If one case of that character exists by plain import of the language of the statute, it is conclusive evidence that the legislature did not intend to imply that tacit general exception, or merely give force to the old fiction with all its limitations.

The defendants ask, in case it should be determined that the mortgages are subject to the lien of the judgments, that they be subrogated to the rights of the savings bank, whose prior mortgage was paid from the loan secured by the later mortgages. The case is in this respect not different in principle from that of *Bohn Sash & Door Co. v. Case*, 42 Neb. 281, where it was held that subrogation was not permissible.

The decree of the district court must be reversed, with directions to enter a decree subjecting the land to the payment of the judgments of plaintiffs, prior to the claims of the mortgagee and of George H. Green.

REVERSED AND REMANDED.

HENRY MAINS, APPELLANT, V. WILLIAM H. BOYD, JR., APPELLEE.

FILED MARCH 3, 1898. No. 7822.

Review: AFFIRMANCE. No question of law is involved in this case. Evidence *held* to sustain the finding of the district court.

APPEAL from the district court of Madison county. Heard below before ROBINSON, J. *Affirmed.*

Campbell & Wallis, for appellant.

B. B. Willey and *C. B. Willey, contra.*

IRVINE, C.

The only question presented by this record is the sufficiency of the evidence to sustain the finding of the district court, and the decision of that question is not incumbered with the consideration of any question of law. It would therefore be useless to set out the evidence in the opinion. It has been examined, and we find that it amply sustains the finding.

AFFIRMED.

WILLIAM POLLOCK ET AL. V. SCHOOL DISTRICT NO. 42 ET AL.

FILED MARCH 3, 1898. No. 7904.

School Districts: APPEAL FROM ORDER OF COUNTY SUPERINTENDENT. An appeal will not lie from the order of a county superintendent changing the boundaries of school districts or creating new districts. The method of reviewing such proceedings is by petition in error.

ERROR from the district court of Antelope county. Tried below before ROBINSON, J. *Reversed.*

E. D. Kilbourn, for plaintiffs in error.

C. C. Jones, contra.

IRVINE, C.

The county superintendent of Antelope county, on petition of certain voters of school district 42 in that county, set apart certain territory from that district and created therefrom a new district. The proceeding was taken to the district court, not by petition in error, but in the form of a technical appeal. A motion was made in the

district court to dismiss the appeal for want of jurisdiction. This motion was overruled, and the district court reversed the action of the superintendent and restored the school district to its former condition. To reverse that judgment this proceeding in error is brought, and the action of the district court in overruling the motion to dismiss the appeal is one of the assignments of error, and the only one necessary to consider.

The power to change the boundaries of school districts is conferred on the county superintendent by Compiled Statutes, chapter 79, subdivision 1, section 4. To authorize the exercise of such power a petition of voters of the territory affected is requisite. The power so vested in the superintendent is to a certain extent judicial in its character and subject to review. (*State v. Palmer*, 18 Neb. 644; *State v. Clary*, 25 Neb. 403.) Section 580 of the Code of Civil Procedure authorizes the review by the district court, on petition in error, of judgments rendered or final orders made by a probate court, justice of the peace, or any other tribunal, board, or officer exercising judicial functions, and inferior in jurisdiction to the district court. This provision affords an adequate remedy in such cases as the present. An appeal, in the technical sense of the term, is a remedy which exists only by force of statute and within the limits defined by statute. (*Wilcox v. Saunders*, 4 Neb. 569; *State v. Ensign*, 11 Neb. 529; *State v. Bethea*, 43 Neb. 451; *Nebraska Loan & Trust Co. v. Lincoln & B. H. R. Co.*, 53 Neb. 246.) There is no statute allowing an appeal from such orders of the county superintendent, and consequently the right of appeal does not in such case exist. In *State v. Clary, supra*, it is said in the syllabus that from the decision of the superintendent in such a matter "an appeal lies to the district court of the proper county," and in the course of the opinion the word "appeal" is used as characterizing the review of the order by the district court; but when the whole opinion is read it is evident that the court was there using the word in its broader sense, applying to all methods of review by

superior tribunals. (See *Nebraska Loan & Trust Co. v. Lincoln & B. H. R. Co., supra.*) The action before the court was mandamus, and what the court held was that the decision of the county superintendent was in the exercise of a power judicial in its nature, and subject to review by appellate proceedings, and, therefore, that such action could not be controlled by mandamus. The method of review was not a matter under particular investigation, although the court cited section 580 of the Code as affording the proper method. It is evident that the court had in mind proceedings in error and not a technical appeal; and, the distinction between the two methods not in that case requiring examination, the word "appeal" was used in its broad and familiar sense, and referring to proceedings in error rather than in contradistinction thereto. This is the more evident because in *State v. Palmer, supra,* the court had pointed out a petition in error as the appropriate remedy in such cases. In *School District v. Coleman,* 39 Neb. 391, it would seem that a technical appeal had been prosecuted to judgment in the district court, but the question of jurisdiction was not raised or considered. The judgment of the district court must be reversed and the cause remanded with directions to dismiss the appeal.

REVERSED AND REMANDED.

NEBRASKA WESLEYAN UNIVERSITY, APPELLEE, V. WILLIAM H. CRAIG'S ESTATE, APPELLANT.

FILED MARCH 17, 1898. No. 7656.

Appeal. An appeal, in the strict sense of the term or as distinguishing the designated procedure from one in error or by petition in error, will not generally lie to this court from an inferior court in a legal or law action.

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

Paul Charlton and *Robert S. Rodgers*, for appellant.

Ralph W. Breckenridge, contra.

HARRISON, C. J.

March 15, 1892, there was filed in the county court of Douglas county by the appellee herein a claim against the estate of William H. Craig, deceased, then in process of administration in said court. The claim was for the sum of $25,000, and predicated on an alleged subscription by William H. Craig, when living, of such sum "as an endowment for the Charles H. Fowler Professorship of Christian Ethics." During the course of the contest which ensued relative to the allowance of the demand an amended statement of the claim was filed, and after a number of adjournments of the hearing of the matter, on December 2, 1892, the claim was disallowed. An appeal from this order was perfected in behalf of the university to the district court, where a petition was filed in which there was a prayer for the allowance of the claim and judgment against the estate for the amount thereof. Of the matters stated in the petition there was in the answer filed for the executors of the estate a general denial. Of the issues joined there was a trial before the court and a jury, which resulted in a verdict favorable to the appellee herein. A motion for a new trial was filed for the executors, which, on hearing, was overruled and judgment for appellee was rendered on the verdict. An appeal has been perfected to this court for the executors. The word "appeal" is used in this connection in its strict import, or as distinguished in its application to, and designation of, the method of procedure from an error proceeding or review of alleged errors sought by petition in error. No petition in error has been filed herein, nor has the issuance and service of a summons in error been procured, and the time for either has long since passed, but notice of an appeal was, at the instance of appellant, issued and served.

The question arises upon the record presented here of the jurisdiction of this court, in this, an appeal, to examine and determine the errors alleged to have been committed by the trial court. It is true this is not raised or discussed by the parties, but is inherent in the proceeding, and the cause, if not properly presented here, cannot be considered and must be dismissed. The claim originated, as we have before indicated, in a promise; it was purely contractual, and its non-performance would ordinarily but have given rise to an action at law for its enforcement. The death of the promisor cast upon the promise its nature of a claim against his estate or afforded a new or different channel through which a compliance with its terms and conditions might be sought. To reach a proper conclusion on the question suggested will necessitate an examination of the course of legislation in regard to presentation of claims or demands against the estates of decedents and appeals from their allowance or disallowance.

During the session of the legislative assembly of the territory of Nebraska, having its inception of date December 5, 1860, there was passed an act "providing for the settlement of the estates of decedents, and for other purposes." (See Session Laws 1860, p. 59, of which chapter 9 was in relation to payments of debts, etc.) In such chapter there was indicated a course of procedure for the presentation and adjustment of claims against estates of deceased persons, and of such procedure was the right of an appeal by a claimant from the order of rejection of claims; and it was further provided in the matter of an appeal that notice of the appeal and the hearing thereof should be given the adverse party in such manner as directed by the judge of probate and at least twelve days prior to the next term of the appellate court; and further, that "The party appealing shall procure and file in the district court to which the appeal is taken, at or before the next term of said court after the appeal is allowed, a certified copy of the record of the allowance or disal-

lowance appealed from, of the application for the appeal and the allowance of the same, together with the proper evidence that notice has been given to the adverse party according to the order of the probate court. When such certified copy shall have been filed in the district court, such court shall proceed to the trial and determination of the same according to the rules of the law allowing a trial by jury of all questions of fact in cases where such trial may be proper; and such court may direct an issue to be made up between the parties in a brief form when it shall be deemed necessary; and questions of law may be carried to the supreme court and costs may be allowed or denied in the discretion of the court." (Session Laws 1860, p. 94, secs. 25, 26.) The act was amended during the legislative session of 1873, the manner of notice of the appeal, etc., was changed, and on the matters to which our attention is more particularly required the subjects were treated as follows: "The party appealing shall, on or before the first day of the term of said court next after the expiration of the time within which notice might have been given as required in the last preceding section, procure and file in the district court a certified copy of the bond, if any, given on appeal, and of the record of the allowance or disallowance appealed from, and of the claim or set-off filed, together with the proper evidence that notice has been given as aforesaid to the adverse party. The district court shall proceed to a trial and determination of the case in like manner as upon appeals brought upon the judgments of justices of the peace; and such court may direct an issue to be made up between the parties when it shall be deemed necessary; and questions of law may be carried to the supreme court and costs may be allowed or denied in the discretion of the court." (General Statutes 1873, p. 322, secs. 237, 238.) It is clear from an inspection of the legislation that the procedure in the district court in an appeal from the adjustment in the probate (now county) court of a claim against the estate of a decedent was to be as in any ordi-

nary civil action commenced in the appellate court, and the action in the case at bar was, by nature of the claim and in all its elements, a legal or law action.

For a general discussion of the subject of appeal and a determination that in a proceeding by a railroad company before a county judge to condemn lands in the exercise of its statutory right in that regard—it being of the provisions of the law governing such proceedings that an appeal from the order or adjudication made might be had to the district court and an appeal from the decision of the district court to the supreme court—that appeal there meant, "the action being essentially legal," a review in the supreme court, to be obtained by error proceeding or petition in error, see *Nebraska Loan & Trust Co. v. Lincoln & B. H. R. Co.*, 53 Neb. 246. That an appeal to the supreme court will not lie in a law action, see *Roode v. Dunbar*, 9 Neb. 95; *Robertson v. Hall*, 2 Neb. 17; *Furnas v. Nemaha County*, 5 Neb. 367. The latter case is also to the point that the court will not exercise jurisdiction when the case is not properly presented, though the question has not been raised by any of the parties. To the main point see also *Morse v. Engle*, 26 Neb. 247; *Prentice Brownstone Co. v. King*, 39 Neb. 816. It follows that the cause is not properly presented to this court and the appeal must be dismissed.

APPEAL DISMISSED.

SAM DAVIS V. STATE OF NEBRASKA.

FILED MARCH 17, 1898. No. 9827.

1. **Larceny by Bailee.** In a prosecution for the statutory crime of larceny by a bailee the gravamen of the charge is the felonious conversion, and the intent may be shown to have been entertained as of the time of the reception of the possession of the property or to have arisen during the continuance of such possession.

2. **Criminal Law:** BURDEN OF PROOF. The burden of proof in a crim-

inal action does not shift to the defendant but rests with and on the state.

3. ———: INSTRUCTIONS. A portion of a statement contained in an instruction criticised, but the entire instruction *held* not open to the objection urged against it.

4. ———: EVIDENCE. In the trial of a criminal cause the general rule operates the exclusion of evidence of the commitment by the accused of a crime or crimes separate and distinct from that on a charge of which he is being tried. To this rule there are exceptions, but in the case at bar reasons did not exist for the departure from the general doctrine.

ERROR to the district court for Otoe county. Tried below before RAMSEY, J. *Reversed.*

Warren & Jackson, for plaintiff in error.

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

HARRISON, C. J.

On May 17, 1897, an information was filed in the district court of Otoe county in which the plaintiff in error was charged with the crime of larceny as bailee, the property said to have been appropriated being one bay gelding, a buggy, and set of harness. To the charge on arraignment he pleaded not guilty, was placed on trial, convicted, and subsequently sentenced to confinement in the penitentiary for a term of three years. A reversal of the judgment is sought in an error proceeding to this court.

It was developed in evidence herein that on or about April 29, 1897, the plaintiff in error arrived in Nebraska City and announced to parties whom he met and with whom he conversed that he "was advance agent" for Ringling Bros., who were conducting a circus; also that the circus would appear and give an exhibition or performance in Nebraska City of date May 29, 1897. The plaintiff in error claimed to be in Nebraska City at the time we have indicated for the purpose of perfecting arrangements for the appearance of the circus there at the

later date stated by him, and partially to make contracts for certain articles and supplies which would be necessary for use by the circus company, its employés, etc., when in the city. He made contracts with different parties, and on April 30, near noon, secured from a firm, then and there running a livery stable, the horse, buggy, and harness, which it was alleged he subsequently converted to his own use with a felonious intent. At the time he obtained the horse and buggy he stated that he wanted to drive around town, would be out about an hour, and then return to the barn with the "rig." Instead of doing as he stated, he drove to Shenandoah, Iowa, where he placed the property in charge of a livery stable keeper to be cared for, etc. The owner of the horse and buggy became uneasy when the plaintiff in error did not return to the barn as promised, and in the afternoon, at 2 or 3 o'clock, reported the matter to the officers. The sheriff sent telegrams to several towns, one of which was Shenandoah, asking for information in regard to plaintiff in error and the property. To the queries sent to Shenandoah the sheriff received an answer which conveyed to him knowledge of the objects of his search. The arrest of the plaintiff in error was ordered and effected, and later he was by the sheriff brought back to Nebraska and a prosecution for the alleged crime instituted, with the result we have hereinbefore stated.

It is of the argument that the trial court erred, in that it instructed the jury, before which the issues were tried, so as to allow a conviction on evidence of a conversion of the property on an intent to commit such act formed by plaintiff in error subsequent to the time he obtained possession of it; and in this connection it is urged that if he did not at the time of taking possession have the intent to feloniously appropriate it to his own use, he could not be convicted of the crime charged. This contention is untenable. In the case of *Ford v. State*, opinion written by NORVAL, C. J., reported in 46 Neb. 390, the defendant was charged with larceny as bailee, as was the plaintiff in

error in the case at bar, and the same argument was made in that case in this court in regard to an instruction given as is made in this case. It was then said: "In a prosecution for larceny as bailee, an instruction which fails to charge that the original taking of the property must be felonious is not for that reason erroneous. The gist of the offense in such a prosecution is the conversion of the property without the knowledge and consent of the owner thereof with the intent to steal the same. It is argued that this instruction is fatally defective, in that it omitted the element of 'felonious taking,' and *Mead v. State*, 25 Neb. 444, and *Barnes v. State*, 40 Neb. 545, are cited to support the proposition. Those cases are clearly distinguishable from the one at bar. They were prosecutions for simple larceny, while this is for larceny as bailee. In the decisions referred to the original taking must have been felonious in order to constitute the offense charged, while such is not the case in a prosecution like this. Here the gist of the offense is not the felonious taking of the rig, but the conversion thereof by Ford without the knowledge and consent of the owner, with the intent to steal it. The statute under which the information in this case was filed, section 121*b* of the Criminal Code, declares: 'That if any bailee of any money, bank bill, or note, goods, or chattels shall convert the same to his or her own use, with an intent to steal the same, he shall be deemed guilty of larceny, in the same manner as if the original taking had been felonious.' The instruction includes every element of the offense described in the statute." The doctrine announced in that case is applicable to and decisive of the question herein raised, and it follows that the argument presented is unavailing.

Objection is urged against the eleventh paragraph of the instructions, which was as follows: "You are instructed that one of the defenses interposed by defendant in this case is that at the time he procured the property in question from Levi Bros. he was under the influence of intoxicating liquors; that he was incapable of forming

an intent to steal, and for that reason claims he is not guilty. Drunkenness, in law, is no excuse for the commission of crime. If the state has proved, beyond a reasonable doubt, that defendant, at and within the county of Otoe and state of Nebraska, at or about the time alleged in the information, temporarily obtained the property in question from Levi Bros., and while in possession thereof, and while in Otoe county, Nebraska, unlawfully and feloniously converted said property to his own use without the consent of said Levi Bros., with intent, feloniously, to permanently appropriate the same to his own use, then the burden would rest upon the defendant to satisfy you by evidence that he was so under the influence of liquor at the time that he was mentally unable to form an intent in his mind to steal said property or raise a reasonable doubt in your minds, after carefully weighing all the testimony in the case, whether he is guilty because of such intoxication at the time as not to be able to form an intent to steal. You are to determine this matter from all the evidence before you." It is insisted that the burden of proof never shifts in a criminal cause, but remains with and on the state; and that the paragraph of instructions quoted is objectionable, in that it casts the *onus* of proof relative to the plea of drunkenness on the plaintiff in error. It has been stated by this court: "In criminal prosecutions the burden of proof never shifts, but, as to all defenses which the evidence tends to establish, rests upon the state throughout; hence a conviction can be had only when the jury are satisfied, from a consideration of all the evidence, of the defendant's guilt beyond a reasonable doubt. That rule applies not alone to the case as made by the state, but to any distinct, substantive defense which may be interposed by the accused to justify or excuse the act charged." (*Gravely v. State*, 38 Neb. 871. See also *Casey v. State*, 49 Neb. 403; *Beek v. State*, 51 Neb. 106; *Peyton v. State*, 54 Neb. 188.) But the portion of the charge under consideration is almost word for word the same as a part of the instructions given in *Ford v.*

State, supra, with no material differences, and in that case the same objections were urged against it as are insisted upon in the present case. In that case it was determined that it was not wholly open to the attempted criticism, and that it did not have the effect of casting the burden of proof as to the plea interposed for defendant upon him, but it was also said in the opinion, in substance, that the idea to be conveyed might have been more concisely and clearly expressed. We think that, to be entirely consistent with the doctrine of this court relative to the burden of proof and to give clear expression to the rule of law applicable, there should have been omitted from the instruction the statement "then the burden of proof would rest upon the defendant to satisfy you by evidence," or the paragraph so framed as to avoid its use. It is not alone from a consideration of the evidence adduced on behalf of the accused that the jury is to draw its conclusions on such a question, but if a reasonable doubt arises in regard thereto from a consideration of all the evidence in the cause, then the defendant is entitled to an acquittal. (*Casey v. State, supra.*) But the objection urged against the instruction is not of force to disturb the judgment. (*Ford v. State, supra.*)

One assignment of error relates to the admission of a portion of the testimony of a witness, William Lieboldt, a member of a firm then conducting a bakery in Nebraska City. The plaintiff in error made a contract with the firm, the transaction being with the witness acting in behalf of the firm, to furnish to the circus company, when it visited Nebraska City, bread as stipulated in the contract. It is strenuously contended that the testimony, the admission of which is the subject of complaint in this assignment, was an effort to prove the commission by plaintiff in error of a separate and distinct crime from that charged in the complaint and its allowance was an error. The testimony on this subject is as follows:

Q. Did Mr. Davis get any money from you that day?

Defendant objects to that, as immaterial. Objection overruled. Exception.

Mr. Jessen: This testimony is offered for the purpose of showing the object of the defendant in leaving Nebraska City with the horse, with which he is charged with the theft, and not for the purpose of proving in any way the commission of the crime with which he is charged, but of his intention of converting the horse to his own use.

Defendant objects, as immaterial, irrelevant, and incompetent. Objection overruled. Testimony admitted for the purposes offered by the state. Exception.

Q. State to the jury under what circumstances it was obtained.

A. After he gave us that contract he asked me if I would loan him $5 until about 2 o'clock, that he expected some money at the Merchants Bank, and I told him I would. I gave him a check that I had there, and he told me that I had better go with him to the bank so that he could get the money, which I did.

Q. Did he get the money?

A. Yes, sir.

Q. What day was that?

A. Friday, April 30, about ten minutes to 12 o'clock.

Q. Did you see anything more of Mr. Davis?

A. I left him about 12 o'clock. He says I am going to get a horse and buggy, and he would be back by half past 1 or 2 o'clock and pay me the $5.

Q. Did he come back?

A. No, sir.

Q. Did he pay you the $5?

A. No, sir. * * *

Q. Was this $5 that you advanced to him, was that—how did that come about?

A. I just gave it to him out of my own pocket. It had nothing to do with the firm.

Q. But he wouldn't have got the $5 if you hadn't got the contract?

A. No, sir.

Under the operation of the general rule in relation to admissibility, the testimony to which we have just re-

ferred would have been excluded; but the general doctrine has been varied, or there has been a departure therefrom, to a greater or lesser degree in cases of a particular or peculiar nature in some, if not all, jurisdictions. In some courts and in some cases the departure has been quite marked in extent and degree, while in others there has been exhibited a decided hesitancy to indulge in a modification of the general rule. Of the latter is this court. In the case of *Smith v. State*, 17 Neb. 358, the accused was on trial charged with the crime of larceny of some jewelry, and there was admitted a record which disclosed his prior conviction of a distinct and independent larceny of jewelry. It was held therein, on error to this court, that the evidence should not have been admitted. In the case of *Cowan v. State*, 22 Neb. 519, the charge was for obtaining money under false pretenses, and during a trial the state was permitted to show that in two instances, entirely separate from and unconnected with the matter on trial, the defendant had obtained goods under false pretenses. In an opinion written by MAXWELL, C. J., it was held that such evidence was inadmissible and should have been excluded. (See also *Berghoff v. State*, 25 Neb. 213, wherein the general rule was adhered to and enforced.) In *Palin v. State*, 38 Neb. 862, in an opinion written by NORVAL, C. J., the general rule was quoted with approval. (See Greenleaf, Evidence sec. 53; *People v. Gibbs*, 93 N. Y. 471.) There were no forcible reasons in the case at bar for a departure or exception from the general rule. The testimony was objectionable, inadmissible, should have been excluded, and its reception was calculated to prejudice the rights of plaintiff in error.

The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

HAMPTON LUMBER COMPANY, APPELLEE, V. H. J. VAN NESS ET AL., APPELLANTS.

FILED MARCH 17, 1898. No. 7935.

1. **Review:** FORECLOSURE OF MORTGAGE: COMPUTATION. Questions of computation or elements of findings of fact or law on which a decree of foreclosure of a real estate mortgage, a mechanic's lien, or a contract of sale of real estate is based, properly presentable in an appeal from the decree, will not be examined in an appeal from the order confirming a sale, under the decree, of the property involved.

2. **Vacating Judgment.** The power of a district court to vacate or modify its own judgments or final orders after the term at which they were rendered or made is limited to the grounds enumerated in section 602 of the Code of Civil Procedure. *Barnes v. Hale*, 44 Neb. 355, followed.

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

Parke Godwin, for appellants.

D. L. Johnson, *E. G. McGilton*, *L. D. Holmes*, and *James B. Meikle*, *contra.*

HARRISON, C. J.

In the case at bar in the district court of Douglas county, after default of the appellants, in the due course of the proceedings, a decree was rendered on June 9, 1894, and as of the May, A. D. 1894, term of the court, by which there was effected the foreclosure of a real estate mortgage, a mechanic's lien, and a contract of sale of real estate, and a sale thereunder was made of the property involved. On motion during a succeeding term of the court to confirm the sale and order to show cause against such confirmation appellants appeared and filed objections to the confirmation. This was of date December 15, 1894. On January 5, 1895, there was filed for appellants a "motion to modify and correct the decree rendered,"

and on the same day there was filed an amended motion to "set aside the sale." During the February, 1895, term of court, and on the 15th day of the month just stated, the motions were overruled. From the order then made this appeal has been perfected.

The brief presented for appellants contains an opening statement, which we quote: "If the court please the errors complained of are as follows:" Then appears verbatim copies of the seven paragraphs of the appellant's motion in the district court to "correct and modify the decree," without further statement or argument. These all refer to computations or other elements of the findings on which the decree was predicated, and might, if the positions and conditions are as asserted, be of force in an appeal from the decree, but cannot be viewed as of objections to the confirmation of the sale, as they could have no possible place in the examination and consideration by the court to ascertain whether the sale was regular and made in all respects according to law; and they were equally unavailing in an effort to secure the correction or modification of the decree, as the motion in which they were embodied was filed and presented at a time subsequent to the close of the term of court at which the decree was rendered, and the motion presented none of the grounds enumerated in section 602 of the Code of Civil Procedure, and the power of a district court to vacate or modify its judgment or orders after the term at which made is limited to the reasons for such action stated in the said section. (*Barnes v. Hale*, 44 Neb. 355.) The order of the district court is

AFFIRMED.

H. M. HENLEY V. THOMAS EVANS ET AL.

FILED MARCH 17, 1898. No. 7950.

1. **Bill of Exceptions:** AUTHENTICATION. A bill of exceptions not authenticated by the certificate of the clerk of the trial court will not be examined and considered in the supreme court.

2. **Assignment:** ACTION BY ASSIGNEE: PARTIES. It is proper matter of defense that plaintiff, the alleged assignee of the claim in suit, is not the owner thereof or the real party in interest.

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

H. C. Vail, for plaintiff in error.

M. W. McGan, contra.

HARRISON, C. J.

The plaintiff herein instituted suit in the district court of Boone county to recover an alleged amount of the rents, issues, and profits of certain designated real estate, which it was pleaded the defendants had unlawfully converted to their own use. The plaintiff's right to recover in the action was asserted as assignee of the claim to the rents, etc., of the land. Of the issues joined there was a trial, which resulted favorably to the defendants, and the cause is presented to this court by an error proceeding on the part of the plaintiff in the action.

The document in the record styled the bill of exceptions wholly lacks the necessary authentication of the clerk of the trial court, without which it cannot be examined or considered in this court for any purpose. (*Romberg v. Fokken*, 47 Neb. 198; *Spurck v. Dean*, 49 Neb. 66.) Without a proper bill of exceptions there is but one of the points argued in the brief of plaintiff in error which is open to examination and decision, that of the sufficiency of the allegations of defendant's answer to raise or present a forceful issue. In the answer there was a denial

of the assignment of the cause of action to the plaintiff and an allegation, in effect, that the plaintiff was not a real party in interest and was without ownership or interest in the subject of the suit. If proof of this was produced, the plaintiff would necessarily have been adjudged powerless to maintain the action. This was proper, available matter of defense. (See *Hoagland v. Van Etten*, 22 Neb. 681, 23 Neb. 462, 31 Neb. 292.) It follows that the judgment must be

AFFIRMED.

FRANK PEYTON ET AL. V. STATE OF NEBRASKA.

FILED MARCH 17, 1898. No. 9852.

1. **Criminal Law:** ALIBI. "Alibi," as employed to express the defense of the accused person in a criminal action, means the claim of the party charged of presence at the time the crime is pleaded to have been committed at a place other than the one alleged of the crime.

2. ———: ———: INSTRUCTIONS. The distance of the place where a party who is charged claims to have been at the time from the alleged location of the commitment of a crime, while necessarily elemental of the different places is not the controlling fact or element; and it is not proper to instruct a jury that in a defense of alibi it must appear that the distance was so great as to preclude the possibility that the accused could have been at the stated scene of the crime charged.

3. ———: ———: ———. In a criminal case the burden of proof is not upon the person on trial to establish an alibi, and an instruction by which a jury is informed that it is is erroneous.

4. ———: ———: EVIDENCE. Where the defense in a criminal action is an alibi, it is sufficient to call for a verdict of acquittal if the jury, from a consideration of all the evidence, have a reasonable doubt of the presence of the accused at the place and time of the alleged crime, whether such doubt be from lack of proof on the part of the state, or from the evidence adduced in behalf of the party charged.

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

T. J. Mahoney and *Duffie & Van Dusen*, 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 Douglas county the plaintiffs in error were charged in a first count thereof with the crime of shooting a designated person with an intent to kill him; in a second count, with shooting said person with an intent to wound him. On arraignment each pleaded not guilty. A trial of the issues resulted in a conviction of plaintiffs in error of the commission of the crime charged in the second count of the information, and subsequently each was sentenced to imprisonment in the penitentiary for a period of four years. Of the proceedings during the trial a review on behalf of the convicted parties is the object of the error proceeding in this court.

Of the defenses interposed for plaintiffs in error in the trial court was that of an alibi. Testimony was introduced which tended to establish that at the time the crime was committed, with the perpetration of which plaintiffs in error were charged, they were at home, not present at the scene of such crime, and could not have been. In its charge to the jury the trial court gave an instruction, numbered 6, on the subject of the defense, to which we have just referred, which instruction was in the following terms: "The defendants claim as a part of their defense what is known as an alibi; that is, at the time the crime with which they stand charged was being committed they were at such a distance and different place that they could not have participated in its commission. The defense of alibi, to be entitled to consideration, must be such as to show that at the very time of the commission of the crime charged the accused were at

another place, so far away and under such circumstances that they could not, with ordinary exertion, have reached the place where the crime was committed. Proof of an alibi must be sufficient to raise in your minds a reasonable doubt of the defendant's presence at the time and place of the commission of the crime charged." This, it is insisted, was erroneous and prejudicial to the rights of the parties on trial, in that it embodied an incorrect definition of the defense relative to which it was framed and read for the information of the jury.

An alibi in criminal law is defined in Black's Law Dictionary as follows: "Elsewhere; in another place. A term used to express that mode of defense to a criminal prosecution, where the party accused, in order to prove that he could not have committed the crime with which he is charged, offers evidence to show that he was in another place at the time; which is termed setting up an alibi." And in 2 Am. & Eng. Ency. Law [2d ed.] 53, "The word 'alibi' means, literally, 'elsewhere,' and a prisoner or accused person is said to set up an alibi when he alleges that, at the time when the offense with which he is charged was committed, he was 'elsewhere'; that is, in a place different from that in which it was committed." The trial court made use of the words "at such distance and different place that they could not have participated in" the commission of the crime in defining an alibi. The expression as to the element of distance was an incorrect one. That parties charged with acts constituting a crime were at a place other than that of the alleged acts embraces necessarily as elemental of its existence as a fact that they were also at some distance from the alleged place of the commitment of the crime. But that the distance disclosed by the evidence be long or short is not always an absolutely controlling fact. It can do no more than to lend greater or lesser countenance and force to the defense in a degree proportionate to its extent. That the distance must be such as to preclude any possibility of a participation in the crime as was expressed in the

instruction quoted was incorrect, conveyed a wrong impression, and was calculated to prejudice the rights of the parties on trial.

What we have just said is equally forcible and applicable to the portion of the instruction in which the jury was told that the defense presented, to be entitled to consideration, must establish that when the crime was committed the accused were so far away and under such circumstances that they could not by ordinary exertion have reached the place of the crime. This was wrong in its absolute requirement that it be shown that the place where plaintiffs in error claimed to have been other than that of the crime was so far distant from the latter that the parties charged could not by any ordinary exertions have been at the latter place.

The instruction was also objectionable for casting the burden of proof of the alibi on the plaintiffs in error. In regard to the burden of proof generally in criminal cases it was stated in *Gravely v. State*, 38 Neb. 871: "In criminal prosecutions the burden of proof never shifts, but, as to all defenses which the evidence tends to establish, rests upon the state throughout; hence a conviction can be had only when the jury are satisfied, from a consideration of all the evidence, of the defendants' guilt beyond a reasonable doubt. That rule applies not alone to the case as made by the state, but to any distinct, substantive defense which may be interposed by the accused to justify or excuse the act charged." (See citations in the body of the opinion, page 873.) It was said by MAXWELL, C. J., in *Burger v. State*, 34 Neb. 397: "An instruction that 'If you find the defendants tendered a reasonable doubt' is erroneous, as it in effect shifts the burden of proof onto the accused. The true rule is that if upon all the evidence the jury entertain a reasonable doubt of the guilt of the accused they should acquit." In *Casey v. State*, 49 Neb. 403, directly on the subject of the defense of an alibi, it was held: "It is error to instruct that the accused in a criminal prosecution is required to prove an

alibi. It is sufficient to entitle him to an acquittal if the jury, from a consideration of all of the evidence, entertain a reasonable doubt of his presence at the commission of the crime charged, whether such doubt arise from a failure of proof on the part of the state, or from evidence submitted by the accused in his own behalf." In the body of the opinion it was stated: "There are, it must be confessed, precedents for the instructions complained of, but the sound rule is believed to be that the accused in a criminal prosecution is entitled to an acquittal whenever the jury, from a consideration of all of the evidence adduced, entertain a reasonable doubt of his presence at the time and place where the crime is shown to have been committed." In the opinion in the case of *Henry v. State*, 51 Neb. 149, appears the following statement: "We are also of the opinion that the court erred in giving instructions Nos. 10 and 11, by which the burden was imposed upon the accused of proving his presence in Franklin county for such length of time that it was impossible for him to have been present at the commission of the homicide. It follows logically, if not necessarily, from the decisions of this court, that the proof of an alibi is not required to cover the entire period within which the offense might possibly have been committed, but that the accused is entitled to an acquittal whenever the evidence is sufficient to create in the minds of the jurors a reasonable doubt of his presence at the commission of the offense with which he stands charged." (See also *McLain v. State*, 18 Neb. 154, *Beck v. State*, 51 Neb. 106, *State v. Child*, 40 Kan. 482, 2 Am. & Eng. Ency. Law [2d ed.] 55, note 3.) For the error in giving the instruction under consideration, the judgment must be reversed and the cause remanded.

There are other assignments of error argued in the briefs filed herein, but we do not deem their discussion necessary and will omit it.

REVERSED AND REMANDED.

GEORGE R. WILLIAMS, TRUSTEE, APPELLANT, V. MICHAEL DONNELLY ET AL., APPELLEES.

FILED MARCH 17, 1898. No. 9515.

Non-Negotiable Instrument: ASSIGNMENT: DEFENSE. A non-negotiable chose in action is subject in the hands of an assignee thereof to all equities which were of force between the original parties thereto prior to the assignment, but not subject to equities of which he had no notice, existent between his assignor and a third person.

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

Wharton & Baird, for appellant.

References: *Connecticut Mutual Life Ins. Co. v. Stinson*, 62 Ill. App. 319; 2 Wait, Actions & Defenses 250; Bishop, Contracts sec. 1189; *Quimby v. Wood*, 35 Atl. Rep. [R. I.] 149; *Martin v. Richardson*, 68 N. Car. 255; *Connecticut Mutual Life Ins. Co. v. Bulte*, 45 Mich. 113; *Jack v. Davis*, 29 Ga. 219; *Smith v. Rogers*, 14 Ind. 224; *Bush v. Lathrop*, 22 N. Y. 535; *Ely v. McNight*, 30 How. [N. Y.] 97; *Timms v. Shannon*, 19 Md. 296; *Cutts v. Guild*, 57 N. Y. 229; *Richardson v. Woodruff*, 20 Neb. 132; *Johnson v. Payne*, 11 Neb. 269; *Young v. Brand*, 15 Neb. 601; *McCreery v. Schaffer*, 26 Neb. 173.

Charles Offutt, contra.

References: *Clippinger v. Fuller*, 10 Kan. 377; *State v. Winn*, 19 Wis. 323; *Van Shaack v. Robbins*, 36 Ia. 201; *Huston v. Markley*, 49 Ia. 162; *Martin v. Ragsdale*, 49 Ia. 589; *Jefferson Land Co. v. Grace*, 57 Ark. 423; *Fargason v. Edrington*, 49 Ark. 107; *Livingston v. Wright*, 88 Ga. 33; *Willard v. Ames*, 130 Ind. 351; *Hagaman v. Commissioners of Cloud County*, 19 Kan. 394; *Griswold v. Wilson*, 36 Ia. 156; *Murray v. Lylburn*, 2 Johns. Ch. [N. Y.] 441; *Livingston v. Dean*, 2 Johns. Ch. [N. Y.] 479; *Davis v. Barr*, 9 S. & R. [Pa.] 137; *Mullison's Estate*, 68 Pa. St. 212; *Bloomer v. Hen-*

derson, 8 Mich. 395; *Croft v. Bunster*, 9 Wis. 457; *Bush v. Lathrop*, 22 N. Y. 535; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41.

HARRISON, C. J.

In this action, commenced in the district court of Douglas county, the appellant sought the foreclosure as a first lien of a mortgage for its alleged unpaid amount of $17,000. The mortgage was executed by Michael Donnelly, of date January 4, 1890, and delivered to the mortgagee, the Lewis Investment Company of Des Moines, Iowa, and by it assigned to appellant of date December 8, 1891. The property involved was situate in Boggs & Hill's Second Addition to Omaha. The National Bank of Norwich, New York, of defendants in the action, filed an answer and cross-petition in which it asserted its right to, and asked foreclosure of, the liens of certain certificates of tax sales and receipts for delinquent taxes on the property paid subsequent to the sales for taxes; and further, that they be declared a first lien. Foreclosure of the claims was decreed and the bank, for the aggregate sum of its liens, was given priority over that of the appellant. The latter in appeal to this court presents the one question, the right of priority of the liens.

Of the facts disclosed by the pleading and record on which the claim of the appellant was and is predicated were the following: There was a statement of the execution and delivery of the mortgage in suit by Michael Donnelly to the Lewis Investment Company as security for the payment of the indebtedness of the former to the latter, as evidenced by a promissory note or bond with interest coupons attached; that the mortgage contained a condition in terms as follows:

"It is further expressly stipulated and agreed that the said party of the first part shall pay all taxes or public rates and assessments on said real estate now due, or hereafter to become due, to whomsoever laid or assessed, and including personal taxes, before the same shall become

delinquent, and shall keep all buildings on said premises insured for not less than $17,000 so long as the indebtedness secured hereby shall remain unpaid, the policy or policies for the same to be delivered to said party of the second part, and the loss, if any, to be made payable to said party, and in case of a failure so to do, the party of the second part, its successors or assigns, may pay such taxes and insure said buildings, and any sum paid for taxes and insurance shall be considered as a part of the indebtedness secured hereby and shall draw interest at the same rate as said principal sum, and shall be included in any judgment which may be rendered on said bond; and if default shall be made in the payment of principal or interest, or for insurance or taxes as herein provided, then the whole indebtedness secured hereby may, at the option of the holder, at once become due and collectible without further notice, and the holder hereof may at once proceed by foreclosure, or in any other lawful mode, to make the amount of said bond, with interest, and all sums paid for insurance or taxes as above provided."

It was further pleaded that "The said Lewis Investment Company is a legal corporation incorporated under the laws of the state of Iowa; that said company, in pursuance of the authority conferred in its articles of incorporation, by vote of its stockholders and directors legally entered, issued and negotiated its certain debenture bonds; that about the 27th day of February, 1890, said company issued its debenture bonds known as 'Series B,' in the sum of $1,000,000, in denominations of $500 each, from one to one hundred inclusive, all made payable to D. Boardman, trustee, at the First National Bank of Ithaca, New York, bearing interest at six per cent, payable semi-annually and running ten years from date; that in connection with the execution and delivery of said bonds, and for the purpose of securing payment of the same, the said Lewis Investment Company entered into a written agreement to and with the said Boardman, trustee, bearing date February 27, 1890, whereby the company cove-

nanted and agreed that it would assign and deliver to said Boardman, trustee, certain first class real estate mortgage and other evidences of indebtedness" (we now quote from the agreement), "all of which shall be first liens on real estate appraised at not less than two and a half times the sum loaned thereon, to an amount which shall fully and at all times equal the amount of outstanding bonds of this issue and five per cent in excess thereof. All of which mortgages or other loans shall be carefully and prudently made on inspected and approved security. The bonds or notes, together with the mortgages securing the same and the assignment of mortgages to said Douglas Boardman, trustee, are to be delivered to the latter and subject to the privilege of exchange of securities hereafter provided.

"It was further covenanted and agreed that the said Lewis Investment Company shall be understood and bound in all cases to guarantee the title good in the borrower, in the case of each mortgage delivered to said Boardman as trustee, and to guaranty each mortgage to be the first lien on the real estate covered thereby, except the current taxes, not delinquent, and shall obtain from the mortgagor insurance to a reasonable amount upon the buildings covered by the respective mortgages wherever said buildings constitute any considerable portion of the security. Each loan or mortgage shall be accompanied by a certificate of title from the attorneys of the said company certifying to the above facts, and also by a certificate of insurance, stating the amount of insurance, the company, when insurance expires, and that the policy is held by the Lewis Investment Company; or, if preferred by the trustee, the abstract of title and the insurance policies shall be delivered to him.

"It is further agreed that the Lewis Investment Company may exchange any security held by the trustee, at any time, for other securities to the same amount equally acceptable and approved by him, and that said company will pay to the trustee a fee for his services equal to one-

half of one per cent on the amount of mortgages originally deposited with the trustee or exchanged for other mortgages; and further, that they will pay the reasonable charges and expenses of an examiner or inspector to be appointed by the trustee to inspect the real estate covered by the mortgages or other securities offered by said company as collateral for the debenture as aforesaid.

"It is further understood and agreed that said trustee shall have the right to reject any mortgages offered as collateral to these bonds which shall not, on inspection, meet his approval or prove satisfactory, and the Lewis Investment Company reserves the right to take up any mortgage placed as collateral, before the maturity thereof, if it shall so elect, replacing the same by mortgage or other security equally acceptable to the trustee. It is further agreed that no bonds shall be issued by the trustee unless protected by mortgages as above provided, and that no bond shall be valid for any purpose or binding upon the Lewis Investment Company, or upon any other person or persons, until the same has been properly countersigned and certified by the trustee as provided on the back of said bonds. And in case of default on the part of the Lewis Investment Company in paying interest due on said debenture for more than sixty days, or in payment of the principal sum due on said bonds at the maturity thereof. then said trustee is hereby authorized and empowered to collect the amount due on said mortgages by legal process, or by the sale of the same at public or private sale, as may seem for the best advantage of the holder of the debenture, and with the least loss to the said company.

"The said Douglas Boardman promises and agrees to accept the trust created hereby, and to do and perform the services required in carrying out the provisions of the trust for the compensation above specified. And in case of his death or inability to perform the duties of the trust before the maturity of said bonds, then George R. Williams, of Ithaca, New York, is hereby appointed his successor, with all the power, duties, and obligations created

by this instrument or imposed upon said Boardman as trustee by law, as fully as if said Williams had been first appointed trustee herein."

Some time after the agreement Boardman died and the duties of the trust devolved upon Williams, the appellant herein, and the mortgage in suit, as we have before stated, was assigned to him as trustee December 8, 1891. The assignment was recorded of date January 11, 1896. The investment company failed to pay the interest due on bonds January 1, 1896, and Donnelly failed to pay interest on the mortgage debt due of date January 1, 1895, and to pay taxes assessed against the mortgaged property. Before the institution of this action the investment company became insolvent and made a voluntary assignment to one Nelson Royal for the benefit of creditors.

The lien of the bank had its origin in the following state of facts: On November 9, 1891, William G. Ure purchased at tax sale lot 10 of the property included in the mortgage in suit for the delinquent taxes of the year 1890; and on the same day lot 9 of the property covered by the Donnelly mortgage was purchased at tax sale by John Ledwich for delinquent taxes for the year 1890. Each purchaser received a treasurer's certificate of tax sale. Each purchaser afterwards paid amounts of taxes which were levied on the lot bought by him and which were not paid by the owner but allowed to become delinquent. Both parties, on January 24, 1893, sold and assigned to the Lewis Investment company the certificates and the receipts for taxes on the property paid by them respectively after tax sale, and in December, 1894, the certificates, etc., were assigned to the bank as security for the payment of an amount of money then loaned by it to the investment company. The loan was in good faith and without notice of the agreement between the appellant and the investment company. It is not contended but that all things in regard to the taxes, the sales, the certificates, the receipts, the payments, and the assignments were regular, and the liens for taxes existing, of force, and the fore-

closure or enforcement proper. It is, however, urged that they were not, in the hands of the investment company, or its assignee, the bank, superior and prior to the lien of the mortgage held by appellant.

At the outset of his argument the counsel for appellant states the propositions to be noticed as follows:

"First—That under the terms of the agreement, by which the mortgage in question was assigned to the appellant, the Lewis Investment Company was legally bound to pay the taxes in question and protect the appellant's mortgage as a first lien on the premises, and that whatever rights the Lewis Investment Company took under the assignment to it of the tax liens in question were necessarily subject to the appellant's mortgage.

"Second—That the rights which the Lewis Investment Company acquired by the assignment to it of the tax liens in question were limited and controlled by the provisions of the mortgage in controversy and the provisions of the agreement under which the mortgage was assigned to the appellant, and were merged in the mortgage of which the Lewis Investment Company was the owner, subject to the prior rights of the appellant as assignee or pledgee of the mortgage.

"Third—That the Lewis Investment Company could assign to the National Bank of Norwich no greater rights to the tax liens in question than it possessed, and as the rights which it had in the tax liens were subject to the mortgage of the plaintiff, it necessarily follows that the rights which the National Bank of Norwich acquired under the assignment from the Lewis Investment Company to it are subject to the mortgage of the appellant."

For the bank the grounds of the discussion are set forth thus:

"It is not alleged in the pleadings, or established by proof, that any of the debenture bonds, to secure the payment of which the $17,000 mortgage was assigned to Williams, trustee, were ever negotiable or sold by the trustee, or that any of them are or ever were outstanding.

"2. Waiving the first proposition, as the tax sales were made to Ure and Ledwich, and these men were the 'original purchasers' at the tax sales, the certificates therefor were, under the provisions of section 117, article 1, chapter 77, of the Compiled Statutes, assignable by indorsement, and an assignment vested in the assignee 'all the right and title of the original purchasers,' that is, of Ure and Ledwich.

"3. Conceding that the investment company, by the trust agreement and the subsequent transfer of the mortgage, incurred an obligation to the appellant to discharge the tax liens, and that the tax liens, while owned by the investment company, were secondary to the mortgage lien,—these tax liens were acquired from the state,—the appellant had no defense to any of these taxes against the state, he conceded their validity (abstract, pp. 29 and 37); the appellee acquired them in good faith for value from the holder of the legal title thereto, and is, therefore, prior in right to the appellant, who asserts a latent equity based upon a private agreement with the investment company, of which appellee had no notice.

"4. The investment company has fulfilled every covenant it made with the appellant, and there is nothing in the record on which to base a claim that the investment company has failed in any agreement it made with appellant."

It seems proper to first take up the proposition advanced for appellee, that it is not of pleading or proof that any of the debenture bonds assigned to appellant were ever negotiated or sold, or that any of them are or ever were outstanding,—in short, that there was no showing, in either pleading or proof, that the plaintiff had any valuable or real interest which entitled him to any standing in this litigation. While these matters are not very strongly pleaded, we think there are statements from which they sufficiently appear. Relative to the first division of the argument for the appellant, it may be said that by an examination and fair construction of the writ-

ten agreement which was made between the trustee and the Lewis Investment Company, pursuant to and under the terms of which the Donnelly bond and mortgage were transferred by the company to the appellant, it clearly appears that the time referred to in the agreement at which, as to any security transferred, the contract or promise of the company should attach and be effectual to the extent the title to any property included in any mortgage, the subject of transfer, was to be affected, that the mortgage should be a first lien thereon, and also as against taxes except the current taxes not delinquent, was of the time the security became a lien on the property by its execution and delivery to the investment company, when it was completed, as an evidence of indebtedness and lien therefor in favor of such company. That by the "current taxes not delinquent" was meant taxes assessed and payable during the year the mortgage was given, but not at the time of such act delinquent, and with this we think the correct construction of the terms of the agreement, none of the taxes which had been paid by the parties who assigned the evidences of the tax liens to the investment company, and which it assigned to the appellee bank, were within the import of the agreement, as the taxes were of the year 1890 and subsequent years. But it is needless to notice in detail the arguments. All the propositions urged for the appellant originated in and derive their being from the agreement between the Lewis Investment Company and the appellant, which we have hereinbefore quoted, and unless, by reason of it, they are potent, have no force; by it equities arose between the company, the assignor of the bank, and a party other than the original parties to the instrument assigned.

We deem it best now to turn our attention to the certificates of purchase at tax sale, etc., which were assigned by the investment company to the bank; of these it is asserted for appellant that they were non-negotiable choses in action, and if assigned, the assignee received them subject to equities, burdens, and offsets which had attached

to or existed as to them between the immediate assignor and other parties, specifically, in this instance, the appellant. There is some contention for appellee on this point that such certificates are evidences of a special nature, and by reason of the transactions in which they originate, entitled to special consideration and to special rank and immunities as assignable claims or liens. The certificates are of statutory creation, both in substance and form (see Compiled Statutes, ch. 77, art. 1, sec. 116), and are by law made assignable, it being provided: "The certificate of purchase shall be assignable by indorsement, and any assignment thereof shall vest in the assignee, or his legal representative, all the right and title of the original purchaser; and the statement in the treasurer's deed of the fact of the assignment shall be presumptive evidence of such assignment." (Compiled Statutes, ch. 77, art. 1, sec. 117.) Whether such certificates are more than non-negotiable choses in action is not necessary here to consider or determine; for the purposes of the discussion, without deciding it, it may be conceded that they are not. The rule is that the assignee of a non-negotiable chose in action stands in the shoes of his assignor as to all equities existing between the original parties, or, in other words, receives it subject to all equities existing between the original parties at or prior to the assignment (2 Am. & Eng. Ency. Law [2d ed.] 1080); but this does not apply as to equities between the assignor and a third person of which the assignee had no notice. (2 Am. & Eng. Ency. Law [2d ed.] 1081, and note.) It was said by Chancellor Kent in *Murray v. Lylburn*, 2 Johns. Ch. [N. Y.] 441: "It is a general and well-settled principle, that the assignee of a chose in action takes it subject to the same equities it was subject to in the hands of the assignor. But this rule is generally understood to mean the equity residing in the original obligor or debtor, and not an equity residing in some third person against the assignor." There are decisions which support a contrary doctrine, but the weight of authority is favora-

ble to the foregoing rule, and the reasons given for it are satisfactory; hence we will adopt it, and applying it to the existent conditions developed in the case at bar the portion of the decree of the district court by which the lien of the bank was accorded priority was correct and is

AFFIRMED.

IRVINE, C., not sitting.

C. H. BROWNING V. STATE OF NEBRASKA.

FILED MARCH 17, 1898. No. 9717.

1. **Criminal Law:** ARRAIGNMENT. A judgment of conviction of felony cannot stand where there was no arraignment of, and plea by, the accused before the trial.
2. ——: ——. *Allyn v. State*, 21 Neb. 593, distinguished.
3. ——: ——. When it is discovered during the trial on the charge of a felony that there has been no arraignment and plea, the court should not proceed with the trial without arraigning the accused, entering his plea, and causing the jury to be resworn and the witnesses to be re-examined.

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

L. W. Colby, for plaintiff in error.

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

NORVAL, J.

This was a prosecution by information filed in the court below, by the county attorney, charging the prisoner with the crime of burglary. Upon the trial the accused was found guilty, a motion for a new trial and also a motion in arrest of judgment were filed and overruled, and he was sentenced by the court to imprisonment in the penitentiary for a term of years. A reversal

is asked because the defendant was not arraigned, and no plea was entered to the information by him, or in his behalf, prior to the commencement of the trial. This court held, in *Barker v. State*, 54 Neb. 53, that it was indispensable to the validity of a conviction of a felony that the record affirmatively show the accused, before trial, was arraigned, and that he pleaded to the information or indictment, or, in case he stands mute or refuses to plead, that the court entered the plea of not guilty for him. A re-examination of the question satisfies us that the conclusion then reached is sound and should be adhered to. In addition to the authorities mentioned in the opinion in that case the doctrine announced is sustained by the following: *State v. Hughes*, 1 Ala. 655; *Childs v. State*, 97 Ala. 49; *Bowen v. State*, 98 Ala. 83; *People v. Corbett*, 28 Cal. 328; *McJunkins v. State*, 10 Ind. 140; *Rockey v. State*, 19 Ind. 225; *Tindall v. State*, 71 Ind. 314; *Bowen v. State*, 108 Ind. 411; *Miller v. People*, 47 Ill. App. 472; *Gould v. People*, 89 Ill. 216; *Parkinson v. People*, 135 Ill. 401; *State v. Epps*, 27 La. Ann. 227; *State v. Ford*, 30 La. Ann. 311; *State v. Christian*, 30 La. Ann. 367; *State v. Revells*, 31 La. Ann. 387; *State v. Hunter*, 43 La. Ann. 156; *Wilson v. State*, 42 Miss. 639; *State v. Hubbell*, 55 Mo. App. 262; *State v. Saunders*, 53 Mo. 234; *State v. Barnes*, 59 Mo. 154; *State v. Montgomery*, 63 Mo. 296; *State v. Agee*, 68 Mo. 264; *State v. Vanhook*, 88 Mo. 105; *Early v. State*, 1 Tex. App. 248; *McFarland v. State*, 18 Tex. App. 313; *Roe v. State*, 19 Tex. App. 89; *Jefferson v. State*, 24 Tex. App. 535; *Munson v. State*, 11 S. W. Rep. [Tex.] 114; *Sperry v. Commonwealth*, 9 Leigh [Va.] 261; *Elick v. Washington Territory*, 1 Wash. Ter. 136; *Douglas v. State*, 3 Wis. 820; *Crain v. United States*, 162 U. S. 625. There are a few decisions which hold that an arraignment and plea may be waived by the prisoner in all except capital cases, but such decisions, for the most part, were rendered under statutes different from ours. Some courts have decided, among others our own, the mere placing the defendant on trial without arraignment or a plea to the

indictment will not work a reversal of a conviction for a misdemeanor. (*Allyn v. State*, 21 Neb. 593.) Whether that decision is right or wrong we are not called upon to decide, since the scope of the opinion is limited to trials for misdemeanors. It has no application to prosecutions and convictions for felonies.

This record shows that, after the jury had been impaneled and sworn and the testimony of two witnesses on behalf of the state had been taken, the defendant, over his objection and exception, was arraigned, and refusing to plead, the court entered for him a plea of not guilty. It is argued that this cured the error committed by the failure to have the defendant arraigned and plead before entering upon the trial. We do not think so. The statutes of this state contemplate that these steps shall precede the trial. The object of requiring an arraignment and plea in a criminal case is to inform the accused of the nature of the charge against him, and to make up an issue for trial. Until a plea of not guilty is entered, there is no issue of fact for the jury to determine. If the arraignment and plea may take place during the progress of the trial, with the same propriety the defendant can be arraigned and his plea entered after verdict and at the time the court passes sentence. There can be no valid trial for a felony without an arraignment and plea before the trial is entered upon.

In Clark's Criminal Procedure, section 128, it is said: "Not only is the arraignment necessary, but the plea is equally so, for without a plea there can be no issue to try. And the fact of arraignment and plea must appear on the record. By weight of authority, the arraignment and plea must precede the impaneling and swearing of the jury. An omission thereof cannot be cured by an arraignment and plea after the trial has commenced." Numerous authorities are cited in the note which sustain the text.

In 1 Bishop, Criminal Procedure, section 733, the rule is stated thus: "Without plea there can be no valid trial.

It is so even though the defendant went voluntarily and without objection to trial, knowing there was no plea. It must be before the jury are sworn; afterward the plea is too late."

Collier, C. J., in *State v. Hughes*, 1 Ala. 657, observed: "The idea of selecting and swearing a jury to try a case which, in its progressive steps, has not reached the stage when it is triable, is a perfect anomaly. The oath administered to the jury related to the present time, and cannot authorize them to try a case which is afterwards placed in a condition for trial; until the prisoner was called upon for his plea, it could not be known whether there would be an issue of fact for the jury, or what the issue, if any, might be. The prisoner, instead of submitting the question of his guilt, might have pleaded in abatement, or have presented to the court legal objections to the indictment."

In *Parkinson v. People*, 135 Ill. 401, the defendant was convicted of rape. The jury was impaneled and sworn, and one witness was partly examined, when it was discovered that there was no arraignment or plea. The defendant was thereupon arraigned, a plea of not guilty was interposed, and the trial proceeded without reswearing the jury. It was held the verdict and judgment were erroneous, because the arraignment and plea did not precede the selection and swearing of the jury, and that the arraignment made and plea entered during the trial did not purge the record of the error.

Crain v. United States, 162 U. S. 625, was a conviction for forgery, and a reversal was sought on the ground that there had been no formal arraignment and plea before the beginning of the trial. The record showed the appearance of the prosecuting attorney; the appearance of the accused in person by his counsel; an order by the court that a jury come "to try the issue joined;" the selection of the jury which were "sworn to try the issue joined and a true verdict render;" the trial, verdict of guilty and judgment entered thereon. The conviction

was reversed, because it did not affirmatively appear that the defendant was formerly arraigned or that he pleaded to the indictment before trial. Mr. Justice Harlan delivered the opinion of the court, and after reviewing the authorities on the question, said: "Without citing other authorities we think it may be stated to be the prevailing rule, in this country and in England, at least in cases of felony, that a plea to the indictment is necessary before the trial can be properly commenced; and that unless this fact appears affirmatively from the record the judgment cannot be sustained. Until the accused pleads to the indictment and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try; and the fact that the defendant did so plead should not be left to be inferred from a general recital in some order that the jury were sworn to 'try the issue joined.' The record should be a permanent memorial of what was the issue tried, and show whether the judgment whereby it was proposed to take the life of the accused or to deprive him of his liberty, was in accordance with the law of the land. * * * Where the crime charged is infamous in its nature, are we at liberty to guess that a plea was made by or for the accused, and then guess again as to what was the nature of that plea? * * * We are of opinion that the rule requiring the record of a trial for an infamous crime to show affirmatively that it was demanded of the accused to plead to the indictment, or that he did so plead, is not a matter of form only, but of substance in the administration of the criminal law; consequently, such a defect in the record of a criminal trial is not cured by section 1025 of the Revised Statutes, but involves the substantial rights of the accused. It is true that the constitution does not, in terms, declare that a person accused of crime cannot be tried until it be demanded of him that he plead, or unless he pleads, to the indictment. But it does forbid the deprivation of liberty without due process of law; and due process of law requires that the accused plead,

or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can rightfully proceed; and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law, and essential to a valid trial, was taken in the trial court; otherwise the judgment will be erroneous."

In *State v. Montgomery*, 63 Mo. 296, it was decided that the failure to arraign a prisoner and enter his plea before the jury is sworn, is reversible error, and that the entry of a plea afterwards is too late. (See *Early v. State*, 1 Tex. App. 248; *State v. Hunter*, 43 La. Ann. 157; *People v. Corbett*, 28 Cal. 328; *Douglass v. State*, 3 Wis. 820; *Territory v. Brash*, 32 Pac. Rep. [Ariz.] 260; *State v. Baker*, 57 Kan. 541.)

The attorney general has cited cases* which are in conflict with the above, but we decline to follow them. After the accused was arraigned the jury should have been resworn and the witnesses already examined should have been re-examined. Had this been done the omission of the arraignment and plea before the selection of the jury would not have been available. (*Weaver v. State*, 83 Ind. 289; *State v. Weber*, 22 Mo. 321; *Disney v. Commonwealth*, 5 S. W. Rep. [Ky.] 360.) For the error indicated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

**Allyn v. State*, 21 Neb. 593; *State v. Greene*, 23 N. W. Rep. [Ia.], 154; *State v. Hayes*, 24 N. W. Rep. [Ia.], 575; *Territory v. Shipley*, 2 Pac. Rep. [Mont.], 313; *Morris v. State*, 30 Tex. App. 95; *Cordova v. State*, 6 Tex. App. 207; *Smith v. State*, 1 Tex. App. 408; *Jacobs v. Commonwealth*, 5 Serg. & R. [Pa.], 317; *Fernandez v. State*, 7 Ala. 512; *State v. Jones*, 70 Ia. 505; *State v. Glave*, 51 Kan. 330; *State v. Vanhook*, 88 Mo. 105; *United States v. Molloy*, 31 Fed. Rep. 19; *People v. Osterhout*, 34 Hun [N. Y.] 262; *People v. Bradner*, 107 N. Y. 1; *People v. M'Hale*, 15 N. Y. Supp. 499; *United States v. McKee*, 4 Dill. [U. S.] 10; *Bateman v. State*, 64 Miss. 233; *Ransom v. State*, 49 Ark. 176.

WILLIAM A. SAUNDERS V. EUGENE C. BATES.

FILED MARCH 17, 1898. No. 7828.

1. **Bill of Exceptions:** OBJECTIONS: LACHES: REVIEW. Objection to a bill of exceptions because it was not presented for examination and amendment in the statutory period, made for the first time in the appellate court nearly two years after filing transcript, and after service of briefs upon the merits by the party seeking the reversal, comes too late.

2. **Note:** POSSESSION: INDORSEMENT. Possession of a negotiable note, duly indorsed by the payee, creates a presumption of title thereto in the holder.

3. ———: CONSIDERATION. The note sued on was executed upon a sufficient consideration.

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

Saunders & Macfarland, for plaintiff in error.

Wright & Thomas, contra.

NORVAL, J.

This was an action upon a promissory note, in which plaintiff below had judgment, and defendant has brought the record here for review.

We are asked to ignore the bill of exceptions on the ground that it was not prepared and served within fifteen days from the final adjournment of the term at which the judgment was obtained, no time, in addition to the statutory period, having been given by the trial court or the judge thereof for the preparation and settlement of the bill. It is true that the draft of the proposed bill was not submitted to plaintiff's counsel for examination and amendment within the time allowed by law, but when served upon such counsel it was received by them without objection, and they held the same for more than ten days, returning the proposed bill to defendant without the suggestion of objections or amendments. The

objection to the bill will not be considered, since it was raised for the first time in this court after the cause had been pending herein nearly two years and subsequent to the preparation, service, and filing of briefs by the defendant below. (*Nash v. Costello*, 50 Neb. 325; *Thompson v. Missouri P. R. Co.*, 50 Neb. 329.)

It is argued that the evidence is insufficient to sustain the finding and judgment, for two reasons: First—The plaintiff is not the owner of the note in suit. Second—There was no consideration for the giving of the instrument. The note in dispute was payable to the order of Charles E. Bates, and contains the following indorsements on the back thereof:

"Payable to the order of The Bates-Smith Investment Company. CHAS. E. BATES.

"THE BATES-SMITH INVESTMENT COMPANY,
"By E. C. BATES, *Sec. and Treas.*"

The proofs show that said indorsements were genuine, and that the note containing them was produced by plaintiff on the trial, and by him introduced in evidence. The production of the instrument bearing the indorsements of the payee and indorsee is sufficient to raise the presumption that the holder is the owner of the note. (*McDonald v. Aufdengarten*, 40 Neb. 41; *City Nat. Bank of Hastings v. Thomas*, 46 Neb. 861; See Lawson, Presumptive Evidence 77; 1 Daniel, Negotiable Instruments sec. 558; *Champion Empire Mining Co. v. Bird*, 7 Colo. App. 523; *Citizens Nat. Bank v. Wintler*, 14 Wash. 558; *Bank of California v. Mott Iron Works*, 113 Cal. 409; *Palmer v. Nassau Bank*, 78 Ill. 380.) The record before us contains no evidence to overcome the presumption of ownership arising from the possession of the paper.

As to the question of consideration for the note sued on, the facts are briefly these: Mr. Saunders, in December, 1890, borrowed a certain sum of money from one John H. Bassett, for which he gave the latter his promissory note secured by a real estate mortgage. The date for payment

of the debt was extended from time to time by the maker giving renewal notes, the one in suit being the last of such several renewals. The original note and mortgage were never surrendered to Mr. Saunders, but were held and retained by plaintiff as collateral security to each renewal note, to be surrendered to defendant upon the payment of the note sued on. The original loan was sufficient consideration for the last note, and the original note being past due and in the possession of the plaintiff below, defendant is fully protected against a recovery thereon. No reversible error appearing in the record, the judgment is

AFFIRMED.

STATE OF NEBRASKA, EX REL. ALFRED W. SCOTT, V. JOHN W. BOWEN, CITY CLERK OF THE CITY OF LINCOLN.

FILED MARCH 17, 1898. No. 9926.

1. **Statutes:** AMENDMENT: TITLE OF BILL. Where the title to a bill is to amend a designated section of a law, no amendment is permissible which is not germane to the subject-matter of the particular original section proposed to be changed.

2. ———: INVALID PORTIONS. When the invalid part of an act was the consideration or inducement for the passage of the residue, the valid and invalid portions will fall together.

3. ———: AMENDMENTS: FIRE AND POLICE COMMISSIONERS. Section 31, chapter 14, Laws 1897, purporting to amend section 91, article 1, chapter 13*a*, Compiled Statutes 1895, contravenes section 11, article 3, of the constitution, since said amended section contains new matter of legislation not germane to the original.

4. ———: INVALID PORTIONS: CONSTITUTIONAL LAW. Said section 31 of chapter 14 was the motive inducement to the passage of sections 6 and 7 of the same chapter purporting to amend sections 13 and 14, article 1, chapter 13*a*, Compiled Statutes 1895, and the unconstitutionality of said section 31 invalidates said sections 6 and 7, leaving the original sections in full force and effect.

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

G. M. Lambertson, Roscoe Pound, and *J. R. Webster,* for plaintiff in error.

N. C. Abbott, contra.

NORVAL, J.

This was an application for mandamus to compel the respondent, as city clerk of the city of Lincoln, to receive and file in his office the certificate of nomination of relator as candidate by petition for the office of city attorney of said city, and to place relator's name upon the ballots to be used at the general election to be held in said city on April 5, 1898, as a candidate by petition for said office. A demurrer to the alternative writ was sustained upon the hearing in the court below, and the cause dismissed. The relator prosecutes error from that judgment.

This proceeding involves the validity of sections 6 and 7, chapter 14, Session Laws 1897, by which sections 13 and 14 of article 1, chapter 13*a*, of the Compiled Statutes of 1895 were attempted to be amended. If the amendatory sections are valid, the city attorney of the city of Lincoln is an appointive, and not an elective, officer, and the decision below was right; but if said amendatory sections are inoperative and void, a peremptory writ should issue. The provisions of said article 1, chapter 13*a*, of the Compiled Statutes of 1895, and the subsequent valid amendments thereof, constitute the charter of the city of Lincoln. The legislature of 1897 passed an act purporting to amend certain sections of said charter, among others sections 13, 14, 67, and 91 thereof. (Session Laws 1897, ch. 14, secs. 6, 7, 24, 31.) The original section 13 provided, *inter alia,* for the election biennially, by a plurality of votes, of a water commissioner, city attorney, and city engineer; that there should be in each city governed by the act an excise board, consisting of the mayor, who was constituted *ex officio* member and chair-

man thereof, and two members elected by the city at large for the term of two years; and also that there should be elected in each ward annually a councilman to serve for two years. Section 6 of the act of 1897, among other changes of the original section 13, so amended it as to eliminate therefrom all provisions for the election of water commissioner, city attorney, city engineer, and excisemen, and reduced the number of councilmen from each ward one-half. The original section 91 of said article 1, chapter 13*a*, related to the duties of the excise board, but the legislature, by section 31 of chapter 14, Session Laws 1897, sought to amend said section 91 by engrafting thereon a clause providing for the appointment by the governor of three fire and police commissioners for each city of the class to which the city of Lincoln belongs, and conferred upon them the power to license and regulate the liquor traffic within their respective cities, and to appoint a chief of the fire department. This amendatory section 31 was assailed in *State v. Tibbets*, 52 Neb. 228, as being unconstitutional, on the ground that the amendment was not covered by the title of the act and was not germane to the subject-matter of the original section proposed to be changed. This contention was sustained by the court, and the amendatory section was declared to be inimical to the constitution and void. In *State v. Stewart*, 52 Neb. 243, upon a review of the authorities bearing upon the question, it was ruled that the adoption by the legislature of the said amendment to section 91 was the consideration or inducement for the passage of said amended section 13, article 1, chapter 13*a*, and that the unconstitutionality of the former section vitiated the latter. In the opinion in that case it is said: "It is very evident that the said amendatory sections 13 and 91 must fall together, since the latter was the consideration for the passage of the former, and hence the original sections have not been superseded, but remained in full force." With this conclusion we are still content. It follows that the

original section 13 was in no respect modified or changed by section 6 of the act of 1897, and that the water commissioner, city attorney, and city engineer are not appointive, but elective, officers, unless the provision in said section 13 relating to their election was repealed or superseded by section 7, chapter 14, Session Laws 1897, which purports to amend section 14, article 1, chapter 13*a*, Compiled Statutes 1895. This proposition will now receive attention.

Said section 14 authorizes the mayor, by and with the consent of the council, to appoint a chief of the fire department and certain other enumerated officers, and all other officers as were provided for in the act and not elective, except the marshal and police. The right to appoint and remove the latter two was devolved upon the excise board. This section was sought to be amended by section 7 of the said act of 1897, so as to read as follows:

"Sec. 14. The mayor, with the consent of the majority of the council, shall appoint a city attorney, a water commissioner, a street and sidewalk commissioner, a city engineer, who shall be superintendent of public works, and perform the duties of the board of public works, and such other officers, whose appointment or election are not provided for in this act, that are necessary for the good government and management of the city, who shall hold their office for the term of two years unless sooner removed," etc.

We are therefore confronted in this case with these conflicting statutory provisions. The original section 13, article 1, chapter 13*a*, provides for the election of a water commissioner, city attorney, and city engineer by the electors of the city at large, while the above quoted amendatory section 14 requires that all of said officers shall be appointed by the mayor, with the consent and approval of the council. It is manifest the legislature never contemplated that a city of the first class should be supplied with, and be put to the expense of maintain-

ing, two sets of said officers, one chosen by the electors, and the other bearing appointive commissions. That no such result was intended by the lawgivers is disclosed by the fact that at the same time the amendatory section 14 was adopted, which made provision for the appointment of said officers, it was sought by the same act to amend said original section 13 by dropping therefrom as elective officers the city engineer, city attorney, and water commissioner. It is, therefore, plain that the adoption of the amended section 13 was the incentive for the passage of the amendatory section 14, and *vice versa*. Both of said amendatory sections must stand or fall together. If one is unconstitutional, the other is likewise invalid; and said amendatory section 13 having been held unconstitutional in *State v. Stewart, supra*, the amendatory section 14 is therefore inoperative and void.

The same result is reached when the amendatory sections 14 and 91 are compared with the originals and the constitutional test is applied to them. The original section 91 related to the licensing and regulating of the sale of intoxicating liquors, while by the amendment of said section authority was attempted to be conferred upon the fire and police commission to appoint the chief of the fire department, although that officer was required to be appointed by the mayor under the original section 14, relating to the subject of appointive officers. The mayor, if the new legislation is upheld, has no authority to make the appointment of a chief of a fire department, as that power was taken from him and given to the board of fire and police commissioners by the amendatory sections 14 and 91. The amendatory clause to section 91 relating to the appointment of the chief of the fire department was not germane to the subject of the original section; hence said amendment was unauthorized. (*State v. Tibbets*, 52 Neb. 228; *State v. Cornell*, 54 Neb. 72.) And applying the reasoning in *State v. Stewart*, 52 Neb. 243, the amended section 14 is carried down by the unconstitutional amendment to section 91, since

the latter constituted the motive and inducement for the passage of the former. It is conceded by counsel for respondent that if the amendatory section 91 is valid it would have affected the appointment of the chief of the fire department, but it is insisted that with said amendatory section overthrown, the insertion or omission of the name of that officer in the amendment to section 14 could not affect the power of the city to have or appoint such officer, because authority therefor is to be found in subdivision 33 of section 67, article 1, chapter 13*a*, of the Compiled Statutes. Counsel evidently overlooked the fact that said subdivision, in its present form, was adopted at the same time the amendatory sections 13, 14, and 91 of said article and chapter were passed, and as a part of the same piece of legislation. The lawgivers never supposed that power was being conferred by said subdivision upon the mayor or council, or both combined, to appoint a chief of the fire department, else it is not reasonable to suppose express authority to make such appointment would have been attempted to have been conferred upon the fire and police board by the amendatory section 91 already mentioned. Moreover, the authority to appoint such chief is not given by said subdivision. The amendatory section 14 only authorizes the mayor to appoint officers whose appointment or election were unprovided for in the act, and as the power to select a chief of the fire department was devolved upon the fire and police board by the amendatory section 91, it is obvious the mayor is powerless to appoint such officer under said amendatory section 14 or said subdivision 33. Had it not been for the provision in said amendatory section 91 for the appointment of a chief of the fire department by the board therein created, the amendatory section 14 would not have been adopted. These two amendatory sections must both fail, since one was the consideration for the adoption of the other. The original sections 13 and 14, article 1, chapter 13*a*, of the Compiled Statutes of 1895 are in full force. The conclu-

sion is irresistible that the city engineer, city attorney, and water commissioner are elective and not appointive offices, and that it is the duty of the respondent to file relator's certificate of nomination and place his name upon the ballots. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

PAUL W. HORBACH, APPELLEE, V. JOHN A. SMILEY ET AL., APPELLEES, AND H. BRASH ET AL., APPELLANTS.

FILED MARCH 17, 1898. No. 7820.

1. **Dormant Judgment:** LIEN. A dormant judgment is not a lien upon the lands of the judgment debtor.

2. **Revived Judgment:** LIEN. A judgment revived is a lien from the date of the order of revivor.

3. **Judgments:** HOMESTEAD. The homestead law in force when the debt was created is applicable to proceedings to enforce the judgment rendered thereon.

4. ——: ——. Under the homestead law of 1867 a judgment is a lien on the homestead, but such lien cannot be enforced by execution so long as the premises are owned and occupied by the judgment debtor.

5. ——: ——. The existing homestead act exempts from forced sale upon execution or attachment a homestead not exceeding in value $2,000, and a judgment while the premises are impressed with the homestead character is not a lien thereon, even after their sale and abandonment by the debtor.

6. ——: ——. Under the present homestead law a judgment is a lien merely on the debtor's interest in lands occupied as a homestead in excess of $2,000.

7. **Marshalling Liens.** In marshalling the liens herein judgments should be given priority according to the date of the respective liens.

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

George E. Pritchett, Francis A. Brogan, and *Warren Switzler,* for appellants.

Charles A. Goss, Wharton & Baird, John W. Lytle, W. R. Morris, H. J. Davis, Howard B. Smith, Bartlett, Baldrige & De Bord, Herbert H. Neale, Kennedy, Gilbert & Anderson, Charles E. Clapp, and *Geo. S. Smith, contra.*

NORVAL, J.

This action was brought to foreclose two real estate mortgages executed by John A. Smiley and wife upon their homestead to Paul W. Horbach, one bearing date August 2, 1889, another August 20, 1891. Numerous judgment creditors of Smiley were made defendants, and some of them filed cross-petitions, setting up their judgments. The decree which was entered found the amount due on the mortgages, adjudicated that certain judgments against Smiley had become dormant and were not liens upon the mortgaged property, determined the priority of liens, and directed that the premises be sold by the sheriff and the proceeds be brought into court to be applied in satisfaction of the several liens according to the order in which the court determined their seniority. An appeal has been taken from that portion of the decree relating to the distribution of the proceeds of sale.

Three judgments recovered against Smiley, in the district court of Douglas county, in favor of the Omaha National Bank, John McCormick & Co., and John F. Sheeley, respectively, and which had been assigned to Elizabeth Galligher, the decree found not to be liens on the mortgaged premises. This finding is in harmony with the statute and the decisions of the court, since such judgments had become dormant, and had not been revived. (Code of Civil Procedure, sec. 482; *Reynolds v. Cobb,* 15 Neb. 378; *State v. School District,* 25 Neb. 301; *Flagg v. Flagg,* 39 Neb. 229.) The judgment liens established by the decree may be arranged in two groups, or

classes, as follows: 1. Those rendered upon debts contracted since the enactment of the present homestead and exemption law. 2. Judgment obtained on indebtedness incurred under the prior statute relating to the same subject. It is true some of the judgments embraced in this class became dormant and, for a time, ceased to be liens upon the premises. (*Flagg v. Flagg*, 39 Neb. 229.) But these judgments were subsequently revived, which had the effect to reinstate the liens upon the real estate from the date of the order of revivor. (*Eaton v. Hasty*, 6 Neb. 419; *Cathcart v. Potterfield*, 5 Watts [Pa.] 163; *Norton v. Beaver*, 5 O. 178.) By the decree the liens of all the judgments in Class 1 were given priority over earlier judgments included in Class 2, and all of those in the latter class were made subordinate to the mortgages, although each antedated one or the other of them. The question presented is whether the liens were properly marshalled and adjusted by the trial court. The following propositions have been firmly established in this state:

1. The homestead law in force when the debt was created governs and controls as to the remedy. (*Dorrington v. Myers*, 11 Neb. 388; *De Witt v. Wheeler & Wilson Sewing Machine Co.*, 17 Neb. 533; *McHugh v. Smiley*, 17 Neb. 620; *Dennis v. Omaha Nat. Bank*, 19 Neb. 675; *Galligher v. Smiley*, 28 Neb. 189; *Jackson v. Creighton*, 29 Neb. 310.)

2. Under the homestead statute of 1867 a judgment is a lien upon the homestead of the debtor, but such homestead is exempt from levy and sale so long as it is owned and occupied for that purpose by the debtor. Upon its sale and abandonment, the lien of the judgment becomes operative, and may be enforced. (*State Bank v. Carson*, 4 Neb. 498; *Eaton v. Ryan*, 5 Neb. 47; *McHugh v. Smiley*, 17 Neb. 620; *Galligher v. Smiley*, 28 Neb. 189.)

3. The provisions of the existing homestead act exempt from forced sale upon execution or attachment a homestead not exceeding in value $2,000, and a judgment recovered against the owner thereof is not a lien thereon,

even after the sale and abandonment of the homestead. Under the present statute a judgment is a lien alone on the debtor's interest in lands occupied as a homestead in excess of $2,000. (*Stout v. Rapp*, 17 Neb. 462; *Schribar v. Platt*, 19 Neb. 625; *Swartz v. McClelland*, 31 Neb. 646; *Giles v. Miller*, 36 Neb. 346; *Baumann v. Frease*, 37 Neb. 807; *Hoy v. Anderson*, 39 Neb. 386; *Corey v. Schuster*, 44 Neb. 269; *Prugh v. Portsmouth Savings Bank*, 48 Neb. 414; *Corey v. Plummer*, 48 Neb. 481; *Mundt v. Hagedorn*, 49 Neb. 409.)

Applying the foregoing principles to the case at bar, it is perfectly plain that the decree of the court below cannot be sustained. The judgments entered upon contracts made prior to the present homestead law were liens upon the homestead of Smiley, but the land could not be appropriated to the payment thereof until after its sale and abandonment by him. As was said in *McHugh v. Smiley*, 17 Neb. 620, "Should a sale of the property take place under the decree of foreclosure, and the title of Smiley be divested, such liens would then become operative to be enforced against the premises." The court, therefore, erred in adjudicating that any portion of the proceeds arising from the sale of the premises under the foreclosure of the mortgages be devoted to the payment of any of the judgment liens belonging to said Class 2, which antedated both mortgages. The liens of the several judgments should have been awarded priority according to the dates of the respective liens, without regard to the law in force when the indebtedness was incurred upon which any particular judgment was rendered. The judgments belonging to the group heretofore designated as Class 1 were liens upon Smiley's real estate, subject, however, to his right to homestead therein; yet the trial court, in marshalling the liens in the decree, ignored his homestead interest, at least as to the judgments in favor of J. M. Woolworth, Morris & Davis, and E. A. Ayerst, respectively, which were found by the decree to be intervening liens between the two mortgage liens of plaintiff. Under the decisions of the court already mentioned, Smi-

ley was entitled to receive from the proceeds of the sale of the premises the sum of $2,000, in the event the surplus existing after satisfying the two mortgages and the intervening judgments obtained on debts created under the prior homestead act equaled that amount. The premises should be sold subject to any judgment lien in force at the time of the sale belonging to Class 2, which antedates the senior mortgage; but it is obvious that it would be inequitable to apply the same rule to the other judgment liens embraced in the same class, since to do so would give them priority over the first mortgage, although junior to it in point of time. The most equitable mode for distribution of the proceeds in the event of sale, and the one adopted in this case by us, is to pay, after costs, first the senior mortgage, next the Kelly judgment, if in force, then set aside for the use of the mortgagor conditionally $2,000 representing his present homestead exemption, then pay the judgments of Ayerst and Woolworth, if in force, in their order, then the judgments of Brash and Morris & Davis in their order, if in force, then the junior mortgage, and the other judgment liens in the order of priority. If the sum realized is insufficient to discharge all the mortgages and the intervening liens, the said $2,000 so set aside is applicable to the payment in the order of seniority of the judgments of Kelly and Brash respectively, if in force, they representing debts contracted under the former homestead law, and also the junior mortgage. The decree is accordingly reversed, and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

JAMES BELL V. JOHN J. WALKER.

FILED MARCH 17, 1898. No. 9376.

1. **Proceeding in Error:** EFFECT OF DISMISSAL. The dismissal of a petition in error from an appellate court, without an examination of the merits of the assignments, operates as an affirmance of the judgment sought to be reviewed. *Dunterman v. Storcy*, 40 Neb. 447, followed.
2. **Supersedeas Bond:** LIABILITY OF SURETIES. The death of the principal in a supersedeas bond, while the cause is pending in the appellate court, does not release the surety from liability, nor is he discharged by the failure to have the action revived.
3. **Principal and Surety:** FORBEARANCE BY CREDITOR. Mere forbearance by a creditor does not release sureties, although, by lapse of time, the remedy is lost against the principal. *Eickhoff v. Eikenbary*, 52 Neb. 332, followed.
4. ———. The liability of a surety in a supersedeas bond is not affected by the failure to present a claim against the estate of his principal.
5. **Erroneous Admissions of Evidence:** HARMLESS ERROR. The admission of improper evidence, in a case tried without the assistance of a jury, is not of itself a ground for reversal.

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

F. I. Foss, *Norman Jackson*, and *Nellie M. Richardson*, for plaintiff in error.

Matt Miller and *Steele Bros.*, *contra.*

NORVAL, J.

It appears from the record that on June 15, 1894, John J. Walker obtained a judgment in the district court of Butler county against W. T. Richardson and C. C. White, in the sum of $3,150.85, besides the cost of suit. White filed a transcript of the proceedings and judgment, and a petition in error, in this court for the purpose of procuring a reversal of said judgment, and on June 28, 1894, to secure a stay of execution during the pendency of said error proceeding, he executed and delivered to the clerk of the district court a supersedeas bond, in the sum of

$6,367.60, with James Bell as surety, conditioned as follows: "Now, therefore, we Charles C. White, as principal, and James Bell, as surety, do hereby undertake to the said John J. Walker, in the sum of $6,367.60, that said C. C. White will pay the condemnation money and costs in case said judgment shall be affirmed in whole or in part." The bond was filed with, and approved by, the clerk of the district court. C. C. White died in September, 1895, while said cause was pending in this court, and his wife was duly appointed as executrix of his last will and testament. The error proceeding not having been revived within one year after the appointment of the executrix, on December 1, 1896, the same was by this court, on motion of counsel for John J. Walker, dismissed. Shortly thereafter this suit was instituted by Walker on said supersedeas bond, and a trial to the court, without the assistance of a jury, resulted in a judgment against the defendant, from which he prosecutes error.

The first contention is that the conditions of the bond have not been broken, for the reason that the judgment which it was given to supersede has never been by this court "affirmed in whole or in part;" in other words, that the dismissal of the error proceeding brought to obtain a review of the said judgment recovered by Walker against Richardson and White was not equivalent to an affirmance of said judgment. The precise question, upon a review of the authorities, was passed upon in *Dunterman v. Storey*, 40 Neb. 447, where it was decided that the dismissal of an appeal out of this court, without an examination of the merits of the cause, operated as an affirmance of the judgment sought to be reviewed, within the meaning of a supersedeas bond conditioned in the language of the one now before the court. The proposition was ably reasoned by RAGAN, C., in his opinion in that case, and the doctrine therein stated is sound, and sustained by the weight of authority. A discussion of the subject anew at this time would be without profit.

In the brief of defendant below it is said: "The act of God has removed White from this world, taking it out of White's power to prosecute said case to the supreme court to final judgment, and the act of God having taken it out of White's power to do this, his surety is released." No decision has been cited, nor after diligent search has the writer been able to find one, which sustains the above contention of counsel. There are numerous cases in the books to the effect that where the performance of a condition of a bail bond or recognizance given in a criminal prosecution is rendered impossible by the death of the principal before the day of performance, the default is excused. Those decisions are not in point here, for the obvious reason that such bonds or recognizances require the principal to discharge an act of a purely personal character, which no one else can perform for him, and the surety is released where the performance of the condition is prevented by the death of the principal. This supersedeas bond did not require the discharge by the principal therein named of an act merely personal in its nature. The action in which the supersedeas was given was upon a promissory note, and the suit did not abate upon the death of White, one of the judgment debtors, but could have been revived in the name of his executrix, and the error proceeding prosecuted by her. (Code of Civil Procedure, secs. 463-468.)

It is suggested that the surety was discharged by the failure of Walker to have the action revived in the name of White's representative. This argument is without merit. While the former, had he so desired, might have had the action revived, the law imposed no duty upon him to secure an order of revivor to be entered.

Another argument is that Bell, the surety on the supersedeas, was released and discharged from liability by the failure of Walker to file and prove his claim against the estate of White in the county court of the county where administration was granted. This contention is opposed to the doctrine announced in *Eickhoff*

v. Eikenbary, 52 Neb. 332. That was a suit upon a replevin bond. Williams, the principal on the bond, died, and it was urged that the sureties were discharged because the obligee presented no claim against the estate of the decedent. IRVINE, C., in delivering the opinion of the court, said: "It is next contended that, under our laws with relation to the estates of decedents, a claim like the present must be presented in the county court against the estate; that an independent action will not lie therefor; that Eikenbary having failed to present a claim against the estate of Williams, the principal on the bond, and more than two years having elapsed before the commencement of this suit, all remedy against the estate has been lost, and the sureties are thereby discharged. It will be recalled, from the statement of facts, that the estate was settled and the executrix discharged before judgment was rendered in the replevin suit. But it is insisted that prior to that judgment the claim on the bond was a contingent claim, and should have been presented as such in order to continue the obligee's rights against the sureties. We do not find it necessary to determine all the questions suggested by this line of argument. It is a well-settled principle of law, several times recognized in this state, that mere forbearance to sue a principal will not discharge a surety. In order to operate as a discharge the plaintiff must do some act which releases the principal, or suspends the right to proceed against him, and a mere failure to proceed with the present power of doing so does not operate as a discharge. (*Dillon v. Russell*, 5 Neb. 484; *Sheldon v. Williams*, 11 Neb. 272; *Smith v. Mason*, 44 Neb. 610.) In *Burr v. Boyer*, 2 Neb. 265, it was held that negligence on the part of the creditor, whereby security held by him is sacrificed to the detriment of the sureties, will operate to discharge them; but the general rule was there recognized, and the case distinguished from a mere failure to pursue legal remedies. The reason for this rule is that the surety is not put to any hazard by the forbearance of the cred-

itor, as he has it in his power to protect himself. He may either pay the debt and thus become subrogated to the rights and securities of the creditor, or he may compel the creditor to sue; and it follows that, if a statute of limitations be permitted to run against the principal in such a case, the fault is as much that of the surety as the creditor. Cases directly in point with reference to the loss of remedy against the estate of a deceased principal are *Villars v. Palmer*, 67 Ill. 204; *Johnson v. Bank*, 4 Smedes & M. [Miss.] 165; *Marshall v. Hudson*, 9 Yerg. [Tenn.] 58; *Sichel v. Carrills*, 42 Cal. 493; *Bull v. Coe*, 77 Cal. 54; *Bank v. State*, 62 Md. 88." The case at bar is within the doctrine just quoted, which we think entirely sound. The liability of Bell was not affected by the failure to present a claim against the estate of his principal. (*Jackson v. Benson*, 7 N. W. Rep. [Ia.] 97; *Moore v. Gray*, 26 O. St. 525.) Bell could have protected himself by filing a contingent claim against White's estate within the time provided therefor by statute.

Complaint is made of certain rulings on the admission of testimony. These are not available, since the cause was tried without the intervention of a jury. (*Stabler v. Gund*, 35 Neb. 648; *Liverpool & London & Globe Ins. Co. v. Buckstaff*, 38 Neb. 146; *Whipple v. Fowler*, 41 Neb. 675; *Tolerton v. McClure*, 45 Neb. 368.) The judgment is

AFFIRMED.

GEORGE N. BEELS V. NORTH NEBRASKA FAIR & DRIVING PARK ASSOCIATION ET AL.

FILED MARCH 17, 1898. No. 7893.

Corporation: MORTGAGE: ULTRA VIRES. Where a corporation borrows money and executes a mortgage on its real estate to secure the payment thereof, a third person cannot assail the transaction on the ground of *ultra vires*, or that the corporation exceeded its power.

ERROR from the district court of Madison county. Tried below before ROBINSON, J. *Affirmed.*

Beels & Schoregge, for plaintiff in error.

Robertson & Wigton, contra.

NORVAL, J.

This action was instituted in the court below by George N. Beels against Herman Winter and others to quiet in plaintiff the title to certain real estate. Winter interposed a general demurrer to the amended petition, which was sustained and the action dismissed as to him. This ruling is presented for review.

The averments of the amended petition, necessary to an understanding of the question involved, may be thus briefly summarized: The North Nebraska Fair & Driving Park Association, a corporation, hereafter called the association, owned the land in controversy, and on August 20, 1890, it executed and delivered a mortgage thereon to C. A. Mast to secure the payment of a loan of $5,000 made the association, which mortgage, on September 20, 1890, was duly filed for record. A decree was subsequently entered foreclosing said mortgage, and the premises were sold thereon to Herman Winter. On January 31, 1893, George N. Beels recovered a judgment against the association in the district court for $26.55, upon which execution was issued, and the real estate covered by the mortgage was seized thereunder and sold to said Beels for $75. This sale was duly confirmed, and the sheriff executed and delivered a deed to the purchaser. Subsequently other judgments were obtained against the association, which have been assigned to Beels. The articles of incorporation of the association are attached to, and made a part of, the amended petition, from which it appears that the capital stock of the corporation was $10,000, divided into shares of $100 each, and that the highest indebtedness to which the corporation could at any time

subject itself was one-half of the amount of the capital stock actually paid in. The articles neither authorize nor forbid, in express terms, the association to borrow money or mortgage its property. The petition charges that the mortgagee and Martin each had actual knowledge of the powers, duties, and authority of the association. Plaintiff asserts that his title to the property is clouded by reason of the execution, delivery, and recording of said mortgage and the proceedings had to foreclose the same. His grounds for relief are that the association did not possess the power to incur an indebtedness to an amount greater than one-half of its paid up capital stock, nor to borrow money and execute a mortgage to secure its payment. The petition does not aver what amount of capital had been paid in. The entire capital authorized by the articles may have been paid, and if it had, the association was authorized to incur an indebtedness not to exceed $5,000, the amount of the mortgage. It is not alleged that the association owed anything at the time said sum was borrowed and the mortgage was executed. Plaintiff is not in a position to plead the want of capacity or authority of the corporation to make the loan and mortgage in question. He cannot assail the transaction on the ground of *ultra vires*. (*Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192; *Carlow v. Aultman*, 28 Neb. 672; *Watts v. Gantt*, 42 Neb. 869; *Smith v. First Nat. Bank of Chadron*, 45 Neb. 444.) The judgment is

AFFIRMED.

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

FILED MARCH 17, 1898. No. 9097.

1. **Judicial Sales:** OFFICERS. Judicial sales must be conducted by the sheriff or other person authorized by the court.

2. ———: ———. One who is designated in a decree of foreclosure as a special master commissioner to make a sale of the mortgaged premises cannot lawfully delegate his authority to another.

3. ———: CONFIRMATION. It is the duty of the district court to confirm a judicial sale of mortgaged premises only upon being satisfied that the sale has been made in conformity with law.

4. ———: ———. When the records of the court conclusively show that the sale was made by an unauthorized person the court may set such sale aside on its own motion; and this it may do although the officer's return does not disclose the irregularity and is not directly assailed.

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

William D. Beckett, J. W. Woodrough, and *Hall & McCulloch,* for appellants.

Montgomery & Hall, John L. Webster, and *Frank T. Ransom, contra.*

SULLIVAN, J.

From an order of the district court for Douglas county refusing to confirm a judicial sale Abraham L. Reed and Freeman P. Kirkendall, claiming to be purchasers of the property sold, have prosecuted an appeal to this court. The facts out of which the controversy arises are sufficiently stated in the case of *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co.,* 51 Neb. 659, and need not be restated here. To show the manner in which the cause was submitted to the district court we make the following excerpt from the order vacating the sale: "This cause came on to be heard upon the return of sale by the special master commissioner heretofore appointed by this court, and upon the motion of the plaintiff for an order confirming such sale, and upon motion of F. P. Kirkendall and A. L. Reed to confirm the sale to them, and their objections to confirmation of the sale to E. W. Nash, trustee, and upon the motion of E. W. Nash, trustee, to confirm the sale to him, and upon his objections to the

confirmation of the sale to F. P. Kirkendall and A. L. Reed, and upon the evidence, and was submitted to the court."

Looking into the bill of exceptions filed since the motion to dismiss the appeal was decided we find that there was presented at the hearing, for the consideration of the court, an affidavit of Isaac N. Watson, from which it appears that the alleged sale was conducted by him acting as the representative of James B. Meikle, the special master commissioner, who was absent from Douglas county attending to business of public concern at the capital of the state. By whom, or in whose behalf, this affidavit was given in evidence is not disclosed by the record, but it seems to have been received without objection, and it cannot now be argued out of the case. That Meikle was absent from Omaha at the time the bid of Reed and Kirkendall was received and acted on is also fully established by the affidavit of Matthew A. Hall. For whom, or upon what issue, Mr. Hall's affidavit was read is not shown; but it is in the record, it was submitted without objection to the district court as competent evidence to influence its action on the question before it for judgment, and it must now be considered by this court as evidence in support of the order vacating the sale. The Creighton Theatre Building Company neither asked nor opposed confirmation, and did not in any way participate in the hearing which resulted in the order of which appellants complain. It has, however, appeared here and filed a brief urging an affirmance of the ruling of the district court.

The power conferred by the court upon the special master commissioner to make the sale was a personal trust which he could not delegate to Watson. Section 852 of the Code of Civil Procedure declares that "all sales of mortgaged premises under a decree in chancery shall be made by a sheriff, or some other person authorized by the court." The sale to appellants not having been made by a person designated in the decree for that purpose, it was

the undoubted right, if not the duty, of the district court to set the sale aside, unless its hands were tied by the rules of procedure. Judicial sales are made by the court acting through its appointed agent. The parties to an action may not, even by their express agreement, secure the appointment of a master of their own choice. Neither may they, after an appointment has been made, effect a substitution by mutual consent. Parties are not permitted to wrest from the court the processes by which its decrees and orders are carried into execution. Besides, the defendant in the case, the party having possibly the most vital interest, did not consent to a sale by Watson. True, it did not object, but it was under no legal obligation to do so. It was the duty of the court to protect its rights without special solicitation. The court was authorized to confirm the sale only after having carefully examined the proceedings of the officer and being satisfied that such sale was in all respects made in conformity with law. On the trial of issues having relation to the proceedings of the master under the order of sale, some of which issues were presented for trial by appellants, and in all of which they participated, it was conclusively established that the sale was not only grossly irregular but made by an unauthorized, and perhaps an irresponsible, person; and, on the record before us, we would be justified in indulging the presumption, if necessary to sustain the action of the trial court, that the affidavits which prove these facts were given in evidence by the appellants themselves. But it is contended that the officer's return is conclusive and that the court could not look beyond it in discharging the duty imposed upon it by the statute. That, surely, cannot be so in a case where the court has before it a record showing the recitals in the return to be untrue. The court was required by the statute to confirm only upon being satisfied that the sale was in all respects in conformity with law. That being so, appellants are in the attitude of insisting that the court must have been satisfied that the sale was

regular, notwithstanding there had just been submitted to it undisputed evidence showing the rankest irregularities. There is nothing peculiarly sacred about a master's return. It possesses no mystic efficacy to compel belief in its recitals when it conclusively appears that those recitals are false.

Various decisions of this court are cited in support of the proposition that a party will not be heard to complain of an order confirming a sale when he has not moved for a vacation of the sale and specifically assigned his objections thereto. (*Ecklund v. Willis*, 44 Neb. 129; *Vought v. Foxworthy*, 38 Neb. 790; *State v. Doane*, 35 Neb. 707; *Johnson v. Bemis*, 7 Neb. 224.) These decisions are right. They establish a wholesome rule of practice and will be adhered to, but they have no application to the question now before us. The rule simply means that one who complains of judicial errors must show that such errors did not occur through his fault. Had there been an order of confirmation and had it been brought here for review by the theatre company these precedents might be cited with appropriateness and profit; but in this case it happened to be unnecessary to challenge the attention of the court to the irregular proceedings which resulted in the illegal sale. The court itself discovered, by an inspection of the record made by the parties to the action, that its process had been abused and acted accordingly; and the action of the court was not arbitrary. The reason for it appears in the record. It was entirely justifiable, and deserves to be commended rather than condemned. The conclusion reached renders unnecessary a construction of the master's return. The order appealed from is

AFFIRMED.

IRVINE, C., dissenting.

I concur in the opinion of the court in so far as it holds that a judicial sale must be made by the person designated in the decree or order of the court for that purpose,

and that such person cannot delegate his authority. I concur also in the holding that when, on motion to confirm a sale, it properly appears that the sale was made by an unauthorized person, it is the duty of the court to refuse confirmation and set aside the sale, although no motion to set aside has been made. The case of *Myers v. McGavock*, 39 Neb. 843, is not opposed to such rule. That was a collateral attack on the title derived under such sale. While so far concurring in the views of the court, I am compelled to dissent from the conclusion that the irregularity appeared in this case in such a manner that the court was justified in noticing it; that is, I do not think that the irregularity was brought to the attention of the court, either by the record itself or by extrinsic evidence properly adduced. By this I do not mean to question the good faith of counsel or affiants who made such proof as was made, nor do I question the propriety of the action of the district judge, as he viewed the case. It is altogether probable that in this instance a correct result was reached. My dissent is based wholly on what I conceive to be the danger of establishing a general rule in accordance with the opinion of the court.

It has always been the rule of this court, as it is the prevailing doctrine elsewhere, that while a purchaser at a judicial sale depends upon confirmation to finally establish his title, still the sale partakes of the essence of a contract, and, if the proceedings are regular, the purchaser acquires, by the acceptance of his bid, a right to have his title completed. The right so acquired cannot be defeated by the arbitrary action of the parties or of the court, although such action may be in the interest of the parties or of fair dealing. (*Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co.*, 51 Neb. 659, where the authorities are cited.) If the sale is set aside, it must be because of some vice or irregularity in the proceedings, either appearing on the face of the record or disclosed by proper proceedings, and by evidence so adduced that the purchaser may be heard to defend against the attack.

That is only another way of saying that the right of such purchaser is property, of which he may not be divested except by due process of law.

On examining this record we find the master's report showing throughout that he conducted the sale personally. On the coming in of the report the plaintiff moved to confirm the sale generally. Appellants moved to confirm the sale to them. Nash moved to confirm the sale to him, and objected to its being confirmed to the appellants. Appellants objected to confirming the sale to Nash. No one objected to the sale itself or moved to set it aside. The only question was as to which purchaser had been successful; that one of them had regularly purchased was on the record conceded by all parties except the theatre company, which was served with notice of the motion to confirm, and by not objecting consented to confirmation. It was not an infant or a lunatic, and had no right to expect the court to act as its voluntary guardian. There was, therefore, no issue before the court as to the truthfulness of the master's report. Two affidavits appear in the bill of exceptions stating that the sale was not made by the master. The irregularity appears solely from these. They were not relevant to any issue before the court. For that reason they were not open to contradiction; for that reason their makers were not subject to the penalties of perjury if they were false. The master was an officer of the court. His report is a part of the record, and is entitled to the same weight, as evidence of the matters therein set forth, as any other return of any other writ by any officer. To my mind it is dangerous in the extreme to permit an incidental statement, in an affidavit relating to other issues and irrelevant to any proceeding pending, to impeach such a return, and be treated as higher evidence than the report of the court's officer. In *Lefevre v. Laraway*, 22 Barb. [N. Y.] 167, the plaintiff moved for a resale in a partition case. He was not entitled thereto, but his motion, and the proofs by him adduced in support

thereof, showed that there had been a fraud on infant defendants. It was held that under such circumstances the court would of its own motion order a resale; but this solely because of the court's protective duty to infant parties. In *Koch v. Purcell*, 45 N. Y. Sup. Ct. 162, it was said: "No doubt that the directions of the court, which concerned matters stated in the report of sale, must rest upon the report itself, and that the report could not be sustained against exceptions by affidavits which tend to show that the referee made the sale on other terms than the report specified." It seems that the remedy is by correcting the report. In *White-Crow v. White-Wing*, 3 Kan. 276, it was held, under a statute precisely like ours, that, on a motion to confirm, the return of the officer is conclusive, and the court cannot look beyond the face of the record. To justify extrinsic evidence a motion to set aside must be made. It was further held that because the lower court had received extrinsic evidence and set aside the sale it would be presumed that there had been a motion to set aside. We cannot here indulge that presumption, because the order itself specifies upon what applications it was based. It does not directly appear by whom the affidavits in question were filed. It is said that, if necessary to sustain the action of the district court, it will be presumed that they were filed by the appellants themselves. But such a presumption would conflict with facts appearing from the record. An order of court, made February, 6, 1897, directed all papers on behalf of appellants to be filed that day, and all "counter-affidavits" on behalf of Nash to be filed by "Monday morning next," which was February 8. All affidavits in their nature supporting appellants' claim were filed February 6, and the affidavits in question were filed February 8, and would appear therefore to be "counter-affidavits" filed in resistance of appellants. Moreover, one of them begins with the statement by affiant, that "some of the statements in the affidavits filed by Messrs. Reed and Kirkendall are abso-

lutely untrue, and that in order to correct the erroneous impression conveyed by such affidavits affiant is obliged, in justice to himself, to make a further affidavit in this case." Surely that affidavit was not filed by Reed and Kirkendall. It is true that no objection seems to have been made to these affidavits. But where an issue is tried without a jury, no error can be predicated on the reception of irrelevant testimony, and this because the court will be presumed to have considered only that which is relevant. Therefore, in the light of that presumption, why should one be required to object, especially when it would require an independent motion for that purpose, such affidavits being filed with the clerk and not merely tendered on the trial, in open court, where an objection could be made. As to the failure to controvert them, they were not original proof, but were themselves evidence contradicting the master's report, and on a point not earlier attacked and with reference to which appellants could not anticipate an attack, and after their time for filing proof had expired.

CHARLES H. BOGUE ET AL., APPELLEES, V. HERMAN O. GUTHE ET AL., APPELLANTS.

FILED MARCH 17, 1898. No. 7909.

Petition to Foreclose Mechanic's Lien. In an action brought to foreclose a mechanic's lien the petition alleged that the materials were sold and delivered to be used in the erection of a building, but did not charge that they were actually so used. It was further alleged that during the time the materials were being delivered the purchaser of the same sold the premises to his co-defendant, who completed the building, using a small portion of the materials for that purpose. *Held*, That the petition states a cause of action against both defendants.

APPEAL from the district court of Buffalo county. Heard below before SINCLAIR, J. *Affirmed.*

Greene & Hostetler, for appellants.

E. C. Calkins, contra.

SULLIVAN, J.

This appeal presents for decision the sufficiency of the petition to sustain a judgment rendered by the district court of Buffalo county in favor of Bogue and Tout against the defendant Anna Guthe. These are the material averments of the petition:

"1. That on or about the 12th day of November, 1892, the plaintiffs were partners doing business at Kearney, Nebraska, under the firm name of C. H. Bogue & Co., entered into a verbal contract with defendant Herman O. Guthe to furnish him lumber and building material for the erection and reparation of certain houses, buildings, and appurtenances upon, and to be erected upon, that certain tract of land situated in the county of Buffalo and state of Nebraska, known as the northwest quarter of section 14, town 9, range 15 west, at fair market value thereof, and that on that day, and on divers days from that day to and including the 19th day of June, 1893, the said plaintiffs delivered to the said Herman O. Guthe lumber and building material for the erection and reparation of said buildings and appurtenances upon said land, of the value and at the agreed price of $868.95.

"2. That at the time of the making of the said contract and the commencement of the furnishing of said materials, and up to the 10th day of May, 1893, the said Herman O. Guthe was the owner and holder of the legal title in fee-simple of the said premises and in possession thereof and that on the said 10th day of May, 1893, the said Herman O. Guthe conveyed said premises to the defendant Anna Guthe, who is the mother of said Herman O. Guthe, and resided with him on said premises, and who has ever since held the legal title thereto.

"3. That plaintiffs furnished all of said described lumber and building material before said conveyance, except

items amounting to the sum of $36.35, and that as to said last named items they were furnished to, and used by, the defendant Anna Guthe in completing said work.

"4. That on the 29th day of June, 1893, and within four months from the time of furnishing said material the plaintiffs made an account in writing of the items of such material furnished said defendant under said contract, and after making oath thereto as required by law, caused the same to be filed in the office of the register of deeds in and for said county and recorded in Mechanic's Lien Record 'D' at page 346, a copy of which account and affidavit is hereto attached and marked Exhibit 'A.'

"5. That no part of said account has been paid except the sum of $200, but that there remains due the plaintiffs from the said defendants the sum of $668.95, with interest on said sum at the rate of seven per cent per annum from the 29th day of June, 1894."

The infirmity imputed to this pleading is the failure to allege that the materials furnished were actually used in the construction of improvements on the premises described. The fact, distinctly charged, that Anna Guthe used a portion of the material in question in completing the structure for which it was all sold and delivered seems to fully meet the objection raised. It not only shows that part of the material was used in improving the premises, but it contains a strong implication that it was all so used. If the structure had not been commenced by Herman O. Guthe before the sale, it is difficult to understand how Anna Guthe could have completed it after the sale. The judgment of the district court is clearly right and is

AFFIRMED.

BOX BUTTE COUNTY V. R. C. NOLEMAN, ADMINISTRATOR OF P. H. DRISCOLL, DECEASED.

FILED MARCH 17, 1898. No. 7895.

1. **Appeal from County Board.** An appeal from an order of a county board, allowing a claim against the county, brings the matter to the district court for trial *de novo*.

2. ———: ISSUES. In a case appealed from an order of a county board issues should be joined in the district court as in cases appealed from justices of the peace.

3. ———: PLEADING: JUDGMENT. In a case appealed from an order of a county board disallowing a claim the district court cannot lawfully render judgment against the county without pleadings being filed or a trial had.

ERROR from the district court of Box Butte county. Tried below before KINKAID, J. *Reversed.*

B. F. Gilman, for plaintiff in error.

R. C. Noleman, contra.

SULLIVAN, J.

The county of Box Butte leased its poor farm to P. H. Driscoll for the period of one year, from March 1, 1893. The lease was in writing, signed by both parties, and provided that Driscoll should pay as rental the sum of $50 on November 1, 1893, and that he should, in consideration of the leasing, keep and board the county paupers at a fixed rate per week. In July and August, 1894, claims were filed by Driscoll against the county for keeping and boarding paupers, and in the following December were presented to the county commissioners for their consideration and action thereon. The order of the commissioners in the matter, duly made and entered of record, is here set out: "P. H. Driscoll, being indebted to Box Butte county in the sum of $50 for rent of poor farm for 1893, as per lease and contract on file, which amount was due November 1, 1893, and the said P. H. Driscoll having

claims numbered 2403 and 2459 on file against said county for boarding paupers amounting to $54.45, on motion it is hereby ordered that the amount due the county from said P. H. Driscoll, to-wit, $50, be deducted from the amount of said claims and that a warrant be drawn on the general fund for the balance $4.45." From this order Driscoll appealed and at the April term of the district court filed a motion for judgment on the certified transcript of the commissioners' record. The motion was sustained and a judgment rendered for the full amount of Driscoll's claim. The county brings the case here for review by petition in error.

As indicating the theory upon which the district court gave judgment against the defendant without pleadings being filed or proofs submitted, we quote from the record: "This cause came on for hearing on motion of the plaintiff for judgment on the pleadings, being the record, and upon hearing argument of counsel, cause was submitted to the court. The court, being fully advised in the premises, sustains the motion and does find that the plaintiff have and recover judgment against the defendant in the sum of $54 and his costs at $3.35. The court reserves the right to set aside or modify this order if the county attorney shall produce authorities to the effect that the county board can audit a claim of the county against an individual and deduct it from his claim against the county as proposed by the honorable county board in this case. Such authorities to be produced June next." It is apparent that the court proceeded on a wrong theory. Mutual demands having arisen out of the contract between the parties, the plaintiff was entitled to an allowance of his claim only to the extent that it exceeded the claim of the county against him. Besides the appeal vacated the order of the county board. The cause was in the district court for trial *de novo*. (*State v. Furnas County*, 10 Neb. 361.) Issues should have been joined and a trial had. (*Haskell v. Valley County*, 41 Neb. 234.) There is in the record no legal basis for the judgment com-

plained of and it is, therefore, reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

WESTERN ASSURANCE COMPANY OF TORONTO V. KILPATRICK-KOCH DRY GOODS COMPANY.

BRITISH-AMERICAN ASSURANCE COMPANY V. KILPATRICK-KOCH DRY GOODS COMPANY.

FILED MARCH 17, 1898. No. 7896.

1. **Pleading:** AMENDMENT: DISCRETION OF COURT. It is not an abuse of discretion for the district court to refuse to permit an amended answer, presenting a new defense, to be filed at the time a case is called for trial, where it appears that the facts embraced in the proposed amendment were known when the original answer was filed, and no excuse is offered for the delay in making the application for leave to amend.

2. **Chattel Mortgage:** NON-DELIVERY: LIEN: EVIDENCE. A chattel mortgage which remains in the possession, or under the control, of the mortgagor may, without actual delivery, create a valid lien on the property therein described if the parties to the instrument intend that it shall have that effect. But such intention will not be presumed, and where the evidence bearing upon the question is substantially conflicting, or equivocal, the finding of the trial court that no lien was created will not be disturbed.

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

Frank H. Gaines, McVey & Cheshire, and *McVey & McVey,* for plaintiffs in error.

W. W. Morsman, contra.

SULLIVAN, J.

These cases, presenting for determination precisely the same questions, were tried together and submitted on the same evidence. The plaintiff, Kilpatrick-Koch Dry

Goods Company, had findings and judgments in its favor and the defendants, the insurance companies, have brought the cases into this court by proceedings in error. The actions are on policies of insurance issued to A. A. Seagraves, a merchant doing business at Silver City, Iowa. The insured property, a stock of merchandise, was partially destroyed by fire, and thereafter the causes of action arising under the contracts of insurance were assigned to the plaintiff, a resident of this state.

The first question presented for consideration is one of practice. The original answers were filed June 16, 1894, and on November 23, 1894, amendments which had been filed without leave on November 7, 1894, were stricken from the files. Defendants then asked to refile them. The applications were denied and the defendants excepted. The proffered amendments presented an entirely new defense, the existence of which was necessarily known to the defendants when the original answers were filed. The applications to amend were made on the day the cases were tried and apparently at the time they were called for trial. No excuse was offered for failing to include in the original answers the defense embraced in the proposed amendments. No reason was given for postponing the applications until the cases were ready for trial on the merits. Under these circumstances was the action of the trial court an abuse of discretion? We think not. Defendants acquired no rights by filing the amendments without leave of court. The law did not charge the plaintiff with notice of their existence and it does not appear that it had any actual notice of them before the day of the trial. The defendants were, therefore, in no better attitude than if the amendments had not previously been among the files of the court. The rule in relation to amendments is stated in 1 Ency. Pl. & Pr. 637, as follows: "It is in all cases proper to require from the party asking leave to amend some reasonable excuse for the defect in the pleading which it is sought to correct. The grounds for the mo-

tion must ordinarily be shown by affidavit." This rule has been recognized and approved in at least three decisions of this court. (*Commercial Nat. Bank of Omaha v. Gibson*, 37 Neb. 750; *Omaha & R. V. R. Co. v. Moschel*, 38 Neb. 281; *Johnson v. Swayze*, 35 Neb. 117.) Having reached the conclusion that the district court did not err in denying the application to amend, we need not determine whether the defense pleaded in the proposed amendments was valid or not.

It is next contended that the findings and judgments are not sustained by the evidence. This contention is based on the proposition that A. A. Seagraves executed a mortgage on the insured property in violation of a condition contained in each of the policies. It appears from the evidence that on December 27, 1893, young Seagraves made out a mortgage on the property in question to his father, J. D. Seagraves, of Dow City, Iowa, to secure a promissory note for $1,300. The note was sent to, and accepted by, the elder Seagraves, but the son retained the mortgage in his possession and under his control until after the fire, when he caused it to be recorded. The facts in relation to the making of the mortgage are not disputed and are fairly set forth in the following testimony of J. D. Seagraves:

Q. You loaned your son some money prior to this mortgage?

A. I had, $300, about one year before.

Q. And then just before that you had loaned him some more?

A. Just before that my son-in-law intended to go into business with my son, and put in his money there, and he wanted I should pay him, and I went on and let my son-in-law have the money and took my son as pay.

Q. Did you assume anything for his father-in-law?

A. He spoke that there were $300 that he had owed his father while he was in business there about a year.

Q. His father-in-law you mean?

A. His father-in-law.

Q. He came up to Dow City to see you about it?

A. He came up to tell me that he was not meeting with success, owing to the season, the last year being a very warm fall and winter, and he wanted to make me safe on loaning the money that I had paid my son-in-law, and proposed this way of fixing it up for my interest.

Q. What way do you mean?

A. He give me a mortgage.

Q. On the stock?

A. Yes, sir; on the stock.

Q. And in view of that you agreed to assume these other claims, did you?

A. I did, sir; this $300 the other money I had paid to my son-in-law for my son.

Q. Did you have any correspondence with your son after he went home and prior to the fire?

A. When he was there prior to the fire and telling me how he was situated in regard to his money matters, I stated to him how I thought it might be safe. We talked it over about the stock of goods he would give as security; make some arrangements. At that time I did not know, nor he did not know, what we ought to do. I had no experience in making loans at all of that kind, and it ran along a number of days after he was there, and he wrote me that he thought he had got it safe, and sent me the note.

Q. And told you that he had made a mortgage to secure you, did he?

A. Yes, he told me he had made arrangements, and I do not know that at the time he sent the notes, but afterwards I received the notes. It was all within a week or two before the fire—the whole transaction.

Q. And he explained to you how he had finally arranged it?

A. Yes, sir.

Q. And you talked the matter over with him, about the security, when he was down there?

A. I did when he was at Dow City.

Q. And that he was to give you a mortgage on the stock?

A. When he was at Dow City. That was the arrangement.

Q. When he was at Dow City?

A. Yes, sir; I say it was.

Q. Where is that letter that he wrote you after he went home? Have you got it?

A. I have not.

Q. Do you know where it is?

A. I do not. I presume it was destroyed. I did not consider it of any value whatever.

Q. Did he say anything about recording this mortgage in that letter?

A. Not at the time, not at the first that I heard he had made the arrangement.

Q. About the recording?

A. No.

Q. You did not know but what it had been recorded?

A. The understanding was, I did not suppose I would ever call upon my son for the money; he proposed himself he wanted to make me safe. I wanted to help him in the business. I was rather opposed to his going into business at first, but afterwards he seemed to have success and I concluded I would help him.

Q. He explained to you at the time it was rather a bad season, and he was more or less indebted, did he?

A. He did.

Redirect:

Q. The proposition to make the mortgage to secure you came from your son, did it?

A. It did, sir.

Q. And there was no understanding whatever about recording it?

A. The understanding was that I did not wish to have it appear that I had any interest in it, as I did not have. I wanted he should prosper in his business and he pro-

posed to make me safe by making this mortgage. At the same time I did not ask it of him.

Recross:

Q. And you agreed to assume this additional $300 at that time?

A. I did, sir.

Q. Then you talked the whole matter over how you could be safe, is that right?

A. I think it must have been, because I was very easily satisfied.

Counsel for the defendants earnestly insist that this evidence establishes the existence of a mortgage lien upon the property in favor of J. D. Seagraves. That a parol agreement to give a lien on chattels constitutes a valid mortgage is not questioned. It was so decided by this court in *Conchman v. Wright*, 8 Neb. 1, and in *Sparks v. Wilson*, 22 Neb. 112. But in the case at bar it is manifest there was no intention to create a lien in this way. The security contemplated was a formal mortgage, but whether it should be executed or not does not seem to have been definitely settled while young Seagraves was at Dow City. The entire matter was apparently committed to his charge, it being understood that whatever he should do would be satisfactory to his father. Now, it is doubtless true that a mortgage in the possession and under the control of the mortgagor may create a lien on property if the parties intend that it shall have that effect. But we are persuaded that it was not the purpose of the Seagraves to create a lien on the stock of merchandise in question in favor of the father unless it should become necessary to do so in order to prevent other creditors from resorting to it for the satisfaction of their claims. It was not the intention of the parties that a mortgage should be executed which the father could enforce against the son, but one which would be effective against other creditors in case they should attempt to seize the property. To be effective against such credi-

tors the mortgage would have to be filed for record. Whether it should be so filed was to be decided by the son, and was to depend on the condition of his business and the disposition of his creditors. Considering the purpose to be accomplished by the execution of the mortgage, and taking into account the fact the elder Seagraves did not demand the security nor ever expect to call on his son to pay the debt secured, it is entirely reasonable to infer that the parties intended that the recording of the mortgage should constitute a delivery of it, and that it should be without legal vitality until the happening of that event. The findings of the district court are sustained by the evidence and its judgments rendered thereon are

AFFIRMED.

R. H. MCALLISTER V. JAMES W. BEYMER.

FILED MARCH 17, 1898. No. 7892.

Title by Adverse Possession. Ordinarily, one who has been in the actual, open, exclusive, adverse, and uninterrupted possession of real estate for ten years thereby acquires absolute title to the same.

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

H. E. Clifford, for plaintiff in error.

W. H. Thompson, contra.

RYAN, C.

The petition in this action was filed in the district court of Hall county August 10, 1892. The averments of the plaintiff James W. Beymer were that he was the owner, had a legal estate in, and was entitled to the possession of, a certain described fraction of a lot in Grand Island, which possession defendant wrongfully withheld from

plaintiff. These averments were denied by an answer in which the defendant asserted title in himself. Between the fraction of lot 5, block 55, owned by plaintiff and the fraction of the same lot owned by defendant, there was a strip one foot seven and three-eighths inches in width, which extended the entire length of said lot. This strip was the subject-matter of contention and the judgment of the district court was adverse to the defendant.

We have stated as briefly as possible the issues presented and in the discussion of these issues we shall, with like brevity, confine ourselves to a brief review of the theory of the argument of each party. At the commencement of the trial it was stipulated that McAllister's deed called for the northerly 22 by 66 feet of lot 5, in block 55, and that his title was derived from James Cleary. It was also stipulated at that stage of the proceedings that the deed to plaintiff covered the next 22 by 66 feet of said lot, immediately south of, and adjoining, the said 22 feet held by McAllister, and that plaintiff's title thereto was derived from A. S. Patrick. There was evidence amply sufficient to sustain plaintiff's contention that the defendant's brick building occupied a strip one foot seven and one-half inches wide, which, tested by accurate measurements, was a part of the fraction of the lot owned by plaintiff. On the other hand, it was shown by the testimony of James Cleary, O. P. Mullin, and R. C. Glanville that, at least as early as the year 1879, Cleary, the grantor of McAllister, had placed a roof over the entire strip in controversy and, as at least one witness testified, this strip was floored. The above named three witnesses also testified that from 1879 the strip was used for the storage of stoves and other hardware until Cleary conveyed to McAllister. From the date of this conveyance the strip was used by McAllister in the same manner, and for the same purposes that it had been used by his grantor, until 1885 and 1886, when the brick building was being erected by McAllister to replace the wooden building up to that time occupied as a hardware store.

It seems from the evidence that when this erection was begun the roof over the strip in controversy was removed. While it remained in position, however, the end of the strip toward the street was closed by a door leading directly out to the street. The only testimony which seems not in harmony with that of the three witnesses just referred to was the testimony of Chris Ipsen, which was as follows:

Q. You know where the McAllister brick building is now on the northerly part of lot 5, in block 55?

A. Yes, sir.

Q. Do you know when that brick building was built?

A. Yes, sir; in 1879. I built it myself.

Q. Do you remember of the fact of Mr. Cleary using the space between that building and his frame building for iron and other stuff?

A. No, sir; I think Mr. Patrick had bought the building before Cleary commenced to use the space.

Q. How long was that after the building was built before Patrick commenced to use it?

A. Mr. Patrick bought it in 1881, I think.

Q. You may state to the court if you recollect positively that Mr. Cleary didn't use the space in there for stuff immediately after the building was erected.

A. He never used it while I was there.

If this evidence is to prevail as being contradictory of the three witnesses alluded to, it overcomes that testimony as to the use of the strip by Cleary previous to some time in 1881. From that year, even under this theory, we are bound to consider the use of this strip, as testified by Cleary and the other two witnesses, until the erection of the building in 1885 and 1886, since which time the occupation has been as it now is. The petition in this case, however, was not filed until August, 1892, so that before this action was brought more than ten years had elapsed while the strip in controversy was in the open, exclusive, adverse, actual, and uninterrupted possession of the defendant and his grantor. This vested in Mc-

Allister an absolute title. (*Fink v. Dawson*, 52 Neb. 647. See also *Lantry v. Wolff*, 49 Neb. 374, wherein there are numerous citations of authorities which support the conclusion just announced as applied to the facts of this case.) The judgment of the district court is therefore reversed and this cause is remanded for further proceedings not inconsistent with the views above expressed.

REVERSED AND REMANDED.

HARRISON, C. J., not sitting.

MODERN WOODMAN ACCIDENT ASSOCIATION V. CELIA V. SHRYOCK.

FILED MARCH 17, 1898. No. 7927.

1. **Insurance**: APPLICATION: WARRANTIES. Statements contained in an application for the issue of a policy of insurance will not be construed as warranties unless the provisions of the application and policy taken together leave no room for any other construction.

2. ———: CAUSE OF DEATH: QUESTION FOR JURY. Whether an accident or a disease caused the death of a party whose life was insured against death by accident should be submitted to, and determined by, a jury, unless, with reference to that proposition, the proofs are so convincing that by them all reasonable men in the fair exercise of their judgment would be brought to adopt the same conclusion.

3. ———: ———: EVIDENCE. Where an accident insurance association introduced evidence of the statements of one of its members with reference to an accident which had happened to him some hours before the time of making such statements, it cannot complain because the same statements, made to other witnesses, were proved by the adverse party.

4. ———: FRATERNAL BENEFIT ASSOCIATIONS: ESTOPPEL. In an action for the recovery of the sum of $3,000 insurance on a certificate issued by a fraternal benefit association to one of its members it cannot be permitted to urge that the said certificate limits the amount payable to the proceeds of an assessment of $2 on each member, and that there is, therefore, a question whether thereby

$3,000 could be realized in view of the fact that the statute to which such association owes its existence forbids it to issue a certificate of over $1,000 if it has not a membership of 2,000 in number.

5. **Review**: EXCLUSION OF EVIDENCE. The supreme court cannot assume that the rejection of written evidence was prejudicially erroneous when there is in the record before it no showing as to the nature of the evidence rejected.

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

A. R. Talbot, for plaintiff in error.

J. H. Broady and *A. N. Sullivan, contra.*

RYAN, C.

This action was brought in the district court of Lancaster county by Celia V. Shryock to recover the amount of insurance existing in her favor by the terms of a certificate of membership issued to her husband whereby his life was insured against death by accident within ninety days. There was a verdict and judgment as prayed, and for the reversal of this judgment the association prosecutes this proceeding in error.

In the petition it was alleged that May 6, 1892, in consideration of $3 as a membership fee paid by William B. Shryock for plaintiff, and of such future payments as might be required under defendant's articles of incorporation, the defendant had made and delivered to said William B. Shryock its policy and certificate of insurance on the life of said William B. Shryock, in the sum of $3,000, and that plaintiff was the wife of William B. Shryock and was the beneficiary in said policy. It was further averred that on or about July 2, 1892, while said policy was in full force, said William B. Shryock received a personal injury in the city of Omaha, from which injury, shortly thereafter, the death of said William B. Shryock resulted. It was further alleged that due proof of the death of William B. Shryock had been made, but

that defendant, nevertheless, had refused to pay or make an assessment for the payment of the amount due plaintiff, or any part thereof. There was a prayer for judgment in the sum of $3,000 with interest, which principal and interest equaled the sum for which the verdict was returned. The material portions of the answer were averments that William B. Shryock died of a disease not the result of any injury alleged to have been by him received; that there had been no compliance with the requirements of the policy as to proofs of injury, and that there had been no request for an assessment upon the members of defendant in good standing, under its rules, for the payment of the claim of plaintiff. It was further alleged that the defendant had never made an assessment upon its members for the payment of the claim set out in plaintiff's petition, and that defendant neither had nor would have in its possession any means wherewith to pay the same until such assessment should be levied and collected. There was in the answer the following language: "Further answering, the defendant alleges the fact to be that at the time of making the application for membership to the defendant, plaintiff's intestate, William B. Shryock, represented and warranted to the defendant, as a condition precedent and as a basis upon which the policy sued on herein was issued, that he never had, nor was subject to, fits, disorders of the brain, or never had or was subject to any bodily or mental infirmity; that, relying upon said statements, representations, and warranty that said William B. Shryock did not then or never did have any bodily or mental infirmity, the defendant issued and delivered to him the certificate or policy of insurance sued on herein, but the defendant avers that at the time of making said application and tendering to the defendant said statements and representations and warranties as aforesaid said William B. Shryock did then have bodily and mental infirmities which would tend to shorten life and which, in fact, did produce the death complained of in plaintiff's

petition, and that by reason thereof there was a breach of said warranties and conditions precedent which made void the policy issued and sued upon herein, and although said William B. Shryock at that time represented and warranted to the defendant that he did not have any bodily or mental infirmity, yet the defendant charges the fact to be that at that time said William B. Shryock did have fatty degeneration of the heart or heart disease, which would tend to shorten life, and from which weakness and defect of the heart he, the said William B. Shryock, died." There was a reply in denial of each affirmative matter pleaded in the answer. On the trial there was submitted to the jury certain special interrogatories, which, with the answer to each, were as follows:

"1. Did William B. Shryock, on or about the 2d day of July, 1892, meet with an accident in the city of Omaha, Nebraska, whereby he received external and violent bodily injury? Answer: Yes.

"2. Did William B. Shryock, prior to and at the time of his death, have fatty degeneration of the heart? Answer: Yes.

"3. If you answer that William B. Shryock received an accidental, external, and violent bodily injury, did that injury alone cause his death? Answer: Yes.

"4. If you answer that William B. Shryock, prior to and at the time of his death, had fatty degeneration of the heart, did that disease alone cause his death? Answer: No.

"5. What was the cause of the death of William B. Shryock? Answer: By violent bodily injury, he at the time having fatty degeneration of the heart."

There was some conflict in the evidence, but as the jury accepted as true that which tended to sustain the theory of plaintiff, it is unnecessary to consider any other in determining whether or not there was sufficient to sustain the special findings above quoted. James M. Robinson was a witness for the defendant in the district court and testified that on July 1 or 2, 1892, he met

William B. Shryock about half-past five in the afternoon and, by appointment, still later in the evening. The testimony of this witness in part was as follows:

Q. Now, did he say anything to you up to that time about slipping and hurting his leg?

A. Yes, sir. He told me several times that his foot had slipped and he had hurt his knee.

Q. He told you several times during the two hours you were with him?

A. Yes, sir.

Q. What did you say he said about that?

A. He said his foot had slipped and that he had wrenched his knee and that it was hurting him.

Q. What knee was that?

A. I think it was the left knee, I am not sure, but it was the same knee he had hurt before.

Q. The same knee that was broken before?

A. Yes, sir.

Q. What did he say at that time about having recently removed the splints or bandages that the doctor had on the knee?

A. He said he had been wearing a bandage or a brace or something and that he had taken it off lately, or something to that effect. I don't know how recently he had taken it off.

William Darst, a witness for the plaintiff, testified that he saw William B. Shryock at the store of witness in Omaha about 8 o'clock in the evening of July 1, 1892; that Shryock looked to witness like a man about to faint, was pale and trembling, and complained that he had hurt himself; that in coming up from the depot he had slipped and partially fallen and that it pained him terribly right over his right hip. He kept his hand rubbing his side and acted as if he was sick in his stomach. He was spitting as if he was sick in his stomach. He remained over two hours from the time he came in. Usually witness closed up at 9 o'clock at night, but his reason for not closing at that time, July 1, 1892, was given thus in his

own language: "The condition he came in my store and seeing that he was in pain I stayed around an hour later than usual, thinking he would get better, and in fact he did get better; I wanted him to rest." This witness accompanied Mr. Shryock to the Murray Hotel. William Anderson, clerk at that hotel, testified that William B. Shryock came to the hotel about 10 o'clock of the night of July 1, 1892, and witness, upon shaking hands with him noticed that Shryock's hand was very cold. Upon being asked about his health, Shryock said he was not feeling well and asked if witness could spare a boy to go out and get some capsules. These were procured, as was also some whisky, and he went to his room. Frank Wigginton, the boy who procured the capsules, testified that they were quinine capsules and that he showed Mr. Shryock to his room. In the afternoon of July 2, 1892, Mr. Shryock was found dead in his bed in the room to which he had been conducted by Wigginton. A post-mortem examination was held, and the result of their investigations, as detailed by the doctors who conducted the same, was to the following effect: Dr. Rebert said he found a contusion or abrasion over the right hip of Mr. Shryock; that his heart was large and dilated, filled with dark fluid, blood. The contusion was of recent occurrence. There was nothing in the condition of the remains that would indicate that he would not have lived an indefinite time. The cause of his death was heart failure induced by a shock and injury. The contusion indicated a fall which might have caused the death of Mr. Shryock. The contusion was somewhat larger than the palm of a large hand. In relation to the opinion that Mr. Shryock might have lived an indefinite time Dr. Rebert testified: "I mean by that, if no accident had occurred, no stage of sickness intervened, and in his ordinary regular life, that in all probability his heart would have been capable of carrying on its functions for an indefinite length of time." Dr. Rebert further testified that while a fall, such as was indicated by the contusion

to have taken place, would bring on heart failure, death might not follow before thirty-six hours. Dr. Lee testified that he took part in the post-mortem examination described by Dr. Rebert, and that there was found the abrasion or contusion described by Dr. Rebert. Dr. Lee also testified that they found an abrasion of the skin on the knee of Mr. Shryock, and that both the abrasion on the hip and that on the knee were of recent occurrence. He said that the death of Mr. Shryock was due to his getting injured and not having sufficient vital capacity to recover from it; that in the condition in which Mr. Shryock's heart was, it was possible for him to die the minute he sustained the injury, or he might have had sufficient vitality to live a few hours afterwards. On cross-examination Dr. Lee testified that the condition of Mr. Shryock was such that any shock or any blow would produce a shock which would so affect his heart that it would not have inherent strength enough to respond, consequently a fainting would follow which he could not, and in this case did not, recover from.

It seems to us that the special findings were in all respects supported by the testimony just quoted. There was no attempt to show that Mr. Shryock might not have been ignorant of any abnormal condition of that vital organ. There was, therefore, no fraudulent or willfully false representation as to the existence of such conditions as would have led to the rejection of the application for insurance had their existence been known to the company. In the membership certificate it was recited that it was issued in consideration of the warranties in the application as well as in consideration of the payment of the premium. In his application Mr. Shryock said: "I never had or am I subject to fits, disorders of the brain, or any bodily infirmity." With reference to payment in case of death the provision of the policy was as follows: "And the said association agrees to pay to Celia V. Shryock, wife, if living, * * * the sum of $3,000 if the death of the certificate holder shall result from such

injuries alone within ninety days from the date of said accident." Upon these provisions the insurance company founds two arguments: One is that the representation as to the physical condition of Shryock was a warranty broken when made because of the existence of fatty degeneration of his heart; the other is that the death of the insured was not attributable solely to the accident which caused the one or more abrasions observed by the physicians. In respect to the alleged warranty the following language quoted from the syllabus in *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842, is applicable: "Statements contained in an application for a policy of insurance will not be construed as warranties unless the provisions of the application and policy, taken together, leave no room for any other construction. In construing a contract, for the purpose of determining whether the statements made therein were intended by the parties thereto to be warranties or representations, the court will take into consideration the situation of the parties, the subject-matter of the contract, and the language employed, and will consider a statement made to be a warranty only when it clearly appears that such was the intention of the contracting parties; that the mind of each party consciously intended and consented that such should be the interpretation of his statements." In line with these propositions it was held in the case just cited that, for representations to constitute a defense to an action on the policy, it is incumbent on the insurance company to prove the warranties were made as written in the application; that they were false in some particular material to the insurance risk; that they were made intentionally by the insured; that the insurance company relied and acted upon such statements, and these are questions of fact and not questions of law. By its general verdict the jury settled this claim of warranty adversely to the contention of the insurance company and its solution must control. (*Travelers Ins. Co. v. Melick*, 65 Fed. Rep. 178.)

In support of its argument that the accident was not the proximate cause of the death of Mr. Shryock there has been cited *National Masonic Accident Ass'n v. Shryock*, 73 Fed. Rep. 774. The action in the case just referred to was on a policy in another company than plaintiff in error, but in all other respects there were involved the same circumstances as are presented by this case. In view of the extended consideration of cases rendered necessary by the holding of the circuit court of appeals of the eighth circuit of the United States as formulated by Sanborn, J., in the case last referred to, we have purposely hitherto refrained from citations of authorities. Of this, the most important question involved in the case under consideration, we believe the cases hereinafter referred to in the discussion of the opinion delivered by Sanborn, J., will be found to furnish a very satisfactory solution. From this opinion we quote the following language: "The certificate of membership in this accident association, on which this action is based, contained the covenant of this corporation to pay to the defendant in error the indemnity it promised in case the death of William B. Shryock resulted within ninety days from the date of any accident, solely because of bodily injuries effected by external, violent, and accidental means, and independently of all other causes; and it also contained an express agreement that the insurance promised thereby should not cover any death which resulted wholly, or in part, directly or indirectly, from disease or bodily infirmity. The defendant in error alleged that Shryock's death was caused by an injury to him which resulted from an accidental fall on the street. The association denied this allegation and alleged that if he was injured by such a fall, his death was not caused by that alone, but resulted wholly, or in part, from some disease of his heart. The burden of proof was upon the defendant in error to establish the facts that William B. Shryock sustained an accident, and that that accident was the sole cause of his death, independently of all other

causes. If Shryock suffered such an accident and his death was caused by that alone, the association agreed by this certificate to pay the promised indemnity; but if he was affected with a disease or bodily infirmity which caused his death, the association was not liable under this certificate, whether he also suffered an accident or not. If he sustained an accident, but at the time it occurred he was suffering from a pre-existing disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected with the disease or infirmity, but he died because the accident aggravated the effects of the disease, or the disease aggravated the effects of the accident, the express contract was that the association should not be liable for the amount of this insurance. The death in such a case would not be the result of the accident alone, but it would be caused partly by the disease, and partly by the accident, and the contract exempted the association from liability therefor. These propositions have been so lately discussed and affirmed by this court that we content ourselves with their statement. (*Travelers Ins. Co. v. Melick*, 27 U. S. App. 547, 12 C. C. A. 544, 547, and 65 Fed. Rep. 178, 181; *United States Mutual Accident Ass'n v. Barry*, 131 U. S. 100, 111, 112, 9 Sup. Ct. Rep. 755; *Freeman v. Mercantile Mutual Accident Ass'n*, 156 Mass. 351, 353, 30 N. E. Rep. 1013; *Anderson v. Scottish Accident Ins. Co.*, 27 Scot. L. R. [Scotland] 20, 23; *Smith v. Accident Ins. Co.*, 5 L. R. Ex. [Eng.] 302, 305; *Standard Life & Accident Ins. Co. v. Thomas*, 12 Ky. Law Rep. 715; *Marble v. City of Worcester*, 4 Gray [Mass.] 395, 397; *National Benefit Ass'n v. Grauman*, 107 Ind. 288, 290, 7 N. E. 233.)" In the opinion from which the above quoted language was taken it was said: "The sufficiency of the evidence in this case to warrant the verdict is not before us for consideration, because the record before us discloses the fact that only a portion of the evidence presented to the court below is contained in the bill of exceptions." While this language was used, there was nevertheless in the opinion such a statement of

the facts as showed that, for some purposes, the bill of exceptions was in fact used. We shall now review the authorities cited in the opinion to sustain the propositions that the insurer was not liable if, at the time of the accident, the insured was suffering from a pre-existing disease, and death would not have resulted from the accident in the absence of such disease, but the insured died because the accident aggravated the effects of the disease, or the disease the effects of the accident.

The opinion in *Travelers Ins. Co. v. Melick, supra,* was written by Sanborn, J., and in it were recited the following conditions of the policy sued on, to-wit: "This insurance does not cover disappearances nor suicide; sane or insane; * * * nor accident, nor death * * * resulting wholly or partially * * * from * * * disease or bodily infirmity, hernia, fits, vertigo, sleep-walking * * * intentional injuries (inflicted by the insured or any other person)." The action of Melick, the administrator, was brought on the policy and in the petition it was alleged that the death of the intestate, Dr. Robbins, was caused by an accidental gun-shot wound in the foot. The answer denied this allegation and alleged that death was caused by the intentional self-inflicted injury of Dr. Robbins in cutting his own throat with a scalpel. We quote from the opinion this language: "There was evidence that the doctor accidentally sent a bullet through the fleshy portion of his foot, June 1, 1890; that the wound thus caused became very painful, confined him to his bed, caused a fever and gradually reduced his strength, until he died, June 18, 1890; that this gun-shot wound was just such an injury as would naturally produce tetanus or lock-jaw; that the doctor and his physicians feared that disease from the first, and, that they used chloral and chloroform to relieve the pain and ward off this disease; that in the early morning of June 18, 1890, while the deceased was alone in his room, he was seized with tetanus; that this disease causes the most excruciating pains that human beings ever suffer; that it

is fatal in a vast majority of cases; that it produces spasms or convulsions, and sometimes causes death by a spasm of the larynx, which prevents the passage of air through the trachea to or from the lungs; that the doctor was found dead in his bed June 18, 1890, with a scalpel in his right hand and his trachea and both his jugular veins cut; that the tetanus was sufficient to produce death and the throat cutting was sufficient to produce it." In this connection there was a reference to the evidence tending to establish each theory as to the proximate cause of death, after which there was this language: "Under this state of the evidence, it is assigned as error that the court below refused to instruct the jury to return a verdict for the insurance company; and it is contended that the question whether the shot wound which caused the tetanus, or the throat cutting, was the proximate cause of the death was a question of law for the court. In *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 474, 476, Mr. Justice Strong, who delivered the opinion of the court, said: 'The true ruling is that what is the proximate cause of an injury is, ordinarily, a question for the jury. It is not a question of science or legal knowledge. * * * In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding; and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally, or probably, connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.' This opinion of the supreme court is a complete answer to the contention of the plaintiff in error here. (*Union P. R. Co. v. Callaghan*, 6 C. C. A. 205, 208, 56 Fed. Rep. 988.) It is urged that this question was for the court, and that the court was bound to declare that the cutting was the proximate, efficient, cause of the death in this case because the evidence was uncontradicted that the cutting was later in time than the shot wound, and was sufficient to cause the

death. This position might be maintained if the cutting was not itself produced by the shot wound, and if the evidence was uncontradicted, that the death would not have occurred as soon from the tetanus in the absence of the cutting. But the argument begs the primary question in the case, whether the cutting was a cause of the death at all. If it neither caused nor hastened the death of the insured, then it was in no sense a cause of it, and however new or sufficient it may have been to have caused it, it could not relieve the insurance company from a death whose sole cause was the accidental injury. This question was peculiarly one of fact. The insurance company had agreed to pay the promised indemnity for any death that resulted from the accidental shot wound alone. The question was, what did in fact cause the death,—the shot wound, the cutting, or both? Nor would this case be withdrawn from the effect of this rule if the evidence upon this question was undisputed, for the question is always for the jury where a given state of facts is such that reasonable men may fairly differ upon it. It is only when all reasonable men, fairly exercising their judgments, must draw the same conclusion from an admitted state of facts, that it becomes the duty of the court to withdraw a question of fact from the jury." Later than the above language was used, Sanborn, J., speaking for the court in this case said: "The objection that the findings of the jury [adverse to the theory of the insurance company] are contrary to the weight of the evidence cannot be considered by this court. In an action at law, this is a court for the correction of the errors of law of the court below, only. There was, as we have already held, sufficient evidence to warrant the submission of the question of the proximate cause to the jury in this case. The court below committed no error in weighing this evidence; that duty was performed by the jury and not by the court; and hence there is no ruling of the court in that regard for us to review, and it is not our province to review and correct the findings of the jury on

questions of fact properly submitted to them. (*Gulf, C. & S. F. R. Co. v. Ellis*, 4 C. C. A. 454, 456, 54 Fed. Rep. 481; *City of Lincoln v. Sun Vapor Street-Light Co.*, 8 C. C. A. 253, 257, 258, 59 Fed. Rep. 756.)"

The case cited next in *National Masonic Accident Ass'n v. Shryock, supra*, was *United States Mutual Accident Ass'n v. Barry*, 131 U. S. 100, in which the association sought the reversal of a judgment which had been rendered against it. On the trial in the lower court there had been embodied in an instruction the following language: "If, for example, the deceased sustained injury to an internal organ and that necessarily produced inflammation, and that produced a disordered condition of the injured part, whereby other organs of the body could not perform their natural and usual functions, and in consequence the injured person died, the death could be properly attributed to the original injury. In other words, if these results followed the injury as its necessary consequence, and would not have taken place had it not been for the injury, then I think the injury could be said to be the proximate or sole cause of death; but if an independent disease or disorder supervened upon the injury, if there was an injury,—I mean a disease or derangement of the parts not necessarily produced by the injury,—or if the alleged injury merely brought into activity a then existing, but dormant, disorder or disease, and the death of the deceased resulted wholly or in part from such disease, then it could not be said that the injury was the sole or proximate cause of the death." We have found no language other than that above quoted which tends to sustain the proposition in support of which it was cited. This was so very favorable to the plaintiff in error, however, that by that party it was not presented for consideration and consequently was neither approved nor disapproved in the appellate court. What was decided is fully stated in the syllabus, which was in this language: "A certificate or policy issued by a mutual accident association stated that it accepted B. as a member

in division AA of the association; 'the principal sum represented by the payment of $2 by each member in division AA,' not exceeding $5,000, to be paid to the wife of B. in sixty days after proof of his death from sustaining 'bodily injuries effected through external, violent, and accidental means.' B. and two other persons jumped from a platform four or five feet high to the ground, they jumping safely and he jumping last. He soon appeared ill, and vomited, and could retain nothing on his stomach, and passed nothing but decomposed blood and mucus and died nine days afterwards. In a suit by the widow to recover the $5,000, the complaint averred that the jar from the jump produced a stricture of the duodenum, from the effects of which death ensued. At the time of the death the association could have levied a two-dollar assessment on 4,803 members in division AA. Held, (1) It was not error in the court to refuse to direct the jury to find a special verdict as provided by the statute of the state; (2) the issue raised by the complaint as to the particular cause of death was fairly presented to the jury; (3) the jury were at liberty to find that the injury resulted from an accident; (4) the policy did not contract to make an assessment, nor make the payment of any sum contingent on an assessment or on its collection; and the association took the risks of those who should not pay."

In *Freeman v. Mercantile Mutual Accident Ass'n, supra,* the insured, who died of peritonitis localized in the region of the liver and induced by a fall, had previously had peritonitis in the same part, and the previous disease had produced effects which rendered him liable to a recurrence of it. In an action upon the policy by the widow of the insured the judge charged the jury that upon the question whether peritonitis, if that caused his death, was to be deemed a disease and the proximate cause of death within the meaning of the policy, depended the question whether or not, before and at the time of the fall, he was suffering with the disease. If

he was, then, although the disease was aggravated and made fatal by the fall, he could not recover; but if, owing to existing lesions caused by the disease, he not having the disease at the time, peritonitis was started, the defendant was answerable, although, if there had been a normal state of things, the fall would not have occasioned such a result. On appeal these instructions were approved, but in our opinion they fail to sustain the radical proposition in support of which they were cited in *National Masonic Accident Ass'n v. Shryock, supra.*

The case of *Anderson v. Scottish Accident Ins. Co., supra*, was one in which a suit had been brought upon a policy which provided that, to recover under it, an accident must be the direct cause of death, and that within three months, and that the company would not be liable for death arising from natural disease although accelerated by accident. Upon appeal it was held that it had not been proved that the accident had caused the death at all, and the court expressly reserved its opinion as to acceleration.

In *Smith v. Accident Ins. Co., supra,* the suit was on a policy against certain accidents, in which there was an express provision that the company did not insure against erysipelas or any other disease or secondary cause or causes arising within the system of the insured before, or at the time of, or following such accidental injury (whether causing such death directly or jointly with such accidental injury). The insured, on Saturday, accidentally cut his foot against the side of an earthenware pan. On the following Thursday erysipelas was caused by the wound, and but for the wound he would not have suffered from it. It was held by a majority of the court that the insurer was protected by the condition, and was not liable. In the discussion of this case great stress was laid on the proposition that the policy expressly excused the company from liability on account of erysipelas which might supervene as a result of an accident.

The following is the entire report of *Standard Life & Accident Ins. Co. v. Thomas, supra:* "In this action upon an accident insurance policy to recover for the death of the insured, the evidence showed that the insured fell on the 12th of June, bruising his side, that he was taken sick in a few days thereafter and died on the 2d day of July. The physicians testified that he died of typhoid fever, which did not result, and could not have resulted from the fall. A nurse of long experience testified that the insured did not have typhoid fever. Held, that the evidence preponderates so decidedly in favor of the theory that the insured died of a disease not brought on by the accident the court should have set aside a verdict in favor of plaintiff."

The syllabus in *Marble v. City of Worcester, supra,* correctly reflects all that was involved and decided in that case. It was as follows: "If a horse drawing a vehicle, though driven with due care, becomes frightened and excited by reason of the striking of the vehicle against a defect in the highway, frees himself from the control of the driver, turns, and, at the distance of fifty rods from the defect knocks down a person on foot in the highway, who is using reasonable care, the city or town bound to keep the highway in repair are not responsible for the injury so occasioned, though no other cause intervene between the defect and the injury. Thomas, J., dissenting."

In *National Benefit Ass'n v. Grauman, supra,* the applicability of the case is indicated by the following paragraph of the syllabus: "Where the risk is limited to a case of death proximately caused by physical injuries of which there shall be some visible external sign, the complaint must make such a case; but the fact that the injury produced apoplexy does not render it any less the cause of death."

This completes a review of all the cases cited in support of the second paragraph of the syllabus in *National Masonic Accident Ass'n v. Shryock, supra,* and it has failed

to convince us of the correctness of the principle in said paragraph embodied. In our opinion the question of what is the proximate cause of death in an action like that now under consideration, is a question of fact to be determined by the jury from a consideration of the evidence and the determination of this question should not be withdrawn from the jury unless, from an admitted state of facts, all reasonable men fairly exercising their judgments must draw the same conclusion. These propositions are sustained by the authorities cited in *Travelers Ins. Co. v. Melick, supra*, as well as by the adjudication of this court. (*Suiter v. Park Nat. Bank*, 35 Neb. 372; *Habig v. Layne*, 38 Neb. 743; *Chicago, B. & Q. R. Co. v. Hildebrand*, 42 Neb. 33; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642.) Whether the injury in this case was the proximate cause of the death of Mr. Shryock was purely a question of fact, for it involved the determination upon evidence of the relations between alleged causes and effects and nothing more. It cannot be said that the evidence was so clearly in support of one theory that no reasonable man, fairly exercising his judgment, could have refused his assent thereto. As to the proximate cause of the death of Mr. Shryock the special findings of the jury must be deemed conclusive, and in this condition we leave this branch of the case.

There was some contention that the statements of Mr. Shryock made a few hours afterwards as to the cause of the injury to him were not a part of the *res gestæ*, and, therefore, should not have been admitted in evidence. We have already quoted from the testimony of Mr. Robinson, a witness for the defendant in the district court, and a reference to this quotation will show that this witness, in response to interrogatories propounded by the defendant, repeated these statements of Mr. Shryock, consequently we cannot say that it was prejudicial error to permit the reiteration of these same statements by witnesses examined on behalf of plaintiff.

It was insisted that there should have been a demand

for an assessment under the terms of the policy before suit brought, and that only a court of equity could grant relief. In the policy there was a provision that the association did not agree to pay to any certificate holder or beneficiary a greater sum than would be realized by said association from one assessment of $2 each upon all assessable holders of certificates, assessable at the date of the action. It is provided in section 110, chapter 43, Compiled Statutes, with reference to fraternal benefit associations, that any such association shall not be permitted to issue a certificate to exceed the sum of $1,000 until it shall have at least 2,000 members. The certificate in this case was for the sum of $3,000. The association therefore could only insist that it had less than 2,000 members by showing affirmatively that it had been transacting business in violation of the terms of the statute which authorized its existence. This could not be tolerated. As $2 per capita on a membership of 2,000 would realize more than the amount of the claim of Mrs. Shryock, there was no necessity for invoking the powers of a court of equity for an accounting and assessment.

It is urged that the court erred in refusing to permit the introduction of the written testimony of Dr. Leonhardt given on a former trial. As this proposed testimony was not embodied in the bill of exceptions, it cannot be assumed that its rejection operated to the prejudice of the association.

It is not considered necessary to state at length the evidence in relation to an alleged oral instruction to the jury. After a prolonged deliberation the jury was brought into the court room that it might be ascertained whether any assistance could properly be rendered toward bringing about an agreement upon a verdict, and the court, on finding this to be impossible, sent the jury back to its deliberation, requesting, however, that if possible the members should try to come to an agreement. No sufficient reason for concluding that this was prejudicial has been advanced and we can conceive of none.

The questions involved in these proceedings have been, in the main, considered as general propositions, whether they arose upon the introduction of testimony or upon the giving or refusal to give instructions. We have considered all the assignments of error and have found none to the prejudice of the plaintiff in error. The judgment of the district court is therefore

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. E. B. COWLES, ADMINISTRATOR OF THE ESTATE OF WILLIAM D. FELKNER, DECEASED.

FILED MARCH 17, 1898. No. 7922.

Master and Servant: INJURY TO SERVANT: CONTRIBUTORY NEGLIGENCE: EVIDENCE. The evidence in this case examined, and *held* to disclose such contributory negligence on the part of plaintiff that a verdict and judgment in his favor cannot be sustained.

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

M. A. Low, W. F. Evans, L. W. Billingsley, and *R. J. Greene,* for plaintiff in error.

J. H. Broady and *John Heasty, contra.*

RYAN, C.

This action was brought by William D. Felkner in the district court of Jefferson county for the recovery of damages alleged to have been sustained by him while in the employ of the Chicago, Rock Island & Pacific Railway Company. There was a verdict, on which judgment was rendered for plaintiff in the sum of $2,500. During the pendency of this error proceeding in this court Felkner died and there was a revivor of the action against his administrator. The parties hereinafter will be desig-

nated plaintiff and defendant according to the status of each when the case was in the district court.

The negligence of the defendant charged in the petition was, in substance, as follows: February 12, 1894, and for a long period prior thereto, plaintiff was a wiper in defendant's employ and as such he was under the sole control, directions, and orders of the night foreman of defendant's engine-house at Fairbury. On the date above mentioned plaintiff was ordered by said night foreman to take certain engines in defendant's yards to coal chutes in said yards and fill the tenders thereof with coal and return the same to the engine-house to be placed in stalls therein. Pursuant to said orders, at about 10 o'clock P. M., on said day, plaintiff took one of defendant's engines from the side track on which it stood and caused it to be propelled to defendant's coal chutes and thereupon filled the tender with coal. In the performance of the work required of him to be performed it became necessary for plaintiff to climb from the cab of said engine to the top of the tender or tank thereof and, by the use of a shovel provided by defendant for that purpose, to remove the coal or a part thereof from the apron of the coal chute into the tender and to scatter the same around therein, to permit said apron to be elevated to its proper place. Plaintiff alleged further that he, for the purpose aforesaid, did climb from the cab to the top of the tank, and, after having hoisted the apron and adjusted the coal, attempted to climb back from the top of said tender into the cab, in order to start said engine and move the same to the place to which, by the defendant's said foreman, he had been directed to return it. While plaintiff was climbing from the top of the tender into the cab of the engine he was, as he alleged in his petition, thrown violently from the top of said tank or tender, a distance of twelve feet, to the ground and seriously and permanently injured. The agencies which caused his being thus thrown were at considerable length described in the petition, and, summarized, are as fol-

lows: (1) The failure of the defendant to light the yards in the vicinity of the coal chutes; (2) the failure of defendant to provide plaintiff with a lantern or light of any kind; (3) the failure of defendant to provide any steps, holds, or other means by which plaintiff could safely climb from the top of the tank or tender to the floor of the cab, when so required to do in the performance of the work required of him; (4) that defendant had knowingly and negligently permitted the iron strap, by which the tool-box on the right side of said tank or tender was fastened and locked in its place, to become broken and out of repair and to stick up over the top of said tool-box; (5) that the work plaintiff was then performing was entirely outside his duties as a wiper and a work he was not accustomed to perform, and that defendant neglected and failed to give plaintiff any instructions regarding the proper and safe manner of performing the work; (6) that defendant should have required an hostler to run said engine to and from the coal chutes, and if this had been done, it would not have been necessary for plaintiff to attempt to climb from the top of the tank to the floor of the cab at said time and place, but defendant carelessly and negligently failed to cause its engine hostler to run said engine to and from the coal chutes, but required plaintiff to do this in addition to the work of loading the tender with coal, thereby requiring the plaintiff to do the work of two men.

In considering the evidence we should bear in mind the fact that the jury found for the plaintiff, and that from this circumstance it is presumable that the testimony of plaintiff was accepted as true, rather than such as was in conflict therewith. The fifth and sixth of the above assignments of negligence should be rejected from consideration, for the reason that the injury complained of cannot, either upon the averments of the petition, or upon plaintiff's own testimony, be attributed to the fact that plaintiff ran the engine to the coal chute, or to the fact that he was not accompanied by an hostler. The

accident happened, according to his own theory, after the coal had been emptied from the chute into the tender and while the engine was not in motion. Whether the movements of this engine, while coming to the chute had been under the control of an hostler or of some other person was therefore immaterial, for the injury was not attributed to the engine's movement and we cannot consider the proposition that, if there had been an hostler in charge, the plaintiff might have done differently. The other assignments of negligence may be grouped under three heads, of which the first was the failure to furnish proper light; the second was the failure to provide steps, holds, or other means, by which plaintiff could safely climb from the top of the tank to the floor of the cab; and, third, that defendant knowingly permitted the strap on the tool-box to become broken and to project above the top of said box. There was no evidence that this strap ever was broken, but the testimony of plaintiff was that he thought that, in the darkness, he stumbled upon it. What importance should be attached to the existence of this strap is therefore properly referable to the importance to be attached to the claim that there was an insufficiency of light and of means for furnishing light. There was no attempt to show that the tender could have been provided with steps, holds, or other means whereby plaintiff, with safety, might have descended from the top of the tender or tank to the floor of the cab. There is, therefore, to be considered but one general proposition, and that is the want of light to enable plaintiff from the top of the tank to reach the floor of the cab. This general proposition is divisible into two elements—the failure to light the yards and the failure to provide a lantern, but these need not be considered separately. From the averments of the petition it has already been made to appear that before the accident happened plaintiff had safely taken the engine to the chute, filled its tender with coal, and necessarily had gone to the top of the tank. He was provided with a

torch which, while he was filling the tender, rested on the cab of the engine. This torch was extinguished before plaintiff had completed the distribution of coal in the tender and he was thereafter left in darkness to shovel the coal as best he could. He testified that after he had put up the chute he went to get his torch and get down, and, in climbing on the right hand side of the tender, he slipped on something and fell to the frozen ground. After testifying as above plaintiff was again interrogated concerning the accident, and testified as follows:

Q. How did it happen that you fell?

A. Because I did not have any light to see with.

Q. You stated something about stumbling. What did you say about that?

A. I stumbled on something; I cannot tell what it was.

Q. Where did you try to get down?

A. I tried to get down on the side of the tender and get down into the cab.

Q. Whereabouts?

A. Right on the top of the tool-box.

Q. Down at the end?

A. Down at the end between the engine and the tender, between the cab and the tender.

Q. Was there any step there to get down?

A. No, sir.

Q. Well, did you look afterwards to see what you stumbled on?

A. Yes.

Q. What did you find there?

A. I found a piece of strap-iron sticking up on what is called the hitch, over the tool-box. I could not tell whether it was that I stumbled on or not.

Q. That is upon the top of the tank, is it?

A. Yes, sir.

On cross-examination plaintiff testified that he began to work for the defendant at Fairbury in 1891, and since that date had been in its employ about half the time until

the accident, and that much of the time he was in the employ of the company he was a wiper. Being recalled for cross-examination plaintiff testified as follows:

Q. When you were up and the light had gone out you was going to state something, as I understood, about the wind. Do you remember what you were going to say?

A. I remember now. I went to light the torch, but it was so windy I could not light it on top of the tender to see to get down by.

Q. The whole tender was then filled with coal?

A. Yes, sir.

On a further subsequent cross-examination plaintiff gave the following testimony:

Q. You stated you were on the tender when you fell?

A. Yes, sir.

Q. The tender was which way from the engine?

A. The tender was east of the engine.

Q. You was on the right-hand side of the tender?

A. On the tender or the tank.

Q. What part of the tank were you standing on when you fell?

A. On the tool-box some place.

Q. Near the tool-box?

A. On the top of it or near it, I could not say positively.

Q. You could not say whether you was on the top or near the tool-box?

A. No, sir.

Q. How wide a space do you think you walked on at that place?

A. Well, I should judge it was a foot and a half.

Q. What had been the width of the space you had walked on from the time you started to go to get the torch? You say you walked some distance before you fell.

A. I stumbled over the coal to get the torch. Yes, sir.

Q. How far had you been from the torch when you first started to get it?

A. Perhaps to the back end of the tender.

Q. That would be about how far, Mr. Felkner, as near as you can give it?

A. In the neighorhood of six or eight feet.

Q. And the space you was walking on was about how wide?

A. Well, I could not say positively that I staggered on it at the farther end. I climbed over the coal and started to get my torch.

The testimony of the plaintiff with reference to the happening of the accident has been given with circumstantial minuteness to show just how it was described by plaintiff himself. The substance of his testimony we think is correctly summarized in the following statement. He stopped the engine in such a position that the tender could be filled from the chute and then, or before that time, placed his lighted torch on the top of the cab. While filling and arranging the coal in the tender the torch was extinguished. Having finished the arrangement of the coal in the tender, plaintiff attempted to walk, at first, perhaps, on the coal, but at any rate when the accident happened, on the tank from near the rear end of the tender, to the cab. This tank was about a foot and one-half in width and on it there was a tool-box, of which the top could be fastened down by means of a hasp. The theory of plaintiff was that he probably stumbled on this hasp and fell to the ground and was thereby seriously injured. There was no explanation by plaintiff as to why he failed to walk upon the coal instead of the tank, though he was examined on that subject. He admitted that he fully knew how the engine, the tender, and the tank, were constructed, and how they were situated with reference to each other, and yet that, of his own accord, he took the risk of being able, in the darkness, to walk on the tank, knowing, as he must have known, that in following the tank he must, in some way, get over the tool-box resting upon it. This testimony was undisputed; indeed, no person other than plaintiff was able to testify with relation to these particular matters. Though it is conceded, as

plaintiff claims, that the foreman improperly required plaintiff to fill the tender lighted only by a torch, it would be a most violent assumption to suppose that this foreman was required to anticipate that, if his torch should be extinguished, plaintiff, in the darkness, would attempt the perilous feat which he admits was attempted by him. As a matter of fact the injuries he sustained were, upon his own showing, attributable, in a very large degree, if not entirely, to his own negligence. The judgment of the district court is therefore reversed.

REVERSED AND REMANDED.

MCCORMICK HARVESTING MACHINE COMPANY V. JOHN G. GUSTAFSON.

FILED MARCH 17, 1898. No. 7906.

Action on Note: ANSWER: COUNTER-CLAIM. In an action for judgment on certain promissory notes the defendant answered that the notes had been given for a combined reaper and binder, in place of which, if it did not work to defendant's satisfaction, plaintiff had agreed to furnish a new machine. *Held*, That proof by defendant that the machine had been made to work to his satisfaction at one time, but that afterwards it had failed to work well, did not entitle the defendant, under the averments of his answer, to establish a counter-claim for damages and thus cancel the notes given by him.

ERROR from the district court of Wayne county. Tried below before ROBINSON, J. *Reversed.*

A. A. Welch, for plaintiff in error.

Frank Fuller, contra.

RYAN, C.

The McCormick Harvesting Company sought judgment in the district court of Wayne county upon three promissory notes made to it October 13, 1891, by John

G. Gustafson. In his answer the defendant alleged that he purchased from plaintiff a self-binder and reaper for which the notes sued on were given; that at the purchase of said machine and executing the notes the plaintiff warranted said machine to do good work and to defendant's satisfaction, and that thereupon defendant purchased said machine and executed said notes. It was alleged in the answer that the machine neither did good nor satisfactory work, and that plaintiff, though notified of the failure in these respects, had failed to make the machine work, from which failure it was alleged that the defendant had been greatly damaged, as the machine was worthless and of no value to him. It was furthermore averred in the answer that plaintiff had promised and agreed with defendant that if said machine did not do good work and to defendant's satisfaction, plaintiff would take back the machine and replace it with a new one, and that defendant had notified plaintiff of the defective working of said machine, but that plaintiff had failed, neglected, and refused to replace said machine with a new one and comply with the terms of its agreement in that regard, whereby defendant had been damaged in the sum of $200, for which sum he asked judgment. By a reply these allegations were denied, and on a trial there was a verdict for defendant, upon which verdict a judgment was rendered for costs.

The above averments of the answer may be reduced to a simpler form. They were, in effect, first, that the machine was sold with a warranty that it would do good work satisfactorily to defendant; second, that if this warranty failed, plaintiff would furnish a new machine; third, that it had failed to fulfill the warranty; and, fourth, that plaintiff, upon being notified of this failure, had neglected and refused to furnish a new machine, by reason of which failure the defendant had been damaged. In the answer there was no denial, except that "Defendant * * * denies that he is in any way indebted to plaintiff." With only this denial of a mere conclusion

plaintiff was entitled to a judgment for the amount of its notes, unless the four above propositions were established by the proofs. We shall therefore consider the evidence, especially as it bears upon the last of these propositions. The machine was sold to Gustafson about the middle of July, 1891. From the testimony of the defendant himself it seems that he used this machine in the summers of 1891 and 1892 for cutting all his small grain, but that during both of these seasons he made repeated complaints to the agents of plaintiff that the machine failed to do good work, and that in consequence of these complaints experts for the plaintiff frequently endeavored to put it in running order. In the year 1893 there was trouble with the machine again, and plaintiff sent another expert, whose efforts seem, from defendant's evidence, to have been more successful than any preceding efforts. At this point we shall take up the testimony of the defendant in his own language, which was as follows:

Q. Did he succeed in making it work?

A. Well, he worked with it not very much; stood there in the yard a while and he told me to go and hitch up the horses, and we went into the field and cut two acres and he got it to bind about half more than before, and he got it to bind so that it would not miss only now and then. And we went round—we cut about two acres, about an acre and a half in the piece I had left, and we went around the wheat field with twenty-five acres in, and I would not say that I missed more than one or two sheaves.

Q. How did it work after that?

A. He said come to town. We had a full talk out there. I said, "It is a shame to let me go this way if there was a man that could fix it and then have men come all the way from Omaha and work hard and could not make it work," and I said, "You come and don't work hard and you make it work," and he said, "Come to town this afternoon and pay for that machine," and I said, "I

show you," and I said, "You fix it sooner;" and I went to town,—thought I would see somebody that would know something about it,—and I said, "The machine is running lots better now, and if the machine works that way I will pay for it." * * * Well, he, this general agent, wanted me to pay. I got some letters from him. I cannot think what his name is till I look at it. It is the one that was here last time. He said I should pay them notes. I said, "I won't till I cut the rest of it, and if it keeps that way I shall, and if it goes back I won't;" and he says, "You have to," and he said, "I sue and beat you and take it to the supreme court."

Q. What did he do after that?

A. Nothing, and I haven't seen anything of them since.

Q. You went back and tried to cut with it?

A. I went back and it went back and wouldn't cut again, and I just left it and bought me another machine.

If the verdict of the jury can be at all sustained it must be upon this testimony alone, for none of defendant's witnesses testified to more than the failure of the machine to do good work, while the testimony of such witnesses of plaintiff as testified to this transaction was to the effect that at this trial of the machine it did work which was good and perfectly satisfactory to the defendant. It is true there was other evidence, for instance on behalf of plaintiff, that the failure was alone that of the binding apparatus, which could have been replaced at a trifling expense, but these facts were not pleaded. For the defendant there was testimony that after the above trial of the machine it became as worthless as before; but this consideration could not avail the defendant, for, tested by the averments of his answer, his relief was confined to the substitution of a new machine if that which he had purchased did not work to his satisfaction. According to his own testimony the defendant's latest expression to plaintiff or to plaintiff's agent, was of his satisfaction with the working of the machine. On the theory of his answer he was entitled to have his machine

repaired and made to work satisfactorily, and to the efforts to bring about these results he had a right to fix a limit at which a new machine must be furnished him. Under the averments of his answer, however, his remedy was strictly confined to this right of substitution. In other words, if the first machine did not work to suit him, he had an option to exchange it for another, but until this option was exercised and a new machine was denied him, he was not entitled to plead damages by way of counter-claim against the amount of his notes. This remedy was not available as a defense in the strict sense of that term, it was rather a counter-claim which, when it arose, might be pleaded affirmatively. When available the rule conforming the proofs to the pleading would be the same as is applicable to evidence offered to sustain the averments of a petition, and this rule is that the averments and proofs must correspond. (*Imhoff v. House*, 36 Neb. 28; *Powder River Live Stock Co. v. Lamb*, 38 Neb. 339; *Traver v. Shaefle*, 33 Neb. 531; *Luce v. Foster*, 42 Neb. 818.) The evidence did not sustain the defendant's counter-claim as pleaded and the judgment of the district court is therefore

REVERSED.

T. E. HALL ET AL. V. STATE OF NEBRASKA, EX REL. FRED RENARD.

FILED MARCH 17, 1898. No. 9839.

1. **County Drainage:** FUNDS. The provisions of chapter 89, article 1, Compiled Statutes, examined, and *held* to require the formation of a special ditch fund, which alone is available for payments for improvements made entirely within a single county, under the provisions of said article, and that for the purpose of making such payments moneys can only be obtained from the county general fund by borrowing as provided by section 26 of said article. RAGAN, C., dissenting.

2. ——: ——: MANDAMUS. By mandamus a board of county commissioners cannot be compelled to provide, through a use of the

county general fund, for the payment of a warrant which, upon its face, requires that payment thereof, when made, shall be charged to a certain designated ditch fund.

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

W. G. Sears, for plaintiffs in error.

H. H. Bowes, contra.

RYAN, C.

The error alleged in this proceeding was the allowance of a writ of mandamus by the district court of Burt county. By assignment, the relator was the holder of a written instrument of the following form:

"No. 10. STATE OF NEBRASKA, BURT COUNTY. $2,670.56.
"TEKAMAH, July 5th, 1889.

"Treasurer of Burt County: Pay A. E. Wyckoff, or bearer, twenty-six hundred seventy and fifty-six one-hundredths dollars, and charge to account of Peterson ditch fund.

L. J. MALMESTEN,
"*Co. Clerk.*

"T. E. HALL,
"*Ch. Board Com'rs.*"

This warrant was presented to the county treasurer and indorsed not paid for want of funds. On it there were credited several payments, so that there remained a balance unpaid of but $1,025, when, in this action, there was made the application for a mandamus requiring the county board of supervisors of Burt county to levy a tax on the taxable property of said county and include the same in the levy for the year 1897, in a sufficient sum to pay the balance unpaid on said warrant. There was an answer, to the several paragraphs of which a general demurrer was interposed and, except as to one paragraph, exclusive of the general denial, sustained. With reference to the facts pleaded in this paragraph there

was a trial, which resulted in a finding adverse to the existence of such pleaded facts, and upon this finding and the ruling on the demurrer there was directed to issue a peremptory writ as prayed.

It was recited in the alternative writ that the above warrant was issued to A. E. Wyckoff for the construction of a ditch in Burt county, known as the Peterson ditch, and, on its face, the payment of this warrant when it, by the county treasurer, should be paid was required to be charged to account of "Peterson ditch fund." In the argument of the case it was conceded by both parties that the warrant in question had been issued under the provisions of chapter 89, article 1, Compiled Statutes. This article makes provisions that the county commissioners of any county may cause to be located and constructed, straightened, widened, altered, or deepened, any ditch, drain, or water course, when the same is necessary to drain any lot, lands, public or corporate road, or railroad, and will be conducive to the public health, convenience, or welfare. It is required that the petition, on which the county board may assume to act, shall be signed only by owners of lots or lands to be benefited by the proposed improvement. On presentation of such a petition the board may avail itself of the assistance of a surveyor or engineer, if it chooses so to do; but it shall view the line of the proposed improvement and determine by actual view of the premises along, and in the vicinity thereof, whether the improvement is necessary, or will be conducive to the public health, convenience, or welfare, and whether the line described is the best route, and shall report their findings, which shall be recorded by the county clerk. After these preliminaries the commissioners are required to direct the line to be established by a survey, and to be marked by stakes. The engineer or surveyor who is intrusted with the work just indicated is also required to return a schedule of all lots, land, public or corporate roads, or railways that will be benefited by the proposed improvement, whether such

benefited property abuts upon the improvement or not. With this schedule there is required to be filed an apportionment of a number of linear feet and cubic yards to each lot, tract of land, road, or railroad, according to the benefits which will result to each from the improvement, and an estimate of the cost of location and construction to each and a specification of the manner in which the improvement shall be made and completed. Within thirty days after the compliance by the surveyor or engineer with the above requirements the county clerk is required to fix a day for hearing, of which hearing notice issued by said clerk must be served upon each owner of property who will be affected by the proposed improvement. Subsequently, the county commissioners, when they find due service of the above notice has been made upon the owners of property to be affected, shall examine the report of the surveyor or engineer and the apportionment by him made, and, if the latter is in all respects fair and just according to benefits, shall approve and confirm the same. If they find said apportionment unfair or unjust, they shall so order and so amend it as to make it fair and just according to benefits. After the action indicated has been taken by the county commissioners, the persons specially affected by the proposed improvement may assert their rights and, by appeal, secure redress of their wrongs. In any event the several amounts are to be assessed against each tract in proportion to the benefits thereto. The provisions of section 19, chapter 89, article 1, Compiled Statutes, are as follows: "The work shall be done under the supervision of the surveyor or engineer appointed by the commissioners, and when a part not less than one-fourth of the portion included in any contract is completed according to the specifications, he shall give the contractor a certificate thereof, showing the proportional amount which the contractor is entitled to be paid according to the terms of the contract, and the county clerk shall, upon the presentation of such certificate, draw his war-

rant upon the treasurer for seventy-five per cent of the amount, and the treasurer will pay the same out of any funds in the treasury applicable to such purpose; *Provided,* That no proportional amounts shall be certified or paid unless the whole of such contract exceeds two thousand lineal feet." Section 26 of the article just referred to is in this language: "The board of county commissioners of any county in this state are hereby authorized whenever they deem it necessary to create a county ditch fund, to consist of taxes collected on county levies, and all balances remaining unexpended of special ditch funds arising from excess of assessments made on ditch improvements after the expenses thereof have been fully paid, and the commissioners are hereby authorized, whenever necessary, to borrow from the county general fund for the benefit of the above named ditch fund, and all money so borrowed shall be, as soon as practicable, returned to the county general fund." It is perhaps well to say that in this entire article there is to be found no provision authorizing the levy of a general tax for the payment of improvements of the class therein contemplated, except where such improvement is located in more than one county. When this is the case the board of commissioners of each county is specially authorized to levy a general tax, not exceeding one mill on the dollar of the assessed valuation of the county, sufficient for the location and construction of such portions of the respective ditches as may be located by them, or by the commissioners of two or more counties, as may be apportioned to such county, and the removal of any obstruction that may accumulate in any portion of any ditch. (Compiled Statutes, ch. 89, art. 1, sec. 25.)

The reference in section 26 to "taxes collected on county levies" obviously refers to such taxes as may be collected under the provisions of section 25, and to none other. Under the provisions of section 26, the board of county commissioners, if it deems such a course advisable, may create a special fund made up of these taxes

and all balances remaining unexpended of special ditch funds arising from excess of assessments made on ditch improvements after the expenses thereof have been fully paid. Whenever it is necessary, the county commissioners are authorized by section 26 to borrow from the county general fund for the benefit of said ditch fund, but all money so borrowed shall be, as soon as practicable, returned to the county general fund. The provisions of section 19 have been quoted, and the scope of this law quite fully described, to show that when the proceeds of the special assessments come into the hands of the county treasurer, they are regarded by the statute as constituting a special fund to be applied in the payment of the improvement as it progresses, and the requirement that the county treasurer shall make these payments is in no degree dependent upon the action of the board of county commissioners authorizing such payments. It seems, however, that the legislature apprehended that under certain circumstances special funds applicable to payments for improvements of this character might properly be placed under the control of the board of county commissioners, and in that event the board was authorized, in a certain specified manner, to create a county ditch fund. It was also contemplated by the legislature that emergencies might require the use of more money than such ditch fund might contain, and in the event of such contingency arising there was given a discretion to the county board to borrow from the general fund for the benefit of the ditch fund, but in that event the money borrowed must be returned to the county general fund as soon as practicable. In every part of this article the ordinary means of paying for improvements by it contemplated are required to be treated as constituting a special fund available for the limited purpose indicated, and for no other.

The record in this case discloses that the warrant, for the payment of which it is sought to compel an assessment of all the taxable property of the county, was issued

for work performed by A. E. Wyckoff in the construction of what is known as the Peterson ditch, and on the face of the warrant itself the treasurer of said county is required to charge the amount thereof, when paid, to the "account of the Peterson ditch fund." If there shall issue a writ of mandamus as prayed, the supervisors of Burt county will be compelled to levy a tax on the taxable property of the county at large, sufficient to pay the balance due on this warrant. In effect, the board of supervisors of Burt county, in that event, will be required to increase the county general fund by a tax sufficient to pay this warrant. The statute has vested in the board the power to resort to the general fund for the purpose of reinforcing the county ditch fund, only by borrowing what may be necessary for that purpose, and whether or not even this shall be done is a matter left entirely discretionary with the board, but in any event the money taken from the general fund must be returned thereto as soon as practicable. The obvious intention of the legislature that from parties specially benefited by the improvement a special fund shall be created, the requirement in the warrant itself that the payment of it, when made, shall be charged to a specially designated ditch fund, and the refusal of the county board to borrow from the general fund to reinforce the special ditch fund, would afford sufficient ground for a refusal to issue a writ of mandamus to compel payment of this warrant to be made out of the county general fund, even if therein there were sufficient moneys available for that purpose. (*Ackerman v. Thummel*, 40 Neb. 95; *Palmer v. Vance*, 44 Neb. 348.) When, however, in addition to this requirement, it is sought by mandamus to compel the assessment and collection of a general county tax in order that the above questions may become living issues, this relief must be denied. The judgment of the district court is therefore reversed and this proceeding is dismissed.

JUDGMENT REVERSED AND CAUSE DISMISSED.

RAGAN, C., dissents.

EUNICE BALDWIN, APPELLANT, V. WELLINGTON R. BURT ET AL., IMPLEADED WITH MARION G. ROHRBOUGH, APPELLEE.

FILED MARCH 17, 1898. No. 9646.

1. **Judicial Sales:** CONFIRMATION: JURISDICTION. A court, called upon to confirm a sale pursuant to its decree directing such sale, discovered that it had no jurisdiction to enter such decree against the party resisting confirmation. *Held*, Not erroneously to have refused confirmation.

2. **Order Quashing Summons:** DECREE. After the entry of a decree, upon a showing that no service of the summons upon which the decree was based had in fact been made, it was erroneous to quash such summons upon a motion asking solely for that order.

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

The opinion contains a statement of the case.

Duffie & Van Dusen and *E. G. Thomas*, for appellant:

The district court has control of its own judgments during the term, but this control ends with the term. Thereafter the power to interfere in any manner with a judgment entered must be exercised within the limits prescribed by statute and governed by fixed principles of law. (*Smith v. Pinney*, 2 Neb. 139; *Nuckolls v. Irwin*, 2 Neb. 60.)

An order of the district court quashing the service of a summons cannot be reviewed by the supreme court before final judgment is rendered in the action. (*Standard Distilling Co. v. Freyhan*, 34 Neb. 434; *Persinger v. Tinkle*, 34 Neb. 5; *Lewis v. Barker*, 46 Neb. 662.)

The judgment is conclusive until set aside. (*Kizer Lumber Co. v. Mosely*, 56 Ark. 544; *Pettus v. McClannahan*, 52 Ala. 55; *Janes v. Howell*, 37 Neb. 320; *Osborn v. Gehr*, 29 Neb. 661; *Pilger v. Torrence*, 42 Neb. 903; *Hall v. Hooper*, 47 Neb. 111.)

The court had no jurisdiction to entertain the motion

to quash the return of service. (*Kohn v. Haas*, 12 So. Rep. [Ala.] 577; *Brewster v. Norfleet*, 22 S. W. Rep. [Tex.] 226; *Gillilan v. Murphy*, 49 Neb. 779; *Smith v. Pinney*, 2 Neb. 139; *Ganzer v. Schifflauer*, 40 Neb. 633; *McBrien v. Riley*, 38 Neb. 561; *McCann v. McLennan*, 3 Neb. 25; *Kemp v. Cook*, 18 Md. 130; *Bronson v. Schulten*, 104 U. S. 425; *Culter v. Button*, 53 N. W. Rep. [Minn.] 872; *Brown v. County of Buena Vista*, 95 U. S. 157; *Bissell v. New York C. & H. R. R. Co.*, 67 Barb. [N. Y.] 385.)

Byron G. Burbank, contra:

Marion G. Rohrbough was not in fact served with summons in this case and the court acquired no jurisdiction over him to enter a decree of foreclosure against him herein. The sheriff has no authority to sell his lot and the court has no authority to confirm the title thereto in the appellant.

The return of an officer of service of summons is not conclusive and may be shown by clear and satisfactory evidence to be untrue. (*Holliday v. Brown*, 33 Neb. 657, 34 Neb. 232; *Connell v. Gallagher*, 36 Neb. 749; *Wyland v. Frost*, 75 Ia. 210; *Randall v. Collins*, 58 Tex. 232; *Walker v. Lutz*, 14 Neb. 276; *Newlove v. Woodward*, 9 Neb. 502; *Meyers v. Le Poidevin*, 9 Neb. 535; *Frazier v. Miles*, 10 Neb. 109; *Prugh v. Portsmouth Savings Bank*, 48 Neb. 414; *Campbell Printing Press & Mfg. Co. v. Marder*, 50 Neb. 283.)

Rohrbough had the right to specially appear and object to the jurisdiction of this court over him. (*Cobbey v. Wright*, 23 Neb. 250; *Brown v. Rice*, 30 Neb. 236; *Enewold v. Olsen*, 39 Neb. 64.)

RYAN, C.

In this case the district court of Douglas county entered a decree of foreclosure against numerous defendants February 10, 1897. Among these defendants was the appellee, Marion G. Rohrbough, the owner of the north half of lot 28, in Griffin & Isaac's Addition,

Omaha. Of this particular half lot it was provided in said decree that an independent sale should be made, and accordingly a sale of the same was advertised by the sheriff of Douglas county to take place June 1, 1897. After the adjournment of the February term of said district court Marion G. Rohrbough gave notice to the plaintiff that on May 8, 1897, he would call up for hearing his objection to the jurisdiction of the aforesaid court. The grounds of this objection were that said Rohrbough had never been served with summons and had never appeared in this case. There was a motion to strike this objection from the files, which motion was considered in connection with the objection against which it was directed.

To an understanding of the questions involved in this inquiry it is proper to state that the service of the summons challenged was returned as having been made on Marion G. Rohrbough, August 14, 1891. There was a decree previous to that above noted, which original decree was reversed by this court. (*Baldwin v. Burt*, 43 Neb. 245.) On the hearing of the objection to the jurisdiction there was submitted evidence which satisfied the district court that no service of summons had ever been made on Rohrbough, and accordingly there was a finding supplemented by this language: "It is therefore ordered, adjudged, and decreed by this court that the said special appearance of the said Marion G. Rohrbough made herein be, and hereby is, sustained; that the objection to the jurisdiction of this court over the said Rohrbough be, and the same is hereby, sustained, and that the pretended service of summons herein upon the said Marion G. Rohrbough be, and the same is hereby, wholly quashed, set aside, and held for naught, and of no force and effect." The above recited proceedings were had May 28, 1897. The half lot of Mr. Rohrbough, nevertheless, was, on June 1, immediately thereafter bidden in by the plaintiff, Eunice Baldwin, at the sheriff's sale, for $6,500. June 25, 1897, there was served on the attorney of Rohrbough a notice that on the day following there would be asked

a confirmation of the aforesaid sheriff's sale. To this confirmation Rohrbough interposed the following objections:

"1. That it was on the 28th day of May, 1897, finally adjudged and determined by said court that no service of summons was ever made upon him in this case in any manner whatsoever or at any time or place and that he has never appeared in this court in this case, and that this court has finally determined that this court has no jurisdiction whatsoever over him or his rights or property in this case.

"2. That this court is without jurisdiction of any kind or nature whatsoever over the said Marion G. Rohrbough or his rights or property, as shown by the decree quashing the service of summons against the said Marion G. Rohrbough now on file in this court in this case, and that this court is without jurisdiction to enter any final order or decree confirming the pretended sale of the real estate of the said Marion G. Rohrbough claimed to have been made by the said sheriff to the plaintiff herein, Eunice Baldwin, on the 1st day of June, 1897."

Upon the showing by sufficient evidence of want of jurisdiction as above alleged the motion for confirmation of the sale was overruled, and to this ruling we shall first direct our attention.

In *Parrat v. Neligh*, 7 Neb. 456, it was held by this court: "In a sale made under the authority of a decree in equity, the court is the vendor, and the commissioner making the sale is the mere agent of the court. The decree directs the sale of the property and the application of the proceeds to the payment of the debt, and is a sufficient warrant of authority to the officer to sell as directed in the decree." The views thus expressed find sanction in *Rector v. Rotton*, 3 Neb. 177; *Bachle v. Webb*, 11 Neb. 423; *Gregory v. Tingley*, 18 Neb. 318; *Burkett v. Clark*, 46 Neb. 466; *Johnston v. Colby*, 52 Neb. 327; *Amoskeag Savings Bank v. Robbins*, 53 Neb. 776. In the case at bar, when the court was called upon to confirm the sale conducted

under its supervision, it was disclosed by a defendant, expressly notified of the pending confirmation proceedings by the purchaser, that, as against the rights of such defendant, the court had never had any jurisdiction whatever. It is now insisted that the court, notwithstanding this condition of affairs, should have assumed that it possessed jurisdiction and, on that unwarranted assumption, should have confirmed the sale. If a confirmation had been ordered, a deed would have been issued to the purchaser, by virtue of which he might have executed a conveyance which would have clouded the title of the defendant not served with summons. Courts are not required to do vain things; neither are they required to assume to exercise a jurisdiction which they do not possess. It was held by this court in *Moore v. Boyer*, 52 Neb. 446, where the judgment defendant had paid to the clerk of the district court a sufficient sum to satisfy a decree before a sale thereunder, that because of such payment and satisfaction a confirmation of such sale, when made, had been properly denied. In *Webber v. Kirkendall*, 44 Neb. 766, the third paragraph of the syllabus is in this language: "The power to correct errors in their own proceedings is inherent in all courts of general jurisdiction, and in the exercise of that discretion they are governed not alone by this solicitude for the rights of litigants, but also by considerations of justice to themselves as instruments provided for the impartial administration of the law." We cannot say that the district court in refusing to confirm the sale committed error, and therefore its order in this regard is affirmed.

It does not result from this, however, that we must sanction the order quashing the summons of which service had been made and returned more than six years before. Of his own volition the defendant interposed objection to the jurisdiction of the court to render the judgment complained of, and moved that the court quash the summons upon which it had acted in rendering such judgment. At this time the summons was *functus officio.*

It is possible that the court may have been misled by this summons with the indorsed return of service thereon when it entered its decree, but this isolated fact, if such it was, was immaterial on the objection to jurisdiction, for the court had passed the point at which these evidences were to be examined as the basis of its judgment. From the time the decree was entered it became the evidence of the facts which it recited, subject, of course, to an attack upon it for want of jurisdiction; but such an attack could only be directed against the decree and not against the evidence upon which it depended for its validity. If in the further history of this case it becomes necessary to use the summons and the return thereon, this evidentiary matter should be considered for whatever it may be worth, and therefore the order quashing the same is reversed.

JUDGMENT ACCORDINGLY.

IRVINE, C., not sitting.

HARRISON, C. J.

I concur in the conclusions herein reached.

NORVAL, J.

I express no opinion.

RAGAN, C., concurring with RYAN, C.

1. Did the court err in quashing the officer's return of service of summons on the appellee? I think it did. The court which rendered the foreclosure decree had jurisdiction of the subject-matter of that suit, and the record on its face disclosed that the court had jurisdiction of Marion R. Rohrbough, a defendant in that suit, the appellee here. The order or decree of the district court quashing the officer's return on the summons is, in effect, an order vacating the foreclosure decree. It is true the court does not expressly say that the foreclosure decree is vacated or set aside, but precisely the same re-

sult follows from the order as if it was couched in those express terms. To say that the order under review is not one vacating the foreclosure decree is to disregard entirely the purpose and effect of the order. It is not a sufficient answer to say: "I did not throw down the roof of your house. It fell of itself. All that I did was to remove the walls from under it." When the court made the order under consideration quashing the officer's return the foreclosure decree fell of itself. This order quashing this officer's return on the defendant in the foreclosure suit was made at a term subsequent to the term at which the decree was rendered, and treating the order as one vacating the decree, the question is whether the order was erroneous. If the appellee had never been summoned in the foreclosure suit, if the return of the officer that he duly served the summons issued in that case for appellee on him was false, then the foreclosure decree, so far as it affects appellee, was irregularly obtained, within the meaning of subdivision 3, section 602, of the Code of Civil Procedure; and the district court, at a term subsequent to the term at which such decree was rendered, was vested with authority by sections 602 and 603 of said Code to vacate that decree on the motion of the appellee. But the court had no authority to set aside the foreclosure decree so far as it affected appellee until it had found and adjudged that he had a *prima facie* defense to the foreclosure action. (Code of Civil Procedure, sec. 606; *Thompson v. Sharp*, 17 Neb. 69; *Lander v. Abrahamson*, 34 Neb. 553; *Gilcrest v. Nantker*, 47 Neb. 58; *Western Assurance Co. v. Klein*, 48 Neb. 904; *Bankers Life Ins. Co. v. Robbins*, 53 Neb. 44, and cases there cited.) The court found that the return of the officer was false; that appellee had never been served with process, and that therefore the court rendering the foreclosure decree had no jurisdiction over appellee, and thereupon quashed that service and in effect vacated the foreclosure decree. But the district court neither found nor adjudged that the appellee had any defense of any character whatever

against this foreclosure action. Though the foreclosure decree was void as to appellee for want of the court's jurisdiction over him, the court did not have authority to vacate that decree at a term subsequent to its rendition until it found and adjudged that the appellee had a *prima facie* defense to the action in which the decree was rendered. The court therefore erred in quashing the return of the service of summons.

2. Did the court err in setting the sale aside? Certainly not. At the time the motion to confirm was made the record before the court disclosed upon its face that the decree upon which the sale was based had been set aside. The court then might of its own motion have set the sale aside. This does not conflict with *Roberts v. Robinson*, 49 Neb. 717, where it was held that a district court was not invested with discretion to arbitrarily set aside a judicial sale when it appeared that the sale had been fairly and regularly conducted and all provisions of the statute had been complied with. That decision is based on a construction of section 498 of the Code of Civil Procedure, but this section, while it neither authorizes nor directs a court to go out of the record before it for a reason for setting aside a sale, contemplates a valid decree. Furthermore, a motion to confirm a sale is, in effect, a challenge to all parties made liable by the decree or whose property will be taken or affected by the sale made thereunder to appear and show cause, if any they have, why such sale should not be confirmed; and I have not the slightest doubt but that a party whose property has been sold at judicial sale may, on motion to confirm such sale, appear and as a cause why the sale should not be confirmed show to the court that the judgment or decree, so far as he is concerned, is void because the return of the officer that he had served him with process is false in fact, and in such case I have no doubt the court might postpone the hearing of the motion to confirm and give the party objecting a reasonable time in which to take steps to vacate the decree by a motion or

petition under sections 602 and 603 of the Code, or by an independent suit in equity have the issues framed and tried; and if it resulted in a finding and judgment that the service was false and the decree therefore void, and that the objector had a *prima facie* defense to the action on which the decree was based, vacate the same, and this of course would vacate the sale made. In the case at bar the court had already found and decreed that the decree on which this sale was based was void as against Rohrbough. This finding and decree of the court was erroneous; but the learned district court thought it was right or it would not have made it, and it was obliged to consider it valid and act upon it until it was reversed. The finding and decree that the service was false and the foreclosure decree void were a part of the record in the case in which the sale was made and which the court was asked to confirm. In setting aside the sale, then, the court did not go out of its record.

3. It becomes necessary now to notice the theory as I gather it from the record of the eminent counsel who represents the appellee here. That theory seems to be that, where one is made defendant to a suit, summons issued for him which is never served, but which the officer returns duly served on him, he is thereupon adjudged in default and judgment rendered against him, and the term of court at which the judgment is rendered adjourns without day, such a defendant, at a subsequent term of the court, may disregard the provisions of sections 602 and 603 of the Code permitting him to file a motion or petition to vacate such judgment, and without filing a petition in equity to vacate the judgment, may appear specially and show the court that the judgment against him is void because the return of the officer is false, and upon the court's finding that issue in his favor, and without any other finding whatever, quash the service in the record and thereby in effect vacate the judgment. This theory is as ingenious as it is dangerous, and is, I am persuaded, a practice not in force in this state, if it is in

any other. Even in states where the old common-law practice prevails the uniform holding is that a motion to set aside a default comes too late when made at a term subsequent to the one at which the judgment is rendered, and that at a term subsequent to the term at which a judgment was rendered the courts have no authority to set aside a judgment rendered by default. The party's remedy then is by a suit in equity to vacate the judgment. (*Cook v. Wood*, 24 Ill., 295; *Messervey v. Beckwith*, 41 Ill. 452; *Scales v. Labar*, 51 Ill. 232; *Kohn v. Haas*, 12 So. Rep. [Ala.] 577; *Kizer Lumber Co. v. Mosely*, 20 S. W. Rep. [Ark.] 409.) The principles upon which these cases rest are that the application to set aside a default is one which invokes the equity powers of the court which rendered the judgment, and that after the adjournment without day of the term of court at which a judgment is rendered, the discretionary power of the court over that judgment ceases; and from that time the judgment can only be vacated or modified by appellate proceedings, or by an independent suit in equity by motion or petition filed in accordance with some provision of the statute or Code. This is the rule practiced in the state of Ohio, from which state we borrowed sections 602, 603, and 606 of our Code. (*Huntington v. Finch*, 3 O. St. 445; *Myres v. Myres*, 6 O. St. 221; *Hettrick v. Wilson*, 12 O. St. 136.) It is likewise the practice in force in this state. (*Smith v. Pinney*, 2 Neb. 139; *Carlow v. Aultman & Co.*, 28 Neb. 672; *Smithson v. Smithson*, 37 Neb. 535; *McBrien v. Riley*, 38 Neb. 561; *Ganzer v. Schiffbauer*, 40 Neb. 633.) As sustaining the practice which the counsel for the appellee has adopted in this case he cites *Porter v. Chicago & N. W. R. Co.*, 1 Neb. 14; *Cleveland Co-Operative Stove Co. v. Grimes*, 9 Neb. 123; *Cleghorn v. Waterman*, 16 Neb. 226; *Cobbey v. Wright*, 23 Neb. 250; *Brown v. Rice*, 30 Neb. 236. But in none of these cases was the motion to quash the service of summons made after judgment and after the adjournment of the term of court at which the judgment was rendered, and I am aware of no case which holds

that it is the proper practice to quash the service of a summons after judgment and after the adjournment of the term of court at which the judgment was rendered, and thereby vacate the judgment or decree without a finding and an adjudication that the party seeking to have the summons quashed had some defense to the action on which the judgment vacated was based. Our practice is prescribed by the Code, and in the respect under consideration follows closely the equity rules of the old chancery courts that he who seeks equity must do equity and that the court will not do a useless thing. And though a judgment has been rendered against a defendant without service upon him, the courts will not do the unnecessary thing of setting that judgment aside when the defendant had no defense to the cause of action on which the judgment was based.

SULLIVAN, J.

I agree to the conclusion reached, but not to all that is said in either of the foregoing opinions. The order quashing the service was erroneous because it was, in legal effect, a vacation of the decree, accomplished in an unauthorized manner. Confirmation of the sale was properly refused only because the erroneous order quashing the service had extinguished the officer's authority to make the sale.

WILLIAM R. MYERS V. STATE OF NEBRASKA.

FILED MARCH 17, 1898. No. 9825.

Rape: CONSENT: EVIDENCE. Under section 12, chapter 4, Criminal Code, it is not necessary to show want of consent on the part of the female to sustain a conviction for rape, or for an offense the elements of which are included within such charge of rape.

ERROR to the district court for Lincoln county. Tried below before GRIMES, J. *Affirmed.*

Wilcox & Halligan, for plaintiff in error.

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

RYAN, C.

In this case the information filed in the district court of Lincoln county charged that on or about June 14, 1897, William R. Myers, in said county, being a male person of the age of eighteen years and upwards, did knowingly, willfully, unlawfully, and feloniously carnally know and abuse one Ethel Griffith, a female child under the age of eighteen years of age and previously chaste. The verdict of the jury was that the accused was guilty of an assault with intent to commit rape upon the person of Ethel Griffith. The accused was thereupon sentenced to imprisonment in the penitentiary for a term of two years. The testimony of the prosecuting witness was to the effect that Myers fully accomplished his purpose, and, corroborated as this was by the testimony of the sheriff as to admissions made by the accused, we are at a loss to understand the theory on which the jury could conclude that there was but an assault with intent to commit rape. The ages of the prosecuting witness and of the accused were sufficiently established as averred in the information, though there was sufficient evidence to have justified the jury in concluding that the prosecuting witness at the time of the alleged offense was at least eighteen years of age. As already indicated, there was sufficient proof of the consummation of the crime alleged, and the accused cannot complain that the jury refused to act logically to his disadvantage. The lesser offense was included within the charge of the greater, even though, in fact, there might have been consent. (*Davis v. State*, 31 Neb. 247.)

It is urged that the court did not define an assault, but to this we cannot yield assent, for while it is true that there was no express definition of an assault, there was

in one instruction a statement of the theory of the accused very favorable to him, and the jury were told that if they found the facts as claimed under said theory, they should find for the defendant. On this point he had all, and, as we think, even a little more, than he was entitled to. In prosecutions under the statute pursuant to which the information in this case was drawn the consent of the prosecuting witness was an immaterial consideration, and the district court properly so ruled. There is found no error in the record and the judgment of the district court is

AFFIRMED.

UNION PACIFIC RAILWAY COMPANY V. SAMUEL J. ELLIOTT.

FILED MARCH 17, 1898. No. 7928.

1. **Master and Servant:** NEGLIGENCE OF EMPLOYER: EVIDENCE. Evidence examined, and *held* to sustain the findings of the jury that the negligence of the plaintiff in error was the proximate cause of the injury received by the defendant in error, and that the latter's contributory negligence was not the cause of his injury.

2. **Evidence:** DECLARATIONS. A declaration or admission, to be competent evidence as *res gestæ*, must be made at such time and under such circumstances as to raise the presumption that it is the unpremeditated and spontaneous explanation of the matter about which made.

3. **Railroad Companies:** HIGHWAY-SIGNALS: NEGLIGENCE: INSTRUCTIONS. An instruction of the district court examined and *held* not erroneous.

4. ———: EVIDENCE OF NEGLIGENCE. Irrespective of a statute on the subject, the starting or running of a switch engine in a switch yard, filled with a network of tracks upon which cars are constantly moving, and in which yardmen are at work, without the ringing of a bell or the blowing of a whistle, is evidence of negligence.

5. ———: ACTION FOR PERSONAL INJURIES: FELLOW-SERVANTS. In a suit against a railway company by an employé thereof for damages for an injury sustained through the negligence of a co-employé a defense, that the two employés were fellow-servants, must be presented to and passed upon by the district court either by a pleading, instruction, or in some other manner, or it cannot be considered by this court.

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

W. R. Kelly, E. P. Smith, and *W. H. Platt,* for plaintiff in error.

W. A. Prince and *J. W. Edgerton, contra.*

RAGAN, C.

The track of the Union Pacific Railway Company extends due east and west through the city of Grand Island, in this state, and at that city the railway company has an extensive switch yard filled with a network of tracks. Two of these tracks extend in straight lines east and west through the yards, and the south rail of the north track is about eight feet from the north rail of the south track. The west end of this switch yard is crossed at right angles by Walnut street, and on the west side of this street is a sidewalk. In August, 1892, and for some years prior thereto, Samuel Elliott was an employé of the railway company and located at said city. His duties were to inspect the wheels, brakes, and appliances and oil the journals of cars which came to that station. In this switch yard the railway company kept one or more switch or shifting engines, which were constantly employed, both day and night, in moving cars from one portion of the yard to another. About 5 o'clock in the afternoon of August 5, 1892, Elliott heard, or saw, coming from the west on the north of the two tracks just mentioned a train and at once started towards this train for the purpose of inspecting its wheels, brakes, etc., and oiling its journals when it should reach the yard and stop. The train which Elliott saw on the north track came to a stop about the time its engine reached the west side of Walnut street, and at that time Elliott had reached that locality, and, while standing between the two tracks with his back toward the south one, was struck by a passing switch engine running west on said

track and injured, to recover damages for which he brought this suit in the district court of Hall county against the railway company. He had a verdict and judgment which the railway company has filed a petition in error here to review. Of the numerous arguments urged for a reversal of this judgment we deem it necessary to notice in this opinion only the following:

1. The first contention of the railway company is that the finding of the jury that the proximate cause of Elliott's injury was its negligence is not supported by sufficient evidence. The evidence on behalf of Elliott tended to show that he took his position between the two tracks immediately west of Walnut street for the purpose of performing his duties when the train coming from the west should come to a stop; that the train stopped and he was standing with his face toward the train waiting for the brakeman to uncouple the air hose; that he had been in that position not more than a minute when he was struck by the switch engine running west on the south track, and that no warning of the approach of this shifting engine was given by bell, whistle, or otherwise. It is true that the evidence on behalf of the railway company tended to show that the bell upon the switch engine was ringing all the time it was running west. We cannot say that the jury's finding that the bell on the switch engine was not rung and the whistle not sounded is not supported by sufficient evidence.

2. A second contention of the railway company, and a more serious one, is that the jury's finding that Elliott's injury was not the result of his own negligence is unsupported by sufficient evidence. The evidence shows, we think without conflict, that Elliott was well acquainted with this switch yard, with the manner in which business was transacted there; that he knew that there were two switch engines in the yard which were constantly passing and repassing over the various tracks thereof; that the two tracks mentioned were unobstructed, and a person being upon either track could see trains or engines

on either of the tracks for a considerable distance east or west of him; that he had been at work in this yard for a number of years; that there was ample space between these two tracks for him to oil and inspect the wheels and brakes of the train on the north track and at the same time be safe from contact with a passing engine on the south track; that at the time he was struck by the switch engine he was standing nearer the south track than was necessary, and that he might have stood one or two feet further north and been in a place of safety. In addition to this undisputed evidence the railway company's testimony tended to show that a moment before the switch engine reached Elliott he took a step backward toward the south track, thus bringing himself in line with the cross-beam on the pilot on the approaching switch engine; that before taking this step backwards Elliott neglected to look along the south track toward the east from which the switch engine was approaching, and that had he done so he would have seen the shifting engine and escaped the injury. In other words, the contention of the railway company is that the evidence shows that Elliott, when he first stood with his face to the north waiting for the brakeman on the train, that had just come in, to uncouple the air hose, was in a place of safety, and, without any excuse, he negligently put himself in a place of danger. The testimony on behalf of Elliott on this feature of the case tends to show that as he started toward the west end of the yard to meet the incoming train he crossed the track on which that train was approaching just ahead of it, or just before it reached Walnut street, and at that time he looked east along the south track and saw no engine of any kind on that track; that the train on the north track came to a stop while he was standing on the sidewalk on the west side of Walnut street immediately south of where the train stopped, with his face toward the north, and waiting there for the air hose to be uncoupled, intending then to commence his work of inspection, oiling, etc.; that while he was stand-

ing nearer the south track than was absolutely necessary he was in that position for only a minute, and had taken the position south of the north track which he did, in order to be safe from the incoming train. He denied taking a step backwards toward the south track just before being struck by the engine. With the evidence in this condition the jury reached the conclusion that Elliott was not guilty of negligence which contributed to his injury. The question is a very close one, and had we been trying it, we might have been of a different opinion from the jury; but we are constrained to say that we think the jury's finding does not lack support in the evidence. Elliott was in the discharge of his duty, and while he stood nearer the south track than was necessary, before commencing his work, he stood there for a very short space of time, and if at the moment he thought of his dangerous proximity to the south track, he had the right to suppose that no engine would pass on that track without signaling its approach by bell or whistle or otherwise.

3. The third argument relates to the ruling of the district court in permitting Elliott to testify to a conversation that occurred between himself and the engineer of the shifting engine after the accident. Just a few seconds after the engine struck Elliott the switch engine came to a stop. The engineer jumped down from his cab, went up to Elliott, and, according to the latter's testimony, the following conversation took place between them (we quote from Elliott's evidence): "Why, he come up to me and he says, 'Sam, I don't want you to think I done that on purpose.'. He said, 'all the time I had after I saw you was just to throw the engine over.' He meant to reverse it. I made the remark there, I said, 'it looked a damn sight like it, Ed, you running up there and not ringing your bell or whistle,' and he said he knew it did, but 'don't say anything about it.' That is his words." It is now insisted that the court erred in permitting this evidence to go to the jury. We think the statements of

the engineer of the shifting engine were made so near the time of the happening of the accident and under such circumstances as to bring the statements within the rule making it admissible as *res gestæ*. The rule is that a declaration to be competent as *res gestæ* must be made at such a time and under such circumstances as to raise the presumption that it was an unpremeditated and spontaneous explanation of the matter about which the declaration was made. (*Missouri P. R. Co. v. Baier*, 37 Neb. 235; *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578; *City of Friend v. Burleigh*, 53 Neb. 674, and cases there cited.) This conclusion does not contravene the holding of this court in *Gale Sulky Harrow Co. v. Laughlin*, 31 Neb. 103, where it was ruled: "The declarations of an agent made after the transaction to which they relate is fully completed and ended are not competent to be given in evidence as a part of the *res gestæ*." In that case the admission of the agent was made two days after the occurrence of the transaction to which the admission related. (*Robinson v. Superior Rapid Transit R. Co.*, 68 N. W. Rep. [Wis.] 961.)

4. Another argument is that the court erred in giving to the jury the following instruction: "The statutes of this state provide that 'a bell of at least thirty pounds weight or a steam whistle shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half to go to the informer, and the other half to go to this state, and also be liable for all damages which shall be sustained by any person by reason of such neglect.' And in this case, if you find from the evidence that as the engine approached the crossing on Walnut street a bell was not rung nor a whistle blown as required by the statute, and that the accident complained of was

caused by the failure to ring the bell or blow the whistle, without any fault or negligence on the part of the plaintiff, then you should find for the plaintiff." We think the giving of this instruction was not error. The statute was enacted for the protection of travelers upon highways and streets. Elliott, though not a traveler, was using Walnut street or the sidewalk thereof. But if the instruction was erroneous, we do not think it prejudiced the railway company, as, after all, the effect of the instruction was to tell the jury that if Elliott's injury, without negligence on his part, was caused by the failure of a bell to be rung or a whistle to be blown on the switch engine, then the railway company was liable. The quoting of the statute by the court in the instruction added nothing whatever to it, as, irrespective of a statute, the starting or running of a switch engine in a switch yard filled with a net-work of tracks, upon which cars and engines are constantly moving and in which yardmen are constantly at work, without the ringing of a bell or the blowing of a whistle, is evidence of negligence.

5. A final argument, which we notice, is that the men in charge of the shifting engine and Elliott were fellow-servants, and that, therefore, the common master, the railway company, is not liable for the injury which Elliott sustained through the negligence of his fellow-servant. Under the facts of this case the correctness of this contention may be conceded. But the railway company did not interpose as a defense to the action that these men were fellow-servants, either by way of answer, instruction, or, so far as the record discloses, in any other manner; in other words, that defense was not presented to the district court, and such a defense cannot be urged for the first time in this court. Whether two servants of the same master are fellow-servants is sometimes a question of law and sometimes a question of fact, sometimes a mixed question of law and fact, to be determined in each case by the particular facts and circumstances of that case; and we do not decide that the defense, to be availa-

ble, must always be pleaded, but such a defense, to be available here, must, either by the pleadings, the instructions, or in some other manner, be presented to and passed upon by the district court. The judgment of the district court is

AFFIRMED.

OMAHA FIRE INSURANCE COMPANY V. MARY E. HILDEBRAND.

FILED MARCH 17, 1898. No. 7954.

1. **Insurance:** PROOFS OF LOSS: WAIVER. A provision of an insurance policy requiring the insured to furnish the insurer proofs of loss is one inserted therein for the benefit of the insurer and one which it may waive.

2. ———: ———: ———. This waiver of proofs of loss may be made before suit brought by the insurer's unconditional denial of its liability for the loss, or it may be waived after suit brought by the insurer's interposing to the action a defense that the policy was not in force at the time of the loss.

3. ———: TIME TO SUE FOR LOSS. Where an insurance company, either before suit brought or by answer in the action, denies that the policy was in force when the loss occurred, it cannot avail itself of the provision in the policy that no action shall be brought until sixty days after receipt of proofs of loss and adjustment. *Home Fire Ins. Co. v. Fallon*, 45 Neb. 554, followed.

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

Jacob Fawcett and *W. W. Morsman*, for plaintiff in error.

George A. Magney, contra.

RAGAN, C.

The Omaha Fire Insurance Company has filed a petition in error here to review a judgment pronounced against it in favor of Mary E. Hildebrand by the district court of Sarpy county.

1. The insurance company had insured against loss or

damage by fire to the extent of $1,000 certain real estate belonging to Mrs. Hildebrand and occupied by her as a dwelling-house and hotel. She brought this suit on that insurance contract, making the insurance policy a part of her petition, and alleging that the insured property was wholly destroyed by fire January 13, 1895, while the policy was in force; that she furnished the insurer proofs of loss under the policy as required thereby, and that the insurance company had refused to pay the loss, or any part of it. The insurer by its answer admitted the execution and delivery of the policy sued on, the destruction of the insured property by fire January 13, 1895, denied all other allegations of the petition, and interposed as an affirmative defense to the action that at the time of the fire the insured property was, and had for some time been, vacant and unoccupied, contrary to the provisions of the insurance contract. On the trial Mrs. Hildebrand did not prove that she had ever furnished the insurance company any "proofs of loss" or proof of the destruction by fire of the insured property. The insurer, to sustain its defense that the property was vacant and unoccupied at the date of the fire, called as its only witness Mrs. Hildebrand, who testified positively that the insured property was at the date of the fire occupied by herself as a residence and for hotel purposes; or, in other words, Mrs. Hildebrand's testimony entirely disproved the defense interposed to the action by the insurer. The district court directed the jury to return a verdict in favor of the insured. This was correct. The provision of an insurance policy which requires the insured to furnish the insurer proofs of loss is one inserted in the policy for the benefit of the insurer to enable it to ascertain the cause of the fire and the extent of the damage, and it is a provision which the insurer may waive; and where it denies that the policy was in force at the time of the loss of the insured property, it will be conclusively presumed to have waived the furnishing to it of proofs of loss. If the policy was not in force at the

date of the fire, the furnishing by the insured of proofs of loss would be an entirely useless proceeding. This waiver of furnishing proofs of loss may be made before suit is brought by the insurer's unconditional denial of its liability for the loss, or it may be waived after the suit is brought by interposing to the action a defense that the policy was not in force at the time of the loss. In *Phœnix Ins. Co. v. Bachelder*, 32 Neb. 490, it was held: "The absolute denial by the insurer of all liability, on the ground that the policy was not in force at the time of the loss, is a waiver of the preliminary proofs of loss required by the policy." To the same effect are *St. Paul Fire & Marine Ins. Co. v. Gotthelf*, 35 Neb. 351; *Western Home Ins. Co. v. Richardson*, 40 Neb. 1; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, 569; *Dwelling-House Ins. Co. v. Brewster*, 43 Neb. 528; *German Ins. & Savings Institution v. Kline*, 44 Neb. 395; *Home Fire Ins. Co. v. Hammang*, 44 Neb. 566; *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb. 537; *Ætna Ins. Co. v. Simmons*, 49 Neb. 811; *Home Fire Ins. Co. v. Fallon*, 45 Neb. 554. The defense interposed by the insurer that the policy was not in force at the time of the fire because the insured property was vacant and unoccupied, contrary to the provisions of the policy, rendered it unnecessary for the insured to prove the allegation of her petition that prior to the bringing of the suit she had furnished the insured with proofs of loss.

2. The policy in suit provided that the loss should become due and payable sixty days after the insured had furnished the insurer proofs of loss. This suit was brought within less than sixty days after the date of the loss, and it is now insisted that the suit was prematurely brought, as at the date of the institution of the action the debt was not due. But the provision in the contract that the insured's claim should become due sixty days after he furnished proofs of loss was a contract for credit, and since the insurer waived the proof of loss it waived the credit, and the insured's claim

matured when the loss occurred. The precise question was before this court in *Home Fire Ins. Co. v. Fallon*, 45 Neb. 554, and it was there held: "Where an insurance company, either before suit brought or by answer in the action, denies that the policy was in force when the loss occurred, it cannot avail itself of a provision in the policy that no action shall be brought until sixty days after receipt of proofs of loss and adjustment."

The judgment of the district court is

AFFIRMED.

FRANCIS N. GIBSON V. E. L. REED ET AL.

FILED MARCH 17, 1898. No. 7944.

1. **Suit on Injunction Bond:** DAMAGES. In a suit upon an injunction bond given to procure an order restraining plaintiff from enforcing the collection of a judgment, his measure of damages is all damages which he has sustained by reason of the wrongful issuing of such injunction order.

2. ———: ———. All reasonable and necessary counsel fees, expenses, and costs which plaintiff has paid or for which he has become liable by reason of the injunction, and the depreciation in value of the judgment debtor's property, on which the judgment was a lien, during the time the injunction was in force, are proper elements for consideration in determining what damages plaintiff has sustained.

3. **Wrongful Injunction:** EVIDENCE. An order dissolving an injunction and dismissing the proceeding is generally an adjudication that the injunction ought not to have been granted.

4. **Injunction Bond:** SURETIES: ESTOPPEL. The signers of an injunction bond are estopped in a suit thereon from asserting as a defense that the injunction order was broader than the application therefor.

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

E. H. Wooley, for plaintiff in error.

A. N. Sullivan and *Byron Clark*, *contra.*

RAGAN, C.

In the district court of Cass county Francis N. Gibson recovered a judgment against E. L. Reed. After the adjournment of the term of court at which this judgment was rendered Reed filed a petition to vacate the judgment. While this proceeding was pending, an execution was issued and by the sheriff levied upon certain personal property of Reed,—certificates of stock in a corporation,—and thereupon Reed filed in the case an application for, and obtained, an order of injunction "Enjoining the defendant [Gibson] and the sheriff of said county of Cass, in the state of Nebraska, from collecting by execution the judgment of the defendant [Gibson] against the plaintiff [Reed] obtained on the 4th day of December, A. D. 1889, and from selling on July 21, 1890, the stock of the plaintiff [Reed] in the Weeping Water Lime & Stone Company until the further order of this court." This injunction order was issued on July 12, 1890, and remained in force to December 7, 1891. Reed at no time filed a bond or undertaking to supersede the judgment against him or stay the issuance of an execution thereon. To procure the order of injunction, Reed as principal, and Adams as surety, executed an undertaking or bond conditioned that they would pay to Gibson all damages which he might sustain by reason of such injunction, if it should be finally decided that such injunction ought not to have been granted. The present suit was brought by Gibson on this injunction bond and resulted in a verdict and judgment dismissing Gibson's action, to review which judgment he has filed here a petition in error.

The evidence tended to show that while the injunction order was in force the personal property which Gibson had caused to be levied upon depreciated in value; that at the time the injunction order was issued Reed had a large amount of real estate in said Cass county upon which such judgment was a lien, and between the date of the injunction order and the date of its dissolution such

real estate depreciated in value; and while the injunction order was in force Reed caused valuable buildings and fixtures to be severed and removed from his real estate. The real estate and personal property of Reed were sold on execution after the dissolution of the injunction, but a sufficient amount was not realized from such sale to satisfy Gibson's judgment. Gibson claimed upon the trial of this case that the depreciation which took place in the corporation stock of Reed and the depreciation which his real estate underwent during the time the injunction order was in force were elements to be considered by the jury in determining what damages he, Gibson, had sustained by reason of the wrongful granting of the injunction. The district court by its instructions, however, limited the damages which Gibson might recover to the depreciation in value of the corporation stock during the time the injunction was in force. This was error. The theory of the district court seems to have been that the injunction order was broader than the application for the injunction; that the latter only prayed the court for an injunction to restrain the sheriff and Gibson from selling the corporation stock levied upon, whereas the order of injunction issued restrained both the sheriff and Gibson from collecting by execution the judgment which Gibson had against Reed. The order of injunction is broader than the application made therefor, but the parties who signed this injunction bond are in no position to take advantage of that fact. They filed the application for an injunction, they procured the injunction order to be issued, and they cannot now be heard to say that they are not liable for the damages which Gibson has sustained by reason of the injunction, because the order restraining him and the sheriff was broader than the application made for such order. The order, in express terms, commanded Gibson and the sheriff to refrain from enforcing or collecting the judgment. This order they were bound to obey at their peril. They were not obliged to look back to the application for

an injunction, and then determine for themselves that they would obey so much of the injunction order as was asked for by the application and disregard the rest. The obligation of the signers of the injunction bond was to make good to Gibson all damages which he might sustain by reason of the injunction order, if it should be finally decided that the order ought not to have been granted. The order of the district court dissolving the injunction and dismissing the injunction proceeding was, in effect, an adjudication by the court that the injunction ought not to have been granted. (*Dowling v. Polack*, 18 Cal. 626.) Gibson was entitled to recover on the injunction bond all damages suffered by him which damages were the result of the injunction. If during the time this injunction was in force the corporation stock upon which Gibson had caused an execution to be levied depreciated in value, such depreciation was an element of Gibson's damage; if during the time the injunction was in force the real estate of Reed depreciated in value from any cause, that depreciation was an element of damage; and if during the time the injunction was in force Reed removed, caused, or permitted to be removed, valuable fixtures and buildings from the real estate upon which the judgment of Gibson was a lien and thereby depreciated in value the real estate, this was an element of damage; and, in addition to these elements, Gibson was entitled to recover all the reasonable and necessary attorney's fees, costs, and expenses which he had sustained, or for which he had become liable, in resisting and attempting to discharge the injunction proceeding. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

T. N. HARTZELL V. A. C. MCCLURG ET AL.

FILED MARCH 17, 1898. No. 7889.

1. **Action on Note:** PETITION. A petition in a suit upon a promissory note, made a part of the petition, which alleges that the defendant executed and delivered the note to the plaintiff, that such note is wholly due and payable, and that the defendant wholly neglects to pay the same, or any part thereof, states a cause of action.

2. ———: ———. It is not essential to such a petition that it negative the payment of the note by a stranger thereto.

3. **Construction of Pleadings.** The allegations of every pleading are to be liberally construed. (Code of Civil Procedure, sec. 121.)

4. **Parties in Appellate Court:** PLEADING. The fact that the parties made plaintiffs in the district court are different from those named in the summons issued by the justice of the peace affords no reason for striking off the petition filed in the district court.

5. **Pleading and Proof.** Every material allegation of a petition not denied by answer, except allegations of value or amount of damage, stands confessed by the defendant and need not be proved by the plaintiff. (Code of Civil Procedure, sec. 134.)

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

Dryden & Main, for plaintiff in error.

Calkins & Pratt, contra.

RAGAN, C.

T. N. Hartzell has filed a petition in error in this court to review a judgment of the district court of Buffalo county recovered against him in favor of A. C. McClurg and others on a promissory note.

1. The first argument is that the petition does not state a cause of action. The petition alleges that the plaintiffs are partners doing business under the firm name of A. C. McClurg & Co.; that on April 19, 1894, for a valuable consideration, Hartzell executed and delivered to plaintiffs his promissory note in writing, wherein and whereby he promised to pay to plaintiffs' order the sum

of $150 September 1, 1894, with interest thereon from date until paid; that said note is wholly due and payable, and defendant wholly neglects to pay the same or any part thereof. Wherefore plaintiffs demand judgment against said defendant, etc. The argument that the petition does not state a cause of action is that it does not expressly aver what amount is due on the note; that any amount is due to the plaintiffs from the defendant on the note; that it does not expressly allege that the note is unpaid. We think, however, the petition states a cause of action. The averments of the petition sufficiently show the making of a contract and its breach. It is said by counsel for the plaintiff in error that the petition does not negative the possibility that the note might have been paid by some party other than the maker. This is true, but a petition does not need to negative such a possibility. If the note had been paid by the maker or any other person, that was affirmative matter of defense. (*Ashland Land & Live Stock Co. v. May*, 51 Neb. 474, and cases there cited.) But it is insisted that the petition is to be construed most strongly against the pleader. Assuming this argument to be correct the pleading is not to be given an unreasonable construction, and such a construction as requires it to negative the payment of the note sued upon by any person whomsoever. But the petition is not to be strictly construed, for section 121 of the Code of Civil Procedure requires the court in the construction of every pleading to give the averments thereof a liberal construction for the purpose of determining its effects and with a view to promoting substantial justice between the parties litigant. The contention of counsel that the petition does not state a cause of action because it does not expressly allege non-payment is supported by *Schroufe v. Clay*, 11 Pac. Rep. [Cal.] 882, but we decline to follow that case.

2. This suit was originally brought before a justice of the peace, and after McClurg and others had filed their petition in the district court Hartzell moved that court

to strike the petition from the files for the reason that the plaintiffs in the district court were different from the plaintiffs named in the summons in the justice court. The overruling of this motion is the second argument made here. The court did not err in overruling this motion. The fact that the parties made plaintiffs in the district court were different from those named in the summons issued by the justice of the peace afforded no reason whatever for the striking off of the petition filed in the district court. The summons issued by the justice notified Hartzell that he had been sued by A. C. McClurg & Co. The petition filed in the district court is in the name of A. C. McClurg and Frederick B. Smith, the petition alleging that they were partners doing business under the firm name of A. C. McClurg & Co. The only part of the justice's record which we have is the summons, and for aught the record shows McClurg and Smith may have been the plaintiffs in the bill of particulars filed in the justice court. Counsel in their brief say that the bill of particulars in the justice court was amended so as to make McClurg and Smith plaintiffs instead of A. C. McClurg & Co., and that this was done over their objection. But we are not reviewing the ruling of the justice of the peace in allowing that amendment to be made. If counsel thought that action of the justice erroneous, they should have taken an exception to it and taken the case on error to the district court. But if the plaintiffs in the bill of particulars before the justice were the same plaintiffs that are in the petition in the district court, and counsel say that they are, this is an unanswerable reason why the district court should have overruled counsel's motion to strike the petition from the files.

3. A third argument is that the finding upon which the judgment is based is unsupported by the evidence. This argument is based on the contention that the petition avers that McClurg and Smith were partners doing business under the name of A. C. McClurg & Co. Counsel say there is no evidence in the record to sustain this

averment. The eminent counsel seem to overlook the fact that they did not answer in the district court the petition of McClurg & Co. The allegation in the petition that McClurg & Smith were copartners doing business under the firm name of McClurg & Co. was a material allegation, and since that allegation was not denied by an answer it stood confessed and McClurg & Co. were not obliged to introduce any evidence to prove it. (Code of Civil Procedure, sec. 134; *Slater v. Skirving*, 51 Neb. 108.)

4. A fourth argument here is that the court erred in admitting in evidence the note sued on, as there was no proof that it was the property of the plaintiffs below. The petition alleged that Hartzell made and delivered the note to the plaintiffs McClurg and Smith, and that they were copartners doing business as A. C. McClurg & Co. These were material allegations which by Hartzell's failing to answer stood admitted by him as true, and McClurg & Co. were not obliged to prove it; and since the note was payable to A. C. McClurg & Co. and in their possession, the presumption arose that they owned it, and, in the absence of a denial of those facts, that presumption became conclusive.

The judgment of the district court is

AFFIRMED.

T. N. HARTZELL V. A. C. MCCLURG ET AL.

FILED MARCH 17, 1898. No. 7888.

1. **Action on Note:** PETITION. In a suit upon a promissory note the petition, after alleging the execution and delivery of the note by the defendant to the plaintiff, averred: "That afterwards the plaintiff sold and discounted said note, and that the holder thereof, at its maturity, presented it for payment and it was dishonored; that by reason of the neglect and refusal of the said defendant to pay said note the plaintiff was compelled to 'take up' said note." *Held*, That this averment was the ordinary and concise language of business men, and, when liberally construed in accordance with section 121 of the Code of Civil Procedure, means that the plaintiff, upon the dishonor of the note, paid the amount

due thereon to its holder, and he thereupon surrendered the note to plaintiff.

2. ——: ——: INDORSEE. The money paid by plaintiff to the indorsee was not paid for the benefit of the maker of the note, but to protect the plaintiff's contract of indorsement; and the effect of the payment and redelivery of the note to the plaintiff was to vest the plaintiff with the equitable title to the note.

3. ——: ——: ——. The equitable owner of a negotiable promissory note in his possession may maintain an action thereon in his own name.

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

Dryden & Main, for plaintiff in error.

Calkins & Pratt, contra.

RAGAN, C.

T. N. Hartzell has filed a petition in error in this court to review a judgment of the district court of Buffalo county recovered against him in favor of A. C. McClurg and others on a promissory note.

The facts in this case and the arguments assigned here for its reversal are the same in all respects as in *Hartzell v. McClurg*, 54 Neb. 313, just decided, with this exception: In this case the petition, after alleging that Hartzell executed and delivered to McClurg & Co. the note sued on, that it was due and no part thereof had been paid, and that the maker of the note had neglected and refused to pay the note, averred "that afterwards [that is, after the execution and delivery of the note by the maker] the said plaintiffs, for a valuable consideration, sold and discounted said note, and that at the maturity thereof the owners, in the usual course of business, caused said note to be presented at the City National Bank, the place of payment thereof, for payment, and payment was refused thereof, and that said note was protested for non-payment therefor, at the costs of $3.10, and that by reason of the neglect and refusal of the said

defendant to pay said note these plaintiffs were compelled to take up said note and pay said protest fees." The argument is now made that the petition does not state a cause of action because it does not allege that McClurg & Co. repurchased the note from their indorsee, or at the bringing of the suit were the owners of the note; in other words, the argument is that the averment of the petition that the plaintiffs were compelled to take up said note when it was dishonored has no legal meaning; that the petition is to be construed most strongly against the plaintiffs, and that if the averment that the plaintiffs were compelled to take up said note means anything it means that they paid the note, and that therefore the plaintiffs have no cause of action against the maker of the note on that instrument, but their cause of action against the maker of the note is for money paid for his use. The Code requires every pleader to state the facts which constitute his cause of action or defense in ordinary and concise language. (Code of Civil Procedure, sec. 92.) We think this petition complies with the Code. The averment that the plaintiffs were compelled to take up the note indorsed by them upon its dishonor is the language of business men. It is ordinary and concise language, and, liberally construed in accordance with section 121 of the said Code, it means that the note not being paid when due, the plaintiffs, in compliance with their contract of indorsement, paid the amount of it to the holder and that he surrendered it to them. The argument that the plaintiffs cannot maintain an action on the note but must sue the maker thereof for money paid for his use is untenable. The money paid by the plaintiffs to the indorsee of this note was not paid for the benefit of the maker of the note, but it was paid to protect the plaintiffs' contract of indorsement, and the effect of the payment and the redelivery of the note to the plaintiffs was to vest the plaintiffs with the equitable title to the note; and if it be conceded that the note has never been formally indorsed back to the plaintiffs, and

that therefore they have not the legal title to the note, they still had the equitable title, and being the equitable owners of the note and in possession of it, they could maintain an action upon it in their own names. (*Greeley State Bank v. Line*, 50 Neb. 434.)

JUDGMENT AFFIRMED.

RICHARDSON DRUG COMPANY, APPELLEE, V. HENRY MEYER ET AL., APPELLANTS.

FILED MARCH 17, 1898. No. 7850.

1. **Equity Jurisdiction.** The test of equity jurisdiction is the absence of an adequate remedy at law; but an adequate remedy at law is one that is as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity.

2. ——: FRAUDULENT CONVEYANCES: PROCEEDS: INJUNCTION. Evidence examined, and *held* to sustain the findings of the district court.

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

Cavanagh & Thomas, for appellants.

Bartlett, Baldrige & De Bord, contra.

RAGAN, C.

In October, 1892, Park Bros., a copartnership, owned a grocery stock and a drug stock in Waterloo, Nebraska, and on that date they sold their drug store to one J. M. Park, a brother of the individual brothers of the copartnership, but himself not one of said copartners. Subsequently J. M. Park became indebted to the Richardson Drug Company for drugs purchased. In December, 1892, Park Bros. failed and Meyer & Co. brought suit against them and caused both the grocery store and drug store to be attached as their property. The Richardson Drug

Company brought a suit, without attachment on its claim, against J. M. Park, and on February 18, 1893, recovered a judgment. Before this judgment was recovered Park Bros. had moved to discharge the attachment sued out by Meyer & Co., and before, or about the time that the Richardson Drug Company's suit went to judgment, an agreement was entered into between Park Bros., Meyer & Co., and J. M. Park, the effect and result of which was that Park Bros. abandoned their defense to the action of Meyer & Co., withdrew their application to discharge the attachment, paid J. M. Park $175 in money, and took the entire property attached in satisfaction of their indebtedness of Park Bros. Meyer & Co., however, did not dismiss their attachment proceeding, nor their suit, but took judgment and caused the attached property to be sold. This sale occurred about the time the Richardson Drug Company obtained its judgment, and it, execution having been issued and returned unsatisfied, then instituted this suit to enjoin the sheriff from paying the proceeds of the sale of the drug store to Meyer & Co. and prayed the court for a decree that the proceeds of the sale of the drug store should be paid to it, at least to the extent of satisfying the judgment against J. M. Park. The drug company had a decree as prayed, and Meyer & Co. have appealed.

1. The first argument is that the petition of the drug company does not state a cause of action; or, as counsel for appellants put it, it shows upon its face that the drug company had a complete and adequate remedy at law for the relief sought by this injunction proceeding, and was therefore not entitled to the protection of a court of equity. This argument is untenable. The test of equity jurisdiction is the absence of an adequate remedy at law; but an adequate remedy at law is one that is as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity. (*Bankers Life Ins. Co. v. Robbins*, 53 Neb. 44, and cases there cited.) At the time the Richardson Drug Company obtained its

judgment it might have caused an execution to be levied upon these goods; but they were then in the hands of the sheriff under the attachment issued by Meyer & Co.; in other words, the property was in custody of the law, and had the execution been issued and the sheriff levied it, he would have had to do so subject to the attachment of Meyer & Co., and after the sale of the property the drug company would have had to institute this or some similar proceeding for the purpose of having the court determine the priority of liens.

2. A second argument is, in substance, that the findings of the district court are not sustained by sufficient evidence. The district court found that the sale of the drug stock made by Park Bros. to J. M. Park in October, 1892, was made in good faith and for a valuable consideration; in other words, that it was not fraudulent. The evidence sustains this finding. The district court further found that the agreement entered into between Park Bros., Meyer & Co., and J. M. Park which resulted in the drug stock being turned over to Meyer & Co. in satisfaction of the debt which Park Bros. owed them was fraudulent. The evidence sustains this finding. The decree of the district court is right and is

AFFIRMED.

A. J. NEIMEYER LUMBER COMPANY v. BURLINGTON & MISSOURI RIVER RAILROAD COMPANY.

FILED MARCH 17, 1898. No. 7691.

1. **Sales:** PLACE OF DELIVERY. Where delivery of property sold is to take place is to be determined by the contract between the vendor and vendee.

2. ———: ———. If the contract between the parties expressly provides that delivery shall be made at a certain place, then the vendor's title to the property is not divested until delivery is so made.

3. ———: DELIVERY TO CARRIER. Where the contract between a

vendor and vendee is silent upon the subject of the place of delivery, then the delivery of the property by the vendor to a carrier for transportation, consigned to the vendee, divests the vendor's title to the property, and the vendee's title, from the moment of such delivery to the carrier, attaches.

4. ———: ———. In such a case the carrier is, in contemplation of law, the bailee of the person to whom, and not by whom, the goods are consigned.

5. ———: ———: BILL OF LADING. Where a vendor of goods delivers them to a carrier for transit to his vendee, and causes the goods to be consigned in the bill of lading to himself, his agent, or his order, the presumption arises that he thereby intended to retain the title in himself to the goods. Per RAGAN, C.

6. ———: ———: ———. Where a vendor of goods delivers them to a carrier for transit and causes his vendee to be named in the bill of lading as the consignee of the goods, the presumption arises that the vendor by that act intended the title to the goods to vest in the vendee on their delivery to the carrier for shipment. Per RAGAN, C.

7. ———: ———: TITLE. The prepayment of freight by a vendor on goods sold and shipped to his vendee is *prima facie* evidence of an intention on the part of the vendor to retain the title to the goods while in transit. Per RAGAN, C.

8. ———: CONSTRUCTION OF CONTRACT: DELIVERY TO CARRIER. The contract between a vendor and vendee set out in the opinion construed, and *held* that the delivery of the property sold took place at the place of its shipment and that the title to the property vested in the vendee on its delivery by the vendor to the carrier for transit to the vendee. Per RAGAN, C.

9. ———: STOPPAGE IN TRANSITU. In order that a vendor of goods may exercise the right of stoppage *in transitu* it is essential that the goods at the time be in transit from such vendor to his immediate vendee. Per RAGAN, C.

10. ———: ———. D. of Omaha ordered a bill of lumber of S. of Dallas, Texas. S. not having the lumber in stock, sent the order to N. at Waldo, Arkansas, requesting him to ship the lumber to D. at Omaha on account of S. and send him the invoice and bill of lading. This was done. While the lumber was in transit S. failed and N. notified the carrier in possession not to deliver the lumber. The carrier delivered to D., the consignee, and N. sued the carrier for conversion. *Held*, (1) That the transaction amounted to a sale and delivery by N. to S. at Waldo; (2) a resale and delivery by S. at Waldo to D.; (3) that the lumber, when it left Waldo, was not in transit from N. to S., but from S. to D.; (4) that N. was not D.'s vendor, but consignor merely, and could not exercise the right of stoppage *in transitu*. Per RAGAN, C.

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

See opinions for references to authorities.

A. S. Churchill, for plaintiffs in error.

C. J. Greene and *C. V. Miles, contra.*

RAGAN, C.

C. N. Deitz is a lumber merchant in the city of Omaha, Nebraska, and will be hereinafter designated as Deitz. The A. J. Neimeyer Lumber Company are a corporation engaged in the manufacture and sale of lumber at Waldo, Arkansas, and will be hereinafter designated as Neimeyer & Co. Simpson, Perkins & Co. are lumber merchants in the city of Dallas, Texas, and will be hereinafter designated Simpson & Co. The Burlington & Missouri River Railroad Company in Nebraska is a railway corporation organized under the laws of this state and will be hereinafter designated as the railroad company. About January 1, 1892, Deitz ordered of Simpson & Co. a large quantity of a certain class of lumber. It appears that Simpson & Co. did not have the material ordered on hand and purchased the lumber to fill the order from Neimeyer & Co., and they, in pursuance of the directions of Simpson & Co., shipped it by rail to Deitz, the bills of lading issued by the initial carrier being made out to Deitz, consignee. Soon after the shipment of this lumber, which consisted of 17 car loads, Simpson & Co. failed and Neimeyer & Co. then notified the railroad company, into whose possession as a common carrier the lumber shipped had come as the last carrier in the line of transit, of the insolvency of Simpson & Co., that the 17 cars of lumber belonged to them, Neimeyer & Co., to hold such lumber, and not to deliver it to Deitz. It seems that when the railroad company received this notice it had already delivered 6 car loads of the lumber, and disregarding the notice of Nei-

meyer & Co. delivered the other 11 cars also to Deitz, and thereupon Neimeyer & Co. brought this suit against the railroad company in the district court of Douglas county to recover the value of the 11 cars of lumber delivered by it to Deitz after receiving notice not to deliver. The railroad company had a verdict and judgment, and Neimeyer & Co. have filed here a petition in error to review the same.

1. Neimeyer & Co. contend that by virtue of the contract existing between them and Simpson & Co. the delivery of the 17 cars of lumber shipped to Deitz was to take place at Omaha, Nebraska, and that until the lumber reached that place the title thereto remained in Neimeyer & Co., and that the railroad company, all the time it had such lumber in its possession, held it as the agent and bailee of Neimeyer & Co. A vendor's title to property sold by him is divested on its delivery to his vendee, and immediately upon such delivery the title to the property vests in the vendee; but where delivery of property sold is to take place is, of course, to be determined by the contract between the vendor and vendee; and if the contract between the parties expressly provides that delivery shall be made at a certain place, then the vendor's title to the property is not divested until delivery is made at such place. But the universal holding of the courts is that where the contract between the vendor and vendee is silent upon the subject of the place of delivery, the delivery of the property by the vendor to a carrier, for transportation to the vendee, of itself then and there divests the vendor's title to the property, and the vendee's title to such property, from the moment of such delivery to the carrier, attaches. (21 Am. & Eng. Ency. Law 528-530; Benjamin, Sales [2d ed.] secs. 181, 682; 2 Chitty, Contracts [11th Am. ed.] 1201; *Smith v. Gillett*, 50 Ill. 290; *Krulder v. Ellison*, 47 N. Y. 36, and cases there cited; *McKee v. Bainter*, 52 Neb. 604; *Congdon v. Kendall*, 53 Neb. 282.) In such case the carrier is, in contemplation of law, the bailee of the person to whom and not by whom

the goods are sent. Keeping in view these principles we now proceed to an examination of the contract existing between Neimeyer & Co. and Simpson & Co., which resulted in the former selling to the latter the 17 car loads of lumber involved in this controversy. The contract existing between these parties is found in certain letters which passed between them. It would seem that prior to January 8, 1892, Neimeyer & Co. had sent out to the lumber dealers of the country statements showing the various kinds of lumber which they manufactured and had for sale, and it was prior to this date that Deitz had ordered of Simpson & Co. the bill of lumber which the latter did not have on hand. On this date, January 8, 1892, Simpson & Co. wrote Neimeyer & Co., saying: "We received your stock sheet sometime since, and herewith send you two orders, which you will find very nice ones. Please name your figures as low as possible on these orders. * * * Also inclose us your lowest f. o. b. price list." Accompanying this letter were the two orders mentioned therein. These orders, so far as material here, were as follows: "A. J. Neimeyer Lumber Company, Waldo, Ark.: Ship to C. N. Deitz, Omaha, Nebraska. * * * 17 cars of certain described lumber. If for any reason you cannot ship, promptly advise. Please also send bill of lading and invoice to us at Dallas." Neimeyer & Co. at once filled the order of Simpson & Co. by shipping the 17 car loads of lumber as already stated to Deitz and on January 9, 1892, wrote to Simpson & Co. as follows: "Your valued order of January 8 received and filed for prompt shipment, with the exception of two items. * * * We have filled your order as follows: [Here follow the description and price of the lumber in the 17 cars.] Prices f. o. b. Omaha, Nebraska." It is to be observed that in the correspondence between Simpson & Co. and Neimeyer & Co. the question of the place of delivery of this lumber was not inquired about nor discussed. The place of the delivery of the lumber was not the subject of the negotiations. The expression in the

Neimeyer & Co. letter of January 9, "Prices f. o. b. Omaha, Nebraska," they insist affords conclusive evidence that the intention of the parties was that the delivery of this lumber to Simpson & Co. should take place at Omaha, Nebraska. Three witnesses testified on the trial as to the meaning among railroad men and shippers of the expression, "Prices f. o. b. Omaha, Nebraska." One of them said it meant "that the price named in the shipper's invoice is the price at Omaha." Another said it meant "to be delivered at Omaha free on board cars." Neimeyer himself, president of Neimeyer & Co., testified: "If we say f. o. b. Omaha, that means that is the price delivered at Omaha." We think the true construction of the contract is the one placed thereon by the district court, and is in line with the explanation of the phrase in the contract under consideration made by the first and last of the witnesses just named. The word "prices" which precedes "f. o. b. Omaha, Nebraska," is of importance in the construction of this contract. By that expression Neimeyer & Co. meant that the prices which they had affixed to the lumber sold Simpson & Co. were to be the prices which the lumber should cost Simpson & Co. at Omaha; not that the delivery of the lumber to Simpson & Co. should take place at Omaha, but that the price charged Simpson & Co. by Neimeyer & Co. for the lumber was to be its price at Omaha; in other words, that Neimeyer & Co. should pay the freight on this lumber from Waldo, Arkansas, to Omaha, Nebraska; or, what is the same thing, that Simpson & Co., or their vendee, Deitz, might pay the freight and then remit the purchase price of the lumber less the freight. But the fact that Neimeyer & Co. agreed to pay the freight on this lumber from its place of shipment to its place of destination does not afford conclusive evidence that the delivery of the lumber was to take place at Omaha, Nebraska. To summarize: The contract between Neimeyer & Co. and Simpson & Co. was this: Neimeyer & Co. sold them 17 car loads of lumber at the price of $—— at

Omaha—not the delivery at Omaha but the price at Omaha; and Simpson & Co., by their letter of January 8, when asking Neimeyer & Co. to inclose "us your lowest f. o. b. price list," were seeking to ascertain from Neimeyer & Co. what the lumber would cost them, Simpson & Co., at Omaha; and when Neimeyer & Co. answered that letter and shipped the goods and said, "Prices f. o. b. Omaha, Nebraska," they meant to inform, and did inform, Simpson & Co. what the lumber would cost them in Omaha, Nebraska. The contract then between the parties, as evidenced by their correspondence, does not provide that the delivery of this lumber should take place at Omaha. To give that construction to the contract the expression, "prices f. o. b. Omaha," would have to read "delivery f. o. b. Omaha." To give the contract this effect would be to put a violent and unnatural construction upon the language used.

We have been referred by counsel for plaintiffs in error to several cases, which, he insists, sustain his construction of this contract. We have carefully examined all these cases, and not one of them, we think, is in point here, and we confidently say that no decision of any court can be found which has construed "prices free on board" at a named place as equivalent to "delivery free on board" at such place. Among the cases cited by counsel for plaintiffs in error are the following: *Gates v. Chicago, B. & Q. R. Co.*, 42 Neb. 379. But this case has no bearing whatever on the question under consideration here. It simply holds that a carrier makes delivery of goods to a consignee thereof at its peril unless at the time of delivery the bill of lading be surrendered. To the same effect is *Union P. R. Co. v. Johnson*, 45 Neb. 57. And in *Shellenberger v. Fremont, E. & M. V. R. Co.*, 45 Neb. 487, the title to the goods sold never passed to the vendee, as he procured their delivery to him by fraud.

Stock v. Inglis, 12 L. R. Q. B. Div. [Eng.] 564, so far as the same bears upon the question under discussion here, is an authority against the contention of plaintiffs in

error. In that case a merchant ordered 200 tons of sugar. The vendor shipped 400 tons of sugar consigned to the city where the purchaser lived. The goods were lost at sea. After the vessel left its wharf the seller sent invoices of 200 tons of this sugar to the vendee, who, upon its receipt, paid the price of the 200 tons of sugar and obtained the bill of lading for the same. The sugar was insured, and the vendee sued the insurance company for the value of the 200 tons of sugar lost. The insurance company claimed that the title to this 200 tons of sugar never vested in the vendee, because that specific amount of sugar was not set apart and delivered by the vendor to the carrier for the vendee, and that, therefore, he had no insurable interest in the sugar lost. But the court ruled that the action of the seller, after the ship left its wharf, in sending to the vendee an invoice for 200 tons of the 400 tons shipped, was a delivery of 200 of the 400 tons of sugar shipped to the vendee at the time of its shipment. This case rests upon the principle that whether the vendor delivered to the vendee 200 tons of the sugar shipped at the time of the shipment was a question of intention to be gathered from the vendor's conduct, and that his making out an invoice of the 200 tons and transmitting it to the vendee, after the ship sailed, evinced his intention of vesting the title of 200 tons of the sugar in the vendee at the time the whole cargo was put on shipboard.

Another case cited by plaintiffs in error is *Miller v. Seamans*, 35 Atl. Rep. [Pa.] 134. The contract in that case was made in February, 1894, between Miller, of Elmira, New York, and Seamans & Co., of Williamsport, Pennsylvania, and by the contract Miller agreed to sell to Seamans & Co. 406,000 feet of hemlock lumber belonging to Miller and then piled in the lumber yard of the Dent Lumber Company at Du Boistown, Pennsylvania, at a price of $8.25 per thousand shipping count f. o. b. cars Williamsport. The lumber was to be loaded, inspected, and measured as ordered by the purchasers.

After a quantity of this lumber had been shipped and delivered to Seamans & Co. a flood occurred and washed away the part of the lumber which had not been shipped, and Miller sought to recover the purchase price of the lumber washed away from Seamans & Co. upon the theory that he had delivered the 406,000 feet of lumber to them on the date of the contract of sale. But the court held "that title did not pass until measurement, inspection, and actual shipment," and then only as to the amount shipped; and that plaintiff, Miller, had to bear the loss of such part of the lumber as not having been measured, inspected, and shipped was carried away by the flood. But this case is not an authority for the contention of the plaintiffs in error here. It is not a decision that "Prices f. o. b. Omaha" is equivalent to "delivery f. o. b. Omaha." The principle upon which the case rests and was decided is that the contract of sale was an executory one and that no title to the lumber agreed to be sold passed to the vendee until the lumber was measured and inspected.

The argument of plaintiffs in error that delivery was to take place in Omaha because, in answer to an inquiry of their vendees, the plaintiffs in error named the price of the goods at that point is not sustained by any authority that I have been able to find. On the other hand the cases in which the question has been presented are against the contention of plaintiffs in error. One of these cases is *Star Glass Co. v. Longley*, 64 Ga. 576. In that case it was held that if the seller, upon inquiry, priced goods to the buyer and thereupon the buyer ordered at that price and the seller delivered the goods to a common carrier consigned to the buyer there was a complete sale at the price named. In *Mee v. McNider*, 109 N. Y. 500, the vendor resided in London, and the vendee in the city of New York. By the contract between the parties the vendor sold to the vendee 500 bags of cocoa at fifty-nine shillings per hundred weight. These fifty-nine shillings per hundred weight, by the terms of the contract, were

"to include cost, freight, and insurance;" and it was held that the title of the vendee to the cocoa vested upon its delivery on board ship for transit to New York. There is no difference in principle between this case and the one at bar, so far as regards the terms of the contract under consideration. Here the vendors agree to sell the vendees lumber for so many dollars, and this price includes the freight from the place of shipment to the lumber's destination, and by the contract the bills of lading are to be sent by the vendors to the vendees, Simpson & Co.

Thus far we have considered whether it was the mutual intention of the parties that the title to the lumber sold should vest in the vendees only upon its arrival and delivery at Omaha; and the contract—the correspondence—between the parties does not afford evidence that such was their intention, but rather that the thing specially negotiated about between the parties was the price of the lumber, and the contract does not afford evidence that the parties did intend that the delivery of the lumber should take place at Omaha, but left the delivery to take place in the ordinary manner of the delivery of goods by a vendor when ordered by a distant vendee. But, notwithstanding the sale of this lumber by Neimeyer & Co. and its delivery to a carrier consigned to their vendee, Neimeyer & Co. might have exercised the *jus disponendi*, as it is called in the text-books, over the property sold; that is, Neimeyer & Co. might have retained the title to the lumber shipped, and by exercising this right made the carrier of this lumber their bailee. (1 Schouler, Personal Property [3d ed.] sec. 271, and cases there cited.) The claim of the plaintiffs in error here is that they did exercise this *jus disponendi*, and that notwithstanding they sold the lumber to Simpson & Co., and at their request consigned it to Deitz, they retained the title and the carrier held it as their bailee. We know what Neimeyer & Co. did, and the question before us now is whether their conduct in the premises authorizes an inference that notwithstanding the sale and the shipment of these goods

they intended to retain title until their arrival in Omaha. Their intention must be found in their conduct, and it is that intention that we are now in pursuit of, and for the purpose of ascertaining it it is our duty to follow every trail, however dim and tortuous it may be, which leads in the direction of such intention. If Neimeyer & Co. at the time of the shipment of these goods intended to reserve in themselves the title thereto until their arrival at Omaha, it must have been because by so reserving the title they desired to make themselves sure of receiving the pay for the goods sold before they should part with them. Certainly they would not voluntarily, and in the absence of a contract requiring them to do so, reserve the title for the purpose of suffering the loss in case the goods should be destroyed in transit. But by the contract of sale between Neimeyer & Co. and Simpson & Co. these goods were not sold for cash on delivery but on sixty days' time. If the goods then had been consigned by Neimeyer & Co. to Simpson & Co. at Dallas, Texas, the fact that they were sold on sixty days' time would afford a presumption that the sellers did not intend at the time they shipped them to reserve title in themselves until they were paid for. Again, it is to be remembered that Neimeyer & Co. did not sell these goods to Deitz, their consignee, and it is an unreasonable claim on the part of Neimeyer & Co. to say in the face of this record that they sold the goods to Simpson & Co. on sixty days' time and at their request consigned them to Deitz and yet all the time intended to retain the title to these goods. Are we to understand from the argument of Neimeyer & Co. that they did not intend that these goods should be delivered to Deitz until sixty days from the date of their shipment? At the time Neimeyer & Co. shipped these goods they might have caused themselves to have been made consignees in the bill of lading, and had they done this, then their conduct in so doing would have authorized the presumption that they thereby intended to reserve the title to the goods, and that the carrier held them

as their bailee. (2 Schouler, Personal Property [3d ed.] sec. 273, and cases there cited; Usher, Sales of Personal Property secs. 228, 230, and cases there cited; Newmark, Sales sec. 147, and cases there cited; R. M. Benjamin, Principles of Sales 92, where the rule is thus concisely stated: "Where goods are shipped and by bill of lading the goods are delivered to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal;" *First Nat. Bank of Cairo v. Crocker*, 111 Mass. 163; *Merchants Nat. Bank of Cincinnati v. Bangs*, 102 Mass. 291; *Seeligson v. Philbrick*, 30 Fed. Rep. 600.) But Neimeyer & Co. at the time they shipped these goods did not cause them to be consigned to themselves, to their agent, or to their order. On the contrary they caused these goods to be consigned to Deitz, the vendee of their vendees, and this fact authorizes the inference that it was then and there the intention of Neimeyer & Co. that the title to the goods should pass upon their delivery to the carrier for transit to their vendees' vendee. Upon this subject the cases are all one way.

In Usher, Sales of Personal Property, sec. 232, it is said: "If the bill of lading, or other written evidence of the delivery to a carrier, be taken in the name of the consignee, or be transferred to him by indorsement, this, if not controlled by other evidence, affords the strongest proof of the intention of the seller not to retain his hold on the property after it is taken by the carrier as security for payment of the price."

In Newmark, Sales, sec. 152, it is said: "For it has been declared to be perfectly well settled that if a consignor in such a case wishes to prevent the property in the goods, and the right to deal with the goods while at sea, from passing to the consignee, he must by bill of lading make the goods deliverable to his own order, and forward the bill of lading to an agent of his own. And if he does not do that, though he still retains the right of stopping the goods *in transitu*, yet, subject to that right, the property in the goods and the right to the possession of the goods is in the consignee."

In 2 Schouler, Personal Property [3d ed.] sec. 264, it is said: "Delivery is a circumstance often considered in connection with the appropriation of specific chattels under a contract. It is doubtless well established as the rule both of England and America that where—all other things being equal—a seller delivers goods to the buyer or to a carrier by order of the buyer, the appropriation is determined beyond his power to recall it, for the property has thus presumably vested in the buyer. This rule, however, is subject to the principle of *jus disponendi.* * * * But the delivery of goods to the buyer or his agent, or to some carrier for him, is a palpable act of appropriation and tender by the seller, whose intent thus evinced to transfer the title absolutely to the buyer can hardly be disputed, if the bill of lading be taken out in the consignee's name, or indorsed over to him without restriction." And the same author in section 273 uses this language: "Now supposing the seller, in sending goods by a vessel, or other carrier, to have taken out a bill of lading or similar document, a new circumstance is presented. The rule of presumption becomes this: That the carrier thereby agrees to take the goods as bailee for the person whose name is therein indicated as the one for whom the goods are to be carried; and this bill being made out to the seller or order, the carrier's engagement is *prima facie* to carry the goods for and on account of the seller, to be delivered to him in case it should not be assigned or indorsed. * * * On the other hand, taking out the bill of lading in the buyer's name affords presumptive evidence on the seller's part of an intent to transfer the title."

In *Emery v. Irving Nat. Bank*, 25 O. St. 360, it was said: "If the consignment be made by a vendor to a vendee, the question whether the consignor reserved the *jus disponendi* is one of intention to be gathered from all the facts and circumstances of the transaction. * * * On such question of intention the terms of the bill of lading are to be taken as admissions of the consignor, and are

entitled to great weight, but are not conclusive." To the same effect are *Straus v. Wessel*, 30 O. St. 211; *Ranney v. Higby*, 5 Wis. 62; *Finch v. Mansfield*, 97 Mass. 89; *Kline v. Baker*, 99 Mass. 253; *Stanton v. Eager*, 33 Mass. 467; *Prince v. Boston & L. R. Co.*, 101 Mass. 542; *Halliday v. Hamilton*, 78 U. S. 560; *Merchants Exchange Bank of Milwaukee v. McGraw*, 76 Fed. Rep. 930; *Webb v. Winter*, 1 Cal. 417; *Putman v. Tillotson*, 13 Met. [Mass.] 517; *Grove v. Brien*, 49 U. S. 429; *Glidden v. Lucas*, 7 Cal. 26; *Hope Lumber Co. v. Foster*, 53 Ark. 196; *Robinson v. Pogue*, 86 Ala. 257.

A. J. Neimeyer, the president of Neimeyer & Co., testified on the trial of this case, and on the subject of the delivery of the lumber—that is, whether its delivery to his vendees, Simpson & Co., was to take place at Omaha or at the place of shipment—said:

Q. Who were you looking to for the payment of this [lumber]?

A. When the delivery was made, when we commenced shipping, we looked to Simpson & Perkins, of course.

Q. Did you consider when you had delivered to the railroad company you had complied with the terms of the agreement between you and Simpson under which you sold?

A. We would——

Q. I ask you the simple question, did you not consider when you delivered this lumber to the railroad company at Waldo you had fully performed your contract with Simpson & Co.?

A. As far as delivering the lumber was concerned.

Here then is the president of the plaintiffs in error admitting on oath that he understood he had complied with his contract with Simpson & Co. when he delivered the lumber they ordered on board the cars at the place of its shipment. In other words, he admits that it was his intention that delivery of this lumber to Simpson & Co. should take place when it was put on board the cars at Waldo. Thus far no act of Neimeyer & Co. in the sale and shipment of this lumber evinces an intention on their part to

retain title to the lumber in themselves until its arrival at Omaha; but their every act authorizes the presumption that they never entertained such an intention, but, on the contrary, intended the delivery of the goods to take place in the usual and ordinary manner of delivery of goods ordered by a party at a distance, namely, by a delivery to a carrier for transit to such a buyer. But by the contract between Neimeyer & Co. and Simpson & Co. the former were to pay the freight on this lumber from its place of shipment to Omaha, and it is insisted that this fact overturns all the other presumptions which Neimeyer & Co.'s conduct raised against them that the title did pass on delivery to the carrier at Waldo, and affords conclusive evidence that they retained the title in the goods shipped and that the carrier held them as their bailee. We have been cited to no case, nor do we think one can be found, which holds that the payment of freight by a vendor is conclusive evidence that he thereby intended to retain the title in the goods, or that the delivery of the goods was to take place not at their point of shipment but at their destination. It is not doubted that a vendor might by express contract agree to deliver goods at their place of destination and that this contract would control; but it is not claimed that any such express contract exists here. The claim here is that because the vendors paid the freight, this fact is conclusive evidence that they retained the title. It may be safely conceded that the payment of freight by the vendors is a circumstance which affords some evidence that the vendors intended to retain the *jus disponendi* of the goods shipped, but it is not conclusive; and there is no case, we repeat, which holds that it is, unless it be a case in Illinois, to be presently noticed. The cases, and all the cases upon the subject, are to the effect that the payment of the freight by the vendor is evidence of an intention upon his part to retain title in the goods. (See the rule stated and the authorities cited in Benjamin, Principles of Sales 87.)

In *Devine v. Edwards*, 101 Ill. 138, it is said in the syl-

labus: "Where a contract for the sale and delivery of personalty * * * expressly provides that it is to be shipped by the seller to the place of business of the purchaser at the expense of the seller, the place of delivery is the business place of the purchaser, and any loss on the way must fall upon the seller." In that case a seller of milk lived at Dundee, Illinois, and the purchaser lived at Chicago. The seller sued the purchaser to recover for the price of milk which he claimed to have sold and delivered to him. The seller interposed as a defense to the action a set-off based on this state of facts: He claimed that he had been buying milk from the plaintiff for some five years; that the milk was shipped in what both parties supposed to be eight-gallon cans, but that, as a matter of fact, the cans did not hold eight gallons; that in consequence of the mistake as to the capacity of the cans he had overpaid the milk seller. On the trial the district court refused to give to the jury the following instruction: "The jury are instructed that if they believe from the evidence that during the five years immediately prior to the commencement of this suit the defendant purchased milk of the plaintiff by the gallon, to be shipped from Dundee to Chicago, and that the plaintiff agreed to pay the freight on such milk, and that nothing was said by either the plaintiff or defendant in regard to the place of delivery, then the law makes Chicago the place of delivery." The supreme court held that this instruction should have been given, thus ruling in fact that the payment of freight by the seller of the milk made the place of delivery, Chicago, the destination of the milk. We are unable to see how the place of the delivery of this milk was material in that action, as the only two questions litigated were (1) a question of fact as to whether the milk cans were short in capacity, and (2) a question of law if the cans were deficient in capacity whether the purchaser could set off overpayments against what he was owing. The court in support of its decision cites *Dunlop v. Lambert*, 6 Cl. & F. [Eng.] 600. But in that case the

seller of the property did not pay the freight. The vendee paid it, and the case, therefore, is not authority for the conclusion reached by the supreme court of Illinois. Furthermore, if the Illinois case is to be regarded as holding that the payment of freight by the vendor is conclusive evidence that he retained title to the goods shipped while in transit, or, in other words, that such payment of the freight made the delivery take place at the destination of the goods, then the case stands alone.

A case exactly in point here and against the contention of plaintiffs in error is *Tregelles v. Sewell*, 7 H. & N. [Eng.] 573. In that case the plaintiff sold "three hundred tons of Old Bridge iron rails at 5*l.* 14*s.* 6*d.* per ton, to be delivered at Harburg, cost, freight, and insurance." Payment was to be made for the rails in London, less the freight, upon delivery to the purchaser of the bill of lading for the rails and a policy of insurance, and it was held that the true construction of the contract was that the vendor was not to make delivery of the rails at Harburg, but only to ship them to that place at his own cost free of any charge to the vendee, and that the property in the rails passed to the vendee on the delivery to him of the carrier's bill of lading and the policy of insurance.

In *Dawes v. Peck*, 8 Term Rep. [Eng.] 330, it was ruled: "If the consignor of goods deliver them to a particular carrier by order of the consignee and they be afterwards lost, the consignor cannot maintain an action against the carrier for the loss, although he paid for booking the goods."

In *King v. Meredith*, 2 Camp. [Eng.] 639, the vendor sold a quantity of brandy and wine and delivered it to a carrier to be conveyed to the vendee, the vendor paying the freight. The goods never reached the vendee. His defense was that the title to the goods remained in the vendor, and that this was evidenced by the fact that he paid the freight. But the court said: "As soon as goods are delivered to a carrier, they are at the risk of the purchaser, although the carrier be paid by the vendor."

In *McLaughlin v. Marston*, 47 N. W. Rep. [Wis.] 1058, it was ruled that where a customer has a continuing contract with a wholesale merchant to ship on order coffee, freight prepaid, and during the continuance of such contract gives a written order to "ship at once ten cases of coffee," which is done, the seller prepaying the freight, and five cases of the coffee are attached by a creditor of the purchaser before delivery to him by the carrier, it is a question for the jury whether the coffee was to be delivered by the seller at the purchaser's place of business or to the carrier only.

In *Havens v. Grand Island Light & Fuel Co.*, 41 Neb. 153, the vendor sold to his vendee "coal at $9.85 per ton f. o. b. Grand Island," and it was in effect held that the fact the price at Grand Island included freight —that is, the vendor paid freight—was a circumstance affording some evidence that the coal was to be delivered at Grand Island. But the case does not hold that the vendor's paying freight is conclusive evidence of delivery at destination.

Wagner v. Breed, 29 Neb. 720, is, however, decisive of the question under consideration and against the contention of the plaintiffs in error. In that case Wagner was a wholesale dealer in beer and resided in Rock Island, Illinois. Breed was a dealer in beer in Hastings, Nebraska. Wagner sold and shipped to Breed large quantities of beer and paid the freight from Rock Island to Hastings. He took Breed's note, secured by mortgage, for the beer furnished him, and this suit was brought to foreclose that mortgage. Breed defended the action upon the ground that Wagner had no license to sell intoxicating liquors in the state of Nebraska; that the consideration for the note in suit was beer sold and delivered by him, Wagner, to him, Breed, and that the delivery took place at Hastings, Nebraska, and that, therefore, Wagner could not enforce the note and mortgage; and the district court ruled that the delivery of the beer furnished by Wagner to Breed took place in Hastings, Nebraska,

that the note and mortgage were unenforceable, and dismissed Wagner's action. On appeal to this court the decree of the district court was reversed, this court holding that notwithstanding the fact that Wagner paid the freight on the beer from Rock Island, Illinois, to Hastings, Nebraska, the delivery of the beer took place in Rock Island, Illinois. In this case the only evidence on the subject that the delivery of the beer took place in Hastings was the fact that Wagner paid the freight thereon. This case then is a solemn adjudication of this court that the mere fact that a vendor pays the freight is of itself not sufficient evidence to overthrow the presumption that where a purchaser orders goods from a distant seller and he in pursuance of the order delivers the goods to a carrier for shipment to the vendee, such delivery is a delivery to the vendee, and that his title at once attaches. To the same effect is *Mee v. McNider*, 109 N. Y. 500.

Conceding then that Neimeyer & Co.'s paying the freight on the lumber in controversy raises the presumption that they retained title to the lumber while it was in transit, and that its delivery was to take place at Omaha, we think the district court was right in holding that the effect of this presumption was destroyed by the other evidence in the case. Whether the delivery of this lumber took place at Waldo or Omaha was a question of fact for the trial court sitting without a jury; that fact was to be determined from the intention of the vendors; and this intention was to be ascertained from all the facts and circumstances in evidence in the case. But when the district court came to weigh and consider the conduct of the vendors, it had before it a sale and shipment made by vendors in the ordinary manner of goods ordered by a distant buyer, the contract specially referring only to quality, quantity, and price of the goods; the contract containing nothing in reference to the place where the goods were to be delivered; the sale made by vendors, and goods shipped to the vendees; a sale made on sixty

days' time, the vendors taking a bill of lading from the initial carrier in which neither they nor their agents were named as consignees of the goods, and which by their contract was to be sent to their vendees, Simpson & Co., and in which bill of lading the vendees were named as consignees; the evidence of the plaintiffs in error that, in so far as delivery of the lumber was concerned, they understood that they had complied with their contract with Simpson & Co. when they delivered the lumber to a carrier at Waldo for transit to their vendees, and that the lumber was sold to Simpson & Co. and the sellers looked to them to pay for it. From these facts, and each one of them, the law raised the presumption that the delivery of the goods took place and the title vested in the vendees when the goods were delivered to the initial carrier. Against all these presumptions stood, and stands, singly, the fact that the vendors paid the freight. The district court was of opinion—and in that opinion we entirely concur—that the presumption that the title remained in the vendors because they paid the freight was overthrown by the other facts in evidence in the case and the presumptions which flowed therefrom.

2. This brings us to the consideration of the question of Neimeyer & Co.'s right to stop these goods *in transitu* because of the insolvency of their vendees, Simpson & Co. In order that a vendor may exercise the right of stoppage *in transitu* of goods sold they must at the time be in the possession of some person intervening between the vendor who has parted with and the purchaser who has not yet received them; that is, they must be in transit from the vendor to his immediate vendee. In the case at bar we have already seen that Neimeyer & Co., the vendors of these goods, delivered them at Waldo, Arkansas, to their vendees, Simpson & Co., and when the goods left Waldo, Arkansas, for Omaha, Nebraska, they were in transit, not from their original vendors, Neimeyer & Co., to their original vendees, Simpson & Co., but from Simpson & Co., who had become vendors of the goods, to their

vendee, Deitz. The sale of these goods by Neimeyer & Co. to Simpson & Co. and their delivery to the latter at Waldo consigned to Simpson & Co.'s vendee, Deitz, was, in effect, the same as if Neimeyer & Co., after selling the goods, had shipped and delivered them to Simpson & Co. at Dallas, Texas, and they had then sold and shipped them to Deitz. So the question is: May a vendor of goods exercise the right of stoppage *in transitu* after they have been received and sold by his immediate vendee and are *in transitu* to that vendee's vendee? We think that all the authorities answer this question in the negative.

In Jones, Liens sec. 870, it is said: "The right [to stop goods *in transitu*] can be exercised only by one who holds the relation of vendor to the consignee. If one buys goods and directs his vendor to consign them to a customer of his own with whom the vendor has no privity, and the vendor accordingly ships the goods to such third person, he cannot stop them *in transitu* to him upon the insolvency of his immediate purchaser."

A case precisely in point here is *Memphis & L. R. R. Co. v. Freed*, 38 Ark. 614, 9 Am. & Eng. R. Cas. 212. In that case Freed was a merchant at Dardanelle and ordered of Walker Bros. & Co., at St. Louis, a bill of goods. The latter transmitted the order to Lehman & Co. at New Orleans with directions to ship the goods to Freed and send the invoice and bill of lading to them, Walker Bros. This was all done. While the goods were *in transitu* from New Orleans to Freed, Walker Bros. & Co. failed and Lehman & Co., claiming to exercise the right of stoppage *in transitu*, demanded and received from the carrier the goods. Freed then sued the railway company for the value of the goods, claiming that he was the vendee of Walker Bros. & Co. and not the vendee of Lehman & Co., but merely their consignee, and that there was no privity of contract between him and Lehman & Co., and, therefore, as against him, they had no right to stop the goods in transit; and the court held the railway company liable to Freed for the value of the goods. To the same effect

are *Rowley v. Bigelow*, 29 Mass. 306; *Eaton v. Cook*, 32 Vt. 58; *Noble v. Adams*, 7 Taunt. [Eng.] 59.

We think, therefore, that the insolvency of Simpson & Co. did not invest Neimeyer & Co. with the right to stop these goods in transit nor render the railway company liable to Neimeyer & Co. for delivering them to Deitz, the consignee thereof, since Deitz was not the vendee of Neimeyer & Co., but their consignee merely. He was the vendee of Simpson & Co. The only transit of these goods that took place as between Neimeyer & Co. and Simpson & Co. was the transit that occurred of the goods between the lumber yard in Waldo, Arkansas, and the railway cars at that station, and when the goods were delivered to the carrier there and billed to Deitz it was the same as a sale and delivery of the goods at that place to Simpson & Co. and a resale and redelivery of the goods there by Simpson & Co. to Deitz.

3. But it is insisted by counsel for the plaintiffs in error that this judgment must be reversed because of the condition of the pleadings. This we will now proceed to notice. Neimeyer & Co. in their petition alleged: "That on or about the 8th day of January, 1892, the plaintiff agreed to sell unto Simpson, Perkins & Co., of Dallas, Texas, 17 car loads of lumber of the plaintiff's manufacture at its mills in Waldo, Arkansas, to be delivered at Omaha, Nebraska, free of freight on board the cars at Omaha, Nebraska, for the sum of $3,432.96, less the freight from Waldo, Arkansas, to Omaha, Nebraska." The railroad company answering this allegation of the petition used the following language: "It admits that the plaintiff agreed to, and did on the date stated, sell to Simpson & Co., of Dallas, Texas, 17 car loads of lumber as therein alleged." Now it is said by the plaintiffs in error that the railroad company by this answer has admitted that the delivery of the lumber in controversy was to take place in Omaha, Nebraska. If the foregoing quotation from the pleadings was all they contained upon the subject, we should feel obliged to reverse this case because of this

admission in the answer; but the answer of the railroad company, in addition to the admission just quoted, sets out the contract between Simpson & Co. and Neimeyer & Co. in full; and Neimeyer & Co., in their reply to this answer, admit that the contract between them and Simpson & Co. pleaded by the railroad company in its answer is the actual contract made between those parties. Neimeyer & Co., by their reply, have admitted that the contract existing between them and Simpson & Co. was not the contract which they pleaded in their petition, but the contract set up in the railroad company's answer; and the question litigated in the district court was as to the proper construction of the contract pleaded in the answer and admitted to be the contract by reply. Under these circumstances we do not think this judgment should be reversed because of the admission made by the railroad company in its answer. The judgment of the district court is right and is

AFFIRMED.

HARRISON, C. J., SULLIVAN, J., IRVINE and RYAN, CC.

We concur in the conclusion reached by Commissioner RAGAN on the ground that, conceding for the purpose of this case that the use of the expression "Prices f. o. b. Omaha" might of itself afford a presumption that the delivery was to be made at Omaha and that title should there pass, the other evidential facts were sufficient to ground an inference that title should pass at the place of shipment, and the question being one of fact the finding is sustained by the evidence.

NORVAL, J., dissenting.

I do not concur in the judgment just rendered. There is no controversy as to the material facts. Simpson, Perkins & Co. were wholesale dealers in lumber at Dallas, Texas, from whom C. N. Deitz, without plaintiff's knowledge, before January 8, 1892, ordered 20 cars of lum-

ber to be delivered to himself at Omaha. Simpson, Perkins & Co. thereupon sent a letter, inclosing order for the 20 cars of lumber, to the plaintiff, the A. J. Neimeyer Lumber Company, at Waldo, Arkansas. The letter is as follows:

"DALLAS, TEXAS, Jan. 8, 1892.

"*A. J. Neimeyer Lumber Company, Waldo, Ark.*—GENTLEMEN: We received your stock sheet some time since, and herewith send you two orders, which you will find are very nice ones. Please name your figures as low as possible on these orders. Kindly advise us how you are fixed for clear flooring and finished stuff, and we may hand you some orders at an early date. Also inclose us your lowest f. o. b. price list.

"Yours very truly, SIMPSON, PERKINS & CO."

The orders inclosed in said letter were alike, except as to number of cars and kind of lumber, and read as follows:

"DALLAS, TEXAS, Jan. 8, 1892.

"*A. J. Neimeyer Lumber Co., Waldo, Ark.:* Ship to C. N. Deitz, Omaha, Neb., via —— R. R., care —— R. R., rate 22 [Here follow the number of cars and description of lumber required.], as soon as you can. If for any reason you cannot ship promptly, advise. Please always send bill of lading and invoice to us at Dallas.

"Yours truly, SIMPSON, PERKINS & CO."

On January 9, 1892, plaintiff sent the following reply:

"A. J. NEIMEYER LUMBER COMPANY,
"MILLS, WALDO, ARK.

"ST. LOUIS, Jan. 9, 1892.

"*Messrs. Simpson, Perkins & Co., Dallas, Texas*—GENTLEMEN: Your valued orders of January 8th received and filed for prompt shipment, with the exception of two items. The 2x4—20ft. and the 2x12—20 we have not now in stock. We have filled orders as follows:

One car	2x10—12,	No. 1	Common	S. 1 S.	1 E	.....	$13.00
"	2x10—14,	"	"	"	"	.....	13.00
"	2x10—16,	"	"	"	"	.....	13.00
"	2x10—18,	"	"	"	"	.....	14.00
"	2x10—20,	"	"	"	"	.....	14.00
"	2x12—12,	"	"	"	"	.....	13.25
"	2x12—14,	"	"	"	"	.....	13.25
"	2x12—16,	"	"	"	"	.....	13.25
"	2x12—18,	"	"	"	"	.....	14.25

"Prices f. o. b. Omaha, Nebraska. Also,

Two cars	2x4—12,	No. 1	Common	S. 1 S.	1 E	.....	$13.00
"	2x4—14,	"	"	"	"	.....	13.00
"	2x4—16,	"	"	"	"	.....	13 00
"	2x4—18,	"	"	"	"	.....	14.00

"Prices f. o. b. Omaha, Nebraska.

"Also on flooring we beg to name you price, f. o. b., Waldo, Ark., $15.30; on finished lumber S. 2 S., 1x4, and 1st and 2d, $15.30; 1x8, 10 and 12, 1st and 2d, $16.80; 1¼x8, 10 and 12, 1st and 2d, $19.80; 1½x8, 10 and 12, 1st and 2d, $20.80; 2x6—8, 10 and 12, 1st and 2d, $21.80. 1-inch Star Finish, $3 less than 1st and 2d; 1¼, 1½, and 2-inch Star Finish, $4 less than 1st and 2d clear.

"Trusting that these figures will be satisfactory to you, assuring you that our material is well manufactured, and we feel confident we can please you, we solicit your trade in our line. Awaiting your further commands, and thanking you for the orders, we remain yours truly,

"A. J. NEIMEYER LUMBER CO.,
"By E. B. ECKHARD."

Plaintiff, in compliance with the contract contained in the foregoing letters, sold to Simpson, Perkins & Co. 17 of the 20 cars of lumber so ordered, and shipped the same from Waldo, Arkansas, consigned to C. N. Deitz at Omaha on different dates between January 15, 1892, and January 21, the same year. The cars of lumber were delivered for shipment to the St. Louis & Southwestern Railway Company at Waldo, Arkansas, by which company they were delivered to a connecting carrier, and by

the latter delivered to the defendant company to be transported to Omaha, this state, for delivery to the consignee, Deitz. Invoices of the lumber were made by plaintiff and sent to Simpson, Perkins & Co., Dallas, Texas. After the delivery of the cars for shipment, and before they had reached their destination, Simpson, Perkins & Co. failed, without having paid for the lumber. Thereupon plaintiff notified the initial carrier to stop delivery of the cars to Deitz, and the defendant likewise received similar notice after a portion of the lumber had been received by the consignee, but before at least 11 cars had reached their destination. Plaintiff demanded from defendant that the remaining cars of lumber be delivered to it, with which request the company refused to comply, but delivered the same to Deitz. Thereupon this suit was brought for the value of the lumber, less freight. The bills of lading were issued by the initial carrier to plaintiff, which were retained by the latter and were never sent, or delivered, to either the consignee or to Simpson, Perkins & Co. The shipments already mentioned constituted the only transactions between said firm and plaintiff. The latter knew nothing about any deal between Simpson, Perkins & Co. and Deitz, and had no knowledge as to how or why the lumber was to be sent to Deitz, except that the orders so directed the shipping to be made.

A. J. Neimeyer, president and manager of plaintiff's company, testified on direct examination concerning the meaning of the words "Prices f. o. b. Omaha," as used in the correspondence above set out, that "the initials f. o. b. have a well understood meaning among railroad men and shippers. They mean free on board at the point of delivery. If we say f. o. b. Omaha, that means that is the price delivered at Omaha." The witness on cross-examination further testified:

Q. Now, this f. o. b. means simply the price at the place named, does it not?

A. We agree to deliver the lumber at that price at the point of destination.

Q. Do you agree to ship the lumber to the consignee at your own risk?

A. Yes, sir.

Q. You assume the risk?

A. We assume the risk. If there is any damage in transit, we look to the railroad company.

Q. That is your understanding of those terms?

A. Yes, sir.

Q. Isn't it your understanding, Mr. Neimeyer, that f. o. b. simply means the price to the consignee, or the purchaser at a certain place?

A. No, sir.

Q. It is a form of expression of where the delivery shall be made, is that your understanding?

A. That is our understanding; and the price of course attached to it.

Q. Don't you know as a matter of fact that in railroad parlance the term f. o. b. has no reference to the question of delivery, but purely to the question of price?

A. In railroad parlance.

Q. And in business parlance?

A. We do not consider it so.

Q. What does the general public consider it?

A. Men in similar business do not consider it so either.

* * *

Q. I ask you the simple question, did you not consider when you delivered to the railroad company at Waldo, you had fully performed your contract with Perkins, Simpson & Co.?

A. As far as delivering of the lumber was concerned.

Q. Whatever the contract was?

A. We had not fulfilled our contract until we did what we agreed to do.

Q. I want to know—you say you had not—you would not consider you had?

A. No, sir; I would not consider I had.

Q. When would you consider you had fulfilled your contract?

A. When the lumber arrived at its destination all satisfactory.

Q. When it arrived at its destination?

A. Yes, sir.

Q. Then that consideration is based upon what; what terms or writing or expression in the contract do you base the construction?

A. On simply the reason that we agreed to deliver it at Omaha.

Q. What expression?

A. Free on board cars at Omaha.

Q. Then because that letter said f. o. b. at Omaha, 22 cent rate, you interpret it as meaning you had not performed your contract with Simpson, Perkins & Co. until the goods reached Omaha.

A. That would be our interpretation of it.

John A. Sargent, the assistant general freight agent of the Kansas City, Fort Scott & Memphis Railway Company, testified by deposition, *inter alia,* that he had been engaged in railroad business about seven years; knew the meaning of the initial letters "f. o. b." as used in commercial and railroad transactions, and that the expression "f. o. b. at Omaha" means "to be delivered at Omaha free on board cars." The foregoing testimony of the two witnesses named stands uncontradicted in the record.

The chief question presented in this case is, in whom was the title to the lumber while being transported by the carrier to Omaha, the final place of destination? If the title passed from plaintiff upon the delivery of the lumber to the railroad company for carriage at Waldo, Arkansas, as the defendant asserts, then there can be no recovery in this action. Ordinarily, in the absence of an agreement, expressed or implied, to the contrary, personal property is delivered at the place where it is when sold. Where, however, a dieffrent place where it is fixed by the contracting parties, that will govern. In this case there is no claim that the delivery of the lumber was to be made at plaintiff's mills in Waldo, or that the title passed

there. The correspondence between Simpson, Perkins & Co. and plaintiff, which constitutes the contract of sale, discloses that the lumber was sold and purchased for the purpose of being shipped to Omaha, and that plaintiff was to make delivery elsewhere than at its mills. The lumber was to be selected by plaintiff and placed on the cars for transportation, and the contract price was a certain sum per 1,000 feet, varying according to the kind of lumber, "f. o. b. Omaha." The authorities unite in stating that the delivery of goods by a seller to a common carrier for conveyance to the buyer, when the transportation is to be made in that manner, and the contract is silent on the subject, is delivery to the purchaser, and *prima facie* the title to the property at once vests in the latter, subject to the exercise of the vendor of the right of stoppage *in transitu*, since the carrier is regarded as bailee or agent of the vendee, and not of the vendor. But if the contract requires the seller to make delivery at a distant point, the carrier is his bailee or agent, and usually the title does not pass until the property has been delivered at the point designated by the parties. (*Sneathen v. Grubbs*, 88 Pa. St. 147; *Braddock Glass Co. v. Irwin*, 153 Pa. St. 440; *Hanauer v. Bartels*, 2 Colo. 514; Benjamin, Sales, sec. 1040.)

R. M. Benjamin, in his work on the Principles of Sales, at page 87, states: "If it appear that the seller undertakes to deliver the goods at the place of their destination, assuming the risk of their transmission, the carrier is the bailee of the seller and the property in the goods does not vest in the buyer until they are delivered at such place." The author, at page 145, in speaking of the general doctrine that the delivery of goods to a carrier by a vendor for the purpose of transportation to the vendee is *prima facie* delivery to the latter, says: "The rule does not obtain when it appears that the seller undertakes to deliver the goods at the place of destination. In such case the carrier is the agent of the seller."

In Newmark, Sales, sec. 166, the author says: "The

general rule is that title will not pass until delivery, if it is a part of the contract of sale that the seller shall deliver the property sold at some place specified and receive payment on delivery. * * * And that if by the terms of the contract the seller engages to deliver the thing sold at a given place, and there be nothing to show that in the meantime the thing sold was to be at the risk of the buyer, the contract is not fulfilled by the seller unless he delivers it accordingly." (*Bloyd v. Pollock*, 27 W. Va. 75; *Devine v. Edwards*, 101 Ill. 138; *Suit v. Woodhall*, 113 Mass. 391; *Weil v. Golden*, 141 Mass. 364; 21 Am. & Eng. Ency. Law 528-530.)

McNeal v. Braun, 53 N. J. Law 617, was an action to recover the contract price of a quantity of coal shipped by plaintiff from Philadelphia to the defendant at Burlington, under a contract fixing the price at $4.10 a ton delivered at Burlington. The coal was shipped in a barge selected by the seller, and reaching in the evening the last named place was moved along side of defendant's wharf for the purpose of unloading. During the night the barge sank, and the coal was lost. The court in the opinion say: "Under a contract of this sort, delivery of the coal on board the barge was delivery to the master as the plaintiff's bailee or agent, to perform for him the act of delivery in execution of his contract. (1 Benjamin, Sales [Corbin's ed.] sec. 556.) Meanwhile, and until delivery was consummated in such manner as to be effectual as between vendor and purchaser, the coal was at the plaintiff's risk. * * * But the plaintiff, instead of being an agent to procure transportation, had himself contracted to deliver the coal, and these instructions ignore the fact that under a contract of that sort the undertaking to deliver is absolute and unqualified, and delivery of the goods is a condition precedent to the right of the vendor to sue for the contract price. If the goods be lost or destroyed before delivery is consummated the vendor must bear the loss. Under such a contract the carrier selected by the vendor is his agent to perform the

contract to deliver, and the vessel in which the goods are carried is *pro hac vice* the vendor's vessel. For the negligence of the one and the condition of the other, and, indeed, for failure to make the delivery of the coal according to the contract, for any cause not due to the fault of the purchaser, the responsibility is upon the vendor."

Westman Mercantile Co. v. Park, 31 Pac. Rep. [Colo.] 945, was to recover the contract price of two cars of hay shipped by plaintiff to defendant at Denver. It was held the delivery was complete and the title to the hay passed to the buyer, when the cars containing the hay were left in the general receiving yards of the carrier at the final place of destination.

It is argued that the place of delivery of this lumber was on board the cars at Waldo, and that the title passed when the lumber was put on the cars for shipment. The soundness of this contention depends upon the construction given to the clause in the contract "prices f. o. b. Omaha," as there is no other provision relating to the subject of delivery. The initial letters "f. o. b." in contracts of sale, when the property is to be transported, mean "free on board" the cars at a designated place, whether that be the initial point of shipment or place of final destination. They imply that the buyer shall be free from all the expenses and risks attending the delivery of the property at the point named in the contract for such purpose. This contract should be interpreted precisely the same as if it read "prices free on board cars at Omaha," and the plain and obvious meaning of those words is that plaintiff was required to pay all freight and expenses, assume all risk of transportation, and that the title did not pass from the seller until the lumber arrived at Omaha. Had the contract named "prices f. o. b. Waldo," then delivery to the carrier at Waldo would have been delivery to the purchasers, and title would at once have passed. (*Congdon v. Kendall*, 53 Neb. 282.) But the contract before us reads "f. o. b." place of destination, which is materially different from a

clause which provides for the delivery of property at the initial point of transportation. Had this lumber been lost while in transit, plaintiff could not have recovered the purchase price from the vendees, since the sale was not complete without delivery of the property free on board the cars at Omaha. This is the construction placed on the contract by plaintiff and defendants in the pleadings, as a reference thereto will show. Each party has pleaded *in hæc verba* the correspondence which constitutes the contract under which the consignments were made. The petition avers that the lumber was sold "to be delivered at Omaha, Nebraska, free of freight on board the cars at Omaha;" and the answer expressly admits the sale of the lumber as alleged in the petition. Each party, therefore, has construed the contract as calling for the delivery of the lumber at Omaha, and not Waldo, and the court is certainly justified in adopting the construction which the parties themselves have admitted to be the proper one. That the delivery was to be made in Omaha is emphasized by the following averment in the answer: "The defendant further answering alleges that before the time mentioned in the petition, and before Simpson, Perkins & Co. had purchased the lumber referred to from the plaintiff they had entered into an agreement with the said C. N. Deitz, of Omaha, to sell and deliver to him at said city, at certain agreed prices, a large quantity of lumber of the kind described in the petition, and that the said Simpson, Perkins & Co. to carry out the agreement purchased of the plaintiff the lumber aforesaid, and at the same time requested the plaintiff to promptly ship it to C. N. Deitz. That the plaintiff, in compliance with such request, delivered the lumber to the said St. Louis & South Western Railway Company, to be transported by it and other connecting carriers to Omaha and there deliver to C. N. Deitz." This is an admission that Omaha was the place of delivery of the lumber. The delivery to a carrier is regarded as delivery to the buyer only when, and as, it is in accord with the

terms and intention of the shipment. In the case at bar the carrier was the bailee or agent of plaintiff, and not of Simpson, Perkins & Co., and the title to the lumber did not vest in them until its arrival in Omaha free of expense of transportation to the purchasers. This conclusion is not without abundant support in the authorities.

In Benjamin, Sales [6th ed.] sec. 682, the author says: "In many mercantile contracts it is stipulated that the vendor shall deliver the goods 'f. o. b.,' *i. e.*, 'free on board.' The meaning of these words is that the seller is to put the goods on board at his own expense on account of the person for whom they are shipped, and the goods are at the risk of the buyer from the time when they are so put on board." At section 693 it is stated: "If, however, the vendor should sell goods, undertaking to make the delivery himself at a distant place, thus assuming the risks of the carriage, the carrier is the vendor's agent."

In *Knapp Electrical Works v. New York Insulated Wire Co.*, 42 N. E. Rep. [Ill.] 147, it was held that a contract for the consignment of goods "f. o. b." place of shipment implies that the consignee is to pay the freight to the place of destination.

In *Miller v. Seaman*, 176 Pa. St. 291, the facts were these: February 21, 1894, one Miller contracted for the sale to the defendants of eleven piles of lumber in the yards of the Dent Lumber Company, at Du Boistown, Pennsylvania, marked "A. G. M." and numbered and mentioned in the schedule annexed to the contract, "at and for $8.25 per 1,000 shipping count, f. o. b. cars Williamsport, to be loaded, inspected, and measured as ordered by said purchasers, by Mr. Sam Aurand for the sellers." The contract further stipulated for inspection and measuring all lumber not loaded on cars prior to June 1, 1894, and the same to be paid for on that date at $8 per 1,000 feet, less two per cent discount. The expenses of the inspection and measurement of lumber in yard on said date to be borne by the purchasers. Before June 1, a portion of the lumber was destroyed by flood,

and Miller brought suit to recover the value of the lumber thus lost. A nonsuit was entered, the trial court holding that the title did not pass from Miller, under the contract, until the lumber was measured and inspected, and delivered at his expense f. o. b. cars Williamsport to the purchasers. The judgment was affirmed, the court in the opinion saying: "It is clear that the defendants had no right to take possession of these piles, as piles of lumber. If they had attempted it, Miller could have proceeded either by replevin or trespass against them. They could not have sold the lumber in a lump and delivered it to a purchaser. They could only take or sell in accordance with their contract. Their title to each shipment vested on its delivery f. o. b. to them at Williamsport. The lumber swept away by the flood had not been ordered by the purchaser; it had not been inspected, measured, or loaded by the seller and delivered at Williamsport to the buyer. * * * The title had left the plaintiff only as orders had been filled and shipped, and as to all that remained in the yard, it had never left him."

In *Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 101 Ala. 446, there was under consideration a contract containing a provision for the sale and purchase of "Flat Top Coke at $5.10 per net ton (2,000 lbs.) f. o. b. cars Sheffield, Ala.," which was the place of destination of the coke. The court, in discussing the meaning of the letters "f. o. b." in contracts of sale, observed: "They import that the purchaser shall be free from all expense which may have attended the shipment and transportation to the point named. Had the provision related to the initial point of the transportation, the buyer would have been entitled to the shipment at that place free from all expense incident to loading the cars—all expense indeed incurred in the premises up to and including the loading of the cars. Then it would have been upon the buyer to pay the freight—the cost of transportation—to the final destination of the consignment. The provision here having relation to the point of final delivery, it can mean noth-

ing else than that the seller is to pay all costs and charges up to that point, and that the buyer is entitled to receive the consignment free from all such costs and expenses."

Capehart v. Furman Farm Improvement Co., 103 Ala. 671, was an action by a consignor against a carrier to recover damages for loss and injury sustained in the transportation of certain goods which were purchased by Scott & Ray from plaintiff to be shipped from Atlanta, Georgia, to Guntersville, Alabama, consigned to purchasers. The contract of sale provided the goods were to be delivered "f. o. b. at Guntersville, Ala." The court, in the opinion, say: "It is admitted that f. o. b. means 'free on board.' Indeed, we judicially know the fact. (*Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 101 Ala. 446.) The effect of the stipulation is that the consignor will place the goods, loaded on the car or vessel wherein transported, at the designated point of destination, free of all expense to the consignee. (*Sheffield Furnace Co. v. Hull Coal & Coke Co., supra.*) When, therefore, the plaintiff paid the freight charges and caused the boat to be landed at Guntersville, with the goods safely thereon, properly consigned to Scott & Ray, it completely fulfilled its contract; the carrier ceased to be its agents for the custody and care of the goods, and immediately became the agent of the consignees. The relations of the parties then became precisely the same, in effect, as if the contract of the plaintiff had been delivered f. o. b. at Atlanta, and the loss or injury had occurred en route, before reaching Guntersville. In such case, the carriers would have been regarded as the agents of the consignees, and the delivery to them f. o. b. at Atlanta would have passed the title to the consignee. This contract is not susceptible of any other construction."

There is no question that, under the contract, plaintiff was required to pay the freight on the lumber from Waldo to Omaha, which fact raises the presumption that the intention was that delivery was to be made by the

seller, and at its risk, at Omaha, and that the title did not vest in the vendees until the lumber arrived in that city.

In *Murray v. Nichols Mfg. Co.*, 11 N. Y. Supp. 734, glassware was shipped by plaintiff in Connecticut for delivery to defendant in New York, the seller paying the freight. It was ruled that the risk of transportation was on the latter, and no recovery could be had for the goods broken before their arrival at place of destination.

Devine v. Edwards, 101 Ill. 138, was an action to recover a sum alleged to be due for a quantity of milk shipped by plaintiff to defendant from Dundee, Illinois, to Chicago, under a contract whereby plaintiff was to pay the freight. There was evidence tending to show that some of the milk spilled from the cans while on the cars, and one of the questions was who was to stand this loss. The decision of the court is expressed in the second subdivision of the syllabus as follows: "Where a contract for the sale and delivery of personalty such as milk expressly provides that it is to be shipped by the seller to the place of business of the purchaser, * * and any loss on the way must fall upon the seller."

In *Suit v. Woodhall*, 113 Mass. 391, a traveling salesman for plaintiffs, who were wholesale liquor dealers in Louisville, Kentucky, took the order of the defendants at Lawrence, Massachusetts, for a quantity of liquors, at a stipulated price subject to the order of plaintiffs. It was agreed that there should be deducted from the price all sums which defendants should pay for freight upon the liquors from Louisville to Lawrence. The liquors were delivered to the carrier for transportation as agreed, and it was held that the title remained in the vendors during the course of transportation, and the sale was not complete until the delivery of the liquors at the place of destination in Lawrence. To the same effect, as to completion of sale at place of delivery, is *Weil v. Golden*, 141 Mass. 364.

The third and fourth paragraphs of the syllabus in

Julius Winkelmeyer Brewing Ass'n v. Nipp, 50 Pac. Rep. [Kan.] 956, are as follows:

"3. Ordinarily, a delivery of merchandise to the carrier is a delivery to the purchaser, but when the seller pays the freight the carrier is his agent, and the delivery is made at the place of its destination.

"4. Where the freight charges are to be paid in the first instance by the purchaser, but are to be charged to the seller, and deducted from the price of the merchandise, held, that the seller pays the freight."

It is asserted that *Wagner v. Breed*, 29 Neb. 720, is decisive of the question against the contention of plaintiff, and that it was therein solemnly adjudicated "the mere fact that a vendor pays the freight is of itself sufficient evidence to overthrow the presumption that where a purchaser orders goods from a distant seller, and he in pursuance of the order delivers the goods to a carrier for shipment to the vendor, such delivery is a delivery to the vendee and that his title at once attaches." This doctrine was not announced in that case, as an examination of the decision will disclose. The suit was to foreclose a real estate mortgage given for the purchase price of beer sold and shipped by Wagner, a wholesale dealer in liquors at Rock Island, Illinois, to one Breed, the mortgagor, at Hastings, this state. The defense interposed was that the sale was made in Nebraska, and therefore void, inasmuch as Wagner had no license to sell intoxicating liquors here. The beer was shipped to Breed from Rock Island to Hastings in car load lots by a common carrier of his own selection and designation, and the vendee uniformly paid freight on the shipment, which was afterwards credited back to him in his account by plaintiff, for the purpose of reducing the price of the beer to conform to the usual price then obtaining. The court in the opinion say: "These sales of beer by the plaintiff to the defendant William Breed, upon which the indebtedness sued on arose, were made and concluded at Rock Island, in the state of Illinois." That case is not an au-

thority for the proposition that the title of this lumber passed from the vendor at the place of shipment, because it was shipped under an agreement requiring the plaintiff herein to pay the freight to Omaha, who selected the carrier, and contracted to deliver the lumber free of expense on board cars at that point. The beer was not shipped under a contract containing any such provisions. In that case the vendee, and not the vendor, designated the carrier and paid the freight, and the court properly held that the sales were made in Illinois, and not in this state.

Of the cases decided by this court the one which more nearly fits the one at bar is *Havens v. Grand Island Light & Fuel Co.*, 41 Neb. 153. That was an action to recover the contract price of a car of coal shipped by plaintiff from Omaha to defendant at Grand Island. One of the defenses was that the quantity of coal sued for was not received at the place of destination. Plaintiff insisted that the title of the coal vested in the fuel company upon the delivery to the carrier at Omaha, and if a less amount of coal was received by purchaser than was delivered to the carrier, the loss must be borne by the defendant. The court held the evidence supported the findings of the jury that the coal was to be delivered at Grand Island, saying: "The general rule doubtless is that the delivery of goods to a carrier consigned to the purchaser is a delivery to the purchaser, and that the title of the goods so delivered to the carrier at once vests in the purchaser; but this rule is by no means universal, and whether applicable in any case, depends upon the facts, circumstance, and the contract between the seller and the purchaser in the case. * * * It is not stated in any of the pleadings in the case at what place this coal was to be delivered, and if the jury found from the evidence that the coal was to be delivered at Grand Island, we think the evidence ample to sustain that finding. By the letter of October 16, written by Havens & Co. to the fuel company, it is stated: 'We have your favor of the 15th and

have entered your order for two cars of grate coal at $9.85 per ton f. o. b. at Grand Island;' * * * and it also appears from the record that Havens & Co. accepted from the fuel company, as part payment of the other car of coal shipped with the one in suit, the freight bills for the coal turned over by the carrier to the fuel company. To adopt the contention of counsel that by the terms of the contract the fuel company was to pay $9.85 per ton for the coal at the place of delivery, and that that place of delivery was Omaha, would make the coal cost the fuel company in Grand Island about $16 per ton, as the evidence shows that the carrier's charges amounted to about $6 per ton."

Tregelles v. Sewell, 7 H. & N. [Eng.] 573, is distinguishable from the case at bar. That was an action to recover damages for the non-delivery of a quantity of bridge rails purchased under a contract whereby the buyer agreed to pay therefor "5*l.* 14*s.* 6*d.* per ton, to be delivered at Harburgh, costs, freight, and insurance; payment by net cash in London, less freight, upon handing bill of lading and policy of insurance." The seller delivered the rails on boat at London, received the usual bill of lading, making the shipment deliverable at Harburgh, procured, at his own expense, a policy of insurance on the shipment, which, with the bill of lading indorsed in blank, was delivered to the buyer, and the latter then paid the contract price of the iron, less the amount of the freight payable under the bill of lading. It was decided that the seller was not required to make delivery at the final place of destination, and that the title passed on the delivery of the bill of lading and policy of insurance to the vendee. That case is in many respects unlike the one before us. There the vendee was to, and did, pay the purchase money on delivery of the iron to the carrier, and the vendor then paid the freight to the buyer and delivered the bill of lading to him, so that there was nothing left for the seller to do to vest the title in the other party. In the present case the purchase money was not paid, nor

the freight on the lumber, and the consignor retained possession of the bills of lading. The contract, therefore, had not been fully performed by the plaintiff.

It is urged that inasmuch as the lumber was not consigned to the plaintiff, or its order, and that the bills of lading were taken in the name of the consignee, the inference may be drawn therefrom that it was the intention of plaintiff that the title to the lumber should pass immediately upon the delivery to the carrier at Waldo. This argument is not tenable, because the bills of lading were never surrendered to the consignee or purchaser, but at all times remaining in the possession of plaintiff. Although ordinarily the rule is, when not rebutted by evidence to the contrary, that the title to goods *prima facie* passes to a vendee upon their delivery by the vendor to a common carrier for transportation to the buyer, yet where a bill of lading is taken in the name of the seller, it is presumptive evidence of his intention to retain control of the property, and that delivery to the carrier is not a delivery to the buyer, but that the carrier is the bailee or agent of the vendor. (Newmark, Sales sec. 147; Benjamin, Sales sec. 399.) On the other hand, if the bill of lading, by direction of vendor, is issued in the name of the consignee and is sent or delivered to him, this is evidence of an intention to transfer the title to the purchaser. "But the fact that the bill of lading is taken in the buyer's name, if it is not delivered, creates no presumption of an intention to transfer the property unconditionally." (Newmark, Sales sec. 150; *Sheridan v. New Quay Co.*, 93 Eng. Com. Law 618; Usher, Sales sec. 233; *Bank of Rochester v. Jones*, 4 N. Y. 497; 2 Am. & Eng. Ency. Law 243, 244; *Thomas v. First Nat. Bank*, 66 Ill. App. 56; *Michigan C. R. Co. v. Phillips*, 60 Ill. 190.)

In 2 Am. & Eng. Ency. of Law 242, it is said: "Where goods are consigned without reservation on the part of the consignor, the *prima facie* legal presumption is that the consignee is the owner. The fact of consignment does not vest an absolute title in the consignee. His

title is not complete until the bill of lading comes into his hands."

Lord Denman, in *Mitchell v. Ede*, 11 Ad. & E. [Eng.] 888, with reference to a bill of lading, says: "As between the owner and shipper of the goods and the captain, it fixes and determines the duty of the latter as to the person, to whom it is (at the time) the pleasure of the former, that the goods shall be delivered. But there is nothing final or irrevocable in its nature. The owner of the goods may change his purpose, at any rate before the delivery of the goods themselves, or of the bill of lading to the party named in it, and may order the delivery to be to some other person, to B instead of to A."

It is obvious that the true construction of the contract of purchase and sale involved in the present case is that plaintiff's agreement was not performed until the delivery of the lumber free on board the cars in Omaha, and that the title was not divested until the shipment arrived in that city. Plaintiff, therefore, without regard to the solvency or insolvency of Simpson, Perkins & Co., had the undoubted right to stop the delivery of the lumber at any time during the course of transportation, which right was duly exercised before at least 11 cars had arrived at the place of their final destination. The defendant, however, delivered the lumber to the consignee, Deitz, notwithstanding it had received timely notice not to do so. Such delivery was, therefore, at the risk of the carrier, and it is liable as for conversion. (*Gates v. Chicago, B. & Q. R. Co.*, 42 Neb. 379; *Shellenberg v. Fremont, E. & M. V. R. Co.*, 45 Neb. 487.) The judgment should be reversed and the cause remanded.

GEORGE W. E. GRIFFITH, APPELLANT, V. JOHN SALLENG ET AL., APPELLEES.

FILED MARCH 17, 1898. No. 7951.

Mortgage: PAYMENT: RELEASE: ASSIGNMENT OF COUPONS: ACTION BY ASSIGNEE. A purchaser of land incumbered by a mortgage showing on its face that it was given to secure a bond with negotiable coupons attached representing the interest installments, paid to the holder of the bond the amount thereof, took from him a release of the mortgage and paid to his vendor the remainder of the purchase price. Some of the interest coupons had been assigned to a third person and were overdue and unpaid. *Held*, That the holder of the interest coupons might maintain an action to foreclose the mortgage for default in their payment.

APPEAL from the district court of Dawson county. Heard below before HOLCOMB, J. *Reversed.*

Warrington & Stewart, for appellant.

E. A. Cook, contra.

IRVINE, C.

The facts in this case are in their essential features undisputed. Salleng, being then the owner of certain land, executed a mortgage thereon to secure the payment of a bond for $2,500 to the Western Farm Mortgage Trust Company. The bond bore interest at the rate of seven per cent per annum, payable semi-annually, and represented by coupons attached to the bond in the form of negotiable promissory notes. Five of these coupons were assigned to a trustee representing holders of bonds of the trust company, for the purpose of securing such bonds. The principal bond was assigned to the People's Guarantee Savings Bank. Salleng sold the land and his grantee finally conveyed it to one Smith, who was to pay therefor in gross $6,000; that is, he was to satisfy the indebtedness which incumbered the land, and pay to his grantor the difference between that indebtedness and

$6,000. He paid the bond held by the savings bank and procured from it a release of the mortgage, and settled with his grantor for the rest of the $6,000. He did not pay the coupons held by plaintiff, who had succeeded to the trust for the bondholders of the trust company, and did not in fact know that those coupons were so held or that they were unpaid. The plaintiff brought this suit to foreclose the mortgage on account of failure to pay the coupons. The district court on these facts found for the defendants and dismissed the case. The plaintiff appeals.

The judgment of the district court is manifestly wrong and must be reversed. The mortgage was recorded and showed on its face that it was given to secure the bond and that the interest was represented by negotiable coupons. Smith was as much charged with notice of these coupons as with notice of the principal debt. The mere fact that the coupons were overdue and that no action had been brought upon them did not justify him in presuming that they had been paid or estop the plaintiff from maintaining this action. No one would contend that one finding a mortgage on record and overdue would be justified in presuming payment within the period of limitations from the fact that it was overdue, but the case is in this aspect the same as if the principal debt instead of interest alone were involved. The case of *Whipple v. Fowler*, 41 Neb. 687, is relied on by appellee. That case is not at all in point. It was there held that one who bought relying on a release of a mortgage, on record and executed by the mortgagee, was protected against the mortgage although it had been assigned to another and the original mortgagee had no right to release it. In this case Smith bought with the mortgage standing of record, unreleased, and merely assumed that when he found the principal bond in the possession of a third person, he was safe in paying that third person, without inquiring what had become of the negotiable interest coupons. There is no element of estoppel in the case, and

Smith settled with his vendor at his peril. The judgment of the district court is reversed and the cause remanded with directions to enter a decree of foreclosure.

REVERSED AND REMANDED.

JOHN H. UNLAND ET AL. V. MCCORMICK HARVESTING MACHINE COMPANY.

FILED MARCH 17, 1898. No. 7881.

Principal and Agent: CONSTRUCTION OF CONTRACT: LIABILITY OF AGENT FOR PURCHASE PRICE OF PROPERTY SOLD. A contract between a harvesting machine company and its agents for the sale of its machines on commission provided that the agents should settle for all machines sold either by cash or by note at the time of their delivery, and if the agents should deliver any machine for use in the field or permit its use before it should be fully paid for by cash or note, the agents should be liable for its price. It was also provided that all notes should be made payable to the order of the company and that all moneys or notes should be received as its agents and remitted to it. A form of contract whereunder the machines were sold provided that if after one day's trial they did not work, time should be allowed to send a person to put them in order. If they still did not work well, they might be returned and the purchase money would be refunded. *Held,* That the trial contemplated by the sales contract was to be after the machine had been paid for or notes given for the purchase money, and that the agents were liable for the price of machines delivered for such trials without first taking the money or notes.

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

J. H. Grimm, W. A. Leese, and *E. W. Metcalfe,* for plaintiffs in error.

Ricketts & Wilson, contra.

IRVINE, C.

A contract existed between the McCormick Harvesting Machine Company and the plaintiffs in error, Unland &

Kubicek, whereby the latter sold on commission harvesting machines and other goods for the harvesting machine company. This action was brought by the harvesting machine company for the price of five machines which it was alleged that Unland & Kubicek had sold contrary to the terms of their contract and for which it was claimed they had thereby rendered themselves liable. In the district court the harvesting machine company was successful, and Unland & Kubicek seek a review of the proceedings.

There are 130 assignments of error. Some of these relate to the giving and refusal of instructions, but in the motion for a new trial the assignment with reference to this subject is of the character which has so frequently been held to preclude a review of each instruction separately. Some of the instructions given were manifestly correct, while one of those refused submitted to the determination of the jury the whole subject of the construction of the written contract between the parties. It was therefore correctly refused. Our investigation of the instructions can go no further.

Numerous assignments relate to the admission of evidence which it is asserted was irrelevant. In the brief attention is not called to any of these assignments and they must therefore be taken as waived.

Nearly all the assignments, however, relate more or less directly to the construction of the contract, and that is the only matter discussed specifically. This contract, after appointing the defendants agents for the sale of plaintiff's goods in certain designated territory, provides that the defendants agree to certain things, among them the following: "To be governed by the printed instructions on the back of this contract, and the instructions of the McCormick Harvesting Machine Company and their general agent. * * * To deliver, set up, and fairly start every machine sold, and to instruct the purchaser how to work it in different kinds and conditions of grain and grass. * * * To draw all notes taken

on the sale of said machines * * * payable to the order of the McCormick Harvesting Machine Company. * * * To sell all machines * * * for such prices and on such terms only as shall be prescribed by the said company or their general agent. * * * To settle for machines sold either by cash or note at the time of delivery, and in no case to warrant machines other than as specified in the regular warranty furnished by said company, and if the agent shall deliver any machine for use in the field or permit the use of a machine before it is fully settled for by cash or note, said agent will account and pay to said company, on demand, full price of said machine, together with interest from date of sale first next, and waive all claims under the warranty; and further agree to pay to said first party for any costs or expenses incurred on said machine." There was a further agreement that all moneys, notes, or other securities taken for machines were to be received by the defendants as agents for the plaintiff, and that they were to promptly remit the whole thereof to the plaintiff, commissions not to be deducted, but to be paid at settlement. Among the printed instruction referred to in the contract was one requiring the agents to give to each purchaser one of plaintiff's printed warranties, "which will be a sufficient guaranty that the machine will work as represented." From the forms used for contracts of purchase it seems that the machines are warranted by the manufacturers to be well made, of good material, and durable with proper care. Further, "if upon one day's trial the machine should not work well, the purchaser shall give immediate notice to said McCormick Harvesting Machine Company, or their agents, and allow time to send a person to put it in order. If it cannot then be made to work well, the purchaser shall return it at once to the agent from whom he received it, and his payment (if any has been made) will be refunded. Continuous use of the machine, or use at intervals through harvest season, shall be deemed an acceptance of the machine."

It is undisputed that the machines sued for by the agents' consent got out of their actual possession and into the possession of the purchasers, and were in fact used to some extent in the field. It is also undisputed that they were not prior thereto settled for either by notes or in cash. The plaintiff contends that these facts create a liability. The defendants contend that they retained at least constructive possession, that the true intent of the contract, taken together with the form of sales contracts used, was that a prospective purchaser might make a one day's trial of the machine, and in case it did not work properly, retain it in his possession until an expert came to repair it, and that if it did not then work he must return it; that a delivery for that purpose was not such a one as the contract contemplates as rendering the agent liable. His liability would only attach if he permitted the use of the machine or its retention by the purchaser after such trial without taking pay or notes for the purchase money. We think the former construction correct. Taking the whole contract, together with the contracts of sale, it seems clear that the very thing which plaintiff sought to avoid was its machines getting into the hands of prospective purchasers for trial or otherwise before full settlement should have been made. It insisted that before the machine should be delivered for use payment by cash or note should be made. It bound its agents to then deliver the machine, set it up, start it, and instruct the purchaser as to its use. To protect the purchaser it made a warranty, which it bound the agent to deliver in each case of sale, whereby, if the machine did not work, an opportunity was given to put it in order. If it still did not work, it might be returned and payments would be refunded. In other words, the company insisted upon a complete contract in the first instance, with the purchase price paid or evidenced by notes, leaving the purchaser to rely on the warranty. To enforce sales in this manner and to prevent agents from delivering machines for trial

or on conditional contracts of sale it was provided that unless payment should be made or notes should be so first taken, the agent should be liable for the price of the machine. It is said that machines could not be sold on such terms. That was a matter for the parties to consider when they made the contract. The plaintiff had a right to select its own method of making sales. If it chose to sell on such terms or not at all, that was its affair. If the defendants were not willing to restrict themselves to such terms they should not have contracted to do so. Having so contracted they were not at liberty to depart from those terms; and when they did depart, they rendered themselves liable for the price of the machines. Construing the contract as we have indicated the verdict was right in any view of the evidence.

AFFIRMED.

R. C. HOYT V. HERMAN KOUNTZE ET AL.

FILED MARCH 17, 1898. No. 7886.

Note: ACTION BY FIRM: PROOF OF PARTNERSHIP. K. and others sued on a promissory note, alleging that they were partners as K. Bros., and that the note had been by the payee indorsed and delivered to them. The answer denied, among other things, the indorsement to plaintiffs and the partnership alleged. The proof showed a general indorsement, and that the note had by such indorsement been transferred to the firm of K. Bros., from whom plaintiffs' attorney had received it. *Held*, That, under this state of the issues and proof, the issue as to plaintiffs' constituting the firm owning the note became material, and that in the absence of proof of the partnership they could not recover.

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

G. M. Johnston, for plaintiff in error.

W. C. LeHane, contra.

IRVINE, C.

The defendants in error, four in number, sued on a promissory note alleged to have been made by the plaintiff in error to the Nebraska National Bank of Beatrice, and by it to have been indorsed and transferred to the plaintiffs as collateral security to another note of like amount, made by other persons to the Beatrice bank and by it sold to plaintiffs. The petition averred that the plaintiffs were partners doing business in New York under the name of Kountze Bros. The answer specially denied the partnership alleged, admitted the making of the note sued on, but denied generally all other allegations of the petition, thus putting in issue the transfer of the note to plaintiffs and their ownership thereof. On the trial the note was produced bearing a general indorsement, "H. C. Ewing, C." Proof was made that this was the genuine signature of Ewing and that he was cashier of the Beatrice bank, the payee of the note. There was no evidence whatever that the plaintiffs were partners constituting the firm of Kountze Bros., although that fact was in issue by special denial. Ordinarily, the production of a negotiable note indorsed generally would raise the presumption of ownership in the party producing it, and the partnership relation of such parties would perhaps be immaterial. But the plaintiffs did not rest on that presumption. They introduced evidence for the purpose of establishing the sale and transfer of the note by the Beatrice bank. One of their attorneys testified that the other note above referred to was made by officers of the Beatrice bank to the bank's order and by the bank transferred to Kountze Bros. for the purpose of obtaining a loan on behalf of the bank, and that the note sued on was transferred to Kountze Bros. as collateral security. He further testified that he received the note from Kountze Bros. This tended to show ownership in Kountze Bros. and not in plaintiffs, unless they in fact constituted that firm. True, the sole witness once or

twice says plaintiffs are the owners, but his whole testimony shows that Kountze Bros. are, and that where he says "plaintiffs" he means Kountze Bros., assuming their identity with plaintiffs to be established. In the light of the proof the fact that plaintiffs constituted the firm of Kountze Bros. became material, and the burden was on plaintiffs to prove it. (*Dessaint v. Elling*, 31 Minn. 287.) There having been no contractual relations between plaintiffs and defendant the latter was not estopped to deny their partnership relationship. In this respect the case is analogous to the denial of a plaintiff's corporate capacity. (*Davis v. Nebraska Nat. Bank*, 51 Neb. 401.) For the insufficiency of the evidence in this respect the judgment must be reversed.

REVERSED AND REMANDED.

ALONZO P. TUKEY, APPELLEE, V. CITY OF OMAHA ET AL., APPELLANTS.

FILED MARCH 17, 1898. No. 7877.

1. **Municipal Corporations:** INCURRING DEBT. When the governing body of a municipality is authorized by a vote of the people, and only thereby, to incur a debt for a particular purpose, such purpose must be strictly followed, and the terms of the authority granted must be strictly and fully performed.

2. ———: ———: BONDS: MARKET HOUSE. A proposition was submitted to the electors of a city, and by them adopted, to issue bonds for the purpose of securing a site for a market place and erecting thereon a market house. The proposition contemplated the purchase of land for that purpose. *Held*, That the erection of a market house on land already owned by the city and used as a public park was a substantial departure from the terms of the vote, and was unauthorized.

3. ———: ———: INJUNCTION. A resident taxpayer, showing no private interest, may maintain a suit to restrain the governing body of a municipality from an illegal disposition of the public money, or the illegal creation of a debt which must be paid by taxation.

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

The opinion contains a statement of the case.

William J. Connell and *Estabrook & Davis*, for appellants:

The undisputed testimony shows that the block of ground in controversy had been dedicated to the public by a common-law dedication for the purposes of a public square, and that there never has been a dedication, statutory or otherwise, of such property as a public park. The legislature so far represents the public that it may at any time change or abolish the original use. (*Brown v. Manning*, 6 O. 298; *State v. Trask*, 27 Am. Dec. [Vt.] 561; *Mowry v. City of Providence*, 10 R. I. 52; *City of Hoboken v. Pennsylvania R. Co.*, 8 Sup. Ct. Rep. 643.)

The legislature may delegate to a municipality the power to change or abolish the original use. (*Whitsett v. Union D. & R. Co.*, 10 Colo. 243; *Polack v. San Francisco*, 48 Cal. 490; *State v. Huggins*, 47 Ind. 586; *Riggs v. Board of Education*, 27 Mich. 262; *Cooper v. City of Detroit*, 42 Mich. 584; *Clarke v. City of Providence*, 15 Atl. Rep. [R. I.] 763; *City of Fort Wayne v. Lake Shore & M. S. R. Co.*, 132 Ind. 558; *Baird v. Rice*, 63 Pa. St. 489; *Heller v. Atchison, T. & S. F. R. Co.*, 28 Kan. 446.)

The legislature has expressly conferred the power upon the city of Omaha to extinguish one public use to which property has been dedicated, for the purpose of devoting such property to another and different public use. (*Lindsay v. City of Omaha*, 30 Neb. 517; *Whartman v. City of Philadelphia*, 33 Pa. St. 202; *Reid v. Board of Education*, 73 Mo. 295; *Langley v. Galliopolis*, 2 O. St. 108.)

Persons purchasing property abutting upon grounds dedicated to a public use, on the faith of such dedication, thereby acquire a vested interest in the continuance of such use, and not even the legislature can extinguish the particular use without the consent of such abutting own-

ers or compensating them in damages; but only such persons may be heard to complain, and the appellee owning no property abutting upon, or contiguous to, Jefferson Square has no such personal interest, as a mere taxpayer, as will authorize him to sue. (*City of San Antonio v. Strumberg*, 70 Tex. 366; *City of Chicago v. Union Building Ass'n*, 102 Ill. 379; *Gall v. City of Cincinnati*, 18 O. St. 563; *Marini v. Graham*, 8 Am. & Eng. Corp. Cases [Cal.] 401; *Kittle v. Fremont*, 1 Neb. 329.)

George W. Doane, contra:

Jefferson Square was dedicated by the city of Omaha for the use of the public as a public square and park forever. (*Trustees of Methodist Episcopal Church v. Council of Hoboken*, 33 N. J. Law 17.)

Such dedication cannot be revoked or the use to which the square was devoted changed. (*State v. Woodward*, 23 Vt. 92; *Story v. New York Elevated R. Co.*, 90 N. Y. 122; *New Orleans v. United States*, 10 Pet. [U. S.] 662; *San Francisco v. Canavan*, 42 Cal. 553; *Wilder v. City of St. Paul*, 12 Minn. 116; *Missouri Institute for Education of Blind v. How*, 27 Mo. 211; *Huber v. Gazley*, 18 O. 27; *City of Jacksonville v. Jacksonville R. Co.*, 67 Ill. 540; *Child v. Chappell*, 9 N. Y. 256; *Wyman v. Mayor*, 11 Wend. [N. Y.] 487; *Haynes v. Thomas*, 7 Ind. 38; *Price v. Thompson*, 48 Mo. 365; *City of Cincinnati v. White*, 6 Pet. [U. S.] 431; *Warren v. Mayor*, 22 Ia. 355; *In re Boston & A. R. Co.*, 53 N. Y. 574; *Inhabitants of Springfield v. Connecticut R. R. Co.*, 4 Cush. [Mass.] 63; *State v. Montclair R. Co.*, 6 Vroom [N. J. Law] 328; *Eastern R. Co. v. Boston & M. R. Co.*, 111 Mass. 125; *New York, H. & N. R. Co. v. Boston, H. & E. R. Co.*, 36 Conn. 196; *Cook v. City of Burlington*, 30 Ia. 98; *City of Ft. Wayne v. Lake Shore & M. S. R. Co.*, 132 Ind. 563; *Clark v. City of Providence*, 16 R. I. 337; *Franklin County v. Lathrop*, 9 Kan. 463.)

It is not in the power of the city authorities to appropriate a fund created by a vote of the electors for two specified objects, to one of those objects only. (*Gray v. Mount*, 45 Ia. 595; *McWhorter v. People*, 65 Ill. 290.)

Plaintiff may maintain the action. (*Whitfield v. Rogers*, 26 Miss. 87; *Gray v. Mount*, 45 Ia. 591; *Harney v. Indianapolis, C. & D. R. Co.*, 32 Ind. 244; *New London v. Brainard*, 22 Conn. 552; *Metzger v. Attica & A. R. Co.*, 79 N. Y. 171; *Mayor of Baltimore v. Gill*, 31 Md. 395; *Wyandotte & Kansas City Bridge Co. v. Commissioners of Wyandotte County*, 10 Kan. 326; *Hodgman v. Chicago & St. P. R. Co.*, 20 Minn. 41; *Webster v. Town of Harwinton*, 32 Conn. 131; *Merrill v. Plainfield*, 45 N. H. 134; *Barr v. Deniston*, 19 N. H. 180; *Wyman v. Mayor of New York*, 11 Wend. [N. Y.] 487; *Mayor of Macon v. Franklin*, 12 Ga. 239; *Mayor of Columbus v. Jaques*, 30 Ga. 507; *Rowan v. Town of Portland*, 8 B. Mon. [Ky.] 238; *Zearing v. Raber*, 74 Ill. 411; *Herbert v. Benson*, 2 La. Ann. 770; *Brockman v. City of Creston*, 79 Ia. 587; *Cummings v. City of St. Louis*, 90 Mo. 264.)

IRVINE, C.

There is in the city of Omaha a tract of land, occupying one city block, and known as "Jefferson Square." This has for many years been used as a public park, and a considerable sum of money has been expended in improving it and adapting it to such use. In 1893, by ordinance, the mayor and council submitted to the electors of the city a proposition for the issuing of bonds "to pay the cost of securing a site for a market place and erecting a market house thereon." The proposition was carried, and thereafter, by another ordinance, Jefferson Square was designated as the site for the erection of a market house, and a resolution was passed directing the board of public works, under the direction of the city engineer, to clear and grade the square, preparatory to the erection of the market house. These officers were proceeding to comply with the resolution when the plaintiff, showing no interest other than as a taxpayer of the city and a citizen thereof, brought this action to restrain the city and the officers named in the resolution from entering upon the square for the purpose indicated. On final hearing the injunction granted at the commencement

of the suit was made perpetual, and the defendants appealed.

An important question involved in the record, and one which has received a masterly discussion in the briefs, relates to the character of the city's title to the land, and whether it has been charged with a perpetual use as a park so that it is not within the authority of the city to divert it, under any circumstances, to a different use. While the district court seems to have passed on that question, it seems to us that it cannot be logically reached until certain other questions are disposed of; and the conclusion we have reached on these disposes of the case without a decision of the underlying question. No opinion is therefore expressed on the broad question referred to.

As the city charter stood at the time of the proceedings complained of the mayor and council had power "to erect and establish market houses, and market places, * * * and * * * locate such market houses and market places * * * on any streets, alleys, or public grounds, or on any land purchased for such purpose." (Compiled Statutes 1893, ch. 12*a*, sec. 62.) It was evidently under this grant that the city undertook to act. The title of the ordinance submitting the proposition was as follows: "An ordinance providing for submitting to the legal electors of the city of Omaha at a general election to be held in said city on the 7th of November, 1893, the question of issuing bonds of the city of Omaha to the amount of two hundred thousand dollars to pay the cost of securing a site for a market place and erecting a market house thereon." The proposition voted on, as embodied in the ordinance, was as follows: "Shall bonds of the city of Omaha in the sum of two hundred thousand dollars be issued for the purpose of paying the cost of securing a site for a market place, not less than a block in size, and erecting a market house thereon, such market place to be on such block in said city north of Leavenworth street, south of Cuming street,

and east of Twentieth street, as may be designated by the mayor and council by ordinance after advertisement for bids of not less than four weeks, the said market house to be erected thereon to be in size at least two hundred and sixty-four feet by sixty feet, two stories in height, the lower story to be devoted to market house purposes, and the second story to contain a public assembly hall, the said bonds to run not more than twenty years and to bear interest, payable semi-annually, at a rate not to exceed five per cent per annum, with coupons attached, the said bonds to be called 'Market House Bonds,' and not to be sold for less than par, the proceeds of said bonds to be used for no other purpose than paying the cost of securing such site and erecting such market house, the said bonds to be issued from time to time as may be required during the years 1894 and 1895." The authority of the city government in the use and expenditure of the fund so provided was limited and strictly defined by the terms of the proposition so ratified by vote of the people. Beyond any doubt this proposition contemplated, not the issuing of bonds to the amount of $200,000 for the erecting of a market house on land already owned by the city and devoted to another purpose, but the purchasing of land for a market place, and the erection of a market house on the land so purchased. Contending against this construction counsel for the appellants call attention to the use, both in the title of the ordinance and in the proposition itself, of the word "securing" instead of "purchasing," and to the failure to designate any particular amount to be appropriated to the purchase of land. It is thence asserted that the voters could not have been influenced by the fact that any particular sum was to be so used, that a site might have been purchased for a nominal sum, and that the use of the word "secure" indicated an intention to permit the use of the fund to pay abutting damages and other expenses incident to the process of appropriating to this use and adapting thereto land already belonging to the city but theretofore de-

voted to other purposes. We cannot believe that the electors so understood it. The statute contemplates two things—market places and market houses, the distinction between the two being carefully preserved throughout the section. By "market place" was evidently meant something more than land occupied by a market house. This distinction is preserved in the title and in the body of the ordinance, the only connection therein being the requirement that the market house shall be erected on the market place. The proposition delimits an area within the city within which the market place is to be located, and we think we may perhaps take notice of the fact that the area designated is in the most thickly populated portion of the city. The proposition requires that the designation of a site shall be made after advertisment for bids—clearly bids for the sale of land to the city. This last feature unmistakably indicates the intention to purchase land for the purpose. Every part of the ordinance reinforces that inference. When we recur to the alternative power in the charter to locate market places on streets, alleys, or public grounds, or else on land purchased for the purpose, the intent of the proposition adopted becomes a demonstrated fact. That when the governing body of a municipality is authorized by a vote of the people, and only thereby, to incur a debt for a particular purpose, such purpose must be strictly complied with, and the terms of the authority granted be strictly and fully pursued. is so well settled that it would be idle to cite authorities on the proposition. That the mayor and council, in attempting to erect a market house on land already belonging to the city and used for another purpose, were departing from the terms of the vote in a material respect, and so diverting the funds at their disposal to an unauthorized purpose, is evident on a moment's reflection. We may take notice of the fact that American cities have largely grown up without adequate provision for parks and public pleasure grounds, and that many cities, including Omaha, after reaching an

advanced period of development, have found it necessary, at enormous expense, to purchase and improve land for parks. A large proportion of a city's inhabitants is therefore always jealous of any attempt to vacate parks already existing or to divert them in whole or in part to other purposes. That feeling may have been so strong that it would have led to the rejection of the market house proposition had it not by its language excluded the possibility of its bringing about the destruction of one of the parks. Again, $200,000 is a large sum to devote wholly to the construction of a market house. If land was to be purchased within the designated area it was certain to require a large portion of the sum voted wherewith to make the purchase. Men might be willing, from the necessity of the case, to vote bonds to the amount of $200,000 where a purchase of land was to be made, but not to incur so large a debt for the construction of a building on land already owned.

It is argued that the plaintiff, merely as a taxpayer, showing no special interest, cannot be heard to complain. Some early cases lend color to this argument, but they are all readily distinguishable. In *Normand v. Otoe County*, 8 Neb. 18, it was said that taxpayers might maintain an action to restrain county commissioners from an illegal exercise of their power, but that it must appear that they would be greatly or irreparably injured by the acts sought to be prevented. That was a proceeding to restrain the commissioners from carrying out a contract made with a lawyer to bring a suit for the county against the plaintiffs, it being alleged that the sum to be paid the lawyer was exorbitant. Clearly those particular taxpayers were properly denied relief. In *Parody v. School District*, 15 Neb. 514, it was said that the plaintiff must show some special damage not common to the public. The opinion shows that there was no assignment of error and no brief, and that the court was "left wholly in the dark" as to the questions presented. The purpose of the action was to restrain the removal of a schoolhouse. It

does not appear from the report that the plaintiff had children of school age, that he was a taxpayer, or that the proposed removal would entail any expense. He therefore showed no interest whatever. In *McLaughlin v. Sandusky*, 17 Neb. 110, it was said that it must appear that the plaintiff would suffer an injury. The plaintiff sued, not as a taxpayer, but as a land-owner, to prevent a road supervisor from opening a ditch from a highway upon his land. Relief was refused because there was no proof that his land would be injured. On the other hand, the right of a taxpayer to maintain a suit to restrain officers from wasting or unlawfully expending public funds, has been several times affirmed. (*Follmer v. Nuckolls County*, 6 Neb. 204; *Solomon v. Fleming*, 34 Neb. 40; *Ackerman v. Thummel*, 40 Neb. 95; *Morris v. Merrell*, 44 Neb. 423.) In a lucid discussion of the question in his work on Municipal Corporations, Judge Dillon says (sec. 914 *et seq.*) that the right of a taxpayer in such a case has been affirmed in many states and that it is now almost the universal doctrine. Of course he must bring himself within some equitable principle. In the case before us he has done this by seeking to prevent the violation of a trust, and the squandering of a trust fund for a purpose contrary to the trust. The right of a stockholder of a private corporation to so intervene is firmly established in cases where the governing body refuses to protect the rights of the stockholders or is itself the wrong-doer. As Judge Dillon suggests, there are still stronger reasons for permitting a taxpayer to assert the same right where the officers of a municipal corporation, charged with the protection of the property, are themselves violating the trust and diverting it from its proper use. Judge Dillon's views on the subject have been cited and adopted by the supreme court of the United States in *Crampton v. Zabriskie*, 101 U. S. 601, where Mr. Justice Field says: "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of

a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question."

AFFIRMED.

OMAHA COAL, COKE & LIME COMPANY ET AL., APPELLANTS, V. HENRY SUESS, APPELLANT, ET AL., APPELLEES.

FILED MARCH 17, 1898. No. 7891.

1. **Judgment:** REPEAL OF STATUTE: CREDITORS' BILL. A judgment against stockholders for a liability arising under section 136, chapter 11, General Statutes 1873, rendered after the repeal of that statute, is erroneous merely and not void; therefore, the repeal of the statute before judgment rendered is no defense to a creditors' bill to enforce the judgment.

2. **Fraudulent Conveyance:** INTENT. The question of fraudulent intent when a conveyance is assailed on the ground that it is void as against creditors of the grantor, is one of fact.

3. **Trial:** WITHDRAWAL OF REST: MORTGAGES. There was no abuse of discretion in refusing plaintiffs leave to withdraw their rest, when the court announced that it would find a deed absolute in form to be a mortgage and valid as such, when the offer of proof made by plaintiffs was not of further evidence of fraudulent intent but only of the amount due under the mortgage, for the purpose of fixing the extent of its lien; and when the court reserved the case for such an accounting and the plaintiff then had an opportunity to make such proof.

4. **Mortgages:** FUTURE ADVANCES: JUDGMENTS. A mortgage to secure future advances was made in the form of a deed absolute. No obligation rested on the mortgagee to make any advances. Creditors of the mortgagor recovered judgments after the mortgage was recorded, and, after causing executions to be levied on the land mortgaged, brought a creditors' bill to subject it to the payment of their judgments. *Held*, That the mortgage was prior to their claims for all sums advanced before the mortgagee had knowledge thereof, but subject to their claims as to sums advanced after the mortgagee acquired knowledge of their rights.

5. ———: ———: EXECUTIONS: CREDITORS' BILL. A deed absolute in form conveying the legal title, although intended as a mortgage to secure future advances, and the lien of a judgment not attaching to an equitable estate, the liens of other creditors of the grantor did not attach until the levy of execution at the earliest; and in

the absence of evidence that advances were made by the mortgagee between the levy and the commencement of a creditor's suit to subject the land to the payment of the judgments, the latter date was properly taken as marking the time after which advances on the mortgage were subordinate to the claims of such other creditors.

6. ——: ——: ——. Whether the levy of an execution on land so conveyed charged the mortgagee with notice of the judgment, *quære.*

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

J. W. West and *Charles Ogden*, for appellants.

Isaac Adams, contra.

IRVINE, C.

This was an action in the nature of a creditors' bill. The plaintiffs had recovered judgments against one Gottlieb Zimmerman, and had caused executions to be levied on certain land in the city of Omaha, the title to which was once in Zimmerman, but which had, prior to the recovery of the judgments, been by him conveyed to Henry Suess. The facts, as disclosed by the pleadings and evidence, are as follows: Zimmerman was a stockholder in a corporation known as the Omaha Brick & Terra Cotta Manufacturing Company. The officers of that corporation failed to publish statements of its indebtedness as required by law, and during the period of such default it became indebted to plaintiffs in divers sums. Judgments were recovered against the corporation, and executions having been returned unsatisfied, a suit was brought by one of the judgment creditors against Zimmerman and other stockholders, which resulted in a judgment or judgments, in favor of all the plaintiffs in this case against the stockholders, for different amounts, according to their respective holdings. It is upon these judgments that this suit is based. Before these judgments were recovered against the stockholders, but after

the debts on which they were based were contracted, Zimmerman made a deed of the land here in question to Henry Suess and that deed was recorded. Suess was an agent of the Anheuser-Busch Brewing Association, and the object of the deed was to secure the brewing association on account of certain indebtedness then existing from Zimmerman to it, and for future advances. The plaintiffs attacked the conveyance to Suess as fraudulent. The court found that the conveyance to Suess was in legal effect a mortgage to secure the brewing association, and that it was a valid lien for that purpose. It established the lien created thereby as a senior lien as to the amount advanced to Zimmerman prior to the commencement of this action. It then established the judgments of plaintiffs as liens inferior to the mortgage to the extent indicated, but superior to the mortgage as against advances made after the commencement of the suit. The plaintiffs and Suess appeal, Suess claiming that the court erred in adjudging that plaintiffs had any lien, and if that was not error, then in subjecting to their claims that for advances made by the brewing association after suit was brought; the plaintiffs asserting that the court erred in allowing the lien of Suess for any amount.

The broad assertion made on behalf of Suess is that the plaintiffs are entitled to nothing by reason of their judgments. This assertion is based on the fact that the indebtedness of the terra cotta company to the plaintiffs arose while section 136 of chapter 11 of the General Statutes of 1873 was in force, and that the judgments were rendered after it had been repealed. The statute referred to rendered stockholders generally liable for debts of a corporation incurred while such corporation was in default in the publishing of notices of indebtedness. In 1891 that statute was repealed and replaced by another substituting a different and a limited liability. (Session Laws 1891, ch. 13.) The debts on which the judgments of plaintiffs are founded were incurred under the former law, but judgment was not rendered, nor indeed was

suit begun until after its repeal. It has been held that these statutes are penal in their nature, and that the repeal of the former act had the effect of defeating existing causes of action thereunder. (*Globe Publishing Co. v. State Bank*, 41 Neb. 175.) It does not, however, follow that because the court should not have rendered the judgments they cannot after their rendition be enforced. On this point the argument of Suess is that the judgments, because of the prior repeal of the act, were void. The authorities cited do not support that theory. They are all cases where the jurisdiction of the court rendering the judgment was affected by the repeal of the act. Thus, if a court is one of limited jurisdiction, and depends upon a statute for its jurisdiction over a certain class of cases, the repeal of the act conferring jurisdiction ousts it of all power in the premises, and judgments thereafter rendered are for that reason void. So, too, perhaps, if a court be one of general jurisdiction, and a statute giving a right of action prescribes a special remedy, the repeal of the act might defeat the jurisdiction in such cases. And, if a court, although of general jurisdiction, derives its power to make a particular order solely from statute, the repeal of the statute might render a subsequent order of that character void, not strictly for want of jurisdiction of the subject-matter, but for want of power to make such an order. This case does not fall within any of these classes. The act repealed did not provide any special procedure or vest in the court the power to render any extraordinary relief. It merely gave a right of action, to be enforced by any court having jurisdiction of actions of that class, and to result in ordinary judgments, enforceable by the usual sanctions. The district court was a court of general jurisdiction. The proceeding in this case was by petition in the nature of a bill in equity, to marshal the debts, and determine the liability of the respective stockholders. The new law preserved such a right of action and made no special provision as to the manner of its enforcement. The district court having

general jurisdiction of actions of this general character, independent of statute, and having jurisdiction of the persons, its judgment was not void; it was at most erroneous. The case is not different in this respect than it would have been if the action had been founded upon the theory that a common-law liability existed. If the court had so held it would have been error, for which the judgment could have been set aside by appellate proceedings, but it would not have been void, any more than any judgment is void when an erroneous view as to the liability of the defendant has been taken by the court, and has led to the judgment.

The next matter presenting itself for examination is the correctness of the court's action in adjudging the conveyance to Suess to be a valid lien. The evidence shows that Zimmerman had for some years been purchasing beer from the brewing association for bottling purposes. He should under his agreement have paid therefor at stated intervals, but before this deed was made he had become lax in this regard, and the brewing association insisted upon security. He then owed the brewing association a considerable sum. The conveyance in question was made to Suess, who, as has been said, was an agent of the association, but who lived in Denver and does not seem to have had any connection with Zimmerman's affairs except to receive the conveyance. The conveyance was to secure what was already owing and to operate as a continuing security for indebtedness that might thereafter be contracted by Zimmerman's purchasing beer from the association. The deed was absolute in form, conveyed much property besides that in dispute, and stated a consideration many times as great as the indebtedness then existing and probably much more than at any time existed. There was perhaps sufficient in the circumstances to have warranted the district court in finding that the conveyance was fraudulent as against creditors, although based on a valuable consideration; but we do not think that the evidence was so conclusive

that the court was bound to so find. Cases are cited which hold that a conveyance made under somewhat similar circumstances is in law fraudulent, but our statute (Compiled Statutes, ch. 32, sec. 20) makes the question of fraudulent intent in such cases always one of fact. The circumstances of this case are not inconsistent with good faith and honest motives, and the finding cannot be disturbed.

In this connection complaint is made of the action of the trial court in prematurely adjudicating the conveyance to be valid. In the first instance Zimmerman was not a party to the action. The plaintiffs alleged generally that the conveyance to Suess was without consideration and was made to defraud creditors. The answer of Suess alleged the character and consideration of the conveyance. Evidence was taken and the plaintiffs rested their case. The defendant moved for a dismissal. The matter was taken under advisement and the court at a later day refused to dismiss, stating that it found the deed to Suess to be a mortgage as above set forth, and that it would order Zimmerman to be brought in in order that an accounting might be had of the amount due the brewing association. Then counsel for plaintiffs said: "I ask leave to withdraw my rest, and go on and introduce further testimony as to the actual consideration of this mortgage. The object of the bill is of course to simply fix the amount, if any, of the defendant's rights in these premises, so that, when the premises are appraised for the sale, that being determined, it can be deducted from the interest of the defendant in the premises, and a proper appraisement may be made for the sale, which cannot be done as long as that indefinite interest stands open." The plaintiffs having rested, it was largely within the discretion of the court to permit them to withdraw the rest, and the court might have required a specific statement as to the evidence they sought to introduce. But it appeared from the statement made that plaintiffs acquiesced in the finding that the conveyance was a mortgage, and only

wished the amount determined in order that Suess' interest might be ascertained in its extent. They did not offer further to attack the *bona fides* of the conveyance. The court was reserving the case for the express purpose of ascertaining that amount, and without setting aside the interlocutory order just made, the court could proceed to take the account, giving plaintiffs full opportunity to be heard on the accounting on the only matter upon which they wished to adduce proof. It does not appear that this opportunity was ever refused them. While the proceedings were not according to the usual course, it does not appear that plaintiffs were at all prejudiced.

We now come to that part of the court's order fixing priorities. There can be no question of the priority of Suess' claim for indebtedness existing when the conveyance was made. The whole subject of priorities as between a mortgage to secure future advances and liens accruing subsequently to the recording of such a mortgage has recently been exhaustively discussed, with copious references to the adjudications in this country and in England, by the supreme court of North Dakota. (*Union Nat. Bank v. Milburn & Stoddard Co.*, 73 N. W. Rep. 527.) A reference to that case is deemed sufficient to render unnecessary any recollation of the cases, and the results there stated so commend themselves to our reason that we are content to adopt them so far as they apply to the case at bar. It is there said that a mortgage to secure future advances is valid between the parties and as to third persons; that if the mortgage on its face states that it is for that purpose, or if it appears to be a mortgage for a sum certain and the actual debt does not exceed that sum, a junior lienor takes subject thereto for all moneys then advanced or which may be advanced after the junior lien attaches and before the senior mortgagee has notice thereof. The recording of a junior lien, or the rendition of a judgment against the mortgagor, does not charge the mortgagee with notice of

such junior lien. It seems that where the mortgagee is legally obligated to make further advances he may make them, even after notice of the attaching of a junior lien, and his mortgage will be prior thereto as to such later advances. This was the case in *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 207, where the mortgage was given priority over mechanics' liens where the work did not begin until after the mortgage was recorded, but before the money was advanced. Applying these principles to the case before us we find that no question here arises from the fact that the deed did not show that it was for future advances and did not specify an amount which it secured, because the plaintiffs' liens are not liens arising by virtue of contract, from debts created on the credit of this property, but attached only by operation of law to the debtor's interest therein, whatever it may be. On the other hand, there was no obligation resting on the brewing association to make any definite advances. True, its agent testifies that it was required to do so, but that was only his conclusion of law, and an erroneous conclusion. The contract for the sale of beer was a verbal one, was uncertain as to duration and the extent of the sales. It was merely a vague agreement to sell Zimmerman beer and to sell no one else in Omaha beer for bottling purposes, and in return Zimmerman agreed to sell no beer other than that made by the brewing association. The brewing association might at any time terminate the arrangement and refuse further credit. There is no proof that any agreement for any particular amount of credit was made as an inducement or consideration for executing the mortgage. The brewing association and Suess had notice of the lien of plaintiffs at the latest when this suit was brought, and the court therefore did right in subjecting to the judgments the claims of the brewing association for indebtedness incurred by Zimmerman after the commencement of the suit. For reasons already indicated the court also correctly gave the claims of the brewing association priority for debts created before it

or Suess had notice of plaintiffs' liens. It is not necessary to inquire when those liens attached or exactly when notice thereof was acquired. To prove the debt, and the times of its creation, the bill of exceptions shows that the books of the brewing association were introduced in evidence. Their contents does not appear from the bill of exceptions. There is therefore no proof that any advances were made between the time of the levies of the executions and the commencement of the suit. A judgment is not a lien on an equitable estate in land. *Nessler v. Neher*, 18 Neb. 649.) A deed absolute in form but intended as a mortgage conveys the legal estate. (*Gallagher v. Giddings*, 33 Neb. 222; *Zittle v. Schlesinger*, 46 Neb. 844; *First Nat. Bank of Plattsmouth v. Tighe*, 49 Neb. 299.) Therefore, plaintiffs acquired no lien until, at the earliest, their executions were levied. It not appearing that any advances were made between the levies and the commencement of the suit, it is not necessary to decide upon which of these events the lien arose or Suess was charged with notice thereof.

AFFIRMED.

PETER SCHMIDT, APPELLEE, V. CATHERINE M. BOYLE ET AL., APPELLANTS.

FILED APRIL 8, 1898. No. 9726.

Right of Appeal: CONSTITUTIONAL LAW: HEARING IN APPELLATE COURT. The constitutional provision which declares that "the right to be heard in all civil cases in the court of last resort by appeal, error, or otherwise, shall not be denied," does not prevent this court from prescribing such reasonable rules as are deemed essential to the prompt and orderly disposition of causes brought here for review, nor is the refusal to permit oral arguments violative of the constitution.

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

T. J. Mahoney, for appellants.

V. O. Strickler, contra.

PER CURIAM.

This is an appeal from an order of the district court of Douglas county confirming the sale of real estate. The submission is upon the motion of appellee to affirm under section 3 of rule 2 of this court (52 Neb. x), which reads as follows: "At any time after the expiration of the time allowed for the service of briefs by the plaintiff in error or appellant, the defendant in error or appellee may move for an affirmance on the ground that the proceedings are without merit and taken for delay. In order to do so he shall cause the record to be printed, according to the form prescribed for the printing of briefs, and file with the clerk ten copies thereof, together with the professional certificate of his counsel to the effect that he is familiar with the record, that it presents no question of law which has not been settled by past adjudications of this court, and no question of fact demanding serious consideration, and that he believes the proceedings are taken solely for delay. On the filing of such motion, printed records, and certificate, the cause will be submitted without argument, and on the record and briefs of the plaintiff in error or appellant alone. If on examination the court be satisfied that the motion is well taken, the judgment will be affirmed. If on examination the record be found to present any question of law or fact as to the proper decision whereof the court entertains a doubt, the motion will be overruled, and the cause will be remanded to its proper place on the docket for hearing in its regular order. A certificate of counsel willfully false will be deemed an act of professional misconduct and dealt with accordingly. This rule shall apply to causes now pending as well as to those hereafter docketed." Appellee has complied with the foregoing provisions by causing the record to be duly printed, and the requisite number of copies

thereof to be filed with the clerk, accompanied with the proper certificate of counsel.

The sole ground urged upon our attention for reversal is that the value placed upon the property by the appraisers was so low as to constitute a fraud upon the rights of the defendants. This question was submitted to the district court and by it decided upon conflicting evidence. Applying the frequently asserted rule that a finding based upon conflicting proof will not be disturbed upon review, the order assailed must stand.

Counsel for defendants, in the brief filed, assails the section of the rule copied above, and protests against the enforcement thereof on the ground that his clients are thereby denied the right on appeal to be heard in the court of last resort. It is this suggestion alone which has prompted the preparation of this opinion, as motions to affirm, made under the rule in question, ordinarily will be disposed of by the court without the filing of an opinion. Section 24 of the bill of rights is as follows: "The right to be heard in all civil cases in the court of last resort by appeal, error, or otherwise, shall not be denied." This provision was before the court in *Moise v. Powell*, 40 Neb. 671, where it was held that the section guarantied to every litigant the right to be heard in the supreme court, not necessarily by appeal, but in that mode, by error, or some other appropriate proceeding. Further, that a statute does not prevent a party from being heard in the court of last resort, by forbidding an appeal to the district court, since it merely takes away one method of review, leaving available another adequate remedy. To the same effect is the *Chicago, B. & Q. R. Co. v. Headrick*, 49 Neb. 286. In *School District v. Traver*, 43 Neb. 524, it was decided that said constitutional provision did not prohibit the legislature from enacting reasonable rules and regulations for the review of a cause in this court by appeal. It is very evident that while the constitution bestows the right to a hearing in the highest court of the state, it does not undertake to regulate the method of pro-

cedure therefor. So long as the mode provided for review is adequate, the requirements of the fundamental law are satisfied. The constitutional provision quoted does not prohibit this court from prescribing such reasonable rules and regulations as are deemed essential to the prompt and orderly disposition of causes brought here by appeal or on error, nor does it forbid the denial of an oral argument in the cause. The word "heard" was not employed by the framers of the constitution to indicate that an oral presentation of a controversy to the court should not be refused, but was intended in the sense of review; in other words, the right to review in all civil cases in the court of last resort by appeal, or error, or otherwise, should not be denied. The rule of court criticised was not framed with reference to any particular class of causes or litigants, but was adopted for the sole purpose of relieving our crowded docket of the many cases brought here for delay merely, so that meritorious actions pending and to be brought herein may be the more promptly reached and determined. The rule is within the letter and spirit of section 13 of the bill of rights, which requires all courts to administer justice without denial or delay. Causes submitted under said rule are not disposed of in a summary manner, but are carefully considered on their merits, assisted by whatever brief or printed argument may be presented by the party bringing the record here. Thus a hearing is accorded the appellant or plaintiff in error, while, in the same sense, no such privilege is given the other party. The appellee or defendant in error, as the case may be, if not satisfied with the rule, need not invoke its provisions. In the present appeal there is no error, and the motion to affirm is accordingly sustained.

AFFIRMED.

JOHN A. ABRAHAM, APPELLANT, V. CITY OF FREMONT ET AL., APPELLEES.

FILED APRIL 8, 1898. No. 7868.

Review: CONFLICTING EVIDENCE. If the evidence is conflicting, and there is sufficient thereof in support of the finding and decree of the trial court, they will not be reversed.

APPEAL from the district court of Dodge county. Heard below before SULLIVAN, J. *Affirmed.*

J. M. Woolworth and *N. H. Bell,* for appellant.

Frank Dolezal and *J. E. Frick, contra.*

HARRISON, C. J.

In this action commenced in the district court of Dodge county the petition filed was in the following language:

"1. The said plaintiff complains of the said defendants for that said defendant, the city of Fremont, is, and was at the time of the grievance hereinafter complained of, a municipal corporation, duly organized and incorporated under the general law of the state of Nebraska, and has more than 5,000 and less than 25,000 inhabitants; that the said defendant William Fried is mayor of said city, Arundel C. Hull is sewer inspector of said city, duly appointed and qualified to exercise the duties of said office, and has the charge and management and control of the sewage system of said city, and said other defendants are members of, and constitute the common council of, said city.

"2. Within two years last past, prior to the filing of this petition, the said city of Fremont did construct, complete, and put into operation, and now owns and operates, a system of sewage in said city and the ditches connected therewith, as hereinafter described, and has connected with said system within said city, cess-pools, privy vaults, butcher-shops, hotels, private dwellings, a brewery, sta-

bles, and other structures above and under ground which open and empty into said sewer a large amount of slops, fecal matter, and other filth and impurities mixed with water and the same are carried and flow through the underground pipes of said sewage system to a short distance beyond the east line of the territorial limits of said city, where the same are discharged from two pipes, a considerable distance apart, into open ditches, which ditches unite a short distance east of said city, and the water conveyed thereby, so fouled, mixed, and impregnated with filthy matters as aforesaid, continues to flow in an open ditch in a general southeasterly direction for the distance of about five miles, where it is emptied and discharged into Raw Hide creek.

"3. Plaintiff owns in fee-simple, occupies and uses, and has so owned, occupied, and used for the space of more than ten years last past, for general farming, stock raising, and stock feeding purposes two tracts of land in Douglas county, Nebraska, lying and situate on both sides of said Raw Hide creek and abutting thereon, to-wit: the east ½ of section 16 and the east ½ of the northwest ¼ of section 16, in township 16, range 10; also the NE. ¼ section 7, and the east ½ of the NW. ¼ of section 8, the east ½ of SE. ¼ section 6, the west ½ of the SW. ¼ section 5, the SE. ¼ of the SW. ¼ of section 5 and the SW. ¼ of the SE. ¼ section 5, all in township 16, range 10 east, all of which land is situate on said Raw Hide creek below the point at which said ditch empties into the creek.

"4. Said Raw Hide creek is a small stream of water which flows all the year round in a general southeasterly direction through Dodge county and into Douglas county until it reaches the Elkhorn river in said section 16, into which river it there empties. In its course it flows through plaintiff's land in sections 5 and 8 as described for the distance of more than a mile and for the distance of about a half a mile through plaintiff's said land in said section 16.

"5. The plaintiff raises, feeds, and pastures a large

amount of stock on his land as aforesaid, and prior to the grievances hereinafter complained of the water in said Raw Hide creek, where it flows through plaintiff's land as aforesaid, was clear, pure, wholesome, and fit to be used, and was used largely by the plaintiff and others for the purpose of watering stock and other farming and domestic purposes, and plaintiff has been accustomed for years to cut ice for the use of his family from a pond or lake on his premises, into which lake water flows from said Raw Hide creek.

"6. That since said sewer ditch had been discharged into said Raw Hide creek as aforesaid the waters of the creek below the mouth of the ditch, by reason of the filthy waters coming through the sewer and discharged from said ditch into said creek, has gradually become, where it flows through the plaintiff's land, foul and unfit to be used, and cannot be used for farming, domestic, or stock watering purposes, and the water of said lake has become unfit for taking ice therefrom as aforesaid, and such water, by reason of said impurities wrongfully and illegally discharged therein by said city, emits unwholesome and unhealthful gases and stenches, which disturb the comfort and enjoyment of the plaintiff, his family and tenants, tends to, and will eventually, if said ditch is allowed to discharge into said stream, as the filth therefrom accumulates in pools, eddies, and backwater of the creek, become injurious and dangerous to the health and lives of plaintiff, his family, and others who reside on or near the creek below the mouth of said ditch and use the water of the creek for the purposes aforesaid.

"7. That all of said acts of the defendants in digging said ditches, thereby discharging the contents of said sewage system into said Raw Hide creek, were done without the consent of plaintiff and without his knowledge.

"8. The injuries so caused to plaintiff and his said land and the occupation, use, and enjoyment of the same are continuous injuries and if not stopped by order of this

court will necessarily become greater, increase, and grow worse as the said city makes other and further connections with its sewage system and thereby discharge a greater amount of slops, waste, and filthy material into said creek, and because of the fact that said slop, waste material, and foul matters accumulate and have been accumulating more and more and from day to day along the banks and in the pools and eddies of said creek, and particularly in the same in said section 16, where it runs through the plaintiff's land, because of the fact that the water from the Elkhorn backs up the Raw Hide for the distance of about two miles, for which distance the creek has no perceptible current, and such impure matters flowing down the same are precipitated or lodged when they reach such stagnant water; that by reason of the nature of said injuries damage therefor cannot be computed in money and the plaintiff has no adequate remedy at law, and to seek his remedy at law would involve the parties to this action in a multiplicity of suits; that by reason of the premises the plaintiff will sustain great and irreparable injury if the defendants are not prohibited and restrained from continuing the infliction of such injuries upon plaintiff."

The relief asked was that the city named and its officers be perpetually enjoined from a further continuance of the acts of which complaint was made in the petition. The first paragraph of the answer was as follows:

"Come now the said defendants, and for answer to the petition of the plaintiff filed herein admit that the defendant, the city of Fremont, is a municipal corporation and that the other defendants are the officers, members of council, and mayor, respectively, of said city, as in said petition alleged, and deny each and every other allegation in said petition contained."

The further portions or paragraphs of the answer, some fifteen in number, were of matter mainly admissions and in avoidance of the grievances alleged in the petition. The reply was directed to these latter parts of the answer.

At the close of a trial the court made findings and rendered a decree, stated in the journal entry in part as follows:

"This cause came on to be heard upon the pleadings and evidence and was submitted to the court; upon consideration whereof the court finds for the defendants upon the issues presented by the petition and the first paragraph of the amended answer.

"The court further finds that the matters contained in the paragraphs 2 to 16, both inclusive, of the amended answer do not constitute a valid defense to the cause of action stated in the petition. Therefore it is adjudged and decreed by the court that the plaintiff's petition be dismissed and that the defendants go hence without day and recover their costs herein expended to the amount of $158.35. It is further considered and adjudged that the plaintiff recover his costs herein expended on the trial of the issues joined upon the affirmative defense presented by the amended answer in the paragraphs thereof numbered from 2 to 16."

The plaintiff has appealed to this court. It is conceded by the parties that, in the main, the law applicable to this case was settled by this court in its opinion in *Barton v. Union Cattle Co.*, 28 Neb. 350, to the effect that where a party fouls and pollutes the waters of a running stream, rendering them unfit for use or thereby creating a nuisance, the continuance of the acts from which such results flow will be enjoined at the suit of an injured person. Whether the acts, the subject of complaint, caused the pollution of the waters of a stream or created a nuisance are in each case, as in this at bar, questions of fact.

It appeared in evidence that the plaintiff lived distant from Fremont about nine or ten miles and quite near the "Raw Hide," the stream of water which had a portion of its course through lands owned by him, and that he had used of its water for the purposes stated in the petition in this action; that the city of Fremont had established and constructed the system of sewerage as alleged, and

that there were some 105 connections therewith in the city of the general character and nature stated in the petition; that through the system there ran each twenty-four hours about 3,000,000 gallons of pure water, into which and away with which flowed all liquids and solids which went into the sewers from any and all sources; that it was conducted through two large pipes to a point near the city, where it all came together in an open ditch and ran in a stream probably about four feet wide and approximately two feet deep, and continued its course in this ditch prepared for the purpose some five or six miles of distance to the place of its discharge into the "Raw Hide," where it mingled with the water of said stream and from there, as the stream ran, it was some three or four miles down to the home of the plaintiff. The "Raw Hide" is one of the surface streams such as we have in this state, apparently, so far as the evidence discloses, not fed to any extent by or from springs, but derives its waters almost wholly from surface drainage, has its rise or source in Colfax county and flows into the Elkhorn river in Douglas county. During rainy seasons or years it is of constant flow. During dry seasons or years it at times is without flow, and portions of its channel or bed entirely dry. When it flows it is sluggish and with but little current or speed. The stream being apparently composed of surface drainage may be denominated a natural sewer, into which go and flow all the impurities drawn off by the surface waters of the tract of land drained by the stream.

The contention on appeal is that the finding and decree of the trial court were wrong and without sufficient support in the evidence and that there should be in this court a contrary finding and decree. Between thirty and forty witnesses were called and examined for each party and the record of the evidence is voluminous, too much so to set forth an analysis of it here or even to summarize it in all its details. We have carefully perused and considered it and discovered it to be, to a very considerable extent, conflicting.

It is urged for appellant that a great deal, if not the major portion, of the evidence for appellees, considered as a whole, is what is known as negative evidence or testimony, and hence is of the "weakest species" of evidence, and not entitled to much weight. That some of the evidence introduced on behalf of the appellees was negative in its character is true, but the greater portion of it was not so, but was devoted to an attempt to establish certain existent conditions relative to the subject-matters of the controversy.

The counsel for the parties in the briefs filed have referred to and quoted from a written opinion which they state was filed at the time of decision of the cause by the trial judge. Neither the original nor a copy of any such written opinion is in the record presented to this court, but portions of it which have been quoted by counsel we feel at liberty to consider and use herein. In the opinion, it seems, was a finding as follows: "Viewed comprehensively it cannot, I think, on the evidence be affirmed that there has been, or is, any casual connection between the Fremont sewage and the condition of the waters at the plaintiff's farm. The clear weight of the crude evidence is to this effect." This was no doubt the finding on which the disposition of the case turned, on which the decree was predicated, and was certainly one which, if sustained by evidence, was fully determinate in its character of the issues.

It was of the undisputed facts that the sewage of the city combined with the clear water, which, as we have before stated, ran through the sewerage system every day, was discharged into the stream which had its course through the plaintiff's land; and the main further question to be ascertained from the evidence was whether it was the efficient cause of the alleged existent conditions of the waters of the stream at his place. Relative to this, if the evidence adduced for the complainant was alone considered, it was clearly sufficient to support the averments of the petition and to warrant a decree in his favor; but a

thorough examination of all the evidence, conflicting as it is, convinces us that the finding and decree as rendered are sustained by sufficient of the evidence to call for their being left undisturbed and unreversed.

AFFIRMED.

SULLIVAN, J., took no part in the decision.

NEBRASKA LOAN & TRUST COMPANY, APPELLANT, V. PAUL IGNOWSKI ET AL., APPELLEES.

FILED APRIL 8, 1898. No. 7957.

1. **Reformation of Instruments:** MISTAKE. A mistake in the terms of a written instrument, if mutual, will be reformed to express the correct intention and agreement of the parties thereto, and with which it was executed, and the instrument as reformed will be enforced.

2. ———: ———. Reformation of an instrument to correct a mistake will not be accorded unless the intent and agreement which it will express as reformed were concurrent in the minds of the parties to and including the time of its execution.

APPEAL from the district court of Sherman county. Heard below before SINCLAIR, J. *Affirmed.*

J. B. Cessna, John A. Casto, and *George F. Work,* for appellant.

Long & Mathew, contra.

HARRISON, C. J.

This action was instituted by the appellant, hereinafter designated the company, to reform the interest coupons attached to a bond and to foreclose a real estate mortgage which had been executed and delivered to secure the payment of the amount of a loan to the mortgagor, the contract of loan being evidenced by the bond and mortgage in suit. It was of the allegations of the petition filed

"that in the filling out and signing of said coupons 1, 2, 3, 4, and 5 to said principal bond attached a mutual mistake was made in this, that said coupons, and each of them, were made out for the sum of $19.50 instead of $39, as they should have been, and that said mistake was not discovered until long after said coupons were made out and signed." There was also a claim made for certain taxes pleaded to have been paid by the mortgagee to protect its lien, conformably and pursuant to a provision of the mortgage on the subject. The answer of the appellees, hereinafter styled the defendants, admitted the execution and delivery of the instrument upon which the suit was brought, but stated:

"Plaintiff, by its agents, represented to these defendants, more especially to the defendant Paul Ignowski, at the time said instruments were executed, and some time previous thereto, that he was obtaining from the plaintiff a loan at the rate of five and one-fourth per cent per annum, and that in consequence of the said representations defendants borrowed the sum of $600 on or about November 1, 1890, at the said agreed price of five and one-fourth per cent per annum, payable annually, for the term of five years.

"Third—That these defendants have promptly paid the interest on the said mortgages, bonds, and notes at the rate of five and one-fourth per cent per annum as agreed, said five and one-fourth per cent per annum being made up of three and one-fourth per cent on the first mortgage bond and two per cent on the second mortgage. The said amount paid annually has been the sum of $31.50, and these defendants hold a receipt in full from plaintiff, dated October 31, 1891, for the interest due on the said loan.

"Fourth—Plaintiff has accepted the interest payments of $31.50 made by these defendants annually.

"Fifth—The rate of interest in the mortgage, of which 'Exhibit B' attached to plaintiff's petition is a copy, is '6½ per cent per annum,' the figures '6½' were inserted

therein by plaintiff either in error or else fraudulently for the purpose of deceiving these defendants, who are illiterate and do not well understand the English language."

A tender to the company of the amount of taxes paid by it was pleaded, and each and every allegation of the petition of which the answer did not contain an admission was denied. In the reply each and every statement of new matter of the answer was either generally or specifically denied. A trial of the issues resulted favorably to the defendants and the company has appealed to this court.

It is disclosed by the evidence that Paul Ignowski, of defendants, made application to the company for a loan through a banker at Ashton, Nebraska, who represented the company, or at least received applications for loans, forwarded them to it, and, if approved, attended to the execution of the papers and completion of the loans. Ignowski's application was in writing, in the usual form, and for a loan in the sum of $600, with interest at eight and one-half per cent per annum, payable annually. The necessary papers, bond, coupons, notes, and mortgages were prepared at the home office of the company and forwarded to the banker in Ashton. In regard to their preparation and the mistake claimed to have been made the treasurer of the company testified as follows:

Q. Have you any personal knowledge and had you any supervision of the making out of these papers?

A. I have and did.

Q. Tell what you know about the making out of these papers.

A. After the loan committee had decided to renew the loan, I made out a memoranda for one of our clerks to make up the papers, dividing the amount to be paid annually, eight and one-half per cent interest, by ordering a bond prepared for the principal and coupons for annual interest thereon at the rate of six and one-half per cent

and the balance of two per cent per year was included in five notes of $12 each, maturing concurrent with the interest coupons upon the principal bond. Upon endeavoring to negotiate this new loan to an eastern party we found that through a clerical error the five coupons for the annual interest, instead of being made up at $39 each, as recited in the mortgage and bond, were only for $19.50 each, which is semi-annual interest instead of annual interest. This error probably occurred from the fact that the clerk who makes our papers makes most of her papers at semi-annual interest, and she, by mistake, figured the semi-annual rate instead of the annual interest, as she was instructed to do.

Q. State whether or not these several coupons correctly represent the amount of annual interest agreed by the defendant to be paid on this principal bond.

A. They do not.

Q. State what the correct amount of each of these several coupons should be in order to represent the correct amount of interest agreed by the defendant to be paid on this principal bond?

A. They should have been $39 each.

The sole contention is that the trial court should have decreed a reformation of the coupons so that each called for the payment of $39 instead of $19.50. We are satisfied that the evidence established the mistake on the part of the company, and that the same occurred by reason of a lack of care by it, or its employé who prepared the loan papers.

It further appears in evidence that Ignowski had, while negotiating with the appellant company, been to St. Paul, Nebraska, and there made application to a loan agent, which had been approved, the rate of interest contracted for being seven per cent per annum. When the bond and mortgage in suit arrived at Ashton, Ignowski was informed that they had been received and that they showed that he was to be furnished the money and a very low rate of interest was exacted, or five and one-

fourth per cent per annum. He then stated to the banker who was acting in the matter for the company the facts in relation to the St. Paul application and told him to retain the papers until such time as he, Ignowski, could go to the latter place and arrange that he be no further liable to fulfill his agreement there in regard to a loan. This request was acceded to by the banker. Ignowski went to St. Paul, the agent there demanded that he pay $10, the stated expenses incurred in and about the application for a loan. This he did, and was relieved from his agreement there in regard to a loan and subsequently went to Ashton and executed the instruments, the basis of this action, with the full belief and understanding that he was to be charged but five and one-fourth per cent per annum interest, and that the papers executed and delivered evidenced an agreement to such effect. Ignowski did not readily understand the English language, either spoken or written, and it is of the testimony that he at two different times, prior to signing the papers, called in a party who had a knowledge of Ignowski's native language and also of the English language to act as interpreter between Ignowski and the banker, and also to examine and explain the papers to the former. One of these was probably present at the time the instruments were executed, and one such party was a witness at the trial of the cause and testified to an examination of the papers, that he figured the interest and determined the rate to be five and one-fourth per cent per annum, and that he at the time so stated it to Ignowski; to make the examination and give Ignowski accurate information being of the purposes for which his presence and services had been requested. The reformation of a contract, in the terms of which there has been a mistake, will be accorded and the instrument as reformed will be enforced (*Hale v. Young*, 24 Neb. 464; Bispham, Principles of Equity sec. 468); but as a general rule a court will only correct a mistake in a written instrument when it has been mutual and the instrument

does not embody the terms of the contract as fully understood by both parties. (7 Wait, Actions & Defenses 328.) It must be shown to be a mutual mistake. (*Conaway v. Gore*, 24 Kan. 389.) "'The proof of mistake must be clear and certain before an instrument can be reformed, as the object of the reformation of an instrument is to make it express what the minds of the parties to it had met upon, and what they intended to express, and supposed they had expressed, in the writing. Unless this meeting of minds, and mistake in expressing it, is made quite clear and certain by evidence, the court, should it undertake to reform, might, under color of reformation, make a contract for the parties which both never assented to or intended to make.' The mistake, to be the subject of the reformation, must be not merely the oversight of one of the parties, but such that the deed fails to express what was intended and agreed upon by both parties. The court will not reform a deed so as to add to it a new condition not contemplated by one of the parties in the execution of it. It will not make it include what was intended by one party, unless it appear that the other party at the time had the same intention." (1 Jones, Mortgages sec. 97.) "The general principles by which the court is guided in such cases are well settled. A person who seeks to rectify a deed on the ground of mistake must establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently, in the minds of all parties, down to the time of its execution." (Bispham, Principles of Equity sec. 469; Kerr, Fraud & Mistakes 421.) Though there was a mistake in the amount expressed in the coupons, it is quite clear that if reformed as prayed in the petition, they would not have expressed the contract which from the evidence the trial court determined Ignowski fully understood he was executing. The minds of the parties were not concurrent at the time of the signing, on what the coupons would express if corrected as asked, and

they would not be as contemplated and intended by Ignowski at that time. This being true, within a proper application of the rules to which we have hereinbefore directed attention, the relief sought was properly denied. The evidence might possibly have warranted a different conclusion in regard to the main issue, that is, the mutuality of the mistake, but it is sufficient to sustain the conclusion of the trial court; hence such conclusion will not be disturbed. The decree must be

AFFIRMED.

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

JOHN WURDEMAN V. ANNA SCHULTZ.

FILED APRIL 8, 1898. No. 7967

1. **Instructions:** EVIDENCE. If a fact is established by the evidence and uncontroverted, it is not reversible error for a trial court to so state or treat it in its instructions to a jury.

2. **Review:** CONFLICTING EVIDENCE. The verdict of a jury upon conflicting evidence will not be disturbed if there is sufficient evidence in support thereof.

3. **Bastardy:** AMOUNT OF JUDGMENT. The amount which a party adjudged guilty in a prosecution for bastardy shall be ordered or adjudged to pay is to some extent within the discretion of the trial court, and its judgment in such matter will not in error proceedings be determined excessive unless there is apparent manifest abuse of discretion. (*Clark v. Carey*, 41 Neb. 780.)

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

Albert & Reeder, for plaintiff in error.

Whitmoyer & Gondring, contra.

HARRISON, C. J.

The plaintiff in error was charged in a complaint made and filed with a justice of the peace in Platte county, by one Anna Schultz, an unmarried woman, with the pa-

ternity of the child with which she was then pregnant. He was arrested, and as a result of the proceedings before the justice of the peace was recognized for appearance before the district court in and for said county to answer to the charge. As the outcome of a trial in the district court the plaintiff in error was by a jury determined guilty, and on April 27, 1895, by the judgment of the court ordered to pay to the mother, for the benefit of the child, the sum of $900 in installments at stated dates, that he give security therefor, and in default thereof be committed to jail.

In proceedings to this court it is urged for plaintiff in error that the trial court erred in several of the paragraphs of its charge to the jury in assuming as an established fact that the prosecutrix was pregnant at the time she filed the complaint with the justice of the peace. The fact to which reference was made was proven and not controverted, and it was not error for the trial court to so state it in the instructions. (*Gran v. Houston,* 45 Neb. 813; 2 Thompson, Trials sec. 2295.)

It is also argued that the evidence was insufficient to sustain the verdict. On this point it may be said that a careful reading of the evidence discloses a direct conflict therein relative to the main issuable facts, and such conditions that had the jury returned a verdict favorable to the plaintiff in error it could not have been said to be unsupported by sufficient of the evidence; but on the other hand it was shown that the complainant gave birth to an illegitimate child at a stated date, and there was sufficient evidence of sexual intercourse with the mother by plaintiff in error at such times as, combined with the other facts and circumstances of evidence, to give support to a verdict which asserted and fixed his fatherhood of the child of the complainant. This being true, the verdict cannot be successfully assailed as unsupported by the evidence.

It is also contended that the judgment is excessive. As we have before stated, it was in the aggregate for

$900, and its payment was to be made in installments as follows: "$100 each year for the next three years, $75 for the next six years following, and $50 each year thereafter for the next three years, each of said payments to be made quarterly in advance, in four equal installments each year, commencing on the 1st day of May, 1895." On the subject of the proper amount of the judgment there was little if any, direct evidence. It appeared that the plaintiff in error was twenty-seven years of age, was a farmer by occupation, and was living with his father on what was known as the "home farm." It was stated by this court in the case of *Clark v. Carey*, 41 Neb. 780, in an opinion written by POST, J.: "It is argued also that the judgment is excessive, and therefore erroneous. The construction uniformly given to similar statutes is that the trial court, in fixing the amount in which the accused shall be charged, may take into consideration such facts as the health of the child and mother, the ability of the latter to care for the child, and the physical and financial ability of the accused; and in no reported case has a judgment been reversed on account of the amount of the judgment unless there appeared to be an abuse of discretion. (See *Mills County v. Hamaker*, 11 Ia. 209; *Jerdee v. State*, 30 Wis. 170; *Goodwine v. State*, 31 N. E. Rep. [Ind.] 554; *State v. Zeitler*, 35 Minn. 238.) As said in the last named case, no evidence seems to have been introduced bearing especially upon the subject of the amount of the judgment. We must presume the court acted according to its best information, from the facts proved at the trial and from all the circumstances surrounding the case. There being no apparent abuse of discretion, the amount fixed by the trial court is presumed to be reasonable and to present no ground for interference by us." The amount which the party charged in that case was ordered to pay was $2,112, in installments of $12, payable on the first day of each month. Within the doctrine then announced the judgment in the case at bar must as to the point under consideration be upheld.

We have discussed and decided all the questions urged in behalf of plaintiff in error, and it follows from the conclusions reached that the judgment will be

AFFIRMED.

SULLIVAN, J., not sitting.

CARL FUNKE ET AL. V. RICHARD J. ALLEN ET AL.

FILED APRIL 8, 1898. No. 7946.

1. **Sales**: REFUSAL OF BUYER TO PERFORM: DAMAGES. If a vendee in an executory contract of sale, or where the title of the property has not passed to him, refuses to perform, a right of action for damages arises in favor of the vendor for the injury or loss he has sustained by reason of the breach of the contract, and this is ordinarily or generally the difference between the market value of the property at the time and place of delivery, and the price fixed by the contract.

2. ——: ——: ——. The question of the measure of damages for a breach of an executory contract of sale was not directly involved in or necessary to a decision in *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279; hence the statement of the rule therein was not authoritative.

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

Charles E. Magoon, for plaintiffs in error.

S. L. Geisthardt, contra.

HARRISON, C. J.

The plaintiffs in error were dealers in crockery and queensware in Lincoln and at the solicitation of a traveling salesman for defendants in error, a firm dealing in crockery and queensware in Philadelphia and New York, delivered to him a written order for a future shipment by the latter firm to the former of twenty toilet sets. Subsequently there was some correspondence between

the two firms relative to the order and the goods, the subjects of its terms, in the course of which it is claimed by plaintiffs in error there was a cancellation or renunciation of the order. After this is claimed to have occurred the vendors shipped the goods to Lincoln to plaintiffs in error, but they would not receive them. This action was instituted by the vendors to recover the price of the goods, it being alleged that they had been duly tendered to the vendees. Of the issues joined by the pleadings there was a trial in the district court of Lancaster county, the jury being instructed as follows: "The jury are instructed that under the pleadings and the evidence in this case the plaintiff is entitled to recover the sum of $103 and interest thereon from July 1, 1891, at the rate of seven per cent per annum and your verdict shall be for the plaintiffs and against the defendants for that amount. The total amount to this date is $127." There was a verdict in accordance with this instruction and judgment rendered thereon.

In this error proceeding it is contended for the vendees that inasmuch as they had withdrawn the order, if it constituted a breach of the contract of purchase, the vendors were not entitled to sue for and recover the agreed price, but a different measure of damages should have been applied and enforced. Under the evidence adduced it was a question for the court to determine whether the order for the goods had been countermanded, and on this point we will say that we are of the opinion that of the letters written by the vendees to the vendors there was one which by a fair construction can mean nothing more nor less than that the goods were not wanted by the vendees and would not be received by them under the then existent order. The letter was clear and specific to such effect. That such a letter constitutes a countermand of an order for goods, see *Peck v. Freeze*, 59 N. W. Rep. [Mich.] 600. This order was an incomplete or executory contract. The title to the goods had not passed to the vendees at the time they counter-

manded the order. Their doing so was a breach of the contract, for which they became liable to the vendors in damages. If the contract of sale is executory, the title has not passed to the vendee. On breach of the contract by the vendee by a refusal to receive the property, the vendor's measure of damages, in general, is to the extent of his actual injury, which ordinarily is the difference between the contract price and the market value at the time and place of the breach. (Tiffany, Sales [Hornbook series] pp. 231, 232, sec. 125; 2 Benjamin, Sales [4th ed.] book 5, p. 971, secs. 1117 & 1118; 2 Sutherland, Damages p. 359; 5 Wait, Actions & Defenses p. 608, art. 3, sec. 2; 21 Am. & Eng. Ency. Law 578-580, cases cited and discussion in note 2; *Hale v. Hess*, 30 Neb. 42; *Scott Lumber Co. v. Hafner-Lothman Mfg. Co.*, 65 N. W. Rep. 513, 91 Wis. 667; *Keeler v. Schott*, 1 Pa. Super. Ct. 458, 38 W. N. Cas. 316; *Neal v. Shewalter*, 31 N. E. Rep. [Ind.] 848; *Todd v. Gamble*, 21 N. Y. Supp. 739; *Ridgley v. Mooney*, 45 N. E. Rep. [Ind.] 348; *Browning v. Simons*, 46 N. E. Rep. [Ind.] 86; *Lawrence Canning Co. v. Lee Mercantile Co.*, 48 Pac. Rep. [Kan.] 749; *Miller v. Burch*, 41 S. W. Rep. [Ky.] 307; *Heiser v. Mears*, 27 S. E. Rep. [N. Car.] 117, 120 N. Car. 443.)

There are authorities which lend support to the doctrine that the vendor in such a contract of sale may treat the goods as belonging to the vendee regardless of his refusal to receive them, and sue for and recover the contract price as his damages; but the weight of authority is to the contrary and favorable to the rule which we have hereinbefore stated. In the opinion in the case of *Lincoln Shoe Mfg. Co. v. Sheldon*, reported in 44 Neb. 279, it was stated by this court: "Where a vendee refuses to perform the vendor has either of two remedies. He may keep the property made the subject of the contract and sue the vendee for damages for a breach of his contract, and in such case his measure of damages will be the difference between the contract price of the property and its actual value at the date of the vendee's breach of

the contract; or the vendor may tender the property made the subject of the contract to the vendee, and then in a suit upon the contract the vendor's measure of damages will be the contract price of the property." But the decision of the case hinged upon the proposition that the contract in question was one of subscription for shares of stock and not of sale and purchase, and the rule of the measure of damages for a breach of a contract of sale by a vendee was not directly in question or involved in the action and its announcement was not necessary to the decision; and what was then said was not authoritative, to the extent at least that the doctrine was stated to be that the vendor may tender the property to the vendee, and in a suit upon the contract the measure of his damages, if he recovers, be the contract price. There are many cases arise wherein the particular facts and circumstances warrant a departure from the general rule, call for an exception therefrom, and in which the doctrine to which we have last referred is applicable and governing, but it is not so in a case such as the one at bar. It follows that the judgment of the district court must be reversed and the cause remanded.

REVERSED AND REMANDED.

MIDLAND STATE BANK V. KILPATRICK-KOCH DRY GOODS COMPANY ET AL.

FILED APRIL 8, 1898. No. 8000.

1. **Chattel Mortgages:** CONTINGENCY: LIEN. An instrument signed by the granting party thereto, not dated, which is taken by the grantee named therein under an agreement, to be retained until such time as the grantor notifies the grantee of a contingency, it being of the terms of the agreement that on such notification the instrument is to be completed and filed as a mortgage or lien on goods or chattels, does not become a completed mortgage until the grantor takes the action contemplated by the agreement.

2. ——: LIEN. As a general rule, and in absence of agreement to the contrary, the lien of a chattel mortgage on a stock of merchandise attaches to the articles in stock at the time of the execution of the instrument, and not to future additions to the stock.

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

McClanahan & Halligan, for plaintiff in error.

W. W. Morsman and *R. B. Montgomery, contra.*

HARRISON, C. J.

On September 20, 1893, Oliver L. Templeton was engaged in business in South Omaha as a retail dealer in general merchandise, and on that date executed and delivered to the Kilpatrick-Koch Dry Goods Company a chattel mortgage on his stock of merchandise and store furniture, securing the payment of $2,905.78 due the company for goods sold and delivered to him by it. The balance of indebtedness on account was figured and evidenced by a promissory note of even date with the mortgage, to which we have just referred, taken as security for the payment of the debt. At the same time Templeton executed a mortgage on the property in favor of the Packers National Bank of South Omaha to secure the payment of an indebtedness to it. This latter mortgage was by its terms subject to the one in favor of the dry goods company. The last mentioned company filed its mortgage in the proper public office on the day of its execution and delivery and immediately took possession of the property and proceeded with a statutory foreclosure of its lien and realized from the sale of the goods, etc., of date October 20, 1893, the sum of $3,500. The mortgage to the Packers National Bank was also filed in the office of the county clerk of date September 20, 1893, the day of its execution. Subsequent to the assumption of possession of the mortgaged property by the dry goods company, the Midland State Bank caused this, an action of replevin, to be insti-

tuted in the district court of Douglas county, and the property was taken under the writ, but, the plaintiff failing to execute the necessary bond, was returned to the dry goods company. The claim of the bank of right of possession of the property in suit was predicated on its ownership, as assignee of W. G. Templeton (a brother of O. L. Templeton, the merchant and owner of the property), of two notes and an asserted chattel mortgage to secure their payment, also as the owner of a note running in terms to the plaintiff bank and a chattel mortgage as security for the payment of the debt of which the note was evidence, both of which chattel mortgages were alleged to be subsisting liens prior and superior to the liens of the dry goods company and Packers National Bank. The latter came into the suit by intervention. Issues were joined, and at the trial thereof before a jury that body was given a peremptory instruction to return a verdict in favor of the dry goods company and the Packers National Bank. This the jury did and judgment was in the due course of procedure rendered on the verdict.

Of the assignments of error in the petition presented in this proceeding on behalf of the Midland State Bank the one urged is that in which the complaint is of the action of the court in instructing the jury as we have hereinbefore stated. The trial court excluded from the evidence the alleged mortgage to the plaintiff in error, and in the condition of the record and pleadings in the case in this court such instrument cannot enter into our consideration of the points discussed under the main subject of objection and argument, the giving of the peremptory instruction.

As we view the record, one question to which considerable attention has been given by counsel for plaintiff in error in the brief filed—that is, the fraudulent or *bona fide* character of the asserted chattel mortgage by the merchant to his brother as between the parties litigant—has no force, for at least two sufficient reasons.

First—The instrument under which the plaintiff asked

a remedy was signed without date; its time of execution was alleged as of July 25, 1893, and it was of the testimoney that it was signed August 12, 1893. Mr. O. L. Templeton, the merchant, the man who signed the instrument, was called as a witness for plaintiff and testified as follows:

Q. What is your name?

A. O. L. Templeton.

Q. Was you in business in the city of South Omaha during the year 1893, and up until about the 20th of September?

A. Yes, sir.

Q. Are you the man who executed the chattel mortgage to the Kilpatrick-Koch Dry Goods Company?

A. Yes, sir.

Q. And to the Packers National Bank?

A. Yes, sir.

Q. On the day and at the time when those mortgages were made, or prior to that time, had you given to any one other than the Midland State Bank any chattel mortgage, bill of sale, or other contract which might become a lien upon the goods there?

A. I had never given any.

And in cross-examination stated:

Q. You had never given any? What do you mean by that?

A. I meant that I had never given any mortgage to any one for that stock prior to this mortgage given to the Kilpatrick-Koch Dry Goods Company.

W. G. Templeton, a brother who was named in the instrument as grantee, gave testimony of the execution of the notes by his brother, and this paper as a mortgage to secure their payment, and in cross-examination stated of the mortgage:

Q. I observe, Mr. Templeton, that the first of these two mortgages about which you have been interrogated—that is, the one which you say was given by your brother to you to secure the sum of $1,700—bears no date. Why was it not dated?

A. Because he had agreed to pay the other mortgage due to the bank first and I did not want to hold a mortgage off of the record and show that it was of so ancient a date.

Q. Then I understand the agreement between you and your brother was that the date should be filled up at the time when it was going to be recorded, was it?

A. That was the understanding; yes, sir.

Q. And that it should not be recorded for the time being?

A. That was the agreement.

Q. Why did you agree with him not to record it for the time being?

A. Because I wanted him to continue in the business and pay the debts.

Q. All of the debts?

A. Yes, sir.

Q. Then your object was to avoid embarrassing his business.

A. That was it, and to protect myself.

Q. But I am speaking with reference to the agreement to withhold it from record?

A. Yes, sir.

Q. So that he might go on with his business just as if you did not have any mortgage; is that right?

A. I answered your question, I think.

Q. So that he might go on with the business just as if you did not have any mortgage; is that right?

A. So that he might continue his business and pay the debts.

Q. And he did continue in the possession of the property?

A. He did.

Q. Buying and selling goods, just as if you did not have any mortgage?

A. I presume he did.

Q. Well, you know he did, don't you?

A. Yes, sir; I know he continued in business after I took the mortgage.

Q. And what was your agreement with reference to the time that it should be recorded?

A. The agreement was that if the contingency arose that made it necessary that he would come and let me know and that I would put the mortgage on record and that would protect myself.

Q. He was to let you know when some contingency arose that would make it necessary to record that instrument?

A. That is what I said.

Q. And he did not, of course, tell you of any contingency of that character, did he?

A. He did not.

It seems beyond doubt, from this testimony and other facts and circumstances of the transaction not bearing so directly thereon, but of a tendency to show its nature and effect, that it was not a completed mortgage or lien and was not to be until some contingency arose or for some reason, the sufficiency of which was to be determined by the prospective mortgagor, he should move in the matter, and a date which would not tend to discredit the instrument as a mortgage was to be inserted and the completed mortgage filed; for no doubt when the witness used the word "recorded" in referring to what should be done with the instrument, if ever completed, he meant filed, or made a matter of record in the authorized method. It was not shown that the contingency ever arose; the instrument never became complete; was allowed to remain imperfect; hence never became operative as a mortgage or lien on the property.

Second—The instrument under which the plaintiff made claim to possession of the property was sought to be established as a lien of date not later than August 12, 1893. It was disclosed that the merchant who signed it remained in possession of the stock of merchandise and sold articles therefrom in the usual course of a retail trade and added to the stock from time to time. If the instrument declared upon by the plaintiff had become of said

date a complete mortgage, and therefore a lien, it would have been on the property then in the store and not on subsequently acquired articles of merchandise, and it would have devolved on plaintiff to show that the property in litigation was that in stock at the time it asserted its lien became operative. On this point there was an entire lack of evidence. (See *Tallon v. Ellison*, 3 Neb. 74; *Gregory v. Whedon*, 8 Neb. 376; *Wedgewood v. Bank*, 29 Neb. 166; *Bank v. Davis*, 38 Neb. 238; *Williams v. Evans*, 6 Neb. 216.)

It follows further from the conclusions reached herein that the trial court's action in directing the verdict by instruction as it did was not erroneous. The judgment is therefore

AFFIRMED.

WILLIAM L. BAILEY ET AL. V. O. K. EASTMAN ET AL

FILED APRIL 8, 1898. No. 8001.

Review: UNAUTHENTICATED TRANSCRIPT. A petition in error will be dismissed from this court if no transcript of the record in the trial court, authenticated by the certificate of the clerk of such court, is filed in this court.

ERROR from the district court of Dawes county. Tried below before BARTOW, J. *Petition in error dismissed.*

G. A. Eckles and *A. G. Fisher*, for plaintiffs in error.

C. H. Bane, contra.

HARRISON, C. J.

The papers and documents herein have been filed in this court in purposed error proceeding, in which there was sought the reversal of the judgment of the district court of Dawes county by which relators' application for the issuance of a writ of mandamus was denied and dismissed. In what is presumably the journal entry of the

trial and the resultant adjudication of the issues presented there is a statement that a motion for a new trial was filed and passed upon, but no such pleading appears in the papers filed in this court. Furthermore—and this is of vital importance—the papers filed here are not authenticated by the certificate of the clerk of the trial court, as required by statute, as copies or in whole a transcript of the record of the proceedings in such court. This is a fatal omission; for that there be an authenticated record of the proceedings in the district court filed with a petition in error in the supreme court is jurisdictional, and if lacking, the petition in error will be dismissed. (*Otis v. Butters*, 46 Neb. 492; *Moore v. Waterman*, 40 Neb. 498; *McDonald v. Grabow*, 46 Neb. 406; *Union P. R. Co. v. Kinney*, 47 Neb. 396; *Wachsmuth v. Orient Ins. Co. of Hartford*, 49 Neb. 590; *Einspahr v. Exchange Nat. Bank of Hastings*, 49 Neb. 557.)

DISMISSED.

DRUMMOND CARRIAGE COMPANY ET AL. V. GEORGE T. MILLS.

FILED APRIL 8, 1898. No. 7846.

1. **Appeal Bond:** JUDGMENT AGAINST SURETIES. Upon the rendition of a judgment against appellant in the district court, that court has no such jurisdiction of the person of the surety in the appeal undertaking that it may render the same judgment against him that it may against the appellant. *Selby v. McQuillan*, 45 Neb. 512, followed.

2. **Bailment:** LIEN OF BAILEE FOR SERVICES. By operation of the common law, in the absence of any specific agreement, every person who has bestowed labor and skill on a chattel bailed to him for the purpose, and has thereby increased its value, has a lien on such chattel and may retain it until paid his reasonable charges for his services.

3. ——: ——. Such rule of the common law is in force in this state.

4. ——: ——: STATUTORY LIENS. The common-law lien to which we have just referred may, by force of special facts or circum-

stances, override or be superior to prior contractual or statutory liens.

5. **Chattel Mortgages:** TITLE. In this state the title to mortgaged chattels remains in the mortgagor until foreclosure of the mortgage.

6. ———: LIEN OF BAILEE FOR REPAIRS: PRIORITY. A physician gave a mortgage on a buggy of which he retained possession and used it in his business. It was of the recitals of the mortgage that he should not so negligently or improperly use or care for the property as to subject it to probable loss or material depreciation in value, and the mortgagee had knowledge that the buggy at times needed repairing, and had seen it at one time left at the shop to be repaired. The mortgagor, without the knowledge of the mortgagee, left the buggy with a carriage company for needed repairs. The company repaired the buggy and retained possession thereof to enforce a claimed lien for, or the payment of its reasonable charges for, such repairing. The mortgagee instituted an action of replevin against the carriage company to obtain possession of the buggy, asserting right thereto under and by virtue of his mortgage lien. *Held*, That the mortgage lien was subordinate to the common-law lien, since the recitals of the mortgage and the facts and circumstances disclosed that the mortgagor had at least implied authority from the mortgagee to have the repairs made.

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

B. N. Robertson, for plaintiffs in error.

W. H. De France, contra.

HARRISON, C. J.

This, an action of replevin, was instituted by defendant in error March 22, 1894, before a justice of the peace in Douglas county to recover the possession of a "Breton buggy," and in a trial he was given judgment for the relief demanded. An appeal was perfected to the district court, wherein the defendant in error was again successful. He there obtained judgment against the carriage company and also against the surety on the appeal undertaking. The carriage company and the surety on the appeal bond present the case to this court for review.

It is contended for the party who signed the appeal

undertaking that the district court had no jurisdiction to render the judgment it did against him. The question presented was discussed and determined in the case of *Selby v. McQuillan*, reported in 45 Neb. 512, and it was stated that the district court, on the rendition of a judgment against an appellant, had no jurisdiction to render a like judgment against the surety in the appeal bond; and, following the doctrine then announced, we must hold that the judgment against the surety in this case was without the jurisdiction of the court and cannot stand.

The trial in the district court was without a jury and on an agreed statement of the facts as follows:

"That W. P. Wilcox was, on and prior to July 1, 1891, a physician engaged in the actual practice of his profession in the city of Omaha, Nebraska; that on September 12, 1889, said Wilcox purchased a physician's phaeton, or carriage, from the defendant, and that from the date of its purchase until on or about the 13th day of May, 1892, the said Dr. Wilcox used the said carriage in his professional business as a physician and surgeon; that on July 1, 1891, said Dr. W. P. Wilcox made, executed, and delivered, for a valuable consideration, being money actually loaned, his certain promissory note to the plaintiff for $350, due one year after date; that no payments have been made on said note, and the same is due. To secure said note the said Dr. W. P. Wilcox made and delivered a chattel mortgage to plaintiff covering the said physician's phaeton, or carriage, a horse and harness. The said mortgage was filed in the office of the county clerk of Douglas county, Nebraska, in accordance with law, on the 3d day of August, 1891, a copy of which is hereto attached and made a part of this stipulation, marked 'Exhibit A.'

"The plaintiff was well acquainted with the buggy in controversy and knew at the time he took his mortgage that it was used by Dr. Wilcox in his business as a physician. Dr. Wilcox and the plaintiff rode out in the buggy quite frequently in the evenings. The plaintiff

was with Dr. Wilcox at the office of the Drummond Carriage Works, defendant, at one time previous to May, 1892, after his mortgage was given, and when Dr. Wilcox run the buggy in there for repairs, which bill of repairs was paid by Dr. Wilcox. About the 13th of May, 1892, said Dr. Wilcox took the buggy mentioned in the mortgage, and in controversy herein, to the defendant for repairs, and, pursuant to agreement between the defendant and Dr. Wilcox, the buggy was to be repaired. The bill for the same agreed upon was $60, to be paid in cash when the work was done. A copy of the memorandum of repairs to be done, and which were actually done, on the carriage, is hereto attached, marked 'Exhibit B' and made a part of this stipulation. The original was, on or about May 13, 1892, mailed by defendant to Dr. Wilcox. The repairs done on the buggy were reasonably necessary for the careful preservation of the carriage, and the bill for the same is well and reasonably worth $60, no part of which has been paid. The buggy was completed, and the bill was due on the 1st of July, 1892. The plaintiff is a resident of Omaha, Nebraska, and has resided therein ever since the 12th day of September, 1889.

"About the 1st of June, 1892, said Dr. W. P. Wilcox left the city of Omaha for Colorado, to be gone an indefinite period of time. Said Dr. Wilcox was absent from the city from about the 1st of June, 1892, until about the 15th of March, 1894. During the time of said Wilcox' absence from the city, as aforesaid, the plaintiff supposed the buggy was in the barn of the father of said Wilcox, and did not know different until about the 21st of March, 1894, when he was notified by said Wilcox that the said buggy was in the possession of the defendant. In the meantime, the plaintiff had made no inquiries about the whereabouts of the buggy, neither had he made any inquiries about the horse and harness, and when this action was commenced the plaintiff did not know where the horse and harness were. Plaintiff never has pressed the said Wilcox for the money secured by the

note and chattel mortgage and never calculated to do so. While Dr. Wilcox was using the buggy in his professional business, he had all his repairing done at the carriage works of the defendant, and the buggy was in the defendant's shop for repairs, and the defendant did small repair work on the buggy twelve different times between the date of its purchase, September 12, 1889, and May 1, 1891. The first actual knowledge that the plaintiff had of the buggy being in the possession of the defendant was obtained from the said Dr. Wilcox on or about March 21, 1894. Immediately after said notification, plaintiff demanded possession of said buggy from defendant, and upon refusal of defendant to deliver up the possession of said buggy to plaintiff, plaintiff commenced this cause of action. The defendant made no inquiries of Wilcox when he took the buggy to its place of business for repairs, as to whether the buggy was incumbered or not, nor did the said Wilcox say anything about it to the defendant. The buggy has been in the continuous possession of the defendant from the spring of 1892. The defendant is a corporation duly organized under the laws of Nebraska, and engaged in the manufacture and sale and general repair work of wagons, carriages, and other kinds of vehicles. The defendant, when demand was made on it for the possession of the buggy, refused to deliver the same to the plaintiff until its bill for repairs, as above stated, was paid, and then and there notified the plaintiff that it claimed a lien upon said buggy for the work and labor and material performed and used in repairing said buggy. The value of the buggy was $75 at the commencement of this action. The defendant and all the officers thereof, at the times when said repairs were agreed upon and made, had no actual knowledge of said mortgage, nor were they aware of the existence of such a mortgage until the month of March, 1894."

It is urged by counsel for the carriage company that it had a lien by force of law on the buggy for the amount of its bill of charges for repairing the buggy, which contin-

ued so long as it retained possession of the buggy under a claim of lien for such services. The principle invoked is, if property is delivered to a person to be by his skill and labor or by adding thereto property of his, enhanced in value, and he performs the labor or adds his own property to that delivered and thereby increases the value of the latter, he may retain possession of it until paid for his labor or materials. This is a doctrine of the common law, and the right is usually denominated a common-law lien, and it exists under a state of facts such as we have just detailed, unless there is a contract inconsistent with such lien, or some modifying circumstances which are in conflict with any such right, or disclose an intent not to claim the right. "A mechanic of any kind has a lien upon all personal property for manufacture or repairs, while it remains in his possession. * * * A carriage-maker for repairs upon a carriage." (See 6 Wait, Actions & Defenses 149, and cases cited.) Persons have by common law the right to detain goods on which they have bestowed labor, until the reasonable charges therefor are paid. (2 Kent, Commentaries 635.) In the absence of specific agreement, if a party has bestowed labor and skill on a chattel bailed to him for such purpose and thereby improved it, he has by general law a lien on it for the reasonable value of his labor or the right to retain it until paid for such skill and labor. (*Bevan v. Waters*, 3 C. & P. [Eng.] 520; *Scarfe v. Morgan*, 4 M. & W. [Eng.] 270; *Lord v. Jones*, 24 Me., 439, 41 Am. Dec. 391; *Grinnell v. Cook*, 3 Hill [N. Y.] 491. This right rests on principles of natural equity and commercial necessity. (2 Kent, Commentaries 634.) No lien exists at common law for the agistment of cattle (*Chapman v. Allen*, 2 Cro. Car. [Eng.] 271; *Jackson v. Cummins*, 5 M. & W. [Eng.] 342; *Wallace v. Woodgate*, 1 C. & P. [Eng.] 575); nor in favor of one to whom a horse has been delivered to be stabled, taken care of, fed, and kept (*Judson v. Etheridge*, 1 C. M. [Eng.] 742). In such cases, a lien for the charges will only arise by virtue of a statute or special agreement in

the nature of a pledge. * * * 'The case of an agistment does not fall within that principle inasmuch as the agister does not confer any additional value on the article, either by the exertion of any skill of his own or indirectly, by means of any instrument in his possession.' " (*White v. Smith*, 43 Am. Rep. [N. J.] 347; *Jackson v. Cummins, supra.*)

We refer to the agister's lien for the purpose of directing attention to the fact that it is not a lien which has been recognized as arising by force of the general or common law or as having any existence at common law, but has its origin in, or is the creature of, statutory provision, and that the reasoning employed and rules announced by this court in reference to agister's liens are not forceful or applicable herein in regard to the lien claimed. The legislature of the territory, when the state was a territory, passed the following act: "So much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory is adopted and declared to be law within said territory." (Compiled Statutes, ch. 15, sec. 1.) The right to the common-law lien would exist in this state unless inconsistent with our statutory law, and we cannot discover wherein it is inconsistent with, or has been abrogated by, statute, hence must determine it in force. In regard to the recognition and enforcement of common-law rules, it is said by this court in the opinion in the case of *Wilson v. Burnstead*, 12 Neb. 1: "In the application of the principles of the common law, where the precedents are unanimous in the support of a proposition, there is no safety but in a strict adherence to such precedents. If the court will not follow established rules, rights are sacrificed, and lawyers and litigants are left in doubt and uncertainty while there is no certainty in regard to what, upon a given state of facts, the decision of the court will be." We must conclude that a common-law lien existed in favor of the

carriage company for the amount due it for the repair of the buggy; and it remains further to determine whether it took precedence of the lien of defendant in error's chattel mortgage. The lien of the mortgage was created and perfected by the filing prescribed by law, long prior to the services, etc., of the carriage company in repairing the buggy, and there is no dispute in regard to time of attachment of either lien.

It now becomes necessary to allude again to some of the facts which appeared of evidence in the cause, more especially to bring out distinctly the position occupied by defendant in error relative to any repairs which became necessary to the useful existence of the buggy, and its possible future appropriation to the satisfaction of the indebtedness, the payment of which was secured by the chattel mortgage. The mortgage provided in terms that until default by the mortgagor in the performance of specified conditions or until the happening of certain indicated events, he should keep possession of the mortgaged property, and one of the enumerated events by the occurrence of which the mortgagee should at his option be entitled to take possession thereof was this: "If the said party of the first part [the mortgagor] shall so negligently or improperly use or care for said property as to subject the same to probable loss or material depreciation of the value thereof—" from which it seems probable that it was in contemplation of the parties that the mortgagor would, of course at his own proper cost and charge have the buggy repaired, if necessary, during the time of its use by him and the existence of the mortgage. It was also of the evidence that defendant in error saw the buggy and rode in it frequently, and had knowledge of its being repaired by the carriage company at least once when he was present and it was run into the carriage company's place of business to be by it repaired.

We may now turn to the rules of law which we deem applicable to the state of facts developed in evidence herein. The legal title to the buggy was in the mort-

gagor. He was the owner thereof. The mortgagee had but a lien thereon. (*Musser v. King*, 40 Neb. 892; *Randall v. Persons*, 42 Neb. 607; *Camp v. Pollock*, 45 Neb. 771; *Gould v. Armagost*, 46 Neb. 897.) It may be said that a lien which arises by force of the common law may be, under special circumstances, superior to prior existing contractual or statutory liens on the same property. In Darlington, Personal Property p. 48, it is stated on this subject: "And though in general a lien cannot be created without authority of the owner, liens for repairs take precedence of prior mortgages where such repairs were necessary for purposes within the intention of the mortgage; *e. g.*, repairs on vessels or carriages, which the mortgagor was to continue to use." A lien on property by operation of the common law may have precedence of an existing mortgage. (Jones, Chattel Mortgages sec. 474; Herman, Chattel Mortgages 308.) In the case of *White v. Smith*, 15 Vroom [N. J.] 105, 43 Am. Rep. 347, it was said: "*Williams v. Allsup*, 10 C. B. [N. S.] 417, is the leading case on this subject. In that case the plaintiff, a shipwright, retained a vessel for his charges for repairs, as against a mortgagee under a prior mortgage. The mortgage had been recorded pursuant to the merchants' shipping act. The vessel was left in the mortgagor's possession and control for use, and was condemned as unseaworthy. The shipwright's charges were for necessary repairs, made by the mortgagor's direction, without the knowledge of the mortgagee. The court sustained the shipwright's lien for repairs, against the claim of the mortgagee. The course of reasoning which led to this result, as expressed in the opinions of the judges, is as follows: Erle, C. J., said: 'I put my decision on the ground that the mortgagee, having allowed the mortgagor to continue in the apparent ownership of the vessel, making it a source of profit and a means of earning wherewithal to pay off the mortgage debt, the relation so created by implication entitles the mortgagor to do all that may be necessary to keep her in an efficient

state for that purpose. The case states that the vessel had been condemned as unseaworthy by the government surveyor, and so was in a condition to be utterly unable to earn freight or be an available security or any source of profit at all. Under these circumstances, the mortgagor did that which was obviously for the advantage of all parties interested. He puts her into the hands of the defendant to be repaired, and according to all ordinary usage, the defendant ought to have a right of lien on the ship so that those who are interested in the ship, and who will be benefited by the repairs, should not be allowed to take her out of his hands without paying for them. * * * It is to be observed that the money expended in repairs adds to the value of the ship; and looking to the rights and interests of the parties generally, it cannot be doubted that it is much to the advantage of the mortgagee that the mortgagor should be held to have power to confer a right of lien on the ship for repairs necessary to keep her seaworthy.' Willes, J., said: 'By the permission of the mortgagees the mortgagor has the use of the vessel. He has therefore a right to use her in the way in which vessels are ordinarily used. Upon the facts which appear on this case, this vessel could not be so used unless these repairs had been done to her. The state of the things therefore, seems to involve the right of the mortgagor to get the vessel repaired, not on the credit of the mortgagees, but upon the ordinary terms, subject to the shipwright's lien. It seems to me that the case is the same as if the mortgagees had been present when the order for repairs was given.' Byles, J., said: 'As it is obvious that every ship will, from time to time, require repairs, it seems but reasonable, under circumstances like these, to infer that the mortgagor had authority from the mortgagees to cause such repairs as should become necessary to be done, upon the usual and ordinary terms. Now what are the usual and ordinary terms? Why, that the person by whom the repairs are ordered should alone be liable personally, but

that the shipwright should have a lien upon the ship for the work and labor he has expended on her. Nor are the mortgagees at all prejudicially affected thereby. They have a property augumented in value by the amount of the repairs.' " (See also *Scott v. Delahunt*, 5 Lans. [N. Y.] 372; *Hammond v. Danielson*, 126 Mass. 294; *Tucker v. Werner*, 21 N. Y. Supp. 264; *Corning v. Ashley*, 4 N. Y. Supp. 255, affirmed. See 24 N. E. Rep. 1100.) We are not holding that in all cases, or generally, the common-law lien will override and be superior to the prior chattel mortgage lien, but that in cases where the mortgagor can be said to have expressed or implied authority from the mortgagee to procure repairs to be made on the mortgaged property it will be so. The carriage company was entitled to its lien, and it was superior to the lien of the chattel mortgage; hence the judgment of the district court was wrong and must be reversed.

REVERSED AND REMANDED.

RAGAN, C., dissents.

STENGER BENEVOLENT ASSOCIATION v. CAROLINE STENGER.

FILED APRIL 8, 1898. No. 7966.

1. **Married Women:** CONTRACTS. The disability of a married woman to enter into contracts still exists in this state, except to the extent it has been removed by legislative enactments.

2. ———: ———: SEPARATE ESTATE. She may contract with parties generally or with her husband, but it must be in reference to her separate property, trade, or business, or upon the faith and credit thereof and with the intent to charge her separate estate.

3. ———: ———: ———. Whether the contract is of the nature just indicated is a question of fact.

4. ———: ———: ———. In an action predicated upon promissory notes executed and delivered by a woman to her husband during the existence of the marital tie, if the coverture is pleaded in de-

fense and admitted or proved, it devolves on the plaintiff to show that the contracts were with reference to the separate property of the wife, upon the credit of and with intent to bind the same.

5. **Husband and Wife:** CONTRACTS: UNDUE INFLUENCE. A relation of trust and confidence arises and continues with the existence of the marital tie between parties, and where the contract of the wife to or with the husband is sought to be enforced and the coverture is interposed as a defense, coupled with a plea of the exercise by the husband of undue influence on the wife in obtaining the execution of such contract, the burden is on the plaintiff to establish that no unfair advantage was taken or undue influence exercised by the husband.

6. **Trial to Court:** ERRONEOUS ADMISSION OF EVIDENCE. Where the trial was to the court, the admission of incompetent testimony furnishes on review no sufficient ground for reversal, if the finding and judgment must for other reasons be affirmed.

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

The opinion contains a statement of the case.

Albert & Reeder, for plaintiff in error.

References: *Buckingham v. Roar*, 45 Neb. 244; *May v. May*, 9 Neb. 16; *Brown v. Brown*, 22 Neb. 703; *Greene v. Greene*, 42 Neb. 640; *Skinner v. Skinner*, 38 Neb. 756; *Schultz v. Culbertson*, 1 N. W. Rep. [Wis.] 21; *Brower v. Callender*, 105 Ill., 88; *Bodine v. Morgan*, 37 N. J. Eq. 426.

Whitmoyer & Gondring and *A. M. Post, contra:*

In controversies between husband and wife, a less amount or degree of proof has always been required to impeach the transaction involved than in cases where the parties are enabled to contract upon terms of equality. Generally speaking, any undue advantage gained by the husband over the wife, by means of the marital relation, is, in a legal sense, a fraud upon her. (*Darlington's Appeal*, 86 Pa. St. 512; *Whitbeck v. Whitbeck*, 25 Mich. 439; *Jenne v. Marble*, 37 Mich. 319; *Farmer v. Farmer*, 39 N. J. Eq. 211; *Switzer v. Switzer*, 26 Gratt. [Va.] 574; *Dolliver v. Dolliver*, 94 Cal. 642; *Bennett v. Bennett*, 37 W. Va. 396.)

It is charged in the answer that defendant was, at the date of the notes and contract described in the petition, the wife of plaintiff's assignor, Martin Stenger, and that said notes were not executed with reference to, or upon the faith and credit of, her separate estate, or with intent to charge the same, while the reply in terms admits the defendant's coverture as pleaded. The burden was accordingly upon the plaintiff to bring the case, both by pleading and proof, within the exception of the statute. (*Grand Island Banking Co. v. Wright*, 53 Neb. 574; *Tracy v. Keith*, 11 Allen. [Mass.] 214; *Nash v. Mitchell*, 71 N. Y. 199; *Broome v. Taylor*, 76 N. Y. 564; *Saratoga County Bank v. Pruyn*, 90 N. Y. 250; *Rodemeyer v. Rodman*, 5 Ia. 426; *McGlaughlin v. O'Rourk*, 12 Ia. 459; *Cupp v. Campbell*, 103 Ind. 213; *Wood v. Losey*, 50 Mich. 475.)

Courts will lend their aid to enforce such agreements only, between husband and wife, as are affirmatively shown to rest upon equitable grounds, such, for instance, as a sufficient money consideration. (*Smith v. Dean*, 15 Neb. 432; *Johnson v. Vandervort*, 16 Neb. 141; *Furrow v. Athey*, 21 Neb. 671; *Ward v. Parlin*, 30 Neb. 376; *Hill v. Fouse*, 32 Neb. 637; *Wanzer v. Lucas*, 44 Neb. 759; *Miller v. Miller*, 16 O. St. 527; *Dean v. Metropolitan E. R. Co.*, 119 N. Y. 540.)

HARRISON, C. J.

In its petition filed in this action, commenced in the district court of Platte county, the plaintiff pleaded its corporate character and existence; and further, that the defendant had executed to Martin Stenger certain specifically described promissory notes which had been by him indorsed and transferred to the plaintiff; that there had been a failure to pay certain sums of interest at their maturity as it was provided should be done in an agreement which had been executed by the defendant in regard to payment of interest on the amount of the indebtedness evidenced by the notes, it being stated that by mistake or omission the intended contract relative to

interest had not been expressed in the notes, and the agreement to which we have alluded was subsequently executed and delivered by the defendant to Martin Stenger, and by him transferred to the plaintiff. Judgment was asked for alleged past due interest in the sum of $3,200 and interest thereon. The answer was as follows:

"The defendant, in answer to the petition of the plaintiff, denies that said plaintiff was, or now is, incorporated or is a corporation, and denies that plaintiff is entitled to receive the money upon said notes described in plaintiff's petition, or any part thereof, and denies that at the time said notes were executed it was the intention of the defendant that the interest mentioned in said notes should be paid annually, and denies that the plaintiff is the owner and entitled to receive the money upon the contract, a copy of which is marked 'Exhibit A' in plaintiff's petition, or any part thereof.

"The defendant, further answering plaintiff's petition, alleged that, before and at the time said promissory notes and contract were executed, said defendant was, and now is, the wife of said Martin Stenger, to whom said notes were made and delivered; that said notes and the contract for the payment of interest annually did not concern her separate property, trade, or business; that at the time of the execution and delivery of said notes and contract the defendant was not indebted to said Martin Stenger in any sum whatever; that no consideration whatever was given for said notes and contract for payment of interest annually; that said notes and contract for payment of interest annually were given solely and only because said Martin Stenger demanded, required, and insisted that she should make and give said notes and contract to him, said Martin Stenger, and threatened her that if she did not make and give up said notes and said contract to him he would break up the household and family ties; that he would commence proceedings for a divorce from her, and do all he could against her, on account of which she was much worried and suffered great fear and distress,

and said notes and said contract were made and delivered to said Martin Stenger to avoid constant worry, fear, and distress that he was inflicting upon her, and not with a view or intention of charging her separate property, trade, or business, or with reference thereto, nor upon the faith and credit of her separate property, trade, or business; that said notes and said contract for the payment of interest annually were transferred and delivered by said Martin Stenger to said plaintiff as a gift and without valuable consideration therefor."

To this there was the following reply:

"Comes now the plaintiff herein, and for reply to the answer of the defendant herein denies each and every allegation thereof not hereinafter specifically admitted.

"The plaintiff admits that at the time of the execution and delivery of the notes and the contract mentioned in the petition the defendant was, and still is, the wife of the said Martin Stenger, but avers that the said notes and contract were made with reference to and upon the faith and credit of the separate property of the defendant for a good and valuable consideration. The plaintiff further avers that it purchased said notes and contract of said Martin Stenger in the usual course of business before maturity, for a valuable consideration, and without notice of any infirmity therein or of any defense thereto."

A jury was waived, and a trial of the issues to the court resulted in a finding and judgment for the defendant. The plaintiff association asks in this court a review of the proceedings in the trial court.

It was disclosed by the evidence that Martin and Caroline Stenger, husband and wife, came to America from France during the year 1872 and that they brought with them several thousand dollars—some in money and some in the form of United States, or as they are generally denominated, "government," bonds. A portion of this amount belonged to the husband and a part to the wife. After they had been in this country about three

years some thousands of dollars more were received for the wife from her parents' estate. The money they had, and also that received, was invested in this country. The title to all real estate purchased or acquired was vested in the husband. At the expiration of about six years, or in 1878, the husband went back to the old country, where he stayed some nine years, or until 1887, when he returned to this country and demanded that the wife give him the property which she then had. During the six years from 1872, the time the couple came to America, to 1878, the husband invested and managed all the property—the money of his wife as well as his own; but when he started for the old country, in 1878, he gave to her what he stated to her was her separate property, which was all personal or chattel, none real, and retained what he considered and what seems to have been conceded as his share. He told his wife at the time, in substance, that he had managed her property long enough and in the future she should attend to it. The theory of the counsel for plaintiff seems to have been that all, or practically all, the property was left in charge of the wife, and that when the husband returned in 1887 he but demanded his own, or a division of the original amount and the accumulations, which, it was asserted amounted to a large sum. The evidence does not support this theory, but, on the contrary, sustains the view that a division was made by the husband in 1878 prior to starting to the old country. The wife refused in 1887 to accede to the demand of the husband relative to delivery to him of the property then in her possession, or any portion thereof, but finally executed and delivered to him thirty-six promissory notes, each for the sum of $500, and one in amount $779. Twenty of the notes were by the husband transferred to the plaintiff. The notes were a gift to the plaintiff. It is doubtless established in this state that a wife may contract with her husband in regard to her separate estate or upon the faith and credit thereof, and that such contract may be enforced in the "civil action"

provided by our Code of Civil Procedure (see Code of Civil Procedure, sec. 2) and probably as at law (see *May v. May*, 9 Neb. 16), but the confidential relation recognized as arising with the marital tie and its continued existence with that of the bond of marriage are still of force and accorded recognition. That relations of trust and confidence do arise and exist between the husband and wife with and during the continuance of marriage, and that the husband will be, or is, with possibly a few notable exceptions, the dominant personage therein, are matters of common knowledge, and must be admitted; and it is of the inherent qualities of such relations that no legislature by its enactments, and no rule or law however established, could as a matter of fact change them, nor do we think it has been attempted. It will not be presumed that the legislature had the intent to combat or set aside such stubborn and well-known principles of human life and conduct. The disability of a married woman to contract with reference to her separate estate with parties generally or with her husband has been removed, but the contract must be within established governing principles and rules of conduct and fairness. A forcible illustration that the confidential phase of the marital sphere is acknowledged as still existent is afforded in the enforcement of the rule which excludes testimony of either husband or wife of communications between them during the existence of the tie. (See Code of Civil Procedure, secs. 328, 331, 332; *Lihs v. Lihs*, 44 Neb. 143; *Niland v. Kalish*, 37 Neb. 47; *Greene v. Greene*, 42 Neb. 634.) The coverture of the defendant was pleaded in the answer and admitted by the reply. In this condition of the issues it devolved on the plaintiff to establish that the notes were executed with reference to, or upon the faith and credit of, the separate estate of the defendant or with intent to charge the same. This it did not do; hence failed to make out a case. (*Grand Island Banking Co. v. Wright*, 53 Neb. 574.)

It may be further said that with the relation of trust

and confidence existent between husband and wife, and the former the dominant factor therein, it was also necessary that it be shown by the plaintiff that in obtaining the contracts, the notes, there was due and sufficient consideration therefor and no unfair or inequitable exercise of power or influence by the husband. There was no such proof; on the contrary, there was sufficient evidence to sustain a finding of the exercise of influence by the husband in an unfair and undue manner. (*Greene v. Greene*, 42 Neb. 634; *Darlington's Appeal*, 86 Pa. St. 512; *Garver v. Miller*, 16 O. St. 527; *Dean v. Metropolitan Elevated R. Co.*, 119 N. Y. 540.)

It is urged for the plaintiff that the trial court erred in admitting the testimony of the defendant of communications between herself and husband. Conceding this to be true without discussing or deciding it, it does not furnish a reason for the reversal of the judgment, as without any of such testimony the finding and judgment must be approved. There are no errors presented which call for a reversal of the judgment and it will be

AFFIRMED.

SULLIVAN, J., took no part in the decision.

S. & C. MAYER ET AL. V. JOHN E. NELSON.

FILED APRIL 8, 1898. No. 7940.

1. **Process:** WITNESSES: EXEMPTION FROM SERVICE. A person is privileged from the service of a summons in an action in which the venue is laid in a county other than that of his residence, while necessarily and in good faith within such county for the purpose of testifying as a witness in a cause.

2. ——: ——: ——: JUDGMENT. A judgment rendered on such service of process is not void, but merely erroneous, subject to be reversed in an appropriate appellate proceeding.

3. **Jurisdiction:** OBJECTIONS. Objections to jurisdiction of the person,

not appearing on the face of the record, may be raised by answer, and the prosecution of an appeal or error is not a waiver of such jurisdictional defense.

4. **Judgment:** INJUNCTION. A court of equity will not enjoin the enforcement of a judgment of a justice of the peace where it appears that a plain and adequate remedy existed at law.

ERROR from the district court of Phelps county. Tried below before BEALL, J. *Reversed.*

J. C. McNerney and *Alexander Altschuler*, for plaintiffs in error.

Hall, St. Clair & Roberts and *Stewart & Munger, contra.*

NORVAL, J.

This action was instituted in the district court of Phelps county by John E. Nelson to enjoin a judgment recovered against him by S. & C. Mayer before a justice of the peace of Lancaster county. On the final hearing a decree was entered for the plaintiff as prayed, and the defendants prosecute a petition in error.

The sole ground upon which relief was sought is that the judgment of the justice was void for want of jurisdiction over the person of the defendant therein. The facts, as gathered from the pleadings and evidence, are these: Nelson was a resident of Phelps county, and on January 5, 1894, he was served therein with a subpœna to appear on the day following as a witness before the county court of Lancaster county in a cause pending therein wherein Dean & Horton were plaintiffs and Sheldon and others were defendants; that Nelson, in obedience to the commands of the writ, went to Lancaster county on January 6 for the purpose of becoming a witness in said suit, and while there the justice's summons was served personally upon him on said date; that on the return day of the summons he made a special appearance before the justice and objected to the jurisdiction of the court over his person, on the ground that he was not

liable to be served with civil process in Lancaster county while in attendance upon court as a witness, which objection was overruled, and Nelson neither by himself nor attorney made any further appearance in the cause, and the judgment sought to be enjoined was rendered against him; that a transcript thereof was filed and docketed in the district court of Lancaster county, and a certified transcript of the same from said court was lodged in the office of the clerk of the district court of Phelps county, upon which an execution was issued and placed in the hands of the sheriff for service.

Undoubtedly Nelson was privileged from being served with summons in Lancaster county while in attendance as a witness before any of the courts of that county, and the justice should have sustained his objection to jurisdiction over his person (*Palmer v. Rowan*, 21 Neb. 452); but it was a privilege or immunity which he might have waived (*Woods v. Davis*, 34 N. H. 328; *Stewart v. Howard*, 15 Barb. [N. Y.] 26; *Washburn v. Phelps*, 24 Vt. 506; *Randall v. Crandall*, 6 Hill [N. Y.] 342). The judgment rendered on such service of process was not void. It was merely erroneous. But the defect is not available in a collateral proceeding. The case of *Hamilton v. Millhouse*, 46 Ia. 74, cited by plaintiff below, does not conflict with our view. The Code of Iowa provides that the jurisdiction of a justice of the peace does not embrace actions for the recovery of money against actual residents of any other county. That case holds that a justice cannot in such an action acquire jurisdiction over a non-resident defendant, though he may be served with process in the township where the action was commenced. That decision is based upon the proposition that the justice lacks jurisdiction over the subject-matter when the defendant is an actual resident of a county other than that in which the suit was brought, and that appearance could not confer jurisdiction. In that state a non-resident of the county is not liable, or subject to the service of summons in any suit brought to recover a money judg-

ment, while the law almost everywhere privileges a litigant or witness from the service of civil process while attending court out of the county of his residence. It is, however, a personal privilege which must be claimed to be available. The distinction between the Iowa case and the one at bar is too marked to require further comment.

Nelson had an adequate remedy at law by appealing from the judgment or prosecuting a petition in error to the district court. (*Hurlburt v. Palmer*, 39 Neb. 158; *Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb. 897; *Dunn v. Haines*, 17 Neb. 560.) The doctrine of these cases is that an objection to the jurisdiction of the court over the person is not waived by appealing or prosecuting an error proceeding, and that the want of jurisdiction, which is not disclosed by the face of the record, may be set up by answer. As a plain and adequate remedy existed at law, a court of equity will not enjoin the enforcement of the judgment rendered by the justice. (*Gould v. Loughran*, 19 Neb. 392; *Langley v. Ashe*, 38 Neb. 53.)

It is argued that the rule stated in *Shawang v. Love*, 15 Neb. 142, should apply to this case, since it had not been overruled at the time the judgment of the justice was entered. While it was decided in that case that the prosecution of an appeal or petition in error constituted a waiver of jurisdiction over the person, it is no reason why we should not in this case apply the true doctrine as announced in *Hurlburt v. Palmer*, *supra*. Plaintiff below has mistaken his remedy. The decree is reversed and the action dismissed.

REVERSED AND DISMISSED.