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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1898

VOLUME LV.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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In behalf of the people of Nebraska.

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THE SUPREME COURT

OF

NEBRASKA.

1898.

CHIEF JUSTICE,

T. O. C. HARRISON.

JUDGES,

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

COMMISSIONERS,

ROBERT RYAN,
JOHN M. RAGAN,
FRANK IRVINE.

OFFICERS.

ATTORNEY GENERAL,

C. J. SMYTH.

CLERK AND REPORTER,

D. A. CAMPBELL.

DEPUTY CLERK,

W. B. ROSE.

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J. S. STULL.....Auburn.

Second District—

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

Third District—

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

Fourth District—

B. S. BAKER.....Omaha.
CHARLES T. DICKINSON.....Tekamah.
JACOB FAWCETT.....Omaha.
W. W. KEYSOR.....Omaha.
CLINTON N. POWELL.....Omaha.
C. R. SCOTT.....Omaha.
W. W. SLABAUGH.....Omaha

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

Ninth District—

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Tenth District—

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

Eleventh District—

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J. R. THOMPSON.....Grand Island.

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Thirteenth District—
H. M. GRIMES.....North Platte.

Fourteenth District—
G. W. NORRIS.....Beaver City.

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

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ADMITTED SINCE THE PUBLICATION OF VOL. LIV.

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DOHERTY, THOMAS L.
HANNIBAL, RASMUS
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MIEDING, FRANCIS J.
REED, EUGENE W.
ROGERS, LOGAN A.
WATERS, FRANK R.

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.)

See page xlvii for table of Nebraska cases overruled.

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

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

TABLE OF CASES REPORTED.

A.

PAGE

Adams v. Osgood 766
DISMISSAL. TRIAL OF COUNTER-CLAIM.

Adler & Sons Clothing Co. v. Hellman 266
WITNESSES. TRANSACTIONS WITH PERSONS DECEASED. DOWER. FRAUDULENT CONVEYANCES. HUSBAND AND WIFE.

Alling v. Fisher 239
TRANSCRIPT FOR REVIEW. BILL OF EXCEPTIONS.

Alling v. Nelson 161
EVIDENCE. REVIEW. DECREE OF FORECLOSURE. TAX LIENS.

Allsman v. Richmond 540
CONFLICTING EVIDENCE. AGENCY. ASSIGNMENT OF ERROR.

Altschuler, Life Ins. Clearing Co. v 341

Anheuser-Busch Brewing Ass'n v. Hier 557
COURTS. JURISDICTION. JUDGMENT.

Atkinson, Welton v 674

Attorney General v. Moores 480

B.

Badger Lumber Co. v. Holmes 473
REVERSAL ON APPEAL. MECHANICS' LIENS.

Badger Lumber Co., Lincoln Mortgage & Trust Co. v 158

Bankers Life Ins. Co. v. Robbins 117
LIFE INSURANCE. ACTION ON POLICY. PRINCIPAL AND AGENT.

Barber v. Crowell 571
MORTGAGE. PARTNERSHIP. PARTIES.

Barker v. Potter 25
ATTEMPT TO MODIFY STATUTE.

Barnd, Hastings v 93

Bartlett v. Scott 477
CORPORATIONS. EVIDENCE. PLEADING.

Bartley v. State 294
INDICTMENT AND INFORMATION. DESCRIPTION OF MONEY. EMBEZZLEMENT.

Barton v. Frantz 167

Bauersachs, Zobel v 20

Beach v. Reed 605
HOMESTEAD. LIEN OF JUDGMENT.

PAGE
Bee Publishing Co., Rosenfield v. ... 388
Bell, Leavitt v. ... 57
Benschoter, Tillson v. ... 443
Bernstein, Home Fire Ins. Co. of Omaha v. ... 260
Bettman v. McConnell. ... 401
LANDLORD AND TENANT. EVIDENCE.
Bloomfield State Bank v. Miller. ... 243
MORTGAGE. DEPOSIT OF TITLE DEEDS. STATUTE OF FRAUDS.
Boales v. Ferguson. ... 565
ADMINISTRATION OF ESTATES. INTERLOCUTORY ORDERS. UNCONSTITUTIONAL ACTS. ESTOPPEL.
Boice v. Palmer. ... 389
OFFER TO COMPROMISE. WITNESSES. INSTRUCTIONS.
Bose, Brown v. ... 200
Bourke, Wyatt-Bullard Lumber Co. v. ... 9
Bradley v. Slater. ... 334
OPENING JUDGMENTS. ASSIGNMENTS OF ERROR.
Brown v. Bose. ... 200
ATTACHMENT. SALE OF NON-RESIDENT'S REALTY.
Brown v. Murphey. ... 81
QUIETING TITLE. EVIDENCE. REVIEW.
Brown v. Sloan. ... 28
REPLEVIN. LIEN.
Burnett, Norfolk Beet-Sugar Co. v. ... 360
Bush v. State. ... 195
CRIMINAL LAW. PLEA IN ABATEMENT. WAIVER.

C.

Calkins v. Miller. ... 601
SUMMONS. TIME TO ANSWER. MECHANIC'S LIEN.
Call Publishing Co. v. Edson. ... 394
CONTRACT FOR ADVERTISING.
Callahan, Munro v. ... 75
Campbell v. O'Connor. ... 638
PAYMENT TO AGENT. MORTGAGES.
Carlson, Gruver v. ... 544
Carpenter Paper Co., Sylvester v. ... 621
Casler v. Nordgren. ... 669
TRANSCRIPT FOR REVIEW.
Charles, Clark v. ... 202
Chicago, B. & Q. R. Co. v. Kellogg. ... 748
NEGLIGENCE. PLEADING. MASTER AND SERVANT. TRIAL. MISCONDUCT OF COUNSEL.
Chicago, B. & Q. R. Co. v. Kellogg. ... 754
SUIT IN EQUITY FOR NEW TRIAL IN ACTION AT LAW. DISMISSAL.

PAGE
Chicago, R. I. & P. R. Co. v. Sturey..... 137
INSTRUCTIONS. RAILROAD COMPANIES. EMINENT DOMAIN. DAMAGES. WITNESSES.

City of Lincoln, Lewis v..... 1
City of Omaha, Collins v..... 208
City of Omaha, Kuhns v..... 183
City of Omaha, Robertson v..... 718
City of Omaha v. Standard Oil Co..... 337
MUNICIPAL CORPORATIONS.

City of Omaha, Tuttle v..... 55
Clark v. Charles..... 202
PURCHASE OF REALTY PENDENTE LITE. DECREE BY CONSENT. PARTITION.

Cleland v. Hamilton Loan & Trust Co..... 13
VACATING JUDGMENT. DEFENSE TO ACTION.

Collins v. City of Omaha..... 208
ERROR PROCEEDINGS. TIME.

Collins Mfg. Co. v. Seeds Dry Plate Co..... 576
PROCEEDINGS IN ERROR. PARTIES.

Connell, Omaha Law Library Ass'n v..... 396
Cook, Leavitt v..... 57
Cox v. Moores..... 34
REMOVAL OF OFFICER. INJUNCTION.

Crosby, Clark v..... 202
Crowell, Barber v..... 571
Crum v. Stanley..... 351
ASSIGNMENT OF JUDGMENT. ACTIONS. PARTIES.

D.

Daggett, Darner v..... 198
Daly, Miller v..... 771
Daniel v. Schomberg..... 773
TRIAL ON MOTION FOR DEFICIENCY JUDGMENT.

Darby, Knight v..... 16
Darner v. Daggett..... 198
SALES. FALSE REPRESENTATIONS.

Davey, Taylor v..... 153
Davis, Fairbanks v..... 574
Davis v. Otoe County..... 677
ASSIGNMENTS OF ERROR. TAXES. PROTEST.

Day, National Masonic Accident Ass'n v..... 127
Dean v. Saunders County..... 759
LANDLORD AND TENANT. COUNTIES. RES JUDICATA. EVIDENCE.

Decker, Home Fire Ins. Co. of Omaha v..... 346
Devries v. Squire..... 438
DEFICIENCY JUDGMENT. NEW TRIAL.

PAGE
Drexel, Maul v. ... 446
Duesman v. Hale ... 577
TRUSTS. CONFLICTING INTERESTS.
Dvorsky, Equitable Trust Co. v. ... 735

E.

Eastern Banking Co. v. Seeley ... 660
MORTGAGES. DEFAULT IN INTEREST.
Edson, Call Publishing Co. v. ... 394
Equitable Trust Co. v. O'Brien ... 735
PLEADING. UNDENIED ALLEGATIONS. TAX LIENS.
Ewing v. Hoffine ... 131
JURORS. MISCONDUCT. EVIDENCE.
Exchange Bank of Cortland, Royal Trust Co. of Chicago v. ... 663

F.

Fairbanks v. Davis ... 574
ACCOUNT. OVERPAYMENT.
Fairbanks v. Welshans ... 362
CREDITORS' BILL. EQUITABLE ASSIGNMENT. PARTNERSHIP.
Fall, Wehn v. ... 547
Fanton, In re ... 703
Farmers Bank of Kearney v. Oliver ... 774
USURY. RENEWALS.
Ferguson, Boales v. ... 565
Finlay, Twinting v. ... 152
First Nat. Bank of Hastings, German Nat. Bank of Hastings v. ... 86
First Nat. Bank of Moline, First Nat. Bank of Omaha v. ... 303
First Nat. Bank of Omaha v. First Nat. Bank of Moline ... 303
BANKS AND BANKING. NOTE. COLLECTION.
First Nat. Bank of Omaha v. Goodman ... 409
SUFFICIENCY OF EVIDENCE. PLEDGE. INSURANCE.
First Nat. Bank of Omaha v. Goodman ... 418
LIABILITY OF SURETY. ALTERATION. PLEDGE BY WIFE.
First Nat. Bank of Omaha v. Hellman ... 266
Fisher, Alling v. ... 239
Flower v. Nichols ... 314
REVIEW OF INSTRUCTIONS. RULINGS ON EVIDENCE. JUSTICE OF THE PEACE. COSTS.
Francisco, Van Sant v. ... 650
Frantz, State v. ... 167
Frederickson, Hayden v. ... 156

G.

Garneau, Kendall v. ... 403

PAGE

Gate City Abstract Co. v. Post 742
LIABILITY OF BONDED ABSTRACTER.

Geer, United States Nat. Bank of Omaha v 462
Geisthardt, People's Nat Bank of Rock Island v 232
George, Clark v 202
German Nat. Bank of Hastings v. First Nat. Bank of Hastings 86
INSOLVENT CORPORATIONS. PREFERRING CREDITORS. CREDITORS' BILL. ESTOPPEL.

German Nat. Bank of Lincoln v. Kautter 103
ATTACHMENT. CONSTRUCTIVE SERVICE. VOID JUDGMENT. PLEADING. ASSIGNMENTS OF ERROR.

Glaze v. Keith 593
JUSTICE OF THE PEACE. SETTING ASIDE VERDICT.

Gloe, Gosmunt v 709
Godfrey, Lyons v 755
Goodman, First Nat. Bank of Omaha v 409, 418
Gosmunt v. Gloe 709
RIGHT TO REDEEM REALTY FROM JUDICIAL SALE.

Graham, Manfull v 645
Grand Lodge Ancient Order United Workmen v. Higgins 741
PRINTED ABSTRACT. REVIEW.

Gruver v. Walkup 544
MORTGAGE FORECLOSURE. MORTGAGE.

Gullikson, Husenetter v 32
Gustin v. Michelson 22
DEEDS. DELIVERY.

Gustus, Philadelphia Mortgage & Trust Co. v 435

H.

Hake v. Woolner 471
REVIEW. MOTION FOR NEW TRIAL. TRANSCRIPT FOR REVIEW.

Hale, Duesman v 577
Hallam v. Telleren 255
NOTE. ATTORNEYS' FEES AS COSTS. CONFLICT OF LAWS.

Hamer, Mills v 445
Hamilton Loan & Trust Co., Cleland v 13
Hastings v. Barnd 93
BANKING CORPORATIONS. LIABILITY OF STOCKHOLDERS. CONSTITUTIONAL LAW.

Hayden v. Frederickson 156
SALE. DESCRIPTION OF PROPERTY.

Hayden, Lewis v 173
Hellman, Adler & Sons Clothing Co. v 266
Hier, Anheuser-Busch Brewing Ass'n v 557
Higgins, Grand Lodge Ancient Order United Workmen v 741
Hilligas v. State 586
LARCENY.

PAGE
Hoffine, Ewing v. ... 131
Holdrege, Lewis v. ... 173
Holmes, Badger Lumber Co. v. ... 473
Holoubek, Swift v. ... 228
Home Fire Ins. Co. of Omaha v. Bernstein ... 260
INSURANCE. KNOWLEDGE OF AGENT.
Home Fire Ins. Co. of Omaha v. Decker ... 346
TRIAL. OPENING AND CLOSING. INSURANCE. INSTRUCTIONS.
Home Fire Ins. Co. of Omaha v. Weed ... 146
REVIEW WITHOUT BILL OF EXCEPTIONS. INSURANCE. ATTORNEYS' FEES.
Hopewell, Peterson v. ... 670
Hopper, Roberts v. ... 599
Hotaling v. Tecumseh Nat. Bank ... 5
BREACH OF CONTRACT. EQUITABLE COUNTER-CLAIM. MORTGAGES. MISTAKE.
Hoyt v. Little ... 71
JUDICIAL SALE. MODIFICATION OF DECREE. PROCESS. FORM.
Huffman v. Newman ... 713
LIABILITY OF AGENT TO THIRD PERSON.
Hunt, Omaha Law Library Ass'n v. ... 400
Husenetter v. Gullikson ... 32
PROMISE TO PAY DEBT OF ANOTHER.
Hutchins, Lincoln Mortgage & Trust Co. v. ... 158

I.

In re Fanton ... 703
HABEAS CORPUS. REVIEW OF ERRORS. EXCESSIVE SENTENCE.
In re Langston ... 310
MUNICIPAL CORPORATIONS. ORDINANCES. BILLIARD TABLES. CITY ORDINANCES. HABEAS CORPUS.
Insurance Company, Bankers Life, v. Robbins ... 117
Insurance Company, Home Fire, of Omaha v. Bernstein ... 260
Insurance Company, Home Fire, of Omaha v. Decker ... 346
Insurance Company, Home Fire, of Omaha v. Weed ... 146
Insurance Company, Life Ins. Clearing, v. Altschuler ... 341
Insurance Company, National Masonic Accident Ass'n v. Day ... 127
Insurance Company, Northern Assurance, of London, Nye v. ... 776
Insurance Company, Omaha Life Ass'n v. Kettenbach ... 330

J.

Jewett v. McGillicuddy ... 588
INTEREST. CONSTRUCTION OF CONTRACT.
Johnson v. State ... 781
BASTARDY. EVIDENCE.
Jonasen, Kane v. ... 757

K.

PAGE

Kane v. Jonasen 757
FORECLOSURE. SALE IN GROSS. DECREE.

Kautter, German Nat. Bank of Lincoln v 103
Keith, Glaze v 593
Kellogg, Chicago, B. & Q. R. Co. v 748, 754
Kendall v. Garneau 403
STATUTES. LANGUAGE. FRAUDS. UNSUBSCRIBED DEED. REVIEW.

Kendall, Rein v 583
Kettenbach, Omaha Life Ass'n v 330
King v. Waterman 324
BREACH OF EXECUTORY CONTRACT.

Kloke v. Martin 554
CREDIBILITY OF WITNESSES. PARENT AND CHILD. MARRIED WOMEN. INSTRUCTIONS.

Knight v. Darby 16
JOINT MOTION FOR NEW TRIAL. REVIEW. CREDITORS' BILL. EVIDENCE.

Kokes v. State 691
MANDAMUS. EVIDENCE. POPULATION OF COUNTY.

Koupal, Kokes v 691
Kuhns v. City of Omaha 183
MUNICIPAL CORPORATIONS. EXTENSION OF STREET ASSESSMENTS.

L.

Langston, In re 310
Latimer v. State 609
CRIMINAL LAW. PRELIMINARY EXAMINATION. ROBBERY. CHARACTER OF ACCUSED.

Learn, Paxton v 459
Leavitt v. Bell 57
INCOMPETENT PERSONS. PARTIES. TAX-SALE CERTIFICATE. QUITCLAIM DEEDS.

Leeder v. State 133
DECREE FOR ALIMONY. ENFORCEMENT.

Lewis v. City of Lincoln 1
DEDICATION. STREETS. EMINENT DOMAIN. DAMAGES.

Lewis v. Holdredge 173
FRAUDULENT CONVEYANCES. GARNISHMENT.

Life Ins. Clearing Co. v. Altschuler 341
PAYMENT. LIFE INSURANCE. CONTINUANCE.

Lincoln, City of, Lewis v 1
Lincoln Mortgage & Trust Co. v. Hutchins 158
PLEADING. COPY OF INSTRUMENT. STRIKING OUT MATTER.

Little, Hoyt v 71

PAGE
Lonergan v. Lonergan 641
PLEADING. EVIDENCE. REVIEW. FOREIGN JUDGMENT.
Lyons v. Godfrey 755
FORECLOSURE. SALE OF REALTY. PRIOR LIENS.

M.

McCague v. Miller 762
MUNICIPAL CORPORATIONS. WIDTH OF STREETS. EVIDENCE.
McCart, Michaut v 654
McConnell, Bettman v 401
McGillicuddy, Jewett v 588
McVey v. State 777
WITNESSES. IMPEACHMENT. CRIMINAL LAW.
Manfull v. Graham 645
INFANTS. GUARDIAN AD LITEM. JUDGMENTS. JUDICIAL SALES.
Mapes, Village of Syracuse v 738
Marder, Pilger v 113
Martin, Kloke v 554
Maul v. Drexel 446
PARTIES. VOLUNTARY ASSIGNMENT. SHERIFF. CONVERSION. MARKET VALUE.
Meyer, Western Cornice & Mfg. Works v 440
Michaut v. McCart 654
JUSTICE OF THE PEACE. JUDGMENT. SUFFICIENCY OF FINDING.
Michelson, Gustin v 22
Middleboro Nat. Bank v. Richards 682
BONDS. CONDITIONAL SIGNATURE. PRINCIPAL AND SURETY.
Mikesell, Ponca Mill Co. v 98
Miller, Bloomfield State Bank v 243
Miller, Calkins v 601
Miller v. Daly 771
AMENDMENT OF JUDGMENT.
Miller, McCague v 762
Miller, Perkins County v 141
Miller, Stull v 20
Mills v. Hamer 445
JUDICIAL SALES. BILL OF EXCEPTIONS.
Missouri P. R. Co. v. Palmer 559
EVIDENCE. SYMPATHY. WITNESSES. NEW TRIAL. PARENT AND CHILD.
Mockett, Philadelphia Mortgage & Trust Co. v 323
Mollyneaux, Wittenberg v 429
Moores, Cox v 34
Moores, State v 480
Morse, Traynor v 595
Munro v. Callahan 75
VACATING JUDGMENT. FRAUD.

PAGE

Murphey, Brown v. 81
Murphy v. Warren 215
CONTRACT. CONSTRUCTION. ELEVATORS. PARTNERSHIP.
Murphy v. Warren 220
BILL OF EXCEPTIONS. REVIEW.

N.

National Masonic Accident Ass'n v. Day 127
INSURANCE. WAIVER OF DEFECTS IN PROOFS OF LOSS. INSTRUCTIONS.
Nebraska Nat. Bank of Omaha v. Pennock 188
ACTION ON RENEWAL NOTE.
Nebraska Telephone Co. v. State 627
MANDAMUS. TELEPHONE COMPANIES. JURISDICTION OF COURTS.
Nelson, Alling v. 161
Nelson v. Swift 598
DEATH BY WRONGFUL ACT. NEGLIGENCE.
Newman, Huffman v. 713
Nichols, Flower v. 314
Nordgren, Casler v. 669
Norfolk Beet-Sugar Co. v. Burnett 360
MASTER AND SERVANT. NEGLIGENCE.
Norfolk Beet-Sugar Co. v. Preuner 656
SPECIAL FINDING. GENERAL VERDICT. MASTER AND SERVANT.
Northern Assurance Co. of London, Nye v. 776
Nye v. Northern Assurance Co. of London 776
INSURANCE.
Nye v. Rogers 353
JUDICIAL SALES. CONFIRMATION.

O.

O'Brien, Equitable Trust Co. v. 735
O'Connor, Campbell v. 638
Ogden v. Rosenthal 163
NEW TRIAL. CONDITIONS.
Oliver, Farmers Bank of Kearney v. 774
Omaha, City of, Collins v. 208
Omaha, City of, Kuhns v. 183
Omaha, City of, Robertson v. 718
Omaha, City of, v. Standard Oil Co. 337
Omaha, City of, Tuttle v. 55
Omaha Law Library Ass'n v. Connell 396
CORPORATIONS. ASSESSMENT OF STOCK. DUES. BY-LAWS.
Omaha Law Library Ass'n v. Hunt 400
CORPORATIONS. ASSESSMENT OF STOCK. DUES.

PAGE

Omaha Life Ass'n v. Kettenbach 330
LAW OF THE CASE. REVIEW. SPECIAL FINDINGS.
Osgood, Adams v. 766
Otoe County, Davis v. 677

P.

Palmer, Boice v. 389
Palmer, Missouri P. R. Co. v. 559
Patterson v. Wenzel 210
Paxton v. Learn 459
REPLEVIN. PLEADING. CHATTEL MORTGAGES.
Pennock, Nebraska Nat. Bank of Omaha v. 188
People's Nat. Bank of Rock Island v. Geisthardt 232
PLEADING. PRINCIPAL AND AGENT. RENDITION OF BILL. ATTORNEY AND CLIENT.
Perkins County v. Miller 141
OFFICIAL BOND. AMENDMENT AND PLEADINGS. JOINT CONTRACT. PARTIES.
Perkins Windmill & Ax Co. v. Tillman 652
ALTERATION OF INSTRUMENTS. RATIFICATION.
Peterson v. Hopewell 670
PLEADING. CONSTRUCTION. TRESPASS. INJUNCTION.
Philadelphia Mortgage & Trust Co. v. Gustus 435
Philadelphia Mortgage & Trust Co. v. Mockett 323
JUDICIAL SALES. CONFIRMATION.
Pilger v. Marder 113
REPLEVIN. RES JUDICATA. BOND. SURETIES.
Pinkham v. Pinkham 729
DEEDS. TESTAMENTARY INSTRUMENT. DOWER.
Ponca Mill Co. v. Mikesell 98
CORPORATIONS. RECEIVERS. CAUSE FOR APPOINTMENT.
Post, Gate City Abstract Co. v. 742
Potter, Barker v. 25
Preuner, Norfolk Beet-Sugar Co. v. 656

R.

Railroad Company, Chicago, B. & Q., v. Kellogg 748, 754
Railroad Company, Chicago, R. I. & P., v. Sturey 137
Railroad Company, Missouri P., v. Palmer 559
Reed, Beach v. 605
Rein v. Kendall 583
CHATTEL MORTGAGES. LEVY OF ATTACHMENT.
Richards, Middleboro Nat. Bank v. 682
Richmond, Allsman v. 540
Robbins, Bankers Life Ins. Co. v. 117

PAGE

Roberts v. Hopper 599
INTOXICATING LIQUORS. DAMAGES.

Robertson v. City of Omaha 718
MUNICIPAL CORPORATIONS. COSTS OF REPAIRING PAVEMENT.

Robertson, State v 41
Rogers, Nye v 353
Rohren, State Bank of Nebraska v 223
Rosenfield v. Bee Publishing Co 388
VERDICT. CONVERSION.

Rosenthal, Ogden v 163
Royal Trust Co. of Chicago v. Exchange Bank of Cortland 663
TRANSCRIPT FOR REVIEW. OPENING JUDGMENTS. EXCEPTIONS.

S.

Saunders County, Dean v 759
Savage, Swain v 687
Schomberg, Daniel v 773
School District No. 24, Sherman County, School District No. 67, Sherman County, v 716
School District No. 67, Sherman County, v. School District No. 24, Sherman County 716
SCHOOL DISTRICTS. BOUNDARIES.

School District of City of Superior, State v 317
Schwake v. Kautter 103
Scott, Bartlett v 477
Seeds Dry Plate Co., Collins Mfg. Co. v 576
Seeley, Eastern Banking Co. v 660
Seeley, Wagenknecht v 769
Shafer v. Whiting 756
REVIEW.

Simpson v. State Bank of Ceresco 240
SALE. TROVER. CHATTEL MORTGAGES.

Slater, Bradley v 334
Sloan, Brown v 28
Smith, State Nat. Bank of Lincoln v 54
Squire, Devries v 438
Standard Oil Co., City of Omaha v 337
Stanley, Crum v 351
State, Bartley v 294
State, Bush v 195
State, Hilligas v 586
State, Johnson v 781
State, Latimer v 609
State, Leeder v 133
State, McVey v 777
State v. Robertson 41
CRIMINAL PROSECUTIONS. STATUTE OF LIMITATIONS.

PAGE

State, ex rel. Attorney General, v. Moores 480
CONSTITUTIONAL LAW. INVALID STATUTES. COURTS. MUNICIPAL CORPORATIONS. SELF-GOVERNMENT.

State, ex rel. Barton, v. Frantz 167
QUO WARRANTO. OFFICE AND OFFICERS. DUTY TO QUALIFY.

State, ex rel. Koupal, Kokes v 691
State, ex rel. Patterson, v. Wenzel 210
SCHOOL LANDS. RIGHTS OF LESSEES. MANDAMUS.

State, ex rel. Vale, v. School District of City of Superior 317
SCHOOLS AND SCHOOL DISTRICTS. NON-RESIDENT PUPILS. RESIDENCE. EVIDENCE. CENSUS. INSTRUCTIONS.

State, ex rel. Yeiser, Nebraska Telephone Co. v 627
State Bank of Ceresco, Simpson v 240
State Bank of Nebraska v. Rohren 223
INJUNCTION. CONTRACT. LANDLORD AND TENANT.

State Nat. Bank of Lincoln v. Smith 54
MARRIED WOMEN. SEPARATE ESTATE. NOTE.

Stevens, Wright v 676
Stull v. Miller 30
EVADING EXEMPTION LAWS. DAMAGES.

Sturey, Chicago, R. I. & P. R. Co v 137
Swain v. Savage 687
REPLEVIN. DISMISSAL. FINAL ORDER.

Swift v. Holoubek 228
MASTER AND SERVANT. PERSONAL INJURY. EXPECTANCY OF LIFE.

Swift, Nelson v 598
Sylvester v. Carpenter Paper Co 621
CONTRACT. EVIDENCE.

Syracuse, Village of, v. Mapes 738

T.

Taylor v. Davey 153
COUNTY BOARD. WARRANT. INJUNCTION.

Tecumseh Nat. Bank, Hotaling v 5
Telleren, Hallam v 255
Texas Land & Cattle Co., Zetterlund v 355
Tillman, Perkins Windmill & Ax Co. v 652
Tillson v. Benschoter 443
JUDICIAL SALES. APPRAISAL. CONFIRMATION.

Traynor v. Morse 595
REAL ESTATE AGENTS. COMMISSIONS.

Tuttle v. City of Omaha 55
RIGHT OF APPELLANT TO DISMISS APPEAL.

Twinting v. Finlay 152
PAYMENT OF TAXES, OATH OF ASSESSOR.

U.

PAGE

United States Nat. Bank of Omaha v. Geer 462
COMMERCIAL PAPER. INDORSEMENT. EVIDENCE.

United States Nat. Bank of Omaha v. Westervelt 424
FRAUDULENT CONVEYANCES. INTENT. BANKS.

V.

Vale v. School District 317
Van Sant v. Francisco 650
APPEAL FROM COUNTY COURT. DELIVERY OF TRANSCRIPT.

Village of Syracuse v. Mapes 738
APPEAL. EVIDENCE. VILLAGES. ANNEXATION OF TERRITORY.

W.

Wagenknecht v. Seeley 769
FORECLOSURE. DECREE. ORDER OF SALE.

Walkup, Gruver v 544
Warren, Murphy v 215, 220
Waterman, King v 324
Weed, Home Fire Ins. Co. v 146
Wehn v. Fall 547
VENDOR AND VENDEE. COUNTER-CLAIM. CORPORATIONS.

Welshans, Fairbanks v 362
Welton v. Atkinson 674
FOREIGN LAWS. NOTARY PUBLIC.

Wenzel, State v 210
Western Cornice & Mfg. Works v. Meyer 440
AMENDMENT OF PLEADING. ISSUES ON APPEAL.

Westervelt, United States Nat. Bank of Omaha v 424
Whiting, Shafer v 756
Wittenberg v. Mollyneaux 429
EVIDENCE. HOTELS. DEED. COVENANT.

Woolner, Hake v 471
Wright v. Stevens 676
JUDICIAL SALE. OATH OF OFFICER.

Wyatt-Bullard Lumber Co. v. Bourke 9
MORTGAGES. ESTATES. MERGER. TRUSTS.

Y.

Yeiser, Nebraska Telephone Co. v 627

Z.

Zetterlund v. Texas Land & Cattle Co 355
CONTRACT. ASSIGNMENT.

Zobel v. Bauersachs 20
EXTENSION OF TIME FOR PAYMENT OF NOTE. EVIDENCE. NEW TRIAL. DEPOSITIONS.

CASES CITED BY THE COURT.

CASES MARKED * ARE OVERRULED IN THIS VOLUME.
CASES MARKED † ARE CRITICISED IN THIS VOLUME.
CASES MARKED ‡ ARE DISTINGUISHED IN THIS VOLUME.

A.

PAGE

Abbott v. Godfrey, 1 Mich. 179 252
Achley's Case, 4 Abb. Pr. Rep. (N. Y.) 35 527
‡Ackerman v. Thummel, 40 Neb. 95 ..... 153, 155
Adams v. Osgood, 42 Neb. 450 ..... 63, 679, 767, 768
Adams v. Rodarmal, 19 Ind. 339 194
Adams Express Co. v. Gregg, 23 Kan. 376 166
Aetna Ins. Co. v. Bank of Wilcox, 48 Neb. 544 386
Ainsworth v. Taylor, 53 Neb. 484 ..... 162, 739
Alderman v. State, 24 Neb. 97 74
Alexander v. Thacker, 43 Neb. 494 163
Allis v. Ware, 28 Minn. 166, 9 N. W. Rep. 666 424
Allman v. Taylor, 101 Ill. 185 649
Allor v. Auditors of Wayne County, 43 Mich. 76 506
Allred v. McGahagan, 39 Fla. 118, 21 So. Rep. 802 712
American Burial Case Co. v. Shaughnessy, 59 Miss. 398 558
American Investment Co. v. McGregor, 48 Neb. 779 355
American Water Works Co. v. State, 46 Neb. 194 635
Anderson v. Colson, 1 Neb. 172 ..... 694, 703
Andres v. Kridler, 42 Neb. 784 577
Anheuser-Busch Brewing Ass'n. v. Hier, 52 Neb. 424 558
Ansley v. Pasahro, 22 Neb. 662 250
Argabright v. State, 49 Neb. 760 394
Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U. S. 379 .. 359
Armour Bros. Banking Co. v. Riley County Bank, 30 Kan. 163 465
Arnold v. State, 38 Neb. 752 ..... 196, 197
Asbury v. Frisz, 47 N. E. Rep. (Ind.) 328 81
Ashland Live Stock Co. v. May, 51 Neb. 474, 71 N. W. Rep. 67 753
Atchison, T. & S. F. R. Co. v. English, 38 Kan. 110 407
Atchison, T. & S. F. R. Co. v. Myers, 63 Fed. Rep. 798 751
Attorney General v. Common Council of Detroit, 29 Mich. 108 506
Attorney General v. Detroit Common Council, 58 Mich. 213 506
Attorney General v. Trombly, 89 Mich. 50 507
Aultman v. Cole, 16 Neb. 4 604

B.

Babcock v. Stanley, 11 Johns. (N. Y.) 178 478

PAGE
Bachelor v. Schmela, 49 Neb. 37 ... 569
Bailey v. State, 30 Neb. 855 ... 313
Baker v. Sloss, 13 Neb 230 ... 604
Balbach v. Frelinghuysen, 15 Fed. Rep. 675 ... 465
Baltimore v. State, 15 Md. 376 ... 534
Baltimore B. R. Co. v. Lee, 23 Alt. Rep. (Md.) 901 ... 672
‡Bank of Harlem v. City of Bayonne, 48 N. J. Eq. 246, 21 Atl. Rep. 478 ... 341
*Bankers Life Ins. Co. v. Robbins, 53 Neb. 44 ... 15, 117, 118, 119, 208
Barnett v. Pratt, 37 Neb. 349 ... 626
Barney v. State, 49 Neb. 515 ... 301
Barr v. City of Omaha, 42 Neb. 341 ... 472
Barry v. Deloughrey, 47 Neb. 354 ... 4, 5
Bartley v. State, 53 Neb. 310 ... 294
Barton v. McKay, 36 Neb. 632 ... 472
Bates v. Moore, 2 Bailey (S. Car.) 614 ... 407
Bay City v. State Treasurer, 23 Mich. 503 ... 532
Beal v. City of Somerville, 50 Fed. Rep. 647 ... 465
Becker v. Anderson, 6 Neb. 499 ... 286
Beech v. Abbott, 6 Vt. 586 ... 201
Beeler v. First Nat. Bank, 34 Neb. 348 ... 145
Belt v. Davis, 1 Cal. 138 ... 688
Benedict v. State, 12 Wis. 314 ... 707
Berry v. Doremus, 30 N. J. Law 399 ... 407
Berry v. Wilcox, 44 Neb. 82 ... 318, 319
Bickett v. Garner, 31 O. St. 28 ... 558
Bicknell v. Bicknell, 31 Vt. 498 ... 250
Bigler v. Baker, 40 Neb. 325 ... 336
Bigley v. Souvey, 45 Mich. 285 ... 732
Billings v. McCoy, 5 Neb. 187 ... 393
Bird v. Pope, 73 Mich. 483 ... 84
Birdsall v. Heacock, 32 O. St. 177 ... 417, 418
Bishop v. Stevens, 31 Neb. 786 ... 443
Blackman v. Preston, 15 N. E. Rep. (Ill.) 42 ... 732, 733
Blaine v. Bourne, 11 R. I. 119, 23 Am. Rep. 429 ... 465, 466
Blakeley v. Chicago, K. & N. R. Co., 25 Neb. 207 ... 140
Blanchard v. Moulton, 63 Me. 437 ... 3
Blanton v. Knox, 3 Mo. 343 ... 407
Bleau v. Wright, 68 N. W. Rep. (Mich.) 115 ... 716
Blodgett v. McMurtry, 39 Neb. 210 ... 235, 348
Bloedel v. Zimmerman, 41 Neb. 695 ... 321, 544
Bloomfield State Bank v. Miller, 55 Neb. 243 ... 408
Board of Public Works v. Columbia College, 84 U. S. 521 ... 380
Bolin v. Fines, 51 Neb. 650 ... 462
Booth v. Rich, 1 Vern. (Eng.) 295 ... 648
Boughn v. State, 44 Neb. 889 ... 41, 51
Bowers v. Oyster, 3 P. & W. (Pa.) 239 ... 250
Bowman v. Griffith, 35 Neb. 361 ... 24, 584
Boyd v. City of Milwaukee, 66 N. W. Rep. (Wis.) 603 ... 726
Boydell v. Drummond, 11 East (Eng.) 142 ... 405, 406

PAGE
Boyes v. Summers, 46 Neb. 308..... 524
Bradley v. Slater, 50 Neb. 682..... 335
Branch v. United States National Bank, 50 Neb. 470.....468
Brewer v. Marshall, 4 C. E. Green (N. J. Eq.) 537..... 252
Briggs v. First Nat. Bank, 41 Neb. 17..... 556
Brill v. Tuttle, 81 N. Y. 454..... 339
Broadwell v. Getman, 2 Den. (N. Y.) 87..... 407
Brock v. Hidy, 13 O. St. 306..... 479
Brooks v Cutler, 18 Ia. 433..... 558
Brown v. Dunn, 50 N. J. Law 111..... 339
Brown v. Hogan, 49 Neb. 746..... 535
Brown v. Jenks, 98 Cal. 10, 32 Pac. Rep. 701.....725, 726
Brown v. Westerfield, 47 Neb. 399.....24, 584
Brugman v. Burr, 30 Neb. 406..... 189
Bruil v. Northwestern Mutual Ass'n, 39 N. W. Rep. (Wis.) 529..... 120
Buchanan v. Griggs, 18 Neb. 121..... 573
Buchanan v. Mallalieu, 25 Neb. 201.....314, 705
Buchanan v. Smith, 16 Wall. (U. S.) 308.....267, 291
Buckingham v. Roar, 45 Neb. 244..... 19
Bull v. Mitchell, 47 Neb. 647..... 640
Bullard v. Boston & M. R. Co., 64 N. H. 27, 10 Am. St. Rep. 367, 27 Am. & Eng. R. Cas. 119..... 753
Buntain v. Mosgrove, 25 Ill. 152..... 166
Burch v. Newbury, 10 N. Y. 374.....392, 493
Burck v. Taylor, 152 U. S. 634.....340, 359
Burkett v. Clark, 46 Neb. 466.....323, 324, 446
Burlingim v. Cooper, 36 Neb. 73..... 604
Burlington & M. R. R. Co. v. Reinhackle, 15 Neb. 279..... 139
Burlington & M. R. R. Co. v. Schluntz, 14 Neb. 421..... 350
Bush v. Bank of Commerce, 38 Neb. 403..... 480
Butler v. Fitzgerald, 43 Neb. 192.....266, 290, 732
Byrd v. Cochran, 39 Neb. 118..... 675

C.

Cady v. Walker, 28 N. W. Rep. (Mich.) 805..... 289
Calmelet v. Sichl, 54 Neb. 97..... 767
Calvin v. Holbrook, 2 N. Y. 126..... 716
Camp v. Pollock, 45 Neb. 771..... 461
Campbell v. Baxter, 41 Neb. 729..... 582
Campbell v. Farmers & Merchants Bank, 49 Neb. 143..... 209
Campbell v. Gittings, 19 O. 347..... 478
Campbell v. Sherman, 35 Wis. 103..... 569
Carey v. Carey, 12 S. E. Rep. 1038, 108 N. Car. 267..... 289
Carey v. Kemper, 45 O. St. 93..... 649
Carleton v. Bickford, 79 Mass. 591..... 112
Carleton v. State, 43 Neb. 373..... 138
Carpenter v. Black Hawk Gold Mining Co., 65 N. Y. 43..... 252
Carrall v. State, 53 Neb. 431..... 301

PAGE
Carson v. Stevens, 40 Neb. 112 291
Carstens v. McDonald, 38 Neb. 858 ..... 138, 328
Case v. Beauregard, 99 U. S. 119, 101 U. S. 688 ..... 380, 384
Cecil Bank v. Farmers Bank of Maryland, 22 Md. 148 465
Center Township v. Marion County, 110 Ind. 579 15
Central Nat. Bank v. Hume, 9 Sup. Ct. Rep. 41 293
Chard v. Hamilton, 56 Hun (N. Y.) 259 144
Chase v Peck, 21 N. Y. 581 251
Cherry v. Heming, 4 Exch. (Eng.) 631 406
Chicago, B. & Q. R. Co. v. Kellogg, 54 Neb. 127, 138 ..... 749, 754
Chicago, K. & N. R. Co. v. Hazels, 26 Neb. 364 139
Chicago Lumber Co. v. Ashworth, 26 Kan. 212 574
Chicago, S. L. & P. R. Co. v. Fry, 131 Ind. 319 751
Christmas v. Griswold, 8 O. St. 558 385
Christmas v. Russell, 81 U. S. 69 385
Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County, 1 O. St. 77 490
Citizens Bank v. Bolen, 121 Ind. 301 546
Citizens Bank v. Closson, 29 O. St. 78 348
City Nat. Bank of Hastings v. Thomas, 46 Neb. 861 139
City of Chadron v. Glover, 43 Neb. 732 ..... 337, 544
City of Denver v. Clements, 3 Colo. 472 765
City of Evansville v. State, 118 Ind. 426 511
City of Harvard v. Crouch, 47 Neb. 133 565
City of Indianapolis v. Kingsbury, 101 Ind. 200, 51 Am. Rep. 749 765
City of Omaha v. Hansen, 36 Neb. 135 ..... 140, 141
City of Omaha v. Kountze, 25 Neb. 60 681
City of Omaha v. McGavock, 47 Neb. 13 321
City of Omaha v. Richards, 49 Neb. 244 544
City of Omaha v. Standard Oil Co., 55 Neb. 337 360
City of Pilot Grove v. McCormick, 56 Mo. App. 530 50
City of St. Louis v. Missouri P. R. Co., 114 Mo. 13 765
City of St. Paul v. Mullen, 27 Minn. 78 187
City of Schenectady v. Union College, 66 Hun (N. Y.) 179, 21 N. Y. Sup. 147, 144 N. Y. 241, 39 N. E. Rep. 67 ..... 725, 728
City of Wahoo v. Tharp, 45 Neb. 563 740
Clark v. Blair, 14 Fed. Rep. 812 768
Clarke v. Kelsey, 41 Neb. 766 ..... 463, 625
Clarke v. Omaha & S. W. R. Co., 5 Neb. 319 442
Cleveland Paper Co. v. Banks, 15 Neb. 20 753
Closson v. Rohman, 50 Neb. 323 742
Cobb v. Insurance Co. of N. A., 11 Kan. 93 130
Coburn v. Watson, 48 Neb. 257 330
Coffield v. State, 44 Neb. 417 ..... 612, 613
Coffin v. United States, 156 U. S. 432, 15 Sup. Ct. Rep. 394 301
Colby v. Parker, 34 Neb. 510 192
Cole v. Edwards, 52 Neb. 711 91
Coleman v. Pearce, 26 Minn. 123 219
Columbus & W. R. Co. v. Bridges, 86 Ala. 448, 5 So. Rep. 864 161
Commercial Nat. Bank of Omaha v. Gibson, 37 Neb. 750 97

PAGE
Commercial State Bank v. Antelope County, 48 Neb. 496.....464, 625
Commercial State Bank of Crawford v. Ketcham, 46 Neb. 568..... 690
Commissioners of Parks v. Detroit, 80 Mich. 663..... 506
Commonwealth v. Hatfield, 107 Mass. 227..... 761
Commonwealth v. Magoffin, 25 S. W. Rep. (Ky.) 599..... 687
‡Commonwealth v. Plaisted, 148 Mass. 375.....518, 533
Conger v. Dodd, 45 Neb. 36.....240, 544
Connelly v. Woods, 31 Kan. 359..... 112
Conrad v. Bell, 61 N. W. Rep. (Minn.) 673..... 732
Cooper v. Reynolds, 10 Wall. (U. S.) 308..... 201
Cooper v. Tim, 38 N. Y. Supp. 67..... 716
Corbett v. Fetzer, 47 Neb. 269.....463, 464
Cortelyou v. McCarthy, 53 Neb. 479..... 17
Costigan v. Newland, 12 Barb. (N. Y.) 456..... 716
County of Valley v. Robinson, 32 Neb. 256..... 144
Courtnay v. Parker, 16 Neb. 311..... 549
Cowles v. School District, 23 Neb. 655..... 718
Cox v. Tyler, 6 Neb. 297..... 594
Craig v. Stevenson, 15 Neb. 362.....355, 444, 758
Crane v. Missouri P. R. Co., 87 Mo. 588..... 750
Crans v. Cunningham, 13 Neb. 204..... 690
Crapo v. Hefner, 53 Neb. 251..... 258
Crawford v. Cheney, 12 Vt. 567..... 558
Creighton University v. Mulvihill, 49 Neb. 577.....323, 324
Crew v. McCafferty, 124 Pa. St. 200..... 166
Crippen v. Hudson, 13 N. Y. 161..... 380
Crites v. Hart, 49 Neb. 53..... 29
Crowell v. Galloway, 3 Neb. 215..... 603
Crowell v. Horacek, 12 Neb. 622..... 382
Curtis v. Sage, 35 Ill. 22..... 407
Cutts v. Perkins, 12 Mass. 206..... 339
Cyr v. Madore, 73 Me. 53..... 3

D.

Daley v. City of St. Paul, 7 Minn. 311..... 516
Dant v. Head, 90 Ky. 255..... 407
Darnell v. Mack, 46 Neb. 740..... 201
Darner v. Daggett, 35 Neb. 695.....198, 442
Davidson v. Cox, 11 Neb. 250..... 573
Davis v. Ravenna Creamery Co., 48 Neb. 471..... 433
Dawson v. Williams, 37 Neb. 1..... 240
Debney v. State, 45 Neb. 856..... 617
DeGraw v. King, 28 Minn. 118, 9 N. W. Rep. 636..... 675
Delahanty v. Warner, 75 Ill. 185..... 40
Delaware County Commissioners v. Diebold Safe & Lock Co., 133 U. S. 473..... 359
Denise v. City of Omaha, 49 Neb. 750.....131, 139
Denny v. Manhattan Co., 5 Denio (N. Y.) 639..... 716

PAGE
‡Dern v. Kellogg, 54 Neb. 560....425, 428
Deuser v. Walkup, 43 Mo. App. 625.... 289
Devlin v. Mayor, 63 N. Y. 8.... 339
Diamond v. Cain, 21 La. Ann. 309....518, 536
Dietz v. City Nat. Bank of Hastings, 42 Neb. 584.... 442
Dillon v. State, 39 Neb. 92.... 471
Dixon v. State, 46 Neb. 298.... 138
Dodge v. Kiene, 28 Neb. 216....463, 625
Dodson v. McAdams, 96 N. Car. 149.... 556
Doll v. Hollenbeck, 19 Neb. 639.... 192
Donald v. Nesbitt, 15 S. E. Rep. (Ga.) 367....732, 733
†Donellan v. Read, 3 B. & Ad. (Eng.) 899....406, 407
Dorsey v. McGee, 30 Neb. 657.... 17
Dozier v. Richardson, 25 Ga. 90.... 112
Duncan v. Lyons, 3 Johns. Ch. (N. Y.) 351.... 15
Durfee v. O'Brien, 16 R. I. 213.... 407
Dusenbury v. Albright, 31 Neb. 345.... 463
Dwelling-House Ins. Co. v. Brewster, 43 Neb. 528.... 130
Dye v. Scott, 35 O. St. 194.... 469

E.

Eagle Fire Co. v. Globe Loan & Trust Co., 44 Neb. 380....260, 264, 543
Eames v. Stevens, 26 N. H. 117.... 558
Early v. Wilson, 31 Neb. 458.... 294
Eayrs v. Nason, 54 Neb. 143.... 111
Ecklund v. Willis, 42 Neb. 737.... 324
Edminster v. Higgins, 6 Neb. 265.... 250
Eldridge v. Hargreaves, 30 Neb. 638.... 392
Ellicott v. Turner, 4 Md. 476.... 407
Elsanger v. Grovijohn, 29 Neb. 139.... 317
Elwood v. First Nat. Bank, 41 Kan. 479.... 103
Emerson v. Opp, 38 N. E. Rep. (Ind.) 330.... 292
England v. Garner, 90 N. Car. 197.... 649
Engle v. Hunt, 50 Neb. 358.... 3
Estrada v. Murphy, 19 Cal. 248.... 8
Evans v. Dunn, 26 O. St. 444.... 689
Excelsior Paving Co. v. Leach, 34 Pac. Rep. (Cal.) 116.... 726
Ex parte Crenshaw, 80 Mo. 447.... 706
Ex parte Fisher, 6 Neb. 309....314, 705
Ex parte Henshaw, 73 Cal. 486.... 706
Ex parte Lacey, 37 Pac. Rep. (Okla.) 1095.... 50
Ex parte Mooney, 26 W. Va. 36.... 706
Ex parte Shaw, 7 O. St. 81....706, 707
Ex parte Van Hagen, 25 O. St. 427....706, 707

F.

Fanton v. State, 50 Neb. 351....301, 704
Farmers Loan & Trust Co. v. Funk, 49 Neb. 353....93, 97

PAGE
Fartunato v. Patten, 25 N. Y. Supp. 333 360
Farwell v. Cramer, 38 Neb. 61 544
Feeley's Case, 12 Cush. (Mass.) 598 705
Fehler v. Gosnell, 35 S. W. Rep. (Ky.) 125 726
Field v. Dortch, 34 Ark. 399 201
Fifth Nat. Bank v. Armstrong, 40 Fed. Rep. 46 468
Filley v. Duncan, 1 Neb. 134 ..... 550, 551
†First Nat. Bank v. Caldwell, 4 Dill. (U. S. C. C.) 314 253
First Nat. Bank of Abilene v. Naill, 52 Kan. 211 429
First Nat. Bank of Chicago v. Reno County Bank, 3 Fed. Rep. 257...464
First Nat. Bank of Crown Point v. First Nat. Bank of Richmond, 76 Ind. 561 465
First Nat. Bank of Grundy Center v. Brown, 81 Ia. 208 166
First Nat. Bank of Madison v. Carsons, 30 Neb. 104 393
First Nat. Bank of Omaha v. Chilson, 45 Neb. 257 640
*First Nat. Bank of Omaha v. Goodman, 55 Neb. 409 419
First Nat. Bank of Pawnee City v. Sprague, 34 Neb. 318 308
Fisher v. McGirr, 1 Gray (Mo.) 1 569
Fiske v. Holmes, 41 Me. 441 687
Fitzgerald v. Fitzgerald & Mallory Construction Co., 41 Neb. 374, 44 Neb. 463 ..... 101, 257, 582
Fitzgerald v. State, 4 Wis. 412 707
Fleming v. Riddick, 5 Gratt. (Va.) 272 ..... 558, 559
Fletcher v. Austin, 11 Vt. 447 687
Fletcher v. Holmes, 25 Ind. 458 206
Florence Cotton & Iron Co. v. Field, 16 So. Rep. (Ala.) 538 753
Flower v. Nichols, 55 Neb. 314 564
Folsom v. McCague, 29 Neb. 124 250
Forbes v. Moffat, 18 Ves. Jr. (Eng.) 384 11
Ford v. Garner, 15 Ind. 298 385
Ford v. State, 46 Neb. 390 617
Foster v. Johnson, 39 Minn. 380 574
Francis v. Leak, 33 N. E. Rep. (Ind.) 807 194
Fred Miller Brewing Co. v. Capital Ins. Co., 63 N. W. Rep. (Ia.) 568..125
Freeman v. Citizens Nat. Bank, 78 Ia. 150 429
Freeman's Bank v. National Tube Works Co., 151 Mass. 413 465
Fremont, E. & M. V. R. Co. v. Bates, 40 Neb. 381 141
French v. Ramge, 2 Neb. 254 ..... 431, 433
Frey v. Drahos, 6 Neb. 1 625
Fuller v. Schroeder, 20 Neb. 636 443
Funk v. Kansas Mfg. Co., 53 Neb. 450 15

G.

Gale v. Morris, 29 N. J. Eq. 222 252
Gans v. St. Paul & Marine Ins. Co., 43 Wis. 108 260
Garber v. Palmer, 47 Neb. 704 461
Gardener v. Board of Education, 5 Dak. 259 320
Gartrell v. Stafford, 12 Neb. 545 238

PAGE
Gaylord v. Nebraska Savings & Exchange Bank, 54 Neb. 104..... 192
German-American Ins. Co. v. Heiduk, 30 Neb. 288..... 151
German Ins. Co. v. Davis, 40 Neb. 700..... 349
German Ins. Co. v. Fairbank, 32 Neb. 750.....264, 349
German Ins. Co. v. Heiduk, 30 Neb. 288.....264
German Ins. & Savings Institution v. Kline, 44 Neb. 395..... 130
German Nat. Bank v. Farmers & Merchants Bank, 54 Neb. 593.... 97
German Nat. Bank of Hastings v. First Nat. Bank of Hastings, 55 Neb. 86..... 385
Gerner v. Church, 43 Neb. 690..... 625
Geuda Springs Town & Water Co. v. Lombard, 47 Pac. Rep. (Kan.) 532 758
Gifford v. Republican V. & K. R. Co., 20 Neb. 538..... 651
Gilbert v. Emerson, 60 Minn. 62..... 765
Gilbert v. Merriam Saddlery Co., 26 Neb. 194..... 393
Gillespie v. City of Lincoln, 35 Neb. 34.....519, 530
Glaze v. Parcel, 40 Neb. 732.....321, 337, 544
Globe Publishing Co. v. State Bank of Nebraska, 41 Neb. 175....97, 552
Godfrey v. Megahan, 38 Neb. 748..... 556
Goembel v. Arnett, 100 Ill. 34..... 380
Goldsmith v. Fuller, 30 Neb. 563..... 293
Goldsmith v. Picard, 27 Ala. 142..... 161
Gordon v. Little, 41 Neb. 250..... 17
Gore v. Kramer, 117 Ill. 176, 7 N. E. Rep. 504..... 380
Gothard v. Flynn, 25 Miss. 58..... 259
Gottschalk v. Chicago, B. & Q. R. Co., 14 Neb. 550..... 139
Goudy v. Hall, 30 Ill. 109..... 112
Gould v. Kendall, 15 Neb. 549..... 360
Grace v. Lynch, 80 Wis. 166..... 407
Graham v. Frazier, 49 Neb. 90.....131, 316
Gran v. Houston, 45 Neb. 813..... 138
Grand Island Banking Co. v. Wright, 53 Neb. 574.....54, 55, 556
Grand Island & W. C. R. Co. v. Swinbank, 51 Neb. 521..... 679
Gravely v. State, 45 Neb. 878..... 321
Graver v. Faurot, 76 Fed. Rep. 257..... 80
Great Northern R. Co. v. City of St. Paul, 61 Minn. 1..... 765
Greeley State Bank v. Line, 50 Neb. 434..... 61
Green v. Hall, 43 Neb. 275..... 649
Green v. Reynolds, 2 Johns. (N. Y.) 207..... 478
Greene v. Greene, 49 Neb. 546..... 240
Gregory v. Langdon, 11 Neb. 166..... 454
Gregory v. Tingley, 18 Neb. 318..... 712
Grier v. Cagle, 87 N. Car. 377..... 287
Griffin v. Griffin, 3 C. E. Green (N. J. Eq.) 104.....251, 252
Griffin v. Griffin, 17 N. E. Rep. (Ill.) 784..... 288
Griffing v. Curtis, 50 Neb. 334..... 461
Grigg v. Landis, 19 N. J. Eq. 350..... 360
Gustin v. Michelson, 55 Neb. 22..... 584

H.

PAGE

Habergham v. Vincent, 2 Ves. Jr. Ch. Rep. (Eng.) 204 732
Hackett v. Reynolds, 4 R. I. 512 252
Hale v. Ripp, 32 Neb. 259 ..... 333, 578, 582
Hall v. Hart, 52 Neb. 4 92
Hall v. McDuff, 24 Me. 311 252
Hall v. Parker, 37 Mich. 590 ..... 686, 687
Hallo v. Helmer, 12 Neb. 87 153
Holles v. Wyse, 2 Vern. (Eng.) 289 258
Hamer v. McKinley-Lanning Loan & Trust Co., 52 Neb. 705 444
Hamilton v. Thrall, 7 Neb. 210 ..... 463, 625
Hampson v. Edelen, 2 Har. & J. (Md.) 54 551
Hancock v. Stout, 28 Neb. 301 393
Haney v. State, 5 Wis. 529 707
Hannig v. Hannig, 24 S. W. Rep. (Tex.) 695 732
Hanover Fire Ins. Co. v. Gustin, 40 Neb. 823 151
Hanscom v. City of Omaha, 11 Neb. 37 523
Hansen v. Bergquist, 9 Neb. 269 ..... 664, 669
Hardin v. Lee, 51 Mo. 241 201
Harman v. Barhydt, 20 Neb. 625 688
Harmon v. City of Omaha, 53 Neb. 164 63
Harrington v. Wilson, 74 N. W. Rep. (S. Dak.) 1055 442
Harris v. State, 24 Neb. 803 336
Hartzell v. McClurg, 54 Neb. 316 61
Harvey v. McDonnell, 21 N. E. Rep. (N. Y.) 695 286
Hastings & G. I. R. Co. v. Ingalls, 15 Neb. 123 139
Haug v. Haugen, 51 Minn. 558, 53 N. W. Rep. 874 160
Havemeyer v. Paul, 45 Neb. 373 258
Havens v. Germania Fire Ins. Co., 27 S. W. Rep. (Mo.) 718 151
Hawley v. Bristol, 39 Conn. 26 339
Haworth v. Gill, 30 O. St. 627 782
Haywood v. Lincoln Lumber Co., 64 Wis. 639 101
Hazelton v. Reed, 46 Kan. 73, 26 Pac. Rep. 450 ..... 732, 734
Head v. State, 43 Neb. 30 617
Heald v. Polk County, 46 Neb. 28 155
Heath v. Erie R. Co., 8 Blatch. (U. S. C. C.) 348 101
Hedges v. State, 18 O. St. 420 616
Heffran v. Hutchins, 43 N. E. Rep. (Ill.) 700 40
Hendreschke v. Harvard High School District, 35 Neb. 400 718
Hendrickson v. Sullivan, 28 Neb. 790 577
Hendrix v. Kirkpatrick, 48 Neb. 670 564
Henley v. Evans, 54 Neb. 187 442
Henry & Coatsworth Co. v. Fisherdick, 37 Neb. 207 11
Herrick v. Borst, 4 Hill (N. Y.) 652 291
Hewitt v. Morgan, 88 Ia. 468, 55 N. W. Rep. 478 675
Hill v. State, 42 Neb. 503 ..... 138, 617
Hinds v. Township of Belvidere, 65 N. W. Rep. (Mich.) 544 681
Hoagland v. Van Etten, 22 Neb. 681, 23 Neb. 462, 31 Neb. 292 442
Hoffman v. First Nat. Bank of Jersey City, 46 N. J. Law 605 465

PAGE

Holbrook v. Armstrong, 10 Me. 31 406
Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371 553
Home Fire Ins. Co. v. Bean, 42 Neb. 537 151
Home Fire Ins. Co. v. Fitch, 52 Neb. 88 258
Home Fire Ins. Co. v. Hammang, 44 Neb. 566 130
Home Fire Ins. Co. v. Skoumal, 51 Neb. 655 742
Holmes v. First Nat. Bank of Lincoln, 38 Neb. 326 ..... 463, 464, 469
Hooper v. Castetter, 45 Neb. 67 324
Hosmer v. Wilson, 7 Mich. 303 478
Howard v. Brown, 37 Neb. 902 4
Howell Lumber Co. v. Campbell, 38 Neb. 567 394
Hubbard v. Township Board of Springwells, 25 Mich. 153 506
Hudelson v. First Nat. Bank, 51 Neb. 557 462
Hudson v. Plets, 11 Paige Ch. (N. Y.) 180 92
Huffman v. Koppelkom, 8 Neb. 344 144
Hughes v. Insurance Co. of North America, 40 Neb. 626 236
Hughes v. Riggs, 36 Alt. Rep. (Md.) 269 759
Hull v. Hall, 78 Me. 114 751
Hurlburt v. Hurlburt, 28 N. E. Rep. (N. Y.) 651 289
Huston v. Tyler, 36 S. W. Rep. (Mo.) 654 716
Hutzler v. Phillips, 26 S. Car. 136 252

I.

Ingwersen v. Edgecombe, 42 Neb. 740 91
In re Babcock, 21 Neb. 500 ..... 117, 122, 123
In re Balcom, 12 Neb. 316 ..... 314, 705
In re Betts, 36 Neb. 282 ..... 314, 705
In re Clark, 3 Den. (N. Y.) 167 201
In re Crandall, 34 Wis. 177 706
In re Fire & Excise Commissioners, 36 Pac. Rep. (Colo.) 234 40
In re Garst, 10 Neb. 78 613
In re Graham, 74 Wis. 450, 76 Wis. 366, 138 U. S. 461 ..... 706, 707
In re Griffith, 35 Kan. 377, 11 Pac. Rep. 174 48
In re Havlik, 45 Neb. 747 ..... 314, 705
In re McDonald, 74 Wis. 451 707
In re McVey, 50 Neb. 481 ..... 705, 708
In re Merrian, 84 N. Y. 596 187
In re Pikulik, 81 Wis. 158 706
In re Ream, 54 Neb. 667 705
In re Sawyer, 124 U. S. 200 40
Insurance Co. v. Leslie, 47 O. St. 409 151
Insurance Co. of North America v. Bachler, 44 Neb. 549 151
Insurance Co. of North America v. McLimans, 28 Neb. 652 120
Iowa Loan & Trust Co. v. Stimpson, 53 Neb. 536 ..... 444, 445
Irwin v. Dixion, 9 How. (U. S.) 10 3
Issitt v. Dewey, 47 Neb. 196 ..... 24, 584

J.

Jackson v. Dunlap, 1 Johns. Cas. (N. Y.) 114 251

PAGE

Jackson v. Parkhurst, 4 Wend. (N. Y.) 369 251
Janes v. Howell, 37 Neb. 320 208
Jansen v. Williams, 36 Neb. 869 582
Jarrett v. Hoover, 54 Neb. 65 770
Jarvis v. Dutcher, 16 Wis. 326 252
Jennings v. Simpson, 12 Neb. 558 649
Jewell v. Lamoreaux, 30 Mich. 155 688
Johnson v. Bemis, 7 Neb. 224 324
Johnson v. Chesapeake & O. R. Co., 36 W. Va. 73 751
Johnson v. Finley, 54 Neb. 733 153
Johnson v. Garret, 16 N. J. Eq. 31 759
Johnson v. Johnson, 36 Neb. 700 292
Johnson v. Parrotte, 46 Neb. 51 383
Johnson v. State, 34 Neb. 257 ..... 610, 620
Johnson v. Watson, 1 Kelly (Ga.) 348 407
Johnson v. Welch, 24 S. E. Rep. (W. Va.) 585 716
Johnston v. Milwaukee & Wyoming Investment Co., 49 Neb. 68, 131, 236, 316
Johnston v. Spencer, 51 Neb. 198, 70 N. W. Rep. 982 672
‡Jolly v. State, 43 Neb. 857 ..... 50, 51
Jones v. Gardner, 10 Johns. (N. Y.) 266 478
Jones v. Null, 9 Neb. 254 712

K.

Kahl v. Love, 37 N. J. Law 5 744
Kane v. People, 4 Neb. 509 ..... 169, 170
Kansas City & P. R. Co. v. Ryan, 52 Kan. 637 750
Kaserman v. Fries, 33 Neb. 427 ..... 463, 625
Kaufman v. Cooper, 46 Neb. 644 316
Kavanaugh v. Brodball, 40 Neb. 875 585
Kearney Electric Co. v. Laughlin, 45 Neb. 390 543
Kearney Land & Investment Co. v. Aspinwall, 45 Neb. 601 446
Keesling v. Watson, 91 Ind. 578 160
Kierstead v. Brown, 23 Neb. 595 392
Killman v. Gregory, 91 Wis. 478, 65 N. W. Rep. 53 561
Kinsey v. Ring, 53 N. W. Rep. (Wis.) 842 194
Kleffel v. Bullock, 8 Neb. 336 317
Kloke v. Gardels, 52 Neb. 117 440
Kloke v. Martin, 55 Neb. 554 564
Klosterman v. Olcott, 25 Neb. 382 350
Kopplekom v. Huffman, 12 Neb. 95 144
Korth v. State, 46 Neb. 631 322
Kuhl v. Pierce County, 44 Neb. 584 ..... 7, 577

L.

La Flume v. Jones, 5 Neb. 257 444
Laithe v. McDonald, 12 Kan. 340 80
Lamar v. Allison, 28 S. E. Rep. (Ga.) 686 554

PAGE
Lancaster County Bank v. Horn, 34 Neb. 742 455
Lander v. Abrahamson, 34 Neb. 553 208
Langley v. Ashe, 38 Neb. 53 15
Lanier v. Booth, 50 Miss. 410 3
Laughlin v. Schuyler, 1 Neb. 409 758
Lawson v. Gibson, 18 Neb. 137 66
Leahy v. Dugdale, 27 Mo. 437 339
Leary v. Blanchard, 48 Me. 269 465
Leaver v. Gauss, 62 Ia. 314 732
Leavitt v. Bell, 55 Neb. 57 ..... 737, 738, 767
Lee v. Walker, 35 Neb. 689 443
Lehman v. Collins, 69 Ala. 127 250
Lent v. Padelford, 2 American Leading Cases 33 417
Levi v. Fred, 38 Neb. 564 321
Lewis v. Connolly, 29 Neb. 222 690
Lewis Investment Co. v. Boyd, 48 Neb. 604 259
Life Ins. Clearing Co. v. Altschuler, 53 Neb. 481 342
Lincoln Rapid Transit Co. v. Rundle, 34 Neb. 559 205
Lincoln Street R. Co. v. Cox, 48 Neb. 807 751
Lindner v. Adams County Bank, 49 Neb. 735 386
Liverpool & London & Globe Ins. Co. v. Buckstaff, 38 Neb. 146 162
Livingston v. Commissioners of Johnson County, 42 Neb. 277 4
Livingston v. Wagner, 42 Pac. Rep. (Nev.) 290 289
Lombard v. Cowham, 34 Wis. 490 8
Long v. Clapp, 15 Neb. 417 17
Losure v. Miller, 45 Neb. 465 471
Low v. Rees Printing Co., 41 Neb. 127 495
Lowe v. City of Omaha, 33 Neb. 587 458
Lowman v. Lowman, 118 Ill. 582 12
Louisville, E. & S. L. C. R. Co. v. Utz, 32 N. E. Rep. (Ind.) 881 750
Louisville & N. A. R. Co. v. State, 25 Ind. 181 634
Lynn v. Lyerle, 113 Ill. 129 283
Lyon v. Tevis, 8 Ia. 79 716

Mc.

McAdow v. Ross, 53 Mo. 199 348
McAlister v. Lancaster County Bank, 15 Neb. 295 647
McAusland v. Pundt, 1 Neb. 211 649
McCarter v. Finch, 36 Atl. Rep. (N. J.) 937 712
McClure v. Warner, 16 Neb. 447 153
McCord v. Hamel, 52 Neb. 286 337
McCormal v. Redden, 46 Neb. 776 ..... 316, 557, 564
McCormick v. Paddock, 20 Neb. 486 647
McEvony v. Rowland, 43 Neb. 97 418
McFall v. Machine Co., 90 Ind. 148 160
McGovern v. Knox, 21 O. St. 547 294
McGrath v. Seagrave, 2 Allen (Mass.) 443 762
McKenna v. Dietrich, 48 Neb. 433 149
McLaughlin v. Davis, 14 Kan. 168 112

PAGE
McMahan v. McMahan, 13 Pa. St. 376 687
McMillin v. Richards, 45 Neb. 786 ..... 171, 694, 703
McNair v. State, 26 Neb. 257 4
McNeill v. Edie, 24 Kan. 108 112
McWilliams v. Mason, 31 N. Y. 294 ..... 420, 423

M.

Macomb v. Prentis, 57 Mich. 225 758
Madden v. Minneapolis & St. L. R. Co., 30 Minn. 453, 16 N. W. Rep. 263 160
Magneau v. City of Fremont, 30 Neb. 843 ..... 313, 489, 523, 524
Mallory v. Ferguson, 50 Kan. 685, 32 Pac. Rep. 410 744
Mandeville v. Welch, 5 Wheat. (U. S.) 277 253
Marbury v. Madison, 1 Cranch (U. S.) 137 527
Marcy v. Marcy, 9 Allen (Mass.) 8 407
Marshall v. Sloan, 35 Ia. 445 634
Martin v. Kunzmuller, 37 N. Y. 396 194
Martin v. State, 63 Miss. 505 753
Marvin v. Weider, 31 Neb. 774, 48 N. W. Rep. 825 672
Mastin v. Gray, 19 Kan. 458 112
Mathews v. Jones, 47 Neb. 616 12
Mathews v. O'Shea, 45 Neb. 299 715
Mathews v. Toogood, 25 Neb. 99 259
Mattison v. Chicago, R. I. & P. R. Co., 42 Neb. 545 ..... 463, 625
Maul v. Hellman, 39 Neb. 322 712
Maxwell v. Burr, 44 Neb. 31 ..... 463, 625
Mayer v. Zingre, 18 Neb. 458 112
Maynard v. District Canvassers, 84 Mich. 228 495
Meador v. Meador, 3 Heisk (Tenn.) 562 250
Meagher v. Storey Co., 5 Nev. 244 569
Meek v. McClure, 49 Cal. 623 681
Mercer v. Vose, 67 N. Y. 56 562
Merchants & Miners Transportation Co. v. Borland, 31 Atl. Rep. (N. J.) 272 293
Merriam v. Dovey, 25 Neb. 618 153
Merrill v. Wright, 41 Neb. 351 768
Metropolitan Telephone & Telegraph Co. v. Domestic Telegraph & Telephone Co., 14 Atl. Rep. (N. J.) 907 91
Meyer Bros. v. Lane, 40 Kan. 491 690
Michelson v. Hyde, 34 Neb. 60 23
Miles v. New Zealand Co., 32 L. R. Ch. D. (Eng.) 266 406
Miller v. Antelope County, 35 Neb. 237 471
Miller v. Finn, 1 Neb. 254 12
Miller v. Gunderson, 48 Neb. 715 625
Miller v. Hurford, 13 Neb. 13 ..... 679, 768
Miller v. Lanham, 35 Neb. 886 444
Mills v. Dennis, 3 Johns. Ch. (N. Y.) 367 648
Mills v. Miller, 4 Neb. 441 625
Mills v. Murry, 1 Neb. 327 353

PAGE
Minick v. Huff, 41 Neb. 516 17
Missouri P. R. Co. v. Hays, 15 Neb. 224 240
Mixter v. Imperial Coal Co., 152 Pa. St. 395 751
Mollyneaux v. Wittenberg, 39 Neb. 547 431
Monroe v. Hanson, 47 Neb. 30 604
Montague v. Raleigh Savings Bank, 24 S. E. Rep. 6, 118 N. Car. 283 .. 758
Moore v. Fedewa, 13 Neb. 381 74
Moore v. Hubbard, 45 Neb. 612 544
Moore v. Waterman, 40 Neb. 498 ..... 663, 668
Moran v. Clarke, 59 Minn. 456 716
Morgan v. Campbell, 54 Ill. App. 244 558
Morling v. Bronson, 37 Neb. 608 661
Morse v. Rice, 36 Neb. 212 ..... 593, 625
Morse v. Traynor, 26 Neb. 594 595
Mowry v. Wood, 12 Wis. 460 252
Moyer v. Hinman, 13 N. Y. 180 551
Mullen v. Morris, 43 Neb. 596 684
Mulloy v. Kyle, 26 Neb. 316 455
Munro v. Callahan, 41 Neb. 849 76
Murphy v. Virgin, 47 Neb. 692 ..... 93, 394
Murphy v. Warren, 55 Neb. 215 222
Murray v. Ballou, 1 Johns. Ch. (N. Y.) 565 205
Murtagh v. Thompson, 28 Neb. 358 259
Musser v. King, 40 Neb. 892 461
Myers v. Davis, 22 N. Y. 489 194

N.

National Savings Bank v. Ward, 100 U. S. 195 744
Nebraska Exposition Ass'n v. Townley, 46 Neb. 893 ..... 464, 625
Needham v. Thayer, 147 Mass. 536 112
Neese v. Farmers Ins. Co., 55 Ia. 478, 8 N. W. Rep. 450 675
Nelson v. Brodhack, 44 Mo. 596 348
Nelson v. Jenkins, 42 Neb. 133 240
Nichols v. Emery, 41 Pac. Rep. (Cal.) 1089 732
Norcross v. Baldwin, 50 Neb. 885 462
Norman v. Waite, 30 Neb. 302 626
North Platte Water Works Co. v. City of North Platte, 50 Neb. 853 .. 742
Northwestern Mutual Life Ins. Co. v. Mulvihill, 53 Neb. 538, 74 N. W. Rep. 78 677
Norton v. Shelby County, 118 U. S. 425 568
Norwegian Plow Co. v. Bollman, 47 Neb. 186 ..... 15, 208
Norwood v. Cobb, 15 Tex. 500 112
Nygren v. Nygren, 42 Neb. 408 137

O.

Oberfelder v. Kavanaugh, 29 Neb. 427 240
O'Connor v. Illinois C. R. Co., 83 Ia. 105 750
O'Grady v. State, 36 Neb. 320 617

PAGE
Olander v. Tighe, 43 Neb. 344 550
Olive v. State, 11 Neb. 34 394
Oltmanns v. Findlay, 47 Neb. 289 149
Omaha B. R. Co. v. McDermott, 25 Neb. 714 140
Omaha Fire Ins. Co. v. Berg, 44 Neb. 522 240
Omaha Fire Ins. Co. v. Dierks, 43 Neb. 473 130
Omaha & Florence Land & Trust Co. v. Hansen, 32 Neb. 449 350
Omaha Law Library Ass'n v. Connell, 55 Neb. 396 400
Omaha Life Ass'n v. Kettenbach, 49 Neb. 842, 50 Neb. 846 330
Omaha Loan & Trust Co. v. Bertrand, 51 Neb. 508, 70 N. W. Rep. 1120 677
Omaha Loan & Trust Co. v. Hanson, 46 Neb. 870 258
Omaha & R. V. R. Co. v. Rogers, 16 Neb. 117 139
Omaha & R. V. R. Co. v. Wright, 49 Neb. 456 750
Orr v. Churchill, 1 H. Bl. (Eng.) 227 259
Osborn v. Bank of United States, 9 Wheat (U. S.) 738 569
Osgood v. Grant, 44 Neb. 350 163
Oskosh Gas Light Co. v. Germania Fire Ins. Co., 27 S. W. Rep. (Mo.) 718 151
Overall v. McShane, 49 Neb. 64 446
Owen v. Baker, 101 Mo. 407 747
Oyler v. Ross, 48 Neb. 211 4

P.

Paine v. Mooreland, 15 O. 435 201
Parker v. Commonwealth, 6 Barr. (Pa.) 511 491
Parker v. Parmele, 20 Johns. (N. Y.) 130 478
Parker v. Starr, 21 Neb. 680 ..... 645, 647
Parks v. Jackson, 11 Wend. (N. Y.) 442 551
Pauly v. Pauly, 107 Cal. 8 564
Pavey v. Pavey, 30 O. St. 600 348
Paxton v. Smith, 41 Neb. 56 433
Pearce v. McKay, 45 Neb. 296 ..... 544, 739
Pearce v. Roberts, 27 Mo. 179 385
Pecker v. Julius, 2 Browne (Pa.) 33 144
Peckham v. Haddock, 36 Ill. 38 252
Paden v. Cavins, 134 Ind. 494 7
Pefley v. Johnson, 30 Neb. 529 160
Peglow v. State, 12 Wis. 595 707
Pentland v. Keep, 41 Wis. 490 3
People v. Albertson, 55 N. Y. 50 ..... 491, 512
People v. Annis, 13 Mich. 511 46
People v. Ayhens, 24 Pac. Rep. (Cal.) 635 50
People v. Baker, 89 N. Y. 460 706
People v. Bostwick, 32 N. Y. 445 687
People v. Bull, 46 N. Y. 57 510
People v. Chapman, 62 Mich. 280 614
People v. City of Detroit, 28 Mich. 228 ..... 494, 530, 531
People v. Clark, 33 Mich. 112 47

PAGE
People v. Common Council of Detroit, 28 Mich. 228.....506, 512
People v. Draper, 15 N. Y. 533..... 517
People v. Evans, 72 Mich. 367, 40 N. W. Rep. 473.....48, 614, 615
People v. Garbutt, 17 Mich. 9..... 620
People v. Hartley, 21 Cal. 585..... 687
People v. Hurlbut, 24 Mich. 44, 79.....499, 507, 512, 531
People v. Jacobs, 66 N. Y. 8..... 706
People v. Judge Superior Court of Detroit, 41 Mich. 31..... 166
People v. Liscomb, 60 N. Y. 559..... 706
People v. Lynch, 51 Cal. 15.....512, 532
People v. McKee, 68 N. Car. 429..... 527
People v. Mahaney, 13 Mich. 481.....508, 532
People v. Maher, 56 Hun 81, 9 N. Y. Supp. 94.....725, 726
People v. Markham, 7 Cal. 208..... 706
People v. Mayor, 51 Ill. 17..... 512
People v. Mayworm, 5 Mich. 146..... 172
People v. Miller, 16 Mich. 56, 24 Mich. 458.....171, 172
People v. Morris, 13 Wend. (N. Y.) 325..... 492
People v. Porter, 90 N. Y. 75.....493, 512
People v. Smith, 25 Mich. 497..... 614
People v. Volksdorf, 112 Ill. 292..... 782
Perkins v. Butler County, 47 Neb. 110..... 338
Perkins v. Clay, 54 N. H. 518..... 407
Perkins v. United States, 20 Ct. of Claims (U. S.) 438..... 527
Philadelphia Mfg. & Trust Co. v. Gustus, 55 Neb. 435..... 712
Phillips v. Dawley, 1 Neb. 320..... 712
Phenix Ins. Co. v. Grimes, 33 Neb. 340..... 264
Phœnix Ins. Co. v. King, 52 Neb. 562, 54 Neb. 630.....337, 544
Phœnix Ins. Co. v. Lorenz, 29 N. E. Rep. (Ind.) 604..... 265
Phœnix Ins. Co. v. Walter, 51 Neb. 182..... 739
Phœnix Mutual Life Ins. Co. v. Brown, 37 Neb. 705..... 83
Pierce v. Paine, 28 Vt. 34..... 407
Pilger v. Marder, 55 Neb. 113..... 353
Pokrok Zapadu Publishing Co. v. Zizkovsky, 42 Neb. 64..... 561
Police Commissioners v. City of Louisville, 3 Bush. (Ky.) 597...517, 536
Polk v. Covell, 43 Neb. 884..... 577
Poorman v. Kilgore, 26 Pa. St. 365..... 556
Pope v. Hooper, 6 Neb. 178..... 15
Porter v. Currey, 50 Ill. 319..... 219
Post v. Garrow, 18 Neb. 682..... 160
Preuit v. People, 5 Neb. 377..... 394
Printz v. People, 42 Mich. 144..... 562
Probasco v. Johnson, 2 Disn. (O.) 96..... 250
Pythian Life Ass'n v. Preston, 47 Neb. 392.....557, 564

Q.

Quinby v. Conlan, 104 U. S. 503..... 8

R.

PAGE

Ragoss v. Cuming County, 46 Neb. 36, 36 Neb. 375 155
Railroad Co. v. Howard, 7 Wall. (U. S.) 392 92
Rake v. Pope, 7 Ala. 161 407
Randall v. Persons, 42 Neb. 607 461
Ransdell v. Putnam, 15 Neb. 642 655
Rathbone v. Wirth, 150 N. Y. 459, 6 Hun 277 ..... 492, 493, 497, 498
Rathbun v. McConnell, 27 Neb. 239 433
Raymond v. Miller, 50 Neb. 506 461
Redmond v. State, 12 Kan. 172 48
Reed v. Rice, 48 Neb. 586 149
Reemelin v. Mosby, 47 O. St. 570 40
Republican Valley R. Co. v. Fink, 18 Neb. 82 4
Reyer v. Odd Fellows Fraternal Accident Ins. Co., 32 N. E. Rep. (Mass.) 469 125
Reynolds v. Cobb, 15 Neb. 378 27
Rhodes v. Thomas, 31 Neb. 848 ..... 654, 655
Richards v. Leveille, 44 Neb. 38 ..... 29, 386
Richards v. State, 36 Neb. 18 ..... 131, 133
Richards v. Waller, 49 Neb. 639 640
Richardson v. Campbell, 34 Neb. 181 259
Riggs v. Miller, 34 Neb. 666 144
Ripp v. Hale, 45 Neb. 567 ..... 334, 578, 581
Roach v. Hawkinson, 34 Neb. 658 321
Roads v. Estabrook, 35 Neb. 297 153
Roberts v. Richards, 36 Ill. 339 252
Roberts v. Snow, 27 Neb. 425 463
Roberts v. Taylor, 19 Neb. 184, 27 N. W. Rep. 87 672
Robertson v. Smith, 26 S. E. Rep. (Va.) 579 712
Robinson v. Kilpatrick, 50 Neb. 795 462
Robinson v. Mathwick, 5 Neb. 252 5
Rock County Nat. Bank v. Hollister, 21 Minn. 385 465
Rockwell v. Hobby, 2 Sandf. Ch. (N. Y.) 10 251
Rogers v. Inhabitants of Greenbush, 58 Me. 390, 4 Am. Rep. 292 681
Rogers v. Russell, 11 Neb. 361 688
Romberg v. Fokken, 47 Neb. 198 ..... 472, 670
Romberg v. Hediger, 47 Neb. 203 149
Rose v. Burr, 43 Neb. 358 ..... 664, 669
Rose v. Washington County, 42 Neb. 1 4
Rosenthal v. Ogden, 50 Neb. 218 164
Roy v. McPherson, 11 Neb. 197 294
Rudolph v. Landwerlen, 92 Ind. 34 753
Runge v. Brown, 29 Neb. 116 ..... 324, 355
Rupert v. Penner, 35 Neb. 587 454
Ryan v. Douglas County, 47 Neb. 9 338

S.

Salisbury v. First Nat. Bank of Cambridge, 37 Neb. 872 463

PAGE
Salladin v. Mitchell, 42 Neb. 859 193
Sargeant v. Bigelow, 24 Minn. 370 15
Scammon v. City of Chicago, 40 Ill. 146 66
Scarborough v. Myrick, 47 Neb. 794 604
Schade v. Gehner, 133 Mo. 252, 34 S. W. Rep. 576 744
Schneider v. Brown, 24 Pac. Rep. (Cal.) 715 672
Schneider v. Tombling, 34 Neb. 661 240
School District v. Cooper, 44 Neb. 714 663
School District v. Estes, 13 Neb. 52 433
School District v. Wheeler, 25 Neb. 199 718
Schuster v. Carson, 28 Neb. 612 561
Scott v. Chope, 33 Neb. 41 17
Scott v. Ocean Bank, 23 N. Y. 289 468
Security Co. v. Eyer, 36 Neb. 507 257
Seddon v. Rosenbaum, 85 Va. 928 407
Seebrock v. Fedawa, 30 Neb. 424 138
Segear v. Segear, 23 Neb. 306 136
Sergeant v. Ewing, 30 Pa. St. 75 564
Seton v. Slade, 7 Ves. Jr. [Eng.] 273 259
Shaffer v. Stull, 32 Neb. 98 670
Sharmer v. McIntosh, 43 Neb. 509 ..... 19, 162
Sharp v. Johnson, 44 Neb. 165 461
Sharp v. United States, 4 Watts (Pa.) 21 686
Shaw v. Robinson, 50 Neb. 403 ..... 30, 90, 585
Shaw v. State, 17 Neb. 334 523
Shewell v. City of Nebraska City, 52 Neb. 138 742
Shomer v. Hekla Fire Ins. Co., 50 Wis. 575 125
Sigler v. McConnell, 45 Neb. 598 337
Simonds v. Catlin, C. & C. (N. Y.) 346 254
Singleton v. Bremar, 4 McCord (S. Car.) 201 ..... 732, 733
Singree v. Welch, 32 O. St. 320 290
Sioux County v. Jameson, 43 Neb. 265 155
Skinner v. Majors, 19 Neb. 453 393
Sloan v. Williams, 138 Ill. 43 360
Smalley v. Greene, 52 Ia. 241 407
Smith v. Ames, 18 Sup. Ct. Rep. 418 635
Smith v. Bond, 25 W. Va. 387 716
Smith v. City of Omaha, 49 Neb. 883 ..... 58, 63, 737
Smith v. Foxworthy, 39 Neb. 214 ..... 355, 444, 445, 446
Smith v. Los Angeles Immigration & Land Co-operative Ass'n, 12 Am. St. Rep. (Cal.) 53 91
Smith v. Pinney, 2 Neb. 139 336
Smith v. Spaulding, 40 Neb. 339 556
Somers v. Sloan, 3 Harr. (N. J.) 46 166
Souch v. Strawbridge, 2 M. G. & S. (Eng.) 808 406
South Branch Lumber Co. v. Littlejohn, 31 Neb. 606 640
South End Mining Co. v. Tinney, 35 Pac. Rep. (Mo.) 89 8
South Platte Land Co. v. City of Crete, 11 Neb. 344 153
Southard v. Dorrington, 10 Neb. 119 67
Southern Ins. Co. v. Wolverton Hardware Co., 19 S. W. Rep. (Tex.) 615 125

PAGE

Southwestern Mutual Benefit Ass'n v. Swenson, 30 Pac. Rep. (Kan.) 405 125
Spear v. Drainage Commissioners, 113 Ill. 632 562
Speed v. Crawford, 3 Met. (Ky.) 207 510
Sperber v. Balster, 66 Ga. 317 ..... 732, 733
Spurgin v. Thompson, 37 Neb. 39 443
Stabler v. Gund, 35 Neb. 648 ..... 19, 162, 739
‡Stahlhut v. Bauer, 51 Neb. 64 40
State v. Aldermen of Pierce City, 3 S. W. Rep. (Mo.) 849 695
State v. Baushausen, 49 Neb. 558 761
State v. Birkhauser, 37 Neb. 521 ..... 63, 68
State v. Board of Supervisors, 29 Wis. 79 634
State v. Chicago, St. P. & M. R. Co., 19 Neb. 476 633
State v. Churchill, 37 Neb. 702 155
State v. Commissioners, 4 Wis. 432 213
State v. Constantine, 42 O. St. 437 495
‡State v. Covington, 29 O. St. 102 ..... 519, 527, 537, 540
State v. Crinklaw, 40 Neb. 759 ..... 314, 705
State v. Denny, 118 Ind. 382, 449 ..... 508, 511, 512, 525, 529, 530, 534
State v. Dimond, 44 Neb. 154 740
State v. Dodge County, 8 Neb. 124 523
State v. Farmers & Mechanics Mutual Benevolent Ass'n, 18 Neb. 276 ..... 117, 122, 123
State v. Frank, 52 Neb. 553 165
State v. Frazier, 28 Neb. 438 169
State v. Fremont, E. & M. V. R. Co., 22 Neb. 313 632
State v. German Savings Bank, 50 Neb. 734 ..... 96, 97
State v. Green, 41 Ia. 693 3
‡State v. Hunter, 38 Kan. 578 ..... 519, 536
State v. Jaynes, 19 Neb. 164 703
State v. Johns, 3 Ore. 533 510
State v. Kennan, 7 O. St. 546 527
State v. King, 23 Neb. 540 594
State v. Kolsem, 130 Ind. 434 530
State v. Lancaster County, 4 Neb. 537 523
‡State v. Lansing, 46 Neb. 514 172
State v. Leidigh, 47 Neb. 126 314
State v. Lewis, 38 Neb. 191 697
State v. Long, 17 Neb. 502 ..... 695, 699
State v. McPeak, 31 Neb. 139 213
State v. Merrell, 43 Neb. 575 155
State v. Moore, 40 Neb. 854 523
State v. Morris, 10 S. E. Rep. (N. Car.) 455 50
State v. Nebraska Telephone Co., 17 Neb. 126 635
State v. Northwestern Endowment & Legacy Ass'n, 22 N. W. Rep. (Minn.) 135 125
State v. Palmer, 18 Neb. 644 717
State v. Plambeck, 36 Neb. 401 ..... 171, 694, 703
State v. Ream, 16 Neb. 685 523
State v. Ritty, 23 O. St. 562 616

PAGE
State v. Robertson, 55 Neb. 41 ... 613
*State v. Seavey, 22 Neb. 454 ... 480, 516, 520, 521, 523, 524, 539, 540
State v. Sloan, 65 Wis. 647 ... 707
State v. Smith, 11 Neb. 238 ... 667
State v. Stauffer, 11 Neb. 173 ... 692, 695
State v. Tate, 68 N. Car. 546 ... 527
State v. Thayer, 46 Neb. 137 ... 213
State v. United States Mutual Accident Ass'n, 31 N. W. Rep. (Wis.) 229 ... 125
State v. Wayman, 2 G. & J. (Md.) 285 ... 535
State v. Whittemore, 11 Neb. 175 ... 692, 695
State v. Yates, 36 Neb. 287 ... 51
State Bank of Nebraska v. Green, 8 Neb. 297, 10 Neb. 133 ... 437
State Ins. Co. v. Buckstaff Bros. Mfg. Co., 47 Neb. 1 ... 222
State Ins. Co. v. Schreck, 27 Neb. 527 ... 264
Stehlick v. Mechanics Ins. Co., 58 N. W. Rep. (Wis.) 379 ... 125
Stein v. Vannice, 44 Neb. 132 ... 337, 544
Stenger Benevolent Ass'n v. Stenger, 54 Neb. 427 ... 55
Stevens v. Carson, 30 Neb. 544 ... 418
Stewart v. American Exchange Nat. Bank of Lincoln, 54 Neb. 461 ... 736
Stewart v. Frink, 94 N. Car. 487 ... 3
Stiff v. Fisher, 22 S. W. Rep. (Tex.) 577 ... 112
St. Louis, I. M. & S. R. Co. v. Gaines, 46 Ark. 555 ... 751
St. Louis Plattdeutcher Club v. Tegeler, 17 Mo. App. 569 ... 686
Stone v. Smoot, 39 Ill. 409 ... 558
Storz v. Finklestein, 48 Neb. 27 ... 240
Stough v. Ponca Mill Co., 54 Neb. 500 ... 91
Stover v. Hough, 47 Neb. 789 ... 19, 162
Stover v. Tompkins, 34 Neb. 465 ... 440
Strahle v. First Nat. Bank of Stanton, 47 Neb. 319 ... 461
Strode v. Parker, 2 Vern. (Eng.) 316 ... 258
Suessenbach v. First Nat. Bank, 5 Dak. 477 ... 8
Sumner v. Beeler, 50 Ind. 341 ... 569
Swan Land & Cattle Co. v. Frank, 39 Fed. Rep. 456 ... 554
Swartz v. Duncan, 38 Neb. 782 ... 236
Sweeney v. Ramge, 46 Neb. 919 ... 149
Sweeny v. Easter, 68 U. S. 166 ... 465
Sykes v. Chadwick, 85 U. S. 141 ... 548
Symns v. Noxon, 29 Neb. 404 ... 336

T.

Taber v. Perrot, 2 Gall. (U. S.) 565 ... 309
Talpey v. Wright, 61 Ark. 275, 32 S. W. Rep. 1072 ... 744
Taylor v. Bowker, 111 U. S. 110 ... 380
Taylor v. Commonwealth, 3 J. J. Marsh (Ky.) 401 ... 527
Taylor v. Robinson, 14 Cal. 396 ... 687
Templin v. Snyder, 6 Neb. 491 ... 594
Terry v. Beatrice Starch Co., 43 Neb. 866 ... 328
Third Nat. Bank of Syracuse v. Clark, 23 Minn. 263 ... 465

PAGE

Thomas v. Carson, 46 Neb. 765 744
Thomas v. Hinkley, 19 Neb. 324 144
Thompson v. Stetson, 15 Neb. 112 443
Thompson & Sons Mfg. Co. v. Nicholls, 52 Neb. 312 462
Throckmorton v. State, 20 Neb. 647 4
Tillson v. Downing, 45 Neb. 549 91
Tolerton v. McClure, 45 Neb. 368 ..... 112, 739
Tootle v. Jones, 19 Neb. 588 ..... 664, 668
Tootle v. White, 4 Neb. 401 437
Towle v. Holt, 14 Neb. 221 679
Town v. Missouri P. R. Co., 50 Neb. 768 131
Trimble v. People, 34 Pac. Rep. (Colo.) 981 40
Trumble v. Trumble, 37 Neb. 340 288
Tucker v. Henniker, 41 N. H. 317 753
Turner v. Scott, 51 Pa. St. 126 732

U.

Underhill v. Shea, 21 Neb. 154 317
Union Central Life Ins. Co. v. Pyers, 36 O. St. 544 120
Union Nat. Bank of Chicago v. Douglas, 1 McCreary (U. S. C. C.) 86, 92
Union P. R. Co. v. Commissioners, 98 U. S. 545 681
Union P. R. Co. v. Douglas County Bank, 42 Neb. 479 358
Union P. R. Co. v. Kinney, 47 Neb. 393 149
Union P. R. Co. v. Marston, 22 Neb. 721 651
Union P. R. Co. v. Montgomery, 49 Neb. 429 316
Union P. R. Co. v. Ogilvy, 18 Neb. 638 234
United States v. Perkins, 116 U. S. 483 527
United States v. Throckmorton, 98 U. S. 61 81
United States Bank v. Bank of Washington, 6 Pet. (U. S.) 8 716
*United States Nat. Bank of Omaha v. Geer, 53 Neb. 67 ..... 462, 463
Upton v. O'Donahue, 32 Neb. 565 258

V.

Van Etten v. Howell, 40 Neb. 850 625
Van Etten v. Medland, 53 Neb. 569 440
Van Etten v. Test, 49 Neb. 725 240
Van Horn v. State, 46 Neb. 62 695
Van Orman v. Spafford, 16 Ia. 186 8
Van Pelt v. Gardner, 54 Neb. 701 97
Van Sickel v. Buffalo County, 13 Neb. 103 394
Vanderkemp v. Shelton, 11 Paige, Ch. (N. Y.) 28 12
Vanmeter v. McFaddin, 8 B. Mon. (Ky.) 435 250
Vaughn v. O'Conner, 12 Neb. 479 594
Verdin v. City of St. Louis, 131 Mo. 26, 27 S. W. Rep. 447, 33 S. W. Rep. 480, 36 S. W. Rep. 52 ..... 725, 726
Viergutz v. Aultman, 46 Neb. 141 471
Village of Hartington v. Luge, 33 Neb. 623 740
Vincent v. State, 37 Neb. 672 620
Violet v. Rose, 39 Neb. 660 238

PAGE
Volland v. Baker, 32 Neb. 391 234
Volland v. Wilcox, 17 Neb. 46 336
Von Steen v. City of Beatrice, 36 Neb. 421 ..... 63, 68
Vought v. Foxworthy, 38 Neb. 790 446

W.

Waddle v. Owen, 43 Neb. 489 ..... 464, 625
Walker v. Larkin, 127 Ind. 100, 26 N. E. Rep. 684 160
Wallace v. Floyd, 29 Pa. St. 184 166
Ward v. Town of Southfield, 102 N. Y. 293, 6 N. E. Rep. 660 81
Ware v. Purdy, 60 N. W. Rep. (Ia.) 526 292
Warner v. Texas & P. R. Co., 54 Fed. Rep. 922 407
Warren v. Chandler, 67 N. W. Rep. (Ia.) 242 561
Warren v. Raben, 33 Neb. 380 218
Washington v. Bassett, 15 R. I. 563 67
Washington & G. R. Co. v. McDade, 135 U. S. 554 751
Wasson v. Palmer, 17 Neb. 330 478
Watson v. Coburn, 35 Neb. 499 457
Watson v. Roode, 30 Neb. 264 ..... 463, 625
Weber v. Kirkendall, 44 Neb. 766 337
Webster v. Wray, 19 Neb. 558 625
Weil v. Lankins, 3 Neb. 384 381
Weinland v. Cochran, 9 Neb. 480 382
Weir v. Weir, 3 B. Mon. (Ky.) 645 556
Werner v. Iler, 54 Neb. 576 29
West Point Water Power & Land Improvement Co. v. State, 49 Neb. 218 495
Western Assurance Co. v. Klein, 48 Neb. 904 208
Western Horse & Cattle Ins. Co. v. Timm, 23 Neb. 526 561
Western Mfg. Co. v. Rogers, 54 Neb. 456 626
Western Union Telegraph Co. v. Call Publishing Co., 44 Neb. 326 635
Western Union Telegraph Co. v. Wilhelm, 48 Neb. 910 434
Weston v. Charleston, 2 Pet. (U. S.) 449 688
Whatley v. Slaton, 36 Ga. 653 558
Wheeler v. Barker, 51 Neb. 847 742
Whipple v. Fowler, 41 Neb. 675 739
Whitaker v. Beach, 12 Kan. 492 67
White v. Flannigain, 1 Md. 525 672
White v. Hopkins, 4 S. E. Rep. (Ga.) 863 ..... 732, 733
White v. Miners Nat. Bank, 102 U. S. 658 465
White v. State, 28 Neb. 341 612
Whitney v. Wyman, 101 U. S. 392 716
Wiggins v. Burkham, 10 Wall. (U. S.) 129 564
Wilcox v. Bickel, 11 Neb. 154 101
Wilkins v. Wilkins, 26 Neb. 235 603
Williams v. Gardner, 22 Kan. 122 690
Williams v. Healey, 3 Den. (N. Y.) 363 478
Williams v. Hill, 19 How. (U. S.) 246 253
Williams v. Stewart, 3 Wis. 678 201
Williams v. Stratton, 10 S. & M. (Miss.) 418 252

PAGE
Williamson v. Williamson, 1 Met. (Ky.) 303 558
Willis v. State, 27 Neb. 98 149
Wilson v. Inhabitants of the City of Trenton, 38 Atl. Rep. (N. J.) 635 726
Wilson v. Macklin, 7 Neb. 50 690
Windhaus v. Bootz, 25 Pac. Rep. (Cal.) 404 292
Wolf v. Murphy, 21 Neb. 472 577
Wolke v. Fleming, 103 Ind. 105 407
Wood v. Fisk, 63 N. Y. 245 144
Wood v. Gerhold, 47 Neb. 397 149
Wood v. Helmer, 10 Neb. 65 153
Wood v. McCain, 7 Ala. 800 687
Wood v. Roeder, 45 Neb. 311 ..... 318, 320
Wood v. United States, 15 Ct. of Claims (U. S.) 151 527
Wood River Bank v. Dodge, 36 Neb. 708 ..... 131, 133
Woodbridge v. De Witt, 51 Neb. 98 679
Woodruff v. White, 25 Neb. 745 350
Wright v. Troutman, 81 Ill. 374 252
Wyland v. Griffith, 64 N. W. Rep. (Ia.) 673 289
Wylie v. Charlton, 43 Neb. 840 ..... 266, 290, 418

Y.

Yaner v. People, 34 Mich. 286 47
Yaple v. Titus, 41 Pa. St. 195 649
Yazel v. Palmer, 81 Ill. 82 546
Young v. Morgan, 9 Neb. 169 15

Z.

Zell v. Herman Farmers Mutual Ins. Co., 75 Wis. 527 125
Zimmerman v. County of Kearney, 33 Neb. 620 4
Zink v. Westervelt, 52 Neb. 90 742
Zweigardt v. Birdseye, 57 Mo. App. 462 744

TABLE OF NEBRASKA CASES OVERRULED.

Adams v. Nebraska City Nat. Bank, 4 Neb. 370.
Musser v. King, 40 Neb. 893.
Murray v. Loushman, 47 Neb. 258.
Strahle v. First Nat. Bank of Stanton, 47 Neb. 320.

Allis v. Newman, 29 Neb. 207.
Stull v. Cass County, 51 Neb. 760.

Alter v. Bank of Stockham, 51 Neb. 797.
Alter v. Bank of Stockham, 53 Neb. 224.

Atchison & N. R. Co. v. Baty, 6 Neb. 37.
Graham v. Kibble, 9 Neb. 183.

Aultman v. Obermeyer, 6 Neb. 260.
Stevens v. Carson, 30 Neb. 551.

Banghart v. Lamb, 34 Neb. 535.
Selby v. McQuillan, 45 Neb. 512.

Bankers Life Ins. Co. v. Robbins, 53 Neb. 44.
Bankers Life Ins. Co. v. Robbins, 55 Neb. 117.

Bartlett v. Bartlett, 13 Neb. 456.
Bartlett v. Bartlett, 15 Neb. 600.

Becker v. Anderson, 11 Neb. 493.
Marsh v. Burley, 13 Neb. 264.
Housel v. Cremer, 13 Neb. 298.
Lancaster County Bank v. Gillilan, 49 Neb. 180.

Bennett v. Fooks, 1 Neb. 465.
Galway v. Malchow, 7 Neb. 285.
Sheasley v. Keens, 48 Neb. 59.

Berkley v. Lamb, 8 Neb. 392.
Schribar v. Platt, 19 Neb. 625.
Best v. Zutavern, 53 Neb. 619.

Bollman v. Lucas, 22 Neb. 796.
Sunday Creek Coal Co. v. Burnham, 52 Neb. 364.

Bonns v. Carter, 20 Neb. 566, 22 Neb. 517.
Jones v. Loree, 37 Neb. 816.
Kilpatrick-Koch Dry Goods Co. v. Bremers, 44 Neb. 868.
Grand Island Banking Co. v. Costello, 45 Neb. 140.
Goldsmith v. Erickson, 48 Neb. 48.

Bradshaw v. City of Omaha, 1 Neb. 16.
Turner v. Althaus, 6 Neb. 77.

Bressler v. Wayne County, 25 Neb. 468.
Bressler v. Wayne County, 32 Neb. 834.

Brooks v. Dutcher, 22 Neb. 644.
City of Omaha v. Richards, 49 Neb. 245.

Bryant v. Estabrook, 16 Neb. 217.
Alexander v. Thacker, 43 Neb. 497.

Burlington & M. R. R. Co. v. Shoemaker, 18 Neb. 369.
Chicago, B. & Q. R. Co. v. Cox, 51 Neb. 479.

Carkins v. Anderson, 21 Neb. 364.
Anderson v. Carkins, 135 U. S. 483.
Robinson v. Jones, 31 Neb. 20.

City of Seward v. Klenk, 27 Neb. 615.
Jones v. Wolfe, 42 Neb. 272.
City Nat. Bank of Hastings v. Thomas, 46 Neb. 861.
State v. Ambrose, 47 Neb. 241.

Commercial Nat. Bank v. Nebraska State Bank, 33 Neb. 292.
Lancaster County Bank v. Gillilan, 49 Neb. 178.

Courcamp v. Weber, 39 Neb. 533.
Dorsey v. Conrad, 49 Neb. 444.

Coy v. Jones, 30 Neb. 798.
Globe Publishing Co. v. State Bank of Nebraska, 41 Neb. 176.

Crook v. Vandevoort, 13 Neb. 505.
Johnson v. Hardy, 43 Neb. 368.

Curtin v. Atkinson, 29 Neb. 612.
Curtin v. Atkinson, 36 Neb. 110.

Darst v. Levy, 40 Neb. 593.
McCord v. Bowen, 51 Neb. 251.

Dawson v. Merrille, 2 Neb. 119.
Simmons v. Yurann, 11 Neb. 516.
Carkins v. Anderson, 21 Neb. 368.

Deere v. Losey, 48 Neb. 622.
Sager v. Summers, 49 Neb. 459.

Drexel v. Richards, 48 Neb. 732.
Drexel v. Richards, 50 Neb. 509.

Edgington v. Cook, 32 Neb. 551.
Graff v. Ackerman, 38 Neb. 720.

Filley v. Duncan, 1 Neb. 134.
Colt v. Du Bois, 7 Neb. 396.

First Nat. Bank of Hastings v. McAllister, 33 Neb. 646.
Capital Nat. Bank of Lincoln v. American Exchange Nat. Bank of Chicago, 51 Neb. 707.

First Nat. Bank of Omaha v. Goodman, 55 Neb. 409.
First Nat. Bank of Omaha v. Goodman, 55 Neb. 418.

First Nat. Bank of South Bend v. Gandy, 11 Neb. 433.
McIntosh v. Johnson, 51 Neb. 34.

Gee Wo v. State, 36 Neb. 241.
O'Connor v. State, 46 Neb. 158.

Geisler v. Brown, 6 Neb. 254.
World Publishing Co. v. Mullen, 43 Neb. 126.

Godman v. Converse, 38 Neb. 657.
Godman v. Converse, 43 Neb. 464.

Hagenbuck v. Reed, 3 Neb. 17.
Graff v. Ackerman, 38 Neb. 724.

Hallenbeck v. Hahn, 2 Neb. 377.
Johnson v. Hahn, 4 Neb. 139.

Handy v. Brong, 4 Neb. 66.
Buckmaster v. McElroy, 20 Neb. 564.

Henry v. Vliet, 33 Neb. 130.
Henry v. Vliet, 36 Neb. 138.

Hill v. Palmer, 32 Neb. 632.
Reynolds v. Fisher, 43 Neb. 173.
Farmers Loan & Trust Co. v. Memminger, 48 Neb. 19.

Hoadley v. Stephens, 4 Neb. 431.
Omaha Real Estate & Trust Co. v. Kragscow, 47 Neb. 593.

Hollenbeck v. Tarkington, 14 Neb. 430.
Sharp v. Brown, 34 Neb. 406.

Holmes v. Andrews, 16 Neb. 296.
Alexander v. Thacker, 43 Neb. 497.

Horn v. Miller, 20 Neb. 98.
Bickel v. Dutcher, 35 Neb. 761.
Continental Building & Loan Association v. Mills, 44 Neb. 142.

Howell v. Roberts, 29 Neb. 483.
Globe Publishing Co. v. State Bank of Nebraska, 41 Neb. 176.

Hurley v. Estes, 6 Neb. 391.
Hale v. Christy, 8 Neb. 264.

Insurance Company of N. A. v. Bachler, 44 Neb. 549.
Hartford Fire Ins. Co. v. Corey, 53 Neb. 213.

Johnson v. First Nat. Bank of Plum Creek, 28 Neb. 792.
Dorsey v. Conrad, 49 Neb. 444.

Johnson v. Jones, 2 Neb. 126.
Holliday v. Brown, 33 Neb. 657, 34 Neb. 232.
Wilson v. Shipman, 34 Neb. 573.
Campbell Printing Press & Mfg. Co. v. Marder, 50 Neb. 287.

Kane v. Union P. R. Co., 5 Neb. 105.
Hurlbut v. Palmer, 39 Neb. 158.
Herbert v. Wortendyke, 49 Neb. 185.

Kittle v. De Lamater, 3 Neb. 325.
Smith v. Columbus State Bank, 9 Neb. 31.

Kountze v. Scott, 49 Neb. 258.
McCord v. Bowen, 51 Neb. 251.

Kyger v. Ryley, 2 Neb. 26.
Hale v. Christy, 8 Neb. 264.

La Flume v. Jones, 5 Neb. 256.
Burkett v. Clark, 46 Neb. 468.

Lancaster County Bank v. Horn, 34 Neb. 742.
Sager v. Summers, 49 Neb. 459.

Landauer v. Mack, 39 Neb. 8.
Landauer v. Mack, 43 Neb. 430.

Lininger v. Raymond, 12 Neb. 167.
Lancaster County Bank v. Gillilan, 49 Neb. 178.

Lipscomb v. Lyon, 19 Neb. 511.
Stevens v. Carson, 30 Neb. 551.

McClure v. Warner, 16 Neb. 447.
Alexander v. Thacker, 43 Neb. 497.

McCord v. Krause, 36 Neb. 764.
McCord v. Bowen, 51 Neb. 251.

McCord v. Weil, 29 Neb. 682.
McCord v. Weil, 33 Neb. 869.

McDonald v. Bowman, 35 Neb. 93.
McDonald v. Bowman, 40 Neb. 269.

Manly v. Downing, 15 Neb. 637.
Green v. Sanford, 34 Neb. 363.

Merriam v. Goodlett, 36 Neb. 384.
Brown v. Ulrich, 48 Neb. 413.

Morgan v. State, 48 Neb. 798.
State v. Cornell, 50 Neb. 526.

Morrissey v. Schindler, 18 Neb. 672.
Herron v. Cole, 25 Neb. 692.
Hanna v. Emerson, 45 Neb. 709.

Morse v. Engle, 28 Neb. 534.
Holliday v. Brown, 34 Neb. 232.
Radzuweit v. Watkins, 53 Neb. 416.

Nickolls v. Barnes, 32 Neb. 195.
Nickolls v. Barnes, 39 Neb. 103.

Omaha Consolidated Vinegar Co. v. Burns, 44 Neb. 21.
Omaha Consolidated Vinegar Co. v. Burns, 49 Neb. 230.

Omaha & R. V. R. Co. v. Wright, 47 Neb. 886.
Omaha & R. V. R. Co. v. Wright, 49 Neb. 457.

Osborne v. Canfield, 33 Neb. 330.
Moline v. Curtis, 38 Neb. 534.

Otoe County v. Brown, 16 Neb. 394.
Alexander v. Thacker, 43 Neb. 497.

Peckinbaugh v. Quillin, 12 Neb. 586.
Burnham v. Doolittle, 14 Neb. 216.

Peters v. Dunnells, 5 Neb. 460.
Hale v. Christy, 8 Neb. 264

Phenix Ins. Co. v. Swantkowski, 31 Neb. 245.
Sharp v. Brown, 34 Neb. 406.

Phillips v. Bishop, 31 Neb. 853.
Phillips v. Bishop, 35 Neb. 487.

Pickens v. Plattsmouth Investment Co., 31 Neb. 585.
Pickens v. Plattsmouth Investment Co., 37 Neb. 272.

Republican V. R. Co. v. Boyse, 14 Neb. 130.
Donovan v. Sherwin, 16 Neb. 130.
Tessier v. Crowley, 16 Neb. 372.

Rice v. Gibbs, 33 Neb. 460.
Rice v. Gibbs, 40 Neb. 265.

Richards v. State, 22 Neb. 145.
Horbach v. City of Omaha, 49 Neb. 851.
Mathews v. Mulford, 53 Neb. 253.

Richardson v. Campbell, 34 Neb. 181.
Havemeyer v. Paul, 45 Neb. 374.
Omaha Loan & Trust Co. v. Hanson, 46 Neb. 870.

Rittenhouse v. Bigelow, 38 Neb. 543.
Rittenhouse v. Bigelow, 38 Neb. 547.

Russel v. Rosenbaum, 24 Neb. 769.
Aultman v. Martin, 49 Neb. 103.

Sandwich Mfg. Co. v. Feary, 34 Neb. 411.
Sandwich Mfg. Co. v. Feary, 40 Neb. 226.

Schields v. Horbach, 40 Neb. 103.
State v. Scott, 53 Neb. 572.

Schoenheit v. Nelson, 16 Neb. 235.
Alexander v. Thacker, 43 Neb. 497.

Scott v. Waldeck, 11 Neb. 525.
State v. Ambrose, 47 Neb. 241.

Shawang v. Love, 15 Neb. 142.
Hurlburt v. Palmer, 39 Neb. 159.
Mayer v. Nelson, 54 Neb. 437.

Shellenberger v. Ransom, 31 Neb. 61.
Shellenberger v. Ransom, 41 Neb. 632.

Smith v. Boyer, 29 Neb. 76.
Smith v. Boyer, 35 Neb. 46.

Stanwood v. City of Omaha, 38 Neb. 552.
Stanwood v. City of Omaha, 42 Neb. 304.

State v. Krumpus, 13 Neb. 321.
Mann v. Welton, 21 Neb. 541.
Hamilton v. Fleming, 26 Neb. 240.
State v. Wilson, 31 Neb. 464.

State v. Missouri P. R. Co., 29 Neb. 550.
Missouri P. R. Co. v. State, 17 Sup. Ct. Rep. 130.
Chicago, B. & Q. R. Co. v. State, 50 Neb. 399.

State v. Priebnow, 16 Neb. 131.
Arnold v. State, 38 Neb. 752.

State v. Roper, 46 Neb. 724.
State v. Roper, 47 Neb. 417.

State v. Sanford, 12 Neb. 425.
Mann v. Welton, 21 Neb. 541.
Hamilton v. Fleming, 26 Neb. 240.
State v. Wilson, 31 Neb. 464.

State v. Seavey, 22 Neb. 454.
State v. Moores, 55 Neb. 480.

State v. Sioux City & P. R. Co., 7 Neb. 357.
Foree v. Stubbs, 41 Neb. 271.
Hall v. Hooper, 47 Neb. 118.

Stewart-Chute Lumber Co. v. Missouri P. R. Co., 28 Neb. 39.
Stewart-Chute Lumber Co. v. Missouri P. R. Co., 33 Neb. 29.

St. Joseph & D. R. Co. v. Baldwin, 7 Neb. 247.
St. Joseph & D. R. Co. v. Baldwin, 103 U. S. 426.

Strader v. White, 2 Neb. 348.
Waggoner v. First Nat. Bank of Creighton, 43 Neb. 85.

Svanson v. City of Omaha, 38 Neb. 550.
Svanson v. City of Omaha, 42 Neb. 303.

Thomas v. Edgerton, 36 Neb. 254.
Thomas v. Edgerton, 40 Neb. 26.

United States Nat. Bank of Omaha v. Geer, 53 Neb. 67.
United States Nat. Bank of Omaha v. Geer, 55 Neb. 462.

Walker v. Morse, 33 Neb. 650.
Moline v. Curtis, 38 Neb. 528.

Walker v. Turner, 27 Neb. 103.
City of Omaha v. Richards, 49 Neb. 245.

Weaver v. Cressman, 21 Neb. 675.
Anheuser-Busch Brewing Ass'n v. Hier, 52 Neb. 424.

Wescott v. Archer, 12 Neb. 345.
Grebe v. Jones, 15 Neb. 317.
Darnell v. Mack, 46 Neb. 740.

White v. State, 28 Neb. 341.
Coffield v. State, 44 Neb. 418.

Whitman v. State, 42 Neb. 841.
Metz v. State, 46 Neb. 556.

Wilson v. Macklin, 7 Neb. 50.
Muller v. Plue, 45 Neb. 702.

Woodruff v. White, 25 Neb. 745.
Stevens v. Carson, 30 Neb. 551.

Woods v. Shields, 1 Neb. 454.
Kyger v. Ryley, 2 Neb. 27.

STATUTES AND CONSTITUTIONAL PROVISIONS

CITED AND CONSTRUED.

STATE.

SESSION LAWS.

1856. PAGE

P. 90, ch. 33. Statute of frauds 405

1864.

P. 70, ch. 14. Statute of frauds 405
P. 145. Insurance companies 121
P. 149, sec. 10. Life insurance 121

1867.

P. 37. School lands 211

1877.

P. 174. School lands 211
P. 181, sec. 19. Rents of school lands 212

1879.

P. 110, secs. 1, 2. Leasing of school lands 210, 213, 214, 215
P. 111, sec. 2. School lands; purchase by lessee at private sale .. 210, 212

1881.

P. 136, ch. 17, sec. 42. Improvement of streets 68, 69, 70, 71

1883.

P. 101, ch. 12, sec. 1. Improvements of streets 68, 69, 71
P. 302. School lands 212, 213, 214

1885.

P. 335, ch. 85. School lands 212, 213, 214
P. 397, ch. 103. Criminal prosecutions 44

1887.

P. 103, ch. 10, sec. 69. Improvements of streets 187
P. 132, ch. 10, sec. 69. Improvements of streets 69
P. 177, ch. 10, sec. 118. Appraisement of damages for street improvements 187
sec. 119. Assessments to pay street improvements .. 187
P. 361, ch. 30. Register of deeds 455
P. 565, ch. 64, sec. 1. Bond of abstracter 745
sec. 2. Abstracts of title 745
P. 566, ch. 64, sec. 3. Abstracts as evidence 745

1889.

P. 369, ch. 25. Exempt wages 31
P. 473, ch. 57. Decedents' act 566, 570

1891. PAGE
P. 82, ch. 7, sec. 8. Improvement of streets..... 69

1895.
P. 158, ch. 32. Legalization of orders of county courts.....566, 570
P. 317, ch. 77. Cattle stealing 705

1897.
P. 54, ch. 10. Metropolitan cities 480, 486, 489
P. 208, ch. 28. Clerks of district court..... 692
P. 303, ch. 56. Regulation of telephone companies..... 632
P. 318, ch. 71. School lands and funds.....212, 213, 214, 215
sec. 1. Withdrawal of school lands from sale.....210, 212
P. 378, ch. 95. Deficiency judgments 438

REVISED STATUTES.

1866.
P. 187, ch. 25. Insurance companies 121, 122

GENERAL STATUTES.

1873.
P. 123, ch. 8, sec. 41. Improvements of streets.....68, 70
P. 445, ch. 33, sec. 41. Life insurance..... 121
P. 990, ch. 70. School lands 211
P. 994, ch. 70, sec. 17. Leasing of school lands..... 211

COMPILED STATUTES.

1887.
Ch. 12*a*, sec. 69. Improvements of streets.....57, 58, 62
sec. 73. Special assessments 58, 63, 735, 737
sec. 85. Equalization and collection of taxes....58, 63, 735, 737
sec. 133. Official newspaper of Omaha 66
Ch. 77, sec. 119. Redemption of land from tax sales..... 60

1889.
Ch. 18, art. 1, sec. 77*a*. Register of deeds..... 697

1891.
Ch. 12*a*. Charter of city of Omaha..... 718
sec. 69. Improvement of streets.....718, 722

1893.
Ch. 79, sub. 1, sec. 4. School districts 718

1895.
Ch. 14, art. 1, sec. 99. Annexation of territory to villages.....738, 739
Ch. 80. School lands and funds 212

1897.
Ch. 2, art, 3, secs. 1, 2. Lien on live stock for damages..... 227
Ch. 6, sec. 5. Assignee under voluntary assignment..... 452
sec. 6. Registration of voluntary assignment..... 455
Ch. 10, sec. 3. Form of official bonds 143
sec. 5. Duty of officers to file official bonds..... 170
sec. 7. Approval of official bonds..... 170

PAGE
Ch. 10, sec. 13. Informality in official bond 144
sec. 15. Failure to give official bond 167, 170, 172
Ch. 12*a*. Metropolitan cities 480, 486
sec. 131. Regulation of telephone companies..... 637
sec. 166. Fire and police commissioners.....486, 522
sec. 167. Appointment of fire and police commissioners.. 486
sec. 168. Qualifications of fire and police commissioners, 487, 521
sec. 169. Powers of fire and police commissioners.....487, 522
Ch. 13*a*, art. 2, sec. 68*. Powers of cities.....310, 311
Ch. 15, sec. 1. Common law 248
Ch. 16. Corporations 122
secs. 1, 2, 3, 4. Incorporated insurance companies..... 123
sec. 5. Foreign insurance companies 122, 123
sec. 6. Insurance companies; license.....122, 124
sec. 8. Agents of insurance companies, 117, 119, 120, 124, 125, 126, 127
sec. 68. Suit against dissolved corporation.....548, 553
Ch. 18, art. 1, sec. 37. Appeal from county board..... 680
sec. 38. Taxpayer's right of appeal 155, 680
Ch. 20, sec. 26. Appeals to district court 652
Ch. 23, sec. 1. Dower 290, 731
sec. 211. Right of executor to recover estate fraudulently conveyed 287
sec. 290. Decree distributing estate 568
Ch. 25, sec. 4*a*. Lien of judgment for alimony..... 136
Ch. 26, sec. 7. Elective officers 692
secs. 8*a*, 8*b*. Clerks of district court..... 692
Ch. 32, sec. 3. Conveyances in writing.....248, 253, 254
sec. 4. Construction of statute of frauds.....248, 253, 254
sec. 5. Written leases 248
sec. 8. Contracts to be in writing..... 404
sec. 20. Fraudulent intent.....266, 291, 427, 585
sec. 22. Estate conveyed by deed..... 248
Ch. 37. Illegitimate children 783
Ch. 43, sec. 43. Value in policy of insurance.....150, 151
sec. 45. Attorney's fee in suit for insurance.....146, 150, 151
Ch. 44, sec. 1. Rate of interest 592
sec. 4. Interest 592
Ch. 53, sec. 2. Contracts of married women..... 556
Ch. 54, sec. 3. Time to foreclose mechanic's lien..... 604
Ch. 61, sec. 5. Notarial seals 675
Ch. 71. Quo warranto 703
Ch. 72, art. 8, sec. 1. Compensation of carriers..... 632
sec. 11. Board of transportation 632
sec. 12. Power of board of transportation..... 632
sec. 24. Regulation of telephone companies..... 632
Ch. 73, sec. 50. Conveyances of realty 62
sec. 53.. Construction of conveyances 62
sec. 65. Bond of abstracter 744
secs. 66-69. Abstracts of title; liability of abstracter..... 742

PAGE

Ch. 77, art. 1, sec. 117. Assignability of tax-sale certificates.....57, 61
sec. 119. Redemption of land from tax sales.....57, 60
sec. 144. Protest against payment of taxes.....677, 679
Ch. 79, sub. 5, sec. 4. Non-resident pupils of public schools.....317, 318
sub. 6, sec. 3. Non-resident pupils of high schools.....317, 319

CODE OF CIVIL PROCEDURE.

Sec. 19. Time action commences 604
Sec. 29. Parties to actions 116, 353
Sec. 55. Place to sue corporations 117, 119, 120
Sec. 73. Service of summons on corporation..... 126
Sec. 74. Service of summons on insurance company..... 126
Sec. 84. Service of process on part of defendants..... 145
Sec. 87. Joinder of causes of action.....98, 102
Sec. 99. Counter-claim 548
Sec. 101. Counter-claim 194
Sec. 110. Time to file answer..... 603
Sec. 129. Action on negotiable instrument; pleading.....158, 160
Sec. 182. Affidavit for replevin..... 689
Sec. 190. Alternative judgment in replevin 772
Sec. 193*a*. Judgment in replevin 771
Sec. 266. Causes for appointment of receivers..... 101
Sec. 294. Special findings and verdicts 657
Sec. 311. Bill of exceptions 220, 222
Sec. 329. Competency of witnesses 266, 286, 287
Sec. 332. Husband and wife; witnesses 286
Sec. 333. Privileged communications.....286, 287
Sec. 384. Authentications of depositions 675
Sec. 430. Dismissal of action 767
Sec. 431. Trial of set-off after dismissal of petition..... 767
Sec. 442. Right of infant to assail judgment.....645, 647
Sec. 477. Lien of judgment 27, 28
Sec. 497. Notice of judicial sale of land.....66, 354
Sec. 497*a*. Redemption of realty from judicial sale.....437, 711
Sec. 498. Confirmation of judicial sales..... 323
Sec. 508. Title under sheriff's deed..... 649
Sec. 509. Expiration of lien of judgment..... 27
Sec. 582. Reviewable orders 688
Sec. 586. Transcript for review 663
Secs. 586, 587. Transcripts for review 670
Sec. 602. Vacating judgments 75, 79, 206, 646, 647, 648, 649
Sec. 606. Defense to judgment assailed 207
Sec. 669. Contempt of court..... 136
Sec. 677. Appeal bonds 163
Sec. 711. Rights of party recovering judgment in quo warranto.. 172
Sec. 847 (1895). Deficiency judgments 438, 439
Sec. 983. Justice of the peace; setting aside verdict..... 983
Sec. 1001. Opening judgments 663, 667, 668
Sec. 1004. Offer to confess judgment.....314, 315, 317
Sec. 1008. Transcript of proceedings before justice of the peace.. 652

CRIMINAL CODE.

PAGE
Sec. 17. Assault and battery 51
Sec. 114. Grand larceny 705
Sec. 117*a*. Cattle stealing 705
Sec. 125. Obtaining money by false pretenses..... 41
Sec. 256. Limitation of prosecution 41, 42, 43, 44, 45, 46, 50, 51, 52
Sec. 302. Discharge of prisoner by magistrate..... 784
Sec. 410. Filing of indictment 45
Sec. 420. Description of money 294, 298
Sec. 444. Waiver of plea in bar 196
Secs. 578-585. Criminal prosecutions 44
Sec. 585. Preliminary examination 612

CONSTITUTION.

Art. 1. Bill of rights 495
sec. 10. Indictments and informations..... 43
sec. 20. Imprisonment for debt 136
sec. 21. Property rights 2, 4
sec. 26. Enumeration of rights 496
Art. 6, sec. 18. Justices of the peace 51
sec. 24. Process 72, 74
Art. 9, sec. 3. Redemption of land from tax sales..... 60
Art. 11, sec. 4 (Carriers). Compensation of carriers 636
sec. 4 (Miscellaneous Corporations). Individual liability of stockholders 93, 96, 97, 552
sec. 7. Liability of stockholders in banking corporations, 93, 96, 97

FEDERAL.

REVISED STATUTES.

Sec. 1044. Limitation of criminal prosecutions..... 49
Sec. 1046. Crimes under revenue laws 49

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, }

HENRY E. LEWIS, APPELLEE, V. CITY OF LINCOLN, APPELLANT.

FILED MAY 4, 1898. No. 8031.

1. **Dedication:** PLAT: STREETS. An effectual statutory dedication of land for use as a public street cannot result from the filing of a plat, in the office of the county clerk or register of deeds, by one who is not the owner of the fee.

2. **Highways:** PRESCRIPTION. To establish a highway by prescription there must be a continuous user by the public under a claim of right, distinctly manifested by some appropriate action on the part of the public authorities, for a period equal to that required to bar an action for the recovery of title to land.

3. ———: SECTION-LINES: DAMAGES. A resolution adopted by a board of county commissioners purporting to establish a section-line road, within the county for which they are acting, is valid as a preliminary order; but before such road can be actually opened

there must be a proceeding upon proper notice to ascertain damages.

4. **Eminent Domain:** DAMAGES: CONSTITUTIONAL LAW. Under section 21, article 1, of the constitution, which declares "The property of no person shall be taken or damaged for public use without just compensation therefor," a landowner cannot be required to surrender his land for public use until his damages are first ascertained and either paid or proper provision made for their payment.

5. **Quieting Title:** STREETS: CITY. Where a city asserts the existence of a public street, and seeks to have its title thereto quieted and confirmed as against the general owner of the land, it must show affirmatively every fact essential to the establishment of its claim.

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

N. C. Abbott, for appellant.

Harwood, Ames & Pettis, contra.

SULLIVAN, J.

By its answer appellant claims that the strip of land in controversy in this action is a part of Twenty-seventh street, in the city of Lincoln, and asks to have its title thereto quieted and confirmed as against Henry E. Lewis, who is conceded to be the fee owner of the tract of which the disputed strip is a part. The city claims title by dedication, by prescription, and under an order of the county commissioners of Lancaster county purporting to establish a public road over the *locus in quo.* The assertion of title by virtue of a dedication is based on the fact that the disputed strip is embraced in the plat of an addition to the city of Lincoln filed in the office of the county clerk of said county by James O. Young, a former owner of the tract of which the land in question formed a part. The filing of this plat was manifestly ineffectual as a statutory dedication, because it did not profess to devote this strip to the use of the public as a street, and for the further and more forceful reason that Young was not the owner of the strip when the plat was filed, having

sold and conveyed it to another some months prior to that time. The evidence touching the establishment of an easement by prescription is somewhat conflicting and equivocal, but we think it fails to sustain appellant's claim in that regard. The principle to be deduced from the authorities seems to be that a highway may be established by continuous adverse user by the public for a period equal to that required to bar an action for the recovery of title to land; but the use by the public must be under a claim of right distinctly manifested by some appropriate action on the part of the public authorities. If the use was by the express or implied permission of the owner of the land, and the public authorities have not improved or repaired it as a highway or exercised any control or dominion over it, a road by prescription is not established. (*Lanier v. Booth*, 50 Miss. 410; *Irwin v. Dixion*, 9 How. [U. S.] 10; *Stewart v. Frink*, 94 N. Car. 487; *Blanchard v. Moulton*, 63 Me. 437; *Cyr v. Madore*, 73 Me. 53; *Pentland v. Keep*, 41 Wis. 490; *State v. Green*, 41 Ia. 693; *Engle v. Hunt*, 50 Neb. 358.) The second point in the syllabus of the last mentioned case states the rule as follows: "To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land." The evidence in this case shows clearly enough that Lewis and his predecessors, in the ownership and occupancy of the premises adjoining the disputed strip, always considered themselves the owners of the strip and continuously used it to some extent, and exercised dominion over it in their own right. On the other hand, it does not appear that the city authorities ever did anything until just prior to the commencement of this action to indicate that they claimed the strip as part of a public street.

It is said by counsel for appellant that Lewis' occu-

pancy and use of the strip were permissive, and in support of the assertion we are referred to certain general ordinances of the city of Lincoln conferring upon lot owners the right to use portions of the streets in front of their premises for the cultivation and care of ornamental trees. But, since Lewis was the owner of the fee, it may with equal or greater reason be insisted that the very limited use by the public of the sidewalk first laid in front of his house was permissive and not adverse.

It appears from the record that on November 1, 1882, the county board of Lancaster county made an order for the establishment of a section-line road over and across the *locus in quo*. The proceedings were taken under the general provisions of the road law, but there is no legal evidence before us that there was any substantial compliance therewith. However, as the order contemplated the establishment of a road on a section-line, it was undoubtedly valid as a preliminary order. (*Throckmorton v. State*, 20 Neb. 647; *McNair v. State*, 26 Neb. 257; *Howard v. Brown*, 37 Neb. 902; *Rose v. Washington County*, 42 Neb. 1; *Barry v. Deloughrey*, 47 Neb. 354; *Oyler v. Ross*, 48 Neb. 211.) But before the county commissioners could physically appropriate the land in question it was necessary that they should give the owner notice and ascertain his damages and pay, or provide for the payment, of the same. Section 21, article 1, of the constitution declares: "The property of no person shall be taken or damaged for public use without just compensation therefor." And it has been repeatedly held that before a landowner can be required to surrender possession of his land for a public use his damages must be first ascertained and either paid or proper provision made for their payment. (*Republican Valley R. Co. v. Fink*, 18 Neb. 82; *Zimmerman v. County of Kearney*, 33 Neb. 620; *Livingston v. Commissioners of Johnson County*, 42 Neb. 277.) In the last mentioned case it was further held that this compensation must be provided whether the landowner makes claim for damages or not. And in the case of *Barry v.*

Deloughrey, supra, it is said: "The county board may, without petition or notice, make a preliminary order establishing a section-line road, or declaring that it shall be opened; but before it can be actually opened there must be proceedings upon proper notice to ascertain damages." In this case it does not appear that any notice was given by the board after it acquired jurisdiction to act. Neither does it appear that there was any action taken for the ascertainment of damages, but, on the contrary, it is fairly inferable from the record that no such action was taken. Consequently, the county authorities never acquired the right to take the land in dispute and use it as a highway; and, indeed, it is not disclosed by the record that they ever attempted to do so. This being an action in which the city, by its counter-claim, seeks to have an easement adjudged to exist across the appellee's land, it is for it to show affirmatively every fact which is essential to the establishment of its claim. (*Robinson v. Mathwick*, 5 Neb. 252.) We are satisfied from an examination of the entire record that Lewis's title to the portion of the disputed strip involved in this appeal has not been divested, and the decree of the district court is therefore

AFFIRMED.

D. W. HOTALING ET AL. V. TECUMSEH NATIONAL BANK ET AL.

FILED MAY 4, 1898. No. 8013.

1. **Breach of Contract:** EQUITABLE COUNTER-CLAIM: TRIAL TO COURT. Where the answer to a petition for the recovery of damages for a breach of contract presents an equitable counter-claim which is traversed by a reply, the issues of fact thus arising are triable to the court without a jury.

2. **Breach of Covenant Against Incumbrances:** MISTAKE: PLEADING. In an action for damages for a breach of the covenant against incumbrances contained in a deed, an answer charging that the deed executed by the grantors does not contain a correct expres-

sion of the intention of the parties in regard to the transaction sufficiently alleges the mutuality of the mistake.

3. **Deeds as Mortgages:** EVIDENCE: MISTAKE. Evidence examined, and *held* to sustain the finding of the trial court that the deeds in question, though absolute in form, were intended to indemnify the grantees and others against a contingent liability, and were, therefore, mortgages. *Held, further*, That the evidence justifies the finding that the insertion in such deeds of covenants of warranty against incumbrances was the result of a mutual mistake of the parties.

ERROR from the district court of Johnson county. Tried below before BABCOCK, J. *Affirmed.*

T. Appelget, for plaintiffs in error.

John H. Ames, C. Gillespie, and *S. P. Davidson, contra.*

SULLIVAN, J.

On September 30, 1891, the firm of Russell & Holmes, being heavily indebted to the Tecumseh National Bank, conveyed to it, as security for such indebtedness, certain real estate situated in Johnson and Pawnee counties, in this state. The conveyance was by deeds of general warranty expressly declared to be subject to certain incumbrances therein mentioned. Afterwards Russell & Holmes, in order to obtain money with which to discharge their indebtedness to the bank and thus enable it to continue in business, induced the plaintiffs and forty-three others to execute to them a large number of accommodation notes, aggregating $57,250. These notes were obtained on the promise of Russell & Holmes that they would, with the proceeds thereof, pay off their indebtedness to the bank and then cause the bank to transfer said real estate to trustees for the benefit of the accommodation note makers. In pursuance of this arrangement the bank's claim was satisfied, and it thereupon joined with Russell & Holmes in conveying by warranty deeds the real estate aforesaid to Dew, Jolly, and Harris, as trustees for all the note makers. These deeds were made subject to the incumbrances mentioned in the

deeds from Russell & Holmes to the bank. It was subsequently ascertained that, in addition to the incumbrances mentioned and excepted in the deeds to the bank and from the bank to the trustees, there were other valid incumbrances on the land amounting in the aggregate to about $4,000. The trustees removed these incumbrances, and this action was thereupon commenced to recover damages for breach of the covenants of warranty contained in the deeds. The judgment of the district court was in favor of the defendants, and the plaintiffs prosecute error.

The refusal of the trial court to submit the issues to a jury is the first error assigned. The case made by the petition was an ordinary legal action to recover damages for breach of contract, and the issues of fact raised therein were, of course, triable to a jury. (*Kuhl v. Pierce*, 44 Neb. 584.) But the answer presented an equitable counter-claim. It charged that the conveyances from Russell & Holmes to it were intended to secure an indebtedness and were, therefore, in legal effect mortgages; and that the conveyances by the bank to the trustees were executed for the purpose only of transferring its interest in the land in fulfillment of a promise given by Russell & Holmes to the note makers that such transfer would be made. These allegations of the answer were traversed by the reply, and the issues of fact thus arising were triable to the court without a jury. In 7 Ency. Pl. & Pr. 810, the rule is thus stated: "When an equitable defense is presented, it is to be decided by the court as if it were an equitable proceeding, before other issues are determined, because the determination of the equitable issues in favor of the defendant would put an end to the litigation and obviate the necessity of trying the legal issues involved." And in *Peden v. Cavins*, 134 Ind. 494, it is said that "a demand for a jury should only include a demand for the trial of such issues as are triable by a jury, and when several issues are joined in a cause, some triable by jury and some by the court, and a de-

mand for a jury to try all the issues is made, it is not error to refuse it." To the same effect are the cases of *Van Orman v. Spafford*, 16 Ia. 186; *South End Mining Co. v. Tinney*, 35 Pac. Rep. [Nev.] 89; *Quinby v. Conlan*, 104 U. S. 503; *Estrada v. Murphy*, 19 Cal. 248; *Suessenbach v. First Nat. Bank*, 5 Dak. 477; *Lombard v. Cowham*, 34 Wis. 490. The action of the trial court in trying the issues without a jury was, therefore, not erroneous.

It is next insisted that the answer does not allege that there was any mutual mistake in failing to except the incumbrances in question from the operation of the covenants of warranty contained in the deeds from the bank to the trustees. But we think the answer is in that respect quite sufficient. It charges that the agreement, in pursuance of which the deeds to the trustees were executed, was that the bank should assign its interest in the land to them for the benefit of the signers of the accommodation notes; and that such deeds were executed in performance of that agreement and for no other purpose. These averments clearly show that the deeds executed by the bank did not contain a correct expression of the intention of the parties in regard to the transaction. They show that there was a mistake in the insertion of the covenants against incumbrances and that such mistake was mutual.

It is also contended on behalf of the plaintiffs that the evidence does not sustain the finding of the trial court that the deeds were not absolute conveyances. In support of this contention special stress is laid on the fact that the trustees sold, and certain officers of the bank purchased, a considerable portion of this land without any action having been taken to foreclose the equity of redemption of Russell & Holmes therein. This, certainly, would be a persuasive circumstance were it not for the fact that Russell & Holmes joined with the trustees in making the conveyances. The fact that they did so join indicates that all the parties must have regarded the deeds held by the trustees as mortgages se-

curing the indebtedness due from Russell & Holmes to the note signers. After a careful examination of all the evidence, we are entirely satisfied with the conclusion reached by the trial court, and its judgment is, therefore,

AFFIRMED.

WYATT-BULLARD LUMBER COMPANY V. MARY F. BOURKE ET AL.

FILED MAY 4, 1898. No. 8017.

1. **Mortgages:** ESTATES: MERGER. Ordinarily, when one having a mortgage on real estate becomes the owner of the fee the former estate is merged in the latter.

2. ———: ———: ———. But the mortgagee may in such case keep his mortgage alive when it is essential to his security against an intervening title. If there was no expression of his intention in relation to the matter at the time he acquired the equity of redemption, it will be presumed, in the absence of circumstances indicating a contrary purpose, that he intended to do that which would prove most advantageous to himself.

3. ———: EQUITY OF REDEMPTION: PURCHASE BY MORTGAGEE. When the equity of redemption is sold on judicial process against the owner thereof the mortgagee may purchase and hold the same either for himself or in trust for such owner.

4. **Trusts:** PURCHASER AT EXECUTION SALE. Evidence examined, and *held* to sustain a finding of the trial court that the grantee in a deed given as security purchased the equity of redemption at an execution sale in trust for the grantor.

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

G. W. Shields, for plaintiff in error.

Charles A. Goss and *R. W. Richardson, contra.*

SULLIVAN, J.

Charles C. Garmong, being the owner of part of lot 11, in block 13, of E. V. Smith's Addition to the city of

Omaha, mortgaged the same to Mary F. Bourke to secure an indebtedness of $3,500. The Merchants National Bank had a judgment lien against the property, subject to the Bourke mortgage, and, subject to said mortgage and judgment, the Wyatt-Bullard Lumber Company had a warranty deed executed to it by Garmong and his wife, Clara C. Garmong, conveying said premises as security for the payment of a promissory note for $1,850, due and payable on July 29, 1892. On September 29, 1891, the property was sold for the satisfaction of the bank's judgment and the lumber company became the purchaser at the sale, and on October 14, 1891, obtained a sheriff's deed therefor. This deed was not recorded until April 11, 1893, and the lumber company made no attempt at any time to obtain possession of the premises or to secure the rents and profits thereof. John A. Horbach was the agent of the plaintiff for the collection of her claim against Garmong and was, also, the agent of Garmong to manage the property and collect the rents. As such agent he did, after the sale and up to the time of the trial, without any objection on the part of the lumber company, manage the property, collect the rents, and apply the same upon the Bourke mortgage. In this action, which was brought to foreclose said mortgage, the lumber company, being made a party defendant, filed an answer claiming to be the fee owner of the premises from the date of the sheriff's deed and demanding a judgment against the plaintiff for the rents collected by Horbach and received by her. Upon the trial, which was had December 12, 1894, the court specially found as follows: "The court further finds from the evidence that the defendant Wyatt-Bullard Lumber Company purchased said real estate at said sale as the trustee of Charles C. Garmong, and for the purpose of preserving and protecting their interest therein as trustees or mortgagees, and they are entitled to add the sum so paid to the amount of their lien on said premises. The court also finds that said Wyatt-Bullard Lum-

ber Company would be entitled to a lien upon said real estate for the balance still due and unpaid from Charles C. Garmong, it being admitted in open court by said company that a part of its claim is paid, but the said Wyatt-Bullard Lumber Company having refused and declined to amend its cross-petition and to take proof as to said balance, and having elected to stand on its answer and cross-petition filed herein, no finding of a lien in favor of said Wyatt-Bullard Lumber Company is herein made, to all of which above findings Wyatt-Bullard Lumber Company duly excepts."

The lumber company insists that this finding is not sustained by the evidence and that the judgment against it based thereon should be reversed. There was, it is true, no understanding or agreement between Garmong and the company that the latter should buy the property and hold the title thereto in trust for the former; neither was there any such obligation imposed by law. Nevertheless, the conclusion reached by the trial court is warranted by the evidence and must be approved. Mrs. Garmong was not a party to the judgment on which the sale was made, and, therefore, the sale did not extinguish her inchoate right of dower in the premises. The estate acquired by the warranty deed being superior to the right of dower, and that obtained by the sheriff's deed being subordinate to that right, the best interests of the company demanded that the two estates be kept separate so that its rights under the former deed might be asserted in a court of equity if the necessity therefor should ever arise. Whether the estate conveyed by the warranty deed merged in the estate conveyed by the deed of the sheriff would depend, of course, on the intention of the company at the time it acquired the equity of redemption. (*Forbes v. Moffat*, 18 Ves. Jr. [Eng.] 384; 2 Pomeroy, Equity Jurisprudence, [1st ed.] sec. 791; *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 207.) There being, at that time, no unequivocal expression of intention, its purpose must be inferred from its acts and con-

duct and from all the circumstances surrounding the transaction. The rule is that it will be presumed to have intended to do that which would prove most advantageous to itself. In the case of *Lowman v. Lowman*, 118 Ill. 582, it is said: "It will be presumed, as matter of law, that the mortgagee must have intended to keep his mortgage alive, when it was essential to his security against an intervening title or incumbrance." It is further said in the same case that the failure to surrender the notes and cancel the mortgage is a circumstance indicating that the mortgage had not been extinguished. In this case it is clear that a merger of the two estates would be prejudicial to the interests of the company, and that fact alone justifies the presumption that no merger occurred. The inferences afforded by the company's conduct also tend strongly to establish the same conclusion. In purchasing at the execution sale its purpose manifestly was to protect the interest it already had and not to acquire a new title. That it might have bought the equity of redemption for itself and still kept its mortgage on foot is not to be doubted. (*Mathews v. Jones*, 47 Neb. 616; *Miller v. Finn*, 1 Neb. 254; *Vanderkemp v. Shelton*, 11 Paige Ch. [N. Y.] 28.) But apparently it did not buy for itself but for Garmong; and it is evident the latter ratified and approved its act, for, notwithstanding the sale, he continued to deal with the property as the owner thereof. He exercised complete dominion over it, expelling one tenant, putting another in possession, paying taxes and insurance, making repairs, and collecting rents. It also appears that he made payments on his indebtedness to the company after the sale. At the same time the conduct of the company, in failing to record its deed, in making no demand for possession or for the rents, although the property was yielding a monthly rental of $30, is not explicable on the theory that it bought for itself or considered itself the absolute owner. As the conclusion thus reached must result in an affirmance of the judgment of the trial court,

it becomes unnecessary to examine and decide other questions discussed in the briefs of counsel. The judgment of the district court is

AFFIRMED.

MARY JANE CLELAND, APPELLANT, V. HAMILTON LOAN & TRUST COMPANY, APPELLEE, ET AL.

FILED MAY 4, 1898. No. 8023.

1. **Vacating Judgment**: DEFENSE TO ACTION. A party seeking relief in equity from a judgment taken against him by default must exhibit a defense to the action, and also show that the rendition of such judgment was not due to his failure to take such proper steps for his own protection as an adequate foresight of consequences would naturally suggest.
2. ———: ———: LACHES. A judgment will not be set aside on the application of a party who has by his own laches failed to avail himself of an opportunity to defend.

APPEAL from the district court of Adams county. Heard below before BEALL, J. *Affirmed.*

B. F. Smith and *W. P. McCreary*, for appellant.

Wharton & Baird and *M. A. Hartigan, contra.*

SULLIVAN, J.

Mary J. Cleland and Isaac G. S. Cleland are husband and wife and for some years prior to the commencement of this action occupied the real estate here in controversy as a family homestead, the title thereto being in Mrs. Cleland. In 1889 Cleland borrowed from the Hamilton Loan & Trust Company $6,500, giving as security therefor two mortgages on this property, executed by himself and purporting to have been signed and acknowledged by his wife. The money thus obtained was intended to be used, and in fact was used, in paying off mortgages on the premises then existing and of unquestioned validity. Afterwards the loan and trust company

brought an action in the district court of Adams county to foreclose one of said mortgages and caused a summons to be issued and personally served on Mrs. Cleland. She, however, made no appearance in the case and judgment was rendered against her by default on December 16, 1890. In execution of the decree of foreclosure the premises were subsequently offered for sale and sold to the Hamilton Loan & Trust Company, and at the November, 1892, term of the court the sale was confirmed and a writ of possession ordered to be issued in favor of the purchaser. Such process was thereupon issued, and, to prevent its enforcement and to secure a vacation of the order of confirmation and decree of foreclosure, Mrs. Cleland commenced this action in the district court, alleging in her petition that she never signed or acknowledged a mortgage to the Hamilton Loan & Trust Company, and that when served with summons in the original case she supposed the writ was issued in a suit to foreclose a mortgage previously given by her to one Deitz and to which she had no defense. There was a trial of the issues, resulting in a general finding and judgment in favor of the loan and trust company, and Mrs. Cleland brings the cause to this court by appeal.

We entirely agree with appellant that her signature to the mortgage in question was forged and that the notarial certificate of her acknowledgment was false. These facts are indisputably established by the proof. Nevertheless, the decree of the district court is right and must be affirmed. It is an inflexible rule that a party seeking relief in equity from a judgment taken against him by default must exhibit a defense to the action and also show that such judgment is the result of fraud, accident, or mistake, unmixed with fault or negligence on his part. A judgment will not be set aside on the application of a party who has, by his own laches, failed to avail himself of an opportunity to defend. This salutary rule rests on principle and authority, and its rigid enforcement is necessary for the repose of society, by

preventing litigation from becoming interminable. (*Duncan v. Lyon*, 3 Johns. Ch. [N. Y.] 351; *Center Township v. Marion County*, 110 Ind. 579; *Bankers Life Ins. Co. v. Robbins*, 53 Neb. 44; *Funk v. Kansas Mfg. Co.*, 53 Neb. 450; *Sargeant v. Bigelow*, 24 Minn. 370; *Langley v. Ashe*, 38 Neb. 53; *Norwegian Plow Co. v. Bollman*, 47 Neb. 186; *Pope v. Hooper*, 6 Neb. 178.) In the last mentioned case the rule is stated in the syllabus as follows: "In an original action in equity to vacate a judgment or decree, if the ground of complaint is not the result of fraud on the part of the plaintiff, or some circumstance beyond the control of the defendant, but is occasioned by the fault, negligence, or want of ordinary diligence on the part of the defendant, he will not be permitted to deny the correctness of the judgment or decree, or renew the controversy."

But appellant contends that she was justified in assuming that the action in which she was served with summons was brought to foreclose the Deitz mortgage and that, therefore, she was not negligent in failing to appear and defend. The case of *Young v. Morgan*, 9 Neb. 169, is instanced in support of this contention, but we do not think it is in point. In that case it appears that Mrs. Young had signed a note in favor of the plaintiffs in the action, and when sued she refrained from making a defense, having good reason to believe that her genuine obligation was the basis of the suit. In the language of MAXWELL, J., delivering judgment, "The plaintiff had the right to presume that the note with her genuine signature was the one upon which the suit was instituted, and it was not necessary to suppose that the crime of forgery had been committed by affixing her name to notes of which she had no knowledge." Besides, in that case it was alleged in the petition and admitted by the demurrer that the plaintiffs knew when the judgment was taken that the notes in suit were mere forgeries. In the case at bar it seems that the Hamilton Loan & Trust Company had no knowledge prior to the

commencement of this action that Mrs. Cleland's signature to their mortgage was not genuine. When the summons was served on her she read it and knew by whom she had been sued. She had no right to assume that the Hamilton Loan & Trust Company had brought an action against her to foreclose the Deitz mortgage. To act on that assumption and fail to take any steps, or make any inquiry, to ascertain the nature of the action was an exhibition of indifference to her own interests clearly amounting to negligence. The judgment of the district court is technically correct, it does substantial justice between the parties, and is

AFFIRMED.

RAGAN, C., not sitting.

BENJAMIN P. KNIGHT ET AL. V. ARTHUR T. DARBY.

FILED MAY 4, 1898. No. 8076.

1. **Joint Motion for New Trial:** REVIEW. Where several defendants join in a single motion for a new trial, and also join in the petition in error, an affirmance as to any one of them requires an affirmance as to all.

2. **Creditors' Bill:** CANCELLATION OF CONVEYANCES. A surety on a promissory note, after demand was made on him for the interest due, refused payment and, soon afterward, executed two conveyances of his available real estate, one of which conveyed a valuable tract to his sons for a small consideration and the other conveyed a tract to his attorney to apply on an inflated account for service. In an action in the nature of a creditors' bill to subject such property to the satisfaction of a judgment on the note, the findings of the court setting aside such conveyances will not be disturbed.

3. **Trial to Court:** EVIDENCE: REVIEW. Where a case is tried to the court without the aid of a jury, it will be presumed that the court did not consider improper evidence in making its findings.

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

Joseph Crow and *John L. Carr*, for plaintiffs in error.

Weaver & Giller, contra.

SULLIVAN, J.

On April 27, 1893, Arthur T. Darby recovered a judgment for $900.61 on a promissory note executed to him in July, 1890, by Benjamin P. Knight, George H. Webster, and John V. Patterson. An execution being issued and returned wholly unsatisfied, this action, in the nature of a creditors' bill, was commenced by Darby in the district court of Douglas county to reach certain real estate conveyed in December, 1891, and January, 1892, by Benjamin P. Knight to Charles E. Knight, Harold B. Knight, and John L. Carr. A trial resulted in a finding and judgment in favor of the plaintiff, and the defendants prosecute error to this court.

All the defendants joined in a single motion for a new trial and they also join in the petition in error filed in this court; so that, under a familiar rule of practice, an affirmance of the judgment against any one of them requires an affirmance as to all. (*Long v. Clapp*, 15 Neb. 417; *Dorsey v. McGee*, 30 Neb. 657; *Scott v. Chope*, 33 Neb. 41; *Minick v. Huff*, 41 Neb. 516; *Cortelyou v. McCarthy*, 53 Neb. 479; *Gordon v. Little*, 41 Neb. 250.)

Counsel for defendants insist, with much earnestness, that the evidence produced at the trial did not warrant the finding of the district court that the conveyances in question were made for the purpose of hindering, delaying, and defrauding the creditors of Benjamin P. Knight; but we think otherwise. The evidence impresses us as it did the trial judge. When the interest on the plaintiff's note became due he demanded payment of Benjamin P. Knight, who refused to pay on the ground that he had received no part of the consideration for which the note was given. Soon afterwards Carr, who acted as Knight's legal adviser, called on Darby and

stated that Knight had received nothing for signing the note and would never pay any part of it, and that he would serve on him, Darby, a written notice to proceed at once against the property of George H. Webster to obtain satisfaction of his claim. Such notice was served on August 13, 1891, and is as follows:

"*A. T. Darby, 214 N. 15th Street, Omaha, Nebraska.*—DEAR SIR: You are hereby notified that I will not pay or be held liable for any part of the note or interest that you informed me that you hold against me, signed by me, John V. Patterson, and G. H. Webster, for the sum of $800, bearing date on or about July, 1890, and due eighteen months from date of said note. I never received said money or any part of the same. I never authorized G. H. Webster to borrow this money for me, or any part of it. And if Mr. Webster induced me to sign or indorse said note, he did it by false and fraudulent representations.

"You are hereby notified that G. H. Webster has title to 320 acres of land in Cherry county, Nebraska; also, he or his wife owns a residence on the corner of Burdette and Nineteenth streets, Omaha, in Douglas county, in Nebraska, which is subject to his debt; also, G. H. Webster and W. A. Spencer own 160 acres of land in Antelope county, Nebraska, all of recent date. Now you can protect yourself and thereby save any costs or lawsuits in attempting to collect the same of me. I therefore give you this notice and information, and govern yourself accordingly.

"(Signed) B. P. KNIGHT.

"Witnessed by FRANK A. PARKER."

The conveyance to Carr was of an undivided half interest in 160 acres of land, estimated by one of the witnesses for the plaintiff to be worth $2,000, and by one of the witnesses of the defendants to be of the value of $1,000 at the time of the trial. The consideration for this transfer was $500, said to be due from Knight to

Carr for legal services previously rendered. The items constituting Carr's account against Knight show an exceptional spirit of liberality on the part of the latter in dealing with his attorney. One was an item of $50 for a brief consultation on a matter of no special importance. Another was a charge of $100 for evolving the plan of notifying Darby to proceed against Webster, and for services immediately connected with the preparation and service of the notice above set out. The conveyance to Charles E. and Harold B. Knight, who are the sons of Benjamin P. Knight, was of 113.85 acres of valuable land in Douglas county for an expressed consideration of $300 in cash and the assumption of a large incumbrance by the grantees. The execution of these conveyances left Knight without any property to which his creditors could resort for the satisfaction of their claims. It had all passed into the ownership and possession of his lawyer and his sons, and we are entirely satisfied that the animating purpose of all the parties to the transactions was to prevent the plaintiff from collecting his note.

It is assigned for error that the court admitted a large amount of incompetent evidence. Conceding this to be true, it furnishes no reason for reversing the judgment. It will be presumed that the district court did not consider improper evidence in making its findings. This rule is laid down in 1 Greenleaf, Evidence sec. 49, and has often been recognized and applied by this court. (*Stabler v. Gund*, 35 Neb. 648; *Sharmer v. McIntosh*, 43 Neb. 509; *Buckingham v. Roar*, 45 Neb. 244; *Stover v. Hough*, 47 Neb. 789.) The judgment of the district court is right and is

AFFIRMED.

LOUIS ZOBEL V. THEODORE BAUERSACHS ET AL.

FILED MAY 4, 1898. No. 8012.

1. **Extension of Time for Payment of Note.** The payee of a negotiable promissory note who has sold and transferred the same cannot make a valid contract extending the time of payment of such note.
2. **Evidence:** DECLARATION AGAINST INTEREST: SALES. Ordinarily, declarations against interest made by a party to a suit, or by one through whom he has derived title to the thing in controversy, are admissible as evidence against him; but one who has purchased property cannot be affected by statements made in relation thereto by his vendor after the latter had parted with his title and possession.
3. **New Trial:** REVERSAL OF SECOND VERDICT: EFFECT. When a verdict in favor of one party is set aside by the district court in the exercise of a sound legal discretion, and a second trial results in favor of the other party, the first verdict will not be reinstated upon a reversal by this court of a judgment based on the second verdict.
4. **Depositions:** OBJECTIONS. An objection to a deposition on the ground that the witness did not testify to all the elements of a valid contract is without merit.

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

Capps & Stevens and *C. H. Tanner*, for plaintiff in error.

A. H. Bowen and *M. A. Hartigan, contra.*

SULLIVAN, J.

On December 6, 1887, Theodore Bauersachs, as principal, and Jacob Fisher and Martin Schellak, as sureties, executed to William Grosse their negotiable promissory note for $500, due one year from date, with interest thereon at the rate of ten per cent per annum. Plaintiff claims that he purchased this note in May, 1888, and continued to be the owner thereof from that time until after its maturity, when he sold and delivered it back to Grosse. Afterwards plaintiff's mother became the owner

of the note and she transferred it to him. His present ownership of the paper is not contested. In this action, which was brought upon said note, the sureties defended on the ground that the time of payment had been extended without their knowledge or consent, by a valid agreement made between Grosse and Bauersachs a short time before the note became due. Fisher and Schellak had a verdict and judgment in their favor and Zobel brings the record here for review.

At the trial the controverted questions were whether there was a contract extending the time of payment, and, if so, whether Grosse was the owner of the note at the time such contract was made. To maintain the issues on their part the sureties offered, *inter alia*, and the court received as evidence, two letters written by Grosse to Bauersachs—one on December 10, 1888, and the other on December 17, 1888. These letters in effect state that the note is the property of Grosse; that he never parted with the title thereto; that what purports to be his indorsement is a forgery perpetrated by Zobel, and that he had previously extended the time of payment until the following May. If Grosse, at the time in question, was the owner of the note in suit, his statement touching the alleged extension of time to Bauersachs would, of course, be a declaration against interest and admissible as such; but it is very clear that his assertion of ownership and denial of Zobel's title were self-serving declarations and should have been excluded as hearsay. From a careful reading of the entire evidence we think it quite probable that these letters were influential factors in the conclusion reached by the jury, and that their reception was prejudicial error for which the judgment of the district court should be reversed.

On a former trial of the same issues in the district court the jury found for the plaintiff against all the defendants. This verdict, on the motion of Fisher and Schellak, was set aside and a new trial awarded. Plaintiff excepted to the order and preserved the evidence

in a bill of exceptions, which is brought here with the record of the proceedings on the second trial. He now asks that the first verdict be reinstated and for a direction to the district court to render judgment thereon. This we must decline to do. After an examination of the evidence submitted on the first trial we see no cause to find fault with the district court for setting aside the plaintiff's verdict. The action taken was clearly within the broad discretion committed to the court in such matters.

It is said that the court erred in permitting Bauersachs' deposition to be read to the jury, because it does not show all the elements of a valid contract extending the time of payment of the note. The objection is based on a false assumption, and would be without merit even if the assumption were not false. A party is not required to make out his entire case, or any particular branch of his case, by a single witness. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

SAMUEL J. GUSTIN V. ANTON MICHELSON.

FILED MAY 4, 1898. No. 8037.

1. **Deeds**: DELIVERY: EVIDENCE. The fact that a deed of conveyance has been recorded affords *prima facie* evidence of its delivery, which is a question of fact.

2. ———: ———: ———. The mere circumstance that a deed was found among the papers of the deceased grantor named in it *held* to be without significance, in view of the fact that such grantor—a resident of Nebraska—had, since the making of the deed, been constituted by the grantee—a resident of New York—his attorney in fact to sell, manage, and convey the property described in such deed.

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

John Lothrop and *Lee S. Estelle*, for plaintiff in error.

Davis & Howell and *E. R. Duffie, contra.*

RYAN, C.

This action of ejectment was brought in the district court of Washington county by Anton Michelson against Samuel J. Gustin. The real property involved was the north half of the northwest quarter of section 27, in township 18 north, range 12 east, 6th principal meridian. In accordance with a peremptory instruction of the court there was a verdict for plaintiff. For a reversal of the judgment entered on said verdict this proceeding in error is prosecuted by Gustin.

In *Michelson v. Hyde*, 34 Neb. 60, there was involved the title to the above described land and that of the north half of the northeast quarter of the same section. The appellants who made this contest in that case were John Lothrop and his wife, Hortense Lothrop. In the case at bar there seems to have been some reliance by Lothrop on the defect in the power of attorney made by Welcome Hyde to Samuel Hyde. This ground was held unavailing in *Michelson v. Hyde, supra*, and, therefore, will be dismissed with a simple reference to the discussion of the facts in that case.

After the filing of the opinion it seems that the case of *Michelson v. Hyde, supra*, was remanded to the district court and that as parties the Lothrops ceased to figure in the further litigation. Subsequently, on September 28, 1892, the heirs of Charles Powell quitclaimed to Hortense Lothrop their interest in the undivided half of the north half of the northwest quarter of the section hereinbefore described. This quitclaim deed was filed for record October 3, 1892. On April 1, 1893, Hortense Lothrop and her husband, John Lothrop, quitclaimed their interest in the undivided half of the north half of the northwest quarter of section 27, aforesaid, to Samuel J. Gustin, who, thereunder, justified his

right of possession, which in the district court in this case has been held unfounded. The question of fact involved is whether or not Charles Powell, at the time of his death, had title to the undivided interest afterward quitclaimed by his heirs. Gustin insists that this was the case, and that what is claimed to have been a deed of conveyance by Charles, under which Michelson claims title, was never in fact delivered, and, therefore, was never operative. The basis for this contention is the testimony of Jesse Davis, to the effect that a daughter of Charles Powell gave him a package of papers in which was the above deed, which was from Charles to Arch. C. Powell. Entirely upon the circumstance that this deed was found among the effects of Charles Powell after his death, Gustin bases his contention that said deed was never delivered. There was offered in evidence the deed referred to by Mr. Davis, which was dated August 3, 1858. The indorsements thereon showed that it was filed for record August 13, 1858, and was recorded in book of deeds 4, page 187, in the office of register of deeds of Washington county. The record found on the page of the book of deeds just indicated varies in some respects from the language of that identified by Mr. Davis; among others, in the fact that the description of the undivided one-half of the northwest quarter of section 27, aforesaid, was omitted. There is, however, such a resemblance between the deed produced and that recorded that there can be no doubt that the discrepancies were mere omissions chargeable solely to the negligence of the register. The fact that a deed had been recorded has been held to afford *prima facie* evidence of delivery. (*Bowman v. Griffith*, 35 Neb. 361; *Issitt v. Dewey*, 47 Neb. 196.) In *Brown v. Westerfield*, 47 Neb. 399, it was held that it was not essential to the validity of a deed that it should be delivered to the grantee personally, but that it was sufficient if the grantor delivered it to a third person, unconditionally, for the use of the grantee, the grantor reserving no control over the instrument. Within a month

from the date of the deed to him the grantee therein named executed to the grantor a power of attorney whereby the attorney in fact, Charles Powell, was empowered to grant, bargain, sell, and convey any and all the property of Arch. C. Powell in Washington county as such attorney in fact saw fit, and to manage, rent, and operate the said property as the said attorney in fact should see fit. At this time Arch. C. Powell was a resident of the state of New York, while Charles, his brother, was a resident of Washington county, Nebraska. The possession of the deed from himself under these circumstances was not inconsistent with the fact that it had been delivered to Arch. C. Powell, for it was but natural that when Charles constituted his brother his attorney in fact to sell land and manage it, he should intrust to his keeping the muniments of his title. As we have already stated, the deed now questioned was so indorsed as to show that it had been duly recorded; hence there was nothing strange or unusual in the circumstance that in this condition this deed should have been returned by Charles to his brother. The evidence of the delivery of this deed was so satisfactory that the district court committed no error in refusing to submit that question to the jury for determination. There is presented no other question and the judgment of the district is

AFFIRMED.

GEORGE E. BARKER ET AL., APPELLANTS, V. ALBERT J. POTTER ET AL., APPELLEES.

FILED MAY 4, 1898. No. 8020.

Attempt to Modify Statute. Where there was an abortive attempt by subsequent legislation to limit the operation of an existing statute, such statute must be deemed to have the force it would have possessed if no limitation of it had been attempted.

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

B. N. Robertson, for appellants.

Warren Switzler, G. W. Doane, W. G. Doane, F. B. Tiffany, J. W. Carr, D. L. Johnson, and *James A. Powers, contra.*

RYAN, C.

This action was originally brought by George E. Barker against several judgment creditors of Clifton E. Mayne, for the removal of the apparent liens of their judgments from certain real property, of which, at the time of the rendition of such judgments, the title of record appeared to be in Mayne, but of which property Barker averred that he was in fact the real owner. On a trial of the issues there was relief granted as prayed as to one tract and denied as to the others. We have carefully examined the evidence and find that it sustains the judgment of the district court in both respects above noted. As between Kate Bird Curtis and George A. Hoagland, there were issues as to which was entitled to a superior judgment lien on the tracts last above referred to. In the year 1888 three judgments had been recovered in the district court of Douglas county against Mayne. These were assigned to Kate Bird Curtis, and on February 1, 1894, she caused executions to issue on them, which executions, on the following day, were levied on the real estate, as to which relief was refused Barker as already noted. Of this property Kate Bird Curtis became the purchaser at sheriff's sale, and as such received a conveyance of it by sheriff's deed. In the interim between the rendition of these three judgments and the levy of the executions issued thereunder they were not suffered to become dormant, and, on the other hand, there was no levy of them until February 1, 1894, as above noted. On May 4, 1889, George A. Hoagland recovered judgment against Mayne in the aforesaid district court. On May 3, 1894, an execution issued on this judgment was levied on the property now claimed by Kate Bird

Curtis by virtue of her purchase at sheriff's sale. Between the rendition of this judgment and its levy, therefore, a period of five years did not elapse, and Hoagland claimed priority as against Kate Bird Curtis because she had suffered more than five years to intervene between the rendition of the judgments held by her and the levy of executions issued upon them. To sustain his position Hoagland cites section 509 of the Code of Civil Procedure, of which the language relied upon is as follows: "No judgment heretofore rendered, or which hereafter may be rendered, on which execution shall not have been taken out and levied before the expiration of five years next after its rendition, shall operate as a lien upon the estate of any debtor, to the preference of any other *bona fide* creditor," etc.

In *Reynolds v. Cobb*, 15 Neb. 378, there was a statement, *arguendo*, which might have some bearing on this case if it had been made with reference to a point involved or considered in respect to the difficulty which now confronts us. As it was, it affords us no light and we must proceed independently of it. It is provided by section 477 of the Code of Civil Procedure: "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," etc. The provisions of section 509, above quoted, may have been intended as a conditional limitation on the duration of the lien created by section 477, but if such was the intention, it was defeated by the use of the qualifying phrase, "to the preference of any other *bona fide* creditor." In the case at bar, Hoagland was a *bona fide* creditor. The levy on the executions held by Kate Bird Curtis was not made within five years from their rendition, and the statute in effect declares that in such case her judgments cannot operate as liens to the preference of Hoagland. Originally this statute contained the word "prejudice" where now occurs the word "preference," and it may have been by inadvertence that

the substitution of the one word for the other was brought about, but we find the word "preference" in the statute and cannot ignore it. We cannot endow the word "preference" with the meaning which inheres in the word "prejudice," merely that such forced construction may restrict the operation of the provisions of section 477. The conclusion which we reach on this branch of the case is that the judgments held by Kate Bird Curtis, and the execution sales thereunder, entitle her to a priority over George A. Hoagland, and accordingly the judgment of the district court is, in all respects,

AFFIRMED.

SELINA F. BROWN V. JOSEPH G. SLOAN, SHERIFF.

FILED MAY 4, 1898. No. 8067.

Replevin: EQUITABLE LIEN OF CREDITOR: INSTRUCTIONS. In an action of replevin prosecuted by one who claimed the right of possession of goods as against a sheriff who held them under writs of attachment it was prejudicially erroneous to instruct the jury that a creditor has an equitable lien on property owned by his debtor merely because the relation of debtor and creditor exists between them.

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

Thomas H. Matters and *Henry Matters*, for plaintiff in error.

H. C. Lindsay, J. B. Raper, A. D. McCandless, G. E. Becker, Story & Story, and *Ricketts & Wilson, contra.*

RYAN, C.

In her petition filed in the district court of Pawnee county Selina F. Brown alleged that she was the owner and entitled to the immediate possession of certain wares and merchandise; that said goods were detained from

her by Joseph G. Sloan, the sheriff of said county, and that said property was not taken upon execution, etc., against her. There was an answer containing a denial of each averment in the petition. On a trial of the issues presented there was a verdict by which it was found that at the commencement of the action the sheriff had a special ownership in the property in controversy by virtue of certain writs of attachment by him levied thereon and was entitled to the immediate possession of said merchandise. The value of the possession of the sheriff was found to be $3,379.44, and there was judgment accordingly.

The court, at the request of the defendant, gave the following instruction:

"6. The court instructs the jury that where a person has incurred debts on the strength of his being the owner of a certain property, his creditors have an equitable lien thereon and may insist that he use his property honestly and fairly and without any intention of hindering and delaying them in the collection of their claims. The law requires a debtor to act in good faith with his creditors and apply his property not exempt, if need be, to the payment of his debts. If he attempts to evade this duty, and for the purpose of hindering and delaying or defrauding his creditors transfers his property to others with knowledge on the part of such grantees of such intent, such grantees will take the property charged with the trust."

In view of the fact that the sheriff's possession was justified by the verdict of the jury because of the writs of attachment under which he had levied on the goods, we cannot assume that this instruction was without influence in shaping that verdict. The assets of a copartnership, even though it be insolvent, are not held in trust by the members of the firm for the payment of copartnership debts; neither has the creditor a lien on such assets. (*Richards v. Leveille*, 44 Neb. 38; *Werner v. Iler*, 54 Neb. 576.) In *Crites v. Hart*, 49 Neb. 53, it was said: "We do

not understand that an individual or a partnership, the owner of property, even if insolvent, holds such property in trust for general creditors, in the true sense of the term, merely because the parties stand to each other in the relation of debtor and creditor. * * * The creditors do not, merely because they are creditors, have any lien, either legal or equitable, which is enforceable or recognized as such, or which interferes with the debtor's sale and disposal of property in any manner, provided it is not fraudulent or with intent to defraud creditors or to hinder and delay them in the collection of their claims." The "trust-fund" doctrine, as applied to corporations, was expressly repudiated by this court in *Shaw v. Robinson*, 50 Neb. 403. The giving of the instructions above quoted was erroneous and, as we think, prejudicially so. The judgment of the district court is, therefore, reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

C. L. STULL V. CHARLES MILLER.

FILED MAY 4, 1898. No. 8024.

Evading Exemption Laws: ACTION FOR DAMAGES: EVIDENCE. A judgment for damages because of an assignment of a cause of action to a resident of another state, for the purpose of evading the exemption laws of this state, cannot be sustained, when, on the trial, there was no proof of the controverted fact that the right of exemption existed.

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

Beeson & Root, for plaintiff in error.

James S. Mathews and *E. H. Wooley, contra.*

RYAN, C.

In his petition in the district court of Cass county Charles Miller alleged facts which entitled him to an exemption of his wages earned within sixty days, from the operation of attachment, execution, and garnishment process; that for five years he had been in the employ of the Burlington & Missouri River Railroad Company in Nebraska; that on or about June 12, 1893, C. L. Stull, the defendant, pretended to sell and assign a pretended account of $10 against plaintiff to a party in Iowa; that plaintiff's wages earned within sixty days prior thereto were garnished in the justice court in Council Bluffs, Iowa, for the purpose of avoiding the laws of the state of Nebraska concerning exemptions, and that plaintiff's costs and expenses in obtaining a dismissal of said garnishment suit in Iowa was $75, for which sum, with a reasonable attorney's fee of $75 and $10, the amount of the account assigned, Miller prayed judgment against Stull. By a general denial of averments not admitted the defendant put in issue the essential fact that the garnishment was of wages earned by plaintiff within the sixty days preceding such garnishment. There was no evidence offered which tended to fix the particular time during which the wages claimed as exempt were earned. The right of action sought to be enforced in this case was created by the act of 1889. (Session Laws, ch. 25, p. 369.) The purpose of this statute was to prevent the appropriation by garnishment or other process in another state of wages by the laws of this state exempt from such appropriation. No transfer of rights of action for any purpose other than that above indicated was within the inhibition of said statute. To avail himself of its provisions it was incumbent upon the plaintiff to bring his case within the class described in the act. His failure to show that the wages garnished were exempt under the laws of this state was a failure with respect to a very essential element. Without discussing the

sufficiency of the petition, and without considering other matters urged, we content ourselves with saying that for the reason above given the judgment of the district court cannot be sustained and, accordingly, it is reversed.

REVERSED AND REMANDED.

JOHN A. HUSENETTER V. ANDREW GULLIKSON.

FILED MAY 4, 1898. No. 8046.

Promise to Pay Debt of Another: PLEADING AND PROOF. Where the promise of a party to pay the debt of another is expressly contingent upon the happening of a certain event, the happening of such event must be alleged and proved to render the promisor liable.

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

W. M. Robertson, for plaintiff in error.

F. S. Howell and *C. E. Spear, contra.*

RYAN, C.

In this case there were a verdict and judgment in favor of the plaintiff in the district court of Boone county. In his petition plaintiff, in substance, alleged the recovery of a judgment before a justice of the peace of said county against Knudt C. Anderson, February 7, 1892; that a transcript of said judgment was duly filed and docketed in the office of the clerk of said district court January 28, 1893; that about January 1, 1893, John A. Husenetter was negotiating for the purchase from Anderson of certain of his real property situated in said county and was informed by the attorney for plaintiff that plaintiff had obtained said judgment for the sum of $130, and that a transcript of said judgment would be filed in the office of the aforesaid clerk. The further averments of the peti-

tion were made with a view to rendering Husenetter liable for the debt of Anderson evidenced by the aforesaid judgment. Whether or not Husenetter's alleged promise was to answer for the debt of another, and was, therefore, void because not in writing, we cannot consider, for the reason which an analysis of that portion of the petition to which we will now devote attention will disclose.

After the averments of the matters above recited it was alleged in the petition that on January 1, 1893, the title to the land of Anderson was held by O. M. Needham, but that, as was well known to plaintiff and defendant, Needham held such title only as security for a sum loaned by Needham to Anderson, and that the relation between the two persons last named was that of mortgagee and mortgagor. It was further averred that the attorney for plaintiff, on January 1, 1893, told Husenetter of these facts and informed him that plaintiff claimed that his judgment was an equitable and valid lien upon the premises of which Needham held the title, and that he, the said attorney, intended to commence an action in the district court of Boone county to have the deed from Anderson to Needham adjudged to be but a mortgage, unless the interests of plaintiff therein could and would be protected. Following the above matters the language of the petition was as follows: "That defendant herein [Husenetter] told the plaintiff's attorney that he would protect the judgment of plaintiff, and that no such action to have said deed to Needham declared and decreed a mortgage need be instituted; that he, the defendant, knew said deed from Anderson to Needham was given and delivered as security only for the payment of an indebtedness due and owing from Knudt C. Anderson to said Needham, and that he was going to pay all judgments against said Knudt C. Anderson and would pay the said judgment of the plaintiff as soon as the deal and transaction between the defendant and Knudt C. Anderson could be consummated; that he had not at that time completed negotiations with the said Knudt C. An-

derson for the purchase of said premises, and that as soon as the same were completed, he, the defendant, would pay the judgment of the plaintiff set out herein, and that said Knudt C. Anderson desired him to pay the same and other judgments against him, the said Knudt C. Anderson." There was no averment in the petition that the deal and transaction between Anderson and Husenetter had ever been consummated. There was an averment that Needham, by quitclaim deed, had conveyed to Husenetter, but, according to the averments of the petition, Needham was in fact a mere mortgagee and his quitclaim deed, therefore, could scarcely be accounted the consummation of a purchase as between parties, to each of whom was known the exact condition of affairs above alleged to have been within their knowledge. From the bill of exceptions we learn that there was a written contract between Anderson and Husenetter by the terms of which the consummation of the purchase was to be effected by a good and sufficient warranty deed from the former to the latter. Tested, therefore, by the averments of the petition, or by the proofs adduced, the contingency upon which depended the liability of Husenetter, according to the averments of the petition, has never arisen; hence, independently of every other consideration, plaintiff's action was prematurely brought and the judgment of the district court is accordingly reversed.

REVERSED AND REMANDED.

WILLIAM W. COX, APPELLEE, V. FRANK E. MOORES ET AL., APPELLANTS.

FILED MAY 4, 1898. No. 9923.

Removal of Officer: INJUNCTION AGAINST BOARD. In advance of consideration of charges against an officer, by a board having power to hear such charges, and upon finding them sustained, to re-

move the officer thereby affected, a court of equity has no jurisdiction, upon the application of such officer, to enjoin action on the pending charges because of prejudice, abuse of discretion, and irregularities in procedure, alleged to be about to be indulged in by such board in the hearing contemplated.

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

W. J. Connell, George A. Day, and *I. J. Dunn,* for appellants.

McCoy & Olmsted, contra.

RYAN, C.

In his petition, in which the members of the board of fire and police commissioners and the chief of police of Omaha were made defendants in the district court of Douglas county, William W. Cox, alleged that on September 17, 1895 he had been appointed by the board of fire and police commissioners of the city of Omaha chief of detectives on the police force of said city; that he duly qualified as such officer, and ever since said date has been, and now is, the only lawful and *de jure* chief of detectives aforesaid; that on April 20, 1897, D. D. Gregory, J. H. Peabody, William C. Bullard, and R. E. L. Herdman were appointed members of the board of fire and police commissioners of said city and entered upon the discharge of their duties as members of said board. The parties whose proposed actions it was alleged rendered necessary the restraint of an injunction were Gregory, Peabody, Bullard, and Herdman. These four members of the board aforesaid, and the chief of police, it was alleged, were not republicans, while plaintiff affiliated with that party, for which reason said defendants had conspired among themselves to remove plaintiff from office and in his place to install a partisan of their own political faith. There were described various steps taken by said defendants to effect the removal of plaintiff from his office and to supplant him therein,

but these need not all be particularly described, for none of them were more than evidence of the existence of the conspiracy above charged. That the nature of this evidence may be illustrated, we select from this part of the petition the allegation, in substance, that, to accomplish their purpose of effecting plaintiff's removal from office, the said four members of the aforesaid board, other than the mayor, procured the chief of police to file with said board the following unverified charge, to-wit:

"AMENDED CHARGES AGAINST W. W. COX, CHIEF OF DETECTIVES.

"OMAHA, NEB., July 10, 1897.

"*To the Honorable Board of Fire and Police Commissioners* —GENTLEMEN: The following amended charges are hereby preferred against W. W. Cox, chief of detectives: That on or about April 6, 1897, he was sent to Nebraska City to bring back one Belle Mason, who was wanted here for the larceny of several hundred dollars from one J. W. Millstead. Millstead gave him $25 to defray the expenses of bringing her back. Millstead complained to Captain Haze that Cox had insisted that Belle Mason gave him $25 to have the case dismissed. I saw Belle Mason and she told me that Cox told her that if she would give him $25 there would be nothing to the case and she would be discharged and that he would see County Attorney Day and see that it was done. When Captain Haze told me this I called Sergeant Cox into the office and accused him of this, and he denied it and said the $25 he asked was a reward. Afterwards I brought Millstead and Cox together, and Millstead said that Cox had made this demand. Belle Mason afterwards said the same thing. I then requested these parties not to give any money to any officer, as it was not necessary. I also instructed Sergeant Cox to return all money to Millstead that was left of the $25 and which was not needed to defray the expenses of bringing Belle Mason back. Belle was afterwards dismissed, and I understand that she

and Millstead have left the city. That the said Cox was and is incompetent to discharge the duties of chief of detectives force of the city of Omaha in this: That he has during all the time wholly failed to conform to or enforce the rules and regulations of the board of fire and police commissioners governing the chief of detectives and the detective force of the said city. He has wholly failed to issue proper and uniform order covering the detective force; wholly failed to require the force detailed to his special command to make daily reports in writing of their services or the method of discharging their duties therein, or to establish that degree of efficiency in the detective department that the service required. That he was wholly neglectful of his duties as chief of detectives in this: He was absent at times from his office in said service for a period of days and as such chief of detectives compelled the detective force to depend upon others for direction, counsel, or advice; that the said Cox wholly failed from time to time to give such directions as should rightfully belong to his duties and come from him in the direction of said detective force; that he was frequently engaged in political controversies and contests arising in said city—held himself out as a politician, and was, in fact, an offensive partisan and politician rather than a policeman and an efficient chief of detective force.

"I am, gentlemen, your obedient servant,

"A. T. SIGWART,
"*Chief of Police.*"

For the purpose of further illustrating and enforcing his averments of the existence of a conspiracy against him, plaintiff, in his petition, described certain motions made by him for more specific statements in the above charge, the names of the witnesses by whom such charges were to be sustained, and the ruling of the board of fire and police commissioners thereon, in each instance in denial of the order asked, and the fact that due exceptions were taken. It was alleged in the petition that

unless the defendants were restrained from so doing they, as the board of fire and police commissioners of the city of Omaha, would continue in their irregular and oppressive course until plaintiff would be deprived of his office with its honors and emoluments.

We have not attempted to state in full the averments of the petition, for, though abbreviation has been attempted, the resulting epitome has not successfully compressed all we have attempted to summarize within a reasonably brief space. What has been said, however, will serve to render clear the general observations with reference to the petition as a whole, that its charges of threatened infractions of plaintiff's rights were reducible to two classes: First, the accomplishment of his removal from office pursuant to a predetermined course of action; second, the adoption of irregular and illegal methods by means of which the desired result should be obtained. It may be urged that the fact of the difference in the political affiliations of the parties should be taken into account, but this cannot be in this case, for in that event there must be considered what constitutes a republican, a populist, and a democrat—propositions which might be difficult of solution in view of past and present political conditions. Reduced to its most concise terms, the petition charged that the board of fire and police commissioners were about to, and unless enjoined would, by irregular and illegal proceedings, remove plaintiff from office. It was not charged that this board by regular proceedings had not authority to order and enforce this removal. The prayer of the petition need not be set out, for its scope is sufficiently reflected in the following portion of the decree entered upon the final hearing, to-wit:

"It is considered and decreed by the court that the defendants, and each of them, and their successors in office and their employés, agents, and subordinates, be, and they are hereby, enjoined perpetually from in any way annoying or harassing or interfering with the plaintiff William W. Cox in and about his office of chief of detec-

tives of the police force of the city of Omaha, and in and about his performance of the duties of said office, and in and about his rights, privileges, benefits, and emoluments accruing to him by virtue of said office, and from proceeding to a trial of this plaintiff upon pretended charges and pretended amended charges filed with said board on the 28th day of June, 1897, respectively described in the petition, and from permitting to be refiled the Blackmore and other charges described in the petition, or any amendment of said Blackmore or other charges, and from proceeding to a hearing on any of said charges, and from making any finding or order of removal, suspension, or discipline of this plaintiff respecting his said office, or from the said police force, on account of the pretended charges and amended charges of June 28, 1897, and July 10, 1897, and on account of the aforesaid Blackmore charges, or on account of any charges refiled or amendatory of any one of said charges, and from permitting to be filed or setting for trial and from hearing any sham, frivolous, insufficient, or unlawful charges or any other charge in which it is not stated specifically and definitely the facts showing the time, place, and manner in which this plaintiff, in respect of his duties in his office of chief of detectives, has infringed and broken some specific rules or rule, regulation, or law of, or governing said board of fire and police commissioners and said police force, and from denying to this plaintiff the right to be heard in person or by attorneys or counsel upon any proceeding that may be brought or pending against him before the said board of fire and police commissioners and from denying him a full opportunity to make all defenses he may have against any charges that may be brought against him," etc.

The relief granted in the above decree, in effect, is the forbidding in advance of proceedings in certain respects indicated as being irregular or illegal, or both. If by his petition plaintiff had averred that the charges preferred against him were untrue, the district court, in line with

the course pursued in granting the above relief, might have adjudged that charges were unfounded and thereupon might have enjoined further inquiry into that question. The action was one for equitable relief, and it is a familiar rule that where a court of equity has obtained jurisdiction of the parties and subject-matter for one purpose, it will administer complete relief. If, therefore, the district court, in advance, could consider what mistakes the board was about to commit in its procedure and prescribe a method of prevention, it could, upon proper issues tendered by the petition, determine in what respect the chief of detectives was guilty and how he should be punished, and ought to have impressed upon the board the impropriety of determining otherwise. In either case, if the board has committed errors, the proper relief, if any, must be sought upon a record showing the actual existence, and not a mere anticipation, of such errors, no matter how well founded the apprehension may be. With respect to one part of the decree and that the part which prevents further proceedings, it is proper to remark that a court of equity should not interfere by injunction to prevent the removal of an officer when the power of removal is vested in a board or officer. (*In re Sawyer*, 124 U. S. 200; *Delahanty v. Warner*, 75 Ill. 185; *Reemelin v. Mosby*, 47 O. St. 570; *Heffran v. Hutchins*, 43 N. E. Rep. [Ill.] 709; *Trimble v. People*, 34 Pac. Rep. [Colo.] 981; *In re Fire & Excise Com'rs*, 36 Pac. Rep. [Colo.] 234.) The case of *Stahlhut v. Bauer*, 51 Neb. 64, is not in conflict with the cases just cited, for it was decided on the principle that the members of the city council who proposed to determine whether or not the mayor should be removed did not possess the power arrogated to themselves. The present case, in all its bearings, is governed by the principle above stated as to the limitations of the powers of a court of equity. The judgment of the district court is reversed and the action is dismissed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA V. FRED Y. ROBERTSON.

FILED MAY 4, 1898. No. 9851.

1. **Criminal Prosecutions:** COMMENCEMENT: STATUTE OF LIMITATIONS. Section 256 of the Criminal Code construed, and *held* that the filing of a complaint before an examining magistrate charging a person with the commission of a crime, and causing him to be arrested, examined, and bound over to the district court, do not arrest the running of the statute of limitations, unless the magistrate, before whom the complaint was filed, had jurisdiction to try and punish the accused for the offense with which he was charged.

2. ———: ———: ———. August 11, 1897, the county attorney of Buffalo county filed with the county judge thereof a complaint charging one R. with having in said county on October 10, 1894, committed the crime of obtaining money under false pretenses. R. was arrested and after a preliminary examination held to answer to such charge in the district court. On November 11, 1897, the county attorney filed in the district court an information against R. for said crime. *Held*, That the filing in court during term time of the information, and not the filing of the complaint with the county judge, was the commencement of the prosecution by the state, and that it was barred by the statute of limitations. *Boughn v. State*, 44 Neb. 889, reaffirmed.

EXCEPTIONS to the decision of the district court for Buffalo county, H. M. SULLIVAN, J., presiding. Filed by leave of the supreme court under the provisions of section 515 of the Criminal Code. *Exceptions overruled.*

Fred A. Nye, County Attorney, for the state.

John A. Miller, H. V. Calkins, and *Dryden & Main, contra.*

RAGAN, C.

On August 11, 1897, the county attorney of Buffalo county filed with the county judge thereof a complaint against Fred Y. Robertson, in which he charged him with having, in said county, on October 10, 1894, committed the crime of obtaining money under false pretenses, as defined by section 125 of the Criminal Code of the state. A warrant was issued on this complaint, Robertson ar-

rested, a preliminary examination had, and he was by the county judge held to appear and answer in the district court for the crime with which he was charged, and for that purpose entered into a recognizance to appear in said district court on the first day of the next term thereof. The district court convened November 8, 1897, and on the 11th of that month the county attorney filed with the clerk of said court an information charging Robertson with having committed the crime of obtaining money under false pretenses in said Buffalo county on October 10, 1894. To this information Robertson demurred on the ground, among others, that the prosecution was barred by the statute of limitations. The district court sustained the demurrer, dismissed the information, and discharged Robertson. The state has filed here exceptions to the decision below, for the purpose of determining the law to govern in similar cases.

Section 256 of the Criminal Code is as follows: "No person or persons shall be prosecuted for any felony (treason, murder, arson, and forgery excepted), unless the indictment for the same shall be found by a grand jury, within three years next after the offense shall have been done or committed. Nor shall any person be prosecuted, tried, or punished for any misdemeanor or other indictable offense below the grade of felony, or for any fine or forfeiture under any penal statute, unless the indictment, information, or action for the same shall be found or instituted within one year and six months from the time of committing the offense or incurring the fine or forfeiture, or within one year for any offense the punishment of which is restricted to a fine not exceeding one hundred dollars, and to imprisonment not exceeding three months; *Provided*, That nothing herein contained shall extend to any person fleeing from justice; *Provided, also*, That where any suit, information, or indictment, for any crime or misdemeanor, is limited by any statute to be brought or exhibited within any other time than is hereby limited, then the same shall be brought or exhibited

within the time limited by such statute; *And provided, also*, That where any indictment, information, or suit shall be quashed, or the proceedings on the same set aside or reversed, on writ of error, the time during the pendency of such indictment, information, or suit so quashed, set aside, or reversed, shall not be reckoned within this statute, so as to bar any new indictment, information, or suit for the same offense."

The crime with which Robertson is charged was committed more than three years before the filing in the district court of the information against him by the county attorney, but within less than three years before the filing by the county attorney of the complaint with the county judge on which Robertson was arrested. The contention of Robertson is that the statute of limitations continued to run from the commission of the crime until the filing of the information in the district court, and that, as it was not filed until more than three years after the commission of the crime, the right of the state to prosecute him for the crime at the time it filed its information was barred. The contention of the state is that the filing of the complaint with the county judge charging Robertson with the crime, with his arrest and preliminary examination on such complaint, was the beginning of the prosecution by the state, and that the filing of such complaint arrested the running of the statute of limitations. The question raised by these contentions must be answered by a construction of said section 256 of the Criminal Code in connection with the legislation, presently to be noticed, in reference to the prosecution of crimes upon the information of a public prosecutor.

Section 10, article 1, of the constitution (bill of rights) provides that no person shall be held to answer for such a criminal offense as the one with which Robertson is charged here, except on an indictment by a grand jury; but the section further authorizes the legislature to provide for holding persons to answer for criminal offenses on information of a public prosecutor. In pursuance of

the authority conferred by this section of the constitution, the legislature in 1885 (see Session Laws 1885, ch. 108; Criminal Code, secs. 578-585, both inclusive) authorized the courts of the state to hear and determine criminal prosecutions for crimes and misdemeanors upon an information filed by the county or prosecuting attorney in the same manner as they had authority to try and determine prosecutions for crimes upon indictments. This section 256 of the Criminal Code went into effect September 1, 1873, and therefore antedates the present constitution and the legislation just referred to. Said sections of the Criminal Code provide that the prosecuting attorney shall subscribe his name to the information, verify the same under oath, and file the same during term time in a court having jurisdiction to try the accused for the crime with which he is charged. In view of this legislation, said section 256 should be so construed, with reference to the facts in this case, as if it read: "No person or persons shall be prosecuted for any felony * * * unless the information for the same shall be filed by the prosecuting attorney in a court having jurisdiction to try the case within three years next after the offense shall have been done or committed."

The filing in court of an information by the county attorney is the commencement of the criminal prosecution, and the information is the first pleading of the state; and until this prosecution is commenced by the state, the statute of limitations runs in favor of the accused. The filing of a complaint before an examining magistrate charging one with the commission of a felony, or any other crime the magistrate has no jurisdiction to try, does not arrest the running of the statute. Such a complaint is not the beginning of the prosecution by the state. It is not the commencement of the state's action. It is not the pleading on which the state's prosecution is based and to which the accused must plead and on which he must be tried. If a grand jury should indict A on the 10th day of a month, and this indictment should not be

returned and filed in court until the 15th of the month, we think the running of the statute would be arrested on the 15th and not on the 10th; for, until the indictment has been brought into court and filed as provided by section 410 of the Criminal Code, it cannot be said that the indictment has been found, nor that the state has begun the prosecution of the accused. The state, like a private individual, must commence its action by the filing in a court having jurisdiction to try and determine the action a pleading in which it charges the accused with having committed a certain crime at a time and place mentioned. This pleading the statute denominates either an indictment, information, or complaint. A copy of this pleading in felony cases must be served upon the accused. It is to this that he must plead, and it is upon the allegations of this pleading that a judgment convicting him of having committed the offense charged must stand or fall. Although the statute authorizes any person to file a complaint before an examining magistrate charging another with the commission of a crime, to cause such person's arrest and examination, such complaint and the proceeding under it do not constitute a prosecution of the accused by the state nor the commencement of the prosecution by the state, if the crime charged be a felony. The object of such a proceeding is to ascertain if a felony has been committed, and if so, who probably committed it, and to secure the perpetrator and hold him until the state, through its prosecuting officers, shall have an opportunity to institute against him a prosecution for the crime found to have been committed.

But it is insisted here by counsel for the state that this section 256 of the Criminal Code was by our legislature taken from the statutes of Michigan; that prior to the time of our adoption of this law the supreme court of Michigan had construed it and held that the filing of a complaint with an examining magistrate charging another with commission of a felony was the commencement of the criminal prosecution and arrested the run-

ning of the statute. There are two answers to this argument. In the first place, said section 256 is no more like the statute of Michigan on that subject than it is like the statutes of a dozen other states. A comparison of the criminal statute of limitations of the state of Michigan with ours affords not the slightest evidence that one is a copy of the other. The language of the statute of Michigan is: "An indictment for the crime of murder may be found at any period after the death of the person alleged to be murdered; all other indictments shall be found and filed within six years after the commission of the offense." (2 Howell's Annotated Statutes, sec. 9507.) In the second place, counsel are mistaken in saying that the supreme court of Michigan has held that the filing of a complaint before an examining magistrate causing the accused to be arrested and bound over is the commencement of criminal prosecution, within the meaning of their statute. *People v. Annis*, 13 Mich. 511, is cited in support of this contention. In that case Annis and one Doty were arrested on a warrant issued by a justice of the peace which charged them with larceny. A preliminary examination was held and they were bound over and subsequently indicted. When the case came on for trial the state called Doty as a witness. Counsel for Annis objected to his being sworn, on the ground of his incompetency. It was insisted that he was a party to the record and, therefore, not a competent witness. The circuit court permitted him to testify, and this ruling was assigned in the supreme court as error. That tribunal declined to decide whether his being a party to the record rendered him an incompetent witness, but said: "It is true he was a party to the proceedings before the justice, but those proceedings are only preliminary to the filing of an information, and do not constitute a part of the record in the circuit court. The statute provides that, except in certain specified cases, no information shall be filed against any person for any offense until such person shall have had a preliminary examination

therefor. * * * The examination under this statute was designed to some extent to accomplish the purpose of a presentment by the grand jury under the law as it existed before. * * * But it was never designed that the complaint or warrant before the magistrate should stand in the place of a formal presentment, nor that in the circuit court the prosecuting officer should be limited by it in the mode of charging the offense." It will thus be seen that this case is not an authority for the contention of counsel. The question of the statute of limitations was not raised in the case, and the court did not decide that the filing of a complaint before an examining magistrate and causing the arrest of the accused thereunder was the commencement by the state of a criminal prosecution by indictment or information.

Another case cited in support of the contention of counsel is *People v. Clark*, 33 Mich. 112. This was an action for seduction and the court said: "The issuing of a warrant in good faith and delivery to an officer to execute, where the defendant was afterwards arrested upon that warrant and bound over for trial, is a sufficient commencement of the prosecution to satisfy the requirement of the statute of limitations." But the opinion does not disclose how long after the commission of the crime the indictment or information was filed; nor does it set out the statute which limited the time in which an action for seduction might be commenced; and the court was not discussing the defense of the statute of limitations. For aught that appears from the opinion, the statute defining and punishing the crime of seduction may have provided that the filing of a complaint before a magistrate charging one with having committed the offense should be deemed the commencement of the prosecution of that action.

Another Michigan case cited is *Yaner v. People*, 34 Mich. 286. But this was a murder case. The question of the statute of limitations was neither raised, discussed, nor decided in the case, and for the very good reason that the

statute of limitations does not run in favor of one accused of murder either in Michigan or in this state.

Still another case cited from Michigan is *People v. Evans*, 72 Mich. 367, 40 N. W. Rep. 473. But the statute of limitations was not raised nor discussed in that case. The court did say: "The examination of persons charged with offenses not cognizable by a justice of the peace was designed to take the place of a presentment by the grand jury." But this was said in discussing the merits of a plea in abatement filed by the accused to the indictment or information which alleged, in effect, that he had had no preliminary examination.

Another case cited is *Redmond v. State*, 12 Kan. 172. This was a civil action upon a criminal recognizance, and the defense was that the record of the justice of the peace before whom the preliminary examination of the accused was had did not disclose that the offense with which he was charged was committed in Coffey county, to the district court of which the accused was bound over to appear. The question as to whether the filing of a complaint charging one with the commission of an offense is the beginning of a criminal prosecution within the meaning of the criminal statute of limitations was not presented in the case.

We have not been cited to any case, nor have we been able to find one, which holds that the filing of a complaint before an examining magistrate causing the accused to be arrested and bound over is the institution or the commencement of the criminal prosecution for a felony within the meaning of a statute like ours. Indeed, the authorities found are all to the contrary effect.

In re Griffith, 35 Kan. 377, 11 Pac. Rep. 174, is a unique case. On September 4, 1883, a complaint was filed before a justice of the peace charging Griffith with forgery. Griffith was not arrested under this complaint, but on September 12, 1883, he was arrested, tried, and convicted of the forgery, and sentenced to the penitentiary for three years. On March 10, 1886, the governor of Kan-

sas pardoned Griffith, and he was at once arrested on a warrant based on the complaint filed before the justice of the peace on September 4, 1883. He then applied to the supreme court for a writ of habeas corpus on the ground that more than two years had elapsed since the commission of the forgery, and that, therefore, the state was barred from prosecuting him for that crime. The court said: "But it is insisted on the part of the state that the making and filing of the complaint on September 4, 1883, is a commencement of the prosecution, within the meaning of the statute of limitations, and prevents the bar under the statute. The question presented then is, does the making and filing of a complaint charging the defendant with a felony, and upon which no warrant is issued nor arrest made, constitute the commencement of the prosecution within the meaning of the statute of limitations? We think not. While the legislature has defined what shall be deemed the commencement of a civil action, it has nowhere provided what shall constitute the commencement of a criminal prosecution. * * * It was conceded in argument that the presentation or filing of an indictment or information was the commencement of a prosecution, but the filing of a mere complaint before a magistrate charging the commission of a felony cannot be so regarded. Neither the preliminary examination nor the prosecution is founded upon the complaint. As has been decided, 'the original complaint has spent its force when the order of arrest is issued, and the order of arrest is the foundation for the preliminary examination.'"

Section 1044, Revised Statutes of the United States, provides: "No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed." Lacey was charged before a United States commissioner with the crime of perjury, warrant issued, and he was arrested. This oc-

curred within three years of the date of the commission of the crime. He appears to have been held in custody without indictment or information having been found until more than three years had elapsed from the date of the commission of the crime, and he then applied to the supreme court of Oklahoma for a writ of habeas corpus upon the ground that, as he had not been indicted for the crime, and more than three years had elapsed since its commission, he could not be prosecuted therefor; and the supreme court took that view of the case and discharged him. The court said: "It is contended by petitioner that, inasmuch as no indictment was found within three years [after the commission of the offense] he cannot be prosecuted; and upon the other hand it is urged that bringing proceedings before the commissioner is sufficient under the statute. The decision must turn upon the construction of that portion of the section of the statute which reads, 'or the information is instituted,' and if it shall be found that such language refers to the filing of a complaint in a commissioner's court, then the petitioner must be remanded, otherwise released." (*Ex parte Lacey*, 37 Pac. Rep. [Okla.] 1095.)

In *City of Pilot Grove v. McCormick*, 56 Mo. App. 530, it was said that the filing of an information by the prosecuting officer, and not the filing of a complaint before the justice of the peace, is the commencement of a criminal prosecution. To the same effect see *People v. Ayhens*, 24 Pac. Rep. [Cal.] 635; *State v. Morris*, 10 S. E. Rep. [N. Car.] 455.

This section 256 of the Criminal Code has been twice under review in this court. In *Jolly v. State*, 43 Neb. 857, Jolly was tried before a justice of the peace for an assault and battery and convicted. He appealed to the district court, was again convicted, and prosecuted error to this court. One error assigned in this court was the charge of the district court to the jury to the effect that they might find the accused guilty if they found that he committed the crime within eighteen months prior to the

date of filing the complaint before the justice of the peace. We disposed of that argument here by saying that the instruction, though erroneous, was without prejudice, because the record disclosed, without contradiction, that the offense was committed on May 29, 1891, and that the complaint was filed before the justice of the peace on June 8, 1891. But it is to be observed that this case was tried upon the theory that the justice of the peace had jurisdiction to try and punish the accused for the offense of assault and battery. That being correct, then the filing of the complaint with the justice of the peace charging the accused with the offense was the commencement of the prosecution. But this section as it now stands was passed by the legislature in 1893, and section 17 of the Criminal Code in force in 1891 provided that a person convicted of assault and battery should be fined in any sum not exceeding $100, or imprisoned in the jail of the county not exceeding three months, or both, in the discretion of the court. The justice of the peace, therefore, had no jurisdiction to try and punish one accused of the offense of assault and battery under that statute. (Constitution, art. 6, sec. 18; *State v. Yates*, 36 Neb. 287.) In the *Jolly Case* we did not hold, nor did we intend to hold, that the filing of a complaint before a justice of the peace accusing one of a felony, causing him to be arrested and examined and bound over, was the commencement of a criminal prosecution for a felony. What we did hold in that case, and all we held on the subject, was that where a justice of the peace had jurisdiction to try and punish for an offense, then the filing of a complaint before him charging a person with the commission of that offense was the commencement of the state's prosecution.

In *Boughn v. State*, 44 Neb. 889, construing this section 256 of the Criminal Code, we distinctly held: "Under section 256 of the Criminal Code, an indictment must be found or information filed within the time fixed by that section. It is not sufficient that the prosecution be in-

stituted by complaint, arrest, or preliminary examination within such period." The correctness of this decision is assailed by counsel for the state in the action at bar. But, after a re-examination of the question, we think the conclusion reached by us in that case was the correct one. Boughn was convicted of assault and battery. The information was filed May 1, 1893, and charged him with committing this offense May 16, 1891. In other words, almost two years elapsed between the date of the commission of the offense and the date when the state began its prosecution by information against him. At that time, to-wit, 1891, a justice of the peace had no jurisdiction to try and punish one for the offense of assault and battery, and the state conceded that under section 256 of the Criminal Code the prosecution must be begun within one year after the commission of the offense, but contended that the filing of a complaint before a justice of the peace, charging the accused with having committed the offense and the holding of a preliminary examination, was the commencement of the criminal prosecution within the meaning of the statute. They based this contention on the word "instituted" found in section 256. Answering this contention we said: "We cannot accept this construction of the statute. The word 'instituted' evidently refers back to the clause 'for any fine or forfeiture under any penal statute.'"

An analysis of said section 256 leaves no doubt in our mind that we placed upon the statute the proper construction: (1.) The statute does not run in favor of persons accused of treason, murder, arson, or forgery. (2.) It has no application to persons accused of crime and fleeing from justice. (3.) The quashing of an indictment or information, or the reversal of a judgment based thereon, does not again set the statute in motion. (4.) It does not control any special statute of limitations made applicable to any specific offense, crime, or misdemeanor. With these exceptions, no person shall be prosecuted for any felony unless the state shall have by indictment or

information instituted a prosecution against him therefor in a court having jurisdiction to try the accused for the felony within three years after the date of its commission. (5.) No person shall be prosecuted for any misdemeanor unless the state by indictment or information shall institute a prosecution against him for the offense in a court having jurisdiction to try and punish the accused for the misdemeanor within one year and six months after the date of its commission, provided that if the punishment for the misdemeanor is limited to a fine not exceeding $100 and imprisonment not to exceed three months, then the prosecution must be instituted by indictment or information within one year after the date of the commission of the misdemeanor. (6.) A suit will not lie on behalf of the state to recover a fine or forfeiture under a penal statute unless the action shall be instituted for that purpose within one year and six months from the time the cause of action accrued.

Our conclusion therefore is that the filing of a complaint before a justice of the peace, or other inferior court, charging a person with the commission of a crime, causing him to be arrested, and a preliminary examination held and causing him to be bound over to the district court, will not arrest the running of the statute of limitations, unless the magistrate before whom the complaint was filed had jurisdiction to try and punish the accused for the offense with which he was charged. The exceptions to the decision of the district court are overruled.

EXCEPTIONS OVERRULED.

NORVAL, J., not sitting.

STATE NATIONAL BANK OF LINCOLN V. MRS. H. C. SMITH.

FILED MAY 4, 1898. No. 8069.

Married Women: SEPARATE ESTATE: NOTE. It is the settled doctrine of this court that the signing of a promissory note by a married woman does not raise the presumption that she intended thereby to render her separate estate liable for its payment, nor that it was given with reference to her separate property, trade, or business, or upon the faith and credit thereof; and to an action upon such note coverture is a complete defense, unless the plaintiff shall establish by a preponderance of the evidence that the note was made with reference to, or upon the faith and credit of, the wife's separate estate or business, or with an intention on her part to charge her separate estate with its payment. *Grand Island Banking Co. v. Wright*, 53 Neb. 574, followed.

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

Thomas Ryan, for plaintiff in error.

Benjamin F. Johnson, contra.

RAGAN, C.

In the district court of Lancaster county the State National Bank brought suit upon a promissory note against M. Isabel Bond and Mrs. H. C. Smith. Mrs. Smith defended the action upon the ground that she was a married woman; signed the note sued upon as surety for Mrs. Bond; that she did not receive, directly or indirectly, any portion of the consideration for which the note was given; that it was not given with reference to her separate property, trade, or business, or upon the faith or credit thereof, nor with intent on her part to thereby charge her separate estate with its payment. The district court found generally in favor of Mrs. Smith, and the bank prosecutes error.

The evidence in the record sustains the finding of the district court on which it based its judgment releasing Mrs. Smith from liability on the note in suit, and the

case is therefore ruled by *Grand Island Banking Co. v. Wright*, 53 Neb. 574, and by *Stenger Benevolent Ass'n v. Stenger*, 54 Neb. 427. A rediscussion of the question would subserve no useful purpose whatever. It is the settled doctrine of this court that the signing of a promissory note by a married woman does not raise the presumption that she intended thereby to render her separate estate liable for its payment, nor that it was given with reference to her separate property, trade, or business, or upon the faith and credit thereof; and in an action upon such note coverture is a complete defense, unless the plaintiff shall establish by a preponderance of the evidence that the note was made with reference to, or upon the faith and credit of, the wife's separate estate or business, and with an intention on her part that her separate property should be bound for its payment.

JUDGMENT AFFIRMED.

RYAN, C., not sitting.

ELIZABETH J. TUTTLE, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

FILED MAY 4, 1898. No. 8070.

Right of Appellant to Dismiss Appeal. On the facts set out in the opinion *held* that the appellant was entitled, as a matter of right, to dismiss her appeal.

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

Fayette B. Tiffany and *Winfield S. Strawn*, for appellant.

W. J. Connell, contra.

RAGAN, C.

Elizabeth J. Tuttle brought a suit in equity in the district court of Douglas county against the city of Omaha

and some railroad companies and others. The object of the action was to obtain a decree declaring an ordinance passed by the city vacating the intersection of some streets, and permitting such intersection to be occupied by the railroad companies, void, and to oust the railroad companies from the possession of such intersection. The trial resulted in a decree dismissing Mrs. Tuttle's action, from which she appealed to this court. Before the trial of the Tuttle suit in the district court H. Goldberg also brought a suit against the parties made defendants in the Tuttle suit and for the same purpose. It seems from a stipulation in the record that the Goldberg suit was tried at the same time the Tuttle suit was tried, but whether any decree was ever entered in the Goldberg suit the record does not inform us. Mrs. Tuttle has now filed here a motion to dismiss her appeal, the appellees consenting thereto. This motion is resisted by Goldberg. He insists that this court should retain the appeal and determine the case upon its merits, because of the fact that the Goldberg case and the Tuttle case involve the same questions, the pleadings and issues being the same; that they were tried in the district court as one case, and that it was agreed between Goldberg and the city of Omaha that the appeal in the Tuttle case should operate as an appeal also in the Goldberg case, and that the decision of this court in the Tuttle case should operate as a decision in the Goldberg case. But Mrs. Tuttle was not a party to the stipulation entered into between Goldberg and the city of Omaha and not bound thereby, and she therefore has the right to dismiss her appeal. We have already stated that we do not know whether any decree was ever entered by the district court in the Goldberg case. For aught the record before us shows that action is still pending and undetermined. But if a decree has been entered in that action we are powerless to review it. If such a decree has been entered in order to enable this court to review the same, either upon appeal or error, a certified transcript of the record of that case must be

filed in this court. This is the requirement of the Code, and unless such a transcript is filed here this court is without jurisdiction in the premises. Goldberg is not a party to the record of the Tuttle suit in this court. He is not concluded by anything this court may decide in that case, as we have no jurisdiction over him. The motion of Mrs. Tuttle to dismiss her appeal must be sustained and the appeal is

DISMISSED.

ISAAC S. LEAVITT V. ELLEN E. J. BELL ET AL., APPELLANTS, AND GEORGE D. COOK, APPELLEE.

FILED MAY 4, 1898. No. 7960.

1. **Incompetent Persons:** PARTIES TO ACTIONS. The fact that one is an infant, idiot, or insane person does not prevent his being sued either at law or in equity.

2. ———: ———: TAX-SALE CERTIFICATE: FORECLOSURE. Section 119, chapter 77, article 1, Compiled Statutes 1897, does not forbid the owner of a real-estate tax-sale certificate from maintaining an action to foreclose the same, although the owner of the real estate may be an infant, idiot, or insane person.

3. **Tax-Sale Certificate:** FORECLOSURE: PARTIES. The equitable owner and holder of a real-estate tax-sale certificate may maintain an action in his own name to foreclose the same, although it has never been formally indorsed by the original purchaser at the tax sale in accordance with the provisions of section 117, chapter 77, article 1, Compiled Statutes 1897.

4. **Quitclaim Deeds.** In the absence of a contrary intent inferable therefrom, a quitclaim deed for real estate passes all the interest the grantor has in such real estate at the date of the delivery of such deed.

5. ———: TAX-SALE CERTIFICATE. Such a deed is sufficient to vest in the grantee the equitable title to a tax-sale certificate of the real estate owned by the grantor.

6. **Special Assessments:** IMPROVEMENT OF STREETS. Section 69, chapter 12*a*, Compiled Statutes 1887, construed, and *held* that the presenting to a metropolitan city council of such a petition as the one required by said section is a jurisdictional prerequisite to authorize it to charge by ordinance the cost of paving streets to the property abutting thereon.

7. ———: ———. Certain special paving taxes, levied on the property in controversy by ordinance passed by the mayor and council of the city of Omaha, *held* void, because the paving of the streets was not petitioned for in accordance with the provisions of said section 69.

8. **Tax Lien: ENFORCEMENT: BURDEN OF PROOF.** Where a lien is sought to be enforced for general taxes, the presumption is that the statutes in reference to the levy and assessment of the taxes and to the sale of the real estate for their non-payment has been complied with; and the burden of showing irregularities, or that the tax sale is void, is upon the party asserting such fact.

9. ———: ———: ———. But no such presumption can be indulged when a lien is sought to be enforced against real estate for a sale made thereof for the non-payment of special taxes. In such a case he who asserts the lien and seeks to enforce it has the burden of showing the validity of the tax lien. *Smith v. City of Omaha*, 49 Neb. 883, followed.

10. **Special Taxes: LEVY: JURISDICTION.** A metropolitan city council has no jurisdiction to pass an ordinance levying special taxes against real estate until, sitting as a board of equalization, it has first determined the amount of such special taxes to be assessed against such real estate as benefits.

11. ———: ———: ———: **BOARD OF EQUALIZATION: NOTICE.** And such a board of equalization has no jurisdiction to determine and fix the benefits to be levied as special taxes against real estate, until it has given notice of its sitting as such board of equalization, "for at least six days prior thereto," by publication in the official paper of the city. (Compiled Statutes 1887, ch. 12*a*, secs. 73, 85.)

12. ———: ———: ———: ———: ———. Where such a board of equalization convenes on the 28th of the month, in pursuance of a notice published on the 23d of the month, it is without jurisdiction to act, and its proceedings are void.

13. ———: ———: ———: ———: ———. The phrase, "for at least six days prior," found in said section 85 is not complied with by publishing a notice once in the official paper of the city six days before the council convenes as a board of equalization.

14. **Mortgages: FORECLOSURE: TAX LIENS.** A mortgagee of real estate foreclosing his mortgage is entitled to have the amount of all valid tax liens owned by him, and taxes paid to protect the same, included in the mortgage foreclosure decree.

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

Howard B. Smith, for appellants.

William D. Beckett, contra.

RAGAN, C.

Isaac S. Leavitt brought this suit against Ellen E. J. Bell, Josephine and Cyril J. Bell, the heirs at law of Joseph Bell, deceased, in the district court of Douglas county to foreclose certain tax liens upon lots 3, 4, 6, 8, 10, 13, and 14, in Jacob's Addition to the city of Omaha, of which said Joseph Bell died seized. George D. Cook was made a party defendant to the action, and before the return day of the summons issued for him at the commencement of the action he filed an answer, in the nature of a cross-petition, setting out that he had a mortgage upon the real estate, made by Joseph Bell, deceased, and asking to have it foreclosed. Howard B. Smith, an attorney at law, was by the court appointed guardian *ad litem* for Josephine and Cyril J. Bell, minors. While the action was pending Leavitt by quitclaim deed transferred his interest in the real estate in controversy by virtue of his tax-sale certificates to one Byron R. Hastings, and he subsequently transferred his interest in the real estate by virtue of the certificates of tax sales by a quitclaim deed to Cook, who thereupon filed a supplemental petition, alleging, in effect, that he had purchased these tax-sale certificates formerly held by Leavitt and all his liens on the real estate in controversy by virtue of such tax-sale certificates, including the taxes which he had subsequently paid to protect his liens; and that he had done this in order to protect the lien of his mortgage upon said real estate. The answer of the widow and her minor children by their guardian *ad litem* put in issue the validity and legality of the tax levies and assessments upon which the tax certificates were based and the levy and assessment of the taxes subsequently paid to protect the liens of those certificates. The court entered a decree giving Cook two liens upon the premises—a first lien for the taxes for which the property had been originally sold and the taxes subsequently paid to protect such sale, and provided in the decree that the minor children of

Joseph Bell might redeem the real estate from this tax lien at any time within two years after they became of age. The second lien awarded Cook was for the amount due him upon his mortgage. From this decree both parties have appealed.

1. The appeal of the Bells: The first argument is that since the constitution (section 3, article 9) gives to the owners of real estate the right to redeem the same from all sales made thereof for the non-payment of taxes or special assessments at any time within two years after such sales, and since section 119, chapter 77, Compiled Statutes 1887, being section 119, chapter 77, article 1, Compiled Statutes 1897, provides that infants, idiots, and insane persons may redeem any real estate belonging to them which has been sold for taxes at any time within two years after their disability has been removed, therefore this action cannot be maintained to foreclose these tax liens against that part of the real estate owned by the minor children until they become of age. We have not been cited to any authority in support of this contention, nor have we been able to find one. Taxes upon real estate are by the statute made a perpetual lien thereon, and when the real estate has been sold for non-payment of the taxes the purchaser is by the statute given the right to bring a suit to foreclose his tax lien and have the real estate sold for the purpose of repaying him the amount paid at the sale with interest and subsequent taxes paid to protect his lien. It may be—we do not decide—that where the real estate of an infant, idiot, or insane person, during his disability, is sold under a decree to satisfy a lien thereon for taxes, such a person, within two years after the removal of his disability, may redeem the real estate; but we do not understand that the fact one is an infant, idiot, or insane person prevents his being sued either at law or in equity.

2. A second argument is that Hastings did not acquire the title and the right to foreclose the certificates of tax sales owned by Leavitt by virtue of the quitclaim deed

from the latter and that Cook did not acquire the title and the right to foreclose the Leavitt certificates of tax sales by the quitclaim deed from Hastings. This argument is based on counsel's construction of section 117, chapter 77, article 1, Compiled Statutes 1897, which provides that a tax-sale certificate shall be assignable by indorsement, and that an assignment thereof shall vest in the assignee, or his legal representative, all the right and title of the original purchaser. The contention of counsel is that the only method by which Cook could acquire a title to the Leavitt certificates of tax sales was by an indorsement thereof in writing by Leavitt. It may be, and probably is, true that, in order for the holder of a certificate of tax sale to vest the legal title of the same in his vendee, it should be indorsed in the same manner as a promissory note payable to order. But we do not understand the meaning of the statute to be that, unless a certificate of tax sale is thus indorsed, one who purchases and pays for such a certificate fails to acquire any title thereto or the right to enforce it. One who has purchased and paid for and has in his possession a negotiable promissory note payable to order of his vendor has such an equitable title to the same that he may maintain a suit at law or in equity to enforce its collection. (*Greeley State Bank v. Line*, 50 Neb. 434; *Hartzell v. McClurg*, 54 Neb. 316.) Leavitt did not transfer his certificates of tax sales to Hastings by indorsing them; but for a valuable consideration he sold and delivered them to him, and then duly executed to him a quitclaim deed in and by which he remised, released, and forever quitclaimed unto Hastings the real estate in controversy, together with all the estate, right, title, interest, claim, and demand which he, Leavitt, had therein. Hastings did not indorse the tax certificates to Cook, but for a valuable consideration sold and delivered them to him, and at the same time duly executed and delivered to him a quitclaim deed for the real estate upon which the certificates were liens, which deed contained the same recitals as the deed from Leavitt

to Hastings. It was the intention of the parties by the execution of these quitclaim deeds that the liens which Leavitt and Hastings had upon the real estate by virtue of the tax-sale certificates should be assigned and transferred to Cook. Section 50, chapter 73, Compiled Statutes, provides: "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." Section 53 of the same chapter provides: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties." We think, therefore, that Cook had the equitable title to the Leavitt certificates of tax sales and as such equitable owner he might maintain this action.

3. A third argument of the Bells, which we notice, involves the validity of certain paving taxes of the city of Omaha. Part of lot 10 and lots 13 and 14 of the property in controversy were in paving district 123. The city council of the city of Omaha, for the purpose of determining the amount of the benefits in money which had or would accrue to these lots by reason of the paving of the streets in said district, met August 28, 1888, and fixed, determined, and decided that said lots would receive benefits by reason of said improvement as follows: Part of lot 10, $111.35; lot 13, $226.04; lot 14, $226.04; and subsequently the city council passed an ordinance levying the said amounts of money against said lots as special paving taxes. These taxes and interest thereon are included in the decree for taxes rendered in this case in favor of Cook. These special taxes and all of them, we think, were void for two reasons: (1.) The statute in force at that time (Compiled Statutes 1887, ch. 12*a*, sec. 69) authorized the mayor and council of a city of the metropolitan class to pave the streets and alleys in a paving district whenever the owners of the lands or lots abutting upon said streets or alleys and representing a majority

of the feet front thereof should petition the council so to pave. Although the streets and alleys in said paving district seem to have been paved in pursuance of authority of the mayor and council of the city of Omaha, the same was done without the petition of the owners, or any of them, of the property abutting said streets and alleys. The presenting to the city council of such a petition as the one required by said section of the statute was a jurisdictional prerequisite to authorize the council to pave said streets and charge the cost thereof to the abutting property. (*Von Steen v. City of Beatrice*, 36 Neb. 421; *State v. Birkhauser*, 37 Neb. 521; *Harmon v. City of Omaha*, 53 Neb. 164.) Not only was such a petition necessary to confer jurisdiction upon the mayor and council to authorize the paving of these streets and alleys and charge the cost thereof to the abutting property, but in this case the validity of these special taxes was, in a proper proceeding under proper pleadings, duly called in question, and the burden of showing that the special taxes had been legally levied and assessed against the property was on the party who claimed to have a lien upon the real estate growing out of such taxes. Where a lien is sought to be enforced or foreclosed for general taxes then, doubtless, the presumption is that the statutes in reference to the levy and assessment of these taxes, and the sale of the real estate for their non-payment, have been complied with, and the burden of showing irregularities, or that such a tax is void, is upon the party asserting the fact. (*Adams v. Osgood*, 42 Neb. 450.) But no such presumption can be indulged when a lien is sought to be enforced against real estate for a sale made thereof for the non-payment of special taxes or assessments. In such a case he who asserts the lien and seeks to enforce it has the burden of showing the validity of the tax lien. (*Smith v. City of Omaha*, 49 Neb. 883.) (2.) By sections 73 and 85, chapter 12*a*, Compiled Statutes 1887, before the city council sat as a board of equalization and fixed and determined the benefits or special taxes to be assessed against

the property in a paving district for the paving of the streets therein, it was required to give notice of such sitting as a board of equalization for at least six days prior to the sitting, through the official paper of the city. A notice was published August 23, 1888, in the official paper of the city that the city council would convene as a board of equalization, for the purpose of assessing the benefits or special taxes on the property in controversy, on the 28th of said month. Until this notice had been published as required by the statute the city council had no jurisdiction to sit as a board of equalization. The publishing of the notice on August 23, 1888, was not a compliance with the statute, which required the council to give notice of its sitting as a board of equalization "for at least six days prior thereto"—*i. e.*, such sitting. On the determination of the benefits which had accrued or would accrue to the property in controversy by reason of the paving of the streets in said paving district, and the amount of the taxes which the board of equalization then determined should be assessed against the lots in controversy by reason of such improvement, depended the validity of the ordinance subsequently passed by the city council levying these benefits found by the board of equalization as special taxes against the property; and, since the board of equalization was itself without jurisdiction to act, the ordinance subsequently passed in pursuance of what it did was a nullity, as the city council had no jurisdiction to pass an ordinance levying these special taxes against the lots until, sitting as a board of equalization, it had determined the amount of the benefits to each lot.

4. Another argument of the Bells relates to the validity of special taxes assessed against lots 13 and 14 of the property in controversy. These lots were in sewer district No. 43. The council, as a board of equalization, on December 20, 1887, adjudged and determined that said lots had or would be benefited in money by the construction of said sewer improvements as follows: Lot 13,

$81.31; lot 14, $80.01. Subsequently the city council passed an ordinance levying said sums as special sewer taxes against said lots. The city council convened as a board of equalization December 15, 1887, for the purpose of determining what benefits had or would accrue to the lots in this sewer district by reason of that improvement. Without acting upon the matter for which it had convened it adjourned until December 17 at 7:30 P. M., and then, without acting upon sewer district 43, adjourned until December 20 at 7:30 P. M., and at that time it determined the benefits or special assessments. For the purposes of this case only we shall consider that the city council, while convened as a board of equalization, acted on December 15, 1887. A notice was published in the official paper of the city, on December 9, that the council would convene on the 15th as a board of equalization for the purpose of determining the special taxes which should be levied on the property in said sewer district 43. This notice was also published December 10, 11, 12, and 13, but it was not published on December 14. Assuming that the council acted as a board of equalization on December 15, the question then is, had it given notice by publication through the official paper of the city of its sitting as such board "for at least six days prior to the day of its sitting"? We think not. The phrase in the statute, "for at least six days prior," is not complied with by the publishing of a notice once in the official paper of the city six days before the council meets as a board of equalization. The word "for" in that phrase means "during," and the phrase must be construed as though it read that the city council shall give notice of its sitting as a board of equalization at least during the six days immediately prior to the date of its so convening. This is a strict construction of the statute. But where a law authorizes a municipal corporation to charge the entire cost of paving a public street to the property abutting thereon, it should be strictly construed; and, before the court should permit an individual's prop-

erty to be taken to pay for a public improvement of which the entire community has the benefit and use, it should be shown that the law has been literally complied with.

Section 497 of the Code of Civil Procedure provides that a judicial sale of real estate shall not be made until the officer has given public notice of the sale in a newspaper "for at least thirty days before the day of sale." Construing this section we held that the word "for" therein meant "during," and that the notice must be published during the thirty days immediately preceding the date of sale. (*Lawson v. Gibson*, 18 Neb. 137.) And it was held that one publication of the notice thirty days before the sale was not a compliance with the requirements of the Code. It was also held that it was not necessary that the notice should be published in a daily paper; that publication for the length of time required in a paper published weekly would answer the requirements of the statute. But by section 133, chapter 12*a*, Compiled Statutes 1887, the official newspaper of a city of the metropolitan class was required to be a daily newspaper; and since the statute required the city council to give notice of its sitting as a board of equalization, for at least six days prior to the time of such sitting, in the official newspaper of the city we think that it was the intention of the legislature that this notice should be published daily for the six days immediately preceding the convening of the city council as a board of equalization.

A statute of Illinois in reference to assessments for public improvements authorized commissioners to determine the benefits which had or would accrue to property by reason of the public improvement after "notice shall be given by said commissioners by six days' publication in the corporation newspaper." Construing this statute the supreme court of Illinois held that to invest the commissioners with jurisdiction to determine the benefits the notice must be published each day for six days immediately preceding the date on which the commissioners met. (*Scammon v. City of Chicago*, 40 Ill. 146.) To the same ef-

fect see *Whitaker v. Beach*, 12 Kan. 492; *Washington v. Bassett*, 15 R. I. 563.

Considering, then, that the board of equalization acted December 15 and the first notice of its meeting as such board was published on the 9th, then, to invest the board with jurisdiction to act, the notice must have been published also on the 10th, 11th, 12th, 13th, and 14th. Because, therefore, this notice was not published December 14, 1887, the city council had no jurisdiction to sit as a board of equalization; and the ordinance subsequently passed by it levying special sewer taxes against said lots in pursuance of the benefits found and determined by the board of equalization was void.

5. What has just been said in reference to the special taxes on the lots in sewer district No. 43 applies to the special taxes levied against lot 8 of $27.27, lot 10 $375, lot 13 $66.02, and lot 14 $66.02, for grading Leavenworth street from Sixteenth to Thirty-sixth streets, and special taxes assessed against lot 3 of $373.46, lot 4 $373.46, lot 6 $34.31, for paving in district No. 32. It consequently follows that the said special taxes above mentioned were and are void and should not have been included in the decree rendered in this case.

6. Cook's appeal: We think the district court erred in giving Cook a lien on the real estate in controversy for the amount represented by his certificates of tax sales and for subsequent taxes paid to protect such certificates as an independent tax lien. Cook, in effect, had paid these taxes for the purpose of protecting his mortgage lien upon the real estate in controversy. This he had a right to do, and the amount of these taxes, so far as they were legal, should have been included in the amount due Cook on his mortgage. (*Southard v. Dorrington*, 10 Neb. 119.) The court should not have made the taxes a separate and independent lien from the lien of the mortgage, nor should the decree have provided that the Bell heirs might redeem the real estate from the sale of these lands to pay those taxes at any time within two years after

they became of age. The decree appealed from is reversed and the cause remanded, not for a new trial, but with instructions to the district court to set aside its former decree and enter a new one in accordance with this opinion.

REVERSED AND REMANDED.

IRVINE, C., dissenting.

I cannot concur in the opinion of the court in so far as it holds that a petition by the owners of abutting property is essential to confer power on the council to order the paving of an improvement district. The cases of *Von Steen v. City of Beatrice*, 36 Neb. 421, and *State v. Birkhauser*, 37 Neb. 521, are, it is true, authority for that construction of the statute, but those cases were based entirely on an interpretation of the section of the charter involved as if it had been drawn and enacted as an entirety and at a given moment. The history of the law has been neglected, and in this instance a consideration of its history is essential to a correct construction. The germ of the section is found in section 41, chapter 8, General Statutes, being the act of March 28, 1873, incorporating cities of the first class, and framed so as to embrace Omaha alone. That section began as follows: "The council shall have power to open, extend, widen, grade, pave, or otherwise improve and keep in good repair * * * any street, avenue, or alley within the limits of the city." This was followed by provisions for special assessments to defray the expense of such improvements, but the broad grant of power conferred by the language quoted was nowhere restricted. By chapter 17 of the Laws of 1881 a new charter was provided for cities of the first class, and section 41 of the act of 1873 was carried into it, somewhat amended, but not in respect to the matters here involved, as section 42. By chapter 12 of the Laws of 1883 many amendments were incorporated into section 42. The opening sentences remained the same, but the following was inserted in the body of the section:

"The mayor and council of any city of the first class shall have power to pave, repave, or macadam any street or alley, or parts thereof, in the city, and for that purpose to create suitable paving districts, which shall be consecutively numbered, such work to be done under contract and under the superintendence of the board of public works of the city. Whenever the owners of lots or lands abutting upon the streets or alleys within any paving district representing a majority of feet front thereon shall petition the council to pave, repave, or macadam such streets or alleys, it shall be the duty of the mayor and council to pave, repave, or macadam the same." (Session Laws 1883, p. 101, ch. 12, sec. 1.) By chapter 10 of the Laws of 1887 the class of metropolitan cities was created, and what was section 42 of the old charter formed the framework for section 69 of the new. In all respects material to this inquiry the two sections were the same. In 1891 (Session Laws, p. 82, ch. 7, sec. 8) this section underwent several amendments, those chiefly affecting the question before us being the substitution of "improvement districts" for "paving districts," and the addition of a clause whereby owners of three-fifths of the frontage on a street were permitted to petition for the paving of that street, the whole expense, including that of paving intersections, to be defrayed by local assessment.

I think this section of the metropolitan charter should be construed in the light of its entire history. While the act of 1887 created a new class of cities with a new name, it was in fact intended to be applied only to Omaha, and this had been true of the preceding acts relating to cities of the first class. No other city had to that time been embraced within the first class of cities. In adopting a new charter, adapted to the wants of a large and rapidly growing city, it was not intended to make an abrupt and radical change in the constitution and political history of the city. A vast scheme of street improvements was then under way. It had been progressing for some years, and it promised to continue indefinitely. There can be

no doubt that the legislature intended to continue the old law substantially in force with reference to such improvements, in order that there might be no break in continuity or method. For that reason section 42 of the old charter was preserved, with amendments going only to details. By repeated amendments that section had grown from a short paragraph until it covered pages and embraced some twenty-odd subdivisions and provisos. That process of piece-meal amendment had not only made it inordinately long, but had made it tautological, involved, and even ungrammatical. Unless it had been the deliberate purpose to retain it in such form that there could be no doubt of its identity with the old law, a simpler and clearer phraseology would have been adopted. Certainly it possessed no charm of literary style which commended it for preservation. Its preservation can only be accounted for on the theory that the legislature was so anxious to prevent a disturbance in the course of street improvement, that it would not incur the hazard of a new construction of the law by recasting its language.

If, then, the history of the law is open for consideration, I think the conclusion irresistible that it was the legislative intent to make three different provisions with regard to paving. In the first place, the council was given plenary power to pave any street. In the second place, the owners of the greater part of the frontage, by petition, might require the paving of any street. The language is in that case "it shall be the duty of the" council to pave. In the third place, on petition of the owners of three-fifths of the frontage, the street may be paved and the whole cost, including intersections, shall be defrayed by local assessment. Paving districts and improvement districts were devices introduced by amendment for convenience in fixing limits for the purpose of assessment, and form no just ground of distinguishing between power to create districts and power to pave them. Their creation is merely incidental to the power to pave. It is too clear to permit of argument that the laws of 1873 and

1881 granted full power to pave without any petition. If so, when was it taken away? If by the provision of 1883, requiring the council to pave on petition, then the new language there used was sufficient to confer the limited power, or rather to impose the duty. The words granting the general power became at the best surplusage, and why were they retained? They were not only retained, but, as if to show clearly that the provision for a petition was merely supplementary to the old power, they were in substance repeated just before the petition clause, and separated therefrom by one of the few periods which occur throughout the weary length of this monstrous section. By regarding the history of the amendment and construing it as only imposing an additional duty, effect can be given to every clause, while to give it the construction placed upon it by the court, is to impute to the legislature not only the useless retention of an obsolete clause, but its actual reduplication.

CHARLES G. HOYT v. ANTOINETTE W. LITTLE ET AL.

FILED MAY 4, 1898. No. 8058.

1. **Judicial Sale:** MODIFICATION OF DECREE: CONFIRMATION. A decree foreclosing a real estate mortgage was rendered June 5 for $363. July 11 an order of sale was issued. July 20 a remittitur of $20 was entered in open court. The order of sale was then changed so as to recite that the decree was rendered for $343 and the property afterwards advertised and sold. *Held*, That the change made in the order of sale was not prejudicial to the owner of the equity of redemption, and that the court did not err in refusing to set the sale aside because thereof.

2. **Decree Foreclosing Mortgage:** REQUEST FOR STAY: TIME. To stay the execution of a decree foreclosing a real estate mortgage a request in writing therefor must be filed with the clerk of the court within twenty days after the date of the rendition of such decree. The filing of such request within twenty days after the date of a remittitur entered, but more than twenty days after the date of the decree, will not stay the execution thereof.

3. **Judicial Sales:** CONFIRMATION. The court did not err in refusing to set aside a sale made under a decree foreclosing a real estate mortgage, on the motion of the owner of the equity of redemption based on the ground that, when the sale was made, a motion made by him to vacate the decree was pending in court.

4. **Process:** FORM. An order of sale headed, "The State of Nebraska, County of Gage, to the Sheriff of said County," etc., complies with section 24, article 6, of the constitution, providing that "All process shall run in the name of the state of Nebraska."

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

ACTION by Antoinette W. Little against Charles G. Hoyt and others to foreclose a mortgage. There was a decree for plaintiff, and from an order confirming a judicial sale of the mortgaged premises Charles G. Hoyt prosecuted a proceeding in error. *Affirmed.*

G. M. Johnston, for plaintiff in error.

E. O. Kretsinger, for Antoinette W. Little, defendant in error.

J. E. Cobbey, for Charles L. Schell, defendant in error.

RAGAN, C.

This is a proceeding in error instituted in this court by Charles G. Hoyt against Antoinette W. Little and others to review a judgment of the district court of Gage county confirming a judicial sale made of certain real estate in pursuance of a decree foreclosing an ordinary real estate mortgage thereon.

1. The first argument relied on here by the plaintiff in error is that the "order of sale was altered" after it was placed in the hands of the sheriff. The decree was rendered June 5, 1894, for $363. July 11, 1894, the order of sale was issued, which recited the rendition of the decree and the amount thereof and commanded the sheriff to cause the real estate to be appraised, advertised, and sold to satisfy such decree. On July 20, the

court still being in session, the plaintiff in the decree remitted from the mount found due him by the court the sum of $20. Subsequent to that time it is insisted that some one changed the order of sale by making it recite that the decree had been rendered for $343 instead of $363. Assuming that this alteration was made as alleged we cannot see how it prejudiced the plaintiff in error.

2. The second argument is that the sheriff advertised the real estate for sale under the decree prior to the time he received the order of sale. This is a mistake. The sheriff's advertisement is dated June 18, 1894, whereas the order of sale was issued on July 20, 1894. But the record shows beyond all controversy that dating the advertisement June 18 was a clerical error. It should have been July 18. The affidavit of the printer who published the notice of sale shows that it was published for the first time on July 20.

3. The third argument is that the court erred in not setting aside the sale, because plaintiff in error had on file with the clerk a request for a stay of execution at the time the order of sale was issued, which request had been filed within twenty days after the date of the rendition of the decree. Whether such a request for stay of execution was filed within twenty days after the rendition of the decree was a question of fact for the trial court and was by it decided against the claim of the plaintiff in error on conflicting evidence, and we cannot say that the conclusion reached by the trial court was wrong.

A second argument under this same heading is this: The decree, as already stated, was rendered June 5. July 20, 1893, a remittitur of $20 was entered. On that date the plaintiff in error filed a request for a stay of the execution of the decree, claiming that the remittitur of the $20 had the same effect as if the decree for $343 had been rendered on that date, and therefore the court erred in not setting aside the sale. We cannot agree

to this contention. The fact that a remittitur of $20 was entered on July 20 did not vacate the decree rendered on June 5, any more than a payment made on July 20 by the plaintiff in error would have vacated the decree. To stay the execution of the decree, plaintiff in error should have filed his request therefor within twenty days after June 5.

4. On July 20, 1894, the plaintiff in error filed in the district court a motion to set aside the default and decree entered against him and for leave to answer in the action. So far as the record before us discloses this motion is still pending in the district court. A fourth assignment of error is that the court erred in not setting aside the sale because of the pendency of this motion to vacate the decree at the time the order of sale was issued. If the plaintiff in the decree was willing to take the chances of having this real estate advertised and sold to satisfy his decree while a motion was pending in court to vacate it, and if a purchaser at the judicial sale was willing to take the chances of obtaining a good title to the real estate sold while said motion to vacate was pending, we do not see that this is a matter of which the plaintiff in error need complain. Certainly he was not and could not be prejudiced by the sale of the real estate while such motion to vacate the decree was pending.

5. A final argument is that the court below erred in not setting aside the sale because the order of sale did not run in the name of the state of Nebraska, and, therefore, did not comply with section 24, article 6, of the constitution, which provides that "All process shall run in the name of the state of Nebraska." But we think this order of sale complied with the constitutional provision. It is headed, "The State of Nebraska, County of Gage, to the Sheriff of said County," etc. (*Moore v. Fedewa*, 13 Neb. 381; *Alderman v. State*, 24 Neb. 97.) The judgment of the district court is

AFFIRMED.

GEORGE F. MUNRO, APPELLEE, V. DELIA A. CALLAHAN, APPELLANT.

FILED MAY 4, 1898. No. 8038.

1. **Vacating Judgment:** FRAUD. Neither an action under section 602 of the Code of Civil Procedure, nor an independent suit in equity, will lie to vacate a judgment, after the term at which it was rendered, on account of the fraud of the successful party, unless such fraud occurred or was practiced in connection with the trial of the case.

2. ———: PERJURY: MISTAKE. Equity will not vacate a judgment on account of an innocent mistake or want of recollection on the part of the plaintiff or his witnesses, nor, generally, on account of the perjury of other witnesses in the case.

3. ———: ———: EQUITY. But where it appears that the judgment depends for its support upon the evidence of the successful party given at the trial, and that the defeated party has a valid defense which he was prevented from establishing by reason of such perjury, and where he has been guilty of no negligence and has exhausted all his ordinary legal remedies for obtaining a vacation of such judgment, then equity, in a proper proceeding, will vacate such judgment and grant the defeated party a new trial of the action.

4. ———: ———: PLEADING. The allegations of the petition *held* to support a decree of the district court vacating a judgment at law procured by the perjury of the successful party on the trial.

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

The opinion contains a statement of the case.

John F. Cromelien and *William F. Gurley*, for appellants:

The petition is demurrable, because (1) a court of equity is without jurisdiction, there being an adequate remedy at law; (2) because it does not state facts sufficient to constitute a cause of action; (3) and because it shows that plaintiff has been guilty of gross negligence, which would deprive him of equitable relief. (*McClure v. Warner*, 16 Neb. 447; *Gibson v. Parlin*, 13 Neb. 292; *Burlington & M. R. R. Co. v. Kearney County*, 17 Neb. 511;

Cheney v. Dunlap, 27 Neb. 401; *Chicago, R. I. & P. R. Co. v. Shepard*, 39 Neb. 526; *Renfrew v. Willis*, 33 Neb. 98; *Scofield v. State Nat. Bank*, 9 Neb. 316; *Young v. Morgan*, 9 Neb. 169; *Gould v. Loughran*, 19 Neb. 392; *Buchanan v. Griggs*, 18 Neb. 121; *Hartford Fire Ins. Co. v. Meyer*, 30 Neb. 135; *Shane v. Clarke*, 3 Har. & M. [Md.] 101; *Clough v. State*, 7 Neb. 324; *Lamb v. State*, 41 Neb. 356; *Hill v. State*, 42 Neb. 503; *Cohn v. Goldman*, 76 N. Y. 284; *Wright v. Bourdon*, 50 Vt. 494; *McHenry v. Sneer*, 56 Ia. 649; *Thomas v. Markmann*, 43 Neb. 828; *Woodward v. Pike*, 43 Neb. 777; *Nicholson v. Patterson*, 6 Humph. [Tenn.] 394; *Harrison v. Harrison*, 1 Litt. [Ky.] 137; *Veech v. Pennebaker*, 2 Bibb [Ky.] 326; *Codde v. Mohiat*, 66 N. W. Rep. [Mich.] 1093; *Gray v. Barton*, 28 N. W. Rep. [Mich.] 813.)

J. H. Van Dusen and *W. S. Summers, contra.*

RAGAN, C.

June 25, 1892, on the complaint of Delia A. Callahan, George F. Munro was by the district court of Douglas county adjudged to be the father of the former's illegitimate child. From this judgment Munro prosecuted a proceeding in error to this court, which affirmed the judgment of the district court. (*Munro v. Callahan*, 41 Neb. 849.) Subsequently, on December 6, 1894, Munro filed a petition in the district court of Douglas county against Callahan reciting the record and proceedings of the former suit and alleging, among other things, that Callahan had procured said judgment by committing willful and corrupt perjury on the trial of that case, and prayed the court to set such judgment aside, and to grant him, Munro, a new trial. The district court, on hearing the action, set aside the former judgment and granted Munro a new trial, from which order Callahan has appealed. The bill of exceptions containing the evidence offered on the trial of this case in the district court has been quashed, and the sole question for our determination is whether the pleadings in this case will support the decree rendered therein.

1. To the petition filed by Munro on December 6, 1894, an answer was filed on the 15th of said month, and subsequently, on the 17th, an amended petition was filed. The record does not disclose that an answer was filed to this amended petition, but the case seems to have been tried on the amended petition. The decree recites that the case was heard upon the pleadings filed by the parties and upon the evidence, and counsel for the appellant have addressed their arguments to the sufficiency of the allegations of the amended petition. We shall, therefore, only inquire whether the allegations of the amended petition will support the decree under review. This amended petition, among other things, alleged: "Plaintiff further charges that said verdict so rendered in said action was obtained on the false, fraudulent, and perjured testimony of the said Delia A. Callahan; that said Delia A. Callahan on the said trial testified that the bastard child, of which she charged this plaintiff as being the father, was conceived on Easter Sunday, March 29, 1891, between the hours of 2 and 5 o'clock of the afternoon of said day; that said testimony was false and fraudulent; and said Delia A. Callahan, at the time of giving the same, well knew it so to be. Plaintiff alleges the fact to be that on the said Easter Sunday he did not see the said Delia A. Callahan. * * * Plaintiff further charges the fact to be that while he well knew that the said Delia A. Callahan had testified falsely on said trial, yet he did not, at the time, know where he could obtain the testimony to show that the said Delia A. Callahan had sworn falsely for the purpose of obtaining an unjust verdict against him; that he had no knowledge of where he could obtain the witnesses who knew and would testify that said Delia A. Callahan had sworn falsely in said action at law until long after the time had expired for filing a motion for a new trial in said cause; that this plaintiff now has such testimony and will produce the same in court." Since the bill of exceptions has been quashed the judgment is to be considered as if

it had been rendered by default, or on the district court's overruling a demurrer interposed to the amended petition by Callahan. In addition to certain special findings the tenth finding of the district court is as follows: "The court further finds that the general equities are with the plaintiff." We take it that within this general finding are included findings that Munro had a *prima facie* defense to the action brought against him by Callahan; that the defeat suffered by him in that action was not the result of any negligence or laches on his part; and that he had diligently pursued and exhausted all ordinary legal remedies provided by statute for obtaining a new trial of said action and for the vacation of said judgment. We think the petition sufficient to support these findings, as it sets out, in addition to what we have quoted, the filing by Miss Callahan in the district court of the complaint against Munro charging him with being the father of her illegitimate child; that he pleaded not guilty to such charge; was tried to a jury and found guilty; his filing of a motion for a new trial; the overruling of such motion; the judgment upon the verdict of the jury; the error proceeding to this court and the affirmance of the judgment of the district court.

2. Assuming that the general finding of the district court includes the finding that the judgment obtained by Miss Callahan against Munro was procured by her willful perjury, is the petition in that respect sufficient to support the finding? Is it good against a demurrer? When the nature of the case in which that judgment is rendered is considered, when it is remembered that the only issue in that case was whether Munro was guilty of being the father of Callahan's illegitimate child, that without her positive and unequivocal testimony that he was her child's father, she could not have procured the judgment she did, and that she, and she alone, could positively and certainly know who was the father of her child, we think the petition sufficient. In other words, from the very nature of the case, a finding that one is the

father of a bastard child rests, and must rest, where the issue is litigated, upon the testimony of the mother; and if this testimony is false and perjured, then a judgment based on such a finding is one procured by fraud practiced by the successful party. Section 602 of the Code of Civil Procedure provides that a district court shall have power to vacate a judgment rendered by it, after the term at which it was rendered, for fraud practiced by the successful party in obtaining the judgment. Certainly the obtaining of a judgment by willful and corrupt perjury is obtaining it by fraud within the meaning of this section of the Code. But this statute is merely a legislative adoption of the doctrine of the equity courts in force when it was enacted. Long before this Code was enacted the setting aside of a judgment procured by the fraud of the successful party and the granting the defeated party a new trial, were jurisdictions possessed and enforced by the courts of equity when it appeared that the defeated party had a valid defense which he had been prevented by the fraud of the successful party from making out, and where he had been guilty of no negligence or laches and had exhausted all his ordinary legal remedies for obtaining a vacation of such judgment. (3 Pomeroy, Equity Jurisprudence [2d ed.] sec. 1364; 2 Freeman, Judgments [4th ed.] sec. 489.) Whether, then, this action is based on section 602 of the Code of Civil Procedure, or whether it be regarded as an independent suit in equity, the jurisdiction and authority of the district court to grant Munro a new trial of the law action are undoubted.

The cases are not numerous in which a judgment has been vacated and the defeated party granted a new trial on the ground that the judgment was obtained by the perjury of the successful party; but this is perhaps because, from the very nature of the case, the existence of the fraud or perjury could not be established otherwise than by trying anew the issue tried and determined in the action in which the new trial is sought; and neither

the equity rule nor the Code authorizes the vacation of a judgment after the term at which it was rendered and the granting a defeated party a new trial for fraud practiced by him, save where the fraud was practiced in connection with the trial.

In *Laithe v. McDonald*, 12 Kan. 340, Laithe brought an action against McDonald for a failure to deliver goods which he charged were received by McDonald as a common carrier and lost through his negligence. McDonald answered by a general denial and did not appear further in the case. On the trial Laithe willfully, corruptly, and falsely swore that McDonald was a common carrier; had received the goods in that capacity and failed to deliver them; and that they were worth something over $5,000, for which sum he obtained a judgment. The supreme court of Kansas affirmed a judgment of the district court vacating the judgment in the law action on the ground that Laithe obtained it by fraud, the fraud consisting of his perjury. The court held that a defendant was not entitled to have a judgment vacated on account of any innocent mistake or want of recollection on the part of the plaintiff or his witnesses, nor even on account of the perjury of other witnesses in the case, but said that no party was bound to anticipate or suppose that the other party would commit willful and corrupt perjury, and that no party was bound to the exercise of extraordinary diligence in preparing to meet such perjury. It will be observed that in the case cited the judgment rested entirely upon the perjured testimony of Laithe, just as, in the case at bar, the judgment that Munro was the father of Callahan's illegitimate child depended entirely for support upon Callahan's evidence that he was the father of her child.

In *Graver v. Faurot*, 76 Fed. Rep. 257, the complainant brought a suit in equity, in a state court, in which he charged two defendants with fraudulently inducing him to purchase some worthless shares of corporate stock, and, in accordance with the old chancery practice, he

required the parties made defendants to answer certain allegations or interrogatories in the bill under oath. The parties made defendants answered. The answers were false and perjured and the complainant suffered a defeat. He subsequently discovered that the answers made by the defendants were false and then brought suit to vacate the judgment, and the court held that the making of the false answers was a positive and actual fraud which vitiated the decree. Here again the judgment complained of rested entirely upon the perjured testimony of the two defendants in whose favor the judgment was rendered. For a further discussion of the subject of the power of a court of equity to vacate a judgment obtained by fraud practiced by the successful party at the trial of the case in which it was rendered, see *United States v. Throckmorton*, 98 U. S. 61; *Ward v. Town of Southfield*, 102 N. Y. 293, 6 N. E. Rep. 660; *Asbury v. Frisz*, 47 N. E. Rep. [Ind.] 328.

Our conclusion therefore is that the petition charges that Miss Callahan procured a judgment determining that Munro was the father of her illegitimate child; that she obtained such judgment by her own false and perjured testimony, and that this was a fraud practiced by her in and about the trial; and, from the nature of the case, the judgment rests solely upon her evidence and the petition sustains the decree of the district court vacating that judgment, and such decree is accordingly

AFFIRMED.

IRVINE, C., expresses no opinion.

CHARLES BROWN, APPELLANT, V. JAMES MURPHEY ET AL., APPELLEES.

FILED MAY 4, 1898. No. 7936.

Quieting Title: EVIDENCE: REVIEW. The evidence in this case examined, found to sustain the finding of the district court, and to leave no question of law before the court for decision.

APPEAL from the district court of York county. Heard below before WHEELER, J. *Affirmed.*

George B. France and *Merton Meeker*, for appellant.

N. V. Harlan, contra.

IRVINE, C.

Omitting for the sake of clearness unessential details, although these are entitled to some evidential effect, the facts of this case are as follows: In 1879 Robert Black, a man seventy-five years of age, was the occupant of the southeast quarter of section 25, township 9 north, of range 1 west, in York county. The title was in the Burlington & Missouri River Railroad in Nebraska, and Black held it under a contract of purchase. In that year Charles Brown, whose wife was Black's niece, removed with his family from Missouri and began to live upon the land, remaining there with Black until shortly before this litigation began. In 1882 Black assigned to Brown his contract for the purchase of the land. Brown paid what was due thereon and obtained a deed. At the same time he made a mortgage thereon in part at least representing a loan whereby he secured the money wherewith he made the payment. He then conveyed to Black the west half. He retained the title to the east half, but executed to Black what was styled a lien contract, but which was in legal effect a mortgage to secure an annuity of $125 payable to Black during the latter's life. The first mortgage was thereafter foreclosed and the east half sold to satisfy it, and arrears of the annuity. Then Black conveyed the west half to Murphey. Two suits were then instituted, the precise nature of which is not indicated by the record before us. One of them was by Brown against Black and Murphey, apparently to set aside the deed to Murphey and establish a right in Brown to the land. The other was by Murphey against Brown, ap-

parently to quiet title and enjoin Brown from interfering with Murphey's possession. By stipulation these two actions were consolidated, amended pleadings being filed with Brown as plaintiff and Black and Murphey as defendants. By his amended petition Brown alleged that he had removed his family to Nebraska and gone upon the land in pursuance of a contract with Black whereby Brown was to farm the land and take care of Black during the lifetime of the latter, Black agreeing that he should have possession of the land and that on Black's death it should become Brown's absolutely. Further, that Black in pursuance of the contract had executed a will devising the land to Brown; that Black, by reason of age and consequent infirmities, had become incompetent to contract, and while so incompetent and through undue influence had been induced by Murphey to convey to the latter, Murphey having full notice of Brown's rights, and paying no consideration. It was also alleged that Murphey had induced Black to make an attempted revocation of the will. Brown asked that the title and right of possession be quieted in him and that Black and Murphey be enjoined from conveying or incumbering the land. By answer and cross-petition Black and Murphey denied the contract alleged by Brown, and alleged that whatever contract was made in 1879 was abrogated in 1882, when a contract was made whereby Brown was for his services to have the east half charged with an annuity. They also pleaded that the conveyance to Murphey was in pursuance of an agreement whereby Murphey was to have the land in consideration of his supporting Black and furnishing him a home. They further pleaded as an adjudication the foreclosure proceedings above mentioned, and which reached this court and were determined in 1893. (*Phœnix Mutual Life Ins. Co. v. Brown*, 37 Neb. 705.) They prayed that Murphey's title be quieted and Brown enjoined from interfering. A large volume of testimony was taken, but before final submission Black died. This fact was set up by supplemental peti-

tion, Brown asking to be decreed the owner in fee. More proof was taken, and finally a judgment was entered finding generally for the defendants and quieting title in Murphey. Brown appeals.

The appellant relies largely on the doctrine of *Bird v. Pope*, 73 Mich. 483. That case would entirely support his contention had he obtained in the trial court a finding of facts according to his pleadings; but unfortunately for that contention the findings were against him and we do not feel warranted in distributing them. On the other hand the appellee relies greatly on the effect of the foreclosure proceedings as an adjudication. By a reference to that case it will be found that the only questions there properly litigated were those affecting the validity and priorities of the several liens. The plaintiff's mortgage was established as the first lien, the annuity mortgage of Black as a second, upon the east half, and a subsequent mortgage executed by Brown was cut out altogether as to the west half, it being properly held that without regard to Brown's ultimate rights to that half the title was then in Black in fee, and that the rights of Brown under his contract and Black's will could not then be determined. That the decision went no farther is evident from the following language from the opinion: "This agreement, it appears from the answer of Brown, continues in full force and effect, and the will executed in his favor unrevoked. He is, so far as appears from the record, in a position, on the death of Black, to insist upon the conditions of that agreement." While that decision is not therefore, strictly speaking, *res judicata* as to the present controversy, it is quite probable that there was involved incidentally the determination of some issues of fact which would conclude the parties here as to such issues. We need not, however, enter into a very close analysis of the two cases for the purpose of applying the principle indicated, because the adjudication is pleaded on behalf of the defendants, and treating the whole matter as one at large, the evidence supports

the finding in their favor. The evidence for Brown would have supported a different finding; but Black's testimony, not given directly here, but introduced as given in the other case, is to the effect that when he assigned his contract to Brown, and took a reconveyance of the land in controversy, it was with the understanding that Brown was only to have the east half charged with the annuity. While all the evidence tends to confirm Brown's theory of the original agreement, this tends to show that it was superseded by another, whereby no vested interest was left in Brown as to the west half. The whole question of fact might be disposed of on the ground that the instruments whereby the later contract was effected or evidenced were introduced in evidence but do not appear from the bill of exceptions. This might be over-technical because their nature and contents are by the pleadings and other evidence sufficiently disclosed. There can be no doubt that Brown conveyed the west half to Black without any reservation in the deed; that he retained the east half, and by the mortgage referred to charged it with an annuity in Black's favor. It also seems that he had drawn and presented to Black a lease of the west half which Black refused to execute. All this tends to corroborate Black and sustain the finding. It being thus determined that Brown had no vested right in the land immediately in controversy, the issues as to Black's competency to convey to Murphey, the consideration for that conveyance, the circumstances and influences surrounding its execution, and Murphey's knowledge of the past relations between Brown and Black, all become immaterial. As to Black's competency to revoke the will in Brown's favor and to execute another in favor of Murphey, as he seems to have done, and the validity of the latter will, it is sufficient to say that, as Brown had no vested estate in or contractual right to the land, those questions could only properly arise on the proposition of one of the wills for probate in the proper forum.

Complaint is made of the action of the district court in allowing an injunction *pendente lite* against Brown, it being asserted that Brown was thus dispossessed before trial and without due process. We cannot notice this argument, because the record before us begins with the stipulation for consolidating the cases and the amended pleadings. The injunction was apparently allowed at a prior stage of the case. The pleadings on which it was based, the evidence on which it was granted, and the order allowing it are alike absent from the record.

AFFIRMED.

GERMAN NATIONAL BANK OF HASTINGS v. FIRST NATIONAL BANK OF HASTINGS ET AL.

FILED MAY 4, 1898. No. 7934.

1. **Insolvent Corporations**: PREFERRING CREDITORS. An insolvent corporation, merely because it is a corporation, is not prohibited from preferring particular creditors.

2. ———: TRUST FUNDS: RIGHTS OF CREDITORS. A corporation resolved to remove its stock of merchandise to a distant city and effect a consolidation there with another corporation. Afterwards its managing officers determined, in order to avoid trouble with creditors, to retain a portion of the goods, sell them, and apply the proceeds to the payment of debts. No trust was created and no provision made for the manner of the application of the proceeds. *Held*, That this arrangement did not constitute the goods a trust fund for the payment of creditors *pro rata*.

3. ———: SALE OF ASSETS: CONVERSION. The president, one director, and a stockholder who was not a director, acting without authority from the board of directors, sold all the visible assets of an insolvent corporation and turned the proceeds of the sale over to a single creditor, a corporation in which two of the persons so acting were interested and of which they were directors. *Held*, That such acts amounted to a conversion of the corporate property.

4. ———: ———: ———: RATIFICATION. Such acts were reported to a meeting of the board of directors, attended by four out of seven members, two of the four being directors of the preferred corporation also. No action was taken. *Held*, That this did not con-

stitute a ratification of the acts of the persons selling the assets and paying out the proceeds.

5. **Corporations:** VALIDITY OF TRANSACTIONS. If a transaction between two corporations, effected by the votes of directors common to both, can in any event be sustained, it must only be on an affirmative showing of good faith.

6. **Creditors' Bill.** An action in the nature of a creditors' bill may be maintained by a judgment creditor to reach any assets of the debtor subject to the payment of his debts, which cannot be reached by ordinary process of law.

7. ———: PARTIES: CONVERSION. So, where the debtor's property, subject to the payment of his debts, has been wrongfully converted by a stranger, the creditor may, by suit in the nature of creditors' bill, reach the debtor's cause of action for conversion.

8. **Actions:** ESTOPPEL: LACHES: PLEADING. Estoppel by laches in delaying the commencement of an action is not available as a defense unless pleaded.

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

Tibbets, Morey & Ferris, for plaintiff in error.

Capps & Stevens, John A. Casto, and *J. B. Cessna, contra.*

IRVINE, C.

The petition of the German National Bank against the First National Bank, Alonzo L. Clark, and Oswald Oliver alleged the existence of a corporation called the Burger-Alexander Hardware Company; that Clark and Oliver were stockholders therein and Oliver a director thereof, and that Clark and Oliver were also stockholders in and president and vice-president, respectively, of the defendant the First National Bank. These facts were admitted by the answer. The petition further alleged that the plaintiff was a judgment creditor of the hardware company and that an execution issued upon its judgment had been returned unsatisfied; that the hardware company had previously in the city of Hastings goods to the value of $20,000, which it was agreed between the officers thereof, the defendants and the plaintiff, should be sold and the proceeds applied *pro rata* to the satisfaction of

debts; that Clark and Oliver sold the goods for about $10,000 and turned the proceeds over to the First National Bank, which converted them to its own use. The prayer was that the defendants be required to account for the value of the goods and that they be required to pay to plaintiff its *pro rata* part thereof. After answers had been filed denying these allegations, except in the particulars above stated, the case was referred to John M. Stewart, Esq., to take the proofs and report findings of fact and conclusions of law. The referee found, in brief, that the hardware company had been organized in 1888 with a capital stock of $100,000, of which $70,000 was paid up; that it carried on a hardware business in Hastings until November, 1890, when it was by the stockholders resolved to ship its property to Denver and effect a consolidation with the Denver Hardware Company. January 1, 1891, merchandise inventoried at $53,000 was accordingly shipped to Denver, and the company received in exchange therefor stock in the Denver company of the par value of $53,000. Merchandise of the cost price of $28,000 was left in Hastings "to avoid trouble with and satisfy" the Hastings company's creditors, and as a provision for the payment of its debts, amounting to from $35,000 to $40,000. The company also had due it on book accounts about $32,000, most of which was uncollectible. The managing officers of the Hastings company then determined to keep its business open until a reasonable opportunity should occur to dispose of the goods so retained, "and under such arrangement it was provided that the fund derived from the sale of such merchandise and the collection of such accounts should be applied to the payment of its said indebtedness." Business was continued in Hastings until September, 1891, and during the interval the stock was partly replenished, but on the latter date it had been reduced to about $16,000, and was then sold to one Hamot for $9,600, which sum the referee finds was its fair market value. Notes given by Hamot in payment were turned over to the First National Bank

and their amount credited on the indebtedness of the hardware company to that bank. The notes have since been paid. The sale of the goods and the application of the proceeds were made by Clark and Oliver, together with Burger, the president of the hardware company, and this conduct "was acquiesced in by Samuel Alexander [another director of the First National Bank] and E. O. Alexander, directors of such company, together with said Burger and Oliver, when in session as a board of directors of such company, at the meeting of September 10, 1891, but no vote was taken or resolution adopted on that subject at such meeting or at any other time by such board of directors." The company had seven directors. Other facts are found which clearly enough show the insolvency of the hardware company at that time. It was further found that the plaintiff was notified by the managing officers of the hardware company of the arrangement for retaining the goods in Hastings for the purpose of paying debts and relied on its receiving its proportion of the proceeds of any sale. The First National Bank, through Clark, its president, had also notice of the arrangement, and that plaintiff was relying thereon. The stock in the Denver company became worthless through the subsequent failure of that company, and was sold on execution for a nominal sum. On these findings the referee based three conclusions of law: First, that the facts were insufficient to create a lien in favor of plaintiff on the goods or their proceeds; second, that the goods and proceeds were not held by the managing officers of the hardware company as a trust fund for plaintiff and other creditors, but that they had authority to sell the goods and apply the proceeds to the payment of the debt to the First National Bank, and in doing so they violated no right of plaintiff; third, that the defendants were entitled to judgment. Exceptions to the report were overruled and a judgment of dismissal entered. The plaintiff brings the case here by petition in error, alleging as error only that the conclusions of

law and judgment are not sustained by the findings of fact.

The conclusions of law are assailed in the briefs on several grounds. The first of these is that an insolvent corporation is without authority in any case to prefer particular creditors, its assets constituting a trust fund which must be devoted to the payment of creditors *pro rata*. Since the briefs were filed this doctrine has been by this court repudiated, and it has been held that the generally recognized right to prefer creditors is not defeated by the single fact that the debtor is a corporation. (*Shaw v. Robinson-Stokes Co.*, 50 Neb. 403.) Next it is claimed that there was here an actual appropriation of certain property for the payment of creditors *pro rata*. The findings do not support that theory. It would seem that it was contemplated that the assets left in Nebraska would prove sufficient to pay all debts, but there was not any specific appropriation thereof for the payment of debts in any particular manner. The business was kept in operation for many months, and from the findings it is evident that a considerable quantity of goods must have been in the meantime disposed of in the usual course of trade before the final sale was made. No provision was made for the preservation of the fund so derived or for its distribution among creditors, and it is at least inferable that the arrangement was merely to so retain the goods here and so conduct the business for the satisfaction of the debts in the ordinary way and as a going concern usually acts. While it is found that the plaintiff was informed of the arrangement and relied on the application of the proceeds of the goods to the payment of creditors *pro rata*, there was nothing in the facts to warrant it in so relying. No assignment was made. No trust was created. No promise is shown, even, to so apply them. All that the facts found warrant is that the business was not to be closed, but that the concern was to be kept going until the stock was disposed of, and that the proceeds were to be used to pay debts—not in any par-

ticular proportion, but as the law permitted them to be paid.

The next objection is based on the manner in which this preference to the First National Bank was effected, or sought to be effected. This objection we think well taken, but not for all the reasons advanced in argument. For instance, we are not prepared to hold that the rule which forbids directors to prefer debts owing to themselves, or debts for which they are personally liable,—a rule enforced and illustrated by *Ingwersen v. Edgecombe*, 42 Neb. 740, *Tillson v. Downing*, 45 Neb. 549, and *Stough v. Ponca Mill Co.*, 54 Neb. 500,—extends so far as to broadly, and in all cases, prohibit directors from preferring a debt owing to another corporation in which they happen to be stockholders. We pass that question as unnecessary to a decision of this case. By recurring to the findings of fact it will be observed that what was here done was not done by the corporation at all, nor by its board of directors, but was the act of the president, a director and a stockholder, the two last mentioned being officers of the preferred corporation. It needs no argument to prove that these men had no authority to make a sale of all the corporation's visible assets and turn the proceeds over to a single creditor. Their acts amounted to a conversion of the property, pure and simple. The bank had notice of the facts and by receiving the proceeds became a party to the wrong. (*Cole v. Edwards*, 52 Neb. 711.) The corporation did not ratify this act. Four directors out of seven met. The facts were reported. The referee finds that they acquiesced, but they took no vote and passed no resolution; in other words, they did nothing. As a board of directors they could have done nothing which would bind the corporation, because, of the four present, two were directors of the preferred corporation; their votes, or the vote of one of them, would be essential to action, and a resolution so adopted would be voidable. (*Metropolitan Telephone & Telegraph Co. v. Domestic Telegraph & Telephone Co.*, 14 Atl. Rep. [N. J.] 907; *Smith v.*

Los Angeles Immigration & Land Co-operative Ass'n, 12 Am. St. Rep. [Cal.] 53.) It is true that there is a conflict of authority as to the character of an act moved by the vote of common directors of two contracting corporations, but the question discussed is not whether such contracts are valid, for it is conceded they generally are not. The question is whether they are always voidable at the election of the stockholders, or whether they may be sustained on an affirmative showing of fairness and good faith. Even if the latter rule be conceded to be the correct one, there are no findings here to sustain the act if a ratification had been attempted. The corporation simply did not act at all, and was not in a position at the only meeting held to have bound the stockholders. What then follows? If A is in debt to B and C seizes A's property and converts it to his own use, must B permit the property, which he had a right to resort to for payment, to be diverted and satisfaction thereby prevented, simply because A does not see fit to pursue it? When a creditor is unable to reach the debtor's property by execution, he may follow it by creditors' bill until it reaches the hands of an innocent purchaser for value. (*Union Nat. Bank of Chicago v. Douglas*, 1 McCreary [U. S. C. C.] 86; *Railroad Co. v. Howard*, 7 Wall. [U. S.] 392.) It is not only in the case of a fraudulent transfer that such a proceeding will lie, but the right extends to all cases where a resort to equitable remedies or procedure becomes necessary to obtain satisfaction of a judgment. By creditors' bill property may be reached which has been conveyed away by contract against public policy. The debtor in such case stands in the same position as a fraudulent grantor. (*Hall v. Hart*, 52 Neb. 4.) Again, it has been held that a creditor may in such manner reach a debtor's right of action for an injury to property to which the creditor had a right to look for satisfaction. (*Hudson v. Plets*, 11 Paige Ch. [N. Y.] 180.) Now in this case all the property to which the plaintiff could have resorted was seized by the defendants. Surely plaintiff

has a right to pursue it. The fact that it was appropriated to the payment of a debt is immaterial. The debtor made no such appropriation. It was the wrongdoers themselves who so appropriated it. Creditors cannot be permitted to obtain payment by an unlawful seizure of the debtor's property. (*Murphy v. Virgin*, 47 Neb. 692.) The conclusions are, therefore, not warranted by the findings in so far as they hold that Clark and Oliver had authority to turn the notes over to the First National Bank and that plaintiff is not entitled to relief.

Defendants contend that plaintiff is estopped from maintaining the action. No such defense is pleaded and the referee finds no facts warranting the argument made on the question. On the contrary, he finds that the plaintiff proceeded with due diligence and that the defendants have suffered no injury by any delay.

REVERSED AND REMANDED.

RAGAN, C., not sitting.

WILLIAM D. HASTINGS ET AL. V. JOHN BARND ET AL.

FILED MAY 4, 1898. No. 8071.

1. **Banking Corporations**: LIABILITY OF STOCKHOLDERS: CONSTITUTIONAL LAW. The requirements of constitution, article 11, section 4, under the title "Miscellaneous Corporations," that, before enforcement of individual liability of stockholders, there must be judicially ascertained the indebtedness proposed to be enforced, and that the assets of the corporation be first exhausted, *held* applicable to the stockholders' liability in banking corporations, as described in section 7 of the same article.

2. ——: ——: ——: ACTIONS: PARTIES. The liability of stockholders in banking corporations under section 7 aforesaid must be enforced by or on behalf of all creditors, and against all stockholders liable. A suit by and on behalf of one out of many creditors against certain selected stockholders will not lie.

3. ——: ——. *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353, followed.

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

The opinion contains a statement of the case.

William Gaslin, for plaintiffs in error:

The constitutional liability of a stockholder of a banking corporation may be enforced as a direct liability in a suit against him alone by a single creditor. (*White v. Blum*, 4 Neb. 556; *Smith v. Steele*, 8 Neb. 115; *Cady v. Smith*, 12 Neb. 629; *Doolittle v. Marsh*, 11 Neb. 245; *Coy v. Jones*, 30 Neb. 798; *Flash v. Conn*, 3 Am. & Eng. Corp. Cas. [Fla.] 28; *Culver v. Third Nat. Bank*, 64 Ill. 532; *Wincock v. Turpin*, 96 Ill. 143; *Buchanan v. Meisser*, 105 Ill. 659; *Potter v. Stevens Machine Co.*, 34 Am. Rep. [Mass.] 431; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. [N. Y.] 473; *Grund v. Tucker*, 5 Kan. 70; *Slee v. Bloom*, 19 Johns. [N. Y.] 456; *Nathan v. Whitlock*, 9 Paige Ch. [N. Y.] 159; *Schalucky v. Field*, 16 N. E. Rep. [Ill.] 904; *Briggs v. Penniman*, 8 Cow. [N. Y.] 395; *Van Hook v. Whitlock*, 3 Paige Ch. [N. Y.] 415; *Moss v. Oakley*, 2 Hill [N. Y.] 265; *Arenz v. Weir*, 89 Ill. 25; *Fuller v. Heath*, 89 Ill. 310; *Corwith v. Culver*, 69 Ill. 502; *Thompson v. Meisser*, 108 Ill. 359; *Queenan v. Palmer*, 117 Ill. 626; *Eames v. Doris*, 102 Ill. 350; *Curtis v. Leavitt*, 15 N. Y. 44; *State v. Sherman*, 22 O. St. 411; *Paine v. Stewart*, 33 Conn. 519; *Perry v. Turner*, 55 Mo. 425; *Young v. Rosenbaum*, 39 Cal. 654; *Norris v. Johnson*, 34 Md. 485; *Garrison v. Howe*, 17 N. Y. 458; *Atwood v. Rhode-Island Agricultural Bank*, 1 R. I. 376; *Marion Township Union Draining Co. v. Norris*, 37 Ind. 425; *Lane v. Harris*, 16 Ga. 222; *Dozier v. Thornton*, 19 Ga. 325; *Windham Provident Insitution for Savings v. Sprague*, 43 Vt. 509; *Norris v. Wrenschall*, 34 Md. 492; *Conant v. Van Schaick*, 24 Barb. [N. Y.] 87; *Conklin v. Furman*, 57 Barb. [N. Y.] 484.)

It was unnecessary for plaintiffs to reduce their claims to judgment before bringing suit against stockholders.

(*Shafer v. Moriarty*, 46 Ind. 9; *Strong v. Wheaton*, 38 Barb. [N. Y.] 616; *State v. Cadwell*, 44 N. W. Rep. [Ia.] 702; *Ryan v. State Bank*, 10 Neb. 527; *Commercial Nat. Bank v. Gibson*, 37 Neb. 765; *Howell v. Roberts*, 29 Neb. 483; *Coy v. Jones*, 30 Neb. 798; *Globe Publishing Co. v. State Bank*, 41 Neb. 175; *Richards v. County Commissioners, Clay County*, 40 Neb. 51; *Mexican Nat. R. Co. v. Jackson*, 32 S. W. Rep. [Tex.] 230; *Huntington v. Attrill*, 146 U. S. 657; *Wilson v. Coburn*, 35 Neb. 530; *Garmire v. Willy*, 36 Neb. 340; *Glade v. White*, 42 Neb. 336; *In re Petition of Attorney General*, 40 Neb. 405.)

Greene & Hostetler and *W. L. Hand, contra.*

IRVINE, C.

William D. Hastings and another, partners doing business under the name of Hastings & Son, sued John Barnd and several others alleged to be stockholders of the Commercial & Savings Bank, a corporation, seeking to enforce an individual liability of the stockholders. Two of the defendants demurred to the petition and their demurrer was sustained. The others answered and, issues having been joined, the cause was as to them submitted to the court on a stipulation of facts and the court found in favor of the defendants. A judgment of dismissal was accordingly entered and the plaintiffs bring the case here for review. A consideration of the sufficiency of the petition is all that is required for a disposition of the case. It alleges that the Commercial & Savings Bank was a corporation organized under the laws of Nebraska and engaged in the banking business; that in 1892 it became indebted to the plaintiffs in the sum of $796.16 for money deposited; that the bank has been declared insolvent and a receiver appointed; that the defendants were stockholders at the time plaintiffs' debt was contracted and subsequently, the petition setting out the amount of stock held by each. It further alleged mismanagement by the officers leading to the insolvency.

It appeared inferentially that there were creditors other than plaintiffs. It was not alleged that the claim of the bank had been ascertained either by reducing it to judgment or by proving it and having it allowed by the receiver. It was not alleged that the corporate assets had been exhausted. The attempt was to recover upon the additional liability imposed by constitution, article 11, section 7, under the head of "Miscellaneous Corporations," which is as follows: "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all liabilities accruing while he remains such stockholder." Counsel for plaintiffs, with characteristic industry and ability, has marshaled a formidable array of authorities in support of his theory that the liability so imposed may be enforced at a suit of a single creditor against such stockholders as he sees fit to sue, as a direct liability, without first reducing his claim to judgment against the corporation and exhausting its assets. Since the briefs were prepared every phase of the questions arising has in some form been considered by this court and the uniform holdings have been contrary to plaintiffs' theory. Constitution, article 11, section 4, provides: "In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." These two provisions must be construed together. (*State v. German Savings Bank*, 50 Neb. 734.) Section 4 fixes the liability of subscribers and transferees of stock for unpaid subscriptions, and applies to all classes of corporations. Section 7 is a special provision confined to banks and extends the liability by superadding an additional liability to the amount of the stock

against those who were stockholders when a debt accrued. Under section 4 it is necessary that the corporate property should be exhausted and the indebtedness ascertained, before the liability can be enforced. "Ascertained," as here used, means judicially ascertained, that is, by judgment or its equivalent. (*Commercial Nat. Bank of Omaha v. Gibson*, 37 Neb. 750; *Globe Publishing Co. v. State Bank*, 41 Neb. 175; *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353; *State v. German Savings Bank, supra.*) It would be strange if the liability for an unpaid subscription could only be enforced under such circumstances and a liability for an additional amount enforced directly without complying with any of those conditions. We are satisfied that such is not the proper construction, but that, on the other hand, the liability created by section 7 is simply an additional burden imposed on stockholders of banks, to be enforced in the same way and under the same conditions as that fixed by section 4. That requires a previous judicial ascertainment of the debt, an exhaustion of the corporate assets, and a suit by or on behalf of all creditors, or by the receiver for them, and against all stockholders, in order that the debts and liabilities may be marshaled and creditors and stockholders alike protected. (*Farmers Loan & Trust Co. v. Funk, supra; Van Pelt v. Gardner*, 54 Neb. 701; *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593.) That the limitations of section 4 apply also to section 7 was expressly held in *Farmers Loan & Trust Co. v. Funk, supra*, and *German Nat. Bank v. Farmers & Merchants Bank, supra.* The plaintiffs did not by the averments of their petition make a case under the section relied on and the judgment of the district court was correct.

AFFIRMED.

PONCA MILL COMPANY ET AL. V. S. P. MIKESELL.

FILED MAY 4, 1898. No. 8077.

1. **Corporations**: RECEIVERS: CAUSE FOR APPOINTMENT. A receiver will not be appointed for a corporation, at the instance of a stockholder, merely because of a difference of opinion between him and the officers or the holders of a majority of the stock as to the proper policy of managing the corporate affairs; but one will be so appointed when it is shown that the officers and the holders of a majority of the stock are fraudulently mismanaging the corporate business, converting its property to their individual use, and abusing their powers to the injury of other stockholders.

2. ———: ———: ———: PROCEDURE. The wrong-doers being in control of the corporation, both through its stock and by being the officers thereof, it is not essential for a complaining stockholder to show as a condition of maintaining his suit that he first made demand on the officers to proceed on behalf of the corporation itself to remedy the wrongs complained of.

3. ———: ———: ACTION BY STOCKHOLDER: JOINDER OF CAUSES. A stockholder, seeking the appointment of a receiver because of mismanagement and fraud by the majority stockholders and officers, alleged among other wrongful acts that the officers had conveyed away corporate property in secret trust for one of their number and for a grossly inadequate price; that plaintiff had been compelled to resort to a stockholder's suit to set aside the conveyance, and that the court had imposed as a condition that the corporation repay a certain sum of money, giving him the right to do so if the corporation refused, and a consequent lien upon the property to indemnify him; that he had been compelled to make the payment. He asked the establishment and foreclosure of the lien. *Held*, That the two transactions were connected with the same subject of action, within the meaning of section 87 of the Code of Civil Procedure, and could be joined.

4. ———: ———: ———: PARTIES. In such an action the corporation itself is the essential defendant. It is not necessary to join all the directors.

ERROR from the district court of Dixon county. Tried below before ROBINSON, J. *Affirmed.*

Gantt & Welty, for plaintiffs in error.

No appearance for defendant in error.

IRVINE, C.

This is an appeal from an order appointing a receiver for a corporation at the instance of a stockholder. The order also establishes and forecloses a lien to the plaintiff upon certain of the corporate property. The defendants demurred to the petition and the demurrer having been overruled, they refused to plead further and the order complained of was then entered. The principal ground of demurrer was that the petition did not state facts sufficient to constitute a cause of action.

The petition alleges that the Ponca Mill Company is a corporation organized under the laws of this state for the purpose of conducting a milling business, with a capital stock of $40,000, divided into eighty shares; that the plaintiff owns twenty-six shares, the defendant S. K. Bittenbender forty-one shares, and the defendant John Stough two shares; that Stough is president and Bittenbender secretary and treasurer. There are averments that Stough was unlawfully made president for the purpose of carrying out schemes to defraud others, but such averments are not specific and may be disregarded. It is then alleged that the officers named have for years failed to make a statement of the condition of the corporation and to publish notices of indebtedness and have refused to give information which would enable others so to do; that they have seized corporate property and converted it to their own use; that they have surreptitiously let contracts to themselves and appropriated to their own use profits realized therefrom; that Bittenbender has borrowed money for the corporation at eight per cent interest and charged the corporation ten per cent therefor; that Bittenbender and Stough made a pretended conveyance of certain corporate property of the value of $10,000 to one Jordan for the sum of $2,110, under a secret trust in Bittenbender's favor, that plaintiff was compelled to resort to the courts to have such conveyance set aside, that a decree was rendered canceling the conveyance on

plaintiff's or the corporation's paying to Jordan $1,138, the decree providing that if the corporation should fail to make the payment plaintiff might do so and would then have a lien on the property for the advancement; that the corporation failed to make the payment and that plaintiff, to protect the corporate interests, was compelled to do so; that all the assets, books, and accounts of the corporation are in the possession of Bittenbender, who refuses to permit plaintiff to inspect the same; that certain buildings, including the mill of the corporation, were destroyed by fire and that the officers have failed to repair and have allowed the property to become dilapidated, and that certain franchises owned by the corporation have become endangered by such neglect and mismanagement; that Stough and Bittenbender have executed a mortgage to Bittenbender on the company's property, ostensibly to secure $3,400, and that the company is not in fact indebted to Bittenbender, but that the mortgage was executed to defraud the stockholders; that the business of the company is managed and conducted by Stough and Bittenbender, the president and the secretary and treasurer.

We think this petition shows sufficient ground for the appointment of a receiver. Counsel in the brief discuss *seriatim* the different charges made in the petition and argue that no one charge is sufficient. Possibly this may be true, but the petition cannot be considered so disconnectedly. Each act of fraud or mismanagement on the part of the officers is not alleged as a cause of action in itself, but they are all alleged to show a continuous and systematic course of mismanagement and fraudulent acts by the managing officers tending to the injury of the corporation and the stockholders. It is also said that the petition does not show that any effort has been made to obtain relief through the corporation itself. To maintain what is called a stockholder's bill it is generally, but not always, necessary to aver a demand upon the officers to act and a refusal by them to do so. The

exception may be said to extend to those cases where it is evident from the other averments of the bill that such a demand is impossible or would be unavailing. Thus, where it was averred that all the officers had absconded, the usual showing was held unnecessary. (*Wilcox v. Bickel*, 11 Neb. 154.) Where the corporation is under the control of the wrong-doers it is not necessary to request them to sue themselves. (*Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374; *Heath v. Erie R. Co.*, 8 Blatch. [U. S. C. C.] 348.) In this case the averments were that those who would be defendants in a case by the corporation to restrain the threatened wrongs and to recover for those consummated, were themselves owners of a majority of the stock and were in possession of the property and in control of the corporation. Such a remedy would clearly be unavailing. Among the enumerated cases wherein receivers are by the Code of Civil Procedure authorized are all those where receivers have heretofore been appointed by the usages of courts of equity. (Code, sec. 266.) Among such cases are those where the property of a corporation is being mismanaged and is in danger of being lost through the collusion and fraud of the officers, especially where they are using it for their individual ends to the detriment of the stockholders. (*Haywood v. Lincoln Lumber Co.*, 64 Wis. 639.) In all such cases the courts should proceed with caution and carefully avoid having their process made use of for the purpose merely of directing corporate action adversely to the policy of the majority stockholders and that of the regularly chosen officers. That is to say, that stockholders must not be permitted to invoke the power of the court through the appointment of a receiver simply to enforce their own ideas of the conduct of affairs against the majority or the duly constituted officers. Matters of corporate policy must be determined by the corporation itself. On the other hand, when it clearly appears that the dispute is not of that character, but arises out of an attempt of the officers or the majority stockholders

to abuse their power by misappropriating the corporate property, by using the corporate means for their individual profit, or by so acting as to wilfully and wrongfully jeopardize the corporate business, then the courts should not hesitate to afford relief. No one is more helpless, unless aided by the arm of the law, than the holder of a small portion of the stock of a corporation, when the large stockholders combine to advance their private interests at the expense of the corporation. Here the demurrer admits, for the purpose of the proceeding, the grossest breaches of trust and dishonesty on the part of the officers, and that a single man, one of the wrongdoers, holds such a proportion of the stock that others are helpless and cannot obtain relief through the usual channels.

Another ground of demurrer was that two causes of action are improperly joined. This is because the plaintiff alleged the proceedings to set aside the conveyance to Jordan and the lien resulting to himself, and prayed a foreclosure. The Code of Civil Procedure provides (sec. 87) that the plaintiff may unite several causes of action relating to "the same transaction or transactions connected with the same subject of action." The vagueness of that language has caused the profession much difficulty; but the facts out of which the lien arose embrace a part of the fraudulent conduct justifying interposition through a receivership; they resulted in giving plaintiff a special interest aside from that of a stockholder, and it would certainly seem that the language quoted is broad enough to cover such a state of facts. Moreover, only one cause of action is in form stated. If two were in fact included in the averments, the remedy was by motion to strike out surplusage or to require the two causes to be separately stated. A demurrer does not reach the commingling of two causes of action in a single count, if they be, under the Code, of such character that they may be joined.

The remaining ground of demurrer was a defect of

parties. On this we understand the argument to be that there were other directors than Stough and Bittenbender and that they should have been joined. It is not disclosed that there were other directors. On the other hand it is averred that Stough and Bittenbender had entire possession and control of the corporate property and affairs. We know of no rule requiring that in such cases the officers must be made defendants. The essential party is the corporation itself. (*Elwood v. First Nat. Bank*, 41 Kan. 479; 5 Thompson, Corporations sec. 6874.)

AFFIRMED.

GERMAN NATIONAL BANK OF LINCOLN AND GEORGE F. H. SCHWAKE V. JOHN KAUTTER ET AL.

FILED MAY 19, 1898. No. 8032.

1. **Attachment:** CONSTRUCTIVE SERVICE: SALE OF RESIDENT'S PROPERTY: ATTACK UPON JUDGMENT. An adjudication by which the *res*, on which a writ of attachment had been levied, was sold, and the proceeds appropriated to the satisfaction of the debt in suit, where the ground of attachment stated in the affidavit filed was the non-residence in the state of the debtor, and he was not otherwise served than constructively, and did not appear in the suit, may be by him attacked and shown to be void for the reason that he was, at the time of the inception and prosecution of the suit, a resident of the state and then therein, in a subsequent litigation between him and the plaintiff in the attachment suit wherein the adjudication in said suit is invoked as a defense to the demand of the debtor in the attachment on the plaintiff therein. This may be done notwithstanding the record of the attachment suit on its face shows all acts and facts to constitute it correct and regular and with jurisdiction.

2. ———: ———: FALSE AFFIDAVIT: VOID JUDGMENT. An attachment based on an affidavit of the non-residence of the debtor, if such statement is untrue, is wrongful and the proceedings void.

3. **Pleading.** The cross-petition herein *held* sufficient as a statement of a cause of action for the relief demanded, and also for that afforded against an attack by demurrer *ore tenus*.

4. **Assignments of Error.** Assignments of error in this, a trial to the court without a jury, of the admission of testimony, of improper

cross-examination and incorrect order of introduction of evidence, examined and determined without force.

5. **Sufficiency of Evidence: REVIEW.** Evidence *held* sufficient to sustain the judgment against one of the plaintiffs in error, and insufficient as to another.

ERROR from the district court of Seward county. Tried below before BATES, J. *Reversed in part.*

Boehmer & Rummons and *Abbott, Selleck & Lane*, for plaintiffs in error.

Norval Bros., D. C. McKillip, and *J. C. Johnston, contra.*

HARRISON, C. J.

In the petition filed in this action, commenced for Ernest Bolse in the district court of Seward county, it was pleaded that on February 27, 1889, he executed and delivered to John Kautter a promissory note in the sum of $1,138.36, payable April 1, 1894, and he and his wife, as security for the payment of the note, at the same time executed and delivered to the said party a mortgage on certain land in Seward county, Nebraska; that thereafter the note was by the payee indorsed and transferred to the German National Bank of Lincoln; that the petitioner paid at various dates the sums of interest due on the note, and on May 3, 1894, paid to the bank the whole amount of principal and interest then due and received from it the note and mortgage, the note marked paid with a stamp then in use by the bank for cancellation of paid instruments of indebtedness; that the pleader had offered and tendered payment of the fees and expenses of the execution, etc., of a release of the mortgage, but had been by the bank and other parties apparently interested in the matter refused the satisfaction or release. He impleaded with the bank John Kautter, Henry Schwake, George F. H. Schwake, George T. Meier, and Frank A. Boehmer, as each having or asserting an interest in the note and mortgage as assignee, purchaser, or pledgee

thereof, or otherwise. He also stated that he had sold the land described in the mortgage and could not complete the sale by reason of the non-release of the mortgage. He prayed that the parties named be ordered to release the mortgage of record or that it be decreed canceled. All the defendants except Kautter filed a joint answer, in which they disclaimed any interest in or to the real estate described in the petition or to the stated mortgage thereon.

For Kautter an answer was filed, and subsequently an answer and cross-petition. His first answer was during the course of the proceedings, on motion of some of the parties to the action, stricken from the files. In the answer and cross-petition Kautter both admitted and pleaded affirmatively the execution, etc., of the note and mortgage referred to in the petition; also admitted that the mortgage was unreleased of record. It was further pleaded in such cross-petition that the note and mortgage were by Kautter delivered to the bank as collateral security for the payment of his indebtedness thereto. This was for moneys loaned to him at different times, in the aggregate $238. That at some date in the month of March or April, 1891, he gave to the bank a promissory note for the total sum of the loans, due three months after date, and the bank retained the collaterals, and, soon after, he went to the state of Kansas to attend to some business; that he was not again at the bank until June, 1893, at which time he asked to settle his indebtedness and that he receive the Bolse note and mortgage and the bank account for the interest, if any, collected thereon. (The interest on the Bolse note was payable annually.) He was then informed by the bank that the Bolse note and mortgage had been sold and the proceeds of the sale applied in payment of the indebtedness—the $238. He further pleaded that on or about December 9, 1891, the bank made a pretended sale and transfer of the note and mortgage; that the same was done with the intent to cheat and defraud him and to wrongfully and fraudulently de-

prive him of his interest in the note and mortgage; that Frank A. Boehmer, Henry Schwake, George F. H. Schwake, and George T. Meier, who each during the life of the mortgage had appeared of record as an assignee and apparent purchaser thereof, had none of them paid any consideration for the note and mortgage, but had figured as such purchasers pursuant to an agreement and intent to aid the bank in its fraudulent purpose relative to the pleader's rights in the instruments apparently transferred. He alleged further that if Bolse had paid the amount due on the note for $1,138.36 to the bank, it was done with a full knowledge of Kautter's continued interest or right thereto and therein, and also of the sale by the bank of the note and mortgage and its purpose with which it made the transfer. The prayer of the cross-petition was that the amount due on the note and mortgage might be ascertained, and after a deduction therefrom of the sum of the pleader's indebtedness to the bank, the balance be adjudged a first lien against the land described in the petition in the action; that if it should appear that the money due on the note and mortgage had been paid to the bank, a judgment be accorded the cross-petitioner against the bank for the amount his due, and also against any other of defendants who were shown to have participated with the bank in the wrongful and fraudulent purposes and acts relative to the rights of the pleader.

To the extent the rights of Ernest Bolse, the original plaintiff, were involved, the issues were tried and determined and the cause was continued. Time was asked by and allowed to the bank and others, against whom the cross-petition declared and demanded affirmative relief, to answer its allegations. The bank, in answer to the cross-petition, admitted the creation and existence of the note and mortgage by Bolse in favor of the cross-petitioner and alleged that the latter, on March 16, 1890, executed and delivered to the bank a promissory note in the sum of $240.75, due June 16, 1890, which was not paid at

its maturity and was unpaid on August 3, 1891; that on the last mentioned date the bank caused an action to be commenced in the county court of Lancaster county to recover the amount due it, the indebtedness evidenced by the note to which we have last referred, and also caused a writ of attachment to issue in said action on the ground that John Kautter was a non-resident of the state of Nebraska; that the writ of attachment was levied on the note and mortgage of Bolse to the defendant in the attachment suit; that such action proceeded regularly as provided by law to its termination, inclusive of a public sale of the note and mortgage under order of the court and the application of the proceeds to the payment of the note on which the attachment cause was predicated. It was further answered that no proceeding had been had or taken to modify, reverse, change, or annul the adjudication of the county court. Frank A. Boehmer, in answer to the cross-petition, admitted the execution and delivery of the $1,138.36 note, and its accompanying mortgage by Bolse to Kautter; alleged his purchase thereof in good faith at the sale by the officer, and denied generally all other allegations of such pleading. Henry Schwake, George F. H. Schwake, and George T. Meier each admitted the $1,138.36 note and mortgage as pleaded, and alleged its *bona fide* purchase for a valuable consideration, and its ownership for a time; and for further answer denied the other statements of the cross-petition.

For the cross-petitioner there was filed a reply to the answer of the bank, in which it was stated that the bank and the other parties, who, during the life of the $1,138.36 note, became apparently its owners and holders, and who were either officers or employés of the bank or were of its stockholders, combined or planned to cheat or defraud the cross-petitioner and used the suit by attachment as a means through which to effect the purpose, and thereby procured a sale of the note and mortgage to be made, at which a purchase thereof was effected for the bank for

the sum of $322, when their value was more than $1,300; that at the time the attachment suit was begun and during its progress, the pleader was a resident of Seward county, Nebraska, which fact and his whereabouts at the time were well known to the bank and the other parties interested, but they purposely avoided any notice to him of the action, attachment, and sale thereunder, and he had no notice thereof, and that the county court was without jurisdiction to act in the suit.

A jury was waived and there was a trial of the issues to the court. The court determined as matters of fact that Kautter borrowed of the bank the sum of $240.75 on March 16, 1890, and as evidence of the indebtedness so created executed and delivered to it a promissory note, also turned over to it the $1,138.36 note and mortgage as collateral security for the payment of his debt; that several sums at different times were paid by Ernest Bolse to the bank on the mortgage note, and the balance due thereof, $1,224, was paid May 3, 1894, to the bank; that at the time of the suit and attachment and the pretended sale of the note and mortgage under order of the court in such suit "The said cross-petitioner, John Kautter, was an actual *bona fide* resident of Seward county, Nebraska, and still resides therein, and that he had no notice whatever of the pendency of said action, and that no notice or summons was served upon him in said action; and the court further finds that said pretended action and attachment, and the pretended sale of said note, was collusive and fraudulent and was made for the purpose of cheating and defrauding said cross-petitioner, John Kautter, out of said note and mortgage."

Judgment was rendered against the bank and George F. H. Schwake for $1,198.66 and costs, to reverse which is the purpose of the present proceeding in this court.

We deem it proper here to notice some of the facts in connection with the findings of the court relative thereto. There was ample evidence of the fact that the note and mortgage were in the possession of the bank as collateral

security for the payment of the indebtedness of the payee thereof to the bank. Of the testimony relative to the residence of John Kautter, it may be said to have been established that he was an unmarried man and during several years prior to the sale of his farm in Seward county to Bolse, lived thereon; after the sale he kept his trunk, some of his belongings and effects at the house of Frank Thomas, in Seward county, this state; that he had some business interests or affairs in Kansas and would go there and stay during some months of probably each year; that at one time when in Kansas he voted at a presidential election; that he always returned to Seward county as his home and was there several months of each year, with the exception possibly of one; that at the time of the commencement and pendency of the attachment suit in Lancaster county he was in Seward county. All the facts and attendant circumstances considered, there was sufficient testimony to sustain the finding of the court that the cross-petitioner was a resident of Seward county. There was no other than constructive service in the attachment suit. There was also testimony in support of a determination that the mortgage note was at the time of its sale in the attachment proceedings of the value of the amount shown on its face. It was also of the testimony that the attorney who commenced and prosecuted the action and attachment for the bank then had the mortgage note in his possession for collection and that it was levied on in his office; that he purchased it at the sale for $322 and held it thereafter for thirty or sixty days; then, as he states, he needed some money and turned it back to the bank and received of the bank $322, the same amount he paid for it at the sale. The foregoing statements in relation to the evidence and facts of the case we deem sufficient, except to the extent they may be further noticed in discussion of the points of the arguments made by counsel for the parties.

It is contended for the plaintiffs in error that the demand for relief by the cross-petitioner involves a col-

lateral attack on a domestic judgment or adjudication, the judgment in the attachment suit; and while it was in form a personal judgment against John Kautter it must be regarded as but an adjudication by which the property attached was subjected to the payment of the debt in suit, and so considered was authorized if jurisdiction of the *res* had been obtained. It is of the contention that such an attack is not allowable where the record discloses, as did that of the county court in the attachment suit, the performance of all acts and the existence of all facts necessary to confer jurisdiction and its due exercise; and further in this connection, that the defendant in error, not having attacked the judgment in the county court in any of the methods, of which there were several afforded him by law, could not be heard to urge its invalidity in the present action. This suit, as instituted by Bolse, directly involved the rights of John Kautter to the note and mortgage and asked that he be deprived thereof, and the reason, if tenable, for the relief against him had its origin in what he asserted in his answer and cross-petition were the wrongful acts of the bank and other parties to the suit in respect to some of the subject-matters of the action relative to his rights thereto or therein. In answer to this such parties pleaded the attachment proceedings and adjudication, and he replied facts to show its invalidity. In this state, where under the Code there is but one—a civil—action in which matters which may be denominated legal or equitable may be litigated, the cross-petitioner could be heard in defense to the suit of Bolse; also in the cross-action against the bank and other parties, to assert and show the invalidity of the adjudication in the attachment suit. It is true that the record of the attachment case, on its face, disclosed that the county court had jurisdiction to proceed as it did; but the affidavit which gave it jurisdiction to entertain the suit, which became one against the thing attached, and not against the person of the debtor—for of the person there was no jurisdiction—contained in the statement, the

groundwork of the jurisdiction, that the debtor was a non-resident of the state and this was not true. Unless it was a fact his property could not be reached in the suit, and as it was not a fact, the adjudication by which his property was appropriated was void. Whether the debtor would be allowed to assert its invalidity and show the facts not apparent of record in litigation between him and some third person we need not and do not decide, but in a contest between him and the bank, the plaintiff in the attachment suit, we think it was competent and allowable. This view has in its support the argument that when the bank was called to account by the allegations and demands of the cross-petition, it invoked in its aid as a defense the adjudication in the attachment suit, and thus, it may be said, placed such proceedings and adjudication in issue.

The circumstances of this case as to the question now under consideration bring it within the principle of the rule announced by this court in *Eayrs v. Nason*, 54 Neb. 143, wherein it was stated: "1. 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 mort-

gage, 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, was false." (See also *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; *Needham v. Thayer*, 147 Mass. 536; *Dozier v. Richardson*, 25 Ga. 90.)

The ground for the issuance of the writ had no existence and the attachment was wrongful (*Stiff v. Fisher*, 22 S. W. Rep. [Tex.] 577; *McLaughlin v. Davis*, 14 Kan. 168; *Connelly v. Woods*, 31 Kan. 359; *Mayer v. Zingre*, 18 Neb. 458), and afforded no forceful defense for the bank against Kautter's demand for his collaterals or the value thereof.

It is urged that the cross-petition was insufficient and the relief afforded was not warranted or supported by the pleading of the prayer thereof. The cross-petition was not the subject of an attack for insufficiency of allegations until at the time of the trial. The question was raised by a demurrer *ore tenus*. It was also of the subject-matter of the motion for a new trial. The cross-petition, we think, was sufficient in its allegation to warrant the relief given, especially construed favorably as is the rule when the demurrer is delayed, as was this, until the inception of the introduction of evidence. There are some other points made in argument for plaintiffs in error which refer to the admission of evidence. The trial was to the court without a jury. That improper evidence was admitted is not in and of itself ground for reversal. There was evidence to sustain the findings of the court. (*Tolerton v. McClure*, 45 Neb. 368.)

It is also asserted that the trial court erred in allowing a designated line of interrogatories to be asked of two of the witnesses during their cross-examination. There were but few objections interposed to any portions of the cross-examination to which this complaint refers, and the

testimony elicited by the questions to which objections were made was either immaterial or, for other reasons, wholly without prejudice to the rights of the complainants.

It is argued that it was error to allow F. C. Thomas and Frank Thomas to testify on rebuttal in regard to the place of residence of John Kautter. Of this argument it may be said that Frank Thomas was not called and did not testify in rebuttal. When F. C. Thomas was called to testify in rebuttal, there was no objection that it would be improper that he should give testimony at that stage of the trial, nor was his testimony objected to as a whole. Of a few questions asked of him it was made of record that they called for improper rebuttal testimony, and the court was asked to reject it, but the testimony allowed to be given in such instances was either immaterial or nonprejudicial; hence the assignments are without force.

Of the judgment as against the plaintiff in error, George F. H. Schwake, we must say that it is, in our view of the cause, without proof to sustain it. Anything he did was in his capacity as employé of the bank and not personally, unless it was his purchase of the note and mortgage, and we do not believe from the evidence that this portion of the affair was of such a nature as to render him personally liable to the cross-petitioner. The judgment against the bank is affirmed, and as to George F. H. Schwake it is reversed.

JUDGMENT ACCORDINGLY.

NORVAL, J., offered no opinion.

A. P. PILGER ET AL. V. MARDER, LUSE & COMPANY.

FILED MAY 19, 1898. No. 8107.

1. **Replevin**: RES JUDICATA. In an action of replevin all who are parties are bound by the judgment.

2. ———: JUDGMENT. The judgment in a replevin suit may award a part of the property to each of two or more defendants.

3. ———: BOND: SURETIES. The obligation of the sureties in the undertaking, by virtue of which the plaintiff in replevin obtains possession of property taken under the writ, is to the party or parties obligees to whom the judgment on the issues accords a recovery.

4. ———: ———: ACTION: PARTIES. In replevin, where there are two or more defendants and the property has been taken under the writ and delivered to the plaintiff after execution by sureties of the prescribed undertaking, if, by the judgment, the entire property is awarded to one defendant, the rights thus accorded may be enforced in an action by such defendant alone, without a joinder of other parties named obligees in the undertaking.

ERROR from the district court of Madison county. Tried below before ROBINSON, J. *Affirmed.*

Robertson & Wigton, for plaintiffs in error.

Powers & Hays, contra.

HARRISON, C. J.

April 30, 1887, A. P. Pilger, P. Schwenk, and T. H. Egbert commenced an action of replevin in the district court of Madison county to recover possession of certain designated chattel property. The defendants in the suit were the firm of Norton, Sprecher & Bell, G. B. Van Voort, and the Norfolk Printing Company. The property was taken under the writ of replevin and on execution of an undertaking as prescribed by law was delivered to the plaintiffs. Issues were joined, a jury was waived, and as a result of a trial to the court judgment was entered for one of the defendants, the firm of Norton, Sprecher & Bell. The judgment and the interest of said partnership in the replevin undertaking were assigned to the defendants in error herein, who instituted the present action on the undertaking to recover of the sureties the value of the property, the damages and costs, which, by the judgment in the replevin action and subsequent proceedings, it was alleged had become due. The defend-

ants in error were successful in the suit, and for the sureties on the undertaking the present error proceeding has been prosecuted to this court.

It will doubtless be borne in mind that in the replevin action there were three defendants and in the present suit there were involved the rights of but the one, the firm of Norton, Sprecher & Bell, by its assignees. It was insisted in the trial court, and it is urged here for the plaintiffs in error, that inasmuch as the bond was given in favor of three obligees they should all have been parties to this suit, and as there was but one, or the assignees of one, there was a fatal defect of parties. The obligation of the undertaking was as follows: "Now, therefore, we, Herman Gerecke, Charles Eble, and C. F. A. Marquardt, do undertake to the said Norton, Sprecher & Bell, G. B. Van Voort, and the Norfolk Printing Company, defendants in said action, in the penal sum of $3,550, that the said A. P. Pilger, P. Schwenk, and T. H. Egbert, plaintiffs, shall duly prosecute the action and pay all costs and damages which may be awarded against them and shall return said property to the defendants in case a judgment for the return thereof is rendered against them." The journal entry of the finding and judgment in the replevin action was in the following terms: "And now on this 21st day of March, A. D. 1894, it still being of the regular March, 1894, term of the district court in and for Madison county, Nebraska, this cause came on for hearing to the court, a jury having been waived, and the cause was accordingly submitted to the court on the petition, the answer, and the evidence, and, after hearing the evidence and the arguments of counsel, the cause was submitted to the court, on consideration whereof the court finds that at the commencement of this action the defendants Norton, Sprecher & Bell were the owners and entitled to the possession of the following goods and chattels described in the petition and in the writ of replevin, to-wit: * * * It is therefore considered by the court that the defendant have a return of the prop-

erty taken on said writ of replevin and his damages, assessed at one thousand dollars ($1,000), or, in case a return of said property cannot be had, that he recover of said plaintiff the value thereof, assessed at fifteen hundred dollars ($1500), and interest thereon from this date, and costs of suit, taxed at $80.25." The nature of the suit in which an undertaking is given, and the relief which may be afforded to the party or parties for whose benefit or security such bond is required, must determine the liabilities of the signers whether, relative to the obligees, the liabilities of the sureties are joint or may be several.

In an action of replevin in which there are two or more defendants each may recover a part of the property, or one may be adjudged the owner and entitled to the possession of all the property, and to have a return of it, or to recover its value, as was the result in the replevin suit on the undertaking and the judgment on which the present action was predicated. It is also true that all the parties to a case in replevin are bound by the adjudication of the rights involved and put in issue therein.

It seems the correct conclusion that the sureties of a replevin undertaking are liable to the party or parties to whom the final determination of the issue may accord a recovery, and under the prescription of section 29 of the Code of Civil Procedure, that "Every action must be prosecuted in the name of the real party in interest," the action on the undertaking must be by the party who, by the judgment in replevin, is awarded a recovery, and we must further conclude that as Norton, Sprecher & Bell recovered the judgment in the replevin cause and for the entire property in controversy, this action, to enforce their rights thereby acquired without a joinder of the other parties obligees to the undertaking who were awarded nothing and whose rights in the property involved in the writ were determined by such judgment, was entirely proper and correct. The judgment of the district court is

AFFIRMED.

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

FILED MAY 19, 1898. No. 7628.

1. **Life Insurance:** ACTION ON POLICY. "A cause of action, or some part thereof, on a life insurance policy arises, within the meaning of section 55 of the Code of Civil Procedure, in the county where the insured died." (*Bankers Life Ins. Co. v. Robbins*, 53 Neb. 44.)

2. ———: ———. "A life insurance company created under the laws of this state is situated, within the meaning of section 55 of the Code of Civil Procedure, in any county in the state in which it maintains an agent or servant engaged in transacting the business for which it exists." (*Bankers Life Ins. Co. v. Robbins*, 53 Neb. 44.)

3. **Principal and Agent:** EVIDENCE OF RELATION. "Whether the relation of principal and agent exists between two parties is generally a question of fact, and, while it is not necessary to prove an express contract between the parties to establish such relation, either that must be done, or the conduct of the parties must be such that the relation may be inferred therefrom." *Bankers Life Ins. Co. v. Robbins*, 53 Neb. 44, approved and followed.

4. ———: ———: INSURANCE. It is stated in section 8, chapter 16, Compiled Statutes, what acts or conduct will constitute the performer or actor an agent of an insurance company, and the language of the section refers to and includes domestic or insurance companies created under the laws of this state.

5. ———: ———: ———: SERVICE OF SUMMONS: STATUTE. The language of said section, wherein it states, "shall be deemed to all intents and purposes an agent or agents of such company," includes the purpose of a service of a summons in an action, on a policy of a company, to recover the amount of a loss.

6. **Insurance:** BANK AS AGENT FOR COMPANY: SUMMONS. A bank, by performance of one or more of the acts enumerated in said section, may become an agent of an insurance company and proper service of summons on it will bind the company.

7. ———. The decisions in *State v. Farmers & Mechanics Mutual Benevolent Ass'n*, 18 Neb. 276, and *In re Babcock*, 21 Neb. 500, approved.

8. ———. The former opinion in this case, to the extent it held section 8, chapter 16, Compiled Statutes, not applicable to insurance companies created under the laws of this state, and reversed the judgment of the district court herein, determined the judgment of the district court of Valley county void, and awarded an injunction against its further enforcement by execution or otherwise, overruled.

REHEARING of case reported in 53 Neb. 44. *Order of reversal vacated and judgment below affirmed.*

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

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

HARRISON, C. J.

John C. Morrow, who was then a citizen and resident of Valley county, was during the month of October, 1891, solicited by one C. R. Swan, agent for the Bankers Life Insurance Company, a corporation formed and in existence under the laws of this state, actively engaged in business in the state, with its home office and place in Lincoln, to apply to said company for insurance on his life. J. L. McDonough, of Ord, Valley county, accompanied Mr. Swan, introduced him to parties, and assisted in the solicitation of applications for insurance. Mr. McDonough did so in the Morrow matter, and signed as agent the application which was obtained and forwarded to the company. The amount applied for was $5,000, and at the close of the regular and usual preliminaries a policy was issued and delivered to the applicant. It bore date October 12, 1891, and the beneficiary named therein was Anna B. Morrow, the wife of the insured. John C. Morrow, the assured, died in Valley county, and as payment of the insurance was not made, suit on the policy was instituted for Anna B. Morrow in the district court of Valley county, in which summons was issued of the date October 22, 1892, which was returned by the officer to whom it had been delivered with the following statement relative to its service indorsed thereon: "I hereby certify that on the 22d day of October, 1892, I served the within writ of summons on the within named Bankers Life Insurance Company of Nebraska, a corporation formed under the laws of Nebraska, defendant, by delivering to J. L. McDonough, the Ord State Bank, and J. A. Patton, cashier of the Ord State Bank, the

agents of said corporation, true and certified copies of this writ, with all indorsements thereon, at the usual place of business of said defendant, as required by law, the chief officer of said corporation not being found in my county." There was no appearance for the company, and on or about November 26, 1892, its default was entered and judgment rendered against it. After the rendition of the judgment, Anna B. Morrow died testate and A. M. Robbins was appointed her executor. At his instance execution was issued for the enforcement of the judgment against the company, which was given the sheriff of Lancaster county for service. The company then caused this suit to be commenced in the district court of the last mentioned county, in which it was asserted that there had been no service of process on the company in the case in the district court of Valley county, said court had acted without jurisdiction, its judgment was void, and it was prayed that its further enforcement be restrained and further action on the execution be enjoined. The company was unsuccessful in the district court and perfected an appeal to this court. The cause was argued and submitted, and on December 9, 1897, an opinion was filed by which the decree of the district court was reversed and judgment rendered here for the company. (See *Bankers Life Ins. Co. v. Robbins*, 53 Neb. 44.) A motion for a rehearing was presented for the executor and was granted, and the court requested that in the further presentation of the case the question of whether section 8 of chapter 16 of the Compiled Statutes of 1897, in relation to insurance companies as corporations, is applicable to domestic insurance companies.

The cause has been again argued and submitted for decision. The first inquiry must be, was the action on the policy commenced in the proper county? Of this it was said in the former opinion: "A cause of action, or some part thereof, on a life insurance policy arises, within the meaning of section 55 of the Code of Civil Pro-

cedure, in the county where the insured died;" and in support of the doctrine announced there were cited *Union Central Life Ins. Co. v. Pyers*, 36 O. St. 544, and *Bruil v. Northwestern Mutual Ass'n*, 39 N. W. Rep. [Wis.] 529. It was also stated: "A life insurance company, created under the laws of this state, is situated, within the meaning of section 55 of the Code of Civil Procedure, in any county in the state in which it maintains an agent or servant engaged in transacting the business for which it exists." Both propositions are, we think, unquestionably correct, and we may add here on the same subject: "Section 55 of the Code, which authorizes the bringing of an action against an insurance company in any county where the cause of action or some part thereof arose, is remedial and not restrictive in its nature; that is, the action may be brought where the cause of action or some part thereof arose, although the company has no agent in that county" (*Insurance Co. of North America v. McLimans*, 28 Neb. 652),—from which it appears that the suit was brought in the proper county. Another query is, did the district court of Valley county, by the service of its process disclosed by the return of the officer, obtain jurisdiction of the company? It was stated in the prior decision: "Whether the relation of principal and agent exists between two parties is generally a question of fact, and while it is not necessary to prove an express contract between the parties to establish such relation, either that must be done, or the conduct of the parties must be such that the relation may be inferred therefrom." It was further asserted: "Section 8, chapter 16, Compiled Statutes, declares what conduct on the part of a person shall be conclusive evidence of the fact that he is an agent of a foreign insurance company. The section has no application to an agent of an insurance company created under the laws of this state." In what we have last quoted is contained an expression of the point of difficulty.

We will give some attention now to the chapter in

which section 8 appears. During the session of the legislative assembly of 1864 there was passed "An act in relation to insurance companies" (Session Laws 1864, p. 145), which comprised sixteen sections, the last one of which merely provided that the act should take effect and be in force from and after its passage. Section 10 was in the following terms: "This act shall not be so construed as in any manner to apply to life insurance companies, but shall include, without provisions, only the fire and fire and marine departments of any company that may have separate departments for life insurance, and fire and fire and marine insurance." It was also stated in the first section: "That it shall be the duty of each and every insurance company incorporated under the laws of this territory, for the purpose of insuring property against fire, and marine losses, to file with the auditor of the territory;" etc.,—from all of which it is undoubtedly apparent that the act had no reference to life insurance companies. In the revision of 1866 the act appeared with fourteen sections, the tenth being omitted and the words in allusion to fire and marine losses were not in the first section. This was chapter 25 of the Revised Statutes of 1866. It was thus left general in its references to insurance companies, except in that some one or more sections or parts thereof were of "foreign" companies as distinguished from domestic ones. It seems a reasonable conclusion that the legislature which passed the act, with the restrictive words as to the kinds of insurance companies to which it should apply eliminated, meant to give it general application and to include in its provisions life as well as other insurance companies. A subsequent legislature evidently so thought and gave expression to such thought as follows: "That portion of chapter twenty-five, of the Revision of 1866, which relates to insurance companies, and all acts and parts of acts amendatory and supplementary thereto, are hereby repealed, except so far as the same relates to the business of life insurance companies." (General

Statutes 1873, p. 445, ch. 33, sec. 41.) The chapter 25 of the revision of 1866 is now chapter 16 of the Compiled Statutes. That portions of the chapter were and are applicable to life insurance companies has been directly recognized by this court (see *State v. Farmers & Mechanics Mutual Benevolent Ass'n*, 18 Neb. 276; *In re Babcock*, 21 Neb. 500), and doubtless this was done with all facts of the history of the chapter in mind. This much on this branch of the subject, for the reason, among others, that it was of insistence in argument that possibly the chapter in question was not applicable to life insurance companies, as would appear from a review of some of the facts of its inception and history. We conclude it applies to life insurance companies.

An examination in detail of some of the sections of chapter 16 of the Compiled Statutes develops that the first four sections have reference to domestic companies; the first two state so specifically, and three and four unmistakably, though not in direct terms. Section 5 alludes in terms to foreign companies. It will also be noticed that nowhere in the first four—the other requirements are quite full—is it prescribed as a duty of home companies to procure a certificate of authority from the auditor before the transaction of business in the state, but in section 5 there is such a provision in relation to foreign companies. In section 6 it is demanded that all companies which fall within the terms of the section, which it must be said are first general, and then specific, relative to foreign companies, shall procure the certificate of authority from the auditor. This would seem, to some extent at least, to indicate that the omission to make the provision as to domestic companies has been, by the use of the general terms here, supplied or cured. The reason for the repetition of the requirements for foreign companies we need not inquire. There have been two decisions of this court, in one of which section 6 was stated in direct terms to be governable of life insurance companies and of domestic ones. (See *In re Babcock*,

supra.) In the other (*State v. Farmers & Mechanics Mutual Benevolent Ass'n, supra*), while there was no direct statement on the subject, the company there involved in litigation was one of life insurance, and a domestic concern.

We have been strenuously urged, especially in the course of the oral argument herein, to overrule the decision in the case of *In re Babcock* as erroneous. Of the reasons, among others, is that it was rendered in answer to a letter addressed to the court by the state auditor, and not in a litigated matter; and it is asserted it was probably not as well presented or considered as might have been a cause before the court regularly and in the course of a suit in which there was a spirited and energetic contest of the issues and questions involved. The questions propounded by the auditor, which were answered in the opinion, were of matters pertaining to and materially affecting the business and affairs of the state, and it must be assumed, without question, that the court in its answer gave the result of its best thought and most careful examination and consideration; and although the reasons for the conclusions announced are not stated in detail in the opinion, we are satisfied, after a careful examination of the section, and a deliberate weighing of the arguments *pro* and *con* on the subject, to approve and adopt the rule of that decision. Moreover, in this connection we again call attention to the prior adjudication of the question in *State v. Farmers & Mechanics Mutual Benevolent Ass'n*, wherein there was a controversy that reached the court through the regular procedure, and in which we presume there was a thorough presentation of the questions; and its determination is, in effect, the same as that in the case of *In re Babcock*, and to overrule the latter would include the overturn of the former.

If we turn again to the chapter itself we discover that in section 1 reference is made, if literally construed, but to incorporated insurance companies, and the same is true of section 2, also 3 and 4. Section 5 treats of matters in

relation to foreign insurance companies. In each and all of these sections companies are mentioned. Section 6 seems to be in the nature of a *résumé* of all that has preceded, and to some extent a construction of it, in that it explains and amplifies the word "company" or companies, as used in prior sections, to include "company or association, partnership, firm, or individual, or any member or agent or agents thereof," and either foreign or domestic, and makes it unlawful for any of them to transact business unless there has been a compliance with all the provisions of the chapter and some additional requirements specified in the section.

Having reached this point in the discussion, we now turn our attention to section 8 of chapter 16, a careful perusal of which, and a construction which gives to it the plain, ordinary, and direct import of the words and language, convince us that it is incontestably, inseparably, and directly connected with and refers to what, and all that, had been said of companies in prior sections of the chapter. Its statements are, "or such insurance company or individual aforesaid," "such company," and "such company aforesaid"—not restrictive to any particular section or portion of the chapter, but to any and all of the companies aforementioned in the chapter. We must conclude that section 8 refers to life insurance companies, and domestic as well as foreign. Section 8 in entirety is as follows: "Any person or firm in this territory who shall receive or receipt for any money on account of or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who shall receive or receipt for money from other persons to be transmitted to any such company or individual aforesaid, for a policy or policies of insurance or any renewal thereof, although such policy or policies of insurance may not be signed by him or them, as agent or agents of such company, or who shall in anywise, directly or indirectly, make or cause to be made any contract or contracts of insurance, for or on account of such

company aforesaid, shall be deemed to all intents and purposes an agent or agents of such company, and shall be subject and liable to all the provisions of this chapter."

It is of argument that the expression, "shall be deemed to all intents and purposes an agent or agents of such company, and shall be subject and liable to all the provisions of this chapter," means no more than to all intents and purposes of the chapter in which it appears; but this view we cannot accept as the true one. The fair, ordinary, and reasonable import of the language is that parties who perform the acts or a distinctive act of those enumerated in the section are agents to all general intents and purposes, as well as within and for the provisions of the chapter. A section of insurance law in which similar language—somewhat the same words—was employed in a like connection has been determined to include the purpose of service of a summons in an action against the insurance company to recover sums alleged to be due on a policy or policies of insurance. (See *State v. United States Mutual Accident Ass'n*, 31 N. W. Rep. [Wis.] 229; *Zell v. Herman Farmers Mutual Ins. Co.*, 75 Wis. 527; *Southwestern Mutual Benefit Ass'n v. Swenson*, 30 Pac. Rep. [Kan.] 405; *Shomer v. Hekla Fire Ins. Co.*, 50 Wis. 575; *Stehlick v. Mechanics Ins. Co.*, 58 N. W. Rep. [Wis.] 379; *Southern Ins. Co. v. Wolverton Hardware Co.*, 19 S. W. Rep. [Tex.] 615; *Reyer v. Odd Fellows Fraternal Accident Ins. Co.*, 32 N. E. Rep. [Mass.] 469; *State v. Northwestern Endowment & Legacy Ass'n*, 22 N. W. Rep. [Minn.] 135; *Fred Miller Brewing Co. v. Capital Ins. Co.*, 63 N. W. Rep. [Ia.] 568.) Some of the foregoing citations, while not directly in point as to service of process, were decisions based on the same general principle. It is true that in the cases cited the companies involved in the litigation were foreign companies, but in the Wisconsin cases the section to which reference is made, and which contains such words, was held to apply to all companies, both foreign and domestic. We have concluded that sec-

tion 8 refers to both domestic and foreign companies, and its words will not be given a different construction in a case in which a home company appears in the litigation than in one wherein are presented issues of the rights and liabilities of a foreign company; hence the cases cited, to the extent of the construction of the language, are in point. We must conclude that this insistence of the argument is untenable. In this connection we will call attention to the sections of our Code (sections 73 and 74), which provide for service of summons on corporations and insurance companies. They are as follows:

"73. A summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office, or last usual place of business of such corporation.

"74. When the defendant is an incorporated insurance company, and the action is brought in a county, in which there is an agency thereof, the service may be upon the chief officer of such agency."

We will now turn our attention to the question of whether the service in the suit in Valley county was valid. We will here pass over the inquiry of whether J. L. McDonough by his acts became an agent for the company within the provisions of section 8. The company, after it had acquired business in Valley county, sent all regular calls or assessments on its policy holders, inclusive of Morrow, to the Ord State Bank for collection. A receipt was forwarded to the bank in each instance, and it was of its instructions that each receipt for a premium, when paid, must be by the bank countersigned, the receipts being in proper form for the transaction of business in the manner indicated in the instruction. Policy holders, Morrow and others, paid their premiums to the bank named and received receipts, and the money was

accounted for and remitted by the bank to the company. This was of and within both the spirit and the letter of section 8 of the acts and facts by which an agency for the company became of existence, and service of a summons on the bank, and in the manner made in the action in Valley county, was proper service and gave the court jurisdiction to adjudicate the rights of the parties, and its judgment was of force and valid. It follows that the former opinion, to the extent it announced that section 8 did not refer to domestic insurance companies, and that the service of the summons on the Ord State Bank in the suit in the district court of Valley county did not confer jurisdiction on such court to render a judgment therein, and that the judgment was void, and awarded an injunction against its enforcement, or the service of the execution, also the reversal of the judgment in this action, must be overruled and the judgment of the district court of Lancaster county herein must be affirmed. The conclusion reached renders a discussion of the other questions in the case unnecessary and they will be passed without further notice. Judgment will be entered in accordance with the opinion.

JUDGMENT BELOW AFFIRMED.

IRVINE, C., dissents.

RAGAN, C., adheres to views heretofore expressed.

NATIONAL MASONIC ACCIDENT ASSOCIATION v. JOHN H. DAY.

FILED MAY 19, 1898. No. 8104.

1. **Insurance:** WAIVER OF DEFECTS IN PROOFS OF LOSS. If an insurance company or association, after reception of the preliminary or final proofs of claim of loss makes no objections thereto relative to either form or substance, but investigates the particulars

of the claim and receives full information and then denies liability for reasons which are without reference to any infirmity or insufficiency of the proofs, such defects of the proofs, if they exist, are waived and cannot be successfully urged and will not be entertained in defense to an action on the claim.

2. **Instructions:** ASSIGNMENTS OF ERROR. Alleged errors in instructions and of refusals to give requested instructions should be separately assigned in the motion for a new trial, and where the assignment is not specific and the action of the trial court as to any one of the several matters grouped therein was without objection, the complaint must be overruled.

3. **Action for Accident Insurance:** VERDICT FOR PLAINTIFF. The evidence *held* sufficient to sustain the verdict.

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

Montgomery & Hall, for plaintiff in error.

James W. Carr, contra.

HARRISON, C. J.

In this action by defendant in error it was alleged that on March 25, 1892, he became a member of the association, the plaintiff in error, and there was issued to him a certificate of membership by which, for stated payments by him made and to be made, and the performance of certain enumerated conditions and under specified restrictions, limitations, etc., the association agreed to pay him a stated sum per week during a specified time if he should thereafter be injured and disabled in or by an accident. It was further pleaded that on February 18, 1893, the defendant in error fell while going up a stairway in the "Board of Trade Building" in Omaha and was severely injured and thereby became entitled to agreed payments from the association. In a trial of the issues presented in the district court the defendant in error was given judgment, of which the association asks of this court a reversal.

At the close of the introduction of the evidence in chief, for the defendant in error, it was moved in behalf of the

association that all such evidence be stricken from the record and the suit be dismissed because of a variance between the statements in the testimony relative directly to the asserted injury and the proofs thereof, which prior to suit, to fulfill the requirements of the certificate in such regard, had been furnished by defendant in error to the company. This motion was overruled. It was of the conditions of the certificate that preliminary proofs of any injury to the party to whom it had issued should be given within a stated time subsequent to its occurrence, and that further and more complete proofs should be prepared and forwarded to the association at the home office within a limited period. Immediately, or within a day or two after the accident which caused the injuries to defendant in error, letters were written for him and sent to the association which contained accounts of the accident to him, and from its answers thereto which were introduced in evidence it appears that the letters which he caused to be written and forwarded were received by it. Forms for preliminary and final proofs with blank spaces for the insertion of the particulars required by the terms of the certificate were sent to the defendant in error by the association and by him prepared and mailed to the association and were received. In these he stated, in substance, that during an ascent of the stairway in the Board of Trade Building he slipped or stumbled and fell and struck on the banister or "stair rail" with his back, and the result was the paralysis of his left arm and hand. In his testimony the defendant in error said that as he was going up the stairs he "caught his toe under the step and fell to the left on the railing and struck his elbow, shoulder, foot, and head." The foregoing statements, one of which is from the proofs and the other the testimony, in short, on the point indicated, will serve to show the alleged variance, which consisted in that in the proofs the force of the fall was stated to have been received on the "back" and in the testimony was on the "elbow, shoulder, foot, and head." Whether this

constituted a variance in an essential particular or particulars of the accident or injury and fatal to this action of defendant in error we need not decide. To be so effectual it must further have been shown that credence was given by the association to the statement in the proofs. It must have been relied on as a true statement of the matter to which it related, and the association must have been misled by it in its future attitude in regard to the claim of defendant in error. This did not appear. On the contrary, it was disclosed that the association, soon after it received the preliminary proofs, sent an agent to Omaha, who investigated the entire matter and who, while there, had an interview with the defendant in error, during which the latter states he told the agent all the particulars of the accident, inclusive of the injuries to the head and arm. This was of a time after the reception by the association of the preliminary proofs, and on report by the agent the secretary of the association wrote to defendant in error and informed him that the association did not care to and would not further inquire into the matter; that the claim was not one on which the association was liable, was not within the agreements of the certificate, and the association was in the possession of ample evidence to prove the claim without merit. This was a clear assertion of the non-liability of the association in any event, or under any conditions, or statements of proofs of loss, and without reference to such proofs; and the defense of insufficiency of the proofs could not be urged or entertained. (*Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473; *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; *Cobb v. Insurance Co. of North America*, 11 Kan. 93.)

It is argued that the trial court erred in its refusals to give in charge to the jury several instructions prepared and requested for plaintiff in error. The assignment as to these alleged errors in the motion for a new trial was not specific and several, but in gross. Number 1 of the

paragraphs thus assigned was in reference to the variance between the statements in the proofs of the particulars of the accident or injury, the basis of the claim, and the testimony on the same subject, and, within the views which we have hereinbefore expressed relative to this same matter, the refusal to give the instruction was proper. This conclusion disposes of and works a disapproval of the entire assignment. (*Town v. Missouri P. R. Co.*, 50 Neb. 768; *Denise v. City of Omaha*, 49 Neb. 750.)

It is complained that the trial court erred in giving paragraph 4 of the charge to the jury. In the motion for a new trial this alleged error was grouped with several others of asserted errors relative to portions of the charge. As to some of the paragraphs included in the assignment no objections are now urged, and it may be added that they were unobjectionable, from which it follows that the assignment must be overruled. (*Graham v. Frazier*, 49 Neb. 90; *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb. 68; *Denise v. City of Omaha*, 49 Neb. 750.)

It is argued that the verdict and judgment are not sustained by and are contrary to the evidence. There was a direct conflict in the evidence on the essential points of the issues, but there was evidence to sustain the verdict rendered; hence it must stand. The judgment of the district court is

AFFIRMED.

ANDREW J. EWING V. SOLOMON HOFFINE.

FILED MAY 19, 1898. No. 8138.

Jurors: MISCONDUCT: EVIDENCE. Jurors may not state to fellow jurors, while considering their verdict, facts relative to issues in the case within their own personal knowledge, but not of the evidence introduced. They should make the same known during the trial, and, if desired, testify as witnesses. *Wood River Bank v. Dodge*, 36 Neb. 708, *Richards v. State*, 36 Neb. 18, followed.

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

W. C. Sloan and *Paul Jessen*, for plaintiff in error.

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

HARRISON, C. J.

Action in ejectment by plaintiff to recover possession of a tract of land which bordered on the Missouri river and had been formed by accretion. The plaintiff was the owner of land to the east of which the land in dispute had been formed, and the defendant in the action was the owner of the land to the north of the tract in controversy and claimed it by accretion, and also alleged exclusive adverse possession during the prescribed statutory period. In the district court there was a verdict and judgment for the defendant.

In error proceeding to this court on behalf of the plaintiff it is contended that the misconduct of jurors who participated in such capacity in the trial of the cause furnishes grounds for a reversal of the judgment. One of the alleged properly assigned acts of misconduct of jurors is that two of them, in the course of the deliberations of the jury and in arguments in the jury room, used what they stated was their own personal knowledge, respectively, relative to the matters in issue in the cause, to influence other jurors to a conclusion favorable to the contention of one of the parties to the action and in whose favor the verdict was returned. There are in the record some attempted denials of the conduct ascribed to the jurors, but they do not fully meet the charges. There were also in this connection affidavits of the attorneys for plaintiff that they had no knowledge of the alleged acts of misconduct of the jurors until after the trial and discharge of the jury. On the subject here involved it has been stated by this court: "A juror will not be permitted to state to his fellow jurors, while they are con-

sidering their verdict, facts in the case within his own personal knowledge. He should make the same known during the trial and testify as a witness in the case. It is for the court to say what evidence is admissible in a case, and the adverse party may desire to cross-examine him. In any event, it is his duty to be governed by the evidence introduced on the trial and the instructions of the court; otherwise, in case of an erroneous verdict, it would be impossible to review the same." (*Wood River Bank v. Dodge*, 36 Neb. 708; *Richards v. State*, 36 Neb. 18.)

The evidence was conflicting, and we will not discuss or comment upon it here, since by reason of the error hereinbefore indicated the cause must be remanded for a new trial; nor do we deem it necessary or proper at this time to examine the other questions presented. The judgment of the district court is reversed and the case remanded.

REVERSED AND REMANDED.

EDWARD LEEDER V. STATE OF NEBRASKA.

FILED MAY 19, 1898. No. 9818.

1. **Decree for Alimony:** ENFORCEMENT. In this state a decree awarding permanent alimony is enforceable in the same manner as judgments at law.
2. ——: DISOBEDIENCE: CONTEMPT. Ordinarily the non-compliance with an order for the payment of permanent alimony is not punishable as for contempt of court.

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

W. S. Shoemaker, for plaintiff in error.

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

NORVAL, J.

This is a proceeding in error to review an order convicting Edward Leeder of contempt of court. On August 4, 1888, in a cause then pending in the district court of Douglas county, in which Catherine Leeder was plaintiff and the said Edward Leeder was defendant, a decree of divorce was obtained by the plaintiff therein and she was awarded the sum of $500 permanent alimony. On the 25th day of the same month an execution was issued for the collection of said amount, which writ was returned, "No property found." No other execution has ever been issued in said cause, nor has the decree for alimony ever been revived. On January 3, 1898, Judge Scott, one of the judges of the district court of Douglas county, without any motion or application therefor having been made in writing, issued an order against Edward Leeder, requiring him to show cause, on the morning of January 5, why he had not complied with the decree of the court regarding the payment of alimony. On January 6 the following order of attachment was issued by Judge Scott:

"CATHERINE LEEDER, Plaintiff,
v.
EDWARD LEEDER, Defendant. } Order.

"An order having been made by this court on the 3d day of January, 1898, requiring the said Edward Leeder to appear on the morning of the 4th instant and show cause why he has not complied with the order of court heretofore made in this case, that he, the said Edward Leeder, should pay to the said Catherine Leeder, as alimony, the sum of $500, which said order was made by this court at the May term of 1888; that in pursuance of said order of citation said Edward Leeder did appear on the morning of the 5th instant and did then and there inform the court that he would have $100 to pay to the plaintiff Catherine Leeder by 10 o'clock on the morning of the 6th instant, and that upon the strength of such promise on the part of Edward Leeder he was allowed to

depart with the distinct admonition on the part of the court that he be present with the said $100 by 10 o'clock on the 6th instant; said Edward Leeder has utterly and wholly refused and negelected to pay into court, or to the said Catherine Leeder, the said sum of $100 as he agreed to do, as a condition on which he was permitted to depart, as above stated, on the 5th day of January, 1898. It is therefore ordered that an attachment do issue against the said Edward Leeder and that he be brought into court to answer as for contempt in not complying with the order of the court.

"Omaha, January 6, 1898.

"By the court: CUNNINGHAM R. SCOTT, *Judge.*"

The defendant appeared and filed an answer setting up that he is without means or money with which to pay said alimony; that he has no personal property save and except his wearing apparel and household furniture, worth not to exceed $300; that he is a married man and the head of a family, and has neither town lots, lands, nor houses within this state. On January 7, 1898, the following order was entered by the court below adjudging Edward Leeder to be guilty of contempt:

"THE STATE OF NEBRASKA
v.
EDWARD LEEDER. } Order of Commitment.

"The defendant having been cited on the 3d inst. to appear before this court on the 5th instant to show cause why he has not complied with the order of this court in the case of Catherine Leeder v. Edward Leeder at the May term of this court, 1888, to pay the said Catherine Leeder the sum of $500 alimony, and showing no good reason therefor, and agreeing then in open court to bring into court on the morning of the 6th day of January, 1898, $100 of said alimony for the use of the said Catherine Leeder, as ordered by the court, which he has wholly failed to do, the defendant is adjudged to be guilty of contempt of court and its orders in that regard, and the judg-

ment of the court is that the defendant pay a fine of $200 and the costs of the action, and that he stand committed to the jail of the county until such fine and costs are paid. Defendant excepts.

"Omaha, Neb., Jan. 7, 1898.

"By the court: CUNNINGHAM R. SCOTT, *Judge.*"

The defendant insists that the court below acted illegally and exceeded its jurisdiction in rendering the foregoing judgment and sentence, which position we are all persuaded is entirely sound. In this state a decree for permanent alimony is enforceable like judgments at law, and in the absence of fraud a party cannot be imprisoned as for contempt for failure to pay permanent alimony. Section 20 of our Bill of Rights declares: "No person shall be imprisoned for debt in any civil action on mesne or final process unless in case of fraud." Manifestly a decree for permanent alimony is a debt within the meaning of the above provision of the constitution. (Constitution, art. 1, sec. 20.) The power and jurisdiction of a court to enforce the collection of decrees and orders of permanent alimony by arrest were passed upon in *Segear v. Segear*, 23 Neb. 306. The court, after quoting section 4*a*, chapter 25, Compiled Statutes, title "Divorce and Alimony," observed: "The provisions of this section establish the character of an order for the payment of alimony with that of a judgment at law, and limits the enforcement and collection to the same means. It is not in the nature of tort, and in the absence of fraud, by the defendant, he could not be subjected to a more summary method of collection than that of levy and sale of property as upon executions at law. The commitment, therefore, for contempt, under the provisions of title 20, section 669, of the Civil Code, to enforce the judgment for alimony, was not a lawful remedy, nor was the non-payment of the judgment, by the defendant, that 'willful disobedience of, or resistance willfully offered to, the lawful process or order of the court,' contemplated by the statute. All proceedings therein, enforced by the district court against the defendant, are

voidable, and will be set aside." The case from which the above excerpt was taken was cited with approval in *Nygren v. Nygren*, 42 Neb. 408. No fraud is imputed to the defendant. It is true the order of commitment recites that he agreed to bring into court, by a specified time, to apply on the decree for alimony, the sum of $100, and that he failed to keep his promise in that regard; but this constituted neither an actual nor constructive contempt of court. The defendant could no more be adjudged guilty of contempt, and fined and imprisoned for failing to pay the $100, than he could be punished as for contempt for a refusal to pay his grocery bill, or to pay an ordinary judgment. The proceedings under review were without jurisdiction and void, and the order and sentence are reversed and the proceedings dismissed.

REVERSED AND DISMISSED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. MARY STUREY.

FILED MAY 19, 1898. No. 8089.

1. **Instructions:** REPETITIONS: REVIEW. A repetition of a proposition of law in the instructions is not reversible error, unless it appears that it operated to the prejudice of the unsuccessful party.

2. **Railroad Companies:** EMINENT DOMAIN: DAMAGES. Where a railroad is built in an alley, the owner of the lot abutting thereon is entitled to recover from the railroad company the depreciation in the value of the lot resulting from such construction of the railroad.

3. **Trial:** WITNESSES: STRIKING OUT ANSWER. Where the answer of a witness is not responsive to the question propounded, the proper practice is to move the court to have such answer eliminated from the record.

4. **Railroads:** DAMAGES TO REALTY. The true measure of damages to real estate occasioned by the construction of a railroad contiguous or adjacent thereto is the difference in the value of the property immediately before and immediately after the im-

provement, unaffected by any increase or depreciation of property values generally in the same vicinity.

5. ———: ———. In estimating the value of real estate, its rental value may be taken into consideration.

6. ———: ———: RULINGS ON EVIDENCE. Certain rulings of the trial court on the admission of evidence examined and approved.

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

L. W. Billingsley and *R. J. Greene*, for plaintiff in error.

Boehmer & Rummons, contra.

NORVAL, J.

The plaintiff below, Mary Sturey, is the owner of lot 40, block 1, Houtz's Place, in the city of Lincoln, which she occupies as a family homestead. In 1893 the defendant, without her knowledge or consent, constructed its railroad bed and laid its tracks over and across plaintiff's premises and in the alley adjoining said lot, without condemning for right of way or making compensation for the loss. This suit was instituted to recover the damages sustained by reason of the premises, and the defendant has brought to this court for review the record of the judgment entered against it, assigning numerous grounds for reversal.

It is urged that the third paragraph of the charge should not have been given, because it was a repetition of the doctrine enunciated in the second instruction. A reversal cannot be obtained for that reason, since the verdict could not have been influenced by the giving of the instruction. This court has often asserted that the repetition of a proposition of law in the instructions is not reversible error where it does not appear that the defeated party was prejudiced thereby. (*Seebrock v. Fedawa*, 30 Neb. 424; *Carstens v. McDonald*, 38 Neb. 858; *Hill v. State*, 42 Neb. 503; *Carleton v. State*, 43 Neb. 373; *Gran v. Houston*, 45 Neb. 813; *Dixon v. State*, 46 Neb. 298;

City Nat. Bank of Hastings v. Thomas, 46 Neb. 861; *Denise v. City of Omaha*, 49 Neb. 750.)

The court charged the jury: "The plaintiff, as the owner of said lot, has a right to use the thoroughfares, streets, and alleys adjacent thereto for the purposes of ingress and egress to and from said lot without obstruction by railway tracks, and has the right to insist that the said adjacent streets and alleys shall be used only for public purposes; and if the railway track of the defendant, laid upon said alley adjacent to the said lot, obstructs the free passage to and from the said lot and thereby damages the plaintiff, or in any manner specifically and directly occasions damage to the said property, then the defendant would be liable to plaintiff for such damage, less special benefits." It is urged that said instruction is erroneous, for the reason it was a repetition of another portion of the charge relating to the recovery of damages. As the defendant was not injuriously affected by the repetition, under the authorities referred to above, this objection to the instruction is overruled. The same instruction is also assailed on the ground that it incorrectly states the law applicable to the case. It was not necessary that defendant should have appropriated any portion of plaintiff's lot. To authorize a recovery it was sufficient that her premises were depreciated in value by the location and construction of the railroad in the alley upon which the lot abuts. This principle is recognized by the instruction in question, and is sustained by the authorities. (*Gottschalk v. Chicago, B. & Q. R. Co.*, 14 Neb. 550; *Burlington & M. R. R. Co. v. Reinhackle*, 15 Neb. 279; *Omaha & R. V. R. Co. v. Rogers*, 16 Neb. 117; *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb. 123; *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364.)

It is insisted there was prejudicial error committed in allowing N. T. Sturey, witness for plaintiff below, to testify in answer to question 62 as to the value of the sod destroyed by the defendant, for the reason the competency of the witness to testify upon that subject had not

been shown. This objection is without merit. Counsel for defendant must have overlooked the answer to the preceding question, which disclosed that Mr. Sturey knew the value of the sod destroyed.

Another assignment is that "a like error was committed in allowing witness to testify over defendant's objection as to the value of the cinders, in answer to question 72, his competency thereon not appearing." The bill of exceptions discloses that question 72 merely asked the witness if he was familiar with the value of the cinders, and did not call for a statement of their value. The answer was not responsive to the question, it is true, but no motion was made to strike the same from the record, so that no ruling of the court below is presented, in this connection, for review.

Another argument is that it was reversible error to permit the witness N. T. Sturey to testify as to the value of the plaintiff's lot, for the reason the proper time for ascertaining such value was not fixed. The true measure of damages in cases like the one before the court is the difference in value of the property immediately before and immediately after the construction of the railroad, unaffected by any increase or depreciation of property values generally in the vicinity. (*Omaha Belt R. Co. v. McDermott*, 25 Neb. 714; *Blakeley v. Chicago, K. & N. R. Co.*, 25 Neb. 207; *City of Omaha v. Hansen*, 36 Neb. 135.) To establish that there has been no infraction of the foregoing rule it is only necessary to state the defendant's road was constructed in the alley May 25, 1893, and quote from the testimony of Mr. Sturey the following:

Q. Now I will get you to state whether you know the value of the property on or about the 25th day of May, 1893.

A. Yes, sir.

Q. You may state what the value was.

A. The value was about $2,500.

Q. Now you may state whether you know the value of

this property after the Rock Island track was laid in the alley adjoining it.

A. Yes, sir.

Q. You may state what that value is.

A. $1,000.

Objection is made to the decision of the court below permitting plaintiff to prove the rental value of her premises after the railroad was constructed. This ruling is sanctioned by *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb. 381; *City of Omaha v. Hansen*, 36 Neb. 135.

We have examined and considered the other rulings of the court made on the introduction of testimony, and discover no reversible error. The judgment is accordingly

AFFIRMED.

PERKINS COUNTY V. J. E. MILLER ET AL.

FILED MAY 19, 1898. No. 8062.

1. **Official Bonds:** FORM. The official bond of a county clerk is not void by reason of its being, in form, joint, instead of joint and several as required by statute.
2. ———: ———: TERM OF OFFICE. The official bond of a county officer is not void because it does not specify or designate the term for which the principal obligee was elected or appointed.
3. **Amendment of Pleadings.** Amendments to pleadings should always be permitted when in furtherance of justice, and the rulings of the trial court in that regard will be reversed when the record presents a clear abuse of discretion.
4. **Action on Joint Contract:** PARTIES. In an action upon a joint contract, all who are jointly liable should be joined as defendants, and if service of summons cannot be had upon all, the action may proceed against those served.

ERROR from the district court of Perkins county. Tried below before NEVILLE, J. *Reversed.*

Parsons & Logan, for plaintiff in error.

G. M. Lambertson, contra.

NORVAL, J.

This action was instituted in the court below against the principal and sureties upon the official bond of John E. Miller, as county clerk of Perkins county, to recover certain moneys alleged to be due the county from Miller by reason of breaches of the conditions of said bond. A general demurrer to the amended petition was sustained by the trial court, and the cause was dismissed. The county has prosecuted this error proceeding.

The amended petition alleged, substantially, that at the general election held in Perkins county in November, 1888, the defendant J. E. Miller was duly elected to the office of clerk of said county for the term of one year from January 2, 1889; that on December 26, 1888, said Miller, with his co-defendants, executed and delivered to the county the bond upon which this suit is brought; that on January 2, 1889, said obligation was duly approved by the county board, and said Miller thereupon, on said date, entered upon the discharge of the duties of his office, and had and held said office until January, 1890. The amended petition, with great particularity, sets forth numerous breaches of the conditions of said bond by the defendant Miller while so exercising the duties of said office, which averments it is unnecessary here to summarize or reproduce. The following is a copy of the obligation in question, omitting the official oath and the indorsements of filing and approval:

"Know all men by these presents, that we, J. E. Miller, J. W. Henry, Frank L. Pearson, James W. Henderson, John M. Hicks, P. R. Johnson, J. A. Phillips, are held and firmly bound unto the county of Perkins and state of Nebraska in the penal sum of five thousand ($5,000) dollars, for the payment of which we bind ourselves, our heirs, executors and administrators.

"The condition of the above obligation is that whereas the above bound J. E. Miller has been elected county clerk in and for Perkins county, Nebraska:

"Now, if the said J. E. Miller shall render a true account of the office and of the doings therein to the proper authority, when required thereby or by law, and shall promptly pay over to the person or officers entitled thereto all moneys which may come into his hands by virtue of his said office, and shall faithfully account for all balances of money remaining in his hands at the termination of his office, and shall hereafter exercise all reasonable diligence and care in the preservation and lawful disposure of all money, books, papers, and sureties, or other property appertaining to his said office, and deliver them to his successor or to any person authorized to receive the same; if he shall faithfully and impartially, without fear, favor, fraud, or oppression, discharge all other duties now or hereafter required of his office by law, then this bond to be void; otherwise in full force.

"Signed this 26th day of December, A. D. 1888.

"J. E. MILLER.
"J. W. HENRY.
"FRANK L. PEARSON.
"JAMES W. HENDERSON.
"JOHN M. HICKS.
"P. R. JOHNSON.
"J. A. PHILLIPS."

A recovery was resisted on the ground that the bond is not joint and several in form. By section 3, chapter 10, Compiled Statutes, it is provided: "All official bonds of county, township, school district, and precinct officers must be in form joint and several, and made payable to the county in which the officer giving the same shall be elected or appointed, in such penalty and with such conditions as required by this act, or the law creating or regulating the duties of the office." Thus it will be observed that the statute expressly declares that the official bond required to be entered into by all county officers should be in form joint and several. The recital in the bond before us, "we bind ourselves, our heirs, ex-

ecutors, and administrators," does not constitute words of severalty, and the obligation of the promisors therein was joint, and not joint and several. (*Wood v. Fisk*, 63 N. Y. 245; *Chard v. Hamilton*, 56 Hun [N. Y.] 259; *Pecker v. Julius*, 2 Browne [Pa.] 33.) The bond, therefore, which is the foundation of this action, being manifestly a joint obligation on its face, does not comply with the positive requirements of the provisions of the statute already quoted. But it does not follow from this fact that the obligation is invalid, and no recovery can be had thereon. The bond was, at least, good as a common-law obligation. The undertaking is binding as a statutory bond, notwithstanding the instrument in form is not joint and several, since section 13, chapter 10, Compiled Statutes declares: "No official bond shall be rendered void by reason of any informality or irregularity in its execution or approval." The making of this bond joint in form, instead of joint and several, was a mere irregularity which did not invalidate the instrument. (*Huffman v. Koppelkom*, 8 Neb. 344; *Kopplekom v. Huffman*, 12 Neb. 95; *Thomas v. Hinkley*, 19 Neb. 324; *Riggs v. Miller*, 34 Neb. 666.) The statute requires that the bond of a county officer shall be made payable to the county in which the officer giving the same shall be elected or appointed, yet in the foregoing cases it has been ruled that the omission to name the proper obligee in the bond is a mere irregularity which does not invalidate the instrument. There is no escaping the conclusion that the bond under consideration is not void for the reason it is in form joint, instead of joint and several. The bond of a county treasurer, similar in form, was sustained in *County of Valley v. Robinson*, 32 Neb. 256.

The validity of the obligation in suit is assailed on the ground that it does not recite or state the term of office for which the principal was elected. A sufficient answer to this contention is that the statute does not require the bond of a county officer to set forth the official term of the principal obligee. The petition avers

the time when Miller was elected county clerk, as well as the dates when his official term commenced and ended, which averments the demurrer admitted to be true. It is very evident that the failure of the bond to designate the official term of Miller did not render the obligation void.

The record discloses that the court below refused to permit the plaintiff to amend its petition by inserting an allegation therein to the effect that all the parties intended said bond as a joint and several obligation, as required by statute, and that by mistake, ignorance, or inadvertence the instrument was drawn in form joint only, and that said court declined to allow the prayer of the petition to be amended so as to ask for the reformation of the bond to conform to the original intention of the parties. It was error, and clear abuse of discretion of the district court, to refuse to permit plaintiff to amend its petition in the matters just indicated. Had such amendment been made and the bond been reformed in the respects suggested, the obligees would have been jointly and severally liable. With this bond in its present form, the principal and sureties therein are jointly, and not severally, liable, and all of them must be joined in an action thereon. This suit was against all the obligees, yet as to one of the defendants the summons was returned not found, and he did not enter his appearance. Section 84 of the Code of Civil Procedure governs, which reads as follows: "Where the action is against two or more defendants, and one or more shall have been served, but not all of them, the plaintiff may proceed as follows: First—If the action be against defendants jointly indebted upon contract, he may proceed against the defendant served, unless the court otherwise direct." Under the foregoing provision the action could proceed to judgment against those served. (*Beeler v. First Nat. Bank*, 34 Neb. 348.) The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

HOME FIRE INSURANCE COMPANY v. WILBER S. WEED.

FILED MAY 19, 1898. No. 8342.

1. **Review Without Bill of Exceptions.** When a bill of exceptions has been quashed, no question will be considered a determination of which necessarily involves an examination of the evidence adduced in the trial court.
2. ———: INSTRUCTIONS. In the absence of a bill of exceptions, instructions to the jury will be presumed to be free from error, unless they contain statements of the law which could not be correct in any possible case made by the proofs under the issues tendered by the pleadings.
3. **Insurance:** VALUE OF PROPERTY. Where there has been a total loss by fire of insured realty, a clause in the policy limiting the amount of recovery to a sum less than the amount written in the contract of insurance is invalid and will not be enforced.
4. ———: JUDGMENT FOR LOSS: ATTORNEYS' FEES. Under the provisions of section 45, chapter 43, Compiled Statutes, plaintiff is entitled to the allowance of a reasonable attorney's fee on the rendition of a judgment on a policy of insurance on realty, to be taxed as part of the costs; and the court has jurisdiction to allow such fee at the time the ruling is made upon the defendant's motion for a new trial, although such motion is not passed upon at the term during which the verdict and judgment were entered.

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

Greene & Breckenridge and *Byron G. Burbank*, for plaintiff in error.

Stewart & Munger, contra.

NORVAL, J.

This suit is upon a policy of insurance issued by the Home Fire Insurance Company of Omaha on May 27, 1893, to one Denton, upon his dwelling-house, insuring against loss or damage by fire to the amount of $800 for one year from the date of the policy. On July 19, 1893, the insured building was burned, and subsequently Denton, for a valuable consideration, assigned the policy and

his rights thereunder to Wilber S. Weed, who instituted this action to recover the entire amount of the policy, alleging that the loss was total. The answer admitted the issuance of the policy; that the insured building was partially damaged by fire; denied the other averments of the petition, and pleaded the violation by the assured of the following conditions of the policy: "This entire policy, unless otherwise provided by an agreement indorsed hereon or added hereto, shall be void if the assured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy, * * * or if the property now is or shall become during the term of this policy incumbered by mortgage or otherwise." The answer alleged that said quoted provisions were violated by the existence, at the time of the issuance of the policy, of a mortgage on the premises in the sum of $600, and that at the time of the fire there was other and additional insurance upon the property in the sum of $600, in the name and for the benefit of said Denton, in the United States Fire Insurance Company, of New York. It was also pleaded that defendant had no notice or knowledge of the existence of either said incumbrance or the additional insurance until after the fire. The reply admitted the incumbrance, pleaded knowledge thereof of the defendant at the time of executing and delivering the policy in suit, and denied each and every other allegation in the answer. A trial was had in the court below, which resulted in a verdict for the plaintiff for the full amount of the policy with interest, and the defendant has prosecuted error from the judgment entered thereon.

The first argument is that the trial court erred in giving the following instruction: "Your attention is next directed to the evidence before you touching the matter of the collection of the insurance money under the policy taken out on said insured premises by Stevens, Love & Cochran for the benefit of the mortgagee, the Continental Building & Loan Association, in the name of the said

J. Q. Denton, but so taken out without the knowledge or consent of said Denton. In this connection you are instructed that if, after the fire and after the said Denton became aware of the existence of said insurance in favor of said mortgagee, the said Denton did any act which recognized the insurance contract made between the United States Insurance Company and Stevens, Love & Cochran in his name for the benefit of said loan association, mortgagee, as a binding and legal obligation on the part of said United States Insurance Company, then such act would in law amount to a ratification of the taking out of said insurance policy, and would render said Denton subject to the same disability under, and forfeiture of, the policy of the defendant sued on in this action, as though he himself had taken out said insurance for the benefit of said loan association without the knowledge or consent of the defendant herein. If you so find the fact to be that by any act of his done the said Denton ratified the taking out of said additional insurance in the name of himself and for the benefit of said loan association, then you are instructed that such act was in violation of the binding and valid condition of the policy sued on in this case, and such additional insurance would, under such circumstances, render the policy of defendant voidable, at its option, and would prevent recovery by plaintiff in this suit. Upon the other hand, if you find from the evidence the fact to be that after discovery of said additional insurance the said Denton did nothing in respect thereto to recognize said additional insurance as binding and valid as between himself and the insurance company issuing said additional insurance, then you are instructed that the acts of Stevens, Love & Cochran in collecting the money upon said additional insurance policy, and the acts of said building and loan association in giving said Denton credit, for the amount collected, upon the debt owed by him to it, would not in law be binding upon him and could not in law constitute a defense in behalf of the defendant in this suit."

The vice imputed to the foregoing instruction, if we have not failed to comprehend the argument of counsel for defendant below, is that it omitted to direct the jury as to the effect of the failure of Denton to repudiate and disaffirm the policy of insurance issued in his name by the United States Fire Insurance Company, at the instance of Stevens, Love & Cochran, for the benefit of the mortgagee. A short answer to this is that it is not shown the defendant below was in any manner prejudiced by the failure to so instruct the jury, inasmuch as the bill of exceptions filed herein has been quashed. In *Willis v. State*, 27 Neb. 98, it was decided that where a cause is presented to this court upon transcript alone, without bill of exceptions, the instructions will be presumed to be faultless, unless they contain statements of the law which could not be correct in any possible case made by the proofs under the issues presented by the pleadings. The same doctrine has frequently been held and applied. (*Romberg v. Hediger*, 47 Neb. 203; *Oltmanns v. Findlay*, 47 Neb. 289; *Union P. R. Co. v. Kinney*, 47 Neb. 393.) The rule is that when a bill of exceptions has been quashed, no question will be considered, a determination of which necessarily involves an examination of the evidence adduced in the trial court. (*Sweeney v. Ramge*, 46 Neb. 919; *Reed v. Rice*, 48 Neb. 586; *McKenna v. Dietrich*, 48 Neb. 433; *Wood v. Gerhold*, 47 Neb. 397.) Without a bill of exceptions we are unable to determine whether or not the instruction criticised was erroneous and prejudicial to the rights of the defendant. It may be that the testimony showed beyond dispute—and such testimony would have been permissible under the pleadings—that plaintiff's assignor, Denton, when he learned of the existence of the policy issued by the United States Fire Insurance Company, immediately refused to ratify the contract of insurance, but repudiated and disaffirmed the same. Had such a state of facts existed, manifestly no prejudice could have been possible to the defendant by the giving of the instruction already quoted.

It is insisted that the defendant was entitled to recover upon this policy only the sum of $282 and interest, for the alleged reason that $518 had been collected from the United States Insurance Company on account of the same loss by the mortgagee and applied upon the loan made to Denton. No question of the payment of said sum of $518 is raised by the answer. Moreover, without a bill of exceptions, we are unable to ascertain whether said sum was in fact paid, and if so, whether Denton or the plaintiff consented to or acquiesced therein.

The next argument advanced by the defendant is that it is liable only for its proportion of the loss incurred, or the sum of $457.14, by reason of the issuance of the policy on the premises by the United States Fire Insurance Company, and the following condition contained in the policy in suit: "In case of any other insurance upon the property herein described, whether made prior, concurrent, or subsequent to the date of this policy (whether valid or invalid, or whether upon the same insurable interest or not), the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, whether such insurance be by specific or by general or by floating policies, and if any such other policy contain an average or co-insurance clause or condition this company's liability herein shall be limited thereby the same and to the same extent as though such clause or condition was contained therein." This stipulation cannot be invoked herein, since the petition in the court below alleges a total loss of the building by fire, and in the absence of a bill of exceptions this court must presume that this averment is supported by the evidence. Section 43, chapter 43, Compiled Statutes, declares: "Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire, tornado, or lightning, and the property insured shall be wholly destroyed, without criminal fault, * * * such policy shall be taken conclusively to be the true

value of the property insured, and the true amount of loss and measure of damages." This provision has been construed by this court more than once, and the uniform holdings have been that where there has been a total loss by fire of insured realty, a clause in the policy limiting the amount of recovery to a sum less than the amount written in the contract of insurance is invalid and will not be enforced. (*Home Fire Ins. Co. v. Bean*, 42 Neb. 537; *Insurance Co. of North America v. Bachler*, 44 Neb. 549.) Where several concurrent policies of insurance upon real property have been written with the consent of the respective companies, and the property insured is wholly destroyed by fire, each company is liable for the full amount of its policy. (*Oskosh Gas Light Co. v. Germania Fire Ins. Co.*, 71 Wis. 454; *Havens v. Germania Fire Ins. Co.*, 27 S. W. Rep. [Mo.] 718; *Insurance Co. v. Leslie*, 47 O. St. 409.) The clause embraced in the policy in suit, being inconsistent with the statute quoted above, the former must yield to the latter. The case of *German-American Ins. Co. v. Heiduk*, 30 Neb. 288, is not in conflict with the conclusion reached herein, since that was a suit on a policy of insurance issued prior to the passage of section 43 quoted above.

It is finally insisted that the court erred in allowing plaintiff below an attorney's fee, because the same was not awarded as costs at the time the judgment was entered on the verdict of the jury, but at a subsequent term of court. Under section 45, chapter 43, Compiled Statutes, it is made the duty of the court on rendering judgment against an insurance company on a policy of insurance on realty to allow plaintiff a reasonable attorney's fee, to be taxed as part of the costs. (*Hanover Fire Ins. Co. v. Gustin*, 40 Neb. 823.) The attorney's fee in this case was allowed and taxed at the time the motion for a new trial was overruled, although at a subsequent term of the court to that during which the judgment was rendered on the verdict, which was a substantial compliance with the requirements of the statute. The trial court

retained jurisdiction over the cause until disposition was made of the motion for a new trial. The judgment below is

AFFIRMED.

H. J. TWINTING, APPELLEE, V. J. B. FINLAY, TRUSTEE, ET AL., APPELLANTS.

FILED MAY 19, 1898. No. 8063.

1. **Payment of Taxes:** EVIDENCE. Evidence *held* insufficient to establish the defense of payment.
2. **Taxes:** OATH OF ASSESSOR. The failure of an assessor to attach his oath to, and return the same with, the assessment roll are irregularities merely which do not affect the validity of the tax.

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

John T. Cathers, for appellants.

William A. Saunders and *Saunders, Macfarland & Dickey, contra.*

NORVAL, J.

This was an action to foreclose a tax deed, and from a decree in favor of the plaintiff the defendants have prosecuted an appeal.

It is insisted that the defendants had paid the taxes to the county treasurer, for which the real estate was sold, prior to the date of such sale. A careful perusal and consideration of the evidence adduced on the trial convinces us that the defendants paid no portion of the taxes included in the decree.

It is finally argued that the taxes are invalid because the assessor failed to attach his oath to the assessment roll for the year 1890. At the time of the trial in the court below it does appear that no oath of the assessor

was attached to the assessment book, nor was such oath to be found in the office of the county clerk of Douglas county. It is not alleged in the answer, nor was it proven upon the trial, that the assessor did not make oath to his return at the time he deposited the same with the county clerk. The mere failure to attach the assessor's oath to the assessment roll did not invalidate the tax based upon such assessment. The omission was an irregularity merely. (*Wood v. Helmer*, 10 Neb. 65; *South Platte Land Co. v. City of Crete*, 11 Neb. 344; *Hallo v. Helmer*, 12 Neb. 87; *McClure v. Warner*, 16 Neb. 447; *Merriam v. Dovey*, 25 Neb. 618; *Roads v. Estabrook*, 35 Neb. 297; *Johnson v. Finley*, 54 Neb. 733.) These cases are decisive of the question. The decree is right, and is

AFFIRMED.

WILLIAM TAYLOR ET AL., APPELLEES, V. FRANK DAVEY, COUNTY TREASURER OF DAKOTA COUNTY, ET AL., APPELLANTS.

FILED MAY 19, 1898. No. 8074.

1. **County Board:** ALLOWANCE OF CLAIMS: CONCLUSIVENESS. An order of a county board allowing or rejecting claims against the county has the force and effect of a judgment, and is conclusive unless vacated or reversed on appeal.
2. ———: ———: APPEAL BY TAXPAYER. A taxpayer may prosecute an appeal to the district court from the decision of a county board in the allowance of claims.
3. ———: ———: WARRANT: INJUNCTION: PARTIES. A court of equity will not, at the suit of a private individual, enjoin the payment of a warrant issued upon a claim duly audited by the county board, the remedy being complete at law, by appeal from the order allowing the claim.
4. **Injunction Against County Board.** *Ackerman v. Thummel*, 40 Neb. 95, distinguished.

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

Jay & Welty, for appellants.

W. P. Warner and *R. E. Evans, contra.*

NORVAL, J.

In November, 1892, one Simon Fritzon presented a claim to the county board of Dakota county for the sum of $1,100, the balance alleged to be due him for making an examination of the books and accounts of the treasurer of said county. On December 1, following, the county board audited and allowed said claim, and a warrant for said amount was drawn upon the county general fund in favor of said Fritzon, and the same was registered for payment by the treasurer. Afterwards, on February 1, 1894, this suit was instituted by two electors and taxpayers of the county to enjoin the payment of said warrant by the county treasurer. The owner of the warrant intervened, and upon the final hearing the district court entered a decree perpetually enjoining the payment of the warrant. The defendant and intervener have brought the record to this court for review.

Plaintiffs sought to enjoin the payment of the warrant in question for the following reasons: (1) That the contract made by said county with Fritzon, which is the basis for said warrant, was illegal; (2) that said contract was not executed; (3) that said claim was not included in the estimates of expenses made by the county board; (4) there was no money on hand, or levy of taxes made, against which said warrant could be drawn.

A county board has exclusive original jurisdiction to examine and pass upon claims against the county properly cognizable for audit and allowance, and the action of such board in allowing and rejecting claims has the force and effect of a judgment, and is conclusive unless vacated or reversed by means of appropriate appellate proceeding. This is the settled doctrine of this court.

(*Heald v. Polk County*, 46 Neb. 28; *State v. Merrell*, 43 Neb. 575; *State v. Churchill*, 37 Neb. 702; *Ragoss v. Cuming County*, 46 Neb. 36, 36 Neb. 375; *Sioux County v. Jameson*, 43 Neb. 265.) The grounds above stated upon which relief is demanded, or the most of them, would have afforded good and valid reasons for the rejection by the county board of the said claim of Fritzon, had the objections been seasonably presented. But the board had jurisdiction to audit and pass upon this claim, and it having acted in the premises, allowed the demand, and drawn a warrant for its payment, the decision is conclusive upon the county and the taxpayers thereof, since no appeal was prosecuted by any one from the action of the board.

A court of equity will not, at the suit of a private individual, enjoin the payment of a county warrant where a complete and adequate remedy is afforded by law. Section 38, article 1, chapter 18, Compiled Statutes, authorizes any taxpayer to appeal to the district court from the allowance of any claim against the county. Thus these plaintiffs under this statute had a complete remedy at law, which they failed to pursue. Relief cannot be had by injunction.

Ackerman v. Thummel, 40 Neb. 95, is readily distinguishable from the case at bar. That was an action to enjoin the issuance and payment of a warrant on the county treasurer for damages sustained by a land owner in the establishing of a public road. The action was maintained because the statute did not authorize a taxpayer to appeal in such a case. There his only adequate remedy was by injunction. In this case a plain and sufficient remedy existed at law, and a court of equity, for that reason, will not interfere. The decree is reversed and the action dismissed.

REVERSED AND DISMISSED.

WILLIAM HAYDEN ET AL. V. NICHOLAS FREDERICKSON.

FILED MAY 19, 1898. No. 8094.

1. **Sale:** DESCRIPTION OF PROPERTY: EVIDENCE. In an action on a contract for the sale of "all patterns that are staple and down to date," where no criterion was fixed by which to determine what patterns came within that description, it was error for the trial court to exclude evidence of competent witnesses regarding the standard usually adopted by the trade in selecting and purchasing such patterns.

2. ———: ———: ———: QUESTION FOR JURY. Evidence received without objection, examined and *held* sufficient to require a submission of the case to the jury.

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

C. J. Smyth and *T. J. Mahoney*, for plaintiffs in error.

George W. Cooper, contra.

SULLIVAN, J.

By this proceeding in error Hayden Bros. seek to reverse a judgment rendered against them by the district court of Douglas county in an action based on the following contract:

"This is to bear witness that Nicholas Frederickson has this day sold and delivered to Hayden Bros. a stock of linens, flannels, domestics, blankets, quilts, and all patterns that are staple and down to date, and everything belonging to the linen and domestic department of the Bell Department Store, of Omaha, Nebraska. It is hereby agreed and understood that said Hayden Bros. pay to said Nicholas Frederickson therefor cash at the completion of the inventory, at the rate of ninety (90) per cent of the original contract price of said goods, without discount. And it is further agreed that said Hayden

Bros. pay to Nicholas Frederickson the sum of $250 to bind the bargain at the signing of this agreement.

"Witness our hands this 16th day of September, 1893.

"NICHOLAS FREDERICKSON.

"HAYDEN BROS."

The verdict in favor of the plaintiff was returned in response to a peremptory direction of the trial court. The controversy results from the refusal of the defendants to accept and pay for the patterns mentioned in the contract. This refusal they attempted to justify at the trial on the ground that the patterns were not "staple and down to date." In making the invoice and ascertaining the patterns that answered the requirements of the contract the plaintiff used an album issued for the then current year by the manufacturer of the patterns. The contention now is that this album was the exclusive criterion by which to determine whether the patterns were "staple and down to date." The trial judge, it is quite evident, took this view of the matter, for he excluded the testimony of competent witnesses offered by the defendants for the purpose of showing that the patterns were not staple on account of the condition of the sealed envelopes in which they were contained and in which they would be kept until sold in the usual course of the retail trade. He also excluded evidence tending to prove that patterns are bought and sold exclusively upon the conditions of, and representations on, the envelopes in which they are inclosed, and that patterns contained in soiled, torn, or shop-worn envelopes are not considered, in that line of business, as salable and up to date. The refusal to receive and submit the proffered evidence to the jury was error, for which the judgment of the district court must be reversed. When the contract in question was made the defendants did not agree to accept the "Album of Fashions of the Universal Fashion Company" as an infallible standard by which to determine what patterns were staple and up to date; and there is no evidence whatever in the record to warrant

the assumption that it was accepted and recognized as such standard among merchants dealing in articles of this kind. On the contrary, it is shown that the fashions are constantly changing and that staple and unstaple patterns may be found on the same page of any fashion book. In the absence of any law, agreement, or binding usage among merchants, fixing an exclusive test by which to determine the question in dispute, the evidence of witnesses qualified by experience to speak on the subject is competent and should be received.

The court also erred in refusing to submit the case to the jury on the evidence admitted without objection. The testimony of Mr. Johnson, a witness for the defendants, was to the effect that he saw and examined the patterns; that they were all old styles and were neither merchantable nor up to date, some of them having hoopskirts and bustles. He also stated that Frederickson admitted to him that they had been purchased more than two years before the sale to Hayden Bros. This was clearly sufficient to raise an issue of fact for the decision of the jury, but it is probable the court considered it incompetent, as it was of the same character as the evidence excluded. For these errors the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

LINCOLN MORTGAGE & TRUST COMPANY ET AL., APPELLEES, V. JANE G. HUTCHINS, IMPLEADED WITH BADGER LUMBER COMPANY ET AL., APPELLANT.

FILED MAY 19, 1898. NO. 8128.

1. **Pleading**: COPY OF INSTRUMENT. By section 129 of the Code of Civil Procedure any instrument for the unconditional payment of money only may be attached to and made part of a pleading founded thereon.

2. ———: FORECLOSURE OF MORTGAGE. An action to foreclose a mort-

gage is not based on an instrument for the unconditional payment of money only.

3. ———: ———: COPY OF INSTRUMENT. In an action of foreclosure copies of instruments evidencing and securing the debt cannot properly be made a part of a pleading by annexation and averment.

4. ———: ———: ———. But such copies, under appropriate averment, may become, and will be considered, part of a pleading to which they are attached unless stricken out on motion.

5. ———: STRIKING OUT MATTER: REVIEW. The refusal of a court to strike redundant and irrelevant matter from a pleading is not reversible error unless it affirmatively appears that the rights of the moving party are prejudiced thereby.

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

A. B. Coffroth, for appellant.

S. L. Geisthardt, contra.

SULLIVAN, J.

This was an action in the district court of Lancaster county to foreclose a real estate mortgage. The first paragraph of the petition is as follows: "That heretofore, to-wit, on December 18, 1889, the defendants Jane G. Hutchins and Charles H. Hutchins executed and delivered to the Clark & Leonard Investment Company a promissory note, with coupons annexed, a copy whereof, with the unpaid coupons, is hereto annexed and made a part hereof and marked 'Exhibit A.'" The Badger Lumber Company, being a party defendant, filed a motion to strike from the paragraph of the petition above quoted the words "and made a part hereof" for the alleged reason that the same were redundant and irrelevant. The motion was overruled, and a final decree having been rendered in the case the appellant brings the record here for review.

The correctness of the ruling on the motion to strike is the only question presented for decision. The motion, it will be observed, did not assail the plaintiffs' right to

attach the copies to the petition, but was directed only against the attempt to make them a substantive part of the pleading. By section 129 of the Code of Civil Procedure, any instrument for the unconditional payment of money only may be attached to and made a part of a pleading founded thereon. But this action does not fall within the provisions of that section. It is not founded on an instrument for the unconditional payment of money only. Its purpose is to ascertain the amount of the plaintiffs' claim and appropriate the land described in the mortgage to its payment. In an action of foreclosure there is no authority in the statute for making attached copies part of the petition or answer, and a party cannot properly make out his case by reference to such copies. The essential facts upon which the right of recovery depends should be stated in the pleading. (*Post v. Garrow*, 18 Neb. 682.) Still, it has been held in this state, contrary to the great weight of authority elsewhere, that attached copies become a part of the pleading when they are made so by averment. (*Pefley v. Johnson*, 30 Neb. 529.) From this it results that the words which the defendant sought to have stricken out were not, strictly speaking, redundant or irrelevant. The motion lacked technical adaptation to the purpose to be attained, and there was, therefore, no error in refusing to sustain it.

But even if the court had erred in overruling the motion, a reversal of the judgment would not follow. A party has no absolute right to have his adversary's pleadings pruned to suit his fancy. A reviewing court will only interfere in such matters where it appears that the denial of a motion to correct a pleading was not only erroneous, but prejudicial to the substantial rights of the moving party. (*Keesling v. Watson*, 91 Ind. 578; *McFall v. Machine Co.*, 90 Ind. 148; *Walker v. Larkin*, 127 Ind. 100, 26 N. E. Rep. 684; *Haug v. Haugan*, 51 Minn. 558, 53 N. W. Rep. 874; *Madden v. Minneapolis & St. L. R. Co.*, 30 Minn. 453, 16 N. W. Rep. 263; *Columbus & W. R.*

Co. v. Bridges, 86 Ala. 448, 5 So. Rep. 864; *Goldsmith v. Picard*, 27 Ala. 142.) The judgment of the district court is

AFFIRMED.

WILLIAM R. ALLING, TRUSTEE, APPELLEE, V. PETER B. NELSON ET UX., APPELLANTS, ET AL.

FILED MAY 19, 1898. No. 8079.

1. **Trial to Court:** EVIDENCE: HARMLESS ERROR. Where a case is tried to the court without the aid of a jury the admission of improper evidence is not prejudicial error.
2. **Rulings on Evidence:** REVIEW. The rulings of the trial court rejecting evidence tendered by a party cannot be reviewed by this court on appeal.
3. **Evidence:** REVIEW. A party who brings a case to this court by appeal impliedly consents to submit the issues for decision upon the evidence actually in the record.
4. **Decree of Foreclosure:** PERSONAL JUDGMENT. A decree in a foreclosure suit which finds the amount due, directs that it be paid within a fixed time, and provides for the sale of the premises in default of payment, is not a personal judgment.
5. **Foreclosure of Tax Lien:** AMOUNT RECOVERABLE. On the foreclosure of a tax lien based on a valid tax sale the holder of such lien is entitled to recover the amount bid at the tax sale, together with interest thereon at the rate of twenty per cent per annum for the period of two years from the date of his certificate and ten per cent thereafter.

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

C. H. Bane and *D. B. Jenckes* for appellants.

Albert W. Crites, contra.

SULLIVAN, J.

This action was commenced in the district court of Dawes county to foreclose a real estate mortgage executed by Nelson and wife to Spargur & Fisher and by

them transferred to the plaintiff William R. Alling. The defendants Josiah D. Bacon and James S. Romine were tax-sale purchasers of the mortgaged premises and filed an answer asserting their tax lien and asking for a foreclosure of the same. A trial resulted in a decree in favor of the plaintiff and also in favor of Bacon and Romine. The Nelsons appeal. The theory of the defense to the plaintiff's action was that the mortgage was given to secure a usurious loan and that Spargur & Fisher acted as plaintiff's agents in the transaction. The plaintiff denied the alleged agency and claimed that he was an innocent purchaser for value, in the usual course of business and before maturity, of the negotiable notes which the mortgage was given to secure. There is some testimony feebly tending to support Nelson's defense, but the finding and decree of the district court in favor of the plaintiff is sustained by ample evidence and is approved.

Appellants complain of the reception by the trial court of evidence alleged to be incompetent. We do not think the complaint is well grounded, but, assuming that it may be, it does not follow that the judgment should be reversed. It has been frequently held that when a case is tried to the court without the aid of a jury the admission of improper evidence is not prejudicial error. (*Stabler v. Gund*, 35 Neb. 648; *Liverpool & London & Globe Ins. Co. v. Buckstaff*, 38 Neb. 146; *Sharmer v. McIntosh*, 43 Neb. 509; *Stover v. Hough*, 47 Neb. 789; *Buckingham v. Roar*, 45 Neb. 244.)

The ruling of the court in rejecting certain evidence tendered by the Nelsons to establish their defense is also made the subject of complaint. This action of the court cannot be reviewed. By bringing the case here on appeal appellants have signified their willingness to submit the issues for decision upon the evidence actually in the record. Such is the holding in the recent case of *Ainsworth v. Taylor*, 53 Neb. 484.

It is said that the decree is, in legal effect, a personal

judgment for the amounts found due the plaintiff and the defendants Bacon and Romine. We do not so understand it. It finds the amounts due, directs that they be paid within a fixed time, and provides for the sale of the premises in default of payment. This is the usual form of decree in such cases. It is not a personal judgment. It furnishes no basis for a general execution against the property of the debtor. Appellants have not, themselves, treated it as a personal judgment, for the supersedeas bond tendered by them and approved by the clerk of the court is drawn with reference to the third subdivision of section 677 of the Code of Civil Procedure, and is conditional merely for a speedy prosecution of the appeal and against the commission or permission of waste.

It is finally asserted that the court erred in allowing Bacon and Romine twenty per cent interest on their claim. No argument is made in support of this assertion and it seems to be entirely without merit. The proceedings which resulted in the tax sale and the sale itself seem to have been regular, and the law is well settled that on the foreclosure of a tax lien based on a valid tax sale the holder of such lien is entitled to recover the amount bid at the tax sale, together with interest thereon at the rate of twenty per cent per annum for the period of two years from the date of his certificate and ten per cent thereafter. (*Alexander v. Thacker*, 43 Neb. 494; *Osgood v. Grant*, 44 Neb. 350.) The judgment of the district court is right and is

AFFIRMED.

CHARLES OGDEN ET AL. V. BENJAMIN ROSENTHAL ET AL.

FILED MAY 19, 1898. NO. 9924.

1. **New Trial**: CONDITIONS. An order of the district court granting a new trial on conditions to be performed by the moving party after the adjournment of the term is valid.

2. ———: ———. In such case the right to a new trial becomes absolute on performance of the condition.

3. ———: ———. An order of the district court construed and *held* not to be a mere declaration of intention on the part of the court, but a positive adjudication establishing at once plaintiff's right to a retrial of the cause on compliance with certain conditions named in the order.

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

John C. Cowin, Charles Ogden, and *J. W. West,* for plaintiffs in error.

References: *McBrien v. Riley,* 38 Neb. 561; *Ganzer v. Shiffbauer,* 40 Neb. 633; *Smith v. Pinney,* 2 Neb. 139; *Secrest v. Best,* 6 Tex. 199; *Hill v. St. Louis,* 20 Mo. 584; *Little Rock v. Bullock,* 6 Ark. 282; *McKnight v. Strong,* 25 Ark. 212; *Anderson v. Thompson,* 7 Lea [Tenn.] 259; *Townshend v. Chew,* 31 Md. 247; *Mabley v. Judge Superior Court,* 41 Mich. 37; *Ward v. Patterson,* 46 Pa. St. 374.

Warren Switzler and *Hall & McCulloch, contra.*

SULLIVAN, J.

The plaintiffs sued the defendants in the district court of Douglas county and recovered a judgment against them, which was subsequently reversed by this court. (*Rosenthal v. Ogden,* 50 Neb. 218.) The cause was remanded for further proceedings and on a second trial the plaintiffs again had judgment in their favor. Afterwards, on June 25, 1897, on the defendants' application for a new trial, the district court made an order, the material part of which is as follows: "This court further finds that the defendants were not diligent in the defense of said cause and were guilty of laches in not preparing for and being present, by themselves or counsel, to defend at the trial of this cause. The court further finds that the plaintiffs being blameless in the premises, and having prosecuted said cause to said judgment in

all respects as provided by law, that the defendants should pay all costs incurred during the pendency of this cause in this court up to this date, but not costs incurred in proceedings in error to the supreme court, and a reasonable attorney's fee for plaintiffs' counsel for services in procuring the judgment now asked to be set aside, which the court finds to be of the reasonable value of $150. And the court, exercising its discretion in the premises under the general control which it has over its said judgment during the term the same was rendered, and desiring to give the defendants further opportunity to make defense, it is ordered and adjudged that, upon the defendants paying into court the amount of said costs and the amount of said attorney's fee for and on behalf of said plaintiffs, within ten days from this date, then that said judgment be, and the same is hereby, set aside and a new trial awarded to the defendants herein; and that upon failure of said defendants within ten days to make said payments, that said judgment, as rendered, stand in full force and effect in all respects to the same extent as if this order had not been made." The term at which this order was entered was formally adjourned June 30, 1897, and on the 3d day of the following month the defendants complied with the conditions of the order, paying the costs and attorneys' fees to the clerk of the court. Afterwards an original application was made to this court for an order requiring the clerk of the district court to issue an execution on the judgment rendered on the second trial. (*State v. Frank*, 52 Neb. 553.) The writ was denied on the ground that the application should have been made to the district court. The procedure suggested by the opinion in that case was thereupon adopted and in due time resulted in an order overruling plaintiff's motion for an execution. From this order, and to secure its reversal, the plaintiffs prosecute error to this court.

Plaintiffs contend that the order above set out did not become operative during the term at which it was

made, and is therefore null. In support of their position they refer us to the opinion in the last mentioned case, where it is said: "Construing the order as an entirety, it seems to us to amount to no more than a declaration of the purpose of the district court to grant a new trial, provided that within the period of ten days certain payments should be made; otherwise, that at the expiration of the limit named a new trial would be denied." This language certainly does tend to support the plaintiffs' claim, but it must be remembered the decision of the case did not turn upon the construction of the order, and that the interpretation placed upon it did not at all affect the conclusion reached by the court. We are now satisfied, after a more thorough consideration of the question, that the order is not a mere declaration of intention on the part of the district court, but a positive adjudication establishing at once plaintiffs' right to a retrial of the cause on compliance with the conditions named. No further judicial action was contemplated. It is true the plaintiffs were required to do something within a time extending beyond the term, before they could avail themselves of the right secured by the order; but the court, itself, did nothing in vacation in relation to the matter. It acted during the term, and its action was complete and final. It is an ancient practice, justified by considerations of convenience and well sustained by the authorities, to award a new trial on conditions to be performed by the moving party after the adjournment of the term at which such order is made. (*First Nat. Bank of Grundy Center v. Brown*, 81 Ia. 208; *Somers v. Sloan*, 3 Harr. [N. J.] 46; *Wallace v. Floyd*, 29 Pa. St. 184; *Crew v. McCafferty*, 124 Pa. St. 200; *Buntain v. Mosgrove*, 25 Ill. 152; *Adams Express Co. v. Gregg*, 23 Kan. 376; *People v. Judge Superior Court of Detroit*, 41 Mich. 31.) In the case last cited an order was held valid which granted a new trial on condition that the party should disclose his defense, waive his right to remove the cause to the federal court, and proceed to trial at the next

term. We know there are holdings to the effect that an order granting a new trial upon a condition to be performed after the adjournment of the term is void; but we are not convinced of the soundness of the doctrine established by these cases and we decline to follow them. The order of the district court refusing an execution is right and is

AFFIRMED.

STATE OF NEBRASKA, EX REL. JOHN BARTON, V. MILLARD F. FRANTZ.

FILED MAY 19, 1898. No. 9968.

1. **Quo Warranto**: JURISDICTION OF DISTRICT COURT. The district court has original jurisdiction in an action in the nature of quo warranto to hear and determine conflicting claims to a public office.
2. **Office and Officers**: SURRENDER OF OFFICE. It is the duty of one in possession of an elective office, at the end of his term, to surrender that possession to one who holds the certificate of election for the ensuing term.
3. ———: DUTY TO QUALIFY. The provisions of section 15, chapter 10, Compiled Statutes 1897, requiring any person appointed or elected to a public office to qualify at the time and in the manner therein directed, do not apply to a claimant for an office who, through the carelessness, negligence, or willful omission of the precinct election boards in the discharge of their duties, failed to receive the certificate of election to such office.
4. ———: CERTIFICATE OF ELECTION: EVIDENCE. Where a candidate for a public office has received and holds the certificate of election, such certificate is conclusive evidence of his right to the office until it is judicially determined that some other person has a better title.
5. ———: ———: QUO WARRANTO. A candidate who has failed to secure the certificate of election may qualify and be inducted into office upon establishing his claim thereto in a quo warranto proceeding.

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

F. I. Foss, J. D. Pope, A. N. Dodson, and *J. A. Wild,* for plaintiff in error.

Hastings & Sands, contra.

SULLIVAN, J.

John Barton, upon his own relation, filed an information in the nature of quo warranto addressed to the district court of Saline county to test the right of Millard F. Frantz to hold and exercise the office of treasurer of said county. The statement of facts which constitutes the basis of the proceeding may be summarized as follows: The relator alleges a demand on the county attorney to institute the action and a refusal on his part to do so; that this action is brought on behalf of the state and of himself; that he is a citizen of the United States and of the state of Nebraska, and on November 2, 1897, was a resident and elector of Saline county and possessed of all the qualifications required by law to hold the office of treasurer of said county; that he and respondent were the regular nominees and candidates of their respective parties for said office; that relator received 1,865 votes for said office and respondent 1,722 votes, and no more; that relator received a majority of all the votes cast at said election for the candidates for said office and was duly and legally elected such treasurer for the term of two years, commencing on the 6th day of January, 1898. It is further alleged that there was error, negligence, and fraud on the part of the judges and clerks of election in the various voting districts in said county in the count of votes and the returns thereof to the county clerk, and that the official canvass of said returns wrongfully and erroneously represented and showed that the respondent received 1,796 votes and the relator 1,752 votes; that some votes were wrongfully counted for respondent or wrongfully rejected and not counted at all, and that on the official canvass, on ac-

count of such carelessness, negligence, and fraud, the facts as to the correct vote for relator and respondent did not appear, and therefore a certificate of election to said office was issued by the county clerk of said county to the respondent, who, on January 6, 1898, wrongfully usurped said office and entered upon the duties thereof. The relator further alleges that prior to and including January 6, 1898, he had no knowledge of such carelessness, negligence, and fraud, and prays for a recount of the votes cast at said election for said office; that respondent be declared not elected; that judgment of ouster be rendered against him; and that the relator be declared elected to said office and installed therein on qualifying as required by law. The respondent demurred to the information for the following reasons: (1) That the court has no jurisdiction of the subject of the action; (2) that the plaintiff has not legal capacity to sue; (3) that the petition and information does not state facts sufficient to constitute a cause of action. The court sustained the demurrer, overruled a motion for a new trial, and dismissed the action. To secure a reversal of this judgment is the purpose of this proceeding in error.

One of the grounds urged in justification of the ruling of the district court on the demurrer is that the court was without jurisdiction to hear and determine the cause for the reason that the statutory remedy by contest is exclusive. That question has been twice before this court for decision and may now be considered as definitely settled adversely to the contention of the respondent. In the case of *Kane v. People*, 4 Neb. 509, LAKE, J., after bringing into view the constitutional and statutory provisions bearing upon the point, uses this language: "This shows the entire harmony existing between the constitution and our legislation on this subject, and leaves us in no doubt whatever as to the full and complete jurisdiction of the district court in this case." In *State v. Frazier*, 28 Neb. 438, a case involving the office of county

attorney, the question was re-examined and the doctrine of *Kane v. People, supra*, approved. In the opinion written by COBB, J., it is said: "I am therefore of the opinion that the remedy by contest under the provisions of the statute above cited, in cases like the one at bar, is a cumulative and not exclusive one, and that the objections to the procedure by quo warranto and to the jurisdiction of this court to hear and determine it must be overruled."

Another argument pressed on our attention with much apparent confidence by the respondent is that the relator was in possession of the office in controversy, and having voluntarily abandoned the same and surrendered the possession thereof to the respondent, he thereby forfeited whatever rights he may have had. This contention is obviously without merit. Barton does not rely on a mere possessory right, but upon a title derived from, and by virtue of, an election. If he was in possession, it was his duty, at the commencement of the new term, to surrender that possession to his adversary, who held the certificate of election and was, therefore, *prima facie* the lawfully chosen treasurer. (McCreary, Elections [3d ed.] sec. 267.) Moreover, it appears from the allegations of the information that Barton did not acquiesce in respondent's claim of title, nor concede its validity, with knowledge of the facts which he now insists show his own election to the office.

A further consideration put forward in support of the judgment of the district court is that the relator has never qualified as treasurer of Saline county. Section 5 of chapter 10 of the Compiled Statutes 1897 requires all officers elected at any general election to file in the proper office their official bonds, with oath of office indorsed thereon, on or before the first Thursday after the first Tuesday in January next succeeding the election. Section 7 of the same act makes it the duty of the county board to approve the official bonds of all county officers except their own; and section 15 provides that "if any person elected or appointed to any office shall neglect

to have his official bond executed and approved as provided by law, and filed for record within the time limited by this act, his office shall thereupon *ipso facto* become vacant and such vacancy shall thereupon immediately be filled by election or appointment as the law may direct in other cases of vacancy in the same office." If these provisions of the statute are applicable to persons who have been chosen by the electors, but not canvassed in by the returning board, it is perfectly clear that the relator has now no legal claim to the office and cannot maintain this action.

It was held in *State v. Plambeck*, 36 Neb. 401, and also in *McMillin v. Richards*, 45 Neb. 786, that where an official bond in due form, with sufficient sureties thereon, is tendered for approval by one having the *prima facie* title to an office, the proper officer must approve it, and that such duty would be enforced by mandamus. But we know of no case holding that there is any right given or duty imposed on any officer or board to approve an official bond offered by one who possesses no competent evidence whatever of his election or appointment. Had the relator presented his bond as treasurer to the county board of Saline county, that body would have no right to approve it and thereby recognize his title to the office. Mr. Frantz held the certificate of election, and that was to them conclusive evidence of his right until the conflicting claims of the parties should be judicially determined in a proper proceeding. Consequently nothing would have been gained—no useful purpose would have been served—by the execution and presentation of an official bond. (*People v. Miller*, 16 Mich. 56.) The logic of respondent's contention, therefore, is that the relator lost his right to the office by failing to have that done which, under the circumstances, was legally impossible of performance. We do not think the statute should receive so narrow an interpretation. We think that the failure of Barton to have his bond executed and approved within the statutory period was not the result of his neglect, and

that section 15 aforesaid has no application to cases of this character. Such failure, according to the averments of the information, was entirely due to the negligent or willful omission of the precinct election boards to discharge the duties imposed upon them by law. It seems to us that the act in relation to proceedings by quo warranto governs the case. Section 711 of the Code of Civil Procedure provides that if judgment be rendered in favor of one claiming an office he shall proceed to exercise its functions after he has qualified as required by law. This provision evidently contemplates that the successful claimant shall qualify after judgment of ouster, and proceeds on the assumption, of course, that he did not qualify before. We are aware it was held in the case of *State v. Lansing*, 46 Neb. 514, that upon the failure of an officer elected to qualify as required by law his office became, *ipso facto*, vacant; but in that case the failure to qualify was due to the officer's own neglect and did not occur through the fault or omission of any other officer charged with a duty in relation to the matter. In that case the officer might have qualified and failed to do so, while in this case the relator was prevented from qualifying by the errors or misconduct of the precinct election officers. The difference is an obvious and substantial one. Our conclusion is that the relator may prosecute this action without having qualified as treasurer of Saline county, and that if he shall be successful he may be inducted into office upon giving, and having approved, his official bond with the oath of office indorsed thereon. This conclusion is warranted by a fair construction of the several statutory provisions bearing on the question. It is consonant with justice and is supported by several adjudged cases. (*People v. Mayworm*, 5 Mich. 146; *People v. Miller*, 16 Mich. 56, 24 Mich. 458.) The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

H. E. LEWIS, TRUSTEE, APPELLANT, V. G. W. HOLDREGE ET AL., APPELLEES, AND KENT K. HAYDEN, RECEIVER, APPELLANT.

FILED MAY 19, 1898. No. 8080.

1. **Fraudulent Conveyances:** ASSIGNMENTS: EVIDENCE: REVIEW. The evidence in this case examined and found to show that the assignments through which plaintiff claims an interest in the subject-matter in controversy were fraudulent and void.
2. **Garnishment:** REVIEW. There being no evidence of the garnishment alleged by the plaintiff and denied by appellees, and the proofs failing to disclose that the garnishee has in hands any money for which he is liable to account, it is not deemed necessary to retain the case merely to settle the matter of garnishment.

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

A. S. Tibbets, Tibbets, Morey & Ferris, L. C. Burr, Cobb & Harvey, and *Lamb, Adams & Scott,* for appellants.

J. W. Deweese, F. E. Bishop, and *G. M. Lambertson, contra.*

RYAN, C.

In the district court of Lancaster county Henry E. Lewis began this action against George W. Holdrege and others to obtain an adjudication of his ownership, as trustee for the Lincoln Savings Bank & Deposit Company, of a one-tenth interest in the proceeds of the sales of certain lands of which the title was held in trust by G. W. Holdrege for the benefit of himself and certain associates, of whom C. W. Mosher was one, to the extent of one-tenth interest in the investment. On January 21, 1893, the Capital National Bank, of which Mosher was the president, closed its doors and afterwards went into the hands of a receiver, and, as the evidence shows, this receiver has so far been able to collect sufficient of its assets to pay but fifteen per cent on its indebtedness. At

the time the bank failed it had on deposit the sum of $4,451.83, of which the syndicate, of which Mr. Holdrege was a representative, was the owner. Plaintiff, as trustee as aforesaid, claims by his petition to be entitled to be decreed the owner of one-tenth of this sum and of such other sums as shall be realized for the syndicate hereafter, and this claim he predicates on an assignment made to the bank and deposit company by the Western Manufacturing Company on May 19, 1894, to which latter corporation Mosher had previously assigned his said interest. The defense of the members of the syndicate represented by Mr. Holdrege is that plaintiff by assignment obtained no right which Mosher could not have enforced, and that Mosher could not have enforced this right to one-tenth of the deposit in the Capital National Bank because of the fact that its failure was attributable solely to its wreckage by Mosher, its president, and they claim the money due Mosher on account of the damage which resulted from this, his misconduct. By denial they also put in issue the averments of the petition. Kent K. Hayden, the only defendant not a member of the syndicate, alleged in his answer and cross-petition that on June 30, 1893, he, as receiver for the Capital National Bank, commenced suit in the United States circuit court for the district of Nebraska against C. W. Mosher, and on July 27 thereafter garnished G. W. Holdrege, and finally obtained judgment for the sum of $84,294.48 against Mosher, which is still unpaid. In the case at bar there was a judgment for the counter-claim of Mr. Holdrege and his associates, and from this judgment plaintiff and the receiver have appealed.

It is a matter of regret that a portion of the books of the Western Manufacturing Company had been destroyed by fire, so that the testimony of M. D. Welch was not as clear and intelligible as, with the aid of the missing books, it might have been. Practically no other testimony than that of Welch is available on the matters to be considered, for, though Mosher's deposition was taken,

it affords no assistance. We shall not undertake to detail the testimony of Mr. Welch in full, but from it shall endeavor to glean and narrate the facts which lead us to the conclusions which we reach.

In substance M. D. Welch testified that he had been manager and secretary of the Western Manufacturing Company since September 1, 1888; that the written assignments of Mosher's interest were two in number; that the first of these was made in April, 1893, while perhaps Mosher was in the custody of the United States marshal in the city of Omaha,—but he could not explain why it was not dated,—and that the second assignment was made by Mosher in the jail at Omaha about July 21, 1893. These assignments, in the order in which they were made, were in the following language:

"ASSIGNMENT.

"For value received I hereby sell, assign, and transfer all my interest in and to the foregoing contract (that defining the objects of the syndicate and the interests of the parties thereto), and all my right thereunder, to the Western Manufacturing Company of Lincoln, Nebraska.

"CHARLES W. MOSHER."

"Know all men by these presents, that I, Charles W. Mosher, of Lincoln, Nebraska, do hereby grant, bargain, sell, and assign to the Western Manufacturing Company all of my interest in my lands lying in, formerly Keith, now Perkins county, Nebraska, and hereby convey and assign to the said Western Manufacturing Company all of my interest in all of the lands described in the attached and within contract, and all my right, title, or interest, either legal or equitable, that I have under the annexed contract. This conveyance and assignment is made by me to secure any indebtedness which I owe to the Western Manufacturing Company. As witness my hand and seal this 21st day of July, 1893.

"CHARLES W. MOSHER."

M. D. Welch in his testimony thus explained why there were two assignments: "I held those contracts [probably referring to the contract and first assignment attached thereto] for two months or such a matter, and from a remark made by Mr. Hayden, receiver of the Capital National Bank, at one time on the streets of Lincoln where he stated that the bank was going to garnishee some land contracts they had found out about, I then took those contracts to my attorney, Mr. Lamb, and asked him if everything was all in order as there was likely to be litigation over them, and he advised me then to have another assignment made and record them in the counties where the land was located, and I did so under his advice." The second of these assignments was acknowledged as indicated by the above testimony. The clause which recites that the purpose of the assignment was to secure any indebtedness which Mosher owed to the Western Manufacturing Company is significant as indicating what was understood to be the purpose of the assignment on July 21, 1893, and may be profitably borne in mind when considering the further testimony of Mr. Welch in respect to the contract of the Western Manufacturing Company with Mosher. It is not by any means clear just what all the transactions were between Mosher, the Western Manufacturing Company, and M. D. Welch, but Mr. Welch did testify that Mosher owed the Western Manufacturing Company $23,591.16, and that the above assignments and another contemporaneous assignment of land in Wyoming were taken as a partial payment to the extent of $9,000. This left due about $14,591.16, which, it seems from some of the testimony of Mr. Welch, was settled by capital stock in the Lincoln Gas Company. We shall not at present go into details of this part of the transaction, but at this point will give Mr. Welch's version of the origin of the indebtedness of $23,591.16.

In June, 1888, the Western Manufacturing Company was organized as a corporation, and of its capital stock of $100,000 Mosher was, and during its existence con-

tinued to be, practically the owner of its shares of the par value of $51,000. In August, 1888, Mosher transferred to the company farm machinery and manufactured products, etc., at a valuation of $44,000. This valuation was fixed by an invoice made by third parties, who were, as Mr. Welch testified, not competent to do this work. In 1889 Welch discovered that the inventory had not been correctly made, and within a year or two thereafter he found that the over-valuation and charges for goods not transferred amounted to $9,000, and more. He testified that the purchase price (presumably $44,000) was paid partly in cash and partly in notes, and that all the notes were payable at the Capital National Bank but one, which was payable at Boston, Mass. He was not able to say how much was paid in cash and how much in notes. The original notes given by the Western Manufacturing Company ran four months and were frequently renewed, and, notwithstanding the fact that the discrepancies in the invoice were known, these notes were paid at the Capital National Bank without any attempt to secure a reduction because of the mistakes in the invoice. While Mr. Welch did not ask to have credits on the notes, he testified that he frequently asked Mosher to pay the difference above indicated, and was put off with promises of Mosher that he would pay. In 1889 the Western Manufacturing Company paid dividends on its stock, likewise in 1890, but these payments did not, as Mr. Welch thought, extend into 1891. These dividends were at the rate of two per cent per month, for whatever time they were made, and Mosher thus received a thousand dollars per month. The discrepancies of the aggregate amount of $9,000 in the invoice were, however, not settled. Of the alleged amount of $23,591.16 due from Mosher to the Western Manufacturing Company, $9,000 was made up as above described, leaving $14,591.16 still to be accounted for. The testimony of Mr. Welch with reference to the history of this item was, in part, as follows: "Mr. Mosher owned a majority of the stock in the Western

Manufacturing Company, and he dominated the policy of that business, because it wasn't necessary to call a meeting of the directors or trustees to make or pass a resolution or do anything, because he would have his way there, as well as he would outside the meeting of the directors or trustees. The result would have been the same, because he owned $50,000 worth of the stock on the books of the company and Maxwell, the assistant cashier of the bank, owned $1,000, which stood in his name, but Mosher said he owned that stock and that gave him $51,000 worth of stock.

"Q. Court: The capital stock was $100,000?

"A. Yes, sir. In 1889 there was a rival cooperage establishment, or rival cooperage company, incorporated in Omaha to manufacture cooperage, and Mr. Mosher was fearful that it would injure our business, and we thought so to the extent that we took steps to stop the erection of that plant, and it cost us $14,640.40, and I paid it, or the Western Manufacturing Company paid it, and I charged it to him, and that amount with the two amounts I have given you makes the $22,591.16."

While Mr. Welch speaks of two amounts to be added to the cost of preventing the existence of a rival cooperage plant, there was but one amount so added, though it may have been made up of two classes of charges. Mr. Welch testified that he protested against the movement to exclude another cooperage establishment from rivalry, and that Mosher agreed that the necessary expenses for this should be charged to him and that, individually, he would pay it. The above accumulations of rebates necessary to silence the rival cooperage business were paid in 1890 and 1891. There were other rebates connected with the manufacturing at the penitentiary, but as they were not clearly stated, and as Mr. Welch admitted that some of them were fictitious, we shall not attempt to describe them, especially as they do not seem, necessarily, to enter into this controversy.

We shall now take up the sale of the gas stock, and to

illustrate Mr. Welch's method of testifying we shall copy his answer when this subject was entered upon. He said: "I got some other stuff from him,—some truck that don't appear in this account. If I get into this account and bring the books up here I will have to go into the history of the Western Manufacturing Company and the prison contract, and the whole business will be spread up here for me to explain, and all things in that account, and show what these charges consist of and how it was balanced and the transactions backwards and forwards for four or five years and after he was sentenced to the penitentiary. There are charges there that I furnished his wife to buy the necessaries of life, and there are charges there that have been settled in different ways by him or his friends. I don't think it is necessary to take up all that stuff, because it has nothing to do with this case." Later, Mr. Welch testified that, for the balance, after $9,000, because of the assignments, had been credited, he got some gas stock of the Lincoln Gas Company. In his testimony still later, and after a searching cross-examination, Mr. Welch described the manner in which this gas stock was transferred to the Western Manufacturing Company. Very much condensed, his statements were to the effect that Mosher had represented that this stock was worth sixty to seventy cents on the market; that he would give the Western Manufacturing Company long time on it at six per cent interest, and finally, that in October, 1892, Mosher handed Welch a $53,500 package of the stock, which Welch placed in the safe of said company. With the exception of a short time in which Mosher had this stock for some temporary purpose of his own it remained in that safe. The price at which Mosher offered to sell this stock was sixty cents on the dollar of its par value. Welch testified that the bulk of this stock was to be applied on the sum which Mosher owed the company; that he himself undertook to pay Mosher the value of $20,000 stock, and the remainder, $33,500, was to be applied on the indebt-

edness of the company. Mr. Welch said that of the $10,000 to be paid for $20,000 in gas stock he had paid $5,000 to some one, he did not know to whom, but he thought it was to Henry Mansfield, a relative of Mosher. This witness did not remember to whom the other $5,000 was paid. In the books of the Western Manufacturing Company there were the following entries with reference to this transaction: "Stock Lincoln Gas Co. Bills payable $37,100; gave our notes as follows: $5,000, $7,100, $10,000, $10,000, $32,100." It appears from the testimony of Mr. Welch that the purchase of the gas stock was not closed up till January 23, 1893, when Mosher, before daylight, came to Mr. Welch's sick room and made known to him the failure of the Capital National Bank two days before, and thereupon, without parley, the deal for the gas stock was closed.

In view of the fact that Mosher practically owned $51,000 par value of the $100,000 stock of the Western Manufacturing Company and, as Welch said, dominated its management, the transaction should be closely scrutinized, and careful scrutiny in no degree tends to diminish reasons for suspicion. The company paid its notes to Mosher and paid him many thousands of dollars in dividends at the same time that he was indebted to it. He was its president. In October, 1892, when the Capital National Bank was hopelessly insolvent, Mosher intrusted to Welch over $53,000 par value of stock, worth, as agreed between them, sixty cents on the dollar, and this stock was held without any agreement that would make it the property of the Western Manufacturing Company. Two days after the doors of the Capital National Bank had closed, and before daylight in the morning, in a sick room at that, the transfer of this stock, it is claimed, was consummated between the president of the company acting for himself and Mr. Welch acting as manager and secretary of the company. But this, according to the books of the company, paid none of its debts. For Mosher's stock there seems to have been received for the benefit of

Mosher $10,000 in the equivalent of cash. There was also received $32,500 in notes of the manufacturing company. It is perhaps not very material what was done with these notes, but Welch says that, without being paid, they came back into his possession and were consumed in the untimely fire to which we have heretofore referred. In April following the transfer of the gas stock an effort was made by Mosher to transfer the matter involved in this controversy to this same company. At that time Mosher was in the custody of an officer and Welch was compelled to procure the transfer under these conditions. Again, in July following, and under similar conditions, another assignment of this same litigated cause of action was made, and in this assignment it was recited that it was as security for whatever Mosher owed the company of which he was president and of which he owned more than one-half the capital stock. In his testimony Mr. Welch admitted that, even after the final assignment and after the account of the company with Mosher had been balanced, he, as said secretary and manager, filled several requisitions of Mosher for $50 each, and charged the same to Mosher's account with the company. At the times when the above assignments were being made the company was owing over $125,000 and, from the evidence, we judge, must have been insolvent. Under these circumstances we have no hesitation in saying that the attempted assignments from Mosher, which are in dispute in this case, were absolutely void. The transfer by the Western Manufacturing Company to plaintiff of its rights conveyed nothing, for it had nothing to convey.

The answer of Mr. Holdrege and his associates interested adversely to the receiver was filed March 25, 1895. The answer and cross-petition of the receiver was filed April 4, 1895, and the reply thereto on the same day. The trial began the day following and, though Mr. Holdrege did not reply, the issues were presented as though he had put in issue the averments of the answer and cross-petition of the receiver. Mr. Harvey testified that the

receiver had never insisted on Mr. Holdrege answering as garnishee, and that Mr. Holdrege had told him that he had a set-off of $4,500. The only evidence introduced to establish the facts of the issue of an attachment, the service of garnishment process, the rendition of judgment, and, in truth, any proceedings was a certificate as follows:

"In the Circuit Court of the U. S., District of Nebraska.

"KENT K. HAYDEN, RECEIVER OF THE CAPITAL NAT. BANK OF LINCOLN, v. CHARLES W. MOSHER. } No. 39. Q.

"I, Elmer D. Frank, clerk of the circuit court of the United States for the dist. of Nebraska, do hereby certify that on the tenth day of Jan., 1894, said plaintiff recovered judgment against said defendant for the sum of $84,294.48 and costs of suit; that on the 18th day of May, 1894, an execution was issued in said case, and on the 28th day of May, 1894, said execution was returned by the United States marshal for said district indorsed, 'no property found.' ELMER D. FRANK, *Clerk.*"

We have carefully examined the testimony in this case and have not been able to find any evidence sufficient to hold Mr. Holdrege liable as garnishee for any sum other than was in the Capital National Bank at the time it closed. On this there has been a dividend of fifteen per cent, and the receiver testified that possibly there might be another ten per cent dividend, but no more. Under these circumstances it is not deemed advisable to hold this case for the making up of issues between Mr. Holdrege and the receiver. The conclusion reached, with regard to other matters involved, disposes of all questions in which other parties are interested, and accordingly the judgment of the district court is

REVERSED AND THE CAUSE IS DISMISSED.

HENRY W. KUHNS ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

FILED MAY 19, 1898. No. 8118.

1. **Municipal Corporations:** EXTENSION OF STREET: ASSESSMENTS. Facts stated, and *held* sufficient to justify a finding of the district court that the alleged lack of continuity of a street did not constitute the parts thereof distinct streets, in such sense that for benefits because of an extension of one part, the lots abutting upon and adjacent to the other part could not be assessed.

2. ———: OPENING STREETS: BENEFITS: QUESTION OF FACT: REVIEW. Whether or not the opening of a street benefits abutting or adjacent lots is in such a degree a question of fact that a finding of the district court upon conflicting evidence will not be disturbed.

3. ———: ———: ASSESSMENT OF DAMAGES: COMPENSATION OF APPRAISERS. The compensation of appraisers for the assessment of damages for the opening of a street *held* a proper item to be charged against the real property specially benefited by such public improvement.

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

E. Wakeley and *A. C. Wakeley*, for appellants.

W. J. Connell, *E. J. Cornish*, and *E. H. Scott*, *contra.*

RYAN, C.

In this case thirty-six parties joined in an action in the district court of Douglas county to enjoin the collection of a special tax levied on the property of the respective plaintiffs to pay the sum of $4,327 damages awarded for the opening of Twenty-sixth street through certain property which will be more fully hereinafter described. There was a judgment in favor of the defendants, the city of Omaha and its treasurer, and therefrom plaintiffs have appealed.

It was averred in the petition, and admitted in the answer, that March 1, 1866, Nelson's Addition was platted upon the north side of the city of Omaha, and that the

streets and alleys of said addition were dedicated to public use; that among the streets so laid out was Montana street, forty-six and one-fourth feet wide, extending part of the way through said addition from what is known as Cuming street on the south to the northern boundary of said Nelson's Addition, and that said Montana street has ever since been used by the public as platted; that about May 5, 1869, the eighty-acre tract just north of Nelson's Addition was platted as Shinn's Addition to the city of Omaha, and its streets and alleys were dedicated to public use. From the averments of the petition and admissions of the answer it was established that there were plats of additions, and dedications of the streets and alleys in each in succession added northward, as follows: Parker's Addition; Patrick's Addition; Patrick's Second Addition. It appears from the evidence that when, on March 1, 1866, Nelson's Addition was platted, one street, running from Cuming street northward through it, was designated on the plat as Montana street. In 1869 Shinn's Addition was platted in such a manner that opposite and across the north end of Montana street there were two lots, and beyond those lots, one hundred and forty and one-half feet distant from the north end of Montana street, there was the south line of Caldwell street. As has already been noted, Montana street was admitted by the pleadings to be forty-six and one-fourth feet in width, and this admission may now be supplemented with the statement that if Montana street had been prolonged there would have remained fractions of the two lots above referred to, and these fractions would have constituted a strip seventy-three and one-half feet wide lying along such imagined prolongation of Montana street. If now there was prolonged the east line of this strip from the south side of Shinn's Addition across Caldwell street and thence northward through that addition, it would be found to constitute the east line of the street, which on the plat of Shinn's Addition was designated as King street. This condition of the streets gives us Mon-

tana street prolonged to Caldwell street, and east of this imagined prolongation of Montana street, at a distance of about seventy-three feet from and parallel with Montana street, is King street. In 1886 there was adopted, approved, and published an ordinance of the city of Omaha entitled "An ordinance naming and changing the name of certain streets in the city of Omaha, for the purpose of securing a more uniform system in the name of streets within the city." By this ordinance it was provided that the then existing names of King street and Montana street should be changed to Twenty-sixth street. On June 7, 1893, it was by ordinance declared necessary to extend Twenty-sixth street (formerly Montana street) north to an intersection with Caldwell street. The damages found to be incident to the opening of this street were assessed at $4,300, and the assessments herein enjoined were those which were made upon lots adjacent to and abutting upon that portion of Twenty-sixth street originally platted as King street. The grounds upon which it is sought to enjoin the collection of the assessments are thus stated in the brief of the appellants:

"First—That the plaintiffs' property was not subject to the assessment for the cost of opening and extending the street in question, because it did not abut upon, nor was it adjacent thereto.

"Second—That the property was so situated that it was not, in fact, benefited in the least by the opening and extension, nor was it legally declared to be so benefited.

"Third—That there was included in the assessment items of cost and expenditure, for which abutting adjacent and benefited property could not be lawfully assessed."

The first proposition above stated as one of the grounds relied upon by appellants has its support in the contention that the street prolonged was not a part of the street platted as King street, and, therefore, that property abutting upon and adjacent to the latter could not with correctness be said to abut upon or be adjacent to

the prolonged street. In this connection it is pointed out that with the prolongation being designated as Twenty-sixth street, and that portion of what originally was King street south of Caldwell street being likewise designated as Twenty-sixth street, there exists two fragments of streets parallel to each other known by the common name of Twenty-sixth street. From the prolonged street it required the use of much less of Caldwell street to reach Twenty-sixth street extending through Shinn's Addition than it would to reach Twenty-seventh street. Notwithstanding this fact, we should hesitate, upon an original inquiry, before we would say that the fraction originally platted as Montana street when prolonged to Caldwell street, and that portion of the street originally known as King street, constituted but one street, even though the city authorities enacted that these fragments should be called by a name common to both. In the first instance, however, the city council ordered the extension, procured the damages thereby caused to be ascertained, and assessed such damages, upon the theory that the extension was a prolongation southward of Twenty-sixth street through a portion of Shinn's Addition. Afterward, the question was submitted to the district court upon the same issues and proofs that are now presented for our consideration, and that court found specially that the effect of appropriating the land for the opening of the street as above described "was to connect Twenty-sixth street north of the land so appropriated with Twenty-sixth street south of the land so appropriated and make said Twenty-sixth street an open, continuous street." There was sufficient evidence to sustain this finding, and it is therefore accepted as correct.

The next proposition was likewise one of fact, and peculiarly so, for whether or not the extension afforded additional or better means of ingress to and egress from the properties assessed depended very much upon the configuration of the country at and surrounding the points we have had under consideration.

The complaint as to items not lawfully assessed had reference to $27 taxed as fees of the appraisers who awarded the damages found in favor of the respective owners of property appropriated. There is no suggestion that the amount is excessive, but the proposition is that no such an item can be charged as a part of the costs of opening a street. The improvements were made under authority of chapter 10, Acts 1887. By the provisions of section 69 of this chapter the mayor and council of the city of Omaha were vested with power to open any street within the limits of said city, and by section 119 the council was clothed with authority to assess the damages for the appropriation of private property upon the lots and lands benefited. These damages, under provision of section 118, were to be assessed by three disinterested freeholders, and it seems to us that it is proper that the fees of these appraisers should be treated as one of the expenses incident to the appropriation of private property, and surely these fees the parties benefited, and not the party damaged, should pay. (*City of St. Paul v. Mullen*, 27 Minn. 78; *In re Merrian*, 84 N. Y. 596.)

There was evidence that there were houses on the lots appropriated for the use of the public, but as the amount of damages in gross was credited with the amount realized from the sale of these houses, which amount seems to have been their fair value, and, as the assessments were ordered modified accordingly, there is presented on this branch of the case no good ground for disturbing the assessments as finally approved. The judgment of the district court is

AFFIRMED.

NEBRASKA NATIONAL BANK OF OMAHA V. HENRY W. PENNOCK.

FILED MAY 19, 1898. No. 8086.

Action on Renewal Note: FAILURE OF CONSIDERATION: EVIDENCE. Where a party defendant gave his promissory note in renewal of his past due note which had been given partly in consideration of the conveyance to him of certain lots by the payee named on both notes, such maker cannot defeat an action against him on the renewal note, in the hands of an assignee thereof before due, by showing that, at the time when said renewal note was executed, the payee promised to cause improvements to be made which would enhance the value of the said lots; the time fixed for the performance of such promise being subsequent to the date when the note was, in fact, assigned to plaintiff.

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

Warren Switzler, for plaintiff in error.

Louis D. Holmes and *Henry W. Pennock, contra.*

RYAN, C.

This action was begun in the county court of Douglas county, from which court, by appeal, it was taken to the district court, in which there was a trial without a jury and a finding and judgment in favor of the defendant. The recovery was sought by plaintiff on a promissory note in these words and figures, to-wit:

"$322.04. OMAHA, NEBRASKA, August 13, 1890.

"On the 13th day of January, 1891, for value received, I promise to pay to the order of the Patrick Land Company of Omaha three hundred twenty-two and .04 dollars, at its office in Omaha, Nebraska, with interest from this date at the rate of eight per cent per annum, payable semi-annually. In case this note is not paid at maturity, it shall bear interest at the rate of ten per cent per annum until paid. HENRY W. PENNOCK."

The petition was in the ordinary form. The answer contained an averment that said note was indorsed after maturity, and there was a stipulation to the effect that before maturity said note was transferred by a separate instrument, as collateral security for a note of $5,000 given by the Patrick Land Company to plaintiff. It was further averred in the answer that the note sued on was given to the Patrick Land Company for the purpose of renewing notes held and owned by said company then past due, and subject to all defenses in the hands of said company; that no consideration was given defendant for such renewal; that the same was given as an accommodation to said company and at the special instance and request of the officers of said company. Plaintiff in this action is the assignee of the renewal note above referred to, and its right to recover cannot be defeated by reason of transactions preceding, and independent of, the making of that note. (*Brugman v. Burr*, 30 Neb. 406.)

With respect to the renewal notes, of which that in suit was one, defendant in his answer alleged that at the time of making such renewals the Patrick Land Company entered into further and renewed agreements that a street car service from the center of the city, operated by electricity, would be provided by said company during the coming fall; that said service would be a continuous street railway service from the center of the city of Omaha through Dundee Place near the lots of defendant—the cars to run at intervals of not to exceed fifteen minutes until 10 o'clock at night; that the note sued on was given in renewal of said former notes upon such express agreement and representation of said company, and without such agreement and representation defendant would not have renewed the former notes then past due and in the hands of the company. It was alleged in the answer that there had been no compliance by the Patrick Land Company with said agreement and representations, by reason whereof defendant had suffered damage in the sum of $1,500. There were other

facts pleaded in the answer, but they need not be described, for the finding of the court was limited to the above matters, as clearly appears from the language in the journal entry of its final judgment: "That the defendant, by reason of the failure of the Patrick Land Company to build the street car line, provide transportation, and make the improvements in pursuance of the agreements made at the time of making said note, suffered damage in the sum of $1,500; that the amount due on the note is $439.58, and that the consideration for said note has heretofore failed." In regard to the renewal of the note in suit there was no evidence except the testimony of the defendant, which was as follows:

Q. What was the inducement to you to secure the renewal of former notes, the note in suit being one of such renewal notes?

A. I would not have made this renewal—would not have given this note in renewal of notes then past due unless Mr. Allen and Mr. Kurtz, as officers of the company, had then agreed to—I have previously stated what the agreement was—I wish to refer to the former agreement now—unless Mr. Allen had made statements to me which I have outlined in my testimony before this, relative to the extension of the street car service to Dundee within the coming fall of 1890.

The conversation above alluded to had previously been thus described in the testimony of the defendant:

Before executing this last note which was to take the place and be in renewal of those other notes I have mentioned I went to the office of the Patrick Land Company and had several conversations with Mr. Allen, who was then the vice-president, and Mr. Kurtz, who was the secretary at that time, in regard to Dundee Place. At that time Mr. Allen informed me that he wished that I would take up these notes past due, and I complained that the company had not fulfilled its agreement to give us rapid transportation, and that it had been impossible for me to sell the lots and that I was unable to meet the notes;

and he said he wanted to get them into proper shape; he did not want to carry this past-due paper and wanted me to fix it up. And I think nothing was done at the first meeting. Afterwards, we had a conversation in which he said that the company was negotiating with the Omaha Street Railway Company and that they had practically closed its negotiations; that they had arranged with them to extend its Farnam street line through Dundee Place in the vicinity of my lots, and that the service would be not to exceed fifteen minutes between cars, and it would run until 10 o'clock at night, and that the service should be one continuous service from the center of the city; and he even went so far as to ask me to see Mr. Murphy about it. He said this was to be done within a few months—the coming fall—and this was, I think, in the summer of 1890, and he said in the fall it would certainly go out there; that they had made the arrangements and they would push it through to completion and see that rapid transportation was had.

Q. What was then done about giving a renewal of the notes?

A. I said to him, with that understanding, I would give him new notes for the old ones and place the paper in better shape for the company.

By the testimony of defendant it was disclosed that in the latter part of the year 1888 he had purchased nine lots in Dundee Place from the Patrick Land Company for $9,200, of which some amount, not stated, was paid in cash, and, for the balance, notes were given secured by mortgages on the lots purchased; that without the improvements agreed to be made these lots were worth in 1890, $500 each, or $4,500 in all, and that in the years 1888, 1889, and 1890 a great many lots in Dundee Place were sold at prices ranging from $1,000 to $1,250 each. By his answer the defendant admitted that in December, 1888, he sold five of the nine lots bought by him of the Patrick Land Company, but there is no showing in the record

of the amount realized by this sale. The facts just noted make clear two propositions, and these are: First, that there has not been a total failure of consideration; and, second, that defendant cannot rescind, for he cannot convey to the company the five lots which he has sold. His remedy, if any, is of necessity confined to compensation in damages for the failure of the Patrick Land Company to procure street car service of the character above indicated. The note sued on was dated August 13, 1890, and was due January 13, 1891. It was transferred to plaintiff on September 5, 1890. The street car service from the center of Omaha, under the agreement relied on by defendant, was not required to be put in operation until the fall of 1890. When the note was transferred the time limited for compliance with the Patrick Land Company's agreement had not yet expired. A transfer by an instrument separate from, and independent of, the note, while it operated to convey the title, did not cut off equities or defenses, as would have been done had this negotiable note been regularly indorsed. (*Doll v. Hollenbeck*, 19 Neb. 639; *Colby v. Parker*, 34 Neb. 510; *Gaylord v. Nebraska Savings & Exchange Bank*, 54 Neb. 104.)

But was there such an existing equity or defense, at the time this note was transferred, that defendant can now avail himself of it to defeat a recovery on the note? The agreement or representation, as it is called, which the defendant seeks to avail himself of, was in no sense a representation of an existing fact. There is a class of cases with which this should not be confounded. Illustrations of this class are found in the sales of machines accompanied by warranties that such machines will do good work. This does not amount to a promise of the vendor to do anything in the future, but it is a representation that the construction is such that, on trial, the machines will be found to operate in the manner described. In the case under consideration it is even doubtful whether the promisor could be said to have undertaken anything more than to procure the Farnam street

line of railway to be operated through Dundee Place. Conceding the correctness of the construction given the alleged agreement by the district court, there is presented the question whether or not an independent agreement of the payee to perform a stipulated service in the future, for the benefit of the maker of the promissory note, so inheres in that note as to defeat, to the extent of damages for the non-performance of such promise, a recovery upon it in the hands of one to whom such note has been transferred previous to the time fixed for the performance of such service. In *Salladin v. Mitchell*, 42 Neb. 859, POST, J., in the delivery of the opinion of this court, said: "We do not rest our conclusion * * * but upon the proposition that the right of set-off existed, according to well established equitable principles, before the adoption of the Code, and that the assignee succeeded to the rights of the insolvent banking company as they existed at the date of the assignment, and no other or greater rights. The authorities bearing upon the proposition are not, it is conceded, altogether harmonious, but the rule as above stated has the support of a decided majority of the courts, as well as text-writers, and rests upon the more satisfactory reasons." In the case in which the above language, fortified by numerous citations, was used the assignee of the Northwestern Banking Company had brought an action for the foreclosure of a mortgage executed to it by the Mitchells. They answered that before the failure and assignment of the banking company they had sold the mortgaged property to one Borchers, who assumed payment of the mortgage, and by whom and for whose benefit deposits had been made with the banking company of sums aggregating a sufficient amount to have discharged the mortgage, before the failure of the banking company, and upon this showing, sustained by sufficient evidence, it was held that the district court had properly adjudged said mortgage to have been fully paid.

Another line of cases holds that where parties have

claims against each other, not yet due, and there is an assignment of one of these claims, the other cannot be pleaded as a set-off in a suit by such assignee. There is not a uniformity of holdings on this point, and it is now noticed, and adjudged cases are cited in support of it, to illustrate the extent to which some courts enforce the rule that a set-off, to be available against an assigned chose in action, must have had such a status at the time of such assignment that an independent action might have been maintained upon the alleged set-off. (*Martin v. Kunzmuller*, 37 N. Y. 396; *Adams v. Rodarmel*, 19 Ind. 339; *Myers v. Davis*, 22 N. Y. 489; *Kinsey v. Ring*, 53 N. W. Rep. [Wis.] 842; *Francis v. Leak*, 33 N. E. Rep. [Ind.] 807.) In the case under consideration the defendant gave his negotiable promissory note payable at a date seventeen months distant. He testified that he gave this note, not on the consideration, but with the understanding, that an electric street railway would be constructed in the fall succeeding the month of August in which the note was executed. Before the lapse of the time for the construction of the railway this note was transferred to plaintiff. It is possible that the defendant regards this right to set up the failure to perform as being within the provisions of our statute defining a counter-claim. By section 101, Code of Civil Procedure, a counter-claim which may be pleaded "must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as a foundation of the plaintiff's claim, or connected with the subject of the action." The provisions as to parties between whom a counter-claim may be pleaded are not material in view of the facts of this case. By the other provisions of the section the subject-matter of counter-claim is classified under two heads: First, the counter-claim must arise out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim; or, second, it must be

connected with the subject of the action. In this case it may be conceded that the promise to secure the construction of the street railway through Dundee Place influenced the defendant to sign a promissory note in renewal of another, or of others of his notes, then past due. This promise was to perform a certain act, or procure it to be performed, at quite a distance of time in the future. When this note was executed there existed no right of counter-claim in favor of defendant. His written undertaking, as expressed by his promissory note, was to pay a sum of money certain, at a fixed time, to the order of a company named. If he had desired to condition his liabilities on the performance of an independent act by the company, he should have so qualified his undertaking. The counter-claim, as he now seeks to assert it, did not become subject to compensation by an action for damages until long after another party had acquired ownership of the negotiable instrument put in circulation without condition or restriction. His reliance for performance was upon the promise of the Patrick Land Company, and for its failure to perform, his remedy, if any, is against that party. For the error in the allowance of the defendant's set-off or counter-claim the judgment of the district court is reversed.

REVERSED AND REMANDED.

JOSEPH BUSH ET AL. V. STATE OF NEBRASKA.

FILED MAY 19, 1898. No. 9919.

1. **Criminal Law**: PLEA IN ABATEMENT: WAIVER. A plea in bar is, by our statute, to be deemed a waiver of a plea in abatement, and this is held to follow where both pleas are presented by a single pleading.

2. ———: PLEA IN BAR: JURY TRIAL. Where the allegations of a plea in bar, liberally and fairly construed, substantially state that the prisoner has previously, by a court having jurisdiction, had a judgment of acquittal, the truth of the averments of the plea must be determined by a jury.

ERROR to the district court for Fillmore county. Tried below before HASTINGS, J. *Reversed.*

L. W. Billingsley and *R. J. Greene*, for plaintiffs in error.

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

RYAN, C.

The information in this case was filed in the district court of Fillmore county, and thereby the defendants were charged with having broken and entered, in the night-time, a certain bank building, and with having stolen therefrom a large sum of money. There was a conviction, and thereupon the defendants were sentenced to serve a term of seven years in the penitentiary. There were in the same pleading a plea in abatement and one in bar, but as the plea in bar was a waiver of the plea in abatement (Criminal Code, sec. 444), we shall consider merely that in bar, which was in this language: "The defendants, having heard read the information herein, say that the state of Nebraska ought not further to prosecute said information against them, because at the last term, 1897, of the district court of Fillmore county, Nebraska, held in Geneva, in said county, they, the said James Lovejoy and Joseph Bush, under the names of Leonhard and Doe, but being in fact the same persons, were duly informed against by the county attorney of Fillmore county, Nebraska, on the same charge. They were duly arraigned in said court on said information and pleaded not guilty thereto; that after having pleaded not guilty, and being placed upon their trial, they were acquitted by being discharged of the offense charged in said information and went acquit." The above language very closely follows that in which the plea in bar was couched in *Arnold v. State*, 38 Neb. 752, and in that case the plea was held sufficient both in form and substance. To the dual pleas in abatement and in bar there was in

this case interposed a demurrer on two grounds, which were: "First—Said plea includes a misjoinder of a plea in abatement and a plea in bar. Second—Said plea does not include facts sufficient to warrant any action of the court by way of abatement or otherwise, except the overruling thereof." The ruling on this demurrer is thus recited in the record before us: "And now, to-wit, on this same day, viz., November 12, 1897, this cause again came on to be heard on the plea filed by defendants herein, and the demurrer thereto filed by plaintiff, and the defendants being present in court and represented by their counselors as aforesaid, the same was duly submitted to the court, upon consideration whereof the court, being fully advised in the premises, does sustain the said demurrer to the said plea of the said defendants and announces to the defendants that they may try their plea in abatement to the jury as they try their case in chief, to which said ruling of the court the defendants Joseph Bush and James Lovejoy, by their counsel, then and there duly except." In *Arnold v. State, supra*, it was said: "But where the allegations of the plea in bar, liberally and fairly construed, substantially state that the prisoner has before, by a court having jurisdiction, had judgment of acquittal, or in such court been convicted, or has been pardoned for the same offense for which he stands charged in the indictment to which the plea in bar is offered, then the truth of the facts averred in said plea must, and can only, be tried by a jury." In the case under consideration the truth of the averments was admitted by the demurrer, and after this demurrer had been sustained there was no question which could be submitted to a jury. Because of the rulings of the court whereby the defendants were deprived of the right to a trial by jury of the facts alleged by them in bar of further proceedings, the judgment of the district court is reversed.

REVERSED AND REMANDED.

H. A. DARNER V. DANIEL DAGGETT.

FILED MAY 19, 1898. NO. 8072.

Sales: FALSE REPRESENTATIONS: CHARACTER OF GOODS: EVIDENCE: INSTRUCTIONS: REVIEW. In an action for damages because of false representations made by the vendor as to the correctness of an invoice of the goods sold, *held* there was no prejudicial error in permitting a witness to testify that certain goods were old, when that fact was important in determining their real value tested by the invoice, and that this was especially the case in view of the fact that the court afterwards instructed the jury that it should not take such evidence into account as furnishing a basis for recovery because of the quality of the goods in question being defective.

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

C. W. McNamar and *G. W. Fox*, for plaintiff in error.

E. A. Cook, contra.

RYAN, C.

In this case there has already been prosecuted proceedings in error in this court for the reversal of a judgment rendered by the district court of Dawson county. (*Darner v. Daggett*, 35 Neb. 695.) There was a reversal of said judgment, because there had been admitted in evidence a statement of a witness as to his estimate of the difference in value of the goods in the condition they were in as compared with what they would have been worth had they been as represented. This ruling was because of the fact that in the petition no claim had been made for damages, because of a misrepresentation by the vendor of the quality of his goods. The gist of the action, it was held, was for the recovery of damages from defendant for falsely representing that the invoice, on the faith of which plaintiff purchased the stock of goods, was based upon the Chicago market, and errors in the footings of said invoice, and a shortage of the goods,

tested by the invoice. The cause was remanded for a new trial, which was duly had, resulting in a judgment for plaintiff in the aforesaid district court.

The petition in error of the judgment defendant contains an assignment that the verdict was not sustained by the evidence, but we shall not enter into a detailed statement for the purpose of showing that this contention is unfounded. The errors urged with reference to the introduction of evidence proceed upon the assumption that there were the same errors which caused the reversal of the first judgment. In this view we cannot concur. It is true the district court refused to strike out statements of witnesses as to the goods being old or new, and it may be admitted that, over objections, testimony of that character was permitted to go to the jury. But it was in evidence, likewise, that there was a difference in the invoice price of such goods dependent upon when they had been manufactured. For instance, one witness said of certain stoves that they were in use when he was a small boy, and that he had never seen any of that kind in stock or in use since he was a boy. When there was an attempt to show that these stoves were old, unserviceable, broken, rusty, and unsalable, the offer was rejected. There was no proof of damages because of defects of the character above indicated, and that there might be no misapprehension the following instruction was given to the jury:

"8. There are no allegations in the petition that the goods in controversy were of an inferior quality or character than as represented and you will disregard any evidence bearing on that matter."

It is insisted that there was error in certain instructions, but the argument on that head is met by the above discussion of the evidence as to which objections were urged. In addition to these criticisms of the instructions it is objected that by one of them the jury was told to consider all of the evidence, and that this instruction justified the consideration of that which should not have

been taken into account. If there was error in this instruction it could not be considered, for no exception was taken to the giving of it. The judgment of the district court is

AFFIRMED.

WALTER W. BROWN ET AL. V. DIETRICH BOSE ET AL.

FILED MAY 19, 1898. No. 8121.

Attachment: SALE OF NON-RESIDENT'S REALTY: TITLE OF PURCHASER: DEFECTIVE NOTICE. Under a sale of the real property of a non-resident defendant appropriated by attachment proceedings, a purchaser acquires a title which cannot be collaterally questioned in another action, even though the publication of notice preceding the judgment in the attachment proceedings might have been held defective if it had been properly assailed.

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

Charles F. Tuttle, William D. Beckett, and *D. T. Hayden,* for plaintiffs in error.

John C. Watson, contra.

RYAN, C.

This was an action of ejectment in which there was final judgment in favor of the defendants in the district court of Otoe county. The trial was to the court without a jury, and the correctness of its conclusion depends upon a single question, which is presented by the following facts: Previous to March 14, 1890, the real property in controversy was owned by the ancestor of the plaintiffs in error. On that day there were two petitions and other proper showings for an attachment, which issued against said owner of the real property in dispute in as many actions. The attachment defendant, at the time of all the transactions herein referred to, was a non-resident of this state. The levies of the writs of attachment were made respectively, on March 20,

1890, and March 25, 1890. The publications of notice to the non-resident defendant were made March 14, March 21, March 28, April 4, and April 11, 1890. By stipulation on the trial of this case it was admitted that the two above mentioned actions were begun against the defendant Brown to cause to be sold the premises in dispute for the payment of debts owing by him; that said property was purchased at sheriff's sale, and that, through the purchaser at said sale, the defendant in the district court, as an innocent purchaser, derived his title, under which, at the time of the commencement of the action, he was in possession. The contention of plaintiffs in error is that no publication could properly be made of the notice to the non-resident defendant until after a levy of attachment; that after such levy there were not four publications of the notice, and consequently the court, at the time it directed a sale of the property, had no jurisdiction to order a sale thereof, from which premises it is argued that the sale pursuant to such order was not effective to vest title.

In *Darnell v. Mack*, 46 Neb. 740, this exact question was not involved, but *arguendo* there were cited several cases in support of the proposition that jurisdiction to order a sale depends upon the lawful seizure of the property, and that subsequent defects may render the judgment erroneous, but not void. We have again examined these cases and find that they sustain the proposition in support of which they were cited. (*Cooper v. Reynolds*, 10 Wall. [U. S.] 308; *Paine v. Mooreland*, 15 O. 435; *In re Clark*, 3 Den. [N. Y.] 167; *Beech v. Abbott*, 6 Vt. 586; *Williams v. Stewart*, 3 Wis. 678; *Field v. Dortch*, 34 Ark. 399; *Hardin v. Lee*, 51 Mo. 241.) We could add nothing of value by going over the propositions considered in *Darnell v. Mack*, *supra*, and hence refrain from any attempts in that direction. The reasoning meets our approval, as applied to the facts of this case, and it is necessary merely to refer to that reasoning for a discussion of the pivotal question with which we are dealing.

The irregularities complained of by plaintiffs in error were of such a nature that, possibly, they might have been available in the actions in which they occurred. They cannot now be invoked to sustain a collateral attack upon the judgments rendered in those actions and upon the proceedings afterward had for the enforcement of said judgments. There is found no error in the record and the judgment of the district court is

AFFIRMED.

CHARLES J. CLARK ET AL. V. JOHN H. CHARLES ET AL., IMPLEADED WITH WILLIAM H. GEORGE ET AL., APPELLEES, AND MARY CROSBY ET AL., APPELLANTS.

FILED MAY 19, 1898. No. 8124.

1. **Purchase of Realty Pendente Lite.** A purchaser of real estate, during the pendency of a suit for its partition, from a party to such suit, is as much bound by the disposition made of the real estate by the decree rendered in such action as his grantor.
2. **Decree by Consent: PARTIES: REVIEW.** When a decree is entered conforming to the agreement and consent made in open court of all the parties to the action, the court having jurisdiction to enter such decree, then no party to that decree, nor one claiming under such party, can be heard to question it except for fraud or mistake, even though the pleadings would not support the decree had the action been contested.
3. **Judgment: ATTACK.** To entitle a party to a judgment to be relieved from its provisions, on motion after term, it is an essential prerequisite that he have a defense to the judgment as it stands.
4. **Partition: ACCEPTANCE OF LAND: EFFECT OF DECREE.** Where one accepts the lands awarded him by the provisions of a consent decree partitioning real estate, he thereby ratifies the entire decree; and he may not hold his lands and be relieved from the burdens imposed thereon by such decree.

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

Spalding, Taylor & Burgess and *W. E. Gantt*, for appellants.

R. E. Evans, M. C. Beck, Jay & Welty, R. B. Daley, and *McConkey & Daley, contra.*

RAGAN, C.

Patrick Gaughran died intestate in 1867 seized in fee-simple of the following described real estate, situate in Dakota county, Nebraska, to-wit: Lots 1 and 2, in section 28, township 29 north, and range 9. He left surviving him as his only heirs-at-law certain brothers and sisters and their descendants. John Gaughran, a brother of Patrick, about the date of the latter's decease, took possession of his real estate and held the same until the year 1887, at which date he attempted to convey the entire property to one John Hogan, and he, about the same time, conveyed a portion of the land to George M. (N.) Martin, and another portion to Charles J. Clark. In this same year Hogan, Clark, and Martin each instituted a suit against Mary Crosby, Kate Leith, and Peter Gaughran, heirs-at-law of Patrick Gaughran, deceased, appellants here, and various other parties to quiet his title to his respective portion of the real estate which he claimed. These three suits were consolidated for trial and known in the record here as the Clark-Charles suit. The appellants claimed to be the owners of certain shares of the land, as heirs of Patrick Gaughran, deceased, and demanded of Hogan, Clark, and Martin an accounting of the rents and profits, and prayed for a partition of the real estate among the owners thereof and for general equitable relief. This suit pended on the docket until August 12, 1891, at which date the court made its findings and entered a decree, which, so far as material here, is to the effect that Hogan, Martin, Clark, and the appellants Crosby, Leith, and Peter Gaughran were the owners of the real estate in controversy, entitled to a partition thereof; that Hogan, Martin, and Clark, or either of them, should not be charged with the rents of such real estate, but that the taxes against the land should be set

off against the rents, and liquidate the same; that the real estate should be partitioned among these owners; that Crosby, Leith, and Peter Gaughran, the appellants, should take their portions of the real estate discharged of the taxes; and that whatever taxes were liens upon the portions of the real estate which should be awarded the appellants should become liens upon the portions of the real estate partitioned to Martin, Hogan, and Clark. The appellants were also to take their portions of the real estate which might be awarded them free of the costs of the suit. This decree was not entered in pursuance of evidence heard by the district court, but recites that it was entered in accordance with the stipulation and agreement of all parties to the action. Subsequent to the date of the entry of this decree and in pursuance of its provisions commissioners were appointed, who partitioned these lands among the parties owning them. The partition was made and duly reported to the court and by it confirmed September 8, 1891. Subsequently, on March 4, 1892, on motion duly made therefor, and in pursuance of due notice to all parties interested in the action, the court modified the decree of August 12, 1891, so as to ascertain the amount of tax liens that existed against the real estate partitioned to Crosby, Leith, and Peter Gaughran, and decreed that the amounts of those taxes should be liens against the specific portions of the land set off to Clark, Hogan, and Martin. While the Clark-Charles suit was pending, and before the rendition of the decree of August 12, 1891, W. H. George purchased from Martin a portion of his interest in the real estate in controversy. After the rendition of the decree of August 12, 1891, James P. Twohig and Lola M. Hunt became interested in the real estate by purchase from the parties to that decree, other than the appellants. George, Twohig, and Hunt, as late as May 15, 1894, each filed in the district court of Dakota county, and in this Clark-Charles suit, two motions—one to modify the decree of August 12, 1891, in so far as it decreed that the taxes which were

liens against the real estate which should be partitioned to the appellants should be made liens against the real estate which should be partitioned to Clark, Hogan, and Martin, by striking that provision from the decree, and to vacate the modification of that decree made March 4, 1892, in and by which the amount of these liens was ascertained and declared to be liens upon the specific property which had been set off to Martin, Clark, and Hogan. The motions filed by George, Twohig, and Hunt were consolidated, tried together by the district court, and sustained, and from this order Crosby, Leith, and Peter Gaughran appeal.

1. The decree of August 12, 1891: The appellees purchased their interest in the real estate during the pendency of the Clark-Charles suit, and from persons who were parties to that suit, and under the court's jurisdiction, or purchased from parties to the suit after the rendition of the judgment of August 12, 1891, and are, therefore, as much bound by the judgment rendered in that action as the parties to that suit. When George purchased his interest in the real estate in controversy the title to the real estate was in litigation. The court had jurisdiction of the subject-matter of the action and of all the parties who claimed to be owners of or interested in the real estate, and George, by purchasing from one of these litigants, is as much bound by the decree rendered in that action disposing of this real estate as if he had been a party to the action. Hunt and Twohig purchased their interest in this property from persons who were parties to the Clark-Charles suit after the decision of that case which fixed the status of the property, and they simply took the title which their vendors had, and that title was subject to the decree pronounced in the Clark-Charles suit. (Black, Judgments sec. 550, and cases there cited; *Murray v. Ballou*, 1 Johns. Ch. [N. Y.] 565; *Lincoln Rapid Transit Co. v. Rundle*, 34 Neb. 559; Code of Civil Procedure, sec. 85.)

2. The record before us will not sustain the finding

that this decree was procured by fraud practiced by any one, nor that the decree is the result of a mistake, neglect, or omission of the clerk of the court.

3. It is insisted that the decree of August 12, 1891, in so far as it made the costs of the Clark-Charles suit and the taxes against the lands which might be partitioned to the appellants liens upon the lands which should be partitioned to Martin, Hogan, and Clark, was void, and, therefore, was irregularly obtained, within the meaning of the third subdivision of section 602 of the Code. Whether a void judgment is one irregularly obtained within the meaning of this section of the Code we do not determine. The argument that the decree is void is based upon counsel's contention that the pleadings filed in the Clark-Charles suit do not support the portion of the decree assailed. We think the answer to this argument is that this decree does not depend for its support entirely upon the pleadings filed in the Clark-Charles suit, but is the result of the solemn agreement and stipulation of the parties in open court. It is a judgment based upon the consent of all the parties to the action, and as the court had jurisdiction of those parties and of the subject-matter of the suit—had jurisdiction and authority to enter just such a decree as it did enter—no party to that decree, nor one claiming under such a party, can be heard to question it, except for fraud or mistake. In *Fletcher v. Holmes*, 25 Ind. 458, the court said: "We can conceive of no reason why a judgment entered by agreement, by a court of general jurisdiction, having power in a proper case to render such a judgment, and having the parties before it, should not bind those by whose agreement it is entered, notwithstanding the pleadings would not, in a contested case, authorize such a judgment. The object of a complaint is to inform the defendant of the nature of the plaintiff's case. It is for his protection that it is required. If he wishes to waive it, or agrees to the granting of greater relief than could otherwise be given under its averments, without amend-

ment, and such relief is given by his consent, we think that the judgment is not even erroneous, much less void, as to him."

4. Modification of the judgment made March 4, 1892: It is also insisted that the modification made March 4, 1892, of the decree in the Clark-Charles suit was void as to the appellees, because Martin, Clark, and Hogan, under whom the appellees claim, had no notice of that proceeding. It would subserve no useful purpose whatever to set out the evidence upon that subject, and it must suffice to say that we think the contention that Martin, Clark, and Hogan had no notice of the application to modify this judgment is wholly unsustained. The jurisdiction of the court to make the modification is also called in question. But the court did have jurisdiction to make the modification. The very statute which the appellees are invoking in this proceeding conferred power upon the district court to make the modification complained of.

5. There are two reasons why the appellees are not entitled to have their motion sustained:

First. Section 606 of the Code of Civil Procedure provides that 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 he has a valid cause of action. The appellees have not shown that the feature of the decree of August 12, 1891, of which they complain is inequitable, unjust, or illegal. In other words, they have not shown that that decree is not just what it should be. They and their grantors had had possession of this real estate for twenty years, and in the judgment which orders it to be partitioned among the appellants and appellees the court decrees that the appellees shall not account for the rents and profits of this land during the years they have held it, and in consideration of this that the costs of the suit shall be borne by the appellants, and the real estate awarded them shall be liable therefor; that the taxes

which may exist against the real estate set off to the appellants shall be paid by the appellees and that the property awarded them shall be liable for such taxes. If the appellees have any valid reason to urge against the justice and equity of this provision of the decree we have failed to discover it in this record. To entitle the appellees to be relieved from this provision of the decree it is absolutely essential that they should, in the language of the statute, show that they have a defense thereto. This they have not done. (*Lander v. Abrahamson*, 34 Neb. 553; *Janes v. Howell*, 37 Neb. 320; *Norwegian Plow Co. v. Bollman*, 47 Neb. 186; *Western Assurance Co. v. Klein*, 48 Neb. 904; *Bankers Life Ins. Co. v. Robbins*, 53 Neb. 44, and cases there cited.)

Second. Another reason why the appellees are not entitled to have their motion sustained is that their grantors have acquiesced in the decree. They accepted the lands awarded them by its provisions, and they cannot accept the decree in part and repudiate it in part. They must accept all or none. The lands allotted them came to them charged with certain burdens. They cannot accept the land and be relieved from the burdens, and the appellees are in no better position than their grantors.

The judgment of the district court sustaining the motions of the appellees is reversed. The cause is remanded to the district court of Dakota county with instructions to dismiss the motions of the appellees.

REVERSED AND REMANDED.

GUSTAVUS COLLINS, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED MAY 19, 1898. No. 8087.

1. **Error Proceedings: TIME.** To invest this court with jurisdiction to review on error a judgment of the district court a petition in error must be filed here within one year after the date of the rendition of the judgment sought to be reviewed.

2. **Appeal:** ACTION AT LAW. An appeal will not lie to this court from the judgment of a district court rendered in an action purely legal in its nature.

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

C. A. Baldwin, for appellant.

W. J. Connell, Lee S. Estelle, and *E. J. Cornish, contra.*

RAGAN, C.

Gustavus Collins sued the city of Omaha in the district court of Douglas county for damages for false imprisonment. The city demurred to the petition of Collins on the ground that it did not state facts sufficient to constitute a cause of action. The district court sustained the demurrer. Collins refused to plead further, and a judgment was entered dismissing his suit. To review this action of the district court he has filed here a transcript of the record and proceedings had in the court below, and had the case docketed as an appeal. No petition in error has ever been filed in this court, and as more than one year has elapsed since the rendition of the judgment of the district court, we have no jurisdiction of the case. To invest this court with jurisdiction to review, on error, a judgment of the district court a petition in error must be filed with the clerk of this court within one year after the date of the rendition of the judgment sought to be reviewed. (*Campbell v. Farmers & Merchants Bank*, 49 Neb. 143.) Furthermore, this action is one purely legal in its nature, and an appeal will not lie to this court from the judgment rendered by a district court in such an action. This court can only review such a judgment on a petition in error. The proceeding filed here is

DISMISSED.

STATE OF NEBRASKA, EX REL. WILLIAM T. PATTERSON, V. JOHN F. WENZEL ET AL.

FILED MAY 19, 1898. No. 9959.

1. **School Lands:** RIGHTS OF LESSEES. The rights of a lessee of state school lands are to be determined by the law in force governing the leasing of school lands at the date of the execution of his lease.
2. ———: ———. The act of 1879 granting to the lessees of school lands the privilege of purchasing the same at private sale was a mere offer or option to such lessees which the state might withdraw at any time before its acceptance by a lessee whose lease antedated the passage of such act.
3. **Mandamus:** NATURE OF REMEDY. The remedy by mandamus rests upon the legal rights of the relator upon one hand and the legal obligations and duties of the respondent on the other. It cannot be predicated solely upon the equities existing between the parties.
4. **School Lands:** RIGHTS OF LESSEES: STATUTES. By section 1, chapter 71, Session Laws 1897, the state intended to, and did, withdraw from sale all its unsold and unleased school lands, and the school lands leased prior to the taking effect of the act of 1879, the lessees of which had not availed themselves of the privilege of purchasing prior to the taking effect of the act of 1897.

ERROR from the district court of Pawnee county. Tried below before STULL, J. *Affirmed.*

Conley & Fulton, for plaintiff in error.

C. J. Smyth, Attorney General, Ed P. Smith, Deputy Attorney General, and *John B. Raper, County Attorney of Pawnee County*, for the state.

RAGAN, C.

On May 22, 1875, the state of Nebraska leased to one S. L. Northrop the west half of the northeast quarter of section 36, in township 2 north and range 9 east of the sixth P. M., for a term of twenty-five years from and after January 1, 1876, in accordance with the provisions of chapter 70, General Statutes 1873. William T. Patter-

son is now the state's lessee of this land by virtue of various assignments of the lease from Northrop and those claiming under him. Said land is situate in Pawnee county. On August 10, 1897, Patterson desiring to purchase the same at private sale applied to the county authorities of said county to appraise said lands. The county authorities refused to appraise the lands and Patterson thereupon applied to the district court of said county for a mandamus to compel them to do so. The district court sustained a demurrer interposed by the county authorities to Patterson's application, dismissed the proceeding, and Patterson has filed a petition in error here to review this judgment of the district court.

1. On June 24, 1867, an act providing for the registry of the school lands of the state and for their control and disposition went into effect. This is chapter 70, General Statutes 1873. By section 17 of this act the county commissioners of the several counties of the state were authorized and directed to lease the common school and university lands within their counties upon certain terms and conditions for a term of twenty-five years from the first day of January after the date of such lease. It was in pursuance of this section of the statute that the lease to Northrop was made. Without a review or analysis of this statute, it must suffice to say that it contained no provision by which a lessee of the school lands of the state was given the right or option to purchase at private sale the lands leased by him during the continuance of his lease. So that the only right which Northrop acquired to the land in controversy by virtue of his lease was the right to use and occupy it for twenty-five years from and after the first of January, 1876, upon paying the cash rent reserved by the lease. The legislature of 1877 (see Session Laws 1877, p. 174) passed another act, complete in itself, in reference to the registry, sale, leasing, and general management of the school lands of the state. This act made no reference whatever to the act of 1867, just referred to, and while it provided for the leas-

ing of the school lands of the state, it made no provision whatsoever for the purchase at private sale of the school lands of the state by a lessee thereof or by any other person. The legislature of 1879 amended section 19 of the act of 1877 so as to authorize any lessee of school lands, upon certain terms and upon compliance with certain requirements, to purchase at private sale the lands of which he was the lessee at an appraisal fixed thereon by or under the direction of the county authorities. (See Session Laws 1879, p. 110.) The legislature of 1883 passed another complete act in reference to the registration, sale, and leasing of the school lands of the state and repealed the acts of 1877 and 1879 just referred to. This act of 1883, however, retained the provision of the act of 1879 permitting a lessee of school lands of the state to purchase them at private sale. (See Session Laws 1883, p. 302.) The legislature of 1885 passed a complete act upon the subject of the registry, sale, and leasing of the school lands of the state and repealed the act of 1883. (See Session Laws 1885, ch. 85, p. 335.) This act of 1885 retained the provision of the acts of 1879 and 1883 authorizing a lessee of school lands to purchase them at private sale upon complying with the terms of the act, and the act was made chapter 80 in the Compiled Statutes of 1895. The legislature of 1897 passed an act entitled "An act to amend chapter 80, Compiled Statutes 1895, relating to school lands and funds, to prevent the further sale of school lands, and to repeal said original chapter 80, Compiled Statutes 1895." (See Session Laws 1897, ch. 71.) This act deals with the whole subject of the leasing and sale of the school lands of the state, and by section 1 of the act it is, among other things, provided that all the educational lands now owned by, or the title to which may hereafter vest in, the state shall be registered and leased, and that none of such lands shall hereafter be sold, except as specifically provided in the act, and that nothing in the act shall be construed to violate existing contracts of sale.

The respondents urge two contentions in support of the judgment of the district court. The first is that at the time the lease in controversy was executed no statute existed which authorized a lessee of the school lands of the state to purchase the same at private sale. As already stated, we concede the correctness of this contention.

A second contention of the respondents is that the provision of the acts of 1879, 1883, and 1885 which authorizes a lessee of school lands to purchase the same at private sale was an option or a privilege granted without consideration to such lessee by the state, and might be withdrawn by it at any time before its acceptance by such lessee; and that by the passage of the act of 1897 the state did withdraw this option given the lessee to purchase, and that as Patterson had not availed himself of the privilege granted him to purchase the land at private sale prior to the time the statute withdrew the option in 1897, he is not now entitled to do so. We think the contention of the respondents correct so far as it relates to lessees of school lands whose leases were executed prior to the taking effect of the act of 1879. The case at bar does not require us to decide whether the state could pass a valid law withdrawing the option to purchase from lessees whose leases were executed after the passage of the act of 1879, and we do not, therefore, decide that question. It is not a debatable proposition that Patterson can claim no greater rights under the lease in controversy than could his assignor Northrop, and that Northrop's rights were fixed and determined by the statutes in force at the time of the execution of his lease in reference to the leasing of school lands. (*State v. Commissioners*, 4 Wis. 432; *State v. Thayer*, 46 Neb. 137; *State v. McPeak*, 31 Neb. 139.) The state did not contract to sell these lands to Northrop, either by the lease which it issued to him or by any statute in force at that time; and if the acts of 1879, 1883, and 1885 had never been passed, then of course he would be in no position to in-

sist that the state should sell him these lands at private sale. By the acts of 1879, 1883, and 1885 the state, without consideration, granted to the prior lessees of its school lands the privilege of purchasing the same at private sale upon certain terms and conditions. We agree with the honorable the attorney general that this was a mere offer which the state might withdraw at any time before its acceptance by a lessee whose lease antedated the option itself.

Counsel for Patterson insist that the state has estopped itself from refusing to sell these lands to him at private sale. In his application for a mandamus Patterson alleges that, relying upon the provisions of the acts of 1879, 1883, and 1885, authorizing lessees of school land to purchase the same at private sale, and intending so to purchase the land in controversy, he made lasting and valuable improvements upon the same by building a stone house thereon and planting a portion of the land to fruit and ornamental trees, etc., and he insists that the state is now estopped from refusing to sell him the land. We do not mean to say that the state may not estop itself by its conduct the same as an individual, but we think there are two answers to the contention as applied to the facts in this record.

Conceding in the first place that the state by the passage of the act of 1879 granted to the holders of school-land leases executed prior thereto the privilege of purchasing such lands at private sale, and that Patterson, relying upon this promise, changed his status and made permanent improvements upon the leased lands, which he would not otherwise have done, still, for aught the record before us discloses, the state gave Patterson a reasonable opportunity to avail himself of the option or privilege granted by the act of 1879 before the act of 1897 went into effect, as the latter act was passed without an emergency clause and three calendar months elapsed after its passage before it took effect.

Again, Patterson comes into court invoking the aid of

the extraordinary remedy of mandamus. This writ is only issued to compel the respondent to perform an act which the law specially enjoins upon him as a duty resulting from an office, trust, or station. Two things must concur in order that this writ may issue: The party applying for the writ must show that he is invested with the legal right to have the respondent perform the act which he seeks to compel him to perform, and it must also appear that the performance of the act by the respondent is one which the law specially makes it his duty to perform. Where the right of the relator to the writ is doubtful, or where there is a substantial doubt as to its being the legal duty of the respondent to perform the act, the writ will not issue. In other words, the remedy by mandamus must rest upon the legal rights of the relator upon one hand and upon the legal obligations and duties of the respondent upon the other hand. It cannot be predicated solely upon the equities existing between the parties. We conclude, therefore, that by the passage of the act of 1897 the state intended to and did withdraw from sale all its unsold and unleased school lands and the school lands leased prior to the taking effect of the act of 1879, the lessees of which had not availed themselves of the privilege of purchasing such lands prior to the taking effect of the act of 1897. The district court correctly refused the writ of mandamus and its judgment is

AFFIRMED.

GEORGE M. MURPHY, APPELLANT, V. N. H. WARREN & COMPANY ET AL., APPELLEES.

FILED MAY 19, 1898. No. 8101.

1. **Contract:** CONSTRUCTION: ELEVATORS. The contract between the parties, set out in the opinion, construed, and *held* that certain elevators therein mentioned were not capital invested in the enterprise in which the parties were engaged.

2. **Partnership:** LIEN OF PARTNER. Where two men are partners and

one is indebted to the other on copartnership transactions, the creditor has no lien, because of such partnership relation, upon his debtor's individual property.

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

F. I. Foss, E. E. McGintie, and *W. R. Matson,* for appellant.

F. C. Power and *S. H. Sedgwick, contra.*

RAGAN, C.

July 1, 1891, N. H. Warren & Co., an Illinois copartnership, owned three grain elevators in this state—one located at Crete, one at Dorchester, and one at Friend. N. H. Warren & Co., as party of the first part, and George M. Murphy, as party of the second part, entered into an agreement in writing as follows:

"Witnesseth, that for and in consideration of the agreements hereinafter set forth the party of the first part agrees to furnish the free use of their steam-power elevator at Dorchester and their horse-power elevator at Crete, in the state of Nebraska, fully equipped and ready for use, to the party of the second part. The said party of the second part agrees, in consideration of the free use of said elevators, to furnish his entire time, also capital to the amount of fifteen thousand dollars, to carry on and properly handle the grain business at said Dorchester and Crete, anything over that amount to be furnished by the party of the first part at seven per cent per annum. The grain bought shall be shipped to said party of the first part, unless it can be sold to better advantage elsewhere; the said party of the first part to charge and retain their regular commissions as fixed by the Chicago board of trade. The said party of the second part agrees to keep a correct and true record and account of weights, prices, and amounts paid for grain and of the amounts received for sale of said grain.

"On the 1st day of August in each year the net profits arising from said purchase and sale of grain shall be declared, and the amount so found be equally divided between the party of the first part and the party of the second part.

"The taxes on the elevators shall be paid by the first party, but the taxes and insurance on grain shall be a part of the running expenses of the business."

By a subsequent written agreement of July 25, 1892, the foregoing contract was made to include an elevator belonging to Warren & Co. located at Friend, Nebraska, and it was to be operated in all respects the same as the elevators at Dorchester and Crete, except that Murphy was to furnish the entire capital for running the grain business at Friend. In the district court of Saline county Murphy brought this suit in equity against Warren & Co. and the Illinois Trust & Savings Bank, an Illinois corporation. He set out in his petition the contract between himself and Warren & Co. and claimed that he and Warren & Co. were copartners; that the elevators referred to in said contract between him and Warren & Co. were contributed by the latter as their share of the capital of the firm of Murphy, Warren & Co.; that the copartnership debts had all been paid, but that there had never been a settlement of accounts between the individual members of the firm of Murphy, Warren & Co., and that upon a settlement of the accounts of that copartnership Warren & Co. would be found largely indebted to him, Murphy. Included in what Murphy claimed was owing to him by Warren & Co., or the copartnership of Murphy, Warren & Co., were three items of moneys expended by Murphy in repairing the three elevators. Murphy prayed that the court would decree that he and Warren & Co. were copartners; that the three elevators were copartnership property; that whatever might be found due him from the copartnership or from Warren & Co., including the moneys expended by him in repairing the elevators, might be decreed a lien upon the ele-

vators. The only service had upon Warren & Co. was a constructive one by publication, and they did not appear in the case. The Illinois Trust & Savings Bank appeared in the action and defended the same, claiming to be the owner of the elevators by purchase from Warren & Co. The district court found that during the existence of the agreement between Murphy and Warren & Co. the elevators were the private property of the latter and were not contributed by them as capital to the enterprise embarked in between them and Murphy; that the Illinois Trust & Savings Bank was the owner of the elevators; that Murphy had no lien upon either of said elevators, and upon these findings the court dismissed Murphy's action and he appeals.

1. The district court was correct in its construction of the contract between Murphy and Warren & Co., that the elevators remained the property of Warren & Co.; that they did not contribute those elevators as capital to the enterprise in which they embarked with Murphy. What Warren & Co. did do in that respect was to contribute the use of these elevators to that enterprise. This was the construction placed by this court upon just such a contract as this in *Warren v. Raben*, 33 Neb. 380.

2. The appellant complains because the district court did not find that a copartnership existed between Murphy and Warren & Co. But there was no personal service upon Warren & Co., and the district court did not have such jurisdiction of them as authorized it to render against them a personal judgment; and that being the case, and the court having no jurisdiction of any property belonging to the copartnership, if one existed, to find that Murphy and Warren & Co. were copartners, and that one was indebted to the other, would have been an entirely useless proceeding.

3. A third argument is that the Illinois Trust & Savings Bank could not interpose to this action the defense that Murphy and Warren & Co. were not copartners, nor that the elevators were not copartnership property. In

support of this contention counsel for the appellant cite us to *Coleman v. Pearce*, 25 Minn. 123. We have not been able to find this case.* It is not in 25 Minn. Another case cited is *Porter v. Currey*, 50 Ill. 319. Without reviewing the latter case, it must suffice to say that it does not sustain counsel's contention. We are not able to understand upon what theory the Illinois Trust & Savings Bank could be debarred from asserting that these elevators were, at the time they acquired title thereto, the property of their vendors, Warren & Co. Murphy claimed that he was in copartnership with Warren & Co. and that the latter contributed these elevators to the capital of that copartnership; that the elevators were copartnership property of Murphy, Warren & Co., and, therefore, the conveyance by Warren & Co. did not pass the title of the elevators to the savings bank. The burden was on Murphy to establish these facts, and he failed to do so. But we think it was perfectly competent for the savings bank to show, as it did, that whatever may have been the relation which existed between Murphy and Warren & Co., the latter owned the title to these elevators at the time it conveyed that title to the savings bank, and that they did not contribute those elevators as capital to the enterprise in which they embarked with Murphy. The record before us would not sustain any other conclusion than the one reached by the district court, that these elevators, from 1891 until the time they were conveyed to the savings bank, were the individual property of Warren & Co., even if the latter and Murphy were copartners.

4. Appellant complains because the district court did not award him a lien upon these elevators for the moneys which he alleges he expended in repairing them. He may have a cause of action against Warren & Co. for money expended for their use in repairing their elevators, but the mere existence of such cause of action does not invest him with a lien, or the right to one, upon their

*Coleman v. Pearce, 26 Minn. 123.

property. If, in pursuance of a contract, express or implied, he has furnished labor or material for the reparation of Warren & Co.'s elevators, then, upon compliance with the mechanics' lien statutes of the state, he might acquire a lien against the interest which Warren & Co. had in the elevators at the time he began the furnishing of such labor or material under his contract. But if Murphy and Warren & Co. were copartners, if the latter or the copartnership is indebted to Murphy on account of the copartnership, that of itself would not invest him with a lien upon the individual property of Warren & Co., although the use of such property was part of the capital of the copartnership. The district court is right and its decree is

AFFIRMED.

GEORGE M. MURPHY, APPELLANT, V. N. H. WARREN & COMPANY ET AL., APPELLEES.

FILED MAY 19, 1898. No. 8102.

1. **Bill of Exceptions:** SEPARATE RECORDS: STIPULATION. Solely by stipulation, a bill of exceptions in one case cannot be made a part of the record of another case, even though the two cases be between the same parties.

2. ———: ———: REVIEW. A bill of exceptions, to be considered in reviewing the judgment of a district court, must be a part of the record of the case brought here, and to make it such it must be settled as the bill of exceptions in the case under review in pursuance of the provisions of section 311, Code of Civil Procedure.

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

F. I. Foss, E. E. McGintie, and *W. R. Matson,* for appellant.

F. C. Power and *S. H. Sedgwick, contra.*

RAGAN, C.

George M. Murphy brought in the district court of Saline county a suit against N. H. Warren & Co. and the Illinois Trust & Savings Bank, an Illinois corporation. Murphy claimed in his petition that about May 1, 1891, Warren & Co. were the owners of a grain elevator situate in the city of Crete; that in pursuance of an oral contract with them of that date he furnished certain labor and material for the repair of that elevator, and for which there was due him from Warren & Co. a certain sum of money. He prayed for a decree awarding him a mechanic's lien upon the elevator for the sum found due him, and in case of the non-payment of such sum that the elevator might be sold to make and raise the same. The Illinois Trust & Savings Bank was made a party to the action, as it claimed to be the owner of the property by purchase from Warren & Co. At the same time Murphy brought two other suits against the same parties to have established and foreclosed mechanics' liens for labor and material which he alleged he had furnished to repair elevators belonging to Warren & Co.—one located at Dorchester and one at Friend, Nebraska. By stipulation between counsel—and we presume in pursuance of an order of the court—these three cases were consolidated and tried as one, and resulted in a decree dismissing Murphy's action, from which he has appealed.

The correctness of the decree of the district court depends upon the evidence in the case, and there is in the record no bill of exceptions. At the time the three consolidated cases were tried there was pending in the district court of Saline county a suit of Murphy against Warren & Co. for a copartnership accounting, known as "Number 85." In pursuance of a stipulation entered into by counsel for the respective parties the court tried and determined the mechanics' lien cases upon the evidence introduced in the copartnership accounting case. A bill of exceptions was settled in that case, and from the decree

rendered therein an appeal was taken to this court, which affirmed the judgment of the district court. (See *Murphy v. Warren*, 55 Neb. 215.) In the case at bar counsel have stipulated that the bill of exceptions settled in the copartnership accounting case may be considered as a part of the record in the case at bar. The district court did not make an order that the bill of exceptions settled in the copartnership accounting case should be, and be considered, a part of the record in the case at bar, nor settle such bill of exceptions as the bill of exceptions in this case. Solely by stipulation of parties, or their counsel, a bill of exceptions settled in one case cannot be made the bill of exceptions in, and, therefore, a part of the record of, another case, even though the two cases be between the same parties. A bill of exceptions, to be considered in reviewing here a judgment of the district court, must be a part of the record of the case under review, and to make it such it must be settled as a bill of exceptions in that case in accordance with the provisions of section 311 of the Code of Civil Procedure. (*State Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 47 Neb. 1.) As was said in the *Buckstaff Case*, we do not mean to decide, where two cases between the same, or even different parties, are tried upon the same evidence, and a bill of exceptions is settled and made a part of the record in the one case, that it is essential that the bill of exceptions should be duplicated for the other case; but what we do decide is that if it is sought to use a bill of exceptions, already a part of the record of the first case, as the bill of exceptions in the second case, then such bill of exceptions must be settled and allowed as the bill of exceptions in the second case and made a part of the record of that case, and that this cannot be done simply by stipulation of counsel or their clients.

The findings of the district court in the case at bar were general in favor of the defendants below. The pleadings sustain the decree and it is

AFFIRMED.

STATE BANK OF NEBRASKA OF SEWARD, APPELLEE, V. HENRY ROHREN, APPELLANT.

FILED MAY 19, 1898. No. 9961.

1. **Injunction:** IRREPARABLE INJURY. To authorize a court of equity to interfere by injunction, the facts averred in the petition must show that if the injunction be denied, the complainant will suffer an irreparable injury for which he has no adequate remedy at law.

2. ———: ———: PLEADING. The mere averment in a petition for an injunction that the applicant will suffer an irreparable injury, unless the injunction be granted, is not of itself sufficient to authorize its issuance.

3. **Contract:** VIOLATION BY TENANT: INJUNCTION BY LANDLORD: IRREPARABLE INJURY. A lease of a farm for one year provided that the lessor should have the right to go upon the leased premises during the continuance of the lease and fall plow and sow any part of said premises proper to be fall plowed and sowed. The tenant refused to permit the lessor to go upon and fall plow and sow to wheat certain stubble lands of the leased premises. The tenant was insolvent. *Held*, (1) That to prevent the lessor's entering upon, plowing, and sowing the stubble lands was to deprive him of a right of substantial value; (2) that though the facts averred in the petition showed that the injury to the lessor by such deprivation would be small, yet it would be irreparable; (3) that for indemnity for such injury the lessor had no adequate remedy at law; (4) that the tenant should be enjoined from preventing the lessor's entering upon, plowing, and sowing the stubble lands.

APPEAL from the district court of Seward county. Heard below before SEDGWICK, J. *Affirmed.*

F. I. Foss, Norman Jackson, and *George W. Lowley,* for appellant.

Norval Bros., contra.

RAGAN, C.

On February 8, 1897, the State Bank of Nebraska of Seward, Nebraska, leased to Henry Rohren a farm in Seward county. The lease was in writing, and provided

that the lessee should have and hold the real estate from March 1, 1897, to March 1, 1898; that he should pay as rent for the real estate a certain proportion of the crops grown thereon. The lease also contained the following: "It is also agreed that the party of the first part [the bank] shall have the right to go upon said premises at any time during the continuance of this lease for the purpose of making any repairs or improvements thereon * * * or to fall plow and sow any lands on said premises necessary or proper in the judgment of the party of the first part to be fall plowed and sowed, and party of the second part agrees to keep his cattle off of same." On August 21, 1897, the bank filed a petition in equity in the district court of Seward county against the said Rohren in which it set out the lease already referred to and then alleged that in order to raise a crop of fall rye and wheat on the premises in the year 1898 it was necessary for the bank to plow a portion of the said premises in the fall of 1897 and plant the same to fall wheat and rye; that in order to do so it was necessary for the bank at that time to commence the plowing of said premises; that it desired to fall plow about thirty acres of stubble land upon said premises upon which the lessee had grown a crop of small grain in the year 1897; that for the purpose of plowing said thirty acres of stubble land and sowing it to wheat and rye the bank went upon, or attempted to go upon, said land in the month of August, 1897; but the lessee thereupon refused to permit the bank or its agents to enter upon said stubble land for the purpose of fall plowing; that the said lessee refused to permit the bank or its agents to go upon said premises for that purpose at the time the petition was filed, or at any other time; that unless the lessee was enjoined from preventing the lessor going upon said premises and fall plowing said stubble land and sowing the same to wheat and rye it would suffer an irreparable injury and damage; that such lessee was insolvent. The petition further alleged that

the lessee threatened to, and would, unless enjoined from so doing, allow his cattle and stock to run upon the ground which the bank might sow to fall wheat and rye and injure and destroy the same. The prayer was for an injunction restraining the lessee from preventing the bank, through its agents, from going upon said stubble land, fall plowing the same, and sowing it to wheat and rye; and further restraining the lessee from allowing his cattle and other stock to run at large upon and injure and destroy the crop of fall wheat and rye which the bank might sow upon said stubble land. To this petition the lessee demurred on the ground that it did not state facts sufficient to constitute a cause of action. The district court overruled the demurrer. The lessee refusing to plead further, a decree was entered in accordance with the prayer of the petition and the lessee has appealed.

1. The first argument is that the petition does not state facts which show that the bank would sustain an irreparable injury if the injunction were denied. Of course a mere averment in a petition for an injunction that the plaintiff will suffer an irreparable injury unless the injunction be granted is not of itself sufficient to authorize the issuing of an injunction. To authorize a court of equity to interfere by injunction the facts averred in the petition must show that the complainant would suffer an irreparable injury or damage. We think the petition at bar complied with this rule. It shows that unless the lessee should be enjoined by the court he will prevent the lessor from entering upon the premises, fall plowing the stubble land and sowing it to wheat and rye, thereby depriving lessor of the right which it reserved under the lease to enter upon said land for that purpose, and also deprive it of the opportunity at least to grow a crop of fall wheat. It may be that the injury which the bank would suffer if this injunction were denied would be small, but the facts averred in the petition show that the injury would be irreparable. We do not know how it

could be shown in a suit for damages what amount of injury the bank had sustained by the refusal of the tenant to permit it to enter upon and fall plow and sow the stubble land; and, if these damages were ascertained, the petition avers, and the demurrer admits, that the tenant is wholly insolvent and unable to pay them. It is insisted by appellant that the appellee's injury would not be irreparable if the injunction were denied because it might put this land into a crop of spring wheat after the tenant's lease of the premises had expired. This argument ignores the landlord's rights under the lease; and while to deprive it of this right might not work a great injury, yet it does deprive appellee of a right of substantial value. Appellant also says that the amount of the injury appellee would suffer is too slight to warrant the intervention of a court of equity. We do not think it is. Appellant complains because of the interference of a court of equity in a case of this character, where the amount of injury sustained by the complainant if the injunction should be denied is so small. But the answer to this is that though the remedy of injunction be extraordinary, and in some instances a harsh one, yet it is sometimes the only remedy available for preventing a party from deliberately violating his contracts and thereby inflicting an injury upon another for which the latter has no redress.

2. A second argument is that the bank has an adequate remedy at law by declaring the lease at an end on account of the lessee's refusal to permit the lessor to enter upon and fall plow and sow the stubble land and then bring forcible detainer for the possession of the premises. The answer to this is that the landlord cannot cancel this lease and retake possession of the leased premises by forcible detainer because of the lessee's refusal to permit appellee to enter upon the land and fall plow it, as the lease makes no provision for its forfeiture on that ground.

Another argument under this same head is that, since the lease reserves the right of the landlord to enter

upon and fall plow and sow the stubble land, therefore it has a remedy at law by suit in forcible detainer to recover from the tenant the possession of the stubble land which it wishes to sow in wheat. We do not subscribe to this argument. For the landlord to recover possession of the leased premises or any part of them appellee would have to establish that the tenant was wrongfully withholding possession of the premises. This it could not do. The right to the possession of all the premises is in the tenant until March 1, 1898. The lease does not reserve to the landlord possession and right to possession during the existence of the lease of any portion of the premises, but only the right to enter upon them for the purposes of fall plowing, etc.

4. A final argument is that if the appellee should sow the stubble land to wheat and rye, and if the appellant should permit his cattle and other stock to run upon said ground and injure and destroy such wheat and rye, then appellant for such injury is provided with a complete and adequate remedy at law by sections 1 and 2, article 3, chapter 2, Compiled Statutes, which makes the damage done to property committed by stock running at large a lien upon the stock. If the appellee at the time it brought this action had already fall plowed and sowed the lands to wheat and rye and sought the injunction because the appellant threatened to permit his stock to run upon and destroy the wheat crop, there might be some force in the argument; but the threat of the appellant to permit his stock to run upon and injure the crops of wheat which the appellee may sow on the land is merely an incidental feature of this case. The gist of this action is the refusal of the appellant to permit the appellee to enter upon the lands and fall plow and sow them to wheat in accordance with the terms of the lease between the parties. Since the court had jurisdiction of the case and the right to restrain the appellant from preventing the landlord's entry upon the premises for fall plowing and sowing wheat, we think it did not transcend

its authority in restraining the appellant from interfering with the crops which the appellee might sow upon said ground. The decree of the district court is right and is

AFFIRMED.

NORVAL, J., not sitting.

SWIFT & COMPANY V. FRANK HOLOUBEK.

FILED MAY 19, 1898. No. 8093.

1. **Master and Servant:** DANGEROUS MACHINERY: PERSONAL INJURY. A master does not insure his servant, although the latter be of immature years, from injury by machinery in its nature dangerous, and an instruction which permits the jury to find for the plaintiff if the machinery was dangerous and the plaintiff not guilty of contributory negligence, is erroneous.

2. **Instructions:** EVIDENCE. An instruction must not submit to the jury the consideration of facts the existence of which the evidence does not tend to establish.

3. **Personal Injury:** EVIDENCE: EXPECTANCY OF LIFE. Where a personal injury is permanent in its character, although the plaintiff be a minor, evidence as to his expectancy of life, from experience tables, must be based on his actual age and not on the age of majority.

4. ———: INFANTS: EARNING POWER. But, where there is no evidence of emancipation, recovery should not be permitted for loss of earning power during his minority.

5. **Evidence Not Within Issues.** Evidence should not be permitted to digress from the issues into an investigation of collateral questions.

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

I. R. Andrews, for plaintiff in error.

J. L. Kaley, contra.

IRVINE, C.

Frank Holoubek, the plaintiff in the district court, a boy fourteen years of age, was employed by Swift & Co.,

a corporation operating a packing house in South Omaha, and while so employed his hand was caught in the machinery and three fingers were lost. He sued to recover for this injury and recovered a judgment for $5,000, which the defendant seeks by these proceedings to reverse.

The court gave the following instruction at the request of the plaintiff: "You are instructed that in determining whether plaintiff exercised ordinary care it is proper for you to take into consideration the nature of the service he was performing when injured, his knowledge or lack of knowledge of the work, the nature of the casing machine upon which he worked, whether simple or complicated, whether plaintiff's attention was required to be constantly concentrated on his work or not, whether but one place was required to be watched by him while working said machine to avoid danger, if there was danger, or numerous places, whether his work consisted of the repetition of one act or numerous acts, whether the instruction he received by defendant when he began work on said machine, if you find he received instruction, tended to aid him in safely working at said machine or to confuse him, and all the facts and circumstances surrounding the case; and if you are satisfied from all the evidence that the work at which the plaintiff was employed at the time he was injured was dangerous and that on account of his youth and inexperience he did not understand or comprehend its dangerous character, and you further find that while working upon said machine at the time said injury occurred plaintiff exercised such ordinary care and prudence as would ordinarily be exercised by persons of plaintiff's age, intelligence, and experience under like circumstances and conditions, then you will be warranted in returning a verdict for the plaintiff and in assessing for him such damages as you think him justly entitled to." Undoubtedly the main purpose of this instruction was to cover the subject of contributory negligence, al-

though why plaintiff desired that that issue be submitted we hardly see in view of the following from the answer: "Defendant further alleges that whatever injury the plaintiff received was not owing to any negligence on his part." We can only treat that language as an express admission that there was no contributory negligence. But the instruction cannot for that reason be disposed of as not prejudicing the defendant, because it referred not only to contributory negligence, but undertook to cover the whole case. After stating certain facts which might be considered in ascertaining whether the plaintiff was negligent, it proceeded to say that the jury would be warranted in returning a verdict for plaintiff if the work was dangerous and plaintiff from his youth was not aware of the danger, provided he was not himself negligent. It omitted altogether the element of defendant's negligence and permitted a recovery on the sole ground that the machine was of a dangerous character. Nearly all machinery is more or less dangerous, in the familiar use of that word, but an employer does not insure his servants, even youths, against accidents on that account. It was not pleaded that the accident was caused by any failure to instruct the plaintiff as to the dangers inherent in the use of the machine, so that its dangerous character, unless the machine were technically defective, was not even a step towards making out a case on that ground. Some of the circumstances detailed in the instruction as proper to consider were not shown by any evidence to exist. While these were stated in connection with the subject of plaintiff's negligence—a fact not in issue—they attracted the attention of the jury to such circumstances and apparently gave them importance, especially as by the instruction the case was made to turn on plaintiff's conduct. There is no evidence that plaintiff received instructions tending to confuse him or that he was injured in consequence of attempting to follow instructions, or by ignorant conduct in the absence of instructions which should have been given.

The Carlisle tables of expectancy were introduced, the defendant objecting to that part showing expectancy at fourteen, and contending that as the plaintiff was not emancipated his expectancy should be shown from the age of twenty-one. Here the plaintiff's position was correct. The tables are only an aid to the jury in ascertaining the probable duration of life. The plaintiff was then fourteen, and his expectancy must be measured in the light of that fact. In the absence of evidence of emancipation there should not, however, have been permitted any recovery for loss of earnings prior to his majority. An instruction on the measure of damages was inaccurate in omitting this feature.

Much immaterial testimony was introduced. It would be hard to say which party was at fault in this or where error began, if there was prejudicial error, in admitting it. As the judgment must be reversed for error in the charge we need not consider the rulings on the evidence in detail. The departure from the issues began with questions asked in cross-examination for the purpose of impeachment. This led to a redirect examination, which brought out more of the conversations inquired about, and then followed evidence in chief from other witnesses, until the collateral matters seemed to absorb the attention of counsel. The last fifty pages of the bill of exceptions is almost entirely occupied with testimony relating to negotiations for a compromise. In subsequent proceedings it would be well for both parties to guard against such digressions.

REVERSED AND REMANDED.

PEOPLE'S NATIONAL BANK OF ROCK ISLAND V. STEPHEN L. GEISTHARDT.

FILED MAY 19, 1898. No. 7973.

1. **Appeal from County Court:** PLEADING IN DISTRICT COURT. In a case appealed from the county to the district court, the plaintiff may allege damages in a greater sum than was claimed in the county court, provided the amount alleged in the district court be within the jurisdictional limit of the county court.

2. **Pleading:** STRIKING SPECIAL DENIALS FROM ANSWER. An answer included a general denial and also admissions accompanied by special denials. *Held*, That the defendant was not prejudiced by an order striking out all except the general denial.

3. ———: INCONSISTENT AVERMENTS. A petition pleaded a contract made through an agent of defendant and also that the defendant had adopted and ratified it. *Held*, That the averments were not inconsistent. The test of inconsistency is that the proof of one averment disproves the other.

4. **Principal and Agent:** RATIFICATION: RELATION. The acceptance by the principal, with knowledge of the facts, of the fruits of an unauthorized act of an agent is a ratification of such act. It relates back to the time of performance and binds the principal as if he himself had been the actor.

5. **Rendition of Bill:** ACTION FOR LARGER AMOUNT: ESTOPPEL. The rendition of a bill for services does not estop the person rendering it from claiming and recovering a larger amount in a subsequent action on a *quantum meruit*, when the other party did not accept or acquiesce in the bill, but refused at once to recognize it as correct.

6. **Attorney and Client:** PROFESSIONAL SERVICES: FEES. Advising with the sheriff as to the proper levying of a writ of attachment is a proper service to a client for which an attorney is entitled to compensation.

7. **Letters:** PROOF OF GENUINENESS. The genuineness of a letter is sufficiently established to permit its introduction in evidence when it is shown that it was received in due and regular course of mail in response to a letter addressed to the supposed writer.

8. **Argument to Jury:** PURPOSE OF COUNSEL: PRESUMPTION. A comment made by counsel in argument to the jury, with reference to a matter in evidence, will be presumed to have been made for a proper purpose and within the limits of legitimate argument, the contrary not appearing.

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

Pound & Burr and *Burr & Burr*, for plaintiff in error.

T. C. Munger and *Stephen L. Geisthardt, contra.*

IRVINE, C.

This was an action by Geisthardt, a practicing lawyer, against the People's National Bank of Rock Island, Illinois, to recover fees for services alleged to have been by him performed in and concerning the commencement of an action aided by attachment, by the bank against C. W. Mosher, to recover on two promissory notes of $5,000 each. There was also a count for money expended by Geisthardt in payment of costs, but as there is no contest as to this count it will not be further noticed. The plaintiff had judgment for $594.85, and the defendant brings the case here.

Several questions are raised with regard to the pleadings. The petition alleged that January 23, 1893, the defendant by its agent, Charles G. Hawley, employed the plaintiff in the matter of collecting the notes, and in the prosecution of all proper suits for that purpose; that plaintiff performed all necessary and proper services to that end until January 30, and began the attachment suit, "all of which proceedings were adopted and ratified by the defendant." The defendant moved the court to strike the petition from the files because it did not conform to the petition in the county court, where it seems that the case originated. It is asserted that the court erred in overruling this motion. This we cannot determine, because the petition in the county court is not in the transcript. It would seem that the variance complained of was in claiming a larger sum for services than was claimed in the county court. If that was all, the variance was not material, the amount claimed in the district court being within the jurisdiction of the

county court. (*Union P. R. Co. v. Ogilvy*, 18 Neb. 638; *Volland v. Baker*, 32 Neb. 391.)

The defendant then filed an answer beginning with a general denial, and proceeding to allege that Hawley had no authority to employ plaintiff; that without authority he had employed him to draw a petition and affidavits for attachment and garnishment, and file the same; that such services were worth $25 and no more; that an agent of defendant came to Lincoln and, on learning that plaintiff had been employed, discharged him and offered to pay him what his services were worth. It was then averred that the case had begun in the county court and that the petition stated a different cause of action. The plaintiff moved to strike out all the answer except the general denial, and this motion was sustained. For reasons already stated we cannot say that it was error to strike out that part pleading a variance between the averments in the two courts. Striking out the other averments did not prejudice the defendant. All the evidence which could be received thereunder was admissible under the general denial. The only effect of the new matter was to admit that plaintiff had been employed by Hawley and that defendant had offered to pay him for what he had done prior to his discharge, which is all that plaintiff asks. While defendant undertook to plead an offer to pay what the services were worth, neither payment nor an actual tender was pleaded.

The defendant then moved that the plaintiff be required to elect on which of his several causes of action he would proceed. This motion did not attack the joining of the two counts for services and for money paid, but was based on the theory that the averments of employment by an agent and of ratification were of two causes of action and were inconsistent. That theory is not sound. The plaintiff might well have pleaded employment by the defendant itself, and under that averment proved either employment by an authorized agent

or a ratification of voluntary acts. By pleading more specifically he narrowed the field of his own evidence, but did not state two causes of action, nor did he plead inconsistently. A contract may be made with an authorized agent, and the principal may so conduct himself thereafter that his acts would amount to a ratification even had the agent been without authority. The proof of one state of facts would not disprove the other. That is the test of consistency. (*Blodgett v. McMurtry*, 39 Neb. 210.) The case then came on for trial. The evidence tended to show that Hawley was a broker and had negotiated three notes made by C. W. Mosher. Two of these for $5,000 each were sold to the defendant, the other, for $10,000, to the Dixon National Bank. Mosher was president of the Capital National Bank of Lincoln and the notes were secured only by a pledge of stock of that bank. Before the notes matured, and January 23, 1893, the Capital National Bank failed. Hawley that day notified his two customers and some correspondence by wire and by mail ensued. Hawley retained plaintiff to act on behalf of both banks. Two days thereafter, it then appearing that the bank and Mosher were insolvent, suits in attachment were begun by plaintiff, and lands and stocks in solvent corporations, owned or supposed to be owned by Mosher, were seized. January 28 Hass, the vice-president of defendant bank, came to Lincoln, discharged plaintiff, and retained other counsel. It is undisputed that the attachments were resisted, but finally sustained, and that the case was prosecuted to judgment by the defendant.

Many assignments of error relate to rulings on the admission of evidence and to the instructions. Most of these relate to evidence and instructions bearing only on the authority of Hawley. These need not be considered, because by uncontradicted evidence it was shown that, whatever might have been the limitations on Hawley's authority, the bank did not repudiate his acts, but, on the contrary, continued the proceedings begun by

plaintiff, pursued the remedy he had instituted, and accepted all the benefits to be derived from his conduct. This amounted to an adoption and ratification, and the court so properly instructed the jury. (*Swartz v. Duncan*, 38 Neb. 782; *Hughes v. Insurance Co. of North America*, 40 Neb. 626; *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb. 68.) The plaintiff was therefore entitled to a peremptory instruction to find in his favor, and the only question for the jury was the amount of recovery. Hawley's authority became therefore an immaterial issue.

It seems that plaintiff had alleged in the county court that his services were worth only $250, and that soon after he was discharged he had rendered a bill to the defendant stating his services at that sum. These facts are the basis for several assignments of error. The defendant in cross-examining plaintiff asked many questions on this subject, all of which were excluded. They were not within the proper limits of a cross-examination, because the plaintiff had not testified to the value of his services, but only to the fact of their rendition. The defendant requested an instruction to the effect that recovery could not be had beyond the amount of the bill rendered, in the absence of evidence of mistake or accidental omission therefrom. This instruction was properly refused. The defendant did not consent to the charge made and did not even acquiesce therein. It promptly repudiated the bill. It takes two parties to state an account. The mere rendition of a bill does not constitute such a statement, unless indeed the other party by silence impliedly accepts it as correct. All the cases cited* by defendant upon this point are cases of accounts stated. If defendant desired to estop plaintiff from claiming more, or from proving that his services were worth more than he first demanded, it should have made the estoppel mutual by accepting the bill as

**Perkins v. Hart*, 11 Wheat. [U. S.] 237; *Keller v. Keller*, 18 Neb. 367; *McKinster v. Hitchcock*, 19 Neb. 103; *Kennedy v. Goodman*, 14 Neb. 585.

correct. The only effect of such proof was that of an admission.

In this connection it is claimed that the damages were excessive. What has just been said covers the most of the argument on this subject. The verdict was well within the limits of the evidence.

The usual objection was interposed to the hypothetical question put to the experts called to prove the value of the services. It is asserted that it assumed facts not established, and incorporated immaterial facts. One element of the question complained of was its including the statement that Mosher and the Capital National Bank were insolvent and that the stock of the bank was worthless. It is said that these facts bore no relation to the plaintiff's services. The collection of notes made by a solvent man and secured by stock of a solvent bank is generally an easy matter, involving no great professional skill and but little responsibility. When, however, the maker is insolvent, the bank has failed, its stock has become worthless, and the notes are not yet due, the problem, both from a professional and from a practical standpoint, becomes more intricate. Another element of the question was that the plaintiff had made efforts to obtain security. It is said that there is no such evidence. It is true there is not much, but there is some evidence, and we do not think that the question was objectionable on that ground. Finally, objection is made because the question assumed that the attorney had advised with the sheriff prior to the levy. It is said that it is the sheriff's duty to find the debtor's property and to levy thereon, and that an attorney cannot charge his client for assisting the sheriff in so doing. Sheriffs unfortunately are not omniscient, and unless one wants a writ returned *nulla bona* it is generally necessary to point out property, and especially in attachment cases to direct the levy. By directing a wrongful levy the attorney may render both himself and his client liable to a stranger. To rightly supervise such a proceeding is not

only a legitimate service to a client but usually a very responsible duty.

The record of the judgment in the attachment case was received in evidence, as were also certain pleadings in other cases in which defendant became involved. It is contended that these records were irrelevant. The judgment was material for the purpose of showing that defendant had prosecuted the case begun by plaintiff and thereby ratified his acts. Some of the other pleadings were offered by defendant itself, and those which plaintiff offered were proper to explain and rebut inferences deducible from those which defendant had offered. They were even proper in chief for the same purpose as the judgment.

During the argument to the jury plaintiff's counsel used this language: "Talk about this defendant. Its letter-head shows that it has a capital of $100,000 and a surplus of $60,000." At least one of the letters bearing the heading was properly in evidence. While handwriting had not been proved it was shown that the letter had been received by Hawley in due course of mail in response to communications from Hawley to the defendant. This rendered it competent. (*Gartrell v. Stafford*, 12 Neb. 545.) Such a foundation is even sufficient to permit evidence as to genuineness of handwriting. (*Violet v. Rose*, 39 Neb. 660.) It was relevant to the issues concerning Hawley's authority. No objection was made to the printed caption as distinguished from the body of the letter. Counsel therefore did not go outside the record in making the comment. The record is entirely silent as to the connection in which the language was used, and it must be presumed that it was used in the line of legitimate argument.

AFFIRMED.

WILLIAM R. ALLING, APPELLEE, V. FLORA R. FISHER ET AL., APPELLANTS, ET AL.

FILED MAY 19, 1898. No. 8100.

1. **Appeal:** TRANSCRIPT FOR REVIEW: PRESUMPTIONS. In the review of cases by appellate proceedings in this court, the transcript being silent as to matters before the district court, it will be presumed that the facts there disclosed were of such character as to warrant the judgment rendered.

2. **Bill of Exceptions:** OMISSIONS: AUTHENTICATION. If a bill of exceptions discloses that important evidence has been therefrom omitted, authentication of the bill that it contains all the evidence will not control, and in such case the finding will not be disturbed as unsupported by the evidence.

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

Allen G. Fisher, for appellants.

Albert W. Crites, contra.

IRVINE, C.

Alling brought suit to foreclose a mortgage executed by Flora R. Fisher and Allen G. Fisher to Spargur & Fisher and by them assigned to plaintiff. Cannon, claiming a tax lien, was made a defendant. From a decree foreclosing both liens the Fishers appeal.

It is contended that the petition shows no ground for a foreclosure of the mortgage. The record does not disclose when the suit was begun. The petition shows that the debt was by its terms payable January 4, 1893, and alleges that it became due on that day. It will be presumed, in favor of the judgment of the district court, that the suit was not brought until after that date.

It is argued that there is a variance between the mortgage pleaded and that offered in evidence, the variance relating only to the date of the mortgage. As the answer expressly admits the execution of the mortgage pleaded,

the offer of the mortgage in evidence was unnecessary, and the variance is immaterial.

The remaining questions argued require for their decision an examination of the bill of exceptions to ascertain the sufficiency of the evidence on certain points, for the most part relating to the tax lien. The bill of exceptions is manifestly incomplete, showing on its face that important matter received in evidence is omitted therefrom. It is therefore unavailing for the purpose required. (*Missouri P. R. Co. v. Hays*, 15 Neb. 224; *Oberfelder v. Kavanaugh*, 29 Neb. 427; *Dawson v. Williams*, 37 Neb. 1; *Schneider v. Tombling*, 34 Neb. 661; *Omaha Fire Ins. Co. v. Berg*, 44 Neb. 522; *Conger v. Dodd*, 45 Neb. 36; *Nelson v. Jenkins*, 42 Neb. 133; *Storz v. Finklestein*, 48 Neb. 27; *Greene v. Greene*, 49 Neb. 546; *Van Etten v. Test*, 49 Neb. 725.)

AFFIRMED.

WILLIAM SIMPSON V. STATE BANK OF CERESCO ET AL.

FILED MAY 19, 1898. No. 8084.

Sale: EXECUTORY CONTRACT: TITLE: TROVER. In an action of trover against a mortgagee of goods by one claiming to have purchased from the mortgagor prior to the mortgage, evidence examined and *held* to sustain a finding that the contract relied on was executory and that title had not passed.

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

Ricketts & Wilson, for plaintiff in error.

Good & Good, contra.

IRVINE, C.

This was an action in the nature of trover for certain clothing alleged to belong to the plaintiff and to have been by the defendant, the State Bank of Ceresco, con-

verted to its own use. Sayers & Walker, a firm which formerly owned the goods, was permitted to intervene as a defendant. The case was tried without a jury and there was a general finding for the defendants. The only assignment of error to which the argument in the briefs is applicable is that the finding is not sustained by the evidence.

Sayers & Walker were engaged in a general mercantile business at Ceresco. On October 12, 1894, Simpson made some arrangement with them for the purchase of a quantity of clothing from their stock. He, in the presence of one or both members of the firm, selected the goods, which were invoiced as selected, and it seems a portion marked with a private cost mark by Simpson. They were then carried into an adjoining room occupied by Sayers & Walker in connection with their store, certainly as a warehouse and it seems to some extent as a salesroom, and there placed in boxes which were nailed up. Simpson then wrote his name on them and left town. It seems that he was expected to return the following week and take the goods. A few hours after Simpson left, Sayers & Walker made a mortgage to the bank covering their entire stock of merchandise and some other property, to secure an existing debt to the bank, and subsequently made mortgages on the same property to other creditors. After the bank's mortgage was executed, but before possession was taken thereunder, Sayers & Walker unpacked the goods in controversy and replaced them in the room from which they had been taken. That night the bank took possession. Simpson appeared the following week, expressed his desire to complete his contract, and was informed that Sayers & Walker had elected to rescind it. He then brought this suit.

The argument is largely directed to the question whether the acts of Simpson and Sayers & Walker, above stated, were sufficient acceptance and receipt of the goods to satisfy the ninth section of the statute of frauds, it

being conceded that the goods were of the value of more than $50, that there was no note or memorandum in writing, and that no part of the purchase price was paid. We do not think it necessary to examine the case from that point of view, because we are convinced that the evidence sustained the finding on the theory that there had been no sale which would pass title regardless of the statute of frauds. The nature of the contract with Simpson does not clearly appear from the evidence. It does clearly appear that Sayers & Walker refused to permit Simpson to take the goods out of their building and that Simpson acquiesced in their decision. In one place it seems that the reason of the refusal was that something was to be ascertained about property which was to be received in exchange, and that an indemnity bond of some kind was to be given by Simpson before he should take the goods. In another it seems that Simpson claimed an indebtedness to himself and that Walker refused to allow the goods to go out until he was satisfied that such indebtedness existed. Simpson himself testified that he did not take the goods because he had not performed his part of the contract. From this the inference is almost conclusive that the selection and packing of the goods were not intended to operate as a delivery, and that the contract was executory, not to be consummated by delivery until Simpson should perform the consideration. Therefore title did not pass and Simpson is without remedy against the bank, or, in this kind of an action at least, against Sayers & Walker.

AFFIRMED.

BLOOMFIELD STATE BANK, APPELLANT, V. H. N. MILLER ET AL., APPELLEES.

FILED MAY 19, 1898. No. 8045.

1. **Mortgage:** DEPOSIT OF TITLE DEEDS. A mortgage by the deposit of title deeds, without writing, is not effective in this state.
2. ———: ———. While such a mortgage is recognized in England, and while the law of England has been adopted by statute in this state, the statute does not extend to those rules of the English law which contravene the object and purpose of our own statutes.
3. ———: ———: STATUTE OF FRAUDS: REGISTRATION. A mortgage by the deposit of title deeds violates the statute of frauds and is contrary to the policy of the recording acts.
4. **Statute of Frauds:** EXCEPTION. The exception of the statute of frauds with regard to estates arising by act or operation of law does not embrace cases where the creation of the estate depends solely on the intention of parties to a contract.
5. ———: ORAL CONTRACT: EQUITY. A court of equity cannot give effect to an oral contract declared void by the statute of frauds, under pretense of aiding an imperfect attempt to execute a contract.
6. **Mortgages:** DEPOSIT OF TITLE DEEDS: EQUITY. Nor can such a court enforce a mortgage by deposit of title deeds because the loan which the deposit was made to secure has been actually received by the depositor.

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

A. A. Welch, for appellant:

An equitable mortgage may arise from non-payment of purchase money, deposit of title deeds, or an unsuccessful attempt to make a valid mortgage deed. (*Gale v. Morris*, 29 N. J. Eq. 222; *Griffin v. Griffin*, 18 N. J. Eq. 104; *Hackett v. Reynolds*, 4 R. I. 512; *Chase v. Peck*, 21 N. Y. 584; *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 51.)

An equitable mortgage may be created by an unsuccessful attempt to make a valid mortgage deed or to appropriate specific property to the discharge of a particular

debt. (*Peckham v. Haddock*, 36 Ill. 38; *Abbott v. Godfrey*, 1 Manning [Mich.] 179.)

A mortgage defectively executed, or an imperfect attempt to create a mortgage upon specific property for the purpose of securing a debt, will create a specific lien upon the property so intended to be mortgaged. (*Daggett v. Rankin*, 31 Cal. 321; *Love v. Sierra Nevada Lake, Water & Mining Co.*, 32 Cal. 639; *Peers v. McLaughlin*, 88 Cal. 294; *Remington v. Higgins*, 54 Cal. 620.)

An equitable mortgage may be created by deposit of title deeds of a legal or an equitable estate, as security for the payment of money, or by a conveyance legal in its form of an equitable estate for that purpose. (*Jarvis v. Dutcher*, 16 Wis. 326; *Hutzler v. Phillips*, 26 S. Car. 136.)

Right of plaintiff to equitable relief: *McCarty v. Brackenridge*, 20 S. W. Rep. [Tex.] 997; *Garland v. Wells*, 15 Neb. 298; *Read v. Morton*, 24 Neb. 760; *Van Etta v. Evenson*, 28 Wis. 33; *Swartz v. Ballou*, 47 Ia. 188; *Field v. Stagg*, 52 Mo. 534; *Drury v. Foster*, 2 Wall. [U. S.] 24; *Curtis v. Buckley*, 14 Kan. 449; *Cribben v. Deal*, 21 Ore. 211; *State v. Young*, 23 Minn. 551; *Nelson v. McDonald*, 80 Wis. 605; *Burnside v. Wayman*, 49 Mo. 356; *Chauncey v. Arnold*, 24 N. Y. 330; *McNab v. Young*, 81 Ill. 11; *Putnam v. Sullivan*, 4 Mass. 45.

Other references: *Craig v. Leiper*, 2 Yerg. [Tenn.] 193; *Polk v. Gallant*, 34 Am. Dec. [N. Car.] 410; *Mowry v. Wood*, 12 Wis. 460; *Smith v. Clarke*, 7 Wis. 468; *Boman v. Griffith*, 35 Neb. 361; *Pleasants v. Blodgett*, 39 Neb. 741; *Veith v. McMurtry*, 26 Neb. 341; *Garmire v. Willy*, 36 Neb. 340; *Savage v. Hazard*, 11 Neb. 323; *Warner v. Trow*, 36 Wis. 195.

Carter & Brown, contra:

The English rule that a mortgage by the deposit of title deeds may be enforced has been criticised or repudiated as being inconsistent with our system of conveyancing and registry laws, and as being in violation of the statute of frauds. (*Bicknell v. Bicknell*, 31 Vt. 498; *Shitz v. Dieffenbach*, 3 Pa. St. 233; *Thomas' Appeal*, 30 Pa. St. 378; *Edwards v. Trumbull*, 50 Pa. St. 509; *Bowers v. Oyster*, 3 P. & W. [Pa.] 239; *Probasco v. Johnson*, 2 Disn.

[O.] 96; *Bloom v. Noggle*, 4 O. St. 45; *Vanmeter v. McFaddin*, 8 B. Mon. [Ky.] 435; *Meador v. Meador*, 3 Heisk. [Tenn.] 562; *Gothard v. Flynn*, 25 Miss. 58; *Lehman v. Collins*, 69 Ala. 127; *Williams v. Hill*, 19 How. [U. S.] 246-250.)

A court of equity is bound by the statute of frauds. (*Watson v. Erb*, 33 O. St. 35; *Abell v. Calderwood*, 4 Cal. 90; *Patterson v. Yeaton*, 47 Me. 308; *Beaman v. Buck*, 9 S. & M. [Miss.] 207; *Skipwith v. Dodd*, 24 Miss. 487; *Chase v. Second Ave. R. Co.*, 97 N. Y. 388.)

IRVINE, C.

D. C. Main held a contract with the state for the purchase of the northwest quarter of section 32, township 32 north, of range 3 west, in Knox county, said land being state educational land. He also held a number of leases of other educational land in the vicinity. In 1892 he entered into contracts with H. N. Miller, which had for their effect the transfer to Miller of Main's rights to the land, payment of the consideration or a part thereof being deferred. The contract first referred to, and out of which this action arises, was assigned to Miller by a separate instrument. January 20, 1893, Miller made his note to the Bloomfield State Bank for $500, representing in part an overdraft and in part a loan made at that time by the bank to Miller. At the same time Miller wrote his name on the back of the assignment from Main to himself, and delivered the assignment in that condition to the bank, intending thereby to have it operate as security for the note. Prior thereto he had, by formal written assignments, transferred his rights to the other lands to French, to secure a debt he owed the latter. In April or May, 1893, finding that he would be unable to meet the payments to Main, Miller negotiated for the sale of his rights to Sexton, Comstock & Co. Sexton, Comstock & Co. not being prepared or not desiring to make immediate payment to Main, an arrangement was made among Miller, Main, French, and Sexton, Comstock & Co., evidenced by a preliminary memorandum agree-

ment, two formal contracts, and certain letters. No single contract was joined in by all the parties to the transaction, but the nature of the arrangement is made plain by a comparison of the different documents. Its precise nature is not material; its general object was to procure contracts of purchase in lieu of the leases, to pass all rights eventually to Sexton, Comstock & Co., and to this end that French should pay to Main all moneys accruing to him under his contracts with Miller, obtain the assigned contracts from Main and hold them until Sexton, Comstock & Co. should repay French his advances to Miller and to Main, when he should assign them to Sexton, Comstock & Co. Accordingly French paid Main what was due him, including the money due on the contract first mentioned. Down to this point neither Main, French, nor Sexton, Comstock & Co. knew of the transactions between Miller and the bank. Learning thereof Main refused to transfer the contract with the state to French. The bank on its part, learning of the other transactions, wrote above Miller's signature on the assignment an assignment thereof to itself. Then it began this action against Miller, Main, and French, alleging in its petition the debt to the bank and that to secure the payment thereof Miller agreed to assign the contract with Main, that he wrote his name on the back thereof and delivered it to the bank with authority to fill in above the signature a formal assignment. It prayed a foreclosure. Miller made default. French answered, denying all the material averments of the petition and alleging that for the purpose of securing title and conveying to Sexton, Comstock & Co. in accordance with his contract obligations he had bought the land of Main and paid him therefor, all in ignorance of any claim by plaintiff. By way of cross-petition he prayed that Main be required to assign the contract to him. Main in his answer pleaded his good faith and offered to assign to whomsoever the court might determine and to refund to French what he had paid if the court should so order.

The findings were against the plaintiff and the court ordered a conveyance by Main to French. Plaintiff alone appeals.

By comparing the statement of facts with the issues it will be seen that neither of the contesting parties succeeded in establishing the facts precisely as he pleaded them. The bank wholly failed to show that it had any authority to write the assignment over Miller's signature, or that the signature was placed there for such a purpose. Even if there had been such authority, the assignment was not written until after French's rights had accrued in his ignorance of the bank's. The bank therefore can claim nothing under the written assignment. On the other hand, French pleaded only an assignment from Main. Main had already assigned to Miller, so that under that pleading French could claim only a subrogation to Main's right to the unpaid purchase-money, provided the bank had any right derived from Miller, although under the evidence French, or Sexton, Comstock & Co., whom he represented, was shown to have acquired Miller's rights also. If the bank obtained no right, then it cannot complain of the decree between the other parties. If it did obtain any right from Miller, then the decree must at least be modified. The proof showing that the written assignment to the bank was unavailing, but also showing that the contract between Main and Miller was by the latter deposited with the bank with the clear intention on the part of both that it should stand as security for a debt in part then contracted, we have thus distinctly presented for the first time in this state the question whether the doctrine of an equitable mortgage by a deposit of title deeds is sound.

It is unnecessary to review the English cases. When the doctrine was there first announced it provoked much opposition, being justly considered a further invasion of the statute of frauds. Lord Eldon expressed his emphatic disapproval of it, but considered the rule too well fixed in his time to justify its overthrow. It must there-

fore be accepted as the established doctrine of the English courts, and as a part of the law of England. The common law is not with us an estate by inheritance, but one by purchase. It is here in force by virtue of statute, which provides: "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.) No one would assert that the phrase "common law" was there used in contradistinction to the rules of equity; it undoubtedly includes the law derived from the English court of chancery. On the other hand, it was not the whole body of the English law which was adopted, but only so much thereof as is applicable (to the nature of our institutions), and is not inconsistent with the constitutions or statutes, past or future. There is certainly nothing in the constitution which conflicts with the doctrine of parol mortgages, but when we examine the statutes the question assumes a different aspect. We have a statute of frauds in the main following the outline of the famous statute of Charles II. By this "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same." (Compiled Statutes, ch. 32, sec. 3.) By section 4 of the same chapter section 3 shall not be construed "to prevent any trust from arising or being extinguished by implication or operation of law." By section 5 every contract for the sale of lands or any interest in lands shall be void unless the contract or some note or memorandum be in writing and signed by the party by whom the sale is made. By section 22 the term "estate

and interest in lands" shall be construed to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent. The language of these sections is so clear that it would be immediately conclusive against the theory of parol liens were it not for the fact that much of the language is taken from the English statute, which in spite of its plain provisions the English courts straightway set themselves to evade and fritter away by a process of misconstruction as systematic as it was ingenious. For years the mischief of that policy has been realized and the danger of further pursuing it has been by most courts carefully avoided. The spirit of the statute should certainly be preserved so far as possible. Its purpose and policy no doubt is to prevent the creation or transfer of estates in or liens upon lands, except by writing, definite and complete in its terms. To enforce a mortgage created by the mere deposit of title deeds is in the plainest violation of such purpose and policy. It directly offends the very letter of the law.

Again, in this state we have created by statute a system whereby conveyances, including mortgages, must be registered in a public office. The purpose of this system is to afford security to titles by a public record which parties dealing with land may, and for their own protection must, examine, and on which they may rely. Secret transfers and liens are sought thereby to be prevented. A mortgage by deposit of title deeds tends to defeat this purpose. The recording acts have another bearing on the question. In England title deeds followed the land. The evidence of title lay not only in the delivery of a deed, but in its continued possession by the grantee. When, therefore, the owner parted with his muniments of title he parted with the means of disposing of the land. When the deposit was by way of pledge, the pledgee, by his manual possession of the deeds, had the effective power to prevent an untoward disposition of the land, either such as would defraud him or such as would de-

fraud others ignorant of his rights. But under our system it is not usual to consult or even to inquire about the original conveyances. They have performed their chief office when they have been recorded. Thenceforth the records become the practical evidence of title. By a deposit of the deeds the pledgee does not obtain that effective control over the thing pledged which is essential to such a security when not evidenced by writing, whether that thing be real or personal.

For the reasons above stated this court has held that the vendor of land, who delivers to his vendee a deed absolute, does not retain a lien thereon for the unpaid purchase-money. (*Edminster v. Higgins*, 6 Neb. 265; *Ansley v. Pasahro*, 22 Neb. 662.) In *Folsom v. McCague*, 29 Neb. 124, Judge NORVAL, speaking of an assignment of a land contract where the place for the vendee's name was left blank, said: "To make a valid assignment of these contracts, it was as necessary to have an assignee as it was the signature of the assignor. Until some one's name was filled in these blanks as assignee the appellees appeared to be and were the real owners. * * * These assignments of the contracts in blank were in violation of the statute of frauds and void." While none of these cases is decisive of that before us, they all recognize the principles already stated. We would, in the absence of authority elsewhere, say without hesitation that the doctrine of equitable mortgages by the deposit of title deeds, although a part of the law of England, is not here applicable, is contrary to our statutes, and was therefore not adopted by the legislature of the territory. This conclusion is reinforced by an examination of the decisions in other states, where by custom or by statute the common law has been acquired. For some or all of the reasons suggested the doctrine has been repudiated in the following cases: *Probasco v. Johnson*, 2 Disn. [O.] 96; *Lehman v. Collins*, 69 Ala. 127; *Bowers v. Oyster*, 3 P. & W. [Pa.] 239; *Vanmeter v. McFaddin*, 8 B. Mon. [Ky.] 435; *Bicknell v. Bicknell*, 31 Vt. 498; *Meador v. Meador*, 3 Heisk. [Tenn.] 562; *Gothard v. Flynn*, 25 Miss. 58.

While the courts of many states have to some extent intimated an adherence to the English rule it has always been on a citation of the English cases, without any discussion on principle of the objections to the enforcement of that rule in this country. Moreover, these cases are by no means so formidable as their bare citation in digests and text-books would indicate. New York invariably leads the list of states in these compilations, and the first case cited is *Jackson v. Dunlap*, 1 Johns. Cas. [N. Y.] 114. There land had been sold; the deed had not been delivered, but was retained by the grantor as security for the purchase-money. Four judges held that there had been no delivery and that title had never passed. Kent alone thought that title had passed, but that an equitable mortgage had been created. He does not discuss the question and his opinion was a dissent, but the case is cited as upholding the English rule. *Jackson v. Parkhurst*, 4 Wend. [N. Y.] 369, merely holds that an equitable mortgage is not available as a defense in ejectment. The validity of such a mortgage for other purposes was not involved in the case. *Rockwell v. Hobby*, 2 Sandf. Ch. [N. Y.] 10, was a case where a son had paid his mother's mortgage and retained an unrecorded deed to her. It was there held that the retention of the deed made an equitable mortgage, but the case loses force from the further holding that independently of the deed the son was subrogated to the rights of the mortgagee whom he had paid. *Chase v. Peck*, 21 N. Y. 581, was a case of a deed absolute; the remarks about deposits of title deeds were *obiter*.

In New Jersey a very peculiar thing has occurred. *Griffin v. Griffin*, 3 C. E. Green [N. J. Eq.] 104, was a bill to compel the defendant to surrender to plaintiff deeds to plaintiff's ancestor of land in New York. It appeared that they had been deposited as security. The court, citing the New York cases we have mentioned, took them as indicating that such a deposit operated in New York as a mortgage, and therefore very properly refused to de-

cree their surrender, without any reference to the New Jersey law on the subject. But in *Gale v. Morris*, 29 N. J. Eq. 222, the court announced the English rule as in force in New Jersey and cited *Griffin v. Griffin*, and also *Brewer v. Marshall*, 4 C. E. Green [N. J. Eq.] 537, a case where the doctrine was not involved, but mentioned by way of remote illustration of a general equitable principle. Moreover, even *Gale v. Morris* did not require a decision of the question. That was a suit to reform a mortgage on a life estate so as to embrace the fee; the mistake as between the parties was admitted, and the issue was whether a subsequent mortgagee was charged with notice so that the reformation could cut him out as to the reversion.

Hackett v. Reynolds, 4 R. I. 512, enforces such a mortgage in a hard case, with the preliminary observation that the fraudulent design of the debtors was so transparent "that a court of equity would be disposed to find or to make a way to thwart them." From a peculiarly apologetic tone in the opinion it is evident that the court realized that it was making a way.

Hutzler v. Phillips, 26 S. Car. 136, often cited as sustaining the rule, holds distinctly that the case was not within it. There was a dissent to the intimation that the rule might be in force.

The following cases, frequently cited, will be found on investigation to involve no such question, and the remarks of the judges on the subject either to be *obiter* or made for the purpose of excluding the question from the case: *Mowry v. Wood*, 12 Wis. 460; *Jarvis v. Dutcher*, 16 Wis. 326; *Abbott v. Godfrey*, 1 Mich. 179; *Peckham v. Haddock*, 36 Ill. 38; *Roberts v. Richards*, 36 Ill. 339; *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 43; *Hall v. McDuff*, 24 Me. 311; *Wright v. Troutman*, 81 Ill. 374.

Williams v. Stratton, 10 S. & M. [Miss.] 418, says: "Such a mortgage is in direct opposition to the statute of frauds, in regard to which we have said that we will create no exceptions not found in the statute."

Mandeville v. Welch, 5 Wheat. [U. S.] 277, does not sustain the doctrine. Judge Story merely says in that case: "It may be admitted, that according to the course of the authorities in England, and as applicable to the state of land titles there" a deposit of title deeds creates a mortgage. Whatever inference might be drawn from that language as to the position of the supreme court of the United States is dispelled by the emphatic words of Justice Campbell in *Williams v. Hill*, 19 How. 246, "Nor can the real property conveyed in the deed be retained as security for advances or debts subsequently made, on the strength of a parol engagement."

The case of *First Nat. Bank v. Caldwell*, 4 Dill. [U. S. C. C.] 314, is entitled to more than passing consideration, not only from the eminent ability of the judge who decided it, but as being a case from this federal district and to which the law of Nebraska was applicable. There certain railroad coupons were held as a pledge. They were exchangeable for land, and by arrangement of the debtor and creditor they were exchanged, land contracts being issued in the name of the debtor but delivered to the creditor. The court held that the pledgee had a lien superior to that of a judgment creditor. Judge Dillon, however, declined to pass on the question whether a lien could be created by the mere deposit of title deeds. The fact that there they stood in lieu of coupons held in perfect pledge was the controlling fact in his mind. Giving, however, due weight to his apparent opinion in favor of the English rule, we do not feel that we can adopt it in the face of what seems to us the overwhelming reason and weight of authority against it.

The plaintiff argues that so far as the reasons urged for denying the lien are founded on the statute of frauds they are of no force because our statute excepts from its operation estates arising by act or operation of law. This phrase occurs twice in the statute—once in section 3, already quoted, and again in section 4, with reference to trusts. (Compiled Statutes, ch. 32.) The phrase is

twice found in the statute of 29 Car. II, ch. 3, and in the same connection; in section 3 in very similar words to our section 3; in section 8 with regard to trusts. Section 8 of the English statute excepts trusts arising by implication or construction of law and extinguishments or transfers by act or operation of law, while our section 4 excepts trusts arising or extinguished by implication or operation of law. It is manifest, from the closeness of context, that the phrase was used in our statute in the English sense. We have not found any exact definition thereof. Chancellor Kent, in *Simonds v. Catlin*, C. & C. [N. Y.] 346, said: "These words are strictly technical, and refer to certain definite estates, such as those by curtesy and dower and those created by *remittitur*." In Bouvier's Law Dictionary it is said that the term indicates the manner in which a party acquires rights without any act of his own. There can be no doubt that parliament intended no more than these statements imply, at least in the third section of the statute. In the eighth section trusts were involved, and the object of the exception seems to have been to avoid the destruction of the ingenious method of conveyancing derived from the doctrine of trusts and the construction which had been placed on the statute of uses, and to preserve resulting and constructive trusts. Whatever may have been the precise idea in the legislative mind, it is clear that the exception was not meant to give effect to contracts which the parties had failed to express in the form required by the statute. Such an interpretation would render the exception wholly destructive of the statute. Yet it requires that interpretation to bring this case within the exception. The lien here arises, if at all, solely from the contract of the parties. It is not a result flowing by law independent of their contract, or even derivative from any valid contract which they made.

Finally, it is insisted that a court of equity will enforce the lien as the result of an imperfect attempt to

create a legal mortgage. Certain California cases are cited in support of the argument. The power of equity is frequently asserted to reform instruments and to compel their execution under certain circumstances. But neither the petition nor the evidence presents a case for the reformation of an instrument or the specific performance of a contract. There is not made out, as suggested, a case for the specific performance of an oral contract on the ground of part performance. The plaintiff has not altered its position except by paying the consideration, and that alone is not such a part performance as will take a case out of the statute of frauds. Moreover there was no contract to specifically enforce. Miller did not promise to execute a mortgage. He indorsed the contract and delivered it, which was all that his contract contemplated. Nothing more could be required, at least where the rights of third persons have intervened. In no way can the bank be given any relief except by giving effect to a transaction which the law has denounced as void.

AFFIRMED.

A. HALLAM ET AL., APPELLANTS, V. OTTO TELLEREN ET AL., APPELLEES.

FILED MAY 19, 1898. No. 8112.

1. **Note:** ATTORNEYS' FEES AS COSTS: CONFLICT OF LAWS. A note made and payable in Iowa provided that if suit should be commenced thereon a reasonable sum should be allowed as attorneys' fees to be taxed with the costs. *Held*, That this was a provision relating to the remedy and not a substantive part of the contract, and although lawful in Iowa, being contrary to the law of Nebraska, will not be enforced here.

2. ———: INTEREST. A note providing for a legal rate of interest until maturity, and for a higher, but still legal, rate after maturity, is valid and will be enforced according to its terms.

3. ———: ———: PENALTY. But a provision for a legal rate until maturity, and if the note should not then be paid, a higher rate

from the date of the note, is, so far as it provides for a higher rate before maturity, in the nature of a penalty and will not be enforced.

4. ———: ———. It is competent for the parties to contract for payment of interest at stated periods, and that installments of interest not paid at the time they fall due shall themselves bear interest, provided, however, that the whole interest so reserved shall not exceed ten per cent per annum, simple interest, on the debt.

5. **Vendor and Vendee:** ASSUMPTION OF MORTGAGE: ESTOPPEL. One who purchases land incumbered by a mortgage, receiving a deed excepting the mortgage from the covenant against incumbrances, and in paying the consideration deducts the lawful amount of the mortgage, is not thereby estopped from pleading the illegality of part of the mortgage contract.

APPEAL from the district court of Cedar county. Heard below before NORRIS, J. *Reversed.*

W. E. Gantt, for appellants.

J. C. Robinson, contra.

IRVINE, C.

This was an action to foreclose a mortgage given by Telleren to the plaintiffs to secure four notes. Two had been paid. The following is a copy of one of the remaining notes, default in the payment of which was alleged. The other was of like tenor:

"$280.00. IDA GROVE, IOWA, October 20, 1885.

"On or before October 20, 1890, after date, for value received I promise to pay A. Hallam and P. Lloyd, or order, two hundred and eighty dollars, with interest thereon at the rate of eight per cent per annum if paid when due, ten per cent from date if not, payable annually at the office of A. Hallam, Ida Grove, Iowa. Should any of the interest not be paid when due it shall bear interest at the rate of ten per cent per annum, and a failure to pay any of said interest within thirty days after due shall cause the whole note to become due and collectible at once. It is also stipulated that a justice of the peace shall have jurisdiction herein to the amount of $300, and

should suit be commenced to enforce the collection of this note a reasonable sum shall be allowed as attorneys' fees and taxed with the costs on the cause.

"OTTO TELLEREN."

Boughn had bought the land after the mortgage was executed, his deed excepting the mortgage from the covenant against incumbrances. It is shown by the evidence that in fixing the purchase price there was deducted from the agreed price the amount of the notes with interest at eight per cent. A tender was pleaded by Boughn, and the evidence showed that Boughn had offered to draw his check to Hallam for the principal of the notes with interest at eight per cent, but had tendered no money, nor had he actually drawn the check, Hallam stating that he would not receive it. Boughn says that this occurred about the time the notes matured, but does not pretend to fix the time accurately. Hallam testifies that it occurred long after maturity. Defendants certainly failed to make good the plea of tender at maturity. The only positive proof is that it was later. The district court held that only eight per cent simple interest was recoverable, without an attorney's fee, and found that there had been a sufficient tender of the amount due, awarding a foreclosure for the sum so determined and awarding costs against the plaintiffs. Plaintiffs appeal.

The petition alleges and the proof shows that the notes were made and payable in Iowa, and that by the law of that state such a provision as that in the notes for the taxation of attorneys' fees is valid and enforceable. But such a provision is a stipulation for costs and refers to the remedy. It is not a substantive part of the contract itself and cannot be enforced in another jurisdiction. (*Security Co. v. Eyer*, 36 Neb. 507.) The decree of the district court was right in that respect.

The question of interest is different. The law of Iowa on that point is neither proved nor pleaded and must therefore be presumed to be the same as our own. (*Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374.)

It is the settled law of this state that where a note provides for a lawful rate of interest until maturity, and for a higher but still lawful rate after maturity, the contract is valid and will be enforced according to its terms. (*Havemeyer v. Paul*, 45 Neb. 373; *Omaha Loan & Trust Co. v. Hanson*, 46 Neb. 870; *Home Fire Ins. Co. v. Fitch*, 52 Neb. 88; *Crapo v. Hefner*, 53 Neb. 251.) But this contract is not of that character. It is to the effect that the notes shall bear eight per cent interest provided they are paid when due, but if not then paid they shall bear ten per cent interest from their date. In *Upton v. O'Donahue*, 32 Neb. 565, such a provision was denounced as a penalty and the court refused to enforce it. We think that decision was correct as to refusing the higher rate from the date of the note until its maturity. We are aware that some authority exists in favor of the legality of such a contract, but those cases seem contrary to principle. If such provision is not a penalty it must be a stipulation of damages. Compensation for the use of the money until maturity is contracted for at the lesser rate. Anything additional must be as damages for not paying when due. Damages for the withholding of money are always measured by interest, from the time the money should have been paid, not from a past date. The law limits the right of persons to contract for such damages to ten per cent; that is, ten per cent during the default. To sustain a stipulation of damages allowing ten per cent from a past date would be to permit an evasion of the usury laws. The time of the default in its nature determines the *quantum* of damages. The time the debt ran before it became due bears no relation whatever to the actual damage because of failure to pay when due, and interest before default cannot compensate for delay in paying after maturity. These considerations stamp that part of the contract as a penalty, and it is quite evident that it was inserted as such. Such, for a long time, seems to have been the view of the English courts. (*Holles v. Wyse*, 2 Vern. 289; *Strode v. Parker*, 2 Vern. 316;

Orr v. Churchill, 1 H. Bl. 227; *Seton v. Slade*, 7 Ves. Jr. 273.)

As it was not shown that any tender was made at maturity, and as the plaintiffs would be entitled to ten per cent interest after maturity, and Boughn tendered only eight per cent, if anything, it is unnecessary to decide whether the predeclared refusal of Hallam to accept that sum excused the failure to make an actual tender. The tender was in amount insufficient. It was insufficient for another reason. Interest was payable annually and interest installments were overdue. The note provided that interest not paid when due should bear interest. This provision is valid when the whole amount so reserved does not exceed ten per cent simple interest. (*Mathews v. Toogood*, 25 Neb. 99; *Murtagh v. Thompson*, 28 Neb. 358; *Richardson v. Campbell*, 34 Neb. 181; *Lewis Investment Co. v. Boyd*, 48 Neb. 604.)

It is argued that Boughn cannot be heard to assert that any part of the contract was illegal, because he assumed the payment of the debt and is estopped to deny its validity. He merely took the land charged with the mortgage and in computing the amount to be paid withheld from the vendor the amount of the incumbrance, calculating interest at eight per cent. He did not withhold anything to which the vendor would be entitled, because of a miscomputation. His acts did not change the character of the mortgage nor increase its amount. There is no estoppel in the case.

The decree must be reversed and the cause remanded with directions to enter a decree for an amount to be determined by allowing interest on the principal debt at the rate of eight per cent until maturity, ten per cent thereafter; also by allowing interest at the rate of ten per cent on unpaid interest installments from the time they became due; no further compounding and no attorneys' fees; but costs should be taxed against defendants.

REVERSED AND REMANDED.

HOME FIRE INSURANCE COMPANY OF OMAHA V. W. BERNSTEIN.

FILED JUNE 9, 1898. No. 8174.

1. **Insurance:** KNOWLEDGE OF AGENT. Knowledge on the part of the agent of an insurance company, authorized to countersign and issue its policies, of facts which render the contract voidable at the insurer's option is knowledge of the company, and of such facts is that additional insurance has been obtained contrary to an expressed condition of the contract. *Gans v. St. Paul & Marine Ins. Co.*, 43 Wis. 108, and *Eagle Fire Co. v. Globe Loan & Trust Co.*, 44 Neb. 380, followed.

2. ———: ENTIRE AND DIVISIBLE POLICIES. A policy of insurance in which the sum thereof is stated in the aggregate, but further expressed in a specific amount on each several designated portions of the insured property, is not an entire and indivisible contract, but as to each division of the property it is entire, though there may be included in a division several articles.

3. ———: ———. A condition or provision of such a policy will not be construed as applicable to the property considered as a whole, but as operative and of force relative to each separated portion or division thereof.

4. ———: ———: PROVISION AGAINST INCUMBRANCES. If of several articles included in one of the divisions of property in such a policy, and as to which the amount for which the several articles are insured is stated in gross, and not in any manner specifically, any are incumbered by mortgage, it is violative of a condition of the contract wherein it is provided "This entire policy, unless otherwise provided by an agreement indorsed hereon or added hereto, shall be void, * * * if the property now is, or shall become during the term of this policy, incumbered by mortgage or otherwise;" and such violation is effective ground of defense for the company in an action on the policy for a loss by fire of the said articles or some of them.

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

The opinion contains a statement of the case.

B. G. Burbank, for plaintiff in error:

The procuring of additional insurance subsequent to the issuance of the policy rendered it void. (*Union Mutual*

Life Ins. Co. v. Mowry, 96 U. S. 544; *Walton v. Agricultural Ins. Co.*, 116 N. Y. 317; *Kimball v. Ætna Ins. Co.*, 9 Allen [Mass.] 540; *Eagle Fire Co. v. Globe Loan & Trust Co.*, 44 Neb. 381; *German Ins. Co. v. Heiduk*, 30 Neb. 288; *Burlington Ins. Co. v. Campbell*, 42 Neb. 208; *Cleaver v. Traders Ins. Co.*, 32 N. W. Rep. [Mich.] 660, 39 N. W. Rep. [Mich.] 571; *American Ins. Co. v. Neiberger*, 74 Mo. 173; *Swan v. Watertown Fire Ins. Co.*, 96 Pa. St. 43; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519; *Richardson v. Maine Ins. Co.*, 46 Me. 394; *Johnson v. Dakota Fire & Marine Ins. Co.*, 45 N. W. Rep. [N. Dak.] 799; *Hankins v. Rockford Ins. Co.*, 35 N. W. Rep. [Wis.] 34; *Brown v. Massachusetts Mutual Life Ins. Co.*, 59 N. H. 307; *Gould v. Dwelling-House Ins. Co.*, 51 N. W. Rep. [Mich.] 455; *Herbst v. Lowe*, 65 Wis. 321; *Quinlan v. Providence-Washington Ins. Co.*, 31 N. E. Rep. [N. Y.] 31.)

The execution of the chattel mortgages rendered the entire policy void. (*Agricultural Ins. Co. v. Morrow*, 43 Neb. 788; *Lee v. Agricultural Ins. Co.*, 44 N. W. Rep. [Ia.] 683; *Koontz v. Hannibal Savings & Ins. Co.*, 42 Mo. 126; *Holloway v. Dwelling-House Ins. Co.*, 21 Ins. L. J. [Mo.] 379.)

Jacob Fawcett, also for plaintiff in error.

N. V. Harlan, contra:

Knowledge on the part of an agent of an insurance company, of facts that render the contract voidable at the insurer's option, is knowledge of the company. (*Eagle Fire Ins. Co. v. Globe Loan & Trust Co.*, 44 Neb. 381; *Gans v. St. Paul Fire & Marine Ins. Co.*, 43 Wis. 108; *Home Fire Ins. Co. v. Hammang*, 44 Neb. 566.)

An agent of an insurance company may verbally waive the conditions of a policy of insurance, though the policy provides that conditions can only be waived by writing indorsed thereon. (*Eagle Fire Ins. Co. v. Globe Loan & Trust Co.*, 44 Neb. 381; *Hughes v. Insurance Co. of North America*, 40 Neb. 626; *Burlington Ins. Co. v. Rivers*, 28

S. W. Rep. [Tex.] 453; *Phenix Ins. Co. of Brooklyn v. Covey*, 41 Neb. 724.)

The incumbering of a part of a number of chattels, where the property can be distinguished and separated, does not render the policy void as to the unincumbered portion. (*State Ins. Co. v. Schreck*, 27 Neb. 527; *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452; *Knowles v. American Ins. Co.*, 21 N. Y. Sup. 50; *Phœnix Ins. Co. v. Lorenz*, 29 N. E. Rep. [Ind.] 604.)

HARRISON, C. J.

Of date May 1, 1893, there was countersigned by the agents of the plaintiff at York and issued to defendant in error a policy of insurance against loss by fire which in respect to consideration, time of existence of the contract, the location and description of the property insured was in terms as follows:

"In consideration of nine dollars premium, and the stipulations herein named, does insure W. Bernstein, for the term of one year from the first day of May, 1893, at noon, to the first day of May, 1894, at noon, against all direct loss or damage by fire except as hereinafter provided.

"To an amount not exceeding six hundred dollars, to the following described property while located and contained as described herein and not elsewhere, to-wit: $25, on his one-story frame shingle roof barn; $25, on his carriage and harness contained therein; $550, on his stock of harness, saddles, collars, fly-nets, whips, leather in stock, harness hardware, consisting of buckles and iron furnishings for harness, and all merchandise usually kept for sale in a general harness store. All while contained in a one-story frame, shingle roof building, situated on lot one (1), block 44, New York, now city of York, Nebraska."

In an action instituted for defendant in error in the county court of York county it was alleged that on March 1, 1894, the insured property, except the barn and car-

riage and harness, was destroyed by fire, and of the payment to which the company by its contract was obligated there had been a refusal and failure on its part. In the answer filed for the company it was pleaded, among other defenses, that of the conditions and restrictions of the policy it was provided: "This entire policy, unless otherwise provided by an agreement indorsed hereon or added hereto, shall be void if the assured now has, or shall hereafter have, make, or procure any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy; or if the property now is, or shall become during the term of this policy, incumbered by mortgage or otherwise;" and that the defendant in error had violated each of the foregoing by the procurement of additional insurance on the property, and had incumbered the same by the execution and delivery to designated parties of chattel mortgages thereon. In the reply it was asserted that of the additional insurance the agents of the company had notice prior to the time of the destruction of the property. In regard to the chattel mortgages it was admitted that they were executed and delivered, but it was pleaded that they were of only a part of the property, of which there was sufficient remaining unincumbered to amount in value to more than the sum expressed in the contract of insurance. From a judgment in the county court there was an appeal to the district court, wherein the pleadings were the same as had been filed in the county court. A jury was waived and a trial resulted in a judgment against the company.

In error proceedings for the company it is urged that the policy was avoided by the additional insurance on the property which was obtained by defendant in error. This is met for the defendant in error by the fact which appeared in evidence that the agents of the company at York had notice of the additional insurance. Of this branch of the argument it must be said that the condition of the policy relative to other insurance, the manner

of issuance of policies which was by the local agents after countersigned by them, and the knowledge which the agents received of the other insurance, all were of such nature as in combination to bring the matter here involved directly within the rule announced in the opinion in *Eagle Fire Co. v. Globe Loan & Trust Co.*, 44 Neb. 380, wherein it was stated of a like contention: "Knowledge on the part of the agent of an insurance company authorized to issue its policies, of facts which render the contract voidable at the insurer's option, is knowledge of the company." And also to render inapplicable the doctrine of *German Ins. Co. v. Heiduk*, 30 Neb. 288, cited on this subject for the company.

It is also contended for the company that by reason of the incumbrance or chattel mortgages placed on the personal property by defendant in error the company was released from liability. We have copied herein the portion of the policy descriptive of the property insured, and it will be noticed by its perusal that although the amount to which the contract extended was stated in the aggregate $600, there were further statements by which the sum was made applicable separately to barn $25, $25 on carriage and harness, and $550 "on his stock of harness, saddles, collars, fly-nets, whips, leather in stock, harness hardware, consisting of buckles and iron furnishings for harness, and all merchandise usually kept for sale in a general harness store." This constituted the contract severable in relation to the three stated kinds of property, and not as a whole entire and indivisible, and a mortgage on the barn would not have precluded a recovery for a loss by fire of either of the other kinds of property described; or a mortgage on any one of the designated divisions would have afforded no defense in an action to recover for a loss by fire of either of the others. (*State Ins. Co. v. Schreck*, 27 Neb. 527; *German Ins. Co. v. Fairbank*, 32 Neb. 750; *Phenix Ins. Co. v. Grimes*, 33 Neb. 340.) But it must be added that relative to each specifically designated property or list of stated arti-

cles to which a certain sum was set apart to be paid, for its loss, the contract was entire and indivisible, and the policy must be subjected to a construction which makes it applicable in its several conditions to its severability in respect to property. To do so makes the statement in regard to incumbrance of force as to each of the divisions of articles insured. But it is urged in this connection that the words of the policy are "if the property now is, or shall become * * * incumbered by mortgage or otherwise," that this means all the property, and an incumbrance of any part would or did not affect the insurance; that if it was desired to make the prohibition against an incumbrance apply to other than all the property it should be framed to read as do a great many,—the property or any part thereof. This has support in *Phœnix Ins. Co. v. Lorenz*, 29 N. E. Rep. [Ind.] 604. With this we cannot and do not agree. It is probably true that insurance contracts are strictly construed against the insurer, but this does not require that a meaning should be given them not in consonance with good reason and fairness in the due enforcement of the contract between the parties thereto. As we have before stated, after it is determined that the contract is divisible in relation to the property insured, the other portions of the policy each must be held applicable to any separable part. The reason for the restriction in the policy in respect to incumbrance is that the risk which the company has assumed may not be increased. In theory, at least, anything which decreases the interest of the insured in the property correspondingly increases the risk. A mortgage or other incumbrance does this, and an incumbrance by mortgage of any or all the articles designated in gross in any of the divisions of the property included in the policy here in question was directly within the spirit and intent, and fairly and reasonably within the unstrained, clear import of the words of the contract, violative thereof, and furnished forceful mat-

ter of defense herein for the company. It follows that the judgment was erroneous and must be reversed.

REVERSED AND REMANDED.

DAVID ADLER & SONS CLOTHING COMPANY, APPELLEE, AND FIRST NATIONAL BANK OF OMAHA ET AL., APPELLANTS, V. MARIA HELLMAN, APPELLANT, ET AL.

FILED JUNE 9, 1898. No. 7762.

1. **Witnesses:** TRANSACTIONS WITH PERSONS DECEASED: FRAUDULENT CONVEYANCES. In an action, by creditors of an estate in which there is a deficiency of assets to meet debts, to set aside alleged fraudulent conveyances of property, during lifetime by the deceased, to the party executrix of the estate, and to subject such property to the payment of debts of the deceased, the executrix is incompetent, under the provisions of section 329 of the Code of Civil Procedure, to testify of the transaction or agreement from which the conveyance originated.

2. ———: ———: ATTORNEYS: CONFIDENTIAL COMMUNICATIONS. The testimony of an attorney, who was present as adviser of one or both parties, of the conversation between them or disclosures then made may not be suppressed on the ground that the disclosures were confidential communications, or privileged, in an action between the parties or their personal representatives.

3. **Dower:** EXTINGUISHMENT. The dower right of a wife in the real estate of her husband while inchoate is not a possessory right, but is a present, subsisting right or interest of a legal character, and can only be extinguished by the voluntary release or act of the wife or operation of law. (*Butler v. Fitzgerald*, 43 Neb. 192; *Wylie v. Charlton*, 43 Neb. 840.)

4. ———: RELEASE: MORTGAGE. The wife may make her release of her dower interest, or by signature to a mortgage that it be subjected to the lien and operation thereof, matter of forceful consideration for the conveyance to her of other property.

5. **Fraudulent Conveyances:** INTENT. In an attack on a conveyance by creditors as fraudulent, in this state, the question of the intent with which the conveyance was made is one of fact and not of law. (Compiled Statutes, ch. 32, sec. 20.)

6. ———: HUSBAND AND WIFE: BURDEN OF PROOF. If a conveyance of property by a husband to his wife is sought to be avoided by

creditors for its fraudulent character, the burden of proof is on the wife to establish the *bona fides* of the transfer.

7. **Insolvency:** DEFINITION. As a general rule, insolvency means that the party whose business affairs are in question is unable to pay his debts as they become due in the ordinary course of his daily transactions. (*Buchanan v. Smith*, 16 Wall. [U. S.] 308.)

8. ———: ———. Insolvency may mean the inadequacy of a man's funds or property to pay his debts.

9. **Husband and Wife:** GIFTS. A man may make a gift to his wife or relatives, if he retain sufficient property subject to execution at the then fair valuation to satisfy all his debts; and that he has made such gift under such circumstances does not of itself as evidence stamp or establish the transfer fraudulent as to creditors.

10. ———: GOOD FAITH OF TRANSFER. *Held*, That the evidence in the present case sustained a finding of the *bona fides* of certain transfers of property from a husband to his wife.

11. **Life-Insurance Premiums:** RECOVERY BY CREDITORS. As a general rule, premiums paid for life insurance in favor of a wife and children, or either, cannot be recovered by creditors as made in fraud of their rights, though the debts were existent at the times of such payment.

12. **Husband and Wife:** TITLE TO REALTY: ESTOPPEL. If a wife allow her husband to retain the title of property to which she is entitled in her own right, and use it to obtain credit, as against the enforcement of a debt which a creditor was influenced by the husband's apparent, and in the transaction asserted, ownership of the property to allow him to contract, she may be estopped to claim the property.

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

The opinion contains a statement of the case.

Warren Switzler, for the First National Bank of Omaha, appellant, and others:

There was no legal evidence offered to support the alleged contract between Mr. and Mrs. Hellman. Mrs. Hellman and Mr. Connell were both incompetent witnesses. As against the representatives of a deceased person Mrs. Hellman cannot disclose the communications made to her by her husband. An attorney should not be per-

mitted to disclose confidential communications properly intrusted to him in his professional capacity. (*Wertz v. Merritt*, 39 N. W. Rep. [Ia.] 103; *Johnston v. Johnston*, 27 N. E. Rep. [Ill.] 930; *Muir v. Miller*, 47 N. W. Rep. [Ia.] 1011; *Bradford v. Vinton*, 26 N. W. Rep. [Mich.] 401; *Brock v. Brock*, 9 Atl. Rep. [Pa.] 486; *Skinner v. Skinner*, 38 Neb. 756; *Wylie v. Charlton*, 43 Neb. 840; *Westover v. Ætna Life Ins. Co.*, 99 N. Y. 56; *Hull v. Lyon*, 27 Mo. 570; *Whiting v. Barney*, 30 N. Y. 330; *Root v. Wright*, 84 N. Y. 72; *Yates v. Olmsted*, 56 N. Y. 632; *Robson v. Kemp*, 4 Esp. [Eng.] 233; *Britton v. Lorenz*, 45 N. Y. 57; *Edington v. Ætna Life Ins. Co.*, 77 N. Y. 564; *Pierson v. People*, 79 N. Y. 424; *Glenn v. Liggett*, 47 Fed. Rep. 472; *Liggett v. Glenn*, 2 C. C. A. [U. S.] 286; *State v. Dawson*, 90 Mo. 149.)

The alleged contract between Mr. and Mrs. Hellman, if proved, cannot be enforced. It was obtained under a misapprehension of the law and facts which amounted to false pretenses. The dower interest was not a sufficient consideration. If the contract was proved by competent evidence and sustained consideration, still Mrs. Hellman is estopped to urge it. (*Trumble v. Trumble*, 37 Neb. 340; *Smith v. Sieberling*, 35 Fed. Rep. 677; *Roy v. McPherson*, 11 Neb. 197; *Steele v. Coon*, 27 Neb. 586; *Sexton v. Wheaton*, 8 Wheat. [U. S.] 229; *Worseley v. De Mattos*, 1 Burr. [Eng.] 467; *Leukener v. Freeman*, Freem. Ch. [Eng.] 236; *Goldsmith v. Fuller*, 30 Neb. 569; *Early v. Wilson*, 31 Neb. 459; *Swartz v. McClelland*, 31 Neb. 646; *Hews v. Kenney*, 43 Neb. 815.)

The assignment of the insurance was a fraud on creditors. (*Ionia County Savings Bank v. McLean*, 48 N. W. Rep. [Mich.] 159; *Elliott Appeals*, 50 Pa. St. 75; *Freeman v. Pope*, 9 L. R. Eq. 206; *Anderson v. Hay*, 85 Pa. St. 202; *Stokes v. Coffey*, 8 Bush [Ky.] 533; *Payne v. Pusey*, 8 Bush [Ky.] 567; *Hathaway v. Sherman*, 61 Me. 475; *Anthracite Ins. Co. v. Sears*, 109 Mass. 383; *Barry v. Equitable Life Assurance Co.*, 59 N. Y. 593; *Pence v. Makepeace*, 65 Ind. 360; *Stigler v. Stigler*, 77 Va. 163; *Talcott v. Field*, 34 Neb. 611; *Fearn v. Ward*, 80 Ala. 555.)

A creditor of the husband may recover premiums paid by an insolvent on insurance. (*Central Bank of Washington v. Hume*, 128 U. S. 195; *Merchants & Miners Transportation Co. v. Borland*, 31 Atl. Rep. [N. J.] 278; *Central Nat. Bank v. Hume*, 9 Sup. Ct. Rep. 41.)

The creditors are the proper parties to bring suit, and in so doing they become the representatives of the deceased person. (*Harrey v. McDonell*, 21 N. E. Rep. [N. Y.] 695; *Grier v. Cagle*, 87 N. Car. 377; *Martin v. Smith*, 25 W. Va. 579; *New York Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 597; *Reddick v. Keesling*, 129 Ind. 128; *Davis v. Davis*, 26 Cal. 37; *Hollister v. Young*, 41 Vt. 160; *Wamsley v. Crook*, 3 Neb. 344; *Ransom v. Schmela*, 13 Neb. 78; *Clark v. Clough*, 23 Atl. Rep. [N. H.] 526; *New York Life Ins. Co. v. Flack*, 3 Md. 352; *Housel v. Cremer*, 13 Neb. 300.)

Decisions on insolvency applicable to the case: *Hinde v. Longworth*, 11 Wheat. [U. S.] 199; *Miller v. Thompson*, 3 Port. [Ala.] 196; *Schaible v. Ardner*, 56 N. W. Rep. [Mich.] 1105; *Winchester v. Charter*, 97 Mass. 140; *Potter v. McDowell*, 31 Mo. 62; *Farrow v. Hayes*, 51 Md. 498; *Allen v. McTavish*, 8 Ont. App. [Can.] 440; *Phelps v. Curts*, 80 Ill. 112; *Gardiner Bank v. Wheaton*, 8 Me. 381; *Roberts v. Radcliff*, 35 Kan. 502; *Babcock v. Eckler*, 24 N. Y. 632; *Morrill v. Kilner*, 113 Ill. 318; *Bohannon v. Combs*, 79 Mo. 305; *Reeves v. Sherwood*, 45 Ark. 520; *Bullett v. Worthington*, 3 Md. Ch. 99; *Williams v. Banks*, 11 Md. 198; *Kipp v. Hanna*, 2 Bland Ch. [Md.] 33.

Where a judgment debtor has fraudulently conveyed his property to hinder and delay creditors, the party who first invokes the aid of the court to set aside such conveyance acquires a prior lien for his judgment. (*Pullis v. Robison*, 73 Mo. 202; *George v. Williamson*, 26 Mo. 190; *Bank of U. S. v. Burke*, 4 Blackf. [Ind.] 141; *Hills v. Sherwood*, 48 Cal. 393; *Henriques v. Hone*, 2 Edw. Ch. [N. Y.] 123; *Richardson v. Ralphsnyder*, 20 S. E. Rep. [W. Va.] 854; *Citizens Bank v. Farwell*, 11 C. C. A. [U. S.] 108; *Miner v. Lane*, 87 Wis. 348; *Brown v. Carroll*, 41 S. Car. 50.)

Connell & Ives, for Maria Hellman, appellant:

Assuming the evidence of the agreement to convey is inadmissible, the transfer of the home as well as that of the insurance policy, and the payment of the premiums should be sustained as voluntary conveyances on the ground of Mr. Hellman's solvency when they were made. (*Wolf v. McGugin*, 16 S. E. Rep. [W. Va.] 798; *Reade v. Livingston*, 3 Johns. Ch. [N. Y.] 481; *Lockhard v. Beckley*, 10 W. Va. 87; *Atkins v. Atkins*, 18 Neb. 477; *Steele v. Coon*, 27 Neb. 597; *Seward v. Jackson*, 8 Cow. [N. Y.] 406; *Pratt v. Curtis*, 2 Low. [U. S.] 90; *Kent v. Riley*, 14 L. R. Eq. Cas. [Eng.] 190; *Aultman v. Obermeyer*, 6 Neb. 260; *Stevens v. Carson*, 30 Neb. 545; *Johnson v. Johnson*, 36 Neb. 700; *Ware v. Purdy*, 60 N. W. Rep. [Ia.] 526; *Brackett v. Waite*, 4 Vt. 389; *Rose v. Colter*, 76 Ind. 590; *Van Wyck v. Seward*, 6 Paige Ch. [N. Y.] 67; *Updegraff v. Theaker*, 57 Mo. App. 50; *Emerson v. Opp*, 38 N. E. Rep. [Ind.] 330; *Holden v. Burnham*, 63 N. Y. 74; *Salmon v. Bennett*, 1 Conn. 525; *Spence v. Dunlap*, 6 Lea [Tenn.] 457; *Stevens v. Robinson*, 72 Me. 381; *Hinde v. Longworth*, 11 Wheat. [U. S.] 199; *Pike v. Miles*, 23 Wis. 164; *Windhaus v. Bootz*, 25 Pac. Rep. [Cal.] 404; *Morgan v. Hecker*, 16 Pac. Rep. [Cal.] 317; *Herring v. Richards*, 3 Fed. Rep. 443; *Providence Savings Bank v. Huntington*, 10 Fed. Rep. 871; *Bank of U. S. v. Housman*, 6 Paige Ch. [N. Y.] 526; *Jackson v. Post*, 15 Wend. [N. Y.] 588; *Dunlap v. Hawkins*, 59 N. Y. 347; *Carr v. Breese*, 81 N. Y. 584.)

Assuming that the evidence of the agreement is admissible, then Mrs. Hellman is a *bona fide* purchaser for a valuable consideration, and is not estopped to assert her title. (*Haas v. Sternbach*, 41 N. E. Rep. [Ill.] 51; *Singree v. Welch*, 32 O. St. 320; *Weaver v. Gregg*, 6 O. St. 550; *Quarles v. Lacy*, 4 Munf. [Va.] 251; *Buzzard v. Briggs*, 7 Pick. [Mass.] 533; *Nims v. Bigelow*, 45 N. H. 343; *Harvey v. Alexander*, 1 Rand. [Va.] 219; *Taylor v. Moore*, 2 Rand. [Va.] 573; *Garlick v. Strong*, 3 Paige Ch. [N. Y.] 440; *Marston v. Dresen*, 55 N. W. Rep. [Wis.] 896; *Hopkins v. Joyce*, 78 Wis. 443.)

The evidence showing the agreement between Mrs. Hellman and her husband is admissible. (*Wamsley v. Crook*, 3 Neb. 344; *Mageman v. Bell*, 13 Neb. 249; *Mutual Life Ins. Co. v. Armstrong*, 6 Sup. Ct. Rep. 877; *Skinner v. Skinner*, 38 Neb. 760; *McNulty's Appeal*, 19 Atl. Rep. [Pa.] 936; *Hurlburt v. Hurlburt*, 28 N. E. Rep. [N. Y.] 651; *Lynn v. Lyerle*, 113 Ill. 129; *Griffin v. Griffin*, 17 N. E. Rep. [Ill.] 784; *Cady v. Walker*, 28 N. W. Rep. [Mich.] 805; *Livingston v. Wagner*, 42 Pac. Rep. [Nev.] 290; *Wyland v. Griffith*, 64 N. W. Rep. [Ia.] 673; *Colt v. McConnell*, 19 N. E. Rep. [Ind.] 106; *Carey v. Carey*, 12 S. E. Rep. [N. Car.] 1038; *In re Bauer*, 21 Pac. Rep. [Cal.] 759; *Appeal of Goodwin Gas-Stove & Meter Co.*, 12 Atl. Rep. [Pa.] 736.)

Creditors cannot recover premiums paid by an insolvent upon insurance for a reasonable amount where the policies are written payable to the wife. (*Central Nat. Bank v. Hume*, 9 Sup. Ct. Rep. 41.

Simeon Bloom, also for appellants.

Montgomery & Hall, for David Adler & Sons Clothing Company, appellee:

There is no competent evidence establishing or tending to establish the alleged contract. (*Buckingham v. Roar*, 45 Neb. 248; *Scroggin v. Johnston*, 45 Neb. 722; *Bradford v. Vinton*, 26 N. W. Rep. [Mich.] 407; *Brock v. Brock*, 9 Atl. Rep. [Pa.] 486; *Wamsley v. Crook*, 3 Neb. 351; *Ransom v. Schmela*, 13 Neb. 74; *Housel v. Cremer*, 13 Neb. 298; *Wylie v. Charlton*, 43 Neb. 840; *Grier v. Cagle*, 87 N. Car. 377; *Johnston v. Johnston*, 27 N. E. Rep. [Ill.] 930; *New York Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 597; *Davis v. Davis*, 26 Cal. 23-38; *Martin v. Smith*, 25 W. Va. 587; *Clark v. Clough*, 23 Atl. Rep. [N. H.] 526; *Basye v. State*, 45 Neb. 281; *Nelson v. Becker*, 32 Neb. 99; *Root v. Wright*, 84 N. Y. 72; *Westover v. Ætna Life Ins. Co.*, 99 N. Y. 56; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 327; *Lynn v. Lyerle*, 113 Ill. 134.)

The alleged contract of July, 1891, as against plaintiff,

followed by the transfer in March, 1892, considering Mrs. Hellman's false idea of the extent of her interest in the mortgaged real estate, and, having in view the inadequacy of the consideration as now claimed, but neither alleged nor testified to, and all the facts and circumstances, constitutes a transaction fraudulent in fact. (*Kircham v. Kratky*, 51 Neb. 191; *Bartlett v. Cheesbrough*, 23 Neb. 767; *Carson v. Stevens*, 40 Neb. 112; *Brownell v. Stoddard*, 42 Neb. 177; *Trumble v. Trumble*, 37 Neb. 340.)

The alleged contract, if proved, and if otherwise valid, did not justify or make legal the conveyance of the real estate in controversy in March, 1892, to Mrs. Hellman, because, under the circumstances of this case, such contract, as against the plaintiff, is without force. (*Roy v. McPherson*, 11 Neb. 197; *Thompson v. Loenig*, 13 Neb. 386; *Hoagland v. Wilson*, 15 Neb. 320; *Steele v. Coon*, 27 Neb. 586; *Stevens v. Carson*, 30 Neb. 544; *Early v. Wilson*, 31 Neb. 458; *Swartz v. McClelland*, 31 Neb. 646; *Brownell v. Stoddard*, 42 Neb. 177; *Porter v. Goble*, 55 N. W. Rep. [Ia.] 530.)

As against plaintiff, ignoring the alleged contract of July, 1891, the transfer of the real estate in controversy should not be sustained as a voluntary conveyance on the ground of the alleged solvency of Mr. Hellman on March 14, 1892. (*Murray v. Stanton*, 99 Mass. 345; *Meixell v. Kirkpatrick*, 6 Pac. Rep. [Kan.] 241; *Esch v. Chicago, M. & St. P. R. Co.*, 39 N. W. Rep. [Wis.] 129; *Little Rock J. R. Co. v. Woodruff*, 5 S. W. Rep. [Ark.] 792; *Bullett v. Worthington*, 3 Md. Ch. 99; *Kipp v. Hanna*, 2 Bland. Ch. [Md.] 26; *Parish v. Murphree*, 54 U. S. 94; *Williams v. Banks*, 11 Md. 198; *Schaible v. Ardner*, 56 N. W. Rep. [Mich.] 1105; *Potter v. McDowell*, 31 Mo. 62; *Gardiner Bank v. Wheaton*, 8 Me. 381; *Morrill v. Kilner*, 113 Ill. 318; *Bohannon v. Combs*, 79 Mo. 305; *Reeves v. Sherwood*, 45 Ark. 520; *Johnson v. Johnson*, 36 Neb. 700.)

As against the plaintiff, regardless of any technical definition of insolvency, the transfer of March 14, 1892, was invalid, because, under the particular circumstances

of this case, the real estate transferred was equitably charged with the payment of the plaintiff's claim and could not, to the prejudice of the plaintiff, be conveyed by Mr. Hellman to Mrs. Hellman without consideration. (*Smith v. Sands*, 17 Neb. 501; *Thompson v. Loenig*, 13 Neb. 386; *Steele v. Coon*, 27 Neb. 598; *Stevens v. Carson*, 30 Neb. 544; *Carson v. Stevens*, 40 Neb. 115; *Brownell v. Stoddard*, 42 Neb. 184.)

HARRISON, C. J.

It appears herein that during a period of twenty-five or more years prior to 1892 and inclusive of a few of the earlier months of said year Meyer Hellman was engaged in business in the city of Omaha as a dealer in clothing, the greater portion of the time both at wholesale and retail, but during the last five years exclusively the latter. On March 14, 1892, he and his wife, Maria Hellman, executed a deed by which they conveyed to Charles Wise, a relative, a piece of real property, their home in Omaha, worth about $35,000, which was by the grantee and his wife on the same day conveyed to Maria Hellman. On the same date Hellman executed a will in which his wife, Maria Hellman, was designated sole legatee and executrix of his estate. After his death, which occurred March 29, 1892, the will was duly probated and Mrs. Hellman qualified and assumed and performed the duties of executrix. During the month of December, 1891, he had assigned to his wife a policy of insurance on his life in the sum of $5,000. There was of insurance on the life of Meyer Hellman in the aggregate $59,500, in all contracts for the payment of which Mrs. Hellman was designated as beneficiary except one for $5,000, in which the children of the parties were beneficiaries. This action was instituted for David Adler & Sons Clothing Company in the district court of Douglas county to obtain a decree by which the transfer of the real estate to Maria Hellman, to which we have referred, might be adjudged fraudulent and void and canceled, and the real

estate subjected to the payment of the claim of the plaintiffs, now appellees, against the estate of Meyer Hellman. During the course of the litigation the First National Bank of Omaha, the Nebraska National Bank of the same city, Lowman's Sons, and Simeon Bloom became of parties to the suit by intervention. Each sought to have the deed of the real estate to Maria Hellman set aside as fraudulent and void as to creditors of Meyer Hellman, and the property made of the assets of his estate; also the assignment of the one policy of life insurance; and further, that all premiums or assessments paid by Meyer Hellman on contracts of life insurance during a period of time it was asserted by the pleading he had been insolvent, should be decreed of the estate and subjected to the payments of the claims against it. At the close of a trial in the district court the interveners were denied any relief and their petitions dismissed and the prayer of the petition of David Adler & Sons Clothing Company was granted. The two banks and Lowman's Sons have appealed from the decree against them, and Maria Hellman has appealed from the decree in favor of David Adler & Sons Clothing Company.

In the bill of exceptions there appears the opinion of the trial court, and therein a clear statement, in substance, of the main facts as shown by the evidence, and since it also shows the impressions and ideas which the court had gathered from the evidence, we deem it proper to here reproduce it, as follows:

"The defendant Maria Hellman is the widow of Meyer Hellman, who departed this life in March, 1892. For twenty-five years or more prior to his death Meyer Hellman had been engaged in the wholesale and retail clothing business in this city, and he acquired a reputation for integrity and fair business methods, which I understand is not questioned by any one interested in this litigation. The amount of capital with which he engaged in business has not been shown, nor does it seem to be material to the issues involved, but at the date of his

death, in March, 1892, he was possessed of property of great value, but which, with the exception of that in controversy in this action and perhaps a few other small pieces, was heavily incumbered. For a few years prior to his death he had engaged to a considerable extent in real estate transactions, and had incurred an indebtedness aggregating over $300,000. While the fact does not clearly appear, it may be fairly assumed that his transactions in real estate had absorbed his ready means to such an extent that he had become a large debtor of the banks, and in the summer of 1891 he had become indebted to the Nebraska National Bank to the amount of about $28,000, and to the First National Bank to the amount of about $80,000. He was also at that time indebted to various wholesale houses on merchandise accounts to quite an amount, and all of these creditors were demanding payment of or security for their debts, and two or three of his mercantile creditors had taken judgments for the amount of their claims. He was married to the defendant in 1871, and while it does not clearly appear, I assume that he was the owner of lots 1 and 2, in Johnson's Addition, at the time of his marriage. These two lots were inclosed together, and shortly after his marriage he erected a three-story brick dwelling-house on lot 1, together with a barn and other improvements, and he occupied the premises with his family from that time up to the date of his death. His widow, the defendant in this action, now occupies it as her home, and she holds the legal title thereto under a deed of conveyance made to her by him shortly prior to his death in March, 1892. Some time in the summer of 1891, and about the time that one or more of his mercantile creditors had put their claims against him into judgment, negotiations were commenced between Hellman and the officers of the two banks looking to the securing of his debts to these two institutions by mortgage on his real estate. Prior to and during these negotiations he had listed his property and placed an estimated value on

each parcel of the same, which list was used during the negotiations. It is conceded that he had planned the making of mortgages upon different parcels of his real estate to his different creditors, apportioning the same among them in a manner which he at the time insisted would afford ample security for all of them. In this plan he had reserved the property in controversy in this suit, which we may call the home property, and had insisted that this property should not be incumbered but should be reserved for his family. During these negotiations Mr. Connell acted with him and as his attorney, and Mr. Congdon was the attorney of the First National Bank, his power, however, extending no further than to pass upon the title of the property offered as security and to advise relative to the legal questions which might arise. After negotiations, which extended over some months, the two banks finally accepted second mortgages upon some portions of the property that had been mortgaged prior to this date to the Northwestern Mutual Life Insurance Company, and first mortgages upon various other tracts, and others of his creditors were secured by taking mortgages upon other and different tracts. In order to make these mortgages a first lien, and in order to pay certain mercantile bills which were then pressing, and interest due the banks, the First National Bank made him at this date a further loan of $9,500, and the Nebraska National Bank a loan of $3,000. By agreement between the parties the money advanced on these new loans was left in the hands of Mr. Kountze of the First National Bank to be by him used for the purposes above indicated, and the money was so used. The mortgages executed at this time aggregated something over $200,000, and evidence has been introduced which, if competent, shows that when Mrs. Hellman was asked to join in these mortgages she refused to do so except upon the condition that her husband would convey to her the home property. This he agreed to do, and subsequently, and a few days prior to his death, the conveyance was made.

I gather from the evidence that this security taken by the banks was taken as collateral to the amount then due and owing them by Hellman, but with the oral understanding or agreement that if the interest was promptly paid foreclosure proceedings would not be instituted immediately, but Mr. Hellman given ample time in which to discharge these debts. It is shown beyond dispute that at the date of the execution of these mortgages Hellman was unable to pay the interest due and owing upon his loans from the banks, and it is also shown that an execution was issued upon one of the judgments obtained against him prior to the execution of these mortgages and placed in the hands of the sheriff, who went to his store for the purpose of levying the same, but that no levy of the execution was actually made upon any of his stock. We insert here it is of testimony that this levy, or whatever action was taken, was to cause the mortgages to be executed in which there was what was thought to be somewhat of slowness or delay on the part of Hellman.

Subsequently, Mr. Hellman not being able to pay the interest on his indebtedness to the banks, foreclosure proceedings were instituted upon the mortgages, the mortgaged property sold, and in some instances large deficiencies exist. It is not controverted that the estate of Mr. Hellman is entirely insolvent, and the banks and others who intervened in this action are now seeking to reach the home property conveyed to Mrs. Hellman and have it applied to the payment of their claims. During his lifetime Mr. Hellman had taken out life insurance policies, all but one of them being made payable to his wife, and this one was assigned to her in the month of December previous to his death. The interveners also claim the right to have applied to the payment of their claims the premiums paid upon these life insurance policies since 1891, and the full amount of the policy which was assigned to Mrs. Hellman in December, 1891. These are the main features of the case so far as the interveners' rights are concerned.

"The claim of the plaintiff in the action rests upon a somewhat different state of facts. About the first of June, 1891, one Myers, a traveling salesman for the plaintiff David Adler & Sons Clothing Company, took an order from Mr. Hellman for a bill of goods and sent it to his house in Milwaukee. The credit-man, upon investigation, refused to fill the order, and had some correspondence with Mr. Hellman relating thereto. In September of the same year Mr. Myers again visited this city and took another order for substantially the same amount of goods. At this time Mr. Hellman referred Myers to Dun's Mercantile Agency for a statement of his credit, and also showed him a list of his assets which included unincumbered real estate amounting to seventy or eighty thousand dollars. On the 28th of September Myers telegraphed his house that he had arranged with the Dun agency for full particulars about Hellman's affairs and the Omaha agency forwarded to the Milwaukee agency the statement which Hellman had furnished the agency here. This statement was furnished by the Milwaukee agency to the plaintiff, and contained, among other matters, Hellman's statement of his unincumbered real estate, which included the home property which Hellman had agreed in the summer previous to convey to his wife, and which he did convey to her in March, 1892. Mr. Oberndorfer, the credit-man of David Adler & Sons Clothing Company, testified that upon the strength of this statement and certain correspondence had with Mr. Hellman which has been introduced in evidence, he filled the order, amounting to $5,000 or more, and the plaintiff now claims that the home property which was included in the list of Mr. Hellman's assets in the statement which he made to procure credit should be subjected to the payment of its bill.

"No party to this litigation questions the good faith of Mr. Hellman in making the conveyance to his wife. No actual fraud or intent to defraud creditors is charged against him or the defendant; but it is said that Hell-

man at the date of the deed to his wife was insolvent and that the withdrawal of this valuable property from the reach of his creditors was a legal fraud or fraud in law, which voids the conveyance when creditors ask that the property conveyed shall be applied to the payment of their claims. This necessitates an examination of the meaning of insolvency under circumstances such as surround this case. A great volume of testimony has been introduced to show the value of the real estate possessed by Hellman at the date of his death. Without reviewing this evidence I think it fair to all the parties to the litigation to base my findings upon the evidence of Mr. Lewis S. Reed, who all the parties agree is a fair witness, and whose judgment of real estate values is conceded to be equal to that of any one in the city; and while an interested party to the extent of being an officer of the Nebraska National Bank, even the attorneys for the defendant pay him the high compliment of being a man whose testimony would not be varied on that account. Two statements furnished by Mr. Hellman to the banks during the negotiations for the making of these mortgages have been introduced in evidence. These statements contain a list of the property owned by Hellman, and attached to each parcel is an estimate of its value. Mr. Reed states that he thinks the estimated value fixed upon the property by Mr. Hellman was excessive to the extent of from twenty to thirty per cent. A deduction of twenty-five per cent from that value ought to be a fair guide for the court in this investigation. The value attached by Mr. Hellman to his real estate in these statements foots up $660,000. Deducting therefrom twenty-five per cent would leave $495,000. I do not know that I can arrive with absolute certainty at the exact indebtedness with which Hellman should stand charged at the date of his death. Taking the figures of Mr. St. Clair, he states that the claims allowed by the probate court were $204,953, and claims not allowed in that court, being mortgages upon real estate not filed, $159,581, make a

total indebtedness of $364,534. During the argument it was shown and admitted that Mr. St. Clair's statement included the expenses of the last illness and funeral of Mr. Hellman; a claim against Hellman arising from liability as an indorser for Mr. Oberfelder, amounting to $10,250, which the evidence clearly shows has since been discharged as to Hellman; ground rent accrued since the date of his death; a contingent claim allowed to the Cambridge bank; the claim of the Snowden estate; interest on the gross amount of his debts from the date of his death; the mortgage of one Forbes, which is now outlawed, and which it was never sought to enforce; and one-half of what is known as the Proctor mortgage; making a total amount of over $30,000, which were not properly chargeable against him at the date of his death. What is known as the Marblestone mortgage is included in Mr. St. Clair's statement, both under the head of claims allowed and claims not allowed, which would increase his statement $8,500 above what it should be. It will thus be seen, taking the figures of the interveners and deducting therefrom say $35,000, which I am clearly of the opinion are wrongfully included, that Hellman's indebtedness at the date of his death did not exceed $325,000 or $330,000. In addition to the real estate owned by him, and which as we have seen, estimated at the value put upon it by Mr. Lewis S. Reed, amounted to $495,000, the stock of merchandise was appraised at, and I think fairly worth, the sum of $30,000; the store fixtures, $3,000; there was actually collected from accounts, $5,573; and averaging the testimony relative to the value of the flats and houses standing upon leased ground, they were of the value of $12,000; other personal property possessed by him may be placed at $1,000. This would give him total assets to the value of $546,573. Placing his debts at the highest figure, $330,000, he would be possessed of assets in excess of his liabilities to the amount of $216,573. The value of the real estate conveyed to the wife may be put at $35,000 and the question

is whether, supposing the conveyance of that property to her was entirely voluntary, no consideration passing at all, it could be said he did not retain enough under ordinary circumstances and conditions to fully meet all obligations against him."

In the decree appeared the following statements:

"The defendant Maria Hellman is the widow of Meyer Hellman, who departed this life in March, 1892, leaving surviving him his widow and six children as the issue of his marriage with said Maria Hellman, as follows: Blanche, a daughter, aged nineteen years; Mabel, aged seventeen years; Selma, aged fourteen years; Lillian, aged twelve years; Clarence, aged six years; Grace, aged four years.

"The court further finds that for twenty-five years and more prior to his death the said Meyer Hellman had been engaged in business in the city of Omaha in the wholesale and retail clothing business, the last five years or more being in the retail trade exclusively, and acquired a reputation for integrity and fair business methods, and that in all the transactions, representations, and dealings involved in this controversy and in making the deed of conveyance and assigning the policy of insurance to his wife, of which complaint is made, he acted in good faith and without intent to hinder, delay, or defraud his creditors, and that the said defendant Maria Hellman, in receiving said conveyance and assignment, also acted in good faith and without intention to hinder, delay, or defraud creditors.

"The court further finds that by the strict rule applied to merchants and traders, Hellman was insolvent in March, 1892, but for the purposes of this case, in determining whether the conveyance to his wife was fraudulent in law, he was perfectly solvent, having assets in excess of his liabilities at the time of the value of more than $200,000, estimated at their fair market value; that he was the owner of and possessed of property to the value as follows, to-wit:

Real estate of the value of	$495,000
Stock of merchandise of the value of	30,000
Store fixtures of the value of	3,000
Accounts and bills payable of the value of	5,573
Flats and buildings on leased ground of the value of	12,000
Other personal property of the value of	1,000
	$546,573

"The court further finds that during the year 1891 and down to the time of the death of said Meyer Hellman, in March, 1892, his entire indebtedness did not exceed $325,000 or $330,000, and that placing his said indebtedness at the highest figure, $330,000, he was possessed of assets in excess of his liabilities to the amount of $216,573.

"The court further finds that the real property involved herein, and hereinafter more particularly described, was improved by said Meyer Hellman about 1881, by the construction of a brick dwelling-house, barn, and other improvements, and that he occupied the premises so improved as a home with his family from that time up to the date of his death in March, 1892, and that since said last mentioned date his widow, the said Maria Hellman, has occupied said house as her home, and holds the legal title thereto under a deed of conveyance made to her shortly prior to said date.

"The court further finds the value of said home property in the month of March, 1892 to have been $35,000, and that the same was conveyed to said defendant by said Meyer Hellman in good faith and without intent to hinder, delay, or defraud his creditors, and was so received by said defendant, at a time when the said Meyer Hellman was solvent, for the purposes of such conveyance, being possessed of a surplus of property amounting to $216,000 in excess of his entire indebtedness, which at that date amounted to about $30,000.

"The court further finds that the said deed conveying to the defendant Maria Hellman the said home property

was for a valuable and sufficient consideration, and was made pursuant to an agreement between the said Meyer Hellman and Maria Hellman in July, 1891, by reason whereof the said Maria Hellman was induced to relinquish her dower interest in a large amount of real estate; that mortgage liens thereon, free from such incumbrance, might be made, as was thereafter made, to creditors of the said Meyer Hellman, including the interveners, the First National Bank of Omaha and the Nebraska National Bank of Omaha, and Simeon Bloom, which each had the benefit of said home property so conveyed to said defendant by receiving in consideration thereof the relinquishment of her dower interest in the real estate mortgaged to said banks and said Bloom, and which said banks and said Bloom, respectively, took as security for the indebtedness of said Meyer Hellman to them.

"And the court further finds that nearly all of the said Hellman's real estate had been mortgaged to secure his creditors at the time of his deed to his wife; and that at the time of his death he owed the First National Bank about $80,000 and the Nebraska National Bank about $28,000, and that in February, 1892, the said Hellman was sued for $80,000 or more, the suit being to foreclose the debt to the First National Bank, the Nebraska National being made a party, and on June 18, 1892, filed its cross-bill for $7,000 and interest, and the Northwestern Insurance Company being a defendant, and on March 26, 1892, the cross-petition was filed to foreclose mortgages to the Northwestern Mutual Life Insurance Company aggregating $60,000.

"And the court further finds that the deed of Hellman and wife to Wise and Wise's deed to Mrs. Hellman and Hellman's will, leaving all his property to his wife, were executed at the same time, and about two weeks prior to his death, but were not recorded until after his death.

"And the court further finds that the statements of his property furnished by Hellman, and used in negotiations with the banks, contained this item: '280x240,

24' and St. Mary's, which item included the property in controversy, the latter being a piece of ground 143x159 feet; and that the $495,000 of real estate owned by Hellman in 1892 as above found included the homestead.

"And the court further finds that no contract, express or implied, was made between the banks and Hellman that the home property should be left free for Hellman's family, but Hellman at all times refused absolutely to include in the mortgages the property afterwards conveyed to his wife, refused to pledge it for debts at the bank, and insisted on keeping it free from any liens whatever; that Mr. Connell acted as attorney for Hellman in the negotiations relating to the mortgages executed to the banks, and Mr. Congdon as attorney for the banks, but Mr. Congdon was empowered only to pass upon the title of the property and to advise as to the legal questions which might arise; that Mr. Congdon fully understood Hellman's intention to retain the home property for himself and family free from any liens.

"The court further finds that just prior to July, 1891, two judgments were obtained against Hellman, and an execution on one of them was in the hands of the sheriff, and he was in the store for the purpose of levying the execution about the time when the interveners, the banks, advanced to him $12,500 on August 6 or 7, 1891, and that such advancements were made to discharge those judgments and make their mortgages taken at that time a first lien, and for the purpose of paying delinquent interest and merchandise accounts then due, and that this advancement of $12,500 was a part and parcel of the same transaction in which the mortgages to the banks were given.

"And the court further finds that at the time of the conveyances to Mrs. Hellman there were outstanding mortgages amounting to over $260,000; that the intervening banks took their mortgages in the summer of 1891 as collateral securities to the notes of Hellman, which matured in the fall and summer previous, and which

Hellman was then unable to pay; and that the Hellman estate is now insolvent; and there remain unpaid claims against the estate, including interest, of more than $100,000.

"And the court further finds that the following items were not properly chargeable against him at the date of his death, namely: The expenses of the last illness and funeral; the note of Oberfelder, amounting to $10,250; the amount of ground rent accrued since the date of Hellman's death; the claim of the Cambridge City Bank; the claim of the Snowden estate; the interest on the amount of Hellman's debts accruing since the date of his death; the Forbes mortgage, which is outlawed; one-half of what is known as the Proctor mortgage; and the Marblestone mortgage; making a total of over $30,000, which was excluded in fixing the amount of Hellman's indebtedness, in the foregoing finding, at $330,000.

"And especially with reference to the plaintiffs' claim herein the court further finds that in June, 1891, the plaintiffs received through their traveling salesman an order from Hellman for goods, which order they did not fill for want of a satisfactory statement of his financial condition, respecting which correspondence was had until late in September of the same year, when the same salesman came to Omaha and took from Hellman another order for substantially the same amount of goods, being those upon which the action in controversy is based. At that time Hellman referred the salesman to Dun's Mercantile Agency for a statement of his credit and also showed him a list of assets, which included unincumbered real estate amounting to about $70,000. The statement which had been furnished the Dun agency was forwarded by the latter to the plaintiff; said statement, and also the one shown to the salesman, included the home property, and was used as a basis for obtaining credit, the plaintiff selling Hellman the goods upon the faith of it, in connection with the correspondence in evidence.

"And the court further finds that Mrs. Hellman took

no steps to enforce her claim to the property, or to give notice to the world of her claims of ownership or of the contract, under which it was subsequently conveyed to her; and that the defendant Maria Hellman is estopped from setting up her claim to the property as against the equities of the plaintiff."

The first question which is presented is the right of the creditors to institute and prosecute this action. As the transfers which it was sought to avoid as fraudulent were to the executrix and so shown by the pleadings, causes were asserted for which relief might be afforded in an action. The jurisdiction of the county court in the settlement of estates of decedents does not afford ample remedy. (*Becker v. Anderson*, 6 Neb. 499; *Harvey v. McDonnell*, 21 N. E. Rep. [N. Y.] 695.)

It was of the contention for Maria Hellman in the trial court and of the issues that at the time her husband was about to execute mortgages on various real properties in favor of creditors inclusive of the banks, appellants herein (this was when the banks as a part of the transactions loaned to Meyer Hellman $12,500), she refused to sign the mortgages unless her husband would agree to convey to her the home property, to which he finally acceded, and pursuant to such agreement she signed the mortgages, thus rendering her dower right in the properties subject to the liens of the mortgages and liable to be sold for their satisfaction and so extinguished. The testimony adduced to show the agreement in which this claim had its origin was of Mrs. Hellman and Mr. Connell of her counsel. It was objected at the time of its introduction and is now urged that all the testimony relative to this agreement was and is incompetent; hence the agreement was not shown and should not have been by the trial court and cannot by this be considered. The objection was based, as is the argument, on the restrictions and limitations of our Code in regard to evidence. (See Code of Civil Procedure, secs. 329, 332, 333.) The trial court decided that the testimony

of Maria Hellman was incompetent, and in this we think it was right. By section 211 of chapter 23, Compiled Statutes, it is made the duty of an executor or administrator, when there is a deficiency of assets of the estate of a decedent and the deceased during life shall have conveyed any property with intent to defraud his creditors, to institute and prosecute an action for the avoidance of the transfer and the recovery of the property to be of the estate and for the benefit of the creditors thereof. In the matter at bar the executrix was also the alleged fraudulent grantee of property alleged to have been conveyed in fraud of creditors by the deceased during his lifetime, and she could not or would not commence and maintain the necessary action and the creditors must and could do so, and in the action by them they occupied the position relative to the estate and its interests which would have been occupied by the executrix had she been without adverse interest, and had been, as contemplated by statute, plaintiff in the suit. The testimony of the alleged fraudulent grantee of the transaction or agreement, out of which came the conveyance attacked, would have been as to her incompetent and not receivable under the provisions of section 329 of the Code of Civil Procedure, and was as much so as against the creditors who instituted and were urging the suit. (*Grier v. Cagle*, 87 N. Car. 377.) From which it follows that the testimony of Mrs. Hellman was incompetent for the purpose offered in this action.

The testimony of Mr. Connell, it is insisted, was and is open to the objection that it was a privileged communication to him in his professional capacity and could not be disclosed. Our Code contains a provision which debars an attorney from detailing in testimony privileged communications (see Code of Civil Procedure, sec. 333), and if the matters which the witness herein stated were within the meaning of the words "confidential communications" and made for the purposes contemplated by the section of the statute, they were incompetent. At the

time the statements were made which constituted the asserted agreement, Mrs. Hellman, immediately after the noon lunch, had gone to the office of Mr. Connell to consult him in regard to her rights in the real estate owned by her husband, and also in what manner and to what extent her rights, if any, would be affected by her signing the mortgages which she had been asked to execute. The firm of which Mr. Connell was a member was then, and had been for some considerable time prior thereto, acting for Meyer Hellman in many matters in which the services and advice of an attorney were desired or necessary. At that time there was in the statutes an enactment of the legislature by which, probably, subject to the payment of debts, the wife on the death of her husband became entitled of right absolute to a designated portion or share of the real estate of which he died seized. It has since been adjudged unconstitutional. (See *Trumble v. Trumble*, 37 Neb. 340.) Mr. Connell's advice to Mrs. Hellman seems to have been given with the idea in mind that the statutory provision to which we have just referred was valid and in force. However this may have been, it is true that when she signed the mortgages she placed her dower right in the real estate in jeopardy.

Mr. Hellman came to the office during the interview between her and Mr. Connell and asked to know why she was down town at that hour, and was informed of her business there, and the conversation then ensued in which, it is asserted, the agreement was made to convey to her the home property, and by virtue of which it was afterwards so conveyed. In none of the interviews or conversations which were then and there had was there anything which was confided by Mr. Hellman to Mr. Connell in his professional capacity; the parties to the purported agreement were both there, and what was said was open and without reserve, and it was competent for Connell to give it in evidence. (19 Am. & Eng. Ency. Law 139; *Lynn v. Lyerle*, 113 Ill. 129; *Griffin v. Griffin*, 17 N. E. Rep. [Ill.] 784; *Cady v. Walker*, 28 N. W. Rep.

[Mich.] 805; *Hurlburt v. Hurlburt*, 28 N. E. Rep. [N. Y.] 651; *Carey v. Carey*, 12 S. E. Rep. 1038, 108 N. Car. 267; *Deuser v. Walkup*, 43 Mo. App. 625; *Livingston v. Wagner*, 42 Pac. Rep. [Nev.] 290; *Wyland v. Griffith*, 64 N. W. Rep. [Ia.] 673.)

It is further argued in this connection that if it be conceded that the contract was made between the husband and wife it was of none effect, since the wife was—in fact both were—possessed of a false idea at the time, which constituted a basis or consideration for the compact on the part of the husband; *i. e.*, that, as they had been informed, the wife, by signatures attached to the mortgages, would relinquish an absolute right to one-third of the real estate of the husband. This was true to a certain degree, but it was also true—it was thoroughly understood by both parties—that the wife, if she executed the projected mortgages, would render liable to the operation of their conditions all the rights she had, either present or prospective, in the real estate described in the instruments. Of what the rights consisted they probably did not at the time have an exact or definite realization, but there was not such an inexactness or confusion as to make ineffective or nugatory their contract.

It is also urged in this same line of argument that the dower right of the wife in the real property included in the several mortgages, considered as a whole, did not furnish any adequate consideration in its worth or value for the conveyance of her home property. There was evidence introduced of a manner of computation of the value of a dower right of a wife in her husband's property. Of the accuracy, worth, or conclusiveness of the computation by the prescribed method it is not within our province at the present time to inquire. It probably furnished as nearly a correct abstract valuation of a dower right, somewhat intangible as the latter may be said to be, as can or could be essayed. It has been stated by this court in its opinion, wherein was determined the strength or nature of a wife's right of dower in real estate

owned by the husband, that the inchoate right of dower, when it once attaches, remains and continues an incumbrance or charge upon the real estate unless or until released by the voluntary act of the wife or extinguished by the operation of law. While not an estate in possession, it is a present right or interest of a legal character. (Compiled Statutes, ch. 23, sec. 1; *Butler v. Fitzgerald*, 43 Neb. 192; *Wylie v. Charlton*, 43 Neb. 840.) If it is such an interest and may be the subject of a release or relinquishment by her, she may make the release, or that she subject it to the lien of a mortgage by her signature, the consideration for substantive matters of conveyance to her. (*Singree v. Welch*, 32 O. St. 320; 2 Scribner, Dower 7.)

In this case the testimony of this agreement was competent and material on the question of the intent with which the home property was conveyed to the wife, whether fraudulent or not, if for no other purpose, and if not sufficient to establish an ample consideration for such transfer to stamp it as a conveyance for value and not of the character of a gift. It may be added here, as urged by counsel for Maria Hellman, that the appellants herein, from the portion of the decree in her favor and against them, desired that the mortgages be executed, that thereby directly and indirectly the payment of the indebtedness of Meyer Hellman to them respectively might be secured, or some further and better assurance of it afforded, and by reason of this, their purpose being given full scope and effect by the signature of the wife to the mortgages, they derived the benefits of such acts on her part. It may be truthfully said that they had no knowledge, at the time, of the contract between the husband and wife or of the promise or concession necessary to be made to her before they could realize their business wishes or plans in regard to the husband's property, but they became nevertheless the recipients of the effects of her acts pursuant to the terms of the agreement. The transaction relative to the dower right of the wife was sufficient alone to sustain the conveyance of the

home to her as to all creditors who attacked it, except the plaintiff, at least to the extent of the full value of such interest.

We will now turn our attention to another point or element of the main question herein involved—the financial condition of Meyer Hellman at the times particularly drawn into view in this litigation. We may as well here say that in the consideration of all the matters herein it must be borne in mind that in this state, by statutory law, the question of fraudulent intent in a conveyance attacked as is the one in question herein shall be deemed a question of fact and not of law (Compiled Statutes, ch. 32, sec. 20); to which must be added, in an attack on a conveyance between relatives or husband and wife the burden of proof is on the grantee to establish the *bona fides* of the transfer. (*Carson v. Stevens*, 40 Neb. 112.)

To go back now to the matter of the financial circumstances of Meyer Hellman at the times of the occurrences from which this litigation originated, and whether he was, in the light of the evidence herein introduced, solvent or insolvent, it may be said that in the examination and decision of similar controversies many courts have stated, generally, that insolvency means that the party whose business affairs are in question is unable to pay his debts as they become due in the ordinary course of his daily transactions (*Buchanan v. Smith*, 16 Wall. [U. S.] 308); also, "Insolvency is the inadequacy of a man's funds to the payment of his debts." (*Herrick v. Borst*, 4 Hill [N. Y.] 652.) Within a strict or literal application of the first rule, Hellman might have been, as a merchant, adjudged insolvent at the time the banks received the mortgages on his real estate, and made him loans in the aggregate the sum of $12,500, but subsequent to this, and up to the time of his decease, it was of the testimony that he had paid his mercantile accounts as they became due, although he did not promptly pay taxes or the interest on some of his loan indebtedness. In cases like this, in which the main, if not sole, factor

on which the creditors rely to establish the fraudulent character of a transfer is the insolvency of the grantor, —for herein it cannot be asserted with any degree of success that there was other evidence of such intent on the part of either the grantor or grantee,—many courts, inclusive of this, have announced a different and more liberal doctrine relative to what is or shows insolvency. In the opinion in the case of *Johnson v. Johnson*, 36 Neb. 700, in which case the litigation was instituted to subject some real estate to the claim of the plaintiff on the ground that the debtor had put his money in the property, which, nominally at least, belonged to his mother, and such action had caused his insolvency, it was stated: "The proof fails to show that Chris Johnson was insolvent when he made the improvements in question for his mother, or that he made the improvements in contemplation of insolvency. A person who is apparently able to pay his debts and believes himself to be so, and has no design to defraud his creditors, may make a valid gift to a relative. The gift, however, must not be disproportionate to his means, nor such as will produce insolvency. The proof fails to show that this gift, if such it was, produced the insolvency of Chris Johnson." (See also *Emerson v. Opp*, 38 N. E. Rep. [Ind.] 330; *Ware v. Purdy*, 60 N. W. Rep. [Ia.] 526; *Windhaus v. Bootz*, 25 Pac. Rep. [Cal.] 404.) Some courts hold that the valuation of the property retained is to be of the time of the transfer which is the subject of attack. Within this doctrine there was ample evidence herein to sustain the finding of the trial court that Meyer Hellman had, at the time he transferred the home property to his wife, also when he assigned to her the one policy of life insurance, sufficient property to satisfy his indebtedness, and the judgment as to these matters as between appellants and Maria Hellman was right. We will add here that there was not such proof that the appellants were so influenced in the allowance of credit to Meyer Hellman by any ownership thereof as to raise an estoppel in their

favor against the claim of title thereto by Mrs. Hellman. (*Goldsmith v. Fuller*, 30 Neb. 563.)

In relation to the premiums and assessments which had been paid for the life insurance during the stated term we are cited by counsel for Maria Hellman to a decision of the supreme court of the United States. (See *Central Nat. Bank v. Hume*, 9 Sup. Ct. Rep. 41, wherein creditors were denied the right to recover life insurance premiums under facts very similar to the circumstances developed on the same subject-matter herein.) On the other hand, for the appellants, our attention is directed to a strong opinion of the court of New Jersey. (See *Merchants & Miners Transportation Co. v. Borland*, 31 Atl. Rep. [N. J.] 272, wherein a contrary doctrine is advanced; also to an able article in the 25 Am. Law Review, page 185, by Mr. Williston, in which the opinion in *Central Nat. Bank v. Hume* is criticised.) After an examination and consideration of the arguments and reasons of the opinions and the article to which we have referred, and the subject in general, we are satisfied with the opinion of Chief Justice Fuller and will follow it. As therein stated, cases may arise in which there may be disclosed payments of large premiums, out of all reasonable proportion to the financial condition of the party, and under circumstances which stamp them as fraudulent as to creditors or justify the inference of fraud on creditors in the withdrawal of such sums from the resources of the debtor, and call for the court, in the exercise of its power, to cause them to be repaid from the amount realized from the policies of the premiums of which they were payments; but no such state of facts was shown in this action, and we must approve the judgment of the district court on this branch of the case.

We have now reached that portion of the judgment of which Maria Hellman, as appellant, complains, by which the David Adler & Sons Clothing Company was given a lien for the amount of its claim on the home property which was conveyed to her by her husband, on the ground

that the facts in regard to the indebtedness embodied in such claim showed that the credit was given to Meyer Hellman under and by virtue of such representations relative to his property and that which at the time was of record in his name inclusive of the home property, afterward conveyed to the wife, as estopped her from the assertion of her claim of title as against the rights of the clothing company. There was sufficient proof to sustain the findings of the trial court that the clothing company relied on Meyer Hellman's asserted ownership of this particular piece of property and was by this belief quite largely influenced in the extension of the credit out of which arose the claim in suit. This being true, the trial court was right in the judgment. (*Roy v. McPherson*, 11 Neb. 197; *McGovern v. Knox*, 21 O. St. 547; *Early v. Wilson*, 31 Neb. 458.)

It follows from the conclusions reached that the judgment will be

AFFIRMED.

JOSEPH S. BARTLEY V. STATE OF NEBRASKA.

FILED JUNE 9, 1898. No. 9347.

1. **Indictment and Information:** DESCRIPTION OF MONEY: EVIDENCE. The provisions of section 420 of the Criminal Code, to the extent they relate to matter of proof, *held* not governable of the question of proof in this case.
2. **Embezzlement of Public Moneys.** The conclusions announced in the former opinion (*Bartley v. State*, 53 Neb. 310) approved and adopted, and, having been then and therein fully stated, are referred to and need not be restated here.
3. ———: CONVICTION: ARGUMENTS. The judgment and sentence reaffirmed.

REHEARING of case reported in 53 Neb. 310. *Former decision sustained.*

Charles O. Whedon and *T. J. Mahoney*, for plaintiff in error.

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

HARRISON, C. J.

Proceedings in error were brought to this court on behalf of Joseph S. Bartley from the judgment and sentence of the district court of Douglas county in an action in which he was charged and, on trial, convicted of the embezzlement of a sum of money, the property of the state. A hearing in this court resulted in an affirmance of the judgment and sentence. The opinion in which were embodied the arguments and conclusions on the different subjects of the litigation as then presented was filed January 3 of the current year, and reported in 53 Neb. 310-364. Subsequently a motion for a rehearing was filed and granted, and the cause has been again argued and submitted for decision.

We will not make any further statement of the case, or the facts and circumstances thereof, but refer the reader to the former opinion for such statement. It was a subject of complaint in the brief filed on rehearing that sufficient time had not been devoted to the examination of the record and the preparation of an opinion. It is true, as stated in the brief, that the record is quite large —contains 1,200 pages—and that extended and elaborate briefs were filed; but it must here be borne in mind that the argument in such briefs and orally—considerable more than the usual time was allowed for the latter —were of great and material assistance in the consideration and decision of the points of complaint which were discussed. Moreover, and finally, it is not a question of the number of hours, days, or weeks consumed or to be taken in the examination and adjudication of a cause, but of such a due consideration of the litigated matters, without reference to the time employed, as will result in a proper and just disposition of them and render true right to the litigants.

It is stated in the brief: "Expressions are used in the

opinion, perhaps inadvertently, which find no support in the record, and to which the assent of silence ought not to be accorded. It is said, in the opinion, that there is no controversy as to the facts; that the defendant on the 10th day of April, 1895, made out in his own name, and presented to the auditor of public accounts, a voucher for the sum appropriated to replenish the state sinking fund, and caused the auditor to issue on that date a warrant, which was delivered to defendant on the day it bears date, and he at once registered it in the proper book in his office, but omitted to enter upon the book in the proper column the name of the person presenting the warrant for payment; that almost immediately thereafter defendant indorsed his name upon the back of the warrant and placed the same in the hands of the Omaha National Bank, or its president, for negotiation, and the latter, as agent for the defendant, sold the warrant to the Chemical National Bank for the face value." It is asserted in this connection that, of many of these acts and things, while it appeared from the evidence that they were done or existed as facts, it was not shown that they were personal acts of the plaintiff in error or made under or by his personal supervision or direction; or of some, of which the time might incidentally or directly be of the controversies, that it was not of the testimony that they occurred of times assumed in the statement in the opinion to which the brief referred. In regard to the matters done in the state treasurer's office, it may be said that some were by deputies or clerks in the performance of their duties in the business of the office and sanctioned by the treasurer, some by his signature, and some of which there were such attendant facts and circumstances as to raise a presumption of the treasurer's knowledge. It may be truthfully observed of the several matters that the evidence of them was of a nature to warrant the broad and comprehensive assertion relative to them employed in the opinion.

It is again urged with much strength and force of argument that there was no evidence to warrant or uphold the verdict of conviction, particularly in that it was not shown that any money, in the strict sense of the term, or cash—actual dollars and cents in specie—was tangibly employed or involved in the transaction which it was and is charged constituted the crime—the embezzlement of the funds of the state. That ninety per cent of the business affairs of the country which involve the payment or transfers of money are conducted successfully and satisfactorily without the exchange of dollars and cents in specie, and yet every one concerned receives and employs his money, is asserted in articles on financial questions and heard in discussions and conversations of business men, and it is no doubt approximately true. The law, conservative as it is, and rightly so, still must and does, where and when administered or interpreted and applied in the true spirit, and there is no direct statutory provision which must be legislated from its position as an obstruction, keeps, it is true, a somewhat tardy pace with the progress in business or other matters, and meets and becomes accordant, or adapts itself in its rules and doctrines to the multifarious changes and conditions which are evolved from the affairs of men. This it does, and yet is stable, settled, firm, and certain. That all men in the ordinary business transactions of life might, may, and do, through the usual media and channels, transfer money, have it, use it, and enjoy it (which cannot be gainsaid), and that a treasurer, when he makes use of the same means, did not receive the money, that it was not transferred, when, at the same time, it appears, without controversy, that his purposes were served, that he had the money and used it to as full an extent as if he had passed it in kind through his fingers, is an anomalous position and one not within good reason and modern usages, conditions, or beliefs. The several acts and matters elemental, directly or indirectly, of the purposed conversion of the state's money were but means

to the end, and had reached their final accomplishment when, pursuant to the order of the check, the moneys of the state were paid out or transferred, not for its use or uses, but to perfect, to close and render entirely effectual the misappropriation of the money to the use or uses of the plaintiff in error. We are entirely satisfied with the arguments and conclusions on this subject expressed in the former opinion, and that the reasons given, and the citations therein, support the conclusions announced. It is true that there was no physical transfer of cash—money in specie—but the mental processes were all fully existent and active, and were, through regular recognized methods of business procedure, carried out, and the money taken for the individual benefit, and not for the state.

It may be said here that aside from, and additional to, what has been formerly said on the point of the payment of the money drawn by the check, it has been further advanced in the brief for the state, and was of matters discussed in consultation, that the warrant in question bore the indorsement of the plaintiff in error, by which he became liable, and the money was applied to, and effected the extinguishment of, this, as it may be styled, contingent liability.

It is further urged in this connection that we ignored in the former opinion the provisions of section 420 of the Criminal Code in which it is stated: "In every indictment in which it shall be necessary to make any averment as to any money, or bank bill, or notes, United States treasury notes, postal and fractional currency, or other bills, bonds, or notes, issued by lawful authority and intended to pass and circulate as money, it shall be sufficient to describe such money or bills, notes, currency, or bonds simply as money, without specifying any particular coin, note, bill, or bond; and such allegation shall be sustained by proof of any amount of coin or of any such note, bill, currency, or bond, although the particular species of coin of which such amount was composed, or the particular

nature of such note, bill, currency, or bond shall not be proved." This section but excuses in the indictment to which it refers the particularity in pleading as to description, and correspondingly relieves from specific proof in the same respect, and cannot, with a fair construction or application, be said to require that in an embezzlement, such as was charged in the present case, there must of necessity be proof that a coin or coins—the pieces of money—were physically handled and passed or carried around. The section is clearly not of the force asserted for it in the argument for plaintiff in error in the present action.

In the matter of the complaint that the judge of the district court who presided during the trial of this case took too active a part therein, in that he interrogated the witnesses, etc., we have carefully examined this matter again and discover that in a number of instances he asked questions for what plainly appears to have been the purpose of a more clear understanding of the admissibility or non-admissibility of testimony to which an objection had been interposed, that the ruling on the objection might be correct. Such actions were entirely proper. In a number of other instances the trial judge questioned witnesses and elicited testimony which bore more or less directly on the main issues. It is undoubtedly necessary that the judge who presides should acquire as full knowledge of the facts and circumstances of the case on trial as possible, in order that he may instruct the jury, and correctly, to the extent his duty demands, shape the determination of the litigated matters, that justice may not miscarry, but may prevail; and doubtless it is allowable at times, and under some circumstances, for the presiding judge to interrogate a witness. The exact extent or when the exigencies may warrant an exercise of this right are matters which are not capable of very precise statement, but it may be said that the right here in question is one which should be very sparingly exercised, and generally counsel for the parties should be

relied on and allowed to manage and bring out their own case. The actions of the judge in this respect should never be such as to warrant any assertion that they were with a view to assistance of the one or the other party to the cause. We do not discover in the present case any undue or prejudicial actions or remarks of the judge who presided.

Under the proposition that the district court of Douglas county had no jurisdiction of the action, the constitutionality of the "Depository Law" is argued at this presentation of the case, and it is in this connection also urged that the court will not apply the doctrine of estoppel in a criminal case to any portion of the issues. We must again, for the reasons stated in the former opinion, and which we deem entirely sufficient, decline to enter upon a discussion of this point.

It was of the complaints strenuously urged in argument that the trial judge made in his charge, on the subject of reasonable doubt, the following statement: "You are not at liberty to disbelieve as jurors, if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered." It was and is insisted that this was vicious, for that its effect was to remove from the jurors the obligation of the oath which they had taken or that it freed them from such obligation. We will say here that in the charge in this case in one or two of the paragraphs the attention of the jurors was specifically challenged to the oath, its solemnity and its application to their acts and duties during the course of the trial, and their deliberations; but to return to the terms employed in the charge which we have quoted, a fair construction does not give them the import and significance which is imputed to them by counsel in the brief. They do not tell jurors to disregard the oath, but interpreted fairly and reasonably they do say that the parties to whom they were addressed shall act in all things, during their performance of their duties as jurors, as true

men; not to sink or lose, respectively, individuality, personality, identity, but, under and in view of the oath, to at all times and in all things act, consider, and determine as sensible, reasoning beings, bringing to bear their powers, abilities, and faculties as men; and surely that they should so do is not foreign to the purpose for which they were impaneled, but directly in consonance with it. We are not to consider whether the terms employed were necessary or added very much to the charge, but we are to determine whether they were, as it is asserted, vicious, and we conclude that they were not. The expression quoted has been approved by this court in several cases. (See citations in former opinion; also *Barney v. State*, 49 Neb. 515; *Carrall v. State*, 53 Neb. 431; *Fanton v. State*, 50 Neb. 351.)

There was at the trial an instruction requested for plaintiff in error, and refused, in which was embodied the statement of the presumption of innocence of the accused, which is always present, and must have place in every trial of a criminal action, coupled with the further announcement that the presumption was a matter of evidence in favor of defendant and to be so considered by the jurors. In the former opinion it was stated of the error which it was argued had occurred in this particular that the principle embraced in the request had been embodied and given in the sixth paragraph of the charge on the court's own motion; also that the twenty-first paragraph of the charge, the one relative to a reasonable doubt, in its substance, as given, was sufficient to warrant the court in the refusal to read the request. It was at the second hearing in this court argued that the court was wrong in the position taken in the former opinion, and in this connection there was quoted in the brief a considerable portion of an opinion of the supreme court of the United States in the case of *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. Rep. 394, in which there appears an exhaustive and able discussion on the subject of the presumption of innocence of a defendant in a criminal

action, its weight, and that it be considered as evidence, and in which the main question determined was whether an instruction on reasonable doubt filled the place of an instruction that the presumption of innocence was a matter of evidence in favor of an accused person. The conclusion reached was announced as follows: "In a criminal case it is error to refuse to charge as to the presumption of innocence, though the court fully and accurately charges as to the doctrine of reasonable doubt." This may be the true doctrine; we need not and do not now decide, but be it as it may, if we leave the twenty-first instruction—the one on reasonable doubt in this case—entirely out of the consideration, except to the extent it must be read and construed with and of the charge as a whole, the sixth instruction given, although it did not employ the same phraseology as the request—and it possibly might have been better had it done so, particularly in the use of the word "evidence" and its application to the presumption as favorable to the defendant—did embody a statement in effect of the principle, and was sufficient; for, with the presumption of force, as it was stated it must be, as a bar to any conviction until guilt was established beyond any reasonable doubt, the same idea was elemental and prevalent in the deliberations of the jurors as would have been had the request been given. It follows that we must again overrule this branch of the argument.

There were many other questions raised and urged in argument, and we have again carefully examined and considered all, inclusive of such as referred to alleged errors in the admission and exclusion of matters of evidence, and, after full investigation and consideration of each and all, must reach the conclusion before announced, that the record discloses no errors which call for a reversal of the judgment; hence the judgment and sentence must be

REAFFIRMED.

FIRST NATIONAL BANK OF OMAHA V. FIRST NATIONAL BANK OF MOLINE.

FILED JUNE 9, 1898. No. 8162.

Banks and Banking: NOTE: COLLECTION: INSOLVENCY. A bank at Moline forwarded to a bank in Omaha, Nebraska, for collection, and so indorsed, a note payable at the Holt County Bank, O'Neill, Nebraska. It was sent to the latter by the intermediary bank indorsed for collection, but inclosed with a letter, by which the bank of collection was instructed to credit the amount of the note, when paid, to the Omaha bank, between which and the bank of collection there had been continuous dealings and accounts during four or five years prior to and inclusive of the time of this transaction. The collection was paid and a credit given for the amount to the intermediary bank, and on the same day the bank of collection failed. Its account with the Omaha bank was at the time overdrawn. *Held*, That the Omaha bank was liable to the Moline bank for the amount of the note.

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

The opinion contains a statement of the case.

Joseph R. Clarkson, for plaintiff in error:

If the collection was legitimate the Moline bank is entitled to the proceeds as a trust fund. (*Griffin v. Chase*, 36 Neb. 328; *Evansville Bank v. German-American Bank*, 155 U. S. 556; *First Nat. Bank v. Bank of Monroe*, 33 Fed. Rep. 408; *Cragie v. Hadley*, 99 N. Y. 131; *Manufacturers Nat. Bank v. Continental Bank*, 20 N. E. Rep. [Mass.] 193.)

The Omaha bank was the agent of the Moline bank, and not responsible for the default of the Holt County Bank. (*First Nat. Bank of Pawnee City v. Sprague*, 34 Neb. 318; *Waterloo Milling Co. v. Kuenster*, 41 N. E. Rep. [Ill.] 906.)

The Omaha bank was not the owner of the paper, and a credit could not make it the owner if, at the time of credit, Holt County Bank was indebted to it. (*Commercial Bank of Pennsylvania v. Armstrong*, 148 U. S. 50; *Bank of*

Clarke County v. Gillman, 30 N. Y. Supp. 1111; *White v. National Bank*, 102 U. S. 658; *National Butchers & Drovers Bank v. Hubbell*, 22 N. E. Rep. [N. Y.] 1031; *Tyson v. Western Nat. Bank*, 26 Atl. Rep. [Md.] 520.)

Until the Omaha bank had actually received the proceeds of the Dorr collection the relation of debtor and creditor would not exist between it and the Moline bank. (*First Nat. Bank v. Bank of Monroe*, 33 Fed. Rep. 408; *Boykin v. Bank of Fayetteville*, 24 S. E. Rep. [N. Car.] 357.)

Isaac E. Congdon and *Hall & McCulloch*, also for plaintiff in error.

James H. McIntosh, contra:

The Holt County Bank was the Omaha bank's agent. (*Kent v. Dawson Bank*, 13 Blatch. [U. S. C. C.] 237; *Strong v. Stewart*, 56 Tenn. 137; *Campbell v. Reeves*, 40 Tenn. 227.)

The Omaha bank's agent collected this note, credited the defendant as instructed, and therefore the defendant is bound for this money to the Moline bank. (*Smith v. Gardner*, 36 Neb. 741; *Pasewalk v. Bollman*, 29 Neb. 519, 528; *Mayer v. Heidelbach*, 123 N. Y. 332; *Howard v. Walker*, 92 Tenn. 452; *Bailey v. Partridge*, 134 Ill. 188; *Pratt v. Foote*, 9 N. Y. 463; *Bolton v. Richard*, 6 Term R. [Eng.] 139; *Marine Bank v. Fulton Bank*, 2 Wall. [U. S.] 252; *People v. City Bank of Rochester*, 93 N. Y. 582; *National Butchers & Drovers Bank v. Hubbell*, 117 N. Y. 384; *Born v. First Nat. Bank*, 123 Ind. 78; *Stephens v. Badcock*, 3 B. & A. [Eng.] 353; *Commercial Bank v. Jones*, 18 Tex. 811; *Myers v. Tyson*, 13 Blatch. [U. S. C. C.] 242.)

HARRISON, C. J.

On April 20, 1893, the defendant in error, hereinafter styled the Moline bank, was the owner of a promissory note in the sum of $1,102.43, executed by David L. Darr, of date November 7, 1892, and due May 7, 1893, payable at Holt County Bank, O'Neill, Nebraska, and on April 20, 1893, sent it to plaintiff in error, hereinafter called

the Omaha bank, for collection. The letter by which it was transmitted was as follows:

"MOLINE, ILLINOIS, April 20, 1893.

"*F. H. Davis, Cashier, Omaha, Nebraska*—DEAR SIR: Herewith find for collection and returns:

"Number. Amount.

"36811 David L. Darr, May 10.....$1,147.25 and Ex.

"Please acknowledge and report by number. Do not hold collections. If dishonored, return at once.

"Yours respectfully, J. S. GILMORE, *Cashier.*"

The Omaha bank acknowledged receipt of the note and on April 26 sent it to the Holt County Bank. The letter with which it was inclosed was in terms:

"OMAHA, NEBRASKA, April 26, 1893.

"*Holt County Bank of O'Neill*—DEAR SIR: I inclose for collection and credit the following items. Correspondents are not authorized to hold collections for convenience of customers. Please return promptly all unpaid paper. Do not credit until paid. Please report by our number. Protest, unless otherwise instructed.

"Yours respectfully, F. H. DAVIS, *Cashier.*

"355136 Darr. No. Pr. Int.....$1,102.43."

The words in the letter, "Do not credit until paid," were in red ink. The note was indorsed as follows:

"Pay F. H. Davis, Cr., or order, for account of First National Bank, Moline, Ills.

"J. S. GILMORE, *Cashier, Omaha.*"

"Pay G. B. Darr, cashier, or order, for collection and remittance to First National Bank, Omaha, Neb.

"F. H. DAVIS, *Cashier.*"

The Moline bank wrote several times to the Omaha bank and inquired in regard to the note and its payment, and urged its return if not paid. The Omaha bank, by letters and telegrams to the Holt County Bank, made inquiries as to what had been done with the note and requested or demanded its return if unpaid. On July

10 the Holt County Bank received of the payee of the note a check signed by one Barrett Scott in the sum of $1,000, and another check or the cash, it is not quite clear which, but probably the former, for the amount of the balance due, stamped the note "paid" and delivered it to the payee, also prepared a deposit slip or credit ticket by which the collection was described, its payment shown, and a credit for its amount indicated to the Omaha bank. This was placed on a spindle as a first entry or statement of the transaction to be thereafter copied or posted in the books of the bank. The Holt County Bank returned to the Omaha bank the letter of the latter which had accompanied the note when sent to the former with the following figures thereon:

"93— 7—10 1102.43
92—11— 7 8%
8— 3 6:2) 88.19.44
44.087
2:3
3:20 18.029
.900
Holt County Bank 63.01
Paid. 1102.43
Jul. 10 10 00
O'Neill, Neb. $1165.44 We credit."

The Holt County Bank did not open its doors for business after July 10, and on July 12, at about 1 o'clock in the morning, passed into the hands of a bank examiner and was afterwards placed in care of a receiver. The Holt County Bank and the Omaha bank had each an account with the other, and there had been such accounts and a course of continuous mutual business transactions between them during four or five years prior and to and inclusive of the time of the matter herein involved. The

Holt County Bank had overdrawn its account with or was indebted to the Omaha bank at the time of its failure. The Omaha bank refused to account to or pay to the Moline bank the amount of the collection, and this action was commenced to recover of it such sum. Its answer to the pleading, in which the claim was asserted, contained some admissions and some denials of matters stated for the Moline bank, and also this further: "Further answering, defendant alleges that on the 10th day of July, 1893, said Holt County Bank failed and immediately was taken under the charge of the state of Nebraska, through its state examiner, James A. Kline; that prior to said failure, after the maturity of said note, defendant repeatedly requested said Holt County Bank to return said note, which was as often refused, and plaintiff notified of the action on the part of said Holt County Bank; that in selecting said Holt County Bank as its correspondent for the collection of said note defendant had every confidence in its reliability and supposed, and had every reason to suppose, that it was in a solvent condition and would duly and properly attend to the collection of said note and 'return it if it were not paid when it became due;' that in accepting from plaintiff said note for collection defendant notified plaintiff that it, defendant, acted only as plaintiff's agent and assumed no responsibility beyond due diligence on its part, the same as on its own paper, and plaintiff consented to defendant's undertaking said collection on said conditions, and knew at the time that defendant could not itself attend to said collection, but would have to transmit said note to a correspondent at O'Neill for collection; that said note has never been paid; that at all times mentioned in petition there was in existence among banks and bankers of the United States, and known to plaintiff, a custom and general usage whereby a city bank having to collect paper payable at town in interior of state would have to transmit for collection such paper to some correspondent bank at the place where the

debtor resided." Of the issues joined there was a trial, during the course of which there was a demurrer to the evidence introduced in support of the defense of the Omaha bank, and a motion for the direction of a verdict in favor of the contention of the Moline bank. These were sustained, the verdict was directed and returned, and an accordant judgment rendered.

In error proceeding to this court it is urged for the Omaha bank that when it forwarded the note to the Holt County Bank for collection it had performed all that could be exacted of it; that the bank of collection became the agent of the Moline bank, and the intermediary bank was not further liable. Had the note been transmitted to the Holt County Bank merely for collection and remittance of the amount received, then the doctrine indicated in the argument might have been successfully invoked and have been governable in the determination of the litigation, for on this subject it has been announced by this court: "Where a bank receives for collection a note or bill payable at a distant point, with the understanding that such collection is an accommodation only, or that it shall receive no compensation therefor beyond the customary exchange, and it transmits such paper to a reputable and suitable correspondent at the place of payment, with proper instructions for the collection and remittance of the proceeds thereof, it will not be liable for the defaults of such correspondent. In such case the holder will be held to have assented to the employment in his behalf of such agents as are usually selected by banks in the course of business in making collections through correspondents, and the correspondent so selected will, in the absence of negligence by the immediate agents and servants of the transmitting bank, become the agent of the holder only." (*First Nat. Bank of Pawnee City v. Sprague*, 34 Neb. 318.) But the Omaha bank did not allow this note to take the regular course of collections and to fall within the established rules relative to such transac-

tions. It withdrew it therefrom by its instructions in the letter of transmittal by which it ordered that it be given a credit for the amount collected at the time of payment. This, conjointly with the further facts of the payment and the credit, established the relations of principal and agent between it and the bank of collection and made it liable to the Moline bank for the amount collected. There were no circumstances or facts of a nature to modify or alter the import and effect of the evidence adduced on the main issues, and there was a clear resultant liability of the Omaha bank to the Moline bank. (Story, Agency [9th ed.] sec. 231*a*, p. 274; *Taber v. Perrot*, 2 Gall. [U. S.] 565.)

It is insisted that there was no payment of the collection to the Holt County Bank shown; that there was such an inference of fraud and unfair dealing exhibited by the evidence on the subject of the payment of the note, or collusion between the bank of collection and the payee, directed against and calculated to affect the rights of the intermediate bank as to render such asserted payment of none effect, to show it a sham and in fact no payment. Whether the defense here sought to be interposed could be made of avail under the issues presented by the pleadings we need not decide. Suffice it to say that the only reasonable conclusions which could be drawn from the evidence were that payment of the note was made, and credit for the amount collected given the Omaha bank in accordance with its instructions.

The charge of the trial court to the jury to return a verdict for the Moline bank was warranted by the facts and the law applicable thereto, was proper, and the judgment must be

AFFIRMED.

IN RE GUS LANGSTON.

FILED JUNE 9, 1898. No. 9949.

1. **Municipal Corporations:** ORDINANCES: BILLIARD TABLES: LICENSE. The legislature, by section 68*, article 2, chapter 13*a*, Compiled Statutes, has conferred power upon cities governed by the provisions of such chapter to enact an ordinance to license and prohibit the keeping of billiard and pool tables for hire or gain, and to provide for the imposing of a fine upon a conviction of a breach of such ordinance, and also imprisonment in the city jail in default of the payment of said fine.
2. **City Ordinances:** INVALID PORTIONS. When a city ordinance contains valid and void provisions, the valid portion will be upheld if it is a complete law in itself, capable of enforcement, and is not dependent upon that which is invalid.
3. **Habeas Corpus:** REVIEW. The writ of habeas corpus is not a corrective remedy, and is never allowed as a substitute for appeal or proceeding in error.

ERROR from the district court of Gage county. Tried below before LETTON, J. *Affirmed.*

Hardy & Wasson, for petitioner.

C. J. Smyth and *F. N. Prout*, for the state.

NORVAL, J.

A complaint under oath was filed with the police judge in the city of Beatrice charging one Gus Langston with unlawfully and willfully keeping for hire on his premises in said city on February 16, 1898, certain billiard and pool tables, and permitting divers persons to play thereon for gain and reward, he, the said Gus Langston, not having a license to keep such billiard and pool tables, contrary to the ordinances of said city. Langston was arrested and tried upon said complaint, found guilty, and sentenced to pay a fine of $10 and the costs of prosecution, and that he stand committed to the city jail until the fine and costs were paid. In default of the payment of such fine and the costs Langston was committed to

jail, whereupon he applied to the district court for a writ of habeas corpus. A general demurrer was sustained by said court to the application, and the writ denied. The record has been removed into this court for review.

It is strenuously insisted that the complaint upon which the petitioner was arrested and convicted did not charge an offense, for the alleged reason it is not a crime, either under the statutes or the ordinance of the city of Beatrice, to keep for hire, within said city, billiard or pool tables. The legislature has made it a crime for the owner or keeper of any billiard table to allow the same to be used for the purposes of gambling or to permit a minor under the age of eighteen years to play thereon; but there is no statute in this state imposing a penalty for keeping a billiard table for the purpose of hire.

The question is presented whether the legislature has delegated the power to the authorities of cities of the class to which the city of Beatrice belongs to pass ordinances making it an offense to keep billiard tables for gain or hire. Section 68*, article 2, chapter 13*a*, Compiled Statutes, declares:

"In addition to the powers herein granted, cities governed under the provision of this act shall have power by ordinance: * * *

"9. To raise revenue by levying and collecting a license tax on any occupation or business within the limits of the city, and regulate the same by ordinance. * * *

"40. To regulate the police of the city, establish and support a night watch, and to impose fines, forfeitures, and penalties for the breach of any ordinance, and also for the recovery and collection of the same, and in default of payment, to provide for confinement in the city prison, or to hard labor in the city, upon streets or elsewhere, for the benefit of the city.

"41. To restrain, prohibit, and suppress unlicensed tippling shops, billiard tables, bowling alleys, houses of prostitution, opium joints, dens, and other disorderly houses and practices, games, and gambling houses, dese-

cration of the Sabbath day, commonly called Sunday," etc.

It is true the provisions quoted do not make it a penal offense to keep a billiard or pool table for hire, but there is no room for doubt that they confer power and authority upon the cities governed by said provisions to enact ordinances licensing billiard tables, and making it a criminal offense to keep such tables for hire without a license so to do. Manifestly such is the import of the section of the statute under consideration. The language is too plain to permit any other interpretation to be placed thereon.

The mayor and council of the city of Beatrice, January 28, 1898, passed an ordinance, which provided, *inter alia*, for the licensing and regulating of the keeping for hire, gain, or reward, billiard, pool, or other game tables, and fixed a penalty for a violation thereof. Section 1 of said ordinance provides that "it shall be unlawful for any person or persons to keep or permit to be kept on his, her, or their premises, or premises occupied by such person of persons, within the limits of the city of Beatrice, for hire, gain, or reward, any ball alley, alleys, bowling alley, or any billiard, pool or other ball table or tables, without first having procured a license so to do as hereinafter provided." Sections 2 and 3 provide the manner of procuring the license and the amount that shall be paid for the same, also fix the sum that shall be paid by the licensee as an occupation tax. By section 4 it is provided that "any person or persons violating any of the provisions of this ordinance shall, on conviction thereof, be fined in any sum not less than $10 nor more than $100 for each offense, and the costs of prosecution, and shall stand committed to the jail of said city until such fine and costs are paid." The foregoing ordinance was duly approved and published, and ever since has been in full force and effect. The petitioner was convicted and sentenced for violating the provisions thereof. The ordinance, as we have seen, was enacted in pursu-

ance of power conferred by statute upon the authorities of the city of Beatrice, and it requires no argument to demonstrate that the ordinance prohibits the keeping for hire or gain, without a license, any billiard or pool table, and prescribes the penalty for violating any of its provisions.

It is urged that the portion of said ordinance is invalid which makes it a crime for one to conduct or carry on a business upon which there is imposed an occupation tax without first paying such tax and procuring a license. Whether the provision relating to the occupation tax is valid or void is not now important, inasmuch as the petitioner was not prosecuted for having failed to pay his occupation tax. Eliminate from the ordinance the clause or provision relating to such tax, and the remainder is a complete ordinance in itself, capable of being enforced, and is valid. (*Magneau v. City of Fremont*, 30 Neb. 843; *Bailey v. State*, 30 Neb. 855.) If, as contended by counsel for petitioner, said ordinance is void, then the ordinance of the city upon the same subject which was in force at the time of the adoption of the one we have had under consideration governs and controls. And by this prior ordinance it was made a crime for any person to keep for hire any billiard, pool, or other gaming table without a license so to do, and prescribed a fine for the violation of the provision of such ordinance. So that, in any view of the case, the complaint upon which Langston was convicted charges a criminal offense under an ordinance of the city of Beatrice. It appears from the averments of the petition for the writ that licenses were issued to petitioner by the authorities of said city under the provisions of said old or earlier ordinance, authorizing him to keep and operate four billiard tables and one pool table in said city until May 1, 1898, and that on January 20, 1898, these licenses were revoked by the mayor and city council. It is argued that the revocation was illegal and such an action did not make the subsequent carrying on of the business by petitioner a crime. Whether the mayor and

council acted within the scope of their authority, or exceeded their powers, cannot be determined in this proceeding. Langston had a license to keep and operate the billiard and pool tables, and whether the same had been lawfully revoked were questions to be decided by the police magistrate, and can be re-examined alone in an appropriate appellate proceeding. The complaint charged a crime; and in a proceeding for a writ of habeas corpus the court will not weigh the evidence to ascertain whether it was sufficient to sustain the conviction. (*Ex parte Fisher*, 6 Neb. 309; *Buchanan v. Mallalieu*, 25 Neb. 201; *In re Balcom*, 12 Neb. 316; *In re Betts*, 36 Neb. 282; *In re Havlik*, 45 Neb. 747; *State v. Leidigh*, 47 Neb. 126; *State v. Crinklaw*, 40 Neb. 759.) The judgment of the district court is

AFFIRMED.

WARREN A. FLOWER V. NICHOLS BROS. ET AL.

FILED JUNE 9, 1898. No. 8103.

1. **Review of Instructions:** ASSIGNMENTS OF ERROR. To entitle instructions to be reviewed they should be separately assigned in the motion for a new trial, as well as in the petition in error.
2. ———: HARMLESS ERROR. A judgment will not be reversed for the giving of an instruction which could not have prejudiced the complaining party.
3. **Review of Rulings on Evidence:** ASSIGNMENTS OF ERROR. The rulings on the admission of testimony cannot be reviewed unless the same were either by general or specific assignments called to the attention of the trial court by the motion for a new trial.
4. **Justice of the Peace:** OFFER TO CONFESS JUDGMENT: COSTS. In an action before a justice of the peace, where the defendant before trial offers in writing to allow judgment to be taken against him for a specified sum, and the plaintiff declines to accept the same, and fails to recover a sum equal to the offer, he is not entitled, under section 1004 of the Code of Civil Procedure, to recover costs subsequently made, but the same should be adjudged against him.
5. ———: ———: ———: APPEAL. An offer to confess judgment duly

made in a cause pending before a justice of the peace need not be renewed in the appellate court to make the provisions of said section 1004 of the Code available to the defendant on final judgment.

ERROR from the district court of Scott's Bluff county. Tried below before NEVILLE, J. *Affirmed.*

T. M. Morrow and *W. J. Richardson*, for plaintiff in error.

O. W. Gardner and *M. J. Huffman, contra.*

NORVAL, J.

Warren A. Flower, plaintiff in error, was plaintiff in the court below. In 1893 the defendants constructed an irrigating ditch or canal over and across his lands. Plaintiff insists that defendants entered upon his land without authority or permission from him so to do, while the defendants maintain that they had the right to construct said ditch, by reason of a contract entered into by them with plaintiff, through his duly authorized agent. This suit was instituted before a justice of the peace to recover damages for the alleged trespass, where defendants offered in writing to permit judgment to go against them in the sum of $27, which offer was rejected by plaintiff, and from the judgment there rendered against him an appeal was prosecuted by plaintiff. A trial to a jury resulted in a verdict and judgment in his favor for $10, but all costs which accrued subsequent to the offer of compromise were taxed against him.

The sixth and seventh paragraphs of the court's charge to the jury are assigned for error in this court. But they cannot be reviewed, because not separately assigned in the motion for a new trial. Six of the eleven instructions given by the court below on its own motion were grouped in a single paragraph in the motion for a new trial. Such an assignment is insufficient, under the repeated decisions of this court, if one of the instructions included in such group was properly given. Errors

in instructions must be separately assigned in the motion for a new trial, as well as in the petition in error. (*Kaufman v. Cooper*, 46 Neb. 644; *McCormal v. Redden*, 46 Neb. 777; *Graham v. Frazier*, 49 Neb. 90; *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb. 68; *Union P. R. Co. v. Montgomery*, 49 Neb. 429.) The third instruction was one of the number embraced in the same assignment, which stated "plaintiff denies that any consent was given or that any agreement was made by which defendants were authorized to construct said ditch across said lands." This portion of the charge was favorable to plaintiff, and manifestly the giving thereof is not reversible error. It follows that the sixth and seventh instructions cannot be reviewed.

The jury were instructed, at the request of defendants, that plaintiff had the right to the use of the water in the ditch or canal by paying to the owner thereof a just and reasonable compensation for such use. Plaintiff could not have been prejudiced by this instruction, as it could not have had any influence with the jury, unfavorable to the plaintiff, in determining the amount of his damages.

Complaint is made of the admission of the testimony of certain designated witnesses for the defendants. These rulings were not assigned for error in the motion for a new trial. Said motion does not even contain the usual assignment of "errors of law occurring at the trial." The only specification made in the motion for a new trial to the admission of the evidence relates solely to the allowing of the defendants to testify on certain subjects. No complaint was made in the trial court, either generally or specifically, of the rulings on the admission of the testimony of any witness for the defense other than the defendants themselves.

The damages allowed by the jury are within the evidence, and the verdict cannot be disturbed for want of an assessment of adequate damages.

It is finally argued that it was reversible error to assess

against plaintiff the costs accruing subsequent to the filing of the offer of compromise made by the defendant. Section 1004 of the Code of Civil Procedure is applicable to causes before justices of the peace, and is as follows: "If the defendant, at any time before the trial, offer, in writing, to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued. But if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer, he cannot recover costs accrued after the offer; but costs must be adjudged against him." The record distinctly shows that prior to the trial before the justice the defendants offered in writing to permit plaintiff to take judgment against them for $27, which offer plaintiff declined to accept, and he only recovered in the district court the sum of $10 damages. Plaintiff having failed to recover a sum equal to the amount of defendants' offer, he was not entitled to recover costs made subsequent to such offer, but the same were properly adjudged against him. (*Elsanger v. Grovijohn*, 29 Neb. 139.) It is true it is not disclosed that the offer to allow judgment was renewed in the district court, but this was not necessary to make the provisions of said section 1004 available to the defendants. (*Kleffel v. Bullock*, 8 Neb. 336; *Underhill v. Shea*, 21 Neb. 154.) No reversible error appearing on the face of the record, the judgment of the district court is accordingly

AFFIRMED.

STATE OF NEBRASKA, EX REL. ELI VALE, V. SCHOOL DISTRICT OF CITY OF SUPERIOR ET AL.

FILED JUNE 9, 1898. NO. 8127.

1. **Schools and School Districts: NON-RESIDENT PUPILS: TUITION.** Non-resident pupils are not entitled, either under the provisions of section 4, subdivision 5, chapter 79, Compiled Statutes, or sec-

tion 3, subdivision 6, of the same chapter, to attend the public school without payment of tuition therefor.

2. **Residence.** One's residence is where he has his established home, and to which, when absent, he intends to return. To effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home. *Berry v. Wilcox*, 44 Neb. 82, and *Wood v. Roeder*, 45 Neb. 311, followed.

3. ———. Where one, who owns a farm which has been his domicile for many years, moves his family and a portion of his furniture to a neighboring city during the fall, temporarily, for the purpose of educating his children, and not with the intention of gaining a new home, and returns to the farm at the end of each school year with his family and furniture, his legal residence remains at the farm.

4. **Evidence:** CENSUS: ENUMERATION. Whether a person has been enumerated in the census taken by a school board, should be established by the production of the proper record disclosing the facts.

5. **Review of Instructions:** EXCEPTIONS. Instructions will not be reviewed where no exceptions were taken to them by the party complaining at the time the charge was given to the jury.

6. ———: REPETITIONS. It is not error to refuse a proper instruction requested by a party to a case, the principles of which have been covered by the charge of the court.

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

Cole & Brown and *R. D. Sutherland*, for plaintiff in error.

Buck & McConnell and *Stubbs & Mauck*, *contra*.

NORVAL, J.

Eli Vale made application to the district court of Nuckolls county for a peremptory writ of mandamus to compel the school board of the school district of the city of Superior to permit the children of relator to attend the public schools of said city without payment of tuition therefor. Issues of fact were joined, upon which a trial to the jury were determined adversely to the relator, and the action dismissed.

Section 4, subdivision 5, chapter 79, Compiled Statutes, relating to the admission by school boards of non-resi-

dent pupils to the public schools, declares that "said board may also admit to the district school non-resident pupils, and may determine the rates of tuition of such pupils and collect the same in advance;" and section 3, subdivision 6, of the same chapter confers upon the district board of any high school district the power "to determine the rates of tuition to be paid by non-resident pupils attending any school in said district." If, therefore, as contended by respondent, relator's children were non-residents of said school district, they were not entitled by law to attend the public schools without payment of tuition, and the writ was properly denied.

It is argued that the verdict is against the evidence. The controversy on the trial in the court below was whether or not plaintiff's children were residents of the respondent school district, and the evidence relating thereto was conflicting. That introduced by the respondents was to the effect that relator owned a farm in Kansas and had resided thereon with his family as a home for many years; that each fall, for two years prior to the bringing of this suit, he moved his family, and a portion of his household goods, to the city of Superior to permit his children to attend the public schools of that city, and at the close of the school year they moved back to their farm in Kansas, where they remained until the beginning of another school year; that while Mrs. Vale and the children were in Superior, relator spent the greater portion of his time on the Kansas farm; that he voted in that state after the removal of his family to Superior, and that the removal to said city was temporary merely, and not for the purpose of making the same the home of relator and his family. The evidence adduced by the relator tended to show that the removal to Superior was for the purpose of making that his permanent home, and that he exercised the rights of franchise by voting at the city election held in Superior in the spring of 1893. This court, in *Berry v. Wilcox*, 44 Neb. 82, defined residence to be the place where one has his es-

tablished home, "the place where he is habitually present and to which when he departs he intends to return. The fact that he may at a future time intend to remove will not necessarily defeat his residence before he actually does remove. It is not necessary that he should have the intention of always remaining, but there must coexist the fact and the intention of making it his present abiding place, and there must be no intention of presently removing." In *Wood v. Roeder*, 45 Neb. 311, it was decided that the word "residence" is synonymous with the term "domicile," and the domicile of a person is the place where he has a fixed and permanent home, and to which, when absent, he has the intention of returning, and "to effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home. The mere residing at a different place, although evidence of a change, is, however long continued, *per se* insufficient." With the foregoing definitions we are content; and applying them to the case at bar, there is no room to doubt that the evidence before the jury was of such a character as to justify a finding that Mr. Vale was a *bona fide* resident of Kansas, although there is in the record other evidence from which the inference could have been drawn that his permanent residence was in the city of Superior. We are satisfied with and approve the finding of the jury on the question of residence of relator's children. The case, as made by the respondents, is almost identical with that of *Gardener v. Board of Education of the City of Fargo*, 5 Dak. 259.

Relator attempted to show on the trial, by his own testimony, that some one in the employ of the school district, in the spring of 1894, enumerated his children as residents of said district, and the offered testimony, on objection, was excluded. The enumeration of persons of school age residing within the district is to be made annually, and reported to the county superintendent of public instruction. The evidence of relator, therefore, was incompetent to show the enumeration of his chil-

dren for school purposes, since the record was the best evidence to establish the fact so sought to be elicited by the questions propounded to relator.

Complaint is made of the giving of the following portion of the court's charge: "The jury is instructed, under the law of the state, that the place shall be considered and held to be the residence of a person in which his habitation is fixed, without any present intention of removing therefrom, and to which, whenever he is absent, he has an intention of returning. A person shall not be considered and held to have acquired a legal residence in any county in this state into which he shall have come for temporary purposes merely, without the intention of making it his residence." This instruction is in accord with the decisions of this court already mentioned. Moreover, the record fails to disclose that any exception was taken to this portion of the charge at the time the same was read to the jury, so if there was any error in its giving, it is not available. (*Roach v. Hawkinson*, 34 Neb. 658; *Levi v. Fred*, 38 Neb. 564; *Glaze v. Parcel*, 40 Neb. 732; *Bloedel v. Zimmerman*, 41 Neb. 695; *City of Omaha v. McGavock*, 47 Neb. 13; *Gravely v. State*, 45 Neb. 878.)

Exception was properly taken to the following instruction, and it is now assigned as being erroneous: "5. By preponderance of proof is meant such proof as satisfies you that the claim of plaintiff as to the residence of his family is true rather than the reverse, and if you should find that in your opinion, from the evidence given, the probabilities for and against the truth of plaintiff's claim are equally balanced, then you should find for defendant." Under the issues presented by the pleadings in this case the burden was upon the plaintiff, or relator, to prove by a preponderance of the evidence that he was at the time the action was instituted a *bona fide* resident of the school district of Superior. If he failed to so establish his residence, or the evidence upon that question did not preponderate in favor of either party, relator

was not entitled to recover. The instruction quoted was a proper exposition of the law on the subject of the burden of proof, and the criticism on the instruction must be overruled.

The court in the seventh instruction charged the jury as follows: "If, however, you find that plaintiff and his family's residence in Superior was only with the object of obtaining temporarily the advantages of schools, and with the intention of returning or going to some other definite place as soon as such purpose should be accomplished, then such purpose of returning or going to some other definite place would, so long as it remained, prevent the acquiring of a residence in Superior." This instruction is criticised. It stated to the jury the proper rule for their guidance. To obtain a legal residence or domicile in Superior at least two things were required of relator, namely, an actual residence there and the intention to make it his place of abode, and the abandonment of his former home in Kansas. This view was submitted to the jury in the foregoing instruction and the other paragraphs of the court's charge, and was applicable to certain phases of the evidence.

As to the instructions tendered by relator which were refused, all that need be said is that so far as they stated correct principles of law they were completely covered by the instructions given by the court on its own motion. It is well settled that it is not reversible error to refuse a proper instruction where the principle sought to be effected by its giving has been clearly and fully covered by the charge of the court. (*Korth v. State*, 46 Neb. 631.) No substantial error appearing from the record, the judgment is

AFFIRMED.

PHILADELPHIA MORTGAGE & TRUST COMPANY, APPELLEE, V. JOHN H. MOCKETT ET AL., APPELLANTS.

FILED JUNE 9, 1898. NO. 8159.

Judicial Sales: OBJECTIONS TO CONFIRMATION: REVIEW. Objections to the confirmation of a sale of real estate not urged in the lower court will be unavailing in this court.

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

Clark & Allen, for appellants.

Wharton & Baird, contra.

NORVAL, J.

This appeal was taken from an order confirming the sale of real estate under a mortgage foreclosure. A single ground urged for a reversal is that a copy of the appraisement was not filed with the clerk of the district court until the day preceding the sale. The copy of the appraisement should have been deposited in the office of the clerk of the court wherein the decree was rendered before the sale was advertised. (*Burkett v. Clark*, 46 Neb. 466; *Creighton University v. Mulvihill*, 49 Neb. 578.) The omission indicated was such a defect in the proceedings as to have wrought a reversal, had the same been seasonably urged; but the objection is for the first time presented in this court in the brief of counsel for appellants, as no motion to vacate the appraisement or to set aside the sale was filed in the court below.

It was argued by the same counsel that it was not necessary to file objections to the report of the sale to make available the point now urged against the proceedings of the sheriff; that section 498 of the Code of Civil Procedure makes it the duty of the court to examine the proceedings and return of the officer under an order of sale, whether objections are filed or not, and confirm

the sale, if found to be regular and made in conformity with law, and refuse confirmation and vacate the sale if the proceedings are defective; and that objections to a judicial sale are only required to be filed when it is sought to raise issues not disclosed by the face of the record. Doubtless, the court may, without objection being filed, vacate a sale where the return of the officer discloses the statutory steps have not been taken by him; but that is an entirely different matter from the question of practice which confronts us. Irregularities and errors in proceedings of courts may be waived by parties failing to take advantage thereof at the proper time, and this is no less true with respect to defects occurring in judicial sales. Whatever may be the rule elsewhere, it is firmly established in the jurisprudence of this state that objections to a confirmation of sale not urged in the trial court are not available on review. (*Johnson v. Bemis*, 7 Neb. 224; *Runge v. Brown*, 29 Neb. 116; *Ecklund v. Willis*, 42 Neb. 737; *Hooper v. Castetter*, 45 Neb. 67; *Burkett v. Clark*, 46 Neb. 466; *Creighton University v. Mulvihill*, 49 Neb. 577.) The order appealed from is accordingly

AFFIRMED.

GEORGE KING V. ALVAH WATERMAN.

FILED JUNE 9, 1898. NO. 8147.

1. **Breach of Executory Contract:** TIME ACTION ACCRUES. An action for a breach of executory contract cannot be maintained upon a mere declaration by the other party, before performance is due, that he does not intend to comply with the terms of his agreement.

2. ———: EVIDENCE. Where an executory written contract for the conveyance of real estate requires the payment of a specified amount of the consideration in cash at the date of such contract, and by virtue of an independent agreement between the parties a demand promissory note of the vendee is accepted as for and in lieu of the cash payment, the refusal of the vendor and the payee to accept the sum due on said note will not constitute a breach of the terms of said executory contract.

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

Brome, Burnett & Jones and *Martin Langdon*, for plaintiff in error.

C. J. Smyth and *T. J. Mahoney, contra.*

NORVAL, J.

On June 13, 1893, Alvah Waterman entered into a written agreement with George King for the sale to the latter of 240 acres of land situate in Douglas county. The following is a copy of said contract:

"Articles of agreement, made and entered into this 13th day of June, 1893, by and between Alvah Waterman, of Elkhorn precinct, of Douglas county, Nebraska, of the first part, and George King, of Wisner, Nebraska, of the second part, witness:

"Alvah Waterman, of the first part, does hereby contract and agree with George King, of the second part, to sell to him the land described as follows:

"The southeast quarter (SE. ¼) of section No. twelve (12), in township No. sixteen (16), range No. ten (10) east. Also the west one-half (½) of the northwest quarter (NW. ¼) of section No. thirteen (13), township No. sixteen (16), range No. ten (10) east, being in all two hundred and forty (240) acres of land, at the price of fifty-five ($55) dollars per acre, making the total price thirteen thousand two hundred (13,200) dollars, to be paid as follows:

"One thousand (1,000) dollars on this 13th day of June, 1893, the receipt whereof is hereby acknowledged, and eight thousand ($8,000) dollars on or before Feb'y 1st, 1894, and the remaining forty-two hundred dollars ($4200) to be secured by mortgage on said land.

"Alvah Waterman does hereby agree and bind himself and his heirs and assigns to make and execute unto George King a warranty deed, as soon as the said pay-

ment of Feb'y 1st, 1894, of eight thousand ($8,000) dollars is made, to said land, taking a mortgage for balance unpaid, the ownership and title to remain in Alvah Waterman until the above described payments are made and mortgage given.

"George King, party of the second part, does hereby agree to the above writings: he agrees to pay Alvah Waterman, his heirs or assigns, the price of fifty-five ($55) dollars per acre for the land heretofore described of two hundred and forty acres, making a total price of thirteen thousand two hundred ($13,200) dollars, and agrees to pay one thousand ($1,000) cash, eight thousand ($8,000) dollars on or before the first day of February, 1894, and further agrees to give to Alvah Waterman a mortgage upon all said land for the remaining unpaid principal, when deed shall be delivered to him. The remaining unpaid principal to be paid as follows: Two thousand ($2,000) dollars payable in three years from date given, and bearing interest at the rate of seven (7) per cent, payable annually, and secured by mortgage on said land; twenty-two hundred (2200) dollars payable in five years from date given, and bearing interest at the rate of seven (7) per cent, payable annually, and secured by mortgage on said land hereto before described.

"To all of the above writing we, and each one of us, hereby and hereto agree, and set our hands, this 13th day of June, 1893.

"Witness: ALVAH WATERMAN.
"J. M. BRUNER. GEORGE KING."

On December 12, 1893, King instituted this action to recover from Waterman damages for the alleged breach by the latter of the conditions of said contract. The making of this agreement is admitted by the answer, but the defendant in his pleading denied that the stipulations of said contract had been broken by him. The jury, under an imperative instruction by the trial judge, returned a verdict for the defendant, and the unsuccessful party has prosecuted error from the judgment entered thereon.

The question presented is whether there had been any breach of contract by Waterman at the time the suit was brought in the court below. It will be observed that by the stipulations of the parties, set out in the agreement under consideration, the defendant was not required to convey before plaintiff had made to Waterman a certain payment of $8,000, and given him a mortgage on the land sold for $4,200, the balance of the unpaid purchase-money, which payment was required to be made and mortgage executed on or before February 1, 1894. This suit was commenced in December, 1893, nearly two months before the final limit of time designated by the parties for the performance of the contract, without plaintiff having paid or tendered to the defendant the said sum of $8,000, or executed the mortgage aforesaid, so that the suit was prematurely instituted, unless a right of action had then accrued by reason of the matters hereafter to be stated.

The contract provided that the first payment to be made thereon by King should be $1,000 in cash. It is undisputed that of this amount only $300 was paid in money at the time the agreement was signed, and that Waterman accepted, in lieu of the balance of said $1,000, the demand note of plaintiff for $700, which defendant left with Mr. Bruner, a banker at Elkhorn, for collection. While a portion of the lands agreed to be conveyed was occupied by Waterman and his wife as their homestead, yet the agreement was signed by the husband alone. Mrs. Waterman informed King on July 15, two days after the date of the contract, that she would not execute a deed to the premises, and subsequently on the same day the defendant stated to plaintiff that the neighbors had been talking to his wife and induced her to refuse to sign the deed, and by reason of the premises he, Waterman, expressed his inability to carry out the contract. King informed the latter that if he broke the contract he would insist upon the payment of the damages sustained by reason of such failure

of defendant to perform. Later, during the same day, King tendered to Mr. Bruner the amount of the $700 note, which the latter held for collection. Bruner, under instructions from defendant, declined to receive the money, and shortly thereafter Waterman offered to return said note and $300 in money to King, which he refused to accept. Several subsequent conversations were had between plaintiff and defendant relative to the sale of the land, during which Waterman informed King, in effect, that he was willing to comply with his stipulations in the contract, but as Mrs. Waterman had refused to join him in the conveyance, a good title could not be given. On October 3, 1893, the defendant notified the plaintiff that his note for $700 was at the bank in Elkhorn awaiting payment, and that Waterman was ready to carry out the provisions of the contract of June 13. King refused to pay the note or comply with his stipulations in said agreement. On February 1, 1894, the defendant tendered to plaintiff a deed of general warranty to the premises, executed by Waterman and his wife, which was deposited with the clerk of the district court, to be by him delivered to plaintiff upon his complying with the terms and conditions of the contract by him to be kept and performed.

We are fully persuaded that the facts in the case at bar bring it within the principle announced in *Carstens v. McDonald*, 38 Neb. 858, where it was stated: "A mere declaration by a party to a contract that he does not intend to carry out the terms thereof before performance is due will not constitute a breach, so as to authorize the other to at once maintain an action; for the party, at any time before the period fixed for performance, has the right to recant and comply with his agreement; but if he fails to withdraw his declaration before the time comes for performance, it will excuse the default of the other party." (See *Terry v. Beatrice Starch Co.*, 43 Neb. 866.) The doctrine stated is sustained by the decisions from other courts, and the correctness of the rule, as an ab-

stract proposition of law, is conceded by counsel for plaintiff; but he argues that it is not applicable to the case in hand, since the proofs disclose that there was an unqualified refusal by the defendant to comply with the contract. As we read and construe the evidence contained in the bill of exceptions, there was no absolute and unqualified declaration on the part of Waterman that he would not perform the contract according to its terms and at the stipulated time for performance. All that can be claimed from the proofs is that the defendant merely expressed a doubt of his ability to carry out his agreement on account of the refusal of his wife to execute the deed; that subsequently, and before the time for performance had arrived, plaintiff was advised by Waterman that he and his wife would make the conveyance of the lands as agreed. The deed was duly executed and tendered at the period fixed by the parties for performance. There had been no breach of the contract by Waterman at the time this action was commenced.

It is urged that the failure to receive the payment of the $700 note constituted a breach of the contract. We do not so consider it. This note was no part of the agreement for the sale of the land, but was accepted merely in lieu of that amount of cash, and having been so received the stipulation for the first payment of $1,000 was fully satisfied. Suppose plaintiff had failed to pay the note, but had complied with every provision in his contract to be performed by him, would the failure to pay the note have prevented him from enforcing specifically the contract against the defendant? To state the proposition is to evoke a negative answer. This shows that the declination at one time to accept the money on the note did not constitute a breach of the contract of sale. The judgment is

AFFIRMED.

OMAHA LIFE ASSOCIATION V. FRANK W. KETTENBACH, ADMINISTRATOR.

FILED JUNE 9, 1898. No. 9966.

1. **Law of the Case:** REVIEW. "The determinations of questions presented to this court in its review of the proceedings of an inferior tribunal become the law of the case, and, ordinarily, will not be re-examined in a subsequent review of the proceedings of the inferior tribunal on a second trial, or hearing of the cause." (*Coburn v. Watson*, 48 Neb. 257.)
2. **Special Findings:** GENERAL VERDICT: JUDGMENT. To entitle a party to a judgment on the special findings of a jury, where the general verdict is against him, such findings must establish all the ultimate facts from which his right to a judgment results as a necessary legal conclusion.

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

Byron G. Burbank, for plaintiff in error.

Macfarland & Altschuler, contra.

SULLIVAN, J.

This case was here before. An opinion reversing the judgment of the district court and remanding the cause for another trial will be found reported in 49 Neb. 842. There was, also, a supplemental opinion denying a rehearing, which appears in 50 Neb. 846. The application for insurance contained a large number of categorical answers to questions propounded by the insurer to the insured for the purpose of determining the advisability of issuing the policy in suit. In relation to these answers the application provides: "And I do hereby declare and agree that each and every statement and answer contained in this application is material to the risk, and I do hereby warrant all the answers and statements, and each and every one of them contained herein, whether written by my own hand or not, to be full, complete, and

true, and it is agreed that this warranty shall form the basis and shall be a part of the contract between me and said association, and that it is the consideration of the contract hereby applied for. I do further agree that if any of the answers or statements made and contained herein are not full, true, and complete, or that if the same, or any of them, whether made in good faith or otherwise, are in any respect untrue, then said policy and this contract shall be null and void." The policy itself contains this clause: "If any statement made in the application for this policy of insurance is in any respect untrue, then, and in each and every such case, the consideration of this contract shall be deemed to have failed, and this policy of insurance shall be null and void." On the second trial the jury returned a general verdict in favor of the plaintiff, together with the following special findings of fact:

"1. Were the statements and answers as written in the application for the policy in this suit made by the deceased, William F. Kettenbach? Answer: Yes.

"2. Were the statements and answers in said application for said policy made intentionally by the said William F. Kettenbach. Answer: Yes.

"3. Did the said William F. Kettenbach, within ten years prior to the date of said application, January 15, 1891, consult and obtain medical treatment of Dr. O. S. Runnels, or of any medical man other than Dr. Morris? Answer: Yes.

"4. Did Dr. Runnels treat professionally the said William F. Kettenbach, deceased, in the years 1887, 1888, and 1889? Answer: Yes.

"5. Did the said William F. Kettenbach have the disease of exophthalmic goitre in 1887, or in 1888, or 1889? Answer: No.

"6. Did the deceased, William F. Kettenbach, at the date of said application have the disease of exophthalmic goitre? Answer: No.

"7. Did the Pythian Life Association, which is the

predecessor of the defendant, the Omaha Life Association, rely and act upon the statements and answers in said application for said policy by issuing the policy in suit to the said William F. Kettenbach, deceased? Answer: Yes.

"8. Did the said William F. Kettenbach, deceased, die of the disease of exophthalmic goitre? Answer: Yes.

"9. Did the said William F. Kettenbach, within three years prior to 1891, have a disease of the genito-urinary organs? Answer: Yes.

"10. Did Dr. Runnels treat professionally the said William F. Kettenbach in 1887, 1888, or 1889, for impotency? Answer: Yes.

"J. W. COBURN, *Foreman.*"

Upon these findings the defendant moved for judgment. The court denied the motion and gave judgment for the plaintiff on the general verdict.

The question presented for decision is whether the facts established by the special verdict are conclusive of defendant's right to a judgment in its favor. We think they are not. Speaking of the essential elements of a good defense to the action it was said in the former opinion: "That in order for such representations to constitute a defense to this action it is incumbent upon the insurance company to plead and prove that the statements and answers were made as written in the application; that they were false; that they were false in some particular material to the insurance risk; that they were made intentionally by the insured; and that the insurance company relied and acted upon such statements; and these were questions of fact and not of law."

In the opinion on the motion for a rehearing this language is used: "The defense of the insurance company to this action proceeded upon two theories: (1) That the statements made by the assured in his application were warranties; and (2) that if the statements made were representations they were false. In the opinion filed in the case we held that the statements of the assured in

the application were representations, and not warranties, and that in order for the falsity of the representations made by the assured to constitute a defense to the action it was incumbent upon the insurance company to plead and prove that the statements and answers alleged to have been made by the assured in his application were actually made by him as therein written; that these statements were false; that they were false in some particular material to the insurance risk; and that the insurance company relied and acted upon such statements. After re-examination of the case we adhere to all the propositions of law already announced." On the first trial it was conclusively proven that the assured in his application falsely represented that he had never had a disease of the genito-urinary organs, and that he had not, within ten years prior to the date of the application, consulted or obtained the advice of any medical man other than Dr. Morris. Because these facts were so proven the trial court peremptorily instructed the jury to find for the company, and a judgment was accordingly entered in its behalf. That judgment this court reversed, holding, in the language above quoted, that the defendant could not succeed in the action without a finding of fact by the jury that the representations were false in some particular material to the risk. The decision thus rendered became the law of the case, and the trial court, acting in obedience to its authority, ignored the special findings, because they lacked one element which this court adjudged to be essential to a complete defense. This action of the court was entirely correct, and its judgment will be affirmed without re-examining the propositions settled by the former decision. In the case of *Hale v. Ripp*, 32 Neb. 259, a verdict was returned for the defendant pursuant to a peremptory direction of the trial court. A judgment rendered on this verdict was reversed on the ground that there was an issue of fact for submission to the jury. After a verdict for the plaintiff and a judgment thereon

the case came again to this court for review, the defendant insisting that the evidence on both trials was the same, that there was no disputed question of fact in the case, and that the court erred in taking the verdict of the jury and basing a judgment thereon. Answering this argument the present chief justice, in *Ripp v. Hale*, 45 Neb. 567, said: "The district court in the second trial of the case obeyed the direction of this court as embodied in its opinion rendered at the former hearing, and its action in so doing was the only correct and proper one, and in so far as the former adjudication of the case in this court related to the facts developed during the trial, and their sufficiency to require a submission of the issues to the jury for their consideration and determination, it will not now be re-examined, but will be adhered to. The rule of law which was announced in the former decision as being applicable to the facts became the law of the case and must now be allowed to govern in its disposition, and, viewed in the light of such rule, the evidence was sufficient to sustain the verdict rendered." In rendering judgment in this case it is quite evident that the learned judge who presided at the second trial was guided by, and acted in strict conformity with, the law of the case as declared in the former opinion. There is no error in the record and the judgment is

AFFIRMED.

IRVINE, C., dissenting.

JACKSON BRADLEY V. AUGUSTUS B. SLATER.

FILED JUNE 9, 1898. No. 9977.

1. **Opening Judgments:** POWER OF COURT. In furtherance of justice the district court may vacate or modify its own judgments at any time during the term at which they were rendered.

2. **Assignments of Error:** NEW TRIAL. An assignment in a petition in error that "the court erred in overruling the motion for a new trial" cannot be considered when the motion is based on several distinct grounds.

3. **Vacating Judgment:** REVIEW OF ORDER. A judgment of the district court was vacated during the term at which it was rendered in response to a motion assigning as grounds therefor, (1) accident and surprise, (2) irregularity in the proceeding, (3) misconduct of the prevailing party, and (4) insufficiency of the evidence. The moving party failed to establish the existence of any of the first three grounds assigned in his motion. The evidence taken on the trial was not preserved in a bill of exceptions. *Held*, That the reason for the court's action not appearing, it will be presumed the evidence was insufficient to support the judgment and that the motion was sustained for that reason.

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

Warren Switzler, for plaintiff in error.

Duffie & Van Dusen, contra.

SULLIVAN, J.

This is a proceeding in error brought to review the action of the district court of Douglas county in setting aside a judgment rendered in favor of the plaintiff and in refusing to set aside a verdict subsequently returned in favor of the defendant. This is the second appearance of the case in this court. When it was here before a judgment in favor of the defendant was reversed for want of sufficient evidence to support it, and the cause remanded for further proceedings. (*Bradley v. Slater*, 50 Neb. 682.) The mandate was filed in the office of the clerk of the district court on April 6, 1897, and the same day, on the motion of the plaintiff, and by direction of the court, it was spread upon the journal and the cause entered on the bar and trial dockets for the next term, which commenced May 3, 1897. It was also listed on the judge's bulletin of cases and published in the Law and Mercantile Reporter, to which defendant's attorneys were subscribers. On the first day of the May term the case was regularly reached for trial and tried in the absence of defendant and his counsel. The plaintiff had

judgment. On June 4, 1897, but before the adjournment of the May term, the defendant filed a motion for a new trial, which was sustained by the court. The grounds of the motion were: "(1.) Said judgment was obtained by accident and surprise which ordinary prudence could not guard against. (2.) Irregularity in the proceedings of the court by which the defendant was prevented from having a fair trial. (3.) Misconduct of the prevailing party. (4.) The judgment is not supported by sufficient evidence and is contrary to law."

The evidence introduced on the hearing of the motion relates entirely to the first, second, and third assignments, and is, we think, clearly insufficient to sustain any of them. The ground upon which the court sustained the order, however, is not disclosed, and we are warranted in presuming that it was for the reason alleged in the fourth assignment. The evidence upon which the judgment was based is not before us and we are, consequently, in no position to judge of its adequacy. If the trial court underestimated its probative value, that fact is not established by the record. We are, therefore, without affirmative proof that error was committed in awarding a new trial.

That the motion was not filed within the time limited by the statute is a matter of no importance. Courts of general jurisdiction are endowed by law with ample discretionary power to vacate or modify their own judgments at any time during the term at which they were rendered upon being satisfied that such action will be in furtherance of justice. (*Smith v. Pinney*, 2 Neb. 139; *Volland v. Wilcox*, 17 Neb. 46; *Harris v. State*, 24 Neb. 803; *Symns v. Noxon*, 29 Neb. 404; *Bigler v. Baker*, 40 Neb. 325.)

It is argued that the verdict returned in favor of the defendant is not sustained by sufficient evidence, and that the court erred in refusing to set it aside and grant a new trial of the cause. The record does not properly present this question for decision, and we do not decide it. There are twenty-nine assignments of error in the

motion for a new trial, while the only assignment in the petition in error, in addition to the one already considered, is the following: "The court erred in overruling the motion for a new trial filed by the plaintiff on the 4th day of October, 1897, and erred in refusing to set aside the verdict rendered on October 2, 1897." It is indisputably settled by the decisions of this court that such an assignment does not indicate with practical definiteness which of the numerous reasons assigned in the motion for a new trial is now relied on as a ground for reversal. (*Glaze v. Parcel*, 40 Neb. 732; *City of Chadron v. Glover*, 43 Neb. 732; *Stein v. Vannice*, 44 Neb. 132; *Sigler v. McConnell*, 45 Neb. 598; *McCord v. Hamel*, 52 Neb. 286; *Phœnix Ins. Co. of Hartford v. King*, 52 Neb. 562; *Weber v. Kirkendall*, 44 Neb. 766.) The judgment of the district court is

AFFIRMED.

CITY OF OMAHA V. STANDARD OIL COMPANY.

FILED JUNE 9, 1898. No. 8105.

Municipal Corporations: ASSIGNABILITY OF CONTRACT FOR LIGHTING STREETS. A contract with a municipal corporation for lighting its streets, containing a stipulation that the contractor shall not assign such contract without first obtaining the consent of the city indorsed thereon in writing, is not assignable, either in whole or in part; and moneys due or to become due thereunder, whether payable as an entirety or in installments, cannot be assigned without first obtaining such written consent.

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

E. J. Cornish, for plaintiff in error.

Hall, McCulloch & Clarkson, contra.

SULLIVAN, J.

On January 29, 1892, the Metropolitan Street-Lighting Company, hereafter called the lighting company, entered

into a written contract with the city of Omaha to light certain of its streets with gasoline lamps for the period of two years. The consideration was to be paid in monthly installments. The Standard Oil Company, the plaintiff herein, furnished the necessary oil, and, at one time, loaned a considerable sum of money to the lighting company to enable it to carry out its contract with the city; and to secure an indebtedness thus incurred the lighting company, on the 14th day of October, 1892, assigned to the plaintiff the money due under the contract for that month. Subsequently the lighting company made another assignment of a portion of the same fund to some of its laborers in payment of wages; and the city authorities, claiming to have no notice of the first assignment, paid the amounts called for by the second. The plaintiff then commenced this action, which resulted in a finding and judgment against the city for the whole amount due the lighting company under the contract for the month of October. The city prosecutes error to this court and urges a reversal of the judgment on various grounds, only one of which we find it necessary to consider.

It may be conceded that, while a contract right to render personal services cannot be assigned without the consent of the person to whom the services are due, the right to receive pay for such services when rendered stands upon a different ground and is assignable in the absence of a statute or stipulation in the contract forbidding it. The authorities, we believe, are in entire accord upon this proposition. (Clark, Contracts 531; 3 Pomeroy, Equity Jurisprudence [1st ed.] sec. 1280; 2 Am. & Eng. Ency. Law [2d ed.] 1027; *Ryan v. Douglas County*, 47 Neb. 9; *Perkins v. Butler County*, 44 Neb. 110.) And the validity of such an assignment, it seems, does not at all depend upon the money being presently due and payable. If the fund has a potential existence—that is, if it will become due in the future under the terms of a contract already made—the assignment vests an

equitable title thereto in the assignee subject to all prior charges. (*Brill v. Tuttle*, 81 N. Y. 454; *Leahy v. Dugdale*, 27 Mo. 437; *Brown v. Dunn*, 50 N. J. Law 111; *Hawley v. Bristol*, 39 Conn. 26; *Devlin v. Mayor*, 63 N. Y. 8; *Cutts v. Perkins*, 12 Mass. 206.) So the assignment of the October installment was valid and the plaintiff acquired an equitable property therein, unless the right to assign was prohibited by the contract itself, which contained the following provision: "It is further agreed between the parties hereto that the party of the second part shall not assign this contract without first obtaining the consent of the first party indorsed hereon in writing." Counsel for the plaintiff insist that this stipulation was directed against the assignment of the obligation resting on the lighting company to perform the work required by the contract, and was not intended to prevent an assignment of the money to be earned thereunder. That view was accepted by the trial court, but we think it is not warranted by a just interpretation of the language employed. The inhibition, it will be noticed, is not alone upon the assignment of the obligation to light the streets, but upon the assignment of the contract. What was the contract between the parties? Certainly one of its important elements was the duty laid upon the city to make monthly payments to the lighting company for the services rendered, and another was the correlative right of the company to receive such payments. The assignment of the October installment, if valid, not only transferred to the plaintiff a right secured to the lighting company by the contract, but affected, as well, an important obligation on the part of the city. It compelled the city to deal with strangers and to determine at its peril which of the contesting claimants was entitled to the fund. This may have been one of the very contingencies contemplated by the city and against which it sought to provide by making the contract non-assignable. Another object in view might have been to prevent the company from losing interest in the performance of the contract

by divesting itself of all beneficial interests therein. But it is needless for us to speculate on the motives for the city's action. It is enough for us to know—whatever its reasons may have been—that it has, in plain language, stipulated against an assignment of the contract. That stipulation is valid and must be enforced. To hold that it covers some, but not all, of the rights and obligations arising out of the contract would be, it seems to us, an inexcusable perversion of its terms. In the case of *Burck v. Taylor*, 152 U. S. 634, where a contract with the state, for the erection of a public building, was made non-assignable by express stipulation, it was held that an attempted transfer of an interest in such contract, without the state's consent, was ineffectual, except, perhaps, to give the assignee a right of action against the contractor for a share of the profits. In the course of the opinion delivered by Brewer, J., it is said: "It is unnecessary to hold that the contractor might not be personally bound upon his promise made before the performance of the contract to transfer a portion of his profits to any third party. Whatever liabilities he might assume by such a promise, it would be an independent promise on his part, and would not let the promisee into an interest in the contract. It would give him no right to take part in the work, no right to receive anything from the state, and all that it would give him would be an independent right of action against the contractor for the failure to pay that which he had promised to pay; the contract remaining all the time the property of the contractor, subject to disposal by and with the consent of the state. To him alone the state would remain under obligations, and with him alone would the state be required to deal. In no way, by garnishment, injunction, or otherwise, could the promisee prevent the state from carrying out the entire contract with the contractor, paying to him the whole consideration, and receiving from him a full release." Counsel have referred us to no case, and we have found none, in which it has been held that an express

stipulation against the assignment of a contract, like the one here in question, should be construed as forbidding a transfer of the burdens imposed but not of the accruing benefits. In *Bank of Harlem v. City of Bayonne*, 48 N. J. Eq. 246, 21 Atl. Rep. 478, it was decided that an assignment of money coming due under a sewer contract with a city was valid, although the parties had made the following stipulation: "And the party of the second part further agrees that he will give his personal attention constantly to the faithful performance of said work, and that he will not assign nor sublet the same, but will keep the same under his control." That case, we think, is not an authority for plaintiff's contention because the language used clearly limits the prohibition to an assignment of the work and does not touch the contract as an entirety.

Our conclusion is that the attempted assignment to the plaintiff vested in it no right of action against the city. The judgment is, therefore,

REVERSED.

LIFE INSURANCE CLEARING COMPANY V. MARGUERITE ALTSCHULER.

FILED JUNE 9, 1898. No. 7727.

1. **Payment:** APPLICATION. One who receives and appropriates to his own use money sent him for a particular purpose will be held to have received and retained it in accordance with the purpose for which it was sent.

2. ———: BAILMENT. Money sent to a person as a payment cannot, without the consent of the sender, be received and held as a bailment.

3. **Life Insurance:** ASSURED'S HEALTH: EVIDENCE. Evidence examined, and *held* sufficient to warrant the jury in finding that the assured was in good health when the policy in suit was delivered and the first premium paid.

4. ———: ACCEPTANCE OF PREMIUM: FRAUD: PLEADING. A defendant, in an action on a policy of life insurance, which claims that it

was induced to accept payment of a past-due premium by the fraud of the beneficiary named in the contract, must, to avail itself of that defense, plead and prove the fact.

5. **Continuance:** ABSENT WITNESSES. There was no prejudicial error in denying an application for a continuance in order to secure the testimony of witnesses who afterwards appeared and testified at the trial.

6. ———: ———. An application for a continuance grounded on the absence of a material witness is properly denied where the party making the application has not been diligent in attempting to procure the testimony or compulsory attendance of such witness.

7. ———: ———: HARMLESS ERROR. Where it appears that the evidence of an absent witness, if given on the trial, could not possibly change the result, an order refusing a continuance to obtain his testimony, if erroneous, would not be prejudicially so.

REHEARING of case reported in 53 Neb. 481. *Former decision sustained.*

Tibbets Bros., Morey & Ferris, for plaintiff in error.

M. A. Hartigan, contra.

SULLIVAN, J.

An opinion heretofore filed in this case will be found reported in 53 Neb. 481. On the application of the defendant a rehearing was allowed and the cause again submitted on printed briefs and oral arguments.

The principal reason urged for a reversal of the judgment is that the contract of insurance was never in force. Printed in red ink on the face of the policy appears the following condition precedent:

"This policy shall not take effect until the first premium shall have been paid to the company or to some person authorized by the company to receive it while the said insured is in good health and in accordance with the health certificate and premium receipt accompanying the same. RUSSELL R. DORR, *President.*"

The plaintiff admitted that no health certificate was furnished at any time, but insists that the requirement

in regard thereto was waived. In the former opinion it was said that the question of waiver was submitted to the jury on conflicting evidence and that their finding in favor of the plaintiff would not be disturbed. The statement is not entirely accurate. A closer inspection of the record has convinced us that the evidence upon this point is not in conflict. It is all one way in relation to certain facts, which we think conclusively establish a waiver. By the terms of the policy the second premium, amounting to $53.95, became due and payable on July 5, 1893. It was not paid at that time, but on the 4th of the following month Mrs. Altschuler procured a draft for the amount and sent it to the home office of the company at St. Paul. The draft was received on August 6, and immediately cashed, and, by the direction of the president of the company, a receipt in due form, signed by him, and bearing date of July 5, was sent to Mrs. Altschuler. The company had previously directed its agent at Grand Island to collect this premium. On August 14 Altschuler died and on the 18th of the same month the defendant purchased a draft and sent it to the plaintiff, informing her that the policy on her husband's life had never been in force, and that the premium paid by her had been kept on deposit while awaiting the delivery of the health certificate mentioned in the contract. But this money was not sent to be held on deposit. The letter accompanying the remittance stated in plain language that it was sent as payment of the second installment of the premium; and the defendant did not receive it on deposit. It received it as payment, for it so states in its receipt. The recital of that document is that the money was received for "the quarterly premium due July 5, 1893, * * * on policy No. 2143, insuring the life of Sigmund Altschuler." Indeed, according to a familiar principle of law the defendant could not have retained the money except on the terms and for the purpose it was tendered. By the mere act of converting plaintiff's draft into money and retaining

the same the defendant accepted it as payment of the premium then due. The idea of holding it as a deposit was manifestly an afterthought suggested by information of Altschuler's death. It is then indisputably established that, with full knowledge of the fact that the health certificate had not been furnished, the company collected and retained, until after the death of the assured, the premium which became due on July 5, 1893. Having done so—having treated the contract as valid for the purpose of collecting premiums—it cannot now, when sued by the beneficiary, insist that it was void from the beginning. The company, with full knowledge of all the facts, dealt with the assured, during his lifetime, on the assumption that his contract of insurance was in force, and it cannot, now that he is dead, be heard to assert that he was deluded by its agents into purchasing and paying for a still-born policy. To hold that the company could escape liability under such circumstances would shock the crudest sense of justice.

But the defendant contends that a waiver of the health certificate did not include a waiver of the condition in regard to the state of Altschuler's health at the time the first premium was paid. Conceding that to be true, it does not follow that the verdict is without sufficient support in the evidence. It is claimed that Altschuler died of scirrhosis of the liver. At the instance of the company's agent he submitted to a medical examination on March 25, 1893. At that time the examiner found his liver free from any suspicion of disease and that he was generally in a fair condition of health. The same physician testified at the trial that he considered the assured a fair risk when the examination was made. About April 7, 1893, the policy was personally delivered by the company's representative who at the same time collected the first premium. Altschuler went about his business in the usual way until the latter part of the following July, when he became sick with the malady of which he afterwards died. From these facts the jury might well

infer that he was in good health at the time the policy was delivered and the first premium paid.

It is claimed that the company was induced to accept the second premium by false representations of Mrs. Altschuler and that such acceptance was, therefore, ineffective as a waiver of the health certificate. It is said in the former opinion that "neither fraud nor misrepresentation was pleaded with reference to the acceptance of this payment." The accuracy of this statement, although vigorously assailed in defendant's brief, is fully sustained by the record. It is distinctly alleged in the petition that the second premium was paid during the lifetime of Sigmund Altschuler. The company denied this averment and characterized the alleged payment as a mere deposit. It took the ground that the transaction with Mrs. Altschuler was, in legal effect, a bailment. Had it desired to present an issue of fraud for trial it should have pleaded by way of confession and avoidance —it should have admitted the fact and avoided its legal consequence by showing that the plaintiff had by artifice misled it.

Another ground upon which defendant demands a reversal of the judgment is the failure of the trial court to grant a continuance to enable it to procure the attendance of three absent witnesses. There was no error in denying the application. Two of these witnesses were actually present and testified at the trial. The testimony which it is claimed the other would give related to the alleged waiver of the health certificate by delivering the policy and collecting the first premium. In view of the fact that a waiver was conclusively established by the payment of the second premium this evidence could not have strengthened the company's defense. Besides no sufficient effort had been made in advance of the trial to secure the testimony or compulsory attendance of any of these witnesses. Defendant relied entirely on a promise that they would be in court when needed, and, consequently, assumed the risk of that promise being

broken. The action of the court was well within the limits of sound judicial discretion.

We do not see any sufficient reason for receding from the conclusion heretofore announced, and the judgment will, therefore, stand

AFFIRMED.

HOME FIRE INSURANCE COMPANY OF OMAHA V. HENRY T. DECKER.

FILED JUNE 9, 1898. NO. 8173.

1. **Trial**: OPENING AND CLOSING: CHANGE OF THEORY: NEW TRIAL. A party who has induced the court to permit him to open and close the trial by representing that there was only one issue of fact for decision cannot, after an adverse verdict, recede from his position and obtain a new trial on the ground that there were other questions of fact which should have been submitted to the jury.

2. **Pleading**: DEFENSES. A defendant may plead as many grounds of defense as he may have, provided they are not so repugnant that if one be true another must be false.

3. **Insurance**: INCONSISTENT DEFENSES. An answer in an action on a contract of insurance which alleges a failure to furnish proofs of loss and that the plaintiff caused the premises to be burned does not present inconsistent defenses.

4. **Evidence**: INSTRUCTIONS. An instruction admonishing the jury to consider the evidence of an accomplice "with great care and caution," without giving them a definition of that phrase, is not erroneous.

5. **Instruction**: OFFER. The giving of an instruction which states a correct and pertinent proposition of law is not error, and a party who complains that such instruction lacks explicitness should himself formulate and tender a better one.

6. **Failure to Mark Instruction "Given"**: HARMLESS ERROR. The failure to write the word "given" on an instruction read to the jury is not sufficient grounds for reversing a judgment when such failure was not prejudicial to the losing party.

7. **Conflicting Evidence**: REVIEW. Where the verdict is the result of substantially conflicting testimony, a judgment based thereon will not be reversed on the ground that the evidence is insufficient.

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

B. G. Burbank and *Jacob Fawcett*, for plaintiff in error.

E. E. McGintie and *Hastings & Sands, contra.*

SULLIVAN, J.

On April 19, 1892, the Home Fire Insurance Company of Omaha issued a policy of fire insurance to Henry T. Decker covering an opera house situated in the village of Dorchester, in Saline county. In August of the same year the building was completely destroyed by fire. The company declined to adjust the loss, and this action was thereupon commenced to recover the amount for which the policy was issued. The petition admitted that the proofs of loss had not been furnished as required by the contract, but alleged that the condition in relation thereto had been waived. The company filed its answer, in the first paragraph of which it denied generally the allegations of the petition. In the second paragraph it alleged that the plaintiff had not complied with the conditions of the policy of insurance respecting notice and proofs of loss, and in the third paragraph alleged that proofs of loss were not furnished within sixty days of the date of loss as required by the conditions of the policy; also, that certain papers designated "proofs of loss" were furnished the company January 31, 1893, but less than sixty days previous to the commencement of the action on the policy. Upon these issues a trial was had which resulted in a verdict and judgment for the plaintiff. Afterwards a new trial was granted on the ground of newly-discovered evidence. The company then filed an amended and substituted answer, setting up, in addition to the allegations in its former answer, a fourth paragraph in which it alleged that the plaintiff, in violation of the conditions and agreements contained in the policy, caused the building to be burned by one S. M. Venard for the purpose of defrauding the defendant.

Before entering on the trial of the cause plaintiff filed a motion to require the defendant to elect upon which of the defenses contained in its answer it would proceed to trial, asserting that the defenses pleaded were inconsistent, and, also, that the new trial was granted only for the purpose of obtaining a decision upon the matters alleged in the fourth paragraph of the answer. What order, if any, was made upon this motion is not disclosed by the record, but it does appear that after the motion was filed the defendant, protesting and excepting, elected to abide by the defenses pleaded in the first and fourth paragraphs of the answer. The case was then tried to a jury and the trial resulted in a verdict and judgment for the plaintiff. The defendant brings the case here for review on error and insists that there are five good and sufficient reasons why the judgment of the district court should be reversed. We proceed to examine these reasons in the order of their presentation.

It is first argued that the court erred in forcing the defendant to an election of defenses because the defenses pleaded were not inconsistent. We entirely agree with counsel that the several grounds of defense stated in the answer were not inconsistent. The proof of one would have no tendency whatever to disprove either of the others. A defendant may, under our system of pleading, allege as many grounds of defense as he may have, subject only to the condition, implied from the requirement in regard to verification, that such defenses shall not be so repugnant that if one be true the other must be false. (*Blodgett v. McMurtry*, 39 Neb. 210; *Citizens Bank v. Closson*, 29 O. St. 78; *Pavey v. Pavey*, 30 O. St. 600; *Nelson v. Brodhack*, 44 Mo. 596; *McAdow v. Ross*, 53 Mo. 199.) But, as already stated, the record does not show that the court made the order of which defendant complains. Assuming, however, that such an order was made, wherein was the defendant prejudiced by it? It abandoned, it is true, the defense grounded on the alleged failure to furnish proofs of loss, but that defense presented no issue for trial. The plaintiff in his petition admitted that he had

not furnished the proofs of loss and attempted to excuse his failure in that regard by pleading a waiver on the part of the company. The issue raised by the second and third paragraphs of the answer was, therefore, immaterial and the defendant sacrificed nothing by abandoning them. Counsel for defendant, however, contend that there is no proof in the record to sustain the plea of waiver and cite *German Ins. Co. v. Fairbank*, 32 Neb. 750; and *German Ins. Co. v. Davis*, 40 Neb. 700 in support of the proposition that such proof was necessary. It is true that no evidence was offered to establish a waiver, but it appears that after the jury had been sworn to try the cause counsel for defendant asked to be allowed to take the affirmative in the trial, stating "that under the ruling of the court requiring defendant to elect the issue to be submitted to the jury, and the only issue, is the fraudulent loss by procuring the property to be burned." The court then granted the request of counsel and the defendant was permitted to open and close the case. It cannot now change its theory. Having obtained an advantage by representing to the court that the issue presented by the fourth paragraph of the answer was the only one for trial, it cannot now be permitted to recede from its position and secure a reversal of the judgment by insisting that its representation was false.

It is next contended that the court erred in giving the following instruction: "One of the witnesses in this case is S. M. Venard, who says that he set fire which consumed the building in question herein; he being an accomplice in this act from his own testimony. A jury should always act upon such testimony with great care and caution." The criticism on this instruction is that it fails to inform the jury what would constitute "great care and caution." It was not necessary that it should. The rule was stated with clearness and legal precision, and if counsel for the defendant were not satisfied with it they should have formulated a better instruction and requested that it be given. (*Burlington & M. R. R. Co. v.*

Schluntz, 14 Neb. 421; *Woodruff v. White*, 25 Neb. 745; *Klosterman v. Olcott*, 25 Neb. 382.) But it may well be doubted whether any attempted elaboration would not have tended to obscure rather than elucidate the matter.

Another ground of alleged error is that the trial court failed to number the first instruction, and did not write the word "given" upon the first and second instructions requested by the plaintiff. From this oversight on the part of the court no possible prejudice could have resulted to the defendant and it affords no sufficient reason for reversing the judgment. Speaking upon this subject in the case of *Omaha & Florence Land & Trust Co. v. Hansen*, 32 Neb. 449, MAXWELL, J., said: "While it is the duty of the court to observe the law, yet, where it is apparent that no injury has resulted to the adverse party from a failure to comply with the statute, a case in which this was the only error would not be reversed for that cause alone. In other words, the omission must be prejudicial to the party complaining to justify the reversal of the judgment."

It is finally insisted that the verdict is not sustained by sufficient evidence. There is much evidence tending to prove that Decker had strong motives for desiring the destruction of the opera house by fire, and there is positive testimony from the witness Venard that he set the building on fire at Decker's instigation. Another witness testified that he heard a conversation between Decker and Venard in which the latter agreed for a consideration to burn the building. The testimony of this witness as well as that of Venard was positively denied by Decker. We would be better satisfied with the verdict had it been for the defendant, but it is supported by competent evidence and we cannot set it aside. Of the questions of fact the jury were legally constituted arbiters, whose decision we are not authorized to annul because, on the same evidence, it is probable we would, as triers, have reached a different conclusion. The judgment is

AFFIRMED.

LEWIS V. CRUM V. ANDREW J. STANLEY.

FILED JUNE 9, 1898. No. 8149.

1. **Assignment of Judgment:** ACCEPTANCE: ESTOPPEL. A party who, upon a consideration acknowledged therein, had caused to be prepared and had subscribed a written instrument assigning all his interest in a judgment which he held and which had been appealed from, and had caused such assignment to be filed in the action wherein the appeal had been taken, cannot be heard to urge in argument, to sustain his own right of recovery on the appeal bond in another action, that the assignment was incomplete for the reason that, affirmatively, no acceptance by the assignee of the assignment had been proved.
2. **Actions:** PARTIES. The assignee of a chose in action is the proper and only party who can maintain an action thereon.

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

Winfield S. Strawn, for plaintiff in error.

Arthur C. Wakeley, contra.

RYAN, C.

This action was brought upon an appeal bond which had been given in an action of replevin, on which bond the makers had become liable by reason of a judgment against appellant. In this case there was judgment in favor of the obligee named in said bond. The errors complained of are presented in argument on special findings of fact. One of these findings was to the effect that while said appeal was pending, and before this suit was brought, Andrew J. Stanley, the obligee in the appeal bond, had had prepared by his attorney an instrument in writing, which he signed and which was duly filed, and is of record in the cause wherein it was given. This instrument was as follows:

"OMAHA, NEBRASKA, March 31, 1893.

"For value received I hereby assign, transfer, and set over to S. G. Johnson all my right, title, and interest in

and to a certain judgment recovered by me against Bates & Co. on or about May 10, 1892, in the county court of Douglas county, said judgment being for the principal sum of seven hundred dollars ($700), and the said cause in which judgment was obtained being appealed by the said Bates & Co. to the district court of Douglas county, and the said case being now pending in the said district court. This assignment is made subject to an attorney's lien of A. C. Wakeley in the sum of two hundred ($200) dollars for services rendered and to be rendered in said suit in said district court and in the supreme court, if the case is taken there. A. J. STANLEY."

Plaintiff in error contends that after having signed and caused to be filed in the case, with the appeal bond, the above subscribed instrument, the obligee had no further interest therein and consequently had no standing to sue for the amount for which judgment was subsequently recovered in the appeal case. It is urged by the defendant in error that as there was no finding that the assignment was accepted, there was no delivery; hence the assignee was vested with no title. This might be a pertinent consideration if the suit was being prosecuted by the assignee. But it is not. The assignor caused the instrument to be prepared, signed it, and filed it in the case wherein the appeal bond had been given. It is he who now seeks to avail himself of the failure of the finding to show an acceptance of the assignment by the assignee. This assignor, by filing the assignment as he did, left it optional with the assignee to avail himself of its benefits, if he so elected. The contract itself recited that it was made for value received, and in the absence of any showing whatever we are not to believe that this was false. If there was a consideration for the assignment, then it was not optional with the assignor, at his election, to withdraw or ignore it. He was therefore in the position of one who brings an action upon an instrument after having parted with all interest therein by an assignment thereof to a third party. In

Pilger v. Marder, 55 Neb. 113 it was held that in replevin, where there are two or more defendants and the property has been taken under the writ and delivered to plaintiff after the execution by sureties of the prescribed replevin undertaking, if, by the judgment, the entire property is awarded to one defendant, the rights thus accorded may be enforced in an action by such defendant alone, without a joinder of other parties named as obligees in the undertaking. This was on the principle that every action is required by our Code of Civil Procedure to be prosecuted in the name of the real party in interest. Controlled by section 29 of the Code of Civil Procedure above referred to, it was held by this court in *Mills v. Murry*, 1 Neb. 327, that the assignee of a chose in action is the proper and only party who can maintain a suit thereon. As the assignment was pleaded as a defense and established by the evidence, the defendant in error had no interest in the right of action sued upon; hence the judgment in his favor is reversed.

REVERSED AND REMANDED.

WILL G. NYE V. J. FRED ROGERS.

FILED JUNE 9, 1898. No. 8145.

1. **Judicial Sales**: CERTIFICATE OF INCUMBRANCES: WAIVER. As the certificates of incumbrances of real property before judicial sale are for the benefit of plaintiff, he may waive any or all such certificates if he chooses so to do.
2. ———: **Objections to Confirmation**: EVIDENCE. Where the showing by affidavit in resistance of confirmation of a judicial sale was that "the property was divided, assessed, and recognized as distinct, separate, subdivisions, one having no relation to the other," *held*, that, for the purpose of reversing the order of confirmation, this language would not be construed as stating that the lots were in fact distinct, separate, subdivisions.
3. ———: ———: PUBLICATION OF NOTICE: BURDEN OF PROOF. Where the return of a judicial sale by a sheriff recited that publication had been made in a newspaper printed and in general circulation

in the proper county, naming it, it devolved upon the party attacking the validity of the sale to show why there was not sufficient compliance with the provisions of section 497, Code of Civil Procedure, if that is the defect relied upon.

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

Robert A. Moore, for plaintiff in error.

Warren Pratt and *E. C. Calkins, contra.*

RYAN, C.

This proceeding in error is for the review of the order of the district court of Buffalo county overruling certain objections to the confirmation of a sheriff's sale upon the foreclosure of a mortgage.

The first objection urged was that one of the appraisers was deputy sheriff of the aforesaid county and therefore was disqualified. Whether the effect claimed would of necessity result from this alleged disqualification we need not determine, for there was evidence that neither appraiser was a deputy sheriff, and a ruling of the district court on a disputed fact made on conflicting evidence will not be disturbed in this court.

It was next objected that there was no showing that the newspaper in which publication of the notice of sale was made had a *bona fide* circulation of 200 copies weekly and had been published for fifty-two successive weeks prior to such publication. The return of the sheriff showed that the newspaper was one printed and in general circulation in Buffalo county, and this is in strict compliance with section 497, Code of Civil Procedure. The sheriff was not required to state the facts upon which his return as to the status of the newspaper in question was founded.

It was next objected that no application for a statement of liens was addressed to the city or town treasurer of the city of Kearney. It has been held by this court that the certificate of liens may be entirely waived by

the plaintiff, as this certificate is for his sole benefit. (*Craig v. Stevenson*, 15 Neb. 362; *Smith v. Foxworthy*, 39 Neb. 214; *American Investment Co. v. McGregor*, 48 Neb. 779.) From this proposition it results that the certificate of any county officer as to what liens are disclosed by the records of his office may be waived by the plaintiff. In the affidavit of R. A. Moore it was stated: "The property described as lots 1, 2, and 3, in block 13, in the decree above, was divided, assessed, and recognized as distinct, separate, subdivisions, one having no relation to the other," and it is insisted that as there was no contradiction of this statement it must be accepted as true, and therefore that the rule laid down in *Runge v. Brown*, 29 Neb. 116, that separate tracts or parcels must be appraised separately, must prevail. But it was not stated that the lots were not contiguous; on the contrary, the reference was to the property as a whole, and the fair inference from the language used is that said property was merely subdivided into lots. In view of the fact that the district court seems to have so construed the affidavit, we do not feel justified in giving the language of Mr. Moore a strained or unnatural construction to justify a reversal. The above review covers all the points argued and the order of the district court is

AFFIRMED.

OLOF ZETTERLUND ET AL., APPELLEES, V. TEXAS LAND & CATTLE COMPANY ET AL., APPELLANTS.

FILED JUNE 9, 1898. No. 8172.

Contract: VIOLATION OF PROVISION FORBIDDING AN ASSIGNMENT: ACCOUNTING: ASSIGNEE. A written contract which, by its terms, requires certain services to be rendered personally by one of the parties thereto and forbids a transfer by said party of his interest and liabilities to a third party cannot, in the face of such inhibitions, be transferred by assignment to a third party so as to vest in such assignee, solely as such, a right, in equity, to an

accounting for the value of services rendered by the said assignee, though such services are of the same general character as those required by the terms of the contract assigned.

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

Congdon & Parish, Estabrook & Davis, McCabe, Wood, Newman & Elmer, and *W. D. McHugh,* for appellants.

Bartlett, Baldrige & De Bord, Chrytraus & Deneen, George Swartz, and *Kennedy, Gilbert & Anderson, contra.*

RYAN, C.

On September 5, 1892, the Texas Land & Cattle Company, a corporation, as party of the first part, entered into a written agreement with Victor Rylander and August Jernberg, as partners composing the firm of Jernberg & Rylander, parties of the second part. By the terms of the contract the parties of second part undertook for the first party to sell a large amount of real property known as the K. O. Ranch, situate in the state of Texas, on certain fixed terms and for agreed rates of compensation. In this agreement there was the following provision: "It is also understood and agreed that this contract is not assignable or transferable by the parties of the second part, and any one accepting such assignment or transfer shall receive no rights or equities under the contract by reason of such transfer and assignment, and said party of the first part shall, at its option, be relieved of its obligations hereunder." On February 20, 1893, the above named August Jernberg and Victor Rylander, as a partnership firm and as party of the first part, entered into a written contract with Ernest Bihl, Olof Zetterlund, Jonas Adling, and Adolph Osterholm, representing the Southern Land Company, a partnership firm, as parties of the second part, by the terms of which the second parties assumed all outstanding obligations to agents connected with the K. O. Ranch, and all expenses incurred or to be incurred in the handling of the K. O.

Ranch, and agreed to meet all requirements of the contract between the Texas Land & Cattle Company and Jernberg & Rylander, and, in consideration of the above assumption of said firm's liabilities and of the receipt of one dollar, said firm gave to the parties of the second part the exclusive handling and charge of all the lands in said K. O. Ranch and all said firm's right, title, and interest in and to the same. Under this arrangement the Southern Land Company transacted the business above undertaken by them until June 15, 1893, when the Texas Land & Cattle Company, as it claimed pursuant to its right reserved so to do, notified Jernberg & Rylander and the individual members of the Southern Land Company that the contract originally entered into for the sale of the K. O. Ranch was canceled. Until June 10, 1893, or thereabouts, it was not known to the Texas Land & Cattle Company that there had been an attempted assignment of the contract to which it was a party for the sale of the lands composing the K. O. Ranch. On December 7, 1894, the individuals composing the firm known as the Southern Land Company began their action in the district court of Douglas county to obtain an accounting with the Texas Land & Cattle Company of the amounts due said plaintiffs by reason of their services rendered in the sale of lands composing part of the K. O. Ranch. In this action there were joined as defendants with the Texas Land & Cattle Company certain judgment creditors of August Jernberg and Victor Rylander, in favor of whom there were in existence orders in garnishment requiring the Texas Land & Cattle Company to pay into court certain amounts due and to become due as commissions for the sale of lands of the K. O. Ranch under the terms of the contract entered into by the Texas Land & Cattle Company. One Carl E. Elving, by his petition of intervention, alleged similar facts and asked for like relief to that prayed by the members of the Southern Land Company. No separate review of this branch of the case

need therefore be undertaken. The services for which compensation was sought to be obtained were partly rendered as agents of Jernberg & Rylander before the assignment by the firm of its interest in the contract with the Texas Land & Cattle Company, and partly afterward. It is unnecessary to consider those rendered before said assignment, further than to say that the claimants were employed as agents of Jernberg & Rylander and as such earned whatever compensation they were entitled to receive. By the contract for the sale of the lands constituting the K. O. Ranch, Jernberg & Rylander agreed to bear all the expenses necessary to make the required sales, and to that firm alone are these parties entitled to look, for the assignment did not purport to assign amounts already earned by Jernberg & Rylander, and there was no equitable principle by virtue of which these amounts might be reached. (*Union P. R. Co. v. Douglas County Bank*, 42 Neb. 479.)

The district court found specially as follows:

"15. That by the terms of said assignment it is sought to assign the contract; that in so far as such assignment attempts thus to assign the contract it is void.

"16. That upon sufficient consideration said assignment transfers to the plaintiffs, as members of the Southern Land Company, the moneys arising as commissions earned by Jernberg & Rylander under their contract with the Texas Land & Cattle Company, and that in so far as said assignment seeks to assign said moneys it should be upheld to the interest of the plaintiff therein."

On the theory that the prohibited assignment was a valid transfer of moneys already earned by Jernberg & Rylander the district court required the Texas Land & Cattle Company to account to the Southern Land Company's individual members for such amounts as had already, or afterwards should, become due to Jernberg & Rylander as commissions on deferred payments upon sales of land already made by that firm, and required that the amounts of these commissions as they fell due

should be paid to the members of the said Southern Land Company. It will prevent misapprehension, though it may produce some confusion, to note at this point that not the whole of such amounts of commissions was required to be paid to plaintiffs and the intervener, for thirty-two per cent of the interest of the Southern Land Company was found, on the trial, to be held by Ernest Bihl in secret trust for Jernberg & Rylander. By this decree of the district court the orders in garnishment entered in other independent cases in favor, respectively, of the Dime Savings Bank of Chicago and of Basil M. Webster were modified so as to permit of present payments to said judgment creditors of but the above mentioned thirty-two per cent of commissions as they should be paid in. The other sixty-eight per cent of commissions was appropriated to the payment of plaintiffs, the members of the Southern Land Company, and to Carl E. Elving, the intervener, before the judgment creditors were entitled to anything. This was, in effect, the creation of an equitable subrogation of said plaintiffs and said intervener to the rights of Jernberg & Rylander by virtue of the assignment, by said firm of its interest in the contract, in which there was an inhibition of such an assignment, coupled with a provision that any one receiving such forbidden assignment thereby should obtain no rights or equities thereunder. We are of the opinion that the district court was right in its fifteenth finding, that the transfer of the contract was void, for it was an attempt to substitute for Jernberg & Rylander other parties in the performance of services which the parties had a right to stipulate, and in fact did stipulate, should be performed by said Jernberg & Rylander. While such an assignment might render Jernberg & Rylander liable to their assignees it would not affect the Texas Land & Cattle Company without its assent thereto. (*Burck v. Taylor*, 152 U. S. 634; *Delaware County Commissioners v. Diebold Safe & Lock Co.*, 133 U. S. 473; *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S.

379; *Grigg v. Landis*, 19 N. J. Eq. 350; *Sloan v. Williams*, 138 Ill. 43; *Fartunato v. Patten*, 25 N. Y. Supp. 333; *City of Omaha v. Standard Oil Co.*, 55 Neb. 337.)

It is, however, insisted by appellees that the services rendered by them were rendered with the knowledge of the Texas Land & Cattle Company, and notwithstanding its ignorance of the assignment that company equitably should be required to account as it was required by the district court. To this we quote as quite apposite the language of COBB, C. J., in *Gould v. Kendall*, 15 Neb. 549: "It may be claimed that the defendants having done business in the name of the plaintiffs, are estopped to deny the interest of the plaintiffs in that business. That would probably be so could the plaintiffs' case ever reach the point at which the defendants are required to develop their defense, but the difficulty is in the inherent weakness of the plaintiffs' case. They cannot reach the enemies' works except through the contract, which, by reason of its illegality, is 'no thoroughfare' for them."

The judgment of the district court is reversed and this action is dismissed.

REVERSED AND DISMISSED.

NORFOLK BEET-SUGAR COMPANY V. JOHN J. BURNETT.

FILED JUNE 9, 1898. No. 8164.

Verdict for Plaintiff in an Action by a Servant Who Was Injured Through the Master's Negligence. The evidence in this case examined, and found sufficient to sustain the verdict returned and judgment rendered.

ERROR from the district court of Madison county. Tried below before ROBINSON, J. *Affirmed.*

Powers & Hays, for plaintiff in error.

Beels & Schoregge, contra.

RYAN, C.

There was a verdict and judgment in the district court of Madison county against the Norfolk Beet-Sugar Company because of injuries alleged to have been sustained by one of its employés, entirely attributable, as he alleged in his petition, to the negligence of said company. The brief of plaintiff in error is entirely devoted to the argument that there was no evidence showing how the accident happened, and consequently there was no proof of negligence on the part of the company. The evidence is not as lucid as it might have been, but our understanding of it, briefly stated, is that the defendant in error was directed to remove some lime from under a mill; that when he began to make such removal the engine and machinery were not running, but while he was performing the work assigned him the engine was started; that a shaft which constituted a part of the machinery had been in bad condition for two days and was in process of repair when the engine was set in motion, and by reason of the fall of the shaft itself, or of some pulleys used in connection with the shaft, either in repairing it or otherwise, the defendant in error was struck and instantly rendered unconscious. No one saw what struck him, but immediately afterwards some of his co-employés came into the room where he was lying bleeding and unconscious and found the fallen shaft and pulleys in such proximity to defendant in error that probably the shaft or the pulleys had fallen upon him. As to the history or cause of the accident the company offered no evidence whatever. There was nothing to indicate that the defendant in error was guilty of negligence in any respect or degree whatever, and from a careful examination of all the evidence we have reached the conclusion that the verdict was thereby sustained. The judgment of the district court is therefore

AFFIRMED.

FAIRBANKS, MORSE & COMPANY ET AL., APPELLANTS, V. J. L. WELSHANS & COMPANY ET AL., APPELLEES.

FILED JUNE 9, 1898. No. 8119.

1. **Creditors' Bill:** PETITION. The petition set out in the opinion, and *held* to be an ordinary creditors' bill and as such not to state a cause of action.
2. ———: ———: PARTIES: ASSETS OF INSOLVENT PARTNERSHIP: SURVIVING PARTNERS. A non-judgment creditor of an insolvent copartnership dissolved by the death of one of the partners, the surviving member and the estate of the deceased partner being insolvent, cannot maintain an action, in the nature of a creditors' bill, to set aside a fraudulent and void disposition made of the copartnership assets by the surviving partner, unless the facts averred in the petition show that the creditor has a lien on such assets, or that they are held in trust for partnership creditors, or that it is impossible to obtain judgment because the parties liable are out of the jurisdiction of the court, and it appears that there exists no property within the court's jurisdiction which can be reached by attachment, garnishment, or other legal process.
3. **Debtor and Creditor:** EQUITABLE ASSIGNMENT. An agreement of a debtor to pay his creditor's claim out of the moneys of a particular fund, but which gives the creditor no present right in or control over such fund or any part thereof, does not operate as an equitable assignment of any part of such fund to the creditor.
4. **Partnership:** LIEN OF CREDITORS. The creditors of a copartnership, merely because they are such, are not given a lien by law upon its assets whether the firm be solvent or insolvent.
5. ———: ASSETS: TRUSTS. The assets of an insolvent copartnership, dissolved by the death of one of its members, are not held in trust by the surviving partner of the firm for the payment of copartnership debts.
6. ———: ———: RIGHTS OF SURVIVING PARTNER. On the dissolution of a copartnership by the death of one of its members the right to the possession and disposition of the copartnership assets vests in the surviving partner.

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

Virgil O. Strickler, Byron G. Burbank, Kennedy & Learned, B. N. Robertson, and *Isaac W. Hascall,* for appellants.

Congdon & Parish, O'Neill & Gilbert, James W. Carr, L. I. Abbott, Rich & Sears, and *A. C. Wakeley, contra.*

RAGAN, C.

Fairbanks, Morse & Co., an Illinois corporation, brought this suit in the district court of Douglas county against J. L. Welshans & Co., a Nebraska copartnership; J. L. Welshans, the surviving member of said copartnership; David C. Patterson, administrator of the estate of J. H. Dwelley, the deceased member of said copartnership; Anna Dwelley, widow of J. H. Dwelley, deceased; Daniel Keniston, Josiah Kent, and David C. Patterson, sureties on certain bonds executed by said copartnership; and the Crane Company, a creditor of said copartnership. The N. O. Nelson Manufacturing Company, also a creditor of said copartnership, intervened in the action and filed an answer in the nature of a cross-petition against the persons made defendants to Fairbanks, Morse & Co.'s action. Numerous other parties, being creditors of said copartnership, were also brought into the action. Fairbanks, Morse & Co. will hereinafter be designated as Morse & Co.; the N. O. Nelson Manufacturing Company as the manufacturing company; Patterson, Keniston, and Kent will hereafter be denominated the sureties.

When the case came on for trial in the district court the sureties and all the creditors of the copartnership of Welshans & Co., except the manufacturing company, objected to the introduction of any evidence on the part of Morse & Co. or the manufacturing company, on the grounds that neither the petition of the former nor the cross-petition of the latter stated facts sufficient to constitute a cause of action against the objectors. These objections were overruled. The court heard the case and rendered a decree therein, which is now before us on appeal.

1. In view of the conclusion reached by us we have thought it best to set out all the material allegations of the petition of Morse & Co. They are as follows:

"(3.) That on the said 29th day of May, 1893, J. L. Welshans and J. H. Dwelley, doing business as J. L. Welshans & Co., as aforesaid, entered into a written contract with Major C. F. Humphrey, quartermaster of the United States army, to furnish all labor and material necessary to do and perform all of the plumbing, steam heating, and gas piping in all of the buildings then being erected by the United States at Fort Crook, Sarpy county, Nebraska. * * *

"(4.) That to secure the faithful performance of all of the covenants, requirements, and conditions of said contract, plans, and specifications the said J. L. Welshans & Co., as principals, and defendants and David C. Patterson and Daniel Keniston, as sureties, did, on the said 29th day of May, 1893, make, execute, and deliver their certain bond to the United States in the sum of $11,708. * * *

"(5.) That on the 2d day of August, 1893, the said J. L. Welshans and J. H. Dwelley, doing business as J. L. Welshans & Co., entered into a contract for $6,355 with Major C. F. Humphrey, quartermaster of the United States army, to furnish certain labor and material in and about the construction of certain other buildings at Fort Crook not included in the contract, marked 'Exhibit A,' and on said date the said J. L. Welshans and J. H. Dwelley, as J. H. Welshans & Co., made, executed, and delivered a bond to the United States to guaranty the faithful performance of said contract, which said bond was for the sum of $2,225, signed by defendants Daniel Keniston and Josiah Kent as sureties; that on September 11, 1893, the said J. L. Welshans and J. H. Dwelley, as J. L. Welshans & Co., entered into a contract for $1,331 with the said C. F. Humphrey, quartermaster of the United States army, as aforesaid, to furnish certain labor and material in and about the construction of a storehouse at the quartermaster's depot at Omaha, Nebraska, and that to secure the faithful performance of said last named contract the said J. L. Welshans * * *

made, executed, and delivered to the United States a certain bond for $446, which said bond was signed by defendants David C. Patterson and Josiah Kent as sureties.

"(6.) That after the execution of said contract between the United States and Welshans and Dwelley, as J. L. Welshans & Co., as aforesaid, on the 29th day of May, 1893, and hereto attached as Exhibit A, the said J. L. Welshans & Co. entered into a contract with the plaintiff whereby the plaintiff agreed to furnish to the said J. L. Welshans & Co., to and for the construction of the buildings at Fort Crook as aforesaid, mentioned in Exhibit A, four boilers and necessary trimmings, valves, water columns, gauges, cocks, grates, and all other appurtenances thereto, according to the specifications furnished, for the agreed price of $2,735; that the said specifications, which were made a part of the contract between J. L. Welshans & Co. and the government, provided that the boilers should be paid for as soon as they were set in place and accepted, and that the said J. L. Welshans & Co. then and there agreed to and with the plaintiff that the said plaintiff should be paid for the said boilers and other materials so furnished, as aforesaid, out of and have a lien upon the proceeds of said contract, and that as soon as said boilers had been set in place and accepted by the United States the plaintiff should receive the money accruing under said contract therefor; that the plaintiff furnished said boilers and other materials and delivered the same at Fort Crook, Nebraska, on or about the 1st of July, 1894, but that on or about the 10th day of September, 1894, the said boilers and other materials so furnished by plaintiff were rejected by the United States, as plaintiff was notified, upon the ground that said boilers and appurtenances thereto did not come up to the requirements of said specifications.

"(7.) That on the 15th day of September, 1894, the said J. L. Welshans & Co. became insolvent and notified

Major C. F. Humphrey, quartermaster as aforesaid, that they would be unable to complete their contracts with the United States; that on said 15th day of September the said J. L. Welshans & Co. attempted to assign, and did assign, in so far as they were able to do, to their said bondsmen, David C. Patterson, Daniel Keniston, and Josiah Kent, defendants herein, all of their rights, titles, and interests in and to all of their contracts with the United States, together with all moneys due or to become due upon said contracts, and gave to their said bondsmen full right and authority to carry on and complete said contracts in the place and stead of the said J. L. Welshans & Co. as fully and completely as the said J. L. Welshans & Co. could or would have done; that by the terms of said attempted assignment the said David C. Patterson, Daniel Keniston, and Josiah Kent were authorized and empowered to collect and receive from the United States all moneys then due the said J. L. Welshans & Co., together with all sums that were to become due under their said contracts, and were empowered, authorized, and directed to proceed with the work under said contracts and to complete the same in the place and stead of said J. L. Welshans & Co.; that the said defendants David C. Patterson, Daniel Keniston, and Josiah Kent accepted, affirmed, and ratified said attempted assignment from said J. L. Welshans & Co. to themselves, together with all the conditions thereof, and immediately on the said 15th day of September, 1894, took charge of the work under said contracts for and in the place of the said J. L. Welshans & Co., and have ever since said time carried on the work under said contracts, and are now carrying on the work under said contracts, in the place and stead of the said J. L. Welshans & Co.

"(8.) That at the time the said David C. Patterson, Daniel Keniston, and Josiah Kent succeeded to said contracts by the attempted assignment from J. L. Welshans & Co., as aforesaid, the boilers, together with the other materials furnished by the plaintiff as aforesaid, to be

used in the construction of the steam heating plant in and about the contract, hereto attached as Exhibit A, were on the grounds at Fort Crook, but the same had been rejected by the United States and no part of the same had either been received or paid for, and were not at that time inwrought into the building for the reason, as plaintiff was informed, that they did not comply with the specifications; that afterward, and for the purpose of completing the contract, the said defendants David C. Patterson, Daniel Keniston, and Josiah Kent, bondsmen and assignees as aforesaid, required plaintiff to make certain changes in and about said boilers and other materials, for the purpose of making the same conform to the specifications; that the boiler fronts furnished by plaintiff were adjudged not to be of the thickness required by said specifications, and that the said David C. Patterson, Daniel Keniston, and Josiah Kent caused other and different boiler fronts to be provided, and those furnished by plaintiff were returned to plaintiff and the difference between the price of those furnished by plaintiff and those required by the said bondsmen to be provided amounting to nearly $200, which said sum was by the said David C. Patterson, Daniel Keniston, and Josiah Kent charged back to the plaintiff upon their contract with the said J. L. Welshans & Co.; that the said David C. Patterson, Daniel Keniston, and Josiah Kent rejected and returned to plaintiff certain water columns and other minor materials which the plaintiff had delivered at Fort Crook under and by virtue of its said contract with J. L. Welshans & Co., alleging that the same did not comply with the specification of said contract, and in each instance the said David C. Patterson, Daniel Keniston, and Josiah Kent charged back upon their books the price of each of said articles to plaintiff and deducted the same from the amount of plaintiff's contract; that the total amount of said deduction so made by the said David C. Patterson, Daniel Keniston, and Josiah Kent, because of such defects as alleged,

including the difference between the cost of the boiler fronts, amounted to the sum of $220.78, which said sum has been by them upon their own books deducted from the amount of plaintiff's original contract; that after the changes had been made in the boilers and appurtenances thereto, as aforesaid, and the same had been made to comply with the requirements of the United States, the same were duly accepted by the United States, and the said David C. Patterson, Daniel Keniston, and Josiah Kent collected and received from the United States full payment therefor.

"(9.) That at the time of the attempted assignment of said contracts by J. L. Welshans & Co. to David C. Patterson, Daniel Keniston, and Josiah Kent, as aforesaid, a large sum of money was due and owing from the government to J. L. Welshans & Co. for work and material already furnished and performed under said contract, which money has since been collected and received by the said David C. Patterson, Daniel Keniston, and Josiah Kent, and by them used to pay and discharge their own personal obligations; that the United States refused to recognize the attempted assignment of said contracts by the said J. L. Welshans & Co. to the said David C. Patterson, Daniel Keniston, and Josiah Kent, bondsmen, as aforesaid, except in so far as the said assignees were permitted to complete the work under said contract in the place and stead of J. L. Welshans & Co.; that the United States refused to pay any moneys arising upon said contract directly to the said David C. Patterson, Daniel Keniston, and Josiah Kent, but after the attempted assignment of said contracts by J. L. Welshans & Co. to David C. Patterson, Daniel Keniston, and Josiah Kent the United States has requested that all payments of moneys under said contract that have been so paid by the government should be paid in the presence of one or more of the bondsmen to J. L. Welshans, who immediately handed the same over to the bondsmen, so that since the 15th day of September, 1894, although the

United States has technically paid all moneys arising under said contracts to J. L. Welshans & Co., yet in fact and in reality the same has been paid to David C. Patterson, Daniel Keniston, and Josiah Kent, and the said David C. Patterson, Daniel Keniston, and Josiah Kent have received all moneys paid by the government upon said contracts since the 15th day of September, 1894, which said payments amount in the aggregate to many thousand dollars (as plaintiff is informed and believes to be more than $10,000), all of which has been used by the said David C. Patterson, Daniel Keniston, and Josiah Kent in and about their own personal affairs and to pay their own personal obligations; that of the money so collected and received as aforesaid by the said David C. Patterson, Daniel Keniston, and Josiah Kent more than $3,000 was so paid to and received by them from the United States for and on account of steam heating connected with the contract of May 29, 1893, a copy of which is hereto attached, marked 'Exhibit A.'

"(10.) That there is now due and owing from the United States under said contracts a large sum of money, amounting in the aggregate to, as plaintiff is informed and believes, about the sum of $17,000, representing the balance due upon said contracts; that all of said sum is due upon the contract of May 29, 1893, a copy of which is hereto attached, marked 'Exhibit A,' and that of said sum about $13,000 is due for and about the completion of the steam heating plant in which plaintiff's boilers and other materials were used; that notwithstanding the fact that the United States has refused to recognize said attempted assignment to J. L. Welshans & Co. to the said bondsmen, the said J. L. Welshans has, ever since the 15th day of September, 1894, paid over immediately upon the receipt thereof to the said bondsmen all moneys so received by him as aforesaid from the government, and that when he receives the balance, amounting in the aggregate as aforesaid to about $17,000, from the United States he will, unless he is restrained, pay

the same over to the said David C. Patterson, Daniel Keniston, and Josiah Kent, and will not pay plaintiff for said materials, as under said contract he should have done, out of the moneys already received, as well as out of those he is about to receive, and that if the said moneys are so paid into the hands of the said David C. Patterson, Daniel Keniston, and Josiah Kent, they will use the same in and about their own personal obligations and will not pay plaintiff the amount due the plaintiff for the materials so furnished as aforesaid.

"(11.) That since the 15th day of September, 1894, the said David C. Patterson, Daniel Keniston, and Josiah Kent have wastefully and extravagantly expended a much greater sum of money in and about the completion of said contracts so attempted to be assigned to them by the said J. L. Welshans & Co. than was necessary to be expended, and have wrongfully diverted the money arising under said contracts and so received by them as aforesaid, to the injury and damage of the plaintiff.

"(12.) That because of the fact that the government is a party to the contract, and is the party in whose hands the money is now held, the plaintiff is without any legal remedy either to prevent the wrongful diversion of said funds or to compel the application of the same to the payment of the plaintiff's claim, as plaintiff is entitled to have done.

"(13.) That on the 4th day of April, 1894, the said J. H. Dwelley died and the defendant David C. Patterson was on the 2d day of June, 1894, duly appointed administrator of the estate of the said J. H. Dwelley, deceased, and that the said David C. Patterson is now performing the duties of such administrator, and that the said J. H. Dwelley was at the time of his death insolvent.

"(14.) That because of the contract made between J. L. Welshans & Co. and the plaintiff, that the plaintiff should be paid for the boilers and other materials so furnished, as aforesaid, by the plaintiff in and about the construction of the buildings mentioned in contract

marked Exhibit A, hereto attached, and the provisions in the specifications of said contract providing that said boilers should be paid for as soon as the same were set in place and accepted by the United States, and because of the insolvency of J. L. Welshans & Co. as aforesaid, and the assignment to the said David C. Patterson, Daniel Keniston, and Josiah Kent of said contracts, together with all of the rights, titles, and interest of the said J. L. Welshans & Co. therein, including all sums of money then due and owing thereunder, and the subsequent dealings of the said parties, the said J. L. Welshans & Co., David C. Patterson, Daniel Keniston, and Josiah Kent became and are trustees of all funds which have come into their hands from the United States. Under said contracts all such funds have so come into the hands of each and all of them, or will come into the hands of each and all of them, in trust for this plaintiff, to the extent of plaintiff's claim for materials so furnished as aforesaid and by the said parties used and inwrought into the said buildings, amounting, as aforesaid, to the sum of $2,514.12, which sum is now due and owing to the plaintiff, together with interest thereon at seven per cent per annum from the time that the said materials were accepted by the government.

"(15.) * * * That long after the decease of the said J. H. Dwelley, partner of the said J. L. Welshans and a member of the partnership of J. L. Welshans & Co., the said J. L. Welshans pretended to give an order upon Major Humphrey, quartermaster aforesaid, in favor of Crane Company, a corporation having a place of business in Omaha, Nebraska; said order being for the sum of $7,400 of the money due or to become due from the said government under said contract of May 29, 1893; * * * that after the decease of the said J. H. Dwelley the said J. L. Welshans attempted to, and did, make to one Mrs. Anna Dwelley an order upon the said Major Humphrey, quartermaster, for the sum of $1,500, which said order was made by the said J. L. Welshans, attempt-

ing and pretending to act as J. L. Welshans & Co.; that the said J. L. Welshans acted and pretended to act in making said order in favor of the said Crane Company for and on behalf of the partnership of J. L. Welshans & Co.; * * * that said partnership of said J. L. Welshans & Co. was absolutely and finally dissolved by the death of the said J. H. Dwelley long prior to the making of either of the above mentioned pretended orders upon said quartermaster, and that the said J. L. Welshans, at the time said orders were made, if made, had no authority in law or in equity to make and deliver, or to cause to be made and delivered, either of the above mentioned orders; neither had the said bondsmen of the said J. L. Welshans & Co. any authority in law or in equity to make any order in favor of either the said Crane Company or the said Mrs. Anna Dwelley, and that any attempt to do so was a fraud upon the creditors of J. L. Welshans & Co. and in direct violation of the rights of the plaintiff herein, and were made for the purpose of fraudulently disposing of the assets of the said J. L. Welshans & Co. and placing them beyond the reach of the creditors of the said J. L. Welshans & Co., and were made for the purpose of diverting said money from the payment of the debts of the said J. L. Welshans & Co., and for the purpose of paying the individual liability of the said D. C. Patterson, Daniel Keniston, and Josiah Kent, and was fraudulent, illegal, and null and void, and of no force and effect; * * * that neither of said orders was, at the time of the institution of this suit, or at the time of the order heretofore made herein directing said moneys in the hands of the said quartermaster to be paid to the clerk of this court, accepted, and the said quartermaster in paying said $7,400 to Crane Company and $1,500, with interest thereon, amounting, as plaintiff is informed, to $1,650, to the said Mrs. Anna Dwelley acted fraudulently and illegally and for the fraudulent purpose of aiding and abetting the said bondsmen and J. L. Welshans and the said Crane Company and Mrs. J. H.

Dwelley in diverting the assets of the partnership of J. L. Welshans & Co. from the creditors of said copartnershp and applying the same upon the individual liabilities and indebtedness of the said D. C. Patterson, Daniel Keniston, and Josiah Kent; * * * that on or about the 15th day of September, 1894, the said J. L. Welshans, pretending to act for and on behalf of the said J. L. Welshans & Co., although the said J. H. Dwelley had long since deceased—the said firm of J. L. Welshans & Co. having thereby dissolved—attempted and endeavored to divert the assets of the firm of J. L. Welshans & Co. from the legitimate purpose of being applied to the payment of the debts of said partnership; and the said J. L. Welshans was in such purpose assisted, aided, and abetted by the said defendants D. C. Patterson, Daniel Keniston, and Josiah Kent, bondsmen of the said J. L. Welshans & Co.; that at said time the said D. C. Patterson was the administrator of the estate of the deceased partner, J. H. Dwelley, and had qualified and was acting in such capacity as administrator of said estate; that acting in said capacity he had no authority whatsoever to receive, by any act of the said J. L. Welshans, or by his own act, any benefit or property of or from the estate of the said J. H. Dwelley of which he, the said Patterson, was administrator; that the said Patterson had no right, either in law or in equity, to have or receive anything of benefit of or from the said estate except through the due course of the administration of the estate of the said J. H. Dwelley in and through the county court of Douglas county, Nebraska; that neither the said J. L. Welshans nor the said D. C. Patterson ever had or took any proceedings whatsoever in said estate to have ascertained or determined the interest of the said J. H. Dwelley in or to the partnership of J. L. Welshans & Co.; and, in direct violation of the laws of this state governing the administration of the estates of deceased persons in partnerships, attempted to sell and dispose of said assets without authority from the county court of Douglas

county, Nebraska, or otherwise; that the said estate of the said J. H. Dwelley has been manipulated by the said D. C. Patterson for the sole and only purpose of preferring to himself the entire payment of all liability of the said Dwelley as a member of the partnership of J. L. Welshans & Co., in violation of the law and for the purpose of cheating and defrauding other creditors of the said Dwelley; * * * that the said J. L. Welshans not only made an assignment pretending to act for and on behalf of the said dissolved partnership of the said J. L. Welshans & Co., but attempted to make and deliver to the First National Bank of Omaha, Nebraska, Nelson Manufacturing Company, Omaha Shot & Lead Works, T. Lyle Dickey Company, and others, assignments of all of the property which had since been the property of the dissolved partnership of the said J. L. Welshans & Co., and that each and all of the said assignments were absolutely null and void and without force and effect; that the sale of said assets and the making of said pretended assignments had never been authorized by the county court of Douglas county, Nebraska, or by any other court whatsoever, and that such pretended assignments were made by the said J. L. Welshans without authority and for the fraudulent and collusive purpose of cheating and defrauding the plaintiff herein and the creditors of the said firm of J. L. Welshans & Co., and for the purpose of giving to the said bondsmen herein and the said First National Bank, Omaha Shot & Lead Works, T. Lyle Dickey, Nelson Manufacturing Company, and others, an unlawful, illegal, and inequitable preference over this plaintiff; * * * that the said J. L. Welshans, pretending to act for and on behalf of the said J. L. Welshans & Co., then long since dissolved by the death of the said J. H. Dwelley, attempted and pretended to give chattel mortgages upon the property which had once been the assets of the said firm of J. L. Welshans & Co., to each and all of the bondsmen and parties hereinbefore mentioned, and falsely,

fraudulently, and collusively attempted thereby to create a preference in favor of the parties above mentioned, over and above the plaintiff herein, which said attempted preference was unlawful, illegal, and inequitable; * * * that the execution and delivery of the said assignments, and each of them, and of said chattel mortgages, and each of them, was in violation of the laws of this state, and therefore null and void and not binding upon this plaintiff; * * * that the said Daniel Keniston and Josiah Kent, as well as the said D. C. Patterson, as sureties upon the said bond of the said J. L. Welshans & Co. to the government, had no authority or right to have and receive from the said J. L. Welshans any of the assets or property of the said dissolved firm of J. L. Welshans & Co., and they could not, by any such act of the said J. L. Welshans, pretending to act for said dissolved partnership, nor by any act of the said D. C. Patterson, who was then in fact the administrator of the estate of the said J. H. Dwelley, deceased, have or receive any preference in any manner whatsoever over and above the other creditors of the said J. L. Welshans & Co. or of the said J. H. Dwelley, deceased member of the said partnership; * * * that neither the said Patterson, Keniston, and Kent could have or receive any preference over the other creditors of the said dissolved firm of J. L. Welshans & Co. and over the creditors of the estate of the said J. H. Dwelley, deceased, by reason of any assignment given to the said D. C. Patterson, Josiah Kent, and Daniel Keniston to secure their liabilities as guarantors to Crane Company, for materials furnished by Crane Company to the said J. L. Welshans & Co., J. L. Welshans, or to said bondsmen; and that the said Crane Company and the said Mrs. Dwelley could not thereby obtain any preference over the said creditors of the said dissolved partnership of said J. L. Welshans & Co., or the creditors of the estate of the said deceased Dwelley, to have and receive of and from the said quartermaster, as hereinbefore stated, the sum of

$7,400, and the $1,500 with interest, received respectively by the said Crane Company and the said Mrs. Dwelley; that the said estate of the said Dwelley is wholly and absolutely insolvent, and the said J. L. Welshans is personally, wholly, and absolutely insolvent, and the said dissolved partnership of J. L. Welshans & Co. is likewise wholly and absolutely insolvent, and the said Dwelley estate and the said Welshans and the said dissolved partnership of the said J. L. Welshans & Co. each were wholly and absolutely insolvent at the time said assignments and mortgages hereinbefore mentioned were made and at the time when said pretended orders in favor of the said Mrs. Dwelley and Crane Company were attempted to be made by the said J. L. Welshans & Co.; * * * that the said J. L. Welshans, pretending to act for and on behalf of the dissolved partnership of J. L. Welshans & Co., and the said bondsmen, Patterson, Keniston, and Kent, have received and appropriated to their own use and benefit large parts of and portions of the assets of the said dissolved firm of J. L. Welshans & Co., and they have thereby unlawfully, illegally, and fraudulently and collusively obtained to themselves a preference over and above the other creditors, and particularly plaintiff, of the said dissolved firm of J. L. Welshans & Co., J. L. Welshans, and the estate of J. H. Dwelley, deceased; * * * that the said J. L. Welshans, D. C. Patterson, Daniel Keniston, and Josiah Kent have received from the United States government about $10,000 since the decease of said Dwelley out of the contracts with the said government which were partnership property of the firm of J. L. Welshans & Co., and the said Welshans, Patterson, Keniston, and Kent have likewise received out of the chattel property of the said dissolved firm of J. L. Welshans & Co. large sums of money, the exact amount of which is unknown to plaintiff herein, and appropriated said $10,000, or more, and said moneys and personal property, falsely, fraudulently, and collusively, to their own individual

use and benefit, and for the unlawful and illegal purpose of hindering and delaying plaintiff herein and the creditors of the said firm of J. L. Welshans & Co., dissolved, J. L. Welshans, and the estate of the said J. H. Dwelley, deceased, and obtained an illegal, fraudulent, and unlawful preference unto themselves. * * *

"Wherefore the plaintiff prays that it may have a judgment against the defendants, and each of them, for the sum of $2,514.12, with interest thereon at seven per cent per annum from the time that said boilers and appurtenances were accepted by the government; * * * that the said Crane Company be forthwith required to pay to the clerk of this court the sum of $7,400, and the said Anna Dwelley be required to pay to the clerk of this court the sum of $1,500, with interest thereon, being the exact sum received by her from the said quartermaster hereinbefore mentioned, amounting to $1,650; that the said Patterson, Keniston, and Kent account to this court for each and all of the moneys and property that have been received by them which had formerly belonged to the dissolved firm of J. L. Welshans & Co., and that it be further ordered, adjudged, and decreed that the plaintiff herein, by its contract with the said J. L. Welshans & Co., hereinbefore set forth, and by virtue of said contract, have an assignment of so much of said funds becoming due under said contract of May 29, 1893, as may be sufficient to pay plaintiff's claim in full, and for such other and further relief as may be just and equitable; and also that the defendants J. L. Welshans and J. L. Welshans & Co. be restrained from paying any part or portion of the money in the hands of said quartermaster, to-wit, Major Humphrey, to the said D. C. Patterson, Daniel Keniston, Josiah Kent, or either of them, or to any other person or persons whomsoever, and that said J. L. Welshans and J. L. Welshans & Co. be restrained and enjoined from giving any orders or assignments of any of said moneys in the hands of said quartermaster due or to become due under said contract dated

May 29, 1893, and that the defendants Patterson, Keniston, and Kent be restrained and enjoined from receiving or taking any money from the said quartermaster, and that the said Patterson, Keniston, and Kent be restrained and enjoined from in any way permitting or causing said moneys to be paid out by the said quartermaster to any person or persons whomsoever, except to said J. L. Welshans, to be paid to the clerk of this court under a prior order of the court; and that the said Patterson, Keniston, and Kent be restrained and enjoined from giving any orders upon said fund, or in any other manner appropriating or attempting to appropriate said funds for any purpose; and that the said J. L. Welshans, J. L. Welshans & Co., D. C. Patterson, Daniel Keniston, and Josiah Kent be each restrained and enjoined from in any manner disposing of or appropriating the assets, or any of the assets, of the said dissolved firm of J. L. Welshans & Co. to their individual use and benefit or to the use and benefit of any other person whomsoever except plaintiff herein."

2. An analysis of this petition shows that its averments disclose that Welshans & Co. are indebted to Morse & Co. on open account for the boilers furnished by them to the copartnership and used in the construction of the improvements under their contracts with the United States. In this respect the petition states a legal cause of action against the copartnership and the surviving member thereof.

3. As to the other defendants to the suit, except the manufacturing company, the petition, in effect, charges that the sureties and other defendants, with the connivance of the surviving member thereof, have converted, and will, if not restrained by injunction, convert, to their own use all the assets of the copartnership, leaving the claim of Morse & Co. unpaid. It is not shown by any averment of fact in this petition that what has been done or threatened to be done amounts to a fraud in fact. Except the sureties, it is not shown that these

defendants are not creditors of the copartnership; and the averments of the petition, when fairly construed, disclose that the object and purpose for which this copartnership property was pledged, assigned, and transferred to the sureties were to enable them to carry out and complete the contracts of the copartnership, the performance of which they had guarantied. If the petition states the facts, and all the facts of the transaction as they actually exist, then the facts stated, if proved, would not convict the parties made defendants with having transferred or received the copartnership assets with a fraudulent purpose.

4. The petition is framed upon the theory that all the assignments, pledges, and conveyances made of the copartnership assets by the surviving partner of the copartnership were absolutely void; and the object of the petition is to obtain a decree setting aside as fraudulent and void the assignments, pledges, and conveyances made of the copartnership property by the surviving partner thereof and to marshal the copartnership assets. Assuming, for the purposes of this case, that the disposition made of the assets of the copartnership by the surviving partner thereof was void for want of authority on his part, and that the several assignments, pledges, and conveyances made of the copartnership assets were made and accepted with the fraudulent purpose of hindering, delaying, and defrauding the creditors of said copartnership, we do not see that Morse & Co. are in any position to complain. They are common creditors of this copartnership. It has not been judicially determined that this copartnership is indebted to them and, for aught the court can know, it may finally turn out that the copartnership is not indebted to Morse & Co.; and if Morse & Co. are not creditors of this copartnership, then it is no concern of theirs what disposition has been made of its assets. The facts averred in this petition make it an ordinary creditors' bill, as that term is generally understood, as against all the parties made

defendants to this action except Welshans & Co., and the question is, does this petition of Morse & Co. state a cause of action against the parties made defendants to the action, except Welshans & Co., since it shows upon its face that the claim of Morse & Co. has never been reduced to judgment?

"No question rising in suits brought by creditors is better settled than that, before a creditor will be permitted to go into equity to set aside a fraudulent conveyance, he must first have recovered judgment at law." (See the rule stated and the authorities collated in 5 Ency. Pl. & Pr., p. 468.)

"Creditors at large of a partnership have no lien upon the assets of the firm, and stand in no better position because their debtor is a partnership, and must, in general, recover a judgment before they can resort to equity, either to marshal the partnership assets and compel their application to the payment of partnership debts, or to reach property of the partnership which has been fraudulently conveyed." (See the rule stated and the authorities collated in 5 Ency. Pl. & Pr., p. 482.)

In *Case v. Beauregard*, 99 U. S. 119, the copartnership and the members thereof were insolvent. One member of the firm in payment of his individual debt transferred his interest in the copartnership property to A. A took possession of the property and sold it to B, the other member of the copartnership uniting in the conveyance. C, a creditor without judgment, of the copartnership, then brought a suit in equity to subject the property transferred to B to the payment of his debt, and the court held that as the property was not held in trust by B, and that as the creditor had no specific lien upon it and no judgment, the action could not be maintained. (See also *Case v. Beauregard*, 101 U. S. 688; *Board of Public Works v. Columbia College*, 84 U. S. 521; *Taylor v. Boucker*, 111 U. S. 110; *Goembel v. Arnett*, 100 Ill. 34; *Gore v. Kramer*, 117 Ill. 176, 7 N. E. Rep. 504.)

In *Crippen v. Hudson*, 13 N. Y. 161, it was ruled that

the provisions of the Code of Civil Procedure, which permit a plaintiff to unite in his petition both legal and equitable causes of action, do not modify the rule which requires a creditors' bill to affirmatively disclose that the plaintiff therein, a creditor of an insolvent copartnership, has exhausted his legal remedies for the collection of his debt, the petition not disclosing that the creditor had a legal or an equitable lien upon the copartnership property.

In 3 Pomeroy, Equity Jurisprudence [2d ed.], sec. 1415, the rule under consideration is discussed and the authorities supporting the rule and the exceptions thereto collated. The author says: "It is a necessary result from the whole theory of the creditors' suits that jurisdiction in equity will not be entertained where there is a remedy at law. The general rule is, therefore, that a judgment must be obtained, and certain steps taken towards enforcing or perfecting such judgment, before a party is entitled to institute a suit of this character."

In *Weil v. Lankins*, 3 Neb. 384, Weil brought an action against Lankins to recover a sum of money and at the same time caused an attachment to be issued and levied upon certain real estate as the property of Lankins, the title being of record in the name of his wife. Subsequently, Weil brought an action against Lankins and his wife, reciting the fact that Lankins was indebted to him—Weil; that a suit was pending for the recovery of the debt; the attachment of the real estate as the property of Lankins, and alleging that Lankins had conveyed this real estate to his wife for the purpose of defrauding his creditors and praying that such conveyance might be set aside; and this court held that the petition did not state a cause of action, because it showed upon its face that Weil had not reduced his claim against Lankins to judgment, and summed up its conclusion as follows: "We think it is clear that a creditors' bill to set aside a fraudulent conveyance can only be maintained by a judgment creditor."

In *Weinland v. Cochran*, 9 Neb. 480, Weinland alleged in his petition that in the superior court of Chicago, Cook county, Illinois, he had recovered a judgment against Cochran and one Wiswall; that after the action was commenced, but before the judgment was rendered, Wiswall, without consideration, and for the purpose of defrauding his creditors, conveyed certain real estate in Nemaha county, Nebraska, to one Ford. The prayer of Weinland's petition was for a judgment on the judgment recovered in Illinois, and for a decree setting aside the conveyance of the land made by Wiswall and subjecting it to the payment of whatever judgment he might recover; and the court held, in effect, that there were two causes of action joined in the petition,—one of them a legal cause of action against the parties liable upon the Illinois judgment, the other an equitable cause of action in the nature of a creditors' bill against those parties and their alleged fraudulent grantees; and that the petition, in so far as it attacked the conveyance made of the land as fraudulent, did not state a cause of action. LAKE, J., speaking for the court, said: "Under our practice, subject to certain statutory restrictions, legal and equitable causes of action may be included in the same suit; but they must be existing, and not merely prospective causes of action. And, furthermore, we see no propriety in a practice which would put a grantee to the trouble and expense of a protracted litigation in defense of his title until after the indebtedness of his grantor has been judicially established."

In *Crowell v. Horacek*, 12 Neb. 622, Crowell filed a petition against Waclaw Horacek and others, in which he prayed (1) for a judgment against Horacek for $365; (2) for an injunction to restrain Mary Horacek from receiving a county warrant of Stanton county drawn in her favor for the sum of $88; and (3) to restrain the county clerk of said county from delivering said warrant to said Mary Horacek, and that upon final hearing of the case the said warrant might be declared to be the property

of Waclaw Horacek and applied to the payment of Crowell's claim. The court held that the petition stated a legal cause of action against Waclaw Horacek, but that it failed to state a cause of action against the other parties made defendants thereto. MAXWELL, J., examined the question at some length, collated and reviewed the authorities, and summed up the conclusion of the court as follows: "A mere general creditor, who has not reduced his claim to judgment, cannot maintain an action to enjoin a debtor from transferring his property;" and stated the principle upon which the decision rests in the following language: "The reason of the rule seems to be, that until the creditor has established his title he has no right to interfere, and it would lead to an unnecessary, and perhaps a fruitless and oppressive, interruption of the exercise of the debtor's rights. Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds."

In *Johnson v. Parrotte*, 46 Neb. 51, Johnson sued Parrotte at law for damages in the district court of Buffalo county. The jury returned a verdict in favor of Johnson, and Parrotte filed a motion for a new trial, which the district court sustained, but entered no judgment dismissing Johnson's suit. Johnson then prosecuted a petition in error to the supreme court to reverse the order of the district court granting Parrotte a new trial. The supreme court reversed the order of the district court and, in pursuance of a stipulation of the parties, rendered a money judgment in favor of Johnson against Parrotte. This judgment Johnson subsequently made the basis of a creditors' bill brought in the district court of Buffalo county to set aside certain conveyances of real estate made by Parrotte subsequent to the rendition of the verdict, but before the judgment was pronounced by the supreme court, and it was held that the creditors' bill did not state a cause of action, because it showed upon its face that Johnson had no judgment against Parrotte, the judgment pronounced by the supreme court being

void for want of jurisdiction; and in that case it was said by the court that the foundation of every creditors' bill is an unimpeachable judgment, and the plaintiff who exhibits such bill, as a condition precedent to his right to relief, is required to plead and prove his ownership of a valid and unsatisfied judgment.

5. In the states of Maryland, Virginia, West Virginia, Masachusetts, and Alabama, and perhaps others, statutes exist authorizing a creditor to maintain a creditors' bill without first having reduced his claim to judgment; but the authorities are practically unanimous in support of the general rule already stated. It is true that to this general rule there are some exceptions. The doctrine of the supreme court of the United States seems to be that a creditor without judgment may maintain a creditors' bill if he has a lien, legal or equitable, upon the property of his debtor or if the property is held in trust for him. (*Case v. Beauregard*, 101 U. S. 688.)

6. In the case at bar Morse & Co. do not claim that they have any legal lien upon the assets of this copartnership of Welshans & Co., but they do claim that they have an equitable lien upon these assets because of the provisions of the contract under which they sold the boilers. They base this claim of an equitable lien upon these assets upon the provisions of the contract in and by which Welshans & Co. agreed that Morse & Co. should be paid for the boilers as soon as they were set in place and accepted by the United States, and paid for out of the moneys coming to Welshans & Co. from the United States on the contract for the improvement in which said boilers were used. The petition does allege that the agreement between Morse & Co. and Welshans & Co. not only provided that Welshans & Co. should be paid for their boilers out of the money coming on the contract with the United States, but that they should have a lien upon the proceeds of that contract. But it is obvious that this is the pleader's legal conclusion of the effect of and not the actual contract between the par-

ties. But an agreement of a debtor to pay his creditor's claim out of the moneys received from a particular fund, but which gives the creditor no present right in or control over the fund, save through the debtor, and looks to the future acts of the debtor to render the fund available, does not operate as an equitable assignment of the fund to the creditor. (*Christmas v. Griswold*, 8 O. St. 558; *Ford v. Garner*, 15 Ind. 298; *Pearce v. Roberts*, 27 Mo. 179; *German Nat. Bank of Hastings v. First Nat. Bank of Hastings*, 55 Neb. 86.)

In *Christmas v. Russell*, 81 U. S. 69, the rule is stated in this language: "A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund even in equity. To make an equitable assignment there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right on the party meant to be provided for, even where the circumstances do not admit of its immediate exercise. If the holder of the fund retain control over it, as, *ex. gr.*, power on his own account to collect it or to revoke the disposition promised, this is fatal to the thing as an equitable assignment." The averments of Morse & Co.'s petition fall far short of bringing them within the doctrine of an equitable assignment. No part of the moneys due from the United States was set aside for the payment of Morse & Co.'s claim. Notwithstanding the promise made by Welshans & Co. to pay Morse & Co.'s claim out of the moneys which might be paid them by the United States as soon as the boilers were accepted and put in place, Welshans & Co. at no time parted with their control and right of disposition of the money coming from the United States; nor did they, by an order or otherwise, invest Morse & Co. with the authority to receive or collect these moneys or any part of them.

7. A second theory upon which this petition is framed is that the assets of this partnership were held in trust

for all the creditors by the surviving partner and that therefore his transferees hold them in trust. But the creditors of a copartnership, merely because they are creditors, are not given a lien by law upon its assets whether the firm be solvent or insolvent; and the assets of an insolvent copartnership are not held in trust by the surviving partner of the firm for the payment of copartnership debts. (*Richards v. Leveille*, 44 Neb. 38; *Ætna Ins. Co. v. Bank of Wilcox*, 48 Neb. 544.) On the dissolution of this copartnership by the death of Dwelley, the right to the possession and disposition of the copartnership assets vested in the surviving partner. (*Lindner v. Adams County Bank*, 49 Neb. 735.) And he no more held those partnership assets in trust for the benefit of the creditors of the partnership than did the partnership itself. It is to be remembered that this is not an action to wind up the copartnership affairs of Welshans & Co. and to marshal and distribute their assets. If, therefore, the petition of Morse & Co. shows that the copartnership of Welshans & Co. and the members thereof are insolvent; that the entire assets of said copartnership have been, with the consent and connivance of the surviving member, transferred and accepted for the purpose of defrauding the copartnership creditors, still the petition states no cause of action against the parties to such transfer, because it shows upon its face that Morse & Co. have not reduced their claim against the copartnership to judgment, the petition disclosing that they have neither a legal nor an equitable lien upon the copartnership assets and that they are not trust funds for the payment of partnership debts. If the petition showed that this copartnership, or the surviving member of it, was not within the jurisdiction of the court and therefore it was impossible for Morse & Co. to obtain a judgment against it or the surviving member of it, and further disclosed that such parties had no property within the jurisdiction of the court which Morse & Co. could reach by attachment, garnishment, or other legal process,

then, perhaps, the petition would state a cause of action, because, though it would show that Morse & Co. had no judgment, it would show it impossible to obtain one, and that they were without any remedy at law whatsoever for the collection of their claim. But to enable Morse & Co. to maintain this creditors' bill the petition must aver that their claim against Welshans & Co. has been reduced to judgment and is unsatisfied, or it must show that the obtaining of a judgment is impossible because the parties liable upon the claim are not within the jurisdiction of the court, and that the copartnership has no property which can be reached by garnishment, attachment, or other legal process. What has been said in reference to the petition of Morse & Co. applies to the cross-petition of the manufacturing company.

On the final hearing of this case the district court made an order dismissing Mrs. Dwelley, the deceased partner's widow, out of the case. This order of the district court is affirmed. The court also made an order, on the final hearing, dissolving a temporary injunction which it had issued at or after the commencement of the action. This order is affirmed. Every other order made by the district court in this proceeding is reversed, vacated, and annulled and the cause is remanded to the district court, not for a new trial, but with instructions, (1) by proper orders, to cause the clerk of the court to repay to the parties who paid it in all money in his custody paid to him by parties to this suit in pursuance of the orders of the district court made herein; (2) to dismiss the cross-petition of the manufacturing company; (3) to dismiss the action of Morse & Co. against all parties made defendants thereto, except the copartnership of Welshans & Co. and J. L. Welshans, the surviving member thereof, the parties so dismissed out of the case to recover their costs; (4) to permit the action of Morse & Co. to stand and proceed as one at law, if desired, to judgment against Welshans & Co. and J. L. Welshans on the claim which Morse & Co. assert against the copartnership; (5) to tax

all the costs of this proceeding to Morse & Co. and the Nelson Manufacturing Company.

REVERSED AND REMANDED.

EMANUEL ROSENFIELD V. BEE PUBLISHING COMPANY ET AL.

FILED JUNE 9, 1898. No. 8156.

1. **General Verdict:** ISSUES. Where no special findings are made, a general verdict in favor of a party includes a finding in his favor on every material issue made by the pleadings.
2. **Conversion:** VERDICT FOR DEFENDANTS. Evidence examined, and *held* to sustain the finding of the jury.

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

Bartlett, Baldrige & De Bord, for plaintiff in error.

E. W. Simeral and *William Simeral, contra.*

RAGAN, C.

Zunder Bros. were indebted to Emanuel Rosenfield, and to secure the payment of such debt executed to him a mortgage upon some shoes, being a part of a boot and shoe stock owned by them. Zunder Bros. were also indebted to the Bee Publishing Company, and it brought suit for the collection of its debt and caused an attachment to be issued, under which certain property of Zunder Bros. was seized. Emanuel Rosenfield then sued the Bee Publishing Company, and the constable who served said writ of attachment, for conversion, claiming that the property seized under said writ was embraced in his mortgage. The trial resulted in the jury finding a verdict for the defendants, upon which a judgment was entered dismissing Rosenfield's suit, and for a review of this judgment he has filed here a petition in error.

1. One of the principal points litigated upon the trial was whether Rosenfield's mortgage covered the property seized on the attachment writ and converted to its own use by the Bee Publishing Company. Rosenfield claimed that this property was embraced in his mortgage, and the evidence introduced on his behalf tended very strongly to establish that contention. On the other hand, the Bee Publishing Company claimed that the property which it seized under the writ of attachment was not the property embraced in Rosenfield's mortgage, and the evidence on its behalf, including that of the officer who served the writ of attachment and the parties who appraised the property taken on that writ, tended to support its conclusion. The jury made no special findings, but returned a general verdict in favor of the defendants below, and we must hold that this general verdict includes a finding that Rosenfield's mortgage did not cover any of the property seized on the writ of attachment and converted to its own use by the Bee Publishing Company.

2. There are some other assignments of error argued, which we have carefully examined, but we find no error in the record which calls for a reversal of the judgment, and it is accordingly

AFFIRMED.

PATRICK BOICE V. JACOB PALMER.

FILED JUNE 9, 1898. No. 8153.

1. **Evidence:** OFFER TO COMPROMISE. In a suit for damages for inducing the purchase of property by false representations an offer of plaintiff to compromise his differences with the defendant before suit brought is incompetent evidence.

2. **Instructions:** ISSUES. A party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence.

3. **Witnesses:** INTEREST IN SUIT. The law does not raise against a

witness the presumption of dishonesty because of his interest in the result of the suit in which he testifies.

4. ———: ———: INSTRUCTIONS. Where a defendant to a suit testifies on the trial in his own behalf, it is error for the court to charge the jury that, "as a general rule, a witness who is interested in the result of a suit will not be as honest, candid, and fair in his testimony as one who is not so interested."

ERROR from the district court of Sarpy county. Tried below before BLAIR, J. *Reversed.*

T. J. Mahoney and *C. J. Smyth,* for plaintiff in error.

James Hassett, contra.

RAGAN, C.

On February 21, 1894, Patrick Boice caused to be sold at public sale at his farm in Sarpy county certain of his property and stock, among the latter a jack. The jack was purchased by Jacob Palmer. In the district court of that county Palmer subsequently sued Boice, alleging that before he bid for and purchased said jack Boice represented to him that the jack was sound, all right, and a sure foal-getter; that, relying upon these representations, he purchased the jack and paid for him the sum of $445; that the representations made by Boice were false; that the jack was then and there diseased, of no value whatever, and soon thereafter died. There was the usual prayer for damages. Palmer had a verdict and judgment, and Boice has brought the proceeding here for review on error.

1. The first assignment of error relates to the action of the district court in permitting Palmer to testify concerning an offer of compromise made by him to Boice with reference to the differences between them growing out of the purchase of this animal. We cannot state this contention better than by quoting the record, observing that the questions were properly objected to at the time by Boice and his objections overruled, and that a motion by him to strike out the testimony given by Palmer was also overruled.

Q. After the veterinary came there I will ask you if you had any conversation with Mr. Boice in reference to it?

A. After the veterinary came there?

Q. Yes, sir.

A. Yes, sir. After the veterinary came there I went and seen Mr. Boice; I had made up my mind—

Q. Now you may state what that conversation was.

A. I went to Mr. Boice and told him that the jack I bought was about to die, and I came over to see whether he wouldn't do something about that note I had given him, and I wanted to get the note back. And I told him I thought it was going to die, and I says, "I come over to see what you are going to do about the note. I want to get my note back." Mr. Boice said that he wouldn't do anything. I says, "Mr. Boice, you know very well that I have had nothing out of the animal." I says, "I have never bred a mare to him. I haven't got a dollar out of him in any way. He has been so I couldn't use him, and you knew he was diseased when you sold him to me." He says, "Well, I won't do anything. When you bought him I didn't give any warranty. You took him just as I did. That is the way you took him. You bought him at public sale, and what are you going to do about it?" I says, "I come over here to settle with you," I says, "and rather than get into a lawsuit," I told him, "Mr. Boice," I says, "I am a poor man and so are you," I says, "and rather than get into a lawsuit with you I would rather make you a present of $100 and get the note back, and if the jack lives, which I don't think he will, you can have him." He says, "I won't do anything of the kind." I told him, "Mr. Boice, I will have to take action against you for to recover the note." He says, "Go and sue me, and I will employ the best attorney in the state to defend me," and that concluded my conversation with him there.

We think the admission of this testimony was prejudicially erroneous. Palmer did not bring this suit for

a rescission of the contract of sale. His action was one for damages and the issues were whether Boice had warranted this jack, and if so whether the warranty had failed; and this evidence did not tend to prove or disprove these issues, but it was calculated to prejudice the jury against Boice by making it appear that he was of a litigious disposition and unwilling to compromise his differences with his neighbors, instead of going to law,—a very potent argument to juries in cases like this. (*Kierstead v. Brown*, 23 Neb. 595; *Eldridge v. Hargreaves*, 30 Neb. 638.)

2. Palmer's contention upon the trial—and the evidence in his behalf tended very strongly to sustain it—was that when the jack was led out for sale, and after several bids had been made upon him, he inquired of the auctioneer as to the soundness and quality of this animal for the purposes for which he was kept; that the auctioneer then turned to Boice, who was standing by, and repeated Palmer's question to him, and thereupon Boice answered: "I will warrant him to be as sound as a dollar and all right and to be a good foal-getter." On the other hand Boice testified positively that at the time the jack was sold he was not near the auctioneer's stand, nor within hearing distance of what was going on; that the auctioneer did not propound any question to him concerning the jack; that he made no representations as to his health or quality to any one, and that he did not authorize the auctioneer to warrant him in any respect whatever. In fact, that the auctioneer asked him no questions concerning the jack. Boice requested the district court to give to the jury the following instruction: "If you should find that any statement or representations respecting the condition of the jack were made at or immediately before the sale by the auctioneer, you should wholly disregard such statements, unless you find from the evidence that they were authorized by the defendant or known to the defendant before the sale was consummated." The court refused to give

this instruction and Boice excepted. In this respect we think the district court erred. The court had already instructed the jury that any representation or warranty made by the auctioneer with the authority of Boice should be regarded as a representation or warranty made by Boice himself. This was correct, as Palmer's contention was that the warranty or representation was made by the auctioneer by authority of Boice; and whether the auctioneer made this representation, and if so, whether he made it by authority of Boice, were issues in the case, and the court, by the instruction given, correctly submitted Palmer's theory of the case to the jury; but the court refused to submit Boice's theory of the case to the jury by denying the instruction under consideration. A party to an action is entitled to have the jury instructed with reference to his theory of the case when the pleadings present the theory as an issue and it is supported by competent evidence. (*Billings v. McCoy*, 5 Neb. 187; *Skinner v. Majors*, 19 Neb. 453; *Gilbert v. Merriam Saddlery Co.*, 26 Neb. 194; *Hancock v. Stout*, 28 Neb. 301; *First Nat. Bank of Madison v. Carsons*, 30 Neb. 104.)

3. The district court, in an instruction numbered 14, among other things charged the jury as follows: "As a general rule, a witness who is interested in the result of a suit will not be as honest, candid, and fair in his testimony as one who is not so interested." What the learned district court says may be true, but we are persuaded that a court should never give such an instruction as this. The law does not raise against a witness the presumption of dishonesty because of his interest in the result of a suit in which he testifies. True, the jury have a right to take into consideration the witness' interest in the result of the suit on trial in determining what credit shall be given the witness' testimony; but the credibility of witnesses and the weight to be given their testimony is solely for the jury, and a trial court should not instruct the jury that the law is that a witness who is interested in the result of a suit will not be as honest, candid, and

fair in his testimony as one who is not interested. (*Van Sickel v. Buffalo County*, 13 Neb. 103; *Preuit v. People*, 5 Neb. 377; *Olive v. State*, 11 Neb. 34; *Howell Lumber Co. v. Campbell*, 38 Neb. 567; *Murphy v. Virgin*, 47 Neb. 692; *Dixon v. State*, 46 Neb. 298; *Argabright v. State*, 49 Neb. 760.)

For the errors indicated above the judgment of the district court must be reversed and the cause remanded.

REVERSED AND REMANDED.

CALL PUBLISHING COMPANY V. JUDSON H. EDSON.

FILED JUNE 9, 1898. No. 8178.

Contract for Advertising. The contract between the parties set out in the opinion and the construction placed thereon by the district court approved.

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

Frederick Shepherd, for plaintiff in error.

A. G. Greenlee, contra.

RAGAN, C.

On January 10, 1891, J. H. Edson and the Call Publishing Company, a newspaper corporation, entered into a contract in writing, in words and figures following:

"ADVERTISING CONTRACT.

"*Publishers Lincoln Daily Call, Lincoln, Neb.:* I hereby authorize you to insert my advertisement in the Lincoln *Daily Call*, to occupy the space of five thousand (5,000) lines local reading matter, said advertisement to run one year, commencing January 10, 1891, for which I agree to pay the sum due for the lines used on the first day of each month until the expiration, at the rate of $2\frac{1}{2}$ cents per line."

Edson furnished the *Call* advertising matter which when printed amounted to 891 lines, and for this number of lines Edson paid for the time they were printed. The publishing company then brought this suit in the district court of Lancaster county against Edson, setting out the foregoing contract, alleging that it had often requested Edson to furnish the additional 4,109 lines of advertising matter under his contract; that they had at all times been ready and willing to print the same in accordance with the contract; that he had neglected and refused to furnish the remaining 4,109 lines of advertising matter, and it prayed judgment against Edson for damages in the sum of $102.80, being what the 4,109 lines at 2½ cents per line would amount to. The trial resulted in a judgment dismissing the publishing company's action and it brings the same here for review.

The theory of the publishing company is that by the contract Edson bound himself to furnish it 5,000 lines advertising matter for a year for which he agreed to pay it 2½ cents per line monthly; but this is an erroneous interpretation of the contract. By this contract Edson agreed to pay the publishing company 2½ cents per line for each line of printed matter furnished by him and published by the printing company during the existence of the contract, not to exceed, however, 5,000 lines; but he did not agree to furnish as much as 5,000 lines and only agreed to pay 2½ cents per line for the number of lines published by the publishing company, not exceeding 5,000 lines. The construction of the contract was the only issue in the case. The district court rightly interpreted it, and its judgment is

AFFIRMED.

OMAHA LAW LIBRARY ASSOCIATION V. WILLIAM J. CONNELL.

FILED JUNE 9, 1898. No. 8166.

1. **Corporations:** ASSESSMENT OF STOCK. An assessment, as that term is understood in corporation law, is a levy made upon the stock of the corporation requiring the stockholder to pay in proportion to the amount of stock owned by him.

2. ———: ———: DUES. The charter of the Omaha Law Library Association examined, and *held* to confer authority on the board of directors of the corporation to enact a by-law imposing an annual due on each of its stockholders.

3. ———: ———. The by-laws of said corporation examined, construed, and *held* not to attempt an assessment of the stock of the corporation.

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

Charles W. Haller and *Brome, Burnett & Jones*, for plaintiff in error.

William F. Gurley, contra.

RAGAN, C.

The Omaha Law Library Association sued William J. Connell in the district court of Douglas county to recover certain dues imposed upon him as a stockholder of said corporation by the by-laws thereof. To review the judgment of the district court dismissing the association's action it has filed a petition in error in this court.

1. The undisputed facts in the case are as follows: The library association is a corporation created and subsisting under and by virtue of the general incorporation law of the state. Its capital stock is fixed at $10,000, divided into shares of $100 each. Connell was a subscriber for one or more shares of this stock, has paid in full for the stock subscribed, and is a stockholder of the corporation, and the dues for which this suit was brought are unpaid.

Article 1 of the articles of incorporation declares: "The undersigned do hereby associate ourselves together and declare that we, together with our associates, successors, and assigns, are and shall be a corporation under and by virtue of the statutes of the state of Nebraska, by the name and style of The Omaha Law Library Association."

Article 2: "The object and purpose of the said corporation shall be to establish and maintain a law library in the city of Omaha, in Douglas county, in the state of Nebraska, for the use of the members of said association."

Article 6 of said corporation provides, among other things: "The board of directors shall have power to provide for the forfeiture of the stock of the association for failure for a period of not less than one year of the owner of any share or shares to pay the annual dues assessed thereon."

Article 11: "By-laws may be made by the corporation not inconsistent with law or with these articles."

The by-laws, section 24, provide: "To meet the current expenses of maintaining the library the following dues shall be paid to the treasurer, or by his direction to the librarian. Attorneys residing in this county shall pay annual dues at the rate of $15 per annum in advance. * * * Attorneys not residing in this county and not being stockholders may have all the privileges of the library on paying in advance $5 for each and every month."

Section 26 provides: "No attorney residing in this county shall be entitled to the use of the library unless he owns at least one share of its capital stock paid up in full."

In support of the judgment of the district court it is insisted that the dues sued for herein are assessments levied or attempted to be levied by the by-laws upon the capital stock of the corporation; that as Connell has fully paid for all the stock for which he subscribed; that as the statute under which the corporation was organized does

not expressly authorize the assessment of the stock, and that as the articles of incorporation—the charter of the corporation—do not expressly authorize the assessment of the stock of the corporation, therefore the by-law imposing the dues is void. The correctness of the conclusion drawn by counsel for Connell, that this by-law is void, may be conceded if the dues provided for therein are assessments upon the stock of the corporation within the meaning of that term as used in corporation law. It is true that this association is not a club, nor a benevolent association, nor a voluntary unincorporated association. It is a corporation, in the broadest sense of that term, duly organized and existing, with a fully subscribed and paid up capital stock. Therefore, in the absence of a statute, or some provision in its articles of incorporation expressly authorizing assessments to be levied upon the paid-up stock, the directors may have no authority to enact a by-law imposing assessments upon the capital stock. An assessment, as that term is understood in the corporation law, is a levy made upon the stock of the corporation and requires the stockholder to pay in proportion to the amount of stock owned by him. But the by-law under consideration does not attempt to levy an assessement upon the stock of this corporation. It provides simply that every stockholder in the corporation shall pay to its treasurer an annual due of $15, and the dues are imposed upon the stockholder—not upon the stock. The holder of one share of stock pays the same dues as the holder of any number of shares of stock; so that the real question is as to the authority of the board of directors to enact this by-law requiring each stockholder of the corporation to pay an annual due. No provision of the statute, under which this corporation was organized, expressly authorizes the enactment of a by-law imposing dues upon the stockholders, and no clause of the articles of incorporation in express terms authorizes the enactment of such a by-law. But we are of opinion that implied authority for the enact-

ment of such a by-law is found in article 6 of the articles of association, which in express terms gives the board of directors authority to provide for the cancellation of a stockholder's stock by reason of his failure to pay the annual dues imposed upon him. Furthermore, article 11 of the articles of incorporation provides: "By-laws may be made by the corporation not inconsistent with law or with these articles." Now what was the purpose for which this by-law in controversy was enacted? While this association is a *de jure* corporation, still it is not a corporation for trade or profit. It is not engaged in any commercial enterprise, but, as its charter declares, it is organized for the purpose of establishing and maintaining a law library for the use of its stockholders. It must have been apparent to the organizers of this corporation that after it was organized certain current expenses would have to be met. Books would have to be purchased from time to time to keep up the library. Rent and taxes would have to be paid. There would be the expense of light and fuel; a janitor and a librarian to be provided for; and, with these thoughts in mind, we think the promoters of this corporation, by its articles of association, authorized its board of directors to enact just such a by-law as the one in controversy, namely, one to meet the current expenses of maintaining the library. The by-law, then, is not inconsistent with the law authorizing the creation of the corporation, nor is it inconsistent with the corporation's charter.

2. Connell also interposed as an answer to this action that during the time in which the dues sued for herein accrued he was not engaged in the practice of law and had no opportunity of enjoying the privileges and the use of the library. This was no defense. The by-law imposes the annual due upon the stockholder, and so long as he is a stockholder he is liable for the dues whether he uses the library or not. Being a stockholder he has the privileges of the library and with the privileges go the burdens.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

OMAHA LAW LIBRARY ASSOCIATION V. GEORGE J. HUNT.

FILED JUNE 9, 1898. No. 8167.

Corporations: ASSESSMENT OF STOCK: DUES. On the authority of *Omaha Law Library Ass'n v. Connell*, 55 Neb. 396, the judgment of the district court rendered in this action is reversed.

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

Charles W. Haller and *Brome, Burnett & Jones*, for plaintiff in error.

William F. Gurley, contra.

RAGAN, C.

The Omaha Law Library Association has filed a petition in error here to review a judgment of the district court dismissing a suit brought by it in the district court of Douglas county against George J. Hunt. The facts in the case are identical with those in the case of *Omaha Law Library Ass'n v. Connell*, 55 Neb. 396, and upon the authority of that case the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.