REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

SEPTEMBER TERM, 1898.

VOLUME LVI.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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1899.

THE SUPREME COURT

OF

NEBRASKA.

1898.

CHIEF JUSTICE,

T. O. C. HARRISON.

JUDGES,

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J. J. SULLIVAN.

COMMISSIONERS,

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First District—

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J. S. STULL.....Auburn

Second District—

B. S. RAMSEY.....Plattsmouth

Third District—

A. J. CORNISH.....Lincoln
LINCOLN FROST.....Lincoln
E. P. HOLMES.....Lincoln

Fourth District—

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JACOB FAWCETT.....Omaha
W. W. KEYSOR.....Omaha
CLINTON N. POWELL.....Omaha
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Fifth District—

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S. H. SEDGWICK.....York

Sixth District—

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C. HOLLENBECK.....Fremont

Seventh District—

W. G. HASTINGS.....Wilber

Eighth District—

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F. B. BEALL.....Alma

Eleventh District—

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

Twelfth District—

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

Thirteenth District—

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Fifteenth District—

M. P. KINKAID.....O'Neill
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STULL, BERTHA B.
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TUCKER, H. O.
UNKEFER, L. B.
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SUPREME COURT COMMISSIONERS.

(Laws 1893, chapter 16, page 150.)

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

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

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

See page xlvii for table of Nebraska cases overruled.

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

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STATUTES AND CONSTITUTIONAL PROVISIONS

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1898.

PRESENT:

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

STATE OF NEBRASKA, EX REL. WILLIAM J. BROATCH, v. FRANK E. MOORES.

FILED SEPTEMBER 23, 1898. No. 9249.

1. **Quo Warranto:** RIGHT TO TRIAL BY JURY. The history of quo warranto examined, and *held* not to furnish a basis for the determination of the question whether or not a jury trial, in this state, is demandable as a matter of right.

2. ———: ———. The provision of section 6 of article 1 of the constitution of Nebraska considered, and, in connection with provisions of the statute in existence at the time of its adoption, *held* not to entitle the respondent in a quo warranto proceeding to demand a jury for the trial of the issues of fact to be determined, as a matter of right.

3. **Supreme Court:** EXERCISE OF JURISDICTION. Where jurisdiction is in direct terms conferred upon the supreme court of this state, it will be exercised in such manner as constitutionally it may be exercised, even though no rules of procedure applicable to such a case have been provided by the legislature.

4. **Clerk of District Court:** PUBLIC MONEY: CONVERSION: ELIGIBILITY. A clerk of the district court who, knowingly and intentionally, deposits public moneys received by him in payment of fines imposed in his court, together with other trust funds and his own private funds in a bank in one general account, to his own individual credit and, before he has paid said fines to the county treasurer as provided by law, knowingly, willfully, and intentionally draws from said bank all of the funds so deposited and uses the same for purposes other than the payment of said fines, thereby converts said public moneys to his own use, and is properly held in default, within the meaning of section 2, article 14, of the constitution of the state, and therefore ineligible to any office of trust or profit during the existence of such default.

ORIGINAL application in the nature of quo warranto to oust respondent from the office of mayor of the city of Omaha on the ground that he is ineligible within the meaning of section 2, article 14, of the constitution, providing that any person who is in default as collector and custodian of public money or property shall not be eligible to any office of trust or profit under the constitution or laws of the state. Heard on demand of respondent for a trial by jury, on exceptions to referee's findings against respondent, and on motion of relator to confirm said findings. *Judgment of ouster.*

See opinions for references to authorities.

C. C. Wright, J. B. Sheean, and *Frank T. Ransom,* for relator.

John C. Wharton, Wharton & Baird, J. J. Boucher, and *Greene & Breckenridge, contra.*

RYAN, C.

In this case there has already been a description and discussion of the issues, which thereby were greatly simplified. (*State v. Moores,* 52 Neb. 770.) There has now been a trial of these issues to a referee, who has reported his findings of fact and conclusions of law in accordance with the requirements of the order under which he was appointed.

Before discussing the exceptions and objections to these findings, we shall consider a question argued very strenuously and one which, not having then arisen, could not be discussed in the former opinion, and that is the right of respondent, upon demand, to a trial of the issues by a jury. The writ of quo warranto seems first to have been used in the year 1198 against the incumbent of a church to require him to show quo warranto he held the church. It was used for the purposes of extortion by the sovereigns of England until its scope was limited and its abuse checked by statute. The first of these statutes was known as the "Statute of Gloucester," from the place where parliament then sat. By its provisions there was an opportunity given the party affected to be heard at the coming of the king, or his justices in eyre. The defendant was still liable, however, to be summoned by a general proclamation at the hands of the sheriff, without any complaint or charge being tendered, and there were frequent delays in pronouncing judgment. To remedy these grievances there was passed the statute of 18 Edward I., in the year 1290, whereby pleas of quo warranto were required to be determined in the circuits of the justices. Probably writs of quo warranto fell into disuse about the sixteenth year of Richard II. The substitution therefor of the information in the nature of a quo warranto was attributed by Blackstone to the length of the process upon the proceeding in quo warranto, as well as to the fact that the judgment rendered was final and conclusive, even against the crown. The original writ of quo warranto was strictly a civil remedy, prosecuted at the suit of the king by his attorney general, and, in case of judgment for the king, the franchise was either seized into his hands, if of such a nature as to subsist in the crown, or a mere judgment of ouster was entered for the ejection of the usurper. There was no fine or other like punishment. The information was originally regarded as a criminal proceeding in which the usurpation of the office or franchise was charged as

a criminal offense, and the offender was liable, upon conviction, to a fine and imprisonment in addition to the loss of the usurped franchise. In speaking of an information in the nature of quo warranto in *Ames v. Kansas*, 111 U. S. 449, Waite, C. J., said: "Long before our revolution, however, it lost its character as a criminal proceeding in everything except form, and was 'applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal only' (3 Bl. Com. 263; *King v. Francis*, 2 T. R. [Eng.] 484; Bacon, Abridgment, Title, Information d.; 2 Kyd, Corporations 439); and such, without any special legislation to that effect, has always been its character in many of the states of the Union. (*Commonwealth v. Browne*, 1 S. & R. [Pa.] 385; *People v. Richardson*, 4 Cow. [N. Y.] 102, note; *State v. Hardie*, 1 Ired. Law [N. Car.] 42, 48; *State Bank v. State*, 1 Blackf. [Ind.] 267, 272; *State v. Lingo*, 26 Mo. 496, 498.) In some of the states, however, it has been treated as criminal in form, and matters of pleading and jurisdiction governed accordingly. Such is the rule in New York, Wisconsin, New Jersey, Arkansas, and Illinois, but in all these states it is used as a civil remedy only. (*Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. [N. Y.] 370, 377; *People v. Jones*, 18 Wend. [N. Y.] 601; *State v. West W. R. Co.*, 34 Wis. 197, 213; *State v. Ashley*, 1 Ark. 279; *State v. Roe*, 2 Dutch. [N. J.] 215, 217.)" A review of some of the cases in which the information in the nature of quo warranto is treated as in its nature a criminal proceeding is not without a certain value, for thereby it will be seen that, while the remedy is deemed a civil remedy, yet that, with the idea of an information there is associated such a leaning toward the analogies of criminal procedure that the holdings of these courts with reference to the right of trial by jury should be accepted with caution.

In *Donnelly v. People*, 11 Ill. 552, Caton, J., in the delivery of the opinion of the court with reference to the degree of precision requisite in indictments and informa-

tions, said: "The same certainty and technical precision are required in both, and the principal, if not the only, difference between them is, that an indictment is presented by the grand jury on their oaths while in informations in the nature of a quo warranto the court is informed of the facts by the state's attorney. In treating of these informations Sergeant Hawkins says: 'An information differs from an indictment in little more than this: that the one is found by the oath of twelve men, and the other is not so found, but is only the allegation of the officer who exhibits it. Whatsoever certainty is requisite in an indictment, the same, at least, is necessary, also, in an information, and consequently, as all the material parts of the crime must be precisely found in the one, so must they be precisely alleged in the other, and not by way of argument or recital.' (2 Hawkins, P. C. p. 369, ch. 26, sec. 4.)" In line with the above quoted language the supreme court of Illinois held that the omission of the words, "In the name and by the authority of the people of the state of Illinois," and "Against the peace and dignity of the same," was fatal to the information. The same ruling was made in *Wight v. People*, 15 Ill. 417; and in *Hay v. People*, 59 Ill. 94. As these three cases were cited in *Attorney General v. Sullivan*, 163 Mass. 446, hereafter to be considered, it will be well to remember the technical nicety which governs them.

In *State v. Davis*, 57 N. J. L. 203, Beasley, C. J., in the delivery of the opinion of the supreme court commenting upon the unjustifiable defense urged by the defendants, said: "It is not proper for this court to pass such a wrong as this without rebuke, and it is therefore ordered that judgment be entered that due process of law issue to remove these defendants from the offices into which they have intruded, and also that a fine of $200 be laid on each of said defendants for their malfeasance."

In *People v. Havird*, 2 Ida. 498, there was under consideration the constitutionality of an act passed by the legislature of that territory in which was embodied a

provision with reference to quo warranto, that: "Such action shall be heard and determined by the judge of the district court at chambers, and without the intervention of a jury, after due service of the summons and the expiration of time allowed by law for answering the complaint in a civil action; but no judgment shall be rendered in such action by default." In the discussion of this law there was the following language; "This law not only provides for supervision of elections and the correction of errors, but it goes further and places in the court unmistakable judicial powers. Section 541 provides 'that when a defendant against whom such action has been brought is adjudged guilty of usurping or intruding into, or unlawfully holding, any office, franchise, or privilege, judgment must be rendered that the defendant be excluded from the office, franchise, or privilege, and that he pay the costs of the action. The court or judge may also in its or his discretion, impose upon the defendant a fine not exceeding two thousand dollars.' Here are questions not merely as to the regularity of an election but also to the personal guilt or innocence followed by pecuniary consequences of no small moment. It aims not only at a civil remedy, but also at a criminal trial, personal punishment, and pecuniary fine and loss. The act of willful intrusion into a public office, to which one has not been elected, is declared to be a misdemeanor. (Revised Statutes Ida., sec. 6388.)" The principal matter discussed under these conditions of the statute was the denial of the right of trial by jury and the act was declared unconstitutional, probably for the most part, because of that denial.

The above references sufficiently illustrate the decided leaning of certain courts towards the practice ordinarily followed in the prosecution of criminals, and the danger that this bias may have influenced judgment as to the right of trial by jury. While some courts which incline towards the analogies afforded by the Code of Criminal Procedure do not evince so marked a leaning as above

indicated, they do go to the extent of insisting upon the right to have the issues determined by jury, apparently influenced by the consideration that the action being by information, the right of trial by jury naturally follows. These courts assert that the practice in England justifies the right to insist that the trial shall be by a jury—a contention not to be wondered at, when we consider the case of *Attorney General v. Sullivan, supra,* in which the right of jury trial was denied, but in which is found the following language and citation of numerous cases: "The practice in England, however, at common law as well as under the statutes, both in writs of quo warranto and in informations in the nature of a quo warranto, we think always has been to try issues of fact in the country by a jury, since juries were established, and this is true of many of the states of this country. (Bracton's Note Book 241, 862, 1666; Keilw. [Eng.] 151 pl. 47, 48, 49; 152 pl. 54; 1 Co. Lit. 155 (*a*) 155 (*b*); *Abbot of Strata Mercella's Case,* 9 Co. Rep. [Eng.] 24; *Attorney General v. Farnham,* Hardres [Eng.] 504; 3 Nelson, Abr. 42; *Rex v. Bennett,* 1 Strange [Eng.] 101; 14 Petersdorf, Abr. [Eng.] 97 *et seq.*; St. 18 Edw. I., 2 Co. Lit. secs. 494, 495; *Rex v. Higgins,* T. Raym. [Eng.] 484; *Darell v. Bridge,* 1 Wm. Bl. [Eng.] 46; *Rex v. Cambridge,* 4 Burr. [Eng.] 2010; *King v. Francis,* 2 T. R. [Eng.] 484; *King v. Mein,* 3 T. R. [Eng.] 596; *People v. Richardson,* 4 Cow. [N. Y.] 97, 100, note; *United States v. Addison,* 6 Wall. [U. S.] 291; *People v. Albany & S. R. Co.,* 57 N. Y. 161; *Buckman v. State,* 24 L. A. R. [Fla.] 806, note; *Van Dorn v. State,* 34 Fla. 62; *People v. Sackett,* 14 Mich. 243; *People v. Doesburg,* 16 Mich. 133; *Harbaugh v. People,* 33 Mich. 241; *Donnelly v. People,* 11 Ill. 552; *Wight v. People,* 15 Ill. 417; *Hay v. People,* 59 Ill. 94; *People v. Golden Rule,* 114 Ill. 34; *People v. Rensselaer & S. R. Co.,* 15 Wend. [N. Y.] 113, 30 Am. Dec. 33 and note.)"

We have examined such of the above citations of English text writers and adjudged cases as are within our reach, and have found in each of them a mere mention of

the fact that a jury trial had been had, but no discussion of the foundation of the right thereto. In the concluding part of the opinion in *Attorney General v. Sullivan, supra*, it was said: "The modern practice has been to try such an information as this without a jury, although it does not appear in the cases that a jury was demanded. (*Commonwealth v. Allen*, 128 Mass. 308; *Commonwealth v. Swasey*, 133 Mass. 538; *Commonwealth v. Harriman*, 134 Mass. 314; *Attorney General v. Crocker*, 138 Mass. 214.)" As might be expected, the inferences which should be drawn from facts accompanying the evolution and use of the information in the nature of a quo warranto have been by no means uniform. Of the cases which deny that the right of trial by jury of informations in the nature of a quo warranto existed at common law, there is none, perhaps, in which is more vigorously stated the grounds for entertaining this view than *State v. Johnson*, 26 Ark. 281 and we shall therefore quote from the opinion therein delivered by McClure, C. J., this language: "Whether the right of trial by jury ever existed as a matter of right in quo warranto, is not a matter easily determined by direct precedent. The respondent claims that such is the uniform practice, not only in this country, but in England, and in support of that position quite a number of authorities have been submitted to our consideration. On a careful examination of the authorities cited, we have found them to apply to informations in the nature of a quo warranto, the former being a criminal prosecution and the latter a proceeding upon a writ in the nature of a writ of right, which partakes more of what is now known as a summary proceeding than a 'case at law.' The right of trial by jury, at common law, never existed in equitable proceedings, in admiralty or summary proceedings, or proceedings against officers of a civil nature, nor did it exist in cases where private property was taken for public use, and yet in all these proceedings, questions of fact, involving the tenure to property in untold amounts, are adjudicated upon by the courts, without

the intervention of a jury. So far as we can now trace the right of trial by jury, at common law, it did not extend to equitable actions, admiralty or summary proceedings, nor in cases where private property was taken for public use, nor in proceedings in rem, nor in civil proceedings against public officers; and this proceeding is nothing more or less than a civil proceeding against a public officer. By Magna Charta, it is declared that 'no freeman shall be arrested or imprisoned, or deprived of his freehold, except by the regular judgment of his peers or the law of the land.' In the seventeenth year of the reign of King John, at Runnymede, these concessions were made by the crown, and from that time forward, to some extent, the rights of Englishmen have been determined by the concession then made. King John's construction of the concession was that it did not protect the 'goods and chattels,' and, as an evidence of this, we have but to refer the unread to history of the time, and it will be found that armed forces were sent against the secret enemies of the king, and they were despoiled of their goods without observing any form of law. Langton and his associates, and many others, were thrown into prison and despoiled of their goods, without the intervention of a jury, notwithstanding Magna Charta. (Ling. His. Eng. vol. 2, 225 note.) So far as our research has extended, the right of trial by jury, at common law, only extended to criminal prosecutions and in actions where a freehold or goods and chattels were in dispute. The term 'goods and chattels' includes personal property, choses in action, and chattels real. The right to an office is neither personal property, nor a chose in action, nor chattels real, in the sense used at law. In information in the nature of a quo warranto it is expressly provided by an act of parliament (3 Geo. II., ch. 25) that a jury shall be struck before a proper officer on the demand of the king or the respondent. This statute was passed for the special purpose and to the end that his majesty's courts at Westminster might be provided with juries to

try questions of fact. If this right existed before this time it was certainly a work of supererogation on the part of parliament to enact the law, and the inference to be drawn from this fact is that, prior to the date of the statute, the issues of fact were tried by the court even in cases of informations in the nature of quo warranto, which, at best, is but little more than a summary proceeding to ascertain the right to an office. * * * We have already stated that when the members of the convention framed and adopted the present constitution they were well aware that this court was not to have a jury and that the jurisdiction in these writs was conferred with a full knowledge of this fact. The proceeding at law is not a criminal action, and yet, from the tearful and pathetic argument of the counsel, one would be led to suppose that the respondent was being tried for a murder or treason, and the argument is based upon the false assumption that his client is to be hanged without the intervention of a jury. The object of this proceeding is to require the respondent to come into court and show the title to the office the functions of which he has been exercising. If he has title, no harm can befall him. If he has no title, he is simply ousted from the office whose functions he has usurped. No penalty, imprisonment, or fine is imposed, no matter what way the judgment goes. It has been frequently held that right of trial by jury, at common law, never extended to cases of defaulting or delinquent officers of the government (*Adams v. State*, 2 Stew. [Ala.] 231; *Harris v. Wood*, 6 T. B. Monroe [Ky.] 641, Hardin's Rep. [Ky.] 5; *Boring v. Williams*, 17 Ala. 516); and the states in which these holdings have been made have denied a jury, when demanded, on the sole ground that in actions against the public officers, the right of trial by jury did not exist at common law, if the actions were not of a criminal nature. Believing this to be the correct distinction, we are unable to see wherein the denial of a jury would contravene the right of trial by jury as it existed at common law or as it existed at

the adoption of the constitution. If we were to consult our own conscience, or desired to shirk the duty imposed on us by the constitution, we would at once order a jury, to dispose of this question; but inasmuch as neither the constitution nor the legislature has provided this court with a jury or the means of obtaining one, and inasmuch as there would be no court in the state with jurisdiction to protect the officers of the state from usurpation if this court were to refuse to exercise the jurisdiction conferred, we feel it to be our duty, under all the circumstances, to overrule the motion for a jury."

Other courts have sanctioned the views above expressed, but there is a limit which forbids reference to them. From the review of this question already indulged in, to perhaps an unwarrantable length, it is clear there exists such uncertainty as to the rule at common law that, if possible, the problem should be solved by resort to fixed principles rather than the disputed teachings of uncertain precedents.

It is provided in section 2, article 6, of the constitution of this state, that the supreme court "shall have original jurisdiction in cases relating to the revenue, civil cases in which the state shall be a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law." By section 13, chapter 19, Compiled Statutes, the appellate and final jurisdiction of the supreme court is defined to be "of all matters of law, fact, or equity, where the rules of law or principles of equity appear from the files, exhibits, or records of said court to have been erroneously determined." It is clear that the jurisdiction of the court with reference to informations in the nature of a quo warranto depends, not upon the fact that such proceedings are in their nature criminal, but upon the express language of the constitution. The extended review of the history of the remedy under consideration will not have been entirely useless if it has prepared us to accept the proposition that the legislature wisely provided, as it did in section 2, Code of Civil

Procedure, that there shall be but one form of action which shall be called a civil action, and the special provisions relating to quo warranto which we shall now consider. By section 1, chapter 71, Compiled Statutes, it is provided by whom an information in the nature of a quo warranto may be filed, and in section 4 it is provided that the proceedings in quo warranto shall be regulated by title 23 of said Code. By section 709 of the Code, just referred to, it is provided that "the defendant shall appear and answer such information in the usual way, and issue being joined it shall be tried in the ordinary manner." The provisions of sections 280 and 281, Code of Civil Procedure, are as follows:

"Sec. 280. Issues of law must be tried by the court unless referred as provided in section two hundred and ninety-eight. Issues of fact arising in actions for the recovery of money, or of specific, real, or personal property, shall be tried by a jury, unless a jury trial is waived or a reference be ordered, as hereinafter provided.

"Sec. 281. All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by a jury or referred as provided in this Code."

These sections constituted a part of our Code of Civil Procedure at the time of the adoption of the constitution of this state, in which, as section 6 of article 1, known as the "bill of rights," there were the following provisions: "The right of trial by jury shall remain inviolate, but the legislature may authorize trial by a jury of a less number than twelve men in courts inferior to the district court." A consideration of these provisions leads unavoidably to the conclusion that in refusing a jury trial to the respondent no constitutional right of his was denied, as is illustrated by the opinion of the court in *Sharmer v. McIntosh*, 43 Neb. 509; *Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 580, and *Mayer v. Wilkinson*, 52 Neb. 764. For reasoning in the same line in quo warranto cases see *State v. Doherty*, 16 Wash. 382.

Intimately connected with the proposition just dis-

cussed is the argument of respondent that the court has no power to refer the issues in this case for findings by a referee, and this argument is based upon the assumption that this court can refer only such cases as by virtue of statutory provisions may be referred by the district court. The constitution has, as we have already seen, conferred upon this court jurisdiction in cases of quo warranto. The legislature has not provided any rules of procedure by which we are to be governed in actions of this nature. It has been customary for this court to refer matters involving the exercise of its original jurisdiction from its organization. If, as requested, we had ordered the impaneling of a jury, we should have acted as independently of express legislative rules as we have done in the appointment of a referee. Where the constitution in direct terms devolves upon this court a duty to be performed, the mere omission of the legislature to point out the method of performance will not prevent the performance of such duty in such manner as this court, with due deference to constitutional provisions, shall find itself bound to adopt. This fact is illustrated in the case entitled *In re Petition of Attorney General*, 40 Neb. 402. We are satisfied that, in refusing a jury and in referring the issues for findings of fact and of law, no constitutional or other right of the respondent was denied, and that this court acted strictly within the powers necessarily implied by the constitutional imposition upon it of original jurisdiction in quo warranto.

In the opinion already filed the matters which were held to be properly for trial as questions of fact were thus indicated: "The answer discloses that prior to respondent's election he had paid to the county treasurer all the fines and penalties received by him, except the sum of $1,818.83. If this last named amount, or any portion thereof, was intentionally, willfully, or corruptly retained by respondent, he was ineligible to the office in question. Of the items which go to make up the said sum, the answer states, in effect, that $364 were never

received by respondent or his deputy; that the item of $200 was paid during the serious illness of respondent to his deputy, and that the principal was unaware of such payment, or the money would have been covered into the treasury; and that the further sum of $500 was retained and held upon the agreement, request, and demand of the county attorney and the attorney for the city of Omaha and the board of education that the same be held pending a controversy over the ownership of the money, and that respondent was at all times ready and willing to pay the same to the county, and would have done so but for such contention and agreement. Those matters pleaded were sufficient to relieve him from being a defaulter as to such items. * * * The only doubt the writer has entertained as to the sufficiency of this answer has been with reference to the excuse set up for not having paid over before election the remainder of said sum of $1,818.83, to-wit, $754.83. It is admitted that the items which go to make up said sum were paid to the respondent personally in sums not exceeding $100, and that he overlooked such payments until after the expiration of his term, and, with reasonable diligence, the same could not have been discovered by him prior to the date of the payment thereof to the county. If there were no other averments contained in the answer we should hesitate before deciding that the pleading is sufficient. But as it is positively alleged, and by the demurrer admitted to be true, that it was never the intention of the respondent to, and he did not in fact, appropriate, any portion of the funds collected to his own use, and that he did not willfully or knowingly withhold any portion thereof, but paid the same to the county treasurer as rapidly and as soon as he was cognizant that he had received the money, we are constrained to the opinion that the demurrer to the answer should be overruled, with leave to the relator to reply, as he has signified a desire so to do." (*State v. Moores*, 52 Neb. 791.) A reply was accordingly filed which negatived the averments

above noted as having been admitted by the demurrer to the answer to be true, and there was a trial of the issues thus made up, and findings of fact and law therein adverse to the respondent. It is to these findings that exceptions have been filed by the respondent, and for the confirmation of them that a motion has been presented by the relator. There is no question made as to the correctness of the findings of the referee that Moores was elected clerk of the district court of Douglas county, and filled that office for two successive terms, the first of which began in January, 1888, and the last ended on January 9, 1896; that on April 20, 1897, he received a majority of the votes cast for mayor of the city of Omaha for the term which began May 10, 1897, and duly qualified as such mayor; and that the relator yielded up possession of said office only when required so to do by due order of the proper district court. The findings which follow those above summarized were as follows:

"8. The respondent, Frank E. Moores, as clerk of the district court of said Douglas county, during his two terms of office, collected and received certain fines and penalties aggregating the sum of $6,119.91, which had been imposed by the district court of said Douglas county upon various offenders against the laws of the state of Nebraska.

"9. The respondent had accounted for and paid over to the county treasurer of said county, prior to the 9th day of May, 1897, of fines and penalties so collected and received, the sum of $4,221.36 and no more; and that at the time of his election, on the 20th day of April, 1897, the respondent had not accounted for nor paid over to the said county treasurer the sum of $1,898.55 of the fines so as aforesaid received by him.

"10. On the 9th day of May, 1897, the respondent paid to the county treasurer of said county a part of said fines, to-wit, the sum of $1,818.83, but failed and neglected to pay the balance of said sum, to-wit, $79.72, which amount is still unaccounted for and unpaid.

"11. The respondent had no actual knowledge, until after expiration of his last term of office of clerk of the district court, that the statute required him to pay all fines to the county treasurer of said county within ten days from receipt thereof, but he did understand at all times that it was his duty to make a report at the end of each quarter, and pay over to said county treasurer all of the fines and penalties received by him during said quarter.

"12. The first report and payment made to said county by respondent of moneys collected by him was dated November 24, 1888, and purported to cover a period from January 5, to September 30, 1888. Said report and payment included $145 witness fees, $74 trial fees, and $525 fines and penalties. Prior to making of said report the respondent had collected and received the following fines imposed by said district court of Douglas county, to-wit: $14 paid by Mike Meany, March 27, 1888, Docket 7, page 115; $100 paid by Charles White, March 21, 1888, Docket 7, page 183; $100 paid by Buck Copeland, March 21, 1888, Docket 7, page 185; $150 paid by —— Cook, March 21, 1888, Docket 7, page 186. All of said fines were omitted from said report, and none of them were ever reported or paid to said county until May 9, 1897.

"13. May 7, 1889, the second report and payment were made by respondent, which purported to cover a period from September 30, 1888, to April 1, 1889, and included and covered $285 trial fees and $250 fines. During this period the respondent had collected and received $29.72 on a fine imposed by the district court of Douglas county on one August Uthof, which amount was paid to respondent October 23, 1888, but the same was omitted from said report and no part thereof has ever been reported or paid to said county by respondent.

"14. July 20, 1889, the third report and payment were made by respondent, and purported to cover the quarter ending June 30, 1889, and included $170 fines and $181 trial fees.

"15. October 26, 1889, the respondent's fourth report was made, purporting to cover the quarter ending September 30, 1889, and included trial fees to the amount of $161, but no fines.

"16. February 7, 1890, the fifth report was made by respondent, purporting to cover the quarter ending December 31, 1889, which report included only $104 trial fees and no fines.

"17. April 2, 1890, the sixth report was made by respondent, purporting to cover the quarter ending March 31, 1890, and which included only trial fees to the amount of $93 and no fines.

"18. October 10, 1890, the seventh report and payment were made by respondent, purporting to cover the period for which no reports had been previously made, up to and including September 30, 1890, which report included $242 trial fees and $105 fines. This sum of $105 was made up of four fines, one of $25, paid to respondent March 17, 1890; one of $5 paid to respondent January 22, 1890; one for $25 paid to respondent April 1, 1890; and one for $50 paid April 3, 1890.

"19. January 23, 1891, the eighth report and payment were made by respondent, purporting to cover the quarter ending December 31, 1890, and included $30 fines and $153 trial fees. On the 27th day of September, 1890, the respondent collected of John Paegler a fine of $50 imposed by the district court of said county, which amount was omitted from said report and not reported or paid to said county until May 9, 1897.

"20. April 29, 1891, the ninth report was made by respondent, purporting to cover the quarter ending March 31, 1891, which included trial fees to the amount of $88 and no fines.

"21. February 17, 1892, the tenth report and payment by respondent were made, purporting to cover the period for which no previous reports had been made and up to January 1, 1892. It included $156.47 fines and $314 trial fees. From this report was omitted a fine of $3.53 paid

to respondent by Mrs. Fenn, June 4, 1891, which amount was not reported or paid by respondent to said county until May 9, 1897.

"22. July 6, 1892, the eleventh report and payment were made by respondent, said report being dated July 1, 1892, purporting to cover the period for which no reports had been previously made, up to and including June 30, 1892, and included $386 fines and $231 trial fees. From this report was omitted a fine of $25 imposed by the district court of Douglas county upon one Ernest Stuht, and which was paid to respondent May 21, 1892. This fine was never reported or paid to said county until May 9, 1897.

"23. September 27, 1892, the twelfth report and payment were made by respondent, purporting to cover the quarter ending September 30, 1892, and included $300 fines and $125 trial fees. From this report was omitted two fines of $100 each, imposed upon David Rich and Edson Rich, respectively, by the district court of said county, and paid to respondent July 23, 1892. No part of these fines was ever reported or paid to said county until May 9, 1897.

"24. January 1, 1893, the thirteenth report and payment were made by respondent, purporting to cover the quarter ending December 31, 1893, and included $28 fines and $232 trial fees. From this report were omitted fines to the amount of $88.30, as follows: $30 paid by A. L. Creighton, October 8, 1892, Docket 31, page 35; $3.30 paid by Chester Mitchell, November 12, 1892, Docket 32, page 384; $10 paid by Henry Hagedorn, November 17, 1892, Docket 33, page 154; $15 paid by Charles Shartow, November 23, 1892, Docket 33, page 165; $30 paid by Fred Pluyler, November 14, 1892, Docket 34, page 9. None of said fines were reported or paid to the county until May 9, 1897. Two other fines—one for $25, Docket 36, page 82, and one for $20, Docket 38, page 92—paid to respondent October 11, 1892, were also omitted from said report, but were afterward, to-wit, on the 6th day of

April, 1895, reported and paid to said county by respondent.

"25. March 31, 1893, the fourteenth report was made by respondent, purporting to cover the quarter ending March 31, 1893. No fines were included in said report, but $88 in fines had been collected and received by respondent during the said quarter, as follows: $80 paid by Ed J. Dee, February 18, 1893, Docket 34, page 320; $3 paid by Simon Levy, March 18, 1893, Docket 36, page 78; $5 paid by Henry A. Homan, March 31, 1893, Docket 36, page 274. None of these were reported or paid to the county until May 9, 1897.

"26. June 30, 1893, the fifteenth report was made by respondent, purporting to cover the quarter ending June 30, 1893. No fines were included in this report, but eleven fines, amounting to $350, had been collected by the respondent during this quarter, as follows: $15 paid by Mrs. Foster, May 25, 1893, Docket 33, page 149; $25 paid by John Shelby, May 29, 1893, Docket 34, page 5; $5 paid by Ed Tuttle, May 26, 1893, Docket 34, page 135; $10 paid by George Hicks, April 6-11, 1893, Docket 36, page 25; $75 paid by William Weabeseak, June 29, 1893, Docket 36, page 83; $5 paid by Frank Hauser, May 26, 1893, Docket 36, page 283; $100 paid by Bertie Mann, May 25, 1893, Docket 37, page 253; $10 paid by John Mathews, May 8, 1893, Docket 37, page 8; $50 paid by John Chaplovski, June 20, 1893, Docket 37, page 379; $5 paid by Will Gresham, June 27, 1893, Docket 38, page 91; $50 paid by Henry C. Hitt, June 17, 1893, Docket 38, page 154. None of said fines were reported or paid to Douglas county until May 9, 1897.

"27. October 1, 1893, the sixteenth report was made by respondent, purporting to cover the quarter ending September 30, 1893, and included trial fees to the amount of $124. No fines were included in this report, but five fines, amounting to $130, had been collected by respondent during said quarter, as follows: $25 paid to respondent on September 28, 1893, and reported and paid by him

to said county April 6, 1895; $1 paid by George Russell, July 21, 1893, Docket 34, page 26; $25 paid by S. Coyle, July 11, 1893, Docket 36, page 75; $75 paid by Robert Parks, July 3, 1893, Docket 37, page 278; $4 paid by Henry Martin, July 22, 1893, Docket 38, page 205. The last four of the above described fines were not reported nor paid to said county until May 9, 1897.

"28. January 1, 1894, the respondent made his seventeenth report, purporting to cover the quarter ending December 31, 1893, and included trial fees to the amount of $248, but failed to include five fines, amounting to $375, which were collected and received by respondent, as follows: $10, October 25, 1893, Docket 39, page 378; $5, October 19, 1893, Docket 40, page 171; $100 paid November 11, 1893, Docket 40, page 326; $250 paid November 15, 1893, Docket 40, page 359. These four fines were reported and paid to said county by respondent April 6, 1895; $10 paid by Dan Sherroy, October 11, 1893, Docket 36, page 81. This last mentioned fine was not reported or paid to said county until May 9, 1897.

"29. April 1, 1894, the eighteenth report was made by respondent, purporting to cover the quarter ending March 31, 1894, and included trial fees to the amount of $230.20. No fines were included in this report, but three fines, amounting to $110, were collected by respondent during said quarter, as follows: $50 paid March 12, 1894, Docket 40, page 73; $20 paid March 12, 1894, Docket 41, page 302; $40 paid February 26, 1894, Docket 42, page 303. None of said fines were reported and paid to said county until April 6, 1895.

"30. July 1, 1894, the nineteenth report was made by respondent, purporting to cover the quarter ending June 30, 1894, and included only trial fees, $309.50. No fines were included in this report. The respondent had, however, collected and received during said quarter three fines, amounting to the sum of $435, as follows: $400 paid May 19, 1894, Docket 43, page 385; $25 paid June 22, 1894, Docket 44, page 72. Neither of said fines were re-

ported or paid to said county until April 6, 1895; $10 paid by Frank Dolezal, May 29, 1894, Docket 43, page 394. Said last mentioned fine was not reported or paid to said county until May 9, 1897.

"31. November 1, 1894, the twentieth report was made by respondent, purporting to cover the quarter ending September 30, 1894, and included trial fees to the amount of $241, but no fines. Four fines, amounting to $975, were collected and received by the respondent during said quarter, as follows: $400 paid July 14, 1894, Docket 43, page 254; $25 paid October 2, 1894, Docket 46, page 312; $50 paid October 11, 1894, Docket 46, page 329—said three fines were not reported and paid to said county until April 6, 1895; $500 paid by Michael Wallenz, October 27, 1894, Docket 46, page 232. Said Wallenz fine was not reported or paid to said county until May 9, 1897.

"32. No fines were reported or paid by respondent to said county between January 1, 1893, and April 6, 1895. On said last mentioned date the respondent reported and paid to said county seventeen fines, amounting to $1,500, fifteen of which had been received by him during that period, and two on October 11, 1892; but there were twenty-one fines, aggregating the sum of $1,063, collected and received by respondent during said period on the dates specifically set forth in the foregoing findings, which were omitted from said report and not reported or paid to said county until May 9, 1897.

"33. April 20, 1895, respondent reported and paid to said county four fines, amounting to $470, but failed to report or pay two fines, amounting to $50, which had been collected by him on April 15, 1895, as follows: $25 paid by Henry Jippi, April 15, 1895, Docket 49, page 360; $25 paid by Nels Borg, April 15, 1895, Docket 49, page 360. Neither of said fines has ever been reported by respondent or paid to said county.

"34. September 23, 1895, respondent reported and paid to said county one fine of $300, but omitted from said report two fines, amounting to $25, which had been col-

lected by him, as follows: $15 paid by Ed Tuttle, June 25, 1895, Docket 39, page 377; $10 paid by Richard Burdish, July 20, 1895, Docket 46, page 306. Neither of said fines was reported or paid to said county until May 9, 1897.

"35. All fines collected and received by defendant, as hereinbefore found, were receipted for upon the appearance dockets, and the amount so received was usually entered upon a 'scratcher' or blotter, kept by the respondent, to show cash received and disbursed, and no other memorandum or account of said fines was kept.

"36. None of the foregoing reports, made by respondent, were personally prepared by him. All of said reports were prepared by a clerk or deputy and handed to respondent, who signed them all. No comparison of any of said reports with the dockets or said 'scratcher' or blotter was made by respondent personally to ascertain whether they were correct.

"37. The 'scratchers' or blotters in which said fines and cash account were kept were destroyed prior to the time of the hearing of this case.

"38. No report or payment of fines was made to said county by respondent after September 23, 1895, until May 9, 1897. On May 7, 1897, respondent's attorney procured of the county attorney of Douglas county an itemized statement of fines, which, it was claimed, the respondent had collected and failed to report or pay to said county, and on May 9, 1897, respondent paid to the county treasurer of said county $1,818.83, being the full amount of said fines shown by said statement and being all of the fines which the evidence shows were collected by respondent, and not, theretofore, paid to said county, except the sum of $79.72 which was received by respondent on fines of August Uthof, Henry Jippi, and Nels Borg, as hereinbefore found, which fines and amount were not included in said statement nor paid by the respondent.

"39. The respondent personally collected, received, and receipted for a large number of the fines paid into

his office between January 1, 1893, and April 6, 1895, and knowingly, wilfully, and intentionally failed to include in any of the reports made by him during said period any of said fines, and knowingly, wilfully, and intentionally failed to report or pay to said county any of said fines, which amounted in the aggregate to $2,518, until April 6, 1895.

"40. The respondent did not keep public funds separate and apart from his private funds, but mixed them together indiscriminately. He received from his predecessor between $20,000 and $30,000 in trust funds which had come into the hands of said predecessor as clerk of the district court of said county. This amount respondent deposited to his own credit in the Merchants National Bank of Omaha, and thereafter carried but said single bank account, in which he deposited the funds, both public and private, received by him, including fines and penalties, and upon which account he drew checks for disbursements, whether made for a public or a private purpose. The only exception to this method of keeping the funds was the placing by respondent, in a comparatively few instances, certain funds in various banks and taking certificates of deposit therefor. In nearly every one of said cases the deposit was made and the certificate taken by order of the court, or for funds received by respondent in a particular case, and in all instances said certificates were either held for, or paid out in, the particular cases in which they were received, or their proceeds were deposited in said general account in the Merchants National Bank.

"41. Between January 1, 1896, and April 20, 1897, the respondent knowingly, wilfully, and intentionally withdrew, for purposes other than the payment of any of said fines, all of the funds in his said general account in said Merchants National Bank. The condition of said account on the morning of each of various days during said period was as follows: January 1, 1896, balance in account, $351.25; January 4, 1896, overdrawn, $848.50; on

January 7, 1896, respondent borrowed $10,000 and deposited the same in said account to replace funds which he had used to pay his help; January 9, 1896, balance in account, $2,844.48; February 1, 1896, balance in account, $358.89; March 1, 1896, balance in account, $15.17; April 1, 1896, balance in account, $80.17; May 1, 1896, balance in account, $263.88; June 1, 1896, balance in account, $146.99; July 1, 1896, balance in account, $233.53; August 1, 1896, balance in account $35.20; September 1, 1896, balance in account, $16.21; October 1, 1896, balance in account, $61.36; November 1, 1896, overdrawn, $12.82; December 1, 1896, balance in account, $12.82; January 1, 1897, overdrawn, $14.20; February 1, 1897, balance in account, $179.13; March 1, 1897, balance in account, $17.83; April 1, 1897, balance in account, $125.62; April 20, 1897, balance in account, $596.91; May 9, 1897, overdrawn, $369.96.

"42. The balance of $596.91 in respondent's said bank account on April 20, 1897, was no part of the fines so as aforesaid collected and retained by respondent, but the same was understood and considered by respondent to be his private funds, and the same was all drawn out and used by respondent for purposes other than to pay any of said fines prior to May 9, 1897.

"43. On and prior to April 20, 1897, the respondent had appropriated and converted to his own use all of the said $1,898.55 in fines which he had collected and received as clerk of the district court of said county and had failed to account for and pay over to said county as hereinbefore found, and on May 9, 1897, the respondent had none of said fines, but on said day borrowed of one John A. Creighton the whole of the amount paid to the county treasurer thereon, to-wit, the sum of $1,818.83, and respondent gave to said John A. Creighton his promissory note therefor.

"44. On the 21st day of March, 1888, fines assessed against Charles White, Buck Copeland, and —— Cook by the district court of Douglas county for gambling,

amounting in the aggregate to $350, were paid into the office of the clerk of the district court of said county, and receipts thereof were duly written on the appearance docket of said office, wherein said cases were recorded, by V. M. Mackey, who was then the respondent's duly authorized deputy, which receipts were unsigned. The fact that said unsigned receipts were in said dockets was called to the attention of respondent by the expert, Points, in the summer or fall of 1895. Respondent made no effort to ascertain whether said fines had been paid to him or into his office until after he paid the same to the county treasurer on the 9th day of May, 1897.

"45. On the 27th day of March, 1888, the respondent, by his duly authorized deputy, V. M. Mackey, collected and received of one Mike Meaney the sum of $14 on a fine imposed upon him by the district court of said county for resisting an officer, and a receipt for said fine was duly entered and signed by said Mackey on the records of said office. The attention of the respondent was called to this receipt by the expert, Points, in the summer or fall of 1895. Respondent made no effort to ascertain whether said money had been paid until the 9th day of May, 1897, at which time he paid the same to the county treasurer of said county.

"46. On the 23d day of July, 1892, the respondent, by his duly authorized deputy, A. Stere, Jr., collected and received of David Rich and Edson Rich $230, being fines of $100 each and $30 costs, imposed upon said parties by the district court of said county for contempt, and a receipt therefor was on said day duly entered on the appearance docket of the office of the district court where said contempt cases were entered and recorded. At the time said fines were collected the respondent was in Europe, where he remained about two months. On his return from Europe respondent learned that said $230 fines and costs had been paid into his office as aforesaid, and personally repaid the said Edson Rich the $30 costs so collected, and took the receipt of said Edson Rich there-

for upon the appearance docket in said case, which receipt is dated February 18, 1893.

"47. On the 27th day of October, 1894, the respondent personally collected and received of one Michael Wallenz a fine of $500, which had been imposed upon him by the district court of said county for selling liquor without a license. In the latter part of the year 1894 or fore part of the year 1895 the city attorney of the city of Omaha notified respondent that said fine and all others of a like nature should be paid to the city treasurer, and not to the county treasurer. The county attorney of said Douglas county denied this proposition and insisted that the same should be paid to the county treasurer of the said county. Respondent declined to pay said fine to either the county or city treasurers until said dispute was settled. On the 9th day of May, 1897, he was first informed by the city attorney that the city released all claims on said Wallenz fine and the respondent on said day paid the amount thereof to the county treasurer of said county.

"48. The respondent did not retain or keep the money so received for said Wallenz fine, nor the amount thereof until the same was paid, but said respondent did, prior to the 20th day of April, 1897, knowingly, wilfully, and intentionally appropriate and convert all of the same to his own use, and on the 9th day of May, 1897, the respondent did not have said fine or any part thereof, but borrowed all of the money with which to pay the same to the county treasurer as aforesaid.

"49. A competent accountant could have ascertained from the records of Douglas county all the fines collected and received by respondent and unaccounted for at the close of his second term as clerk of the district court of said county, as hereinbefore found, in two months, and, with reasonable diligence, the respondent could have discovered said fines, and that they were unpaid, long before the 20th day of April, 1897.

"50. The respondent collected and received, between

January 1, 1893, and October 1, 1894, thirty-five fines, exclusive of the Michael Wallenz fine, aggregating the sum of $2,018, nearly all of which were received and receipted for by the respondent personally. In failing to report or to pay over to said county any of said fines before April 6, 1895; in omitting from his report and payment of fines made April 6, 1895, twenty of the thirty-five fines so collected; in withdrawing and converting to his own use all of the funds in the bank account in which said fines were placed, without first ascertaining whether any of the same remained unpaid; and in failing to pay any of said twenty fines to said county until the 9th day of May, 1897, the respondent was guilty of such flagrant disregard of duty as to fairly justify the inference that his conduct in failing to account for and pay over said fines was wilful and corrupt.

"51. I find that before and at the time the respondent, Frank E. Moores, was elected to the office of mayor of the city of Omaha, on the 20th day of April, 1897, he was in default as collector and custodian of public money, and was ineligible to the said office of mayor of the city of Omaha.

"FINDINGS OF LAW.

"First. The office of mayor of a city of the metropolitan class is an office of profit and trust under the laws of this state.

"Second. A clerk of the district court, as to moneys received by him in payment of fines and penalties imposed in said court, is a collector and custodian of public money within the meaning of section 2, article 14, of the constitution.

"Third. The word 'eligible' relates to the capacity to be elected or chosen to an office as well as to hold office.

"Fourth. The statute requires a clerk of the district court to account for and pay over to the county treasurer all fines collected and received by him within ten days from the receipt thereof. This provision is mandatory, and a failure to comply with it makes such clerk civilly liable on his official bond.

"Fifth. The term 'default,' as used in said section 2, article 14, of the constitution, implies more than a mere civil liability. To constitute a default within the meaning of said section, there must exist on the part of a collector and custodian of public money a willful omission to account and pay over, with a corrupt intention, or such a flagrant disregard of duty as to fairly justify the inference that his conduct was wilful and corrupt.

"Sixth. All moneys received by a clerk of the district court in payment of fines and penalties imposed in said court are, when in his hands, trust funds of which he is the mere custodian and not the owner. He has no right to loan, invest, or in any manner convert to his own use any part of said funds, and any such loaning, investment, or conversion of same is by section 124 of the Criminal Code declared to be a felony.

"Seventh. A clerk of the district court who knowingly and intentionally deposits public moneys received by him in payment of fines imposed in his court, together with other trust funds, and his own private funds, in a bank in one general account, to his own credit, and before he has paid said fines to the county treasurer, as provided by law, knowingly, wilfully, and intentionally draws from said bank all of the funds so deposited, and uses the same for purposes other than the payment of said fines, thereby converts said public money to his own use, and is in default within the meaning of section 2, article 14, of the constitution, and ineligible to any office of trust or profit under the constitution or laws of this state during said default.

"Eighth. I find at the time of his election on April 20, 1897, the respondent was in default as collector and custodian of public money, and ineligible to the office of mayor of the city of Omaha, and that the relief prayed for by complainant should be granted.

"E. J. CLEMENTS, *Referee.*"

After the taking of the evidence before the referee, the respondent, with proper leave so to do, amended his an-

swer so that the averment in excuse of paying the items of $200 in the aggregate was the absence of the respondent in Europe, instead of his serious illness, as at first had been alleged. There was a motion that the referee be required to make certain findings, whereby it was alleged it would have been made to appear that the respondent could not give personal attention to all the matters of business in his office; that he was compelled to intrust some of the duties of the office to subordinates; that he relied upon these duties being performed by such subordinates, especially as to the receipt and payment of moneys; that during his two terms there was received and disbursed through said office sums aggregating over $2,000,000; that until January, 1898, Douglas county owed respondent over $20,000; that respondent did not know, prior to May 9, 1897, that there was in his hands any funds or penalties which had been paid to respondent except the Wallenz fine of $500; that when he was so informed respondent paid the amount of said fines to the county treasurer of Douglas county; that during the time that respondent was clerk of the district court aforesaid he had property and credits many times in excess of the fines and penalties alleged to have been unaccounted for by him; that, even though his bank account was overdrawn at times, his check for the amount of the public moneys remaining in his hands at the date of his election to the office of mayor of the city of Omaha would have, at any time, been honored and paid by the bank where he kept his account, and that frequently, after the county's experts began checking over the records in the office of the clerk of the district court, respondent and his deputies requested of said experts and county auditor and the county clerk an inspection of the checkings made, for the purpose of ascertaining whether such checkings showed that respondent had any public moneys in his possession, and, that respondent's demand of such checkings was denied. In the argument on the exceptions to the referee's report there are observations

that several of the findings were mere matters of evidence, and not the statement of ultimate facts deducible therefrom. We do not wish to be understood as sanctioning this criticism, but we cannot forbear the observation that the findings requested by the respondent's motion would have elicited matters purely of an evidentiary character. The report by the referee was very full, because, as was thereby disclosed, the referee was desirous to submit all the facts for the information of this court. It would have subserved no useful purpose to have recited the multifarious duties of the clerk of the district court, and his necessary dependence upon the efficiency and fidelity of his subordinates. The report of the referee disclosed facts for the existence of which the fault of deputies, or oversight on the part of their principal, was no excuse. The fines and penalties which he neglected to account for and pay over belonged to the school fund of the state, under the provisions of section 5, article 8, of our constitution, and the county was merely the custodian thereof. It would have been, therefore, no excuse for him to show, and for the referee to find, that the county was Mr. Moores' debtor with respect to other independent matters.

In section 534 of the Criminal Code it is provided as follows: "Every magistrate or clerk of court upon receiving any money on account of forfeited recognizances, fines, or costs accruing or due to the county or state, shall pay the same to the treasurer of the proper county (except as may be otherwise expressly provided) within ten days from the time of receiving the same." It would be a harsh rule which would hold a clerk liable for the mere failure to pay over fines, irrespective of oversight or other unavoidable excuse. The report of the referee, however, shows, and the evidence fully sustains it, that some of the fines therein mentioned were carried from month to month; that the Wallenz fine was not held by agreement of parties, but because of protest against paying by attorneys of parties who had no right to control payment.

Near the close of Mr. Moores' term it was shown by the evidence, and found by the referee, that the bank account of Mr. Moores was overdrawn; that in his account there had been deposited to his own individual credit the fines which he failed for a long time to pay over after the same should have been paid, and that, by his overdrafts the amounts of these fines had been appropriated to his own use. Indeed, in his testimony Mr. Moores said that if he had known that there was to his credit in the bank a certain small amount he would undoubtedly have drawn it out. There was sufficient evidence to justify the conclusion of the referee that this appropriation of public money was willful and corrupt, and this was a question of fact, with all its concomitants. It could not operate to Mr. Moores' advantage, if it had been found that he was a man of large means and credit. The only logical tendency this could have had would have been to show that Mr. Moores could have made good his default, and this consideration has doubtless lured many, if not most, defaulting officers to take risks which have ultimately proved their destruction. In a majority of cases of defalcation, it is quite likely that the first misappropriation was made in the full confidence that it would be made good and no one would be harmed. There is no middle ground either of safety or honesty. Trust funds must be held sacred, and the officer who appropriates them to his own use must be held to be guilty of a breach of trust, no matter how able and willing he may afterwards prove to be to replace the misappropriation of that which was not his own. The exceptions and objections of the respondent have been sufficiently met by these general observations, and it remains but to say that we approve the findings of the referee, and that judgment will accordingly be entered in accordance with his recommendations.

JUDGMENT OF OUSTER.

SULLIVAN, J., concurring.

While concurring in the judgment, I feel constrained to express my dissent from the proposition announced in the former opinion that the first clause of section 2 of article 14 of the constitution is directed only against those who are in default either as collectors and custodians of public money or as collectors and custodians of public property. I think the provision should be construed as though it read: "Any person who is in default as a collector or custodian of public money or property," etc. A construction based on a literal reading of the clause is not merely unreasonable, but leads to an absurdity. There never has been, and there is not the slightest reason to suppose there ever will be, in this state such an office as that of collector and custodian of public property. That the framers of the constitution or the electors of the state had such an office in mind as a possible legislative creation is beyond belief. Besides, there seems to be an insuperable difficulty in the way of one who is a collector and custodian of money ever being in default in both capacities. His relation to the money as collector necessarily ends where his connection with it as custodian begins. He cannot become a custodian without having been faithful as a collector. Thus a too literal interpretation of the clause practically nullifies it. Being charged with the duty of issuing execution for the collection of fines and judgments on forfeited recognizances, the clerk of the district court is undoubtedly a collector of public money, but his possession of such money is only incidental to its collection and he is, therefore, not a custodian within the meaning of the constitution.

NORVAL, J.

I dissent from the propositions that a respondent in quo warranto is not entitled, as a matter of right, to have the issues of fact determined by a jury, and that such

cause can properly be tried to a referee, without the consent of parties. The guaranty of the right of trial by jury is contained in both the first and last constitutions of this state in specific language. By section 6, article 1, of our present constitution, it is provided that "the right of trial by jury shall remain inviolate," and the identical language is to be found in the fifth section of the declaration of rights of the state constitution of 1866. This constitutional provision did not extend the right to a jury trial, but merely preserved or secured it in civil and criminal cases where it had before existed, or where the right was recognized by the common law. (*Sharmer v. McIntosh*, 43 Neb. 509; *Kuhl v. Pierce County*, 44 Neb. 584; *Omaha Fire Ins. Co. v. Thomson*, 50 Neb. 580; *Yager v. Exchange Nat. Bank of Hastings*, 52 Neb. 321.) In *Kuhl v. Pierce County, supra*, RAGAN, C., speaking for the court, observed: "Section 6 of the bill of rights provides that the right of trial by jury shall remain inviolate. This is a constitutional guaranty that the right of trial by jury shall remain as it did prior to the adoption of the constitution of 1875. Without going into a history of this provision, it is sufficient to say that at the time of the adoption of the present constitution the right of trial by jury was guarantied by the constitution of the state to its citizens substantially as the right existed at common law. * * * The spirit of the constitution and laws of this state seems to be this; that, if an issue of fact arise in an action equitable in its nature, such issue of fact is triable to the court; but if the issue of fact arise in a purely legal action then the issue of fact is triable to a jury." (*Vide Hagany v. Colmen*, 29 O. St. 82; *Davis v. Morris*, 36 N. Y. 569; *Byers v. Commonwealth*, 42 Pa. St. 89; *Plimpton v. Town of Somerset*, 33 Vt. 283; *Ross v. Irving*, 14 Ill. 171.)

In *Davis v. Morris, supra*, the court of appeals of New York, in considering a provision in the constitution of that state relating to jury trials similar to our own, said: "At the time of the adoption of the constitution all cases

at common law were tried by jury. It follows that any party has the right to have any such action so tried at the present time, and that he cannot be deprived of this right if defendant, by the plaintiff including in his complaint a statement of fact arising out of the same transaction showing a right of recovery in equity. * * * The right founded upon the common law must be tried by jury, and it would seem to follow necessarily that the entire cause must be so tried, as no provision is made for two trials of the issues joined in the same action. It would follow that when a plaintiff moved the trial of a cause at special term, and the defendant demanded that it be tried by jury, that the judge must determine whether any of the grounds upon which a recovery was sought were such as at the adoption of the constitution were redressed solely by an action at law, and if so should direct the cause to be tried by jury at a circuit, or, at all events, should refuse to try the cause without a jury."

The writer has sufficiently familiarized himself with the history of quo warranto and the adjudications of the courts of England to be able to assert, without fear of successful contradiction, that the invariable practice at common law in informations in the nature of quo warranto and in writs of quo warranto was to try disputed issues of fact to a jury. During the fourth year of King George I. a jury was awarded upon the trial of a quo warranto proceeding in *Rex v. Bennett*, 1 Strange 101, and the same practice obtained in *Rex v. Ellis*, 2 Strange 995; *Neville v. Payne*, 1 Cro. Eliz. 304; *King v. Jones*, 8 Mod. 201. In the reign of King Charles II., *Rex v. Higgins*, 1 Vent. 366, an action of quo warranto, was tried to a jury. (*Vide Rex v. Phillips*, 1 Burr. 292; *Rex v. Malden*, 4 Burr. 2135; *King v. Mayor of London*, 1 Show. 274; *King v. Carpenter*, 2 Show. 47; *King v. Pool*, 2 Barn. 93; *King v. Bingham*, 2 East 308.) After diligent search I have been unable to find a single case in the English reports where a jury was denied to try an issue of fact in quo warranto, while a multitude of decisions are to be found in those

reports in which a jury was called in quo warranto proceedings. These considerations alone would justify the assertion that at common law a respondent in a proceeding like the present had the undoubted right to insist upon a jury trial. But we are not without an express adjudication upon the subject. In 1749 (*King v. Bridge*, 1 W. Bl. 46) it was ruled that disputed questions of fact arising in an information in the nature of quo warranto must be submitted to a jury. (*Vide King v. Duke of Richmond*, 6 Term 560; *King v. Whitechurch*, 8 Mod. 211; *King v. Harwood*, 2 East 177.)

The practice in this state, prior to the adoption of the present constitution, was, it seems, to call a jury in quo warranto. (*Kane v. People*, 4 Neb. 509.) And the same rule obtained elsewhere. (*State v. Tudor*, 5 Day [Conn.] 329; *People v. Rensselaer & S. R. Co.*, 15 Wend. [N. Y.] 113; *Tuscaloosa Scientific & Art Ass'n v. State*, 58 Ala. 54.)

In *People v. Docsburg*, 16 Mich. 133, it was decided that when an issue of fact is to be tried in quo warranto, it is not in the power of the court to deprive either party of the right to a trial by a jury against his consent.

In *State v. Allen*, 5 Kan. 213, which was a proceeding in the supreme court in quo warranto, a jury trial was awarded the defendant without deciding whether he was entitled thereto as a matter of strict right, the court saying: "At common law, in a proceeding in quo warranto, the respondent was probably entitled to a jury for the trial of questions of fact. (*People v. Docsburg*, 16 Mich. 133; Angell & Ames, Corporations 741 and notes; *State v. Messmore*, 14 Wis. 125; 3 Stephens, Nisi Prius 2429 *et seq.*; *People v. Richardson*, 4 Cow. [N. Y.] 97 and note *a*.) If the respondent at common law was in such cases entitled to a jury trial, the defendant in a civil action, in the nature of a proceeding in quo warranto, is probably still entitled to a jury trial. (Bill of Rights, Constitution sec. 5; *State v. Sheriff of Lyon County*—decided at the January term of this court, 1868, but not yet reported; *Work v. State*, 2 O. St. 296; *Greene v. Briggs*, 1 Curtis [U. S. C. C.] 311.)"

Reynolds v. State, 61 Ind. 392, was an information by the prosecuting attorney to test the right of the respondent to hold a public office. The defendant demanded a jury trial. The request having been overruled by the circuit court, that decision was reversed by the supreme court, that tribunal holding that either party to such a proceeding is entitled, as of right, to a trial by jury.

State v. Messmore, 14 Wis. 125, was an original information in the supreme court in the nature of a quo warranto, in which the attorney general demanded a jury to determine the issues of fact. His request was granted. Dixon, C. J., speaking for the court, said: "The action is an important one. Although civil in form, it is in every other respect just what it was at common law—a public prosecution. The usurpation of an office, though it involves private rights and interests, has always been regarded as a public offense. The remedy is still by action in the name of the state. It is instituted and conducted by the attorney general under his official oath and responsibility. * * * For these reasons, we think a jury should be called in this court."

While there is some conflict in the decisions in this country as to the right to have an issue of fact joined in quo warranto tried by a jury, the weight of the adjudications, as the writer conceives, confirms such right. (See Paine, Elections sec. 903; *Commonwealth v. Walter*, 83 Pa. St. 105; *Commonwealth v. Allen*, 10 Pa. St. 465; *Commonwealth v. Delaware & Henderson Land Co.*, 43 Pa. St. 295; *State v. Burnett*, 2 Ala. 140; *Buckman v. State*, 34 Fla. 48; *Van Dorn v. State*, 34 Fla. 62; *Bradford v. Territory*, 1 Okl. 366; *People v. Albany & S. R. Co.*, 57 N. Y. 161; *People v. Van Slyck*, 4 Cow. [N. Y.] 297; *People v. Havird*, 2 Ida. 498.)

Sections 280 and 281 of the Code of Civil Procedure are invoked in the majority opinion to sustain the proposition that the respondent was not entitled to a jury trial. Said sections being upon the statute book when the present constitution was adopted were modified by the

provision of the fundamental law, which guarantied to the people of this state the right of trial by jury as it existed at common law. The principle that legislative enactments may be repealed or modified by the subsequent adoption of a constitution containing a provision repugnant thereto was recognized and applied in *Moore v. State*, 53 Neb. 831.

In *Mayer v. Wilkinson*, 52 Neb. 764, it was asserted that on a trial of an issue of fact on an application for mandamus, a jury trial is not demandable as a matter of right. The writer had no part in that opinion. What is there said upon the subject was not essential to a decision of the case, since the court had already reached the conclusion that a reversal of the judgment should be entered because the trial was had at chambers in vacation.

I am firmly convinced that the constitution was violated in the present case in refusing the respondent a jury trial when he made demand therefor. Moreover, the denial of such right is in violation of rules 14-16 promulgated by this court. (52 Neb. xiv.) The first of these provides that whenever an issue of fact is presented for trial in an original action, a commission, consisting of two electors of the state appointed by the court, will select such number of persons having the qualification of jurors in the district court as may be designated in the order of appointment, and that a venire will be issued by the clerk for the persons so chosen. Rule 15 makes provision for the challenges of jurors, and rule 16 declares: "The jurors summoned or called as above provided, or such of them as are not set aside or challenged as will make up the number of twelve, shall constitute the jury for the trial of said issue of fact." This proceeding was instituted in this court, and, under the foregoing rules, the issue of fact tendered was triable to a jury.

There was no power to appoint a referee to try this cause against the objection of either party, and the order of reference was in violation of the right of trial by jury guarantied by the constitution. The writ of quo warranto

and information in the nature of quo warranto were both common-law remedies. (3 Bl. Com. 262; *Bradford v. Territory*, 1 Okl. 366; *Commonwealth v. Cullen*, 53 Am. Dec. [Pa.] 450.) This court has held by an unbroken line of decisions that under the provisions of our Code of Civil Procedure a purely legal action cannot be referred without the consent of parties, for the reason it is the right of either party in such cause to demand a trial by jury of an issue of fact. (*Mills v. Miller*, 3 Neb. 94; *Lamaster v. Scofield*, 5 Neb. 148; *Kinkaid v. Hiatt*, 24 Neb. 562; *Kuhl v. Pierce County*, 44 Neb. 584.) Numerous decisions of other courts affirm the same doctrine. (*McMartin v. Bingham*, 27 Ia. 234; *Grim v. Norris*, 19 Cal. 140; *American Saw Co. v. First Nat. Bank*, 58 N. J. L. 438; *Tunison v. Snover*, 56 N. J. L. 41; *Thayer v. McNaughton*, 117 N. Y. 111; *Untermyer v. Beinhauer*, 105 N. Y. 521; *Camp v. Ingersol*, 86 N. Y. 433; *McMaster v. Booth*, 4 How. Pr. [N. Y.] 427; *Andrus v. Home Ins. Co. of New York*, 73 Wis. 642.)

It will not be claimed that quo warranto is an equitable proceeding; and if it be true, as the majority opinion argues, that it is not a criminal proceeding, then it must be a legal remedy, and hence this court was powerless to send the cause to a referee for trial without the consent of both parties. The conclusion that I have reached makes the expression of an opinion upon the other questions considered by my associates wholly unnecessary.

JOHN S. LEONHARDT ET AL. V. CITIZENS BANK OF ULYSSES.

FILED SEPTEMBER 23, 1898. No. 8109.

1. **Guaranty**: BANKS: TRANSFER OF NOTE; RENEWAL: LIABILITY OF GUARANTOR. A co-partnership engaged in banking transferred its assets to an incorporated bank in consideration of certain of

its stock, guarantying the payment of the notes transferred. Two of the co-partners became president and cashier, respectively, of the incorporated bank. The latter, by these officers, renewed and extended the time of payment of a note transferred to it by the co-partnership. Suit was brought by the incorporated bank against the co-partners on their guaranty to recover the debt evidenced by the note which had been renewed. *Held*, Under the circumstances, the renewal of the note was not a defense of which the co-partners could avail themselves.

2. **New Trial:** JOINT MOTION. A joint motion for a new trial by two or more parties, if not good as to all, should be overruled.

3. **Corporations:** COMPROMISE WITH GUARANTOR OF NOTE. Where co-partners engaged in banking transfer their assets to an incorporated bank, guarantying the paper transferred, and become stockholders of the incorporated bank, and some of them the managers thereof, a compromise and settlement of the liability of the co-partnership and the incorporated bank by its managing officers is voidable at the election of the incorporated bank, unless in such settlement the full amount due on the guaranty is paid, or the settlement is authorized or ratified by the stockholders or board of directors of the bank, the co-partners not voting as stockholders or directors.

4. **Payment:** EVIDENCE. The evidence examined, and *held* not to sustain the defense of payment interposed by the defendants below.

5. **Guaranty of Note:** CONSTRUCTION. A co-partnership engaged in banking transferred its assets to an incorporated bank under a written contract of guaranty in the following language: "All bills receivable taken by the new bank are to be fully guaranteed by Leonhardt Bros. & Co., and such guaranty to remain on all bad and doubtful paper until same are collected." *Held*, A guaranty of payment, and not of collection.

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

R. S. Norval, George W. Lowley, George P. Sheesley, and *Sheesley & Aldrich*, for plaintiffs in error.

Matt Miller and *A. J. Evans, contra.*

RAGAN, C.

In 1889, John S. Leonhardt, Frederick W. Leonhardt, and George Dobson were co-partners, and as such owned and conducted a bank at Ulysses, Nebraska. In June of

said year these gentlemen and others organized a banking corporation known as the Citizens Bank of Ulysses. The Leonhardts and Dobson subscribed for the majority of the capital stock of the incorporated bank, and paid for the stock received by them with the assets of the co-partnership bank. It seems that the other stock subscribers paid cash for their stock. By an agreement in writing between the co-partnership and the incorporated bank all the furniture, fixtures, and assets of the co-partnership were transferred to the incorporated bank, the co-partnership guarantying the notes, accounts, etc., owned and by it turned over to the incorporated bank. Among the paper so transferred was a note of one Jensen for $1,260 dated June 2, 1888, and June 1, 1890, with ten per cent interest from maturity. Frederick W. Leonhardt, upon its organization, became the president of the incorporated bank and continued as such until June, 1892. George Dobson, upon its organization, became the cashier of the incorporated bank and remained such until April 30, 1891, at which date he ceased to be a stockholder and an officer of said bank. In November, 1894, the Citizens Bank of Ulysses brought this suit in the district court of Butler county against the Leonhardts and Dobson on their contract of guaranty made with it at the time of its organization, and at the time of its receiving from said co-partnership its bills, notes, and assets; and, for a breach of the contract, alleged that the debt of the said Jensen had never been paid, and, that there was due the bank from said co-partners, by reason of their guaranty, $1,260, with ten per cent interest from June 1, 1890. The bank had a verdict and judgment and the Leonhardts and Dobson have filed in this court a petition in error to review such judgment.

1. At or soon after the date of the maturity of the Jensen note, the bank took from Jensen a renewal of said note, and when this renewal note matured, or afterward, took from Jensen still another renewal note, and at the time this suit was brought it held the note of Jensen,

dated May 11, 1891, for $1,630.10. This note represented the original Jensen note, with interest. Plaintiffs in error contended below, and the contention is renewed here, that the several renewals of the Jensen note by the incorporated bank released them from their contract of guaranty. It is admitted that none of the plaintiffs in error guarantied the renewal notes thereon, that John S. Leonhardt had no knowledge of such renewals until this trial occurred, and that the contract of guaranty entered into between the plaintiffs in error and the incorporated bank did not expressly provide that the plaintiffs in error should be liable upon renewals made by the incorporated bank of paper transferred to it. But we think that the plaintiffs in error are in no position to claim that the renewals of the Jensen note released them from their contract of guaranty. While it is true that the plaintiffs in error did not put a guaranty of payment on the renewal notes, this is not a suit upon the Jensen note, or any renewal thereof, but a suit upon the original contract of guaranty made by the plaintiffs in error with the incorporated bank; and whatever renewal was made of the Jensen note by the incorporated bank was made by Dobson and Leonhardt, as cashier and president, respectively, of such bank. In other words, in that transaction Dobson and Leonhardt were acting as the agents of the incorporated bank in renewing the paper; and, if the effect of renewing the paper was to discharge the plaintiffs in error from their contract of guaranty, then Dobson and Leonhardt, by making the renewals, were in effect releasing themselves from their contract of guaranty with their principal. It is not necessary to cite an authority to show that they could not thus discharge their contract with the incorporated bank. If this Jensen note had been owned and held by a bank of which none of the plaintiffs in error had the management or control, and it had renewed the note without their knowledge or consent, it may be that they would have been thereby released from their contract of guaranty. But that is not

this case. And it may be that, if they had renewed the Jensen note by express authority of the board of directors of the incorporated bank, they not participating as directors in said action, or if the board of directors—the plaintiffs in error not participating as directors—had afterwards ratified this renewal of the Jensen note, that ratification would have amounted to a novation of the debt which Jensen owed the incorporated bank, and the plaintiffs in error would have been released. But these are not the facts in this case. Stripped of all legal technicalities the contention amounts to this: The plaintiffs in error guarantied the payment of the Jensen debt to the incorporated bank, and the plaintiffs in error, or some of them, as managers of the incorporated bank, renewed the Jensen note, and therefore the plaintiffs in error have discharged themselves from liability on their guaranty. We cannot subscribe to this doctrine.

2. Dobson insisted in the court below, and insists here, that, inasmuch as he was not a stockholder nor in any wise connected with the incorporated bank on May 11, 1891, at which date the bank took the last renewal of the Jensen note, he is therefore released from his contract of guaranty; and for this reason alone, if no other, the judgment holding him liable is erroneous. A sufficient answer to this is that the last renewal of the Jensen note was made by the incorporated bank by F. W. Leonhardt while acting as its president. The taking of this renewal was, under the circumstances, then, not a defense for F. W. Leonhardt. The motion for a new trial in this case was a joint one by the plaintiffs in error, and, since the district court could not have sustained this motion in favor of F. W. Leonhardt, it could not have sustained it on this ground in favor of Dobson. The motion for new trial was indivisible, and, if this defense was not good as to all the plaintiffs in error, it was not good as to either one of them. (*Minnick v. Huff*, 41 Neb. 516, and cases there cited.)

3. August 3, 1891, Dobson paid to the incorporated

bank $241.19, and at that time the incorporated bank, by F. W. Leonhardt, its president, executed and delivered to Dobson a writing which recited that the incorporated bank had received of Leonhardt Bros. & Company—the plaintiffs in error—$723.57 in full of all claims, obligations, guaranties, and demands of all kinds held by the incorporated bank against the plaintiffs in error. At this time, or soon afterward, it is claimed that F. W. Leonhardt paid to the incorporated bank $482.38, the balance of the money called for by this receipt. The plaintiffs in error claimed below, and renew the claim here, that on August 3, 1891, they paid to the incorporated bank this sum of $723.57 in pursuance of an accounting and a settlement then had between the plaintiffs in error and the incorporated bank of all liabilities of the former to such bank. We think there are two answers to this contention: (1.) Conceding that the settlement was made as claimed, it is not binding upon this incorporated bank. It was not made by the authority of the stockholders or the board of directors of the bank, and the settlement, if made, was never ratified by either the stockholders or the directors of the bank. These plaintiffs in error could not make a settlement with the incorporated bank, and discharge themselves from their guaranty to it, while the bank was represented by one of their number, unless by such a settlement they paid the full amount due to the bank upon their guaranty, or unless such settlement was authorized by the stockholders or board of directors, or afterward ratified by them. (2.) But we think the evidence is conclusive that this receipt was not given as evidence of a settlement had between the plaintiffs in error and the incorporated bank as to the liability of the former to the latter on their guaranty; that, as a matter of fact, the plaintiffs in error were indebted to the incorporated bank on overdrafts in the sum of $723.57, and whatever money was paid to the bank on August 3, 1891, was paid to discharge this overdraft; that this alleged settlement and payment

of money had no reference whatever to the liability of the plaintiffs in error on their guaranty of paper transferred to them by the bank.

4. Another claim of plaintiffs in error is that in October, 1892, plaintiffs in error and the bank had a settlement, and at that time the plaintiffs in error paid and discharged all their liability to the Citizens Bank, including the Jensen debt. It appears from the evidence that at that time the stockholders of the bank met and made an investigation of the bank's assets and their value, and they then determined to charge off, as it were, all bad, worthless, and doubtful paper, and to assess the stock an amount which, when paid into the bank, would make the stock worth par. It is claimed that one of the Leonhardts at this time transferred his stock to the bank at a certain figure; that the bank deducted from what it was to pay Leonhardt for the stock the assessment made thereon, and a sufficient sum to cover all the liabilities of the plaintiffs in error to the bank, including the Jensen debt, and paid him the difference. But the evidence in the bill of exceptions leaves no doubt in our minds of the untenableness of this contention. The stock was assessed, and one of the Leonhardts transferred his stock to the bank; but the money retained by the bank as proceeds of that stock sale was, we think, retained to pay indebtedness which the plaintiffs in error, or some of them, owed the bank, and the Jensen debt was not included in these debts. The evidence shows, and we think conclusively, that at the time the stockholders were investigating their assets the last renewal of the Jensen note was produced; and at the request of F. W. Leonhardt that note was classed with the good paper, Leonhardt then claiming to the other stockholders that the guaranty of the plaintiffs in error made the Jensen debt good, and that they were liable therefor, and expected soon to discharge it. As the renewal of the Jensen note was classified as good paper, no part of the assessment made upon the bank stock was applicable to

the discharge of that note; and the other evidence is quite as conclusive that the amount retained by the bank out of the proceeds of the sale of the Leonhardt stock over and above the assessment made thereon was retained for the purpose of being applied on other obligations of the plaintiffs in error, or some of them, to the bank, the Jensen debt not being one of such obligations.

5. The guaranty executed by the plaintiffs in error to the incorporated bank at the time of its organization and at the time it took the assets of the co-partnership contained this language: "All bills receivable taken by the new bank are to be fully guarantied by Leonhardt Bros. & Company, and such guaranty to remain on all bad and doubtful paper until same are collected." It is now insisted that this is a guaranty of collection merely and not a guaranty of payment, and that therefore the plaintiffs in error are not liable upon their contract of guaranty until the incorporated bank had failed, after exhausting its legal remedies, to collect the Jensen note; and, that the only evidence of the non-collectibility of the Jensen note is the return of an execution unsatisfied, issued on a judgment rendered against Jensen on his note; and that, as the bank had not prosecuted the Jensen note to judgment, and tried to collect it by execution and failed, the judgment against the plaintiffs in error on their guaranty cannot stand. It has been held that the guarantor of the collectibility of a note cannot be sued until legal proceedings to enforce its collection have been taken against the maker of the note. (*Bosman v. Akeley*, 39 Mich. 710.) But the contract entered into by the plaintiffs in error with the incorporated bank was not a guaranty of the collectibility of the paper transferred by them to the bank. It was a guaranty of payment. The case of *McMurray v. Noyes*, 72 N. Y. 523, cited by plaintiffs in error to sustain their contention that their contract was one of collectibility, is not authority for the contention in support of which it is cited. In that case the contract was that in case of fore-

closure and a sale of the mortgaged premises, the proceeds should prove insufficient to satisfy the debt which the mortgage secured, the grantor would pay the deficiency, and the court very properly held that that was a guaranty of collection.

The briefs criticise the action of the court in its instructions to the jury and in the admission and rejection of evidence. After a careful examination of the record, we have reached the conclusion that the district court committed no error in the respects indicated prejudicial to the plaintiffs in error. Indeed we think the verdict and judgment rendered are the only ones that could stand under the evidence in the record. The judgment of the district court is right and is in all things

AFFIRMED.

NORVAL, J., not sitting.

DAVID BENNISON ET AL., APPELLANTS, V. JOSEPH H. MCCONNELL ET AL., APPELLANTS, IMPLEADED WITH MARCUS L. PARROTTE ET AL., APPELLEES.

FILED SEPTEMBER 23, 1898. No. 8230.

1. **Insolvent Corporations:** CONTRIBUTION BETWEEN STOCKHOLDERS. Where a stock subscriber discharges a debt of an insolvent corporation for which all the stock subscribers thereof are liable, he may maintain an action for contribution against his co-stock subscribers.
2. ———: ———: ESTOPPEL. *Held*, That he was not estopped under the facts of this case from maintaining such suit because he participated in a distribution made of the assets of the corporation by the stockholders thereof, the debt discharged by him not being provided for in such distribution.

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

Kennedy & Learned, G. W. Cooper, L. D. Holmes, Clinton N. Powell, and *J. B. Meikle,* for appellants.

Joel W. West, contra.

RAGAN, C.

In 1888 there was organized under the laws of this state, and domiciled in the city of Omaha, a corporation known as the Guaranty Loan & Investment Company. This corporation was organized for the purpose of negotiating real estate loans and guarantying the payment of the same. The authorized capital stock of the company was subscribed; but it seems that each subscriber paid in cash for only a part of the stock subscribed for by him, giving his note to the corporation for the remainder of the subscription. The corporation made a loan of $6,500, which was secured by a mortgage upon real estate. It then sold this mortgage loan to one Bertha Zenner, guarantying the payment of the same. The loan was also guarantied by John L. Kennedy and David Bennison and other stockholders of the corporation. Early in 1889 the stockholders of the corporation held a meeting, and, because it was not doing a profitable business, resolved to wind up its affairs. At this meeting the stockholders set aside out of the company's funds $500 to be used in defraying future expenses, "liabilities, and needs." They also levied an assessment of three per cent on the stock for the purpose of covering losses of the company, and by resolution returned to each stock subscriber seventy-seven per cent of the cash paid by him on the stock for which he had subscribed, called in the outstanding stock and cancelled it, and surrendered to each stock subscriber his note. Some four years after this, Bertha Zenner foreclosed the mortgage which had been sold to her by this investment company, and caused the property mortgaged to be sold; but the proceeds of the sale were not sufficient to satisfy the mortgage debt,

and Zenner took a deficiency judgment against the investment company. John L. Kennedy and David Bennison, two of the stockholders in said investment company, and who had guarantied the payment of the mortgage sold by it to Zenner, then advanced the money to Zenner on the deficiency judgment, and took from her an assignment thereof to themselves. An execution was then issued on this deficiency judgment against the investment company, and returned wholly unsatisfied; and thereupon Bennison and Kennedy brought this suit in equity in the district court of Douglas county, making the investment company and all the stock subscribers and creditors thereof parties. The object of Bennison and Kennedy's action was to recover from their co-stock subscribers their proportionate share of the mortgage debt which they had paid to Zenner. The district court dismissed Bennison and Kennedy's petition and they have appealed. There were several questions litigated in the district court by the various parties to this record, and several questions have been presented and argued here by such parties. All these questions we have examined, and we are entirely satisfied with all the rulings made by the district court, except as to the judgment rendered against Kennedy, on the cross-petition of the International Loan & Trust Company, and the order dismissing Bennison and Kennedy's petition. These we will now examine.

It appears from the evidence that Kennedy held one $500 share of stock. It further appears that he paid on behalf of the company, one-half of the deficiency judgment, or more than four times his entire subscription to the stock company. He cannot be held liable to the International Loan & Trust Company until he has collected from his co-stock subscribers an amount sufficient to make his payments on stock and expenditures made on behalf of the company less than his stock subscription.

The district court placed its denial of the appellants' right to recover on the following grounds: "That the

plaintiffs in this action are estopped from recovering from the defendant stockholders of the Guaranty Loan & Investment Company by reason of their participation in the distribution of the assets of the company, whereby they received back the notes which they had given in payment for their stock, and whereby a large amount of money then on hand was distributed to stockholders who had made cash payments upon their stock, a number of said stockholders being now without the jurisdiction of this court and are not parties to this suit." But we cannot agree to this conclusion of the learned district judge. We are of opinion that the rule of estoppel should not be enforced against the appellants under the facts of this case. If at the time the stockholders met and resolved that the incorporation should go out of business, distributed its assets, called in its stock, and returned the stock subscribers' notes, this deficiency judgment against the corporation had been in existence, then it may be that Bennison and Kennedy, being stockholders of the investment company, could not afterward have purchased this judgment and enforced it against their co-stock subscribers. But when the distribution of the assets of the investment company took place, this deficiency judgment was not in existence; and it was not at that time within the contemplation of any of the stockholders that the corporation or themselves would be called upon to make good the company's guaranty. The appellants by participating in this distribution of the investment company's assets neither said nor did anything nor omitted to say or do anything which caused any other stock subscriber to change his status. These stock-subscribers have not been injured by the distribution made of the investment company's assets; and, if it can be said that they have, we are unable to see how the appellants are responsible for such injury. Again, it must be remembered that the distribution made of the assets of the corporation by the stockholders did not impair Zenner's right, after the corporate property was ex-

hausted, to call upon the stock subscribers to the extent of their unpaid stock subscriptions for the satisfaction of her judgment. All the stock subscribers, after the exhaustion of the corporate property became liable to the extent of their unpaid stock subscriptions to her for this deficiency judgment. The appellants were among these unpaid stock subscribers and therefore liable for this deficiency judgment; and, by paying the judgment and taking an assignment of it, they succeeded to the rights Zenner had; and, since she could enforce the judgment against the stock subscribers, any one of them liable might pay the judgment, take an assignment of it and enforce contribution against his co-subscribers. (*Van Pelt v. Gardner*, 54 Neb. 70.)

The judgment of the district court against Kennedy, in favor of the International Loan & Trust Company, is reversed; and the judgment of said court, dismissing the plaintiff's action, is reversed, and the cause remanded, not for retrial, but with instructions to the district court to enter a judgment in favor of the plaintiffs, as prayed for in their petition. All other orders and rulings made by the district court in the case are

AFFIRMED.

NEW ENGLAND LOAN & TRUST COMPANY, APPELLEE, V. EMILY J. ROBINSON, APPELLANT.

FILED SEPTEMBER 23, 1898. No. 8235.

1. **Assignment of Coupon:** MORTGAGES. The detaching of an interest coupon from a bond, by the owner thereof, and transferring it to a third party, operate as an assignment *pro tanto* of the mortgage which secures the entire debt.

2. **Mortgage:** COUPON: ACTION BY TRANSFEREE. The mortgage in suit examined, and *held* not to contain a contract between the mortgagor and mortgagee precluding the holder of only an interest coupon from maintaining a suit thereon, nor to contain a provision that only the owner and holder of the principal bond secured

by the mortgage should maintain a suit to foreclose the same for a breach of its conditions.

3. ———: RIGHTS OF TRANSFEREE. The provisions of a mortgage are not personal to the mortgagee, but inure to the owner of any part of the debt thereby secured.

4. **Rights of Junior Lienor:** DISCHARGE OF FIRST LIEN. The holder of a lien upon property may discharge any prior valid lien existing against the same, for his own protection and, for the purpose of reimbursing himself, add the amount due on the lien discharged to his own lien.

5. ———: ———. It is not essential that this right shall be found in express contract between the property holder and the lien holder.

6. ———: ———: VOLUNTARY PAYMENT. The discharge by a lien holder of a prior valid tax or other valid lien is not a voluntary payment, but a payment *in invitum.*

7. **Note:** POSSESSION: EVIDENCE OF OWNERSHIP. The possession of a promissory note payable to bearer is *prima facie* evidence of the holder's ownership of such note.

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

Howard B. Smith, for appellant.

C. H. Ballict, contra.

RAGAN, C.

Emily J. Robinson executed and delivered to the New England Loan & Trust Company her bond for $2,500, due five years after date, drawing interest at the rate of 6 per cent per annum from date until maturity, and payable semi-annually, such interest evidenced by ten coupons or interest notes of $75 each, attached to said principal bond. The first of said coupons matured six months after the date of said principal bond, and one other coupon each six months thereafter. These coupons were payable to bearer. To secure the payment of the bond and coupons, Robinson executed and delivered to the trust company a mortgage upon certain real estate in Douglas county, Nebraska. The trust company brought this suit

in the district court of said county, alleging, among other things, that it had sold and transferred said bond and coupons, and the mortgage securing the same, to a third party and guarantied the payment of said bond and coupons; that Robinson made default in the payment of coupons nine and ten, and that the trust company, in accordance with its guaranty, had advanced and paid the amount due thereon to its assignee; and that it—the trust company—was then the owner and holder of said coupons. It claimed to have a lien upon the mortgaged real estate by virtue of the mortgage to secure the payment to it of said coupons, which lien, however, it claimed was subject to the lien of its assignee securing the payment of the principal bond. The trust company further alleged in its petition that, in order to protect its mortgage lien upon said real estate, it had advanced and paid certain state, county, and city taxes which had been legally levied and assessed, and were valid prior liens upon the property. The prayer of the petition was for an accounting of the amount due from Robinson to it on coupons nine and ten, and for the taxes paid, and that said sum might be declared a lien upon the mortgaged property, subject only to the lien of its assignee securing the principal bond. The trust company had a decree as prayed and Robinson has appealed.

1. It is first insisted that the trust company's petition filed in the district court does not state facts sufficient to constitute a cause of action. This argument is based upon counsel's contention that an owner only of an interest note or coupon of said loan cannot maintain an action to foreclose the mortgage securing the payment of such coupon; that a suit to foreclose the mortgage can be brought only by the owner of the principal bond. It is insisted that such is the express contract between the mortgagor and mortgagee, as found in the mortgage itself. The mortgage provided that in case the mortgagor should fail to pay the taxes upon the mortgaged property when due, or make default in the payment of any interest

coupon when due, then "the whole of the indebtedness secured hereby shall become due and collectible at once, at the option of the said second party [the trust company], without further notice, and shall bear interest at the rate of ten per cent per annum from the date of the bond secured hereby; and the holder thereof may recover the whole of the amount of said bond, with interest thereon." By this agreement the holder of the principal bond was given the option of declaring it due before maturity, by its terms, in case the mortgagor made default in paying the taxes or in paying his interest. But it is not a contract between the mortgagor and mortgagee which precluded the holder of an interest coupon from maintaining a suit either at law or in equity thereon; nor is it a contract providing that only the holder of the principal bond should be entitled to maintain a suit to foreclose the mortgage by reason of a breach of its conditions. The mortgage was given to secure the payment not only of the principal bond, but to secure the payment of the interest coupons as well; and the detaching of the coupon from the bond by the owner thereof and transferring it to a third party operated as an assignment *pro tanto* of the mortgage which secured the entire debt. (*Burnett v. Hoffman*, 40 Neb. 569, and cases there cited; *Griffith v. Salleng*, 54 Neb. 362.)

2. A second contention under the argument that the petition does not state facts sufficient to constitute a cause of action is that the holder of the coupons could not pay taxes which were a lien upon the mortgaged real estate and recover such taxes from the mortgagor or the mortgaged property. The mortgage provided that if the mortgagor should neglect to pay the taxes on the mortgaged property, the mortgagee might do so, and recover the amount paid with ten per cent interest from the mortgagor, and that the mortgage should stand as security for the taxes so paid. The argument is that the owner of the principal bond and mortgage might pay the taxes upon this mortgaged property and have a lien upon

the property to secure their repayment, but that the payment of taxes by the holder of a coupon only was a voluntary payment; but the agreement of the mortgagor that, in case he failed to pay the taxes upon the mortgaged property when due, the mortgagee might pay the same, and have a lien upon the mortgaged property for their repayment, was an agreement, not only for the benefit of the original mortgagee, but one which inured to the lawful owner and holder of any part of the debt secured by this mortgage. But if the mortgage had contained no provision whatever upon this subject, we think that the lawful owner and holder of this particular bond, or of any coupon thereof, might discharge any prior valid lien upon the property for the protection of his own lien, and, to secure the repayment of the money so advanced, add the amount of that lien to his own. (*Leavitt v. Bell*, 55 Neb. 57, and cases there cited.) The holder of a lien upon property, either real or personal, may discharge any prior valid lien existing against the property, for his own protection, and for the purpose of reimbursing himself add the amount due on the lien discharged to his own lien upon the property; and it is not necessary that this right should be found in an express contract between the property owner and the holder of the lien. The discharge by a lien holder of a prior valid tax or other lien is not a voluntary payment, but a payment *in invitum*.

3. The petition of the trust company alleged that after it received the bond, coupons, and mortgage from Robinson, it transferred and sold them to a third party and guarantied the payment of the mortgage debt, and that it subsequently, by reason of Robinson's default, was compelled to and did pay to its assignee the amount due on coupons nine and ten. These allegations were denied by the answer of Robinson, and it is now argued that the finding of the district court that these allegations of the trust company's petition were true is not sustained by the evidence. The contention is correct. The evidence does not sustain that particular finding of the district

court; but the petition of the trust company also alleged that it was the owner and holder of these coupons nine and ten; and, while this allegation of the petition was denied by the answer, the evidence sustains the finding of the district court that the trust company, at the time this suit was brought, was the owner and holder of these coupons. We think, therefore, the finding of the district court that the trust company had sold and guarantied the payment of this mortgage debt, and then to protect its guaranty had paid to its assignee these two coupons, becomes immaterial.

4. But it is insisted that the finding of the district court that the trust company, at the time of bringing this suit, was the owner of coupons nine and ten is not sustained by the evidence. We think it is. The execution and delivery of these coupons to the trust company by Robinson were admitted by her in her answer. They were payable to bearer and they were in possession of the trust company, and produced on the trial. The possession of a promissory note payable to bearer is *prima facie* evidence of the holder's ownership of such note. (*Sharmer v. McIntosh*, 43 Neb. 509; *City Nat. Bank of Hastings v. Thomas*, 46 Neb. 861.)

5. The foregoing are the only points argued in the briefs of counsel which we deem it necessary to notice. The decree of the district court is right and is

AFFIRMED.

WILLIAM WALLACE ET AL. V. SARAH SHELDON ET AL.

FILED SEPTEMBER 23, 1898. No. 8240.

1. **Costs**: LIABILITY OF PARTIES. The courts have no inherent power to award costs to a litigant. The right to costs is a statutory one.

2. ———: ———. The provisions of the Code on the subject of costs examined, and *held* to establish the following principles: (1)

Generally, costs follow the judgment—are awarded the successful and taxed to the losing party; (2) *prima facie*, the unsuccessful litigant is liable for costs; and, to justify a judgment awarding him costs, either an express statute must intervene, or the circumstances be such that a judgment against him for costs would be inequitable.

3. ———: ———. The discretion conferred on the courts by section 623 of the Code is not an arbitrary, but a legal, one, to be exercised within the limits of legal and equitable principles.

4. ———: ———: CONTEST OF WILL: ATTORNEY'S FEES. The courts are not invested with the discretion to award costs or attorney's fees to an unsuccessful contestant of a will simply and solely because of the fact that he undertook the contest in good faith, and at the time there existed probable cause therefor.

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

SEE opinion for references to cases.

Lee Helsley and *Charles Offutt*, for plaintiffs in error.

Wm. O. Gilbert and *O'Neill & Gilbert, contra.*

RAGAN, C.

Mary E. Ramacciotti died in Douglas county, leaving a paper purporting to be her last will and testament, in and by which she appointed William Wallace and Louis Reed of the city of Omaha her executors. These gentlemen produced said will in the county court of said county, and demanded its probate. The heirs at law of the deceased appeared in the county court and contested the validity of the alleged will. The contest resulted in a judgment of the county court establishing the validity of the will. The contestants thereupon appealed to the district court where another trial was had, which resulted in a judgment affirming the judgment of the county court. That judgment remains in force. The district court upon motion of the contestants taxed all the costs expended by them in the contest, including the fees of their counsel, to the estate of the testatrix. To

review this judgment the executors have filed here a petition in error.

The power of a court to award costs to a litigant is not an inherent one. The English law courts found their right to exercise the power in legislative provisions, and it seems to have been thought necessary to specially and expressly authorize the English chancery courts to exercise the power by act of parliament. In this country the power of the courts, both federal and state, if not found in statute or contract of the parties, does not exist. The cases construing statutes on the subject of costs establish this general rule: Costs follow the judgment—are awarded the successful party and taxed to the losing party. (5 Ency. Pl. & Pr. 106.) To this general rule there are some exceptions. A familiar one is the allowance to an executor of the necessary costs and expenses incurred by him in unsuccessfully defending a contest against the will of his testator. (*Andrews' Executors v. His Administrators*, 7 O. St. 143.) The courts justify this exception on the theory that the executor is a trustee, and, having accepted the trust, is bound to defend the trust estate. Another exception to the general rule that only the successful party may recover costs arises in cases in which an executor, devisee, or legatee of a will applies to a court for a proper construction of the instrument; and still another exception arises where property or a fund is in court, or under the control of the court, and various parties claim interests in or liens upon this fund or property. In such cases the exception of allowing costs to the unsuccessful party is justified by the courts upon the theory that the proper construction of the will or the determination by the court of the rights to the fund or property is alike beneficial to all parties. (*McClary v. Stull*, 44 Neb. 175.) The Code of Civil Procedure provides:

"Section 620. Where it is not otherwise provided by this and other statutes costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions

for the recovery of money only, or for the recovery of specific real or personal property."

Section 621 provides that a plaintiff shall not recover costs if a justice of the peace had jurisdiction of the action and the same was brought in any other court; nor, in certain actions, unless he recovered more than five dollars.

Section 622 of the Code provides: "Costs shall be allowed of course to any defendant upon a judgment in his favor in the actions mentioned in the last two sections."

Section 623 provides: "In other actions the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable."

The action in which the order complained of was made was not one for the recovery of money only, nor for the recovery of specific real or personal property. Nor was the action one mentioned in said section 621 of the Code; but the action was one of the "other actions" named in section 623, and in which action the court was invested with the discretion to tax and apportion the costs. It will thus be seen that these provisions of the Code sustain the general rule that costs follow the judgment—are awarded to the successful and taxed to the losing party. We think also that these provisions of the statute justify this rule: *Prima facie* the unsuccessful litigant is liable for costs, and, to justify a judgment in his favor for costs, either an express statute must intervene, or the circumstances be such that a judgment against him for costs would be inequitable. (*Clark v. Reed*, 11 Pick. [Mass.] 446; *Saunders v. Frost*, 5 Pick. [Mass.] 259.) While the court is invested by said section 623 of the Code with discretion to award costs to an unsuccessful contestant of a will such discretion is not an arbitrary one, but a legal discretion, to be exercised within the limits of legal and equitable principles.

The district court found that the defendants in error

instituted and carried on the contest of this will in good faith, and that there existed at the commencement of the contest probable cause therefor; and upon these grounds it based its order allowing these contestants to recover their costs and attorney's fees out of the estate of the testatrix. In making this order we think the district court erred. The order was an abuse of the court's discretion. Because the contest was instituted in good faith and there existed probable cause therefor do not of themselves establish that a judgment against the unsuccessful contestant for costs would be inequitable. In the absence of an express statute, the right of a contestant of a will to recover costs, if successful, or his liability to pay costs, if unsuccessful, cannot be made to depend upon the motive which influenced him to undertake the contest. If the doctrine be carried to its logical conclusion, then the successful contestant of a will would be deprived of his right to recover costs if it appeared that at the time he undertook the contest he did not do so in good faith, and did not have reasonable grounds for beginning the contest. To adopt the doctrine of motive would be to open the courts, and invite the disappointed, the discontented, and the litigious to scramble for the property of the dead man's estate, assuring them in advance that they had everything to gain and nothing to lose, since the costs and expenses, including attorneys' fees incurred by them, would in any case be charged to the estate. Such we are persuaded is a wrong construction of the Code. We are aware that in *Mathis v. Pitman*, 32 Neb. 191, and in *Seebrock v. Fedawa*, 33 Neb. 413, the unsuccessful contestants of a will were allowed to recover their costs and attorneys' fees, upon the ground that they had instituted the contest in good faith, and that reasonable grounds existed for instituting the contest. But a re-examination of the question convinces us that that conclusion is wrong, and, in so far as those cases announce that doctrine, they are overruled.

In *Clapp v. Fullerton*, 34 N. Y. 191, the court permitted the unsuccessful contestant of a will to recover his costs and seems to have based its conclusion upon the ground that the contest was instituted in good faith and with probable cause therefor. There is, however, no discussion of the question by the court and for aught the opinion discloses it may have been based upon the express provisions of a statute. But the doctrine announced in that case is no longer the doctrine of the New York courts. (*In re Wilson*, 8 N. E. Rep. [N. Y.] 731.)

In *Carter v. Carter*, 12 S. W. Rep. [Ky.] 385, the heir at law unsuccessfully contested the will and the circuit court allowed the contestant to recover her costs and attorney's fees against the estate. The court of appeals of Kentucky reversed this judgment and we cannot better express our views of the question under consideration than to quote the language of Pryor, J., who delivered the opinion of the court of appeals: "There was no more reason for allowing the heir at law her costs, if unsuccessful, in this litigation than there would have been in any ordinary action decided adverse to her claim. She may have had probable cause for doubting the mental capacity of her sister to execute such a paper, or to question the testamentary act upon other grounds; still, this will not authorize the court to require the successful party to pay the costs. The court and jury have said that no legal grounds existed for invalidating the paper, and this appellee, like any other unsuccessful litigant, must pay the costs of the litigation, such as are usually taxed in favor of the one party against the other in ordinary actions, each party paying their employed attorneys."

We do not attempt to formulate a rule for determining what state of facts will justify a court in any case in awarding costs to an unsuccessful litigant; but what we do decide is that the courts are not invested with the discretion to award costs or attorneys' fees to an unsuccessful contestant of a will simply and solely because of the

fact that he undertook the contest in good faith, and at the time he did so there existed probable cause for the contest. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

NORVAL, J. I dissent.

JOHN NICHOLAS BROWN, APPELLEE, V. DENNIS FITZPATRICK, APPELLANT, ET AL.

FILED SEPTEMBER 23, 1898. No. 8262.

1. **Foreclosure of Mortgage: OBJECTIONS TO APPRAISEMENT: CONFIRMATION.** A mortgagor, before the date of sale, filed objections, and affidavits in support thereof, to the appraisement on the ground that the same was too low. These objections were not ruled on before the sale. The court made an order that the mortgagor show cause by the 19th why the sale should not be confirmed. He made no further showing. *Held*, (1) That the court was not obliged to pass on the motion to confirm on the 19th; (2) that it had a right to consider affidavits filed on or after that date by the mortgagee tending to support the appraisement made; (3) that the mortgagor was not entitled to notice of the filing of such affidavits; (4) that he was not entitled to notice of the time when the court would pass on the motion to confirm; (5) that the court could have confirmed the sale though the mortgagee had never filed an affidavit in support of the appraisement made, as the latter was not assailed by the mortgagor for fraud.

2. ———: ———. An appraisement duly made of real estate for the purposes of a judicial sale cannot be successfully attacked solely on the ground that the property has been appraised too low. To make the low valuation a successful ground of attack on the appraisement it must be challenged for fraud.

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

I. J. Dunn, for appellant.

Morris & Marple, contra.

RAGAN, C.

This is an appeal from a judgment of the district court of Douglas county confirming a sale of real estate made in pursuance of a decree of mortgage foreclosure. The property was appraised at $7,700, but before the sale occurred the mortgagor filed objections to the appraisement on the ground that the value placed on the property was too low, and at the same time filed a number of affidavits tending to support his motion. The record discloses no ruling of the district court on this motion, prior to the sale. The plaintiff served a notice on the mortgagor that he would, on October 12, 1895, move the court to confirm the sale. On that date the court made an order that the mortgagor show cause by the 19th of the month why the sale should not be confirmed. The mortgagor filed no additional showing against the confirmation. It was not confirmed on October 19. On the 25th, however, the plaintiff filed affidavits tending to support the appraisement made of the property by the sheriff; and on the 26th of said month, without any notice to the mortgagor, and in the absence of himself and counsel, the court confirmed the sale. The appellant complains because the plaintiff was allowed, after October 19, to file affidavits tending to sustain the appraisement, and that the court considered these affidavits, and made the order on the 26th in the absence of the appellant and without notice to him or his counsel. Our views are these:

1. The district court was not obliged to pass on the motion to confirm on October 19. It had a right to consider affidavits filed on that date, or after that date, by the plaintiff, which tended to support the appraisement; and the appellant was not entitled to be notified of the filing of such affidavits, or of the time when the court would pass on the motion. He had already filed his objections to the appraisement made.

2. The court should have confirmed the sale, even

though the plaintiff had never filed an affidavit in support of the appraisement made, as that appraisement was not assailed by the appellant for fraud, and an appraisement duly made of real estate for the purpose of a judicial sale cannot be successfully attacked solely on the ground that the property had been appraised too low. To use the low valuation as a successful basis for attacking the appraisement, it must be alleged and proved that it was fraudulent. (*Vought v. Foxworthy*, 38 Neb. 790; *Mills v. Hamer*, 55 Neb. 445.) The judgment of the district court is

AFFIRMED.

EDGAR M. WESTERVELT, RECEIVER, V. ALEXANDER H. BAKER ET AL.

FILED SEPTEMBER 23, 1898. No. 8252.

1. **Married Woman:** LIABILITY AS SURETY ON NOTE: ESTOPPEL. A national bank loaned a customer a sum of money greater than ten per cent of its capital, contrary to the United States statutes. The customer's wife signed the notes given for this loan, as surety. *Held*, In a suit upon the notes, the wife was not estopped from interposing her coverture and that she signed the notes as surety, as a defense.

2. ———: ———: CONSTRUCTION OF STATUTE. The court adheres to the construction placed by it upon the "Married Woman's Act" in *Grand Island Banking Co. v. Wright*, 53 Neb. 574.

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

O. A. Abbott and *Abbott & Caldwell*, for plaintiff in error.

References: *Todd v. Lee*, 15 Wis. 400; *Kavanagh v. O'Neill*, 53 Wis. 101; *Jones v. Crosthwaite*, 17 Ia. 393; *Patton v. Kinsman*, 17 Ia. 428; *Elliott v. Lawhead*, 43 O. St. 171; *Johnson County v. Rugg*, 18 Ia. 137; *Deering v. Boyle*, 8 Kan. 525; *Wicks v. Mitchell*, 9 Kan. 80; *Marlow v. Barlew*, 53 Cal. 456; *Williams v. Urmston*, 35 O. St. 296;

Metropolitan Bank v. Taylor, 62 Mo. 338; *Bell v. Kellar*, 13 B. Mon. [Ky.] 381; *Cowles v. Morgan*, 34 Ala. 535; *Burnett v. Hawpe*, 25 Gratt. [Va.] 481; *Mayo v. Hutchinson*, 57 Me. 546; *Cookson v. Toole*, 59 Ill. 515; *Elder v. Jones*, 85 Ill. 384; *Yale v. Dederer*, 22 N. Y. 450; *Reed v. Buys*, 44 Mich. 80; *De Vries v. Conklin*, 22 Mich. 255; *Willard v. Eastham*, 15 Gray [Mass.] 328; *Ankeney v. Hannon*, 147 U. S. 118; *Watson v. Thurber*, 11 Mich. 457; *Edwards v. Schoeneman*, 104 Ill. 278; *Woolsey v. Brown*, 74 N. Y. 82; *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 613; *Owen v. Cawley*, 36 N. Y. 600; *Williams v. Hayward*, 117 Mass. 532; *Major v. Holmes*, 124 Mass. 108; *Webb v. Hoselton*, 4 Neb. 308.

W. H. Thompson and *Robert Patrick, contra.*

RAGAN, C.

Westervelt, as receiver of the Citizens National Bank of Grand Island brought this suit in the district court of Hall county against A. H. Baker and Mary J. Baker, his wife, upon two promissory notes executed and delivered by them to said bank. Mrs. Baker interposed as a defense to the action of the receiver that at the date of the execution of said notes she was a married woman —the wife of A. H. Baker—and signed the notes sued upon as surety for her husband; that she did not receive, directly or indirectly, any portion of the consideration for which said notes were given; that they were not given with reference to her separate property, trade, or business, or upon the faith and credit thereof, nor with intent on her part to thereby charge her separate estate with their payment. Mrs. Baker had a verdict and judgment for the review of which the receiver has filed here a petition in error.

1. The first argument is that the finding of the jury sustaining Mrs. Baker's defense, aside from the fact of her being a *feme covert*, is not sustained by sufficient evidence. We think it is.

2. One of the notes was signed: "M. J. Baker. A. H. Baker." The other was signed: "A. H. Baker. M. J. Baker." The aggregate of the two notes exceeded $6,000. The capital stock of the bank was $60,000. It was pleaded by the receiver below, and he insists here, that Mrs. Baker is estopped from interposing her defense to these notes because by virtue of the United States statutes it is unlawful for a national bank to lend to one person more than ten per cent of its capital stock; that persons examining the notes made by Mrs. Baker and her husband would presume one of them to be for his debt, and one for hers, because of the position which their names occupied on said notes, and that the position of said names was calculated to deceive national bank examiners; that Mr. Baker was thereby enabled to procure a larger loan from said bank than the law permitted it to make. We admit that we are unable to comprehend the force of this argument. What fact should Mrs. Baker be estopped from asserting? Certainly not that she was a *feme covert* at the time she executed the notes. She did not by her conduct lead the officials of the bank, at the time they made the loan to her husband, to believe that she was a *feme sole*. Had she done so and the bank's officers had relied upon her representation that she was a single woman, and acted thereon, doubtless she would be estopped now from asserting the contrary as a defense to this action. She ought not to be estopped from asserting that she signed those notes as surety for her husband, since the jury have found—and the evidence sustains the finding—that such was the fact, and there is no finding here—nor would the evidence sustain one, had it been made—that the bank loaned the money it did, or any part of it, to her. If the making of a loan of more than $6,000 was forbidden by the law under which the bank was organized, we do not see that the receiver is in any position to estop Mrs. Baker from asserting her defense to the notes because of that fact. If the transaction was

unlawful, the bank's officers participated in it, and the receiver can no more successfully claim that Mrs. Baker is estopped from asserting her defense to the notes by reason of this unlawful transaction than Mrs. Baker could interpose that unlawful transaction as a defense. This record does not disclose that the bank was induced to make these loans relying upon any representation made by Mrs. Baker contrary to the facts which she alleges as a defense here.

3. The third contention of the receiver consists of a very able and exhaustive argument assailing the correctness of the construction placed by this court upon chapter 53, Compiled Statutes, commonly known as the "Married Woman's Act." This construction amounts to this: 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 the note was given with reference to her separate property, trade, or business, or upon the faith and credit thereof, and that 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. In the brief filed by counsel for the receiver cases are cited from other courts which place a different construction upon similar statutes. We have read and examined these cases heretofore, and have again studied them, and still we feel that our construction of the statute is correct. The court is divided as to the proper construction of this statute. It has several times been given the most careful consideration of which we are capable, and in *Grand Island Banking Co. v. Wright*, 53 Neb. 574, will be found the views of the majority of the court, sustaining the construction which it has placed upon the statute, and the views of the members of the court who dissent from that construction.

The construction there placed by the majority of the court upon the statute must be considered as closing the question. Of course we may be wrong in the construction which we have placed upon this law—altogether wrong—for we do not pretent to infallibility; but the views expressed in that case are the result of the best judgment we have as to the intention of the legislature, and to that tribunal an appeal should be made for an amendment of the statute, if our construction is unsatisfactory to the bar or the state.

The judgment of the district court is

AFFIRMED.

HARRISON, C. J., not sitting.

JOHN D. HOOVER ET AL. V. F. J. HALE.

FILED SEPTEMBER 23, 1898. NO. 8274.

1. **Executions:** OBJECTIONS TO APPRAISEMENT. Objections that real estate seized on execution has been appraised too high or too low should be made and filed in the court from which the execution issued before the sale occurs or such objections will be unavailing.

2. ———: ———: RES JUDICATA. A judgment is an adjudication of the rights of the litigant to the subject-matter of the suit, and in a proceeding to confirm a sale made to satisfy such judgment the district court has no authority to inquire into its merits.

3. ———: SALE: OBJECTIONS TO CONFIRMATION: RES JUDICATA: MARRIED WOMAN: ESTATE CONVEYED. A married woman owned a flour mill and the fee to five acres of land on which it was situate. The mill was operated by water power furnished by a race and dam situate on an adjoining piece of school land, the title to which was in the state, but of which her husband was lessee, and on which land he resided with his family. A sheriff levied an execution upon the mill property, attempted to levy it upon the race and dam as the water power of the mill, caused the mill property and the water power to be separately appraised, in his notice of sale described the mill property and the water power separately, and sold the whole to satisfy a judgment rendered against the husband and wife on a promissory note signed by them. The wife interposed as an objection to the confirma-

tion of the sale her coverture at the time of the execution of the note; that she signed the same as surety for her husband, and without reference to her separate property or business. *Held*, That, though this was a defense which she might have interposed to a suit upon the note, she could not urge it as an objection to the confirmation of the sale. The husband objected to the confirmation of the sale on the ground that the mill race and dam constituting the water power of the mill were part of his homestead, and therefore not liable to sale on execution. *Held*, (1) That no part of the husband's leasehold interest in the school land passed by the sale; (2) that the mill dam and race were easements upon the fee of the school land; (3) that the sale of the mill property carried these easements with it, as appurtenances; (4) that the separate appraisement and advertisement of the mill and water power, while proper enough, were not essential.

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

S. O. Campbell, for plaintiffs in error.

Reed & Ellis and *Reed & Gross, contra.*

RAGAN, C.

To an understanding of the points decided in this case a brief statement of the facts is essential. In June, 1891, in the county court of Madison county, F. J. Hale recovered a judgment against John D. Hoover and Luella Hoover, his wife, on a promissory note executed by them. It seems that this note was not given by Mrs. Hoover with any reference to her separate estate, trade, or business, nor did she intend to bind her separate estate for its payment; that she received no consideration for signing said note but executed the same as surety for her husband. A transcript of this judgment was duly filed and docketed in the office of the clerk of the district court of said county, and subsequently an execution issued thereon. Under this execution the sheriff levied upon some five acres of land in a certain section 31, the property of Mrs. Hoover. On this land, and constituting its chief value, was a flour mill. The mill was operated by

water power. This was furnished by a dam and race situate on a part of a certain section 36, the fee simple title to which land was in the state of Nebraska. John D. Hoover and his family occupied this land as their homestead under a lease from the state. The sheriff levied or attempted to levy the execution in his hands upon this mill race, dam, and water power on the school land, had the same separately appraised and advertised, and, in the sale made under the execution, not only sold the five-acre tract on which the mill was situate, but in express terms included in said sale the race, dam, and water power of the mill. After the sale had been made, Hoover and his wife appeared in the district court of Madison county, and objected to the confirmation of the same. The objections were overruled, the sale confirmed, and they have filed a petition in error here to review the confirmation judgment.

1. It is first insisted that the property was appraised too low; that it was worth at least twice the sum at which it was appraised. But the plaintiffs in error filed in the district court no objections to the appraisement made of the property until after it had been sold. After the sale was made it was then too late for the plaintiffs in error for the first time to question the appraisement on the grounds that the same was too low. Objections that real estate seized on execution has been appraised too high or too low should be made and filed in the court from which the execution issued, before the sale occurs, or such objections will be unavailing. (*Mills v. Hamer*, 55 Neb. 445, and case cited.)

2. A contention of Mrs. Hoover is that the district court should have set aside the sale because she made it appear on the hearing of the objections to the confirmation that she received no consideration for the note which she had signed with her husband; that it was not signed by her with reference to her separate estate, trade, or business. But this is an argument that Mrs. Hoover was entitled, on the hearing of objections to the confirma-

tion of the sale, to interpose and have determined—a defense which she alleged she had to the action in which the judgment was rendered and under which judgment the sale occurred. But the record of the judgment on which the sale under consideration was based disclosed upon its face that the county court had jurisdiction of the subject-matter and of the parties to the suit in which that judgment was rendered. The district court then was without authority to entertain an objection to the confirmation of the sale, which objection was simply a defense which Mrs. Hoover might have interposed to the action against her in the county court. That judgment determined the rights of the parties to that suit, and in the proceedings to confirm the sale of real estate made to satisfy such judgment the district court was without authority to investigate the merits of that judgment. (*Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900.)

3. As already stated, the tract of school land on which were the mill race, dam, and water power of the mill of Mrs. Hoover was occupied by Mr. Hoover and his family as a homestead; and he complains of the refusal of the district court to set the sale aside because he alleges that this homestead, being less in quantity than 160 acres, and less in value than $2,000, and not being in any incorporated municipality, was not liable to be taken and sold on execution. Mr. Hoover's contention that his homestead was not liable to sale on execution is conceded, but, as we view the case, no part of his homestead was sold under this execution. In the first place the fee simple title to this school land was in the state, and Hoover was a mere tenant; and the sale made by the sheriff did not have the effect, and was not intended to have the effect, of divesting Hoover of his leasehold interest in this school land. The mill race, the water power, and dam were appurtenances of the mill of Mrs. Hoover; and, by the sale of the mill, they passed as such appurtenances to the purchaser. These appurtenances constituted an easement on the school land, and we sup-

pose that the right to construct and maintain this easement on this school land had been granted to Mrs. Hoover, or her grantors, by the owner of the fee of the school land; and Hoover, when he became lessee of the school land, held subject to this easement. The sheriff's causing the race, dam, and water power on the school land to be separately appraised and described in express words in his proceedings of sale, while proper enough, were by no means essential, as this race, dam, and water power were appurtenances belonging to the mill property, and a sale and conveyance of that property, either voluntarily by the owner, or involuntarily by judicial process, would have invested the purchaser with the appurtenances had they not been mentioned or described in the conveyance or proceeding. (*Witte v. Quinn*, 38 Mo. App. 692; *Riddle v. Littlefield*, 53 N. H. 503; *Jackson v. Trullinger*, 9 Ore. 393; *Huttemeier v. Albro*, 18 N. Y. 48; *Morgan v. Mason*, 20 O. 402; Compiled Statutes. ch. 73, sec. 50; Code of Civil Procedure, secs. 499, 500.)

We conclude, therefore, that the mill race, dam, and water power were not included in John D. Hoover's leasehold interest in the school land, and that these constitute an easement upon that land and appurtenances of the mill property which belonged to Mrs. Hoover. The judgment of the district court is

AFFIRMED.

ROBERT KYD ET AL. V. HARRISON F. COOK.

FILED SEPTEMBER 23, 1898. NO. 8290.

1. **Wrongful Attachment:** PLEADING AND PROOF: LOSS OF CREDIT. Suit for wrongful attachment of a merchant's goods. The averments of the petition *held* sufficiently specific to permit plaintiff to introduce evidence of loss of credit sustained by him in consequence of such attachment.

2. ——: ——: ——. A petition in such case is not demurrable

for omitting to give the names of persons who refused the plaintiff credit because of the attachment of his property.

3. ———: DAMAGES: EVIDENCE. For wrongful injury or destruction of one's financial credit he may recover whatever pecuniary damages he can prove, by competent testimony under proper pleadings, he has sustained thereby.

4. ———: ———: LOSS OF PROFITS: EVIDENCE. A sheriff wrongfully attached a merchant's goods, removing the greater part thereof from his store and retaining them for three months. In a suit by the merchant against the sheriff for damages, evidence of the sales and profits made by the merchant in his business, during the three corresponding months of the previous year under substantially the same conditions is competent, as it affords a reasonably certain basis for determining the profits lost by the merchant in consequence of the interruption of his business.

5. ———: ———: ———. One's measure of damages for wrongful attachment of his property is, under proper pleadings, all the damages he has sustained thereby. Gains prevented are losses, and these are damages.

6. ———: ———: ———. A loss of profits is a loss which may be reasonably, naturally, and ordinarily expected to follow from the closing up of a merchant's place of business and the seizure of his goods.

7. **Instructions upon Issues:** REQUESTS: DAMAGES. A court is bound to instruct the jury, whether requested or not, upon the material issues of the case; but it is not obliged, without request, to formulate a method of computation for the jury to pursue in estimating a plaintiff's damages.

8. **Sales:** DECLARATIONS OF SELLER: TITLE: FRAUD. Generally the declarations of a vendor, made after the conveyance, which tends to disparage the title of the vendee, are not admissible in evidence; but an exception arises to this rule in cases where the conveyance is assailed as fraudulent.

9. ———: ———: ———: ———. In those cases such declarations of the vendor, if in possession of the property, are admissible as *res gestæ*. If not in possession, the declarations are admissible as tending to establish the intent with which he made the conveyance, but not for the purpose of disparaging the vendee's title.

10. ———: ———: ———. Such declarations made by a vendor's vendor, not in possession of the property, nor in the presence of the vendee, are hearsay and incompetent.

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

W. C. LeHane and *George A. Murphy*, for plaintiffs in error.

Griggs, Rinaker & Bibb and *A. Hazlett, contra.*

RAGAN, C.

In 1893 George R. and Walter W. Scott, as co-partners, were engaged in the furniture and undertaking business in the city of Beatrice. Some time in June of said year, George R. Scott sold his interest in said business to his partner. In July of said year Walter W. Scott sold said furniture and undertaking business to Harrison F. Cook. In October, 1893, Kountze Brothers brought a suit against Scott Brothers on a promissory note, and caused an attachment to be issued, under and by virtue of which the sheriff seized most of the stock of furniture in the possession of Cook, closed up his place of business, and kept it closed for ten days, removed the goods attached from the store, and retained possession of them until about January 12, 1894, at which time he returned them to Cook. The goods actually removed from the store were then of about the value of $6,000. Kountze caused these goods to be attached as the property of Scott Bros., on the ground that the sale from Walter Scott to Cook was made for the purpose of fraudulently hindering and delaying the former's creditors. The district court dissolved the attachment, and its judgment was affirmed by this court. (*Kountze v. Scott*, 52 Neb. 460.) Cook brought the suit at bar in the district court of Gage county, against the sheriff thereof and the sureties on his official bond, to recover the damages which he alleged he had sustained by reason of the closing up of his place of business, the depreciation in value of the goods removed from the store while in the sheriff's hands, and for the loss of profits which he had sustained by reason of the interruption of his business. Cook had a verdict and judgment and the sheriff and his sureties have brought the same here for review on error.

1. The first argument is that the court erred in permitting Cook to testify on the trial that he had been injured in his credit, and had been refused credit by certain wholesale houses by reason of the attachment of his goods. The argument is that the allegations of the petition were not such as to justify the admission of such evidence. The petition, among other things, alleged: "And that plaintiff enjoyed among the wholesale houses, business men, and manufacturers throughout the country a high and first-class credit, and was thereby enabled to do and was doing a large, prosperous, and profitable business. * * * And plaintiff further alleges that the said defendant, Robert Kyd, as such sheriff, and under said writ of attachment, then and there levied upon and took into his posession, carried away from plaintiff's said place of business, and converted to his own use, all of the said furniture, goods, wares, and merchandise set forth and mentioned in Exhibit B, the same being of the value of $6,000, and then and there forcibly and wrongfully closed up the plaintiff's store and locked the same, and kept the same closed up and locked and remained in possession thereof for the period of ten days, and thereby broke up, damaged, injured, and destroyed plaintiff's business and plaintiff's credit, by reason whereof the plaintiff has been damaged in the sum of $——. * * *" In support of their contention counsel for plaintiffs in error have cited us, among other cases, to the following: *Geisler v. Brown*, 6 Neb. 254; *Cook v. Cook*, 100 Mass. 194; *Bassell v. Elmore*, 48 N. Y. 561; *Tobias v. Harland*, 4 Wend. [N. Y.] 537; *Stiebeling v. Lockhaus*, 21 Hun [N. Y.] 457. Without reviewing these authorities, however, or any of them, we do not think they are in point. It is said by counsel that loss of credit is a special damage, which must be specially pleaded in order to be proved. This may be safely conceded, but we think it is here sufficiently specifically pleaded. Again, it is insisted that the petition should allege how and by what means the plaintiff was injured in his loss of credit. We

think he has sufficiently done that. He specifically alleges that his credit was injured and destroyed because of the fact that the sheriff attached and removed his furniture and locked up and closed his place of business.

It seems also to be the contention of counsel that in order to make the petition, in the respect under consideration, good, it should have set out the names of the persons who refused the plaintiff credit. We do not think the petition was demurrable because of that omission. If the defendants desired a more specific and detailed statement as to what credits the plaintiff enjoyed before the attachment suit, and of what credits the attachment and seizure of his property had deprived him, they should have made application to the district court for a rule upon the plaintiff to make his petition more specific in that respect. (*Haverly v. Elliott*, 39 Neb. 201.) We think the petition in the respect under consideration states the ultimate facts in ordinary and concise language as required by section 92 of the Code of Civil Procedure. *Lawrence v. Hagerman*, 56 Ill. 68, was a suit similar to the one at bar. The declaration in the case alleged that by the attachment of his property plaintiff's business had been broken up, and his credit and reputation impaired and destroyed, and it was held that these averments were broad enough to admit evidence of all damage sustained by plaintiff in consequence of the wrongful attachment, including his loss of character, credit, and business.

2. Another argument is that loss of credit was not a proper element of Cook's damages; that this element was too remote and speculative for consideration. This is simply saying that the wrongful destruction or injury of a merchant's credit is one for which the law affords no redress. We cannot subscribe to this doctrine. A man's financial standing or credit may not be "property," within the technical meaning of that term, but it is something often more valuable; and, if it be wrongfully injured or destroyed by another, he may recover what-

ever pecuniary damages he can prove, by competent testimony under proper pleadings, he has sustained thereby. (*Meyer v. Fagan*, 34 Neb. 185; *Lewis v. Taylor*, 24 S. W. Rep. [Tex.] 92; *Hangen v. Hachemeister*, 21 N. E. Rep. [N. Y.] 1046; *Haverly v. Elliott*, 39 Neb. 201.)

3. It is next insisted that the court erred in permitting Cook to introduce evidence in reference to profits lost by him by reason of the attachment of his goods, and the closing up of his place of business. It is contended under this heading that the court permitted Cook to introduce testimony to show loss of profits sustained by him in conducting the business after the goods were returned to him. We do not so understand the record. It is as follows:

Q. What effect did it—that is the closing up of the store, attaching and removing the goods—have on your business after the time the goods were returned?

A. Well, we done some business by marking those goods down about thirty-five per cent. We were able to sell some of them, but the best part of the year had gone for trade.

Q. Well, were you able to sell those goods after you got them back; and if so, by what means, and at what prices?

A. Why, I was able to sell some by selling them at considerable less than the cost of them.

Q. Now, during the ten days the sheriff was in possession, and your store was closed, what effect did that have on your business?

A. Why, it completely stopped our business.

Q. Well, now you may state what the effect of shutting up this store for ten days, and then taking all those goods out for two or three months, was upon Mr. Cook's business down there.

A. It broke it up. People did not know he was in business afterwards for months.

It will thus be seen that this evidence was directed to the inquiry as to what effect the locking up of the store

for ten days, and the removing of the goods for three months, had upon Cook's business. And, though the question was propounded as to what effect that transaction had on the business after the time the goods were returned, the witness evidently understood the question to refer to what effect the locking up of the store and removing of the goods had upon the business, and as to how that business was affected by the return of the goods, because he answered that, as the best part of the year for trade had gone, they were still able to sell some of the goods returned by marking them down. We do not think the object or effect of this evidence was to show profits lost by Cook in conducting his business after the return to him of the attached goods.

Another contention under this heading is that the district court erred in admitting in evidence the proofs offered by Cook to show the loss of profit sustained by him in consequence of the attachment and removal of his goods, and the locking up of his store. The store was absolutely closed from the 23d of October for ten days. The attached goods, comprising nearly all of his stock, were held by the sheriff from the time they were attached for some three months. The court permitted Cook to show the amount of sales and the profits made by him in this business during the corresponding period of the previous year—that is, from October in one year until January in the next—as a basis for estimating his loss of profits; that by reason of the attachment of his goods and the knowledge thereof that had been bruited abroad, he was unable to purchase goods on credit from persons with whom he had been previously dealing in order to carry on the business. We think this testimony was all competent. It furnished a reasonably safe basis for determining whether Cook had been deprived of profits by this attachment proceeding and the amount of such profits. The measure of Cook's damages was all the loss he had sustained as the result of this wrongful attachment. If the goods, when returned, were worth

less than when they were seized, the amount of that depreciation was one element of damages. If Cook's reputation and credit as a merchant were injured by this wrongful attachment, this injury was another element of his damages. If, by reason of the locking up of his store and the attachment of his goods, Cook's business was interrupted, and he was thereby deprived of profits which he would have made had the business not been interrupted, this loss of profits was another element of his damages; and, if the plaintiffs in error cannot be made to respond to Cook for all the damages which he sustained as the result of this wrongful attachment, it is not because of the fact that under the law Cook is not entitled to these damages, but because of the inability of the courts to formulate any reasonably certain rule for their admeasurement. (*Schile v. Brokhahus*, 80 N. Y. 614; *Goebel v. Hough*, 2 N. W. Rep. [Minn.] 846; *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 349; *Schars v. Barnd*, 27 Neb. 94; *Harerly v. Elliott*, 39 Neb. 201; *Western Union Telegraph Co. v. Wilhelm*, 48 Neb. 910.)

Counsel for plaintiffs in error criticise somewhat the doctrine of this court making loss of profits in cases like the one at bar an element of damages. We think, however, the doctrine is a just and a reasonable one, and one enforced by the courts generally. We think that a loss of profits is a result which may be reasonably, naturally, and ordinarily expected to follow from the closing up of a merchant's place of business, and the seizure of his goods; and where an officer holding a writ of attachment directed against A and his property closes up the place of business and seizes the goods in the possession of, and claimed to be owned by, B, when called upon to make good B's damages he ought not to complain because the court includes in such damages the loss of profits sustained by B because of the seizure of his goods and the interruption of his business.

4. Another argument is as follows: "The court erred in failing to instruct the jury specifically and definitely

as to the manner in which they should estimate the damages as to the loss of business credits, profits, etc." The court instructed the jury: "The court instructs the jury, in case they find for the plaintiff, that in determining the amount of damages which the plaintiff is entitled to recover they are to consider not only the amount, if any, which the evidence in this case shows the goods in question were damaged while in possession of the sheriff, but also the actual loss, if any, which the evidence in the case shows the plaintiff sustained by reason of the suspension of business during the time he was prevented from carrying it on, by reason of the acts of the sheriff, if the jury believe from the evidence in the case that plaintiff was prevented from carrying on his business by the acts of the sheriff." The complaint is that the court nowhere in its instructions to the jury specifically told them what method they should pursue in estimating or arriving at or determining the damages which the plaintiff had sustained. But we think that the instruction quoted was specific and definite enough. It limited Cook's right to damages to the depreciation in value of the property seized, and the loss he had sustained by reason of the locking up of his store and the interruption of his business; and the jury, if it awarded Cook any damages by reason of the suspension of his business, were bound to base such an award upon the evidence. What manner or method the jury should pursue in estimating the amount of Cook's damages by reason of the suspension of his business was by the court left to the jury to determine. If this was unsatisfactory to the defendants below, they should have prepared and submitted to the court, with a request that it be given, an instruction prescribing the method which the jury should pursue in estimating the amount of the damages sustained by Cook by reason of the interruption of his business. (*Gran v. Houston*, 45 Neb. 813.) The court was bound to instruct the jury, whether requested or not, upon the material issues of the case. This it did, and correctly instructed the jury

as to the plaintiff's measure of damages. But the court was not obliged—if it was authorized to formulate—to prescribe a method of computation which the jury should pursue in estimating the plaintiff's damages.

5. As already stated, George R. Scott and Walter W. Scott, as co-partners, at one time owned the stock of furniture in controversy. George R. Scott sold his interest in the business to Walter W. Scott, and subsequently Walter W. Scott sold the entire business to Cook, the plaintiff below. One of the defenses interposed to this action by plaintiffs in error was that the sale from George R. Scott to Walter was made with a fraudulent purpose on the part of both of them to defraud their creditors; that the sale from Walter Scott to Cook was made with a fraudulent purpose on the part of both of those parties to defraud the creditors of Scott Bros. On the trial certain declarations and admissions made by Walter Scott subsequent to the sale of the property to Cook, to the effect that the sale from him to Cook was fraudulent, were admitted in evidence by the court; and the plaintiffs in error also sought on the trial to introduce in evidence certain declarations made by George R. Scott subsequent to the sale from himself to Walter, to the effect that that transaction was fraudulent. These declarations the court excluded, and this is the next ruling complained of. The district court was correct. Walter Scott was the vendor of Cook, and his declarations in disparagement of the title to the property, had he been in the actual possession thereof, were admissible as part of the *res gestæ;* and, though he was not in possession of the property, his declarations as to the intent with which the conveyance to Cook was made were admissible for the purpose of showing the intent with which he made the conveyance, although not for the purpose of establishing Cook's intent in accepting the conveyance, or for the purpose of disparaging Cook's title to the property. (*McDonald v. Bowman*, 40 Neb. 269.) But George R. Scott was the vendor of Cook's vendor. He was not in possession of the furniture when it was attached. He was not

Cook's vendor, and therefore his declarations were mere hearsay, and inadmissible. The general rule is that the declarations of a vendor, made after the conveyance which tend to disparage the title of the vendee, are not admissible in evidence. But the courts have formulated an exception to this rule in cases where the conveyance is assailed as fraudulent. In such cases the declaration of the vendor made after the conveyance and while in the actual possession of the property concerning the objects, intents, and purposes of the conveyance, have been held admissible as *res gestæ*. In *McDonald v. Bowman, supra*, and in *Sloan v. Coburn*, 26 Neb. 607, it was held that the declarations of a vendor made after the conveyance, as to the objects, purpose, and intent of the conveyance, in a suit in which the deed was assailed as fraudulent, were admissible in evidence, though such vendor at the time the admissions were made was not in possession of the property. But the declarations were held admissible in evidence on the ground that they tended to show the intent with which he made the conveyance, although they were not competent evidence as tending to show the intent of the vendee in accepting the conveyance. The answer of the defendants below does not allege that Cook had any knowledge of, or participated in, the alleged fraudulent conveyance from George R. Scott to Walter W. Scott; and as George R. Scott was not Cook's vendor, and was not in possession of the goods when attached, his declarations or admissions in reference to the object and purpose of the conveyance made by him to Walter or by Walter to Cook were incompetent, immaterial, and hearsay.

6. It is also insisted that the verdict is not sustained by the evidence, and that the damages awarded by the jury are excessive, appearing to be the result of passion and prejudice. We do not think that either of these contentions is tenable. The record contains no prejudicial error. The judgment of the district court must be and is

AFFIRMED.

STATE OF NEBRASKA V. EUGENE MOORE ET AL.

FILED SEPTEMBER 23, 1898. No. 10021.

1. **Fees Paid by Insurance Companies:** STATE OFFICERS. Section 32, chapter 43, Compiled Statutes (General Statutes 1873, ch. 33, sec. 32), relating to fees paid by insurance companies for services performed for them by the auditor, was so far modified by the constitution of 1875 as to require such fees to be paid in advance into the state treasury, and prohibited the auditor of public accounts from receiving them. (*Moore v. State*, 53 Neb. 831.)
2. **Officers:** LIABILITY OF SURETIES. For all wrongful acts or omissions of a public officer within the limits of what the law authorizes or enjoins upon him as such officer his sureties are liable.
3. ———: ———: EMBEZZLEMENT. But such sureties are not liable for moneys collected and embezzled by their principal, unless as such officer he was authorized by law to collect or receive such moneys.
4. ———: ———: ———. The law required of the insurance companies transacting or desiring to transact business in the state to first pay certain enumerated fees into the state treasury. The auditor of public accounts collected from the insurance companies these fees and embezzled them. *Held*, That his sureties were not liable therefor.

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

SEE opinion for references to cases.

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

Brome & Burnett and *Field & Brown, contra.*

RAGAN, C.

From January, 1891, to January, 1895, Eugene Moore was auditor of public accounts of the state of Nebraska; and during his term of office he collected from various insurance companies about $25,000, being fees which the law required of insurance companies doing business in the state. Moore converted the fees so collected to his

own use; and the state, in the district court of Lancaster county, brought this suit against him and the sureties on his official bond to recover such fees. The district court sustained a general demurrer of the sureties to the petition of the state and dismissed its action, to reverse which it has prosecuted here a petition in error.

1. The record presents two questions, one of which is: Did the law authorize or make it the duty of the auditor to collect these fees? The district court held that it did not, and upon that theory released the auditor's sureties. By section 32, chapter 43, Compiled Statutes, which went into effect in 1873, every insurance company doing or desiring to do business in the state was required to pay for the privilege of transacting business certain enumerated fees. This section of the statute further provided that the required fees should be paid to the auditor, and should "go to the auditor;" that is, become his property, as a perquisite of his office. In November, 1875, section 24, article 5, of the present Constitution took effect; and this provided that the auditor should not receive to his own use any fees, "and all fees that may hereafter be payable by law for services performed by an officer, provided for in this article of the constitution, shall be paid in advance into the state treasury." The state caused Moore to be indicted for embezzlement for converting to his own use the fees sued for herein. He was convicted, and prosecuted error to this court. (See *Moore v. State*, 53 Neb. 831.) And, though the court was divided on the question as to whether the judgment of conviction for embezzlement should stand, it was the unanimous opinion of the court that the constitutional provision just quoted not only prohibited the auditor from receiving the insurance fees to his own use, but prohibited him from collecting those fees; that the only officer authorized to receive such fees was the state treasurer. The majority of the court was therefore of opinion that the judgment of conviction for embezzlement was erroneous, because the auditor, in collecting the insurance fees,

was not performing a duty authorized or imposed upon him by law. The correctness of the construction placed by us on the constitution in that case is earnestly and vigorously assailed by the attorney general in his argument in the brief filed in the case at bar. The contention of this officer, as I understand it, is that the provision of the constitution under consideration does not prohibit the auditor from collecting these insurance fees, but from receiving them to his own use, and, that the only part of the statute, just quoted, which is inconsistent with the said constitutional provision, and repealed thereby, is that provision of the statute which authorized the treasurer to receive the insurance fees to his own use. I do not feel that I can strengthen the argument made by my Brother IRVINE who wrote the opinion in *Moore v. State*. After a re-examination of the question we are all still of the opinion that the section of the constitution quoted repealed and annulled not only so much of said section 32 of the statute as authorized the auditor to receive the insurance fees to his own use, but also that provision of the statute which required the insurance fees to be paid to the auditor. The constitutional provision declares that the insurance fees shall be paid in advance into the state treasury. This language, as applied to the facts of the case at bar, means that an insurance company desiring to do business in the state should, before being authorized thereto, pay the fees which the law demanded of it into the state treasury. It is the insurance company that the constitution commands to make the payment, not the auditor; and this payment is to be made, not after the company has been authorized to do business, but as a condition precedent to the authority of the auditor to empower it to do business. If the framers of the constitution had meant that the auditor might collect insurance fees, as he had been doing prior to the adoption of the constitution, and then within a reasonable time cover them into the state treasury, they would undoubtedly have said

so in so many words. We do not know that it is necessary for us to find a motive which prompted the framers of the constitution to require these insurance and other fees to be paid in advance into the state treasury. But it may be that they were of opinion that such a method of transacting the business would be more likely to prevent frauds, and cause the state to receive the benefit of such fees as, under the system prescribed by the constitution, every executive state office, and the records therein, would at all times show with what insurance fees, at least, the treasurer should be charged.

2. A second question presented by the record is whether the sureties are estopped from interposing the defense that the auditor was neither authorized nor empowered by law to collect the insurance fees which he did collect and embezzle. The attorney general insists that, if Moore is estopped, his sureties are. Conceding, without deciding, this proposition, we state the position of the attorney general by a quotation from his brief: "We believe that the authorities are practically unanimous in holding that an officer who has received money under and by virtue of a statute cannot be heard to question the validity of that statute when called upon to account for the money thus received." The argument is that the auditor, having demanded of the insurance companies the payment of the fees which the law required them to pay, and having collected these fees, is estopped from saying that the adoption of the constitution of 1875 repealed said section 32 of the statute which authorized him to collect these fees. In support of his contention the attorney general cites us, among others, to the following cases: *Chandler v. State*, 1 Lea [Tenn.] 296; *Village of Olean v. King*, 116 N. Y. 355; *Swan v. State*, 48 Tex. 120; *Morris v. State*, 47 Tex. 583; *Waters v. State*, 1 Gill. [Md.] 302; *Commonwealth v. City of Philadelphia*, 27 Pa. St. 497; *Middleton v. State*, 120 Ind. 166; *Hoboken v. Harrison*, 30 N. J. L. 73; *Ferguson v. Landram*, 5 Bush [Ky.] 237; *Mississippi County v. Jackson*, 51 Mo.

23; *Vermilion Parish v. Brookshier*, 31 La. Ann. 736. A review of one of these cases will suffice. In *Village of Olean v. King*, 116 N. Y. 355, the defendant was a tax collector and failed to pay over to the village certain taxes collected by him. When sued on his bond for these taxes he attempted to defend upon the ground that the law imposing the tax was unconstitutional, and the court very properly held that this was no defense for the tax collector. But in the New York case the tax collector was not only authorized to collect the taxes levied, but was charged by law with the duty of collecting them. It was the law imposing the tax that was unconstitutional, and, if that law was unconstitutional, that was a question between the state which imposed it and the taxpayer; and it was not for the officer whose duty it was to collect all taxes levied to question the validity of that law, to escape liability for the taxes collected by virtue of it. The other cases cited by the attorney general are like the case from New York, but they are not in point here. In the case at bar there is no question as to the validity of the law imposing a tax or fee upon insurance companies. But here the question is, who had authority to collect these fees or taxes? The auditor did collect them, but the law not only did not authorize him to do so, but the constitution forbade his touching them. In the case at bar, if the auditor had been authorized or enjoined by law to collect these fees from the insurance companies, and he had done so, and then the court had declared the law imposing the fees upon the insurance companies unconstitutional, the cases cited by the attorney general would be exactly in point. But here it is proposed to hold the sureties of the auditor liable for his failure to account for moneys received by him which the law not only did not authorize him to receive, but fees which he was by the constitution forbidden to receive. We understand that, for these sureties to be liable to the state for the fees sued for here, the auditor must have collected them by virtue of

his office, and failed to account for them. The contract of the sureties with the state was a guaranty to the commonwealth that Moore should faithfully perform the duties of his office; that is, that he would account and pay over to his successor all moneys received by him which he was authorized by the law to receive. If Moore was not authorized by the law to collect these insurance fees, in converting them to his own use, and failing to account for them to his successor, he has not failed to perform a duty enjoined upon him by law. To adopt the construction contended for by the state in this case would be to make the sureties on the official bond of a county clerk liable for state and county taxes paid by the citizen to him, which the law requires to be paid to the county treasurer; and if such payment should be made, and the county clerk should embezzle the taxes received, can any principle be found in the law books upon which the sureties on his bond would be estopped from saying that he was not authorized by law to collect those taxes? For all wrongful acts or omissions of the auditor within the limits of what the law authorized or enjoined upon him, as such officer, the sureties are bound; but they are not bound to make good to the state moneys which the auditor embezzled, and which moneys he was not authorized to receive or collect. (*People v. Hilton*, 36 Fed. Rep. 172; *San Luis Obispo County v. Farnum*, 41 Pac. Rep. [Cal.] 447; *Lowe v. City of Guthrie*, 44 Pac. Rep. [Okla.] 198; *People v. Cobb*, 51 Pac. Rep. [Col.] 523; *Orton v. City of Lincoln*, 41 N. E. Rep. [Ill.] 159; *People v. Pennock*, 60 N. Y. 421; *Governor v. Perrine*, 23 Ala. 807; *Griffith v. Commonwealth*, 10 Bush [Ky.] 281; *Scott v. State*, 46 Ind. 203; *Hawkins v. Thomas*, 29 N. E. Rep. [Ind.] 157; *Holliman v. Carroll*, 27 Tex. 23; *United States v. Adams*, 24 Fed. Rep. 348; *Ward v. Stahl*, 81 N. Y. 406; *Dedham Bank v. Chickering*, 21 Mass. 314; *City of San Jose v. Welch*, 4 Pac. Rep. [Cal.] 207; *State v. Bonner*, 72 Mo. 387; *State v. Moeller*, 48 Mo. 331; *Nolley v. Callaway County Court*, 11 Mo. 447; *Heidenheimer v. Brent*, 59 Tex. 533; *Saltenbery v. Loucks*,

8 La. Ann. 95; *United States v. Rogers*, 81 Fed. Rep. 941; *Huffman v. Koppelkom*, 8 Neb. 348; *Ottenstein v. Alpaugh*, 9 Neb. 237; *State v. Holcomb*, 46 Neb. 629.)

The judgment of the district court is

AFFIRMED.

JOHN T. MCDONALD, APPELLEE, V. JOHN A. BUCKSTAFF, APPELLANT, IMPLEADED WITH WILLIAM H. B. STOUT ET AL.

FILED SEPTEMBER 23, 1898. No. 8091.

1. **Transcript for Review:** RIGHTS OF CROSS-APPELLANT. One party having perfected an appeal by filing a transcript in this court, the other may maintain a cross-appeal on the same transcript. It is unnecessary for him to file a duplicate.

2. **Partnership:** PAVING CONTRACT: PROFITS: ACCOUNTING. S. & B., having formed a partnership for the purpose of paving streets, contracted with M. that the latter should superintend the work and receive as his compensation twenty-five per cent of the net profits. *Held*, That in an accounting M. was restricted to the profits actually earned except as they might be reduced by acts of bad faith on the part of S. & B.

3. ———: ———: ———: ———: SALARY. The contract between S. & B. provided that B. should have charge of the business of the firm and that he should receive a stated salary for his services in that behalf. *Held*, That in calculating the profits to ascertain M.'s share, this salary should be treated as an expense, although while the work was in progress B. had acquired S.'s interest.

4. ———: ———: ———: ———. B. was also the owner of a brick manufactory which furnished most of the brick with which the paving was done. He borrowed money on the credit of the paving concern and lent it to the brick concern without interest. *Held*, That as between B. and M. the interest paid on the loans was a charge against the brick concern, and could not be charged against the paving concern as an expense thereof.

5. ———: ———: ACCOUNTING: BOOKS OF ACCOUNT: EVIDENCE. M.'s contract providing that he should have access to the books of S. & B., and M., having constantly availed himself of the right, those books are in an accounting competent evidence on behalf of either party.

6. ———: ———: ———: LOBBYING EXPENSES: PUBLIC POLICY. The

payment of money by a public contractor to induce men to remain silent, or to lobby on behalf of contracts or estimates, is against public policy, and the courts will not compel contribution between partners on account thereof, nor will they, when one partner is chargeable with the receipts, allow him credit for money so expended.

APPEAL from the district court of Lancaster county. Heard below before HASTINGS, J. *Modified.*

The issues and facts are stated in the opinion.

Charles O. Whedon, for appellant:

The appellee having had access to the books, they were *prima facie* evidence against him. (*Topliff v. Jackson,* 12 Gray [Mass.] 565; *Caldwell v. Leiber,* 7 Paige Ch. [N. Y.] 483.)

Plaintiff ascertained from the books that defendant was drawing a salary, and having failed to object, he is in no position to make objection after completion of the work. (2 Herman, Estoppel 1165, 1172; *Grant v. Cropsey,* 8 Neb. 205; *Newman v. Mueller,* 16 Neb. 523; *Betts v. Sims,* 25 Neb. 166; *St. Louis Wrought Iron Range Co. v. Meyer,* 31 Neb. 551; *Cain v. Boller,* 41 Neb. 721; *Winchester v. Glazier,* 152 Mass. 316.)

The refusal of the referee to allow defendant's charges for interest was erroneous. (*Duden v. Maloy,* 11 U. S. C. C. A. 119; *Helmer v. Yetzer,* 61 N. W. Rep. [Ia.] 206.)

Reference as to defendant's charges for lobbying expenses: *Johnson v. Byerly,* 3 Head [Tenn.] 194.

Joseph R. Webster, Halleck F. Rose, and *Cyrus W. Fisherdick, contra:*

Salary is not allowable to a partner for service in the partnership business, except upon an express agreement. (*Denver v. Roane,* 99 U. S. 358; *Caldwell v. Lieber,* 7 Paige Ch. [N. Y.] 483; *Godfrey v. White,* 43 Mich. 183; 2 Bates, Law of Partnership sec. 770.)

Defendant's interest account was properly disallowed. (*Van Ness v. Van Ness,* 32 N. J. Eq. 729; *Johnson v. Garrett,*

23 Minn. 566; *Dimond v. Henderson*, 47 Wis. 172; *Harvey v. Varney*, 104 Mass. 436; *Gray v. Haig*, 20 Beav. [Eng.] 238; *Simpson v. Feltz*, 16 Am. Dec. [S. Car.] 602; *Catron v. Shepherd*, 8 Neb. 308; *Shaler v. Trowbridge*, 28 N. J. Eq. 595; *Rogers v. Batchelor*, 12 Pet. [U. S.] 230.)

Defendant's charges for lobbying expenses are not allowable. Payment of money for lobbying is against public policy. Contracts which are void as being against public policy cannot be ratified. (Greenhood, Public Policy p. 8; *Shenk v. Phelps*, 6 Brad. [Ill.] 612; *Coppell v. Hall*, 7 Wall. [U. S.] 538; *Thompson v. Warren*, 8 B. Mon. [Ky.] 491; *Wheeler v. Wheeler*, 5 Lans. [N. Y.] 355; *Hunter v. Nolf*, 71 Pa. St. 382; *McKee v. Cheney*, 52 How. Pr. [N. Y.] 144; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Robinson v. Kalbfleisch*, 5 T. & C. [N. Y.] 212; *Firemen's Charitable Ass'n v. Berghaus*, 13 La. Ann. 209; *Negley v. Lindsay*, 67 Pa. St. 217; *Sampson v. Shaw*, 101 Mass. 145; *Holman v. Jornson*, 1 Cowp. [Eng.] 343; *El Dorado County v. Davidson*, 30 Cal. 524; *Crawford v. Wick*, 18 O. St. 190; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Lucas v. Allen*, 80 Ky. 611.)

IRVINE, C.

This was an action by McDonald against Buckstaff, the object of which was to secure an accounting of certain transactions growing out of the paving of streets in the city of Lincoln. The case resulted in a judgment in the district court against Buckstaff for $4,392.72. Buckstaff perfected an appeal to this court, and on the same transcript McDonald caused a notice of appeal to be issued and served. Buckstaff now objects to the consideration of the case in the light of an appeal by McDonald on the ground that Buckstaff alone provided and filed the transcript. The filing of a duplicate transcript would be an idle procedure, and the uniform practice of the court, which is certainly not opposed to statute, has been to consider a cross-appeal based on the appellant's transcript. This practice will here be followed.

Early in 1888 the city of Lincoln awarded to Buckstaff

and W. H. B. Stout contracts for paving certain paving districts, and for the purpose of carrying out said contracts Stout and Buckstaff entered into a partnership contract dated May 4, 1888, which, omitting formal parts, was as follows: "That the said parties have become partners in the business of paving certain streets in the city of Lincoln, Neb., under contracts heretofore awarded them by the proper authorities of said city, said contracts being for paving in districts numbers 3, 4, 5, 6, 7, 8. Said partnership is limited to said business of paving said districts under said contracts and does not extend to any other business. Said partnership is to continue until said work is completed.

"Each party is to furnish and pay in one-half the cash required to carry on said business as the same is needed.

"Books are to be kept which shall contain correct entries of all matters relating to said partnership business; said books shall contain nothing save what relates to said partnership business. Buckstaff shall have the general management and control of said business; he shall pay out all the money on account of said firm, and he alone shall draw and sign drafts, checks, and orders for money on said firm account. For his compensation for managing said business Buckstaff shall receive from said firm the sum of $200 per month.

"Each party is to bear one-half the expense of said business, each party to bear one-half the loss of said business, and each party to receive one-half the profits of said business. In the purchase of material for use in said work, both parties shall be consulted, and they shall agree upon the material and the price to be paid therefor before the same is purchased. Neither of said parties shall draw or take out of the firm account any money until the said work is fully completed."

Shortly afterwards the following contract was made between Stout & Buckstaff on the one side and the plaintiff McDonald on the other: "This agreement made this 17th day of May, A. D. 1888, by and between the firm of

Stout & Buckstaff and John T. McDonald, all of the city of Lincoln, county of Lancaster, and state of Nebraska, witnesseth, as follows: Said John T. McDonald is employed by the said Stout & Buckstaff as superintendent of the work of paving streets in the said city of Lincoln under contracts heretofore awarded them by the city. Said John T. McDonald is to have the employment of all men, and the discharging of the same employed on the work. And also the subletting of all contract work, subject to the approval of said Stout & Buckstaff. In consideration of the services of the said John T. McDonald he is to receive as his compensation twenty-five (25) per cent of the net profit of said work, after deducting all cost and expense of said work, and said John T. McDonald is permitted to draw a sum of money not to exceed two hundred dollars ($200) per month from May 1, A. D. 1888, monthly from said Stout & Buckstaff, which amount shall be deducted from said (25) twenty-five per cent of the net profit going to him. In case of the death of the said McDonald before the work is completed his legal representatives shall be entitled to receive said twenty-five per cent of the net profits, which said McDonald would be entitled to receive if alive, less any sums he may have drawn; provided his legal representatives shall furnish a competent man to take the place of the said McDonald as superintendent, said John T. McDonald to devote his entire time and attention to said work and the prosecution thereof. The books and papers of said firm of Stout & Buckstaff relating to said contracts are to be open to the inspection of said McDonald. Said McDonald is to have no control over the bookkeeper of said Stout & Buckstaff, and no power to discharge the same."

While the work was progressing Buckstaff purchased Stout's interest, so when it came to the settlement, McDonald and Buckstaff were the only interested parties.

The controversy relates to a number of different items or transactions growing out of the business performed,

and relates almost entirely to questions of fact; so much so that the encumbering of the reports with an opinion in the case is justified only by the statute requiring such opinions to be written and filed. A few general observations with reference to the contracts are pertinent, however, to assist in the elucidation of the particular matters in controversy. While in the district court and here the case has been to a certain extent treated as one of an accounting between partners, it will be seen that the arrangement was not strictly one of partnership as between Buckstaff and McDonald. Stout and Buckstaff had formed a partnership for transacting the business; they then contracted with McDonald that McDonald should superintend the work of paving, and receive as his compensation one-fourth of the profits realized by Stout & Buckstaff. The result of the two contracts was that the firm of Stout & Buckstaff was alone the contracting party with the city, entitled to all benefits, and charged with all the responsibilities of the paving contracts. Buckstaff was the business manager, having control of receipts and disbursements. McDonald was in charge of the actual performance of the work, and had the power to employ and discharge workmen. While he was not a party to the contract between Stout & Buckstaff his compensation depended upon their profits. Their profits depended upon the nature of their contracts with the city, the cost of performing the work, the terms of their own contract, and upon Buckstaff's skill and judgment in the management of the business. These were all elements which McDonald consented to when he consented to measure his own compensation by the profits of Stout & Buckstaff. In this proceeding he cannot hold Buckstaff responsible for the highest degree of skill and business judgment. He may only hold him responsible for the actual profits, always with the reservation that good faith must be exercised; that is to say, that if the profits of Stout & Buckstaff were less than they should have been, and the decrease was due merely to mistaken judg-

ment on the part of Buckstaff, McDonald must abide the consequences; but he may hold Buckstaff responsible for any loss of receipts or increased expenditures due to bad faith on Buckstaff's part.

Taking up in the first place Buckstaff's appeal, the first matter in controversy arises out of the disallowance of charges to the amount of $8,800 on account of salary of Buckstaff as manager of the business. The case was in the district court first heard by a referee under a general order of reference. The referee disallowed this item on the theory that McDonald was not a party to the contract between Stout & Buckstaff, and that as between McDonald & Buckstaff there was no agreement whereby the latter was entitled to a salary. This finding of the referee was approved by the district judge, but as already indicated we think the construction thus put on the contracts was erroneous. The matter of Buckstaff's salary was not a mere matter of book-keeping as between Stout & Buckstaff. It was contemplated that Buckstaff should have entire charge of the business operations, and to compensate him in this behalf it was provided that he should receive from the firm of Stout & Buckstaff a salary of $200 per month. If the partners had contracted to employ a third person for this purpose there could be no doubt that this item would be properly an item of expense, to be deducted from the receipts in ascertaining the profits of the partnership. It is none the less so because this work was entrusted to one of the partners. The purchase by Buckstaff of his partner's interest pending the work did not abrogate this provision. McDonald knew, or had the right to know and might have known, when he agreed to receive a portion of the profits as his compensation, what expenses had been assumed, or were contemplated, which might affect the item of profits. This salary should have been allowed, not because it was a part of McDonald's contract, but because it was an agreed item of expense in the Stout & Buckstaff contract, with reference to which the profits must be ascertained,

and because McDonald agreed to accept as his compensation a portion of these profits.

The referee in the district court disallowed to Buckstaff interest charges appearing on the books to the amount of $15,708.50. These arise in the following manner: It was found that the brick makers near Lincoln were entirely unable to furnish brick to the number and of the quality required for the work, and that to procure such brick from a distance would be so expensive as to materially impair if not destroy the profit which should be realized under the contracts. Accordingly there was organized a corporation known as the Vitrified Paving & Pressed Brick Company, and this corporation established a plant at Lincoln and furnished nearly all the brick required for the work. Stout and Buckstaff were the principal incorporators, and Buckstaff seems to have acquired Stout's interest. While an effort was made to show that other persons were interested in the brick company that effort was a signal failure, and the evidence entirely supports the finding that the brick company and Buckstaff were substantially identical. This brick company required a large amount of money to establish itself and conduct its operations. From the funds of Stout & Buckstaff, or Buckstaff, arising out of the paving, Buckstaff advanced to the brick company large sums of money. He also borrowed on behalf of the paving concern large sums and advanced these to the brick company. The brick company paid to the paving concern no interest, and Buckstaff sought to charge the paving concern with interest on all money borrowed by it and advanced to the brick company. This charge constituted the item the disallowance of which is now complained of. We think the referee and the district court were quite right in disallowing this item. It is true there is evidence tending to show that McDonald knew of these advances and acquiesced therein. It is also true that the evidence tends to show that the net result of the arrangement was a decided benefit to the paving contractors, as they were

thereby enabled to procure brick much cheaper than they could be procured and shipped in from adjacent markets. Still it must be remembered that the brick company was Buckstaff's individual enterprise; that the borrowing of money on interest and re-loaning it without interest was not a natural or reasonable incident to the business for which Stout & Buckstaff's partnership was organized. Such an interest charge should not, without the clearest proof of an antecedent agreement to that effect, be treated as a proper expense of the paving work. It was an expense of the brick company, not of the paving concern.

The referee finds that while the work was in progress McDonald took men engaged thereon and, during time for which they were paid by Buckstaff, used them in the building of a house for McDonald. He did not, however, in the accounting charge McDonald with any amount because thereof, but, in the report, disposed of this in connection with several other items "as afterthoughts sprouting out of the warmth and fertility of this hotbed of litigation after it commenced." We are convinced that this disposition of these minor matters was entirely justified by the proof. It appears that the paving work frequently suffered delays for want of material wherewith to proceed, and considerable laxity was evidently indulged during these periods. The amount of labor thus diverted by McDonald does not appear to any degree of certainty from the evidence, but it does appear that McDonald made some payments to these men himself, and that certain charges for their time were made against him on the books. We cannot say that these charges did not cover the whole item of labor so diverted; or, if they did not, that Buckstaff suffered any damage by reason thereof.

By recurrence to McDonald's contract it will be seen that he agreed to devote his whole time to the work. While that work was in progress McDonald, in connection with O. P. Mason, entered into a contract with the city to pave certain other districts, and from this con-

tract he realized a profit of $4,000. Buckstaff asks that he be charged with three-fourths of this profit as being the result of services to which Buckstaff was entitled. The referee disallowed this item, and, we think, correctly. In the first place there is evidence, contradicted, it is true, but tending to show that Buckstaff was consulted by Mason before he entered into the contract with McDonald, and that Buckstaff consented to McDonald's engaging therein. Even if he did not it is clear that he knew of McDonald's action in that respect while the work was going on, and that he not only made no protest, but that supplies were interchanged, and in that way the work of Mason & McDonald actually assisted. The work does not seem to have been in any sense competitive, and it is not shown that Buckstaff suffered any damage by reason of McDonald's engaging therein. We know of no rule whereby, for such a breach of contract, Buckstaff would be entitled to participate in the profits of the outside work, at least without proof that his own business was thereby affected.

McDonald employed, as foreman on the work, one Christopher. Buckstaff claimed that Christopher spent his time drinking and gambling and neglected the work. He demanded his discharge. McDonald refused to discharge him, and Buckstaff refused thereafter to pay him his wages. Christopher brought suit against Buckstaff and recovered judgment for his wages. The referee and district court charged the total costs of this suit to Buckstaff personally. This item amounted to $78.80. We shall not disturb this finding. McDonald's contract gave him the right to employ and discharge all men except the book-keeper. Under proper allegations and proof Buckstaff might recover for the willful retention of incompetent men, but under the contract Buckstaff had no right to discharge them. When McDonald refused to discharge Christopher his wages were a proper charge against the paving contract. It was Buckstaff's duty to pay them. The judgment determined that they were earned. The

costs incurred under the circumstances were not a proper charge as affecting McDonald, but should be borne by Buckstaff alone.

The bid of Stout & Buckstaff for the paving seems to have been at the rate of $1.75½ per yard, but for some reason the contract was executed at the rate of $1.75 per yard. A portion of the paving was settled for at a rate of $1.75½, but the discrepancy between the bid and the contract having been discovered the city allowed for the remainder only $1.75—the contract rate. Buckstaff presented a claim to the council for the additional half cent per yard. It was disallowed, and the proceedings stopped. Buckstaff sought to charge McDonald with the amount so lost, on the theory that McDonald had interfered and prevented the allowance of the claim. This charge was properly denied. If there was a mistake in the contract, Buckstaff had his remedy by appropriate legal proceedings against the city for its reformation. If the mistake was not of such character that it might be so reformed then no legal damage resulted.

Complaint is made in the briefs that McDonald was not charged with sufficient cash. In his petition he admitted receiving $8,663.41, and it is said that the referee charged him only with $8,292.29; but an inspection of the report will show that there are charges made of moneys received outside of the item of $8,292.29, which came directly from the paving contracts, more than sufficient to meet the admission of receipts in the petition. In this connection it is also argued that McDonald should be charged interest on certain loans of money made by Buckstaff. An examination of the evidence in this behalf entirely justifies the conclusion which seems to have been made by the referee—that these loans were treated as advances on account of the work and carried into McDonald's account. This is true except with regard to a note for $125 made August 1, 1889, due in one year, and stipulated to bear ten per cent interest after maturity. This was an express contract to pay interest and was probably overlooked by

the referee. It was, however, brought into the accounting by Buckstaff himself. He should be allowed interest thereon from the maturity of the note to December 31, 1891—the date at which the referee computed the balance of the account. Thenceforth it became merged in the account. This item makes an additional charge against McDonald of $17.70.

On McDonald's appeal the principal controversy is as to the expenses incurred for brick used in the paving. The books show an expense for brick of a little over $250,000. The referee first proceeded by deducting from this $6,483.29 on account of certain brick furnished by the Vitrified Paving & Pressed Brick Company, and charged at the rate of $11 per thousand instead of $10, the contract rate. He then made a computation of the number of brick used in the paving, estimated at 101 per square yard, and computing the price of these brick, found an additional overcharge of $11,355.86. He deducted these two items from the book figures and allowed for brick $232,174.39. Apparently after the draft had been made of his report, and before his report had been filed, he, on his own motion, re-opened the case for further testimony as to the number of brick. Complaint is made of his so doing, but his decision had not been rendered, and we have no doubt of his power, before filing his report, to permit the introduction of further evidence. The evidence so received was of certain persons who made an actual count of the brick at some sixty-seven different places within the paving districts. As a result of this, the referee made special findings that the pavement contained, in the top course, 66.55 bricks per square yard, and in the bottom course 41.45. He then revised his finding of the cost of the brick by adding $10,271.80 thereto. The district court on exceptions by Buckstaff set aside the finding as to the total number of brick used, and then found from the evidence that the cost of brick was not less than $246,576. The account was finally settled in accordance with that finding. As the case is presented

on the decree of the district court, which in this respect was founded on the evidence and not on the referee's findings, the question before us is not what we would find as the correct number of brick, or whether the number was correctly computed by the referee, but it is whether the court's finding of the total expense of the brick is sustained by the evidence. McDonald had at all times access to the books, and he availed himself of that privilege. The case so far is analogous to that of a partnership that the books are under such circumstances *prima facie* evidence on behalf of both parties. The books standing alone would sustain the court's finding as against any complaint McDonald might make. Both parties resorted to somewhat complicated processes of computation and reached widely divergent results. The basis of the court's computation does not appear in the decree. We have, however, pursued a method which seems as accurate as the state of the evidence and findings permits, and reach a result slightly in excess of the finding of the court, which will not therefore be disturbed. We shall not incumber the opinion with the detailed calculation, but shall content ourselves with indicating the method pursued. The total amount of brick paving was taken at 205,423.63 yards. (This from the finding of the referee, which accords with the evidence.) We accepted the referee's finding of the number of brick per square yard in the bottom and top courses respectively. Having thus obtained the total number of brick used, we deducted therefrom the number of brick furnished by parties other than the Vitrified Paving & Pressed Brick Company, as shown by the books. Of these a certain number are shown to have been used in the bottom course alone. The remainder were apportioned between the bottom and top courses, as indicated by the referee's finding of the number of brick per square yard in each. The contract between the Vitrified Paving & Pressed Brick Company and Stout & Buckstaff provided that top brick should lay not less than two inches by eight, or sixteen super-

ficial inches for each brick, and such brick were to be furnished at $10 per thousand, "but, for every superficial inch they will lay over the above size, we are to receive an additional compensation according to the increased superficial inches they will lay." The contract provided, as the means of determining the size of brick, that "as fast as each district is finished * * * it shall be inspected and sample bricks of the surface taken from several places in each block and street crossing and carefully measured, and ascertain the average superficial inches they have laid, to arrive at a basis of settlement and payment." The bottom brick was to be paid for at the rate of $10 per thousand, without provision for extra-sized brick. Having, in the manner indicated, ascertained the number of brick furnished by the brick company for each course, we added to the number found in the top course three-sixteenths thereto, the evidence showing that the top brick furnished measured two and three-eighths by eight inches, or nineteen square inches instead of sixteen. Each brick therefore should be counted as one and three-sixteenths. This method of computation decreased the allowance for extra size of brick which the referee took from the books, and which was manifestly miscalculated. Nevertheless when the just cost of brick so furnished by the brick company was thus ascertained, and to this item was added the actual cost of brick furnished by other parties, it was found that the court's estimate was a few dollars below the result reached by us.

The referee charged as expense against the work an item of $728.75 as loss suffered by the discounting of city warrants issued in payment of the work. This was upon the theory that the discounting of these warrants was within the ordinary financial operations of the business, and a matter entrusted to Buckstaff's discretion. This theory of the law was correct, but an examination of the books and the evidence discloses that a number of the warrants were discounted at a time when considerable

interest had accrued. The discount suffered was for the most part covered by this accrued interest, and the remainder was carried into the interest account where it figures in another item of the report. The excess over accrued interest was therefore charged twice, and that covered by the accrued interest should not have been charged unless the accrued interest was credited as a receipt. This item should therefore be stricken from the account.

There was much controversy on the hearing over certain items of expense of a suspicious, but unfortunately, perhaps, not of an uncommon, character in connection with such contracts. As to these expenditures Buckstaff testified, not very certainly, but sufficiently so to disclose their real character. In one place he stated: "It was to pay somebody to keep still and do as we wanted them to." In another: "It was for expense of administration; for service rendered by people whose names I do not care to state." And generally the testimony was that the expense was for "lobbying." From $5,000 to $5,500 of these expenses did not appear upon the books. The referee allowed it as a proper expense, on the theory that the contract was executed, and the parties should be left where they were. The court disallowed this item, but it allowed items of a kindred nature amounting to $1,820 which appeared on the books. We can see no reason for discriminating between the two classes of items. Buckstaff was the business manager and received all the money coming from the concern. He had charge of these operations and the burden devolved upon him of accounting for the expenditures. As to these items he is asking the assistance of the court to embrace them in the account as charges against McDonald. Every consideration of public policy demands that money paid out by a public contractor to induce men to keep still, to make them do as he wants them to, to lobby to secure him contracts, or to secure the allowance of estimates, should be considered as a corrupt and unlawful expenditure.

In such cases the court does not refuse to grant relief because the other party did not authorize the expenditure, nor does it grant relief because the other party did authorize it. It refuses to grant relief because the claim is corrupt in its nature and against public policy. The items entered on the books did not cease to be so tainted because they were so entered. If one member of a firm or organization engaged in public work expends his own funds in such a manner he cannot ask contribution from the others. If he has charge of the joint funds and is chargeable by the others therefor, he cannot discharge himself by showing that he so unlawfully spent the money. The item of $1,820 must be disallowed along with the $5,000.

An effort was made to show that the referee made an improper adjustment of what was called the "tool account." The tools used in the work were also used to a certain extent by Mason & McDonald, and by Buckstaff individually. They were finally sold in a damaged condition for a small sum. We are asked to readjust the apportionment made of the depreciation in the tools owing to their different uses. If the readjustment were made it could not very appreciably affect the account, and the condition of the item is such that no exact adjustment is possible. We do not feel we could improve on that made by the district court.

Correcting the judgment in accordance with the results here reached, we add to the expenses, $8,800, Buckstaff's salary, and deduct therefrom the items of discount of warrants, $728.75, and the various so-called lobbying expenses, $1,820. The net result of these corrections is the increase of expense account by $6,251.25, and decrease of profits accordingly. McDonald's fourth of the profits so ascertained is found to be $15,255.50, which other credits allowed by the referee and court increase to $15,400.36. From this there should be deducted charges against McDonald, as found by the court, $12,898.57, and also the item of interest on the note above mentioned,

$17.70—in all $12,916.27—leaving on the face of the account a balance due McDonald from Buckstaff of $2,484.09. From the judgment rendered in the district court Buckstaff was allowed to retain $625 for the payment of a claim in litigation. No complaint was made on this account and we continue the allowance. The result is that the judgment of the district court should be reversed, and judgment will be entered here similar thereto, except that the amount thereof will be $1,859.09, to which should be added interest at seven per cent from December 31, 1891, when the balance was taken.

DECREE ACCORDINGLY.

NORVAL, J., not sitting.

CHARLES J. OLSON, APPELLEE, V. WALTER J. LAMB ET AL. APPELLANTS.

FILED SEPTEMBER 23, 1898. No. 8019.

1. **Judicial Sales:** PURCHASE BY ATTORNEY: TRUSTS. An attorney may not purchase at judicial sale property in which his client is interested. If he do so the client at his election may treat him as a trustee.

2. ———: ———: ———: RATIFICATION. But the client by afterwards dealing with the attorney as the owner, may ratify the purchase or estop himself from claiming the benefit thereof.

3. ———: ———: ———. If the attorney conceal from the client material facts which might affect the client's election, dealings with the attorney on the basis of the latter's ownership, but in ignorance of such facts, will not prevent the client, on learning the facts, from then enforcing the trust.

4. ———: CONTRACT RELATING TO BIDS. A contract between two persons, whereby one of them is to bid at a judicial sale, with provisions for subsequently handling the property on behalf of both, will be upheld, when the intent or effect was not to chill bids or prevent competition, but to permit a bid to be made on behalf of both where neither could bid alone.

5. **Attorney and Client:** JUDGMENT. An attorney who purchases a

judgment against his client may recover thereon only the amount he paid and not the face of the judgment.

6. **Constructive Trustee:** FRAUD: ACCOUNTING. While a constructive trustee, for actual fraud, may be denied reimbursement, this rule will not be extended to a case where the circumstances raising the trust were not directly the result of the fraud. If there was fraud in collateral matters this may be compensated in the accounting.

7. **Contracts:** FRAUD: RESCISSION. A contract rescinded for fraud is rescinded *in toto*, and an adjustment of matters growing therefrom must proceed on both sides independent of the contract.

8. **Constructive Trustee:** COMPENSATION. A constructive trustee who is charged with rents should be credited with his reasonable expenditures, and may be allowed a reasonable compensation for managing the property.

9. **Attorney:** TRUSTS: COMPENSATION. An attorney who purchases for his own benefit will not, in a suit to declare a trust, be allowed compensation for professional services in procuring the sale to be confirmed.

10. **Set-Off:** PARTNERSHIP. A claim owing to a firm of which the defendant was a member cannot be set off against debts owing by the defendant individually.

11. **Attorney and Client:** JUDICIAL SALES: ACCOUNTING. An attorney owned in his own right one of several liens upon property under foreclosure. A sale was had and to procure a re-sale he offered to bid a certain sum. On the re-sale he bought for $1,000 less than his offer. To procure confirmation he remitted $1,000 from his own lien. One of his clients held a lien of equal priority, and the bid actually made was insufficient to pay this class. *Held*, That on an accounting the client was entitled to such share of the $1,000 as he would have realized if the bid had been that much higher and no remittitur entered.

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

The opinion contains a statement of the case.

Ricketts & Wilson, for plaintiff and the Prentice Brownstone Company:

The set-off was erroneously allowed. (*Dorsey v. McGee*, 30 Neb. 657; 22 Am. & Eng. Ency. Law 287, notes 1, 3; 2 Bates, Partnership secs. 1078, 1084; *Dehon v. Stetson*, 9 Met. [Mass.] 341.)

Where an agent is unfaithful to his trust, or abuses the confidence reposed in him, or engages in transactions by which he acquires interests adverse to those of his principal, or otherwise misconducts himself in the business of his agency, he should be deprived of commissions and compensation. (1 Am. & Eng. Ency. Law 397; *Larey v. Baker*, 12 S. E. Rep. [Ga.] 684; *Chatfield v. Simonson*, 92 N. Y. 209; *Andrews v. Tyng*, 94 N. Y. 16; *Hofflin v. Moss*, 67 Fed. Rep. 440; *Cleveland & St. L. R. Co. v. Pattison*, 15 Ind. 70; *Porter v. Silvers*, 35 Ind. 295; *Vennum v. Gregory*, 21 Ia. 326; *Sumner v. Reichcniker*, 9 Kan. 320; *Pollard v. Lathrop*, 20 Pac. Rep. [Colo.] 171; *Barnes v. Mays*, 16 S. E. Rep. [Ga.] 67.)

Where an attorney buys for himself property in relation to which he has been intrusted with regarding the interests of his client, the court should compel the purchaser to act as trustee and not as owner. Where an attorney makes a purchase secretly and does not disclose that he is purchaser, the purchase is voidable at the option of the client. The defendant claiming title through the judicial sale should be required to convey the premises to his client and to account to the latter for the rents and profits. (*Baker v. Humphrey*, 101 U. S. 494; *Johnson v. Outlaw*, 56 Miss. 546; *Briggs v. Hodgdon*, 7 Atl. Rep. [Me.] 388; *Moore v. Brocken*, 27 Ill. 23; *Pearce v. Gamble*, 72 Ala. 341; *Sutherland v. Reeve*, 41 Ill. App. 302; *Wheeler v. Willard*, 44 Vt. 645; *Barrett v. Bamber*, 9 Phila. 202; *Wright v. Walker*, 30 Ark. 48; *McPherson v. Watt*, L. R. 3 App. Cas. [Eng.] 254; *Davis v. Smith*, 43 Vt. 269; *Harper v. Perry*, 28 Ia. 60; *Stockton v. Ford*, 11 How. [U. S.] 232; *Wade v. Pettibone*, 11 O. 60; *Ingalls v. Rowell*, 36 N. E. Rep. [Ill.] 1018; *Wilson v. Kellogg*, 77 Ill. 47; *Loyd v. Malone*, 23 Ill. 43; *Manhattan Cloak & Suit Co. v. Dodge*, 21 N. E. Rep. [Ind.] 344; *Crayton v. Spullock*, 13 S. E. Rep. [Ga.] 561; *Phelps v. Benson*, 29 Atl. Rep. [Pa.] 86; *Hatch v. Fogerty*, 40 How. [N. Y.] 492; *Cunningham v. Jones*, 15 Pac. Rep. [Kan.] 572; *Zeigler v. Hughes*, 55 Ill. 288; *West v. Raymond*, 21 Ind. 305; *Simp-*

son v. Lamb, 7 Ell. & Bl. [Eng.] 90; *Baker v. Humphrey*, 101 U. S. 494; *Eoff v. Irvine*, 18 S. W. Rep. [Mo.] 907; *Davis v. Kline*, 9 S. W. Rep. [Mo.] 724; *Succession of Hoss*, 8 So. Rep. [La.] 833; *Larey v. Baker*, 12 S. E. Rep. [Ga.] 684.)

Where actual fraud is shown the court should refuse its aid to remedy the condition of the wrongdoer. (*Walton Plow Co. v. Campbell*, 35 Neb. 173; *Gilbert v. Hoffman*, 26 Am. Dec. [Pa.] 105; *Guckenheimer v. Angerine*, 81 N. Y. 397; *Burnham v. Heselton*, 20 Atl. Rep. [Me.] 80; *Connecticut Mutual Life Ins. Co. v. Smith*, 117 Mo. 261; *Sands v. Codwise*, 4 Johns. [N. Y.] 599; *McCasky v. Graff*, 62 Am. Dec. [Pa.] 336; *Goble v. O'Connor*, 43 Neb. 49.)

Any combination or arrangement between intending bidders which tends to prevent competitive bidding, renders the sale to one of such colluding bidders fraudulent and void. (*Devine v. Harkness*, 117 Ill. 45; *Crumb v. Davis*, 54 Ia. 25; *Brisbane v. Adams*, 3 N. Y. 129; *Carrothers v. Harris*, 23 W. Va. 177; *Cain v. Cox*, 23 W. Va. 594; *Gardiner v. Morse*, 25 Me. 140; *Durfee v. Moran*, 57 Mo. 374; *Wooton v. Hinkle*, 20 Mo. 290; *Hook v. Turner*, 22 Mo. 333; *Abbey v. Dewey*, 25 Pa. St. 413; *Hamilton v. Hamilton*, 2 Rich. Eq. [S. Car.] 355; *Jackson v. Ludeling*, 21 Wall. [U. S.] 616; *Jones v. Caswell*, 3 Johns. Cas. [N. Y.] 29; *Benedict v. Gilman*, 4 Paige Ch. [N. Y.] 58; *Brown v. Lynch*, 1 Paige Ch. [N. Y.] 147; *Easton v. Mawkinney*, 37 Ia. 601; *Martin v. Evans*, 2 Rich. Eq. [S. Car.] 368; *Weld v. Lancaster*, 56 Me. 453; *Fleming v. Hutchinson*, 36 Ia. 519; *Underwood v. McVeigh*, 23 Grat. [Va.] 409.)

The agreement of a bidder to pay the judgment of another in consideration of the latter not bidding is fraudulent. (*Slingluff v. Eckel*, 24 Pa. St. 472; *Barton v. Benson*, 126 Pa. St. 431.)

Lamb, Adams & Scott, contra:

Neither plaintiff nor cross-petitioner could have recovered the property, and there is no equity in their case. (*Burke v. Daly*, 14 Mo. App. 542; *Page v. Stubbs*, 39

Ia. 537; *Wilber v. Robinson*, 29 Mo. App. 165; *Johnson v. Outlaw*, 56 Miss. 541; *Marsh v. Whitmore*, 21 Wall. [U. S.] 178; *Kisling v. Shaw*, 33 Cal. 425.)

Plaintiff and cross-petitioner are estopped from setting up any claim to the property. (*Gillespie v. Sawyer*, 15 Neb. 536; *Wilcox v. Raben*, 24 Neb. 372; *Forbes v. McCoy*, 24 Neb. 706; *Malley v. Thalheimer*, 44 Conn. 41.)

Neither upon the pleadings nor by the defendant's conceding to the cross-petitioner the right to redeem, which it did not have, does the plaintiff or the cross-petitioner obtain anything but the naked legal right. (*Foley v. Holtry*, 41 Neb. 563; *McCulloch v. Scott*, 13 B. Mon. [Ky.] 172; *Johnson-Brinkman Commission Co. v. Missouri P. R. Co.*, 52 Mo. App. 407; *Wynkoop v. Niagara Fire Ins. Co.*, 91 N. Y. 478; *Beals v. Home Ins. Co.*, 36 N. Y. 522; *Platt v. Ætna Ins. Co.*, 38 N. E. Rep. [Ill.] 538; *Rob v. Vose*, 15 Sup. Ct. Rep. 14; *Connihan v. Thompson*, 111 Mass. 272.)

Parties are bound to the particular form of action which they first adopt. (*Barndt v. Frederick*, 47 N. W. Rep. [Wis.] 6; *Warren v. Landry*, 42 N. W. Rep. [Wis.] 247; *O'Rourke v. Leva*, 13 So. Rep. [Ala.] 747; *Thomas v. Coultas*, 76 Ill. 494; *Rodermund v. Clark*, 46 N. Y. 354; *Stevens v. Hyde*, 32 Barb. [N. Y.] 171; *Kinney v. Kiernan*, 49 N. Y. 164.)

The election to redeem the property by the Prentice Brownstone Company, and the acceptance thereof by the defendant, constitute a binding contract, from which said cross-petitioner cannot retire except by the consent of these defendants. (*Downey v. Gerrard*, 3 Grant's Cas. [Pa.] 64; *Beardsley v. Root*, 11 Johns. [N. Y.] 464; *Finlay v. Bryson*, 84 Mo. 671; *Vassault v. Edwards*, 43 Cal. 465; *Estes v. Furlong*, 59 Ill. 302; *Tobey v. Foreman*, 79 Ill. 489; *Favill v. Roberts*, 50 N. Y. 222; *Goodman v. Winter*, 64 Ala. 410; *Sowle v. Holdridge*, 25 Ind. 119.)

Defendants are entitled to a decree against the plaintiff dismissing the bill, and against the cross-petitioner, the Prentice Brownstone Company, for the value of the

improvements placed upon the property, not only for the amount expended, but for the amount that the improvements have increased the value of the property over what it was at the date of the sale. (*Chaney v. Coleman*, 13 S. W. Rep. [Tex.] 850; *McMurray v. Day*, 70 Ia. 671; *Smith v. Drake*, 23 N. J. Eq. 302; *Freichnecht v. Meyer*, 39 N. J. Eq. 551; *Hammond v. Inloes*, 4 Md. 138; *Bacon v. Cottrell*, 13 Minn. 184; *Mulford v. Minch*, 3 Stock. [N. J.] 17; *Smith v. Townshend*, 27 Md. 369; *McLaughlin v. Barnum*, 31 Md. 425; *Oliver v. Court*, 8 Pr. [Eng.] 172; *Ex parte Hughes*, 6 Ves. [Eng.] 617.)

Defendants are entitled to be reimbursed for all expenses paid or incurred and for all services rendered while in possession of the property. (*Edwards v. Gottschalk*, 25 Mo. App. 549; *Iddings v. Bruen*, 4 Sandf. Ch. [N. Y.] 223.)

Defendant is entitled to recover commissions for all moneys collected or paid out, and for all business done about the property while trustee. (*Jennison v. Hapgood*, 10 Pick. [Mass.] 111; *Shirley v. Shattuck*, 6 Cush. [Miss.] 13; *Miller v. Beverleys*, 4 H. & M. [Va.] 415; *Barrel v. Joy*, 16 Mass. 227; *Cowing v. Howard*, 46 Barb. [N. Y.] 579; *Barney v. Saunders*, 16 How. [U. S.] 542; *Brown v. South Boston Savings Bank*, 148 Mass. 300; *Rensselaer & S. R. Co. v. Miller*, 47 Vt. 152; *Tucker v. Buffum*, 16 Pick. [Mass.] 46; *Waterman v. Curtis*, 26 Conn. 247.)

The purchase by Muir and the conveyance by him to defendants do not change the rights of the parties. (*Beeson v. Beeson*, 9 Pa. St. 279.)

IRVINE, C.

This action was brought by Charles J. Olson against Walter J. Lamb and his wife, for the purpose of having a trust declared in favor of plaintiff in certain property alleged to have been bought by Lamb at judicial sale while he was acting as attorney for plaintiff. The Prentice Brownstone Company was made a party defendant, and by cross-petition alleged that Lamb was also its at-

torney in the foreclosure case resulting in the judicial sale, and it prayed that a trust be declared and conveyance ordered. Both the petition and cross-petition originally offered as a condition of the conveyance to reimburse Lamb for his expenses. After the coming in of an answer in which Lamb, among other things, pleaded the agreement under which the sale was made, hereinafter more particularly referred to, the plaintiff and the cross-petitioner amended their respective pleadings, withdrawing their offer to redeem and demanding a conveyance without submitting to redemption. From the decree rendered appeals were taken by all parties. The appeal of Lamb raises, among other things, the question of the propriety of permitting the case to proceed on the amended petitions. The district court had, however, by its decree, required Olson to redeem, and had denied to the Prentice Brownstone Company any relief whatever, so that we cannot see how the propriety of the amendment becomes a material consideration.

Preliminary to the consideration of the merits of the case a statement of the somewhat complicated facts involved becomes necessary. In this statement we shall endeavor to omit, for the sake of brevity and clearness, non-essentials and the less important details. Their omission from the statement, however, is no indication that they have been overlooked in considering the case. In 1892 Mr. Howell was the owner of a certain lot in the city of Lincoln, and undertook the construction thereon of a building described in the record as the "Conservatory of Music." He made a contract with Olson for the stone and brick work on the building, and Olson began the performance of the work, purchasing material from several different persons to whom he became indebted therefor. After the work had progressed to a considerable extent, but before the building was under roof, it became evident that Howell was unable to proceed, and the decree on sufficient evidence finds that he was wholly insolvent. Mr. Lamb was then a member of the law firm

of Lamb, Ricketts & Wilson, and Mr. Olson consulted him with reference to his interests. Mr. Olson introduced to Mr. Lamb the agent of the Prentice Brownstone Company, to which Olson was indebted for stone furnished for the erection of the building. Mechanics' liens were perfected both by Olson and the stone company, and a suit to foreclose the liens was begun by the stone company. About this time the firm of Lamb, Ricketts & Wilson was dissolved. The evidence indicates that business intrusted to it before the dissolution was carried on by one or another of the members of the late firm on behalf of the old firm. The business of Olson and the stone company was in part conducted by Mr. Wilson, but the evidence amply sustains the finding that Mr. Lamb remained the attorney of both parties until after the sale in controversy. There was on the property, at the time the liens accrued, a mortgage to the Nebraska Savings Bank of about $6,000. For the purpose of enabling Howell to obtain a further loan Olson had consented that another mortgage be made which should have priority over any lien of his, and consequently the Savings Bank had made another mortgage loan of about $2,500. The material-men we have here to consider had not, however, waived their rights. Consequently when the decree was rendered in the foreclosure case it established the original mortgage as a first lien, a certain judgment which does not figure in the case as a second lien, then the liens of certain material-men as a third class of liens. Of these the Brownstone Company had one for $1,121.35, Henry M. Leavitt $1,673.43, L. K. Holmes $970.87. Olson was individually liable for these debts. As the fourth lien the second mortgage of the Savings Bank was established. Olson's lien followed as the fifth lien, and amounted to $3,708.36. This decree was rendered June 30, 1893, and within due time Howell filed a request for a stay, which would operate of course to stay the sale on the mortgage debts. Then began a long series of negotiations for the purpose of forming a plan for purchasing

the property. The evidence shows that from the time the decree was rendered until February, 1894, when the sale was had, was a period of business depression and financial stringency, and that the task of raising money sufficient to buy the property at a price protecting the mechanics' liens was, to say the least, arduous. The details of these negotiations are only important in so far as they show how Lamb has become interested personally in the litigation. The first plan was to sell the property subject to the first mortgage, while the execution of the decree in so far as it foreclosed that mortgage was suspended by the stay. It was proposed that the lienors, or some of them, should buy the property and Olson should proceed with the building until it should be inclosed, and so put in condition that a loan could be negotiated which might take care of the mortgages. This plan was defeated by Howell's withdrawing his stay. The Savings Bank mortgages had by this time been assigned to one Miller as trustee for certain associated banks in Lincoln which had lent money to the Savings Bank to tide it through difficulties. When the stay was withdrawn these banks stood ready to buy in the property to protect their mortgages. This they could safely do, unless there were other bidders, at the lowest price for which the property could be bought. In this state of affairs Mr. Lamb undertook to arrange a plan by which the lien owners should advance money to make a bid on the property sufficient to protect them. Olson proposed to raise about $3,000 for this purpose, and there is evidence that Mr. Lamb offered to assist him in so doing. The stone company, through some of its agents, promised to do its part. Mr. Leavitt was, however, unable to raise his portion, and at this juncture Mr. Lamb bought the Leavitt lien himself, at a discount of about $100. The court found on sufficient evidence that Lamb made this purchase without the knowledge or consent of Olson or of the stone company. It is clear, however, that they soon after learned of it and acquiesced therein, but they

were not informed that it had been purchased at a discount, and did not learn that fact until long after the sale. The stone company afterwards refused to advance any money. Its officers stated that no agent had authority to agree so to do. The property went to sale without any arrangement being consummated and was bid in by R. D. Muir, who had become the owner of the Holmes lien, for $970.87. Motions to set aside the sale were filed by Olson, the stone company, and by Lamb as owner of the Leavitt lien. In connection with the motions Olson offered, in case of a re-sale, to bid $8,500 and Lamb pledged himself to bid $8,000. The proof shows that Olson was not at that time responsible for such a bid but Mr. Lamb was of ample financial responsibility. The court set aside the sale, and negotiations were renewed for acquiring the property on behalf of the lienors. Of these it is sufficient to say that no result was reached and that the stone company refused to take any part in the purchase. As the time of sale approached Mr. Lamb, in view of his bid of $8,000, made arrangements to borrow $10,000 on the security of real estate by him owned. The arrangements had been perfected but the money had not reached him on February 6, 1894, when the second sale took place. He had on that day only about $150 to his credit in the bank. Mr. Muir, having the Holmes lien to protect, was able to temporarily command the use of a considerable sum, but could not safely buy unless he could almost immediately dispose of the property and re-possess himself of the money. Within a few hours of the time of the sale Muir and Lamb entered into a contract whereby Muir was to bid upon the property and continue to bid until Lamb should indicate that he should stop. If he should get the property under his bid he might within ten days sell it by paying to Lamb the amount of the Leavitt lien. If he should fail to so dispose of it he was to convey it to Lamb, on Lamb's paying him the amount of his bid and $500 additional, in which event Muir was to assign to Lamb the Holmes

lien, which seems to have been a personal judgment against Olson. When the property was offered Miller on behalf of the banks bid $7,000; Muir bid $7,001, and the property was sold to him. Muir failed to dispose of the property, and, Lamb's money arriving, he paid Muir the amount of his bid, either directly or by paying the money to the sheriff and taking up a certified check which Muir had deposited. The sale was confirmed, the sheriff's deed to Muir was delivered to Lamb, and Lamb at once caused to be recorded both that deed and a conveyance from Muir to him.

After the title was thus perfected in Lamb he made a contract with Olson whereby Olson undertook to perform the labor necessary to complete the building according to certain designs which Lamb had made to fit it for a different purpose. By this contract Lamb's ownership of the Leavitt and Holmes judgments was recited, and, allowing certain deductions, their net amount was fixed at $2,500. Lamb agreed to pay Olson certain specified rates for labor performed on the building and on completion of the work to release the judgments. This contract was carried out. The stone company had shipped a quantity of stone which was not inwrought in the building prior to the foreclosure. In completing the building Lamb bought this stone and the stone company received pay from him therefor, knowing that he had become the owner of the property. Soon after the building was completed this suit was brought.

It will be convenient to consider first the case of Olson and then that of the stone company. The position of Olson is that Lamb as his attorney could not without his consent buy the property for himself; that Lamb was guilty moreover of actual fraud which had a double effect: first, to relieve Olson from any estoppel which might arise by reason of his dealing with Lamb as the owner; and second, to deprive Lamb of all right to compensation or reimbursement. That an attorney cannot himself purchase at judicial sale the property in litiga-

tion in which his client is concerned, and hold it to his own use without the consent of his client, is an elementary principle. If he so purchase, the client may at his election treat him as a trustee and enforce the trust. Motives are immaterial, and it is also immaterial whether the client actually lost or gained by the transaction. Such a purchase is contrary to public policy. In support of this rule there is a multitude of authorities, some of which may be found in 3 Am. & Eng. Ency. of Law 340. It therefore results that from the fact of the relationship of attorney and client alone, Olson had a right to the benefit of Lamb's purchase, and could enforce the trust unless he had first consented to the purchase, or afterwards by word or conduct elected and permitted Lamb to retain the property. Ordinarily undoubtedly his contracting with Lamb after the purchase, knowing him to be the owner, to finish the building for Lamb's benefit, and so encouraging Lamb to expend money in permanent improvements, would bind Olson both as an election and by estoppel. The facts which it is claimed relieve Olson from these consequences being those which it is asserted amount to actual fraud, are so complicated with the question of Lamb's right to reimbursement that the two questions can properly be considered together. We cannot see that the contract with Muir for the purchase of the property was fraudulent or that it was against public policy. It was not, as asserted, an arrangement to chill bids, nor did it seek to prevent anyone from bidding, as was the case in *Goble v. O'Connor*, 43 Neb. 49. The situation was this: Lamb was able to buy the property but did not possess cash on the day of sale sufficient to permit him then to bid. Muir, on the contrary, had an arrangement for the temporary use of sufficient money to enable him to bid, but the necessity of repaying that money within a short time was such that he could not buy without some assurance that the purchase would be taken off his hands. The contract then was an arrangement between two men, neither of whom could bid alone,

but by whom a single bid might be made if they acted in concert, and the case is in this aspect in line with *Gulick v. Webb*, 41 Neb. 706, where it was held that where the object is not to prevent competition or chill bids, but to enable parties to compete where without combining they could not do so, the transaction will be upheld. The remaining facts applicable to this branch of the case are the concealment of this contract from Lamb's clients, the concealment of the fact that Lamb had become the owner of the Leavitt and Holmes judgments for less than their face value, and a fact in connection with the confirmation of the sale which has not yet been stated. So far as Olson is concerned it is clear that he did not know the price at which Lamb bought the Holmes and Leavitt liens; and while he knew that Lamb had become the owner of the property soon after the sale, he did not know the nature of the contract by which that ownership was acquired. In view of the duties imposed by law upon an attorney, the failure of Lamb to disclose to Olson these facts must be treated as an unlawful concealment thereof. The other circumstance which has been adverted to was that Howell had opposed the confirmation of the sale on the ground that it had been made for $7,001 in the face of Lamb's offer to pay $8,000. For the purpose of curing this defect Lamb entered a remittitur of $1,000 on the Leavitt lien, and it was due to this remittitur that the sale was confirmed. Olson did not know of this remittitur until after his subsequent contract with Lamb had been carried out. We think that Lamb's concealment of these facts from Olson was entirely sufficient to relieve Olson from the effect which would otherwise attach to his conduct in afterwards dealing with Lamb. An attorney who purchases judgments against his client at a discount cannot be permitted to reap an advantage therefrom. Such a purchase operates for the benefit of the client, and the attorney is entitled only to the amount he paid for the judgments. (*Larcy v. Baker*, 86 Ga. 468; *Sutherland v. Reeve*, 151 Ill.

384.) The remittitur of $1,000 from the Leavitt judgment of course reduced the judgment both as a lien on the property and as a personal obligation of Olson. Olson was therefore indebted on these judgments much less than he supposed. The difference amounted to about $470 on the Holmes judgment and to $1,100 on the Leavitt judgment. Had he known this fact he undoubtedly would not have made the contract with Lamb in the manner in which it was made, adjusting the amount of his debt at $2,500 when in fact it was only about $1,000. Moreover, had he known the terms of the contract between Muir and Lamb he would have known or could have learned that Lamb stood in the attitude of the purchaser at the sale and could be treated as a trustee. Without such knowledge Lamb appeared in the attitude of a subsequent purchaser from Muir. But while these facts, by relieving Olson of his election and of the estoppel, retained in him a right to redeem, we do not think that they deprive Lamb of the right to reimbursement. The sale itself was not actually fraudulent. It was simply against public policy and raised a constructive trust. In every case of this character which we have observed the purchasing attorney has been protected in his disbursement, even where he has been deprived of compensation for his services. The other facts were not inherent in the sale or so connected with it as to taint the purchase with actual fraud. In the accounting Olson can properly be compensated for any loss sustained by him in consequence of the concealment practiced upon him by Lamb, but such concealment was undoubtedly a material inducement to the subsequent contract, and should be given the effect of releasing Olson from those obligations including the settlement effected thereunder. On the other hand we think the contention of Mr. Lamb is sound, that if Olson be released from the terms of that contract affecting him, Lamb should also be released from its other terms. Lamb agreed to pay the price he did for the work in view of the adjustment of Olson's debt

to him at $2,500. The settlement thereby effected not being binding on Olson, the adjustment should be made not according to the contract, but on the basis of what Olson's labor was reasonably worth in completing the building.

In this connection we may here dispose of certain other features of the accounting had. The court allowed Lamb $300 for services in procuring the confirmation of the sale. We must regard this as an unwarranted allowance. The sale was on such terms that Olson was entirely uninterested in its confirmation, and it was evident that Lamb performed these services on his own behalf. We know of no rule which permits an attorney endeavoring to purchase for himself to receive compensation from his client for his efforts in so doing. The decree also includes as an allowance to Lamb $500 for his services in the foreclosure case. These services were rendered on behalf of the firm of Lamb, Ricketts & Wilson and are not a proper set-off in a suit against one member of the firm. Another item allowed Lamb was $750 for services in superintending the building. We think the rule is that even a constructive trustee is entitled to compensation for managing property, where he is chargeable with the rents. The decree charges Lamb with the income from the property; and taxes and other expenses, including a reasonable compensation for management, should in equity be deducted from the amount so allowed.

The accounting in order to ascertain the amount required to redeem proceeded in several particulars on a false basis, and we have not findings in all respects sufficient to enable us to restate the account. As to Olson the case must be reversed and remanded with directions to the trial court to retake the account, allowing to Olson the benefit of the discounts at which Lamb purchased the liens, including the $1,000 remittitur, and to allow him also the reasonable value of his work under the contract to complete the building; to charge Lamb with rents. On the other hand Lamb should be credited with

his actual disbursements in buying the property, in completing the building and in managing the same. He should be allowed nothing for legal services, but receive a reasonable compensation for superintending and managing the property after he acquired title.

We now reach the case of the Prentice Brownstone company, and what has already been stated applies in great measure to this branch of the case. The stone company positively refused to buy the property or to advance any money for the purpose of purchasing it or protecting its lien. The day after the sale an agent of the company was in Lincoln and what occurred is somewhat in dispute. It is very evident that Mr. Lamb told the agent that by some means they were still in position to take the property and protect themselves. According to Lamb the statement was that "he had kept a string to it." It is equally clear that the nature of this "string" was not disclosed, and that the company did not know that Lamb was in effect the purchaser. The company again peremptorily refused to take any steps. Here again by this action and by the company's subsequently selling stone to Lamb to complete the building, knowing that Lamb claimed it as his own, there would be an election allowing him to take the property; but the force of this election was avoided, in the first place, by Lamb's concealing the fact that he was the purchaser and could therefore be treated as a trustee. Moreover the company's rights were unjustly affected by other facts of which it then had no knowledge and of which it did not acquire knowledge until after the building was completed. The bid of $7,001 was just about sufficient to discharge the liens prior to the first group of mechanics' liens, one of which was held by the stone company. The company did not know that the amount of the other liens in this class had been reduced by Lamb's purchase thereof at a discount, nor did it know that the terms of the sale were such as to provide in whole or in part for the discharge of the other liens in the same class, to the

entire exclusion of the lien of the stone company. Then when the sale was confirmed Lamb's remittitur of $1,000 upon the Leavitt lien was to make good his offer to pay $8,000. Had he paid $8,000 the stone company would have received its proportionate part thereof as one of the third class of lienors. By paying only $7,001 and remitting $1,000 on the Leavitt lien Lamb in effect paid the whole of the excess of his offer above $7,001 to himself to apply on the Leavitt lien, entirely excluding the stone company which stood in equal priority. Such a transaction cannot for a minute be tolerated. The stone company must also be permitted to redeem. In adjusting its account it should be allowed credit for such portion of this $1,000 as it would have been apportioned had the bid been that much higher and no remittitur entered. It should also be given the benefit of the discounts on the two liens.

Finally, the court erred in entering a judgment absolute against Lamb for the amount which he obtained by these discounts and by the remittitur, and then calculating the amount required from Olson to redeem at the full sum. This would require Olson to pay the whole amount and recover part back on his judgment. The amount owing Olson from Lamb should be deducted in ascertaining the amount required to redeem, and any judgment against Lamb should be effective only in case of Olson's failure to redeem.

The judgment is reversed and the case remanded with directions to proceed in accordance with this opinion.

REVERSED AND REMANDED.

ISAAC ADAMS V. NEBRASKA SAVINGS AND EXCHANGE BANK.

FILED SEPTEMBER 23, 1898. No. 8253.

1. **Justice of the Peace:** JURISDICTIONAL AMOUNT: INTEREST. In computing the "amount in controversy" to ascertain whether a case is within the jurisdiction of a justice of the peace, interest accrued at the time of suit on an interest-bearing debt should be considered.
2. ———: ———. It is not the amount which the bill of particulars shows the plaintiff might claim, but the actual amount of his demand, which ascertains the jurisdictional amount.
3. ———: ———: VARIANCE. Where there is a variance in respect to the amount demanded between the bill of particulars and the writ, the writ controls.
4. ———: ———. Where the defendant failed to appear, the justice of the peace had jurisdiction of the subject-matter, the amount for which he might render judgment according to the face of the writ and the indorsement thereon being less than $200.
5. ———: WRIT: DEFAULT: AMOUNT OF JUDGMENT. A statement of plaintiff's demand in the writ and its indorsement as $150 and interest, without specifying the rate of interest or the time for which it was demanded, authorize judgment by default for only $150 and interest from the commencement of the action.
6. **Review:** ASSIGNMENTS OF ERROR: CORRECTION OF ERRORS. While this court will not reverse a case for errors not called to the attention of the district court and specifically assigned in this court, nevertheless, when, in passing upon the assignments of error properly made, it is disclosed that they are not well taken because of an unassigned error, of which the defendant in error must avail himself to defeat the assignments made, and which this court must pass upon to decide the case, such error will be corrected.

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

The opinion contains a statement of the case.

Isaac Adams, for plaintiff in error:

Jurisdiction is to be determined by the amount sued for: (*Brondberg v. Babbott*, 14 Neb. 517; *Bates v. Phœnix*

Publishing Co., 50 Neb. 79; *Plunket v. Evans*, 2 S. Dak. 434; *Wharton v. King*, 69 Ala. 365; *Stewart v. Thompson*, 85 Ga. 829; *Raymond v. Strobel*, 24 Ill. 113; *Stone v. Murphy*, 2 Ia. 35; *Lamberton v. Raymond*, 22 Minn. 129; *Evans v. Hall*, 45 Pa. St. 235.)

Interest claimed as part of the original contract sued on must be calculated in computing the amount in controversy. (*Wilson v. Sparkman*, 17 Fla. 871; *Denver Brick Mfg. Co. v. McAllister*, 6 Colo. 326; *Stone v. Hawkins*, 56 Conn. 111; *Gregg v. Wooden*, 7 Ind. 499; *Schlenker v. Taliaferro*, 20 La. Ann. 565; *Barber v. Kennedy*, 18 Minn. 216; *Reese v. Hawks*, 63 Md. 130; *Smith v. Smith*, 15 Vt. 620; *Woodward v. Jewell*, 140 U. S. 247.)

Silas Cobb, contra:

Accrued interest should not be considered in determining the question of jurisdiction, nor the costs. (12 Am. & Eng. Ency. Law 283, 284; *Fisher v. Hall*, 1 Pike [Ark.] 275; *Hedgecock v. Davis*, 64 N. Car. 650.)

Interest being an incident may be thrown off. (*Evans v. Hall*, 9 Wright [Pa.] 235; *Bradley v. Lill*, 4 Biss. [U. S.] 473.)

Plaintiff may remit the excess and confer jurisdiction. (Hawes, Jurisdiction of Courts sec. 33, note 4; *Farley v. Gibbs*, 4 N. Y. Supp. 353.)

The amount in controversy means the principal without interest. (*Jackson v. Whitfield*, 51 Miss. 202.)

Plaintiff may remit at the trial, though, in his pleading, he claims more than the jurisdictional amount. (*Best v. Best*, 16 Mo. 530.)

The court will not make a computation and act on the inference to be drawn therefrom as to the amount in controversy. (*Scott v. Lunt*, 6 Pet. [U. S.] 349.)

IRVINE, C.

The Nebraska Savings & Exchange Bank sued Adams on a promissory note before a justice of the peace. It recovered a judgment and Adams took the case to the

district court on error, and the judgment was there affirmed. Adams now brings the case to this court.

Adams, both in the district court and here, relies on a want of jurisdiction arising from the amount in controversy, which he claims is beyond the jurisdiction of a justice of the peace. The note set out in the bill of particulars is for $150, with interest at the rate of 10 per cent per annum from July 22, 1890. The suit was begun August 22, 1895. The bill discloses no payments, and it follows that, if interest is to be considered in computing the amount in controversy, the bill showed that more than $200 was due. The prayer of the bill of particulars is "for judgment upon said note for $150 and interest according to its tenor, and costs." The summons issued by the justice recited that the plaintiff sued "to recover the sum of $150 and interest due on a certain promissory note." The summons was indorsed: "If defendant fail to appear plaintiff will take judgment for $150 and int. as within specified and all costs, not to exceed $50." The defendant did not appear before the justice and judgment was entered for $200. If, as defendant in error contends, interest is not to be considered in computing the amount in controversy, jurisdiction affirmatively appears throughout the proceedings; but we think that interest accrued at the time of suit, if demanded, must be considered as a part of the "amount in controversy." The phrase just used is that employed by the constitution in limiting the jurisdiction of justices of the peace. (Constitution, art. 6, sec. 18.) Interest is not so far collateral to the debt that when suit is brought it can with any pretense of reason be said that the interest as well as the principal is not in controversy. Some statutes, notably those regulating the jurisdiction of the federal courts, by their express terms, either include or exclude interest for this purpose. Where the statute is silent and uses the phrase "amount in controversy," there is no reason and should be no authority for saying that such amount refers to the principal alone, although

the actual controversy may, and sometimes does, relate to the interest alone. All our decisions indicate a want of power in a justice to render judgment for more than $200. This must be because the demand cannot be raised beyond that figure, by allowance of interest or otherwise.

This consideration does not dispose of the case. In *Brondberg v. Babbott*, 14 Neb. 517, it was said: "It seems to be well settled that in a court of limited jurisdiction it is the amount stated in the *ad damnum* clause of the writ that gives jurisdiction even in cases where the petition or bill of particulars states a different amount as that for which judgment is demanded." We think that statement, although it was there *obiter*, is correct. The writ is the principal thing in acquiring jurisdiction, and it is that to which the defendant must look and on which he may rely in determining whether he shall appear and contest the case, or disregard it and permit the plaintiff to proceed. This writ did not disclose from what time or at what rate the plaintiff claimed interest. In the absence of such data a claim for $150 and interest did not show that more than $200 was demanded. Moreover our statute provides that there shall be indorsed on the writ the amount for which the plaintiff will take judgment if the defendant fail to appear, and that if he fail to appear judgment shall not be taken for a greater amount and costs. (Code of Civil Procedure, sec. 910.) The strictness with which this provision has been enforced may be seen in *Watson v. McCartney*, 1 Neb. 131; *Co-operative Stove Co. v. Grimes*, 9 Neb. 123; *McKay v. Hinman*, 13 Neb. 33. The indorsement in this case was that judgment would be taken for "$150 and int. as within specified." Even if it be conceded that a reference to the body of the summons will satisfy the statutory requirement, this indorsement, neither of itself nor when coupled with the vague statement in the writ, specified an amount beyond the principal or gave data from which an amount might be ascertained. All except the statement of the principal is so vague that it must be re-

jected, and the court should not, on defendant's failing to appear, have rendered judgment for more than $150. We conclude that while accrued interest, if demanded, must be considered in computing the jurisdictional amount, nevertheless, as the plaintiff may remit the excess, if it appear that he is entitled to more than that amount (Code of Civil Procedure, sec. 1003), the amount is to be found from plaintiff's actual demand, and not from the amount that the bill of particulars indicates that he might properly demand. (*Stone v. Murphy*, 2 Ia. 35.) But when there is a variance as to the amount demanded between the prayer of the bill of particulars and the writ, the writ governs. If the judgment which may be rendered under the terms of the writ be within the jurisdiction of the court, jurisdiction of the subject-matter exists. Such was here the case.

But we now meet this difficulty: The plaintiff in error, both in the district court and here, raised only the question of jurisdiction. He did not by any assignment of error in either court suggest that the judgment was too large. It is the established practice to disregard all errors where the matter was not called to the attention of the district court and where it is not here specifically assigned. In this case the investigation of the question properly raised discloses the error in the amount of the judgment, and the error is of such a character that it is only by considering it and determining that it was error that we reach the conclusion that the actual assignments of error are not well taken. Indeed the defendant in error has been compelled, to avoid the conclusion that there should be a dismissal for want of jurisdiction, to itself call attention to the real error. Under these circumstances, and because to decide the case we have been compelled to notice the error and adjudicate it to be such, we think we should proceed to correct it. *McKay v. Hinman, supra*, points out the course which the district court should have pursued. It should have permitted the plaintiff to remit the excess of the judgment above $150

and if plaintiff saw fit to do so, have affirmed the judgment as so modified. The judgment of the district court is reversed and the case remanded with directions to so proceed.

REVERSED AND REMANDED.

LOUIS W. POMERENE V. SCHOOL DISTRICT NO. 56, BUTLER COUNTY.

FILED SEPTEMBER 23, 1898. No. 8233.

1. **School Districts:** INDEBTEDNESS: TIME WARRANTS. A school district may not incur indebtedness in the erection of a schoolhouse and issue in evidence thereof warrants payable at a future date and bearing interest. (*State v. Sabin*, 39 Neb. 570, followed.)
2. ———: ———: ———: CONTRACTS. A contract with a district board providing for payment in such time warrants is tainted with the same vice as the warrants themselves, and no recovery can be had thereon.
3. ———: CONTRACTS: ASSUMPSIT. Whether a person who has performed work under such a contract may recover therefor on an implied assumpsit, not decided, it appearing that the action so far as based on that theory was barred by the statute of limitations.

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

Ricketts & Wilson, for plaintiff in error.

S. H. Steele, Steele Bros., and *A. J. Evans, contra.*

IRVINE, C.

In substance the petition in the district court alleged that the voters of the defendant school district September 12, 1887, authorized the issue of bonds in the sum of $16,000 to complete a ward school building and to erect a high school building, and at the annual meeting held April 2, 1888, the board of education was by the electors

authorized to put into the high school building, then in course of construction, a steam heating apparatus; that of the proceeds of the bonds $4,000 was used in completing the ward building, and $10,000 in constructing the high school building; that the board advertised for bids for the steam heating apparatus, Pomerene & Percival tendered a bid therefor and the contract was let to them. A copy of the bid and acceptance is incorporated into the petition. The bid provides for payments as follows: "On completion of the work $325 cash payment; $500 in warrant due Sept. 1, 1890; $500 in warrant due March 1, 1891." The petition then alleged that the board of education accepted the work September 2, 1889, and issued warrants in accordance with the contract; that the warrant last to mature had not been paid, although a tax had been levied and collected sufficient to pay it. It was further averred that the price stipulated was the reasonable value of the work performed, and that the claim is now the property of the plaintiff. A demurrer to this petition was sustained, and the action dismissed. It will be seen that the petition, while drawn in a single count, has a triple aspect. It might be regarded as a suit on the warrant, a suit on the special contract, or on a *quantum meruit.*

So far as the action is based on the warrant it has already been by this court decided adversely to the plaintiff. (*State v. Sabin*, 39 Neb. 570.) That was an application for a writ of mandamus to compel payment of the warrant. At the close of the opinion it is said that the court was not then required to determine what remedy, if any, was open to the plaintiff; certainly it was not mandamus. While therefore only the duty of paying the warrant was there directly determined, it was held that no such duty existed for the reason that the school board was without authority to issue a "time warrant"—that is, one payable at a future day, and bearing interest. That decision had for its fundamental principle that a district board is limited in its power by the statutes, and

that the statutes provide for the creation of debts for erecting schoolhouses by the issuing of bonds. To permit time warrants to be issued would be to suffer an evasion of the statutory conditions under which alone such indebtedness may be incurred. The decision followed *School District v. Stough*, 4 Neb. 357, where it was said that contracts for the erection of schoolhouses should be made with reference to the funds in the treasury for that purpose, and that the board has no power to draw warrants on a fund which has been proposed but not raised. *Andrews v. School District*, 49 Neb. 420, is in line with the foregoing cases. Counsel refer to certain statutory provisions which they claim imply a right to incur indebtedness otherwise than by issuing bonds, and we are asked to reconsider the questions decided in the cases cited. The most that can be said of this branch of the argument is that it shows that the main question would as one of first impression be one whose solution would be attended with doubt, but that is true of all questions where precedent is of real assistance. It is only those questions where the precedents are clearly wrong that call for re-examination. Where the point is on principle doubtful *stare decisis* is a safe maxim. The reasons which render the warrant unenforceable apply with equal force to the contract. The case is not like *Andrews v. School District*, where the contract was lawful and only the warrants void. Here the contract expressly provides for payment in illegal warrants, and is tainted with the same vice as the warrants themselves.

It is suggested that it is only the district board which is prohibited from incurring debts in such manner, and that the electors themselves may do so or authorize the board in that behalf. But the authority from the electors here pleaded is merely to put in the steam heating apparatus. The requirement of payment in time warrants appears for the first time in the contract made by the board. The authority granted was to be exercised in a lawful matter. The record affords no basis

for an inquiry as to the soundness of the distinction suggested.

Nor can we in this case determine whether, the work having been performed and accepted by the district, an implied assumpsit arose to pay therefor. If such an obligation existed the cause of action arose on completion of the work, or at latest on its acceptance, which is shown by the petition to be September 2, 1889. This suit was brought June 7, 1895. The statute of limitations is a defense presented by the demurrer, and affords an effective bar to the implied assumpsit.

AFFIRMED.

WESTINGHOUSE COMPANY V. JOSIAH H. TILDEN.

FILED SEPTEMBER 23, 1898. No. 8238.

1. **Principal and Agent:** BREACH OF CONTRACT: ACTION FOR COMMISSIONS: PLEADING. A contract between a manufacturer and a selling agent provided that on deferred payments commissions should be paid only on payment of the notes representing such deferred payments, and in proportion as payment should be made. In an action for commissions the agent declared solely on the contract and alleged no breach except failure to pay. *Held*, That he could not, under such averments, recover commissions on unpaid notes, on the theory that the principal had been negligent concerning their collection.

2. ———: ———: ———: ———: AMENDMENT: PROOF. An amendment to such a petition, alleging that oral agreements and correspondence had modified the contracts, was insufficient to sustain proof of such damages, the amendment not alleging what modifications had been made.

3. **Violation of Instructions to Jury.** A verdict in plain disregard of the instructions of the court is contrary to law.

4. **Evidence:** LETTERS: COPIES. Letter-press copies of letters are but secondary evidence, and are not admissible against objection without showing the loss of the originals or giving notice to produce them.

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

Mockett & Polk, for plaintiff in error.

Harlan & Taylor, contra.

IRVINE, C.

Josiah H. Tilden for several years acted as agent for the Westinghouse Company in selling farm machinery, and brought this suit to recover moneys alleged to be due for services, for commissions on goods sold, and for moneys paid at the defendant's request. The petition alleged three written contracts—one for the year 1888, one for 1889, and one for 1890—and recovery was sought only on the basis of these contracts. A verdict was returned within the amount alleged in the petition to be due, but for more than that amount, deducting therefrom claims admitted during the trial to be erroneous. A remittitur of $75 was entered and judgment rendered for the remainder. The defendant brings the case here.

The judgment cannot be sustained. The written contract sued on provided on what terms Tilden should make sales. He was required to take notes to the company for deferred payments and transmit them to the company. He might retain his commissions on cash payments, but as to the deferred payments the contracts provided in unmistakable terms that the company should remit him his commissions only in proportion as payment should actually be made. A large portion of the recovery was for commissions represented by unpaid notes, and an instruction permitted a recovery in such case, provided the defendant had refused to turn the notes over to plaintiff to collect, and had failed to use reasonable diligence whereby the notes would have been collected. There was no requirement in the contract that the defendant should send the notes to plaintiff for collection, and there was no averment in the petition that the defendant had by its negligence failed to collect the notes. The plaintiff, after the evidence was in, moved to amend his petition to conform with the proofs in several respects; among them being to add: "Also by oral agree-

ments and the said written and printed contracts as modified by correspondence and concessions made by defendant to plaintiff during the time plaintiff was in the employ of defendant." Leave to so amend was given, but the amendment was not in fact made, and it is impossible to tell where the interpolation was to be made. But even had it been made in such connection as to indicate a pleading of some change in the contracts sued on, the words sought to be interpolated would not show what changes had been made in those contracts, and would show no right to recover in the respects referred to. So far as the verdict is founded on commissions on unpaid purchase-money, it is excessive and does not respond to the issues.

The record also discloses that the jury allowed interest on the different items from the dates of the respective transactions. This was contrary to one of the instructions, and in that respect the verdict was contrary to law, whether or not the instruction was correct. (*Aultman v. Reams*, 9 Neb. 487; *Omaha & R. V. R. Co. v. Hall*, 33 Neb. 229; *Standiford v. Green*, 54 Neb. 10.)

There were received in evidence over the objections of defendant a number of letter-press copies of letters addressed by plaintiff to defendant. If they were genuine the originals were presumably in possession of the defendant. They were not accounted for, nor was any notice given to produce them. Such copies are secondary in their nature. (*Delaney v. Errickson*, 10 Neb. 492; *Ward v. Beals*, 14 Neb. 114.) In the latter case the court refused to reverse a judgment for a similar error because no prejudice appeared. All the facts except one disclosed by the copies being otherwise fully established, and that one being immaterial, that view was proper. Here, however, the letters related to matters directly in issue and also tended to show that plaintiff had been persistently seeking a settlement which defendant seemed to be evading. They were very prejudicial in their character.

REVERSED AND REMANDED.

MOLINE, MILBURN & STODDARD COMPANY V. SAMUEL HAMILTON ET AL.

FILED SEPTEMBER 23, 1898. No. 8258.

1. **Replevin:** INTERVENTION: FINAL ORDER: APPEAL. A third person filed a petition of intervention in a replevin case in the county court. He obtained leave to do so, but at the time of judgment his petition was dismissed, after a finding for plaintiff. *Held*, that this was an adjudication of the merits against him, and he might appeal from the judgment.
2. **Joint Appellants:** QUESTION NOT RAISED BELOW. An objection that by the default of one of two joint appellants the appeal failed as to both, not examined, because preserved only by objecting to the evidence on the trial.
3. **Intervention:** PLEADING. An intervener must plead some interest in the subject-matter of the litigation; a mere denial of plaintiff's right is insufficient to give him a standing in court.
4. ——: ——. An interest in the intervener is a traversable fact, and in a case appealed from the county court the assertion of such interest in the petition of intervention in the county court does not excuse the failure to plead it, and so tender an issue in the district court.

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

James H. McIntosh, for plaintiff in error.

B. N. Robertson, contra.

IRVINE, C.

The Moline, Milburn & Stoddard Company sued out from the district court of Douglas county a writ of replevin for certain wagons. The B. N. Ousterhoudt Spring Wagon Manufacturing Company and Samuel Hamilton were made defendants. No service was obtained on the Ousterhoudt Company. The wagons were taken under the writ from Hamilton and delivered to plaintiff. Garwood P. Butts intervened by petition, asserting a lien as warehouseman. On the trial in the county court there

was a finding for plaintiff, an order dismissing the petition of intervention, and judgment for plaintiff. Hamilton and Butts filed a joint appeal undertaking and took the case to the district court, where the plaintiff filed his petition against the original defendants alone. Hamilton made default. Butts answered the petition by denying all its averments except as to the value of the property. On the trial the plaintiff objected to the introduction of any evidence on behalf of Butts. The objection was overruled. At the close of the evidence the court peremptorily directed a verdict for Butts for the amount which his testimony showed was due him. The plaintiff tendered an instruction that it was entitled to a verdict against Hamilton who had made default. Judgment followed in favor of Butts for a delivery to him of the property or payment of the amount of his claim.

The plaintiff, who brings the case here, asserts that Butts did not become a party, and for that reason should not have been heard. We do not think the record bears that construction. It shows that in the county court Butts was given leave to file his petition of intervention. The order at the time of judgment dismissing it was not a refusal to permit him to be heard, but a final judgment against him on the merits of his claim, from which he had a right to appeal.

It is also argued that, the appeal being joint and Hamilton having made default, the whole appeal fell. We do not consider this, because the question could not be properly raised, as was here attempted, by objection to evidence on the trial. The same is true of the suggestion, which at once occurs, whether a defendant and an intervener claiming distinctly from one another can both obtain the position of appellants under a single undertaking.

The exceptions to the instructions were well taken. Butts' only pleading in the district court was an answer to the petition, in effect a general denial. The petition asserted nothing against him. It alleged that plaintiff

was the owner and entitled to the possession of the chattels and that Hamilton and the Ousterhoudt Company unlawfully detained them. These were the material averments traversed by Butts. Their denial showed no right in the intervener to the property and could not found a judgment for its delivery to him. The defendant in replevin it is true may under a general denial show a special interest in himself where such evidence negatives plaintiff's averment of right of possession and unlawful detention by defendant. But a stranger may not intrude himself into a case without any interest in the subject-matter and defeat plaintiff by denying his right as against the defendant. Much less may such stranger without interest obtain judgment for a delivery to him of the property in litigation merely by disputing plaintiff's right. The first requisite of an intervention is that the intervener show that he claims an interest in the subject-matter of the litigation. (Code of Civil Procedure, sec. 50*a*.) This is well illustrated by two cases of the same title—*Welborn v. Eskey*, 25 Neb. 193, 25 Neb. 195. Each was replevin, in each there was an intervention, in each the district court had failed to rule on the petition of intervention, and the intervener sought a reversal for that reason. In the latter the judgment was reversed. In the former it was affirmed, for the reason that the petition of intervention showed no interest in the intervener, and the error was therefore without prejudice. The assertion of an interest in the original petition of intervention in the county court was not enough. Under our practice new pleadings are filed on appeal. The allegation of an interest in the intervener was a traversable averment, and the intervener should, by appropriate pleadings, have made the averment in the district court, and so tendered an issue. As the case stood the plaintiff was on the pleadings and proofs entitled to judgment against Hamilton, and Butts had, under his answer, no standing in court.

REVERSED AND REMANDED.

MARY LAMB ET AL. V. LIZZIE LYNCH ET AL.

FILED SEPTEMBER 23, 1898. No. 8291.

1. **Perpetuities:** DEVISE TO BISHOP AND SUCCESSORS. The rule against perpetuities is aimed against undue restraints on alienation. A devise to a named bishop and his successors, without such restraint, does not offend against the rule.
2. **Opinion Evidence:** INSANITY. Non-expert witnesses can be permitted to express opinions as to the sanity or insanity of a person only when they have shown other sufficient qualifications, and have stated the facts and circumstances upon which their opinion of mental condition is based.
3. **Testamentary Capacity:** INSTRUCTIONS: REVIEW. The court having of its own motion instructed the jury as to the bearing of the testator's conduct, previously to executing a contested will, on the question of his mental condition at the time of such execution, it was error to refuse an instruction, correct in law and applicable to the evidence, as to the bearing of his subsequent conduct on the same issue.

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

T. J. Mahoney and *Mahoney & Smyth*, for plaintiffs in error.

C. A. Baldwin and *George W. Doane, contra.*

IRVINE, C.

James M. Ryan, a priest of the Catholic Church, died in Omaha, March 25, 1894, leaving an instrument, executed in due form, purporting to be his last will and testament. By this there was bequeathed to Father Ryan's sister, Mrs. Mary Lamb, $8,000. The remainder of the estate—quite considerable in value—was bequeathed and devised "to the Rt. Rev. Richard Scannell, Roman Catholic Bishop of the diocese of Omaha, and to his successors in the bishopric of said diocese, to be disposed of or used by said bishop in whatsoever manner said bishop shall deem of greatest advantage to the Roman

Catholic Church in said diocese." The instrument was propounded for probate by Mrs. Lamb, and its probate contested by certain nephews and nieces of Father Ryan, heirs at law and distributees. The grounds of contest were, first, that the will by its terms was invalid; secondly, that at the time it was made Father Ryan was not of sound or disposing mind; thirdly, undue influence. The county court admitted the will to probate. On appeal to the district court there was a verdict for the contestants. The proponent, with whom joins the bishop, brings proceedings in error from the judgment denying probate which resulted from the verdict.

If, as contestants assert, the will is invalid on its face, the judgment must be affirmed without regard to what occurred on the trial. The illegality asserted is that the clause quoted creates a perpetuity. But we cannot read that clause in any manner even implying the slightest restraint on alienation, and it is only an undue restraint on alienation which creates a forbidden perpetuity. The grant to the present bishop and his successors is a limitation of the estate. It does not create estates in remainder to the various successors. Moreover there is an express grant of the power of alienation.

The contention at the trial was, not that Father Ryan was insane in the usual sense, but that when the will was made he was so affected by bodily disease that he was for the time being incapable of exercising that degree of reason which the law in such case demands. Much of the evidence on this issue was in the form of opinions by witnesses not experts. All this testimony was objected to and the rulings admitting it are assigned as error. The character of this evidence and the foundation laid therefor may be illustrated by the testimony of Mrs. Lynch, a niece of the decedent. She testified that she knew Father Ryan; saw him at Mrs. Lamb's house in December, 1891, when he was there sick. He went there December 17. She saw him "mostly every day" the first week of his illness. Saw him December 25 (the day the will was

executed). She that day went to his room and talked to him. He was in bed. Fourteen years before the trial she had kept house for him for a period of about three years. He had often promised he would give witness a house and lot. He had never in fact compensated her for her services. The day after the will was made she called on him. Tears came to his eyes, and he said: "Lizzie, I didn't intend to treat you that way. I didn't know what I was doing." He was in a very bad condition. Solely on this foundation the following question was asked: "From your acquaintance with Father Ryan as you have detailed it to the court and jury, tell the court whether or not on the evening of this 25th day of December, 1891, Father Ryan was in condition to transact ordinary business." She answered in the negative. The conditions under which the opinions of witnesses, not experts, may be received on such an issue, have been several times defined by this court. Such opinions may be received only when they come from persons who have observed the person in question frequently and for a considerable period, and then only after they have narrated the facts on which their opinion is based. (*Schlencker v. State*, 9 Neb. 241; *Shults v. State*, 37 Neb. 481; *Polin v. State*, 14 Neb. 540; *Pfleuger v. State*, 46 Neb. 493; *Hay v. Miller*, 48 Neb. 156; *Hoover v. State*, 48 Neb. 184.) The latter requirement is not merely of proof wherefrom it may appear that the witness had opportunities for observation justifying the formation of some opinion, but it is a requirement that the specific facts leading to the opinion be stated to the jury. The same rule prevails in most of the states, and while the reason therefor does not seem to have been stated in any of our opinions, it may be found from an examination and comparison of decisions elsewhere which this court has expressly followed, or which have been called to its attention in the investigation of the earlier cases. Among such cases are the following: *Clapp v. Fullerton*, 34 N. Y. 190; *State v. Stickley*, 41 Ia. 232; *State v. Klinger*, 46 Mo. 224; *Grant v. Thompson*,

4 Conn. 203; *Shaver v. McCarthy*, 110 Pa. St. 339; *Holcomb v. State*, 41 Tex. 125; *Connecticut Mutual Life Ins. Co. v. Lathrop*, 111 U. S. 612. The witness must detail the facts to the jury, for its information, not to inform the court as to his opportunities to observe; and this to afford the jury means of determining what credit should be given to the opinion. Indeed the facts are the principal thing; the opinion, an incident. The facts being narrated, the witness may then, by such an opinion, say what impression they created on his mind at the time of the occurrence. Thus the jury has the basis for a judgment of its own—the aid of the witness's opinion, and the means of weighing that opinion. It will be seen that the testimony of Mrs. Lynch was wholly wanting in this respect. She showed a long acquaintance and apparently intimate relations with Father Ryan and that she had seen him frequently about the time in question. But details as to his condition, his conduct, his appearance are entirely missing. There is, it is true, a repetition of a short remark the day after that to which the inquiry immediately relates, but this remark throws no light on the issue we are now considering. His language might have been that of a person entirely sane or wholly demented. With the other witnesses the foundation was similar, except that a brief conversation with Father Ryan, immediately after the will was executed, was related. The conversation was not significant of mental condition. If that was all these witnesses observed, and on which they entirely based their opinion, the opinion should have been excluded because not founded on sufficient data. (*Shaver v. McCarthy, supra.*) If other facts were by them observed and used in forming the opinion, they should have been narrated. By this we do not mean that, before the opinion may be received, the witness must, to the remotest minutiæ, detail every fact which has in any degree influenced his judgment. That is impossible. Unremembered trifles of appearance, gesture, accent, may have had an influence on the mind. It is

precisely for the sake of obtaining in brief the resultant of these details, impossible of portrayal, that some courts permit the opinion to be given. But it is necessary that the essentials be narrated and detailed to such an extent that the jury may judge of the correctness of the opinion formed, and, therefore, from those facts itself form a conclusion.

Father Ryan lived more than two years after the will was executed. He recovered his health, at least to the extent that he made a journey to Chicago, and from time to time performed duties appertaining to his priestly office. There was evidence tending to show that after his recovery the lawyer who drew the will and who had retained it after execution, told Father Ryan that he had heard talk of the latter's having made a provision for Mrs. Lamb different from that made in the will, and that he preferred for that reason to place the will in Father Ryan's custody; that Father Ryan kept the will for about a year and then gave it into the custody of Mrs. Lamb. The proponent requested the following instruction: "It will be your duty to inquire and determine from all the evidence in the case what the mental condition of the deceased was at the time of making the will in question, as his mental condition at that time will have to control as to whether he was of sound mind in making the will, and in this connection if you find from the evidence that he had the will in his custody and possession for a long period of time between the date of its execution and the time of his death, that during said time he was in the full possession of his mental faculties and uninfluenced by any coercion or undue influence and delivered said will to the witness Anna Lamb with instructions for its safe-keeping, you will take that fact into account as a circumstance bearing upon the question of his mental condition at the time the will was executed." This was refused. There was also testimony tending to show that Father Ryan had previously expressed an intention to provide for other relatives and declared he would give

nothing to the church. The court of its own motion instructed as follows: "If you believe from the evidence that said testator before executing said instrument had expressed any fixed purpose and intention regarding the disposition of his property at variance with the provisions of his said will, then you may consider whether or not the provisions thereof are consistent with mental soundness and with his previously expressed and fixed purpose, if any; and if you find they are so, then those facts also may be weighed by you in determining the question of mental soundness of said testator at the time of the execution of the written instrument under consideration." It is not always error to refuse an instruction correct in the abstract and applicable to the evidence, asked for the purpose of explaining the bearing of particular evidence singled out from the mass; but here we think the former instruction should have been given. It was applicable to the proof, stated the rule correctly, and related to evidence the pertinency of which might not be realized or properly understood in the absence of an instruction. The court had of its own motion instructed in a similar manner as to the pertinency of Father Ryan's past conduct, and justice demanded that on proper request it should also instruct as to the pertinency of his subsequent conduct.

REVERSED AND REMANDED.

BRENNAN-LOVE COMPANY V. JAMES H. MCINTOSH.

FILED SEPTEMBER 23, 1898. No. 9791.

1. **Bill of Exceptions: AMENDMENTS.** In settling a bill of exceptions it is not sufficient that a paper containing suggestions of amendments be attached, and that it be disclosed that such amendments were allowed. Amendments which are allowed should be actually made in the body of the bill.

2. ———: CORRECTIONS AFTER SETTLEMENT. A district judge has authority, after the expiration of the time for settling a bill of exceptions, to make corrections therein, if it be found not to disclose what it was intended to at the time of settlement.

3. ———: RETURN FOR CORRECTIONS BELOW. If it be disclosed, after the bill reaches this court, that it does not disclose what the trial judge intended at the time of settlement, it will be remanded to the district court for correction under his supervision.

PROCEEDING to review an order of the district court of Douglas county overruling a motion to quash the bill of exceptions. Heard below before DICKINSON, J. *Remanded for amendments.*

Mcikle & Gaines, for plaintiff in error.

Charles A. Goss and *James H. McIntosh, contra.*

IRVINE, C.

In this case the defendant in error moved in the district court, after the bill of exceptions had been settled, that the certificate thereto be cancelled and the bill quashed. The motion was overruled and the defendant has filed here a supplemental transcript embodying the proceedings, and seeks a review of the action of the district court on the motion.

The record discloses that the plaintiff in error, the defendant in the district court, within the time limited tendered to defendant in error a proposed bill of exceptions. The defendant in error returned it proposing eight amendments. Of these seven related to more or less formal changes in the transcript of the oral testimony, the remaining one suggested that a copy of a telegram in evidence was incomplete in that it disclosed the message alone and did not show the check marks, whereby the time and manner of transmission are indicated. Plaintiff in error wrote on the paper proposing the amendments: "The amendments hereby proposed are accepted by defendant," and, with the paper attached to the bill, presented it to the trial judge, who settled the

bill in that condition, the amendments not being in fact made. The motion to quash the bill was founded on the failure to incorporate the amendments, it being claimed that unless the amendments be in fact made there is no authority to settle the bill without notice. On the hearing of the motion the court ordered the plaintiff in error to attach to the bill a true copy of the telegram or the original thereof, and the latter having been done, overruled the motion, on the theory that the remaining amendments were sufficiently disclosed by the suggestions thereof.

It is quite correctly contended by defendant in error that amendments are not properly made by a separate paper suggesting and allowing them. They should be incorporated into the bill before it is settled. This court will not look to several papers to find what the bill was intended to be. On one occasion at least this court has referred a bill so settled back to the trial judge that the amendments allowed might be incorporated under his direction.

The further contention of defendant in error that, after the expiration of the statutory time for settlement, the district judge had no power to make or permit an amendment, and that the whole bill must therefore fail, cannot be adopted. It is true that a bill of exceptions is the creature of statute, and can be allowed only within the time fixed by statute. But where a bill of exceptions has been settled within that time it becomes a part of the record, and if it be incomplete, or by mistake fail to represent what it was intended to when the judge allowed it, the judge has the same power to correct it that he has to make any other part of his record speak the truth. This court must take the bill as it comes from the trial court, but for many years it has been the practice, when it appeared that the bill failed to show what the district judge at the time of allowance intended that it should show, to remand the bill to that judge that it might be corrected under his supervision. (*Macfarland v. West Side Improve-*

ment Ass'n, 47 Neb. 661, 53 Neb. 421.) In ordering the telegram to be attached the trial judge did only what this court on a proper showing would have directed him to do.

But the bill is still imperfect in that it fails to conform to the other amendments suggested and allowed. We have no authority to go through the bill and change it in these particulars, and while the papers attached show what these amendments should be, unless they be incorporated in the body of the bill it will be impossible to examine it properly. The action of the district court in overruling the motion to quash is affirmed, but the record will be returned to the trial judge with directions to cause the other amendments to be actually made.

ORDER ACCORDINGLY.

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

FILED SEPTEMBER 23, 1898. No. 10008.

1. **Claims Against State:** APPEAL FROM DECISION OF AUDITOR. Under the constitution every claimant against the state has the right to have the auditor examine and pass upon his claim, and to appeal to the district court from an adverse decision.

2. ———: ———: OFFICERS. Statutes conferring power on other officers to examine claims, and requiring the approval of such other officers before the claim is paid, are at the most requirements as to evidence. They cannot deprive the auditor of the power of passing on the claim or the claimant of the right to appeal.

3. ———: RECORD OF AUDITOR. The auditor is required to keep a record of his action on claims. A memorandum made on a voucher returned to the claimant is not such a record.

4. ———: ———: CORRECTIONS. The auditor, if his records are by mistake or otherwise made to incorrectly state his action, may correct them by making them show what was actually done.

5. ———: DUTY OF AUDITOR: MANDAMUS. If the auditor refuses to examine or pass upon a claim, this court will not examine into

the merits of the claim as a means of determining whether action would be available to the claimant. It will compel action and leave the merits to be examined in the manner provided by law.

ORIGINAL application for mandamus to require the auditor of public accounts to examine, audit, and allow or disallow claims presented by relator against the state. *Writ allowed.*

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

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

IRVINE, C.

This case is akin to *State v. Williams*, 54 Neb. 154, and *State v. Cornell*, 54 Neb. 158. It grows out of the same controversy and involves a portion of the claims involved in the latter case. *State v. Cornell, supra*, was an application for a writ of mandamus to compel the payment of certain claims for supplies furnished to the Home for the Friendless and of salaries of officers thereof. The writ was denied because, for the disallowance of claims against the state by the auditor, the law affords an adequate remedy by appeal. After the decision of that case the present was instituted, the relator alleging that vouchers for the claims in controversy had been presented to the auditor and that that officer had declined to act on them or make any record thereof or permit them to remain in his office. The prayer is for a mandamus requiring the auditor to examine, audit, and allow or disallow the claims. The auditor answered denying the validity of the claims, and averring that they had previously been presented to him and that he had disallowed them by indorsing a rejection on each of the vouchers. The case has now been submitted on the pleadings, and the report of the referee appointed to take the testimony.

The first question naturally arising is on the issue whether the auditor did refuse to act, or, on the other hand, disallowed the claims. If he disallowed them no further action can be demanded. The evidence on this issue discloses clearly what was done and resolves the issue into a difference of opinion between the parties as to the legal effect of the auditor's acts. Prior to the institution of the former case the vouchers were presented to the deputy auditor, who examined them only so far as to ascertain that they were on behalf of the Home for the Friendless. Then by him or by his direction there was indorsed on each: "Rejected because not approved by the board of public lands and buildings." After the decision of the former case, when its result was stated to the auditor, he declared that there had been no intention of passing on the claims, but that he had refused to examine them. He then furnished to relator a number of slips for the purpose of having them attached to the vouchers. Each read as follows: "This claim presented for auditing and allowance by the society of the Home for the Friendless, acting through H. A. Babcock as its attorney, and the auditor declines to file, examine, audit, or consider the same because it has not been approved by the board of public lands and buildings, and declines to make any record thereof in the auditor's office."

The constitution provides (art. 9, sec. 9): "The legislature shall provide by law, that all claims upon the treasury, shall be examined and adjusted by the auditor, and approved by the secretary of state, before any warrant for the amount allowed shall be drawn. Provided, that a party aggrieved by the decision of the auditor and secretary of state may appeal to district court." In accordance with this mandate the legislature has so provided. (Compiled Statutes, ch. 83, art. 8.) But the legislature has also undertaken to surround the expenditures on behalf of state institutions with additional safeguards. It has enacted (Compiled Statutes, ch. 83, art. 12) that

certain officers shall constitute a board of purchases and supplies; that vouchers for supplies approved by the board shall be approved by the secretary of state; and that the auditor shall thereupon draw his warrant therefor. It is also provided (Compiled Statutes, ch. 83, art.7) that the board of public lands and buildings shall examine the accounts of officers of institutions, and, if correct, approve them; and the auditor is then directed to draw his warrant. It is further enacted that no such claims shall be entitled to payment until so approved. Presumably the auditor refused to act because these preliminaries had not been satisfied, giving the statutes a literal construction. It is clear that by the constitution the auditor is made the responsible adjusting officer, and the legislation giving effect to the constitutional provision requires him to pass upon claims and to keep a record of his action. The purposes of this case do not require us to determine to what extent it is competent for the legislature to control his action by requiring other officers to examine claims. Certainly the constitution contemplated two things: First, that the auditor should have the power, and on him should rest the duty, of examining every claim upon the treasury; secondly, that every claimant should, by appeal from the auditor's decision, have the right to have tested judicially, and according to the ordinary methods of procedure, his claims against the state. Whatever restrictions the legislature may impose, of the kind to which we have referred, must be merely in the nature of evidential requirements. Without flagrant disregard of the constitution such legislation cannot be given the effect of transferring from the auditor to other officers the power of examining and finally passing upon the merits of claims. Nor can such legislation be given the effect of depriving a party of the right to a judicial inquiry into the justice of his claim, by preventing an appeal. If the auditor may refuse to pass upon a claim because it has not been approved by the board of public lands and buildings, the

refusal of that board to approve a claim would defeat it finally and deprive the claimant of all right to be heard in the manner secured by the constitution. We do not pass upon the question whether the Home for the Friendless is a state institution. Whatever its position it is entitled to have its claims ruled upon by the constitutional accounting officer and to appeal from his decision if adverse.

The proofs show that the auditor in fact refused to pass upon the claim, or to examine its merits, and refused to make any record. It is said that his indorsement on the vouchers was a rejection, and that he had no right to change his record. There are two answers to this argument. The first is that the statute requires the auditor to keep the record. An indorsement on a voucher not retained by the auditor, but returned to the applicant, is not such a record. The other is that if the auditor makes an entry which, through mistake, is false, and does not show what really occurred, he has the power to correct it, just as a court may correct its record. To hold otherwise would be monstrous. The auditor did not here undertake to change his action. He merely undertook to correct a memorandum made by him which incorrectly stated his action.

We do not mean to intimate whether the failure to purchase supplies through the board of purchase and supplies, or whether the failure to obtain the approval of the board of public lands and buildings, would be a sufficient reason for rejecting a claim. It is not a sufficient reason for refusing to pass upon it and make a record for an appeal. Giving the statutes their fullest possible force a claim so situated would only lack the necessary evidence to justify its allowance.

It is argued that because of these defects and on the merits of the claims, they must be disallowed, and that a writ will not issue to compel the performance of a vain act. No authority has been cited to this proposition, nor have we been able to find any. On principle it seems

untenable. This court has no original jurisdiction of claims against the state. An application for a mandamus cannot be used to confer jurisdiction to determine indirectly what the court has no jurisdiction to pass upon. Whether we consider the claims clearly good or clearly bad or of a doubtful character is of no consequence. The constitution gives the relator the right to present them, to have them acted upon by the auditor and to appeal from his decision. For this court, when such right has been denied, to inquire into the merits of the claim and to grant or refuse relief according as we think the claim should be allowed or rejected would be the plainest usurpation of authority reposed solely in the auditor in the first instance, and then in the courts through appellate proceedings alone. Further, a litigant has a right to a judgment in the manner provided by law even if that judgment be adverse to him, especially when such judgment is the foundation of a right to appeal. While the auditor's action is not, strictly speaking, a judicial investigation and judgment, it is an essential prerequisite to such investigation. To deny him one deprives him of the other. All the cases where a court of competent jurisdiction has been compelled to hear and pass judgment on a case, without any inquiry by the court awarding the writ into the merits of the case, or any direction as to what judgment should be rendered, are, in principle, applicable, as are those other cases where an officer clothed with discretion has been compelled to exercise that discretion without directions as to the manner of its exercise. This court, like all others of last resort, is sometimes called upon to compel the judge of an inferior court to settle a bill of exceptions. It has never been suggested that to such an application it is a good answer to show that the bill if settled would not disclose any error. That is a question that the parties are entitled to have settled in a different way, and which cannot be inquired into on mandamus.

Finally it is said that the relator is not the real party

in interest. It claims to own the claims in controversy and its title and its right to assert them are also questions to be passed upon in auditing the claims. They do not justify a refusal to examine them.

WRIT ALLOWED.

FIRST NATIONAL BANK OF HASTINGS V. FARMERS & MERCHANTS BANK ET AL.

FILED SEPTEMBER 23, 1898. No. 7685.

1. **Negotiable Instruments:** INDORSEMENTS. An indorser of a negotiable instrument guaranties the genuineness of prior indorsements.

2. ———: ———: FORGERY: ESTOPPEL. Accordingly, where a check is drawn payable to the order of a named payee, one who takes the check on the forged indorsement of the payee and himself indorses it, is liable to the bank on which the check is drawn if that bank pays it in ignorance of the forgery, in the absence of circumstances estopping the drawer from setting up the forgery.

3. ———: ———: ———: EVIDENCE. There was presented to a trust company by its local correspondent an application for a loan, offering certain land as security. The application was signed "B.," and an abstract also tendered showed title in B. The loan having been accepted, a bond and mortgage were tendered purporting to be executed by B. The company sent to the correspondent a check payable to the order of B. This check was presented to a bank bearing the indorsement "B." and also the indorsement of the correspondent. The bank paid the check to the correspondent and itself indorsed it, and the bank on which it was drawn paid it. B. did not own the land, and the abstract was false and forged. *Held*, (1) That if the application was made and the bond and mortgage executed by a third person, and that person indorsed the check, the indorsement was genuine, whether or not his real name was B., and although he did not own the land; (2) if the correspondent himself signed the application, bond, and mortgage, and indorsed the check, the indorsement was a forgery.

4. ———: ———: ———: ———. Evidence examined, and *held* not to sustain a finding that the indorsement was genuine.

5. **Principal and Agent:** AGENT'S AUTHORITY: ESTOPPEL. A principal is not estopped to deny the authority of his agent to perform a particular act, on the ground that it was within the agent's apparent authority, unless the authority to perform it was apparent to the person dealing with the agent, and by him relied on.

6. ———: ———. Evidence examined, and *held* not to show apparent authority in the correspondent to receive the money on the check.

7. **Custom:** PLEADING AND PROOF. A custom, special to a particular class of business operations, to be availed of, must be pleaded, and, if put in issue, proved.

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

J. B. Cessnâ, J. A. Casto, and *A. M. Post,* for plaintiff in error.

T. J. Mahoney, Mahoney, Minahan & Smyth, McAllister & Cornelius, and *Lake, Hamilton & Maxwell, contra.*

IRVINE, C.

In 1892 one A. M. Swartzendruver lived in Columbus and occupied certain relations with the Nebraska Loan & Trust Company of Hastings. The precise character of these relations is one of the questions in controversy, but it suffices for present purposes to say that he had authority to receive and transmit to the trust company applications for loans on real estate security, and bonds and mortgages securing such loans, and, in some cases at least, to deliver the instruments transmitting the money to the borrower. He transmitted to the company an application for a loan, purporting to be made by one John Baughman, and offering certain described land in Platte county as security. An abstract was also sent purporting to be made by Becher, Jaeggi & Co., and showing title in Baughman clear of incumbrance. The loan was accepted by the company and Swartzendruver transmitted to it a bond and mortgage, the bond purporting to be executed by Baughman and the mortgage by Baughman and wife. The signatures were in each in-

stance by a mark. The loan company sent to Swartzendruver its check on the First National Bank of Hastings for $1,136, the net amount of the loan, the check being drawn payable to the order of John Baughman. Swartzendruver presented this check to the Farmers & Merchants Bank of Platte Center, indorsed as follows: "John his x Baughman. Witness: A. M. Swartzendruver. A. M. mark Swartzendruver." The bank paid him the amount of the check, and, having indorsed it, sent it to the United States National Bank of Omaha, which in turn indorsed it and sent it to the First National Bank of Hastings, which paid it. The trust company afterwards discovering that, as it supposed, the indorsement of Baughman was forged, the Hastings bank credited back to the trust company its amount, and brought suit against the Platte Center and the Omaha banks on their respective indorsements. Among the facts clearly established are that the land described in the mortgage did not and never did belong to Baughman, that the abstract was forged, and that the certificate of recording of the mortgage was also forged.

A large portion of the voluminous briefs is devoted to a discussion of the law with reference to negotiable instruments drawn to the order of fictitious payees, and whether the fictitious character of the payee depends upon the non-existence of the person named or the drawer's knowledge of his non-existence. An examination of the instructions against which this argument is directed convinces us that they really conform to the plaintiff's theory of the law in this respect and that they are not open to adverse criticism. On this branch of the case the essential issue made was whether the Baughman indorsement was genuine or forged, not whether such a person as Baughman existed or did not exist. After stating the issues the court gave the following instructions:

"7. From the evidence it conclusively appears that the Loan & Trust Company on the 10th day of August, 1892,

had in its possession a bond for $1,200 and a mortgage to secure the same, covering real estate in Platte county, both of which instruments purported to have been executed by John Baughman; that the said Loan & Trust Company believed said Baughman was a real person; believed that he had executed the bond and mortgage aforesaid, and that in consequence thereof they were indebted to him in the sum of $1,136; that they executed the check in question intending thereby to pay him such supposed indebtedness. It thus appears that the Loan & Trust Company, when it issued said check, intended it for a real person named John Baughman who it supposed had executed the bond and mortgage aforesaid. No other person, under these circumstances, could indorse said check, or without Baughman's true indorsement rightfully receive the money therein directed to be paid. Neither the defendants nor any other bank was authorized to pay or cash said check without the genuine indorsement thereon of the payee, the person for whom it was intended by the Loan & Trust Company. Therefore, if Baughman was a fictitious person, and his name indorsed on the check a mere forgery, the payment thereof by the Farmers & Merchants Bank was unauthorized, and it and its co-defendant must bear the resulting loss.

"8. But if a person bearing the real or assumed name of John Baughman made to the Loan & Trust Company the application for a loan given in evidence, and executed the bond and mortgage aforesaid, and also indorsed his name upon the check in question before it was presented for payment to the Farmers & Merchants Bank, then the payment of said check by said bank was authorized and rightfully made, and the plaintiff cannot recover, even though Baughman did not own the land described in the mortgage and was unknown in this county, and either alone or in collusion with others, imposed on and deceived the Loan & Trust Company with intent to cheat and defraud it.

"9. The Loan & Trust Company, however, did not intend that said check should be paid to Swartzendruver. Therefore if he forged the abstract, bond and mortgage and indorsement of the name of 'John his x mark Baughman' on the check, payment thereof by the Farmers & Merchants Bank was unauthorized, and the plaintiff is entitled to a verdict in its favor."

By the seventh instruction the jury was told that, the trust company believing that John Baughman was a real person, and intending the check to be paid only to his order, no other person could indorse it, or, without Baughman's true indorsement, rightfully receive the money, and that the bank could not rightfully pay the money without his true indorsement. By the eighth it was in effect stated that if a person whose real or assumed name was Baughman had made the application and executed the bond and mortgage, and had indorsed the check, then the indorsement was genuine and the bank protected. The ninth was that the trust company did not intend Swartzendruver to be the payee, and if he indorsed the name of Baughman the indorsement would be a forgery. A little reflection, even without the aid of the many authorities cited, must show that this theory was sound. An indorser guaranties the genuineness of prior indorsements; and if the Baughman indorsement was not genuine the indorsing banks were liable, unless indeed the trust company was estopped to set up the forgery and the bank's repayment of the amount to the company was therefore voluntary—a question arising on another branch of the case. If some one other than Swartzendruver, or even some one in collusion with him, falsely pretended to own the land, executed the bond and mortgage and indorsed the check, the indorsement would not be forged, it would be by the person to whom the check was in terms payable. The false representation of ownership of the land, and the assumption of a false name would be merely steps in de-

frauding the company, but the crime would not be forgery. But if Swartzendruver himself had executed the previous papers and indorsed the check, the indorsement was a forgery. He was not the one intended as the payee nor was he described as such.

Examining the evidence with a view to this issue we are persuaded that it demanded a verdict for the plaintiff, and that the verdict rendered cannot be sustained. In this we assume, as the parties assumed by their method of trial, and as the district court charged, that the burden of proof was on the plaintiff. The plaintiff so clearly satisfied this burden that without countervailing evidence there was no room for a finding adverse to plaintiff. The plaintiff showed that the abstract was forged, that Baughman never owned the land and the real owner had no connection with the transaction. The application stated Baughman's address to be Columbus and the postmaster did not know of such a person's ever receiving mail there. Several residents of the neighborhood, believing themselves conversant with its habitués, never heard of Baughman. The application was entirely in Swartzendruver's handwriting. The signature of Baughman in each instance, and that of his wife on the mortgage, was by means of a mark, and in each instance was witnessed by Swartzendruver alone. The check was presented by Swartzendruver alone, and no one could point to any other person as having had connection with the unlawful operation. Swartzendruver received the money and soon after fled the country. The inference from these facts certainly is that he was the criminal. The presumption of innocence does not aid the defendants. A crime was proved. Swartzendruver was at least an accomplice. To avoid the conclusion of forgery by him it is necessary to presume without any proof that another crime was committed by another person. There should be some proof of this before even a doubt of Swartzendruver's sole guilt could reasonably arise. It is claimed that there is some proof arising from two facts:

First, the abstract was not in Swartzendruver's handwriting; secondly, the certificate of acknowledgment of the mortgage showed that some person known to the notary to be Baughman, personally appeared and acknowledged it. Under the circumstances we cannot see that either fact has the slightest probative value. To present an abstract in Swartzendruver's handwriting would be an act of recklessness which would lead to the discovery of the fraud before its fruits could be plucked; while it would be an obvious manœuvre to procure an innocent person to copy such a paper and then use the copy. As to the certificate of acknowledgment it was Swartzendruver himself who as notary made the certificate. If he concocted the scheme and performed the other acts he would not hesitate to do this part. There is no sanctity about an official seal which makes it tell the truth when used by a dishonest man. To suppose without evidence that there was a guilty third person, and in face of strong proof of one crime, to avoid a finding thereof by presuming without evidence a different crime, is to reason irrationally. In criminal cases it is often said that the jury must not reason irrationally to create a doubt; that they must not resort to fanciful conjectures and absurd hypotheses having no bases in the evidence; that they must not doubt as jurors what they believe as men. If so, then in this, a civil case, where the plaintiff was only required to produce a preponderance of the evidence, the jury must not overthrow a strong presumptive case made by the proofs, by the unfounded assumption of a state of facts which there is no evidence to render even probable. The mind is irresistibly led to the conclusion that this transaction was a bold and systematic scheme of forgery, secretly devised and successfully carried out by Swartzendruver himself.

One of the defenses interposed, and sustained to a certain extent at least by special findings of the jury, was that Swartzendruver was the agent of the trust company, authorized or apparently authorized to indorse the check

or to procure its indorsement, and then to receive payment and see to the application of the proceeds; that the trust company is therefore estopped from saying that the indorsement was forged, and that the Hastings bank in repaying the money, did so voluntarily and was not legally damnified. The evidence does not sustain this theory. Swartzendruver was in a sense the agent of the company, although the latter saw fit to style him a "local correspondent." But his agency was limited in character. The company furnished him blanks and he secured applications for loans which he forwarded to the company. He also sent abstracts, and if the loan was accepted procured the execution of the securities and sent them to the company. The company then remitted the loan through him, drawing in each instance, so far as the evidence discloses, a check to the order of the borrower. A form of letter was used in this last remittance, apparently a printed form. In the Baughman case it was as follows: "We inclose for John Baughman our draft to close the loan as per statement." Then followed a statement of the account. Below this was a form beginning: "Close the loan with care. Remove all liens (if any) and pay all taxes due," followed by other instructions. In the Baughman letter, all following the statement of account was stricken out. The words could be read below the erasing lines, but this served only to emphasize the fact that in this case Swartzendruver was to do nothing but deliver the check to Baughman. Clearly he had no actual authority to indorse it, or to receive the money after a genuine indorsement. But it is claimed that the transmission of previous checks, with directions to remove liens and pay taxes, conferred an apparent authority which could not be here limited as against the bank by secret instructions. To make out such a case defendant's reliance on such apparent authority would be an essential element. Authority to procure the indorsement and receive the money in other cases would not imply authority to forge the indorsement in

this. If the previous indorsements were also forged, such acts would not bind the company in this case unless at least when it sent this check it knew of the prior crimes. The evidence is that it did not have such knowledge. Authority to see to the application of money might imply authority to procure a genuine indorsement, but it would not imply authority to indorse the name of a third person to whom the check was payable. The Platte Center Bank had paid two previous checks in a similar manner, and in one case Swartzendruver's instructions had been to pay prior liens. But if other elements of an estoppel existed that of defendant's reliance did not, as based on that transaction, because it is not shown that the bank relied on the instructions so given or that it even knew thereof. The apparent authority which will estop a principal to deny an agency must be an authority apparent to the one dealing with the agent, and by him relied on.

It is said that it is a matter of common knowledge that in such cases the correspondent is expected to procure payment of the check and discharge prior incumbrances from its proceeds, and that to do so he must either indorse the check or procure its indorsement. It is therefore claimed that apparent authority thereby existed, the fact of Swartzendruver's agency being known to the bank. If such a custom exists, it is peculiar to a single class of operations and is at variance with the tenor of the checks drawn in this case. The court certainly cannot take notice of such a custom and it was neither pleaded nor proved. Its legal effect, if it exists, cannot be now considered.

REVERSED AND REMANDED.

SULLIVAN, J., and RAGAN, C., not sitting.

STATE OF NEBRASKA, EX REL. HIRAM SAVAGE ET AL., V. CHARLES B. LETTON, JUDGE.

FILED SEPTEMBER 23, 1898. No. 9958.

Replevin: DISMISSAL: RIGHTS OF DEFENDANT: JURY TRIAL. In an action of replevin wherein the property has been taken under the writ and delivered to the plaintiff, if the defendant on motion for such purpose secures a declaration of the non-jurisdiction of the court over the subject-matter of the suit and a dismissal thereof for that reason, he is not entitled by virtue of the provisions of sections 190 or 1041 of the Code of Civil Procedure or otherwise to have a jury impaneled, to inquire of his rights of property and possession. SULLIVAN, J., and RAGAN, C., dissenting.

ORIGINAL application for mandamus. The facts are stated in the opinion. *Writ denied.*

F. B. Sheldon and *E. O. Kretsinger*, for relators.

References: *State v. Hunter*, 27 Pac. Rep. [Wash.] 1076; *Whalcy v. King*, 28 Pac. Rep. [Cal.] 579; *State v. McClinton*, 48 Pac. Rep. [Wash.] 740; *State v. Engle*, 127 Ind. 457; *Ex parte Charleston*, 18 So. Rep. [Ala.] 224; *Brown v. Mesnard Mining Co.*, 63 N. W. Rep. [Mich.] 1000; *People v. Swift*, 59 Mich. 529; *Illinois C. R. Co. v. People*, 143 Ill. 434; *State v. Scott*, 53 Neb. 571; *Garber v. Palmer*, 47 Neb. 699; *Bolin v. Fines*, 51 Neb. 650; *Bartels v. Sonnenschein*, 54 Neb. 68; *State v. Tarpen*, 1 N. E. Rep. [O.] 215; *State v. Home Street R. Co.*, 43 Neb. 830; *State v. Merrell*, 43 Neb. 575; *State v. Holmes*, 38 Neb. 355; *State v. Laflin*, 40 Neb. 442; *State v. Thiele*, 19 Neb. 220; *O'Chander v. State*, 46 Neb. 10; *State v. Beall*, 48 Neb. 817; *City of Emporia v. Randolph*, 56 Kan. 117; *State v. Parker*, 12 Wash. 685; *Shedenhelm v. Shedenhelm*, 21 Neb. 387; *Grimes v. Chamberlain*, 27 Neb. 605.

George A. Murphy, contra.

References: *Williams v. Bruffy*, 102 U. S. 249; *Smith v. Western Union Telegraph Co.*, 83 Ky. 271; *Draper v.*

Davis, 102 U. S. 371; *State Bank v. Green*, 8 Neb. 297; *Kountze v. Erck*, 45 Neb. 288; *State v. Churchill*, 37 Neb. 702; *People v. McRoberts*, 100 Ill. 458; *Ives v. Muskegon Circuit Judge*, 40 Mich. 63; *Ex parte Perry*, 102 U. S. 183; *Ex parte Whitney*, 13 Pet. [U. S.] 404; *People v. Dutchess*, 20 Wend. [N. Y.] 658; *McGee v. State*, 32 Neb. 154; *State v. Kinkaid*, 23 Neb. 641; *State v. Powell*, 10 Neb. 48; *State v. Bowman*, 45 Neb. 752; *State v. Holliday*, 35 Neb. 333.

HARRISON, C. J.

In an action of replevin, commenced in the county court of Gage county, the property was taken under the writ and delivered to the plaintiff. Issues were joined, a trial had, and judgment rendered, from which an appeal was perfected to the district court; and during the course of the proceedings in the appellate court a motion was presented for defendants that the writ be quashed, the action dismissed, and a jury impaneled to inquire of defendants' right of property, possession, and damages, on the ground that the petition and affidavit filed in the court where the suit was instituted were insufficient and fatally defective in statements. The motion was sustained, the judgment of dismissal rendered, and the requested order made. The plaintiff prosecuted error proceedings to this court and filed a supersedeas bond. The district court refused the defendants further proceedings in that tribunal during the pendency of the error proceedings in the cause in this court. The defendants instituted this action in this court to obtain the issuance of a writ of mandamus to the judge of the district court by which he should be ordered to further hear the defendants in the replevin suit. To the petition in the case at bar the respondent filed a general demurrer and the issue thus made has been argued and submitted.

The point to which we deem it best to direct attention, and on which to base the decision herein, is in relation to the right of defendants to further proceed in the action of replevin after they had succeeded on their motion

and secured a dismissal of the plaintiff's suit for the reason, as given by the court, of a lack of jurisdiction in the court of inception, also of the appellate court. In a quotation in the petition from the journal entry of the action of the district court, when it passed on the motion, there appears the statement: "The county judge had no jurisdiction to issue the writ in this action and this court acquired no jurisdiction by the appeal." This was followed by the recital of the judgment quashing the writ of replevin, the dismissal of plaintiff's suit, and the order of inquiry of the rights of defendants. It is provided in section 1041 of the Code of Civil Procedure, in relation to an action of replevin before justices of the peace, as follows: "If the property has been delivered to the plaintiff, and judgment be rendered against him, or if he otherwise fail to prosecute his action to final judgment, the justice shall, on application of the defendant, or his attorney, impanel a jury to inquire into the right of property and right of possession of the defendant to the property taken;" and in section 190 of the Code, applicable to replevin cases, as follows: "If the property has been delivered to the plaintiff, and judgment be rendered against him on demurrer, or if he otherwise fail to prosecute his action to final judgment, the court shall, on application of the defendant or his attorney, impanel a jury to inquire into the right of property and right of possession of the defendant to the property taken." We quote from both sections for the reason that it does not appear, in the petition herein, whether the replevin action was one within the jurisdiction of the county judge acting as a justice of the peace, or was a term case and within the jurisdiction of the county court proper. A careful consideration of the question involved convinces us that under the provisions of these sections whenever judgment goes against the plaintiff in a replevin action in which the court has acquired and retains jurisdiction of the subject-matter, the defendant shall have the inquiry; but where the court has apparent jurisdiction and

its want or lack thereof in reality is laid bare or declared on motion of defendant, as it has no existence, it cannot be invoked by the defendant or exercised for and in any inquiry for him or adjudication of his rights. A court may always act in a cause to ascertain its jurisdiction or lack thereof, but when the latter is determined it will proceed no further than to divest itself of the appearance of that which does not exist. In the decision in the case of *Campbell v. Crone*, 10 Neb. 571, wherein a similar question to the one herein was discussed, it was said by LAKE, J., for the court: "Campbell certainly had no right to complain of an order which he had moved, nor of the consequences naturally and necessarily resulting therefrom, one of which was, as correctly held by the county judge, that if the court was without jurisdiction as claimed by the motion to dismiss, and as the court had held by granting the motion, it was without authority to entertain the question of the right of property or of damages;" and in the syllabus it was stated: "The defendant having appeared specially and moved the court to dismiss the action for want of jurisdiction, which was done, he has no right to complain that the court afterwards refused to hear him, in that action, as to his right to the property replevied, or on the question of his damages." (See, also, to the same effect, *Moore v. Herron*, 17 Neb. 697; *Hill v. Bloomer*, 1 Pinney [Wis.] 463; *Parsell v. Genesee Circuit Judge*, 39 Mich. 542.) The last case cited is as follows:

"Where, on motion of the defendant in replevin, the writ has been quashed as void for not describing the property seized, the defendant cannot have an assessment of damages, which is confined by Comp. L., secs. 6758-9, to cases where 'the property specified in the writ' has been delivered to the plaintiff, and can cover no other property.

"Mandamus. Motion submitted October 22. Denied October 31. Goods were taken from Parsell under a writ of replevin that did not describe them, the only descrip-

tion being in the affidavit annexed. The writ was accordingly quashed as void, and Parsell waived return and asked an assessment of damages, which was refused for want of jurisdiction, the writ being void. He applied for mandamus to compel an assessment. The writ was denied." (See, also, *Jordan v. Dennis*, 7 Met. [Mass.] 590; *Gray v. Dean*, 136 Mass. 128; *Burdett v. Doty*, 38 Fed. Rep. 491; *Smith v. Fisher*, 13 R. I. 624.)

Viewed in the light of the foregoing conclusion it appeared on the face of the petition in this case that the order of the court which the relators seek to enforce was non-effective and made without jurisdiction, and the pleading was open to attack by demurrer; the latter must be sustained, the writ denied, and the action dismissed.

WRIT DENIED.

SULLIVAN, J., and RAGAN, C., dissent.

NORFOLK BEET-SUGAR COMPANY V. THOMAS G. HIGHT.

FILED OCTOBER 5, 1898. No. 8108.

1. **Construction of Petition:** DEMURRER. Against an objection at the inception of a trial to the introduction of any evidence for plaintiff on the ground that the petition does not state a cause of action, the pleading attacked will be liberally construed and if possible sustained.

2. **Master and Servant:** RISKS OF EMPLOYMENT: NEGLIGENCE. An employé assumes all the ordinary risks and hazards incident to the employment of which he is possessed of sufficient intelligence and capacity to know and understand, and an adult person is presumed to be of sufficient mental power to comprehend such risks; but if a person is employed for a work which is dangerous or to labor in a dangerous place or situation, and, by reason of youth, inexperience, ignorance, or want of mental capacity he may fail or fails to comprehend the danger, it is the duty of the employer to warn the employé of the hazards and instruct him of the work. (*Jones v. Florence Mining Co.*, 66 Wis. 277, 28 N. W. Rep. 207.)

3. ———: ———: INSTRUCTIONS. An instruction in an action by a servant against the master for damages for injuries received while in the performance of work, which states that the employé assumes the "ordinary risks of the business upon which he enters as far as these risks, at the time of entering on the business, are known to him, or could be readily discernible by a person of his age and capacity in the exercise of ordinary care," *held*, in the conditions of the issues as developed in the pleadings and evidence, prejudicially erroneous in its reference and limitation relative to time.

4. **Instructions:** ISSUES. An instruction which would allow the jury to render a verdict on an issue not of the pleadings is erroneous.

5. ———: ———. An instruction examined and determined not open to the criticism that in it there was an attempt to specifically state or cover all the essential or material elements of the issues.

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

Robertson & Wigton, for plaintiff in error.

Brome, Burnett & Jones and *Mapes & Hazen, contra.*

HARRISON, C. J.

The defendant in error instituted this action against the plaintiff in error, hereinafter designated the company, to recover an amount alleged to be his damages from injuries sustained while in the employ of the company, by reason of its negligence. A verdict in favor of the defendant in error was returned in the district court, and judgment rendered thereon, and the company has removed the cause to this court for review of the proceedings in the trial court.

At the commencement of the trial there was interposed for the company an objection to the introduction of any evidence. The ground of the objection was that the petition did not state a cause of action. The objection was overruled, and such action is of the alleged errors presented in argument here. So much of the petition as we need notice in the discussion of this point was as follows:

"1. That said defendant is and at all the times hereinafter mentioned has been a corporation engaged in the manufacturing of sugar from beets at Norfolk, Nebraska, and operating at said town of Norfolk a beet-sugar factory for such purpose.

"2. On the 2d day of November, 1894, plaintiff, who then was a strong, able-bodied, healthy man, thirty years of age, was and for two weeks prior to said date had been employed by said defendant in and about its beet-sugar factory at Norfolk, as a common laborer.

"3. On said 2d day of November, 1894, and at the time of the happening of the injuries and wrongs hereinafter complained of, plaintiff was employed as a common laborer, as aforesaid, for defendant, in a room in its factory under the room commonly known and designated as the "Filter-Press Room," under the immediate charge and supervision of an agent, servant, and foreman of defendant by the name of Brugeman, the first name of said Brugeman plaintiff does not know, and therefore cannot state; but plaintiff avers in that behalf that on said date said Brugeman was the authorized agent, superintendent, and foreman of defendant in that portion of defendant's work in which plaintiff was employed, and that it was plaintiff's duty to receive orders respecting his work from said Brugeman and obey the same.

"4. At the time of the happening of the injuries hereinafter complained of there was in use and operation by defendant in said room where plaintiff was employed as hereinbefore recited, a wide belt, said belt being a part of the appliances used to propel certain machinery in and about the operation of defendant's work, said belt passing over and around an iron wheel connected with an iron shaft in the operation of a portion of defendant's machinery in said room. At the time of the happening of the injury, hereinafter complained of, said machinery was in motion, propelled by steam power, and said belt was running very rapidly. At said date, and while said machinery and belt were running very rapidly

as hereinbefore recited, there having accumulated upon said belt a quantity of water, and defendant's said foreman, Brugeman, desiring to procure said water to be removed from said belt, carelessly and negligently ordered and directed this plaintiff to procure a gunny sack and wipe the water from said belt, at a point thereon underneath the portion of said belt passing over said wheel. That plaintiff had no experience in the use and operation of machinery of that character, and did not know that it was dangerous and unsafe to obey the order of said foreman, and in the manner directed attempted to wipe the accumulation of water from underneath said belt. That in truth and in fact it was very dangerous and unsafe to obey said order, and attempt, in the manner directed, to remove said water from said belt; that defendant and its agent and foreman, the said Brugeman, were well advised, did know, and ought to have known, that the service plaintiff was so directed to perform was very dangerous and unsafe; that in pursuance of said order and direction of said foreman, and without any knowledge of the dangerous and unsafe character of the service he was directed to perform, and without having had any experience, or opportunity to acquire such knowledge, plaintiff did procure a gunny sack, and in strict and literal compliance with said order of said foreman, and in the immediate presence and at the specific direction of said foreman, plaintiff undertook to perform said service and remove the water from said belt; that although plaintiff used the utmost care and caution in and about the attempt to perform such service, immediately upon said gunny sack coming in contact with said rapidly running belt, and without fault or negligence on the part of plaintiff in any manner whatever, said gunny sack, and plaintiff's hand and right arm in contact therewith, were drawn by said belt over said wheel and around said shaft, and plaintiff's arm, and the bones thereof, crushed, bruised, broken, and mangled; that this defendant's foreman well knew of the fact that plaintiff

was ignorant of the danger attached to the performance of said service, and well knew that plaintiff had had no experience in and about the operation of machinery of that character, or opportunity of acquiring knowledge of the danger of said service, and knew, and ought to have known, that the performance of said service was very dangerous and unsafe, and carelessly and negligently ordered plaintiff to perform said service and carelessly and negligently failed to advise plaintiff of the dangerous and unsafe character of said service at and prior to the time plaintiff undertook to perform the same."

In the solution of a question raised by a general demurrer to a petition made at the time of trial, and such was the effect of the action we have described in this case, there is to be applied the rule that the allegations of the petition shall be liberally construed and, if possible, the pleading sustained. (*Roberts v. Taylor*, 19 Neb. 184.) In the decision of the case of *Jones v. Florence Mining Co.*, 66 Wis. 277, 28 N. W. Rep. 207, the supreme court of Wisconsin announced the following rule, the principle of which we think applicable herein, and approve: The duty devolved upon the master, employing in a dangerous occupation a servant, who, from youth, inexperience, ignorance, or want of general knowledge, may fail to appreciate the danger, to first instruct the servant, and warn him, so that he may comprehend the danger, and do the work safely with proper care on his part; and this, even though the servant consented to be employed in the dangerous situation. In the body of the opinion it is said, and citations made in support of the statement, that: "We think it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character, or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail

to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely, with proper care on his part. This rule does not in any manner conflict with the other well established rule that the employé in any particular business assumes all the risks and hazards which are incident to such business, when the employé is of sufficient intelligence and knowledge to comprehend the dangers incident to his employment; and in the case of an adult person, in the absence of evidence showing the contrary, the presumption is that the employé has sufficient intelligence to comprehend the dangers incident to his employment. (*Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Grizzle v. Frost*, 3 Fost. & F. [Eng.] 622; *Gilman v. Eastern R. Co.*, 13 Allen [Mass.] 433, 441, 442; *Bartonshill Coal Co. v. Reid*, 3 Macq. [Scotch] 266-295; *Hill v. Gust*, 55 Ind. 45; *St. Louis & S. E. R. Co. v. Valirius*, 56 Ind. 511; *Union P. R. Co. v. Fort*, 17 Wall. [U. S.] 553; *Thompson v. Railroad Co.*, 14 Fed. Rep. 564; *Cook v. St. Paul, M. & M. R. R. Co.*, 24 N. W. Rep. [Minn.] 311; *Anderson v. Morrison*, 22 Minn. 274; *Strahlendorf v. Rosenthal*, 30 Wis. 674.) These cases, and many others which might be cited, fully establish the rule as above stated in regard to the employment of servants who, by reason of youth, inexperience, or want of capacity, are unable to comprehend the dangers incident to a hazardous employment. There are many reasons given by the courts for holding to the rule above stated, the most satisfactory of which are: (1) that the master owes a duty toward an employé who is directed to perform a hazardous and dangerous work, or to perform his work in a dangerous place, when the employé, from want of age, experience, or general capacity, does not comprehend the dangers, to point out to him the dangers incident to the employment, and thus enable him to

comprehend, and so avoid them, and that neglect to discharge such duty is gross negligence on the part of the employer; (2) that such an employé does not assume the risk of the dangers incident to such hazardous employment, because he does not comprehend them, and the law will not therefore presume that he contracted to assume them." In the opinion in the case of *Verdelli v. Gray's Harbor Commercial Co.*, 115 Cal. 517, 47 Pac. Rep. 364, the following observations on this subject are made: When one who is known to be an inexperienced person is put to work upon dangerous machinery, the employer is bound to give him such instructions as will cause him to fully understand the danger attending the employment and the necessity for care. "The law applicable to cases of this kind has been many times declared by this court. In *Ingerman v. Moore*, 90 Cal. 410, 27 Pac. Rep. 306, it is said: 'It is well settled that one who enters the service of another takes upon himself the ordinary risks of the employment; and if he is an adult, and engages to do a particular work, the employer has a right to presume, unless otherwise informed, that the employé is competent to perform it, and understands and appreciates such risks. But, on the other hand, when one who is known to be an inexperienced person is put to work upon machinery which is dangerous to operate, unless with care, and by one familiar with its structure, the employer is bound to give him such instructions as will cause him to fully understand and appreciate the danger attending the employment, and the necessity for care.' " (See, also, *Mullin v. California Horseshoe Co.*, 105 Cal. 77, 38 Pac. Rep. 535; *Ryan v. Los Angeles Ice & Cold Storage Co.*, 112 Cal. 244, 44 Pac. Rep. 471; *Foley v. California Horseshoe Co.*, 47 Pac. Rep. [Cal.] 42; *Harrison v. Detroit, L. & N. R. Co.*, 44 N. W. Rep. [Mich.] 1034; 2 Thompson, Negligence 1010; *Nelson Mfg. Co. v. Stoltzenburg*, 59 Ill. App. 628.)

Liberally construed, the petition in this case stated a cause of action within the doctrine of negligence of the

master relative to the rights of a servant, as given in the cases to which we have referred, and was sufficient to withstand the demurrer of the time interposed; hence the trial court did not err in overruling the objection to the introduction of any evidence.

Objections were urged against instruction numbered 4 of the court's charge to the jury, which read as follows: "You are instructed that a servant is held to assume the ordinary risks of the business upon which he enters as far as these risks, at the time of entering upon the business, are known to him, or could be readily discernible by a person of his age and capacity in the exercise of ordinary care; and while a person who engages for a particular service only agrees to encounter the danger of that service, yet if being assigned to duties not within his contract, he determines to perform them as a part of his engagement, he is held to assume the necessary risks attendant thereon; and in that case it is for you to determine, from a fair consideration of all the testimony, whether the danger, if any, to which the plaintiff was exposed at the time he entered upon the task of wiping the water from the moving belt, was such a danger as was known to him or could have been readily seen by a person of his age and capacity in the exercise of ordinary care." It is complained that the portion of this from the beginning, to and inclusive of the words "ordinary care," limits the risks which the jury were told the servant assumed to such as were known at the time of the employment or then discernible by the exercise of ordinary care. This portion of the instruction is open to the criticism made, and, furthermore, is defective and erroneous. The general rule, of which it is undoubtedly an attempted statement, is that the servant assumes all the ordinary risks incident to the employment (*Missouri P. R. Co. v. Baxter*, 42 Neb. 793, 60 N. W. Rep. 1044; *Dehning v. Detroit Bridge & Iron Works*, 46 Neb. 556, 65 N. W. Rep. 186; *Chicago, B. & Q. R. Co. v. McGinnis*, 49 Neb. 649, 68 N. W. Rep. 1057; *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb.

442, 71 N. W. Rep. 42); and not alone such as are at the time designated in the instruction under examination known to the employé or then readily discernible by him by the use of ordinary care. This error was well calculated to mislead the jury in the present case as there was testimony to the effect that the defendant in error had wiped the belt at times during his employment and in a similar manner, prior to the attempt which closed with the injuries of which he complains in this suit.

Relative to the further portion of the instruction, it is insisted that it was not applicable to any issue presented by the pleadings or to the evidence. There was testimony to the effect that the act which the defendant in error essayed was not within the scope of his duties, but no such issue was raised by or of the pleadings, and the latter portion of the instruction was improper and should not have been given. Whether this, in the absence of further error or errors, would be sufficient to call for a reversal of the judgment would probably depend on another question, *i. e.*, whether there was evidence on another and independent issue to sustain the verdict rendered. (*Crosett v. Whelan*, 44 Cal. 200.) But we need not and will not investigate as to this latter point more especially since it would involve an inquiry into the evidence and a discussion of it and its weight.

It is also argued that paragraph 5 of the charge to the jury was erroneous in that it was therein attempted to include all the elements of the cause as developed in evidence under the issues, and that essential matters were omitted. As we read the instruction the complaint made against it is not of force. The paragraph is probably not free from faults, but, if it has defects, the one urged is not one of them.

As, for the error herein indicated in regard to a portion of the fourth instruction, there must be a new trial ordered, we deem it best not to comment on or discuss the evidence, and will pass the assignment of its insufficiency to support the verdict.

The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

H. H. ANDERSON ET AL., APPELLANTS, v. W. H. KREIDLER ET AL., IMPLEADED WITH BENJAMIN MELQUIST ET AL., APPELLANTS, AND MCCOMB & KUBIAS ET AL., APPELLEES.

FILED OCTOBER 5, 1898. No. 8206.

1. **Mortgages:** PRIORITIES: RES JUDICATA. A finding of the court that the question of priority of liens between two mortgages was not settled in a prior action *held* supported by the evidence.
2. **Res Judicata:** ISSUES. To sustain a plea of prior adjudication the matter in question must be shown to have been of the issues joined and tried in the former action.
3. **Mortgages:** ASSIGNMENTS. A mortgage is but an incident to the debt the payment of which it secures and its ownership follows the transfer or assignment of the latter.
4. ———: ———: RELEASE BY ASSIGNOR. The assignor of a promissory note the payment of which is secured by a mortgage cannot as a rule release the promisor from liability for the debt, and, by such release, bind the assignee, or in any manner or to any extent disturb or change the force of the mortgage lien.
5. **Evidence of Agency.** *Held* that the evidence will not sustain a finding that certain parties plaintiffs in a prior suit acted therein, and in some other matters connected with the transactions involved in the present litigation, as agents for the plaintiffs herein.
6. **Lis Pendens.** The conditions of the issues as developed in evidence are such as not to present for discussion and decision the efficiency or force of a notice of *lis pendens* perfected in an action in which it is now contended the question herein litigated was settled.

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

F. B. Tiffany, Bartlett, Baldrige & DeBord, J. Q. Burgner, L. D. Holmes, Montgomery & Hall, and *W. H. DeFrance,* for appellants.

Duffie & Van Dusen, Bradley & DeLamatre, McClanahan & Gilmore, contra.

HARRISON, C. J.

On October 17, 1889, J. Herbert Van Closter executed and delivered to John L. Miles and James Thompson three coupon bonds, each in the sum of $5,000, and payable five years after date, and to secure the payment thereof, executed and delivered to the payees a mortgage of lot 27 in Rees Place, an addition to the city of Omaha. The mortgage was filed for record in the proper office of Douglas county, October 18, 1889. October 28, 1889, one of the notes or bonds was sold and transferred to the plaintiff, herein one of the appellants. December 2, 1889, another of the bonds was sold and transferred to W. C. Putnam, and by him to Laura A. Raff, Lida B. Raff, and Mary F. Raff. The other of said bonds was purchased by Daniel K. Reamey December 8, 1889, and duly transferred to him, and from him Mary R. Reamey became the owner, December 25, 1889. Of each note or bond and the accompanying interest coupons, Miles & Thompson, by the indorsement of transference, became the guarantors of the payment thereof. The assignments of the mortgage were not recorded; hence, of record, Miles & Thompson were the apparent owners and holders thereof. Subsequent to the execution of the aforesaid notes and mortgage, Van Closter made improvements on the mortgaged property, during the progress of which he incurred a large indebtedness; and mechanics' liens, amounting in the aggregate to about $10,000, were filed and perfected against the property. On August 2, 1890, Van Closter executed and delivered to H. H. Henderson three promissory notes, in total to the amount of $8,455.75, and a mortgage on the premises to which we have hereinbefore referred, as security for the payment of the notes. These notes were sold, indorsed, and delivered to the Omaha National Bank, appellee herein. It is not dis-

closed of record that there was any assignment of the mortgage to the bank. The mortgaged property was by Van Closter afterward conveyed to William H. Kreidler. Van Closter had instituted an action in the district court of Douglas county in which he sought a recovery of Miles & Thompson of quite a large sum; and on October 28, 1891, a contract was entered into between the parties by which there was accomplished an adjustment or settlement of at least some of their matters of difference, of which agreement the following is an excerpt: "That said Miles & Thompson shall release said Van Closter from all personal liability upon any and all indebtedness contracted with them for loans made by the said Miles & Thompson, or either of them, to said Van Closter, and from all personal liability arising from indorsement of securities discounted or assigned as collateral by said Van Closter with said Miles & Thompson, or either of them, and shall hold the said Van Closter harmless from any personal judgments in favor of said Miles & Thompson or their assignees, arising either out of any loans made by said Miles & Thompson to said Van Closter, or out of any securities transferred by said Van Closter to said Miles & Thompson." After the existence of this agreement Miles & Thompson, who by reason of the failure of the original debtor to pay some of the interest coupons of the bonds first mentioned herein, and in compliance with their contract of guaranty, had paid the amount of such coupons as they became due and were unpaid, commenced an action to foreclose the mortgage for the amount of said coupons. The further references to that action herein will be to "Case No. 303, Docket 37." Such is the designation given it in the brief for one of the parties to the case at bar. In Case 303, Docket 37, there was filed on December 14, 1893, an amended petition in which the cause of action was outlined as we have just, in substance, stated it. The Omaha National Bank came into that suit by intervention on July 14, 1894, pleaded the notes it had acquired from H. H. Henderson, and asked foreclosure

of the mortgage which had been given to secure their payment. The agreement of October 28, 1891, between Miles & Thompson and Van Closter was also pleaded in the answer or cross-petition of the bank, and it was asserted in the litigation that its effect had been to render void the mortgage first executed, or at least the contract had operated its postponment to the lien of the mortgage, the source of the bank's rights. For the bank there was filed and recorded in the proper office, of date February 14, 1894, a notice of *lis pendens*. In April, 1894, there was a decree entered in which the right of priority between the claim of Miles & Thompson and the intervener, the bank, was determined; and on July 14, 1894, a final decree was entered in which the positions of the various liens were fixed. This decree was the subject of allegation in the answers and cross-petitions in the present suit, inclusive of the one filed for the bank; and it is asserted that it established the priority of the lien of the bank over that of the plaintiffs and others whose rights were asserted of derivation from the mortgage first in point of time of execution. In the case at bar there was a trial and resultant decree in which the lien of the bank was given priority to the liens of which the mortgage from Van Closter to Miles & Thompson was the source of existence, and from which adjudication this appeal has been perfected.

The first question presented in argument was in relation to the force and effect on the rights of plaintiffs in this suit of the decrees in Case No. 303, Docket 37. The judge who presided at the trial of that action, and decided the issues, also heard and determined the points of controversy in this one. Of the findings made in the present suit was the following: "The court further finds that as to the allegations, in the answers and cross-petition of the answering defendants herein, that the interest and priority of the lien of the plaintiffs herein, under and by virtue of the mortgage under which they claim, were adjudicated and determined by this court, and by the final

decree entered on the 9th day of July, 1894, in the case of Andrew Miles *et al.* against J. Herbert Van Closter *et al.*, Docket 37, No. 303, of the records of the district court of Douglas county, Nebraska, are not true, for that the evidence fails to show that there was any adjudication of the rights of the plaintiffs herein in said cause and that said decree has no binding force or effect upon the rights of the plaintiffs." This finding has full support in the evidence herein, which, on the subject involved, consists of the pleadings and decrees or portions of the record of the case to which reference is made. The matter now under consideration in the case at bar was not, in that, one of the issues, and was not litigated or determined. The amended petition therein declared upon certain interest coupons as the property of Miles & Thompson, that they had been sold, transferred, and the payment guarantied, and the guarantors, Miles & Thompson, the plaintiffs in the action, forced to pay them to their assignees; and it was asked that, to the extent the mortgage was a security for the payment of such coupons, it be in favor of Miles & Thompson foreclosed. To this pleading the appellants herein, if it be conceded that they were represented in that action by some one who possessed any authority therefor, which from the evidence is more than doubtful, answered and admitted the truth of the allegations and confessed the right of the petitioners to the relief demanded.

The bank, appellee herein, intervened, as we have before stated, and alleged the execution of the agreement of October 28, 1891, between Miles & Thompson and Van Closter, and asserted that its effect was to render the lien of the mortgage under which Miles & Thompson had declared inferior and second to the one under which the bank claimed rights. In the decrees it was adjudicated that the rights of Miles & Thompson, then in litigation, were postponed to those of the bank; but the priorities between the plaintiff and appellants herein and the bank, under the mortgages assigned to and held by them

respectively, were not in question, and not settled. Another point of argument is that the agreement of October 28, 1891, postponed the lien of the mortgage to Miles & Thompson to the lien of the one to Henderson, which, by reason of the ownership of the notes secured by it, was the security of the bank. The contract of October 28, 1891, by its terms, literally taken, provided for releases to be made for future actions; but we will construe it as of present operation of the time of execution, as such was probably the intention to the extent it was to affect Van Closter's personal liability on loans which had been made to him by the other immediate parties to the agreement, the evidences of which were then owned by them. It was general in its terms, referred to all the mentioned transactions between the parties and to none especially or in particular, nor was it shown that any other than a general meaning or application was in contemplation at the time of its execution.

The coupon bond which, as evidence of indebtedness, furnished the groundwork of this action had long prior to the time of the said contract been sold and transferred to the appellants; and the mortgage in suit, as an incident to the notes or debts, had followed their transfer or assignment, and was the security of the assignees in the transactions. (*Cram v. Cotrell*, 48 Neb. 646; *Whipple v. Fowler*, 41 Neb. 675.)

The note or debt is the principal thing and the mortgage a mere incident thereto, and the party to whom the first is transferred becomes thereby the owner of the second. (*Daniels v. Densmore*, 32 Neb. 40.) The mortgagee, after he has assigned the note and debt, cannot release the incident thereto—the mortgage, so as to defeat the rights of the assignee. (*Daniels v. Densmore, supra.*) Neither can he release the debtor from all liability or from liability to a deficiency judgment, so as to bind his assignee of the debt. There is no question here of the rights of a *bona fide* subsequent purchaser of incumbrances, where, as in *Whipple v. Fowler, supra*, and some

subsequent decisions of this court, it has been announced that in favor of such parties a release by the mortgagee, where no assignment of the mortgage appears of record, will be operative and of effect as against an assignee of the secured debt. The bank was the assignee of the debt secured by a mortgage of date and record after the one in suit, and the latter was prior of date, and also of assignment to the contract of October 28, 1891.

The proposition advanced for the bank is that it was entitled to tender and pay the debt secured by the prior mortgage, and be subrogated to the rights of the owners and holders of the evidences thereof, and that the release of the personal liability was an invasion of this right, which operated to diminish or lessen it, and to decrease what would be obtained by reason of such payment, and that equity demands that the lien for the liability which was thus partially destroyed be postponed to the one which, in point of time and record, was its inferior. If the litigation now was between Miles & Thompson, as owners and holders of the debt and mortgage in suit, and the bank in the assertion of its rights as assignee of the Henderson notes and mortgage, the cases cited, namely, *Coyle v. Davis*, 20 Wis. 593, and *Sexton v. Pickett*, 24 Wis. 346, would lend support to the propositions advanced which we have just stated. Whether the doctrine is correct or not we need not and do not decide. In the matter in hand it appears that prior to the time of the contract of October 28, 1891, Miles & Thompson had sold and assigned the debt, and with it the accompanying mortgage, to the plaintiffs and appellants herein, and then had no control over either, or power or authority to release or in any manner deal with either; and it seems clear that the appellants, as assignees of the debts and mortgage, could pursue their rights under either or both and recover as fully and completely as if the contract alluded to had never been in existence; and the bank, if it paid the debt to appellants, and, by subrogation, succeeded to their rights, would have received them thus undiminished and

complete; hence the position taken for the bank in this branch of the argument is untenable and cannot prevail.

By some of the expressions employed in the decree in this cause, color is lent to the idea that the trial court had determined that Miles & Thompson had acted in the capacity of agents for the appellants in many portions of the transactions and matters involved herein, and appellants had become bound by such acts, the effects of which were the postponement of the lien of the mortgage in suit to that of the one owned by the bank. A finding that Miles & Thompson were agents for the appellants in any acts which might have the force to work such a postponement, if any was expressed,—which, from the language used in the decree is, to say the least, doubtful,—would have been without support in the evidence; hence this view must be discarded.

As we have before stated, there was filed for the bank at the time of its intervention in Case No. 303, Docket 37, a notice of *lis pendens*, and it is now contended that this operated to bind appellants by the decree in that case, the same as if they had been made parties thereto by service of process. The portion of section 85 of the Code of Civil Procedure, in relation to notice of *lis pendens*, upon which the argument here is based, was declared unconstitutional in the opinion in the case of *Sheasley v. Keens*, 48 Neb. 57, and we are earnestly urged to again examine the question, and some very forcible arguments are produced to induce a belief of the error in that decision, and the constitutionality of the part of the section involved. As we have hereinbefore decided that even if it be conceded that the appellants by the answer filed in their names were parties to Case No. 303, Docket 37, the finding of the trial court in this case that their rights were not adjudicated in that case was correct, and must be approved. The fact that a notice of *lis pendens* was duly filed and recorded is without force, as its utmost effect would be to render a decree in the case in which it was perfected binding as to parties against whom the

notice would operate, the same as if made parties to the action. These things being true, the question of the effectiveness of the notice of *lis pendens* is not presented, and we may not examine herein whether the portion of section 85 of the Code of Civil Procedure under which it was given was constitutional or the reverse.

The judgment of the district court herein appealed from was erroneous and must be reversed and judgment entered here of the priority of the lien of the mortgage foreclosed for appellants over that of the lien of the mortgage foreclosed for the bank.

JUDGMENT ACCORDINGLY.

COMBINATION GAS-MACHINE COMPANY V. HORACE P. KING.

FILED OCTOBER 5, 1898. No. 8295.

Conflicting Evidence: REVIEW: CONDITIONAL SALES. A judgment based on a finding on evidence in which there is a conflict relative to the material point, but of which there is sufficient in support of the finding, will not be disturbed.

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

Joshua Palmer and *E. S. Abbott*, for plaintiff in error.

J. D. Pope, contra.

HARRISON, C. J.

It appears that during the year 1887, Lusk Brothers erected a building on a lot in Friend, Nebraska, and purchased of the plaintiff company a "combination gas machine," and it was placed in said building. The transfer to the Lusk Brothers was what is denominated a "conditional sale." After the completion of the building certain liens on the property were foreclosed by action, and

in a resultant sale the premises were purchased by one E. I. Ferguson, by whom they were sold and conveyed to the defendant in the suit. Lusk Brothers failed to perform the condition of the sale of the machine to them, or never paid the company for the same, and for the company there was a demand made on Horace P. King, the defendant herein, that he pay for the machine or allow the company to take possession thereof, and on his refusal of either and both branches of the demand this suit was commenced for the company to recover the value of said machine. The result of the trial of the issues was a judgment for the defendant, of which the plaintiff seeks a reversal in an error proceeding to this court.

The trial was to the court without a jury and the assignments of error are in substance contained in the two: "That the finding of the court was contrary to law," and "that the finding of the court was contrary to the evidence." It was of the admitted facts that there was not filed in the office of the clerk of the proper county a copy of the contract by which the conditional sale of the gas machine was evidenced, as is provided in section 26 of chapter 32, Compiled Statutes; but the contention for the plaintiff is that the defendant, when he purchased the property, had actual notice of the condition of the sale of the gas machine to Lusk Brothers, and that the same was unperformed and unfulfilled, and he could not hold it against the company, and his appropriation of it was a conversion. It may be said that it has been decided that actual notice is as effectual to bind a purchaser and give the condition of a sale force against him, as is the filing of the contract in the manner and place prescribed by the statute (see *Peterson v. Tufts*, 34 Neb. 8); but the consideration of the question and its decision herein is unnecessary, for, if it be conceded that actual notice would have been in this instance sufficient, then the settlement of the litigation must hinge entirely upon the point of what was shown by the evidence in regard to the actual notice of defendant of the condition. The evidence

on this subject was conflicting, and a finding that he was without notice had ample support, and must be left undisturbed. The judgment of the district court was without error and is

AFFIRMED.

GEORGE H. WHITEMAN v. CHARLES E. PERKINS.

FILED OCTOBER 5, 1898. No. 10172.

1. **Vendor and Vendee:** DEFERRED PAYMENTS: SPECIFIC PERFORMANCE. A contract of sale and purchase of real estate, in which the time in relation to deferred payments of the purchase price is made of the essence of the contract, and a forfeiture provided for non-performance, may be enforced in accordance with the terms of the express stipulation.

2. ———: ———: ———: TENDER. A tender made after action instituted by the vendor to enforce his rights under the contract is too late to be effectual.

3. ———: ———: ———: OCCUPYING CLAIMANTS. A vendee of such a contract is not, as against the rights of the vendor in an action to make operative the stipulation and its forfeiture, within either the letter or spirit of what is known as the "Occupying Claimants Act" (Compiled Statutes, ch. 63).

4. **Ejectment:** SECOND TRIAL. In an action of ejectment a general demurrer was interposed to the reply and on hearing was overruled. The demurrant announced and made of record his determination to stand on the demurrer and plead no further, and judgment was rendered against him. *Held*, Not on demand and as of course entitled to have the judgment set aside and a new trial ordered by virtue of the provisions of section 630 of the Code, viz.: "In an action for the recovery of real property, the party against whom judgment is rendered may, at any time during the term at which the judgment is rendered, demand another trial by notice on the journal, and thereupon the judgment shall be vacated, and the action shall stand for trial at the next term."

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

Warrington & Stewart, for plaintiff in error.

Charles O. Whedon, E. C. Calkins, and *H. V. Calkins, contra.*

HARRISON, C. J.

The defendant in error instituted this action in the district court of Dawson county to recover of plaintiff in error the possession of a quarter section of land. The petition consisted of the ordinary declaration in an action of ejectment. The answer to the petition was as follows:

"1. That he denies each and every allegation therein contained.

"2. This defendant further shows that on the 2d day of August, 1897, he entered into an agreement with the plaintiff under the name of C. E. Perkins and E. F. Perkins, his wife, in which said parties agreed to sell and did sell to this defendant, and this defendant agreed to purchase and did purchase from said parties, the premises described in plaintiff's petition; and said agreement is hereto attached, marked "Exhibit A," and hereby made a part hereof.

"3. That the defendant, in good faith, entered into possession of said premises under said contract of purchase, on said day, and has remained in possession ever since.

"4. That the defendant, in good faith and relying on his rights under said contract and the law, has broke and cultivated twenty acres on said tract, of the value of $40.

"5. That this defendant has been at all times, and is now, ready and willing to pay the amounts due the plaintiff on said contract according to the terms of the same, and to comply with all the conditions thereof, and he hereby tenders in open court, for the use and benefit of the plaintiff, the sum of $367.08 and interest thereon, if any is due, to be applied on said contract.

"Wherefore, the defendant prays that plaintiff's petition may be dismissed, and for such other and further relief in the premises as in equity this defendant is entitled to, and as the court may deem proper."

Exhibit A of the foregoing pleading, the contract of purchase, contained first a general, then a specific, state-

ment of the agreed price of the land and the dates of deferred payments, principal and interest. The further portions of the contract were as follows: "And it being mutually understood that the above premises are sold to said second party for improvement and cultivation, the said party hereby further agrees and obligates himself and his heirs and assigns, that all improvements placed on said premises shall remain thereon and shall not be removed or destroyed, until final payment for said land; and further that he will punctually pay said sums of money as above specified as each of the same becomes due; and that he will regularly and seasonably pay all taxes and assessments upon said premises for the current year of 1897 and thereafter. In case the said party, his legal representatives, or his assigns, shall pay the several sums of money aforesaid punctually, and at the several times above limited, and shall strictly and literally perform all and singular his agreements and stipulations aforesaid after their true tenor and intent, then the first party will furnish the second party, his heirs or assigns, upon request of said party, and the surrender of this contract, a good and sufficient warranty deed, free and clear of all incumbrances, except as against such taxes as may be assessed against said lands, and as against any and all acts done and suffered by said purchaser or assigns, subsequent to the date of the contract. But in case the second party shall fail to make the payments aforesaid, or any of them, punctually and upon the strict terms and times above limited, and likewise to perform and complete all and each of his agreements and stipulations aforesaid, strictly and literally, without any failure or default, the times of payment being of the essence of this contract, then the party of the first part shall have the right to declare this contract null and void, and all rights and interests hereby created or then existing in favor of the said second party, or derived under this contract, shall utterly cease and determine, and the possession of the premises hereby contracted shall revest in

said first party or his assigns, without any declaration of forfeiture or act of re-entry, or without any other act by said first party to be performed, and without any right of said second party of reclamation or recompensation for moneys paid or improvements made, as absolutely, fully, and perfectly as if this contract had never been made, and in such case such payments and improvements are to be accepted as full value of use of said premises herein held by party of second part. And it is further agreed, on the part of the purchaser, that a failure to pay any installment of principal or interest, or a failure to keep all taxes paid before penalty thereon shall accrue, or to keep any of the covenants and agreements herein made by him, shall work a forfeiture and relinquishment of all his rights, and that thereupon the first party may, if he so elects,—and the purchaser hereby waives any notice of such election,—treat any purchaser as a tenant holding over and at sufferance, and proceed against such purchaser by summary action of forcible entry and detainer to recover possession. And it is further stipulated that no assignment of the premises shall be valid unless the same shall be indorsed hereon, or permanently attached hereto, and countersigned by the first party, for which purpose this contract must be sent to him by mail, or otherwise, and that no agreements, or conditions, or relations between the second party and his assignee, or any other person acquiring title or interest from or through him, shall preclude the first party from the right to convey the premises to said party or assigns, on the surrender of this agreement and the payment of the unpaid portion of the purchase-money which may be due to the first party."

For the defendant in error there was filed the following reply:

"1. Admits that the defendant entered into possession of premises described in plaintiff's petition by virtue of and under the contract set up in and made a part of said defendant's answer, but alleges the fact to be that said

defendant failed and neglected to pay the installment of $300 principal and $67.08 interest due under the terms of said contract on the first day of January, 1898, and that thereafter and on the 12th day of February, 1898, the said defendant still failing and neglecting to pay said installments of principal and interest or either, the plaintiff, in the exercise of the right and privilege reserved and stipulated for in and by said contract, and in pursuance of the provisions therein contained, declared said contract null and void, and on the same day made, executed, and delivered to said defendant a notice and declaration in writing of said forfeiture, a copy of which is hereto attached and marked "Exhibit A" and made a part of this reply.

"2. That defendant has made no offer of payment of said sum of $367.08, or any part thereof, except by the filing of his said answer, nor has he in fact paid said sum or any other sum into court for the use or benefit of plaintiff.

"Wherefore he prays for the relief demanded in his said petition."

EXHIBIT A.

"BURLINGTON, IOWA, February 12, 1898.

"*George H. Whiteman, Lexington, Nebraska*—DEAR SIR: You are hereby notified that contract for the following described property, to-wit: The southwest quarter of section 25 in township 9 north, range 19 west, in Dawson county, Nebraska, has this day been declared forfeited and cancelled, because of non-compliance of the terms of the agreement. Possession of said premises is hereby demanded. You will take notice of this declaration of forfeiture and demand for possession, and be governed accordingly."

To the reply a demurrer was interposed which, on hearing, was overruled. The plaintiff in error signified his election to stand on the demurrer and plead no further, and, after motion for a new trial on part of the plaintiff in error was overruled, judgment was rendered for defendant in error.

The main question presented and argued is with reference to the enforceability of the forfeiture clause of the contract. We know of no effective reason why, if two persons who fully understand and realize the import of the matter in hand, and in course of its adjustment meet and enter into a contract for a sale and purchase of real estate of which there is an express stipulation that time is of the essence thereof, and in event of non-performance of the conditions of payment a forfeiture shall ensue, that it may not be upheld and executed as made.

In Pomeroy, Contracts, page 462, section 390, it is said on this subject, and numerous cases cited in support of the statement: "It is now thoroughly established that the intention of the parties must govern, and if the intention clearly and unequivocally appears from the contract, by means of some express stipulation, that time shall be essential, the time of completion or of performance, or of complying with the terms, will be regarded as essential in equity as much as at law. No particular form of stipulation is necessary; but any clause will have the effect which clearly and absolutely provides that the contract is to be void if the fulfillment is not within the prescribed time."

In the decision of the case of *Missouri R., F. S. & G. R. Co. v. Brickley*, 21 Kan. 276, opinion by Brewer, J., it was stated: "While in agreements for the sale of real estate the time of payment is not ordinarily of the essence of the contract, yet, by express stipulation, the parties may make it so, and, when so made, such stipulation is, like all other stipulations of the contract, to be respected and enforced by all courts, those of equity as well as those of law."

This court in *Morgan v. Bergen*, 3 Neb. 209, gave recognition and approval to the principle on which the doctrine just stated is based when it said: "Parties may make time the essence of the contract, so that if there be a default at the day, without any just excuse and without any waiver afterwards, the court will not inter-

fere to help the party in default." (See, also, *Langan v. Thummel*, 24 Neb. 265; *Patterson v. Murphy*, 41 Neb. 818; *Brown v. Ulrich*, 48 Neb. 409; *White v. Atlas Lumber Co.*, 49 Neb. 82. We further cite *Phelps v. Illinois C. R. Co.*, 63 Ill. 468; 2 Warvelle, Vendors pp. 819, 830; 2 Beach, Equity Jurisprudence sec. 592; *Martin v. Morgan*, 25 Pac. Rep. [Cal.] 350; *Coughran v. Bigelow*, 9 Utah 266, 34 Pac. Rep. 51; *Axford v. Thomas*, 28 Atl. Rep. [Pa.] 443; *Miller v. Hughes*, 63 N. W. Rep. [Ia.] 680; *Ralph v. Lomer*, 28 Pac. Rep. [Wash.] 760; *Foot v. Bush*, 69 N. W. Rep. [Ia.] 874; *Higbie v. Farr*, 28 Minn. 439.)

The tender pleaded in the answer, if sufficient in other respects, was not made until subsequent to the forfeiture and suit brought to enforce it, and was ineffectual. (*Ralph v. Lomer, supra.*)

It is further contended that the enforcement of the contract in accordance with its terms is contrary to the spirit and intent of what is known as the "Occupying Claimants Act" (Compiled Statutes, ch. 63). It was determined in *Vance v. Burlington & M. R. R. Co.*, 12 Neb. 285, that a vendee of land under such a contract as is herein involved was not within either the letter or spirit of the act the provisions of which are invoked, and we will adhere to that decision.

It is also urged that the court erred in not granting to the plaintiff in error on his motion in that regard a second trial. It is provided in section 630 of the Code of Civil Procedure, in relation to an action such as the one at bar: "In an action for the recovery of real property, the party against whom judgment is rendered may, at any time during the term at which the judgment is rendered, demand another trial by notice on the journal, and thereupon the judgment shall be vacated, and the action shall stand for trial at the next term." This does not provide that where a party has interposed, as in the present suit, a demurrer to a pleading, which has been overruled, and has announced that he desires to plead no further, but will stand on his demurrer, and, in due

course of the proceedings, the consequent judgment has been rendered, the judgment will on demand be set aside as of course, and a new trial of the issue of law ordered. The section of the Code is clearly not open to such an interpretation. To so construe would be to give it a strained and false import. The judgment of the district court must be

AFFIRMED.

BANK OF MAYWOOD V. ESTATE OF JOHN L. MCALLISTER.

FILED OCTOBER 5, 1898. No. 8314.

1. **Principal and Surety:** FAILURE TO SUE PRINCIPAL. Mere voluntary forbearance of the creditor, or his mere failure to institute and prosecute a suit against the principal debtor, will not operate the discharge of a surety on the obligation of indebtedness, nor will non-compliance by the creditor with a request or notice of surety to commence suit against the principal work the surety's release.
2. **Dismissal:** RES JUDICATA. A dismissal of a suit which is not upon, or does not involve, the merits, is not a bar to another action on the same cause nor to its presentation as a claim against the estate of the deceased adverse party.

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

J. L. White and *Hoagland & Hoagland,* for plaintiff in error.

Wilcox & Halligan, contra.

HARRISON, C. J.

The bank, party hereto, commenced an action in the county court of Lincoln county to enforce the collection of an amount alleged to be its due on a promissory note signed by E. E. Reese and J. L. McAllister. The latter had died prior to the institution of the action and service of a summons was made on the administratrix of his estate, who appeared and challenged the jurisdiction of the court on the grounds that she was not of the parties to the suit, and no action would lie against her. At the

time set for the trial of the cause there was for the bank, by leave of the court, a dismissal of the action to the extent it purported to involve the estate or administratrix of the estate of J. L. McAllister. In proceedings for the purpose, an administratrix of said estate had been appointed, and in the further course of the matter notice was given of the time allowed for the presentment of claims against the estate, and of the dates fixed for their examination and adjustment. For the bank a claim was presented predicated on the promissory note to which we have hereinbefore referred, and on hearing this claim was disallowed. The reasons for such action, as stated in the entry thereof, were that the deceased had signed the note as surety; the amount due thereon might have been collected of the principal debtor if the payee had not failed, neglected, and refused to properly and diligently proceed against said principal maker; that such non-action on the part of the creditor had worked a release of the surety from liability; also, that the dismissal of the suit in the county court, to which we have alluded, had effected a final disposition of any action or claim on the note against the estate of the surety thereon. From the rejection of its claim, the bank prosecuted error to the district court wherein the action of the county court was affirmed, and the matter has been presented to this court for review.

Of the first reason given for the disallowance of the claim it must be said that it was wholly insufficient. A mere voluntary forbearance on the part of the creditor relative to the principal debtor, or a mere failure to institute an action against him, will not discharge a surety. (*Smith v. Mason*, 44 Neb. 610.) Nor will notice or request by the surety to the creditor that suit be commenced against the principal debtor operate to compel it, nor a noncompliance with the request or notice release the surety. (2 Daniel, Negotiable Instruments p. 307, sec. 1326; Tiedman, Commercial Paper sec. 424; 1 Parsons, Notes & Bills pp. 236, 237.)

In regard to the second ground on which the rejection of the claim was based, it is clear from the record that the dismissal by or for the plaintiff of the suit in county court as against the estate or the administratrix, if indeed there was any jurisdiction, was not upon or with any reference to the merits of the controversy, and hence constituted no bar to another action for the same cause or its presentation as a claim against the estate. (*Chency v. Cooper*, 14 Neb. 418; *Philpott v. Brown*, 16 Neb. 387; *Runge v. Brown*, 23 Neb. 817; 6 Ency. Pl. & Pr. 986.)

It follows that the order of the county court by which it disallowed plaintiff's claim was erroneous; also its affirmance in the district court. Both adjudications must be, and are, reversed and the matter remanded for further proceedings.

REVERSED AND REMANDED.

W. H. BURNET V. JOSEPH A. CAVANAGH ET AL.

FILED OCTOBER 5, 1898. No. 8289.

1. **Instructions:** EVIDENCE. An instruction given which submits to the jury a question of fact material to the issues on trial, of the existence of which there has not been evidence sufficient to warrant or support an inference, is error which may call for setting aside a verdict or reversing a judgment.
2. **Pleading:** UNDENIED ALLEGATIONS. All material allegations of new matter in the answer not denied in a reply must be taken as true. (Code of Civil Procedure, sec. 134.)
3. **Immaterial Evidence:** HARMLESS ERROR. Admission of immaterial evidence which, though erroneous, is not prejudicial to the rights of the complaining party, is not ground for the reversal of a judgment.
4. **Conflicting Evidence:** REVIEW. A finding on a point at issue as to which there is a conflict in the evidence will not be disturbed if there is sufficient favorable evidence to sustain it.
5. **Instructions:** EXCEPTIONS: REVIEW. An exception at the time to giving an instruction is essential to secure a review of error assigned of such action.

6. **Evidence:** ASSIGNMENTS OF ERROR. The admission of evidence will not be reviewed in an error proceeding to this court, if of the alleged error of the trial court in that regard there is no special assignment in the petition in error.

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

Saunders & Macfarland and *Macfarland & Altschuler*, for plaintiff in error.

T. J. Mahoney and *Cavanagh & Thomas, contra.*

HARRISON, C. J.

In this action, instituted in the district court of Douglas county, the plaintiff alleged an indebtedness of defendants to him in the sum of $5,000 as evidenced by a promissory note by them executed and delivered to him of a stated date, also accrued and unpaid interest on the principal sum as provided for in the note, for all of which he asked a judgment. Octave Bouscaren, of defendants, was not served with process. The other defendant, Joseph A. Cavanagh, in response to service of summons in the suit appeared and answered, and of the issues joined there was a trial which resulted in a verdict for the plaintiff. A motion for a new trial was presented for the defendant, and on hearing was sustained. The verdict was set aside and a new trial ordered. After an amended answer for defendant and the plaintiff's reply thereto were filed, a second trial occurred in which the defendant was successful, a verdict in his favor being returned by the jury, on which, after plaintiff's motion for a new trial was heard and overruled, judgment was rendered. The plaintiff, in an error proceeding to this court, presents the entire record, inclusive of the evidence introduced during the two trials, and asks by petition in error a review of the order of the district court by which a new trial was granted after verdict returned at the first hearing; also of certain alleged errors of the proceedings

during the second trial. The defendant in his answer admitted the execution and delivery of the note on which the plaintiff's action was predicated, but alleged that the plaintiff had, prior to the execution of the note in suit, agreed with Octave Bouscaren, the other party to the note, to loan to him a sum not to exceed $10,000, to be used in his business of money broker or lender in Omaha, and to be loaned to applicants therefor, the payment of such loans to be secured by mortgages of real or mortgages or pledge of personal property; that the matters between Bouscaren and plaintiff were to be managed for the latter by a designated party, resident in Omaha, who was styled in the written agreement which was entered into by plaintiff and such party, as "trustee" for the plaintiff; that the party trustee was to receive from Bouscaren, as evidence of the indebtedness of any sum loaned to him by plaintiff, a note signed by Bouscaren and also by "J. A. Cavanagh, of the city of Omaha, either as joint maker or guarantor of payment (not merely collection) at maturity," to receive payments of interest as they accrued in favor of plaintiff, and further to receive from Bouscaren mortgages, pledges, and evidences of loans made by the latter and hold, manage, and collect them as security for the payment of and application of proceeds on amounts due plaintiff from Bouscaren. The details of the proposed transactions, and which were afterward in part of actual occurrences and given existences, were embodied in a written article which was executed by the plaintiff and the trustee. The defendant further answered that, with full knowledge and in accord with the agreement between the plaintiff and trustee, he signed the note in suit with his co-signer Bouscaren, as the latter's surety, and that the plaintiff knew that it was in such capacity the defendant executed the note; that defendant so signed in full reliance that the conditions of the contract of plaintiff and the trustee relative to the mortgages and pledges, or the collateral securities, and of which a number were in fact placed in

the hands and care of the trustee, would be by him observed and such securities retained and controlled strictly in conformity to the terms of said contract, but that there was such a disposition by the trustee and plaintiff of the collateral securities as worked a discharge of the defendant from any liability on the note in suit. There was also a plea of usury. The reply contained an affirmative plea that Bouscaren and the defendant Cavanagh were partners in the loan business, and as such partners received the money for which, as evidence of the debt thereby created, the note sued upon was given; that Cavanagh signed the same as principal. The reply also contained denials of the allegations of the answer that Cavanagh had executed the note as surety, or that any of the collateral securities had been managed, or any disposition made of them, other than according to the wishes and instructions of Cavanagh. There were in the reply some further assertions and denials which we need not particularly notice.

We will first give attention to the portion of the argument which is devoted to the complaint of the action of the trial court on the motion to set aside the first verdict in the case. There is nothing in the journal entry or record which discloses the ground or grounds upon which the court based its order. All statements with regard to it are general. In the brief filed for plaintiff in error it is stated: "The court in instruction nine stated to the jury that if the jury should find that Cavanagh and Bouscaren were partners, the plaintiff is entitled to recover, and he took the position that the evidence did not disclose a partnership, but that this instruction might have misled the jury. While the jury might have found their verdict under the instructions upon other theories of the case, still, as the verdict might have been based upon this instruction, he would grant a new trial." We have adopted, as seems entirely allowable, this statement as an embodiment of the views of the matter which the trial court had when it sustained the motion for a

new trial, and an examination of all that transpired at the first trial convinces us that the order of the court was without error. There was no evidence which would have warranted an inference by the jury that the defendants were partners; hence the instruction was erroneous and calculated to mislead, and that it had been given was sufficient to call for setting aside the verdict. (*Morearty v. State*, 46 Neb. 652; *Dunbier v. Day*, 12 Neb. 596; *McCready v. Phillips*, 44 Neb. 796; *Williams v. State*, 46 Neb. 704; *Walrath v. State*, 8 Neb. 81; *City of York v. Spellman*, 19 Neb. 357; *Kay v. Noll*, 20 Neb. 380.) This disposes of the sole point made in argument in regard to the decision of the district court on the first motion for a new trial.

It is urged that the court erred during the second trial in the admission in evidence of Exhibit 1, which was the written contract between the plaintiff and the person in Omaha who was therein styled "trustee." As we view the record, the question of the character of the ruling of the court on the objection to the admission of this piece of evidence, whether erroneous or not, is immaterial, for, as we have indicated in the statement of the cause, the existence of this article of agreement and its contents were as facts pleaded in the answer as new matter, and not denied in the reply. All such facts so pleaded as were material were thus admitted to be true (Code of Civil Procedure, sec. 134); and the admission of the contract as evidence of such facts could not prejudice the rights of the plaintiff. Of such facts as were of its recitals, and not material, its admission as evidence of them was clearly not prejudicial, if erroneous; hence that it was admitted does not call for a reversal of the judgment. (*Graham v. Frazier*, 49 Neb. 90.)

It is contended for the plaintiff that the evidence conclusively established the signature of the defendant Cavanagh to have been made as a principal maker of the note on which it appeared, and so signed pursuant to specific agreement between the signer and the plaintiff. On the question of whether the defendant signed

the note as a principal or as a surety there was a conflict in the evidence, with sufficient to support a finding that it was as surety, and the evident determination of the jury to such effect will not be disturbed.

Error is asserted in argument, of the action of the trial court in giving in the charge to the jury an instruction numbered 6. The plaintiff did not except to the giving of this or, indeed, any of the instructions, and the alleged error will not be reviewed. To secure a review of alleged error in giving an instruction it is necessary to except at the time. (*Johnson v. Swayze*, 35 Neb. 117; *Lowe v. Vaughan*, 48 Neb. 651; *City of Omaha v. McGavock*, 47 Neb. 313; *Sigler v. McConnell*, 45 Neb. 598.)

It is argued that the court erred in the exclusion from the evidence of an exhibit numbered 9. This is without force for the reason that of the alleged error there was no specific assignment in the petition in error. Where such is the case a review cannot be obtained. (*Smith v. Mason*, 44 Neb. 610; *Redman v. Voss*, 46 Neb. 513; *Hedrich v. Strauss*, 42 Neb. 485.) We will say further, in this connection, that on page 153 of the record it is disclosed that this exhibit was received in evidence without objection and read to the jury.

No errors have been presented which call for a reversal of the judgment and it will be

AFFIRMED.

REID, MURDOCH & COMPANY V. AUGUST PANSKA ET AL.

FILED SEPTEMBER 23, 1898. No. 8278.

1. **Continuance:** BILL OF EXCEPTIONS. Affidavits in support of a motion for continuance will not be reviewed by this court unless they have been embodied in a bill of exceptions.

2. **Replevin:** SUMMONS. A summons in an action in replevin brought in the county court must be made returnable within 12 days from its date.

3. ———: ———: JUDGMENT. Where a writ of replevin is quashed, on motion of the defendant, for defects appearing on its face, a judgment for a return of the property cannot be given, nor for the value thereof and damages. SULLIVAN, J., and RAGAN, C., dissenting.

4. ———. *Garber v. Palmer*, 47 Neb. 699, and *Ahlman v. Meyer*, 19 Neb. 63, distinguished.

5. ———: STATUTE: AMENDMENT. Act of the legislature of 1875 (Code of Civil Procedure, sec. 193*a*) amending the provisions of said Code relating to actions of replevin is void, as containing no provision for the repeal of the sections amended, as required by the constitution then in force.

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

The opinion contains a statement of the case.

Schomp & Corson, for plaintiff in error:

The court erred in striking from the record the affidavit for a continuance. (*Moline v. Curtis*, 38 Neb. 520.)

Defendants having objected to the jurisdiction of the court and obtained an order quashing the summons, are estopped from demanding a trial to determine their property rights and damages. (*Bollong v. Schuyler Nat. Bank*, 26 Neb. 281; *Robertson v. Smith*, 15 L. R. A. [Ind.] 273.)

After the summons was quashed the court was without jurisdiction to enter judgment for a return of the property and for damages. (*People v. Sturtevant*, 9 N. Y. 263; *Perrine v. Farr*, 22 N. J. Law 356; *Ex parte Reed*, 100 U. S. 23; *Hill v. Bloomer*, 1 Pinney [Wis.] 463; *Parsell v. Genesee Circuit Judge*, 39 Mich. 542; *Gray v. Dean*, 136 Mass. 128; *Burdett v. Doty*, 38 Fed. Rep. 491; *Jordan v. Dennis*, 7 Met. [Mass.] 590; *Moore v. Herron*, 17 Neb. 697; *Ahlman v. Meyer*, 19 Neb. 65.)

Beeson & Root, contra:

Where plaintiff has given bond and obtained the property and the writ has been quashed, judgment should be

entered for a return of the property and a trial awarded to ascertain its value and the damages. (*Kendrick v. Watkins*, 54 Miss. 495; *People v. Judge*, 23 Mich. 497; *People v. Tripp*, 15 Mich. 518; *Fleet v. Lockwood*, 17 Conn. 232; *McArthur v. Lane*, 15 Me. 245; *Greely v. Currier*, 39 Me. 516; *Collamer v. Page*, 35 Vt. 387; *Thurber v. Town of Richmond*, 46 Vt. 395; *Garber v. Palmer*, 47 Neb. 699.)

The application for a continuance was properly denied. (*Rowland v. Shephard*, 27 Neb. 494.)

The affidavit for a continuance is not a proper part of the transcript but should have been incorporated into the bill of exceptions. (*Cleghorn v. Waterman*, 16 Neb. 231; *Barton v. McKay*, 36 Neb. 632; *Real v. Honey*, 39 Neb. 516.)

References to question of estoppel: *Worley v. Shong*, 35 Neb. 311; *Omaha Loan & Trust Co. v. Hogeboom*, 47 Neb. 7.

Byron Clark and *C. A. Rawls*, also for defendants in error.

NORVAL, J.

This was replevin commenced in the county court by Reid, Murdoch & Company, a corporation, to recover possession of specific personal property. The summons or writ of replevin served on defendants was by its terms made returnable more than 18 days after the date of its issue. The property was taken under the writ, and the possession thereof delivered to the plaintiff on its execution of the proper undertaking. On the return day the defendants made a special appearance, challenging the jurisdiction of the court over their persons, and moved to quash the summons or writ on the ground that it was returnable more than 12 days after the date when issued. At the same time plaintiff filed a motion for a continuance for a longer period than 30 days, and also moved to strike the motion of defendants from the files for the reason no notice of the filing thereof has been served on

plaintiff. The county court quashed the replevin writ or summons, overruled plaintiff's motions, and taxed the costs to it. Whereupon, on motion of the defendants, the court, a jury being waived, over the objections of plaintiff, proceeded to ascertain their right to the property replevied and the possession thereof, and from a consideration of the evidence adduced found the right of property and possession at the commencement of the action in the defendant August Panska, assessed the value of the property at $183.85, and damages for withholding the same in the sum of $125, and entered a judgment for a return of the property in favor of Panska, or in case a return could not be had that he recover the value in damages determined as aforesaid. Error was prosecuted by the plaintiff to the district court, where, on motion of defendant, the affidavit of W. A. Corson filed in the county court by plaintiff in support of its application for a continuance was stricken from the transcript, and thereupon the judgment of the county court was affirmed. Plaintiff now seeks a review of the record by error proceeding.

It is argued that it was prejudicial error to eliminate the affidavit of Mr. Corson from the transcript of the county court. The ruling assailed is no just cause for complaint. The affidavit in question was no part of the record of the county court, it not having been incorporated in a bill of exceptions. (*Hobbs v. Hunt*, 34 Neb. 657; *Hunter v. Bell*, 33 Neb. 249; *Wright v. State*, 45 Neb. 44; *Gray v. Godfrey*, 43 Neb. 672; *National Lumber Co. v. Ashby*, 41 Neb. 292; *Barton v. McKay*, 36 Neb. 632.)

Section 9, chapter 20, Compiled Statutes, requires that in all actions of replevin in the county court the summons shall be returned within the same time as in similar actions before justices of the peace. By section 1035 of the Code of Civil Procedure a summons in such an action shall be issued by the justice as in other cases, and section 911 of said Code provides that a summons in justice court "must be returnable not more than twelve days

from its date." In view of these statutory requirements, the summons issued in the case at bar by the county court was void, and that court very properly quashed the same, since the writ was made returnable 18 days from its date.

It remains to be determined whether the county court erred in trying the defendants' right of property and right of possession and rendering a judgment for a return of the property or the value thereof in case no return could be had. The present suit was cognizable before a justice of the peace, the appraised value of the property being less than $200, so that the provisions of section 1041 governing actions of replevin before justice of the peace are applicable. This section declares: "If the property has been delivered to the plaintiff, and judgment be rendered against him, or if he otherwise fail to prosecute his action to final judgment, the justice shall, on application of the defendant, or his attorney, impanel a jury to inquire into the right of property and right of possession of the defendant to the property taken." This section authorizes an inquiry to be made by the court in a replevin action into the defendant's right of property or right of possession on his request on the happening of either of the events indicated in the section, where the property has been seized under the writ and delivered to the plaintiff. But this case is not within the purview of the section, as the provisions thereof are not applicable where the defendant obtains a dismissal of replevin action for want of jurisdiction. In the language of counsel for plaintiff: "The statute was intended to prevent any act of the plaintiff to work a discontinuance and at the same time allow him to reap the fruits of his improper conduct. But does not apply to cases where plaintiff's action fails because of jurisdictional defects, for jurisdiction is fundamental to the protection of all rights in the action whether asserted by the defendant or by the plaintiff." If the county court acquired no jurisdiction by virtue of its process, then it was powerless to adjudicate the rights of either party. This is clear, and the principle is amply

sustained by the authorities. (*State v. Letton*, 56 Neb. 158, and cases there cited.) *Garber v. Palmer*, 47 Neb. 699, is readily distinguishable. There jurisdiction over the subject-matter and of the person was acquired, and plaintiff sought to voluntarily dismiss his replevin action without the consent of the defendant and to the prejudice of the latter, which was properly held could not be done, and that in such a case the defendant was entitled to a trial of his rights of property or right of possession. Of like import is *Ahlman v. Meyer*, 19 Neb. 63.

The defendants invoke the provisions of section 193*a* of the Code of Civil Procedure, which declares: "That whenever any action in replevin shall be dismissed by the court for irregularities or defects in the proceedings by the plaintiff, judgment may be given in favor of the defendant on proof of the value of the property and the amount of the damages." This section was enacted by the legislature of 1875 under the title "An act to amend the Code of Civil Procedure in actions of replevin." (Session Laws 1875, p. 44.) That was an amendatory act, in its scope and effect, and not an independent and complete piece of legislation, and is invalid inasmuch as the act contained no provision for the repeal of the section of the Code of Civil Procedure sought to be amended. (*Reynolds v. State*, 53 Neb. 761.) The judgment of the county and district courts are reversed, and the action dismissed.

REVERSED AND DISMISSED.

SULLIVAN, J., and RAGAN, C., dissent.

WILLIAM F. PICKERING V. SAMUEL C. HASTINGS.

FILED OCTOBER 5, 1898. No. 8283.

Corporations: LIABILITIES OF STOCKHOLDERS: ACTIONS: PARTIES. It is the settled doctrine of this court that the liability of a stockholder in a banking corporation, under the provisions of section 7, article 11, of the constitution, is for the creation of a fund for the benefit of all creditors, and an action to enforce such liability must be prosecuted for the benefit of all the creditors of the corporation against all the stockholders within the jurisdiction of the court.

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

Greene & Hostetler, for plaintiff in error.

William Gaslin, contra.

NORVAL, J.

The Commercial and Savings Bank of Kearney was incorporated under the laws of this state on September 2, 1889, and for some time thereafter was engaged in the business of banking. William F. Pickering was a stockholder therein, owning ten shares of the stock of the face value of $100 each. Samuel C. Hastings was a depositor in said bank, and had money on deposit therein at the time the bank closed its doors and ceased to do business. Hastings recovered a judgment against said bank in the sum of $649.80 for moneys so deposited as aforesaid. Execution was issued on said judgment, which was returned *nulla bona.* Thereupon this action was instituted by Hastings in his own behalf in the county court of Buffalo county against Pickering alone, under section 7, article 11 of the constitution, to enforce the liability imposed by said section upon stockholders in banking corporations. A general demurrer to the petition was sustained by the county court, and on error proceeding this judgment was reversed by the district court, and the cause was retained

for trial therein. Subsequently plaintiff filed a petition similar to the one in the county court, which the defendant answered denying part of the averment contained therein, and pleading certain matters in defense,—among others, that there are various creditors of said bank to the defendant unknown, and also a large number of stockholders of said corporation, giving the names of the latter, with the number of shares of stock owned by each; that one Henry Gibons was by this court in February, 1892, appointed receiver of said bank, who qualified as such and entered upon the duties of his trust, and as such receiver took possession of all the assets of said bank, which was ample to pay plaintiff's claim, and still retains possession thereof, and if the execution mentioned in the petition was returned no property found it was because all the assets of the bank were at the time in the custody of the receiver and could not be reached; that plaintiff should have sued on behalf of himself and the other creditors of the bank, and that all the stockholders should have been made parties defendant. To this answer plaintiff replied by a general denial, and the trial upon the issues joined resulted in a judgment in favor of plaintiff for the full amount of his claim against the bank. The defendant has prosecuted an error proceeding.

It was stipulated in open court on the trial that plaintiff and the several other persons mentioned in paragraph 6 of the answer were residents of Buffalo county and stockholders of the Commercial and Savings Bank of Kearney at the time the bank became indebted to Pickering, as well as when the suit was instituted, and that there were and are numerous creditors of said bank similarly situated with plaintiff, whose claims were due and unpaid. The proper disposition of the case at bar can be based upon a single ground, and that is, whether the action was properly brought to enforce the liability created by the section of the constitution already mentioned, which declares: "Every stockholder in a banking

corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder," etc. In other words, can an action under the foregoing provision be maintained by one creditor of the corporation in his own behalf against a single stockholder? Plaintiff argues in support of the affirmative of the proposition and cites authorities* in support of his position; but subsequent to the filing of the briefs herein, and after the judgment of the trial court was rendered, the precise question was presented to this court for consideration, and determined adversely to the contention of the plaintiff. Thus in *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353, it was expressly decided that the liability of a stockholder in a banking corporation under the provisions of section 7, article 11, of the constitution is for the creation of a trust fund for the benefit of all creditors, and an action to enforce such liability must be prosecuted by one creditor of the corporation for the benefit of all, or by the receiver when one has been appointed. That was an action at law by a creditor of the State Bank of Ainsworth against one of the stockholders thereof to collect an amount equal to the par value of his stock, and it was ruled that the action could not be maintained. The action should be for the benefit of all the creditors of the corporation against all the stockholders within the jurisdiction of the court. (*Van Pelt v. Gardner*, 54 Neb. 70; *German Nat. Bank of Lincoln v. Farmers & Merchants Bank of Holstein*, 54 Neb. 593.) These decisions are directly in point, and if adhered to, must control the disposition of the case under consideration. There is a conflict in the adjudications of other courts on the subject, but the rule announced by this court in the foregoing cases is the most

*For counsel's citations to sustain the contention that liability of a stockholder may be enforced in a suit against him alone by a single creditor, see *Hastings v. Barnd*, 55 Neb. 94.

just and equitable one, and being sustained by the better reason as well as authority, will not be now departed from.

White v. Blum, 4 Neb. 555, cited in brief of plaintiff, is easily distinguishable. So far as the report of that case discloses plaintiffs were the only creditors of the Midland Pacific Railway Company, and the defendants were the sole stockholders of said corporation. That the proper parties were before the court was a matter not in controversy, the principal contention being whether a joint judgment for unpaid subscription to capital stock could be rendered against all the stockholders, where the amount due for each on account of his subscription equaled or exceeded the demands of the corporation creditor.

Smith v. Steele, 8 Neb. 115, was an action at law against the stockholders of a corporation and the corporation itself, and it does not appear that there were any creditors of the corporation other than the plaintiffs.

Doolittle v. Marsh, 11 Neb. 243, was a suit against a stockholder of the Omaha Horse Railway Company to enforce the payment of a judgment recovered against the corporation for a tort. It was held that the action would not lie under section 136 of the chapter of the General Statutes on Corporations.

Howell v. Roberts, 29 Neb. 483, and *Coy v. Jones*, 30 Neb. 798 were actions at law against stockholders to enforce the liability created by said section 136. In none of these decisions rendered prior to the handing down of the opinion in *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353, was it decided that an individual creditor of a corporation could maintain an action for his own benefit alone against a single stockholder to enforce the constitutional liability of stockholders for the debts of the corporation.

The present action must fail because all the stockholders of the Commercial and Savings Bank within the jurisdiction of the court were not made parties defendant.

REVERSED AND REMANDED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. CHARLES BUEL.

FILED OCTOBER 5, 1898. No. 8266.

1. **Eminent Domain:** INTEREST ON AWARD OF DAMAGES. Where, on an appeal from an award of damages for land taken for right of way purposes, the damages are found to exceed the award of the commissioners, it is proper to instruct the jury to allow interest from the time of condemnation at the rate of seven per cent per annum.
2. **Review:** EVIDENCE: CROSS-EXAMINATION. A party cannot obtain a reversal on account of the admission of incompetent evidence which he brought out on the cross-examination of the witness of his adversary.
3. ———: ———. Error cannot be predicated upon the refusal to eliminate from the record the testimony which the party complaining himself introduced.
4. **Eminent Domain:** MAP OF PREMISES: EVIDENCE. On the trial of an appeal from an award of damages for land appropriated for railroad purposes a map or plat of the premises, shown to be correct, is admissible in evidence.
5. ———: EVIDENCE: VALUE OF PROPERTY: WITNESSES. The owner of land appropriated by a railroad company for right of way, who has resided upon and cultivated the land and is familiar with the value thereof, is a competent witness on the question of its value.
6. ———: RAILROADS: ELEMENTS OF DAMAGE. The elements of damage for the construction of a railroad across a farm are the actual value of the portion taken and the depreciation in value of the remainder caused by the proper construction and operation of the railroad, excluding general benefits.

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.

Charles E. Magoon, contra.

NORVAL, J.

The Chicago, Rock Island & Pacific Railway Company instituted proceedings for the condemnation of right

of way over and across the land of Charles Buel and for the assessment of his damages in the premises. The commissioners appointed by the county judge assessed the damages at $800, and from said award an appeal was prosecuted to the district court, where the landowner obtained a verdict and judgment in the sum of $1,957.50. The railway company has brought error proceeding in this court to review the record of the trial.

The first assignment argued in the brief is directed against the ninth or last instruction given by the court on its own motion, which was to the effect that if the jury ascertained that the value of the land taken for right of way purposes and the damages to the remainder of the tract, if any, determined in accordance with the previous instructions, together, exceeded the sum of $800, —the amount awarded by the commissioners,—interest was to be allowed at the rate of seven per cent per annum on the entire sum found by the jury to be due the plaintiff below. This instruction is in harmony with many adjudications of this court, and is opposed to none. It is well settled that where, on an appeal for an award of damages for lands taken for right of way, the damages are found to exceed the sum returned by the commissioners, the owner is entitled to interest from the date of the appropriation. (*Sioux City R. Co. v. Brown*, 13 Neb. 317; *Berggren v. Fremont, E. & M. V. R. Co.*, 23 Neb. 20; *Atchison & N. R. Co. v. Plant*, 24 Neb. 127; *Burlington & M. R. R. Co. v. White*, 28 Neb. 166.)

The gist of the argument of counsel for the railway company is that evidence was adduced as to damages occasioned by the destruction of crops, by digging a ditch, and various other items of damages, and that the instruction assailed permitted a recovery of interest on such damages from a date long anterior to the time they accrued. This is not a fair criticism of the doctrine announced by the court. The ninth paragraph of the charge, in express terms, confines the jury in the determination of the damages to the principles laid down for

their guidance in the other portions of the charge, and it is a familiar rule that instructions are to be considered as a whole. The doctrine is distinctly announced in the instructions that plaintiff can recover the actual value of the land appropriated, and the depreciation in value of the portion not taken caused by the careful and proper construction and operation of defendant's road, and that no recovery could be had for loss sustained by the negligent or faulty construction or operation of the road, or by acts of defendant upon plaintiff's land outside of the right of way. So that the jury, if they were guided by the rule given to them by the court, not only did not allow improper elements of damages, such as injury to growing crops, but did not award plaintiff interest thereon for any length of time whatever.

Complaint is made of the allowance of the witness Boarman to testify that the depreciation in value of the land resulted from the embankment constructed by the defendant backing surface water on the land and destroying the crops, and that witness observed water standing on the land after the construction of the road. The record shows that Boarman was called as a witness for the landowner and testified on direct examination as to the value of the land, both before and after the appropriation. It was on cross-examination of the witness by the attorney for the defendant company that the testimony was given of which complaint is now made. A reversal cannot be had for the admission of incompetent evidence brought out by the unsuccessful party. For the same reason error cannot be predicated upon the testimony of plaintiff's witnesses Wilson and Meyers relating to the depreciation in value of the land caused by the damming-up of the water, since the testimony was elicited on cross-examination by the railway company. Moreover, the defendant could not have been prejudiced by this class of testimony, for the jury were directed by the sixth instruction as follows: "You are not, however, to consider any damages to the land not taken, if any

such has been shown by the evidence to exist, occasioned by reason of the improper or negligent construction of the defendant's railway, even though such improper or negligent construction of the defendant's railway obstructs the said waterway, and throws the water back upon plaintiff's land."

It is urged that there was prejudicial error in the trial court refusing to strike out the evidence of the witness Boarman as to damages sustained by surface water and destruction of crops. His testimony having been given in response to interrogatories propounded by counsel for defendant, it cannot complain because the court declined to eliminate it from the record.

Objection is made to the receipt in evidence of a map of plaintiff's lands. This document was made by a civil engineer and was shown to be a correct map or plat of the premises in controversy. It was admissible in evidence to enable the jury to properly understand and apply the other evidence adduced on the trial, especially as both parties used the map in the examination and cross-examination of the witnesses. (*Village of Culbertson v. Holliday*, 50 Neb. 229; *Brown v. Galesburg Pressed Brick & Tile Co.*, 132 Ill. 649; *State v. Harr*, 17 S. E. Rep. [W. Va.] 794; *Clegg v. Metropolitan S. R. Co.*, 37 N. Y. Supp. 130; *Le Beau v. Telephone & Telegraph Construction Co.*, 67 N. W. Rep. [Mich.] 339; *Goldsborough v. Pidduck*, 54 N. W. Rep. [Ia.] 431; *Chicago, K. & N. R. Co. v. Davidson*, 49 Kan. 589; *Rodriquez v. State*, 22 S. W. Rep. [Tex.] 978.)

Objection is raised to permitting plaintiff to testify as to the value of the land in dispute. It is argued that he was not shown to be competent to testify on the question of value. The evidence discloses that he owned the land and cultivated it, was familiar therewith and with other real estate in the same vicinity, and that he was acquainted with the value of his farm before and after the location of the defendant's right of way. He was competent to testify on the subject of value, even though he was not an expert, or dealer in real estate. The first

paragraph of the syllabus in *Burlington & M. R. R. Co. v. White*, 28 Neb. 166, reads thus: "Where witnesses are shown to be familiar with the value of a particular piece of land across which a railroad has been built, they are competent to testify as to the value of such tract of land immediately before the location of the road and to the value thereof immediately afterwards. (*Republican V. R. Co. v. Arnold*, 13 Neb. 485; *Northeastern N. R. Co. v. Frazier*, 25 Neb. 53.)" And the first and second divisions of the syllabus in *Burlington & M. R. R. Co. v. Schluntz*, 14 Neb. 421, are as follows: "(1.) The owner of land taken for right of way by a railroad company, having resided upon and improved it for several years, who swears that he knows what it is worth, is a competent witness on the question of value. (2.) So, too, are other persons who have resided for several years in the immediate neighborhood of the land, and who seem, upon examination, to be well informed of its situation, condition, and value." The same principle is stated in *Sioux City & P. R. Co. v. Weimer*, 16 Neb. 272. In the light of these adjudications there is no room to doubt that Buel was competent to testify on the question of value.

We have examined and considered the other rulings of the trial court on the admission of evidence, to which reference has been made in the brief, and discover no error therein prejudicial to the company.

In discussing the fourteenth, fifteenth, twenty-eighth, and twenty-ninth assignments of error counsel for the corporation observe: "The measure of damages in a railroad condemnation where a part only of the land is taken is the fair market value of the land actually taken, plus the depreciation in value of the remainder caused by the proper construction and operation of the road." This is sound doctrine, and is sustained by the decisions of this court. (*Blakeley v. Chicago, K. & N. R. Co.*, 25 Neb. 207; *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb. 542; *Omaha S. R. Co. v. Todd*, 39 Neb. 818; *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb. 381; *Chicago, B. & Q. R. Co. v. O'Connor*,

42 Neb. 90.) The jury were instructed in accordance with the rule announced in the foregoing authorities. It is true some of the witnesses were interrogated as to the value of the plaintiff's farm before and after the location of the railroad, instead of the market value thereof at those times, but it is manifest from a reading of the evidence that the witnesses and jurors must have understood the expressions "value" and "market value" were interchangeably used, the value of a farm necessarily meaning its market price. Discovering no prejudicial error, the judgment is

AFFIRMED.

SMITH BROTHERS LOAN & TRUST COMPANY, APPELLEE, V. M. H. WEISS ET AL., APPELLEES, IMPLEADED WITH HULDA A. THOMPSON ET AL., APPELLANTS.

FILED OCTOBER 5, 1898. No. 8306.

1. **Judicial Sales:** APPRAISEMENT. Where lands constituting one body are used as a single tract, ordinarily they may for judicial sale be appraised together.
2. ———: ———: OBJECTIONS. Objections to the appraisement must be made prior to the sale.
3. **Bill of Exceptions:** AFFIDAVITS. Affidavits used on the hearing of a motion in the district court cannot be considered on review in the appellate court unless embodied in a bill of exceptions.
4. **Judicial Sale:** PLACE. The sale of lands under a decree of foreclosure must take place at the court house, unless there be none in the county, in which case the sale must occur at the door of the building in which the last district court of the county was held.

APPEAL from the district court of Thayer county. Heard below before HASTINGS, J. *Reversed.*

W. H. Barnes and *John Heasty*, for appellants.

Griggs, Rinaker & Bibb, O. H. Scott, C. L. Richards, Charles P. Schwer, M. H. Weiss, and *Richards & Dinsmore, contra.*

NORVAL, J.

This is an appeal from an order of the court below confirming the sale of real estate under a decree of foreclosure.

The first objection is that the premises were not separately appraised. To this there are two answers. In the first place there is nothing in the record to show that the premises constituted two separate and distinct tracts. The lands were contiguous, and if used as a single tract there was no error in so appraising the property. Again, no objections were made to the appraisement until after the report of the sale was filed. This was too late to be available. (*Vought v. Foxworthy*, 38 Neb. 790; *Ecklund v. Willis*, 42 Neb. 737; *Burkett v. Clark*, 46 Neb. 466; *Overall v. McShane*, 49 Neb. 64.)

It is urged that no certificates of liens were ever obtained of the county clerk and clerk of the district court. The return of the sheriff on the order of sale shows that certificates of liens existing against the premises were obtained from the county treasurer, county clerk, and clerk of the district court, and copies thereof, together with a copy of the appraisement, were forthwith filed in the district court, and the return of the officer in this respect is not discredited by any testimony found in the record.

A complaint is made that the purchaser at the sale has not paid, but refuses to pay, the amount of his bid for the premises. The foundation for this assertion is the affidavits of the sheriff and clerk of the district court, copies whereof are included in the transcript. These affidavits cannot be considered, for the reason there is no bill of exceptions in the case. (*Hobbs v. Hunt*, 34 Neb. 657; *Hunter v. Bell*, 38 Neb. 249; *Barry v. Barry*, 39 Neb. 521; *Norfolk Nat. Bank v. Job*, 48 Neb. 774.)

Another reason urged for vacating the sale is that the same was not held at the court house, or at the door of the building wherein the district court was last held.

By section 503 of the Code of Civil Procedure all sales of real estate under an execution are required to be held at the court house, unless there be none in the county, in which case the sale must take place at the door of the house in which the last district court of the county was held. And this provision is likewise applicable to sales made under decrees foreclosing real estate mortgages. (*Burkett v. Clark*, 46 Neb. 466.) The return of the sheriff fails to disclose the property was offered and sold either at the court house in Thayer county, or at the door of the building in which the last district court was held. The return discloses that the premises were once offered for sale at the court house on May 6, 1895, but were not then sold for want of bidders. Under the same order of sale and appraisement the lands were readvertised, and on June 10, 1895, were sold, but the return is wholly silent as to the place where the sale took place. For this defect in proceedings the order of confirmation is reversed, the sale vacated, and a resale of the premises ordered.

REVERSED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. JAMES E. PHILPOTT ET AL.

FILED OCTOBER 5, 1898. No. 8323.

1. **County Judge:** ACTION ON BOND: LIMITATION. An action on the official bond of a county judge is barred in ten years after the cause of action accrued.

2. ———: ———: CONVERSION. The failure of a county judge, after the expiration of his official term, to pay over to his successor in office, or the person entitled thereto, money deposited in condemnation proceeding, is a breach of his official bond; and thereupon a cause of action accrues to the person damaged by such breach. *Clelland v. McCumber*, 15 Colo. 355, followed.

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

The opinion contains a statement of the case.

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

Plaintiff contends that defendant Philpott, by virtue of the statute and his bond, received the condemnation money as an express continuing trust for the benefit of the railroad company, with that duty continuing beyond his term; that as such trustee he could not hold adversely to his *cestui que trust* until demand and refusal to deliver; that the statute of limitations did not begin to run against this express trust until July 1, 1892; that consequently the defendants have violated their trust obligation, the action is not barred, and they are liable to the plaintiff for the deposit. (*King v. Nichols*, 16 O. St. 87; *Streitz v. Hartman*, 26 Neb. 49; *Parks v. Satterthwaite*, 132 Ind. 411; *Smiley v. Fry*, 100 N. Y. 262; *Presley v. Davis*, 62 Am. Dec. [S. Car.] 396; *Havens v. Church*, 62 N. W. Rep. [Mich.] 151; *Hayden v. Thompson*, 71 Fed. Rep. 69; *Alexander v. Overton*, 22 Neb. 227; *Cutler v. Roberts*, 7 Neb. 13; *State v. Grand Island & W. C. R. Co.*, 31 Neb. 209; *St. Louis, O. H. & C. R. Co. v. Fowler*, 113 Mo. 458.)

Lamb & Adams and *J. E. Philpott, contra:*

The action is barred by the statute of limitations. (*Merriam v. Miller*, 22 Neb. 218; *Clelland v. McCumber*, 15 Colo. 355; *Blackshire v. Atchison, T. & S. F. R. Co.*, 13 Kan. 514; *White v. Wabash, S. L. & P. R. Co.*, 64 Ia. 281; *Owen v. State*, 25 Ind. 107.)

NORVAL, J.

This suit is upon the official bond of James E. Philpott, as county judge of Lancaster county. The court below sustained a general demurrer to the petition, and dismissed the action. Plaintiff prosecutes error.

The petition alleges, substantially, that plaintiff is a corporation and, by consolidation with the Burlington

& Missouri River Railway Company in Nebraska, plaintiff succeeded to all the last named company's rights, privileges, and property on or about January 1, 1880; that the defendant Philpott was elected county judge of Lancaster county for the term commencing in January, 1880, qualified as such officer and gave the bond set out in the petition, with his co-defendants as sureties, which was duly approved, and he took possession of, and occupied, said office for the full term of two years; that in December, 1879, the Burlington & Missouri River Railway Company in Nebraska made application to the predecessor in office of said Philpott for the condemnation of certain real estate in the city of Lincoln for right of way purposes, including lots 14, 15, 16, and 17, in block 70, of said city; that a commission was appointed to view the premises and assess the damages to be paid by the railroad company, which commission made its report to the defendant Philpott, as county judge, April 3, 1880, and on the 7th day of the same month the railroad company deposited with him, as such county judge, the sum of $1,000, being the amount of damages so assessed for the appropriation of said lots, for the use and benefit of the owners of the property; that the land owners declined to recognize as legal and valid the said condemnation proceedings, and in September, 1885, they commenced proceedings against said railroad company to recover said lots, which litigation continued in the courts for several years and until in July, 1892, when it was decided that said condemnation proceedings were invalid and that the railroad company obtained thereby no right or title to said lots; that the $1,000 so deposited with Philpott at all times remained in his possession, and has never been turned over to his successor; that in December, 1893, plaintiff demanded of said Philpott said money, yet he refused to comply with said request, but still retains said money, which was received by him in his official capacity, under the statute, in trust for owners of said lots, if they chose to accept the same; and that said

Philpott has no right, title, interest, or claim to said money or any portion thereof.

The decision of the district court was grounded upon the proposition that the action was barred by the statute of limitations, and while other questions are argued in the briefs, the only one necessary for us to consider is whether the statute had run against the cause of action at the time the suit was instituted. By section 9 of the Code of Civil Procedure it is provided: "Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued;" and section 14 of said Code declares: "An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer, or upon the bond or undertaking given in attachment, injunction, or in any case whatever required by statute, can only be brought within ten years." It is too plain to require discussion that under the foregoing provision an action on the official bond of a county officer is barred in ten years after the cause of action accrued. It has been so held as to actions upon county treasurer's bond (*Merriam v. Miller*, 22 Neb. 218; *Alexander v. Overton*, 22 Neb. 227); and the same rule unquestionably obtains as to suits on the bond of a county judge.

The next inquiry is, when did plaintiff's cause of action accrue? It is argued by counsel for plaintiff that the statute of limitations did not commence to run until the invalidity of the condemnation proceeding was finally adjudicated. We cannot yield assent to the proposition. No appeal was taken by either party from the award of the commissioners selected to assess the damages for the appropriation of the lots, so that if the condemnation proceedings were legal, the rights of the parties were fixed and established, and one or the other was entitled to the money deposited not later than the expiration of the time for prosecuting an appeal from the assessment of damages. If the proceedings were without jurisdic-

tion and void at the inception, it required no determination thereof in collateral actions to entitle the railroad company making the deposit, or its successor, to recover the same from the county judge. The money, by reason of the invalidity of the proceedings to condemn, always belonged to the depositing corporation and a right of action accrued in its favor on the official bond, and the statute began to run, if not on the deposit of the money with the county judge, at the latest on the failure of such officer to pay such money, on the termination of his official term, to his successor. The condition of Judge Philpott's bond required him to pay over to the person or officer entitled thereto all money which should come into his hands by virtue of his office, and faithfully account for all the balances or money remaining in his hands at the termination of his office and deliver the same to his successor or to any other person authorized to receive the same. The failure of Judge Philpott to pay this condemnation money, on the expiration of his official term, to his successor or to this plaintiff was clearly a breach of the condition of the bond declared on, and plaintiff could have at once, and without demand, maintained an action to recover said money. But it is said that there is no statutory provision requiring a county judge to turn over to his successor money deposited with him in condemnation proceedings. We do not so construe section 97, chapter 16, Compiled Statutes, the last proviso of which reads: "That either party may appeal from the decision of the district court to the supreme court of the state, and the money so deposited shall remain in the hands of the county judge until a final decision be had, subject to the order of the supreme court." The fair inference to be drawn from the language quoted is that the condemnation money shall be retained by the county judge, and not by the person who happened to hold that office when the deposit was made, until the right thereto is finally determined in appropriate appellate proceedings. The official term of Judge Philpott expired in Janu-

ary, 1882, while this suit was not instituted until June 3, 1895, or more than ten years after the accruing of the cause of action. The bar of the statute is complete. (*Clelland v. McCumber*, 15 Colo. 355, and cases there cited.) The judgment is

AFFIRMED.

JACOB BODEWIG ET AL. V. STANDARD CATTLE COMPANY.

FILED OCTOBER 5, 1898. No. 9993.

1. **Judgment:** ENFORCEMENT PENDING REVIEW. A plaintiff may proceed to enforce his judgment obtained on a contract for the payment of money only, notwithstanding the execution by the defendant of a sufficient supersedeas bond as required by law to stay proceedings pending a review of the judgment in the appellate court, upon the plaintiff executing, with at least two sufficient sureties, the undertaking prescribed by section 591 of the Code of Civil Procedure and obtaining leave from the court below, or a judge thereof in vacation, to enforce the collection of the judgment.

2. ———: ———: INJUNCTION. Where plaintiff has complied with the provisions of section 591 of said Code, the defendant is not entitled to an order restraining the enforcement of the judgment during the pendency of error proceedings to review such judgment.

ERROR from the district court of Platte county. Tried below before WESTOVER, J. Heard on motion of defendant in error to dissolve an order of the supreme court restraining enforcement of the judgment below. *Motion sustained.*

A. M. Post and *James G. Reeder*, for the motion.

Cookingham & McAllister, contra.

NORVAL, J.

The Standard Cattle Company instituted an action in the court below against the defendants on a contract for the payment of money only, and recovered a judgment

against them therein on February 19, 1898, in the sum of $525.29, besides costs. An execution was issued on said judgment and placed in the hands of the sheriff, who made a levy thereunder. Subsequently on April 5, 1898, and during the life of the execution, the defendants filed in this court a transcript of the proceedings, including the final judgment, also a petition in error, and caused a summons in error to be issued. They also executed and filed a supersedeas bond, with sureties approved by the clerk of the district court in accordance with sections 588, 589, and 590 of the Code of Civil Procedure, for the purpose of staying the execution of said judgment. On April 8, 1898, the defendants filed an application in the trial court for an order recalling the execution then in the hands of the sheriff, which was sustained, and the officer was ordered to return the process forthwith to the clerk of the trial court. The plaintiff below filed an application, under the provisions of section 591 of said Code, for leave to enforce its said judgment notwithstanding the giving of the supersedeas bond by the defendants and the steps taken by them to have said judgment reviewed. An order was entered authorizing the enforcement of the judgment upon the plaintiff's executing a bond with two sufficient sureties in the sum of $1,400, to be approved by the clerk of the district court, conditioned that if the judgment be reversed or modified, plaintiff below would make full restitution to the adverse parties of the money received under the judgment. The bond in accordance with the terms of the order was given and approved. An additional transcript embodying said applications and orders and a supplemental petition in error based thereon were filed in this court, and on June 8 an order was entered herein, on application of the defendants below, plaintiffs in error, restraining the collection of said judgment until otherwise ordered. The Standard Cattle Company has moved for a dissolution of said restraining order, and the present submission is upon the motion.

If the order of the court below authorizing the collection of the judgment is a final order within the meaning of section 581 of the Code of Civil Procedure which can be superseded under section 588 of said Code, the enforcement of said order has not been stayed by the giving of the undertaking prescribed by said section 588, but we are persuaded that the action of the court giving leave to plaintiff below to collect its judgment is not an order which can be stayed under said section. The judgment was recovered upon a contract for the payment of money only, and the execution could be superseded by the giving of the undertaking prescribed by subdivision 1 of section 588. Defendants below gave the requisite bond to secure a stay of execution, and no further proceedings were permissible to collect the judgment during the pendency of the proceedings in error in this court except for section 591 of said Code and the compliance therewith by the judgment creditor. This section reads: "In an action arising on contract, for the payment of money only, notwithstanding the execution of the undertaking in the last section mentioned, to stay proceedings, if the defendant in error give adequate security to make restitution in case the judgment is reversed or modified, he may, upon leave obtained from the court below, or a judge thereof in vacation, proceed to enforce the judgment. Such security must be an undertaking executed to the plaintiff in error by at least two sufficient sureties, to the effect that if the judgment be reversed or modified, he will make full restitution to the plaintiff in error of the money by him received under the judgment." It was under this section, and in pursuance of its provisions, that permission was granted by the trial court to collect the judgment which had at that time been superseded by the defendants in execution. This section, if valid and binding,—and its validity not now being assailed, will be treated as in force,—confers ample power, upon compliance with the provisions, for the enforcement of a judgment rendered in an action on a contract for the

payment of money only, although the collection of such judgment may have been superseded by the giving of the undertaking provided in said section 588. The judgment creditor must first obtain leave of the court below, or a judge thereof in vacation, and give the bond prescribed in said section 591 before he can have enforcement of his judgment, during the pendency of error proceeding. It is obvious that said sections 588 and 591 must be construed together. Section 588 provides for the stay of execution while error proceeding is being prosecuted, and section 591 prescribes the conditions upon which the right conferred by section 588 upon a judgment debtor may be defeated in actions on contracts for the payment of money alone. In the case at bar plaintiff below has fully complied with the requirements of said section 591, and is entitled to enforce his judgment, since leave to do so was given by the court below, notwithstanding the defendants had given the undertaking required by section 588. It is a familiar maxim that "equity follows the law," and to restrain the enforcement of the judgment in this case would contravene said maxim, and override and render nugatory a plain provision of statute, which we have no right to do. The motion to dissolve the restraining order heretofore issued by this court is sustained, and said order is vacated.

MOTION SUSTAINED.

SULLIVAN, J., not sitting.

GEORGE B. LASBURY, APPELLEE, V. THOMAS H. MCCAGUE, RECEIVER, APPELLANT.

FILED OCTOBER 5, 1898. No. 8251.

1. **Municipal Corporations:** STAGNANT WATER ON PRIVATE LOT: COST OF ABATING NUISANCE. The power conferred by section 29, chapter 12*a*, Compiled Statutes 1895, upon the authorities of a city

of the metropolitan class to levy the costs and expenses of draining, filling, or grading a lot to prevent stagnant water accumulating thereon and becoming a nuisance is contingent upon the failure of the owner of the lot to fill, drain, or grade the same when so requested. The law contemplates that the city request the owner to perform the work, and if he fail to do so, the city can cause the premises to be drained or filled and assess the cost thereof against the property.

2. ———: SPECIAL TAXES: VALIDITY: BURDEN OF PROOF. Where the owner of a city lot institutes an action to have declared void certain special taxes assessed against the lot, the burden is upon him to establish the invalidity of said tax.

3. ———: ———: ———: NUISANCE. A special tax assessed by a city on the lot of a citizen to pay the costs of abating a nuisance created by the municipality on the same lot will not be sustained in equity.

4. ———: ———: ———. The invalidity of a special tax levied by a municipal corporation against the lot of an individual is ordinarily as available to the subsequent purchaser of the property as to one who was its owner when the assessment was imposed.

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

The opinion contains a statement of the case.

Saunders & Macfarland and *Ralph W. Breckenridge*, for appellant:

Plaintiff was not the owner of the lot when the assessment was made, and cannot urge its invalidity. (*Cheney v. Dunlap*, 27 Neb. 401.)

The proceedings under which the tax was levied are regular. (*Douglas v. State*, 4 Wis. 403; *Shaw v. Cummiskey*, 7 Pick. [Mass.] 76; *People v. Townsend*, 3 Hill [N. Y.] 479; *Story v. Hammond*, 4 O. 376; *Baumgartner v. Hasty*, 100 Ind. 575; *North Chicago City R. Co. v. Town of Lake View*, 105 Ill. 207; *King v. Davenport*, 98 Ill. 305.)

The abatement of the nuisance was a legitimate exercise of police power. (*Smiley v. MacDonald*, 42 Neb. 5; *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549; *Lawton v. Steele*, 119 N. Y. 226; *Hagar v. Supervisors of Yolo County*, 47 Cal. 222; *Donnelly v. Decker*, 58 Wis. 461; *State v.*

City of Newark, 27 N. J. Law 185; *City of Charleston v. Werner*, 38 S. Car. 488.)

Byron G. Burbank, contra:

The special assessment for filling the lot was illegal, null and void, because no request was made upon the owner before the filling was done. (*Horbach v. City of Omaha*, 54 Neb. 83.)

A city cannot create a nuisance upon plaintiff's lot and compel him to abate it. (*City of Hannibal v. Richards*, 82 Mo. 330; *Weeks v. City of Milwaukee*, 10 Wis. 186.)

The proceedings under which the special assessment was levied are null and void and a usurpation of the judicial power of courts. (*Cale v. Kegler*, 19 N. W. Rep. [Ia.] 843; *Tissot v. Great Southern Telegraph & Telephone Co.*, 39 La. Ann. 996; *Hutton v. City of Camden*, 10 Vroom [N. J.] 122; *Yates v. City of Milwaukee*, 10 Wall. [U. S.] 498.)

NORVAL, J.

The east 60 feet of the south half of lot 8, in block 1, in Park Place, an addition to the city of Omaha, abuts upon Burt street, in said city. The authorities of the city of Omaha caused said street to be graded in front of said premises to the established grade. Appraisers were appointed to assess the damages to abutting property owners by reason of said grading, who found and reported that no damages were occasioned by the improvement, which report was thereafter approved and confirmed by the city council, and no appeal therefrom was taken. The bringing of the street to the established grade caused the water in a small stream which flowed adjacent to said premises, and also the surface water of the neighborhood, to back upon said property, and to become stagnant. Subsequently, an ordinance was passed by the city declaring the premises a nuisance by reason of the existence of stagnant water thereon, the city authorities caused the lot to be filled with earth,

and, by ordinance, levied the cost thereof, to-wit, $262.50, upon said lot. Afterwards the county treasurer of Douglas county sold the premises for taxes to E. B. Baer, and issued to him a certificate of tax sale therefor, who, as the holder of said certificate of sale, paid the said sum of $262.50, to redeem the lot from the special assessment levied by the city of Omaha as aforesaid. Thomas H. McCague, receiver, is the owner of said tax certificate and all rights thereunder. George B. Lasbury, who purchased said premises subsequent to the tax sale and the levy of said special assessment, brought this action to declare invalid the said special tax levied for the purpose aforesaid. From a decree in favor of plaintiff the defendant appeals.

It is strenuously insisted by counsel for plaintiff that the special assessment in dispute is illegal because no request was made upon the owner of the lot to fill the same before the filling of the property by the city. This contention is predicated upon section 29, chapter 12*a*, Compiled Statutes 1895, known as the "Charter of Cities of the Metropolitan Class," which reads as follows: "The mayor and council shall have power to require any and all lots or pieces of ground within the city to be drained, filled or graded, so as to prevent stagnant water, banks of earth, or any other nuisance accumulating or existing thereon; and upon the failure of the owners of such lots or pieces of ground to fill, drain, or grade the same when so required, the council may cause such lots or pieces of ground to be drained, filled, or graded, and the cost and expense thereof shall be levied upon the property so filled, drained, or graded and collected as other special taxes." This provision contemplates that a lot owner in the city of the class to which Omaha belongs is entitled to notice before said section can be enforced against him, since the power therein conferred upon the city to levy the costs and expenses of draining, filling, or grading his premises is contingent "upon the failure of the owner of such lots or pieces of ground to fill, drain, or grade

the same when so required." This language clearly implies that the citizen must have been requested by the city to fill his lot, and he must have failed to comply with the demand before the municipal authorities can perform the work, and assess the costs thereof against the property. The petition, it is true, alleges "that no power or authority existed in said city council to levy any assessment upon or against the above described premises for the purpose of paying for the filling of said lot as herein set forth, and that no notice was ever given to the owner of said lot of said proceeding; and this plaintiff alleges that all and singular of the proceedings had in connection therewith, from the passage of the original ordinance as herein set forth and mentioned to the levying of said assessment, are utterly void and of no force and effect whatsoever." Conceding, for the present purposes, without deciding the point, that these averments sufficiently plead the want of a demand by the city that the lot be filled, a sufficient answer to plaintiff's argument is that said allegations of his petition were put in issue by express denials in the answer of the defendant; and the stipulation of facts found in the record, and upon which the trial court based its finding and decision, is entirely silent upon the question whether the city requested the owner of the lot in controversy to fill the same. So the averment of the petition relied upon to tender the issue is not established by the proofs. The general rule in this state is, and we have so declared, that when it is sought to foreclose a lien against real estate for the non-payment of special taxes or assessments, there is no presumption that the statute relating to their levy and assessment has been complied with, but the burden is upon the person asserting the lien to establish its validity. (*Smith v. City of Omaha*, 49 Neb. 883; *Leavitt v. Bell*, 55 Neb. 57; *Equitable Trust Co. v. O'Brien*, 55 Neb. 735.) The same rule does not obtain where, in a case like the present, the property owner comes into a court of equity asking that certain special taxes be de-

cleared invalid and not a lien upon the premises against which they were assessed, since he predicates his right to affirmative relief on the ground that the taxes are void, and the burden rests upon him to establish their invalidity. Before he can have the title to his lots quieted he must be able to show that the special taxes constituted no lien upon the property.

In the briefs and at the bar counsel on either side ably argued, among others, the following propositions:

1. Is the determination whether a nuisance exists or not a judicial question?

2. Has a city council the power to determine what constitutes a nuisance?

3. Was the levy of the special assessment in question a violation of section 6, article 9 of the constitution of this state?

4. Is the abatement of a nuisance by a city a legitimate exercise of the police power of the state?

5. Can a city create a nuisance upon the lot of an individual and abate it at his costs and expense?

In our view the last proposition alone requires consideration, as the determination thereof is decisive of t. case. It is stipulated in the agreed statement of facts that the city of Omaha graded Burt street from Thirtieth to Thirty-sixth streets, and "that prior to the grading of said Burt street, a small stream of water fed by springs in the block immediately southwest of the premises above described flowed adjacent to said premises; that the grading of said Burt street stopped the outflow of said creek and formed a dam so as to prevent the water from escaping, and thereby caused the water which rose from said small stream and other surface water of the immediate neighborhood to back up and collect upon the above described premises, which it would not have done but for the grading of said Burt street, as aforesaid." It requires no argument to show that whatever nuisance existed on the lot in dispute by the reason of the accumulation of stagnant water was

directly chargeable to the city of Omaha. The foregoing quotation from the written stipulation of facts makes it perfectly plain that the nuisance abated by the city was created by its agents. This being so, to permit the city to assess the costs and expenses of abating the nuisance it created against plaintiff's lot would, indeed, be a reproach upon the law. If this special tax can be upheld in an equitable proceeding, then, by a parity of reasoning, one who creates a nuisance upon the land of his neighbor may have it abated at the expense of the latter and a court of equity could not afford relief. The mere statement of the proposition shows its absurdity.

The doctrine that a municipal corporation which has created a nuisance upon the lot of an individual cannot then assess the costs of abating the same against the property, is sustainable upon the plainest principles of equity, and is fortified by authority. In *City of Hanibal v. Richards*, 82 Mo. 330, the city constructed an embankment in the street in front of defendant's lots, which occasioned the water to accumulate on them and injuriously affect the health of the city. The defendant having refused to comply with an ordinance requiring him to fill the lots, the work was done by the city, and it brought an action to recover the cost and expense thereof. The court say: "Now, we are asked to hold, also, that the city may create a nuisance upon the lot of an individual, and then have it abated at his expense, if he refuse to do it when ordered. As well at once declare that one can acquire any rights to town or city lots which the municipal corporation is bound to respect. The city cannot create a nuisance upon the property of a citizen and compel him to abate it. * * * At a trifling expense at the time plaintiff passed the ordinance requiring these lots to be filled the pond could have been drained, and but for the neglect of the plaintiff to make such drain the nuisance complained of would never have existed. The judgment is reversed and the cause remanded. All concur." In *Weeks v. City of Milwaukee*, 10 Wis. 186, the

defendant city graded an alley adjoining, and made a fill in the street in front of plaintiff's lots, causing the water to flow and remain stagnant thereon, and a special tax of $498.75 was levied upon the lots by the city, $111.25 of which was to pay for the grading, and $387.50 for abating the nuisance created by the city as aforesaid. Plaintiff instituted an action to restrain the collection of the special assessment, and the trial court held the nuisance tax illegal, which view was sustained by the supreme court on a review of the case. Paine, J., in delivering the opinion of the court said: "I am also of the opinion that the tax assessed against the plaintiff's lots to abate a nuisance, which, it appears, was created entirely by the act of the city, in so constructing a street as to cause the water to flow and remain upon the lots, which it would not otherwise have done, is illegal. I cannot recognize the right of a corporation to create a nuisance on the lot of an individual. But to create the nuisance, and then tax him to abate it, is a double wrong. I shall not attempt any examination of the question upon authority, but I am satisfied such a right cannot be sustained. I think this conclusion results from the reasoning of Mr. Justice Smith in *Goodall v. Milwaukee*, 5 Wis. 32, which I fully approve. And until I am prepared to say that private rights must yield, even to the extent of total destruction, rather than place any impediment in the way of whatever proceedings corporations may see fit to take, I cannot say that a city may create a nuisance on the lot of a citizen without making him any compensation for the damage, and then tax him to abate it." The conclusion is irresistible that where by a neglect of a city to provide proper sewerage in the grading of a street a nuisance is created upon a private lot by the accumulation thereon of stagnant water, and the nuisance is abated by the city, an assessment upon the lot of the costs and expense of the work will not be sustained in equity.

There is no presumption that the lot owner was

awarded compensation for the expense of filling his premises with earth by the appraisers selected to ascertain his damages resulting from the grading of Burt street, for two reasons: First, it is expressly stipulated that the appraisers allowed him no damages whatever; secondly, the appraisement was made before the street was graded, and the appraisers could not have known beforehand that the city would so negligently perform the work as to create a nuisance upon the property in question. The expense of abating the nuisance was not an element to be considered by the appraisers. This follows from the holding by this court that an action at law will lie against a municipal corporation to recover damages resulting from the negligence or unskillfulness of its officers or agents in the construction of a public improvement by which there is cast surface water upon the lot of a citizen. (*City of Beatrice v. Leary*, 45 Neb. 149.)

It is insisted that plaintiff is not in a position to urge the invalidity of this special tax, inasmuch as he was not the owner of the lot at the time the same was imposed, and counsel cite the usury cases which hold that the person contracting to pay unlawful interest alone can plead the invalidity of the agreement. Those cases are not analogous. The defense of usury is personal to the borrower, his sureties and privies, who may waive it, therefore the purchaser of the equity of redemption, being neither a surety, nor in unity with him or the borrower, cannot plead usury in the contract. A tax levied against land for a public improvement attaches to, and follows, the property, and the defense that the assessment was illegal is not personal to the person who at the time was the owner of the property, but ordinarily is available to the subsequent purchaser. The decree is

AFFIRMED.

CHARLES KAUFMANN, APPELLANT, V. JOHN C. DREXEL, SHERIFF, ET AL., APPELLEES.

FILED OCTOBER 5, 1898. NO. 8249.

1. **Word.** The word "thereupon," as used in section 1039 of the Code of Civil Procedure, is an adverb of time, signifying without delay.
2. **Replevin:** JUSTICE OF THE PEACE: TRANSFER OF CASE. If, in an action of replevin pending before a justice of the peace, the appraised value of the property taken on the writ exceeds $200, it is the duty of the justice to transmit the transcript and files therein to the district court without unnecessary delay.
3. ———: ———: ———. The failure of the justice to comply with the requirements of said section for a period of nearly ten months *held* to work a discontinuance of the action.
4. **Unauthorized Appearance:** JUDGMENT: ATTACK. Where judgment is rendered against a party whose appearance in the cause is entered by an unauthorized attorney, the presumption of jurisdiction is not conclusive in an original action directly assailing such judgment.
5. **Judgment:** INJUNCTION AGAINST ENFORCEMENT. An action may be maintained to enjoin the enforcement of a void judgment when there is a concurrence of the following conditions: (1) The judgment must be without any legal or equitable basis; (2) its invalidity must not appear on the face of the record; and (3) the party complaining must be without an adequate remedy at law.
6. ———: PROCEEDINGS TO VACATE. Section 602 of the Code of Civil Procedure has reference only to judgments and orders possessing some degree of legal vitality, and not to such as are absolutely void.

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

Guy R. C. Read, for appellant.

A. H. Murdock, contra.

SULLIVAN, J.

In May, 1893, a dwelling-house standing in one of the public streets of the city of South Omaha was seized by the defendant Adams, a constable of Douglas county, under an execution issued on a judgment for work and

labor rendered against one Carl Hanuse. The building was owned by Hanuse and, with the view of recovering its possession, he consulted Theodore F. Elliott, a member of the Douglas county bar. Owing to the fact that Hanuse had an imperfect knowledge of the English language and that Elliott did not understand German—for which, however, the plaintiff herein was not in the slightest degree responsible—an action was commenced before Justice Levy in the name of Charles Kaufmann, and by virtue of an order of delivery issued therein the property in question was taken from the possession of the constable. Kaufmann neither had nor claimed any title, right, or interest in or to the property, and the action was commenced without his knowledge or consent. While the action was pending he was informed of the fact by the justice of the peace and the attorney for the defendant, and to both of them he promptly disclaimed having any interest in the suit and disavowed the acts and denied the authority of Elliott in the premises. Presuming, doubtless, that the action would be then abandoned, he gave it no further attention, and was entirely ignorant of the steps subsequently taken to prosecute it to final judgment. The house was not delivered to him on the writ of replevin. He did not sign the affidavit nor furnish the statutory bond. He did not know Mr. Elliott, and seems to have had neither social nor business relations with Hanuse, except that, as agent for an investment company, he had, some years before, negotiated a loan for him on the dwelling-house in question and the lot on which it then stood. The justice, when the case came on to be heard, refused to take any further action therein for the reason that it was commenced and was pending without Kaufmann's authority or sanction. He informed Mr. Elliott and Mr. Lane, the attorney for the defendant, that if the case was to be further prosecuted they had better take a change of venue. Accordingly the venue was changed on June 30, 1893, and afterwards a motion was made on behalf of the defendant to dis-

miss the case on the ground that Mr. Elliott was not the authorized attorney of the plaintiff. It does not appear that the motion was supported by proper evidence, and the justice overruled it. On August 1, the cause, having been previously heard, was submitted to Justice Wilcox, who made the following finding: "August 1, 1893, 2 o'clock P. M., cause submitted to me by the parties upon briefs. I find, upon the proofs made before me on the trial of this action, that the value of the property taken upon the writ of replevin herein, and delivered by the constable to the plaintiff, exceeds the sum of $200. I therefore decide that I have not jurisdiction of this action, and I certify proceedings upon the said writ to the district court of Douglas county." On May 24, 1894, a certified transcript of the proceedings before the justice, together with the original papers, was filed by Mr. Elliott in the office of the clerk of the district court. Here an abortive attempt at intervention was made by Augusta Hanuse; and eventually a judgment was rendered against Kaufmann, there being no effort made at the trial to establish his alleged right of possession. To secure the cancellation of this judgment and to enjoin the threatened enforcement of an execution issued thereon are the purposes for which this action was brought. The decree of the district court dismissed the petition, and the plaintiff brings the record here for review by appeal.

There are two grounds on which it is sought to vindicate the action of the trial court. It is first claimed that it was the duty of the plaintiff, upon being informed of the pendency of the action, to appear before Justice Levy and file a formal disclaimer, and that it was not enough to merely inform the defendant and the justice that the case was not his and did not concern him. The writer is of opinion that, under the circumstances, no such obligation rested upon Mr. Kaufmann; but a decision of the point is unnecessary to a proper disposition of the case and we, therefore, do not decide it.

Section 1039 of the Code of Civil Procedure is as follows: "Whenever the appraised value of the property so taken shall exceed two hundred dollars, the justice shall certify the proceedings upon the said writ to the district court of his county, and thereupon shall file the original papers, together with a certified transcript of his docket entries, in the clerk's office of the said court; the case there to be for trial at the first term of said court on the original papers without further pleadings, except by the leave of the court granted on sufficient showing." The word "thereupon," as used in this section, is an adverb of time and signifies without delay or lapse of time. (Anderson's Dictionary of Law; *Hill v. Wand*, 47 Kan. 340; *Putnam v. Langley*, 133 Mass. 204; 25 Am. & Eng. Ency. Law, 1058.) The language of the statute is imperative. It was the duty of the justice to transmit the files and transcript to the district court with reasonable dispatch so that the cause might be tried at the term next ensuing. He had no limitless discretion in the matter; and the fact that no effort was made to enforce the performance of the duty imposed on him by the statute clearly indicates that the proceeding was abandoned. By the failure to transmit the record to the district court for a period of nearly ten months the action abated and was at an end as effectually as though the plaintiff had appeared and procured an order of dismissal to be entered therein. The action in the district court was a new action; the jurisdiction was original and not derivative. (*Thompson v. Church*, 13 Neb. 287; *Lydick v. Korner*, 13 Neb. 10; *Austin v. Brock*, 16 Neb. 642; *Worley v. Shong*, 35 Neb. 311.) That the case was pending in that court and that it passed to judgment, therefore, cannot be charged to any act or culpable inaction of the plaintiff. There was nothing in his conduct to work an estoppel. The presumption of jurisdiction arising from the appearance of Mr. Elliott as attorney for the plaintiff is not a conclusive presumption; and in this action, which is a direct attack on the judgment, the fact that the ap-

pearance was unauthorized may be shown. (*Kepley v. Irwin*, 14 Neb. 300; *Kirschbaum v. Scott*, 35 Neb. 199; *Hess v. Cole*, 23 N. J. Law 116; *Shelton v. Tiffin*, 47 U. S. 163; *Reynolds v. Fleming*, 30 Kan. 106.) That an action may be maintained to enjoin the enforcement of a void judgment and to secure its cancellation is well established where the following conditions exist, viz., that the judgment is without any legal or equitable basis; that its invalidity is not disclosed by the record; and that there is no adequate remedy at law by which relief against it may be obtained. (*Winters v. Means*, 25 Neb. 241; 1 High, Injunctions [3d ed.] sec. 229; 1 Black, Judgments sec. 374; *Corbitt v. Timmerman*, 95 Mich. 581; *Chambers Bros. v. King Wrought Iron Bridge Mfg. Co.*, 16 Kan. 270.) The defendants, apparently conceding this rule, insist that plaintiff had an adequate remedy at law under the provisions of section 602 of the Code of Civil Procedure. By that section the district court is given authority to vacate or modify its own judgments after the term at which they were entered. It has reference only to orders and judgments possessing some degree of legal vitality, not to such as are absolutely and utterly void. To speak of the vacation or modification of a void judgment is a perversion of language. There being no judgment, but the mere form and counterfeit of a judgment, there is nothing to modify or annul. "A void judgment," says Mr. Freeman (Freeman, Judgments [4th ed.] sec. 117), "is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress. The first and most material inquiry in relation to a judgment or decree, then, is in reference to its validity. For if it be null, no action upon the part

of a plaintiff, no inaction upon the part of a defendant, no resulting equity in the hands of third persons, no power residing in any legislative or other department of the government, can invest it with any of the elements of power or of vitality. It does not terminate or discontinue the action in which it is entered, nor merge the cause of action; and it therefore cannot prevent the plaintiff from proceeding to obtain a valid judgment upon the same cause, either in the action in which the void judgment was entered or in some other action." In the case of *Leonard v. Capital Ins. Co.*, 101 Ia. 482, 70 N. W. Rep. 629, the supreme court of Iowa, construing provisions of the Code of that state almost identical with those contained in section 602, held that they related only to orders and judgments that are voidable but not void. And speaking upon this subject Commissioner RAGAN, in *Bankers Life Ins. Co. v. Robbins*, 53 Neb. 44, 73 N. W. Rep. 269, remarked: "In this connection we deem it proper to say we do not think that the provisions of section 602 of the Code contemplate a void judgment, but one which is voidable by reason of some fraud or irregularity." The alleged judgment of the district court against the plaintiff in the replevin action was not a judgment obtained irregularly or otherwise; it had the form and semblance of a judgment, but it was entered without jurisdiction, and was and is absolutely null. The district court had apparent jurisdiction of the parties. The judgment in question was fair on its face. It was a cloud upon the plaintiff's credit and upon the title to his land, if he possessed any in Douglas county. Upon it successive executions could issue. There was no adequate remedy at law against it, and therefore this action was properly brought and the relief prayed for should have been granted. The judgment of the district court is reversed and a final judgment will be entered in this court as prayed.

REVERSED.

RAILWAY OFFICIALS & EMPLOYÉS ACCIDENT ASSOCIATION OF INDIANAPOLIS, INDIANA, V. SUSAN E. DRUMMOND.

FILED OCTOBER 5, 1898. No. 8331.

1. **Pleading:** PETITION: AID BY ANSWER. A petition which is defective by reason of the omission of material facts therefrom will be aided and cured by the averment of such facts in the answer.
2. ———: ———: ACTION ON CONTRACT. Generally, a plaintiff is only required to bring his case within the terms appearing on the face of the contract in suit, and need not negative conditions and exceptions indorsed thereon.
3. **Insurance:** DEFENSE: PLEADING. Where, in an action on a contract of insurance, it is claimed that death resulted from one of the excepted causes enumerated on the back of the policy, it is for the defendant to plead and prove that fact.
4. ———: DEFINITION OF ACCIDENT. An accident, within the meaning of contracts of insurance against accidents, includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby.
5. **Accident Insurance:** INJURY BY ROBBER: INSTRUCTIONS. An accident insurance policy contained a clause insuring against injury "inflicted by external, violent, and accidental means" and excepted cases where the injury results "from the intentional acts of the insured or any other person." Death resulted from a gunshot wound inflicted by a robber. Whether the wound was accidentally or intentionally inflicted being a matter of inference from equivocal circumstances, the jury were properly instructed that the plaintiff could recover unless the shooting of the assured was the robber's intentional act.

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

The opinion contains a statement of the case.

Lambertson & Hall, for plaintiff in error:

The petition having omitted to allege that the death of the insured was due to injuries inflicted by external, violent, and accidental means, fails to state a cause of action. (*De Graw v. National Accident Society*, 51 Hun [N. Y.] 142; *Newman v. Railway Officials & Employés Accident*

Ass'n, 42 N. E. Rep. [Ind.] 650; *Hale v. Missouri P. R. Co.*, 36 Neb. 266; *Lace v. Foster*, 42 Neb. 818; *Omaha Consolidated Vinegar Co. v. Burns*, 44 Neb. 21; *Traver v. Shaefle*, 33 Neb. 531; *Imhoff v. House*, 36 Neb. 28.)

The motion of defendant at the close of plaintiff's testimony for a nonsuit, and the request of defendant for an instruction to the jury directing a verdict for the defendant, should have been granted. (*Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 643.)

Where a man is waylaid and shot down without warning by a foot-pad, even though the injury was unexpected, unforeseen, and unprovoked by the assured, the beneficiary cannot recover under the terms of the policy, which provides that the contract shall not cover injury or death due to the intentional act of the assured or any other person. (*Travellers Ins. Co. v. McConkey*, 127 U. S. 661; *Hutchcraft v. Travelers Ins. Co.*, 8 S. W. Rep. [Ky.] 570; *American Accident Co. v. Carson*, 30 S. W. Rep. [Ky.] 879; *Travelers Ins. Co. v. McCarthy*, 25 Pac. Rep. [Colo.] 713; *Fischer v. Travelers Ins. Co.*, 19 Pac. Rep. [Cal.] 425; *Butero v. Travelers Accident Ins. Co.*, 71 N. W. Rep. [Wis.] 811; *Johnson v. Travelers Ins. Co.*, 39 S. W. Rep. [Tex.] 972; *Standard Life & Accident Ins. Co. v. Askew*, 32 S. W. Rep. [Tex.] 31; *Phelan v. Travelers Ins. Co.*, 38 Mo. App. 640; *De Graw v. National Accident Society*, 51 Hun [N. Y.] 142; *Railway Officials & Employés Accident Ass'n v. McCabe*, 61 Ill. App. 565; *Newman v. Railway Officials & Employés Accident Ass'n*, 42 N. E. Rep. [Ind.] 650.)

There was error in instructions informing the jury that the shooting of Drummond was an accident as far as he was concerned, and which directed the jury to return a verdict for plaintiff unless they found the killing was intentional. (*United States Mutual Accident Ass'n v. Barry*, 131 U. S. 100; *Newman v. Railway Officials & Employés Accident Ass'n*, 42 N. E. Rep. [Ind.] 650.)

Strode & Strode, contra:

The court looks alone to the intention or design of the

person injured, and if to him the injury was unforeseen and unexpected, it is within the definition of an accident. (*Paul v. Travelers Ins. Co.*, 112 N. Y. 472; *Richards v. Travelers Ins. Co.*, 89 Cal. 170; *Ripley v. Railway Passengers Assurance Co.*, 2 Bigelow, L. & A. Ins. Cases [Mich.] 738; *American Accident Co. of Louisville v. Carson*, 99 Ky. 441; *Supreme Council of Order of Chosen Friends v. Garrigus*, 104 Ind. 133.)

Accident will be presumed from injury or death. (*Jones v. United States Mutual Accident Ass'n*, 61 N. W. Rep. [Ia.] 485; *Utter v. Travelers Ins. Co.*, 65 Mich. 545; *Richards v. Travelers Ins. Co.*, 89 Cal. 170; *Cronkhite v. Travelers Ins. Co.*, 75 Wis. 116; *Travellers Ins. Co. v. McConkey*, 127 U. S. 661; *Warner v. United States Mutual Accident Ass'n*, 8 Utah 435; *Robinson v. United States Mutual Accident Ass'n*, 68 Fed. Rep. 825; *Guldenkirch v. United States Mutual Accident Ass'n*, 5 N. Y. Supp. 428.)

Accident being presumed death resulting from an accident imports an external and violent agency. (*Paul v. Travelers Ins. Co.*, 112 N. Y. 479; *McGlinchey v. Fidelity & Casualty Co.*, 80 Me. 251; *Eggenberger v. Guarantee Mutual Accident Ass'n*, 41 Fed. Rep. 172; *Healey v. Mutual Accident Ass'n*, 133 Ill. 556; *Mallory v. Travelers Ins. Co.*, 47 N. Y. 52; *Tucker v. Mutual Benefit Life Co.*, 50 Hun [N. Y.] 53; *United States Mutual Accident Ass'n v. Newman*, 84 Va. 52.)

The answer cures alleged defects in plaintiff's petition. (*Haggard v. Wallen*, 6 Neb. 271.)

Plaintiff's petition is not defective in failing to charge that assured was not intentionally shot and killed by a third person. (*Cronkhite v. Travelers Ins. Co.*, 75 Wis. 116; *Anthony v. Mercantile Mutual Accident Ass'n*, 162 Mass. 354; *Meadows v. Pacific Mutual Life Ins. Co.*, 50 Am. St. Rep. [Mo.] 427; *Redman v. Ætna Ins. Co.*, 49 Wis. 435; *Farmers & Merchants Ins. Co. v. Peterson*, 47 Neb. 747; *Conboy v. Railway Officials & Employés Accident Ass'n*, 60 Am. St. Rep. [Ind.] 156; *Follis v. United States Mutual Accident Ass'n*, 58 Am. St. Rep. [Ia.] 408.)

Exceptions in insurance policies are matters of defense

to be pleaded and proved by insurer. (*Standard Life & Accident Ins. Co. v. Jones*, 94 Ala. 434; *Freeman v. Travelers Ins. Co.*, 144 Mass. 572; *Badenfield v. Massachusetts Mutual Accident Ass'n*, 154 Mass. 77; *Railway Passenger Assurance Co. v. Burwell*, 44 Ind. 460; *National Benefit Ass'n v. Bowman*, 110 Ind. 355; *Sutherland v. Standard Life & Accident Ins. Co.*, 87 Ia. 505; *Couadeau v. American Accident Co.*, 95 Ky. 280; *Guldenkirch v. United States Mutual Accident Ass'n*, 5 N. Y. Supp. 428; *Dougherty v. Pacific Mutual Life Ins. Co.*, 154 Pa. St. 385; *Jones v. United States Mutual Accident Ass'n*, 61 N. W. Rep. [Ia.] 485; *Travelers Ins. Co. v. Nitterhouse*, 38 N. E. Rep. [Ind.] 110; *Home Benefit Ass'n v. Sargent*, 142 U. S. 691.)

Assured's death was due to external, violent, and accidental means. (*American Accident Co. v. Carson*, 99 Ky. 441; *Richards v. Travelers Ins. Co.*, 89 Cal. 170; *Lovelace v. Travelers Protective Ass'n*, 126 Mo. 140; *Robinson v. United States Mutual Accident Ass'n*, 68 Fed. Rep. 625; *Fidelity & Casualty Co. v. Johnson*, 72 Miss. 333; *Jones v. United States Mutual Accident Ass'n*, 61 N. W. Rep. [Ia.] 485.)

SULLIVAN, J.

This was an action on a policy of accident insurance issued by the Railway Officials & Employés Accident Association of Indianapolis, Indiana, to Elmer E. Drummond, insuring him against bodily injuries inflicted by "external, violent, and accidental means." The plaintiff, Susan E. Drummond, was the mother of the assured, and the beneficiary named in the contract. A trial to a jury in the district court of Lancaster county resulted in a verdict and judgment for the plaintiff. The defendant prosecutes error to this court.

The petition alleges the corporate character of the insurance company, the issuance of the policy, the death of the assured while the policy was in force, and the furnishing of proofs of death in accordance with the requirements of the contract. The allegation in regard to the death of Drummond is that, while riding along the public

road near the city of Holdrege, he was shot and killed by an unknown person. There is no direct averment that death resulted from an accident, and the petition does not disclose the fact that, by the express terms of the contract, written on the face thereof, the right of recovery was made to depend upon the injury being accidental. The cause of action was stated as though it had arisen on an ordinary life policy. The defendant, however, made no objection to either the form or substance of the pleading, but filed an answer thereto, which, after admitting the issuance of the policy, denying the sufficiency of the proofs of death, and alleging that Drummond was murdered by a foot-pad or highwayman, proceeds as follows: "Defendant alleges that said certificate of membership in said Railway Officials & Employés Accident Association and said policy of insurance provided, among other things, as follows: That 'the defendant shall not be liable for injuries resulting from the intentional acts of the insured, or any other person, or death resulting from such acts, whether the insured or such other person be sane or insane (injuries inflicted by burglars excepted), or injuries or death while in or at any place or assembly prohibited by law.' Defendant alleges that the deceased, Elmer E. Drummond, came to his death at the hands of some person unknown to this defendant, but which this defendant states upon information and belief to have been a foot-pad or highwayman, and that said Elmer E. Drummond came to his death and was intentionally shot and killed while he was at a place prohibited by law, to-wit, a brothel or house of ill-fame in the town of Holdrege, and that said injuries or death occurred at said place and in consequence of his being there and by reason of his being engaged in an unlawful act, by reason whereof said policy of insurance is void, and the said defendant is not liable thereon, or on said certificate of membership in said defendant association." The plaintiff replied traversing the new matter pleaded by the defendant. At the trial the policy was received in evidence without objec-

tion, and among a large number of conditions printed on its back appears the provision set out in the answer.

The first argument of the defendant is that the judgment is erroneous because the petition does not state a cause of action on the policy. This contention cannot be sustained. According to a familiar rule of pleading, the deficiencies of the petition may be, and often are, supplied by the averments of the answer. "When the defendant chooses," says Parker, C. J., in *Slack v. Lyon*, 9 Pick. [Mass.] 62, "to understand the plaintiff's count to contain all the facts essential to his liability, and, in his plea, sets out and answers those which have been omitted in the count, so that the parties go to trial upon a full knowledge of the charge, and the record contains enough to show the court that all the material facts were in issue, the defendant shall not tread back and trip up the heels of the plaintiff on a defect which he would seem thus purposely to have omitted to notice in the outset of the controversy." To the same effect are *Erwin v. Shaffer*, 9 O. St. 43; *White v. Joy*, 13 N. Y. 83; *Kercheval v. King*, 44 Mo. 401; Bliss, Code Pleading [3d ed.] 437; 1 Boone, Code Pleading, sec. 236. In this case the petition and answer, taken together, affirmatively show every fact which plaintiff was required to plead and prove,—every fact upon which her right of recovery under the contract depended, —viz., that the policy was issued and was in force when the assured died; that his death was the result of a violent external injury; that such injury was, as to him, and within the meaning of the contract, accidental; and that the death proofs were duly furnished. In other words, when the allegation of the answer that Drummond was murdered by a highwayman is read into the petition it is shown that the injury causing his death was not intentionally self-inflicted, but was an accident within the settled interpretation of the agreement written on the face of the policy. The plaintiff was only required to bring her case within the terms of the policy appearing on its face. She was not required to negative the condi-

tions or exceptions indorsed thereon. In declaring on a contract which contains exceptions, conditions, or provisos it is not necessary for the pleader to do more than allege the general clause under which his cause of action has arisen. He is not obliged to set out and negative a distinct clause which operates as an exception to the general clause, but which is not incorporated in it. (*Meadows v. Pacific Mutual Life Ins. Co.*, 129 Mo. 76, 50 Am. St. Rep. 427; *Commonwealth v. Hart*, 11 Cush. [Mass.] 130.) It results from these considerations that in determining whether a cause of action has been stated on the contract in suit the condition of the policy pleaded by the defendant is not to be taken into account. That condition afforded the basis for an affirmative defense which would defeat a recovery if sustained by adequate proof. The burden of proving that death resulted from any of the causes enumerated on the back of the policy was on the defendant. (*Anthony v. Mercantile Mutual Accident Ass'n*, 162 Mass. 354, 44 Am. St. Rep. 367; *Grangers Life Ins. Co. v. Brown*, 57 Miss. 308, 34 Am. Rep. 446; *Home Benefit Ass'n v. Sargent*, 142 U. S. 691.)

It has thus far been assumed that the killing of Drummond was an accident within the import of the contract. This view of the matter is vigorously combatted by counsel for the defendant. It seems to be entirely justified by the authorities. An accident, within the meaning of contracts of the kind here considered, includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby. This, in substance, is the definition given in Webster's Unabridged Dictionary and in Bouvier's Law Dictionary. It has been either recognized as correct or expressly approved in the following cases involving accident insurance: *Richards v. Travelers Ins. Co.*, 89 Cal. 170, 23 Am. St. Rep. 455; *Paul v. Travelers Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758; *McGlinchey v. Fidelity & Casualty Co.*, 80 Me. 251, 6 Am. St. Rep. 190; *Lovelace v. Travelers Protective Ass'n*, 126 Mo. 104, 47 Am. St. Rep. 638; *Insurance Co. v. Bennett*,

90 Tenn. 256, 25 Am. St. Rep. 685; *Hutchcraft v. Travelers Ins. Co.*, 87 Ky. 300, 12 Am. St. Rep. 484; *Supreme Council v. Garrigus*, 104 Ind. 133, 54 Am. Rep. 298; *American Accident Co. v. Carson*, 99 Ky. 441, 59 Am. St. Rep. 473; *Button v. American Mutual Accident Ass'n*, 92 Wis. 83, 53 Am. St. Rep. 900. In the case of *American Accident Co. v. Carson, supra*, it is said: "While our preconceived notions of the term 'accident' would hardly lead us to speak of the intentional killing of a person as an 'accidental' killing, yet no doubt can now remain, in view of the precedents established by all the courts, that the word 'intentional' refers alone to the person inflicting the injury, and if as to the person injured the injury was unforeseen, unexpected, not brought about through his agency designedly, or was without his foresight or was a casualty or mishap not intended to befall him, then the occurrence was accidental, and the injury one inflicted by accidental means within the meaning of such policies." In *Fidelity Co. v. Johnson*, 72 Miss. 333, it was held, construing the language of an accident policy, that one who was hanged by a mob came to his death by "external, violent, and accidental means." The same conclusion was reached in *Hutchcraft v. Travelers Ins. Co., supra*, where one was waylaid by robbers and killed while being robbed. Cases apparently holding a contrary doctrine, so far as we know, are based on contracts containing a provision against liability where the injury causing death is intentionally inflicted either by the assured or any other person.

That there can be no recovery under such circumstances was conceded by the trial court in this case, and the jury were accordingly instructed as follows:

"The gun-shot wound that resulted in his death was an external and violent bodily injury (and was accidental as far as the insured was concerned). The defendant company, by virtue of its said undertaking to indemnify for such death, would in this action be liable beyond dispute, except for the said proviso of the contract relieving the company from liability for death resulting from the in-

tentional act of the insured, or from the intentional act of any other person."

"6. If from the evidence before you touching the matter you find and determine that the shooting and killing of the insured by the tramp was the accidental act of said tramp, then plaintiff is entitled to recover upon said policy. If the evidence before you convinces you that the shooting and killing of the insured was the intentional act of the tramp, then under the said conditions of the policy the death of the said Drummond is not covered by the said insurance and plaintiff cannot recover under said policy."

These instructions clearly and accurately stated the law applicable to the case and were properly given, unless it is conclusively shown by the evidence that the killing of Drummond was the intentional act of the robber who shot him. The tragedy occurred under the following circumstances: On the night of June 30, 1894, the deceased, with a companion named Rundstrum, visited a brothel in the city of Holdrege. They left the house about midnight, had just mounted their bicycles, and were very slowly proceeding to their homes, Rundstrum being about six feet in advance of Drummond, when a couple of foot-pads, who had been lying in wait for any one who might come out of the house, leveled revolvers on them and called on them to halt or throw up their hands. Rundstrum stopped at once, dropped his right foot to the ground, and looking around saw Drummond in about the same attitude with his hands on the handlebars of his machine. Just as Rundstrum looked around at him in that position he saw one of the robbers with a revolver in his hand, saw the flash, heard the report, and Drummond staggered forward, fell to the ground and in a few minutes expired. After the shot was fired the man who did the shooting said to Drummond, "Now, then, can you do as you are told?" to which Drummond answered, "Yes, sir." The robber whose attention was directed to Rundstrum said to his associate, "Did you

hurt the man?" to which the assassin answered, "I guess I touched him a little." The other man then said, "Beat him over the head and see if you can't make him talk." The pockets of both Rundstrum and Drummond were then rifled, after which the robbers fled and have never been apprehended. Rundstrum testified that he saw Drummond offer no resistance to the demand of the man who shot him. Prior to the happening of the events here mentioned, but on the same evening, the foot-pads had waylaid and robbed a man named Roberts, whom they forced to accompany them and who was with them when Drummond was killed. The testimony of Roberts, taken in connection with the other evidence in the case, leaves no room to doubt that robbery was the specific and sole end the foot-pads had in view. To the accomplishment of that end the killing of Drummond was neither a necessary means nor even one well-suited to the purpose. Indeed the act, under the circumstances, was distinctly and manifestly calculated to frustrate their scheme rather than facilitate it. The personal safety of the robbers, as well as the success of the enterprise, would seem to depend upon the business being quietly and quickly done. To discharge a pistol was to attract attention and invite interference from officers or other persons who might be in the vicinity. As Drummond made no resistance, but yielded prompt obedience to the demand of the man who killed him, the killing, on the hypothesis of the defendant, was a needless and wanton murder. We would long hesitate before accepting that conclusion as being the more reasonable and probable solution of the question, and we do not at all doubt the propriety of the court's action in submitting the matter to the jury for their determination. The inference that the pistol in the hand of the robber was accidentally discharged and that the killing of Drummond was unintentional, is a reasonable deduction from all the circumstances proven on the trial. The verdict is sustained by sufficient evi-

dence. There was no error in the giving or refusal of instructions. The judgment is right and is

AFFIRMED.

JOSEPH R. WEBSTER, ADMINISTRATOR, v. CITY OF HASTINGS.

FILED OCTOBER 5, 1898. No. 9901.

Right of Administrator of Party to Prosecute Error. Where a party dies after judgment has been rendered against him, the administrator of his estate may prosecute error without procuring an order reviving the action in his name.

ERROR from the district court of Kearney county. Tried below before BEALL, J. Heard on motion of defendant to quash the summons in error. *Motion overruled.*

L. J. Capps and *Tibbets Bros., Morey & Ferris,* for the motion.

Joseph R. Webster, Halleck F. Rose, J. L. McPheely, B. F. Smith, and *Ed L. Adams, contra.*

SULLIVAN, J.

In an action grounded on negligence, brought by Jefferson H. Foxworthy against the city of Hastings, the defendant had judgment in its favor in the district court of Kearney county on May 20, 1897. In the following October, Foxworthy died intestate and Joseph R. Webster, the plaintiff in error, was appointed and has qualified as administrator of his estate. These facts are shown by the petition in error filed by Webster in this court on February 17, 1898. The defendant moves to quash the summons in error on the ground that the administrator cannot prosecute error in this court without having first obtained an order of the district court reviving the action in his name. It will be conceded that the adminis-

trator could take no steps in the original action in the district court without being made a party thereto in the manner provided by the statute; but at the time he entered upon the execution of his trust the cause had passed to judgment; the action in the lower court was ended. The filing of the petition in error and the issuance and service of the summons to which this motion is addressed were the commencement of a new action, having for its object the reversal of a judgment which the administrator claims illegally obstructs him in the collection of money due to him in his representative capacity from the defendant in error. The proceedings in this court are quite analogous to those in ordinary actions. The plaintiff in error is required, within the time limited by the statute, to file a petition showing his right to the relief demanded. He must bring his adversary into court in the usual way and affirmatively establish the material averments of his pleading.

The courts in other jurisdictions have generally regarded the writ of error as a new action. An Illinois statute requiring the dismissal of every suit at law or in equity whenever commenced by a non-resident without filing security for costs was held applicable to writs of error. Craig, J., delivering the opinion of the court in *International Bank v. Jenkins*, 104 Ill. 143, said: "This question, that the writ of error was the commencement of a new action at law or in equity within the intent and meaning of the statute, we think is fully settled by the former decisions of this court, and we are fully satisfied that these decisions are in harmony with the current of authority on the question." The supreme court of Ohio reached the same conclusion in the case of *Taylor v. Boyd*, 3 O. 338, remarking in the course of the opinion that, "In the obvious nature and character of the proceeding, a writ of error is a new and original suit." The precise question presented for decision in this case was before the supreme court of West Virginia in *Phares v. Saunders*, 18 W. Va. 336, where it is said: "It is true, that it is

a general rule, that no person can bring a writ of error who is not a party or privy to the record; but the right to bring the writ of error in case of the death of the party against whom the judgment was rendered will be in the personal representative without a revival of the judgment, because the personal representative stands in the shoes of the deceased and has the same rights as his intestate had with reference to the judgment." Other authorities to the same effect are: *Dale v. Roosevelt*, 8 Cow. [N. Y.] 333; *Hill v. Hill*, 6 Ala. 168, 1 Archbold, Criminal Practice, 209. There is no ground for quashing the summons in error and the

MOTION IS DENIED.

RAGAN, C., not sitting.

JAPHTHA A. HUDELSON ET AL. V. FIRST NATIONAL BANK OF TOBIAS ET AL.

FILED OCTOBER 5, 1898. No. 10100.

1. **Rulings on Motions:** REVIEW. It is not error to deny a motion which cannot be allowed substantially in the form in which it is presented.
2. ———: ———: PLEADINGS. It is not reversible error to overrule a motion to strike from the reply evidential facts which, if submitted to the jury, would tend to establish the ultimate facts alleged in the petition.
3. **Review of Instructions:** BILL OF EXCEPTIONS. Where instructions lay down correct legal propositions, possibly pertinent under the pleadings, it will be presumed, in the absence of a bill of exceptions, that such instructions were applicable to the evidence produced on the trial.
4. **Replevin:** AMENDMENT OF PLEADINGS. In an action of replevin in the district court the pleadings may be amended in furtherance of justice, as in other cases.

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

Hastings & Sands and *Willard E. Stewart*, for plaintiffs in error.

F. I. Foss and *Bartlett, Baldrige & De Bord, contra.*

SULLIVAN, J.

As appears from a former opinion filed in this court (*Hudelson v. First Nat. Bank*, 51 Neb. 557), each of the plaintiffs obtained from H. C. Larsen & Co. a chattel mortgage covering the whole of the property here in controversy. These mortgages being co-ordinate liens, and the property being held adversely, the parties joined in an action to recover the possession thereof from the defendants. J. V. Ainsworth, describing himself as cashier of the First National Bank of Tobias, made and filed the affidavit on which the order of delivery was issued. In the district court, after the cause was remanded, the defendants moved to quash the writ for the reason, among others not necessary to notice, that no affidavit in replevin was ever filed by the K. S. Newcomb Lumber Company or Stanley Larsen, or by the agent or attorney of either of them. The motion was denied, and this ruling of the court is now assigned for error.

It is shown by the record that Ainsworth assumed to act for all the plaintiffs in procuring the order of delivery, and that they, by receiving the property from the coroner and executing the statutory bond, fully ratified his action in the premises; in other words, the record before us discloses the fact that the affidavit was filed by an agent of all the plaintiffs. Such being the case, there was no error in overruling the defendants' motion. It will be observed that an averment of agency in the affidavit is not one of the conditions upon which the clerk is authorized to issue the order of delivery in replevin. (Code of Civil Procedure, sec. 182.) But assuming the affidavit to be the exclusive evidence of Ainsworth's authority to make it, the motion to quash the

writ was nevertheless properly denied. The affidavit discloses the fact that it was made by the cashier of the bank, and that the bank was entitled to the immediate possession of all the property as against the defendants. Consequently the motion, addressed as it was to the writ as an entirety, could not be allowed. The court may, of course, in a proper case, grant a motion in part and deny it in part, but it is well settled by our own decisions that to refuse to do so is not error. (*Keens v. Gaslin*, 24 Neb. 310; *McDuffie v. Bentley*, 27 Neb. 380; *Fox v. Graves*, 46 Neb. 812.)

Complaint is made that the case was cast on one theory in the petition and on a different and inconsistent one in the reply. A motion to purge the latter pleading was overruled, and this action of the court is alleged as error. The ultimate facts are stated in the petition and the evidential facts in the reply. One of the material averments of the petition is that the mortgages executed by H. C. Larsen & Co. to the plaintiffs created a valid lien on the property in question; and the evidence pleaded in the reply, if submitted to the jury on the trial, would merely tend to establish the truth of that allegation. The record disclosing nothing to the contrary, we assume the trial proceeded in the same manner and that the order of proof was precisely the same as though the reply had been a general denial. While the motion may have been technically good, we fail to see how the defendants were prejudiced by the refusal of the court to sustain it.

Another assignment of error is that undue prominence was given by the court in its instructions to the testimony of H. C. Larsen. We have examined the instructions complained of and find that they lay down propositions of law about the correctness of which there can be no serious question. Whether the rules announced were applicable to the evidence produced we have no means of determining, as there is no bill of exceptions contained in the record. Upon this point it is sufficient to say that error does not affirmatively appear.

Counsel urge that the case be reversed and dismissed "Because neither the petition, nor affidavit originally filed, contained any statement or allegation that either of the notes, for the security of which the alleged mortgages were given, was due, or any part of either of them unpaid, or any exigency of fact entitling plaintiffs in that court to immediate possession of the property mortgaged." In the former opinion it was held that the petition did not state a cause of action, and the judgment of the district court was reversed for that reason. The jurisdiction of the court in replevin does not depend upon the validity of the special proceeding by which the plaintiff obtains possession of the property by a writ issued at, or after, the commencement of the action. The cause may be instituted and pending without an order of delivery being issued; and it may proceed to trial and judgment without the property being delivered to the plaintiff. (Code of Civil Procedure, secs. 181-197.) This being so, the pleadings may unquestionably be amended in furtherance of justice, as in other cases. It was also held when the case was here before that the petition and affidavit taken together furnished a legal basis for the order of delivery, and that the proceeding, though irregular, was not void. The district court, upon the cause being remanded, very properly allowed an amended petition and affidavit to be filed. To these no objection has been made, and they seem to be in all respects sufficient to sustain the verdict rendered and the judgment pronounced.

AFFIRMED.

STATE OF NEBRASKA, EX REL. ROBERT B. MORTON ET AL., V. CHARLES T. DICKINSON, JUDGE.

FILED OCTOBER 5, 1898. No. 10366.

1. **Bill of Exceptions:** TIME TO SERVE. Where no order is made extending the time, a bill of exceptions, including the evidence given on the trial of a case, must be served within fifteen days from the final adjournment of the term at which the motion for a new trial is ruled on.
2. ———: ———. If there be no motion for a new trial, as in equity cases, the bill must be served within fifteen days from the final adjournment of the term at which judgment is rendered.
3. ———: FORMER TRIALS: EVIDENCE. Where there have been two or more trials, the bill of exceptions cannot, after the ruling on the final motion, reach back indefinitely and bring into the record the evidence adduced on former trials.
4. **Motion for New Trial.** The motion for a new trial mentioned in section 311 of the Code of Civil Procedure, as amended in 1895, does not necessarily mean the motion immediately preceding the judgment. It means in every case the motion following the particular trial, the events of which it is sought to make authentic history.

ORIGINAL application for mandamus to require respondent to settle, allow, and sign a bill of exceptions. *Writ denied.*

Byron G. Burbank, for relators.

Joel W. West, contra.

SULLIVAN, J.

This is an original application for a writ of mandamus to require the respondent, one of the judges of the district court of Douglas county, to settle, allow, and sign a bill of exceptions. The case of the Western Seed & Irrigation Co. against Robert B. Morton and others was tried before the respondent during the September, 1897, term of said court and resulted in a verdict for defendants. The plaintiff moved for a new trial, and its motion was

sustained on January 6, 1898. On the 15th of the same month the September term was adjourned *sine die*. A second trial of the action, at the May, 1898, term, resulted in a verdict for the plaintiff. On June 18 a motion for a new trial was overruled and judgment rendered on the verdict. On the same day the term was adjourned *sine die*. Afterwards, and within the time limited by the court at the May term for that purpose, the draft of a bill of exceptions was served by the defendants and presented to the respondent for allowance. This draft embraced the evidence taken on the first trial, and its substantial correctness is conceded. Was it the duty of the judge to allow the bill with this evidence included? That is the question for decision.

Prior to 1895, section 311 of the Code of Civil Procedure, so far as it is material to this inquiry, was as follows: "When the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing within fifteen (15) days, or in such time as the court may direct, not exceeding forty (40) days from the adjournment *sine die*, and submit the same to the adverse party or his attorney of record for examination and amendment if desired." There was much diversity of opinion among the members of the bar as to whether the time limited in this section for the settlement of a bill of exceptions commenced to run from the adjournment of the term at which the trial was had or from the adjournment of the term at which the result of the trial was judicially declared and entered of record. The construction of the law by the district judges was not uniform and the decisions of this court left the matter in some doubt. After an exhaustive review of our cases bearing upon this question Mr. Commissioner IRVINE in *State v. Ambrose*, 47 Neb. 235, stated the conclusion of the court in the following language: "Where a trial has been had and a motion for a new trial sustained, the time for preparing a bill of exceptions em-

bodying the evidence on that trial is fixed at the latest by the term at which the motion for a new trial was sustained, and not by the term at which final judgment was rendered, or at which a new trial was had, or a new trial after such second trial denied." Owing to the broad discretion vested in the district court to grant new trials, as well as to the fact that this court has rarely disapproved the action of the district court in the exercise of that discretion, the practice of preserving the evidence supporting a verdict which has been set aside on motion of the losing party has never been much in vogue. The contention of the bar was that a party ought not to be put to the expense of procuring a bill of exceptions until the result of the trial was known. It was not claimed, so far as we know, that, under the statute as it existed prior to 1895, a bill of exceptions could be allowed covering anything more than the evidence which was the basis of the decision objected to. In *State v. Ambrose, supra*, after showing that the reporter's notes are not a conclusive record of what transpired at the trial, it is said: "Therefore, the policy of the law requires that the bill of exceptions should be settled within such reasonable time fixed by statute after the taking of the evidence sought to be preserved, that the parties and the judge may bring to their aid their own recollections." Considering then the general policy of the law as shown by the foregoing excerpt, and bearing in mind the mischief resulting from the diverse constructions given by the courts to the old section, we experience no difficulty in reaching the conclusion that the purpose of the amendment of 1895 was to render certain what was previously in doubt, and to settle definitely the right of suitors to have a bill of exceptions allowed within a limited period after the adjournment of the term at which the result of the hearing or trial is formally announced. It was not intended that such bill of exceptions should reach back and take in the evidence adduced on former trials. The language of the amended section is that "the party ex-

cepting must reduce his exceptions to writing within fifteen (15) days, or in such time as the court may direct, not exceeding forty (40) days from the adjournment *sine die* of the term of court at which judgment is rendered or at which the motion for a new trial is ruled on." (Code of Civil Procedure, 1895, sec. 311.) The amendment was merely the insertion of a prepositional phrase defining and limiting the meaning of the word "court" as it stood in the original section. In law cases the decision on the motion to vacate the verdict is the action of the court that finally determines the result of the trial. When the motion is denied, the unsuccessful litigant is reliably informed of the necessity of securing the settlement and allowance of a bill of exceptions if he desires a review of errors of law occurring at the trial. In suits in equity the announcement of the findings and the rendition of judgment are nearly always concurrent acts, and if there be no motion for a new trial the bill of exceptions is to be settled within the statutory period following the adjournment of the term. The motion for a new trial mentioned in the statute is not necessarily the motion immediately preceding the judgment. It means in every case the motion following the particular trial, the events of which it is sought to make authentic history. The writ is

DENIED.

STATE OF NEBRASKA V. THOMAS P. KENNARD.

FILED OCTOBER 5, 1898. No. 10322.

Claim Against State: COMPENSATION OF AGENT. The facts in this case examined, and *held* to show that the allowance of the claim of defendant in error against the state was improper because of the fact that in the joint resolution of the legislature, under which defendant in error was employed as agent, there was an inhibition of the employment of an agent to collect the five per cent cash school fund accruing to the state.

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

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

Tibbets Bros., Morey & Ferris and *Talbot & Allen, contra.*

RYAN, C.

This action was begun in the district court of Lancaster county under the sanction of a resolution of the house of representatives of the legislature of 1895 permitting the institution of such a suit against the state, and there was a judgment for the sum of $13,521.99, for the reversal of which these proceedings are prosecuted by the judgment defendant. There were several matters urged by way of defense in the district court, but the view which we take of the case dispenses with a consideration of other questions than those which shall now receive attention.

On February 8, 1873, there was approved the following joint resolution, which had been adopted by the legislature then in session, to-wit:

"*Be it enacted by the Legislature of the State of Nebraska:*

"That the governor be, and he hereby is, authorized and empowered to appoint an agent or agents in behalf of this state to prosecute to final decision before congress, or in the courts, the claim of this state for the five per cent due to the same from the United States upon the land of this state disposed of by Indian reservations and by the location of military land warrants and land scrip issued for military service in the wars of the United States and for agricultural college scrip and railroad lands; and

"WHEREAS, The government of the United States has allowed various states large amounts of swamp and overflowed lands lying within their borders; and

"WHEREAS, No such allowance of swamp and overflowed land has ever been received by this state for the large area of land lying within its limits subject to overflow: Now, therefore,

"*Be it resolved by the Senate and House of Representatives of the State of Nebraska*, That the governor is hereby authorized and empowered to appoint a competent and reliable agent or agents as provided by section one of this act, and that said agent or agents shall receive such compensation from said lands or money as may be agreed upon by said agent or agents and the governor conditioned that the state shall be put to no expense whatever unless said agent or agents shall be successful in whole or in part in securing the aforementioned claims: Provided that the foregoing shall in nowise apply to the five per cent cash school fund accruing to the state." (General Statutes 1873, p. 869, ch. 59.)

On October 15, 1874, Robert W. Furnas, as governor of Nebraska, entered into a written agreement with Thomas P. Kennard by the terms of which the latter was to receive fifty per cent of the amount to be collected by him as agent for the state of Nebraska under the terms of the joint resolution above set out. In his petition in the district court Mr. Kennard alleged that he had prosecuted the claims of the state of Nebraska for five per centum due to the state of Nebraska on account of Indian reservation lands, and in the said prosecution he had expended large sums of money, and, to quote his own language used in said petition, that he, "as a result of such prosecution, obtained from the department of the interior, one of the executive departments of the United States government, a decision on the 14th day of January, 1881, whereby the state of Nebraska was authorized to receive five per cent of the proceeds of all sales of lands upon what was known as the Pawnee Indian reservation within the borders and limits of the state of Nebraska, and by such decision of the said department the state of Nebraska was awarded five per centum of said sales." This action was for one-

half of the net amount which had been received by said state from the sales of land in the Pawnee Indian reservation.

The enabling act by virtue of which Nebraska became a state contained the following provisions: "Sec. 12. And be it further enacted, that five per centum of the proceeds of the sale of all public lands lying within said state, which have been or shall be sold by the United States prior or subsequent to the admission of said state into the Union, after deducting all expenses incident to the same, shall be paid to said state for the support of common schools." (13 U. S. Statutes at Large, p. 49.) The five per cent cash school fund accruing to the state, mentioned in the proviso with which the joint resolution closed, it is claimed by the attorney general, is the five per cent contemplated by section 12 of the enabling act, and, therefore, that no compensation was earned for collecting this because of the terms of said proviso expressly denying the right of compensation for such collection. On behalf of the defendant in error it is contended that the misapprehension which vitiates this argument of the attorney general is that the term "public lands" was not applicable to an Indian reservation. To sustain this view the defendant in error insists that the supreme court of the United States, in *Newhall v. Sawyer*, 92 U. S. 763, defined the expression "public lands" in the following language: "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." The deductions which counsel for defendant in error make from these premises will probably be most correctly stated by quoting from the brief submitted by them this language: "The lands within the Pawnee reservation were never subject to sale or other disposal under general laws, and when they were finally sold it was under the provision of a special act of congress approved April 10, 1876, entitled 'An act to authorize the sale of the Pawnee Reservation.' (See U. S. Statutes at

Large, vol. 19, p. 28, ch. 51.) This act provided that these lands should be advertised for a certain time in papers in local cities and should be sold at public auction. Had these been 'public lands,' they would have been subject to entry under the homestead and pre-emption laws, and would not have been sold at public auction. If, therefore, they were not 'public lands,' then the state of Nebraska had no claim upon them or their proceeds by virtue of section 12 of the enabling act."

We confess that this course of reasoning does not impress us as being sound or convincing. If we apprehend the propositions implied or embodied in the above language, they are, first, that these lands were not public lands, for if they had been they would have been subject to entry under the homestead and pre-emption laws; second, that the fact that they were sold at public auction after advertisement shows they were disposed of under a special act of congress, and, consequently, third, it is inferred that they were not "subject to sale or other disposal under general laws." As to the inference just stated, it is sufficient to say that the mere fact that congress, by a special act, prescribed how these lands should be sold does not justify the inference that they could not have been sold in any other manner. Counsel for defendant in error have not in their brief or argument cited any authority or statutory provision which tends to sustain the general proposition above laid down that the lands within the Pawnee reservation were never subject to sale or other disposal under general laws, and we cannot accept this unsupported statement as correct. In the letter of the commissioner of the United States land office, addressed to Mr. Kennard, of date January 14, 1881, referred to in the petition, and which Mr. Kennard offered in evidence, the right of the state of Nebraska to an accounting was recognized under the provisions of section 12 of the enabling act, because of the fact that the lands sold were public lands. Counsel for the defendant in error, however, in their brief, repudiate this

theory and state the right to compensation as follows: "The facts may be stated thus: The state claimed that the five per cent provision in the enabling act gave it some kind of a claim against these reservation lands. The United States denied it. The state employed Mr. Kennard to convince the United States that it was wrong. Mr. Kennard succeeded in doing so, and recovered over $27,000. The state accepted the money, but the attorney general would now refuse Mr. Kennard any compensation on the ground that the money belonged to the state all the while." If we understand this language, we are asked to infer that the claim prosecuted by Mr. Kennard was not one on which the state was entitled to recover payment, but that Mr. Kennard made a showing so plausible that it was paid; therefore, he should recover half of that payment. Mr. Kennard is prosecuting this action to enforce the payment of his claim as a matter of strict right under his contract. With considerations of what the state should do, independently of its contract obligations, we have no concern. If Mr. Kennard has obtained the allowance and payment to the state of that to which the state was not entitled, the legislature must determine how his services should be recognized. Upon the record and evidence submitted for our consideration we see no room for doubt that to enforce the claim of Mr. Kennard to a division of the five per cent of the proceeds of sales of lands constituting the Pawnee Indian reservation would be in contravention of the proviso of the joint resolution by which it was declared that the employment of a collecting agent should in nowise apply to the five per cent cash school fund accruing to the state. The judgment of the district court is, therefore, reversed and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

IN RE HERMAN F. GRANGER.

FILED OCTOBER 5, 1898. No. 10142.

Statutes: EVIDENCE OF ENACTMENT. Where from the journals of both branches of the legislature and from the copy of the bill sent to the governor for approval, and by him approved, and which was attested by the proper officers of both houses, it is shown that a certain bill was properly passed, that fact cannot be disproved by the introduction in evidence of what it is agreed between the litigants was the bill originally introduced and memoranda thereon indorsed tending to show that the bill approved and attested was not the one really passed by both houses.

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

The facts are stated by the commissioner.

Tibbets Bros., Morey & Ferris, for petitioner:

The statute under which applicant was sentenced is unconstitutional and void, hence the court had no jurisdiction to impose the sentence. (*In re McVey*, 50 Neb. 483.)

Upon an application for a writ of habeas corpus the constitutionality of the statute under which applicant was convicted will be inquired into, and if found to be unconstitutional the writ will be granted. (*Ex parte Smith*, 36 S. W. Rep. [Mo.] 628; *Ex parte Marmaduke*, 91 Mo. 228; *In re Thompson*, 117 Mo. 83; *In re Betts*, 36 Neb. 282; *In re Havlik*, 45 Neb. 747; *Ex parte Donahoe*, 24 Neb. 66.)

Evidence from other sources than the record may be introduced. (Church, Habeas Corpus secs. 202, 236; *In re Divine*, 21 How. Pr. [N. Y.] 80; *Ex parte McGrew*, 40 Tex. 472.)

Courts take judicial notice of the journals of the legislature to ascertain the validity of a statute. (*Stein v. Leeper*, 78 Ala. 517; *Edger v. Board of Commissioners*, 70 Ind. 331; *Blake v. National Banks*, 23 Wall. [U. S.] 307;

Fosdick v. Village of Perrysburg, 14 O. St. 472; *Somers v. State*, 58 N. W. Rep. [S. Dak.] 804.)

R. C. Noleman, also for petitioner.

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

RYAN, C.

This application for a writ of habeas corpus was denied in the district court of Lancaster county, and by petition in error the judgment of said court is presented for review in this court. The detention of the applicant was justified by the warden of the penitentiary of this state by a record of the conviction of the applicant of the crime of stealing a cow of the value of $20 and his sentence by the district court of Sheridan county to imprisonment for a term of three years, which term has not yet expired. The act making the stealing of cattle a felony is chapter 77 of the Laws of Nebraska 1895, carried into the Compiled Statutes as section 117*a* of the Criminal Code. On the trial there were offered in evidence the portions of the journals of both houses of the legislature of 1895 in which there was reference to the acts of either legislative branch in reference to House Roll No. 87. There was also by the applicant introduced in evidence the copy of a bill showing the approval of the governor and the attestation of the proper officers of each branch of the legislature. At the time the copy of the bill was offered in evidence it was admitted that it was a true and correct copy of House Roll No. 87 as it was enrolled, engrossed, and presented to the governor. By comparison we find its title and language to be identical with those of chapter 77, Laws of Nebraska 1895. Over objections of the respondent there was also offered by the applicant a copy of a bill certified by the secretary of state, which, it was admitted, was a correct copy of the original bill and of its indorsements now on file in

the office of said secretary of state. The reliance of the applicant for his right to be released from confinement is upon the showing made by the above evidence of alleged failure to comply with one requirement of section 10, article 3, of our constitution, which is: "No bill shall be passed unless by assent of a majority of all the members elected to each house of the legislature." It is urged that while the act published only shows that it was directed against the stealing of cattle, the act introduced and adopted, in at least one branch of the legislative body, was directed against the stealing of cattle and hogs. Whether or not the existence of the discrepancy has been made to appear by satisfactory evidence we shall now consider.

House Roll No. 87 was introduced in the house under this title: "A bill for an act to punish cattle stealing and to punish persons receiving or buying stolen cattle, and to punish all persons harboring or concealing cattle thieves." The journal of the house discloses that House Roll No. 87, by the title just quoted, regularly passed through the succesive stages in the house and was transmitted to the senate under the title above given. While in the house the judiciary committee, to which it had been referred, recommended that it be passed as amended, but there is no other intimation in the journal of the house that there was any amendment. We must therefore assume that this reference to an amendment was without warrant and was probably the result of misapprehension. At any rate this recitation is not of such controlling force that from it we are required to assume that there was an amendment and that it was of such a character as to defeat the action of the house.

In the senate, House Roll No. 87 was introduced under this title: "A bill for an act to punish cattle stealing and to punish persons receiving or buying stolen cattle, and to punish all persons harboring or concealing cattle thieves," and this was the title under which it was referred to the committee on agriculture. When that com-

mittee made its report to the senate it was in this language:

"MR. PRESIDENT: Your committee on agriculture, to whom was referred House Roll No. 87, a bill for an act to punish cattle and hog stealing and to punish persons receiving or buying stolen cattle or hogs, and to punish all persons harboring or concealing cattle or hog thieves, have had the same under consideration and instruct me to report the bill back to the senate with the recommendation that it be placed on general file and passed as amended."

The next action taken upon this bill is recited in the senate journal in this language:

"MR. PRESIDENT: Your committee of the whole house has had under consideration * * * also House Roll No. 87, a bill for an act to punish cattle stealing and to punish persons receiving or buying stolen cattle, and to punish all persons harboring or concealing cattle thieves, and submit the following amendments: Amend by striking out section two (2); amend by striking out the word 'hog' wherever it appears in the bill, and report the same back to the senate with the recommendation that it be passed with the word 'hog' stricken out.

"D. CRANE, *Chairman.*"

After this report the committee on engrossed and enrolled bills reported senate amendments to House Roll No. 87, a bill for an act to punish cattle stealing and to punish persons receiving or buying stolen cattle, and to punish all persons harboring or concealing cattle thieves, correctly engrossed. Afterward House Roll No. 87, a bill for an act to punish cattle stealing and to punish persons receiving or buying stolen cattle, and to punish all persons harboring or concealing cattle thieves, was read a third time and passed by the senate. These proceedings in the senate show an attempt to eliminate the word "hog" from the bill, though from the journal of either house we have no means of knowing that it ever

was in the bill. Certainly, as already shown, it was not in the title, and if that is to be assumed to be a correct reflex of the scope of the bill, the word "hog" was not in it when it was adopted by the house of representatives. Nevertheless the senate ordered it stricken out of the bill considered in that body, and if the entries in the journal of the other house are to govern as against mere inferences, the senate in fact thereupon passed the bill as it had passed the other house.

The next mention we find of this bill is in the house of representatives, in which the journal recites that the following proceedings were had:

"The honorable secretary of the senate appeared with the following message:

"SENATE CHAMBER, LINCOLN, NEB., April 5, 1895.

"MR. SPEAKER: I am directed by the senate to inform your honorable body that they have passed the following bills: * * * House Roll No. 87, a bill for an act to punish cattle and hog stealing and to punish persons receiving or buying stolen cattle or hogs, and to punish all persons harboring or concealing cattle or hog thieves. * * * Your concurrence in the above is respectfully asked."

Subsequently it is recited in the journal of the house of representatives that a motion that said house does not concur in the senate amendments to House Roll No. 87 prevailed. The bill was thereupon returned to the senate, in the journal of which body is found the following record:

"MR. PRESIDENT: I am directed by the house to inform your honorable body that they have refused to concur in senate amendments to House Roll No. 87, a bill for an act to punish cattle stealing and to punish persons receiving or buying stolen cattle, and to punish all persons harboring or concealing cattle thieves, and respectfully ask the senate to recede therefrom.

"W. M. GEDDES, *Chief Clerk.*"

Afterwards, on motion, the senate receded from its amendments.

The bill under the title and in the form in which we find it published as chapter 77, Laws of Nebraska 1895, was duly approved by the governor and attested by the proper officers of the senate and house of representatives. We have not been able to discover in the journal of either branch of the legislature evidence of irregularities such as would justify us in assuming that there has been such a failure to comply with constitutional requirements that the act in question must be declared not to have been adopted by both houses. On the contrary, it seems to us that while irregularities exist as shown by the journals, they are not such as vitiate legislative action. These irregularities, in the opinion of the writer, do serve one purpose, and that is to illustrate the danger of permitting the impeachment of an act because not constitutionally adopted by reason of facts shown independently of the bill enrolled, engrossed, approved by the governor, and attested by the proper officers of both branches of the legislature. In this case, however, the attempt has been made to contradict, not only the inferences proper to be drawn from the bill in the condition above indicated, but, in addition, to negative the proofs offered by the journals of the two houses with respect to the purport of the title expressly given in said journals and the contents of the bill, which should be presumed from the recitations of the journals and from the title of the act as it occurs in said journals. To effect this purpose the applicant for the writ of habeas corpus offered in evidence, over the objections of the attorney general, what was certified by the secretary of state to be a copy of the original bill introduced in the house of representatives, together with indorsements thereon, which are evidently memoranda purporting to show what action had been taken in respect thereto in each branch of the legislature. When this was offered in evidence proper objections were made, but the attorney general, representing the respondent, ad-

mitted that it was a copy of the original bill and of its history in the house and senate as disclosed by the original bill on file in the office of the secretary of state, which bill was House Roll No. 87, and that this copy offered was a correct copy of the bill introduced in the legislature as House Roll No. 87.

That it was not competent to impeach the proceedings of the legislature by contradicting the journals of the house and senate and the facts proper to be inferred from the approval of the governor and the attestation of the bill by the officers of both branches of the legislature we think is clear from the cases which we shall now consider.

In *Attorney General v. Rice*, 64 Mich. 385, there was used this language: "If the constitution has not been complied with in the passage of an act, that fact must be shown by the printed journals, or the certificate of the secretary of state, the custodian of legislative proceedings. Such fact cannot rest in parole. * * * And unless the journal shows affirmatively that the constitutional directions were not complied with it must be presumed that they were followed."

In *Kochler v. Hill*, 60 Ia. 541, Seevers, J., speaking for a majority of the court, said: "The senate journal, by the provisions of the constitution, is made primary evidence of the contents of the resolution as it passed the senate. This journal is in existence and, as has been said, was kept as required by the constitution. Now we are asked to ignore this constitutional evidence and receive parole evidence or ascertain for ourselves, by inquiry of those who are supposed to know, as to the existence of a fact which is contradictory to the journals kept, certified to, and preserved by sworn officers as provided by law. To our minds this is a startling proposition."

The supreme court of Ohio, in *State v. Smith*, 44 O. St. 348, said: "Counsel have exibited unusual industry in looking up the various cases upon this question, and out of a multitude of citations not one is found in which any

court has assumed to go beyond the proceedings of the legislature as recorded in the journals required to be kept in each of its branches on the question whether a law had been adopted. * * * Imperative reasons of public policy require that the authenticity of laws should rest upon public memorials of the most permanent character. * * * In this state, what appears on the journals affecting the passage of a law has been noticed by this court, but in no instance has attention been given to anything not appearing upon the journals though it be the omission of a requirement of the constitution."

In the case entitled *Division of Howard County*, 15 Kan. 194, it was claimed that there was a discrepancy between the engrossed bill as it passed the house and the enrolled bill as certified to by the proper legislative officers and approved by the governor; and with reference to this contention there was used this language: "The engrossed bill as it passed the house is also on file in the office of the secretary of state, but it is not signed by any person, and there is no record evidence of any kind whatever tending to show that it is in fact such engrossed bill. The only record evidence of any kind whatever showing what said bill No. 54 contained in any of its stages from the time it was first introduced in the house until it was finally filed as an enrolled bill in the office of the secretary of state is the enrolled bill itself. The journals of the two houses are entirely silent upon the matter, and the said engrossed bill, as we shall presently see, is not a record, nor a part of any record. An engrossed bill, in this state, is the bill as copied for final passage in either house. * * * The enrolled bill is the bill as copied after its final passage in both houses and as it has passed both houses and as presented to the governor for his signature and approval." The opinion then quotes the provisions of the constitution of that state relative to keeping a journal of the proceedings of each branch of the legislature and the provisions of the statutes of that state providing that all laws passed by

the legislature shall be deposited with the secretary of state, etc., provisions similar to those in our own state. The court then says: "It will be noticed that the legislative journals and the enrolled bills are the only records required by law to be kept for the purpose of showing any of the legislative proceedings. There is no provision for preserving the engrossed bill as a record of the legislative proceedings, and as the legislative journals and the enrolled bills are, by law, records and the only records of legislative proceedings, they must, of course, import absolute verity and be conclusive proof as to whether any particular bill has passed the legislature, when it passed, how it passed, and whether it is valid or not. * * * Now, as we have before intimated, the enrolled bills and the legislative journals being records provided for by the constitution importing absolute verity, we cannot take judicial notice that they are untrue, nor can we even allow evidence to be introduced for the purpose of proving that they are not true. Therefore, as the enrolled bill of the law dividing Howard county and the journals of the legislature would seem to prove that said bill has been legally passed by the legislature and has been legally approved by the governor in the form as it now appears enrolled in the secretary's office, we cannot take judicial notice that said bill was not properly so passed and so approved, and we cannot even allow evidence to be introduced showing that it was not so passed and so approved."

Subsequent to the delivery of the above opinion the supreme court of Kansas, in *State v. Francis*, 26 Kan. 724, said: "In our opinion the enrolled statute is very strong presumptive evidence of the regularity of the passage of the act and of its validity, and that it is conclusive evidence of such regularity and validity unless the journals of the legislature show clearly, conclusively, and beyond all doubt that the act was not passed regularly and legally. * * * If there is any room to doubt as to what the journals of the legislature show, if they are merely

silent or ambiguous, or if it is possible to explain them upon the hypothesis that the enrolled statute is correct and valid, then it is the duty of the courts to hold that the enrolled statute is valid."

The principles above enumerated and enforced by the courts from whose opinions we have quoted are decisive of the rights of the applicant in this case. The evidence submitted does not overcome the presumption of regularity of procedure in both houses which arises from the recitations of the journals offered in evidence and from the bill admitted to have been enrolled, engrossed, and presented to the governor for his signature, and which, upon its face, shows it to have been attested by the proper officers of both houses of the legislature. It follows, therefore, that the judgment of the district court is

AFFIRMED.

MARGARET BOYD V. R. M. MUNSON ET AL.

FILED OCTOBER 5, 1898. No. 8316.

Joint Judgment: MOTION TO VACATE: PARTIES. Under the provisions of section 1001, Code of Civil Procedure, a motion to set aside a joint judgment against two or more defendants inseparably connected as such, should be overruled, when made by one defendant on his or her own behalf alone.

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

L. K. Alder, for plaintiff in error.

P. D. McAndrew, contra.

RYAN, C.

In the county court of Brown county R. M. Munson filed his bill of particulars, upon which he sought to recover judgment against Cyrus Boyd and Margaret Boyd in the sum of $126.81, for goods sold and delivered

to defendants. A summons was issued and duly served upon defendants, and a joint judgment was, in proper time, rendered by default against said defendants. Afterward, Margaret Boyd filed a motion to set aside the judgment against her because said judgment had been rendered against her in her absence. This motion, which contained an offer to confess judgment for costs, was filed within the time fixed in section 1001, Code of Civil Procedure, and Margaret Boyd, by her error proceeding in the district court, ineffectually sought to reverse the ruling of the county judge denying her motion, and the correctness of this ruling in the district court is presented by her petition in error in this court.

It has been held by this court that a motion for a new trial, when made jointly by two or more persons, if it cannot be sustained as to all, must be overruled as to all. (*Gordon v. Little*, 41 Neb. 250, and cases cited.) The principle on which the cases above referred to was decided leads us to the conclusion that when judgment has been rendered against two or more defendants inseparably connected, a motion by one defendant to set aside the judgment as to himself alone should be overruled. The judgment of the district court is, therefore,

AFFIRMED.

McCLOUD-LOVE LIVE STOCK COMMISSION COMPANY V. JAMES M. DOUD.

FILED OCTOBER 5, 1898. NO. 8299.

Trial: OPENING CAUSE: ADDITIONAL TESTIMONY: REVIEW. Under the existing conditions of the issues and the showing made, *held* that there was no reversible error in the refusal of the district court, after final submission, to open a cause for the reception of additional testimony.

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

Hall, McCulloch & Clarkson, for plaintiff in error.

Eli H. Doud and *Duffie & Van Dusen, contra.*

RYAN, C.

This action was brought in the district court of Douglas county upon an account stated and there was judgment as prayed. The answer, in addition to a denial of authority to any one to make the alleged statement of account on behalf of defendant, contained averments that business transactions between plaintiff and defendant of a nature similar to those set forth in the stated account alleged in the petition were carried on prior to the first item in said stated account and up to about October 31, 1890; that during said transactions moneys, drafts, and checks passed between plaintiff and defendant, and that, from time to time, settlements were had and payments of balances between them were made; that on October 31, 1890, all differences, obligations, debts, claims, and demands of every nature were settled, adjusted, and paid. These averments were put in issue by a reply filed during the progress of the trial February 23, 1895. Subsequently, as seems to be conceded by both parties after the cause had been submitted for judgment upon the merits, the defendant in the district court filed a motion to open the cause for the introduction of further evidence. This, it was set forth, was to be the testimony of J. M. Bennett, now a resident of the state of New York, and whose whereabouts was not known until after the case had been submitted to the court for determination. By the affidavits in support of this motion it was made to appear that Bennett, when his address was learned, had been telegraphed as follows: "Doud sues us for $500, and swears that you admitted debt and promised to pay it. Is it true or false? Wire answer." To which Bennett answered by telegram: "There is no truth whatever. Know nothing of it." It is not shown that any effort

whatever had been put forth before or during the progress of the trial to learn where Bennett might be living. It was disclosed on the trial that the statement of the account was with Bennett, who was an officer of the defendant, and that he assented to the stated account. There was then no suggestion of surprise. After the case had been under advisement some time this application was made, with no showing why the whereabouts of Bennett had not been sooner learned. It was alleged that if the cause should be opened it would be disclosed that a judgment in fact ought to be rendered in favor of the defendant in the district court. We cannot see how this could be available to the said defendant, for its answer furnished the foundation for no such a judgment. Under the circumstances we cannot say that the district court erred in refusing to open the cause and permit the introduction of additional testimony.

As the trial was to the court, the alleged errors in the introduction of evidence cannot be considered. The judgment of the district court is

AFFIRMED.

CENTRAL INVESTMENT COMPANY V ANDREW MILES, EXECUTOR, ET AL.

FILED OCTOBER 5, 1898. NO. 8332.

Guaranty: LIABILITY OF GUARANTOR. A mere guarantor of collection is liable upon his guaranty where it is shown that the note guarantied cannot be collected of the maker, and not otherwise.

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

McCabe, Wood, McGilton & Elmer, for plaintiff in error.

F. B. Tiffany, contra.

RYAN, C.

In the district court of Douglas county it was alleged by the plaintiff, the executor of J. L. Miles, and by James Thompson, that the defendant the Central Investment Company had sold, assigned, and delivered to said Miles and Thompson three promissory notes originally made to the Central Investment Company, and indorsed upon each the following guaranty:

"We guaranty collection of the within note and waive notice of protest.

"CENTRAL INVESTMENT COMPANY,
"By M. S. LINDSAY,
"*President and Manager.*"

In the petition there were joined with the Central Investment Company as defendants the maker of said notes and three sureties thereon. The Central Investment Company demurred to the petition, and the district court on said demurrer held that the Central Investment Company could be sued as it was sued, notwithstanding the guaranty by it was merely of collection, and not of payment, and there was judgment accordingly. In *Bosman v. Akeley*, 39 Mich. 710, the holdings of several courts are reviewed with the conclusion announced by Cooley, J., that a mere guarantor of collection could not, over his objections, be held liable jointly with the principal even though it was alleged that the latter was insolvent, but the guaranty implied that the property of the maker should be exhausted before resort could be had to a guaranty of collection. In *Peck v. Frink*, 10 Ia. 193, it was held, where the payee of a note had transferred it by an indorsement of the form of that on which the Central Investment Company was held liable in this case, that, to render the guarantor liable on his guaranty, it was necessary to show that the note could not be collected of the maker. To the same effect was *Dewey v. Clark Investment Co.*, 50 N. W. Rep. [Minn.] 1032. We think that rule is

sound, and accordingly the judgment of the district court is reversed.

REVERSED AND REMANDED.

JOHN W. MARSHALL, APPELLANT, V. MILTON H. GOBLE ET AL., APPELLEES.

FILED OCTOBER 5, 1898. No. 8234.

Trusts: COMPENSATION OF AGENTS: LIEN ON FUND. Where a firm of real estate brokers undertook to find purchasers of land for one who held title thereto merely for convenience of transfer for the benefit of associates interested therein, such firm is not, in equity, entitled to a decree subjecting unsold portions of such land, or such associates personally, to liability for the payment of commissions on the theory that the services of the firm in finding purchasers as undertaken were rendered in the execution of a technical trust.

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

Gregory, Day & Day, for appellant.

References: *Mason v. Pomeroy*, 7 L. R. A. [Mass.] 771; *Noyes v. Blakeman*, 6 N. Y. 567; *New v. Nicoll*, 73 N. Y. 127; *Buck v. Winn*, 11 B. Mon. [Ky.] 320; *Marshall v. Goble*, 32 Neb. 9; *Kothman v. Skaggs*, 29 Kan. 5; *Kutz's Appeal*, 40 Pa. St. 90.

Hall & McCulloch, contra.

References: *Durall v. Craig*, 2 Wheat. [U. S.] 45; *Taylor v. Davis*, 110 U. S. 330; *Cobb v. Knapp*, 71 N. Y. 348; *McGraw v. Godfrey*, 14 Ab. Pr. n. s. [N. Y.] 398; *Thomson v. Davenport*, 9 B. & C. [Eng.] 78; *Jones v. Ætna Ins. Co.*, 14 Conn. 501; *Kingsley v. Davis*, 104 Mass. 178.

RYAN, C.

On July 30, 1896, a certain quarter section of land in Douglas county was conveyed to M. H. Goble as trustee,

but no trust was described in the conveyance. From the evidence introduced on the trial of this cause we learn, however, that the title was vested in Mr. Goble to enable him to plat the tract into lots and blocks and to sell the same for the benefit of the parties who had contributed the purchase price paid for the entire tract. On August 16, 1896, Milton H. Goble, trustee, in writing agreed to make the firm of Marshall & Lobeck his sole agent for the sale of lots into which the tract was subdivided. By his written contract it was provided in express terms that the said Goble was to pay the said firm a commission of ten per cent on all sales made by it or by parties employed by it. There was afterward a sale of several lots for the sum of $44,000, but this sale was made by Goble himself. John W. Marshall, the surviving member of the firm of Marshall & Lobeck, sued Goble for ten per cent of the amount of the above sale, and in March, 1893, recovered judgment as prayed. This judgment has never been paid, and this suit was begun in the district court of Douglas county for the purpose of charging the beneficiaries, for whom Goble was acting, with the obligation of paying it and for the purpose of enforcing it as a lien on the portion of the 160-acre tract remaining unsold, of which the title before the rendition of said judgment had been by Goble conveyed to another person named as trustee. There was a judgment for the defendants, from which Marshall has appealed.

It is urged by appellant that the estate held by Goble was a trust estate and that, therefore, any expense incurred in its management should be enforced against it and its proceeds so long as the rights of third parties are not thereby prejudiced. In this connection attention is challenged to the fact that in the contract between Goble as party of the first part and the firm of Marshall & Lobeck as parties of the second part there was the following provision: "The party of the first part shall sign all papers pertaining to sale of said lands, and after said papers have been signed they shall be turned over to

him, together with the proceeds of sales in excess of the commission before named." If we understand correctly the force of this provision, it does not create a lien upon any part of the land of which Goble held the title. In case of a sale made by the firm of which Marshall was a member that firm was entitled to withhold ten per cent of the moneys first paid to it under the terms of such sale. No part of the $44,000 came into the hands of the firm, and the judgment against Goble was obtained on the theory that he had obtained the money upon the sale and had wholly failed and refused to pay the commission justly due said firm; in other words, the amount of the commission was sued for as money of the firm had and received by Goble. Upon the judgment there could be founded no claim of right to a lien on other real property of which the title was held by Goble, and much less could such claim be asserted with reference to the proceeds of the sales thereof. By the use of the descriptive word "trustee" there was intended by the parties no reference to a trust in the technical sense of that term, for with the proceeds of sales Goble was charged with no duty but to pay them to the beneficiaries entitled thereto. In effect, he was a mere agent, who, to perform the more readily his duties as such, had taken, or procured to be taken, the title of the subject-matter in himself. The firm of Marshall & Lobeck contracted with him to act as his sole agency, not to execute or assist in the execution of a technical trust, but to assist in selling the land of which he held the legal title. The district court, therefore, very properly denied the relief prayed, and accordingly its judgment is

AFFIRMED.

JOHN D. MACFARLAND V. WEST SIDE IMPROVEMENT ASSOCIATION.

FILED OCTOBER 5, 1898. No. 7635.

1. **Corporations:** ACTION AGAINST SUBSCRIBER TO STOCK: DEFENSE: PLEADING: EVIDENCE. Where, in a suit by a corporation against a subscriber to its stock to recover his unpaid subscription, the defense is that the entire capital stock was not subscribed, a reply which avers that the defendant waived the non-payment of the entire stock is good as against a demurrer. Such a plea is not a conclusion of law, but the averment of an ultimate fact, included in which are all the ingredients which constitute waiver.

2. ———: ———: ———: ———: ———. Under such a plea the acts and omissions of the defendant which tend to show, or from which may be inferred, an intention on his part to waive subscription of the entire capital stock are competent and relevant.

REHEARING of case reported in 53 Neb. 417.

Lambertson & Hall and *A. G. Greenlee*, for plaintiff in error.

Ricketts & Wilson, contra.

RAGAN, C.

This is a rehearing of *Macfarland v. West Side Improvement Ass'n*, 53 Neb. 417, in which we affirmed a judgment of the district court rendered in favor of the association against Macfarland. The action was brought by the association against Macfarland on a contract of subscription to its capital stock. His defense was that the entire capital stock had not been subscribed. On the former hearing we held that he had estopped himself by his conduct from interposing this defense, and beyond all question the evidence in the record sustains this holding, as will appear from a *résumé* thereof in the former opinion. But it is insisted by Macfarland that the petition of the association does not state a cause of action and will, therefore, not sustain the judgment. We think it does. The petition, after alleging the incorporation of the plain-

tiff, the purposes for which it was incorporated, the amount of its capital stock and Macfarland's subscription thereto, recites: That the full amount of the capital stock had not been subscribed, but that "the defendant waived this defense by participating in the execution of the main design for which the company was organized, and is, therefore, estopped to rely on the defense that the whole of the capital stock was not subscribed;" that the corporation, relying upon the subscription of Macfarland and its other assets, entered into contracts aggregating $105,000 for the construction of buildings, the construction and ownership of which were the purposes for which the corporation was organized.

It is true that the petition does not set out the specific acts or conduct of Macfarland which we held estopped him from interposing the defense that the capital stock was not all subscribed, but it does allege that he waived this defense. This plea was good as against a general demurrer. It is not a conclusion of law, but is the statement of an ultimate fact. If Macfarland desired the petition to state what the pleader claimed he had said or done which amounted to a waiver of his defense, he should have submitted a motion to the petition. Waiver is the intentional relinquishment of a right or privilege. It was the right of Macfarland to have all the stock subscribed before being liable on his subscription, but this was a right which he could waive; and the averment of the petition is in effect the same as if it had alleged in express words that Macfarland intentionally relinquished his right to have all the stock subscribed. Of course, when it is claimed that a party has waived a right, it must appear that he knew he had such right; otherwise he could not have intentionally relinquished it. But whether in such a case a party knew that he was possessed of a right is a question of evidence, and we are dealing with a question of pleading; and when the pleader avers that Macfarland waived his right, included in that averment are all the ingredients which constitute

waiver. Contrary to the common-law rule, pleadings under the Code are to be liberally construed. (Code of Civil Procedure, sec. 121.) If the averment is that A went from the city of Lincoln to the city of Omaha, this is the statement of a fact. The means employed by him for going are included in the statement that he went. If A sues an officer, alleging that he seized and sold on judicial process his horse which was exempt, and the officer answers that the allegations are true, but that A waived his exemption, this plea is good as against a demurrer. In the case at bar, if Macfarland waived or relinquished his right to have the full amount of stock subscribed before he should become liable upon his contract, then his estoppal to assert that defense followed as a conclusion of law from his waiver. So that the whole question here is whether the petition avers that Macfarland did waive or relinquish his right to have the whole amount of the stock subscribed. In express language, it does aver that he did waive and relinquish that right; and to make the petition good as against a demurrer it was not necessary that the pleader should state the specific things done or omitted to be done by Macfarland which constituted that waiver; and under this allegation the pleader might introduce evidence of the acts and omissions of Macfarland which tended to show, or from which might be inferred, an intention on his part to relinquish the right or defense. In *Omaha & R. V. R. Co. v. Wright*, 49 Neb. 457, the petition alleged "that the defendant carelessly and negligently * * * ran their engine and train over * * * plaintiff's stock" injured it, etc., and it was held that this general allegation of negligence was good as against a demurrer; that under the averment evidence of any fact which contributed to the injury sued for was competent and relevant.

We adhere to the former opinion, and the judgment of the district court is

AFFIRMED.

RYAN, C., not sitting.

NORVAL, J.

I dissent. In the former opinion it was ruled that the defendant by his conduct estopped himself from urging the defense that the entire stock was not taken, and it was upon that ground alone that the judgment of affirmance was based. The sole proposition necessary to be considered by the court on the present submission is whether an estoppel or the waiver by the defendant of the right to assert that the stock had not all been subscribed is sufficiently raised by the pleadings to be available to the plaintiff below.

It was determined in the former hearing herein, following the earlier decisions of this court, that the entire amount of capital stock of a corporation must be subscribed before action can be maintained against a subscriber to recover assessments thereon, except where the law or charter authorizes the corporation to proceed with its ultimate object or purpose with a less subscription, or the subscriber has either waived this condition precedent, or estopped himself from asserting that the whole capital stock had not been taken. And in *Livesey v. Omaha Hotel Co.*, 5 Neb. 50, a case similar to the one at bar, it was expressly decided that the capital stock required by the charter of a corporation must be wholly subscribed as a condition precedent to the bringing of an action to recover the assessments levied on a stock subscription, and in such an action the plaintiff must aver the performance of such condition precedent, or set up the facts essential to show a waiver thereof by the defendant so as to fix his liability without such performance. In the light of these principles, which are firmly established in the jurisprudence of this state, I will proceed to an examination of the petition of plaintiff in the trial court. It contains the following: "While it is true that the entire amount of capital stock described in the articles of incorporation was not subscribed, the defendant waived this defense by participating in the execution

of the main design for which the company was organized, and therefore estopped to rely on the defense that the whole of the capital stock was not subscribed." This is the sole averment in the petition upon the subject of waiver and estoppel. It will be observed that the plaintiff admits in its pleading that the entire capital stock in the proposed corporation had not been subscribed at the time this suit was instituted, so that, under the authorities to which reference has already been made, the petition is fatally defective, unless the allegation therein quoted above is a sufficient plea of either a waiver or estoppel. Conceding, without deciding the point, that the paragraph of the pleading under consideration is an allegation of ultimate facts and not merely the statement of a conclusion of law, as argued by counsel for defendant, it is not a valid plea of waiver or estoppel. The statement "the defendant waived this defense," treated as a sufficient plea, if standing alone, most certainly cannot be regarded when read in connection with the language "by participating in the main design for which the company was organized." This phrase modifies the portion of the remainder of the sentence in which the same appears, so that the plea of waiver consists alone in Macfarland participating in the principal object of the corporation, and that, too, without knowledge that all the stock had not been taken. There is no averment in the entire pleading, nor is there a scintilla of evidence, that the defendant had knowledge that the full amount of capital stock had not been subscribed, nor is any fact alleged from which it can be inferred that the corporation, or any one dealing with it, relied upon the action or conduct of the defendant. The facts constituting an estoppel *in pais* must be pleaded. (*Schribar v. Platt*, 19 Neb. 625; *Norwegian Plow Co. v. Haines*, 21 Neb. 639; *Erickson v. First Nat. Bank of Oakland*, 44 Neb. 622.) This court has frequently held that knowledge of the existence of a right or defense and the intention to relinquish the same are indispensable to create an estoppel by

waiver. (*Livesey v. Omaha Hotel Co.*, 5 Neb. 50; *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 227; *Hamilton v. Home Fire Ins. Co.*, 42 Neb. 883.) It is an essential element of estoppel *in pais* that the party to be benefited by the estoppel must have altered his position in reliance upon the words or conduct of the party estopped. (*Lingonner v. Ambler*, 44 Neb. 316; *Nash v. Baker*, 40 Neb. 294; *Hager v. Cleveland*, 36 Md. 476.) "A subscriber who attends meetings and participates in the organization waives the defense that the full capital stock has not been subscribed; but if he does so without knowledge of the fact that the full capital stock has not been subscribed, he does not waive such defense." (1 Cook, Stocks & Stockholders sec. 181, note; see *Cabot v. Chapin*, 6 Cush. [Mass.] 50; *International Fair & Exposition Ass'n v. Walker*, 88 Mich. 62.)

In the last preceding case Champlin, C. J., speaking for the court, said: "There is no dispute upon the testimony in this record that the defendant attended what was considered as a meeting of the subscribers to the capital stock, which included those who had joined in the organization, and others like him, who had agreed to subscribe for and take stock in the corporation. He acted, to all intents and purposes, as a stockholder upon the occasion, and for the purpose of considering a corporate act. I think there can be no question but that the corporation recognized him as a stockholder and member, and that he recognized that relation himself. The estoppel, so far as membership is concerned, is mutual and binding upon both parties; but whether he is liable to assessments depends upon other considerations. He was not liable to be assessed upon his stock, unless he has waived the condition upon which such assessments in a corporation like this are based, and that is that the whole capital stock must first be subscribed. (See Michigan authorities before referred to.) Did he intend by what he did to waive that condition? The burden of proof is upon the plaintiff to show waiver. The plaintiff

must show that the defendant had knowledge of the facts from which the intention can be inferred to waive the right given him by law. Waiver is voluntary, and implies an election to dispense with something of value, or forego some advantages which he might, at his option, demand or insist upon. * * * Whether the defendant intended to waive the requirement that all the stock should be subscribed before he should be called upon to pay would depend upon the knowledge which he had that it had not all been subscribed, and, further, upon the act and conduct of defendant tending to show that he was willing and desirous that the main purposes of the corporation should be proceeded with without such stock being subscribed."

In *Portland v. Spillman*, 32 Pac. Rep. [Ore.] 688, the court, in the opinion, uses this language: "It does not appear, nor is it claimed, that at the time of such waiver of notice, or participation in the stockholders' meeting, he knew that the required amount of stock had not been subscribed; and without such notice it is not perceived how he can be said to have waived the condition of his subscription." The same doctrine was stated and applied by this court in *Livesey v. Omaha Hotel Co.*, 5 Neb. 50. GANTT, J., delivering the opinion, says: "Now, the corporation, with full knowledge of the condition precedent contained in the subscription contract and of that in the charter, and in violation of this condition in the contract, has proceeded to assess the shares of stock, and it is insisted that the plaintiff in error by his acts has waived his immunity from liability to pay such assessments. In other words, the proposition contended for is, in effect, that these acts of the plaintiff in error are equivalent to an assent by him to the unauthorized proceedings of the corporation, and therefore he is estopped from claiming the rights he had under the contract. It is said that 'a waiver is the intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish

it.' There is a total failure of proof showing that the plaintiff in error acted with knowledge of the fact that a deficiency remained in the capital required by the charter, and the facts shown by the record are not sufficient to show an intention to waive the rights of the party."

I am fully persuaded that the petition fails to set forth sufficient facts to constitute a waiver or an estoppel, in that it is not averred that Macfarland knew that the whole capital stock had not been subscribed and that the conduct of the defendant was relied upon and induced action. There is no allegation that the articles of incorporation contained a provision authorizing the corporation to proceed to do business before the full amount of stock was subscribed. It is true the contract of subscription is set out in the petition, but there is no statement therein that the corporation was to proceed with the execution of its main purpose when a portion of its stock was subscribed, nor does it contain any language indicating an intent that the subscribers should be bound to pay their subscription until the whole capital should be taken. The sufficiency of the petition was not assailed for the first time in this court, since the defendant objected in the court below to the introduction of any evidence on the ground that the petition failed to state a cause of action against him. The judgment of the district court is wrong and should be reversed.

FARMERS & MERCHANTS INSURANCE COMPANY V. IVER JENSEN.

FILED OCTOBER 5, 1898. No. 9877.

1. **Insurance.** An insurance contract is a personal one between insured and insurer.

2. ——: TRANSFER OF TITLE. A provision in a fire insurance policy that it should cease to be in effect if the insured conveyed the title of the insured property without the insurer's consent is a reasonable and valid one.

3. ———: ———: TERMINATION OF CONTRACT. An insured and his wife conveyed by warranty deed the insured property to their son, who at the same time conveyed the premises by warranty deed to the wife of the insured. This transaction occurred in pursuance of an agreement between the husband and wife that the latter should hold the title to the insured property in trust for her husband. The insurance policy provided that it should cease to be in force "in case any change shall take place in the title of the assured." *Held*, That the conveyance terminated the contract of insurance.

ERROR from the district court of Saunders county. Tried below before SEDGWICK, J. *Reversed.*

The opinion contains a statement of the case.

Halleck F. Rose and *Wellington H. England*, for plaintiff in error:

The pleadings and proof establish a breach of the condition against change of title, and the company is not liable. (*Oakes v. Manufacturers Fire & Marine Ins. Co.*, 131 Mass. 164; *Baldwin v. Phœnix Ins. Co.*, 60 N. H. 164; *Langdon v. Minnesota Farmers Mutual Fire Ins. Ass'n*, 22 Minn. 193; *Milwaukee Mechanics Mutual Ins. Co. v. Ketterlin*, 24 Ill. App. 188; *Milwaukee Trust Co. v. Lancashire Ins. Co.*, 70 N. W. Rep. [Wis.] 81; *Dadmun Mfg. Co. v. Worcester Mutual Fire Ins. Co.*, 11 Met. [Mass.] 434; *Savage v. Howard Ins. Co.*, 52 N. Y. 502.)

Clark & Allen, contra:

The wife of insured held the naked legal title in trust for him. She held the title subject to his order, and agreed to convey it whenever he so directed. The insurable interest was therefore unaffected by the transfer, and the company is liable on the policy. (*Ayres v. Hartford Fire Ins. Co.*, 17 Ia. 178; *Sun Fire Office v. Clark*, 42 N. E. Rep. [O.] 248; *Grable v. German Ins. Co.*, 32 Neb. 645; *Bailey v. American Central Ins. Co.*, 13 Fed. Rep. 254; *New Orleans Ins. Co. v. Gordon*, 68 Tex. 144; *Imperial Fire Ins. Co. v. Dunham*, 12 Atl. Rep. [Pa.] 674; *Diehlman v. Dwelling-*

House Ins. Co., 43 N. W. Rep. [Mich.] 1045; *Sun Fire Office v. Wich*, 39 Pac. Rep. [Colo.] 587; *Continental Ins. Co. v. Ward*, 31 Pac. Rep. [Kan.] 1079; *Stephens v. Illinois Mutual Fire Ins. Co.*, 43 Ill. 328; *Dupreau v. Hibernia Ins. Co.*, 43 N. W. Rep. [Mich.] 585; *Rumsey v. Phœnix Ins. Co.*, 17 Blatch. [U. S. C. C.] 527.)

RAGAN, C.

This is an error proceeding instituted in this court by the Farmers & Merchants Insurance Company to review a judgment of the district court of Saunders county pronounced against it in favor of Iver Jensen. Jensen in his petition declared upon an ordinary fire insurance policy. The insurer interposed as a defense to the action that the contract of insurance provided that it should cease to be in force "in case any change shall take place in the title * * * of the assured in the above mentioned property" without the consent of the insurer thereto indorsed on the policy; that after the delivery of the policy the insured, his wife joining therein, conveyed the real estate on which the insured property was situate, by ordinary warranty deed, to one John H. Jensen, and that the latter afterward by an ordinary warranty deed conveyed the insured property to the wife of the insured, all without the knowledge or consent of the insurer. The insured attempted to meet this defense by a reply admitting the conveyance of the title by the insured to John H. Jensen and by him to the wife of the insured, but alleging that these conveyances were made in pursuance of an agreement between the insured and his wife that the latter should and would hold the title to the property for the use and benefit of the insured and subject to his direction and control.

The judgment of the district court cannot stand. The provision in the policy that it should cease to be in force if a change should take place in the title of the insured without the consent of the insurer is a valid and reasonable provision. An insurance contract is a personal one

between the insured and the insurer. An insurance company might be very willing to guaranty A against loss or damage of his property by fire, but unwilling to furnish such a guaranty to A's vendee; and it is for this reason that such a provision as the one under consideration is inserted in fire insurance policies, so that in case the insured shall transfer his title the insurer may have notice thereof and an opportunity to elect whether it will keep the policy in force in favor of the grantee or vendee; and it is because the courts recognize such a provision in an insurance policy to be a personal contract between the insurer and the insured that they hold that the violation thereof by the insured terminates the contract of insurance. (*Milwaukee Mechanics Mutual Ins. Co. v. Ketterlin*, 24 Ill. App. 188; *Langdon v. Minnesota Farmers Mutual Fire Ins. Ass'n*, 22 Minn. 193; *Oakes v. Manufacturers Fire & Marine Ins. Co.*, 131 Mass. 164; *Ehrsam Machine Co. v. Phenix Ins. Co.*, 43 Neb. 554.)

Counsel for the defendant in error insist that since the wife of the insured holds the legal title to the insured property in trust for him there has been no violation of the provision of the policy under consideration by the assured. This contention we think untenable. The provision of the policy is that if any change should take place in the title of the assured, the policy should cease to be in force. Certainly the execution and delivery of the warranty deed by the assured and his wife to John H. Jensen vested the latter with the legal title to these premises; and the execution and delivery by the latter of the warranty deed to the wife of the assured vested her with the legal title to these premises. There has been, then, a change in the title of the assured. The authorities cited by counsel for defendant in error do not sustain their contention. One of these cases is *Grable v. German Ins. Co.*, 32 Neb. 645. In that case the assured, without the knowledge or consent of the insurer, entered into a contract in writing, agreeing to sell the insured property and make a conveyance thereof upon the payment of certain

sums of money in future by the purchaser. This contract was interposed as a defense to a suit on the insurance policy; but the insurance company was held liable upon the ground that the contract agreeing to sell and convey was not an alienation of the title to the property. Another case cited is *Bailey v. American Central Ins. Co.*, 13 Fed. Rep. 250. In that case the policy was issued to a mortgagee. He subsequently became the owner of the insured property, after which it was destroyed by fire. In a suit upon the policy the insurance company interposed the defense of a change of title without its knowledge or consent; but the court held that a mere increase of his interest in the insured property was not a change of title within the meaning of the contract.

The judgment of the district court is

REVERSED AND THE CAUSE REMANDED.

ESTATE OF O. F. DAVIS V. ALBERT WATKINS, RECEIVER.

FILED OCTOBER 5, 1898. No. 8305.

1. **National Bank:** ASSESSMENT OF STOCKHOLDER: INTEREST. An assessment levied by the comptroller of the currency on a stockholder of a national bank draws interest from the date such assessment is made payable.

2. ———: APPOINTMENT OF RECEIVER: CERTIFICATE. The commission or written appointment of a receiver of a national bank issued by the comptroller of the currency, signed by him and attested with his seal of office, is a certificate within the meaning of section 884, Revised Statutes United States.

3. ———: ———: EVIDENCE. Such a certificate proves itself, and is admissible in evidence without extraneous proof of its genuineness.

4. **Judicial Notice:** ACTS OF CONGRESS. The courts of this state take judicial notice of the acts of congress providing for the appointment of a deputy comptroller of the currency and defining his powers and duties.

5. **National Banks:** ACTION AGAINST STOCKHOLDER: ASSESSMENTS. In

a suit against a stockholder of a national bank to recover assessments levied against him by the comptroller of the currency it will be presumed that the stock certificate bearing the corporate seal of the bank was issued and signed by the officer having authority so to do.

6. ———: ———: ESTOPPEL. In such a suit the validity of the incorporation of the bank is a collateral issue, and the stockholder is estopped from asserting that it is not a corporation *de jure*.

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

Kennedy & Learned, for plaintiff in error.

Tibbets Bros., Morey & Ferris and *Bradley & De Lamatre, contra.*

RAGAN, C.

Oscar F. Davis owned 50 shares, of $100 each, of the capital stock of the First National Bank of Ponca, Nebraska. The bank became insolvent. The comptroller of the currency of the United States appointed Albert Watkins receiver of said bank and levied an assessment of 100 per cent upon the stockholders of said corporation. Davis died, and the receiver filed the claim against his estate in the county (probate) court of Dixon county. From the allowance of that claim by the county (probate) court the administrator of Davis appealed to the district court of said county, where the trial resulted in a verdict and judgment in favor of the receiver, and the administrator of Davis brings that judgment here for review on error.

1. The district court awarded the receiver judgment for $5,000, with seven per cent interest thereon from July 12, 1893, the date on which the comptroller of the currency made an assessment upon the stockholders. The first complaint of the administrator is as to the allowance of this interest. His contention is that the estate is not liable for interest on this claim until it was

allowed by the county (probate) court May 5, 1894. But the assessment made by the comptroller was payable on or before August 12, 1893, and we think that it drew interest from that date. In *Casey v. Galli*, 94 U. S. 673, it was held that the assessment drew interest from the date it was made; and the same ruling was made in *Bowden v. Johnson*, 107 U. S. 251. In each of those cases it appears that the assessment was payable on the date it was made. Here the assessment was payable thirty days after it was made, and, within the principle of the cases cited, would draw interest from the time it was payable. The judgment of the district court is for $29.16—or one month's interest—too much.

2. The second argument is that the court erred in receiving in evidence what is known in the record as Exhibit 1, being the commission or written appointment of Watkins as receiver. The document was signed "Oliver P. Tucker, Deputy and Acting Comptroller of the Currency," and was attested by the seal of office of the comptroller. The argument is that no foundation was laid for the introduction in evidence of this commission, as there was no proof of the genuineness of Tucker's signature, and no evidence that he had any authority to execute such an instrument. Section 884, Revised Statutes United States, provides: "Every certificate, assignment, and conveyance executed by the comptroller of the currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals." The exhibit referred to is not of course an assignment or a conveyance. It is not, nor does it purport to be, a copy of any paper or record in the comptroller's office. But this exhibit is the original certificate, writing, or commission issued by the comptroller of the currency appointing Watkins receiver. If this appointment or writing had been deposited in the comptroller's office, then a copy

thereof, certified by him and attested by his seal, would, by reason of the statute just quoted, have been competent evidence equally with the original, and the seal would have authenticated the genuineness of the comptroller's signature; and since the exhibit in question is the original certificate, appointment, or commission, the seal thereon guaranties the genuineness of the comptroller's signature and the certificate proves itself.

As to the point that there is no evidence that Tucker was deputy and acting comptroller of the currency, and if he was such, that he had authority to issue this commission, we think the fact that he was in possession of the comptroller's office and performing its duties raises the presumption that he was the comptroller's duly appointed and acting deputy and clothed with power to perform the acts which he did perform. Furthermore, by act of congress the comptroller of the currency is invested with authority to appoint receivers for insolvent national banks. (See Revised Statutes U. S., sec. 5191.) And the acts of congress expressly provide for the appointment of a deputy comptroller of the currency and authorize him to perform the same duties as his principal. (See Revised Statutes U. S., sec. 327.) Of these statutes this court will take judicial notice.

3. The third assignment of error relates to the admission in evidence by the district court of what is known in the record as Exhibit 2, being the order made by the comptroller of the currency assessing the stockholders of this bank. This certificate was signed by James H. Eckels, comptroller of the currency, and was attested by his seal of office. It was objected to as evidence because no proof had been adduced that the signature attached thereto was the signature of the comptroller. What has been said in reference to the admissibility in evidence of the receiver's commission is applicable to this argument and it need not be further noticed.

4. The certificate of stock held by Davis in his lifetime was dated February 3, 1887, and signed by Fay

Mattison, vice-president, F. M. Dorsey, cashier. On the trial, for the purpose of showing that these gentlemen were the vice-president and cashier, respectively, of the bank at the time the certificate of stock was issued the court permitted the receiver to introduce in evidence what is known in the record as "pages 11 and 12 of the minute book," being the proceedings of the board of directors of the bank at a meeting held January 11, 1887, at which time Mattison was elected vice-president and Dorsey cashier of the bank. This ruling of the court is the next thing complained of. It is insisted that this evidence was incompetent because no proof was introduced to show that the proceedings recorded in the minute book actually occurred; in other words, that they were genuine. We need not stop to inquire whether the court erred in admitting this evidence, as in no view of the case could its admission have prejudiced the plaintiff in error, since the undisputed evidence is that Davis in his lifetime was the holder of a certificate calling for 50 shares of the capital stock of this bank; that this certificate was signed by Mattison as vice-president and Dorsey as cashier and attested by the corporate seal of the bank, and that after the death of Davis this certificate came into the hands of his administrator as an asset of his estate, and that on this certificate he received dividends from this bank. In other words, the undisputed evidence is that Davis was at all times after February 3, 1887, a stockholder of the bank. In this proceeding it will be presumed that this certificate bearing the seal of the corporation was issued and signed by officers having authority to do so.

5. A final argument which we notice is that the evidence fails to establish the corporate existence of the bank; but the validity of the incorporation of this bank is a collateral issue which cannot be tried in this action. The administrator's intestate subscribed for and received stock in this bank, and he is estopped now from denying the validity of its incorporation. (*Casey v. Galli*, 94 U. S. 673.)

The defendant in error will be permitted to file within thirty days a remittitur of $29.16, and if he do so the judgment of the district court thus modified is affirmed, otherwise reversed.

AFFIRMED UPON FILING OF REMITTITUR.

JOHN D. PHILLIPS v. A. H. DORRIS, ADMINISTRATOR, ET AL.

FILED OCTOBER 5, 1898. No. 8303.

1. **Partition:** PARTIES. Only a joint tenant or a tenant in common of real estate can maintain an action for its partition.
2. ———: ———: EXECUTORS AND ADMINISTRATORS. An administrator or executor is neither a joint tenant nor a tenant in common with the heir or devisee of his decedent, and cannot maintain an action for the partition of his real estate.
3. ———: OBJECT OF ACTION. The object of a partition suit is to assign property, the fee simple title to which is held by two or more persons as tenants, or joint tenants in common, to them in severalty.
4. ———: ADVERSE TITLE: JURISDICTION OF COURT: PROCEDURE. The raising of questions of adverse title in a partition suit does not oust the court of jurisdiction nor render a dismissal of such suit necessary. The court may hold the case, determine the issues of title, and then proceed with the partition.

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

J. R. Gilkeson and *T. B. Wilson*, for plaintiff in error.

J. W. Deweese, L. E. Gruver, and *C. S. Allen, contra.*

RAGAN, C.

Jason G. Miller brought a suit in the district court of Saunders county against John D. Phillips and others. In his petition Miller claimed to be the owner in fee of an undivided one-third interest in certain real estate de-

scribed in the petition. The prayer was for a partition of the land. Before the trial of the action Miller died and it was revived in the name of his administrator. The case then proceeded to trial, and resulted in a judgment partitioning the lands. Neither the widow, the heirs, nor devisees of Miller were made parties to the action. The judgment of the district court is brought here for review on error by Phillips, the defendant below.

1. Only a joint tenant or a tenant in common of real estate can maintain an action for its partition. (Code of Civil Procedure, sec. 802; *Hurste v. Hotaling*, 20 Neb. 178; *Barr v. Lamaster*, 48 Neb. 114.) If Miller died intestate, the title to the lands which he owned at his death descended to, and vested in, his heir at law. If he died leaving a will, the title vested in his devisee on probate of the will. Miller's administrator was neither a tenant in common nor a joint tenant of such heir or devisee. True, by the statute the administrator or executor of a decedent is given the right to the possession of such decedent's real estate until the estate is settled (Compiled Statutes, ch. 23, sec. 202); but this statute, of course, does not invest the administrator with any estate or interest in the realty of the decedent, the manifest object of the statute being to invest the administrator or executor with possession of the decedent's real estate solely for the purposes of administration; that is, to enable him to collect the assets and pay the debts of the estate. (*Carson v. Dundas*, 39 Neb. 503.) The object of a partition suit is to assign property, the fee simple title to which is held by two or more persons as joint tenants, or tenants in common, to them in severalty; and with such a suit an administrator has no concern whatever, as it is only after the estate has been settled and the administration closed that the heirs or devisees are entitled to the decedent's estate.

2. The parties made defendants to Miller's action in the district court denied his title to the real estate in controversy and set up title in themselves. This did not

oust the district court of jurisdiction to hear and determine the partition suit nor make the dismissal of that suit necessary. The court was one of general jurisdiction, administering both legal and equitable remedies, and was invested with authority in that proceeding to try the issues as to the title, and, after they were determined, proceed to partition the estate among the parties found to be the owners thereof. (*Wilkin v. Wilkin*, 1 Johns. Ch. [N. Y.] 110; *Lynch v. Lynch*, 18 Neb. 586; *Seymour v. Ricketts*, 21 Neb. 240.)

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

NETTIE B. NORRIS, TRUSTEE, v. BURT COUNTY.

FILED OCTOBER 5, 1898. No. 8319.

1. **Tax Sale:** CAVEAT EMPTOR. In the absence of an express statute to the contrary the rule of *caveat emptor* applies to a purchaser at a tax sale.
2. ———: ———: LIABILITY OF COUNTY. The liability of a county to a purchaser for money paid by him to its treasurer for lands sold by the latter at tax sale, there being at the time no valid tax delinquent against the land and for which it is sold, is not a common-law but a statutory one.
3. ———: ———: ———. The rights and liabilities of such purchaser and the county are to be determined by the statutes in force when the void sale occurred.
4. ———: STATUTE. Section 131, chapter 77, Compiled Statutes (Revenue Law 1879), applies only to sales made after it took effect.
5. ———: INDEMNIFICATION OF PURCHASER. A county cannot be compelled to indemnify a purchaser at a void tax sale made prior to June, 1871, unless the sale resulted from the mistake or wrongful act of its treasurer.

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

Edward W. Peterson, for plaintiff in error.

W. G. Sears, contra.

RAGAN, C.

In 1868 certain state and county taxes were levied and assessed upon a tract of land in Burt county. The tax so imposed was void, as the land at the time was not subject to taxation. In 1869 these lands were sold for the non-payment of the taxes levied in 1868. Subsequently the purchaser obtained a treasurer's deed for the lands based on the tax sale made thereof; and it seems that in 1893 a decree of the district court of said county declared such tax deed and the tax upon which it was based void and vacated the tax levy, sale, and deed, as clouds upon the owner's title. Subsequently the purchaser at the tax sale sought reimbursement from Burt county for the money paid by him at the tax-sale purchase and for subsequent taxes paid upon the real estate. The district court denied him relief, and he has brought its judgment here for review.

1. The record presents two questions, one of which is whether, in the absence of an express statute, a county is liable to a purchaser for money paid by him to its treasurer for lands sold by the latter at tax sale, there being at the time no valid tax delinquent against the land for which it was sold. This question we answer in the negative. Whatever may be the rule elsewhere, the doctrine of this court is that the rule of *caveat emptor* applies to a purchaser at a tax sale, except where he is protected by express statute. (*Pennock v. Douglas County*, 39 Neb. 293.)

2. The second question is whether any statute exists which renders the county liable to the purchaser for the money he paid at the tax sale and for subsequent taxes paid by him upon the land. The first legislation in this state upon the subject seems to have been enacted in 1866. Section 75, chapter 46, passed in that year, pro-

vided that "When by mistake or wrongful act of the treasurer land has been sold on which no tax was due at the time, the county is to save the purchaser harmless," etc. This statute was re-enacted in section 71 of an act entitled "An act to provide a system of revenue," which went into effect on February 15, 1869. On June 6, 1871 (see Session Laws 1871, p. 83), the act was amended so as to read as follows: "When by mistake or wrongful act of the treasurer or other officer land has been sold contrary to the provisions of this act, the county is to save the purchaser harmless," etc. This latter provision was amended by the revenue act of 1879, being section 131, chapter 77, Compiled Statutes, and reads as follows: "When by mistake or wrongful act of the treasurer or other officer land has been sold on which no tax was due at the time, * * * the county is to hold the purchaser harmless," etc. It will thus be seen that at the time the plaintiff in error purchased at the void tax sale in 1869 no statute existed which made the county liable to him for the money paid at such void sale unless the sale was the result of a mistake or wrongful act of the treasurer. There is neither pleading nor proof here that this void tax sale resulted from any mistake or wrongful act of the then county treasurer. The rights of the plaintiff in error are to be determined by the law in force defining those rights at the time this void sale occurred. If at that time no statute on the subject had existed, the county would not have been liable to him for the money paid at the void tax sale, even if he had pleaded and proved that the sale resulted from the mistake or wrongful act of the treasurer. It is conceded that there was no tax due on this land at the time the plaintiff in error purchased it; that the sale was the result of the mistake or wrongful act of the county treasurer or of some other officer of the county; and plaintiff in error therefore insists that he is protected by the revenue act of 1879. This is simply saying that that act should be given a retroactive effect. We do not think so. We think the act should be construed as

applying only to sales made after its passage. At the time the void sale occurred the county was not liable to the plaintiff in error for the money he paid thereat. The void tax sale did not result from the mistake or wrongful act of the county treasurer of Burt county. It did result from the mistake or wrongful act of some "other officer" or officers of said county in listing said lands for taxation and in levying and assessing taxes against them. But for these mistakes or wrongful acts of such "other officers" until 1871 no statute existed making the county liable; and neither the statute which went into force on that date, nor the amendment thereof made in 1879, were intended to render counties liable to a purchaser at a void tax sale for the mistakes and wrongful acts of "such other officers" performed prior to the passage of such act. The judgment of the district court is

AFFIRMED.

CLARENCE LACKEY V. STATE OF NEBRASKA.

FILED OCTOBER 5, 1898. No. 9929.

Review of Instructions. The correctness of the ruling of a district court in giving or refusing instructions cannot be considered here unless such ruling is first challenged in the district court by motion for a new trial.

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

J. R. Webster and *T. F. Barnes*, for plaintiff in error.

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

RAGAN, C.

Clarence Lackey was by the judgment of the district court of Hitchcock county sentenced to imprisonment in

the penitentiary for the crime of robbery. To review this judgment he has filed here a petition in error.

There is in the record no bill of exceptions. The motion of the plaintiff in error for a new trial filed in the district court made no complaint as to the ruling of that court in the giving or refusing to give instructions, and the correctness of the ruling of the district court in those respects cannot be raised for the first time here. (*Barr v. Omaha*, 42 Neb. 341; *Jolly v. State*, 43 Neb. 857; *Cleveland Paper Co. v. Banks*, 15 Neb. 21.) The information supports the judgment and it is

AFFIRMED.

HENRY S. HANKINS ET AL. V. THOMAS J. MAJORS.

FILED OCTOBER 5, 1898. No. 8329.

1. **Review of Instructions.** Instructions relating to the right to recover, and having no bearing on the *quantum* of damages, cannot be complained of by the plaintiff when the verdict was in his favor, and unsatisfactory only in its amount.
2. **Vendor and Vendee: FRAUD: DAMAGES.** Evidence examined, and *held* sufficient to sustain a verdict for slight damages in an action by a vendee of land for false representations by the vendor as to quantity.

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

F. C. Power, for plaintiffs in error.

Gilbert Bros., *contra.*

IRVINE, C.

This was an action by the plaintiffs in error against the defendant in error to recover damages because of alleged false representations inducing a sale of land by the defendant to the plaintiffs. It was alleged that defendant represented the tract sold to contain 320 acres when in fact it contained but 248. The plaintiffs had a verdict

for $1, and bring the case here for review, assigning as error the giving of certain instructions and also the inadequacy of the damages allowed.

The instructions complained of relate to the right to recover, and have no bearing whatever on the measure of damages. As the plaintiffs had a verdict and the jury therefore found that they had a right to recover under the instructions as given, there could have been no error in those instructions prejudicial to plaintiffs. Whatever error there may have been was cured by the verdict.

Were the damages inadequate? The evidence on the part of plaintiffs tends to show that defendant at first asked $30 per acre for the land and the plaintiffs offered $25 per acre. Finally it was agreed that plaintiffs should take the land at the price of $9,000. One of plaintiffs inspected the land before it was bought. The court, at the request of plaintiffs themselves, instructed the jury that the measure of damages was the difference between the value of the land, had it contained the quantity represented, and its actual value. There was no proof of its value except by inference from the agreement of the parties. As they had agreed on a price of $9,000, it might be inferred that the land was regarded as worth something more than $28 per acre, and that the difference might be ascertained by apportioning the shortage on that basis; but we cannot regard that inference as necessary. The proof equally warranted the inference that the parties had agreed on an aggregate value on inspection of the land as it lay, without regard to the precise quantity; that the agreed price was not a valuation per acre, and no more represented a valuation on the hypothesis of its containing 320 acres than on actual view as to its apparent quantity. In this aspect there was no proof of the factors proposed by the instructions as fixing the damages. There is no legal presumption that the value of land varies in the exact ratio of its quantity. The jury must have found that while the trade was induced by false representations as to quantity, there was no

proof that plaintiffs had not received substantially what they expected and bargained for.

AFFIRMED.

FRANK A. DEAN V. STATE OF NEBRASKA, EX REL. J. THEODORE MILLER.

FILED OCTOBER 5, 1898. No. 8298.

1. **Quo Warranto:** REVIEW: EXPIRATION OF TERM OF OFFICE. A proceeding in quo warranto, brought by a claimant to the office, will not be dismissed or a review thereof denied, because, pending the review of the case in this court, the term of office has expired, the office being a lucrative one.

2. **Elections:** CONTESTS: EVIDENCE. In a judicial proceeding to test the validity or result of an election, where it has been shown that illegal votes were cast, testimony cannot be received of declarations made by the illegal voters as to the nature of the votes by them cast, unless such declarations are strictly a part of the *res gestæ* or fall within some recognized exception to the rule excluding hearsay evidence.

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

G. Norberg and *James I. Rhea*, for plaintiff in error.

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

IRVINE, C.

At the municipal election held in April, 1895, at Holdrege, a city of the second class, J. Theodore Miller and L. J. Titus were the candidates for the mayor. When the votes were canvassed it was found that each candidate had received 215 votes, and the council declared that there was a tie and that neither candidate had been elected. Thereupon Dean, the then incumbent, qualified as an officer holding over his term until his successor should be chosen and qualified. Miller took the oath of office and instituted this proceeding in quo warranto against Dean. The substantive issue was whether Miller

had been elected, he charging that certain illegal votes had been cast and counted for Titus, and with these rejected that Miller had received a majority. These allegations were denied by Dean, who in turn charged irregularities and illegal voting vitiating the election. The district court found generally for the relator and entered a judgment of ouster against Dean and an order that Miller be installed.

Of the questions discussed that naturally first presenting itself for decision is whether this court will review the proceedings of the district court at this time, it appearing that the term of office in controversy has expired. It is insisted that the case therefore falls within the rule followed by many courts, that when no effective judgment can be rendered except for costs a case will be denied further consideration. This was not a proceeding by the public prosecutor to oust an usurper, but one by a rival claimant to the office, a judgment in which would be necessary to adjudicate the title to the office as between the parties. We must assume that the office in dispute is a lucrative office. While the statute does not fix the salary of mayor, it directs that the mayor and other officers named shall receive salaries to be fixed by ordinance, and itself fixes a maximum. (Compiled Statutes, ch. 14, art. 1. sec. 7.) An adjudication of the title, in a proper proceeding, is essential to establish the rights of the parties to the emoluments. This is a property right, and cannot be denied because the delay occasioned by the crowded condition of our docket has rendered the active part of the judgment ineffective. (*Hunter v. Chandler*, 45 Mo. 452.)

There was sufficient evidence to show that at least one, perhaps three, of those voting at the election had abandoned their residence in Holdrege prior thereto, but the only evidence that any of these votes was cast for Titus consists in the testimony of third persons as to declarations of these voters as to the nature of their votes. Some of these declarations were made prior to the casting

of the votes and were expressions of intention; the others were made subsequent to voting. In one or two instances the declarations were made the day on which the election took place, but none was made to an election officer, none was made at the polls or at the time of voting, and none was connected with any principal fact pertinent to the issue and explanatory of such fact. In other words, none was a part of the *res gestæ* determined by the ordinary rules. We have thus presented, and we think for the first time, the question whether such declarations are competent evidence to show the character of the illegal vote. It is generally said that the practice of legislative bodies is to receive such evidence, but an investigation has disclosed that neither in parliament nor in congress has such practice been uniform. The congressional cases have been so inconsistent that they cannot be said to establish a rule. The question received much attention from the committee in *Wallace v. McKinley*, Mobley [Digest of Contested Elections] 185. The majority, for reasons based on principle, recommended the rejection of the evidence; while the minority recommended its reception for the reason that in legislative bodies the practice was to do so. As to the distinction between courts and legislative bodies suggested by the minority, the language of Judge Campbell, in *People v. Cicott*, 16 Mich. 283, is very pertinent: "The course adopted by legislative bodies cannot be regarded as a safe guide for courts of justice. * * * The view taken of contested elections by these popular bodies is not always accurate or consistent with any settled principles." An examination of the reports of contested congressional elections in connection with the party affiliations of the claimants and of the members of the committees lends much weight to the remark that the course of such bodies cannot be regarded as a safe guide for courts of justice.

The judicial cases have more frequently turned on the admissibility of evidence of declarations regarding the qualifications of the voters than the nature of their votes;

but a precedent against the former class of declarations is, *a fortiori*, a precedent against the latter. As to residence, and sometimes as to other elements affecting qualifications, intention is a factor, and must largely be gathered from conduct, including spoken words. On the other hand, it is the policy of this country to protect the secrecy of the ballot. The voter cannot be compelled to disclose the nature of his vote, and, as said in one of the cases, the protection thus given him implies the right to deceive a prying neighbor who tries to learn his secret. And, as it has also been said in one of the cases we shall cite, it would be useless to protect the voter from disclosing the nature of his vote, if at the same time there should be encouraged a system of extrajudicial espionage to discover the secret. The competency of such evidence has been denied in strong, and, to our minds, conclusive, opinions in *People v. Cicott, supra, People v. Commissioners*, 7 Colo. 190, and *Gilleland v. Schuyler*, 9 Kan. 569. It has been affirmed in *People v. Pease*, 27 N. Y. 45, and in *State v. Olin*, 23 Wis. 319. In the New York case the court held the evidence admissible because such was conceived to be the practice of legislative bodies, and the court could not see why the courts should adopt a different rule. The recent tendency of legislation to throw contested elections into the courts shows that legislative bodies themselves have seen that the course adopted by them in such matters is not a safe guide. Perhaps the willingness of the New York court to follow legislative precedents accounts for the further remarkable holding in the case cited, that while a voter cannot be compelled to testify for whom he voted, he may be compelled to testify for whom he intended to vote when he went to the polls, and this as a means of ascertaining for whom he did vote. In the Wisconsin case there is no discussion of the question. The New York case is cited and it is said to be the established rule to admit such evidence. The character of these cases quite justifies their curt disapproval by Judge Brewer in *Gilleland v. Schuyler, supra.*

The reasons given for admitting such proof are in some instances that every voter is a party to a contest, and in others that it is a part of the *res gestæ*. The first reason is obviously a sham one founded on a groundless and inexcusable fiction. The second reason is a sound one when the facts justify it. Thus, in *Beardstown v. Virginia*, 81 Ill. 541, subsequent declarations were held inadmissible, but those made as to the voter's disqualification, as a reason for not voting when he was sought after to vote, were received. Perhaps the application of the rule of *res gestæ* was there a little extended, but the decision in principle, apart from its application to the facts, was certainly sound. So in *Patton v. Coates*, 41 Ark. 111, declarations were admitted of a crowd of negroes returning from a county in which the election was held to the county of their residence. These were declarations as to how they had voted, coupled with a display of marked ballots. The court there said that such declarations could not be received for the purpose of rejecting the votes, but that they were competent to show a conspiracy to control the election by fraud in favor of a certain interest—this on the principle announced in the case of Lord George Gordon, whereby the cries of a mob are received to show its object.

We conclude that in such cases as the present the established rules of evidence must be applied, and that these require the rejection of declarations of voters as to how they voted, as being hearsay, unless they be strictly a part of the *res gestæ* or fall within some other recognized exception to the rule excluding hearsay. When we thus disregard the evidence of declarations in this case, there is nothing left to show that any illegal votes were cast for Titus. The other phases of the case need not be considered. The election, in the aspect most favorable to Miller, resulted in a tie. No steps to dissolve the tie were taken, Dean's successor had not been chosen, and he was the rightful incumbent.

REVERSED AND REMANDED.

HOME FIRE INSURANCE COMPANY OF OMAHA V. ELIJAH H. GURNEY.

FILED OCTOBER 5, 1898. No. 8294.

1. **Insurance**: REFORMATION OF POLICY: EVIDENCE. Evidence stated, and *held* sufficient to sustain a decree reforming a policy of fire insurance.

2. ———: KNOWLEDGE OF AGENT. An agent of an insurance company, empowered to receive and transmit applications and to receive payment of the premium, binds the company by knowledge acquired in and about the preparation of the applications and by representations made to the insured while so doing and concerning the same.

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

Byron G. Burbank, for plaintiff in error.

W. T. Thompson, contra.

IRVINE, C.

This was an action to recover on a policy of fire insurance, coupled with a proceeding to reform the policy. The policy, as issued, contained a promise on the part of the insured that he would take an inventory of the stock of goods insured at least once a year; that he would keep books of account showing all purchases and sales, and would keep the inventories and books locked in an iron or fire-proof safe or vault at night and at all times when the building described as containing the insured goods was not open for business, or in some secure place not exposed by fire which would destroy the building. The stock of goods insured was destroyed by fire. The plaintiff had taken and kept an inventory and books as required by the provision referred to, but he did not preserve them in a safe or other secure place. On the contrary, he kept them in his store, with the goods, and they were destroyed. The reformation asked was the

elimination of the provision referred to from the contract of insurance. In the district court there was a trial of the issues without a jury, followed by special findings and a judgment for the plaintiff in accordance with the averments and prayer of the petition. The whole controversy here relates to the correctness of this action in reference to the prayer for reformation as regards the special clause mentioned, and by the parties styled the "iron-safe clause."

Plaintiff had formerly a safe in his office and had a policy in the defendant company containing the "iron-safe clause." The safe had, however, been removed before the present policy was negotiated. Plaintiff testified that an agent of defendant, one Gue, called on him with reference to a renewal of his policy. Gue is shown to have been merely a soliciting agent with power simply to receive and transmit applications, and, it seems, also, to receive payments of premiums. When the application was made out plaintiff told Gue that he no longer had a safe and that he had no place to keep his books. Gue said that would be all right and made out the application accordingly. Plaintiff did not promise as stated in the policy. Plaintiff's wife heard the conversation and testified that she heard plaintiff state that he had no safe and Gue replied that it made no difference in case the company accepted the application; that plaintiff then told Gue he kept his books in the building, and Gue said that made no difference, it was all right to keep them there. Gue denied that there was any talk as to the place of keeping the books. In the application in evidence there are questions as to whether such books were kept, and the question "Are they kept in fire-proof safe?" The answer is "No." The application was made and the premium paid November 16, 1894, and the insurance then began. The policy was not delivered until about December 1, and the fire occurred December 12. On this evidence the court based its findings. While it is conflicting, and on the part of the plaintiff perhaps not very

satisfactory, we think it is sufficient to sustain the finding. If the application stood alone it would not negative the clause in the policy, because, while it indicated that the books would not be kept in a safe or vault, they might still be kept in some place where they would not be endangered by a fire which might destroy the insured property. But the evidence tends to show that plaintiff not only told Gue that he had no safe, but that he told him he had no place to keep the books, meaning, of course, no place other than his store, and that Gue said that would make no difference. The policy was only received a few days before the fire, so that there is no estoppel from claiming a reformation because of an unreasonable retention of the policy before demanding it. Plaintiff testified that he had only read the written part and a portion of the printed, and that before the fire he had not observed the "iron-safe clause." The company received and retained the premium, and does not even now yield to the theory that there was no consensus and seek a rescission.

It is argued that Gue, being only a soliciting agent, could not bind the company by any agreement prior to the policy or in conflict with its terms. It has often been held that the insurer is bound by the knowledge of its agent, so as to constitute a waiver of the strict terms of policies afterwards issued. In regard to soliciting agents the following language from *State Ins. Co. v. Jordan*, 29 Neb. 514, is peculiarly applicable: "The agents of an insurance company authorized to procure applications for insurance and to forward them to the company for acceptance are the agents of the insurers, and not of the insured, in all they do in preparing the applications or as to any representations they may make to the insured as to the character and effect of the statements so made. * * * Public policy and good faith require that the persons clothed by the insurance companies with power to examine proposed risks and fill out, receive, and approve applications for insurance shall bind their prin-

cipals by their acts and knowledge acquired by them." In a somewhat similar case, *Home Fire Ins. Co. v. Fallon*, 45 Neb. 554, a similar conclusion was reached. The application, so far as any information was demanded, stated the facts. The proof tends to show that the plaintiff made further statements to the agent, indicating at least an intention not to comply with any such condition, and that the agent informed him that such facts would be immaterial if the policy should be issued. Giving full effect to the limitations of this particular agent's authority, what thus occurred was within the apparent scope thereof. In making the application the plaintiff had a right to rely on the agent's statement as to the meaning and effect thereof and of the consequence of facts truthfully imparted. The plaintiff paid and the company received the premium, both on the faith of the agent's acts. The company is bound thereby.

AFFIRMED.

SULLIVAN, J., not sitting.

OTTO SNIDER V. STATE OF NEBRASKA.

FILED OCTOBER 5, 1898. No. 10177.

1. **Criminal Law**: CONFESSIONS: FOUNDATION FOR EVIDENCE. In laying the foundation for evidence of confessions in a criminal case it is sufficient to prove affirmatively all that occurred prior to and at the time of the confessions, provided such affirmative proof excludes the hypothesis of inducements of hope or fear.

2. **Witnesses**: OPINIONS AS TO SANITY. Witnesses not experts may give their opinions as to a person's sanity only after narrating the facts by them observed on which they base their opinions.

3. **Insanity**: INSTRUCTIONS: BURDEN OF PROOF: TEXT-BOOKS. An instruction in a criminal case, in effect, that every one is presumed sane, but if there is evidence tending to rebut the presumption and sufficient to raise a reasonable doubt on the issue of insanity, then the burden is on the state to show sanity beyond a reasonable doubt, shifts the burden of proof and is therefore erroneous.

4. ———: BURDEN OF PROOF. To cast on the state the burden of proving sanity it is only requisite that there be some evidence tending to prove insanity. It is not necessary that there must first be evidence sufficient to raise a reasonable doubt.

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

L. S. Hastings and *Steele Bros.*, for plaintiff in error.

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

IRVINE, C.

Otto Snider was convicted of the statutory offense of placing an obstruction on a railway track, and brings the proceedings here for review.

One group of assignments of error relates to the admission in evidence of certain confessions. The objection to this evidence was, in effect, that it was not sufficiently shown that the confessions were voluntary. *Ballard v. State,* 19 Neb. 609, is relied on in support of the objection. It was there held that an officer may testify to statements made to him by the defendant while in custody if it is shown that they were made voluntarily and without inducements of hope or fear having been made or offered by the officer or any other person. It is said that the evidence was here insufficient to satisfy the condition, because it was only shown what was said; that menaces were not excluded nor were inducements by others. It would be useless to set out the evidence at length. It was shown that while others were in sight, no other persons than the defendant and those to whom the confessions were made took part in the conversation, or probably heard it. The witnesses narrated all that occurred, and this affirmative evidence excluded any hypothesis of inducements of any character. By showing what the witnesses did say, and all that they said, it was shown as well as by direct negative evidence that neither promises nor menaces existed. It is hardly ever possible to abso-

lutely exclude the possibility of the influence of some previous inducement held out by a stranger and not known to the witness by whom it is sought to prove the confession. Here circumstances were proved rendering it highly improbable that there had been such previous inducements, and there was no evidence that there were or might have been such. This was sufficient.

By another group of assignments certain rulings are challenged whereby the court struck out answers of witnesses relating to defendant's mental condition. These witnesses were not experts. Counsel were endeavoring to elicit from them facts throwing light on the question of defendant's sanity. The answers stricken out were in the nature of opinions or inferences from observed facts not previously narrated; for instance, "he appeared not to understand things." In each instance the court struck out such answers, but permitted further questions to be asked calling out the facts which gave rise to such opinions, and finally, after the facts were so narrated, permitted answers to categorical questions eliciting the opinion of witnesses, derived from those facts, as to defendant's sanity. In so doing the court pursued strictly and correctly the rule established by several decisions of this court which have been recently reviewed and the rules thereby established again enforced in *Lamb v. Lynch*, 56 Neb. 135.

The following instruction was given: "You are instructed that the law presumes every one to be sane and responsible for his acts until the contrary appears from the evidence; but if there is evidence in the case tending to rebut this presumption and sufficient to raise a reasonable doubt on the issue of insanity, then the burden of proof is upon the state to show by the evidence, beyond a reasonable doubt, that the defendant was sane, as explained in these instructions, at the time the alleged offense was committed." This instruction was erroneous in that it shifted the burden of proof until such point as the evidence should be sufficient to raise a reasonable

doubt. The rule is that the burden does not shift in a criminal case. In the absence of any evidence tending to show insanity, the presumption of sanity satisfies the requirements of the law; but as soon as there is any evidence tending to show insanity, then the state must convince the jury of sanity, as of every other element of guilt. It is not necessary that there must first be evidence sufficient to raise a reasonable doubt. The attorney general calls attention to the fact that the instruction assailed appears in a work on Instructions to Juries as applicable to those states where, as here, the rule is that the burden does not shift. This fact only serves to show with what caution resort must be had to this, perhaps the most dangerous, class of text-books. It does appear in the work referred to and in the connection stated, but the only case cited as sustaining it is *Commonwealth v. McKie*, 1 Gray [Mass.] 61. In that case there was no issue of insanity. It was a prosecution for assault and battery, and the trial judge had instructed that if the bare fact of the battery had been proved, the burden was upon the defendant to show justification. This was held bad because it shifted the burden, the court adding to its discussion: "There may be cases where a defendant relies on some distinct, substantive ground of defense to a criminal charge, not necessarily connected with the transaction on which the indictment is founded (such as insanity, for instance), in which the burden of proof is shifted upon the defendant. But in cases like the present (and we do not intend to express an opinion beyond the precise case before us) * * * the burden of proof does not change." It will be seen that this is not even an *obiter dictum* in support of such an instruction; it is only an effort by the court to prevent an inference to be drawn either way. Nevertheless, the same court a little later (*Commonwealth v. Eddy*, 7 Gray [Mass.] 583) did hold that while the burden is throughout on the commonwealth, it is satisfied as to sanity by the presumption thereof, and if insanity be a defense the defendant must

prove it by a preponderance of the evidence—a conclusion directly opposed to the uniform rule in this state. The court by such an instruction in effect says that the jury is not to look constantly to see if the state has proved guilt, but, if insanity is a question, it must first look at the case from the standpoint of guilt, and see if there is affirmative evidence of insanity sufficient to acquit, and only then recur to the proper point of view. That it is erroneous is shown by many of our decisions. They are reviewed in *Peyton v. State*, 54 Neb. 188. In that case an instruction contained a similar vice, and while it related to an alibi, it is in point, because, as shown by the cases there cited, this court has always refused its assent to the doctrine that as to the burden of proof there is a distinction between essential elements of the offense and what the Massachusetts court styles a "distinct, substantive ground of defense."

REVERSED AND REMANDED.

JOHN L. LUNNEY V. LESLIE J. HEALEY.

FILED OCTOBER 5, 1898. No. 8261.

1. **Trial to Court:** ERRONEOUS ADMISSION OF EVIDENCE. This court will not reverse the judgment in a case tried to the court without a jury merely because of the admission of improper evidence.

2. **Real Estate Agents:** COMPENSATION. Where a real estate broker contracts to produce a purchaser who shall actually buy, he has performed his contract by the production of one, financially able, with whom the owner actually makes an enforceable contract of sale. The failure to carry out that contract, even if the default be that of the purchaser, does not deprive the broker of his right to commissions.

3. ———: ———. Evidence in such a case examined, and *held* to sustain a finding for the broker.

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

Biggs & Thomas, for plaintiff in error.

References: *Dent v. Powell*, 61 N. W. Rep. [Ia.] 1043; *Mattingly v. Pennie*, 105 Cal. 514; *Pearson v. Mason*, 120 Mass. 53; *Rice v. Mayo*, 107 Mass. 550; *Love v. Miller*, 53 Ind. 294; *Keys v. Johnson*, 68 Pa. St. 43; *Neiderlander v. Starr*, 50 Kan. 766; *Cremer v. Miller*, 57 N. W. Rep. [Minn.] 318; *Tansey v. Etzel*, 34 Pac. Rep. [Utah] 291; *Barber v. Hildebrand*, 42 Neb. 406.

C. S. Rainbolt, also for plaintiff in error.

D. C. McKillip and *Thomas A. Healey, contra.*

IRVINE, C.

This was an action by Healey against Lunney to recover commissions as a real estate broker. The plaintiff recovered in the district court, and the defendant seeks a reversal of the judgment.

It is suggested that the petition does not state a cause of action, but the supposed defect is not pointed out in the briefs and we perceive none on examining the petition.

Error is assigned on the admission of certain evidence. The case was tried to the court without a jury, and errors, if any were made, in the admission of evidence are, therefore, not a ground of reversal.

The principal controversy concerns the sufficiency of the evidence. The petition alleges a contract between the parties whereby it was agreed that if Healey would find a purchaser for certain land of Lunney's at the price of $6,400, and on such terms of purchase as should be agreed upon between Lunney and the purchaser, Lunney would pay Healey $200. It is then alleged that Healey produced a purchaser willing and able to pay the price fixed; that terms were agreed upon and a contract executed for the sale of the land. On analysis it will be seen that the petition does not charge the usual broker's con-

tract to produce a purchaser able and willing to purchase on terms previously fixed by the owner. Here the owner had fixed the price alone, and the other terms were to be arranged with the purchaser. The contract would only be performed by the production of a purchaser with whom the owner should actually make a bargain. The evidence on behalf of the plaintiff strongly tended to establish the averments of his petition. It appears that the purchaser by him produced actually executed a contract to purchase the land, but it also appears that the contract was not performed, and it is inferable that the default was that of the purchaser. In spite of some authority to the contrary we are convinced that under such a contract as is here pleaded the broker is entitled to his commission when through his instrumentality a purchaser has been produced, able and willing to buy, and with whom the owner actually makes an enforceable contract of sale, even though that contract fails in performance through the default of the purchaser. In such case the vendor may usually enforce the specific performance of the contract, and he may in any case recover damages for the breach. In either way he gets the advantage of his bargain, and the broker has done all required of him. Such is the generally accepted view. (*Love v. Miller*, 53 Ind. 294; *Love v. Owens*, 31 Mo. App. 501; *Leete v. Norton*, 43 Conn. 219; *Pearson v. Mason*, 120 Mass. 53; *Bach v. Emerich*, 35 N. Y. Sup. Ct. 548.)

It is, however, insisted that in this case the contract of sale never became operative, because of the vendee's failure to perform a condition precedent, and the case is said to be similar to *Barber v. Hildebrand*, 42 Neb. 400. There the contract was for an exchange of lands, and the person produced by the broker failed to furnish an abstract showing perfect title in himself to the land which he was to give in exchange. The furnishing of such an abstract was a condition precedent to the exchange. It was as if a purchaser produced had been financially unable to buy and had been for that reason rejected. Here

the contract was that the purchaser should pay "$6,400 in manner following: $300 cash in hand paid, the receipt whereof is hereby acknowledged, and the balance as follows," etc. The evidence was that the $300 was not intended in fact to be paid in cash, but was to be represented in part by the assignment of a land contract at the agreed price of $125. For the remaining $175 the purchaser gave and the vendor received a note payable in ten days. There is nothing in this that indicates such payment as a condition precedent to the taking effect of the contract. So far as stated it is quite evident that Lunney might have sued on the note or recovered damages on the contract. But it is said that the contract was not delivered, but left in escrow for delivery only when the other contract should be assigned and the note paid. While possibly the evidence might permit the inference that such was the intention, there is no witness who directly so testifies, and the inference drawn by the trial court, that the contract was deemed complete, is decidedly the more reasonable. Indeed the express and implied admissions of Lunney's answer are such that it it doubtful whether his present theory was admissible under the pleadings.

There is a suggestion that the fact that the purchaser failed to assign the contract and pay his note shows that he was not financially able to do so. This fact would at most be evidence tending to so show, and the purchaser's default was explained in a manner consistent with the theory of his ability to perform. Moreover, all the direct evidence was to that effect.

AFFIRMED.

COLUMBUS STATE BANK V. CRANE COMPANY.

FILED OCTOBER 5, 1898. No. 8277.

Trial: ABANDONMENT OF COUNT: SUBMISSION OF ISSUES. During a trial a plaintiff whose petition was drawn in two counts stated that he abandoned the second count except in so far as averments in that count might be necessary to complete the cause of action stated in the first count. *Held*, That it was error for the court thereafter to submit to the jury the determination of an issue relevant only to the second count.

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

Whitmoyer & Gondring, for plaintiff in error.

O'Neill & Gilbert and *McAllister & Cornelius, contra.*

IRVINE, C.

Brandt & Fleming, prior to October 4, 1889, were erecting a hotel in Columbus. Charles Schroeder performed the plumbing work therefor, purchasing material from the Crane Bros. Manufacturing Company. Brandt & Fleming being indebted to Schroeder and the latter to Crane Bros. Manufacturing Company, Schroeder made what in the pleadings is styled an order, but what is in legal effect a demand bill of exchange, on Brandt & Fleming for $300, payable to the order of Crane Bros. Manufacturing Company. November 22 that company sent the draft to the Columbus State Bank, accompanied by a letter of instructions somewhat equivocal in its terms. It certainly constituted the bank an agent to procure acceptance, and in the light of circumstances it is equally clear that the bank was expected and assumed to exercise the duties of a collecting agent. The bank received the draft about November 23, but did not procure its acceptance until December 9. Previously Schroeder had perfected a mechanic's lien securing his entire

claim against Brandt & Fleming. December 9 he assigned this lien to the bank. Schroeder was then indebted to the bank on a note for $1,000 and on three notes for $150 each. The bank foreclosed the lien and realized its full amount. After deducting the expense of foreclosing there remained in its hands $1,001.92. The Crane Company, which had in the meantime succeeded to the rights of the Crane Bros. Manufacturing Company, brought the present action against the bank. Its petition was drawn in two counts. The first alleged the drawing of the bill and that it operated as an assignment of so much of the debt from Brandt & Fleming to Schroeder; that the bill had been sent to the bank and had been by Brandt & Fleming accepted; that the bank, while acting as the agent of plaintiff, had taken the assignment of the lien with knowledge that $300 of the debt secured thereby had been already assigned to plaintiff; that it had collected the lien in full and refused to account to plaintiff. The second count charged that at the time of the assignment and in consideration thereof the bank had agreed with Schroeder to collect the lien, apply its proceeds to the payment of the three notes of $150, and the surplus to the payment of plaintiff, thus excluding the note for $1,000 or subordinating it to plaintiff's claim. The bill of exceptions shows that during the trial, and while the defendant was adducing its evidence, the plaintiff "abandons its second cause of action except in so far as any allegations contained in the second cause of action may be necessary to complete the first cause of action set out in the petition."

The court, among other things, instructed the jury as follows: "It is claimed by plaintiff that the bank took said assignment under an agreement with Charles Schroeder that it should be first held as security for three acceptances of $150 each owned by the bank and drawn by Brandt & Fleming in favor of Schroeder, and that after said acceptances were paid it should stand as security for the order in suit. If this claim is established

by the evidence, the plaintiff is entitled to recover, and you should find in its favor." The jury found for the plaintiff. We think, in view of what occurred at the trial, that this instruction was erroneous. While the plaintiff should have dismissed its second cause of action if it desired to abandon it, or else amended its petition so as to omit any averments it sought to abandon, the statement made at the trial should be treated as if such course had been pursued. It was notice that nothing was claimed under the second count, and the defendant was justified in thereafter ignoring all evidence directed to that count. Plaintiff now claims that while it abandoned the second count as a separate cause of action it reserved the averments founding the instruction. The reservation was only of such averments in the second count as might be necessary to complete the cause of action stated in the first count. The first count undertook to charge the bank because of breach of duty as plaintiff's collecting agent, to create a sort of involuntary or constructive trust because of the bank's undertaking to derive a benefit to itself in disregard of its duties as agent. The second count was based on the theory of an express trust, involving no bad faith. The instruction submitted the theory of the express trust, the phase of the case embodied in the second count which had been abandoned. The averments on which the instruction rested related only to this theory and in nowise tended to complement the first count, which was not based on any such theory.

REVERSED AND REMANDED.

SULLIVAN, J., not sitting.

TURLINGTON W. HARVEY V. FIRST NATIONAL BANK OF OMAHA.

FILED OCTOBER 20, 1898. NO. 8360.

1. **Guaranty:** TIME. The contract of guaranty herein in suit *held* to be without limitation in its terms of the time of credit to be given the principal debtor. (*Young v. Hibbs*, 5 Neb. 433.)
2. **Notes:** RENEWAL: PAYMENT. A note taken for a pre-existing debt or as a renewal of another note is not a payment or discharge of the debt, unless by express agreement it is accepted as such payment or discharge.
3. ———: ———: ———: EVIDENCE. Whether it is payment or not is to be determined from the intention of the parties as shown by the acts, facts, and circumstances accompanying and attendant upon the transaction in question.
4. **Guaranty:** EXTENSION OF TIME: CUSTOM AND USAGE. Whether extensions of time of payments effected by renewal notes were within the scope of the unlimited credit as to time in terms of a guaranty, *held* to be a matter to be determined from the evidence relative to the usages and customs of business in such transactions, also of the acts of the parties to and the facts and circumstances of the transactions.
5. ———: ———: ———. A finding that such renewals were within the contemplation of the parties at the time of the contract of guaranty and within the time of credit authorized to be accorded the principal debtor, *held* to be supported by the evidence.
6. ———: ———: LIABILITY OF GUARANTOR. If, with full knowledge of facts which might work his discharge, and that such might be their effect, a guarantor recognizes his liability as existent and secures an extension of time for its payment, and also by request secures further proceedings for collection by the creditor against the principal debtor, he will be bound for its payment.
7. **Trial to Court:** ERRONEOUS ADMISSION OF EVIDENCE: HARMLESS ERROR. In the trial of a case to a court without a jury, if incompetent evidence be admitted and considered, but the findings—upon competent evidence and sustained thereby—demand the judgment rendered as the only one which could follow, such error, if committed, is without prejudice.

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

The opinion contains a statement of the case.

Horton & Blackburn, for plaintiff in error:

The indebtedness created under the guaranty was paid. (*Phœnix Ins. Co. v. Church*, 81 N. Y. 220; *Slaymaker v. Gundacker*, 10 S. & R. [Pa.] 75; *Bank of the United States v. Daniel*, 12 Pet. [U. S.] 34; *Cumber v. Wane*, 1 Smith, Leading Cas. 633; *Young v. Hibbs*, 5 Neb. 436; *Fisher v. Marvin*, 47 Barb. [N. Y.] 159.)

References to question as to extension: *Combe v. Woolf*, 8 Bing. [Eng.] 156; *Samuell v. Howarth*, 3 Mer. [Eng.] 272; *Chace v. Brooks*, 5 Cush. [Mass.] 43; *Tootle v. Elgutter*, 14 Neb. 158; *Manning v. Alger*, 52 N. W. Rep. [Ia.] 542.

References to question as to laches: *Talbot v. Gay*, 18 Pick. [Mass.] 534; *Newton Wagon Co. v. Diers*, 10 Neb. 284; *Oxford Bank v. Haynes*, 8 Pick. [Mass.] 423.

Winfield S. Strawn, contra.

References to questions as to construction of guaranty and as to liability of guarantor: *Watts v. Gantt*, 42 Neb. 869; *Tolerton v. McClure*, 45 Neb. 368; *Lihs v. Lihs*, 44 Neb. 143; *Monroe v. Reid*, 46 Neb. 316; *Merle v. Wells*, 2 Camp. [Eng.] 413; *Smith v. Dann*, 6 Hill [N. Y.] 543; *Union Bank v. Coster*, 3 N. Y. 203; *Lawrence v. McCalmont*, 2 How. [U. S.] 426; *Lafargue v. Harrison*, 70 Cal. 385; *Mason v. Pritchard*, 12 East [Eng.] 227; *Russell v. Wiggin*, 2 Story [U. S.] 213; *Drummond v. Prestman*, 12 Wheat. [U. S.] 518; *Davis v. Wells*, 104 U. S. 159; *Merchants Nat. Bank v. Hall*, 18 Hun [N. Y.] 180; *White's Bank v. Myles*, 73 N. Y. 340; *Bent v. Hartshorn*, 1 Met. [Mass.] 24; *Louisville Mfg. Co. v. Welch*, 10 How. [U. S.] 461; *Palmer v. Rice*, 36 Neb. 844; *Wilcox v. Draper*, 12 Neb. 138; *Lonsdale v. Lafayette Bank*, 18 O. 142; *Klosterman v. Olcott*, 25 Neb. 382; *Douglass v. Howland*, 24 Wend. [N. Y.] 35; *Case v. Howard*, 41 Ia. 479.

HARRISON, C. J.

It appears that Charles A. Harvey, who was engaged in business in the city of Omaha, desired to arrange with the bank, defendant in error herein, to make him loans of money to be used in the business at such times and in sums necessary to best forward his plans, efforts, and hopes in the enterprise. Turlington W. Harvey, the father of Charles A. Harvey, to help his son in his business venture and to aid him in obtaining accommodations in money matters of the bank, executed and delivered to it the following:

"For value received, I hereby guaranty to the First National Bank of Omaha, for one year from this date, the payment of any loan or discount by them to Charles A. Harvey, to the amount of seven thousand dollars ($7,000).

"Sept. 18, 1889. (Signed) T. W. HARVEY."

And on September 18, 1889, the bank loaned to the son $1,700, which transaction was evidenced by his note of that date in favor of the bank and due in ninety days. October 22, 1889, another loan was effected, evidenced by promissory note of the borrower to the bank as payee and due in ninety days from its date.

It was pleaded in the petition, relative to these loans and the notes to which we have just referred, as follows: "The two said sums of money, loaned as aforesaid and under the said guaranty, were never paid, but as the evidence of such loans of said sums, and for no other purpose, the said Charles A. Harvey made to the plaintiff his individual notes for each of the said sums, which said evidences of the said loans were from time to time replaced by other notes of the said Charles A. Harvey only, the last thereof, for the said loan of $1,700, bearing date of October 5, 1891; and the last thereof, for the said loan of $2,500, bearing date of November 4, 1891, at which time there was included the said loan of $2,500

the further sum of $200, also loaned to the said Charles A. Harvey, in consideration of, in reliance on, and within the time limited by the said written guaranty, making the last evidence of said loan a note in the sum of $2,700." There were further declarations in regard to a second guaranty and certain transactions thereunder, but there is no controversy here of and concerning it or them, and they will receive no further notice.

In the answer it was admitted that the guaranty was executed and delivered, the loans made, and the notes given, and it was stated:

"Said defendant further answering states that at the maturity of said above described note for $1,700, to-wit, December 20, 1889, said Charles A. Harvey gave to said plaintiff his personal check drawn on said plaintiff for said amount due, and that said plaintiff on said date discounted for said Charles A. Harvey one promissory note for $1,700, said Charles A. Harvey paying the interest on said note in advance, and that said plaintiff placed the amount of said note to the credit of said Charles A. Harvey; that at the maturity of said above described notes for $1,000 and $1,500 respectively, to-wit, January 25, 1890, said Charles A. Harvey gave to said plaintiff his personal checks drawn on said plaintiff for said amounts due, and that said plaintiff on said date discounted for said Charles A. Harvey one certain promissory note for $2,500, said Charles A. Harvey paying the interest on said note in advance, and that said plaintiff placed the amount of said note to the credit of said Charles A. Harvey. Said defendant further states that the delivery of said checks and the discount of said last mentioned notes on December 20, 1889, and January 25, 1890, respectively, were by said Charles A. Harvey given and by said plaintiff received in payment of said loans described in paragraphs three and four of this answer."

"(6.) Said defendant further answering admits the execution and delivery of said note of $1,700, bearing date October 5, 1891, and said note of $2,700, bearing date

of November 4, 1891, and states that both of said notes were by their terms made payable in ninety days from their respective dates and were given and received in payment of any and all loans then due and remaining unpaid made by said plaintiff to said Charles A. Harvey. Said defendant further states that in consideration of the execution and delivery of said notes all evidences of indebtedness for all loans then due were by said plaintiff surrendered and delivered up to said Charles A. Harvey. Said defendant further states that said note for $2,700 was by said Charles A. Harvey given and by said plaintiff received in payment of a note for the sum of $2,500 dated August 3, 1891, and a loan made by said plaintiff to said Charles A. Harvey after the expiration of said guaranty. Said defendant further states that said $2,700 note included, also, three months' interest in advance from said November 4, 1891, on said sums included in said note. Said defendant further states that in consideration of said plaintiff's extending the time of payment of the amounts included in said last mentioned notes for $1,700 and $2,700, respectively, for ninety days from their respective dates said Charles A. Harvey executed and delivered said notes, and also paid to said plaintiff three months' interest in advance on said note for $1,700 and included interest in advance, as aforesaid, on said note for $2,700.

"(7.) Said defendant further answering states that after the maturity of said notes of $1,700 and $2,700, respectively, said plaintiff, by the consideration of the court, duly recovered judgment thereon against said Charles A. Harvey.

"(8.) Said defendant further answering admits that the notes given for any loans made during the continuance of said guaranty were from time to time replaced by other notes, and states that when each new note was given the old one was surrendered and delivered up to said Charles A. Harvey and the payment of the amount represented by said new note was extended for a definite

period in consideration of payments made said plaintiff by said Charles A. Harvey and the execution and delivery of said new notes. Said defendant further states that when each of said notes became due said Charles A. Harvey gave to said plaintiff for the amount of such note his personal check drawn on said plaintiff, and also signed a new note, which was discounted by said plaintiff and the amount thereof placed to the credit of said Charles A. Harvey by said plaintiff.

"(9.) Said defendant further states that all of the said extensions and final extensions of the payment of said sums of $1,700 and $2,700 ninety days from October 5, 1891, and November 4, 1891, respectively, were made by said plaintiff for a valuable consideration moving from said Charles A. Harvey to said plaintiff and without the knowledge or consent of said defendant.

"(10.) Further answering said defendant states that the first knowledge he had that any loans made by said plaintiff to said Charles A. Harvey had not been paid at their maturity was some time subsequent to February 1, 1892, when he received notice by letter from said plaintiff. Said defendant further states that during the continuance of said guaranty, and for more than one year from its expiration, said Charles A. Harvey was solvent, was a resident of the city of Omaha, said county, and had property in said county subject to execution; that when said defendant first received notice of the non-payment of certain loans made by said plaintiff to said Charles A. Harvey said Charles A. Harvey was insolvent and had no property whatever subject to execution."

The reply, to the extent we need notice it, was as follows:

"Alleges that upon the failure of said Charles A. Harvey to pay the said sums in the petition mentioned, loaned to him under defendant's said express guaranty, plaintiff informed defendant of that fact and demanded payment by him of the said sums and interest. And thereupon defendant verbally requested that plaintiff

would, in order to save defendant upon his said express guaranty, endeavor to get said sums of money from the said Charles A. Harvey during the then six months, and verbally proposed and agreed that if within the said time the said Charles A. Harvey had not paid the same, he, the defendant, would pay to the plaintiff the said sums and interest; that plaintiff then and there relying on the said promise agreed to said request, delayed to require payment of said sums from defendant during said time, and used all reasonable means to collect said sums from said Charles A. Harvey, but without any success."

"Third. That to indemnify himself against liability or loss by reason of making and giving to plaintiff the contracts of guaranty in the petition set out, defendant demanded of and received from said Charles A. Harvey, who is the son of the defendant, the conveyance to defendant of a large amount of property of the said Charles A. Harvey, which plaintiff cannot fully set forth and describe, but among other things the following: Twenty-five (25) lots or parcels of real estate 'on the west side,' in the city of Chicago, Cook county, Illinois, of the value of eight hundred dollars ($800) per lot; and defendant still held the title and ownership of the said realty, when called upon to pay the loans guarantied by him as stated in the petition and at the time when he made the verbal promise of payment as stated in this reply.

"Fourth. That the taking of the notes merely as the evidence of the amounts loaned to said Charles A. Harvey under the said guaranty, and the renewal of said evidences of indebtedness on account of the said original loans under said guaranty, were in accordance with established bank usage and banking custom, which obtains in such matters in banking business generally."

There was a trial of the issues to the court without a jury, and in response to a demand on the part of plaintiff in error for findings of fact and conclusions of law, the court made the following findings of fact:

"1. That of date September 18, 1889, the defendant

made and delivered to the plaintiff the written guaranty set out in the first count of the petition herein.

"2. That the Charles A. Harvey, named therein, was the son of the defendant, and defendant's object in giving said guaranty was to secure for his said son a continuing credit to enable him to carry on business in Omaha, Nebraska.

"3. That in reliance on said letter of guaranty or credit plaintiff loaned to said Charles A. Harvey the two several sums of money sued on, to-wit, $1,700 on September 18, 1889, and $2,500 on October 22, of the same year.

"4. That during the continuance of the said guaranty the defendant knew that the money was being furnished thereunder to his said son, but was not acquainted with the details thereof.

"5. That said sums of money so loaned have not been paid in whole or in part, but are still owing and due.

"6. That as evidence of said loans notes were made by said Charles A. Harvey to plaintiff, which notes were, as stated in the petition, replaced from time to time by new notes signed by the said Charles A. Harvey, but evidenced only the original loans.

"7. That in the last of the notes evidencing the original loan of and for $2,500 made October 22, 1889, there was included the sum of $149.92, the same being the amount of an overdraft of his account by said Charles A. Harvey, after the expiration of the time limited by the said guaranty within which loans could be made to said Charles so as to charge defendant with the payment thereof.

"8. That the notes made by the said Charles A. Harvey from time to time as evidence of the said loans made in the year 1889 were not, either, any, or all of them, taken or received in, for, or as payment of said loans of money, either in whole or in part, but were given and received only as the renewed evidences of the original loans and for no other purpose.

"9: That the contract contained in the said letter of credit of September 18, 1889, was never varied by any other contract or agreement, and there was no restriction, reservation, or limitation upon the dealings of the said Charles A. Harvey with plaintiff thereunder other than that the actual loans of money should be made to him within one year from said date, and should not exceed the sum of $7,000.

"10. That there is due to the plaintiff upon and for the loans so made to said Charles A. Harvey, in the year 1889, the sum of $5,537.50, and said sum should draw ten per cent interest from February 4, 1895, that being the first day of the present term of this court.

"11. That with full knowledge at the time of the promise hereinafter in the paragraph mentioned, that said two loans had been made to his said son, at the times hereinbefore stated, and of the facts following upon the making of said loans, and of the manner in which the business with plaintiff had been conducted by his said son, defendant requested to press said Charles A. Harvey for payment of the loans of money so guarantied by defendant, in order, if possible, to save the defendant from the loss which he anticipated he would sustain by being compelled to pay the same as his said son's guarantor therefor, and requested plaintiff to wait upon him, defendant, for the period of six months while so doing, and requested that if said loans were not paid by that time to inform him, the defendant; that by reason of said request and promise plaintiff granted said delay, pressed the said Charles A. Harvey for payment of said loans, brought suit against him therefor, took judgment of this court therefor, issued execution thereon, and upon return thereof took due proceedings in aid of said execution; examined said defendant in this court, had a due minute of his examination thereunder made in full by the shorthand reporter of this court, had the same copied, and duly certified by the presiding judge, filed with the clerk and made of record in the case, all as provided by law

and in compliance with the requirements of section 547 of the Code of Civil Procedure.

"12. That to indemnify defendant against loss for making the said written guaranties sued on herein, said Charles A. Harvey, on defendant's request, made to the defendant a deed for twenty-five lots in the city of Chicago, Cook county, Illinois, the property of said Charles A. Harvey, which said lots were at the time of the reasonable value of $20,000; which said realty has never been reconveyed by defendant, either in whole or in part.
* * *

"CONCLUSIONS OF LAW.

"1. That the rights of the parties are to be determined by and from the language and express terms of the letter of credit of date September 18, 1889; and that by the express terms of said letter the maker thereof became and is liable for the money loaned by plaintiff to his said son within one year from its date, so that said loans did not exceed the sum of $7,000.

"2. That subject to the conditions that the money should be actually loaned within one year from September 18, 1889, and should not exceed the sum of $7,000 the defendant's said undertaking to pay the same was absolute.

"3. That the period of one year provided in said guaranty was a limitation as to the time within which the money was to be loaned to said Charles A. Harvey, and not a limitation as to the time for which credit should be given him for the loan of said money.

"4. That neither notice by plaintiff of acceptance of the guaranty sued on, or of the lending of the money in pursuance thereof, was necessary, either as a matter of law or by any term of the contract in writing herein sued on; but that it was the business of the guarantor to inquire of his son and learn what was being done under said guaranty.

"5. That as said guaranty was given for the promotion of the guarantor's son and to assist him in life, then, first

restricting its construction of the fair and reasonable interpretation of the words used in the writing, said instrument should be so construed as to attain the object for which it was given, and not in a technical manner, and in case of reasonable doubt as to their meaning the words are to be taken most strongly against the person giving the guaranty, and he should be held to what appears to be the full extent of his contract or agreement.

"6. That the various notes made by the said Charles A. Harvey did not pay or extinguish the debts made by the actual loan to him of money within the year from September 18, 1889, there not having been any express agreement that the giving and taking of the same should have such effect; but the changes or renewals of the said notes evidencing said loans were at most only a change of the evidences of the said prior actual loans of money made to said Charles under the guaranty.

"7. That the said undertaking of guaranty was burdened with no conditions, restrictions, or limitations save those which the guarantor chose to express and did express therein; but as made and delivered it left to the borrower thereunder, and to the bank, all the details of the business, the manner of evidencing said loans of money, the times for which said evidences should run, renewals thereof, so as to comply with bank usages in that respect; the length of the credit to be given, the rate of interest to be paid (within the legal rate), and every other manner and thing connected with the loans, unless restricted in the guaranty; and, not having limited the acts of his said son and plaintiff to one transaction, or to any specific number of transactions under said guaranty, the replacing of the evidences of the loans from time to time with other evidences thereof was immaterial, so that the actual loans of money themselves were made within the prescribed limit of one year, and did not exceed the sum of $7,000.

"8. That the indemnity taken by the defendant from his said son for making the guaranty sued on prevented

defendant's release, and fully held him for the money actually loaned, under the circumstances of this case."

Judgment was rendered, to reverse which is the object of the error proceeding to this court.

The instrument of guaranty was a limited one as to the amount to be loaned and the time within which the money was to be furnished, but was unlimited in respect to the time or length of credit to be given. Such an interpretation was given to a similarly worded guaranty in respect to time of credit in *Tootle v. Elgutter*, 14 Neb. 158. All matters of detail, how the loans were to be evidenced, whether notes taken, etc., were not mentioned. On this subject there appears some significant indications in the testimony of the guarantor as follows:

Q. Did you have any knowledge during the year 1889 of any loans made by the First National Bank of Omaha to Charles A. Harvey? (Objected to, as immaterial and irrelevant. Overruled, and plaintiff excepts.)

A. I had no specific knowledge of any particular loans as to amounts or time or anything of that sort.

Q. Did you have any knowledge during the year 1889 of any notes discounted by the bank for Charles A. Harvey? (Objected to, as irrelevant and immaterial. Overruled, and excepts.)

A. I had a general knowledge that he was borrowing money there, but I did not know anything about the amounts or anything about that. I didn't know anything about the details of the business.

From this it would seem that he understood that the matter of time, of credit, and other details were to be arranged between the bank and the son and were in fact being so adjusted. It may be said that the time of credit to be accorded was left by the instrument delivered to be fixed by the immediate parties to the transaction of loan and might have been forty, fifty, or one hundred years, but we incline to the view that it must in any such an affair be a reasonable time within the purview of the purposes to be accomplished, as exemplified by the

facts and circumstances which surround and accompany the principal matters of the occurrences,—the loans. (*Lehigh Coal & Iron Co. v. Scallon*, 63 N. W. Rep. [Minn.] 245.)

So much we have devoted to what we considered the proper elucidation of some of the points of the case preliminary and subsidiary to the main subjects of argument. It was shown that when the debts herein involved were first contracted by Charles A. Harvey, promissory notes were by him executed, and, as their evidences, delivered to the bank, due in ninety days from date, and at or near the close of the stated times the notes had to run new notes were given for the same amounts and the old notes were taken up. The exact mode of each transaction is stated more in detail in the excerpt from the pleading of the plaintiff in error hereinbefore made. It is urged for plaintiff in error that each of the changes thus effected constituted a payment or extinguishment of the debt evidenced by the note taken up. The general rule on this subject was stated in the opinion in the case of *Young v. Hibbs*, 5 Neb. 433, to be that "A note taken for a pre-existing debt will not discharge the original cause of action, unless it is by express agreement taken in payment of such prior debt." "It is a general rule that if one indebted to another by note gives another note to the same person for the same sum, without any new consideration, the second note shall not be deemed a satisfaction of the first unless so intended or accepted by the creditor." (*Hart v. Boller*, 15 S. & R. [Pa.] 162.) Counsel for plaintiff in error argue that such transactions as occurred between the bank and Charles A. Harvey relative to his indebtedness and notes were not within the reason or the letter of the general rule, and refer to the note to *Cumber v. Wane*, 1 Smith's Leading Cases, 659, wherein it is said: "Where the transaction is the renewal of notes in whole or in part at bank, the general course of business and undertaking of merchants rather implies that the new note is a satisfaction of the old; that

the transaction is a new discount and repayment of the former note. (*Slaymaker v. Gundacker*, 10 S. & R. [Pa.] 75; *Bank U. S. v. Daniel*, 12 Pet. [U. S.] 34)," to which may be added *Phœnix Ins. Co. v. Church*, 81 N. Y. 218; but in the same note it is also stated in direct connection: "Still, even here, the decision of the court is regulated exclusively by the intention of the parties and the justice of the case." (*Bank of Commonwealth v. Letcher*, 3 J. J. Marshall [Ky.] 195, 1 Dana [Ky.] 82.) It will no doubt have been noticed that the main quotation goes no further than to say that the general course of business, rather implies certain results from the transaction. We take it that there was not meant an unavoidable or uncontradictable conclusion, but one governable by the ascertainable intention of the parties. The evidence in the case at bar was to the effect that the father desired the bank to allow to his son what may be denominated a "running credit"—(it is true it may often run beyond what is pleasant when the day of payment arrives, but this cannot avail to avoid the payment),—such accommodations within the limit as to amount fixed by the guaranty as would enable the son, whom the father wished to assist, to proceed with and operate his business venture in the manner he judged best calculated to accomplish its projected ultimate ends; and these were of the facts known to all the parties and which were attendant upon the transactions in question. That such evidence is competent and may be received in a case similar to the present on the subject of the intention of the parties see *Lehigh Coal & Iron Co. v. Scallen, supra; White's Bank v. Myles*, 73 N. Y. 335; *Bent v. Hartshorn*, 1 Met. [Mass.] 24; *Tootle v. Elgutter, supra.* For the plaintiff in error we are referred to the decision in the case of *Fisher v. Marvin*, 47 Barb. [N. Y.] 159, in which it was held: "The discounting of a new note and the application of the proceeds realized from it to the payment of a former note extinguishes the old debt and creates a new one. Such a transaction is not a mere

change of securities,—the taking of the new note in the place of the old one,—but a discount and a payment of money upon the strength of the new security by means of which the old obligation is discharged, given up, and surrendered so as to render it ineffective for any purpose. Under such circumstances the contract does not relate back to the time when the first note was discounted, but the old note having been paid and taken up the debt will be deemed to have been contracted when the new note was given." The doctrine just quoted was overruled in *Jagger Iron Co. v. Walker*, reported in 76 N. Y. 521, wherein the rule was stated as follows: "The taking, by a creditor, of the debtor's note for an existing indebtedness does not merge or extinguish the indebtedness; the note is simply evidence of the debt, and its operation is only to extend the time of payment. When default is made in payment, the creditor may sue upon the original demand and bring the note into court to be delivered upon trial. And so successive renewal notes are simply extensions from date to date of the time of payment. This rule is not changed by the facts that the first of a series of notes so given was indorsed and procured to be discounted by the creditor, and the succeeding ones were each discounted to raise money to take up the preceding one. No note in the series is a payment of the preceding one, unless there has been a discharge of the creditor as indorser, or unless by the transaction he has obtained a claim against another party." That the latter overruled the former decision did not destroy the force of the reasoning employed in the former, but we think the reasons of the latter the more cogent; hence approve them. All the facts considered we are satisfied that the trial court was right in its findings; that the transactions in question were changes or renewals of the evidences of indebtedness and not payments of the old notes which were taken up when new ones were given.

It is insisted in behalf of plaintiff in error that the extensions of time after one time of credit fixed had ex-

pired, viz., the first ninety days, operated the release of the guarantor. Here again we are satisfied that where the instrument of guaranty is silent in relation to the credit to be granted, the facts and circumstances which were contemporaneous with the inception of the transaction, and the motives of the parties which prompted the actions as well as usages and customs usually attendant upon and elemental of like business matters, may be looked to in the consideration and determination of the relative positions which the parties assumed by their acts and conduct. Within this view and the evidence adduced herein it is clear that the finding of the trial court that the extensions given were within the contemplation of the parties at the time the guaranty was executed, and became of force, was amply sustained, and will not be disturbed.

It is also contended that the bank released the guarantor by laches, or neglect to notify him of the failure of the principal debtor to make payment, and that in the meantime the latter had become insolvent, to the damage of the guarantor. Of the rules of law governable of such a question we need not inquire. Regardless of their point, the judgment was correct. The trial court determined that, when notified of the default of his principal, the guarantor, with full knowledge of all the facts, asked and obtained an extension of time to himself, and in the meantime a further effort by the creditor to collect of the principal debtor, this was sufficient to bind him. (Brandt, Suretyship & Guaranty sec. 119.) This finding of the court had ample support in the evidence and must be given effect.

On the offer of defendant in error evidence was received from which it was sought to make it appear that an effort to take a deposition for the bank had failed by reason of some efforts to cause such failure put forth on behalf of the plaintiff in error; and also connected with this there was offered and admitted the testimony of the party whose deposition had been purposed but not taken,

which testimony had been given in supplementary proceedings in aid of execution in a suit against the principal debtor herein to recover the debt which in this action it is sought to obtain from the guarantor, and which strongly tended to establish that Charles A. Harvey had conveyed certain property to his father to indemnify him for becoming liable as guarantor in the transactions with the bank, and that such property was full and ample indemnity. Of this it is complained that it was all incompetent, and its reception an error. It is true that the trial court made a finding that the indemnity had been furnished, and it is further true that the testimony of the admission of which the complaint is made must have been of the basis for such finding, but whether error or not to receive the testimony to which we have just referred, cannot change the disposition of the cause here, for with a finding of the recognition by the guarantor of the indebtedness and supported by sufficient competent evidence no other judgment than the one rendered could have followed; hence, if there was an erroneous admission and consideration of testimony in the particular urged, it could not have been prejudicial and would not call for a reversal of the judgment. The judgment of the district court is

AFFIRMED.

SAMUEL M. CROSBY V. J. T. RITCHEY.

FILED OCTOBER 20, 1898. NO. 10140.

1. **Note:** ACTION BY INDORSEE: CONSIDERATION: BURDEN OF PROOF. If the only defense alleged in an action on a promissory note by an indorsee thereof is a failure of consideration, the burden is upon the defendant to overcome the presumption that the note was transferred before due for value in the due course of business. (*Crosby v. Ritchey*, 47 Neb. 924; *Violet v. Rose*, 39 Neb. 660; *Kelman v. Calhoun*, 43 Neb. 157.)

2. **Instructions:** CONFLICTING PARAGRAPHS. If in a paragraph of the

charge of a court to a jury there is contained a misstatement of the law upon a material point of the issue, the error is not cured by a correct statement thereof in another or other paragraphs. (*Wasson v. Palmer*, 13 Neb. 376; *Fitzgerald v. Meyer*, 25 Neb. 77; *Ballard v. State*, 19 Neb. 609.)

3. ———: GENERAL STATEMENTS. If the statements of the charge to the jury upon a material point are but general, a requested explicit explanatory instruction which is entirely pertinent and applicable to the issues and evidence should be given.

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

Beeson & Root, for plaintiff in error.

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

HARRISON, C. J.

In this action the plaintiff declared upon two promissory notes executed and delivered to one A. T. McLaughlin, by whom they were sold and transferred to plaintiff. This is the second appearance of the case in this court. In the opinion rendered on its former hearing it was determined: "(1.) In pleading fraud it is necessary to set out the facts relied upon for relief. Mere epithets or conclusions of fraud, without any statement of the facts upon which such charge is predicated, are insufficient. (2.) Answer examined, and held to charge a failure of consideration only and not fraud in the inception of the notes sued upon. (3.) Where the only defense alleged in an action by the indorsee of a promissory note is the failure of consideration, the burden is upon the defendant to overcome the presumption that such note was transferred before due, for value, in the usual course of business." (*Crosby v. Ritchey*, 47 Neb. 924.) The cause was then remanded to the district court for further proceedings, and was there again tried on the issues that the plaintiff was not a *bona fide* purchaser of the notes, coupled with a failure of the consideration which had moved their execution and delivery. A portion of the

fourth paragraph of the charge of the court to the jury was as follows: "You are instructed that if you find from the evidence that plaintiff purchased the notes in controversy before maturity and without notice or knowledge of any defenses as between the maker of said notes and the original payee thereof and without any notice or knowledge of a failure of consideration, then your verdict should be for the plaintiff." To this the plaintiff excepted at the time it was given, and that it was of the instructions to the jury is of the assignments of error.

In the trial of the cause the defendant was allowed to open and close in the introduction of evidence, etc., for the reason that the burden was on him to maintain the issues presented. As we have seen, this was settled in the prior decision herein, and had there been no evidence introduced the plaintiff would have been entitled to a verdict and judgment because of the force and weight of the presumption of the law which would have prevailed that he was a good-faith purchaser; hence it was error for the court to refer the jury to the evidence for a basis for a verdict in favor of plaintiff and further tell that body that it must appear from the evidence that the plaintiff was a good-faith purchaser to warrant a finding in his favor. This wholly ignored the presumption to which he was entitled and required something necessarily elemental of a finding for him which was not requisite by law. It is true that there were other paragraphs of the charge in which were contained correct general statements of the rules of law applicable in this same connection, but there was thus produced a direct conflict or contradiction in the instructions which was calculated to confuse the jury and leave it at a loss as to which portion of the charge should be followed, and we cannot now determine with any degree of certainty which view did assume the most force. (11 Ency. Pl. & Pr. 145-148; *Wasson v. Palmer*, 13 Neb. 376; *School District of Chadron v. Foster*, 31 Neb. 501; *Fitzgerald v. Meyer*, 25 Neb. 77; *Ballard v. State*, 19 Neb. 619; *Richardson v.*

Halstead, 44 Neb. 606; *Carson v. Stevens*, 40 Neb. 112; *First Nat. Bank of Denver v. Lowrey*, 36 Neb. 290.)

The instructions given were general in statements, and there were several presented on behalf of the plaintiff and requested to be incorporated in the charge, some of which were with the purpose of placing before the jury definite and explicit information on the subjects relative to which there were in the charge as we have just stated but general declarations. These were refused and the action as to each has been assigned as error. One of such assignments is of the refusal to give an instruction numbered five, which was as follows: "The notes sued on in this case are negotiable instruments, the execution of which is admitted by the defendant. You are instructed that a holder of negotiable paper who takes it before maturity, for a valuable consideration, in the usual course of trade, without knowledge of facts which impeach its validity between antecedent parties, holds it by a good title. To defeat his recovery thereon, it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man. To have that effect, it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part. The burden is on the defendant to establish, by a preponderance of evidence, that plaintiff is not a *bona fide* holder of the note sued on, as defined in this instruction." The matter of this instruction was entirely pertinent and applicable to the theory on which the case was tried and the issues as developed in the evidence and, as the point to which it was directed was not specifically covered in the instructions given, its refusal was error. Whether this alone would have been sufficient to call for a reversal of the judgment we need not determine, as such action must ensue by reason of the first error herein noticed.

We deem a discussion of other assignments of error unnecessary. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN LATENSER V. WALTER T. MISNER.

FILED OCTOBER 20, 1898. NO. 8339.

1. **Sufficiency of Petition:** ATTACK. A petition may be attacked at any stage of the proceedings on the ground of its insufficiency in statement of a cause of action.
2. ———: ———: REVIEW. Where such an attack on the pleading is delayed until in this court on appeal, it will be liberally construed.
3. **Contracts:** PAROL TESTIMONY. A written contract, the meaning of which is certain and patent from its terms, may not be varied by direct explanation or interpretation in oral testimony.
4. ———: ———: CONSTRUCTION. If the meaning of a written contract is not entirely free from ambiguity or obscurity, or it may be capable of two constructions, acts of the parties to it during and in its performance, and other circumstances which tend to an exposition of its true import, or to show the construction which such parties have placed upon it, are admissible; and its interpretation in the light of such facts and testimony may be committed to the jury under proper instructions from the court.

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

Ed P. Smith and *James B. Sheean*, for plaintiff in error.

E. W. Simeral and *William Simeral, contra.*

HARRISON, C. J.

This action was commenced by the defendant in error in the county court of Douglas county, and from the judgment rendered an appeal was taken to the district court, wherein of the pleadings there was an amended petition in which the cause of action was stated as follows:

"Comes now the said plaintiff and shows to the court that the said defendant is indebted to him in the sum of $396, with interest thereon from the 1st day of April, 1893, due for work and labor as a clerk under a written agreement entered into between this plaintiff and de-

fendant, whereby said defendant agreed to employ this plaintiff for the period of one year from the 4th day of April, 1892, to the 4th day of April, 1893, a copy of which said agreement is attached to this petition and made a part hereof."

Exhibit A is as follows:

"April 1, 1892. Between Misner and Latenser. Engagement by the year; $150 for six months, $125 for second six months. JOHN LATENSER."

In the answer it was pleaded: "Defendant admits that he employed the plaintiff to work for him as a clerk, which verbal contract was not to be performed within one year from the making thereof, and was conditioned upon the defendant having work for the plaintiff to perform; that the plaintiff was to be compensated for his services so rendered at the rate of $150 for the first six months and $125 for the second six months;" and further, that the defendant in error had been paid in full for all labor performed for the plaintiff in error. The reply was a general denial, and of the issues joined there was a trial and from the judgment rendered error proceedings have been prosecuted.

No objection to the petition was made in either the county court or district court, but it is in this court, for the first time during the entire proceedings in the case, insisted that the petition is insufficient in that there is not a cause of action stated therein. The pleading attacked is quite brief and somewhat indefinite and incomplete, but construed liberally, as a pleading must be when the attack is delayed until the stage of the proceedings at which it is herein made, may be said to set out a cause of action for the non-payment of an amount due for work and labor performed under the contract which was attached to and made a part of the pleading. The contract upon which the action was predicated was on the part of defendant in error proffered in evidence and finally received. Subsequent to its reception, and

during the examination in chief of the defendant in error, the following occurred with reference to it and its terms:

Q. "I will ask you to state what this $150 for six months—what that had reference to."

Mr. Sheean: "Object to that, as immaterial, irrelevant, and incompetent, the contract itself being the best evidence of its contents, the same being in writing and in evidence."

The court: "The objection is overruled." (Defendant excepts.)

A. "It was an agreement to pay me $150 a month for the first six months, and $125 a month for the second six months."

That the foregoing testimony was received is the subject of complaint in one of the assignments of error. The contract was not so doubtful of import as to be inexplicable or without an intelligent meaning in and of itself, unaided by extrinsic evidence. There was a direct interpretation suggested by and within its words relative to the sums to be paid and for what extent of time each sum named was the agreed compensation for the labor to be performed; hence it was not competent or properly allowable that the witness should state what the contract was in the particulars in which he did, and thus add to its written terms two or three words which materially altered its direct and more patent significance. It may be said, and correctly, that there was some ambiguity in the contract in its reference to the time for which each of the two amounts stated was to be payment,—whether each for six months, or each for one month of the six to which by the plain and direct import of the contract it seemed to be made applicable; and doubtless it would have been proper to allow the jury to consider, under explicit instructions on the subject, the contract in connection with the pertinent facts and circumstances developed in evidence, the acts of the parties under and by virtue of the agreement, such as the payments made, etc.,

in the light of which a true construction of the portion of the contract to which we have referred might have been reached, or the interpretation which the parties themselves placed thereon might have been ascertained. The error committed in the admission of the testimony in relation to the meaning of the contract was of a nature calculated to prejudice the rights of plaintiff in error and calls for a reversal of the judgment.

REVERSED AND REMANDED.

W. M. CONNOR ET AL. V. GEORGE BECKER.

FILED OCTOBER 20, 1898. No. 8328.

1. **Action on Check:** LIMITATION OF ACTIONS. An action on a check by the holder against the maker after demand of the drawee and non-payment is a suit on a written instrument, within the meaning of section 10 of the Code of Civil Procedure, and the limitation is five years.
2. ———: QUESTION OF FACT: DIRECTING VERDICT. *Held*, That there were questions of fact which should have been submitted to the jury, and a peremptory instruction of a verdict was erroneous.

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

Bradley & De Lamatre, for plaintiffs in error.

References: *Heartt v. Rhodes*, 66 Ill. 351; *Scroggin v. McClelland*, 37 Neb. 644; *Little v. Blunt*, 9 Pick. [Mass.] 488; *Wenman v. Mohawk Ins. Co.*, 13 Wend. [N. Y.] 267; *Brush v. Barrett*, 82 N. Y. 400; *Norton v. Ellam*, 2 M. & W. [Eng.] 461; *Burnham v. Allen*, 1 Gray [Mass.] 496; *New Hope Delaware Bridge Co. v. Perry*, 11 Ill. 467; *First Nat. Bank of Wymore v. Miller*, 37 Neb. 500; *Holmes v. Briggs*, 17 Am. St. Rep. [Pa.] 804; *Lord v. State*, 17 Neb. 526; *Bailey v. State*, 36 Neb. 808; *Hower v. Aultman*, 27 Neb. 251; *Arapahoe Village v. Albee*, 24 Neb. 244; *May*

v. School District, 22 Neb. 205; *Hemphill v. Yerkes*, 19 Am. St. Rep. [Pa.] 609; *Fonner v. Smith*, 31 Neb. 107; *Hoyt v. Seeley*, 18 Conn. 358; *Edgerton v. Wachter*, 9 Neb. 500.

Charles Offutt and *Charles S. Lobingier, contra.*

References: *Fonner v. Smith*, 31 Neb. 107; *Platt v. Black*, 10 O. C. C. 499; *Rogers v. Durant*, 140 U. S. 298; *Foote v. Farmer*, 14 So. Rep. [Miss.] 445; *Talcott v. First Nat. Bank*, 36 Pac. Rep. [Kan.] 1066; *Hertwick v. National City*, 36 Pac. Rep. [Cal.] 667; *Knight v. St. Louis, I. M. & S. R. Co.*, 30 N. E. Rep. [Ill.] 543; *Miller v. Thomson*, 3 Man. & Gr. [Eng.] 576; *Forbes v. Thomas*, 22 Neb. 541; *Brown v. Rollins*, 44 N. H. 446; *Conrad v. Nall*, 24 Mich. 274; *Hart v. State*, 14 Neb. 572; *Hards v. Platte Valley Improvement Co.*, 46 Neb. 709; *Osborne v. Kline*, 18 Neb. 344.

HARRISON, C. J.

In this, a suit on a check against the drawer thereof, the instrument having been presented for payment to the bank to which it was directed and not paid, the defense interposed by plea in the answer was that of the bar of limitation of the cause of action. At the close of the introduction of the evidence, the trial being to a jury, the presiding judge instructed a verdict for the defendant, which was returned, and in the due course of procedure an accordant judgment was rendered thereon. The plaintiffs present the case to this court for review.

It is contended for the plaintiffs that the claim in suit was of such a nature that an action thereon was not barred by limitation until the expiration of five years from the time of its accrual; while for the defendant it is insisted that it was of the causes upon which suit must be commenced within four years. The sections of the statutes to which reference is made in the arguments are as follows:

"Sec. 10. Within five years, an action upon a specialty,

or any agreement, contract, or promise in writing or foreign judgment."

"Sec. 11. Within four years, an action upon a contract, not in writing, expressed or implied; an action upon a liability created by statute other than a forfeiture or penalty."

"Sec. 15. Actions brought for damages, growing out of the failure, or want of consideration of contracts, expressed or implied, or for the recovery of money paid upon contracts, express or implied, the consideration of which has wholly or in part failed, shall be brought within four years."

In 2 Daniel, Negotiable Instruments, section 1566, it is stated: "A check is (1) a draft or order (2) upon a bank or banking house, (3) purporting to be drawn upon a deposit of funds (4) for the payment at all events of a certain sum of money, (5) to a certain person therein named, or to him or his order, or to bearer, and (6) payable instantly on demand;" and the author quotes from other text-writers as follows: "'A check is a brief draft or order on a bank or banking house, directing it to pay a certain sum of money,' says Parsons (vol. 2, N. & B. 57). 'A check drawn on a bank is a bill of exchange payable on demand.' (Edward, Bills, 396.) 'A check on a banker is, in legal effect, an inland bill of exchange drawn on a banker, payable to bearer on demand.' (Byles, Bills [Sharswood's ed.] 14.) 'A check is a written order or request addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay on presentment to another person, or to him or bearer, or to him or order, a certain sum of money specified in the instrument.' (Story, Promissory Notes 487.) Chitty's definition is substantially the same as Story's. (Chitty, Bills [13th Am. ed.] (511) 578.)" A check may be regarded as substantially an inland bill of exchange. (*Bickford v. Bank*, 42 Ill. 238; *Rounds v. Smith*, 42 Ill. 245.) "A check is a bill of exchange drawn by a customer on his banker,

payable on demand, and is governed by the rules relating to such instruments." (2 Lawson, Rights, Remedies, & Practice sec. 530; *Rogers v. Durant*, 140 U. S. 298, 11 Sup. Ct. Rep. 754.) "The differential traits decidedly preponderate; and the more correct method is to treat the check as an altogether independent and distinct instrument from the bill of exchange, admitting at the same time that in some few specific matters the resemblance between the two instruments is sufficiently strong to cause one and the same rule to cover and include them both." (Morse, Banks & Banking [3d ed.] sec. 380.)

The foregoing but serves to show the general opinion which has been expressed relative to the nature and characteristics of a check and with what other commercial paper it is classed. Coming more directly to the point, we will say that accompanying every check, and as part or elemental of the transaction of its execution and delivery, is the contract or promise of the drawer that the party or bank against whom or which it is drawn has funds of the drawer to meet it and will on presentment pay it. While not expressed in words in the instrument, this contract or promise is as much a part of it and evidenced by it as if written on its face, and this agreement being so elemental of every check, the action against the drawer, on the instrument, if it is not paid on demand, is one predicated or founded on the instrument for the breach of the contract or promise thereof. No other or further evidence is necessary in an action on a check against the drawer thereof to show his promise or contract than the instrument. Its exhibition in evidence proves the agreement. This suit then is on the check and not on some independent or implied liability which has its origin in the transaction in which the check figures. The contract and the obligation thereof may be likened to that of an indorser of negotiable paper. The signature may be all that appears in the instrument, but the promise is there, requires no oral testimony to establish it, is governed by the rules of written agreements

and not by those applicable to verbal ones. (*Hoffman v. Hollingsworth*, 37 N. E. Rep. [Ind.] 960.) In an action on an indorsement the bar of the statute of limitations was raised in defense. Simple contracts not in writing were barred in six years. Similar contracts in writing were barred in fifteen years. It was said in an opinion of the supreme court to which the cause had been removed for review: "An indorsement is a written contract of which the law declares the effect; and when counted upon it is the foundation of the action; and a plea that the cause of action did not accrue within six years is no bar under the statute." (*Haines v. Tharp*, 15 O. 130.) The obligation of the drawer of the check "rests in" or "grows out of" the instrument immediately, and not remotely, and the suit is on the check,—the written instrument,—and governed by section 10 of the Code or the limitation is five years. There has been cited by counsel for the defendant the case of *Platt v. Black*, 10 O. C. C. 499, in support of the proposition advanced by them. In the cause cited the suit was by the bank against the maker of a check, who, when the instrument was presented at the bank on which it was drawn, had no funds on deposit therein. The bank had paid the check and sought a recovery of the amount. The action was held not to be on the check, but on an implied promise of the maker to repay the drawee. The transaction differed materially from the one in the case at bar. The right of action did not arise or grow immediately out of the check, but had its source in the act of the bank in making the payment and the implied liability of the maker of the instrument to repay the amount. The bank was moved to do the act by the check, but the liability to repay had its immediate and direct origin in the act of payment. If the bar had been effectual against this action in four years, then the evidence would have established, and without dispute, that the time of limitation had fully run and expired prior to the institution of the suit, but with the five years to run, the evidence was of

such a nature that it should, under proper instructions, have been submitted to the jury to determine the question of the time when the defendant became a resident of this state to which he removed from Ohio where the check was made and given,—whether he had resided here five years prior to the commencement of the suit,—being a vital one of the issues.

The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

MARK LEVY ET AL. V. GEORGE W. CUNNINGHAM ET AL.

FILED OCTOBER 20, 1898. No. 8366.

1. **Parties to Action:** DEFENSE. That plaintiffs were not the owners of the claim on which the action was predicated and were not the real parties in interest were proper matters of defense in the case at bar.
2. **Principal and Agent:** SIGNATURES: EVIDENCE. The instrument introduced to show the authority of a party to sign another's name *held* to be restricted to signatures of the latter as officer of a company when necessary in the transaction of its business, and not applicable to his individual affairs.
3. **Evidence:** INDORSEMENTS ON INSTRUMENTS. The offer and reception in evidence of certificates of purchases at tax sales do not include and make of evidence indorsements of assignments thereon, unless the offer was broad enough for such purpose.
4. ———: INSTRUCTIONS. It is error to give instructions which treat as established a disputed fact as to which there is a conflict in the evidence.
5. ———: ———: ISSUES. An instruction in which it is attempted to include all the elements of the issues necessary to a finding for one of the parties to a suit and from which is omitted a material element is erroneous, and, if given, may furnish cause for reversal of a resultant judgment.

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

A. H. Bowen and *J. B. Cessna*, for plaintiffs in error.

Tibbets Bros., Morey & Ferris and *Batty, Dungan & Burton, contra.*

HARRISON, C. J.

In this action, commenced in the district court of Adams county, in the petition filed it was of the matters alleged that during the year 1891, and for a term which had its inception during 1890 and extended to 1892, Charles H. Paul was treasurer of Adams county, and the other parties named as defendants were his sureties on his bond as such treasurer; also that "On the 13th day of November, 1891, one James L. Britton, being then the owner of the legal title to the same, sent to said Adams county treasurer, Charles H. Paul, the following tax certificates, among others, to-wit: Numbers 684, 685, 868, 869, 990, 991, 1018, 1026, 1027, 1032, 1070, 1119, 1120, 1121, 1132. The lands represented by said certificates were purchased by said James L. Britton at the tax sale of 1889, held by the said Charles H. Paul, treasurer of Adams county, Nebraska, and said certificates were received from the said treasurer, Charles H. Paul, by the said James L. Britton, and each of the said certificates bears date the 8th day of November, 1889, and plaintiffs allege that said tax certificates were sent by the said James L. Britton to the said Charles H. Paul, treasurer, some time in the month of November, 1891, and were received by the said Charles H. Paul, treasurer, prior to and not later than the 25th day of November, 1891, and said certificates were so sent to the said treasurer, together with other certificates, in pursuance of an arrangement, understanding, and custom by which certificates were to be sent on for a remittance of all redemption moneys paid in thereon, or for the issuance of tax deeds, as the case might be." It was further pleaded that prior to the time the certificates were forwarded to

the treasurer redemption had been made of the real estate described therein and the money was in the hands of the treasurer for the owner of the certificates; that the treasurer failed and refused to pay the said money to James L. Britton and did not account to his successor in office for the same. It was further stated that "On the 5th day of December, 1893, the said James L. Britton sold, transferred, and assigned all his right, title, and interest in and to the above described certificates, redemption money, and costs, and all his rights thereunder, to the plaintiff George W. Cunningham, for the use and benefit of the plaintiff, the National Bond & Debenture Company, and the said plaintiff George W. Cunningham now holds the legal title to the same for and on behalf of said National Bond & Debenture Company. Plaintiffs allege that not less than thirty days subsequent to said assignment the said James L. Britton departed this life." The answers of the defendants, now plaintiffs in error, put in issue the parties petitioners' ownership of the certificates and their right as real parties in interest to maintain the action. A trial resulted in a verdict and judgment for the complainants and the unsuccessful parties have prosecuted error proceedings.

It was assigned specifically that the trial court erred in giving to the jury paragraphs numbered 2, 3, 4, and 8 of the charge; they read as follows:

"2. The jury are instructed that when redemption money is paid to a county treasurer or his deputy, such moneys are held by the treasurer subject to the order of the holder of the tax certificates in redemption of which said moneys are paid, and if the treasurer fails to pay over such moneys on demand, then the treasurer and the sureties on his official bond became absolutely liable therefor to the owner of the tax certificates so redeemed. If, therefore, you find from the evidence that the redemption money in controversy was paid to Charles H. Paul, treasurer, or to his deputy, and that a demand was made for said money by the owner of the tax certificates, his

agent or attorney, and that said Charles H. Paul never paid or remitted said money to the owner of said tax certificates, his agent or attorney, then your verdict must be against said Charles H. Paul and the sureties on his official bond.

"3. The jury are instructed that section 119, chapter 77, article 1, of the Compiled Statutes, provides that when redemption money is paid to a county treasurer, the said treasurer may charge a fee of 25 cents, and shall hold the redemption money paid subject to the order of the purchaser, his agent or attorney. Under this statute it is the duty of the treasurer to remit or pay over such redemption money upon demand being made therefor, either by mail or otherwise, by the owner of the tax certificates, his agent or attorney. The statute makes the treasurer the agent or trustee of the owner of the tax certificates, so far as holding or paying over money is concerned, and the treasurer has no right or authority under the statute to make any charge to the owner of the tax certificates for holding or paying over such money. The law provides for the compensation of the county treasurer, and he is not permitted to make any extra charge to the owner of tax certificates for performing his duty. If, therefore, you find from the evidence that the redemption money in controversy was paid over to Charles H. Paul, county treasurer, or to his deputy, and a demand was made therefor of Charles H. Paul, treasurer, by the owner of the tax certificates, or his agent or attorney, and such money was not paid to said owner of tax certificates or his agent or attorney, then you should find for the plaintiffs.

"4. The jury are instructed that where the law makes a public officer an agent or trustee for a certain purpose, such officer cannot, by constituting, or attempting to constitute, himself a private agent for that purpose, evade or avoid liability, either for himself or his bondsmen. If, therefore, you find from the evidence that Charles H. Paul was the county treasurer of Adams

county, Nebraska, that while such treasurer the redemption money in controversy was paid to him, then the statute constitutes Charles H. Paul the agent or trustee of the owner of the tax certificates for holding and paying over such money on demand, and if the redemption money was demanded of Charles H. Paul by the owner of the tax certificates and not paid over, your verdict must be for the plaintiffs, regardless of whether Charles H. Paul was constituted or attempted to constitute himself a private agent of the owner of the tax certificates for the purpose of collecting and remitting redemption money, for it was his duty under the law to remit the money for all tax certificates redeemed."

"8. If you find from the evidence that there was a shortage in the accounts of Charles H. Paul, treasurer, at the time he went out of office, and that the redemption money in controversy constituted a part of said shortage, then you must find for the plaintiffs."

Of each it is complained that it was attempted therein to state specifically the matters to be determined and on which must be based a finding against the complainants, and that each ignored the issue of the ownership by defendants in error of the certificates and their right to maintain the action. As is observed in the brief filed for plaintiffs in error the main question of the litigation was the defendants in error's ownership of the certificates and right to the action.

We will now turn our attention to some of the propositions advanced in argument for defendants in error for the avoidance of the force of the objections raised for plaintiffs in error. In the petition the right of the pleaders to sue and to recover was predicated on an assignment of the certificates on a specific and particular date to one of the parties for the use and benefit of the other, and, strictly speaking, could only be properly and satisfactorily supported by proof of such an assignment.

The first contention for defendants in error which we will notice is that the defense interposed of their non-

ownership and lack of interest in the cause was not entertainable or of force, and the court should not have inquired into or attempted to adjust differences or possibly conflicting claims of defendants in error, and a third party not impleaded in the suit. To this we cannot agree under the issues and their pleading. It was for them to establish that they were the owners of the certificates or were the real parties in interest. In this action plaintiffs in error were entitled to demand such a showing. (*Schroeder v. Neilson*, 39 Neb. 335; *Central City Bank v. Rice*, 44 Neb. 594.)

Defendants in error offered and were allowed to introduce proof which tended to establish that the properties were purchased by James L. Britton, and in whose name the certificates in terms ran for and in behalf of the National Bond & Debenture Company, and that such company was the real purchaser and owner. The evidence on this point was conflicting, if indeed it, under the issues presented by the pleadings, was available to the parties for whom it was urged as forceful. To sustain the allegations of the petition relative to the transfer from James L. Britton to the company there was introduced as the authorization of the assignment of the certificates the following:

"ARKANSAS CITY, KANSAS, October 3, 1893.

"To Whom it May Concern: Know all men by these presents, that I, the undersigned, James L. Britton, do hereby authorize Geo. W. Cunningham to sign my name in indorsing checks or drafts received by the National Bond & Debenture Company; also to sign my name whenever necessary in the general conduct of the business of the National Bond & Debenture Company.

"JAMES L. BRITTON.

"Subscribed in my presence this 3rd day of October, 1893. H. S. COBURN,

"Notary Public,"

And in direct connection the asserted assignment as follows:

"ARKANSAS CITY, KANSAS, December 5, 1893.

"For value received, I hereby assign to George W. Cunningham, for the use and benefit of the National Bond & Debenture Company, of Arkansas City, Kansas, the following Adams county, Nebraska, tax sale certificates, sale of November 8, 1889, viz: Numbers 684, 685, 1119, 1120, 1121, 1132, 868, 869, 1026, 1027, 990, 991, 1018, 1032, and 1070. The property covered by all the above said certificates having been redeemed from said tax sale, and suit in the name of James L. Britton against Adams county having been brought in the district court of Adams county, Nebraska, for the recovery of the money paid in redemption thereof with interest and costs. The said suit shall be continued in my name for the use and benefit of the said National Bond & Debenture Company, who shall pay all expenses and receive all benefits arising from said suit or any other suit brought for the recovery of the money paid in redemption as hereinbefore stated.

"JAMES L. BRITTON,
By GEO. W. CUNNINGHAM,
"His Attorney in Fact."

At the times of the transaction herein involved, James L. Britton was secretary and treasurer of the National Bond & Debenture Company, and it is strenuously insisted for the plaintiffs in error that the instrument of power to George W. Cunningham did but authorize him to sign the name of James L. Britton wherever and whenever it was necessary in the transaction of the general business of the National Bond & Debenture Company,—and it would no doubt frequently be necessary, being, as we have before stated, its secretary and treasurer,—and that the authorization had no reference to any private, personal, individual affairs of James L. Britton. A careful reading of the instrument in question leads to the conclusion contended for by counsel for plaintiffs in error. By no fair, reasonable interpretation of it does it contain anything which in the least indicates or grants any authority to the party designated to sign James L.

Britton's name in matters appertaining to his personal and individual affairs. It follows that the assignment introduced in evidence, which we have quoted, was executed or Britton's name signed thereto without authority, and the assignment was of no force.

The certificates were in the custody of the county clerk, who was called as a witness and produced and identified them, after which they were received in evidence. On the back of each there appeared in writing the name "James L. Britton." After their reception in evidence a witness who was then being examined as to other facts was asked to identify such signatures, and stated they were James L. Britton's. This, it is insisted for defendants in error, constituted evidence of an indorsement of each certificate, and its transfer to the bond and debenture company or to George W. Cunningham for its use and benefit, and conjointly with the fact of their being delivered or turned over to George W. Cunningham, conclusively established such transfer.

In this connection reference is made to chapter 77, article 1, section 117, Compiled Statutes 1897, which is to the effect, or states in terms, that certificates such as were these in suit shall be assignable by indorsement. All that was done in regard to this signature, according to the record, is as follows:

Q. Did you ever see Britton write?

A. No, sir.

Q. Do you know his signature?

A. Yes, sir.

Q. Handing witness Exhibits B to P inclusive. State to the jury whose signature that is on the back of these several exhibits.

A. That is Mr. Britton's signature.

Q. Is the signature on the back of those several exhibits the signature of the James L. Britton whose name is contained as grantee in the several exhibits?

A. Yes, sir.

There was no offer or reception of the indorsement as

substantive evidence of the assignment. The offer and reception of the certificates did not include the assignment or indorsement. It was not offered and received independently, and it was not of the evidence. (*Schroeder v. Neilson*, 39 Neb. 335, 57 N. W. Rep. 993; *Noll v. Kennedy*, 37 Neb. 879, 56 N. W. Rep. 772; *Johnson v. English*, 53 Neb. 530.) This being true, this branch of the argument for defendants in error fails.

In the statement hereinbefore made, that the evidence was conflicting in regard to whether the purchases evidenced by the certificates in question were by James L. Britton for himself or were for the bond and debenture company or its benefit, we referred to the evidence considered, exclusive of certain depositions which were taken from the record of causes which had been commenced by or for James L. Britton against the county of Adams to recover the amount herein claimed and which depositions were not taken in this suit nor in an action between the same parties and were never filed in this case but were received in evidence; also, exclusive of some other documentary evidence obtained from other cases.

The trial court erred in instructing the jury as we have hereinbefore set forth. An attempt to cover in a single paragraph all the elements, which if determined established by the evidence or the weight thereof will warrant a verdict in favor of parties stated, and omitting therefrom a litigated element of the issues as to which the evidence admitted was conflicting, is error.

There are other assignments of error, but we do not deem their discussion necessary at this time. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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

HENRY ALBERS, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED OCTOBER 20, 1898. No. 8343.

Appeal: TIME TO FILE TRANSCRIPT. This court is without jurisdiction to hear a case on appeal unless the transcript of the record is filed here within six months after the rendition of the judgment or final order sought to be reviewed.

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

W. J. Connell and *E. H. Scott,* for appellant.

William D. Beckett and *Wharton & Baird, contra.*

NORVAL, J.

The board of public works of the city of Omaha, in pursuance of an ordinance passed by the mayor and council, caused the lots of Henry Albers to be filled with earth for the purpose of abating a nuisance occasioned by the existence of stagnant water on the property. A special tax was levied against the lots by the city authorities to defray the cost of the work, and this action was instituted in the court below to enjoin the enforcement of said tax. A trial on the merits resulted in a decree in favor of plaintiff, and the city has brought the record here for review.

The cause is docketed in this court as an appeal. While the city attorney has filed a paper assigning certain errors in the record and proceedings, he has treated the case in the brief filed as being here on appeal. The decree was rendered in the district court on May 13, 1895, and the transcript was not filed with the clerk of this court until March 5, 1896. The cause was not docketed in the time prescribed by statute for prosecuting appeals to this court, as more than six months had elapsed between the entering of the decree and the lodging of the

transcript in this court. (*Withnell v. City of Omaha*, 37 Neb. 621.)

The practical result to the city would be no more favorable if the cause should be treated as being here on error. The assessment was assailed, and it was held invalid, because plaintiff had never been notified that his lot had been declared a nuisance, and that he was given no opportunity to abate the same himself. It has been ruled that under the charter governing the city of Omaha the owner of a lot is entitled to notice from the municipal authorities of the purpose to fill his lot, and an opportunity to make the improvement himself, and a special tax to pay for the work is invalid where such notice and opportunity have not been given. (*Horbach v. City of Omaha*, 54 Neb. 83; *Lasbury v. McCague*, 56 Neb. 220.) Whether this plaintiff received notice to fill his lot was the issue tendered by the pleadings, and whether the same was established or not was solely a question of fact to be determined from a consideration of the evidence adduced on the trial. The city filed no motion for a new trial; hence it is not entitled to have the evidence reviewed to ascertain whether it sustains the findings and decree. (*Losure v. Miller*, 45 Neb. 465; *Gray v. Disbrow*, 36 Neb. 857; *Scroggin v. National Lumber Co.*, 41 Neb. 195; *Brown v. Ritner*, 41 Neb. 52.) So that if the cause was properly here on error, the decree would necessarily be affirmed for want of a motion for a new trial. However, as the appeal was not docketed in time, it is

DISMISSED.

CHAMPION S. CHASE V. OMAHA LOAN & TRUST COMPANY.

FILED OCTOBER 20, 1898. No. 8324.

1. **Bond for Appeal:** COUNTY COURT. A bond given for the purpose of taking an appeal from a judgment rendered by a county court is not required to be signed by the appellant, but is sufficient if executed by a good and sufficient surety alone.

2. ———: ATTORNEY AS SURETY. A practicing attorney is not a proper surety on an appeal undertaking, but if he execute the same, the bond is not thereby rendered invalid.

3. ———: ———: COUNTY JUDGE. A county judge has no authority to eliminate from the files an appeal undertaking which he has approved, because the bond was signed by a practicing attorney.

4. ———: RENEWAL IN APPELLATE COURT. When an insufficient appeal bond is filed, the appropriate practice is to move in the appellate court for an order requiring a renewal of the bond by a time to be designated by the court, and in default thereof that the appeal be dismissed.

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

Simeon Bloom and *W. J. Connell,* for plaintiff in error.

F. A. Brogan, contra.

NORVAL, J.

The Omaha Loan & Trust Company recovered a money judgment against Champion S. Chase on November 8, 1895, in the county court of Douglas county. On the 16th day of the same month, and within the time prescribed by law, the defendant gave an appeal undertaking signed by the surety alone, which was on the same day approved by the county judge. Subsequently plaintiff filed a motion to strike the undertaking from the files, which was sustained, and a new bond ordered to be filed by a specified date, the county judge finding "that there is an irregularity in the execution of said undertaking, and that the same is voidable and should be stricken from the files." A transcript of the proceedings before the county court, including a copy of said undertaking, was filed by the defendant in the district court on December 5, 1895, and within the period fixed by statute for perfecting an appeal. Plaintiff thereafter filed a motion in the last named court to dismiss the appeal on the following grounds: (1.) No appeal bond was given and approved in the trial court. (2.) The pretended appeal bond was not executed according to law, and was ordered stricken from the files

by the county court. (3.) The surety on the bond was at the time of its execution a practicing attorney of Douglas county. This motion was sustained, and the appeal dismissed. To reverse this order defendant prosecutes error.

The first subdivision of the motion is without merit, since an appeal undertaking was executed and filed in the county court wherein the action was instituted and the surety thereon was duly approved by the judge of said court.

Neither the second nor third ground of the motion furnished sufficient reason for dismissing the appeal. The assignment that "the pretended appeal bond was not executed according to law" was too general to require consideration. Moreover, the undertaking was regular and valid on its face. True it was not signed by Mr. Chase, the principal therein and appellant. But that was wholly immaterial, and did not render the undertaking invalid. It has been ruled that a bond given to perfect an appeal from a justice's court is sufficient if signed by the surety alone. (*Clark v. Strong*, 14 Neb. 229; *Stump v. Richardson County Bank*, 24 Neb. 522.) Appeals from the county court are prosecuted in the same mode as causes tried in justice's court. (See Compiled Statutes, ch. 20, sec. 26.) The fact that the surety on the undertaking was a practicing attorney did not render the instrument a nullity. An attorney, under section 14, chapter 10, Compiled Statutes, is not a proper surety on an appeal undertaking, yet if he executes the same as surety, and the bond is approved, he is legally bound, and cannot escape liability on the ground that he was at the time a practicing attorney. The justice might have declined to approve this bond because the person signing was not a proper surety, but not having done so, the obligation was valid; and the fact that the surety was an attorney at law furnished no legal cause for striking the instrument from the files. (*Tessier v. Crowley*, 17 Neb. 207; *Luce v. Foster*, 42 Neb. 818.)

The transcript of the judgment rendered by the county court was filed in the district court, together with a copy of the appeal bond within the time fixed by law for docketing the appeal, which conferred jurisdiction of the cause on the last named court. If the appellee was dissatisfied with the appeal bond for any reason, the appropriate practice would have been to file a motion in the appellate court for an order requiring a change or renewal of the bond within a time to be fixed by the court, and on a failure to comply with such order enter a dismissal. (*Gallagher v. Wolf*, 47 Neb. 589.) The district court gave no opportunity to the appellant to give a new bond, but peremptorily dismissed the appeal. This was substantial error. (*Rube v. Cedar County*, 35 Neb. 896.) The judgment is reversed and the appeal reinstated.

REVERSED.

R. K. WELSH V. GEORGE F. BURR ET AL.

FILED OCTOBER 20, 1898. No. 8364.

1. **Reply**: DEFECTS IN ANSWER: WAIVER. The filing of a reply is a waiver of the right to assail the answer on the ground that the averments are not sufficiently definite and certain.
2. **Trial**: OPENING AND CLOSING. Where a plaintiff is required to introduce any evidence in support of his case, he is entitled to first introduce his testimony before the jury, and also the right to open and close the argument.

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

G. W. Bemis, for plaintiff in error.

F. C. Power, contra.

NORVAL, J.

This suit was upon a promissory note by the indorsee against the makers. The petition alleges the execution

and delivery of the instrument declared on to the Royal Sewing-Machine Company, the payee mentioned therein, the indorsement of the note by it, that the plaintiff is the owner thereof, and that no part has been paid except the sum of $90 on October 20, 1893. The answer admitted the execution and delivery of the note, the payment of the $90, denied all other averments of the petition, and pleaded that the note was given for the purchase price of sewing-machines; averred substantially that the machines were sold under a certain warranty, and that they failed to comply with the terms thereof. The reply put in issue the warranty set up in the answer. The trial resulted in a verdict for the defendants, upon which judgment was subsequently rendered. Plaintiff by means of this proceeding seeks a review of the record.

A point urged for a reversal is the overruling of plaintiff's motion to require the defendants to make their answer more definite and certain by stating therein whether the warranty relied upon was verbal or written, and if verbal, who made it on behalf of the payee. The transcript of the record shows that the motion was made after plaintiff had filed his reply to the answer. The motion was too late to make the ruling thereon available in the appellate court. (*Stevenson v. Anderson*, 12 Neb. 83; *Fritz v. Grosnicklaus*, 20 Neb. 413.)

After reply plaintiff assailed the answer by motion to strike therefrom certain allegations therein, which motion was overruled by the court, and the ruling is assigned for error. The decision was proper, since the motion was filed after plaintiff had replied to the answer of the defendants. (*Supra.*)

The trial court refused to permit plaintiff to first introduce his testimony and to open and close the case to the jury. This was reversible error. The answer put in issue the indorsement and transfer of the note by the payee and the ownership of the instrument by plaintiff. In this state of the pleadings, had no evidence been adduced by either party, the verdict must have been for the de-

fendants; so that the burden was on the plaintiff, and he was entitled to open and close the testimony and the arguments to the jury. (*Vifquain v. Finch*, 15 Neb. 505; *Rolfe v. Pillond*, 16 Neb. 21; *Osborne v. Kline*, 18 Neb. 344; *Brooks v. Dutcher*, 22 Neb. 644; *Suiter v. Park Nat. Bank*, 35 Neb. 372; *Mizer v. Bristol*, 30 Neb. 138; *Rea v. Bishop*, 41 Neb. 203; *Citizens State Bank v. Baird*, 42 Neb. 219.)

There are argued other assignments of error, but the conclusion reached makes their consideration at this time unnecessary. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN W. ARGABRIGHT V. STATE OF NEBRASKA.

FILED OCTOBER 20, 1898. No. 9945.

1. **Murder**: EVIDENCE. Evidence examined, and *held* sufficient to sustain a verdict of murder in the first degree.
2. ———: ———: INSTRUCTIONS. The fourth and thirteenth instructions were based upon the evidence adduced on the trial.
3. **Witnesses**: IMPEACHMENT. The order of introducing testimony designated by section 478 of the Criminal Code will not preclude a defendant from introducing, in a proper case, testimony to impeach a witness examined by the state on rebuttal.
4. **Criminal Law**: ORDER OF INTRODUCING TESTIMONY: REVIEW. The order of introducing testimony in a criminal case rests largely in the discretion of the trial court, and an abuse of discretion in that regard is sufficient ground for reversal.

ERROR to the district court for Nemaha county. Tried below before LETTON, J. *Reversed.*

W. H. Kelligar and *H. A. Lambert*, for plaintiff in error.

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

NORVAL, J.

John W. Argabright was prosecuted by indictment in the district court of Nemaha county for the murder of William Smelser. A trial resulted in the conviction of the accused of the crime of manslaughter, and the sentence imposed upon him was reversed by this court at the September, 1896, term, for the giving of an erroneous instruction, and the cause was remanded to the court below for further proceedings. (49 Neb. 760.) The defendant was a second time placed upon trial, which terminated in a verdict of murder in the first degree, the jury fixing the punishment at imprisonment in the penitentiary for life, and this was the sentence imposed by the court. The record is again before us for review.

While the motion for a new trial and petition in error contain more than fifty assignments of error, the questions discussed in argument, and relied upon to secure a reversal, are confined to very narrow limits. The first point urged upon our attention is that the verdict is not sustained by sufficient evidence. The record shows without controversy that the accused was a son-in-law of the deceased, William Smelser, and for more than a year prior to the tragedy resided in South Omaha, and a portion of the time was on the police force of said city. His wife and two children lived with him until the fall of 1893, when, owing to domestic trouble between the accused and his wife, a separation took place. The wife returned to Nemaha county with the children, and made their home with her father. In November, 1893, the accused went to said county to visit his children, and on the road from the railroad station to Smelser's he met the latter, who informed him he could not see the children, and warned him to keep off the premises of the deceased. On this visit Argabright was permitted to see the baby alone, but not the older child. On February 7, 1894, the accused made a second trip by rail to Nemaha county, riding out from Howe with a Mr. Dressler. On the way

they met the deceased, who declined to speak to the defendant. The latter on February 8 went to the home of Mrs. Copeland, a sister of his wife, and sought to arrange for seeing his children, but was unsuccessful, and the forenoon of the next day he a second time visited Mrs. Copeland for the same purpose, and the defendant's father also went to the residence of the deceased to obtain permission for the accused to see his children, but Mr. Smelser refused to make such arrangements, and the children were not seen. That night an entertainment was given at the Champion schoolhouse, which was attended by the deceased and his wife, Mrs. Argabright, the wife of the accused, and their two children. There were also present on that occasion the defendant and a number of his relatives. The defendant remained in the schoolhouse for some time after the entertainment closed and so stationed himself that the Smelser family and Mrs. Argabright and the children could not leave the building without passing him. As the deceased and Mrs. Argabright were leaving the schoolhouse the accused intercepted them and attempted to see his boy, which deceased informed him he could not do. Thereupon the defendant drew his revolver and shot William Smelser, causing his instant death.

The killing is admitted, but it is asserted that there is no evidence to establish premeditation, deliberation, and malice. A careful perusal of the bill of exceptions convinces us that this contention is without foundation. It was established that defendant, a short time before the tragedy, purchased the revolver with which the fatal shot was fired, also bought a long-caped mackintosh, under which the revolver was concealed the night of the tragedy; that before leaving South Omaha he was advised by a friend not to take the fire-arm with him on his trip to Nemaha county, else he might get into trouble; that the defendant related his family difficulties to W. H. Beckett, and in that conversation with reference to his children and his father-in-law stated to Beckett "that

he would have his children or kill the old son-of-a-bitch;" that just before the defendant entered the train at South Omaha on February 7 he showed his revolver to James Emerick and stated to the latter as he stepped on the cars: "I shall surprise you wonderfully when I come back;" and that while the defendant was at the home of Mrs. Copeland the day preceding the tragedy he stated to her "that he had offered everything that was fair, and they would not let him see the children, and that he proposed to make it hot for them;" and in the same conversation stated that he would see the children before a week. These facts detailed by disinterested and credible witnesses, considered in connection with the actions and conduct of the accused at the schoolhouse the night of the homicide as detailed by the state's witnesses, are ample to show that the life of the deceased was taken with deliberation and premeditation, and that the verdict is not the result of either passion or prejudice on the part of the jury.

Complaint is made of the fourth and thirteenth instructions given at the request of the state. They are as follows:

"4. The court instructs the jury that the father of an infant child has no such vested right in the custody of his infant child as to authorize him to take it from its mother by force and against her will; and in this case, if you find from the evidence that at the time of the tragedy the mother of the defendant's infant child was living with her parents, the deceased, and his wife, and they together had the custody of this child, defendant would have no right to attempt to take such child from the arms of Mrs. Smelser, the wife of the deceased, by force and against her will."

"13. The court instructs the jury that if you find from the evidence that when the deceased made the first assault upon the defendant he honestly believed, from the conduct and actions of the defendant, that he was attempting by force to take the child from the arms of the

wife of the deceased; and if he had reasonable grounds to apprehend such contemplated design on the part of the defendant, he had the right to use such force as was reasonably necessary to defend the possession of said child and to protect himself and family as they passed to the door on the way home."

The vice imputed to these instructions is that they had no application to the evidence adduced on the trial. The bill of exceptions records ample testimony tending to establish that the accused, as the Smelser family were passing towards the door of the schoolhouse, reached for the child, and that it was his purpose forcibly to take it from the possession of the grandmother, and that when the deceased sought to prevent the accused from doing so, the latter drew his revolver, and while he did not succeed in obtaining the child, he did kill William Smelser. The instructions assailed are predicated upon the testimony, and the criticism brought against them is unfounded.

The defendant, while a witness in his own behalf, gave testimony tending to show that at the time the fatal shot was fired he was being assaulted by the deceased and James Sparks; that during the altercation he was struck by the latter and they were both following the defendant as he retreated towards the door of the schoolhouse. On rebuttal the state placed James Sparks upon the witness stand, who testified that he did not strike the defendant on the occasion in question, nor did he attempt to do so. After the state had finally rested, the defense applied to the court for permission to impeach the witness James Sparks by proving that he had stated the day following the tragedy, and at other times, to Amos Hughs, J. S. Thomson, William Hughs, and Levi Hughs, that he struck the accused, and had it not been a glancing blow it would have knocked him down. The court refused to allow such impeaching testimony to be given, although the proper foundation for its reception had been laid. Counsel for the state attempt to justify this

ruling upon the ground that section 478 of the Criminal Code fixes the order of proof. The third and fourth subdivisions of said section read as follows: "3d. The state must first produce its evidence; the defendant will then produce his evidence. 4th. The state will then be confined to rebutting evidence, unless the court for good reason, in furtherance of justice, shall permit it to offer evidence in chief." By the foregoing provisions the legislature has designated the usual order in which testimony is to be given upon the trial of a criminal cause. But the rule is not an imperative one which must be adhered to without deviation. The order of introducing testimony rests largely in the discretion of the trial court. (*Basye v. State*, 45 Neb. 261; *Clough v. State*, 7 Neb. 320.) In the last case cited, after the testimony for the state had closed and the defendant had examined a number of the witnesses, counsel for the state were permitted to open their case and introduce additional testimony in chief. Upon review this practice was sustained by this court. Manifestly the order of proof laid down in the statute could not be followed in all cases without working great injustice. The rule invoked by the prosecution in the case at bar would prevent a defendant in any criminal action from impeaching a witness called by the state on rebuttal, because the prisoner could not know before resting his case what witnesses would be examined in rebuttal, or what would be their testimony. To refuse to allow the defendant to introduce testimony to impeach the state's witness, Sparks, was clearly an abuse of discretion. The ruling of the court cannot be justified on the ground that the accused could not have been prejudiced by the exclusion of the testimony offered for the purpose of impeachment on the ground that the undisputed proofs showed that Sparks did not strike the defendant during the altercation. Many of the witnesses did so testify, but they were contradicted by the prisoner while he was being examined as a witness in his own behalf. The successful impeachment of Sparks

might have caused the jury to accept as true the testimony of the accused as to what transpired at the schoolhouse, and have caused them to return a verdict of manslaughter, if not one for acquittal. We are unable to determine, and no disinterested person who reads this record could say, with absolute certainty, that the verdict would have been the one returned had the excluded impeachment testimony been admitted. For the error indicated the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

STATE OF NEBRASKA V. HOWARD PAUL.

FILED OCTOBER 20, 1898. No. 10011.

1. **Physicians:** PRACTICE IN VIOLATION OF STATUTE. Under section 16, article 1, chapter 55, Compiled Statutes, any person not within the exceptions prescribed by said article and not having complied with its requirements as to certificates and registration, who shall for a remuneration operate on, profess to heal, or prescribe for, or otherwise treat any physical or mental ailment of another, is liable to the penalties of said section, although the operations were performed and the medicines were administered and given under the direction and charge of a licensed physician and surgeon.

2. ———: ———. To make one liable to the penalties of said section it is not essential that at or before the treatment of the sick he represented, claimed, or advertised himself to be a regular, legal, or competent practitioner of medicine.

EXCEPTIONS to rulings of the district court for Lincoln county, GRIMES, J., presiding. Filed in the supreme court under the provisions of section 515 of the Criminal Code. *Exceptions sustained.*

J. G. Beeler, for exceptions.

Neville & Parsons, contra.

NORVAL, J.

In an information filed in the district court of Lincoln county Howard Paul was charged in eight counts with unlawfully practicing medicine and surgery without a license, in violation of section 16, article 1, chapter 55, Compiled Statutes. Upon the trial he was acquitted. Exceptions were taken by the county attorney to certain instructions, and he has brought the case to this court under the provisions of section 515 of the Criminal Code.

At the trial it was admitted that the defendant was not a registered physician, and that he had never been admitted to practice medicine. It was established that one Dr. Bedell, a duly registered physician and surgeon, had an office in North Platte and practiced his profession in Lincoln county for two years; that he was assisted in his work by Charles Thorpe,—called "Dr. Thorpe" by the witnesses, although not shown to have been a registered physician,—and the defendant; and that the three operated jointly, and all remuneration for their services was divided among them equally, each receiving one-third. Evidence was introduced tending to show that while Paul assisted in the performance of surgical operations and administered remedies to the sick and infirm, he did so under the directions of Dr. Bedell, a regular licensed and registered physician and surgeon. The state likewise produced evidence conducing to establish that the defendant treated patients without instructions from Dr. Bedell and in his absence. The defendant tendered the following instruction, which was given: "The court instructs the jury that before the defendant can be legally found guilty of the offense charged, the jurors must be satisfied from the evidence, beyond a reasonable doubt, that the defendant did operate on, profess to heal, or prescribe for some one of the patients mentioned in the information, or that he treated them, or some one of them, for a mental or physical ailment as a practicing physician; and the court

further instructs the jurors that a person not a physician or surgeon who gives or applies medicines in quantities or in a manner as directed by a licensed physician in charge of the patient, or who assists a licensed surgeon in charge of an operation and only does what the surgeon in charge directs him to do, is not, by reason of such acts, practicing medicine or surgery in violation of law."

In the fifth instruction given by the court on its own motion it is stated: "The defendant has admitted upon the witness stand that he has not procured such required certificate from the state board of health, and the court instructs you that this admission removes from your consideration the question of the defendant having procured and registered such certificate, and the remaining question for you to consider and determine is whether the state has shown by evidence, to your satisfaction, beyond a reasonable doubt, that the defendant, at the time or times in the information charged, was engaged in the practice of medicine,—that is, that he operated upon the person or persons mentioned in the information upon his own account,—profess to heal any of said persons, or otherwise treated any physical ailments of any of said persons named in the information; that is, that the defendant so operated, professed to heal, prescribed for, or treated said persons, representing, claiming, or advertising himself to be a regular, legal, or competent practitioner of medicine; and if you do so find from the evidence, to your satisfaction, beyond a reasonable doubt, you will then find the defendant guilty, and name in your verdict the count or counts in the information you so find him guilty."

Instruction No. 6 contains the following: "The court further instructs the jury that although you may find from the evidence that the defendant assisted in the operations and treatments of the persons named in the several counts in the information contained, or that he administered medicines to such persons, or any of them,

yet, if the assistance rendered and the medicines administered were done and given under the direction and charge of a licensed physician and surgeon and not upon the prescription or under the direction of the defendant, you will find the defendant not guilty."

Exceptions were taken by the prosecutor to, and complaint is now made of, the giving of the foregoing portion of the charge of the court in this case. It is argued that said instructions are erroneous in that they authorized and required an acquittal in case the jury found that defendant's acts were performed under the direction and instructions of a registered physician and surgeon, and that the court in its charge excepted from the operation of the statute persons not within the contemplation of the framers of the law.

Section 16, article 1, chapter 55, Compiled Statutes, declares: "Any person not possessing the qualifications for the practice of medicine, surgery, or obstetrics, required by the provisions of this act, or any person who has not complied with the provisions of this act, who shall engage in the practice of medicine, surgery, or obstetrics, or any of the branches thereof in this state, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than fifty ($50) dollars nor more than three hundred ($300) dollars, and costs of prosecution for each offense, and shall stand committed until such fine and costs are paid." Section 17 of the same article and chapter defines practitioner of medicine and surgery in the following language: "Any person shall be regarded as practicing medicine within the meaning of this act who shall operate on, profess to heal or prescribe for, or otherwise treat any physical or mental ailment of another. But nothing in this act shall be construed to prohibit gratuitous services in case of emergency, and this act shall not apply to commissioned surgeons in the United States army and navy, nor to nurses in their legitimate occupations, nor to the administration of ordinary household remedies." It will be

observed that the legislature, by the foregoing provisions, has excepted from the operation of the law persons belonging to any one of the classes designated in the act, and the only proper inference to be drawn is that any person other than a registered physician or surgeon not embraced in one of such classes who shall "operate on, profess to heal or prescribe for, or otherwise treat any physical or mental ailment of another," is, on conviction, subject to the penalties prescribed by said section 16 already quoted. (*State v. Buswell*, 40 Neb. 158.) We think the court in its instructions excepted from the force and effect of the statute persons not within the meaning of the law. Under the instructions the jury were fully warranted to acquit the defendant if he applied the remedies under the directions of a licensed physician in charge of a patient, or if the defendant merely assisted a licensed surgeon in performing an operation and did that which such surgeon directed him to do, notwithstanding the defendant received one-third of the remuneration paid for such treatment or operation. The statute will not bear the interpretation the trial court has placed upon it. A person not being a registered physician, nor acting gratuitously under an emergency, nor being a commissioned surgeon in the army or navy of the United States, nor being in the occupation of a nurse, nor administering usual or ordinary household remedies, who for a remuneration treats any physical or mental ailment of another, is within the condemnation of the statute, even though he acted under the directions of a registered physician. Any other interpretation would do violence to the language employed by the legislature. The construction adopted by the trial court would protect one not a registered surgeon in the amputation of the limb of another, in case the operation was guided by the instructions of a registered surgeon. Such interpretation would nullify and defeat the beneficent object of the law.

The fifth instruction is faulty, in that it makes the rep-

resentation, claiming, or advertising of the defendant "to be a regular, legal, or competent practitioner of medicine" an essential element of the crime, while the statute contains no such ingredient of the offense of illegal practice of medicine. Under this instruction, if the defendant did not advertise himself to be a regular, legal, or competent practitioner of medicine, there could be no conviction, though he was not at the time a registered physician, and had performed all the acts charged in the information prohibited by the statute. The exceptions of the county attorney are sustained.

EXCEPTIONS SUSTAINED.

S. H. H. CLARK ET AL., RECEIVERS OF THE UNION PACIFIC RAILWAY COMPANY, APPELLANTS, V. HENRY NEUMANN ET UX., APPELLEES.

FILED OCTOBER 20, 1898. No. 8365.

1. **Separate Contracts:** ENFORCEMENT OF VENDOR'S LIEN. Four separate and complete written agreements, contemporaneously executed, claiming no relationship with one another, and each evidencing the sale of one-quarter of a certain section of land, cannot, in an action to enforce a vendor's lien, be treated as interdependent parts of a single, indivisible contract.
2. **Land Contract:** FORFEITURE: WAIVER. An attempted forfeiture of a land contract will not be effective when both parties subsequently deal with the contract and the land as though there had been no rescission.
3. ———: ENFORCEMENT OF VENDOR'S LIEN: TENDER. In an action on land contracts to enforce a vendor's lien an alleged tender by the defendant should be kept good by bringing the money into court.
4. **Equity:** FINDINGS AND DECREE. The findings and decree in an action in equity should respond to all the material issues presented by the pleadings.

APPEAL from the district court of Cheyenne county. Heard below before NEVILLE, J. *Reversed.*

W. R. Kelly and *E. P. Smith*, for appellants.

J. L. McIntosh, contra.

SULLIVAN, J.

This action was commenced in the district court to foreclose four land contracts executed by the Union Pacific Railway Company to Henry Neumann on July 17, 1884. From a decree in favor of the defendants the plaintiffs have appealed. Each of the contracts in suit was for one-quarter of section 31, in township 14 north, of range 47 west of the sixth principal meridian, being in Cheyenne county, in this state. The contracts covering the north half of the land were numbered, respectively, 78084 and 78085; the others were numbered 78086 and 78087. It seems that the north half of the section is, and was at the time of the sale, much more valuable than the south half; and that the railroad company, with the view of making a single sale of the entire tract, fixed its average value at $5 per acre. Whether Neumann was informed of this fact at the time he purchased the land does not appear, as there is in the record no evidence of any negotiations preceding the execution of the contracts. It is shown, however, by his admission that he could not have bought the north half of the section without buying the south half.

The contention of the receivers is that there was but one transaction between the parties, and that the several written agreements executed by the company to Mr. Neumann are interdependent parts of a single, indivisible contract. The difficulty with this position is that the contracts claim no relationship with one another. Whatever may have been the reason for dividing the transaction into four separate and distinct parts it is entirely certain that such division has been made. Each contract, under the issues of this case, is the exclusive evidence of the rights and obligations of the parties re-

sulting from the sale of 160 acres of land. No one of the contracts contains any reference to any of the others. Each fixes the price of the quarter section therein described, imposes on the purchaser the duty of paying the same in ten equal annual installments, reserves to the company the right of forfeiture for non-payment, and provides for the delivery of a deed of conveyance when the full consideration has been paid. The contracts themselves are the best and only competent evidence of the intention of the parties. Had the company intended to reserve a vendor's lien on all the land as security for the entire purchase-money, it is reasonable to suppose the evidence of that purpose would have appeared in the contracts. To charge the north half of the section with the amounts delinquent on the contracts for the south half would, doubtless, accomplish substantial justice between the parties, but it could not be done without disregarding their express agreement and releasing the company from its stipulation to make a deed of conveyance for each quarter section as soon as the consideration therefor should be paid. The fact that the company would not have sold Neumann the north half had he not purchased the south half at the same time, affords no evidence, competent or incompetent, of an understanding that the unpaid purchase-money should be a general lien on the whole tract. The inference is that the company was satisfied with the security for which it contracted. If the south half of the section was not adequate security for the part of the purchase price apportioned thereto, it may be that the personal responsibility of the purchaser was relied on in severing the transaction. But it is needless to speculate in regard to this matter. The parties have made their own engagements and put them in writing. They must now abide by them. After July 17, 1885, Neumann made no payments on the contracts covering the south half of the section, but the payments on the other contracts were punctually made and were received by the company up to, and including, the in-

stallment which became due in 1892. In 1887, and again in 1891, the company notified Neumann that under the operation of a forfeiture clause contained in each of the contracts, his rights under the contracts covering the south half of the land had become forfeited, but that the forfeiture would be waived in case the amounts delinquent were paid within thirty days. This conduct on the part of the company is pretty conclusive evidence that it did not at that time consider the separate agreements as part of one indivisible contract. The defendants assign to it a more serious consequence. They insist that it terminated Neumann's rights in the lands mentioned in the notice of forfeiture, and that the equitable title thereto reverted to and revested in the Union Pacific Railway Company. If this is true, the action to foreclose these contracts cannot be maintained. When Neumann bought the land he inclosed it in one body and used it for pasturage. In 1891 or 1892, it is not clear which, he removed the fences inclosing the south half of the land and rebuilt them about ten feet south of the division line between the north half and the south half of the section. This fence had five gateways, usually open, through which Neumann's cattle would occasionally pass and graze on and range over the south half of the section. He was also accustomed to drive his cattle across this land in taking them to and bringing them back from his grazing lands in Colorado.

In September, 1891, after the service of the second notice of forfeiture, Mr. Lunger, an agent of the company, called on Neumann and urged him to pay up the amounts delinquent on the contracts 78086 and 78087. Neumann stated that he could not do so at that time, but that the contracts were in the hands of his agent at Denver to sell, and in case a sale was made he would settle the arrearage. Upon these facts we think the defendants are not in an attitude to insist that there was an effectual rescission of the contracts. They were treated by both parties as being in full force and effect. The

company recognized their validity and waived the right of forfeiture by attempting to enforce them; and Neumann, by using the land and attempting to dispose of it as his own, asserted an interest and ownership which he may not now repudiate. He contends, however, that having acted on the company's notice that the contracts were rescinded,—having removed the fence and refrained from using the land,—the doctrine of estoppel precludes the plaintiffs from showing a waiver of the forfeiture. A sufficient answer to this argument is that the evidence does not support it. If there had been a forfeiture of the contracts, the fence in question, by the terms of the contracts, became the property of the company, and the act of removal was unlawful. If the use of the land was abandoned, it is inconceivable why Neumann should keep five open gateways in the fence dividing the two halves of the section. The trial court made no finding and rendered no decree in relation to the contracts numbered 78086 and 78087. The balance due upon these contracts should have been ascertained and a decree of foreclosure rendered thereon according to the prayer of the petition. There was a sufficient tender of the amount due upon contracts 78084 and 78085, and in their answer the defendants alleged a willingness to pay the same, but did not bring the money into court. Nevertheless, a decree was rendered unconditionally directing the plaintiffs to convey the north half of the land to Mr. Neumann. This was erroneous. The decree should provide that the amount of the tender be deposited with the clerk of the district court by a designated day, and that the plaintiffs should execute proper conveyances within a limited time thereafter. It should also provide for a foreclosure of the contracts in the event of a failure on the part of the defendants to bring the money into court as directed. The judgment is reversed and the cause remanded to the district court, not for a new trial, but for a decree conforming to the views expressed in this opinion.

REVERSED AND REMANDED.

HENRY E. LEWIS, TRUSTEE, APPELLANT, V. GEORGE W. HOLDREGE, TRUSTEE, ET AL., APPELLEES, AND KENT K. HAYDEN, RECEIVER, APPELLANT.

FILED OCTOBER 20, 1898. No. 8080.

1. **Fraudulent Conveyances:** RIGHTS OF CREDITORS. A sale or transfer of property in fraud of the rights of creditors of the vendor is valid between the parties thereto; and it is void as to such creditors only to the extent that they are prejudiced thereby.
2. **Assignment of Chose in Action:** DEFENSES. The assignee of a non-negotiable chose in action takes it subject to all equities existing between the original parties.
3. **Equity:** MAXIMS. "He who seeks equity must do equity" and come into court with clean hands.
4. ———: EFFECT OF PLAINTIFF'S MISCONDUCT: RELIEF. A plaintiff who does not stand in conscientious relations towards his adversary, with reference to the claim which is the subject of the action, is not entitled to the aid of a court of equity, and will be denied affirmative relief, although such claim does not arise out of an illegal transaction and is not tainted with actual fraud.
5. ———: ———: ———. If the plaintiff, or his assignor, has been guilty of any misconduct in connection with the transaction out of which the claim in suit arose, so that the enforcement of such claim would be harsh, unconscionable, and oppressive, a court of equity will either decline to grant any relief whatever or grant it on such terms as may be just and equitable.

REHEARING of case reported in 55 Neb. 173. *Decree below affirmed in part.*

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.*

SULLIVAN, J.

This case is now before us on rehearing. In the former opinion (55 Neb. 173) it was held that the transfer of the fund and property here in controversy, by C. W. Mosher

to the Western Manufacturing Company, was made in fraud of Mosher's creditors. To that conclusion we still adhere. The transfer being fraudulent as to creditors was void as to them, but only to the extent that it was prejudicial to their rights. Between the parties the assignment was valid and effective. (*Baldwin v. Burt*, 43 Neb. 245; *Richardson v. Welch*, 47 Mich. 309; *Freeman v. Auld*, 44 N. Y. 50; *Songer v. Partridge*, 107 Ill. 529.)

The transfer by the Western Manufacturing Company to Lewis was made in the ordinary course of business for a valuable consideration and without notice of the fraudulent character of his assignor's title. Under these circumstances Lewis took the fund and property free and clear of the general claims of Mosher's creditors. By virtue of his garnishment proceedings Hayden, as receiver, had, prior to the assignment, obtained a specific lien on a small portion of the fund assigned. To the extent of this lien the assignment is not effectual; in all other respects it is. Consequently the claims of creditors constitute no bar to this action.

The appellees, however, insist that a court of equity will not lend its aid to the enforcement of so unconscionable a claim against them. We will now inquire into the merits of this contention. The assignee of a non-negotiable chose in action, in the absence of special circumstances, takes it subject to all equities existing between the original parties. He cannot enforce it unless his assignor could. The transfer does not strengthen the claim. In other words, the debtor loses nothing by reason of the assignment and is in no worse position than if the assignment had not been made. (2 Am. & Eng. Ency. of Law [2d ed.] 1080; Clark, Contracts, 536; *Roberts v. Clelland*, 82 Ill. 538; *Commercial Nat. Bank v. Burch*, 141 Ill. 519; *Wing v. Page*, 62 Ia. 87; *Warner v. Whittaker*, 6 Mich. 133, 72 Am. Dec. 65; *Willis v. Twambley*, 13 Mass. 204; *Callanan v. Edwards*, 32 N. Y. 483; *Littlefield v. Albany County Bank*, 97 N. Y. 581.)

The rights of Lewis against Holdrege and his associ-

ates are, therefore, no greater than those which Mosher would possess were he, in the absence of an assignment, attempting to prosecute the action. How would Mosher stand as plaintiff in the case? The primary purpose of the suit is to determine the plaintiff's right, as assignee of Mosher, to a one-tenth interest in the sum of $4,451.83 deposited by Holdrege, as trustee for the syndicate, in the Capital National Bank, and which was lost by the failure of that institution. A further and subordinate end sought to be attained is a decree establishing the validity and general effectiveness of the assignment. The money was deposited in the bank at the instance of Mosher. As president of the bank, and without the knowledge of his associates, he diverted more than a half-million dollars of the bank's funds to his own use and so completely wrecked it. In other words, he deliberately pursued a line of dishonest conduct which he knew would inevitably result in the loss of the syndicate's money. He was under a moral obligation to make good this loss to his associates, and if he were solvent a legal liability could be enforced through an action brought against him by the receiver for the benefit of all the creditors. Both in the character of debtor and a stockholder he was liable through the bank to its creditors.

It will be conceded that the demand of the syndicate against the bank could not be made the basis of a legal or equitable action against Mosher, and that it does not constitute a technical set-off or counter-claim. Nevertheless, we are entirely satisfied that the plaintiff has no absolute right to the assistance of a court of equity for the unconditional enforcement of his claim. The main purpose of the suit being to obtain a decree which would require the syndicate to pay Mosher's assignee one-tenth of the amount which the syndicate lost through Mosher's deliberate, intentional, and criminal conduct, and for a considerable portion of which he is now indirectly liable, the remedy sought would seem to be excep-

tionally unjust, harsh, and oppressive. A court that would unconditionally grant such relief would not be worthy to be called a court of conscience. "He who seeks equity must do equity" and come into court with clean hands. The misconduct of Mosher was intimately connected with the entire matter in litigation here. It was in relation to a part of the common fund and property which is the subject of this action. The court might, therefore, according to the settled maxims of equity jurisprudence, decline to act at plaintiff's instance. Discussing the principle on which courts of equity refuse to aid in the enforcement of unconscionable claims, Mr. Pomeroy says: "It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him all recognition and relief with reference to the subject-matter or transaction in question. It says that whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine;* the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." (1 Pomeroy, Equity Jurisprudence, sec. 397.) A familiar illustration of the doctrine is found in cases where courts have declined to grant specific performance of valid contracts because unfairly obtained. The plaintiff in this case bases his action upon an unconscionable claim. He occupies no higher ground than his assignor. Without offering to do equity he has no claim upon a court of conscience. The district court, however, rendered a decree establishing his claim to the fund and property of the syndicate charged with a lien in favor of the appellees for the loss sustained by them in consequence of the failure of the Capital National Bank, and that decree, being one that does complete justice between the parties, will be affirmed. The correctness of the judg-

ment, heretofore rendered, dismissing the case as to the receiver, is not questioned and will not be disturbed.

AFFIRMED.

JAMES S. THOMAS V. NEBRASKA MOLINE PLOW COMPANY.

FILED OCTOBER 20, 1898. No. 8311.

1. **Contracts:** PAROL EVIDENCE. In an action between the parties to a valid written contract it is a general rule of evidence that parol testimony touching an antecedent or contemporaneous agreement in relation to the same matter cannot be received to vary, add to, or subtract from the terms of the written instrument.
2. **Depositions:** PRESUMPTIONS ON APPEAL. Depositions filed in a lower court are presumed, in the absence of proof to the contrary, to have been transmitted to the district court within the time limited by the statute for that purpose.
3. ———: ———: FILE MARK. An objection to the reading of depositions, based on the fact that they did not bear the clerk's file mark showing that they had been filed more than one day before the trial, was properly overruled where it appeared that such depositions had been taken and used in the lower court and had been for a long time among the files of the case in the district court.
4. **Trial to Court:** EVIDENCE. Where a cause is tried without a jury, it will be presumed that the court considered only competent evidence in reaching a conclusion.

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

E. A. Cook, for plaintiff in error.

William Gaslin, contra.

SULLIVAN, J.

This action to recover on a promissory note was brought originally in the county court of Dawson county and appealed therefrom to the district court. The defense pleaded and relied upon at the trial was an oral

agreement extending the time of payment. The alleged contract for extension of time was denied by the plaintiff. The agreement which the defendant attempted to establish seems to have been made, if at all, at the time the note was executed and as part of the same transaction. Such being the case, all of the testimony in support of the defense was received in violation of a fundamental rule of evidence, and the court who tried the cause without the aid of a jury was justified in disregarding it. The note itself was the appointed repository and exclusive evidence of the contract between the parties. A variant agreement co-incidently made could not be shown by parol testimony. But if all the evidence produced and received on the trial were competent and entitled to be considered, the finding of the court would still be sustained by sufficient proof.

Depositions taken and filed in the county court while the action was there pending were read in evidence on the trial in the district court over an objection of the defendant grounded on the fact that such depositions did not bear the clerk's file mark showing that they had been filed in his office at least one day before the day of the trial. The depositions had been among the files of the case for months. They had evidently been used on the trial in the county court and were presumably transmitted to the district court by the county judge in performance of the duty imposed on him by law. They were legally filed in the office of the clerk before the issues were joined, although that fact was not evidenced in the usual way. If defendant was entitled to be heard in the district court on exceptions to these depositions, he had ample opportunity to present his exceptions before the day of trial. There is another reason why there is no merit in this assignment of error. The evidence contained in the depositions was in rebuttal of the testimony offered by the defendant to establish a parol contemporaneous agreement modifying the written contract on which the action was predicated. The evidence of the

defendant upon this point being incompetent, that contained in the depositions was immaterial, and, therefore, did not influence the judgment of the court in any degree. These are the only questions argued in the brief of counsel for defendant. The judgment is

AFFIRMED.

ANN E. CAMPBELL, APPELLEE, V. MARC A. UPTON ET AL., IMPLEADED WITH WINFIELD S. MAYNE, APPELLANT.

FILED OCTOBER 20, 1898. No. 8345.

Mortgage Foreclosure: LIMITATION OF ACTIONS. An action to foreclose a real estate mortgage, given to secure a note, bond, or other written evidence of indebtedness, may be commenced at any time within ten years after the cause of action accrues.

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

Winfield S. Strawn, for appellant.

J. W. Woodrough, contra.

SULLIVAN, J.

Nothing would be gained by a delineation of the events out of which this controversy has emerged. The precise question to be determined is whether a suit to foreclose a real estate mortgage, securing a debt evidenced by promissory notes, may be maintained after the right of action on such notes has become barred by the statute of limitations.

Section 6 of the Code of Civil Procedure is as follows: "An action for the recovery of the title or possession of lands, tenements, or hereditaments, can only be brought within ten years after the cause of such action shall have accrued. This section shall be construed to apply also to mortgages." It is contended by counsel for appellant

that this section is only applicable to naked mortgages and has no reference to such as are incidental to, and security for, notes, bonds, or other instruments evidencing indebtedness. The argument submitted by the learned counsel for appellant in support of this position is a strong and persuasive one, but it seems to us the question is already settled the other way by precedents of controlling authority. (*Hale v. Christy*, 8 Neb. 264; *Stevenson v. Craig*, 12 Neb. 464; *Cheney v. Cooper*, 14 Neb. 415; *Herdman v. Marshall*, 17 Neb. 252; *Cheney v. Woodruff*, 20 Neb. 124; *Cheney v. Campbell*, 28 Neb. 376; *Merriam v. Goodlett*, 36 Neb. 384.) In *Herdman v. Marshall*, *supra*, it was announced that discussion of the question now under consideration was foreclosed by the past adjudications of this court, REESE, J., remarking that "It has so frequently been held that a suit to foreclose a mortgage is not barred until the lapse of ten years, that it can no longer be considered an open question." And in *Cheney v. Campbell*, *supra*, it was said: "This question has been so often decided by this court that it is unnecessary again to review it. For the purpose of foreclosure the notes continue as evidence of the debt for ten years from the time they become due." From the rule established by the decisions cited we are not at liberty to depart, even though we may think it rests on an erroneous interpretation of the statute. The judgment appealed from is

AFFIRMED.

GEORGE H. DOWNING, APPELLANT, V. A. F. LEWIS ET AL., APPELLEES.

FILED OCTOBER 20, 1898. No. 8353.

1. **Monopolies**: ANTI-TRUST LAW: LAUNDRY. A laundry is not a manufacturing establishment within the meaning of chapter 69, Session Laws of 1889.

2. ———: ———: MANUFACTURERS. Chapter 69, Session Laws of 1889,

was designed to prevent manufacturers and dealers in articles of commerce from combining for the purpose of lessening competition, regulating production, and increasing profits, and to secure to the public the benefits of fair competition in trade.

3. **Contracts in Restraint of Trade:** ANTI-TRUST LAW. All contracts in restraint of trade are not forbidden by the act, but only such as are entered into by parties who are "engaged in manufacturing, selling, or dealing in the same or any like manufactured or natural products."

4. ——: ——: INJUNCTION. An agreement in partial restraint of trade, which is not within the inhibition of the statute aforesaid, is valid and may in a proper case be enforced by injunction.

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

Marston & Marston, for appellant.

W. D. Oldham, E. C. Calkins, and *H. V. Calkins, contra.*

SULLIVAN, J.

On August 6, 1895, the defendants, who are the appellees herein, sold to the plaintiff George H. Downing the business and good-will of an establishment conducted by them in the city of Kearney and known as the "Lewis Laundry." As part consideration for the purchase price agreed upon it was stipulated that the defendants should not engage in the laundry business in said city, either for themselves or for any other person, for the period of five years from August 10, 1895. The alleged violation of this agreement by the defendants furnishes the ground on which this action to obtain a perpetual injunction is predicated. A restraining order allowed at the commencement of the suit was afterwards dissolved and the petition dismissed. The plaintiff appeals.

The contract in question forbids the defendants from engaging in a particular business, in a single city, for a limited time. It is supported by a valuable and sufficient consideration. The restriction imposed is reasonably necessary for the protection of the plaintiff's interests and is not an undue interference with, or impairment of,

the rights of the public. According to the doctrine of the common law as laid down in all the modern cases, the agreement, although in partial restraint of business competition, is entirely valid, and for its effective enforcement an injunction is the appropriate remedy. (*State v. Nebraska Distilling Co.*, 29 Neb. 700; *Mollyneaux v. Wittenberg*, 39 Neb. 547; *Clark v. Crosby*, 37 Vt. 188; *Roller v. Ott*, 14 Kan. 609; *Sutton v. Head*, 86 Ky. 156; *Hodge v. Sloan*, 107 N. Y. 244; *Angier v. Webber*, 14 Allen [Mass.] 211; *Chaplin v. Brown*, 83 Ia. 156; 10 Am. & Eng. Ency. Law [1st ed.] 943.)

The defendants, however, contend that the agreement is within the inhibition of the anti-trust law of 1889. (Session Laws 1889, p. 516, ch. 69.) The first section of the act, which is the only one bearing upon the question under consideration, is as follows:

"Section 1. It shall be unlawful for any person or persons, partnership, company, association, or corporation, organized for any purpose whatever, or engaged in the manufacture or sale of any article of commerce or consumption, or for any such person or persons, partnership, company, association, or corporation dealing in any natural product, to enter into any contract, agreement, or combination with any other person or persons, partnership, company, association, or corporation, organized and doing business in this state, or in any other state or territory and doing business in this state, engaged in the manufacturing, selling, or dealing in the same or any like manufactured or natural product, whereby a common price shall be fixed for any such article or product, or whereby the manufacture or sale thereof shall be limited or the amount, extent or number of such product to be sold or manufactured shall be determined, or whereby any one or more of the combining or contracting parties shall suspend or cease the sale or manufacture of such products, or whereby the products or profits of such manufacture or sale shall be made a common fund to be divided among the respective persons, partnerships, com-

panies, associations, or corporations so entering into such contract, agreement, or combination."

It seems perfectly plain that a laundry, the business of which is to wash and iron linen and other articles of wearing apparel and domestic use which have become soiled in the service for which they were fabricated, is not a manufacturing establishment within the meaning of the section quoted. In the common understanding the function of a laundry is to make clothes clean rather than to make clean clothes. But if it were true that in the classification of occupations this business should be assigned to the manufacturing class, still the statute would have no application to the case before us. The law was intended to redress a well known evil. It was designed to prevent manufacturers and dealers in articles of commerce from combining for the purpose of lessening competition, regulating production, and increasing profits. It was intended to secure to the public the benefits of fair competition in trade, and markets in which prices of products would be fixed with reference to the natural demand and supply. It will be observed that all contracts in restraint of trade are not forbidden, but only such as are entered into by parties who are "engaged in manufacturing, selling, or dealing in the same or any like manufactured or natural products." It does not appear that Mr. Downing was engaged in the laundry business at Kearney or anywhere else when he bought the "Lewis Laundry," and that being so he was not within either the letter or spirit of the law. The transaction was not in contravention of the policy of the statute, for it did not have any tendency to limit or suppress competition. It was not calculated to make washing dear by making launderers scarce. The contract was lawful and should be enforced. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

MARION E. ROBERTSON V. ROBERT BROWN.

FILED OCTOBER 20, 1898. No. 8344.

Torts: INSTRUCTIONS AS TO WEIGHT OF EVIDENCE: SYMPATHY. In an action for damages alleged to have been sustained by the wrongful act of the defendant, plaintiff is entitled to have the evidence considered by the jury uninfluenced by considerations of sympathy or public policy, and an instruction that these considerations may be properly taken into account in weighing the evidence is prejudiciously erroneous.

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

T. E. Bennett and *George B. France*, for plaintiff in error.

F. C. Power, contra.

RYAN, C.

This action was brought in the district court of York county by Marion E. Robertson for the recovery of damages because of the alleged seduction by defendant of plaintiff's wife and the alienation of her affections. There was a trial of the issues, which resulted in a verdict and judgment for the defendant.

At the request of the plaintiff the court instructed the jury that "the familiar conduct and intimate actions of the defendant towards the plaintiff's wife, and the fact, if proven by the evidence, that they were found alone together in defendant's bedroom while defendant was yet in bed and undressed, is a strong circumstance tending to prove that defendant debauched and carnally knew her." On its own motion the court instructed the jury as follows: "Although you find from the evidence that the defendant and plaintiff's wife were found alone together in defendant's bedroom while defendant was yet in bed and undressed, the act charged is one that tends to degrade the parties, and inflicts great injury

upon society, and, if the facts shown by the evidence may as well be explained upon the hypothesis of innocence as of guilt, then you should always adopt the former rather than the latter hypothesis. And if you find from the evidence that this act has been fully explained upon the hypothesis of innocence, then you should find for the defendant." Thus in one instruction the court tells the jury that a state of facts described is a strong circumstance tending to establish plaintiff's right to recover. In the course of the instructions the jury is told afterwards that if they can be explained as well on the hypothesis of innocence as of guilt, these same facts, from considerations of sympathy and public policy, should be construed favorably to the defendant. Unquestionably the jury, in view of these instructions, was confused rather than assisted, for in one the court tells them the facts constituted strong proof against the defendant and in the other treats these same facts as possibly capable of two constructions. The question to be determined was whether or not plaintiff had sustained damage by the wrongful conduct of the defendant, and plaintiff was entitled to have that question considered by a jury, uninfluenced by sentimental considerations. To him, if he had been wronged as he claimed, it was immaterial that a disclosure of the facts in a court of justice shocked the sensibilities of the public and entailed mental suffering upon guilty parties. These effects, much as they are to be deprecated, are not chargeable to the plaintiff, if the proof disclosed their existence, but they are the consequences which the actor risked when he perpetrated the wrong. In every case where guilt exists there is a sufficient temptation to excuse it on mistaken grounds of humanity without the encouragement of courts, whose duty it is to administer exact justice between litigants. The comments upon the evidence in this case serve to illustrate the wisdom of leaving the consideration of mere questions of fact to the jury, uninfluenced by comments thereon by the court. For the error in giving the above

quoted instruction on its own motion the judgment of the district court is reversed.

REVERSED AND REMANDED.

VICTORIA HALL, APPELLEE, V. WILL H. CRABB, APPELLANT, AND DORA LYON ET AL., APPELLEES.

FILED OCTOBER 20, 1898. No. 8336.

1. **Freehold Estate: INHERITANCE.** An estate less than a freehold is not an estate of inheritance, and a freehold estate is one of which possession, at the common law, could only be given by livery of seisin. Following *Crawl v. Harrington*, 33 Neb. 107.
2. **Estate of Curtesy.** A surviving husband, whose wife died in 1877, was not entitled to an estate of curtesy in lands in which she had a mere equitable estate at the time of her death.

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

Harlan & Taylor, for appellant.

Gilbert Bros., contra.

RYAN, C.

In the petition of Victoria Hall filed in the district court of York county she alleged that she and her sister, Dora Lyon, were the daughters and sole heirs at law of Lorina McCully, who died intestate in January, 1877; that said Lorina McCully, during her lifetime, was the holder of a certain executory contract for the purchase of a forty-acre tract from a railroad company, which tract was particularly described and was in York county; that on said contract she had made four payments; that on December 3, 1883, all remaining payments having been made as required, this tract was conveyed to the "heirs at law" of Lorina McCully by that general designation; that on July 6, 1893, an execution was levied on

what was described in the return thereof as the "life interest of John W. McCully," the surviving husband of Lorina McCully, and that said so-called life estate was thereunder purchased by Will H. Crabb, to whom it was by sheriff's deed conveyed, after confirmation of the sale. The prayer was for a decree whereby plaintiff and Dora McCully might each be adjudged the owner of a one-half fee simple title and that the estate claimed by Crabb should be adjudged of no validity. By the answer of Crabb the interest in the property claimed by him was expressly limited to the life estate of John W. McCully in the forty-acre tract in controversy. There was a judgment as prayed, from which Crabb prosecutes this appeal.

On the trial the facts were shown to be substantially as described in the petition. It will be seen upon an analysis of the above statements that when Lorina McCully died she was the holder of a contract whereby the railroad company had agreed to convey certain real property to her; that she had made payments thereon which gave her an equitable interest in said land; that afterwards, the other payments having been made, the railroad company conveyed to the heirs at law of Lorina McCully, and that, by purchase at sheriff's sale, Crabb claims to have acquired an estate of curtesy for the life of John W. McCully in said forty-acre tract. The death of Lorina McCully was in 1877, and to the statute in force at that time we must resort to find what estate of curtesy, if any, John W. McCully had in land in which his wife had a mere equitable interest or title. The statute in force was embodied in section 29, chapter 23, Compiled Statutes 1885, from which we quote this language: "When any man and his wife shall be seized in her right of any estate of inheritance in lands, the husband shall, on the death of his wife, hold the lands for his life, as tenant thereof by curtesy; Provided," etc. The right of the husband to curtesy in 1877 therefore depended upon the force to be given the words "estate of

inheritance" as they are used in the section from which we have quoted. These words are used in the section defining the right of dower of a wife in the lands of which her husband is seized during marriage. In *Crawl v. Harrington*, 33 Neb. 107, the dower right of a wife in the lands of her husband was under consideration, and it was held by this court that an estate less than a freehold is not an estate of inheritance, and a freehold estate was defined as one of which actual possession could, under the common law, be given only by livery of seisin. The equitable interest which Lorina McCully had in the land in controversy at the time of her death was less than a freehold estate, and consequently, under the authority above cited, was not an estate of inheritance. Her husband was, therefore, not entitled to a tenancy by curtesy in this land, and accordingly the judgment of the district court is

AFFIRMED.

CITIZENS STATE BANK OF COUNCIL BLUFFS, APPELLANT, V. GEORGE H. HAYMES ET AL., APPELLEES.

FILED OCTOBER 20, 1898. No. 8325.

Judicial Sale: TITLE OF PURCHASER: EFFECT OF OPENING DECREE. After setting aside a decree under the provisions of section 82, Code of Civil Procedure, upon the application of a non-resident defendant served with notice of the pendency of the action by publication alone, *held* erroneous upon further proceedings to set aside a title acquired by a purchase under the provisions of said decree while in force, especially as the *bona fides* of such purchase was not questioned by any pleading.

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

I. R. Andrews, Stone & Dawson, Charles O. Whedon, Charles E. Magoon and *Stone & Tinley*, for appellant.

John N. Baldwin and *James H. Van Dusen, contra.*

RYAN, C.

On September 6, 1892, the Citizens State Bank of Council Bluffs filed its petition in the district court of Douglas county asking the foreclosure of a mortgage on a certain described lot in the city of Omaha. In the petition it was alleged that the notes secured by the mortgage sought to be foreclosed, as well as the mortgage itself, were made by George H. Haymes, one of the defendants; that other defendants, among whom was George E. Gage, claimed to have an interest in the mortgaged property by virtue of certain deeds held by them, but it was alleged that whatever interest either of said last referred-to defendants had in said mortgaged property was subject and inferior to the said mortgage. Service by publication of the pendency of the action was completed October 7, 1892, upon certain defendants, among whom was said Gage. On December 24, 1892, there was entered of record the default of all the defendants, and on January 6, 1893, there was a decree as prayed. The property affected by the decree was duly advertised and sold for the satisfaction thereof to the Citizens State Bank of Council Bluffs on March 21, 1893. On March 29, 1893, the sale was duly confirmed, and the special master who had conducted it was ordered to make a deed to the purchaser of the premises. On May 3, 1893, there was filed a motion in said court in which George E. Gage asked that the judgment be opened and he be let in to defend for the reasons set forth in his affidavit, which affidavit was in this language: "George E. Gage, being duly sworn, on oath says, that he is the George E. Gage, one of the defendants in the above entitled suit and one of the parties against whom the decree in said cause was rendered; that service was had upon him in said action by publication only; that during the pendency of said action he had no actual notice or knowledge thereof, and that the existence of said action first came to his knowledge after the sale under the decree entered in

said cause was confirmed by the court; and further deponent saith not." There was an answer and cross-petition filed on May 20, 1893, by Gage, in which there was a denial that the Citizens State Bank of Council Bluffs, prior to the notes falling due, or at any time, became the owner, or ever was the owner, of said notes and the mortgage securing the same, and a denial that they were executed for value, but he alleged that they were without consideration. There was a general denial in said answer and cross-petition of every averment in the petition on which there had been a foreclosure, except as such averments were admitted to be true. As a basis for relief in his said answer and cross-petition George E. Gage alleged his ownership of the premises as to which there had been a foreclosure; that service had been made upon him by publication alone; that the property was in the possession of the purchaser under and by virtue of special master's deed made in conformity with the terms of the decree; that at the time of the original institution of the action the Citizens State Bank of Council Bluffs was not the owner of the notes and mortgage foreclosed, or, if it was the owner thereof, it purchased said notes and mortgage subsequent to defaults in the terms thereof, and while knowing that said notes and mortgage were made without consideration and were void; that said bank purchased said property at said sale for the sum of $4,919.38, which sum did not represent its true value, but was very much less than the true value of said property, which was worth not less than $6,000; that said bank was threatening and was about to dispose of said property, to the irreparable injury of the said Gage, whose prayer was, first, for the vacation of the decree and that the prayer of the original petition be denied; second, that the bank be enjoined from selling or conveying the property involved during the pendency of the action; and, third, that the bank be required to reconvey the premises to said Gage; and for equitable relief. On May 25, 1893, the decree was opened. On February 18, 1895 there was

filed an answer and cross-petition by Gage in which were reiterated the averments of that which had been filed on May 20, 1893. The prayer was that the decree be set aside and that the bank be required to reconvey the property to Gage. There was issue joined by a lengthy reply, and on December 20, 1895, there was a decree setting aside the former decree and requiring the bank to reconvey to Gage the mortgaged premises and quieting title to the same in Gage, and the bank appeals.

It is provided in section 82, Code of Civil Procedure, how a judgment rendered on service by publication upon the application of a defendant so served may be set aside. It is, however, provided in said section as follows: "But the title to any property, the subject of the judgment or order sought to be opened, which by it, or in consequence of it, shall have passed to a purchaser in good faith shall not be affected by any proceedings under the section." The application to open the judgment was in conformity with the requirements of said section. In the pleading of Gage there was no averment of bad faith in the purchase by the bank. The only fact alleged with reference to the purchase was that the property was bought by the bank for $4,919.38 when it was in fact worth at least $6,000, and this did not impute bad faith, for, if the appraisement was $6,000, the price was more than two-thirds of that sum. By its purchase the bank became vested with title while there was no action pending. (*Scudder v. Sargent*, 15 Neb. 102; *Keene v. Sallenbach*, 15 Neb. 200.) Section 82, Code of Civil Procedure, furnishes a special method whereby certain relief may be had, but this, we think, extends no further than the litigation of matters which could have been properly put in issue anterior to the entry of the original decree. There is a saving clause in this section in favor of the rights of *bona fide* purchasers after decree, but this clause does not provide that the *bona fides* of the purchase may be determined in proceedings authorized by that section. As there was no action pending after the rendition of judg-

ment, an attack upon the validity of the sale made subsequent thereto was a matter independent of any issues involved in the case wherein the non-resident defendant was permitted to defend. His alleged cross-petition, whereby he sought to set aside the deed to the bank, was, therefore, in the nature of an independent action. If without setting aside the decree he had brought an independent action against the bank to set aside its title, he would, without question, have been required to show something more than that the original decree was erroneous. As this was a special proceeding, it should have been strictly pursued according to the terms of the statute giving it. (*Church v. Callihan*, 49 Neb. 542.) Aside from this consideration, it is certainly clear that only such relief can be granted as is warranted by the facts pleaded. It was therefore erroneous to set aside the title of the bank in this case under the facts pleaded, and the judgment of the district court is therefore reversed.

REVERSED AND REMANDED.

JOSEPH ELLIS V. ISAAC HARRIS ET AL.

FILED OCTOBER 20, 1898. No. 9707.

1. **Equity**: ENTRY OF DECREE: POWER OF COURT: WAIVER OF OBJECTIONS. After an entry of an interlocutory decree finding a defendant entitled to a foreclosure against property which had been conveyed to him, he withdrew his cross-petition and without objection introduced additional evidence upon and took part in the trial of the issue whether or not he held the property in dispute in fraud of the rights of creditors of his grantor. *Held*, That he could not complain that the court had no power to enter a decree on the issue last indicated without formally setting aside the interlocutory decree first entered.

2. **Receivers**: OBJECTIONS: WAIVER. Where a litigant consented to the original appointment of a receiver of property in litigation, he was not prejudiced by an order continuing such receivership, in view of the fact that a final decree was formally and properly entered that he had no interest in the subject-matter of the action.

ERROR from the district court of Gage county. Tried below before LETTON, J. *Affirmed.*

L. M. Pemberton, for plaintiff in error.

F. B. Sheldon, E. O. Kretsinger, and *E. R. Fogg, contra.*

RYAN, C.

This action was brought by Isaac Harris and Jacob Friedman to set aside certain transfers of real property and of personal property which had been made by John Ellis to his brother, Joseph Ellis. These transfers, it was alleged, had been fraudulently made and received as against the rights of the firm of Harris & Friedman, which firm was a creditor of John Ellis at the time of the making of the transfers assailed. There were other creditors of John Ellis, who became parties to this action by their petitions of intervention, in which, in substance, they alleged the same facts and prayed the same relief as had been insisted upon by the original plaintiffs. The above statements indicate the general nature of the issues which were to be tried, and it is unnecessary to describe further the pleadings by which they were presented.

The first question to which we shall devote attention is the condition of the judgment entries in this case. From the first of these we quote as follows: "Now on the 30th day of March, 1896, * * * this cause coming on to be heard upon the pleadings and evidence, was argued by counsel and submitted to the court, and the court, being fully advised in the premises, finds that the conveyance and bill of sale made by John Ellis to Joseph Ellis was intended as a mortgage and is a mortgage, and that Joseph Ellis has the rights of a mortgagee in and to said property. And the court further finds that it is necessary to appoint a receiver in this case to take care of the property involved and to recover the same and to rent the same. Cause retained for further proof as to the consideration of the making of said mortgage and

amount, if any, due on same and foreclosure of said mortgage. The plaintiff and the defendants John Ellis, Joseph Ellis, and Margaret Ellis and all of the cross-petitioners except." Later in the record we find the following journal entry: "Now on this 4th day of May, 1897, * * * this cause coming on to be heard, cross-petitioners Joseph Ellis, Emery S. Ellis, and Harry O. Ellis, allowed to dismiss and withdraw cross-petitions, and defendant E. R. Fogg is allowed to withdraw answer and cross-petition to cross-petition of Joseph Ellis, and parties allowed to introduce further proofs on both sides of main cause as if the said cause had never been submitted to the court. * * * And now on this 5th day of May, 1897, * * * this cause coming on to be heard, the evidence is taken. By consent of parties ex-court reporter J. A. O'Keefe is ordered to prepare transcript of evidence taken upon former hearing and reporter McLucas is ordered to make transcript of evidence taken at present hearing." It is disclosed by the transcript that on June 19, 1897, there was a submission of the cause on the pleadings and evidence, whereupon the record recites: "The court finds generally for the plaintiffs and for the cross-petitioners Mary A. Reed and Edward R. Fogg as receiver of the Nebraska National Bank, and that the deeds and bill of sale set out and described in the petition of plaintiffs and in the cross-petitions of Mary A. Reed and Edward R. Fogg as such receiver, purporting to convey the real estate and personal property therein described from the defendant John Ellis to the defendant Joseph Ellis, was executed by the said John Ellis with the fraudulent intent and design to place all of said property, both real and personal, described in said deeds and bill of sale beyond the reach of the creditors of the said John Ellis and to hinder, defeat, and delay them in the collection of their debts, against the said John Ellis especially to hinder, defeat, and delay the collection of the debts of the plaintiff herein and the cross-petitioners Mary A. Reed and Edward R. Fogg as

receiver, and that said fraudulent design in executing said fraudulent conveyance was participated in by the defendant Joseph Ellis, and that the said Joseph Ellis received all the said real and personal property, and every portion of the same, described in said deeds of conveyance and bill of sale charged with a secret trust in favor of John Ellis, and with the fraudulent intention to aid said John Ellis in placing his said real and personal property beyond the reach of the creditors of the said John Ellis, especially the plaintiff herein and the cross-petitioners Mary A. Reed and Edward R. Fogg as receiver."

From these excerpts it is made to appear that on March 30, 1896, there was a trial of the issues, and a finding that the written transfers in effect were mortgages and that Joseph Ellis had the rights of a mortgagee. On May 4, 1897, which was more than a year afterward, Joseph Ellis dismissed and withdrew his cross-petition. The printed record on which this cause was submitted does not contain a copy of this cross-petition, hence we cannot describe it; but as the court found a right of foreclosure in his favor, it is fair to assume that said cross-petition contained averments and a prayer upon which a foreclosure could properly be based. When this was withdrawn, the issue in the main cause was whether the conveyance was fraudulent and void, and to the order permitting the introduction of further evidence pertinent thereto Joseph Ellis interposed no objection; indeed, the additional evidence seems, for the most part, to have been adduced in his favor. In the action of the court in thus practically setting aside the interlocutory decree which had been rendered there was therefore involved only the question of the power of the court to make such an order.

The interlocutory decree was not one from which an appeal or error proceeding could be prosecuted, for it was not final. To constitute it a final decree it was necessary that it should have been one which disposed of

the cause without reserving anything for further consideration. The distinctions on this head are pointed out and illustrated by many authorities in a note in 2 Daniell, Chancery Practice 994, and they are uniform in holding that a decree like the first entered in this case is interlocutory, not final, and that, therefore, the court had power upon further hearing, upon consent of the contending parties, to make other and contradictory findings upon which a different decree might be entered. Of the cases on this subject *Fourniquet v. Perkins*, 16 How. [U. S.] 82, *Clark v. Blair*, 14 Fed. Rep. 812, and *Kelly v. Stanbery*, 13 O. 408, are perhaps as instructive as any that can be cited. We are convinced that the action of the court in treating the interlocutory decree as though it had been set aside and in making findings and entering a decree inconsistent therewith, upon the introduction of additional evidence by all parties without objection, was warranted by law and did not prejudice the rights of Joseph Ellis, the plaintiff in error herein. The cause presents conditions which frequently are found in this class of cases. It is possible that if we had been trying this case in the first instance we might have reached conclusions different from those found by the district court of Gage county, and yet, upon consideration of all the evidence, we cannot say that different minds might not reach different results. Under such circumstances we cannot say that there was insufficient evidence to sustain the findings of the trial court.

It is complained that there was an order continuing the receivership of the property in dispute after the entry of the final decree. The original appointment of the receiver was upon the agreement of parties, and for this reason we presume the complaint is directed merely to the continuance of such receivership. In the view which we have taken of the proceedings in error in this case, there is no room for the assumption that any prejudice was sustained by Joseph Ellis by reason of the property in dispute remaining under the management of the re-

ceiver, for Joseph Ellis never had any interest therein which he could assert as against the rights of the defendants in error represented by said receiver.

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

AFFIRMED.

CITY OF NORTH PLATTE V. NORTH PLATTE WATER-WORKS COMPANY.

FILED OCTOBER 20, 1898. No. 10057.

1. **Municipal Corporations**: WATER-WORKS: CONTRACTS: VALIDITY OF ORDINANCE: PARLIAMENTARY LAW. The provisions of subdivision 15 of section 69, chapter 14, article 1, Compiled Statutes, empowering cities of the second class of less than 5,000 inhabitants to pass ordinances whereby such cities may make contracts with and authorize any person, company, or corporation to erect and maintain a system of water-works and water supply for a term of twenty-five years, and to furnish water to such cities, *held* to fall within the exception contained in section 89 of said chapter, and, consequently, that an ordinance of that nature duly passed is valid, though not preceded by an appropriation to meet its requirements of payments of water rentals.

2. ———: ———: ———: ———. Where an ordinance authorizing the erection of water-works and the supply of water through hydrants of a certain number and at certain rentals was otherwise duly passed, *held*, that a suspension of the rule requiring it to be read only once on each of three different days unless this rule was suspended, was sufficiently complied with, where there were present four councilmen, all of whom voted for the suspension; the entire council consisting of six members, of whom one had resigned and another was absent when the suspension took place.

ERROR from the district court of Lincoln county. Tried below before NORRIS, J. *Affirmed.*

See opinion for references to cases.

A. F. Parsons and *William Neville*, for plaintiff in error.

Marston & Marston and *Wilcox & Halligan*, *contra.*

RYAN, C.

In this case there has already been filed an opinion. (See *North Platte Water-Works Co. v. City of North Platte*, 50 Neb. 853.) When the cause was remanded there was filed an amended petition, and thereupon issues having been made up, there was a judgment in favor of the water-works company for $11,057.90, and the city, by proceedings in error, seeks a reversal of this judgment.

It was alleged in the amended petition that by assignment the water-works company became entitled to the right to perform the conditions required to be performed by its assignor and to compensation therefor; that it had performed these conditions by putting in certain hydrants through which water was furnished the city after the year 1887, and by a supplemental petition this performance was alleged to have been until January 1, 1898, and the prayer was for a balance in the aggregate of $11,057.90. In the opinion in this case above referred to there was a full statement of the items making up the sum claimed, except as described in the supplemental petition, whereby was added a claim for $6,822.47, which, as plaintiff alleged, had fallen due since the first petition was filed. By a stipulation it was admitted that the payments pleaded in the answer were therein correctly set forth. Without going into details it must suffice to say that these payments were made in the years 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, and 1897, and in the aggregate amounted to $18,406.22. We are not advised by the petitions why there were no averments showing for what particular years the hydrant rentals had not been paid; neither is this made clear by the stipulation, for its recitations on this subject were simply of the amounts paid in each of the years above enumerated.

The ordinance by which the city of North Platte authorized to be furnished the hydrants and the water through said hydrants at a stipulated rental was adopted July 14, 1887, and was known as ordinance No. 62. It

was stipulated that the water-works company had put in forty-five hydrants, through which it had furnished water from November, 1888, and six additional hydrants, through which water had been furnished from January 1, 1890. It was further stipulated that in the estimate for the years 1886 and 1887 made by the city council no item for water supply or hydrant rentals was included and that no annual appropriation ordinance was passed therefor by said city council in the year 1887. It was also stipulated that there was levied and collected on the assessments of 1886 and 1887 for water purposes the sum of $4,325.80, and that between February 21, 1887, and March 18, 1890, there was paid out by said city $1,905.30 upon warrants drawn against the water fund of said city for purposes other than hydrant rentals, and that no proposition to construct water-works or furnish water supply, nor to appropriate money or levy a tax therefor, was ever submitted to a vote of the legal voters of said city. In the stipulation there was a recitation that under the terms of the contract sued on there remains unpaid the hydrant rental due January 1, 1898, as claimed by plaintiff. It will thus be seen that the hydrant rentals are claimed covering a period of eleven years, though the contest seems to be over the rentals which accrued in two of those years, that is to say, 1886 and 1887. As to the first of these it was expressly stipulated that no estimate or appropriation was ever made by the city council to meet it, and as to the second the stipulation in this respect is silent. In this regard, however, it corresponds with the supplemental petition by which the amount of $6,822.47 was claimed, for there is therein no averment of either an estimate or appropriation by the city council. As it is not claimed in argument that there had ever been such an estimate made or a special appropriation ordinance passed, we shall treat that branch of the case as it has been treated by counsel for the parties litigant. Under these conditions we have presented the question whether or not the city was lia-

ble by reason of the provisions of the ordinance passed July 14, 1887, in the absence of a special appropriation ordinance to meet the hydrant rentals which accrued in 1888 and at some time preceding January 1, 1898.

Plaintiff in error relies upon the inhibitions embodied in section 89, chapter 14, article 1, Compiled Statutes. This section is in this language: "No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, except as hereinafter expressly provided." To sustain its contention of the applicability of the above section to the facts of the case at bar plaintiff in error cites *City of Blair v. Lantry*, 21 Neb. 247; *McElhinney v. City of Superior*, 32 Neb. 744; *Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla*, 40 Neb. 775.

In *City of Blair v. Lantry, supra*, the warrant was drawn for the payment of the purchase price of land to be used for an addition to a cemetery, and it was held invalid for the reason that no appropriation had been made to meet the expense of such purchase.

In *McElhinney v. City of Superior, supra*, there was an ordinance passed in November, 1889, by the provisions of which Robert Guthrie was given permission and authority to construct and operate an electric light plant and power in the city of Superior and, for those purposes, granting him the right to use the thoroughfares and public grounds of the city. Afterwards in the same month there was passed another ordinance, by which the city contracted with Robert Guthrie to pay him $924 per year for the period of three years for eleven electric lights to be furnished, maintained, and operated by him at such points in the city as its council should designate. The suit was brought by McElhinney, a resident and tax-

payer of the city, against the city council and Robert Guthrie to enjoin said Robert Guthrie from constructing said electric light plant or doing any work under the franchise granted by the ordinance first above referred to and to enjoin him from furnishing for the use of the city any electric lights and to enjoin the council from paying therefor. It was held that the contract for furnishing the electric lights was void, because no appropriation had been made for the expenditure proposed. The contract held void seems to have been entered into under a misapprehension of the provisions of chapter 19, Laws of 1889, which had been approved March 30 of the year just named. That chapter gave cities of the second class the right to construct and operate a system of electric lights, but did not confer upon such cities the power to employ individuals to operate such a system of lighting; therefore, at the time the ordinance was adopted whereby contracts were made with Robert Guthrie, subdivision 14, section 69, article 1, chapter 14, Compiled Statutes, did not confer authority upon cities of the class of North Platte to make contracts for lighting such cities by the use of electricity; hence the case of *McElhinney v. City of Superior*, *supra*, though correctly decided in view of the existing condition of the statutes of the state, affords no precedent for our guidance in this case, as we hope to make clear in the further progress of this discussion.

In *Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla*, *supra*, the contract was for the purchase of certain fire apparatus. In these three cases the general rule laid down in *City of Blair v. Lantry* was applicable, for in each there was an attempt to enforce a contract in violation of section 89, chapter 14, article 1, Compiled Statutes. In the section just referred to there is, however, an exception, within which the contracts contemplated in the three cases just reviewed were not embraced, and that exception was, in effect, that an appropriation was not necessary in cases in the statute otherwise expressly pro-

vided. By subdivision 15, section 69, of the chapter just referred to it is provided that cities of the class in which North Platte is embraced may enact ordinances, among other things: "To make contracts with and authorize any person, company, or corporation to erect and maintain a system of water-works and water supply, and to give such contractors the exclusive privilege, for a term not exceeding twenty-five (25) years, to lay down in the streets and alleys of said city water mains and supply pipes, and to furnish water to such city * * * and the residents thereof and under such regulations as to price, supply, rent of water meters as the council * * * may from time to time prescribe by ordinance, for the protection of the city." The power to contract with individuals or corporations for a supply of water to be furnished for the use of the city for a term not exceeding twenty-five years implies the power to provide that payments shall be made as the right to receive them accrues, without an appropriation having been previously made with reference to the several payments as they shall mature. This is evident from the language of section 86 of said chapter, which is as follows: "The city council of cities and boards of trustees of villages shall, within the first quarter of each fiscal year, pass an ordinance to be termed the annual appropriation bill, in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, not exceeding in the aggregate the amount of tax authorized to be levied during that year; and in such ordinance shall specify the objects and purposes for which appropriations are made, and the amount appropriated for each object or purpose. No further appropriations shall be made at any other time within such fiscal year unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city or village, either by a petition signed by them, or at a general or special election duly called therefor, and all

appropriations shall end with the fiscal year for which they were made." In effect, this section requires an annual appropriation for expenses which may be incurred during the current year, and if within that year the appropriation is not exhausted, the portion not used becomes unavailing. Clearly, therefore, such an appropriation could not be made to cover the sums to fall due for a period of perhaps twenty-five years. To hold that the city could not contract for water or hydrant rentals without an antecedent appropriation to defray the sums to fall due would effectually prevent the making of contracts in advance for furnishing water for any period of years. We are therefore of the opinion that in the case at bar it was not necessary to show an appropriation to have been made as a condition precedent indispensable to a right of recovery of judgment against the city.

It was stipulated that the city of North Platte was a city of the second class of less than 5,000 inhabitants; that it was divided into three wards, each of which was entitled to two councilmen; that in April, 1897, P. Walsh, Matt Hook, James Snyder, and W. J. Roche were elected councilmen of said city and M. Oberst and E. Blankenburg held over; that about June 20, 1897, Matt Hook resigned and the vacancy caused by his resignation was filled by appointment about August 1, 1897. In the progress of the consideration of the ordinance under which the water-works asserts its right to compensation the rules were suspended upon the affirmative vote of four members of the council, being all who were present at the time of such suspension, and under such circumstances and upon a like vote the ordinance was finally adopted. It is insisted by plaintiff in error that the ordinance is not binding upon the city, for the reason that in the suspension of the rule above noted there were but four affirmative votes, which constituted but two-thirds of the council. Under the provisions of section 79, chapter 14, Compiled Statutes, ordinances of a general or permanent nature must be fully and distinctly read on three

different days, unless three-fourths of the council shall dispense with the rule. The ordinance was passed by a majority of the entire membership of the council, composed of six members, so that the proposition now urged does not involve the sufficiency of the final vote. The sufficiency of the vote for suspension of the rules by the four members of the council who were present when the rule was suspended is the sole question presented in the attempt to show that the ordinance in question is not binding upon the city, and this question we shall now consider in the light of adjudicated cases.

In *Zeiler v. Central R. Co.*, 84 Md. 304, these were the facts: An ordinance of the mayor and city council of Baltimore authorized the defendant to lay railway tracks upon certain streets. Plaintiff filed a bill for an injunction to restrain the construction of the same, alleging that certain rules of procedure of the two branches of the city council had been violated in the passage of the ordinance, and that it was consequently void. The rules is question were substantially as follows: Rule 9. Every ordinance shall have two readings on two separate days, unless two-thirds of the members of the branch shall by vote otherwise direct. Rule 15. Any standing rule may be suspended upon the assent of three-fourths of the members present, except rule 9. An ordinance was passed under the suspension of the rules, which was ordered by the affirmative vote of fourteen members, which was two-thirds of the members present, but not two-thirds of the entire body. It was held that under rule 9 a vote of two-thirds of the members of the branch present and voting not being less than a majority, was sufficient, and that a vote of two-thirds of all the members of the branch was not necessary. The rule of construction enforced was that when a rule of the council provided that a vote of two-thirds of the members of a branch shall be necessary in certain cases, this means two-thirds of the members present and voting and constituting a quorum, and not two-thirds of all the members

elected. In the course of the delivery of the opinion of the court Page, J., said: "The question now before us must be determined by the proper meaning to be placed upon the words 'members of the branch' as used in the ninth rule. It is now well settled that in all cases a majority of a legislative body is a quorum entitled to act for the whole body, except where the power that creates it has otherwise directed. In *United States v. Ballin*, 144 U. S. 1, the court said: 'Where a quorum is present, the act of the majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations.' There is no act of the state of Maryland that prescribes what number shall constitute a quorum of either of the two branches of the city council. That is determined by the common law, which fixes the 'majority as the legal body,' and under the authority granted by the legislature to 'settle their rules of procedure' there exists no power in either branch, or both, to fix a greater number. (*Heiskell v. Mayor and City Council*, 65 Md. 152.) In that case the court defined a quorum to be 'that number of the body which, when assembled in their proper place, will enable them to transact their proper business; or in other words, that number that makes a lawful body and gives them power to pass a law or ordinance.' It would therefore seem to follow from this that when a 'branch' or 'the members of a branch' are the words used, with nothing to qualify them, and in the absence of a clear intent to the contrary, they must be taken to mean that 'number of the body that makes a lawful body.' To construe the words 'two-thirds of the members of the branch,' as used in the ninth rule, to mean two-thirds of all the members would be to fix a meaning upon them that would deprive the majority of their legal power to act. It would amount to declaring that a majority, constituting the lawful body, intended by a rule of procedure to take away from itself, under certain circum-

stances, the power it rightfully has to do the work it was assembled to do. We think, therefore, it would be anomalous to hold that while a majority is competent to do business, a rule made under a power to settle the 'mode and manner' of conducting the business should be construed in such a manner as to take away from it the power to do business at all, under certain circumstances. 'Two-thirds of the members of the branch,' we are of opinion, means two-thirds of the members voting, not being less than a majority; and not two-thirds of all the members. This view is fully sustained by authority." To sustain the view above expressed there was cited *State v. McBride*, 4 Mo. 308, in which it was held that the requirement of "two-thirds of each house" contemplated the most common meaning of that expression, which is two-thirds of those constituting a quorum to do business. With the same view there was cited *Southworth v. Palmyra & J. R. Co.*, 2 Mich. 287, in which it was held that the requirement of two-thirds of each house contemplated two-thirds of the members present and doing business being a quorum. To the same effect was *Green v. Weller*, 32 Miss. 700. There was also cited *Morton v. Comptroller General*, 4 S. Car. 463, in which was considered the force of a constitutional provision that no law creating a debt should take effect until it had been passed "by a vote of two-thirds of the members of each branch of the general assembly," and in which, after stating that the constitution required the quorum to be a majority, the court said: "It [a quorum] is indeed for all legal purposes as much the body to which it appertains as if all the component parts were present. When, therefore, either branch of the general assembly is spoken of, in the absence of a clear intent to the contrary, the quorum of such body must be understood as intended. It would follow that provisions ascertaining the mode in which the body should divide, in order to complete action in any given case, whether by a mere majority or by a still greater proportion, must be inter-

preted primarily as applicable to the body as legally organized at the time such action is taken. If the rule is the mere majority rule, a majority of the quorum present and acting is intended; if the rule is that of two-thirds, then two-thirds of such quorum must concur for such effective action."

In *Atkins v. Philips*, 8 So. Rep. [Fla.] 429, the second paragraph of the syllabus correctly summarizes one proposition decided, in this language: "Where a municipal charter act provides that a majority of the members of the council shall be required to form a quorum for the transaction of business, and a rule of proceeding adopted by the council prescribes that a proposed ordinance may be passed on its first reading by a majority vote of the members present and then placed on a second reading by a like vote, and, if passed on its second reading, may then be read as passed as a whole on such second reading, but no ordinance shall be put on its third reading at the same meeting at which it is read the first time except by unanimous consent of the council, the term 'unanimous consent of the council' means all the members who may be present at the time the action as to putting the ordinance on its third reading is taken, whether a bare quorum or more. It does not require that every member of the council shall be present and consent."

Plaintiff in error, to meet the above cases, relies upon *Downing v. Rugar*, 21 Wend. [N. Y.] 178, *Lee v. Parry*, 4 Den. [N. Y.] 125, *Powell v. Tuttle*, 3 N. Y. 396, *People v. Supervisors Chenango County*, 11 N. Y. 563, *Fuller v. Gould*, 20 Vt. 643, *Schenk v. Peay*, 1 Dill. [U. S.] 267, and *Williamsburg v. Lord*, 51 Me. 599. These cases we have examined, and find that where they are in point they fall within this language used in *Downing v. Rugar*, *supra:* "The rule seems to be well established, that in the exercise of a public as well as private authority, whether it be ministerial or judicial, all the persons to whom it is committed must confer and act together, unless there

be a provision that a less number may proceed." It was accordingly held that where overseers of the poor were clothed with authority to institute certain proceedings such proceedings could not be commenced by a portion of such overseers.

In *Lee v. Parry, supra*, it was held that a portion of the trustees authorized to apportion a school tax could not act.

In *Powell v. Tuttle, supra*, it was held that where an act required two commissioners to conduct a sale of mortgaged lands a sale by one of them was invalid.

In *People v. Supervisors Chenango County, supra*, it was held that one assessor could not make a valid assessment, but that it must be made by all the assessors, or at least, by a majority of them upon a meeting of all.

In *Fuller v. Gould, supra*, an assessment had been made by assessors, one of whom afterwards entered upon the list a minute that the assessment was vacated. It was held that the listers could treat this entry as an error and restore the assessment as it originally had stood.

The part of the opinion relied on in *Schenk v. Peay, supra*, referred to the force of a curative statute, and it was held that its provisions must be strictly construed.

The paragraph of the syllabus in *Williamsburg v. Lord, supra*, which is a reflex of the portion of the opinion relied upon herein, is as follows: "By law, the board of assessors cannot consist of less than three persons, who shall be qualified by taking the oath prescribed; and where it does not appear that more than two were thus qualified and acted, the tax assessed by them is illegal."

From these cases it appears very clearly that if we are to be governed by the opinion of other courts, we must hold that at the meeting where four councilmen were in attendance it was within their power by a unanimous vote to suspend the rule. There was required by the statute to suspend the rule three-fourths of the council, but in the passage of an ordinance the requirement of a concurrence of a majority of the whole number of mem-

bers elected to the council was sufficient. (Compiled Statutes, ch. 14, art. 1, sec. 76.) It seems to us this particularity in prescribing that the majority in one instance must be of the whole number "of members elected to the council" indicates an intention on the part of the legislature that the general rule should govern provisions in the same chapter as to which no qualifying language was used. We therefore conclude that the rule was properly suspended by the vote by which, under the circumstances, it was attempted, and there being presented no question other than those considered, the judgment of the district court is

AFFIRMED.

WESTERN UNION TELEGRAPH COMPANY v. ELIAS S. BEALS ET AL.

FILED OCTOBER 20, 1898. No. 10163.

1. **Telegraph Companies:** ERROR IN TRANSMITTING MESSAGES: DAMAGES. A telegraph company is liable for all damages sustained by reason of its failure to correctly transmit and deliver a message received by it, notwithstanding an agreement printed on its blanks to the contrary. (Compiled Statutes, ch. 89*a*, sec. 12.)
2. ———: ———. A message was delivered to a telegraph company which read: "Attach property of A for seven hundred ninety dollars." The message as delivered read: "Even hundred ninety dollars." *Held*, That the recipient of the message was not guilty of negligence in interpreting the amount $190.

ERROR from the district court of Brown county. Tried below before WESTOVER, J. *Affirmed.*

W. W. Morsman, for plaintiff in error.

Macfarland & Altschuler, contra.

RAGAN, C.

November 28, 1892, Beals, Torrey & Co., a copartnership doing business in Milwaukee, Wisconsin, by their

attorneys, Winkler and others, delivered to the Western Union Telegraph Company a telegram for transmission and delivery to Alexander Altschuler, also attorney for Beals, Torrey & Co., at Ainsworth, Nebraska. The telegram, together with the printed matter upon the blank upon which it was written, was as follows:

"Send the following message subject to the terms on the back hereof which are hereby agreed to.

"MILWAUKEE, WIS., Nov. 28, '92.

"*To Alexander Altschuler, Ainsworth, Neb.:* Attach property of Sargent & Co. favor of Elias S. Beals, Alexis Torrey, E. Frank Beals, and James L. Beals, copartners doing business here as Beals, Torrey & Co. Claim for goods sold and delivered seven hundred ninety dollars. Claim not yet due. Ainsworth bank will furnish bond. Statement by mail.

"WINKLER, FLANDERS, SMITH, BOTTUM & VILAS.

"Read the notice and agreement on back."

This notice and agreement was as follows:

"All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery or for non-delivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages, and this company is hereby made the agent of the sender, without liability, to forward any message

over the lines of any other company, when necessary to reach its destination. Correctness in the transmission of a message to any point on the lines of this company can be insured, by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz.: One per cent for any distance not exceeding 1,000 miles, and two per cent for any greater distance. No employé of the company is authorized to vary the foregoing.

"(Signed) NORVIN GREEN, *President.*
"THOS. T. ECKERT, *Gen. Mgr.*"

The telegram delivered to Altschuler at Ainsworth read: "Attach property, etc., even hundred ninety dollars." In pursuance of the telegram Altschuler caused the property of Sargent & Co. to be attached in favor of Beals, Torrey & Co. for $190. In the district court of Brown county Beals, Torrey & Co. brought this suit against the telegraph company to recover the remainder of their claim against Sargent & Co. on the ground that the mistake of the telegraph company in transmitting the dispatch caused the loss of said debt. Beals, Torrey & Co. had judgment, to review which the telegraph company has filed here a petition in error.

The first argument of the plaintiff in error is that by the terms of the contract under which the message was transmitted Beals, Torrey & Co.'s right of recovery was limited to the sum paid by them for transmitting the message. In support of this contention counsel has cited us to a long array of cases* which hold that a

**Becker v. Western Union Telegraph Co.*, 11 Neb. 87; *Southern Express Co. v. Caldwell*, 21 Wall. [U. S.] 264; *Kiley v. Western Union Telegraph Co.*, 109 N. Y. 231; *Western Union Telegraph Co. v. Carew*, 15 Mich. 525; *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1; *United States Telegraph Co. v. Gildersleve*, 29 Md. 232; *Passmore v. Western Union Telegraph Co.*, 78 Pa. St. 238; *Grennell v. Western Union Telegraph Co.*, 113 Mass. 299; *Redpath v. Western Union Telegraph Co.*, 112 Mass. 71; *Clement v. Western Union Telegraph Co.*, 137 Mass. 463; *Hart v. Western Union Telegraph Co.*, 66 Cal. 579; *Wann v. Western Union Telegraph Co.*, 37 Mo. 472; *Pegram v. Western Union Telegraph Co.*, 97 N. Car. 57; *Western Union Telegraph Co. v. Hearne*, 77 Tex. 83; *Dixon v. Western Union Telegraph Co.*, 38 N.

telegraph company has a right to make reasonable rules and regulations relative to sending messages and thereby limit its liability for errors not occasioned by its negligence, and that the contract exempting the company from liability for damage for mistakes in transmitting an unrepeated message is a reasonable and enforceable one. Among the cases cited is *Becker v. Western Union Telegraph Co.*, 11 Neb. 87, which sustains the argument of the plaintiff in error. This case was decided at the January, 1881, term of this court. The legislature which convened in this state in January, 1883, enacted what is now chapter 89*a* of Compiled Statutes, section 12 of which chapter provides: "Any telegraph company engaged in the transmission of telegraphic dispatches is hereby declared to be liable for the non-delivery of dispatches entrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, and for all damages resulting from a failure to perform any other duty required by law, and any such telegraph company shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks." After this statute went into force the question was again presented to this court whether a telegraph company which had made a mistake in transmitting a message was protected by the contract printed on the blank that it should not be liable for mistakes or delays in the transmission or delivery or non-

Y. Supp. 1056; *Grace v. Adams*, 100 Mass. 505; *Kemp v. Western Union Telegraph Co.*, 28 Neb. 661; *Wilcox v. Hunt*, 13 Pet. [U. S.] 378; *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397; *Hibbard v. Western Union Telegraph Co.*, 33 Wis. 558; *Candee v. Western Union Telegraph Co.*, 34 Wis. 471; *Thompson v. Western Union Telegraph Co.*, 64 Wis. 531; *Cutts v. Western Union Telegraph Co.*, 71 Wis. 46; *New York C. R. Co. v. Lockwood*, 84 U. S. 357; *McFadden v. Missouri P. R. Co.*, 92 Mo. 343; *Harvey v. Terre Haute & I. R. Co.*, 74 Mo. 538; *Hart v. Pennsylvania R. Co.*, 112 U. S. 332; *Pacific Express Co. v. Foley*, 46 Kan. 457; *Ballou v. Earle*, 17 R. I. 441; *Alair v. Northern P. R. Co.*, 53 Minn. 160; *Zouch v. Chesapeake & O. R. Co.*, 36 W. Va. 524; *Shackt v. Illinois C. R. Co.*, 94 Tenn. 658; *Durgin v. American Express Co.*, 66 N. H. 277; *Duntley v. Boston & M. R. Co.*, 66 N. H. 263; *New York C. & H. R. R. Co. v. Fraloff*, 100 U. S. 24; *Magnin v. Dinsmore*, 62 N. Y. 35; *Graves v. Lake Shore & M. S. R. Co.*, 137 Mass. 33; *Richmond & D. R. Co. v. Payne*, 86 Va. 481; *Douglas Co. v. Minnesota T. R. Co.*, 62 Minn. 288.

delivery of any unrepeated message beyond the amount received for sending same; and it was ruled that the company, by reason of the statute just quoted, was liable for all damages sustained by its failure to correctly transmit and deliver the message received by it, notwithstanding the clause, condition, or agreement on its printed blanks. (*Kemp v. Western Union Telegraph Co.*, 28 Neb. 661.) To the same effect: *Pacific Telegraph Co. v. Underwood*, 37 Neb. 315, and *Western Union Telegraph Co. v. Kemp*, 44 Neb. 194.) We think it clear beyond all controversy that the statute just quoted was enacted by the legislature for the express purpose of obviating the effect of the decision of this court in *Becker v. Western Union Telegraph Co.*, 11 Neb. 87. The cases cited by counsel for the plaintiff in error, because of the provision of our own statute, cannot be regarded as authority by us in support of the telegraph company's contention. Not one of these cases, we think, was influenced by such a statute as the Nebraska statute, nor decided in a jurisdiction in which existed such a statute. It seems to be the contention of counsel for the telegraph company that the contract printed on the telegraphic blank does not attempt and was not intended to exempt the telegraph company from liability for the negligence of itself or its employés. We quote the argument of the eminent counsel in his brief:

"The primary and important question is, is the contract under which the message was transmitted, providing, *inter alia*, that the company 'shall not be liable for mistakes * * * in the transmission * * * of any unrepeated message beyond the amount received for sending the same,' valid? It is the contention of the plaintiff in error that this provision is valid; that it does not violate any principle of the common law; that it is not in conflict with any statute of the state of Wisconsin or of the state of Nebraska; that the object and effect of the contract * * * is not to exempt the company from responsibility for negligence, * * * but to offer

to the public a reasonable and practicable method of preventing errors and their injurious consequences, to secure a due proportion between charges and risk, and to protect the company against claims which, at the time of entering into the contract, cannot be known or foreseen, and for which, therefore, the company receives no compensation. * * * It may be fully admitted at the outset that this company cannot avail itself of any stipulation, the design of which is to exempt it from the consequences of its own negligence, or that of its servants. The question is not whether the company can stipulate for exemption from liability for the negligence of itself or of its employés. Nor is the question whether it can so stipulate when the negligence is only ordinary as distinguished from gross. The proposition is that the contract does not provide for exemption at all, but provides the means of avoiding errors and due compensation to the company for the service rendered and the risk assumed. If the contract be rightly interpreted, negligence does not enter into the consideration of its validity at all."

As we understand this argument it is that the contract printed on the telegraphic blank exempting the company from liability for a mistake in transmitting an unrepeated message beyond the amount paid for transmitting the same does not conflict with the statute quoted. We think it does. The contract on the blank provides: "It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated message." The statute provides that the telegraph company "is hereby declared to be liable for the non-delivery of dispatches entrusted to its care and for all mistakes in transmitting messages made by any person in its employ; * * * and any such telegraph company shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed

blanks." Our conclusion is that by the contract printed on its blanks the telegraph company seeks to exempt itself from liability for damages for mistake or neglect in transmitting or delivering an unrepeated message and that the statute declares all such contracts unenforceable. The statute of Wisconsin—the state in which the contract for the transmission of the message in controversy was made—provides: "Any person, association, or corporation, operating or owning any telegraph lines doing business in this state, shall be liable for all damages occasioned by failure or negligence of their operators, servants, or employés, in receiving, keeping, transmitting, or delivering dispatches or messages." This statute is not materially different from our own. The Wisconsin statute was construed by the supreme court of that state in *Cutts v. Western Union Telegraph Co.*, 71 Wis. 46, 36 N. W. Rep. 627. In that case Lyon, J., speaking for the court, said: "It is claimed by counsel for the plaintiff that the above law renders each telegraph company doing business in this state liable for any and all damages sustained through its negligence in respect to the transmission of messages delivered to it for that purpose, and flowing directly and approximately therefrom, even though the import of the telegram is wholly unknown to the company's agents, as in the case of cipher dispatches not translated to the agent. We shall not attempt an interpretation of this statute any further than to hold that it does render telegraph companies liable for the damages resulting directly from their negligence in the matter of transmitting messages; especially where, as in this case, the agent of the telegraph company is acquainted with the contents and significance of the message." It will thus be seen that both by the law of Wisconsin, where the telegraphic contract in controversy was made, and the law of Nebraska, where the message was delivered, a contract entered into between a telegraph company and its patrons the effect of which is to exempt the company from liability for damages sus-

tained by its patrons by reason of the mistake or neglect of the telegraph company to correctly transmit and deliver an unrepeated message is illegal and unenforceable.

A second argument is that Altschuler's negligence contributed to the injury sued for. As already stated, Altschuler interpreted the message received by him "$190," and caused an attachment to be issued in favor of his client for that sum. But the message as delivered to Altschuler was not unintelligible. It was not couched in extraordinary or unusual language. Altschuler would certainly have been guilty of negligence had he interpreted the message received by him to read seven hundred ninety dollars. The expression "even hundred ninety dollars" was not different in meaning from what it would have been had it read "$190 even," and the interpretation placed on the message by Altschuler was a reasonable one. We do not think that the language of the message was of such a character as to give Altschuler reasonable cause for suspecting that a mistake had been made in its transmission. The foregoing are the only contentions which we deem it necessary to notice. There is no error in the record and the judgment of the district court is

AFFIRMED.

RODNEY K. JOHNSON V. JOSEPH B. BARTEK, SHERIFF.

FILED OCTOBER 20, 1898. No. 8053.

1. **Attachment:** RES JUDICATA: PROPERTY. The judgment of a court sustaining an attachment does not settle the status of the attached property,—that is, it does not determine whether or not it was exempt from seizure on attachment.

2. **Exemption.** The exemption provided for by section 521 of the Code of Civil Procedure was intended by the legislature to be an exemption in addition to the property specifically exempted to the debtor by section 530 of said Code.

3. ———: RELEASE OF LEVY: ACTION AGAINST SHERIFF. An officer sued by a creditor for releasing the property of his debtor which

had been seized on attachment may successfully defend himself by showing that the property was as a matter of law specifically exempt from seizure.

4. ———: ———: APPRAISEMENT. No statute exists requiring or authorizing the officer to have such property appraised before releasing it to the debtor.

5. ———: ———: ———. The appraisal which section 522 of the Code requires to be made of property seized on judicial process, and claimed by the debtor to be exempt, has no reference whatever to property specifically exempted by section 530 of the Code.

REHEARING of case reported in 54 Neb. 787. *Judgment below affirmed.*

Clark & Allen, for plaintiff in error.

Good & Good, contra.

RAGAN, C.

This is a rehearing of *Johnson v. Bartek*, 54 Neb. 787. Johnson sued Scott before a justice of the peace and caused a writ of attachment to be issued and Scott's property seized thereon. The ground of the attachment was that Scott was a non-resident of the state. Scott subsequently appeared before the justice and moved to discharge the attachment. His motion was overruled, the attachment sustained, judgment rendered against him, and the justice issued an order for the sale of the attached property. Scott then filed with the sheriff an inventory, under oath, of all the property which he owned, accompanied by an affidavit alleging that he was a resident of the state, the head of a family, and that he had neither houses, lands, nor town lots exempt as a homestead; and thereupon the sheriff attempted to have the property appraised in accordance with section 522 of the Code of Civil Procedure. The appraisers fixed the value of all Scott's property at less than $100, and thereupon the sheriff turned over the property he had attached to Scott. This suit was brought by Johnson against the sheriff to hold him liable for the amount of the judgment against Scott, because of his release of the

property attached. The court below directed a verdict for the sheriff, and Johnson brought the case here on error. On the former hearing we reversed the judgment of the district court, solely upon the ground that the appraisement which the sheriff attempted to have made of the attached property was void, as it was made by only two appraisers and the statute required three.

1. The argument of the plaintiff in error is that the order or judgment of the justice of the peace overruling the motion to discharge the attachment fixed the status of the attached property—that is, adjudicated that it was not exempt and was liable to be sold for the satisfaction of the judgment rendered in the case in which the property was seized; and, since this judgment stands unreversed and unappealed from, both the debtor and the sheriff are now estopped from asserting that the property was exempt and was not liable to be sold to satisfy that judgment. To support this contention counsel cite us to *State v. Sanford*, 12 Neb. 425, and *State v. Krumpus*, 13 Neb. 321. Those cases sustain the contention of counsel, and the decisions were based upon the doctrine that attached property is in the custody of the law, and the judgment of the court sustaining the attachment includes a judgment that the property is not exempt. But these cases were expressly overruled by this court in *Hamilton v. Fleming*, 26 Neb. 240, and *State v. Carson*, 27 Neb. 501; and the doctrine of the court now is that the judgment of a court sustaining an attachment does not settle the status of the attached property,—that is, does not determine whether or not it was exempt from seizure on attachment. (*State v. Wilson*, 31 Neb. 462; *Smith v. Johnson*, 43 Neb. 755.) The reason for the rule was stated by HARRISON, J., in *Quigley v. McEvony*, 41 Neb. 73, to be that the question as to whether attached property is or is not exempt is not an issue involved in an attachment proceeding; that the issue involved in that proceeding is whether or not the grounds stated in the affidavit for attachment are true. It therefore follows

that an officer sued by a debtor for selling exempt property could not successfully defend solely by showing that he seized the property on attachment, and that the attachment, on motion of the debtor to dissolve, was sustained. He would have to go further and show either that the property was not exempt from seizure or that the debtor had waived his exemption.

2. As already stated, we held on the former hearing that the attempted appraisement made of the property in question by the sheriff was void. We adhere to that conclusion. But the undisputed evidence in the case shows that the property which the sheriff released was property specifically exempt from sale on judicial process by section 530 of the Code of Civil Procedure; and the contention of the defendant in error is that, notwithstanding the attempted appraisement was void, the judgment of the district court was right, since no statute exists authorizing or requiring the sheriff to have specifically exempt property appraised. The territorial legislature of Nebraska in 1859 exempted from sale on judicial process a homestead not exceeding 160 acres of land outside of a municipal corporation, or land consisting of not more than two contiguous lots within an incorporation, and at the same time provided how lands levied upon and claimed as a homestead might be selected and set apart; and in the same year it enacted what is now section 530 of our Code of Civil Procedure, specifically exempting from sale on judicial process certain specifically named property of the debtor. Neither at that time, nor at any time subsequent thereto, has the legislature provided in what manner specifically exempt property seized on execution or attachment should be determined. It enumerated the articles of property which the debtor might hold as exempt, and specifically forbade the seizure of those articles by sheriffs or constables. The law of 1859 in that respect remains unchanged. An officer seizes property which is specifically exempt at his peril, and when sued for refusing to seize

such property on process, it would seem that he might successfully defend himself by showing that it was specifically exempt. In 1860 the territorial legislature, perhaps for the purpose of equalizing somewhat the exemption between those who owned lands and those who did not, enacted what is now section 521 of our Code of Civil Procedure, which provides that "All heads of families who have neither lands, town lots, nor houses subject to exemption as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property;" and the same legislature enacted what are now sections 522 and 523 of our Code of Civil Procedure, which provide, in substance, that any person desiring to avail himself of the $500 of exemption allowed him in lieu of a homestead might file an inventory under oath in the court where the judgment was obtained against him, or with the officer holding the execution, of all the personal property owned by him, at any time before the property seized on execution had been sold, and the officer thereupon should cause the property to be appraised; and the debtor might select, at the appraisement made thereof, $500 worth of his property and hold it exempt. The exemption provided for by this section 521 was intended by the legislature to be an exemption in addition to the property specifically exempted by section 530 of the Code. (*Williams v. Golden*, 10 Neb. 432.)

We thus see that the legislature has divided property which is exempt from seizure by judicial process into two classes. The property of the first class is enumerated in section 530 of the Code of Civil Procedure. That property is specifically exempted, not only to the resident and citizen who owns a homestead, but to the one who does not. The other exemption is a general one awarded to heads of families in the state who have neither lands, town lots, nor houses subject to exemption as a homestead; and he who claims that exemption is required to file an inventory and have the property appraised as re-

quired by section 522 of the Code. In such an inventory the property specifically exempted from sale on judicial process by section 530 of the Code should not be included, or if included and appraised, the debtor, in making his selection, may first take out that specifically exempt property and then take $500 worth of the other property. It follows, therefore, we think, that when an officer is sued by a creditor for releasing the property of his debtor which had been seized on attachment or execution, he may successfully defend himself if he shows (1) that the property was, as a matter of law, specifically exempt from seizure, or (2) that it was exempt under section 521 at the election of the debtor, and that he had exercised his right to have it declared exempt by complying with the statute in that respect. In the case at bar the property in controversy was specifically exempt under section 530 of the Code, and it was not necessary for the officer to cause it to be appraised in order to shield himself from liability for returning it to the debtor. No statute exists authorizing him to have such property appraised. He, like every one else, must know the law. He must determine for himself, at his peril, whether or not property is specifically exempt. If he makes a mistake and sells specifically exempt property, he cannot escape liability therefor by showing that he had the property appraised in accordance with section 521 of the Code. On the other hand, if the property is specifically exempt and he releases it, he is not liable to the creditor, because he did not have it appraised in accordance with said section. The judgment of the district court is

AFFIRMED.

NORVAL, J., dissenting.

I agree that an order sustaining a writ of attachment is not an adjudication whether or not the property levied upon was exempt from judicial process, and that the exemption in favor of a debtor of personal property to the

value of $500, provided by section 521 of the Code of Civil Procedure, is in addition to the specific exemptions designated in section 530 of said Code, but I do not assent to the proposition that in an action by a creditor against a sheriff for releasing property seized by him under an attachment it is a sufficient defense for the officer to show that the property was specifically exempt to the debtor. This doctrine implies that an officer may plead such exempt character of the property, although the debtor never claimed it was so exempt, and it was not released on that ground. It is too well settled to require the citation of authorities in support thereof that the statutory exemption of chattels from levy and sale on execution or attachment is a personal privilege which must be claimed by the debtor, or his agent or representative, before the sale or the right will be lost. And this rule is as applicable to the specific exemptions enumerated in section 530, as to the exemption of $500 in lieu of a homestead authorized by section 521, since said section 530, after enumerating the personalty specifically exempt, declares that "all of which articles hereinbefore intended to be exempt, shall be chosen by the debtor, his agent, clerk, or legal representative, as the case may be."

It is manifest that property levied upon which is specifically exempt must be claimed as such before sale either by the debtor himself or some one by him duly authorized to act in his behalf. There is in this record not a particle of evidence tending to show, nor is there any averment in the answer, that the attaching debtor, Scott, ever demanded of the sheriff that the property be returned to him on the ground that it was specifically exempt, or that it was released as being exempt under section 530. On the contrary, the uncontradicted evidence discloses that the debtor and officer alike acted upon the theory that the property was exempt under section 521. Scott filed with the sheriff such an inventory of his personal property as required by section 522 of said

Code to entitle a debtor to avail himself of the $500 exemption provided by section 521, and the sheriff attempted to appraise the property under section 522, but called to his assistance as appraisers only two freeholders, instead of three as by said section required. The appraisement was therefore invalid and constituted no justification to the officer to release the property from the levy of the attachment. The trial court directed a verdict for the defendant on the theory that the property was exempt under section 530, while the debtor, so far as this record shows, never claimed the property was specifically exempt, and this court approves and sanctions the judgment rendered on the verdict. I am unable to reach the conclusion that an officer can release from the levy of an attachment personal property as being exempt under section 521 of said Code, and afterwards justify his action by showing that the chattels were specifically exempt, when the debtor had never claimed that they were so exempt. Scott waived his right to assert the specific exempt character of the property, and it is no justification to the sheriff to establish the property was exempt under the provisions of said section 530. Under the decision of the majority, carried to its logical extent, if a sheriff releases his levy upon personal property because the debtor was not the owner thereof, or for any other cause, the officer may defeat a suit brought against him by the creditor for such release, by establishing that the property was exempt, although the debtor had never claimed his exemption. The judgment of the district court is wrong and should be reversed.