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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1899.

VOLUME LVIII.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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THE SUPREME COURT

OF

NEBRASKA.

1899.

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J. J. SULLIVAN.

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SUPREME COURT COMMISSIONERS.

(Laws 1893, chapter 16, page 150.)

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

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

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

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1899.

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.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. MARGARET E. OYSTER, ADMINISTRATRIX.

FILED FEBRUARY 23, 1899. NO. 8642.

1. **Death by Wrongful Act:** WHO MAY SUE. Under chapter 21, Compiled Statutes, an action for the wrongful death of a person may be maintained by his personal representative, where the person deceased left surviving him some one belonging to the class for whose benefits the statute was enacted, who has sustained pecuniary loss by his death.

2. ———: DAMAGES. The damages recovered in such an action are assets for proper distribution to "the widow and next of kin" of the decedent.

3. ———: PETITION: CONTENTS. A petition under Lord Campbell's act should disclose the names of all the beneficiaries, but if the names of the surviving minor children of the decedent who were dependent upon him for support are averred, the omission to

allege whether or not he left a widow will not render the pleading bad on demurrer.

4. **Pleading:** HARMLESS ERROR. One cannot predicate error on the refusal to require the pleading of the opposite party to be made more definite and certain where prejudice has not resulted from the ruling.

5. **Review:** ASSIGNMENTS OF ERROR. An assignment in a petition in error that "the verdict of the jury is not sustained by sufficient evidence, and is not in accord with the evidence and instructions," is sufficiently definite and specific to require the appellate court to review the evidence preserved in the bill of exceptions to ascertain whether the same supports the finding and judgment.

6 **Master and Servant:** NEGLIGENCE: BURDEN OF PROOF. The burden is on the master, if it claims it, to show that the injuries received by a servant were caused by the negligence of a fellow-servant.

7. ———: ———: PLEADING. Whether such a defense must be specifically pleaded to be available is not decided.

8. ———: ———: ———. A general allegation in an answer of contributory negligence on the part of the plaintiff is good as against a demurrer *ore tenus*.

9. ———: ———: RULES. Rules of a railway company are not binding on an employé who it is not shown had notice or knowledge thereof.

10. ———: ———: RES GESTÆ. The testimony of a witness describing the positions of decedent and the engine shortly after the accident which resulted in the death of the plaintiff's intestate was admissible as *res gestæ*.

11. **Instructions.** A party cannot predicate error upon the giving of a vague instruction, unless he has requested a proper one.

12. ———: REVIEW. Upon review instructions should be considered as an entirety.

13. **Railroads:** APPLIANCES: NEGLIGENCE. A railroad company is only required to exercise reasonable and ordinary care and diligence in furnishing its employés reasonably safe road-bed, machinery, and appliances for the operation of its road. The law does not impose the absolute duty of providing a reasonably safe roadway, but makes the company liable for negligence in that regard.

14. **Instructions:** CONFLICTING STATEMENTS. An erroneous instruction is not cured by merely giving another instruction stating the law correctly on the subject.

15. **Jurors:** PRIVATE VIEW OF PREMISES: HARMLESS ERROR. In an

action against a railroad company for wrongfully causing the death of plaintiff's intestate misconduct of jurors in visiting and examining the locality of the accident, without permission of the court or knowledge of the parties, is not ground for setting aside the verdict, where it is disclosed that such view did not influence the finding.

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

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

Abbott, Selleck & Lane and *S. A. Dravo, contra.*

NORVAL, J.

Action by Margaret E. Oyster, administratrix of the estate of Granville R. Oyster, deceased, against the Chicago, Burlington & Quincy Railroad Company to recover damages for negligently causing the death of decedent. Plaintiff obtained a verdict in the sum of $5,000, and the defendant has instituted this proceeding for the purpose of securing a reversal of the judgment entered thereon.

A brief reference to the issues presented by the pleadings in the cause will aid in an understanding of the questions urged upon our attention. The petition avers the appointment and qualification of the plaintiff as administratrix of the estate of Granville R. Oyster, deceased; the incorporation of the defendant and the operation by it of a line of road extending from the Missouri river through the city of Holdrege to the east line of the state of Colorado; the employment of decedent by the defendant as a locomotive engineer on and for some time prior to July 29, 1894; that on said date, in the proper and careful discharge of the duties of his said employment, and under the directions of defendant and its officers and agents, the said Oyster was running the engine used to pull the regular night passenger train from McCook to Hastings, and when said engine arrived at the city of Holdrege it ran into an open switch, left the rails of the

track, overturned, violently throwing said Oyster down under the engine, breaking his leg, bruising and scalding his flesh, and from which injuries he died the second day thereafter; that said accident was occasioned through no fault, failure of duty, or negligence of decedent, but by reason of the defendant having negligently, carelessly, and wrongfully left open said switch without proper, usual, and customary display of signal lights or other means of warning so as to advise him of the open switch and the condition of the road-bed, and that Oyster left surviving him six minor children, whose names and ages are stated in the petition, who were wholly dependent upon him for support, and by reason of his death are left helpless and destitute. The defendant filed a motion to require the plaintiff to make her petition more definite and certain by alleging therein whether the intestate left surviving him any widow. This motion was denied by the court, whereupon a general demurrer to the petition was interposed and overruled. An answer was filed which admits the incorporation of the defendant, and the employment of plaintiff's intestate; denies the appointing of Margaret E. Oyster as administratrix, and avers "that the accident, whereby the death of Granville R. Oyster was caused, was the result of his own carelessness, negligence, and disobedience of the rules and regulations of the defendant governing his conduct as a locomotive engineer, and that said accident was caused without any fault or negligence on the part of the defendant." It is further pleaded in the answer that the person deceased left at the time of his death surviving him his wife, the said plaintiff Margaret E. Oyster; that said action is not brought for the benefit of the widow, and hence there is a defect of parties plaintiff and the action should abate and be dismissed. The answer closes with a general denial of each averment contained in the petition, except those previously admitted. The reply admitted that Margaret E. Oyster was the decedent's widow, and then denied all the other allegations in the answer.

The petition contains no averment as to whether or not Oyster left surviving him any widow, and it is argued from this that no cause of action is stated against the defendant, and that the motion to make the petition more definite and certain in that particular should have been sustained. The action was under chapter 21, Compiled Statutes, called "Lord Campbell's Act." Section 2 of said chapter declares: "That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars." This section has more than once been considered by this court, and the uniform holding has been that an action for the wrongful death of a person cannot be maintained where it is not disclosed that the decedent left surviving him some one belonging to the class for whose benefit the statute was enacted, and who has sustained pecuniary loss by the death of the deceased person. (*Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95; *Kearney Electric Co. v. Laughlin*, 45 Neb. 390; *Orgall v. Chicago, B. & Q. R. Co.*, 46 Neb. 4; *City of Friend v. Burleigh*, 53 Neb. 674; *Omaha & R. V. R. Co. v. Crow*, 53 Neb. 747.) The damages recovered by a personal representative of a deceased person for the wrongful death of the intestate are assets for the proper distribution to "the widow and next of kin," and are not subject to the payment of the debts of the decedent. A petition therefore under Lord Campbell's act is defective which fails to disclose that the person deceased left a widow or next of kin

depending upon him for support. (*Burlington & M. R. R. Co. v. Crockett*, 17 Neb. 570.) Manifestly it was not the intention of the legislature to give an action under said act only where both a widow and next of kin survive the person deceased. The action is well planted if there exists either a widow or next of kin on whom the law confers the right to be supported by the person killed. It is evident this is the meaning of the section quoted, and the petition in this cause disclosing that Granville R. Oyster left him surviving six minor children, who were depending upon him for maintenance, the action was instituted for the benefit of persons within the class named in the statute. The demurrer was properly overruled.

The statute authorizes the action to be brought for the benefit of the widow and next of kin, and the petition should disclose all beneficiaries,—that is, whether the decedent left a widow or next of kin, or both; but it is very evident that the defendant was not prejudiced by the denial of its motion to require the plaintiff to aver in the petition whether a widow survived the intestate, for the reason the defendant subsequently pleaded in its answer that Margaret E. Oyster, who sued as administratrix, was the widow of the decedent, and the reply admitted such averment to be true. So all the beneficiaries were named in the pleadings, and the existence of a widow was not a controverted point in the case. Certainly the fact that one of the beneficiaries was not mentioned in the petition could militate only against the plaintiff, and that in the assessment of the amount of damages. There is no defect of parties plaintiff. Margaret E. Oyster was the sole administratrix of the estate, and the action was properly brought by her in her representative capacity for the benefit of those in whose behalf it was prosecuted. She was the personal representative of the intestate, and alone could maintain the action. The widow or next of kin were not necessary parties thereto, but the damages recovered inured to their exclusive benefit.

The verdict is assailed as being against the evidence. Counsel for the administratrix insist that this question is not properly presented for review by the petition in error. The tenth assignment therein is as follows: "The verdict of the jury is not sustained by sufficient evidence, and is not in accord with the evidence and instructions given." It is conceded that this would be a sufficient assignment in a motion for a new trial, but it is argued that it is too indefinite and uncertain for a pleading in this court. The rule is that alleged errors must be specifically pointed out in the petition in error, and that mere general assignments are unavailing. But the rule has never been carried to the extent now pressed by counsel. We have never required that the petition in error should specify the particular branch of the case, or the question of fact raised by the record, it is claimed the evidence was insufficient to sustain. We regard the objection now raised as entirely too technical and devoid of merit. The assignment is sufficiently definite to require the consideration of the evidence certified up in the bill of exceptions to ascertain whether the verdict is contrary thereto.

There is but little, if any, conflict in the evidence. It is disclosed that Granville R. Oyster, plaintiff's intestate, was an experienced and careful engineer, and had been in the employ of the defendant for several years preceding the accident, in charge of an engine drawing a regular passenger train between McCook and Hastings. On the night of July 29, 1894, he started on his regular run from McCook, reaching Holdrege on the regular schedule time, about 12:40 A. M. West of this last named station is a switch connecting the main line with a side track. This switch had been negligently left open, so that a train from the west would enter the side track, instead of remaining on the main line. The switch had been usually provided with a lantern to serve as signal to trainmen of the position of the switch. White lights were exposed if the main line was open for the passage of trains, while red lights were exhibited if the switch was thrown for

entering the side track. One of these lanterns, early in the evening of the accident, had been placed on the switch stand by a section-man, but the light had either been extinguished or had gone out three hours before, and was not burning at the time engineer Oyster reached it with his train, nor was any signal exposed to indicate that the switch was not closed, nor was any warning given that he was approaching danger. The night was dark and the train at the time was running at a moderate and reasonable rate of speed. When the train reached the switch, the engine on entering it was derailed, inflicting injuries upon Oyster, from the effects of which he soon thereafter died. Each and every averment in the petition is amply sustained by the evidence. The jury were justified in finding that the leaving of the switch open without any signal or warning advising the engineer of such fact was the proximate cause of the injury. (*Lake Shore & M. S. R. Co. v. Wilson*, 38 N. E. Rep. [Ind.] 343.) The defendant seeks to escape liability on two grounds: First, the accident was attributable to the acts of a fellow-servant; second, plaintiff's intestate was guilty of contributory negligence. These objections will now receive attention.

In the first place it should be stated that the claim that the accident was occasioned by the negligence of a fellow-servant of Oyster was not pleaded in the answer. The burden was on the defendant to establish the defense, and it well may be doubted whether it was available without being pleaded. (*Chicago & A. R. Co. v. House*, 50 N. E. Rep. [Ill.] 151; *Nicolaus v. Chicago, R. I. & P. R. Co.*, 57 N. W. Rep. [Ia.] 694; *Patterson v. Houston & T. C. R. Co.*, 40 S. W. Rep. [Tex.] 442.) The evidence, however, fails to reveal that it was a fellow-servant who locked the switch in question for the side track. It was shown that a train crew who had charge of a train which had arrived at Holdrege that evening over the Edgar branch had been using this side track and the switch in question, but it does not appear any one of said crew

left the switch open, which caused the accident. Moreover, the evidence adduced fails to establish that the employment and duties of those in charge of the Edgar train were such as to constitute them fellow-servants with plaintiff's intestate within the rule laid down in the decisions of this court on that subject.

As to the defense of contributory negligence counsel representing the plaintiff below insist that it was not pleaded in the answer, and hence must be disregarded here. There is no room to doubt that it is an affirmative defense, and when relied upon must be raised by suitable averments. This court, in harmony with the decisions in other jurisdictions, has decided that a general allegation of negligence in a petition is sufficient as against a demurrer. (*Omaha & R. V. R. Co. v. Wright*, 49 Neb. 456.) And by a parity of reasoning a general averment in an answer charging contributory negligence on the part of plaintiff is good, unless assailed by a motion to make more definite and certain. In the case at bar the answer, in general terms, as we have already seen, pleads that the negligence of plaintiff's intestate contributed to the injury, and but for which the accident would not have occurred. The answer not having been assailed by motion, it must be held sufficient to raise the defense of contributory negligence. The argument in support of this defense is that there being no light displayed on the switch stand it was the duty of Oyster to have stopped his engine, and his failure so to do was in direct violation of the rules of the company, and the cause of the injury. There was introduced on the trial, over the objections of plaintiff, a book entitled "Rules of the Transportation Department," which purports to have been issued by the general manager of the Burlington & Missouri River Railroad Company in Nebraska. Rule 65, as contained in said book, is in the language following: "A signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as a danger signal, and the fact reported to the superin-

tendent." The evidence tending to prove that said rules, including the one quoted above, were promulgated by the proper officer of the defendant company is quite meager and unsatisfactory. But waiving this point, for the purpose of the present investigation, it is not disclosed by competent proofs that the decedent ever saw or knew of the rule above quoted, and which it is claimed he violated by failing to stop his engine before reaching the switch. The witness C. A. Dixon, called on behalf of the company, testified in a general way that the engineers under him have a book of rules and instructions which govern and control them in the operation of trains, but it was not shown by the witness, or by any one else, that Oyster had any knowledge of the existence of the rule in question. Objection to the admission as testimony of said rule was distinctly made on that ground at the time. The proposition is not only sound on principle, but is abundantly supported by authority, that rules of a railway company are not binding on an employé unless he has notice thereof, or the same have been brought to his knowledge. (*Alabama M. R. Co. v. McDonald*, 20 So. Rep. [Ala.] 472; *Louisville, N. A. & C. R. Co. v. Berkey*, 35 N. E. Rep. [Ind.] 3; *Atchison, T. & S. F. R. Co. v. Plunkett*, 25 Kan. 188; *Covey v. Hannibal & S. J. R. Co.*, 27 Mo. App. 170; 14 Am. & Eng. Ency. Law 908, 909.) It not having been established that the decedent was aware of the existence of the rule, manifestly he cannot be charged with contributory negligence in violating the same. Whether a party is guilty of contributory negligence is usually a question of fact, and from a perusal of this record we cannot say that the triers of fact were not fully warranted in finding that plaintiff's intestate was free from any negligence which contributed to the accident.

In the brief of the company it is stated that "the court permitted witness Daily (p. 15), Dr. Miller (p. 24), and Mrs. Oyster (p. 46) to testify as to Oyster's physical condition after the hurt, the extent of his bodily injuries,

and the length of time he was held under the engine and suffered pain," and it is urged that such testimony was erroneously admitted. An examination of the pages of the bill of exceptions indicated above reveals that no one of the witnesses named testified, against an objection, to the pain and suffering of the decedent. It is true the witness Daily described the position of Oyster under the engine, the length of time he was held there, and how the engine was taken off. This was a part of the *res gestæ*, and for that reason was competent evidence.

Dr. Miller, a physician and surgeon, was called to see Oyster shortly after the accident, and during the same night. The witness was permitted to answer but two questions, to which objections had been interposed by counsel for defendant, which questions, with the objections, and the answers made by the witness follow:

Q. What condition did you find Mr. Oyster in?

Defendant objects, as immaterial under the issues joined. Overruled. Exception.

A. I found him prostrate from an injury.

Q. What sort of an injury?

Defendant objects, as immaterial under the issues joined. Overruled. Defendant excepts.

A. He had a fracture of the small bone of the left leg, as well as extensive injuries to the soft tissues and muscles and flesh.

The witness further testified, without objection, that he remained with the patient continuously, and rendered him proper and necessary medical treatment, until death, and that Oyster died from the shock resulting from the injury.

Mrs. Oyster testified that she arrived at Holdrege the morning after the accident and remained with her husband until the evening of July 31, when he died. She testified, against objection of defendant, that she found her husband "just resting. He had not roused up from the accident, but did in a very few minutes."

It requires one with a keener perception than the writer

possesses to discover any prejudicial error in all this testimony, which merely showed the extent of decedent's injuries and how they occurred. The testimony did not unduly tend to excite the sympathy of the jury.

Some of the instructions to the jury given by the court at the request of the plaintiff are assailed as being erroneous. In the first three of these instructions the jury were told, in substance, that it was the duty of the defendant to use all reasonable care and foresight to provide such lights and signals for the switches as were necessary and reasonable for the safety of Oyster in the prosecution of his duties, and to exercise all reasonable care in inspecting and keeping in proper order and condition for use its lights, lamps, signals, and switches. The vice imputed to these instructions was that they did not inform the jury what constituted reasonable care. If the defendant desired the jury to be advised upon that point, it should have tendered an appropriate instruction, and requested the court to give it. Not having done so, it cannot predicate error upon the failure of the court to define what constituted reasonable care. (*German Nat. Bank of Hastings v. Leonard*, 40 Neb. 676; *Barr v. City of Omaha*, 42 Neb. 341; *Gran v. Houston*, 45 Neb. 813; *Carter White Lead Co. v. Kinlin*, 47 Neb. 409; *Ferguson v. State*, 52 Neb. 432.)

Instruction No. 4, given at the request of plaintiff below, reads thus: "You are instructed that the said Granville R. Oyster was not obliged to know or inquire beforehand whether or not the switch was properly placed, and whether or not the proper lights and signals had been placed, but in the absence of absolute knowledge to the contrary he had the right to assume that all that could reasonably be done to render the roadway safe had been done; there is an implied undertaking or obligation on the part of the defendant with its employés to see that all that can reasonably be done to make the road safe had been done." By this instruction the court did not purport or attempt to state principles which

should guide the jury in the determination of every feature of the case, but merely stated to the jury, in a general way, the obligations and duties resting upon the master relative to the furnishing of its employé with reasonably safe appliances for the performance of his duties, and that such employé had the right to assume, in the absence of the want of knowledge to the contrary, that the master has done all that could reasonably be required of him in that regard. So far as the instruction went the correct rule was enunciated therein. It did not purport to treat of the question of contributory negligence. That feature of the case was fully covered by other instructions in a more favorable way to the defendant than the law and facts warranted. The fourth instruction did not make it the absolute duty of the defendant to provide a safe road-bed and appliances. It obliged the company only to exercise reasonable care in that regard, and this the law required. The rule is that instructions must be construed together, and when thus interpreted they properly state the law, error cannot be predicated thereon. This principle has been so frequently stated by this court as to make the citation of the authorities in support thereof superfluous. It is said, in argument, that the instruction quoted abrogated and nullified the rule promulgated by the company for the guidance of Oyster, the observance of which on his part would have saved his life. There are two answers to this contention. The decedent was not bound by the rule in question, since it was not shown that knowledge thereof was ever brought home to him. Again, by the third instruction given at the request of the defendant the jury were informed that if the accident was occasioned by reason of Oyster disregarding a rule of the company, the plaintiff could not recover. It follows that the defendant was not prejudiced by the giving of the fourth instruction.

In the sixth instruction the jury were told "that it was the duty of the defendant company to provide the said

Granville R. Oyster with a reasonably safe and clear road-bed upon which to operate said engine and train; and further, that the said Granville R. Oyster had a right to rely on the defendant's performing its duty in that regard, and if the defendant failed in this duty it would be liable to, and your verdict should be for, the plaintiff, unless you find that the said Granville R. Oyster knew that said road-bed was unsafe, or that the same was not clear in the manner in which it was usually operated, or that he was negligent or careless in the operation of said engine and train." We agree with counsel for defendant that the instruction was clearly erroneous, since it imposed upon the company the absolute duty of providing a reasonably safe and clear road-bed, while it owed no such obligation to its employés. All that the law required of it was, and the correct rule was also stated in the fourth instruction already quoted, that the defendant was required only to exercise reasonable and ordinary care to furnish a reasonably safe and clear roadway for the use of its employés. Under this instruction, if the defendant had not been guilty of negligence, but had exercised reasonable care in the premises, and the accident had occurred by reason of its road-bed having become recently unsafe, it made the company liable. The defendant is held accountable for the negligent performance of a duty, and the failure to exercise reasonable and ordinary care and diligence in furnishing its employés reasonably safe road-bed and appliances for the operation of its trains. (*Kansas City & P. R. Co. v. Ryan*, 59 Am. & Eng. R. Cas. [Kan.] 136; *St. Louis, I. M. & S. R. Co. v. Needham*, 69 Fed. Rep. 823; *Innes v. City of Milwaukee*, 70 N. W. Rep. [Wis.] 1065.) The instruction under consideration purported to cover the entire case. It told the jury, if they found certain things to exist, then the plaintiff was entitled to a verdict; hence the vice in this instruction was not, and could not be, cured by other portions of the charge. (*Farmers Bank v. Harshman*, 33 Neb. 445; *First Nat. Bank of Denver v. Lowrey*, 36 Neb. 290; *Barr*

v. State, 45 Neb. 458; *Metz v. State*, 46 Neb. 547.) My associates are of the opinion that the error was not prejudicial, since no other verdict would have been justified by the evidence. To this view the writer, reluctantly, yields his assent.

The record shows that during an intermission of the court certain jurors in the case visited and examined the locality of the track, switch, and appliance at the scene of the accident, after which they returned to the court-room and the trial proceeded without the defendant having knowledge of the occurrence. This was a gross irregularity on the part of the jurors, but not sufficient to cause the verdict to be set aside, for reasons now to be stated. The rule is that jurors must base their findings upon the evidence adduced on the trial, and may not make an inspection of the *locus in quo*, unless a view is authorized by the trial court. If a juror of his own accord, and without permission, visits and makes an inspection of the premises, or thing in dispute, it may be sufficient cause for vacating the verdict, but it will not have that effect if it is plain that such examination was not influential in obtaining the verdict. As stated by Start, J., in considering the same question in *Rush v. St. Paul City R. Co.*, 72 N. W. Rep. [Minn.] 733: "Not every unauthorized view of the *locus in quo* will require the setting aside of a verdict. Considerations of practical justice forbid it. It would be an injustice to deprive an innocent party of his verdict simply because there was a casual inspection of the premises by some of the jurors, or because they were familiar with them. If verdicts were set aside for such reasons, there would be no reasonable limits to litigation, especially in cities where the opportunities are great for jurors to personally view the locality of the accident under consideration. * * * This rule must be given a reasonable operation, and not applied where there is only a possibility that the result was influenced by the alleged misconduct, but is to be applied where the court cannot determine with any

reasonable certainty whether the result was affected or not." In the case at bar there is no claim made that the plaintiff was guilty of any misconduct in the matter. It is not even suggested that she had any knowledge of the intended action of the jurors. There was no conflict in the evidence, so that a view of the place of the accident would assist those making it to apply the evidence or determine the credibility of the witnesses. It fully appears from the record that a view at the time it was taken could have been of no practical assistance in reaching a conclusion. It could not have influenced or affected the result. It follows that the judgment should be

AFFIRMED.

C. M. WITTSTRUCK ET AL., EXECUTORS, V. E. A. TEMPLE.

FILED FEBRUARY 23, 1899. No. 8738.

1. **Dormant Judgments:** REVIVOR: PRESUMPTION. The lapse of fourteen years after the entry of a judgment and before a proceeding to revive is instituted, without issuance of an execution, raises the presumption of payment. This presumption, however, is not conclusive, but may be overcome by proof that the judgment has never been paid.

2. ———: ———: ———. The presumption of payment arising by the lapse of time cannot be invoked by the judgment debtor when he has not tendered the issue of payment in the proceeding to revive.

3. **Summons:** SERVICE. A summons must be served by delivering a copy thereof to the defendant personally, or by leaving a copy for him at his usual place of residence. Service by leaving a copy for him at his usual place of business is insufficient to confer jurisdiction over his person.

4. ———: RETURN: AMENDMENT. The permission to an officer to amend his return on a summons is not equivalent to an actual amendment.

5. **Dormant Judgments:** REVIVOR: JURISDICTION. In a proceeding to revive a dormant judgment the defendant may interpose as a defense that such judgment is void on the ground that the court entering it had no jurisdiction over his person.

6. **Summons:** RETURN: AMENDMENT. The granting of permission to a sheriff to amend his return on a process to conform to the facts, upon proper showing and notice, is discretionary with the trial court.

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

Willard E. Stewart, for plaintiffs in error.

Stearns & Tyrrell, contra.

NORVAL, J.

It is sought by this proceeding to review an order of the court below reviving a dormant judgment. On June 1, 1881, Edward A. Temple obtained a judgment in the district court of Lancaster county against Frank G. Wittstruck for the sum of $248.98, and costs of suit. On motion of plaintiff, accompanied by the affidavit of his counsel, setting forth the recovery of the judgment for the sum stated above, and that the judgment had become dormant by the lapse of time, but was wholly unpaid, the court made a conditional order of revivor, returnable in three days after service thereof, and afterwards a hearing was had, and the conditional order was made absolute against Charles M. Wittstruck and J. H. Wittstruck, as executors of the estate of Frank G. Wittstruck, deceased, who prosecute this error proceeding.

The order of revivor is assailed on various grounds; among others, that the lapse of fourteen years between the rendition of the judgment and the application for the order of revivor raises the presumption of payment, which was not overthrown by the proofs adduced on the hearing. It is true that the lapse of so many years between the entry of the judgment and the proceeding to revive the same, without the issuance of an execution, raises the presumption of payment and satisfaction of the judgment. (*Wright v. Sweet,* 10 Neb. 192; *Hunter v. Leahy,* 18 Neb. 80; *Garrison v. Aultman,* 20 Neb. 311;

Creighton v. Gorum, 23 Neb. 503.) This presumption is not, however, conclusive, but may be overcome. The motion and affidavit filed by the judgment creditor to revive state that the judgment is wholly unpaid, and this averment was not put in issue by any plea or evidence. The question of payment was not an issue before the district court. Had the payment of the judgment been pleaded, then, under the foregoing authorities, the presumption of payment arising from the lapse of time would have defeated the proceeding to revive, unless the judgment creditor had overcome such presumption by proof that the judgment had never been paid. It devolved upon those resisting the order of revivor to tender the issue of payment by proper plea, and not having done so, the averments in the motion to revive and the affidavit filed in support thereof "that the judgment is wholly unpaid" were confessed.

Another argument is that the face of the record discloses that the court had no jurisdiction over the person of F. G. Wittstruck to render the judgment against him which is sought to be revived herein. He made no appearance in the action. The return of the sheriff on the summons states that the writ was served "on the within named Frank G. Wittstruck, by leaving at his usual place of business, in Firth, a true and certified copy of the same, with all the indorsements thereon." Section 69 of the Code of Civil Procedure requires that "the service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence, at any time before the return day." By section 25 of the same Code service in an action against a partnership or firm may be made by copy left at the usual place of business. (*Ruth v. Lowrey*, 10 Neb. 263; *Rosenbaum v. Hayden*, 22 Neb. 744; *Herron v. Cole*, 25 Neb. 692.) The action was not against a firm or association of persons, nor was the defendant Frank G. Wittstruck sued as being a member of a partnership; hence summons could not be legally served upon him by

leaving a copy at his usual place of business. Service could only be made by delivering a copy to him personally, or by leaving one at his usual place of residence. (*Aultman v. Steinan*, 8 Neb. 109.) It is, therefore, very evident from the return made by the sheriff to the summons that it was insufficient to confer jurisdiction upon the court to pronounce any judgment against the defendant. It is true permission was granted the sheriff, during the pendency of the proceeding to revive, to amend his return on the summons so as to show that the writ was served by leaving a copy at the usual place of residence of the defendant Frank G. Wittstruck; but no amendment of the return was in fact ever made by the officer. The permission to amend was not equivalent to an actual amendment of the return of the summons, no more than would the granting of authority to a party to amend his pleading constitute an amendment thereof. The judgment rendered upon the service of the summons by copy left at the defendant's usual place of business was without jurisdiction and void. This fact was sufficient to defeat a revivor of the judgment. (*Enewald v. Olsen*, 39 Neb. 59; *Haynes v. Aultman*, 36 Neb. 257.)

Complaint was made because authority was granted the sheriff to amend his return on the summons to conform to the facts. There was a conflict in the evidence adduced on the question whether the place where copy of the summons was left by the sheriff for the defendant was the latter's place of business or usual place of residence. The court below merely sustained the motion to amend the return, but did not direct what the officer should insert in his return as an amendment. If the return did not speak the truth, or the facts completely, it was the duty of the court, upon proper showing and notice, permission therefor being asked, to allow the sheriff to amend his return so as to make the same conform to the facts. (*O'Brien v. Gaslin*, 20 Neb. 347; *Shufeldt v. Barlass*, 33 Neb. 785; *Phœnix Ins. Co. v. King*, 52 Neb. 562.) No abuse of discretion is shown in granting permission to

make the amendment. The order of revivor is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

HOSEA S. BALLOU, TRUSTEE, ET AL., APPELLEES, V. CLARENCE L. SHERWOOD ET AL., IMPLEADED WITH GILBERT BLUE, APPELLANT.

FILED FEBRUARY 23, 1899. NO. 8734.

1. **Judicial Sales:** APPRAISEMENT: DEDUCTION OF LIENS. The provision of the statute for the deduction of prior liens in appraising lands for judicial sale is solely for the benefit of the plaintiff, and the failure to observe the law in that regard cannot be successfully urged by the defendant as a ground for vacating the appraisement, or as an objection to confirmation.

2. ———: ———. The appraised value of property made under an order of sale can only be assailed for fraud.

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

D. W. Merrow, for appellant.

Duffie & Van Dusen, contra.

NORVAL, J.

This appeal was taken from an order confirming the sale of real estate by a special master commissioner under a decree of foreclosure. The first objection urged against the sale is that the amount of taxes against the real estate was not deducted in making the appraisement. This point is not available to the appellant, because he was not prejudiced by the omission to deduct from the real value of the premises the amount of tax liens. Had the deduction been made as contemplated by statute, the interest of the appellant in the property would necessarily

have been appraised at a smaller sum than it was, and consequently a lower bid could have been accepted at the sale than under the appraisement as made and returned. The provision of the statute for the deduction of prior liens in making the appraisement of lands for judicial sale is for the benefit of plaintiff only, and the failure to observe the law in that regard cannot be successfully urged by the defendant as a ground for setting aside the appraisement, or as an objection to confirmation. (*Craig v. Stevenson*, 15 Neb. 362; *Smith v. Foxworthy*, 39 Neb. 214; *American Investment Co. v. McGregor*, 48 Neb. 779.)

It is likewise insisted that a copy of the appraisement was not filed in the office of the clerk of the district court before the sale was advertised. The record shows that a copy of the appraisement was deposited in the clerk's office on January 28, 1896, the very day the property was appraised, and that notice of sale was not given or published until three days later. Of course no copies of written application for liens were filed with the copy of the appraisement, for the obvious reason no applications for liens were made by the special master commissioner. But the appellant was not prejudiced by such omission, or failure to comply with the statute.

It is finally urged that the valuation made by the appraisers is unjust, inequitable, and far below the real value of the property. No fraudulent conduct was imputed to the persons making the appraisement, nor was the value returned by the appraisers so much below the actual value of the premises as to raise the presumption of fraud. It is the doctrine of this court that the appraised value of property made under an order of sale can only be assailed for fraud. (*Vought v. Foxworthy*, 38 Neb. 790; *Ecklund v. Willis*, 44 Neb. 129; *Kearney Land & Investment Co. v. Aspinwall*, 45 Neb. 601.) Tested by this rule the appraisement in the case at bar must be sustained. The order from which the appeal was prosecuted is

AFFIRMED.

HOWARD CHURCHILL V. GEORGE M. WHITE.

FILED FEBRUARY 23, 1899. No. 8754.

1. **Infants:** LIABILITY FOR TORTS. An infant who hires a team and buggy for a specified journey, and drives to another place and in a different direction, takes upon himself all the consequences following therefrom. If the team is injured or the buggy is broken while being so driven, he is liable in damages for the tort, and his infancy is no protection to him.

2. **Evidence:** ADMISSIONS. Admissions or statements made by a party to a suit against interest upon a material matter may be proved without laying the foundation required in impeaching a disinterested witness.

3. ———: REVIEW. To obtain a review of the rulings of the trial court on the admission of evidence the particular rulings assailed must be specifically assigned in the petition in error.

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

Thomas H. Matters, for plaintiff in error.

William M. Clark, contra.

NORVAL, J.

This was an action by George M. White against Howard Churchill to recover damages to plaintiff's buggy, alleged to have been caused by the wrongful act of the defendant. From a judgment for $60 entered on a verdict for plaintiff the defendant has prosecuted this error proceeding.

The first assignment of error challenges the sufficiency of the petition filed in the court below, and upon which the cause was tried. Plaintiff for a cause of action alleges, in substance and effect, that plaintiff is engaged in the livery business at Clay Center, furnishing horses, harness, buggies, etc., for hire to those who may desire the same; that the defendant is a minor of the age of nineteen years, residing with his father near the town; that

on October 23, 1894, defendant hired from plaintiff a livery rig, consisting of a span of horses, a set of harness, and a two-seated covered buggy, to go four or five miles immediately south of Clay Center to a dance at the residence of one A. R. Baker, and agreed to and did pay plaintiff as use for said team, harness, and buggy the sum of $1.50; that defendant, after obtaining possession of said rig, drove the same to the town of Harvard, situate two and one-half miles west and six and one-half miles north of Clay Center, thence, after obtaining or receiving other passengers, he drove to said Baker's residence, where he remained a few minutes and drove the rig with five passengers directly west two and three-fourths miles, thence north eleven and one-half miles to Harvard, and thence to Clay Center; that the defendant, while said rig was in his possession, and being driven out of the line of the route from Clay Center to the place of the dance, and on the return trip from Baker's to the town of Harvard, permitted the buggy to upset, and the team to run several rods, thereby breaking the buggy in numerous places, described with great particularity in the petition, cutting and bruising the heel of one of the horses; that the team was overdriven, and that defendant drove the rig in a direction, and used the same for a purpose, different than that for which it was hired; by reason whereof plaintiff has been damaged in the sum of $100.

The contention of defendant below, plaintiff herein, is that the action is founded upon a contract with an infant, and, therefore, no recovery against him can be had. While ordinarily infants are not liable on their contracts, except for necessaries, they are answerable for their torts. In 10 Am. & Eng. Ency. Law 668, 669, the rule is stated thus: "An infant is liable for all injuries to property or person wrongfully committed by him. His privilege of infancy is given to him as a shield and not as a sword, and it cannot be used for protection against the consequences of wrongful acts; for, where civil injuries are

committed by force, the intent of the perpetrator is not regarded. * * * Although an infant is liable for his torts, he is not liable for the tortious consequences of his breach of contract. Whether the form of the action be contract or tort, the infant cannot be held for a mere violation of contract, but the contract cannot avail if the infant goes beyond the scope of it. The tort must be a distinct and substantive wrong in itself, even though it grow out of a contract, to make the infant liable. The contract must be generally put in proof to support the action, but that is because the tort, inasmuch as it is committed by departing from the terms of the contract, cannot be shown without showing the contract and not because the contract is otherwise involved." The text is abundantly sustained by judicial decisions. Although no recovery can be had against an infant for a breach of contract, the principle is well recognized, and has been often applied, that he is liable for a tort committed by him, notwithstanding it may have arisen out of, or in some way may have been connected with, a contract.

In *Fitts v. Hall*, 9 N. H. 44, Parker, C. J., observed: "The principle to be deduced from these authorities seems to be that if the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealment respecting the subject-matter of it, the infant cannot be charged for this breach of his promise or contract, by a change of the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, willful, and positive wrong of itself, then, although it may be connected with a contract, the infant is liable."

In *Freeman v. Boland*, 14 R. I. 39, it was held that where an infant hires a horse and buggy of a keeper of a livery stable to go to a designated place, and drives beyond the place or in another direction and injures the horse, the infant is liable therefor. To the same effect are *Homer v. Thwing*, 3 Pick. [Mass.] 492; *Rotch v. Hawes*, 12 Pick. [Mass.] 136; *Hall v. Corcoran*, 107 Mass. 251; *Fish v. Ferris*, 3 E. D. Smith [N. Y.] 565.

In *Towne v. Wiley*, 23 Vt. 355, an infant who hired a horse to drive to an agreed place twenty-three miles distant, returned by a circuitous route which nearly doubled the distance, and stopped at a house on the way, leaving the horse standing out of doors during the night without food, and it died from overdriving and exposure. It was decided that the infant was liable in damages, by reason of his having departed from the object of his bailment. Redfield, J., in delivering the unanimous opinion of the court, said: "So long as the defendant kept within the terms of the bailment, his infancy was a protection to him, whether he neglected to take proper care of the horse, or to drive him moderately. But when he departs from the object of the bailment, it amounts to a conversion of the property, and he is liable as much as if he had taken the horse in the first instance without permission. And this is no hardship; for the infant as well knows that he is perpetrating a positive and substantial wrong when he hires a horse for one purpose and puts him to another, as he does when he takes another's property by way of trespass." This case was cited by the same court, and the principle applied, in *Ray v. Tubbs*, 50 Vt. 688.

Eaton v. Hill, 50 N. H. 235, was an action against an infant to recover damages for having so carelessly and immoderately driven plaintiff's horse, which he had hired, as to cause the animal's death. The plea was infancy. Bellows, C. J., in passing upon the question, employed the language following: "We think, then, that the doctrine is well established, that an infant bailee of a horse is liable for any positive and willful tort done to the animal distinct from a mere breach of contract, as by driving to a place other than the one for which he is hired, refusing to return him on demand after the time has expired, willfully beating him to death, and the like; so if he willfully and intentionally drive him at such an immoderate speed as to seriously endanger his life, knowing that it will do so. * * * In all these cases it may be urged that the law implies a promise, on the part of the

bailee, to drive the horse only to the appointed place, to return him at the end of the journey, not to abuse him or drive him immoderately, and that a failure in either respect is merely a breach of contract. So it might be said that the law would raise a promise not to kill him; and yet no one would fail to see that to kill him willfully would be a positive act of trespass, for which an infant should be liable the same as if there were no contract. * * * When the infant stipulates for ordinary skill and care in the use of the thing bailed, but fails from want of skill and experience, and not from any wrongful intent, it is in accordance with the policy of the law that his privilege, based upon his want of capacity to make and fully understand such contracts, should shield him. * * * But when, on the other hand, the infant wholly departs from his character of bailee, and by some positive act willfully destroys or injures the thing bailed, the act is in its nature essentially a tort, the same as if there had been no bailment, even if assumpsit might be maintained in case of an adult, on a promise to return the thing safely." In the case in hand the petition discloses, and the evidence adduced by plaintiff on the trial tends strongly to establish, that the tort of the defendant was not committed under the contract, but by absolutely abandoning or disregarding it, or in departing from the terms thereof. The petition is not framed upon the theory of a breach of contract, but for the tort, and contains sufficient averments to constitute a cause of action, notwithstanding the infancy of the defendant.

The seventh instruction is criticised, which reads as follows: "You are instructed, gentlemen, that, so far as this case is concerned, the infancy of the defendant does not affect the liability. The rule that one who hires property of this kind for one purpose and uses it for another or different purpose from that contemplated by the parties in the contract of hiring is liable for any harm that may happen it while he is so using it, applies to minors as well as to adults." This instruction harmonizes with

the views which we have already expressed and is within the doctrine announced in the cases cited above. This portion of the charge did not withdraw from the consideration of the jury whether or not the defendant used the team and buggy for a purpose different from that contemplated by the contract of hiring. Such question was fairly submitted to the jury by other instructions, which expressly advised the jury there could be no recovery if the defendant did not hire the property for a specific and designated trip, or route of travel, or to drive to a specific place. Under the theory of neither party was the infancy of the defendant material, or an important consideration, since it could not influence the decision either way. If the team was hired to drive to Mr. Baker's, as plaintiff insisted was the agreement of the parties, then it was driven nearly fifty miles, instead of ten miles, the distance from Clay Center to Baker's and return by the usual route of travel.

It is insisted that error was committed in admitting the testimony of J. M. Lyons, George Nye, Robert Stewart, Thomas Stewart, George M. White, and Snyder White. The defendant on the trial testified that there was no agreement when the team was hired that it was to be driven from Clay Center to Baker's to a dance. The testimony of the persons named above was, to the effect, that the defendant, when a witness for himself before H. C. Palmer, a justice of the peace of Clay county, in a criminal prosecution against said Churchill stated he hired the team and buggy to go to Baker's four or five miles south of the place of hiring. It is urged that the testimony of said witnesses was impeaching in its character, and was improperly admitted, because no legal foundation therefor had been laid. In the case in hand the following question was propounded to the defendant on cross-examination by counsel for plaintiff: "I will ask you to state if you did not swear in the lower court, before H. C. Palmer, justice of the peace in the town of Sutton, Nebraska, on the 8th day of December, 1894, in

the case wherein the state of Nebraska was plaintiff and Howard Churchill was defendant, that you hired the team and buggy to go south of Clay Center four or five miles to Baker's to a dance." The answer made to this question was, "No, sir; I did not." It was subsequent to the propounding of said interrogatory, and the taking of the answer thereto, that the admissions or statements of the defendants were proven. It is not necessary to decide whether the foundation attempted to be laid would have been sufficient to admit impeaching testimony had Churchill been merely a disinterested witness and not a party to the present litigation, since the testimony was competent as an admission against the interest of a party to the record. It is true one of the modes of impeaching a witness is by showing that he has made statements out of court at variance with his testimony, and that the same rule may be applied to a party to the action, but it is equally well settled that the admissions or statements of a litigant against interest, made out of court or upon a former trial relating to a material matter, may be proved without laying the foundation required in impeaching a disinterested witness. (*Bartlett v. Cheesebrough*, 32 Neb. 341; *German Nat. Bank of Hastings v. Leonard*, 40 Neb. 678.) There is no error in admitting the testimony to which objection has been interposed.

In the brief of defendant below complaint is made of the receipt as evidence of plaintiff's Exhibit 1 and testimony offered by the same party relative to the measure of damages "found on pages 6, 7, 16, 26, 36, 38, 50, 56, and 59 of the bill of exceptions." The second assignment of the petition in error states: "The court erred in admitting all evidence on the part of the plaintiff over the objection of the defendant, to which exceptions were there and then duly taken." There is no other assignment in the petition in error which in any manner attempts to present the rulings of the court on the admission of evidence, and the assignment quoted is entirely too general and indefinite to make available on review the decision of the

trial court on the admission of proofs relative to the measure of damages. This court has said that errors must be specifically assigned in the petition in error or they will be disregarded. (*Cortelyou v. Maben*, 40 Neb. 512; *Hedrick v. Strauss*, 42 Neb. 485; *Bloedel v. Zimmerman*, 41 Neb. 695; *City of Omaha v. Richards*, 49 Neb. 224.) No reversible error being disclosed, the judgment is accordingly

AFFIRMED.

CHARLES SHIVERICK & COMPANY V. R. J. GUNNING COMPANY.

FILED FEBRUARY 23, 1899. No. 8701

1. **Directing Verdict.** Where only one conclusion can be drawn from the evidence, the court may direct a verdict consistent therewith.
2. **Party Walls:** STATUS OF OWNERS. Owners of a party wall, built at joint expense, are not tenants in common, but each owns in severalty the part thereof situated on his own land, with an easement of support from the other part.
3. **Trespass.** Where one enters upon the premises of another and obliterates a display advertisement, he is liable to the owner for the costs and expenses of replacing or restoring the sign to its former condition.
4. **Instructions:** REVIEW. It is not error to refuse an instruction which, in its theory, has no support in the proof adduced.
5. ———: ———. A party cannot predicate error upon an instruction which is in harmony with one which was given at his own request.

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

Hall & McCulloch, for plaintiffs in error

References as to the proper use of party walls: *Milne's Appeal*, 81 Pa. St. 54; *Vollmer's Appeal*, 61 Pa. St. 118; *Sullivan v. Graffort*, 35 Ia. 531; *Dauenhauer v. Devine*, 51

Tex. 480; *Gibson v. Holden*, 115 Ill. 199; *Hendricks v. Stark*, 37 N. Y. 106; *Andrea v. Haseltine*, 58 Wis. 395.

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

References as to the law of party walls: *Matts v. Hawkins*, 5 Tau. [Eng.] 20; *Hoffman v. Kuhn*, 57 Miss. 746, 750; *Andrea v. Haseltine*, 58 Wis. 395; *Wolfe v. Frost*, 4 Sandf. Ch. [N. Y.] 72*; *Partridge v. Gilbert*, 15 N. Y. 601; *Burton v. Moffitt*, 3 Ore. 29; *Bloch v. Isham*, 92 Am. Dec. [Ind.] 287.

References as to the law of joint tenancy: *Phelps v. Jepson*, 1 Root [Conn.] 48; *City of Chicago v. Sheldon*, 9 Wall. [U. S.] 50; *Gracssle v. Carpenter*, 70 Ia. 166; *Vermilya v. Chicago, M. & S. P. R. Co.*, 66 Ia. 606; *Sabine & E. T. R. Co. v. Joachimi*, 58 Tex. 456.

NORVAL, J.

The R. J. Gunning Company, plaintiff below, is a corporation organized under the laws of the state of Illinois, with its principal office at Chicago, and engaged in the business of display advertising, leasing walls in different cities for that purpose. The defendants below, Charles Shiverick & Co., are a partnership engaged in the furniture and carpet business in the city of Omaha, occupying as lessees the four-story building situate on the west one-third of lot 8, in block 103, in said city. On and prior to August 15, 1882, one John McCreary was the owner of the said west one-third of lot 8, and the east two-thirds of said lot was owned by one Samuel E. Rogers. McCreary was about to erect a building on his portion of said lot, so on said date he and Rogers entered into a party-wall contract, whereby it was agreed that they should unite in building a party wall on the line dividing the said premises; one-half of the wall to stand upon the property of each and one-half of the costs of construction to be paid by each. The wall was erected during said year and the cost thereof was paid according to contract, and McCreary at the same time erected a four-story brick building on his

portion of the lot, using the said party wall as the eastern wall of his building. No building has been erected on the east two-thirds of said lot 8. In November, 1890, McCreary leased to the R. J. Gunning Company the east or outside surface of said party wall to be used for advertising purposes. Immediately thereafter S. G. Higgins, the then owner of the said east two-thirds of said lot 8, notified the agent of the R. J. Gunning Company that he was the owner of the east half of said wall, and on Mr. McCreary's attention being called to the matter he paid back the money which he had received as rent and the lease was surrendered to him. Thereupon the R. J. Gunning Company entered into a lease with Higgins for the east half of said party wall for the term of two years. On May 22, 1893, said company entered into a new lease for said wall with the then owner of said east two-thirds of lot 8, for two years for advertising purposes, and on October 17, 1894, the lease was renewed for another year. In 1890, in pursuance of the lease with Higgins, the R. J. Gunning Company caused to be painted upon the east surface of said party wall a Durham tobacco sign, 108½ feet long and 50 feet high, advertising Blackwell's Durham tobacco. The lettering on the sign was "Smoke Blackwell's Genuine Durham Tobacco." Besides, there was a picture of a large Durham bull, occupying a space of 18 feet by 35 feet. This sign remained on the east surface of the party wall until July, 1893, or a month after Charles Shiverick & Co. entered the building as tenants, when the R. J. Gunning Company brightened up the sign with a fresh coat of paint. Charles Shiverick & Co. at the time protested against the revival of the sign and asserted the right to put their sign on the building, and requested the R. J. Gunning Company to paint the same, which the latter declined to do. Plaintiff was thereupon notified it had no right to use said party wall for display advertising. In October of the same year Charles Shiverick & Co. obliterated said Durham tobacco sign and painted their own sign upon said wall. In March, 1894,

the R. J. Gunning Company effaced this last sign and replaced upon the wall the Durham tobacco sign, which last sign was painted out by Charles Shiverick & Co. and their own sign was again placed upon the wall. The following August the R. J. Gunning Company again replaced the Durham tobacco sign on the wall and during the night following it was painted out by Charles Shiverick & Co. This suit was brought by the R. J. Gunning Company to recover damages alleged to have been sustained by reason of the painting out of said sign by Charles Shiverick & Co. Plaintiff secured a verdict in the sum of $600, and to obtain a reversal of the judgment entered thereon the defendants have prosecuted this error proceeding.

The principal question presented for our consideration is raised by the giving of the first paragraph of the instructions, which was to the effect that the plaintiff had the right, under its lease, to paint and maintain the sign in question upon the east surface of said wall, and that the defendants are liable for the damages sustained by the obliteration of such sign. This instruction substantially directed a verdict for the plaintiff below, which, in our view, was entirely proper. There was no conflict in the evidence adduced, and but one inference could be drawn therefrom. The question was of law alone for the court, and therefore it was proper to direct a verdict for the party entitled thereto under the evidence, and the law. (*Woolsey v. Chicago, B. & Q. R. Co.*, 39 Neb. 798; *Slayton v. Fremont, E. & M. V. R. Co.*, 40 Neb. 840; *Knapp v. Jones*, 50 Neb. 490.) The wall in question was built by two adjoining lot owners, under a written contract so that one-half of the wall, divided longitudinally, rested on the one's lot and the other half on the other's lot. Each party to the agreement paid one-half of the cost of constructing the wall, and each was the owner in severalty of the portion thereof that stood upon his land, subject to the easement or right in the other to have it support the building which he might erect and attach to or

connect with the wall. The fact that the agreement under which the wall was erected speaks "of the joint ownership of said wall by said parties in equal proportions" does not take the case out of the rule governing party walls. A consideration of the entire contract, in connection with the practical interpretation placed thereon by the parties thereto, discloses that the wall was, nevertheless, a party wall, not owned either jointly or as tenants in common by the proprietors of the soil, but each possessed the portion of the wall which stood on his lot, subject to the cross-easement of support in favor of the owner of the other lot and part of the wall. (*Sullivan v. Graffort*, 35 Ia. 531; *Dauenhauer v. Devine*, 51 Tex. 480; *Burton v. Moffitt*, 3 Ore. 29; *Bloch v. Isham*, 28 Ind. 37; *Sherred v. Cisco*, 4 Sand. [N. Y.] 480.)

"Land covered by a party wall remains the several property of the owner of each half, but the title of each owner is qualified by the easement to which the other is entitled of supporting his building by means of the half of the wall belonging to his neighbor. The only proper easement attached to a party wall is the easement of support." It does not include the right to go upon the land of the other. The easement of support is all that either can convey. (*Ingals v. Plamondon*, 75 Ill. 118; *Gibson v. Holden*, 115 Ill. 199.)

In *Hoffman v. Kuhn*, 57 Miss. 746, Chalmer, J., said: "The owners of adjoining buildings connected by a party wall, resting partly upon the soil of each, are neither joint owners nor tenants in common of the wall. Each is possessed in severalty of his own soil up to the dividing line, and of that portion of the wall which rests upon it; but the soil of each, with the wall belonging to him, is burdened with an easement or servitude in favor of the other, to the end that it may afford a support to the wall and building of such other. Each, therefore, is bound to permit his portion of the wall to stand, and to do no act to impair or endanger the strength of his neighbor's portion, so long as the object for which it was erected, to-wit,

the common support of the two buildings, can be subserved; and each will consequently be liable to the other for any damage sustained by a disregard of this obligation. But the obligation ceases with the purpose for which it was assumed, namely, the support of the houses of which the wall forms a part."

In *Andrea v. Haseltine*, 58 Wis. 395, Lyon, J., in speaking of party walls, observed: "It seems to be the settled law that the owners of a party wall standing in part upon the lot of each are not tenants in common of the wall, but that each owns in severalty so much thereof as stands upon his lot, subject to the easement of the other owner for its support, and the equal use thereof as an exterior wall of his building. Such being the tenure by which the wall is held and owned, it seems logically to follow that either owner may, at least upon his own land, do anything with the wall, or make any use of it, which does not interfere with or impair the enjoyment of such easement by the other owner."

Applying the principle governing the foregoing decisions to the case at bar, it is very plain that the defendants below had no right to go upon the lot of the adjoining owner and obliterate the sign painted by plaintiff on the east surface of said party wall. The instruction criticised was pertinent and proper.

Instructions were tendered by the defendants, which were refused, announcing the doctrine that the owners of the lots on which the wall was erected were joint owners of the wall, and directing the jury to find a verdict for the defendants. From what we have already said in this opinion it follows that said requests to charge were properly refused.

It is urged in the brief that the court erred in not giving instruction No. 3 asked by the defendants "found on page 177½." No instruction tendered by defendants appears on said page of the record, but such page contains instructions requested by the plaintiff, which were refused by the court. On page 177¾ there is recorded de-

fendants' request No. 3, which is probably the instruction sought to be criticised in the brief, which is in the language following: "The jury are instructed that if they believe from the evidence that the character of the painting placed upon the wall in question was such as to be injurious and detrimental to the other person having an interest in said wall, so as to injure said building or its use for any purpose for which it might properly be used, you will find for the defendants." This request is based upon the theory that the sign in question was detrimental to the business of the defendants. No evidence is found in the record on which to base this instruction. It is true evidence was offered, and rejected, to establish that defendants' customers were mainly ladies of the city of Omaha and the advertisement greatly impaired and injured their trade. The ruling upon this point was not assigned for error in the petition in error. The proofs show that the sign contained a perfect picture or likeness of a Durham or shorthorn bull, but we cannot take judicial notice from this fact that the picture was so immodest or indecent as to prevent the most fastidious or refined ladies visiting defendants' store. There was no error in refusing to charge the jury as requested by said instruction.

Complaint is made of the rule of damages laid down in the following portion of the charge of the court: "The plaintiff is entitled to recover as its measure of damages in this action such amount as will compensate it for the loss it sustained in consequence of defendants' wrongful act in erasing and marking out the sign in question, the cost of replacing said sign, including railroad fare of workmen from Chicago or elsewhere, if sent specially for that purpose, together with hotel bills to plaintiff. The actual cost of repairing, replacing, and maintaining said sign under its contract to the Durham tobacco people is plaintiff's full measure of damages, and this you will ascertain and allow in such sum as from a preponderance of the evidence you find to be such cost, but you cannot

allow exemplary damages; that is, you must not assess damages for the purpose of punishing the defendants." It is argued that the true measure of damages is the market value of the material and labor necessary to replace the sign, and that the instruction was erroneous in allowing plaintiff to recover hotel bills and railroad fare. Ordinarily, the reasonable costs and expense of replacing or restoring the sign each time it was obliterated by the defendants was the proper measure of damages. (3 Sedgwick, Damages [8th ed.] sec. 932; *Harrison v. Kiser*, 79 Ga. 588; *Graessle v. Carpenter*, 70 Ia. 166; *Vermilya v. Chicago, M. & S. P. R. Co.*, 66 Ia. 606.) As to the allowance for railroad fare and hotel bills these might or might not be proper elements of damages, according to the circumstances of the case. In this action the defendants brought out on cross-examination of one Cartwright, a witness called and examined on behalf of the plaintiff, the testimony relating to expenses incurred by plaintiff for railroad tickets and hotel charges for the persons who repainted the sign, and it was likewise shown beyond controversy that workmen could not be obtained in Omaha who could restore the sign. It was proven that such workmen were employed at a monthly salary ranging from $80 to $100 and their expenses paid. Moreover, the defendants tendered, and the court gave, this instruction on the subject: "The jury are instructed that the plaintiff, if entitled to recover, is entitled to recover only the value of the necessary expense in replacing the sign upon the wall, and unless you believe from the evidence that in replacing said sign it was necessary to bring workmen from another city to do the work, you will not consider the evidence as to railroad fare in connection with your estimation of the amount of damages." Plaintiff cannot be heard to complain of the instruction given by the court on its own motion, since it was along the same line, and announced the same principle, as that given at the request of the defendants. (*Jonasen v. Kennedy*, 39 Neb. 314; *Richards v. Borowsky*, 39 Neb. 774; *City of Omaha*

v. Richards, 49 Neb. 244; *American Fire Ins. Co. v. Landfare*, 56 Neb. 482.) No prejudicial error in the record having been pointed out, the judgment is

AFFIRMED.

THOMAS H. MCCAGUE, RECEIVER, V. CITY OF OMAHA.

FILED FEBRUARY 23, 1899. NO. 8672.

1. **Tax Sales:** RECOVERY OF PAYMENTS BY PURCHASER. In absence of statutory authority a city of the metropolitan class cannot be required to refund money received from a purchaser of real estate at a sale made thereof by the county treasurer for illegal special assessments or taxes imposed by the city. *Pennock v. Douglas County*, 39 Neb. 293, and *Merrill v. City of Omaha*, 39 Neb. 304, followed.

2. ———: ———. Sections 69 and 94, chapter 12*a*, Compiled Statutes 1889, and section 144 of chapter 77 do not authorize the recovery from a metropolitan city of moneys received by it under a tax sale made to enforce the collection of illegal special taxes levied by the municipality.

3. ———: ———: CAVEAT EMPTOR. The rule of *caveat emptor* applies to purchasers of real estate at tax sales.

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

R. W. Breckenridge, for plaintiff in error:

The statutes contain numerous provisions which require void taxes to be refunded to the payer thereof. (*Touzalin v. City of Omaha*, 25 Neb. 817; *Morris v. Merrell*, 44 Neb. 423; *Caldwell v. City of Lincoln*, 19 Neb. 569; *Chicago, B. & Q. R. Co. v. County of Nemaha*, 50 Neb. 393; *Supervisors v. United States*, 4 Wall. [U. S.] 435; *Galena v. Amy*, 5 Wall. [U. S.] 705; *City of Indianapolis v. McAvoy*, 86 Ind. 587; *People v. Commissioners of Buffalo County*, 4 Neb. 150; *State v. Farney*, 36 Neb. 537; *People v. Supervisors*, 36 How. Pr. [N. Y.] 1; *King v. Inhabitants of Derby*, Skin. [Eng.] 370; *King v. Barlow*, 2 Salk. [Eng.] 609; *Backwell's Case*, 1 Ver. [Eng.] 153; *People v. Supervisors*,

51 N. Y. 401; *Phelps v. Hawley*, 52 N. Y. 23; *People v. Supervisors*, 68 N. Y. 114; *People v. Common Council*, 140 N. Y. 300; *Inhabitants of Veazie v. Inhabitants of China*, 50 Me. 518; *Milford v. Orono*, 50 Me. 529; *Kellogg v. Page*, 44 Vt. 356; *Hayes v. Los Angeles County*, 99 Cal. 74; *Ralston v. Crittenden*, 13 Fed. Rep. 508.)

There is a clear and sharp distinction between a sale which is void because the tax is void, and a sale void for irregularities in procedure which defeat the title of the purchaser. (*Lynde v. Inhabitants of Melrose*, 10 Allen [Mass.] 49; *Churchman v. City of Indianapolis*, 110 Ind. 259; *State v. Casteel*, 110 Ind. 174; *Casselbury v. Piscatawa Township*, 43 N. J. Law 353; *Mayor of Jersey City v. Riker*, 38 N. J. Law 225; *Budge v. City of Grand Forks*, 1 N. Dak. 309.)

Money paid for void taxes can be recovered back at common law. (*Town of Virden v. Needles*, 98 Ill. 367; *City of Covington v. Voskotter*, 80 Ky. 220; *Lincoln v. Worcester*, 8 Cush. [Mass.] 55; *Wright v. Boston*, 9 Cush. [Mass.] 233; *Wells v. Chicago*, 66 Ill. 289; *Rogers v. Greenbush*, 58 Me. 390; *Newman v. Livingston County*, 45 N. Y. 676; *Bank of Commonwealth v. Mayor*, 43 N. Y. 184; *Mayor of Jersey City v. Riker*, 38 N. J. Law 225; *Tuttle v. Everett*, 51 Miss. 27; *City of Galveston v. Sydnor*, 39 Tex. 236.)

Money paid under mistake may be recovered. (*Alston v. Richardson*, 51 Tex. 1; *Koontz v. Central Nat. Bank*, 51 Mo. 275; *Devine v. Edwards*, 87 Ill. 177; *City of Indianapolis v. McAvoy*, 86 Ind. 587; *City of Louisville v. Henning*, 1 Bush [Ky.] 381; *City of Covington v. Powell*, 2 Met. [Ky.] 226; *City of Louisville v. Zanone*, 1 Met. [Ky.] 151; *Ray v. Bank of Kentucky*, 3 B. Mon. [Ky.] 513; *Underwood v. Brockman*, 4 Dana [Ky.] 309; *City of Louisville v. Anderson*, 79 Ky. 334; *Northrop v. Graves*, 19 Conn. 548; *Walker v. Conant*, 65 Mich. 194; *Fraker v. Little*, 24 Kan. 598.)

The doctrine *caveat emptor* is not applicable to the facts of this case. (*Hayes v. Los Angeles County*, 99 Cal. 74; *Phelps v. Mayor*, 112 N. Y. 216; *Loomis v. Los Angeles County*, 59 Cal. 456; *Clapp v. Pine Grove Township*, 138

Pa. St. 42; *Mayor of Jersey City v. Riker*, 38 N. J. Law 225; *Corbin v. Davenport*, 9 Ia. 239.)

Saunders & Macfarland, also for plaintiff in error.

W. J. Cornell, Lee S. Estelle, and *E. H. Scott, contra.*

NORVAL, J.

The facts upon which this action was predicated may be summarized thus: The city of Omaha opened and extended South Nineteenth street through Hartman's Addition, and to pay the costs and expenses thereof the municipal authorities levied special assessments upon the adjacent lots, including lots 60, 61, 66, 67, 72, 73, and 78 in said Hartman's Addition to the city of Omaha. These special taxes or assessments not having been paid by the lot owners at the time the same became delinquent, the lots heretofore mentioned were sold by the county treasurer to Edward B. Baer, at private sale, for said special assessments. Subsequently said special taxes were adjudged null and void, and the purchase-money having been paid by the county treasurer to the city of Omaha, Edward B. Baer instituted this action against the city to require it to return said purchase-money. Plaintiff has prosecuted error from the judgment rendered against him. In this court Thomas H. McCague, as receiver of the German Savings Bank of Omaha, was substituted as plaintiff.

It is insisted by the city attorney that the precise question herein involved was decided adversely to the contention of this plaintiff in *Pennock v. Douglas County*, 39 Neb. 293, and it is agreed that the court below determined this case on the authority of that decision. The correctness of the rule announced in *Pennock v. Douglas County, supra*, is denied by plaintiff. It was there decided that in the absence of statutory authority a city of the metropolitan class cannot be required to refund money which it has received from a purchaser of real estate at a sale

made thereof by the county treasurer for a special assessment or tax levied by the city, and for which special assessment or tax said real estate was not liable. It was also held in that case that the rule of *caveat emptor* applies to a purchaser at a tax sale. It is now strenuously argued in the brief of counsel for plaintiff that the court in the *Pennock Case* incorrectly assumed that there was no statute under which one paying an illegal or void city tax may recover the same from the municipality. In this the learned counsel is in error. The court assumed no such proposition; but what it did hold was that there was no statute which authorized a metropolitan city to refund to a tax purchaser money paid on the sale of real estate for void special assessments, and upon an investigation of the subject anew, aided by able argument of counsel, we discover no valid reason for changing our views upon the question. An examination of the arguments advanced by plaintiff's counsel will disclose that they are fallacious.

Attention is challenged to the following provisions of section 69, chapter 12*a*, of Compiled Statutes 1889, popularly known as the "Charter of Metropolitan Cities": "Any party feeling aggrieved by any such special tax or assessment or proceeding may pay the said special taxes assessed or levied upon his, her, or its property, or such installments thereof as may be due, at any time before the same shall become delinquent, under protest and with notice in writing to the city treasurer that he intends to sue to recover the same back, which notice shall particularly state the alleged grievance and grounds thereof, whereupon such party shall have the right to bring a civil action within sixty days thereafter, and not later, to recover back so much of the special taxes paid as he shall show to be illegal, inequitable, and unjust, the cost to follow the judgment or to be apportioned by the court as may seem proper, which remedy shall be exclusive. The city treasurer shall promptly report all such notices to the city council for such action as may be proper."

The first observation which we make of the foregoing provisions is that they had been repealed prior to the time, and were not in force, when plaintiff purchased the lots for the special taxes assessed against them. Moreover, these provisions have no application to the case at bar, and cannot be invoked by a purchaser at a tax sale. They conferred authority upon one paying illegal special taxes under protest and notice in writing to the city treasurer to bring an action against the city within sixty days thereafter to recover from the city such illegal taxes so paid by him. Plaintiff is not within the provision of this statute, since he did not pay these special assessments at all, much less under protest, but purchased the lots at treasurer's sale. Again, he did not institute this action within sixty days after his said purchase, so in no event is he in a position to invoke the statute under consideration.

The following portion of section 94, chapter 12*a*, Compiled Statutes, is relied upon by plaintiff: "The city council may at any time correct any error or defect, or supply any omission in the assessment or listing of any property subject to municipal tax made for the purpose of taxation for the then current fiscal year, and may require any and all persons to appear and answer under oath as to their possession or control of personal property subject to municipal taxation; and the mayor and council by ordinance may make such compromise, settlement, or adjustment of any action or litigation concerning the validity, legality, or regularity of any tax or taxes levied for city purposes, as they may deem just and expedient, and the city treasurer shall conform thereto in his action respecting the collection of taxes under any tax list in his hand. These provisions shall apply to general municipal taxes and to special assessments, as far as the same are applicable, unless otherwise provided in the ordinance levying the same." We discover nothing in the above provision which justifies the maintaining of the present suit. It would require either a great stretch of the imagination

or radical judicial legislation to make said section applicable to a purchaser at tax sale. A mere reading of the section is sufficient to disclose that it has no bearing upon the question now before the court. Certainly the power given the city council to correct an error in the assessment or listing of property for the purposes of taxation does not carry with it the power to refund money received by the treasurer from the purchaser at a tax sale. The authority of the mayor and council to compromise or settle "any action or litigation concerning the validity, legality, or regularity of any tax levied for city purposes" was given with reference to actions or litigations concerning the collection of the public revenues, and has no application to suits relating to the disbursements of moneys which have been paid into the treasury. This position is strengthened by the fact that the remainder of the same sentence from which the last quotation was taken declares that "the city treasurer shall conform thereto in his action respecting the collection of taxes under any tax list in his hand." It is very evident this suit is not within either the letter or spirit of said section 94.

Another argument is that this action is maintainable under the second proviso of section 144 of the general revenue law (Compiled Statutes, ch. 77), which reads as follows: "If such person claim the tax, or any part thereof, to be invalid for the reason that it was levied or assessed for an illegal or unauthorized purpose, or for any other reason, except as hereinbefore set forth, when he shall have paid the same to the treasurer, tax collector, or other proper authority, in all respects as though the same was legal and valid, he may at any time, within thirty days after such payment, demand the same, in writing, from the treasurer of the state, of the county, city, village, township, district, or other subdivision, for the benefit, or under the authority, or by the request of which the same was levied, and if the same shall not be refunded within ninety days thereafter, may sue such

county, city, village, township, district, or other subdivision for the amount so demanded; and if upon the trial it shall be determined that such tax, or any part thereof, was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases." It is urged that the foregoing is applicable to the case in hand, and *Caldwell v. City of Lincoln*, 19 Neb. 569, is cited in support of this contention. The above excerpt from said section 144 was considered in the *Caldwell Case*, and it was there ruled that it authorized the recovery from a municipal corporation of an illegal business tax paid under protest; and by a parity of reasoning it would seem that said section might justify a suit to recover special taxes and assessments paid which have been paid under protest. We did not hold a contrary doctrine in *Pennock v. Douglas County*, 39 Neb. 293. Said section 144 can avail the plaintiff nothing, because he has paid no illegal assessments under protest. He was not required to either pay the special taxes against the lots in question, nor to purchase the property at tax sale. He voluntarily purchased the lots for the amount of the illegal taxes imposed thereon, and he has no one but himself to blame for the loss. He cannot recover the amount back. (*Dixon County v. Beardshear*, 38 Neb. 389.) The rule of *caveat emptor* applies to him. (*Pennock v. Douglas County, supra; Merrill v. City of Omaha*, 39 Neb. 304; *Adams v. Osgood*, 42 Neb. 450.)

No statutory provision has been pointed out which permits a municipal corporation to hold a purchaser at a tax sale harmless, and without legislative enactment of that character, this action is not maintainable. We are fortified in this conclusion by legislative interpretation. By section 131, chapter 77, Compiled Statutes, the lawmaking body has conferred power upon the counties to reimburse purchasers at tax sales in certain cases by paying them the amount of the purchase-money, interest, and costs, thus indicating that the legislature regarded that

county boards possessed no such power independent of said section 131. The judgment is

AFFIRMED.

ELMER E. SPENCER ET AL. V. JOHN R. JOHNSTON.

FILED FEBRUARY 23, 1899. No. 8745.

1. **Set-Off:** JUDGMENT: SUPERSEDEAS. A judgment which has been superseded and is pending for review in an appellate court cannot be pleaded as a set-off in another action between the same parties.

2. ———: PROPER SUBJECTS. In the absence of equitable considerations a defendant can only plead as a set-off a claim or judgment upon which, at the commencement of the action, he might have maintained an independent suit against the plaintiff.

3. **Plea in Abatement.** The pendency of a former action for the same cause, between the same parties and in the same court, constitutes a good plea in abatement.

4. **Fraud:** PLEADING. In an action on a note the answer alleged that part of the consideration was corporate stock sold and transferred to the defendant by one who held it in trust for the plaintiff, and that such stock was worthless. It was also alleged that on a former occasion the plaintiff had induced the defendant to purchase of him other stock of the same corporation by fraudulent representations as to its value. *Held*, That the answer did not charge actionable fraud in the sale of the trust stock, and failed in this respect to state a defense.

5. **New Trial:** JOINT MOTION. Where parties jointly move for a new trial or for the reversal of a judgment rendered against them, the court will not sever their interests, but will deny the motion or petition unless all who unite therein are entitled to the relief demanded.

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

F. I. Foss and *W. R. Matson*, for plaintiffs in error:

The fact that E. E. Spencer had already obtained judgment should not interfere with his pleading that judgment in set-off. (*Gaddis v. Leeson*, 55 Ill. 522; *King v. Bradley*, 44 Ill. 342; *Baskerville v. Brown*, Burr [Eng.]

1229; *Clayes v. White*, 65 Ill. 357; 1 Sutherland, Damages [ed. of 1882] 299; *Miller v. Hyde*, 37 N. E. Rep. [Mass.] 760.)

The supersedeas in the former case, and the suit pending in the supreme court, do not prevent the set-off. (*Gunn v. Todd*, 21 Mo. 303; *Wiltsie v. Northam*, 3 Bosw. [N. Y.] 162; *Good v. Good*, 5 Watts [Pa.] 116; *Sargent v. Southgate*, 16 Am. Dec. [Mass.] 409; *Lindsay v. Stewart*, 72 Cal. 540; *Willard v. Fox*, 18 Johns. [N. Y.] 497; *King v. Bradley*, 44 Ill. 342; *Sandel v. George*, 18 La. Ann. 526; *Richardson v. Doty*, 44 Neb. 73; *Burge v. Gandy*, 41 Neb. 149; *Simpson v. Jennings*, 15 Neb. 671; *Taylor v. Root*, 4 Keyes [N. Y.] 335; *Clark v. Story*, 29 Barb. [N. Y.] 295; *Badlam v. Springsteen*, 41 Hun [N. Y.] 160.)

Sawyer & Snell, contra:

There was another suit pending. (*Brasch v. Brasch*, 50 Neb. 75; *Demond v. Crary*, 1 Fed. Rep. 480; *Frettretch v. McKay*, 47 N. Y. 426; *Ansorge v. Kaiser*, 3 N. Y. Supp. 785; *Naylor v. Schenck*, 3 E. D. Smith [N. Y.] 137; *Jennings v. Warnock*, 37 Ia. 278.)

Former judgment cannot be used as a set-off. (*Tessier v. Englehardt*, 18 Neb. 172; *Welton v. Beltezore*, 17 Neb. 399.)

SULLIVAN, J.

In September, 1886, John R. Johnston and George D. Stevens sold to Elmer E. Spencer eleven shares of the stock of the Crete Globe Publishing Company for the sum of $1,000. No part of the purchase price was paid in cash, but in lieu thereof the vendors accepted a note signed by Elmer E. Spencer as principal and his father, J. G. Spencer, as surety. In the following December, in order to obtain a controlling interest in the company, Mr. Spencer was induced to buy of one J. W. Craig seven more shares of stock, for which he gave $400 in cash and a promissory note for $200. Both of the Spencer notes were transferred to the State Bank of Crete, of which

institution Johnston was president and Stevens cashier. These notes being past due were renewed on March 22, 1888, by the Spencers executing a new note for $1,200. Afterwards the bank failed, and its assets being offered for sale by the receiver under the direction of the court, Johnston bought the Spencer note and thereupon brought this action to enforce payment. The defenses presented by the answer are: (1) That the sale of the eleven shares of stock was effected by fraud and misrepresentation with respect to the affairs of the Globe Publishing Company, and the value of the stock; (2) that the defendant Elmer E. Spencer had recovered against the plaintiff and George D. Stevens a judgment which ought to be set off against the note in suit; and (3) that the Craig stock was really owned by the plaintiff and Stevens, and that by reason of the fraud and false representations made by them the $400 paid in the transaction should be allowed as a counter-claim, and that there should be no recovery for the $200 remaining unpaid. The reply alleges that the fraud and false representations mentioned in the answer were made the basis of an action brought by Elmer E. Spencer against Johnston and Stevens; that said action was tried in the district court of Lancaster county and resulted in the judgment referred to in the answer; that such judgment has been superseded and that the action is now pending and undetermined in the supreme court. To the counter-claim based upon the Craig transaction the plaintiff pleaded the statute of limitations. Upon these pleadings the cause was tried to a jury who, in obedience to a peremptory instruction of the court, returned a verdict in favor of the plaintiff for the amount due on the note according to its terms. To obtain a reversal of the judgment rendered on the verdict the defendants file in this court a petition in error containing many assignments. Some of these we now proceed to consider.

There is no dispute about the facts. Elmer E. Spencer sued Johnston and Stevens and recovered against them

a judgment for fraud and misrepresentation in the sale of eleven shares of the stock of the Globe Publishing Company. The judgment was superseded and the cause was pending in this court at the time of the trial of this action in the district court. That judgment and the facts upon which it rests were offered in this case to defeat a recovery on the note. It will be convenient to inquire, first, whether the judgment was a proper matter of set-off. Of course the action was, as counsel contend, an action on contract; but the judgment pleaded was not enforceable either at the time the answer was filed or when the cause was tried. Its lawfulness was denied and its right to exist was being litigated in another court. An undertaking in conformity with the statute had been given to prevent its enforcement. The law gives a defeated litigant the right to prevent his adversary from executing the judgment until the cause can be heard in a reviewing court. By giving the statutory undertaking the judgment debtor obtains a respite until the lawfulness of the judgment against him is finally determined. The remedy would be a barren one if it were permissible to execute the judgment by pleading it as a set-off or making it the basis of a fresh action. The object of giving the bond is to supersede the judgment—to render it unenforceable by judicial process or otherwise. The owner of the judgment, having ample security, can afford to wait. He has no right to make a judgment which is possibly illegal the foundation of a judgment in another case which, on the face of the record therein, would be regular and valid. Except as provided in section 591 of the Code of Civil Procedure, there is no authority for collecting a judgment which is pending for review in an appellate court, and which has been superseded in the manner prescribed by the statute. In 1 Ency. Pl. & Pr. 756 the rule is stated as follows: "The pendency of a writ of error or an appeal from a judgment in a former suit, where it operates · · a supersedeas, may be pleaded in abatement of a subsequent suit between the same parties for the same subject-matter."

There is another reason why the judgment could not be used as a set-off. It was not in existence when this action was commenced. It has been frequently held by this court that a claim which a defendant may properly set off must be one upon which he could have sued the plaintiff at the time the plaintiff sued him. (*Simpson v. Jennings*, 15 Neb. 671; *Tessier v. Engelhardt*, 18 Neb. 167; *Burge v. Gandy*, 41 Neb. 149.)

The next question argued by the defendants is their right to present as a defense to this action the facts alleged in the petition in the case wherein Elmer E. Spencer recovered judgment against Johnston and Stevens. We think the right did not exist. Those facts were once submitted for judicial investigation in an action between the same parties, the jury made its finding in regard to them, and the court rendered judgment accordingly. There ought to be an end to litigation. No man ought to be twice vexed with the same controversy. Considerations of public policy forbid the maintenance of an original action or a cross-action upon a matter, between the same parties, which has been already tried and adjudicated. Indeed, the mere pendency of the action in Lancaster county, without judgment, would constitute a good and sufficient plea in abatement. (*Monroe v. Reid*, 46 Neb. 316; *State v. North Lincoln Street R. Co.*, 34 Neb. 634; *Demond v. Crary*, 1 Fed. Rep. 480; *Beyersdorf v. Sump*, 39 Minn. 495, 41 N. W. Rep. 101.)

In regard to the purchase of the Craig stock it is sufficient to say that the facts pleaded fall far short of charging actionable fraud. It is not alleged that the purchase was induced by the representations made by Johnston and Stevens in September, 1886. Neither is it averred that Spencer was at the time of the purchase ignorant of the value of the stock of the Globe Publishing Company or of the condition of its financial affairs. Without these elements this branch of the answer is palpably defective.

It is finally asserted that J. G. Spencer, not being a

party to the suit in Lancaster county, is not affected by the pendency of that action or by the judgment rendered therein. Both defendants joined in the motion for a new trial filed in the district court, and they join in the petition in error filed here. On the authority of repeated decisions we are constrained to hold, under these circumstances, that an affirmance of the judgment as to one requires an affirmance as to both. (*Knight v. Darby*, 55 Neb. 16.)

AFFIRMED.

FREDERICK D. REYNOLDS V. STATE OF NEBRASKA.

FILED FEBRUARY 23, 1899. No. 10472.

1. **Bigamy.** A married person will not be absolved from the bonds of matrimony by believing, even upon information apparently reliable, that the marriage has been dissolved by death or divorce. Public policy forbids that the permanence of the marriage relation should depend upon anything so precarious as the mental state of one of the parties.
2. ———. Whether in a prosecution for bigamy an honest and reasonably grounded belief entertained by the defendant in the death of an absent spouse is of itself a complete defense, *quære*.
3. ———: EVIDENCE. In a prosecution for bigamy it is prejudicial error to permit the state to reinforce a disputable presumption in regard to the capacity of one of the parties to contract a valid marriage, by the introduction of incompetent evidence directly bearing upon the question.
4. ———: DIVORCE: PROOF. To prove a divorce the record of the decree, or a duly authenticated copy thereof, is the appropriate and only competent evidence.
5. **Review:** EXCEPTIONS. In the absence of an exception a ruling made by the district court during the progress of the trial cannot be reviewed.
6. **Presumptions:** EVIDENCE. When a rebuttable presumption possessing no inherent probative force is met by opposing evidence, it is entirely destroyed and ceases to be a factor in the trial, unless it be required to turn an evenly balanced scale.

ERROR to the district court for Hayes county. Tried below before NORRIS, J. *Reversed.*

J. L. McPheely and *E. E. Ferris*, for plaintiff in error.

References: *People v. Lambert*, 5 Mich. 349; *Gahagan v. People*, 1 Parker's Crim. Rep. [N. Y.] 378; *Bird v. State*, 21 Gratt. [Va.] 800; *King v. State*, 40 Ga. 244; *Rex v. Deeley*, 1 Moody C. C. [Eng.] 303; *Eaton v. Hasty*, 6 Neb. 419; *Davis v. Commonwealth*, 13 Bush [Ky.] 318.

C. J. Smyth, Attorney General, and *W. D. Oldham, Deputy Attorney General*, for the state.

References: *Moses v. Comstock*, 4 Neb. 516; *Lord v. State*, 17 Neb. 526; *Haggin v. Haggin*, 35 Neb. 376; *Montgomery v. Bevans*, 1 Sawyer [U. S.] 666; *Miles v. United States*, 103 U. S. 304; *Taylor v. State*, 52 Miss. 84; *People v. Beevers*, 99 Cal. 286; *Shafher v. State*, 20 O. 1; *Walls v. State*, 32 Ark. 565; *Beggs v. State*, 55 Ala. 108; *Cooley v. State*, 55 Ala. 162.

SULLIVAN, J.

The defendant Frederick D. Reynolds was convicted of bigamy and sentenced to imprisonment in the penitentiary for a term of seven years. He was found guilty on the first count of the information, which charges a first marriage with Jennie Ford in Beaverhead county, in the state of Montana, in February, 1895, and a second marriage with Lizzie J. Caulk in Hayes county, Nebraska, in July 1897. The solemnization of both marriages, as alleged in the information, was shown by competent evidence and was admitted by the defendant while testifying as a witness in his own behalf. The hypothesis upon which the defense was conducted was that the Montana marriage was void for the reason that both the contracting parties were at the time bound by prior matrimonial alliances and so lacking in legal capacity to marry or live in lawful wedlock. Jennie Ford being produced as a witness for the state on cross-examination gave testimony from which it appears that she,

as well as the defendant, was incorrigibly addicted to matrimony. She testified that she married J. J. Jordon at Vinton, Iowa, in 1883; that she married Frank Ford in Chicago in 1884, and that, at Dillon, Montana, in August, 1892, she was wedded to Mark S. Purman. At the conclusion of the cross-examination she was dismissed by the state, but was subsequently recalled and, over defendant's objection, testified that at the time she married Reynolds all of his predecessors in marital right were dead. She also testified that she had obtained a divorce from Purman in 1893. During the course of a further cross-examination it was developed that the only information the witness possessed in regard to the death of Purman was derived from a letter written to her by some one in Kansas City. Whereupon the defendant moved to strike out the testimony. The motion was denied for the reason suggested by the following remark of the judge who presided at the trial: "An honest belief of the death of a husband or a wife, together with some reasonable ground for their believing it, would be a good excuse. I believe on that ground it ought to be overruled." The motion should have been sustained. The mere reception of the letter did not render the witness an eligible candidate for matrimony. Neither reason nor authority sustains the position of the trial court upon this question. There are, it is true, cases which hold that an honest belief in the death of a former husband or wife, when such belief is reasonably grounded, is a defense to a prosecution for bigamy; but if the doctrine of these cases is sound, which we do not concede, it has no application whatever to the facts of this case. The witness was not on trial; her intent, whether criminal or innocent, was not in issue, and, therefore, her belief touching the contents of the letter was wholly immaterial. A married person cannot become absolved from the bonds of matrimony by believing, even upon information apparently reliable, that the marriage has been dissolved by divorce or death. Public

policy forbids that the permanence of the marriage relation should depend on anything so precarious and elusive as the mental state of one of the parties. But it is contended by the attorney general that the refusal of the court to sustain the motion was not prejudicial error, because the law would presume in favor of the innocence of Jennie Ford that Purman was dead at the time she contracted the marriage with Reynolds. The better opinion seems to be that there is in such case no absolute and inflexible presumption, but that the question is to be determined by the jury from all the facts in the case. (*Williams v. Williams*, 63 Wis. 58; *Town of Northfield v. Plymouth*, 20 Vt. 582; *Johnson v. Johnson*, 114 Ill. 611; *Rex v. Harborne*, 2 Ad. & El. [Eng.] 540*.) But, conceding that the presumption of innocence should be indulged notwithstanding the reasonable and probable presumption of life, it does not follow that there was not prejudicial error in submitting to the jury the evidence against which the motion was directed. There was evidence in the case that Purman was seen alive and well at Evans, Colorado, in 1897. This evidence destroyed the presumption of his death and left the question for the jury to determine upon a consideration of all the facts and circumstances proven on the trial. As applied to the facts in this record, the presumption was nothing more than an arbitrary rule. It possessed no inherent probative force. Its value depends upon law and not upon logic. When it met opposing testimony, it was completely overthrown and ceased to be a factor in the trial. (*Graves v. Colwell*, 90 Ill. 612.) This being so, it follows that the court permitted the jury to find that Purman was dead and to rest their finding upon the testimony of Jennie Ford with respect to the contents of a letter which was neither produced nor accounted for. It cannot be said that this evidence did not exert a decisive influence upon the jury in reaching their verdict. It was palpably incompetent and should have been rejected. The defendant also complains because Jennie Ford was permitted

to give oral evidence of the fact that she had obtained a divorce from Mark S. Purman. The evidence was clearly secondary, and its reception was prejudicial error. If a divorce had been obtained, a duly authenticated copy of the decree was the appropriate and only legal evidence of the fact. (*Commonwealth v. Boyer*, 7 Allen [Mass.] 306; *State v. Barrow*, 31 La. Ann. 691; *Tice v. Reeves*, 30 N. J. Law 314; 1 Jones, Evidence sec. 199; 4 Am. & Eng. Ency. Law [2d ed.] 45.) This evidence may have influenced the jury to find that Jennie Ford possessed capacity to contract a valid marriage with the defendant. At any rate, it is impossible to say that it did not have that effect. Other rulings of the trial court assigned for error cannot be considered, because in some instances appropriate objections were not made and in others no exceptions were taken. The instructions given seem to be lacking in accuracy of statement, while at least one of the instructions tendered by the defendant and refused by the court states a correct principle, was applicable to the facts, and should have been given. But as there was no exception to the instructions, the assignments in relation to them cannot be considered. It has been suggested, and is doubtless true, that in this case "outraged Justice has laid her avenging lash on the back of one who honestly deserves the scourge;" but we cannot for that reason alone affirm the judgment. The jurisdiction of the courts is not co-ordinate with that of the mob. The defendant, by his own confession, is an inveterate bigamist, but notwithstanding that fact he is, under the constitution and laws of this state, entitled to a fair and impartial trial. Notwithstanding his odious character he must, like every other person accused of crime, be tried and convicted by due course of law or else go free. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

HERMAN BROTHERS V. HAYES & JONES.

FILED FEBRUARY 23, 1899. NO. 8650.

Attachment: DISCHARGE AFTER JUDGMENT. A court is without authority to hear and determine a motion to discharge an attachment filed before judgment in the action, but not submitted until after judgment. Third point in the syllabus of *Stutzner v. Printz*, 43 Neb. 306, overruled.

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

Bane & Altschuler, for plaintiffs in error.

Lamb & Adams, contra.

SULLIVAN, J.

Herman Bros. commenced this action before E. E. Spencer, a justice of the peace for Lancaster county, to recover of Hayes & Jones an alleged indebtedness of $44. The action was aided by attachment. The summons was returnable August 15, but by agreement of the parties the trial of the cause was postponed to a later day. At the time agreed upon the evidence was submitted and a judgment rendered in favor of the plaintiffs for the full amount of their claim, together with the costs of the action, taxed at $5.70. Just prior to the commencement of the trial the defendants filed a motion to discharge the attachment, but did not press it to a hearing, nor, so far as the record shows, make any attempt to do so. After judgment was rendered the plaintiffs moved for an order to sell the attached property, and the defendants presented their motion to dissolve the attachment. The former motion was denied, the latter sustained, and the costs taxed to the plaintiffs. To secure a reversal of these orders Herman Bros. prosecuted error to the district court, where the rulings of the justice were ap-

proved and a judgment rendered dismissing the proceeding. The costs, amounting to $48.08, were taxed to the plaintiffs.

The question for decision is the authority of the justice of the peace to entertain the motion to discharge the attachment after judgment in the action. By section 235 of the Code of Civil Procedure it is provided: "The defendant may, at any time before judgment, upon reasonable notice to the plaintiff, move to discharge an attachment, as to the whole or a part of the property attached." This section confers upon an attachment defendant the right to apply to the court for a release of property claimed to be wrongfully held under an order of attachment. It contains also a limitation upon the exercise of the right. The application must be made within the time and in the manner fixed by the statute. It is not sufficient to place a motion among the files of the case; that does not meet the requirements of the law, which clearly contemplates that the matter shall be brought to the attention of the court and its action invoked thereon. Such was the construction adopted in *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb. 520, where NORVAL, J., delivering the opinion, said: "The only reasonable construction of the section quoted is that the authority of the court to dissolve an attachment is limited to cases where a motion to discharge is filed before judgment; in other words, where such a motion is seasonably made and submitted to the court for its decision thereon, but through inadvertence or otherwise no ruling has been made before final judgment on the merits, the court has jurisdiction to rule upon the motion after such judgment." In the case of *Stutzner v. Printz*, 43 Neb. 306, the court, while professing to follow *Moline, Milburn & Stoddard Co. v. Curtis*, decided that a motion to dissolve an attachment filed before judgment might be submitted and ruled on after judgment. The decision is apparently the result of a misconception of the point decided in the earlier case. It does not assume to

stand on an independent exposition of the statute and cannot be accepted as a precedent. The motion in the case at bar not having been brought to the attention of the court before judgment, and no notice having been given to the plaintiffs as required by section 235 of the Code, the justice of the peace was without power to discharge the attachment. The judgment of the district court is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. BURNEY J. KENDALL, V. CHARLES T. DICKINSON, JUDGE.

FILED FEBRUARY 23, 1899. No. 10605

1. **Bill of Exceptions:** MANDAMUS. A litigant has an absolute legal right to the allowance of a bill of exceptions embracing all the evidence considered on the hearing of an application for an interlocutory order. This right, in a proper case, may be enforced by mandamus.

2. ———: TIME FOR SETTLEMENT. The time for settling a bill of exceptions in such case begins to run from the final adjournment of the term at which the order complained of is made.

ORIGINAL application for mandamus to require respondent to allow and sign a bill of exceptions. *Writ allowed.*

Albert Swartzlander, for relator.

Joel W. West, contra.

SULLIVAN, J.

This is an original application for a writ of mandamus to require the respondent, who is one of the judges of the district court, to allow and sign a bill of exceptions. After the reversal of the judgment in *Kendall v. Garneau*, 55 Neb. 403, the defendant in that case filed an answer

in the district court containing three separate defenses to the cause of action stated in the petition. The plaintiff moved to strike out the first and second defenses on the ground that they were pleaded in violation of a stipulation of the parties filed in the case before the decision on the demurrer. The motion was presented to the respondent presiding in the district court for Douglas county, and, after a hearing upon evidence, was overruled. The plaintiff excepted to the order of the court and prepared and tendered a draft of a bill of exceptions for settlement and allowance. The correctness of the bill is conceded and the respondent refuses to sign it only because the order denying the motion to strike is not a final order. The order is certainly interlocutory, but the plaintiff is, nevertheless, entitled to a record on which he may hereafter have the ruling of the district court upon the motion reviewed. The time for settling such bill does not begin to run from the close of the term at which the case is finally disposed of, but from the adjournment of the term at which the order is made. Such is the holding in *Schields v. Horbach*, 40 Neb. 103. We do not determine whether all the matters sought to be incorporated in the bill should be so incorporated. It is evident a bill including the stipulation should be allowed, and that the reason assigned by the respondent for refusing to sign the one presented to him is insufficient. The writ is

ALLOWED.

JOHN FINDERS ET AL. V. ELLEN A. BODLE ET AL.

FILED FEBRUARY 23, 1899. No. 8644.

1. **Constitutional Law:** VOID STATUTES. An act of the legislature passed in violation of the constitution is void from the date of its enactment, and not from the time it is judicially determined to be in conflict with the supreme law.

2. ——: ——. An unconstitutional statute creates no new rights

and abrogates no old ones. It is for all purposes as though it had never been passed.

3. ———: ———: DECEDENTS. "Baker's Decedent's Law" was never in force, and notwithstanding its adoption by the legislature and approval by the governor, it did not change, or affect in any way, the statutes regulating the descent and transmission of testate or intestate estates.

4. **Homestead:** DESCENT. When a homestead is selected from the property of the husband, it vests on his death in his widow for life and afterwards in his heir or devisee in fee simple.

5. **Void Judgments.** When a court renders a judgment which it has no authority to render in any case, nor under any circumstances, such judgment is void for want of jurisdiction.

6. ———: HOMESTEAD: COUNTY COURTS. A decree of the county court assuming to vest in a widow the absolute title to a homestead selected from the lands of her deceased husband is void as an exertion of power not granted by the constitution or laws of the state.

7. **Statutes:** CURATIVE LEGISLATION. Curative legislation does not operate against persons acquiring title to property in good faith and for value before its enactment.

ERROR from the district court of Richardson county. Tried below before STULL, J. *Reversed.*

C. Gillespie, for plaintiffs in error.

Edwin Falloon, contra.

SULLIVAN, J.

This was an action of ejectment brought by Ellen A. Bodle and Mary Rosa against John Finders and Eliza Finders to recover possession of lot 1, in block 8, of the village of Verdon, in Richardson county. In the district court there was judgment according to the prayer of the petition. The material facts are undisputed and may be thus summarized: Asaph Oliver was the fee owner of the lot in question and at the time of his death was occupying it with his wife, Catherine Oliver, as a family homestead. The property, which did not exceed in value the sum of $500, was devised to Fred Oliver, a son of

Asaph Oliver by a former marriage. The plaintiffs are daughters of Catherine Oliver by a former marriage and step-sisters of Fred Oliver. After the death of Asaph Oliver, which occurred February 4, 1892, his widow, rejecting the provisions of his will in her favor, declared her election to take under the law. Thereupon the county court, acting under the authority of chapter 57, Session Laws 1889, known as "Baker's Decedent's Law," made a decree assuming to transfer to Catherine Oliver absolute title to the property in controversy. In December, 1892, Catherine Oliver died intestate and the plaintiffs succeeded to her rights. The validity of their title to the lot depends, therefore, upon the validity of the decree of the county court. The Baker law was passed in violation of the constitution. It neither created new rights nor destroyed old ones. It was as ineffectual as though it had never been enacted. (*Trumble v. Trumble*, 37 Neb. 340; *Boales v. Ferguson*, 55 Neb. 565.) Consequently, upon the death of Asaph Oliver the lot in question became the property of Fred Oliver, subject to his step-mother's life estate therein. Section 17, chapter 36, Compiled Statutes 1897, provides that on the death of the owner of the homestead it shall vest in the surviving husband or wife during the life of such survivor and afterwards in the heir or devisee of the original owner.

Fred Oliver having acquired the fee to the property by his father's will, it was not within the power of the county court to divest his title and vest it in the plaintiff's ancestor, conceding for the purposes of the case that the proceedings were adversary. Courts must keep within their jurisdictions. They must have power to hear and decide, or their decisions will be null. Unless the question decided is presented for decision, and unless the authority to decide questions of like character is given to the court by law, the decision is a nullity and may be assailed in a collateral action. (*Fithian v. Monks*, 43 Mo. 502; *Bridges v. Clay County*, 57 Miss. 252; *Ex parte Lange*, 18 Wall. [U. S.] 163; *Feillett v. Engler*, 8 Cal. 76;

Sheldon v. Newton, 3 O. St. 494; *Strobe v. Downer*, 13 Wis 11; *Lewis v. Smith*, 9 N. Y. 502; *Bigelow v. Forrest*, 9 Wal [U. S.] 339; *Windsor v. McVeigh*, 93 U. S. 274; *Spoors Coen*, 44 O. St. 497, 9 N. E. Rep. 132.) In 1 Freeman Judgments [4th ed.], section 120*c*, it is said: "If a cour grants relief which under no circumstances it has an authority to grant, its judgment is to that extent void. In *Munday v. Vail*, 34 N. J. Law 418, it is said that a essential element of jurisdiction is power in the cour to take cognizance of cases to which the one to be ad judged belongs. In the case at bar the county court o Richardson county undertook by its decree to divest Fre Oliver's title to the lot in dispute on the assumption tha it had authority to confirm in Catherine Oliver, as widow of Asaph Oliver, the fee to the family homestead, sinc it did not exceed in value the sum of $1,000. The cour possessed no such power in any case. It was withou legal capacity to entertain the application of the widow or to grant the relief demanded. The decree assigning the homestead, to the extent that it assumed to confe rights outlasting the life of Mrs. Oliver, was not merely erroneous, but utterly void.

Plaintiffs, however, insist that if the decree was origi nally void for want of jurisdiction in the county court it was afterwards legalized and made effective by cura tive legislation. We need not in this case determine th extent to which the legislature may rightfully go in the enactment of curative statutes, for it is evident the one in question is not applicable here in view of the facts conclusively shown by the record. It appears that John Finders bought the property from Fred Oliver in good faith, and for an adequate consideration, after the de cision in *Trumble v. Trumble* and before the curative stat ute was passed. The title of a purchaser thus acquired is not affected by legislation designed to validate void judgments. Upon this proposition the authorities are agreed. One about to buy property is not required to anticipate future legislative action affecting the title

offered for sale. Otherwise, investments would be safe only to those having access to oracles, or possessing something like that comprehensive sweep of vision ascribed by Homer to the Grecian seer. Discussing a similar question Chief Justice Marshall, in *Fletcher v. Peck*, 6 Cranch [U. S.] 87, used the following language: "It is, then, the unanimous opinion of the court that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles, which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void." In Freeman, Void Judicial Sales, section 61, it is said: "The curative act does not operate against purchasers from the grantor in good faith, and for value, before its passage." In support of this proposition the author cites *Newman v. Samuels*, 17 Ia. 528; *Thompson v. Morgan*, 6 Minn. 199; *Brinton v. Seevers*, 12 Ia. 389; *Sherwood v. Fleming*, 25 Tex. Supp. 408; *Wright v. Hawkins*, 28 Tex. 452; *Menges v. Dentler*, 33 Pa. St. 495. Other cases holding the same doctrine are: *Johnson v. Wells County*, 107 Ind. 15; *McDaniel v. Correll*, 19 Ill. 226; *Nelson v. Rountree*, 23 Wis. 367; *Denny v. Mattoon*, 2 Allen [Mass.] 361; *Pryor v. Downey*, 50 Cal. 388. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CHARLES J. ESTEP, APPELLEE, V. SAMUEL SCHLESINGER ET AL., IMPLEADED WITH ISAAC A. WOOD ET AL. APPELLANTS.

FILED FEBRUARY 23, 1899. NO. 8732.

1. **Review:** EXCEPTIONS. An interlocutory order to which no exception has been taken cannot be reviewed.
2. **Appeal.** In a cause brought to this court by appeal the judgment will not be reversed if it responds to, and is warranted by, the pleadings and proof.

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

Silas Cobb, for appellants.

James H. McIntosh, contra.

SULLIVAN, J.

This action was brought in the district court of Douglas county to foreclose three real estate mortgages. Isaac Wood and Eliza Wood were the fee owners of an undivided one-half of the mortgaged property. The other half was owned by two other defendants. The Woods answered denying plaintiff's ownership of the mortgages and questioning the amount claimed to be due thereon. They also filed a cross-petition containing the usual allegations in actions for partition, and asked that the several shares and interests of the parties as therein alleged be confirmed and that referees be appointed to make allotment accordingly. To this pleading the plaintiff demurred, and the demurrer was sustained. It is now urged that the ruling on the demurrer was erroneous and that the judgment of foreclosure should, therefore, be reversed.

We cannot consider the correctness of the decision, for the reason that no exception was taken. The order

being interlocutory, in the absence of an exception, is not reviewable. (*Abbott v. Barton*, 47 Neb. 822; *Yager v. Lemp*, 39 Neb. 93; *Weich v. Calhoun*, 22 Neb. 166.) Besides, this being an appeal, the only question for our determination is whether the judgment rendered is the one which ought to have been rendered on the pleadings and evidence. There is nothing whatever in the record before us that would warrant a decree for partition. The judgment is

AFFIRMED.

HENRY E. LEWIS, RECEIVER, v. WILLIAM F. PICKERING.

FILED FEBRUARY 23, 1899. No. 8725.

Negotiable Instruments: SET-OFF. In an action against the maker of a promissory note he cannot plead as a set-off an amount due from plaintiff to a society, of whose funds the defendant, as an officer, is custodian.

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

Dryden & Main, for plaintiff in error.

References: *Scammon v. Kimball*, 92 U. S. 362; *Slow v. Yarwood*, 14 Ill. 424.

John Hoge, contra.

RYAN, C.

This action was brought in the district court of Buffalo county by the receiver of the Buffalo County National Bank for the collection of a note for $597.22 made to that bank by William F. Pickering. The defendant just named was allowed a set-off of the amount which was due on a deposit in the Buffalo County National Bank, and there was judgment against him for the balance of the note and interest. For a review of the ruling whereby the

said set-off was allowed the receiver of the bank has prosecuted these error proceedings. The note was the individual note of Pickering. The set-off was evidenced by an account with the bank under the name of W. F. Pickering, receiver, and the evidence disclosed that the money he had deposited in this account was the property of a society described as the A. O. U. W. Lodge. It was suggested in argument that the ruling of the district court was in line with *First Nat. Bank of South Bend v. Gandy*, 11 Neb. 431, but in this we cannot concur. In *First Nat. Bank of South Bend v. Gandy, supra*, Gandy had deposited, as county treasurer, certain money with the bank, which was garnished as a supposed debtor of Gandy, on an execution issued upon a judgment against him. In the district court the garnishee was discharged and the judgment debtor prosecuted error proceedings to this court, and it was held that Gandy could not legally deposit the funds of the county with the garnishee bank, and, therefore, that the bank could not be permitted to assert that he had done so. In the case under consideration the receiver of the A. O. U. W. Lodge bases his right to set-off the amount due that lodge on the proposition that the deposit was his own individual property. If the principle underlying the case of the *First Nat. Bank of South Bend v. Gandy, supra*, is applicable, its practical effect would be to estop Pickering to insist that the money of the lodge had been converted to his use. The estoppel invoked in *First Nat. Bank of South Bend v. Gandy, supra*, was based upon statutory provisions forbidding the loaning by a public officer of public funds with which he is intrusted, and we shall not, therefore, accept that case as determinative of the questions involved herein. The deposit in this case was of funds of the lodge, practically as though the deposit had been in its name; for, if there had been a controversy between a successor of Pickering in office and himself as to who was entitled to such funds, they must have been awarded to such successor. If we are correct in this assumption,

it inevitably results that Pickering could not plead as a set-off to the claim against himself, individually, the indebtedness due from the creditor to the lodge. The judgment of the district court is therefore reversed.

REVERSED AND REMANDED.

HENRY KREBBS ET AL. V. WILLIAM HOLWAY.

FILED FEBRUARY 23, 1899. No. 8410.

1. **Pleading:** AMENDMENT: REVIEW: PRESUMPTIONS. It cannot be assumed in the supreme court that the district court erroneously overruled a motion to cause to comply with a former pleading in the county court a pleading in the district court, by striking from the latter certain language, when the record in the supreme court fails to show what pleading was filed in the county court.
2. **Sales:** CONTRACTS: EVIDENCE. Allegations of a failure to deliver cattle upon demand pursuant to a contract of purchase and sale are not sustained by proofs of a failure to return earnest money paid upon an agreement, at the time of purchase, that, if conditions not then known, but subsequently to be ascertained, should not prove to be satisfactory, the earnest money would be refunded.

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

C. J. Smyth, for plaintiffs in error.

Charles Offutt, contra.

RYAN, C.

The first pleading in the transcript of the record of this case is an amended petition filed in the district court of Douglas county. The defendants therein named filed a motion to strike from this petition certain averments so that it might describe the same cause of action that, as was alleged in the motion, had been plaintiff's cause of action in the county court. As already indicated, the

transcript does not purport to describe any issue presented in the county court. In the bill of exceptions we find what are styled a "petition" and "an amended petition," purporting to be filed in the county court. Neither of these is certified as a transcript and each is apparently the original paper filed in the county court. Even if we could take notice of such proofs, there is nothing to indicate what was intended to be established by them. There is nothing in the motion to show that any resort was to be had to proofs outside the record before the district court. If we are confined to the record as it stood in the district court, there is nothing in the record before us to show that these pleadings were ever filed in the district court. If these pleadings are to be considered as in the nature of extrinsic evidence, and if proofs might be admitted of that kind,—propositions upon which we do not pass,—we meet with the insurmountable objection that there is nothing in the record to show that they were submitted on the hearing of the motion to strike out parts of the petition. For these reasons we cannot determine whether or not there was a departure from the cause of action described in the county court.

In his amended petition above mentioned William Holway sought to recover, and did recover, against Henry Krebbs and Charles R. Ferrall, individually and and as partners under the firm name and style of Henry Krebbs & Co., a judgment in the sum of $450, with interest from March 1, 1893. The essential part of the amended petition was as follows: "That on or about the 1st day of March, 1893, the said defendants, then and there being engaged in the live stock commission business as partners, received from the plaintiff $450 as part purchase price of about eighty-three head of cattle, known as the Chumley cattle, which plaintiff then purchased by bargain with defendants—but who were the owners of said cattle plaintiff cannot state—with the agreement that said cattle should be delivered to plain-

tiff by one R. C. Chumley to be weighed at the station of shipment, when plaintiff would pay the remainder of said purchase price; that the defendants accepted said money and agreed that said cattle should be, as aforesaid, delivered to this plaintiff, or if not so delivered, that they, the said defendants, would refund the said $450." This language was supplemented by averments of a failure to deliver the cattle in pursuance of the contract above described, of a consequent failure of consideration, and of the refusal by defendants to repay to plaintiff the said $450, though said defendants knew of the aforesaid failure of consideration. There was a verdict and judgment as prayed in said petition, and these are assailed in this court by the petition in error of the judgment defendants.

The firm of Henry Krebbs & Co. was a live stock commission firm doing business in South Omaha on, as well as before and after, March 1, 1893. The cattle described were, at the time of the alleged purchase, on the ranch of R. C. Chumley, in Custer county. There had been an oral contract between Chumley and one Tierney, whereby the latter became the owner of these cattle, but they remained in the possession of Chumley, who had authority to sell them,—an authority which he exercised by making a contract with Eli Grubb, who was a traveling soliciting agent for Henry Krebbs & Co. The live stock commission firm of Gasman & Dudley, at the times herein involved, was doing business at South Omaha, and William G. Allen was one of its soliciting agents. In February, 1893, Allen proposed to Henry Krebbs & Co. to purchase the Chumley cattle at an advance of ten cents per hundred pounds over the price Grubb had agreed to pay for them. This proposition was accepted. It was made for plaintiff William Holway, and as earnest money there was paid by Gasman & Dudley, by check, the sum of $450 to Henry Krebbs & Co., and this action was for the recovery of this sum with interest.

The disagreement between the parties to this action

arose from the fact that it was not understood between the firm of Gasman & Dudley and the firm of Henry Krebbs & Co. where delivery of the cattle was to be made. It was the understanding of Gasman & Dudley that the delivery was to be at Broken Bow, a railroad station twenty miles distant from Chumley's ranch, and Allen testified that a member of the firm of Henry Krebbs & Co. created that impression by reading to him, during the negotiations, a letter in which the place of delivery to Grubb was described as Broken Bow. Plaintiff William Holway testified with reference to his efforts to get possession of the cattle as follows: "I told him [Chumley] that I was taking steps to come and see the cattle; that I wanted to make arrangements to weigh them at Oconto instead of Broken Bow; that I had bought them to weigh at Broken Bow. He said they were not to be weighed at Broken Bow or Oconto; they were to be weighed at my yard. I said that was not the way I bought those cattle. He said that was the way he sold those cattle and the way they must be delivered. I says: 'Mr. Chumley, I will come and receive those cattle on these terms. You must hold those cattle a few days until we can see what the law says. There is a lawsuit in Omaha. Just hold those cattle for a few days and I will straighten the matter out.'" This was a few days before March 9, 1893, the day the cattle were to be delivered. Further testifying on cross-examination Mr. Holway said: "As I understood the contract, they were to be delivered on or before the 10th. * * * I understood that I had until the 10th to carry out my contract." On redirect examination Mr. Holway used this language: "I said to Mr. Chumley that he must hold those cattle for a few days until we could get the facts in the case in Omaha; that I would pay the charges for feeding the cattle until I could see how I would receive the cattle. I didn't want to take them upon his contract. I wanted the cattle as I bought them. He wouldn't deliver them that way."

Mr. Chumley did not testify with reference to the above conversation, but he did testify that the cattle were by him delivered to Grubb on March 9 at Chumley's place, where they were weighed; that these cattle were moved the evening of the day of delivery to the Crewdson ranch, from which place they were the next morning taken a distance of six miles to Oconto, a railroad station, from whence they were on the same day shipped to South Omaha to Henry Krebbs & Co., by whom, in that market, one car load was sold, and the remainder were sold in Chicago. Mr. Grubb telegraphed Henry Krebbs & Co. March 7, 1893, as follows: "Holway has squealed on the Chumley deal. Hold the advance money. I will ship the cattle Friday myself." In 1893 March 10 was Friday, and on that day Grubb telegraphed Henry Krebbs & Co. from Oconto as follows: "Have tendered Allen the cattle. He refuses. Ship myself. Hold advance money. Wire markets." With reference to the tender of the cattle to Allen, referred to in the above telegram, Mr. Chumley testified that on the morning of March 9, 1893, Allen was at his place and wanted to know what was the contract between Chumley and Grubb, and was told that the cattle were to be weighed at Mr. Chumley's place, and that the shrinkage was three per cent from the hour and date the weighing commenced. Allen then asked, "If there was any monkey work about that," and was assured by Chumley that there was not. About an hour after the conversation Grubb and other parties came to the ranch to weigh the cattle. When they reached the ranch Allen was going down the river on the further side from Chumley's house. James Kelley was sent after him. When Kelley overtook Allen he told Allen that Grubb wanted him to come back and weigh those cattle; that Grubb was ready to deliver them to him, whereupon Allen answered that Kelley might tell Grubb to go to a designated place of eternal torment and that he, Allen, did not want the cattle, which he referred to by an epithet which would indicate that, in

Allen's mind at least, those cattle were qualified to accompany Grubb to the place to which he had consigned him.

On the oral argument we were impressed with the idea that this was a refusal to receive the cattle, but a critical examination of the record satisfies us that on this point we labored under a misapprehension. Mr. Holway, without contradiction, testified that a few days before the day on which the cattle were to be delivered he saw Mr. Chumley and informed him that he would not take the cattle on the terms as understood by Chumley, but that his own understanding was that they were to be weighed at Broken Bow. Mr. Chumley was then in possession of the cattle and was managing them for Grubb, whose principal was the firm of Henry Krebbs & Co. As we shall hereafter show, the request of Mr. Holway that there should be a delay to enable communication to be had with South Omaha was, under the circumstances, a reasonable request. It is very evident that soon after this request Grubb telegraphed to Henry Krebbs & Co. that Holway had squealed; that the money advanced should be held, and that Grubb would ship the cattle himself on Friday. An apparent anxiety to get rid of the Chumley deal was further evidenced by the telegram of Grubb sent two days later, in which he said Allen had refused a tender of the cattle, that Grubb would ship them, and requesting that Henry Krebbs & Co. should hold the advance money and wire markets to Grubb.

That we may explain why the request of Holway for delay was reasonable under the circumstances it is necessary to state one fact, which, that its importance might not be lost sight of at the proper time, we have hitherto omitted to mention. When the firm of Gasman & Dudley was about to complete the purchase of the cattle Mr. Krebbs told Mr. Dudley that he, Krebbs, had heard the cattle were to be delivered at Broken Bow, but did not know whether that was the fact or not. When Dudley

gave Krebbs the check for $450 Krebbs testified that Dudley said: "If this deal is not right you will return this, will you?" To which Krebbs said that he answered, "Yes." To the cause of action to which this evidence would be pertinent it is not of special importance where the cattle were in fact to be delivered under the contract between Grubb and Chumley. When the contract was made between the commission firm in South Omaha it was a recognized fact that there was no satisfactory knowledge possessed by Henry Krebbs & Co. as to what place of delivery had been agreed upon between the parties in Custer county, Henry Krebbs, however, stated that he had heard that the delivery was to be at Broken Bow. Mr. Dudley was, therefore, warranted in assuming that Broken Bow was probably the place of delivery, but to guard against the contingency of being misled by the statement of Mr. Krebbs, Mr. Dudley exacted a promise that if the deal was not right Henry Krebbs & Co. would return this advance payment. Under these circumstances it is possible that Henry Krebbs & Co. owed a duty to Gasman & Dudley and that firm's principal, whoever he might be, and that that duty was ignored when Henry Krebbs & Co. permitted its agent, Mr. Grubb, to ship the cattle to South Omaha and itself sold this stock on the South Omaha and Chicago markets.

On this evidence the question presented is not as to the right to recover upon a failure to deliver upon demand as agreed, but it is the right to a recovery on account of money intrusted to Henry Krebbs & Co. upon the express agreement of that firm that if there was a disagreement as to terms made by other parties, the money advanced would be returned. These proofs, however, were on a different theory from that on which the amended petition was drawn. In that pleading plaintiff alleged the payment of $450 as earnest money on the purchase of the cattle; that said cattle were to be delivered to plaintiff to be weighed at the station of shipment; "that defendants accepted said money and agreed that said cattle

should so, as aforesaid, be delivered to this plaintiff, or, if not so delivered, that they, the said defendants, would refund the said $450." There was not sufficient evidence to sustain the averment which followed that above quoted, that plaintiff, "in manner and form as agreed, made demand for the delivery of said cattle in pursuance of said contract, but the same were not delivered to plaintiff, and thereby the consideration for said payment so made to the said defendants failed." There was in fact no demand shown. The conversation between Chumley and Holway did not fulfill the requirement of a demand for performance, for it was as early as March 7, 1893, and without question the delivery was not to be made until the second day thereafter. Mr. Holway's request was not for a delivery of the cattle on the terms as he understood them, but that Chumley should hold the cattle until Holway could communicate with parties in Omaha. This delay was expected by Holway to extend beyond March 9, for he offered to pay for the subsistence of the cattle during the time required beyond March 9.

The instructions followed the theory of the petition and were without reference to a cause of action in support of which the evidence introduced might be pertinent. On account of the errors indicated the judgment of the district court is reversed and the cause is remanded for further proceedings not inconsistent herewith.

REVERSED AND REMANDED.

GEORGE M. GRANT, APPELLEE, V. FRANK N. CLARKE ET AL., APPELLANTS.

FILED FEBRUARY 23, 1899. No. 8761.

1. **Note:** INDORSEMENT: EVIDENCE. Where issue has been joined on the averments of a transfer by indorsement of the notes sued on, the introduction of the notes in evidence, without referring

to the indorsement, amounts to a failure to introduce evidence indispensable to plaintiff's right of recovery.

2. **Default of Defendant.** The default of a defendant admits the truth of each averment of the petition aside from those of the amount of value or damages.

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

Charles B. Keller, Charles F. Tuttle, and *James P. English,* for appellants.

W. A. Saunders, contra.

RYAN, C.

In the district court of Douglas county this action was instituted by George M. Grant for the foreclosure of a mortgage securing two promissory notes. The payee of these notes, and the mortgagee, was Martha M. Ish. In his petition plaintiff alleged that by the indorsement of Martha M. Ish and the indorsement of H. Ambler plaintiff had become the owner of said notes and entitled to foreclose the mortgage securing the same. By their answers Walter and Minnie Moise and Anton and Mary Larsen denied the averments of the petition in such a manner that the execution of the assignments aforesaid were put in issue. The notes and mortgage were offered in evidence, but there was no offer of the alleged indorsements, and therefore there was no proof made of the assignments through which plaintiff claimed title to the notes and the right to maintain an action of foreclosure on the mortgage securing them. (*Noll v. Kenneally,* 37 Neb. 879; *Cummins v. Vandeventer,* 52 Neb. 478; *Johnson v. English,* 53 Neb. 530; *Levy v. Cunningham,* 56 Neb. 348; *Comstock v. Kerwin,* 57 Neb. 1.)

As against the parties who had put in issue the alleged assignments the decree lacked sufficient evidence to support it, and accordingly the judgment adverse to the appellants Walter and Minnie Moise and Anton and Mary

Larsen is reversed. Frank N. Clarke made default in the district court, and because of this fact all averments of the petition were properly taken as true, except as to the amount of the recovery (Code of Civil Procedure, sec. 134), and the proof on this point was supplied by the introduction of the notes. Mr. Clarke is, therefore, not entitled to a reversal, but as to the other appellants the judgment is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

ANNA B. HOLMES V. LINCOLN SALT LAKE COMPANY ET AL.

FILED FEBRUARY 23, 1899. No. 8739.

1. **Error Proceedings:** MOTION FOR NEW TRIAL. Where there was filed in the district court no motion for a new trial, the supreme court will only look into the record to ascertain if the pleadings support the judgment sought to be reversed by error proceedings.
2. **Review.** The issues in this case considered, and *held* to support the judgment of the district court.

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

J. R. Webster and *W. E. Stewart*, for plaintiff in error.

Abbott, Selleck & Lane, contra.

RYAN, C.

In this case, originally, Leonidas K. Holmes was plaintiff and the Lincoln Salt Lake Company, Joseph Burns, Edward Bignell, John Lindloff, B. R. Cowdrey, and A. R. Humphrey, commissioner of public lands and buildings, were defendants. After this action was begun in the district court of Lancaster county, Anna B. Holmes was ordered to be made a defendant, and thereafter she

was a party to issues made up and tried. Plaintiff Leonidas K. Holmes was denied relief, as was also Anna B. Holmes, his wife, on her answer and cross-petition. She alone has prosecuted error proceedings to this court. There was no motion for a new trial in the district court, and under these conditions the following language quoted from *Hansen v. Kinney*, 46 Neb. 207, is applicable: "Where it is sought to review on error in this court the judgment of a district court, no motion for a new trial having been filed, this court will look into the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree rendered; but this court will not go back of the verdict rendered by the jury, or the findings of fact made by the trial court, to review anything done or any proceedings had."

As no complaint is made in this court by Leonidas K. Holmes the averments of his petition are unimportant, except to the extent they may throw light upon the issues litigated between Anna B. Holmes and certain of her co-defendants. Leonidas K. Holmes, in his amended petition, alleged that he was the owner of the leasehold and was in possession of certain saline lands of the state of Nebraska of the area of 116 acres in a single tract; that his dwelling-house was situated on the south fifteen acres of a part of said tract which he had leased from the state of Nebraska in 1889, upon which fifteen-acre tract thereafter he had placed improvements of the value of $3,000; that plaintiff was the head of a family, and that said forty-acre tract constituted a part of his homestead. It was further alleged in the petition that John Lindloff had obtained from the state of Nebraska a lease on the forty-acre tract, in which was included the fifteen acres above referred to; that the lease to plaintiff and to Lindloff were of the same date; that soon after the said date plaintiff and Lindloff agreed to make an exchange whereby plaintiff would receive the rights of Lindloff in the fifteen-acre tract above described, and between themselves said lessees executed writings for the agreed pur-

pose above described, but owing to the ignorance of the scrivener by whom the writings were drawn plaintiff obtained a mere lease from Lindloff of the fifteen-acre tract heretofore referred to, and not, as was intended, a conveyance of Lindloff's interest therein. It was further alleged in the petition that the defendants Joseph Burns and Edward Bignell had obtained an assignment from Lindloff and from plaintiff of the aforesaid fifteen acres; that for plaintiff's assignment the consideration was nominal, but in fact was the promise to pay plaintiff for a right of way for a street railway over other lands of plaintiff—a promise never performed,—and that this assignment was never executed or acknowledged by Anna B. Holmes, wherefore, as plaintiff alleged, it was void. It was further alleged that Burns and Bignell were officers of the Lincoln Salt Lake Company, and that, therefore, the rights of the company were no greater than those of the two individuals just named. It was further averred that plaintiff had procured all his lands to be appraised in accordance with the law which provides for cases where lessees desire to purchase saline lands, and had made a proper tender of the necessary amount and had demanded a receipt showing payment of the amount necessary to entitle him to a deed for the above mentioned 115 acres of land, but because of the conflicting claims set up, the county treasurer of Lancaster county refused to receive the money tendered and refused to receipt for it as having been paid, and that A. R. Humphrey, commissioner as aforesaid, was about to, and unless restrained would, receive final payment from the Lincoln Salt Lake Company and issue to said company a deed whereby it would be vested with the title to said fifteen-acre tract. It was alleged in the petition that the defendants Cowdrey and Steen claimed some interest in the land in controversy, but that such interest was as mere stockholders in the Lincoln Salt Lake Company. The prayer was for equitable relief, such as, from the averments made, would be proper to form the conclusion of plaintiff's petition.

By the answer of Bignell, Burns, and the Lincoln Salt Lake Company, in addition to admissions of the truth of the averments of the petition whereby the title was apparently vested in said answering defendants, there were affirmative averments of a purchase from Lindloff upon the faith of the records of Lancaster county, whereon appeared the leases referred to in plaintiff's petition. It was further alleged in this answer that the plaintiff had failed and refused to pay the annual stipulated rent in the lease between himself and Lindloff, and that by reason of the non-payment of said rent the answering defendants had elected to, and did, declare the lease void and demanded possession of the leased premises. In the answer of the three defendants last above referred to it was averred that Leonidas K. Holmes had transferred all his right, title, and interest in the land in dispute to said Burns and Bignell, and that said two defendants had transferred the same to the Lincoln Salt Lake Company and delivered the possession, which ever since had been held by said company; that said company, as owner of the lease from the state of Nebraska, had made application under the laws of said state to purchase said land, and had caused the same to be appraised and had tendered the amount of the appraisal as required by law, and was entitled to receive a deed. There was a prayer that the title of the Lincoln Salt Lake Company might be quieted and that plaintiff might be barred of any right therein, and for other equitable relief. The answer and cross-petition of Anna B. Holmes, omitting the formal parts, was as follows:

"Comes now Anna B. Holmes, one of the above-named defendants, and, answering for herself only, denies each and every allegation in the answer herein filed of the defendants not hereinafter expressly admitted.

"2. This defendant alleges that she is the wife of the plaintiff Leonidas K. Holmes, and has been for more than seven years last past, and that she, together with said plaintiff as husband and wife, with their family, at the

beginning of this suit and for many years prior thereto, lived upon and occupied as a homestead the hereinafter described property, * * * containing about 100 acres.

"3. This defendant further says that the plaintiff is, and at the beginning of this suit was, the owner of the above described land and all thereof, and that the same constituted, and at all times, for more than twenty years, has been, the homestead of said plaintiff.

"4. The defendant the Lincoln Salt Lake Company claims to have some interest in said lands by reason of a pretended conveyance by quitclaim to a portion thereof, and by reason of a pretended assignment of a land contract from one John Lindloff to a portion thereof, and such pretended conveyances cast a cloud upon the title to said lands, to the great damage and injury to this defendant.

"Wherefore this defendant prays that title may be quieted as against the Salt Lake Company and that their said pretended conveyances may be canceled and held for naught, from the record of her said title, and that said premises may be declared the homestead of this defendant and may be discharged of any and all claims to the Lincoln Salt Lake Company, and that she may recover her costs herein, and have such further and other and different relief as she, in equity and good conscience, is entitled to."

By a reply of all the defendants, except Anna B. Holmes, there was a denial of each averment of her answer and cross-petition, aside from the averment that the Lincoln Salt Lake Company has some interest in the property described, which latter averment was admitted to be true. There was a trial to the court, followed by findings which negatived the averments of Burns, Bignell, and the Lincoln Salt Lake Company, whereon they sought to found rights because of instruments being of record in Lancaster county. There were also findings which sustained plaintiff's averments as to the alleged mistake between Lindloff and plaintiff, and that the Lin-

coln Salt Lake Company acquired its rights with knowledge of this mistake. There was also a finding to the effect that after Bignell and Burns had received the assignment of Lindloff in the fifteen-acre tract in dispute, they, and their successor in right, the Lincoln Salt Lake Company, made improvements on the said tract, of which Mrs. Holmes was aware and to which she made no objection. This matter of estoppel was not pleaded; therefore this finding was immaterial. In connection with this finding, however, there was the further finding that the said defendant the Lincoln Salt Lake Company was, through the assignment of the lease from Burns and Bignell, the lawful owner and holder of the leased premises. It was also found that said company, having done all things necessary and as provided by the laws of Nebraska, was entitled to receive a deed from said state, and there was judgment in accordance with the above findings.

The issues and findings above set forth, in so far as they are pertinent to our present purposes, may be summarized as follows: Mrs. Holmes founded her right of protection in the enjoyment of a homestead on the facts that she was the wife of Leonidas K. Holmes, in whom then was, and for twenty years had been, the title to the property as to which her claim was made, and she alleged that the claim made by the Lincoln Salt Lake Company casts a cloud upon the title of the property involved in this litigation, which cloud she prayed might be removed. By the answer of her adversaries they alleged their own title and denied hers, and upon this issue the court found against her, and this finding furnished sufficient support for the judgment which was rendered, and accordingly it is

AFFIRMED.

BLUE VALLEY LUMBER COMPANY ET AL. V. JULIUS NEUMAN.

FILED FEBRUARY 23, 1899. No. 8678.

1. **Verdict:** EVIDENCE: COUNTER-CLAIM: HARMLESS ERROR. When the verdict of a jury would have been sustained by the evidence if it had been for the entire amount claimed by plaintiff, the allowance of a counter-claim inexplicable upon any theory of the evidence, if an error, is not such an error that the defendant may be heard to complain of it.

2. **Sales:** MISREPRESENTATIONS: INSTRUCTIONS. Where the petition contained averments of erroneous representations affecting the value of personal property honestly made, and other averments of like misrepresentations dishonestly made, an instruction to meet the latter theory is not erroneous when given in connection with and to supplement one based on the former theory.

3. ———: ———: EVIDENCE: REVIEW. When the misrepresentations relied upon as the basis of a counter-claim were alleged to have been made to one person, proof of facts showing the misrepresentations to have been made to another person is irrelevant; and the fact that such proof was ignored by the jury in its verdict is not available in proceedings in error to reverse the judgment based on such verdict.

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

L. M. Pemberton, for plaintiffs in error.

A. D. McCandless, contra.

RYAN, C.

This action was brought in the district court of Gage county by Julius Neuman on a promissory note made by the Blue Valley Lumber Company to plaintiff and indorsed by F. C. Jaynes and A. E. Winter, for a balance unpaid thereon of $377.13, with interest from its date, February 4, 1890. The defendants, by their answer, admitted the execution of the note as alleged in the petition, and that there had been paid on it the sum of

$793.56 on February 3, 1891, as plaintiff had averred. For further answer the defendants alleged that the note sued on had been given pursuant to, and in fulfillment of, the conditions of a certain written contract, which was in the following language:

"These articles of agreement, made and entered into this 4th day of February, A. D. 1890, by and between Julius Neuman, of Wymore, party of the first part, and Fremont N. Jaynes, agent, of Omaha, Nebraska, party of the second part, witnesseth: Said first party agrees to sell, assign, and convey to second party, or his assigns, fifty shares of the capital stock of the Blue Valley Lumber Company, of Wymore, Nebraska (incorporated), and all of his interest in the profits accrued, and all accounts and bills receivable due or to become due said company, and to resign his position as manager of said company and to wholly sever his connection with said company. In consideration for which said second party hereby agrees to pay first party the sum of $4,150 in manner following, to-wit: $900 cash in hand at the time of signing this instrument and the transfer of said stock, which shall take place the 4th day of February, 1890; $1,000 in one year from date hereof and $1,000 in two years from date hereof; both sums to be put into promissory notes to be signed by the Blue Valley Lumber Company, Fremont N. Jaynes, and A. E. Winter; the balance of said consideration, to-wit, $1,250, to be paid by conveyance by quitclaim deed of an undivided one-half interest in a certain farm in Pawnee county, Nebraska, 160 acres, now jointly owned by said Julius Neuman and A. E. Winter; said deed to be signed by A. E. Winter and his wife, Kittie Winter, and executed in due and legal form. Said Blue Valley Lumber Company assumes all the existing liabilities of said corporation, and said first party is released therefrom and shall be held harmless from said liabilities by said second party and said corporation.

"In testimony of which we have hereunto set our hands this 4th day of February, A. D. 1890.

"JULIUS NEUMAN.
"F. A. JAYNES.

"Witness:
"H. C. JAYNES.'

"Wymore, Neb., February 4, 1890."

The defendants in their answer further alleged that said Blue Valley Lumber Company was a corporation and had a lumber yard and office at Wymore; that from its organization till the time of making said contract plaintiff had been its president and general manager and had had full charge of the management of all the affairs of said company, had kept its books and had full knowledge of its assets and liabilities, and was the only person who had such knowledge; that at the time of making said contract, and as an inducement to the defendant F. N. Jaynes to enter into said contract, plaintiff stated and represented to said defendant that the assets of the company, including its bills receivable, exceeded its liabilities, inclusive of its capital stock, by the sum of $1,501.37; that the accounts and bills receivable of said company, at the time of making said contract, amounted to the sum of $8,820.62, all of which accounts plaintiff then stated to said defendant were due and unpaid to the company, and that the liabilities of said company at said time amounted to $3,340.70, and no more, exclusive of the capital stock of said corporation, which was $10,000; that the books of said company were correct and represented the true condition of the accounts of said company, and that the net profits of said corporation for the time it had been in existence, and which were then on hand, amounted to said sum of $1,501.37, one-half of which said defendant was to get under said contract. It was further alleged in the answer that the defendant F. N. Jaynes, in reliance upon the representations of the plaintiff, entered into the contract hereinbefore set out by a copy thereof, and caused to be exe-

cuted the notes and quitclaim deed in said contract provided for, and performed all the undertakings on his part assumed. It was further alleged in the answer that plaintiff assigned and transferred to said defendant, or to the persons whom he represented in said transaction, A. E. Winter, H. C. Jaynes, and O. F. Jaynes, fifty shares of the capital stock of said Blue Valley Lumber Company, together with the assets of said company which were then actually in the possession of plaintiff, except as in the answer stated; that after the transfer of said fifty shares of stock and the assets, including the bills receivable of said company, to defendant F. N. Jaynes and those for whom he was acting, defendants discovered that said statements and representations made to F. N. Jaynes by plaintiff with reference to the assets and liabilities of said company were untrue, and that plaintiff, with the fraudulent intent to cheat and defraud said defendant and those for whom he was acting, had misrepresented the true condition of said company; that a part of the accounts and bills receivable transferred and turned over to defendant by plaintiff pursuant to said contract as being still due and payable to said company had, in fact, been paid to plaintiff long prior to the time of making the contract, as plaintiff well knew, and that said defendant and those for whom he was acting thereby lost one-half of all such accounts and bills receivable to which they were entitled by virtue of said contract with plaintiff. There were further errors alleged in the books in general terms, followed by the special averment that the profits of said company did not amount to $1,501, the amount of them as represented by plaintiff, but that such profits only amounted to $901.85. The answer concluded with this language: "That by reason of the said false and fraudulent representations of plaintiff and the mistakes and errors contained in the books of said company as kept by plaintiff and turned over to the defendant F. C. Jaynes, said defendant and those for whom he was acting were cheated and defrauded in

the sum of $318.92, and failed, for said reason, to get under the said contract as much as they would have got had the statements and representations been true, by the sum of $318.92, and that to said extent the consideration of the note herein sued upon has failed, and the makers of said note are entitled to a credit thereon of the full amount which would otherwise be due thereon, and defendants ask that they may have such credit in this action, and that they be allowed to go hence with their costs." The above averments of affirmative matter were denied in the reply. There was a verdict in favor of the plaintiff Neuman, and the judgment defendants, by a joint petition in error, ask the reversal of the judgment thereon. This circumstance requires that we shall not consider separately the errors which might otherwise have been presented by an individual plaintiff in error.

The evidence disclosed that on the contract, of which a copy is above given, there was indorsed the following assignment:

"WYMORE, NEB., February 4, 1890.

"I hereby assign the within contract to A. E. Winter, H. C. Jaynes, and O. F. Jaynes, as their interests may appear. F. N. JAYNES, *Agent.*"

There are some features in this case that are rather unusual. In the first place, the designation of agent, as it follows the name of F. N. Jaynes in and as attached to the contract, is in no way explained. In the evidence there was no attempt to show that Neuman knew anything about the principal or principals of F. N. Jaynes, except that in his own testimony Mr. Neuman said that a certain exhibit was in his own handwriting, and that on the day of making the contract F. N. Jaynes stated to him that he wanted something to show to Mr. Winter the condition of the lumber yard to satisfy him he was getting something for the money he was to pay, and there was nothing but the paper referred to in the pigeon-hole, and that Neuman and said Jaynes figured that out, as Neuman had previously figured it out before there had

been any talk of buying or selling. Again, there is no explanation of the rather singular circumstance that while the subject-matter of the sale was composed of shares of capital stock of the company and its assets, which were to be transferred to F. N. Jaynes, the company, which was in no way interested in the transaction, as far as we are advised, was required to, and in fact as principal obligor did, execute the purchase-price notes to Neuman. There was introduced in evidence a telegram signed Mrs. F. N. Jaynes, which recited that her husband was too sick to attend court in Gage county, but there was no application for a continuance, and we have no knowledge of the facts as they were understood by this person. It seems that he has ceased to be a stockholder in this corporation, though how or when this happened we have no means of knowing. It is, however, clear from the testimony of Neuman, offered by the defendants, that previous to February 4, 1890, F. N. Jaynes owned forty-nine shares of the stock of the Blue Valley Lumber Company; that for some time previously he had been its secretary; that usually he came from his home in Omaha to Wymore every fortnight; that he made one of these visits on February 3, 1890, and then made a protracted examination of the books of the company, and that he finished this task about 2 o'clock of the morning of February 4, 1890. At this hour he said to plaintiff that he was not satisfied with the way the business was going on and wanted to sell his interest, but plaintiff answered that it was too late in the night to make such a proposition, and besides this, plaintiff said he did not think he could buy. In the morning, at about 8 o'clock, plaintiff again said he could not buy, but asked Jaynes how much he would take for his stock, and Jaynes answered that he would take $4,500; that the books showed that there was that at that time. On being told by Neuman that he could not buy, Jaynes asked for an option of thirty minutes in which he could arrange to buy Neuman's stock at the price above indicated. This was given

him, but after an absence of three-quarters of an hour Jaynes came back and offered $4,150, which, after some hesitation, Neuman accepted. According to the testimony of Neuman, Jaynes acted on his own judgment, made up from what information he had gathered from an examination of the books of the company. This was sufficient to justify a finding that no defense whatever had been established, and plaintiffs in error have no just cause of complaint in the fact that the jury found upon the counter-claim in their favor in a measure that it is difficult to find figures in the evidence to sustain.

It is urged that the court instructed that it was necessary that the erroneous information on which the defendants acted must have been imparted with knowledge that it was misleading. It must be remembered that the petition justified the assumption that plaintiff was seeking to recover on two theories: one of which was that the information acted upon was erroneous, but was given in good faith; the other was that the misinformation had been purposely imparted. The instruction complained of was applicable to the first of these theories, but it was followed by other instructions, under which the defendants were entitled to avail themselves of the fact of being misled, even though the error in this respect was not willful.

There is complaint that an instruction was refused, but there was no error in this, for the court on its own motion gave, in substance, the instruction asked, and its nature is indicated by the second theory above described.

It is urged that one of the statements of the condition of the lumber company's accounts was made out in the handwriting of the defendant in error; that in it there were erroneous items; that this statement was shown to Winter, as Neuman knew it would be, and that thereby Winter was deceived and induced to become a purchaser of the capital stock. We have already indicated that the petition in error was joint, and from this fact it would result that Winter, individually, cannot be heard

to complain, even if there existed no other objection. But the original petition does not describe any misrepresentation, except such as was made directly to F. N. Jaynes, with whom alone it was alleged the negotiations were conducted. The theory that F. N. Jaynes in purchasing relied upon his own investigations and knowledge of the affairs of the corporation is strongly countenanced by the provision in the written contract, that "Said Blue Valley Lumber Company assumes all the existing liabilities of said corporation, and said first party [Neuman] is released therefrom and shall be held harmless from said liabilities by said second party [Jaynes] and said corporation." We have found no error in the record, and the judgment of the district court is

AFFIRMED.

JAMES CLARK, APPELLEE, V. HENRY MOSSMAN ET AL., APPELLANTS.

FILED FEBRUARY 23, 1899. No. 8653.

Reformation of Bond. Where a party orally agreed to purchase four acres of land along a section line, upon his own uninfluenced assumption that he would thereby obtain said four acres independently of the highway along said line, and soon thereafter a bond for a deed was, with the purchaser's eight notes for the purchase-money, left with a banker, in which bond the description unmistakably included the highway, and the purchaser, without taking the bond into his possession, as was his right, or ascertaining the terms of said bond, paid seven of his notes as they fell due at intervals of ninety days, and with actual knowledge of the language of the bond paid the eighth note, *held*, that such party was not entitled to a decree reforming the bond so as to make it express his own understanding of the scope and effects of the contract of purchase.

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

Powers & Hays, for appellants.

References: *Kutz v. McCune*, 22 Wis. 628; *Pomeroy v. Milwaukee & C. R. Co.*, 25 Wis. 643; *Scribner v. Holmes*, 16

Ind. 142; *Milwaukee & N. R. Co. v. Strange*, 63 Wis. 179; *Chicago & P. R. Co. v. Shepherd*, 39 Neb. 523; *Omaha S. R. Co. v. Beeson*, 36 Neb. 362; *Hymes v. Esty*, 22 N. E. Rep. [N. Y.] 1087; *Whitbeck v. Cook*, 15 Johns. [N. Y.] 483; *Huyck v. Andrews*, 113 N. Y. 85; *Wilson v. Cochran*, 46 Pa. St. 229; *Purkiss v. Benson*, 28 Mich. 538; *In re Robbins*, 24 N. W. Rep. [Minn.] 356; *City of Cincinnati v. Brachman*, 35 O. St. 289; *Trice v. Kayton*, 84 Va. 217.

H. D. Kelly, contra.

References: *Grand Trunk R. Co. v. Dyer*, 49 Vt. 74; *Welder v. Hunt*, 34 Tex. 44; *Cottingham v. Parr*, 93 Ill. 233; *Piper v. True*, 36 Cal. 606; *Wagner v. Gage County*, 3 Neb. 243.

RYAN, C.

James Clark brought this action in the district court of Madison county. In his petition he alleged that about July 16, 1892, the defendant Henry Mossman was the owner of a certain tract of land in the southeast quarter of section 1, township 23 north, range 3 west, sixth principal meridian; that this tract was described as follows: Commencing at a point on the section line seventy-six and four-fifths rods due south of the northeast corner of said southeast quarter, running thence west twenty-seven rods, thence south twenty-five and three-fifths rods, thence east twenty-seven rods, thence north to the place of beginning, containing four acres. It was alleged in the petition: "The above description embraces half of the public highway running north and south for a distance of twenty-five and three-fifths rods; that the above description contains and embraces four acres of land, exclusive of said portion of the public road." In the language just quoted there are two inharmonious statements; the first that the four acres embraces one-half of the highway, the second that the description embraces four acres, exclusive of said portion of the public road, and this variance is quite important, for in his petition plaintiff further alleged that about July 16, 1892, he en-

tered into a contract, by the terms of which he agreed to purchase said four acres for $400, and accordingly made his eight promissory notes, each for $50, to the defendant; that defendant and his wife were to execute to plaintiff a bond conditioned that they would convey said premises by deed of general warranty upon payment of the consideration above named; that afterward, about July 30, 1892, said defendants did purport to execute the bond agreed upon and left the same at the bank for the use of plaintiff, but plaintiff alleged that said bond for a deed did not correctly describe the premises purchased by plaintiff, but did describe a tract of land containing fifty-one and a half square rods less land than was purchased by plaintiff,—the said fifty-one and a half square rods being one-half of the highway as above described, and it was not owned by the defendants, or either of them, at the time of the making of said contract. Plaintiff alleged, however, that he never saw said bond until about June, 1894, after all except the last note to mature had been paid, and until that time did not know of the defect in the description of the land in said bond; that as soon as he discovered said mistake in the description he called the defendant's attention to it and requested a correction thereof, which defendant refused, and continues to refuse, to make, and that had the plaintiff known of said error he would not have accepted said bond and would not have paid said note. The closing allegations and prayer of the petition were as follows: "The plaintiff has paid each and all of said notes according to the terms of said bond, and has performed each and all of the conditions of said bond to be by him performed, and has made demand of said defendants for a deed of conveyance of the lands so purchased by plaintiff from defendant, as first above described, and contained four acres, but the defendant has refused, and does so now refuse, to convey said lands to plaintiff. Wherefore plaintiff prays that said bond may be reformed in the manner indicated in this petition, in such a manner

as to carry out the intention of the parties thereto so that the same will embrace full four acres of land, exclusive of said public highway; that said defendants may be required to convey by deed of general warranty and clear of all incumbrances the said four acres of land according to the description as the same may be reformed and corrected so as aforesaid. In case said bond is not so reformed and the defendants ordered to convey said four acres to the plaintiff, then, and in that case, that the court find that no contract of purchase and sale of said premises have been entered into by and between the plaintiff and defendants, and that an accounting be had of the moneys paid by plaintiff to the defendants as aforesaid, and that plaintiff have judgment for such sum, with interest, and for such other and further relief as may be just and equitable." The district court seems to have taken this petition as one for the reformation of the bond for a deed so that the land to be conveyed should include four acres, exclusive of one-half of the highway, and upon the issues joined found that plaintiff was entitled to the reformation prayed or a return of $400, the purchase price of the land, with interest thereon, and accordingly required a conveyance to be made within twenty days, or in default thereof ordered that its said decree operate as such conveyance.

The testimony of plaintiff as to the original contract was as follows: "Well, sir, on or about the 8th day of July, as near as I can remember, I met Mr. Mossman between his house and the creamery. I asked him if he would sell me that piece of land there. I told him I would like to buy three or four acres, provided we could agree on the payments. He asked me how I wanted to buy it, and I told him I would give him $400 and I would pay him $50 every ninety days, with ten per cent, till it was paid. He said he would talk with his wife and let me know in a day or two. On the Saturday following I met him at Battle Creek. He told me I could have the land. He asked me how I wanted to pay for it, and I told

him $50 every ninety days. He started to go into the bank to have Mr. Warrick to make out the notes. He had not the time then, and on the first of the week I came in to give the notes to Mr. Steve Warrick; eight notes, $50 each. Some time afterward I was in the bank and Mr. Warrick told me the bond was there. I didn't see the bond. I told him I would leave the bond and I never saw the bond, and about the 15th day of May, 1894,—that was the first time I ever saw the bond. I didn't know anything at all about what was in the bond at that time." When asked as to whether or not anything about the road was mentioned when he bought the land, Mr. Clark answered: "No, sir; there wasn't. The road was never mentioned." There was but little real conflict as to what took place when the original oral agreement was made. One party assumed that in purchasing four acres the half of the highway was excluded therefrom,—the other that it was included. There was no misunderstanding of the terms of the contract, the misunderstanding was as to what was implied by the use of the language in which the terms were described.

By the terms of the bond for a deed which Mr. Warrick drew up, the land to be conveyed, upon full payments being made, was described as follows: "A piece of land in the southeast quarter of section one (1), township twenty-three (23), range three (3) west of the 6th P. M., Madison county, described as follows, to-wit: Commencing at a point on the section line seventy-six four-fifths ($76\frac{4}{5}$) rods due south of the northeast corner of said southeast quarter, running thence west twenty-five rods, thence south twenty-five and three-fifths rods ($25\frac{3}{5}$), thence east twenty-five (25) rods, and then to place of beginning." The reformation made this description read so that the tract to be conveyed measured twenty-seven rods east and west, instead of twenty-five rods as above recited. After Mr. Warrick had drawn the bond and it had been signed, it, with the notes, was left in his hands as a banker; the bond to be delivered to plaintiff, and

the notes to be surrendered to plaintiff as each was paid. Plaintiff testified that he paid all the notes but one without seeing or knowing of the description contained in the bond. After he learned of that description he paid the last note which fell due and thereafter refused to receive a deed following the description contained in the bond, but began this action to have it reformed to express his own understanding of the terms of his purchase. By this course the bond was recognized by him as proper evidence, and the court was not at liberty to discard it. To justify a court in reforming a written contract the evidence should be clear and satisfactory. (*Hale v. Young*, 24 Neb. 464.) In this case it is a circumstance of significance that plaintiff not only paid seven notes without seeing the bond for a deed, though Warrick held it for his benefit, but even after knowing of the description contained in it he paid the eighth and last note, and then, for the first time, made known to the defendant his understanding of the description which the deed he was entitled to was to contain.

Another very strong consideration which should be taken into account is that the one-half of the highway, under the terms of the reformed bond, is to be the property of plaintiff, subject to the easement of the public therein. He strenuously insists that he shall be given four acres, just what he contracted for, and the court not only has given him the four acres but along its side it has taken a strip two rods in width, subject to an easement, and has added that to what plaintiff understood was all he was to have. On the vacation of a highway the land therein included reverts to the abutting proprietor. (*Omaha S. R. Co. v. Beeson*, 36 Neb. 361. See, also, *Chicago, R. I. & P. R. Co. v. Shepherd*, 39 Neb. 525; *Blakely v. Chicago, K. & N. R. Co.*, 46 Neb. 272.) It has been held that a purchaser of land is bound to take notice of the existence of a public highway, and that the existence of such an easement is not a breach of covenant against incumbrances, though an easement of any kind would

constitute such a breach. (*Huyck v. Andrews*, 113 N. Y. 81; *Wilson v. Cochran*, 46 Pa. St. 229; *Scribner v. Holmes*, 16 Ind. 142; *Kutz v. McCune*, 22 Wis. 628.) There are like holdings with reference to breaches of the covenant for quiet enjoyment. (*Whitbeck v. Cook*, 15 Johns. [N. Y.] 482; *Hymes v. Esty*, 22 N. E. Rep. [N. Y.] 1087.) In the case last cited it was said: "It must be deemed the settled doctrine in this state that the fact that part of land conveyed with covenant of warranty was at the time of conveyance a highway and used as such is not a breach of the covenant. This is so for the reason that the grantee must be presumed to have known of the existence of the public easement, and purchased upon a consideration in reference to the situation in that respect." We are not required to pass upon the effect of an existing public highway as creating a breach of the covenant for quiet enjoyment or against incumbrances. For our purposes it is sufficient to point out that under the above cases the existence of a public highway cannot be ignored by a purchaser of the land with which the title of the strip must pass subject to the easement indicated. In purchasing the four-acre tract plaintiff must be presumed to have taken notice of the public highway. Both parties, it is to be assumed, contracted with reference to its existence.

From all these considerations we think there was no clear and satisfactory evidence of a mistake between the parties as to the terms of the contract between them, and that plaintiff had no right to assume that he was not only entitled to four acres, but also to an additional strip two rods broad along its side. What he was entitled to under the circumstances indicated was four acres made up in part of the strip, subject to the easement of the public. The bond for the deed aptly and clearly expressed this right and should not have been reformed. The decree of the district court is therefore reversed and the action is

DISMISSED.

JESSE LOWE ET AL., APPELLEES, V. PROSPECT HILL CEMETERY ASSOCIATION, APPELLANT, ET AL.

FILED FEBRUARY 23, 1899. No. 8654.

1. **Nuisances:** CEMETERIES: EVIDENCE. The evidence set out in the opinion and *held* to sustain the finding of the district court that the proposed use by appellant of its grounds for interring therein dead bodies would probably result in contaminating the waters of appellees' wells with disease germs, and thus endanger the health and lives of appellees and their families.

2. ———: INJUNCTION. A use made by one of his property which works an irreparable injury to the property of his neighbor, or whereby the unwritten but accepted law of decency is violated, or which deprives his neighbor of the reasonable and comfortable use of his property, or which will probably endanger the health and life of his neighbor, is a private nuisance and may be enjoined.

3. ———: ———: EVIDENCE. In such a case, to authorize the injunction, it must be established by satisfactory evidence that the injury threatened or apprehended will probably result.

4. ———: ———. A court of equity has jurisdiction to enjoin a threatened injury whenever its nature is such that it cannot be adequately compensated in damages and its continuance would occasion a constantly recurring grievance.

5. ———: ———: ABSENCE OF LEGAL REMEDY. *Held*, Under the established facts, that appellees were without an adequate remedy at law for the redress of the apprehended injuries of which they complained.

6. **Right of Private Property.** Neither courts nor legislatures, except on the demand of the state and for its use, can compel one citizen to sell his property even for its full value to his neighbor for the latter's private use.

7. ———: EASEMENTS. The citizen is entitled to the use and enjoyment of the light and the air over, and the water beneath, the surface of his premises, and in order that his neighbor may devote his property to a particular use cannot be compelled to surrender those rights even if fully paid therefor.

8. **Nuisances:** INJUNCTION. The object of an action to enjoin a private nuisance is to prevent the defendant from using his property in such a manner as will disturb the plaintiff in the reasonable use and occupation of his property.

9. ———: ———. A tenant for life or years rightfully in possession of real estate may maintain such an action.

10. **Confession and Avoidance: PLEADING.** A defense in the nature of a confession and avoidance, to be available, must be pleaded.

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

E. Wakeley, for appellant:

If it be doubtful or contingent whether acts will constitute a nuisance, injunction will not be granted until actual demonstration. (*McCord v. Iker*, 12 O. 387; *Upjohn v. Board of Health*, 46 Mich. 542; *Rhodes v. Dunbar*, 57 Pa. St. 274; *City of Greencastle v. Hazelett*, 23 Ind. 186; *Porter v. Witham*, 17 Me. 292; *Adams v. Michael*, 38 Md. 123; *Butler v. Rogers*, 9 N. J. Eq. 487; *Rogers v. Danforth*, 9 N. J. Eq. 289; *Kingsbury v. Flower*, 65 Ala. 479; *Dunn v. City of Austin*, 77 Tex. 139; *St. James Church v. Arrington*, 36 Ala. 546; *Ellison v. Commissioners*, 5 Jones Eq. [N. Car.] 57; *Barnes v. Calhoun*, 2 Ired. Eq. [N. Car.] 199; *Dorsey v. Allen*, 85 N. Car. 358; *Laughlin v. President*, 6 Ind. 223.)

Injunction is discretionary. (*Pettibone v. La Crosse & M. R. Co.*, 14 Wis. 443; *Cobb v. Smith*, 16 Wis. 692; *Hine v. Stephens*, 33 Conn. 497; *Wilder v. Strickland*, 2 Jones Eq. [N. Car.] 386; *Jones v. City of Newark*, 11 N. J. 452; *Torry v. Camden & A. R. Co.*, 18 N. J. Eq. 293.)

There is an ample remedy at law. (*Wing v. Fairhaven*, 8 Cush. [Mass.] 363; *Blain v. Brady*, 64 Md. 373; *Dana v. Valentine*, 5 Met. [Mass.] 8.)

Defendant cannot be denied the lawful use of its property. (*Stoughton v. State*, 5 Wis. 291; *Chope v. Detroit & H. P. R. Co.*, 37 Mich. 195; *Danville, H. & W. R. Co. v. Commonwealth*, 73 Pa. St. 29; *Hinchman v. Patterson Horse R. Co.*, 17 N. J. Eq. 75; *Attorney General v. New York & L. B. R. Co.*, 24 N. J. Eq. 49.)

Anything authorized by law is not a nuisance.

Courts will not create a nuisance. (*Cleveland v. Gas Light Co.*, 20 N. J. Eq. 201; *Musgrove v. Catholic Church*, 10 La. Ann. 431; *Minke v. Hopeman*, 87 Ill. 450; *Attorney*

General v. Colney Hatch Lunatic Asylum, 4 Ch. App. [Eng.] 147; *Earl of Ripon v. Hobart*, 3 Myl. & K. [Eng.] 169; *Rouse v. Martin*, 75 Ala. 510; *Cook v. Benson*, 62 Ia. 170.)

C. A. Baldwin, also for appellant.

References: *Attorney General v. Forbes*, 2 M. & C. [Eng.] 123; *Frewin v. Lewis*, 4 M. & C. [Eng.] 249; *Town of Lakeview v. Rose Hill Cemetery*, 70 Ill. 191; *People v. Gadway*, 61 Mich. 286; *In re Hauck*, 70 Mich. 407; *Richard's Appeal*, 57 Pa. St. 105; *Page v. Symonds*, 63 N. H. 17; *City of Austin v. Austin Cemetery Co.*, 28 S. W. Rep. [Tex.] 528; *Village of Waupun v. Moore*, 34 Wis. 450; *Schuster v. Board of Health*, 49 Barb. [N. Y.] 450; *Attorney General v. Fagan*, 22 La. Ann. 545; *Taunton v. Taylor*, 116 Mass. 254; *Powell v. Foster*, 59 Ga. 790; *Thebaut v. Canova*, 11 Fla. 143, 154; *Laughlin v. Lamasco City*, 6 Ind. 223; *Morris Canal & Banking Co. v. Central R. Co.*, 16 N. J. Eq. 419; *Turnpike Co. v. Yuba*, 13 Cal. 190; *Wilder v. Strickland*, 2 Jones Eq. [N. Car.] 386; *Mayor of Newark v. Watson*, 29 Atl. Rep. [N. J.] 487; *Hoboken Land Co. v. City of Hoboken*, 7 N. J. Law 540; *Village of Mankato v. Willard*, 13 Minn. 1; *Trustees of Methodist Church v. City of Hoboken*, 33 N. J. Law 13; *Vick v. Vicksburg*, 1 How. [Miss.] 379; *Harding v. Jasper*, 14 Cal. 643; *Rector v. Hartt*, 8 Mo. 448; *Warren v. Jacksonville*, 15 Ill. 236; *Abbott v. Mills*, 3 Vt. 521; *Heirs of David v. City of New Orleans*, 16 La. Ann. 404; *Godfrey v. City of Alton*, 52 Am. Dec. [Ill.] 476; *Wolford v. Crystal Lake Cemetery Ass'n*, 54 Minn. 440; *City of Cincinnati v. White*, 6 Pet. [U. S.] 431; *Hunter v. Trustees Sandy Hill*, 6 Hill [N. Y.] 407; *Buschmann v. City of St. Louis*, 26 S. W. Rep. [Mo.] 687; *Town of Lakeview v. Letz*, 44 Ill. 81; *Lambeau v. Lewinski*, 47 Ill. App. 656; *Gwin v. Melmoth*, 1 Freeman Ch. [Miss.] 505; *Rhodes v. Dunbar*, 57 Pa. St. 274; *Duncan v. Hayes*, 7 C. E. Greene [N. J.] 25; *Mohawk v. Utica*, 6 Paige Ch. [N. Y.] 554; *Nelms v. Clark*, 44 Ga. 617; *McDonough v. Robbens*, 60 Mo. App. 156; *Wolcott v. Melick*, 11 N. J. Eq. 204; *Attorney General v. Steward*, 20 N. J. Eq. 415; *Babcock v. New Jersey Stockyard Co.*, 20 N. J. Eq. 296;

Ross v. Butler, 19 N. J. Eq. 294; *Dana v. Valentine*, 46 Mass. 8; *Jung v. Neraz*, 71 Tex. 396; *Rodenhausen v. Craven*, 141 Pa. St. 546; *Barnes v. Hathorn*, 54 Me. 124; *Appeal of Pennsylvania Lead Co.*, 96 Pa. St. 116; *Clark v. Lawrence*, 6 Jones Eq. [N. Car.] 83; *Minke v. Hopeman*, 87 Ill. 450; *Randolph v. Rosser*, 7 Port. [Ala.] 249; *Duncan v. Greenwood*, 22 N. J. Eq. 25; *Windfall Mfg. Co. v. Patterson*, 47 N. E. Rep. [Ind.] 2; *McCutchen v. Blanton*, 59 Miss. 116; *Rouse v. Martin*, 75 Ala. 510.

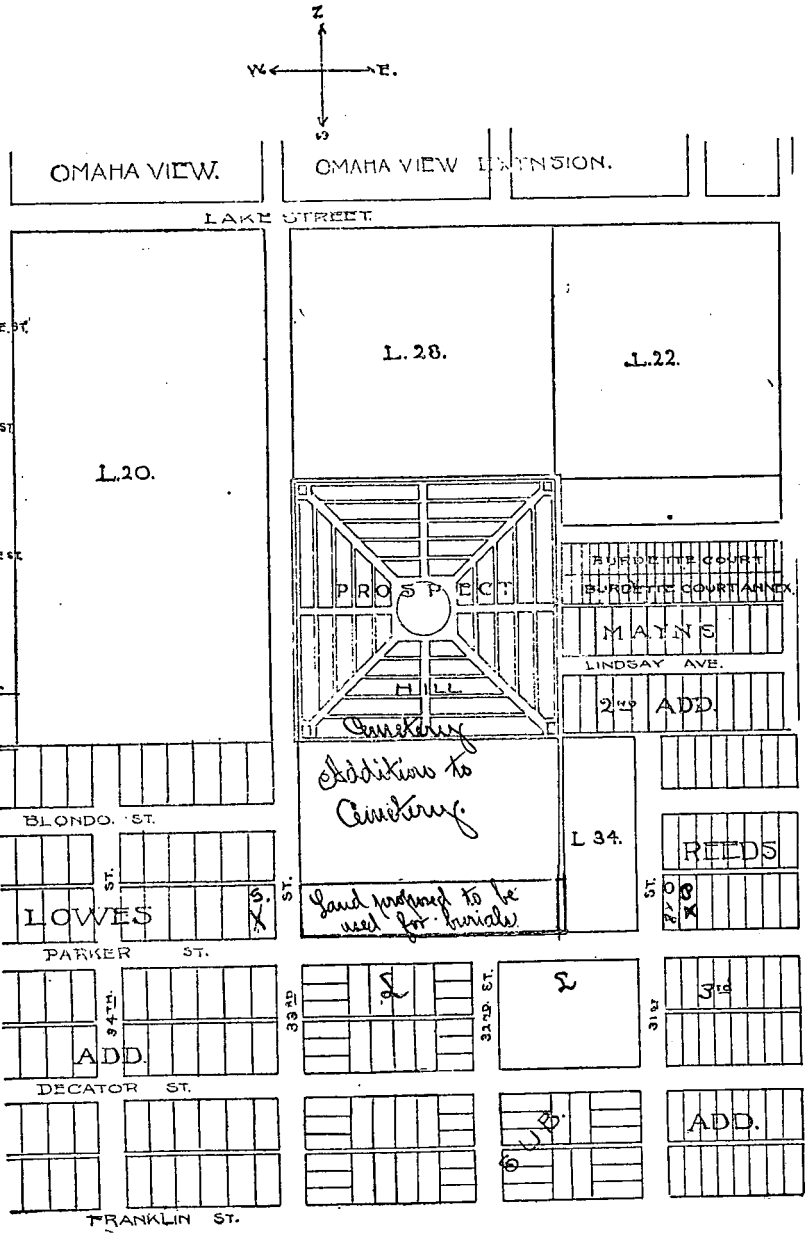
W. D. Beckett, also for appellant.

Francis A. Brogan, contra.

References: *Laflin Co. v. Tearney*, 131 Ill. 322; *Adams v. Ohio Falls Car Co.*, 131 Ind. 375; *People v. Detroit White Lead Works*, 82 Mich. 471; *Wier's Appeal*, 74 Pa. St. 230; *Crump v. Lambert*, 3 L. R. Eq. Cas. [Eng.] 409; *House v. Metcalf*, 27 Conn. 639; *Commonwealth v. Upton*, 6 Gray [Mass.] 473; *Campbell v. Seaman*, 63 N. Y. 568; *Davis v. Londgreen*, 8 Neb. 43; *Farrell v. Cook*, 16 Neb. 483; *Sapp v. Roberts*, 18 Neb. 299; *Barton v. Union Cattle Co.*, 28 Neb. 350; *Beatrice Gas Co. v. Thomas*, 41 Neb. 662; *Welton v. Dickson*, 38 Neb. 767; *Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb. 897; *Smith v. Phillips*, 8 Phila. [Pa.] 10; *Central R. Co. v. English*, 73 Ga. 366; *Coates v. Mayor*, 7 Cow. [N. Y.] *585; *Kincaid's Appeal*, 66 Pa. St. 411; *Humphrey v. Church*, 109 N. Car. 132; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Concordia Cemetery v. Minnesota & N. R. Co.*, 121 Ill. 199; *Woodlawn Cemetery v. Everett*, 118 Mass. 357; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257; *Henry v. Trustees*, 48 O. St. 671; *People v. Detroit*, 82 Mich. 471; *In re Debs*, 158 U. S. 564; *Young v. Board*, 51 Fed. Rep. 585; *Schlessinger v. Mallard*, 70 Cal. 326; *Stockton v. Weber*, 98 Cal. 433; *Windt v. German Reform Church*, 4 Sandf. Ch. [N. Y.] 471; *Redwood Cemetery v. Bandy*, 93 Ind. 246; *Edwards v. Stonington Cemetery*, 20 Conn. 466; *State v. Bemis*, 45 Neb. 724; *State v. Baldwin*, 45 Conn. 134; *Campbell v. Kansas City*, 102 Mo. 326.

RAGAN, C.

The Prospect Hill Cemetery Association is a corporation organized under the laws of the state. As its name indicates, it is engaged in the business of interring the dead and in conducting and maintaining a cemetery in the city of Omaha. The space on the map following (p. 99), marked "Prospect Hill Cemetery," indicates the site of an old cemetery belonging to this corporation, which has been used for burying the dead for a long number of years, was established when the city of Omaha was a frontier town, and at the time such cemetery was established it was outside the residence portions of said city. The space on the map immediately south of Prospect Hill cemetery, marked "Addition to Cemetery," also belongs to the Prospect Hill Cemetery Association, and the land which that space represents is used by the cemetery association, and has been for a number of years, as a part of the original Prospect Hill cemetery. The cemetery association also owns the strip south of the addition and marked on the map "Land proposed to be used for burials." The association acquired the legal title to this property in 1895 and was taking steps to cause the same to be surveyed into burial lots, intending to sell those lots and bury therein the dead, when Jesse Lowe, Martin R. Pruitte, and Nathan Stevens, the owners of lots marked L., L., S., P., P. on map, in behalf of themselves and all others similarly interested and situated who might desire to come into the suit and contribute to the expenses thereof, brought this suit in the district court of Douglas county to enjoin the cemetery association from interring or permitting to be interred dead bodies in said strip of land south of the addition to said cemetery. Lowe and others based their right to the injunction asked on two grounds: (1) That interments in the strip of land proposed to be devoted to cemetery purposes would pollute and poison the water in the wells of Lowe and others, and that in other wells in the vicinity, in that disease germs


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LAKE STREET
L. 28.
L. 22.
L. 20.
PROSPECT
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Cemetery
Addition to Cemetery.
Land proposed to be used for burials
BURDETTE COURT
BURDETTE COURT ANNEX.
MAYNS
LINDSAY AVE.
2ND ADD.
L 34.
REEDS
BLONDO ST.
LOWES
PARKER ST.
34TH ST.
ADD.
DECATOR ST.
33RD ST.
32ND ST.
31ST
3RD
ADD.
FRANKLIN ST.

or microbes would be carried from the decomposing interred bodies by moisture seeping from the graves through the pores of the soil into the wells; that thereby the health and lives of the inhabitants of such locality would be endangered, the comfortable use and enjoyment of their property would be interfered with, the neighborhood and locality would be rendered unhealthful, and the real estate, which in that vicinity was used exclusively for residence purposes, would be rendered valueless, and, therefore, the use by the said cemetery association of said lands for interring therein dead bodies would constitute a private nuisance at common law; (2) that the using of said land by said cemetery association for interring therein dead bodies would violate the ordinances of the city of Omaha. The district court entered a decree in accordance with the prayer of the petition of Lowe and others, and the cemetery association has appealed.

1. We dispose of the second ground on which the application for injunction was based first. We cannot see that it would subserve any useful purpose to set out in this opinion the history of the title of the cemetery association to this piece of real estate, and the argument of the association that to devote it to the purposes of interring therein dead bodies would not violate the ordinances of the city of Omaha. We have carefully studied both the history and the argument, and have not the slightest doubt that the ordinances of the city of Omaha forbid the cemetery association from interring dead bodies in the strip of land in controversy, and, without determining whether the appellees made such a showing as would entitle them to this injunction because the interring of dead bodies in the land by the cemetery association would violate the ordinances of the city of Omaha, we proceed to inquire whether the decree of the district court can be sustained upon the ground that the use proposed to be made by the cemetery association of its ground would constitute a private nuisance at common law, and that the appellees were entitled to the injunction given them upon that ground.

2. The appellant earnestly insists that the evidence in the record is insufficient to support the court's finding that the use of this strip of land by the cemetery association for interring therein dead bodies would probably or likely pollute and poison the water in the wells in the vicinity as claimed, and therefore the evidence does not sustain the court's finding that the proposed use of this land by the cemetery association would constitute a private nuisance. The undisputed evidence is that Prospect Hill cemetery is located on the crest of a hill; that the ground slopes rapidly in all directions; that the original cemetery, the addition, and the strip of land now proposed to be devoted to cemetery purposes are all higher than the property of the appellees and the other property in that locality; that the property on the east, south, and west of the strip of land proposed to be devoted to cemetery purposes is laid out in residence lots; that many of these lots are occupied for residence purposes; that the city of Omaha in the last fifteen years has so increased in population that the cemetery grounds are now within the residence district of the city; that the ground proposed to be devoted to cemetery purposes is sufficient for 2,000 interments. There is in the record a seeming conflict of evidence as to the nature of the subsoil or the earth underlying the cemetery and the lands in its immediate vicinity. The witnesses for the appellant made it out a dry, compact clay without seam, fissure, or pore. The witnesses for appellees, a porous one,—a loess containing about eighty per cent of silica and possessing great absorptive properties and powers. But the witnesses of the appellant on this subject were well and grave diggers and graders; they had no geological or scientific knowledge of the nature and properties of this soil. The evidence of appellees on this subject was scientific,—was of a character that convinces the understanding and convicts the judgment and leaves no doubt in the mind that the earth under the cemetery and the lands in its vicinity is a clay, highly silicious,

highly porous, and having great absorptive powers. In a geological sense it is loess. It is not an impervious soil; no "hard pan," for the depth of more than one hundred feet, is found below the surface of the earth at this cemetery. But this conclusion does not impugn the motives or veracity of appellant's witnesses. They did not see in this earth the silica as segregated sand, and thought there was none. They did not see seams and fissures in the earth, and concluded it was compact and practically impervious. Their evidence then, while honest enough, was, on this subject, of little value, because of their lack of scientific knowledge in the premises. No doubt these witnesses, and thousands of others, would honestly testify that a drop of clear water or a rosebud had in them no living organisms, and base their evidence on the fact that though they had seen millions of rosebuds and drops of water, they had never observed a living thing in either. These witnesses would perhaps have testified that a piece of polished steel had no pores in it; but what would this evidence be worth against that of a trained microscopist that the water and the rosebud were teeming with living animalcules and that the steel had millions of pores? The appellant's witnesses did not find in the wells and graves they dug streamlets flowing through visible fissures, did not find the earth water-soaked and wet, and therefore concluded that the rains and snows which fell on the surface did not sink into the earth, and that, therefore, there was no moisture in this subsoil; and yet on these grounds there were trees growing whose roots extended many feet below the surface. The inference of an absolutely dry soil was not the logical one from the established facts. The evidence of the appellees established another thing, namely, that if a well be sunk on these premises, the particles of moisture held in the soil of the well-wall would seep into the well, the spaces in the soil vacated by this moisture would at once be filled by the moisture in the soil adjoining, and these vacated spaces filled by the moisture in the adjacent

soil, and so on until such a well would establish for itself and into itself a drainage of moisture from a portion of the surrounding earth, cone-shaped, whose base would be the surface of the earth and whose diameter would be many times that of the depth of the well; that wells sunk on the premises of the appellees and on lands in their vicinity would thus drain into themselves moisture in the ground proposed to be used for cemetery purposes.

The evidence in behalf of both parties to this controversy shows, without conflict, that contagious and infectious diseases, such as typhoid and scarlet fevers and diphtheria, are caused by the presence in the system, blood, and stomach, of the human, of infinitesimal microscopic microbes, germs,—living organisms; that on the death of the human these germs multiply and reproduce themselves in countless numbers; that in the grave they flourish in the liquids of the decomposing body; that they live and flourish in any moisture; that they live for an indefinite length of time; that they become inactive when exposed to a condition of dryness, but upon coming in contact with moisture their activity revives; that some classes of these germs live in oxygen, some cannot live in that gas, and that some live either in or out of it; that such a soil as that underlying the cemetery in controversy is not a germicide,—that is, that the germ is not destroyed by coming in contact with that soil; that moisture sinking and seeping into the pores of the earth will carry these germs living and active from graves for considerable distances; that if moisture containing these germs seeps into a well, the germs will communicate to persons using the water the disease of which the body died from whence the germ sprang;—if the body died of consumption, the germ is a consumptive one, and will communicate that disease; if the body died of diphtheria, the germ is a diphtheritic one, and will communicate that disease;—that the substances best adapted for the transmission of these germs to the human are water and milk; that so infinitesimal and so persistent are these germs

that if vessels be rinsed in well water infected with them and then used for milk, they will or may be present in the moisture on the sides or bottom of the vessel and thus get into the milk and communicate to one drinking it the disease of which they are the product.

There is a sharp conflict in the evidence on this question, namely, whether these germs were likely to or would probably be carried by the liquid of the decomposing bodies and other moisture seeping into the graves and thence sinking into the earth from the graves to the wells of appellees,—the nature of the soil, the contour of the cemetery grounds, the quantity of liquid matter set free by decomposing human bodies, and the annual precipitation of moisture considered. The evidence shows that about eighty per cent of the human body is liquid, and that the annual precipitation of moisture is twenty-three inches plus; and experiments show that soil which has been cultivated or dug up will absorb nine or ten times the amount of the moisture which falls upon it that the unbroken sod will. (Aughey, Sketches of the Physical Geography and Geology of Nebraska 45.) The witnesses for appellant gave it as their opinion that these germs were not likely or would not find their way from the graves to the wells. The witnesses of appellees were of the contrary opinion. The district court adopted the opinion of appellees' witnesses. We cannot say that it erred in this. Indeed we think it did not. The evidence showed that some years before this trial occurred such diseases as typhoid and scarlet fever and diphtheria were more prevalent in the vicinity of what is now the old cemetery than elsewhere in the city of Omaha; that the families afflicted with those diseases used water from wells, and an eminent physician testified that, in his opinion, such diseases were communicated by germs which had found their way from the old cemetery to the wells.

Counsel for appellant say that the finding of the district court rests upon "theories of self-styled experts."

We think this criticism unwarranted. The physicians who testified in this case—Crummer and Summers for appellees and Grossman for appellant, not to mention others—were not physicians of the ordinary type. They were and are men deeply learned in the nature and cause of disease. They are not merely physicians, but they are scientists. The evidence given by them did not consist of theories evolved from their inner consciousness. Their evidence did not consist of guesses and conjectures. As witnesses they detailed the results of scientific experiments; they gave the logical scientific results deducible from established facts; they told what answers Nature had given to scientific inquiries put to her by men skilled in scientific pursuits. The evidence of these men was not that of the ordinary expert called to give his opinion about a matter of common knowledge, and in the presence of the knowledge and opinions of such men as these witnesses the criticism of the advocate and the preconceived opinions of the judge should yield. We are of opinion that the evidence amply sustains the district court's finding that the proposed use by appellant of its ground for interring therein dead bodies would probably result in contaminating the water of appellees' wells, and that of others in the vicinity, with disease germs, and thus endanger the health and lives of appellees and their families.

3. These facts established, the law of the case is simple. We cannot better express our views on this subject than to quote from the opinion in *Clark v. Lawrence*, 6 Jones Eq. [N. Car.] 83, which was an action to enjoin parties from maintaining a cemetery. The court said: "The jurisdiction of a court of equity to restrain by an injunction the erection or continuance of a nuisance, either public or private, which is likely to produce an irreparable mischief, is well established. It is equally well settled that the destruction of, or injury to, the health of the inhabitants of a city, or town, or of an individual and his family, is deemed a mischief of an irreparable char-

acter. * * * In cases of this kind the plaintiff will not have to encounter the difficulty that a place for the burial of the dead, within the limits of a city or town, or near the residence of a private person in the country, is considered a matter of public weal. On the contrary, the public sentiment is already, or is becoming to be, in favor of more secluded spots, where we, like the patriarch of old, 'may bury our dead out of our sight.' Whenever, then, it can be clearly proved that a place of sepulture is so situated that the burial of the dead there will injure life or health, either by corrupting the surrounding atmosphere or the water of wells or springs, the court will grant its injunctive relief upon the ground that the act will be a nuisance of a kind likely to produce irreparable mischief, and one which cannot be adequately redressed by an action at law." (See, also, *Laflin & Rand Powder Co. v. Tearney*, 131 Ill. 322; *Jung v. Neraz*, 71 Tex. 396; *Barnes v. Hathorn*, 54 Me. 124.)

In *Gilford v. Babies' Hospital*, 21 Abbott New Cas. [N. Y.] 159, the court enjoined the proposed opening of a hospital for the care of infants on the ground that the locality in which it was proposed to locate the hospital was a residential locality, and that the probability of contagious diseases being disseminated in the neighborhood would threaten the comfort and security of the inhabitants.

In *Hurlbut v. McKone*, 55 Conn. 31, the maintenance of a planing and moulding mill near the plaintiff's home was enjoined as a private nuisance on the ground that the smoke and dust from it interfered with the comfortable and reasonable use and enjoyment of the plaintiff's home.

In *Rodenhausen v. Craven*, 141 Pa. St. 546, the establishing of a carpet-cleaning establishment in the residence locality of the city was enjoined upon the ground that the dust arising from the cleaning of carpets would invade the homes of the people living near by and disturb their reasonable enjoyment of their homes. To the same effect see *Haugh's Appeal*, 102 Pa. St. 42; *Appeal of Pennsylvania*

Lead Co., 96 Pa. St. 116; *Adams v. Ohio Falls Car Co.*, 131 Ind. 375; *Clowes v. Staffordshire Potteries Water-Works Co.*, 8 L. R. Ch. [Eng.] 125.

In *Farrell v. Cook*, 16 Neb. 483, the owner of some jacks and stallions was enjoined from keeping and standing them for mares in view of the plaintiff's dwelling, upon the ground that such a use of the defendant's property offended against the laws of decency, and was therefore a private nuisance.

In *Barton v. Union Cattle Co.*, 28 Neb. 350, it was ruled that the pollution of a stream of water by discharging into it the dung, urine, etc., of a large feed stable, thus rendering the water unfit for use and creating a stench, constituted a nuisance and should be enjoined.

In *Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb. 897, it was held that the befouling of a well or cellar by filthy and noxious matter permitted by the defendant to percolate through the adjacent soil constituted a nuisance. To the same effect is *Beatrice Gas Co. v. Thomas*, 41 Neb. 662.

These cases then are authority for the proposition that the use made by one of his property which works an irreparable injury to the property of his neighbor, the use made by one of his property whereby the unwritten but accepted law of decency is violated, the use made by one of his property whereby his neighbor is deprived of the reasonably comfortable use and enjoyment of his own property, the use made by one of his property which will probably or likely endanger the health and the life of his neighbor, are private nuisances and may be enjoined.

4. Counsel for appellant say that the special injury apprehended or charged to exist must not be a conjectural, contingent, or doubtful one, but be established by satisfactory evidence. We concede the correctness of this argument, but we think the evidence in this case brings the appellees within the contention of counsel.

5. Again it is argued that if the alleged evils are apprehended the proofs must be strong and conclusive that

the use to which it is proposed to put the property will produce the alleged nuisance, and that the courts must wait until an experiment has demonstrated that the use will prove a nuisance. To this last contention we do not subscribe. We think the rule is that a court of equity has jurisdiction to enjoin a threatened injury whenever its nature is such that it cannot be adequately compensated for in damages and its continuance would occasion a constantly recurring grievance. (See the rule stated and the authorities collated in 10 Am. & Eng. Ency. Law 835.)

6. Another argument is that when one asks for an injunction to protect him from an apprehended danger the court will not grant the injunction if it be doubtful whether the apprehended injury will occur, and in support of this counsel cite us to *Rogers v. Danforth*, 1 Stockt. Ch. [N. J.] 289. In that case an injunction was sought by the plaintiffs to prevent the defendant from erecting on their lots buildings for the purposes of carrying on therein a factory for the manufacture of locomotive engines and other kinds of machinery. It was alleged in the bill that the proposed building would be within a few feet of the plaintiffs' property, which was a cotton mill, and that the forges and furnaces of the defendant would be dangerous to the complainants' cotton mill, subjecting it to imminent risk from fire and cinders escaping from the forges and furnaces. The injunction was denied because the evidence did not show that the plaintiffs' property would probably be endangered by the erection and operation of the forges and furnaces. But that is not this case. Here the evidence is that if the cemetery association is permitted to bury dead bodies upon the strip of land in controversy, the disease germs already mentioned will probably or likely be transmitted from the dead bodies by the moisture in the earth into the water of the wells of the appellees, and if this occurs and the water be used, it will certainly infect the users of the water with dangerous diseases.

7. Another argument is that the granting or refusing

of such an injunction as the one in the case at bar is discretionary with the trial court, and in support of that contention we are cited to *Torrey v. Camden & A. R. Co.*, 18 N. J. Eq. 293; *Hine v. Stephens*, 33 Conn. 497; *Cobb v. Smith*, 16 Wis. 692. The decisions cited sustain the contention of counsel, and we have no fault to find with those decisions as applied to the facts of the cases in which they were rendered; but if the power to grant an injunction is discretionary, it is a legal discretion, and in this case we certainly cannot say that the court abused its discretion in granting this injuncton.

8. Another argument is that the appellees have a complete and an adequate remedy at law, and in support of this contention we are cited to *Wing v. Inhabitants of Fairhaven*, 8 Cush. [Mass.] 363. In that case the owner of a mill-dam sought an injunction to restrain the defendant from opening certain sluices, and it was claimed that if this was done the water would flood highways and thus make the dam a nuisance. The court denied the injunction upon the ground that such damages could be compensated in money.

Another case cited is *Dana v. Valentine*, 5 Met. [Mass.] 8. In that case the plaintiff sought an injunction to restrain the exercise of an offensive trade near his dwelling-house on the ground that it would be a nuisance to him. The defendants' defense was a prescriptive right to exercise the trade at that place, and the court held that the injunction would not issue until the complainant had established his right to redress in a suit at law.

Another case cited is *Laughlin v. President & Trustees of Lamasco City*, 6 Ind. 223. In this case the city of Lamasco sought to enjoin the defendants from constructing a wharf. The court said: "The wharf in question appears to encroach in some measure upon the public thoroughfare known as the Ohio river. But it does not seem very probable that it will interfere with or incommode the public. And as the wharf is not a nuisance in itself—is not likely to become so—and the alleged injuries feared

as impending being, according to the case made by the affidavits, more fanciful than real, we think it one of the cases contemplated by the authorities, in which a court of equity will refuse to act without an adjudication at law. If the complainants place it on the ground of a private nuisance, they concede too much. For it is not to prevent every inconvenience or injury that the courts will interpose by injunction. That extraordinary power will be exercised in such cases only as cannot be adequately compensated, and thus their repetition or continuance prevented, by damages at law."

Still another case cited is *Dunning v. City of Aurora*, 40 Ill. 481. In that case the plaintiff sought to have the court declare a nuisance and order removed certain wooden buildings which had been removed from one place in the city of Aurora and located on lots near the complainants' property. The court declined to pass upon the question as to whether the wooden buildings constituted a nuisance and remanded the case to the *nisi prius* court to have that fact determined by a jury. The court, however, said that where a building which has been erected is complained of as a nuisance a court of equity would not, unless in an extreme case, interfere to remove it. If it were to be occupied for a business, or for a storage of dangerous combustibles, which might endanger the lives of persons or the destruction of property in the vicinity before the question could be passed upon by a jury, it might be otherwise.

Not one of these cases is of controlling authority here. The claim in this case is that the use which the appellant proposes to make of its property will probably or likely poison the waters in the wells of the appellees with the disease germs from the cemetery and thus destroy the health, if not the lives, of the appellees and their families. What remedy does the law afford for this injury? Will a money judgment compensate the appellees for the loss of a wife or child? In this connection it seems to be the contention of counsel for appellant that the appellees

may abandon the use of their wells and procure water from the city water-works, and that their expenses and damages in this respect can be fully compensated in an action at law against the appellant. This argument is technically correct. No doubt the appellant may make good to the appellees all the costs, expenses, and damages which they would sustain by abandoning the use of their wells and procuring water from the city water-works. But this argument would wipe out of existence the law of private nuisance, because it assumes that if one is able to pay his neighbor the full value of his property, he then may erect and carry on upon his property any such business as he chooses, no matter how offensive it may be; no matter if the conduct of the business would endanger the life and health of a neighbor, since he can compensate this neighbor in damages by paying him the full value of his property and the neighbor may go elsewhere. In other words, it denies the neighbor the right to the reasonable use and enjoyment of his property and compels him, whether he wishes or not, to sell his property to the party who wishes to erect a slaughter-house or other offensive institution on an adjoining lot. We do not understand that either courts or legislature, except on the demand of the sovereign and for its use, can compel one citizen, even for a valuable consideration, to sell his property to his neighbor for his private use. The appellees are entitled to enjoy the light and the air over their premises, and entitled to enjoy the water beneath the surface of their premises; and in order that their neighbors may devote their lands to the burial therein of the dead the appellees cannot be compelled to surrender their rights under the earth, nor over it, even if fully compensated.

9. Another argument is that the appellees cannot maintain this suit because it is said that the appellees Pruitte and Stevens are not the owners of the title to the premises occupied by them. At the time of the institution of this suit Pruitte was occupying under a contract of

purchase. He had paid the purchase-money and made improvements upon the real estate, but his contract was held in trust for him by his mother, who lived in his family. Stevens had fee simple title to his property, but at the time this suit was brought a proceeding to foreclose a mortgage on the lot had been instituted, gone to decree, and before the trial, at least, the sale of the property occurred; an appeal had been taken from this to the supreme court and the sale superseded by bond. Notwithstanding all these things Pruitte and Stevens, at the time this suit was brought and at the time of the trial, were the owners of the real estate upon which they resided. (*Philadelphia Mortgage & Trust Co. v. Gustus*, 55 Neb. 435; *Leader v. Tierney*, 45 Neb. 753.) We do not understand that to enable the plaintiff to maintain a suit like this it is necessary that he should be vested with the legal title to the real estate upon which he lives. The object of this action—and such actions as this—is to prevent the defendant from putting his property to such a use as would disturb the plaintiff in the reasonable use and occupation of the property on which he resides, and we see no reason why a tenant for years or for life rightfully in possession of real estate might not maintain such an action as this. (*Jung v. Neraz*, 71 Tex. 396; *Smith v. Phillips*, 8 Phila. [Pa.] 10; *Central R. Co. v. English*, 73 Ga. 366.)

The decree under consideration does not rest solely upon the proposition that to permit the appellant to use his property for cemetery purposes would depreciate the value of the real estate of the appellees, but it is grounded upon the theory that to permit the appellant to use its property for cemetery purposes would deprive the appellees of the reasonably comfortable use and occupancy of the premises of which they are in the rightful possession and endanger their health and lives and that of their families.

10. A final contention of the appellant is that it is not the interments themselves which would constitute

a nuisance but the methods of those interments, and that the court should not have enjoined interments absolutely or unconditionally, but only interments in such a method as would constitute a nuisance, and it is insisted that the decree of the district court should be so modified as to permit the appellant to use its grounds for the purposes of interring dead bodies therein under such rules and regulations as may be prescribed by the board of health of the city of Omaha. A sufficient answer to this contention—if we concede, which we do not, that this would be a defense—is that no such an issue was tendered by the pleadings in this case. The appellant, in its answer, did not suggest to the district court that it could make, or cause to be made, interments in its grounds in such a manner that no injury would result therefrom; nor did the appellant in its answer suggest to the district court that the board of health of the city of Omaha had prescribed any rules or regulations for the interment of dead bodies, much less that they had prescribed rules and regulations which, if complied with, would render the interment of dead bodies in the grounds of the appellant harmless. The defense is one in the nature of a confession and avoidance and one the appellant should have set up in its answer in the court below. We cannot determine from this record whether the appellant may make interments in its grounds in such manner that they will be harmless. We must decide the case on the record before us. The decree must be, and is,

AFFIRMED.

OMAHA LOAN & TRUST COMPANY, APPELLEE, V. EDWIN D. KITTON, APPELLANT, ET AL.

FILED FEBRUARY 23, 1899. No. 8755.

1. **Mortgages:** FORECLOSURE: INTEREST ALONE DUE. The owner of a mortgage debt may foreclose the mortgage for the unpaid interest coupons subject to the unmatured principal of the debt.

2. ———: ———: IMMATERIAL ALLEGATIONS. In such a suit an averment in the petition that plaintiff had sold and assigned the principal note to a third party is an immaterial one and need not be proved to entitle plaintiff to decree, it appearing on the face of the petition that the principal note had not matured.

3. ———: ———: JUDGMENT ON PLEADINGS. In such a suit defendant denied the assignment averred by plaintiff and pleaded a payment of $50 on the coupons sued on. The plaintiff, by motion, admitted such payment and demanded judgment on the pleadings. The court entered a decree for plaintiff. *Held*, On appeal, that the record supported the decree.

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

Congdon & Parish, for appellant.

Francis A. Brogan, contra.

RAGAN, C.

This is an appeal by Edwin D. Kitton from a decree of the district court of Douglas county foreclosing an ordinary real estate mortgage at the suit of the Omaha Loan & Trust Company. The trust company in its petition alleged the execution and delivery by Kitton to it on July 1, 1892, of a principal note of $3,200, due five years after date, drawing interest at six per cent per annum, payable semi-annually, and evidenced by coupons, and all secured by real estate mortgage; that before the maturity of such mortgage debt, or any part of it, the trust company sold and assigned it to Louisa A. Corbett, guarantying the payment of principal and interest; that Kitton made default in paying three of the coupons of said loan, and that the trust company, in pursuance of its contract of guaranty, paid said coupons and took them up. The suit was to foreclose the mortgage for those three coupons subject to the principal unmatured debt. Kitton, by his answer, denied the assignment of the mortgage to Corbett and specially denied that there was due to the trust company the amount

claimed by it in its petition, alleging that he had paid it $50, which it had not credited. After this answer was filed the trust company admitted that Kitton had paid the $50 alleged by him in his answer, credited the same on the coupons sued on, and demanded judgment on the pleadings, which the court awarded it.

If the trust company had never parted with the title to the principal debt secured by the mortgage, but had owed it all at the time this suit was brought, we know of no reason why it might not have foreclosed for the unpaid coupons subject to the unmatured principal. The pleadings showed upon their face that the principal of the debt secured by this mortgage was not due when this action was brought. The averment, then, in the trust company's petition that it had sold and assigned this principal debt to Corbett was an immaterial allegation and one that the trust company was not required to prove in this case in order to be entitled to decree. The effect of the answer of Kitton as to the amount due the trust company is that the amount claimed to be due by it was correct, except the $50 which Kitton alleged he had paid. The trust company, by admitting in its motion the payment of this $50 and crediting it on Kitton's coupons in suit, was the same in effect as if the trust company had taken decree for all it claimed and then remitted the $50, and had this been done, the record would have supported the decree. The judgment of the district court is

AFFIRMED.

GEORGE B. WOOD, APPELLEE, V. WALTER G. CLARK, ADMINISTRATOR, APPELLANT.

FILED FEBRUARY 23, 1899. No. 8756.

1. **Judicial Sales:** APPRAISEMENT. It was never the intention of the legislature that the honest valuation placed upon property for purposes of judicial sale by legally qualified appraisers should be

set aside by the courts because other persons differed in opinion as to the value of such property.

2. ———: ———. The legislature has not left it for the courts to say, when a piece of property has been sold, whether the price bid for it was two-thirds of its fair cash value, but created a tribunal to ascertain and determine its value before its sale.

3. ———: ———. The meaning of the appraisement law is that the valuation placed by appraisers upon real estate is conclusive unless it be set aside because the appraisers were not legally qualified or because they acted fraudulently in making the appraisement, or for some other equally potent reason.

4. ———: LIENS. The owner of the equity of redemption in real estate cannot be heard to object to the confirmation of a sale made thereof because an incumbrance upon the property prior to the one under which it was sold was not deducted from the valuation placed on the property by the appraisers.

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

Congdon & Parish, for appellant.

D. M. Vinsonhaler, contra.

RAGAN, C.

Walter G. Clark, administrator, appeals to this court from a decree of the district court of Douglas county confirming a judicial sale made of certain real estate in pursuance of the foreclosure of an ordinary real estate mortgage thereon at the suit of George B. Wood. Before the sale of the property the administrator filed a motion to vacate the appraisement made thereof on the ground that the property was appraised at so low a price as to raise the presumption that the appraisement was fraudulent. This motion the court sustained and ordered a reappraisement. The property was again appraised. The administrator filed a motion to vacate the appraisement upon two grounds: (1) That the property was appraised at much less than its fair cash value, and so low as to raise the presumption that the appraisers acted fraudulently; and (2) that no application was made to the

proper officers for incumbrances existing on the property prior to the lien of the mortgage sought to be foreclosed, and in making the appraisement no such prior incumbrances were deducted. The court overruled the motion to vacate the appraisement and confirmed the sale.

1. Sixteen witnesses testified by affidavit as to the value of this property. These witnesses varied in their estimate of its value from $4,000 to $8,000. The appraisers estimated the value of this property at $5,500. How can we say that the district court erred in accepting the valuation placed on this property by the appraisers and those witnesses who made it of less value than $5,500? The value of any property is largely a matter of opinion, and so far as this record shows all the witnesses were equally competent to speak as to its value and all equally honest. This case shows the unreasonableness of requiring a court to set up its judgment as to the value of real estate as against that of appraisers who have put a valuation on it in pursuance of their duties and oaths. Doubtless the witnesses who testified in this case as to the value of this property were influenced in their judgments in favor of the parties who asked them to make affidavits,—influenced, not consciously, it may be, but nevertheless influenced. On the other hand, the appraisers were absolutely disinterested, so far as this record shows, and their judgment as to the value of this property, under the circumstances, is worth more as evidence than any number of conflicting affidavits procured by parties interested in having this sale confirmed or set aside. It was never the intention of the legislature that the honest valuation placed upon property for purposes of judicial sale by legally qualified appraisers should be set aside by the courts because other persons differed in judgment and opinion as to the value of such property. The appraisement law was enacted for the benefit of the debtor in order that his property might not be sacrificed for a nominal sum, and, therefore, it provides that before a creditor can sell his debtor's real estate to sat-

isfy his debt the property must bring at the sale two-thirds of its fair cash value. The legislature did not leave it for the courts to say, when a piece of property has been sold, whether the price bid for it was two-thirds of its fair cash value, but it created a tribunal to ascertain and determine its value before the sale occurred; and it is the meaning of the law of this state that the valuation placed by appraisers upon real estate is final and conclusive, unless it be overthrown and set aside because the appraisers were not legally qualified or because they acted fraudulently in making the appraisement, or for some other equally potent reason. (*Vought v. Foxworthy*, 38 Neb. 790.) But solely because witnesses, or any number of witnesses, differ in their judgment as to the value of the property from that placed thereon by the appraisers affords not the slightest reason for disturbing the valuation placed on the property by the tribunal created by the legislature to ascertain and fix that value.

2. The appellant is in no position to complain because the liens existing against this property, which were prior to the lien on which it was sold, were not deducted. The more prior liens which existed against the property which were not deducted from its value the more the purchaser paid for it. As an example, the only liens existing against this property at the time it was sold, and which were prior to the mortgage under which it was sold, were $615 of taxes. Since these taxes were not deducted, the purchaser took his title burdened therewith, and instead of paying $3,500 for the property, as a matter of fact he paid $4,100 for it. On what theory then can the appellant be heard to complain that his property sold for $4,100 when it should only have sold for $3,500? It was held in *Smith v. Foxworthy*, 39 Neb. 214, that the provisions of the statute requiring liens existing against property, and prior to the lien under which the property was about to be sold, to be deducted from the value placed on the property was for the benefit of the creditor, and that the owner of the equity of redemption could

not be heard to object to the confirmation of a sale made because such prior incumbrances were not deducted. The same ruling was made in the *American Investment Co. v. McGregor*, 48 Neb. 779. The decree is

AFFIRMED.

JOHN K. SOWARDS V. GEORGE H. MOSS.

FILED FEBRUARY 23, 1899. No. 8746.

1. **Vendor and Vendee:** ACTION FOR PURCHASE PRICE: PLEADING. In a suit to recover the purchase price of real estate, alleged to have been sold and conveyed by the plaintiff to the defendant, it is not essential that the petition should allege that the contract of sale was in writing.
2. ———: ———: STATUTE OF FRAUDS. In such a suit the statute of frauds as a defense is overthrown where it is established that the plaintiff executed and delivered to defendant the deed.
3. ———: ———. Evidence examined, and *held* to support the finding of the district court that the vendor of real estate executed and delivered his deed therefor in the time fixed by the contract between the parties.
4. ———: DELIVERY OF DEED. A delivery of a deed to an agent appointed by the vendee therein to receive it is a delivery to such vendee.
5. ———: ———. The neglect of such agent to notify his principal of the receipt of such deed affords the principal no defense to an action by the vendor for the purchase-money.

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

W. L. Hand, for plaintiff in error.

B. O. Hostetler, contra.

RAGAN, C.

In the spring of 1895 John K. Sowards resided near Danville, Illinois. George H. Moss and Howe Blue resided in Buffalo county, Nebraska. Sowards wrote a

letter to Blue in which he directed him to offer Moss $1,000 for a piece of real estate owned by the latter in said Buffalo county, a warranty deed for the property, accompanied by an abstract of title, to be delivered by Moss by July 10, 1895, to the First National Bank of Danville, Illinois. Blue showed this letter to Moss, and the latter authorized Blue to notify Sowards that he accepted the latter's proposition. Blue did at once so notify Sowards by letter. On July 8, 1895, Moss and his wife executed a warranty deed of their farm to Sowards and sent the same, accompanied by an abstract of title, in a registered letter to the First National Bank of Danville, Illinois, accompanied by a letter of instruction to deliver the deed to Sowards upon his paying to it for Moss the $1,000. This deed and abstract reached the First National Bank certainly as early as July 12, 1895, but the bank neglected to notify Sowards that the deed was there until some time in August. He then refused to accept it because not delivered by July 10. Moss then brought this suit in the district court of Buffalo county against Sowards to recover the $1,000 purchase-money and had judgment, to review which Sowards has filed here a petition in error.

1. The first argument is that the petition does not state a cause of action, because it does not allege that the contract for sale and purchase of this real estate between the parties was in writing. But in a suit to recover the purchase price of real estate alleged to have been sold and conveyed by the plaintiff to the defendant it is not necessary that the petition should allege that the contract of sale was in writing. (*Schmid v. Schmid*, 37 Neb. 629.)

2. Another argument is that the evidence shows that the contract by these parties was an oral one; that Moss was not bound to convey, and, therefore, Sowards is not bound. There are two answers to this contention: (1.) The proposition of Sowards to purchase the land was in writing. Moss accepted this proposition and authorized

Blue to notify Sowards that he had accepted it. The letter then written by Blue to Sowards, informing the latter of Moss' acceptance of the proposition of purchase, was in effect Moss' letter in writing accepting the proposition. (2.) If the letter written by Blue to Moss was out of the way, still Moss actually made a conveyance of the real estate to Sowards and delivered it to his appointed agent. Moss then performed the contract and bound himself by his deed, and since the deed was made and delivered to Sowards, the statute of frauds is no defense for Sowards in an action against him to recover the purchase price. (*Harris v. Roberts*, 12 Neb. 631; *Morrow v. Jones*, 41 Neb. 867.)

3. The third argument is that by the terms of the contract Moss was to deliver his deed, accompanied by an abstract of title, to the First National Bank of Danville, Illinois, by July 10, 1895, and that it was not delivered at that time. The evidence shows, without conflict, that the abstract and deed were deposited in the United States mail at Kearney, Nebraska, on July 8, 1895, and that by the usual course of the mail it would reach Danville on July 9. The bank officers testified that their books showed that the deed reached there on July 31, but that their books were wrong and that the deed did reach there, they think, about July 12. We think, then, that the evidence sustains the finding of the district court that this deed reached the First National Bank of Danville, Illinois, on or before July 10, 1895. The First National Bank was the agent of Sowards, and if it neglected to notify him promptly of the arrival of the deed, that default cannot be charged to Moss. The bank was Soward's agent, and a delivery to the bank was a delivery to Sowards, and his refusal to accept the deed was based solely on his contention that it had not been delivered to him July 10. The court found that it was. The evidence sustains the finding. The judgment of the district court is

AFFIRMED.

CLARA L. BACHELOR ET AL. V. GEORGE KORB, JR., ET AL.

FILED FEBRUARY 23, 1899. No. 8758.

1. **Guardians:** LICENSE TO SELL REAL ESTATE: BOND. The provision of the statute (Compiled Statutes 1897, ch. 23, sec. 54), requiring a guardian licensed to sell the real estate of his wards to give a bond to the judge of the district court, to be approved by such judge, is mandatory.

2. ———: ———: ———. The district courts are not invested with discretion to require or not a guardian appointed in this state, when licensed to sell lands in this state of his wards, to give the bond required by said section 54.

3. ———: ———: ———. Such a guardian's sale of the lands of his ward is void unless, before such sale, the guardian executes the bond required by said section 54. The judge of the district court granting the license must be the obligee in the bond, and it must be approved by such judge.

4. ———: ———: CONSTRUCTION OF STATUTE. The clause "in case any bond is required by the court on granting the license," found in section 64 of said chapter 23, has reference to sales of real estate in this state made by foreign guardians who have given bonds to the courts appointing them.

5. ———: ———: OATH. The failure of a guardian licensed to sell the real estate of his wards to take and subscribe the oath required by section 55 of chapter 23, Compiled Statutes 1897, "before fixing on the time and place of sale" renders the sale, if made, void.

6. ———: SALE OF WARD'S REAL ESTATE: NOTICE. The date of the first publication of the notice of sale is the date on which such a guardian fixes on the "time and place of sale."

7. ———: ———: ESTOPPEL. Heirs, on becoming of age, are not estopped from questioning the validity of a sale of their real estate made by their guardian because he applied the proceeds of such sale to their maintenance and education.

8. ———: ———: CAVEAT EMPTOR. The rule of *caveat emptor* applies to a purchaser at a guardian's sale of the real estate of his ward.

9. **Case Distinguished.** *Myers v. McGavock*, 39 Neb. 843, distinguished.

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

T. J. Mahoney, for plaintiffs in error:

The notice was sufficient. (*Townsend v. Tallant*, 33 Cal. 45; *Monahon v. Vandyke*, 27 Ill. 155; *Gibson v. Roll*, 30 Ill. 172; *Knickerbocker v. Knickerbocker*, 58 Ill. 399; *Turney v. Turney*, 24 Ill. 625; *Morris v. Hogle*, 37 Ill. 150; *Moore v. Starks*, 1 O. St. 372; *Benson v. Cilley*, 8 O. St. 613; *Sibley v. Waffle*, 16 N. Y. 180; *Halleck v. Moss*, 17 Cal. 340; *Johnson v. Johnson*, 30 Ill. 215; *Rankin v. Miller*, 43 Ia. 11; *Lyon v. Vanatta*, 35 Ia. 521; *Blodgett v. Hitt*, 29 Wis. 169.)

The bond required by law was not given. (*Hubermann v. Evans*, 46 Neb. 784; *Weld v. Johnson Mfg. Co.*, 54 N. W. Rep. [Wis.] 335; *Holden v. Curry*, 55 N. W. Rep. [Wis.] 965; *Babcock v. Cobb*, 11 Minn. 347; *Rucker v. Dyer*, 44 Miss. 591; *Barnette v. Bull*, 81 Ky. 127; *Stewart v. Bailey*, 28 Mich. 251; *Ryder v. Flanders*, 30 Mich. 336.)

The guardian did not take the oath required by law. (*Williams v. Reed*, 5 Pick. [Mass.] 480; *Parker v. Nichols*, 7 Pick. [Mass.] 111; *Campbell v. Knights*, 26 Me. 224; *Blackman v. Baumann*, 22 Wis. 611; *Wilkinson v. Filby*, 24 Wis. 441; *Cooper v. Sunderland*, 3 Ia. 114; *Thornton v. Mulquinne*, 12 Ia. 541; *Myers v. McGavock*, 39 Neb. 843.)

C. J. Smyth, also for plaintiffs in error.

M. McLaughlin and *J. C. Crawford*, *contra*.

References: *Bryant v. Estabrook*, 16 Neb. 217; *Larimer v. Wallace*, 36 Neb. 444; *Wilcox v. Raben*, 24 Neb. 368; *Saxon v. Cain*, 19 Neb. 488; *Neligh v. Keene*, 16 Neb. 407; *Franklin v. Kelly*, 2 Neb. 112; *Trumble v. Williams*, 18 Neb. 144; *Yocmans v. Brown*, 8 Met. [Mass.] 51; *Robertson v. Johnson*, 57 Tex. 62; *Montgomery v. Johnson*, 31 Ark. 74; *Cain v. Boller*, 41 Neb. 721; *Wilmore v. Stetler*, 36 N. E. Rep. [Ind.] 856; *Bumb v. Gard*, 8 N. E. Rep. [Ind.] 713; *Palmerton v. Hoop*, 30 N. E. Rep. [Ind.] 874; *Deford v. Mercer*, 24 Ia. 118; *France v. Haynes*, 67 Ia. 139; *Commonwealth v. Schuman*, 18 Pa. St. 346; *Valle v. Flemming's Heirs*, 29 Mo. 152; *Hudgin v. Hudgin*, 6 Gratt. [Va.] 320; *Dufour*

v. Camfranc, 11 Mart. [La.] 607; *Grignon's Lessee v. Astor*, 2 How. [U. S.] 340; *Seymour v. Ricketts*, 21 Neb. 240; *Stack v. Royce*, 34 Neb. 833; *Richardson v. Farwell*, 51 N. W. Rep. [Minn.] 915; *Schroeder v. Wilcox*, 39 Neb. 136; *McGavock v. Pollack*, 13 Neb. 535; *Emery v. Vroman*, 19 Wis. 724; *Pursley v. Hayes*, 22 Ia. 11; *Haller v. Blaco*, 14 Neb. 195.

RAGAN, C.

Andrew Bergthold died intestate in Cuming county, Nebraska, in October, 1877, leaving a widow, Amelia, and three children. The deceased died the owner of certain real estate. About a year after Bergthold's death his widow married one Ferdinand Schmela, who was subsequently appointed administrator of Bergthold's estate. Upon the petition of Schmela's wife the probate court of Cuming county appointed her husband, Schmela, the guardian of the three minor children of Bergthold, deceased, the children being at that time nine, eleven, and thirteen years of age, respectively. This appointment of Schmela as guardian was made about September, 1885. On September 3, 1887, the judge of the district court of Cuming county, in pursuance of the guardian's petition therefor, granted him a license as such guardian to sell the real estate of his wards for the purpose of raising money to educate and support them. In pursuance of this license the guardian advertised and sold at public auction the real estate of his wards to one Wenzel F. Kriz on September 30, 1887, and on October 14, 1887, executed and delivered to him a guardian's deed for such real estate. George Korb, Jr., Charles Korb, and J. A. Johnson now claim title to the real estate through Kriz. The heirs of Bergthold, having become of age, brought this, an action in the nature of ejectment, in the district court of Cuming county against the Korbs and Johnson to recover possession, with rents and profits, of said real estate. The district court entered a judgment dismissing the action of the heirs, to review which

they have filed here a petition in error. The sole question in the case is the validity of the guardian's sale. If that sale was not void, the judgment of the district court is correct. If it was void, the judgment is wrong and the plaintiffs in error were entitled to the judgment of the district court prayed for in their petition filed therein.

1. Authority for a guardian to sell the land of his wards for their maintenance and education and the procedure regulating such sale are found in sections 42 to 64, both inclusive, of chapter 23, Compiled Statutes 1897. Section 54 of this chapter provides: "Every guardian licensed to sell real estate, as aforesaid, shall, before the sale, give bond to the judge of the district court with sufficient surety or sureties, to be approved by such judge, with condition to sell the same in the manner prescribed by law." Section 64 of such chapter provides: "In case of an action relating to any estate sold by a guardian, under the provisions of this subdivision, in which the ward or any person claiming under him shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings, provided it shall appear: * * * Second—That he [the guardian] gave a bond which was approved by the judge of the district court, in case any bond was required by the court upon granting the license." In the proceeding for the sale of his wards' real estate instituted and carried on by the guardian he executed with sureties a bond, the judge of the district court of Cuming county being the obligee named therein. This bond was never presented to, nor in any manner approved by, the judge of said district court. It was, however, filed in the court and approved by the clerk thereof. The statute just quoted is mandatory, that a guardian licensed to sell his ward's real estate shall, before the sale, give a bond to the judge of the district court, to be approved by such judge. Unless such bond be given and approved, a guardian appointed in this state has no authority or jurisdic-

tion to sell the real estate of his wards in this state for the purposes of their maintenance and education. The clause in the second subdivision of section 64, "in case any bond is required by the court upon granting the license," does not mean that the district courts are invested with discretion to require or not a guardian to give the bond required by section 54 as a condition precedent to his authority to sell the real estate of his ward. That provision in said section 64 has reference to the sales of real estate in this state made by foreign guardians who have given bonds to the courts appointing them. The guardian's sale of his wards' real estate was void because the bond given by the guardian was not approved by the judge of the district court. It was not a valid bond until it was approved. The clerk had no authority to approve it, and the effect of the transaction is that the guardian made the sale without giving any bond at all. See upon the subject: *Weld v. Johnson Mfg. Co.*, 54 N. W. Rep. [Wis.] 335; *Holden v. Curry*, 55 N. W. Rep. [Wis.] 965; *Currie v. Stewart*, 26 Miss. 646; *Babcock v. Cobb*, 11 Minn. 247; *Rucker v. Dyer*, 44 Miss. 591; *Williams v. Morton*, 38 Me. 47; *Barnett v. Bull*, 81 Ky. 127; *Stewart v. Bailey*, 28 Mich. 251; *Ryder v. Flanders*, 30 Mich. 336.

In this connection it is said by the defendant in error that the failure of the guardian to have the bond executed by him approved by the judge of the district court was an irregularity merely. The answer to this is, if it was an irregularity, it was such a one as the statute in effect prescribes shall avoid the sale.

Another contention of the defendant in error is that the provision of the statute requiring this bond to be approved by the judge of the district court is directory merely, and that this court held, in *Myers v. McGavock*, 39 Neb. 843, that such a bond need not be approved by the judge of the district court. The requirement of the statute that the district court shall approve this bond is not directory, but it is mandatory; and this court did

not hold in *Myers v. McGavock*, or in any other case, either that the statute requiring this bond to be given was directory, or, that if given, and not approved by the judge, his failure to approve it was immaterial. The *Myers-McGavock Case* was an action in ejectment by heirs. The defendants to that action claimed under a sale made by a guardian. It was insisted that that sale was void because the guardian had not given a bond approved by the judge granting the license as required by statute. Answering this objection we said: "A bond in proper form and with proper sureties was executed and filed in the court in the proceeding as required by the statute; but the record of the proceeding in which the license to sell the real estate of the wards was granted does not show that this bond was formally approved by the judge who granted the license. It is now claimed that this silence of the record is conclusive evidence that the bond was not approved by the judge, and his failure to formally approve the bond renders the entire proceeding void. On the trial of the case at bar the defendants proved by the attorney who conducted the proceeding on behalf of the guardian that the bond was in fact presented to and approved by the presiding judge. The fact of the approval of the bond, like any other fact, might be proved by the best evidence attainable. We are of opinion, however, that in this collateral proceeding the guardian's deed could not be declared void because the bond filed for the purpose of obtaining the license to sell the real estate was not formally approved. (*Emery v. Vroman*, 19 Wis. 724; *Pursley v. Hayes*, 22 Ia. 11; *Hamiel v. Donnelly*, 75 Ia. 93.)" This is not a holding that the approval of the guardian's bond by the judge granting him the license to sell is not an absolutely essential thing. The statute does not prescribe what shall constitute an approval of a guardian's bond to sell his ward's real estate. It does not declare what shall be the only evidence of the judge's approval of such bond. A formal approval of a bond would perhaps consist in the judge's

writing on the bond "approved," or "this bond approved," or some such words, and signing his name. In the *Myers-McGavock Case* the bond was actually presented to the judge, and the fact that he approved it was established by oral evidence,—the best and the only evidence attainable,—and we held that that was sufficient, and that the sale would not be declared void, not because the judge had not approved the bond, but because he had not formally approved it; that is, that the evidence that he had approved it did not appear upon the bond in writing. In the case at bar the bond was never presented to the judge who granted the guardian license to sell. It was never approved by him in any manner whatever. He testified as a witness that the bond was never presented to him nor approved by him.

2. Section 55 of said chapter 23, among other things, provides: "Such guardian shall also, before fixing on the time and place of sale, take and subscribe an oath," etc. The guardian fixed the time and place of sale of his wards' real estate on September 5, 1887, by publishing the first notice of his sale on that date, in which he recited that the sale would occur at a certain time and place on September 30. He took and filed the oath required by statute on September 30, whether before or after the hour fixed for the sale is not disclosed by the record. This did not comply with the statute. It required him to take and subscribe an oath "before fixing on the time and place of sale." In effect he did not take and subscribe the oath required by the statute. The statute of Wisconsin on the subject under consideration provides that the guardian shall, "before fixing on the time and place of sale, take and subscribe an oath," etc. In *Blackman v. Baumann*, 22 Wis. 611, a guardian was licensed by the court to sell his ward's real estate for the latter's education and maintenance. The sale occurred on December 10, 1850. The guardian took and subscribed the oath required by the statute on the same day. The court said: "For it appears that the guardian

did not take the oath until the day the sale was made; in other words, he did not take it 'before fixing on the time and place of sale,' as required by this section. But it is said, inasmuch as it appears that the proper oath was taken by the guardian before the sale was actually made, that this should be deemed a sufficient compliance with the statute upon that matter. The provision, however, is peremptory, that the oath required shall be taken before fixing on the time and place of sale. Can the court say, in view of language so explicit, that the oath need not be taken before fixing on the time and place of sale, but may be taken at any subsequent time? We think the court has no right to take such liberties with the statute and disregard a requirement so plainly expressed, even to sustain a sale otherwise regular. To do so would be assuming the province of the lawmaking power. We are therefore unable to see upon what principle the sale in this case can be held valid;" and it was ruled in that case that because the oath was not taken and subscribed by the guardian before he fixed upon the time and place of his sale the latter was absolutely void. To the same effect are *Williams v. Reed*, 5 Pick. [Mass.] 480; *Parker v. Nichols*, 7 Pick. [Mass.] 111; *Campbell v. Knights*, 26 Me. 224; *Cooper v. Sunderland*, 3 Ia. 114; *Ryder v. Flanders*, 30 Mich. 336. Indeed there seems to be no conflict among the authorities that the failure of the guardian to take and subscribe the oath before he fixes upon the time and place of the sale renders the sale void. We are of opinion, therefore, that the sale made by the guardian in this case was and is void, because the bond given by the guardian in pursuance of section 55 of said chapter 23 was not approved by the judge who granted the license, and because the oath taken and subscribed by the guardian was not so taken and subscribed "before fixing on the time and place of sale."

3. An argument of the defendants in error is that the heirs are estopped from maintaining this suit because they, the defendants in error, at the time they purchased

the property, went into the actual possession thereof and have since been in such possession; that they have made improvements upon the property of the value of $400, and have paid taxes and insurance on the property amounting to $292.73, and that during all the time the defendants in error have been in possession the heirs and their guardian, though living in the same locality with the defendants in error, made no objection or protest to the defendants in error and gave them no notice that they had or claimed any title in the premises; that the defendants in error purchased the premises from the mother of the plaintiffs in error and paid her therefor the sum of $2,312, and assumed and paid off upon the property certain liens put thereon by the mother of the plaintiffs in error while she owned it; that a large portion of the money expended by the defendants in error in the purchase of said real estate and the discharging the liens thereon was used and expended by the guardian of the plaintiffs in error for their education and maintenance, and that they have not paid, nor offered to repay, the same to the defendants in error. But the fact, if it is a fact, that the proceeds of the guardian's sale of the real estate of these wards was applied by him toward their maintenance and education does not estop them from denying the validity of the sale. (*Wilkinson v. Filby*, 24 Wis. 441; *Requa v. Holmes*, 26 N. Y. 338; *Rowe v. Griffiths*, 57 Neb. 488.)

But the defendants in error, though they may have paid a valuable consideration for this real estate, are not innocent purchasers of it. One who purchases real estate at a guardian's sale, or purchases from the vendee of that sale, must take notice at his peril of the authority of the guardian to make the sale. The doctrine of *caveat emptor* applies to purchasers at guardians' sales. The guardian in this case reported that on September 30, 1887, he had sold his wards' real estate for $2,700 cash to one Wenzel F. Kriz. This report he filed in court on October 14, 1887. On that same date the guardian executed and delivered

his deed for the real estate to Kriz, and on October 17 of said year Kriz and his wife, for the same purported consideration of $2,700, conveyed the real estate to the guardian's wife. The defendants in error claim by conveyance from her. An intending purchaser of this real estate, looking at the record of its title, would have seen in this transaction of a sale by the guardian to Kriz and a deed to him for $2,700, and three days afterward a deed from Kriz for $2,700 to the guardian's wife, sufficient to have aroused the inquiries and suspicions of any prudent man, and these inquiries, if pursued with any diligence whatever, would have probably revealed the fact that Kriz never paid anything for this real estate; that the entire proceeding instituted and carried on by this guardian was for the purpose of depriving his wards of the title to their property and vesting it in his wife.

We are not deciding that where a guardian's sale is absolutely void that any one can be protected as an innocent purchaser for value of the real estate sold; but what we do say is that, if these defendants in error are to suffer a loss, it is the result of their own negligence. There was enough upon the face of this record to have deterred any prudent man from investing his money in this property. The fact that defendants in error discharged liens upon this property put thereon by the wife of the guardian affords not the slightest reason why this real estate, when handed over to these heirs, should be burdened with the amount of those liens. Those liens were not upon the real estate when the title to it vested in the heirs upon their father's death. We think the most the defendants in error are entitled to is to set off the taxes upon this real estate paid by them which were liens upon it against the rents and profits. If the money paid by defendants in error to the mother of these children for this real estate was by her used toward the maintenance and education of her children, the latter cannot be charged with it in favor of defendants in error. She was not their legal guardian. No part of the money ex-

pended by the defendants in error went to the guardian of the heirs and was used by him for their benefit. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

CLARA L. BACHELOR ET AL. V. HENRY SCHLAUTMAN.

FILED FEBRUARY 23, 1899. No. 8759.

Guardian and Ward. On the authority of *Bachelor v. Korb*, 58 Neb. 122, the judgment of the district court in this case is reversed.

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

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

M. McLaughlin and *J. C. Crawford, contra.*

RAGAN, C.

The facts in this case are the same as in *Bachelor v. Korb*, 58 Neb. 122, and upon the authority of the latter case the judgment of the district court in this is reversed and the cause remanded with the same directions as in that case.

REVERSED AND REMANDED.

INTERSTATE SAVINGS & LOAN ASSOCIATION, APPELLEE, V. HATTIE B. STRINE ET AL., APPELLANTS.

FILED FEBRUARY 23, 1899. No. 8724.

1. **Usury**: COSTS. In a suit on a contract for the payment of money, where the defense of usury is established, the plaintiff is not entitled to costs nor interest on the judgment awarded him.
2. ———: FOREIGN BUILDING AND LOAN ASSOCIATIONS. The contracts of foreign building and loan associations made in this state are not exempt from the penalties denounced against usurious transactions by our statutes.
3. **Review.** Evidence examined, and *held* insufficient to support the decree.
4. **Acknowledgments.** A United States commissioner has no authority to take acknowledgments of real estate conveyances executed in this state.
5. ———: HOMESTEAD. A conveyance of real estate, the same being the homestead of the grantors, is, unless acknowledged by both husband and wife, void.

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

Daniel F. Osgood, for appellants.

Benjamin F. Johnson, contra.

RAGAN, C.

The Interstate Savings & Loan Association, a foreign corporation, brought this suit in the district court of Lancaster county against William R. Strine and wife to foreclose a real estate mortgage. Strine and his wife interposed as defenses (1) that the contract sued on was usurious, and (2) that the property covered by the mortgage was a homestead and Mrs. Strine had never acknowledged that mortgage, and therefore it was void. The answer also set out the exact sum of money received from the loan association and the amount of payments

that had been made. The court entered a decree in favor of the association for a certain sum of money, the decree to draw ten per cent interest, and also awarded the association costs. Strine and his wife have appealed. The decree must be reversed.

1. The pleadings show upon their face that the note sued upon drew interest at the rate of thirteen per cent per annum, payable monthly. The association then was not only not entitled to recover costs, but the decree should not have drawn any interest whatever.

2. Since the building association is a foreign corporation, its contracts are not exempt from the penalties denounced against usurious transactions by the statute. Only building and loan associations organized under the laws of this state are exempted by the general statutes from the penalties of usury. (*National Mutual Building & Loan Ass'n v. Keeney*, 57 Neb. 94.)

3. The evidence in this case shows without conflict that Strine and his wife executed and delivered to this association a note for $600, for which they received the sum of $572.70 only; that they have paid to this association on this contract, including the amount reserved by the association, $198.40, so that in no event should a decree be awarded against them for more than $374.30, without interest and without costs.

4. The acknowledgment of Strine, the wife, to the mortgage in suit was taken by one Straut, a United States commissioner. We know of no law of this state which authorized that officer to take acknowledgments of deeds.

There was some conflict in the evidence as to whether the mortgaged property was the homestead of the mortgagors. If the district court shall find that it was not, then the fact that the acknowledgment was taken before a United States commissioner, and, therefore, that the mortgage was not acknowledged at all, would, in this case, be immaterial and no defense. But if the district court shall find on retrial that the mortgaged property was the homestead of Strine and wife, the mortgage

should be canceled, since a conveyance of real estate, it being the homestead of the grantors, is, unless acknowledged by both husband and wife, absolutely void. (*Horbach v. Tyrrell*, 48 Neb. 514; *France v. Bell*, 52 Neb. 57.) If the mortgage shall turn out to be void because the mortgaged property was the homestead of the mortgagors, the building association would be entitled to a judgment against Strine, the husband, for not more than $374.30, without interest or costs. The decree is reversed and the cause remanded with instructions to the district court for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

HENRY GERNER V. CHARLES W. MOSHER ET AL.

FILED FEBRUARY 23, 1899. No. 8707.

1. **Jurisdiction:** REMOVAL OF CAUSE: RES JUDICATA. Where a cause has been removed from a state court to the federal court and has been by that court remanded to the state court for want of jurisdiction, it is the duty of the state court, in subsequent proceedings, to treat as conclusive upon it the decision of the federal court on the question of jurisdiction.

2. **Stockholders:** RIGHT TO INSPECT BOOKS. Assuming it to be the right of a stockholder in a corporation to examine the books thereof, it is not, as a matter of law, his duty to do so, after becoming a stockholder, for the purpose of ascertaining whether or not he has been defrauded in the purchase of such stock, he not being aware of any fact leading to a suspicion that he may have been so defrauded.

3. **National Banks:** REPORTS: PUBLICATION. The object of requiring publication by national banks of reports made to the comptroller of the currency in pursuance of section 5211, Revised Statutes U. S., is to afford information to all persons having or contemplating business transactions into which the condition of the bank directly enters as a material factor.

4. ———: ———. Therefore, one contemplating the purchase of stock in the bank is entitled to rely on such publications equally with a depositor or note-holder.

5. ———: ———: ATTESTATION. The statute referred to requires such report to be verified by the oath or affirmation of the president or cashier and to be attested by the signature of at least three directors. To charge a director individually with the consequences of false reports it must appear that he attested them, or that he in some manner participated in making or publishing them. The attestation is not the act of the whole board, but that of the individual directors signing it.

6. **False Representations.** One who makes a false representation under circumstances which would render him liable if it were made voluntarily is not excused by the fact that the law required him to make a true statement of the character counted upon.

7. **National Banks:** FALSE REPORTS: OFFICER. The president and cashier of a bank, shown to have personally conducted its business, cannot be presumed ignorant of the falsity of reports of the bank's condition by them published, the books of the bank on their face disclosing the falsity.

8. ———: ———: STATUTES. The word "attest," as used in section 5211, Revised Statutes U. S., means something more than to witness the execution of the report by the president or cashier. It means to certify its correctness.

9. ———: ———: EFFECT OF ATTESTATION. Where the directors of a national bank attest the reports made of its condition by its executive officers to the comptroller of the currency under section 5211, Revised Statutes U. S., they thereby certify that the statements contained in said report are absolutely true. IRVINE and RYAN, CC., dissenting.

10. **False Representations.** In an action for false representations it is not necessary to aver or prove that the party making them knew they were untrue. And this rule is applicable to an action for deceit against the director of a bank for falsely stating the financial condition of the corporation. IRVINE and RYAN, CC., dissenting.

11. **National Banks:** FALSE REPORTS: LIABILITY OF DIRECTORS. The directors of an insolvent national bank are personally liable, at the suit of one purchasing the stock of such bank, for damages sustained by the reason of the insolvency of the corporation, when the plaintiff is induced to make such purchase by false representations of solvency, contained in reports made by the bank to the comptroller of the currency and attested by the directors and published in pursuance of law, even though the directors were unaware that such reports and representations were false or untrue and were made without intention to defraud. IRVINE and RYAN, CC., dissenting.

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

Joseph R. Webster, Halleck F. Rose, and *Cyrus W. Fisherdick,* for plaintiff in error:

The official report is a public representation, and plaintiff had a right to rely on it. (*Bartholomew v. Bentley,* 15 O. 666; *Merchants Nat. Bank v. Thoms,* 28 W. L. B. [O.] 164; *Morse v. Swits,* 19 How. Pr. [N. Y.] 275; *Prescott v. Haughey,* 65 Fed. Rep. 659; *Delano v. Case,* 121 Ill. 247; *Seale v. Baker,* 70 Tex. 283; *Salmon v. Richardson,* 30 Conn. 360; *Tate v. Bates,* 118 N. Car. 287; *Prewitt v. Trimble,* 92 Ky. 181; *Bedford v. Bagshaw,* 4 Hurl. & N. [Eng.] *548; *Solomon v. Bates,* 24 S. E. Rep. [N. Car.] 478; *Morgan v. Skiddy,* 62 N. Y. 325; *Kinkler v. Junica,* 84 Tex. 116; *United States v. Allis,* 73 Fed. Rep. 169; *National Exchange Bank v. Sibley,* 71 Ga. 726; *Upton v. Vail,* 6 Johns. [N. Y.] *182; *Barney v. Dewey,* 13 Johns. [N. Y.] 224; *Allen v. Addington,* 7 Wend. [N. Y.] 22; *Williams v. Wood,* 14 Wend. [N. Y.] 126.)

The right to maintain the action against national bank directors is clearly and distinctly given by section 5239, Revised Statutes U. S. (*Welles v. Graves,* 41 Fed. Rep. 459; *Hayden v. Thompson,* 67 Fed. Rep. 273; Potter Dwarris, Statutes & Constitutions 275, note 5; *Lowry v. Chicago, B. & Q. R. Co.,* 46 Fed. Rep. 83; 3 Thompson, Corporations sec. 4113; *Stephens v. Overstolz,* 43 Fed. Rep. 771.)

As to the character of proof required to establish knowledge on the part of directors of the financial condition of a bank, see: *Merchants Bank v. Rudolf,* 5 Neb. 540; *United States v. Allis,* 73 Fed. Rep. 165; *Allis v. United States,* 155 U. S. 117; *Finn v. Brown,* 142 U. S. 71; *United Society of Shakers v. Underwood,* 9 Bush [Ky.] 609; *Hauser v. Tate,* 85 N. Car. 84; *German Savings Bank v. Walfekuhler,* 19 Kan. 60; *Hubbard v. Weare,* 79 Ia. 678.

A stockholder in a bank, by virtue merely of that relation, is not chargeable with notice of its financial condition. (*Hardy v. Veasey,* 3 L. R. Ex. [Eng.] 107; *Foster v. Bank of London,* 3 F. & F. [Eng.] 214; *Commonwealth v. Phœnix Iron Co.,* 105 Pa. St. 111; 4 Thompson, Corporations sec. 4428; *Foley v. Holtry,* 43 Neb. 133.)

Charles O. Whedon and *J. W. Dewcese, contra.*

References: *Brackett v. Griswold*, 112 N. Y. 454, 467; *Honnewell v. Duxbury*, 154 Mass. 286; *Arthur v. Griswold*, 55 N. Y. 400; *Wakeman v. Dalley*, 51 N. Y. 27; *Kountze v. Kennedy*, 147 N. Y. 124; *Nash v. Minnesota Title Ins. & Trust Co.*, 163 Mass. 574; *Pier v. Hanmore*, 86 N. Y. 95; *Bonnell v. Griswold*, 89 N. Y. 122; *Stebbins v. Edmands*, 12 Gray [Mass.] 203; *Peck v. Gurney*, 7 Eng. Ruling Cas. 527; *Derry v. Peek*, 14 Appeal Cas. [Eng.] 337; *Crocker v. Manley*, 164 Ill. 282; *Southern Development Co. v. Silva*, 125 U. S. 247; *Runge v. Brown*, 23 Neb. 817; *Byard v. Holmes*, 34 N. J. Law 296; *Humphrey v. Merriam*, 32 Minn. 197; *Lord v. Goddard*, 13 How. [U. S.] 198; *Wells v. Cook*, 16 O. St. 67; *McCracken v. West*, 17 O. 16; *Caldwell v. Bates*, 24 S. E. Rep. [N. Car.] 481; *Nudd v. Hamblin*, 8 Allen [Mass.] 130; *Wood v. Carpenter*, 101 U. S. 135; *Hecht v. Slaney*, 72 Cal. 367; *Jesup v. Illinois C. R. Co.*, 43 Fed. Rep. 503; *Parker v. Kuhn*, 21 Neb. 413; *Wright v. Davis*, 28 Neb. 479; *Gillespie v. Cooper*, 36 Neb. 775; *State v. Boyd*, 49 Neb. 311; *Rugan v. Sabin*, 3 U. S. C. C. A. 578; *Stearns v. Page*, 7 How. [U. S.] 819; *Moore v. Greene*, 19 How. [U. S.] 69; *Beaubien v. Beaubien*, 23 How. [U. S.] 190; *Badger v. Badger*, 2 Wall. [U. S.] 95; *Lorenzen v. Kansas City Investment Co.*, 44 Neb. 99; *Slayton v. Fremont, E. & M. V. R. Co.*, 40 Neb. 840; *Dehning v. Detroit Bridge & Iron Works*, 46 Neb. 556; *Briggs v. Spaulding*, 141 U. S. 132.

F. M. Hall, also for defendants in error.

IRVINE, C.

Henry Gerner brought this case against Charles W. Mosher, Richard C. Outcalt, Charles E. Yates, David E. Thompson, Rollo O. Phillips, Ambrose P. S. Stuart, and Ellis P. Hamer. Homan J. Walsh and Emma H. Holmes, the latter as administratrix of the estate of William W. Holmes, were also named as parties defendant, but as

to them the proceedings seem to have been abandoned. The petition alleges that Mosher was the president of the Capital National Bank, Walsh its vice-president, and Outcalt its cashier, and that the other defendants named, together with Mosher, constituted its board of directors. The petition is in two counts, the first alleging that on May 18, 1887, a report was made by the defendants, to the comptroller of the currency, of the resources and liabilities of said bank as they existed May 13, 1887; that said report was sworn to by Outcalt as cashier and attested as correct by Mosher, Holmes, and Yates as directors; that the defendants caused said report to be published in the *State Journal*, a newspaper published in Lincoln, "for the purpose of inducing others, and particularly this plaintiff, to deal with said corporation and to repose in it and them, its directors and managing officers, and to induce others, and particularly this plaintiff, to purchase its capital stock and make investments therein, and represented and held out said statement to be a true statement of the financial condition of said corporation." The report is then set out in terms, and it is alleged that said report was false, in that it overstated the mortgages, stocks, and bonds held by the bank to the amount of $30,000, the amount due the bank from reserve agents, about $76,000, and its loans and discounts $50,000; that said report and false representations were made by said four defendants with the knowledge, assent, and co-operation of all the other defendants, and the same were, as they and each of them well knew, wholly false and untrue; that plaintiff believed said representations to be true, and on the faith thereof purchased from Charles Hammond on July 11, 1887, fifty shares of the capital stock of said corporation for the sum of $6,250; that it would have been worth said sum had the said report been correct, but in fact the bank was insolvent and the stock worthless; that January 22, 1893, the bank failed; that the stockholders have been assessed one hundred cents on the dollar on their stock, and judgment

rendered against the plaintiff for said assessment; that notwithstanding that the bank had no net earnings, dividends were from time to time declared, and suit has been brought against the plaintiff to recover dividends by him received. The second cause of action is, substantially, pleaded in the same manner, charging a false report of the condition of the bank September 30, 1889, and the purchase by the plaintiff, in reliance on that report, in November, 1889, of fifty shares of stock from Henry E. Lewis for the price of $7,250. The defendants filed separate answers, denying the material averments of the petition, pleading the statute of limitations, and also pleading that the action was one whereof the federal courts had exclusive jurisdiction, and that it had been removed to the circuit court for the district of Nebraska. At the close of the trial the district judge peremptorily instructed the jury to return a verdict for all the defendants. The plaintiff brings the case here for review.

The plaintiff contends that he was entitled to relief under the provisions of section 5239 of the Revised Statutes U. S. relating to the liability of directors of national banks. It, however, partly appears from the record, and is stated in both of the briefs, that the action was at one time removed to the federal court; that a motion to remand was overruled, but that subsequently, the case arising in that court, Judge Shiras presiding, on a demurrer to the petition it was found that the federal court had no jurisdiction and the case was therefore remanded to the district court of Lancaster county. The opinion of Judge Shiras, remanding the case, is found in *Gerner v. Thompson*, 74 Fed. Rep. 125, and proceeds on the ground that an action under section 5239 of the Revised Statutes may be maintained only by the receiver of the bank, so that an action by a private individual against directors for making false reports must be maintained, if at all, as an action at the common law for deceit, and therefore presents no question under the laws of the United States. Judge Shiras also expresses his opinion to the

effect that in order to maintain an action under the federal statute it must appear that a forfeiture of the bank's charter has been adjudged at the suit of the comptroller of the currency. Plaintiff vigorously attacks this opinion, especially the latter part. But under the circumstances we would not be free, if we were so disposed, to give the statute a construction different from that which was given it by the federal court in this very case. The construction of the statute was necessary for the purpose of the demurrer, and as leading to the order remanding the case, and it being a federal statute, construed by a federal court in determining its own jurisdiction, we are bound to accept the result of that construction, and are not at liberty to here review it. (*Missouri P. R. Co. v. Fitzgerald*, 16 Sup. Ct. Rep. 389.)

The defendants, to sustain the action of the trial court, contend that the action was barred by the statute of limitations, the first cause of action arising in 1887, the second in 1889, and the suit not having been brought until 1894. It is evident that if the action may be maintained at this late date it must be by virtue of section 12 of the Code of Civil Procedure, providing that actions may be brought "Within four years, * * * an action for relief on the ground of fraud, but the cause of action in such case shall not [be] deemed to have accrued until the discovery of the fraud." In order to bring the case within the exception of this statute, the plaintiff pleads "that defendants continued after said 18th day of May, 1887, to be directors and managing officers of said corporation, and contrived by repeated false statements of the resources and liabilities of said corporation, all of which were published and came to the notice of the plaintiff at the time of their being made and published, or shortly thereafter, and were by him believed to be true and relied upon, and by fraudulently declaring unauthorized dividends on its capital stock that the corporate business might falsely appear to be profitable, to conceal from the plaintiff the condition of said corporation and the

falsity of said representations; and said defendants fraudulently, knowingly, and willfully so concealed its condition that plaintiff did not discover said reports and representations to be false until on or about the 1st day of April, 1894." The evidence quite clearly shows that the plaintiff did not in fact know of the real condition of the bank until about the time of its failure. It also appears that reports were from time to time published of the condition of the bank, down to about the time of its failure, and that such reports were all false. It appears also that dividends were declared from time to time until shortly before the failure. It affirmatively appears, however, that none of the defendants save Mosher and Outcalt actually knew of the condition of the bank or the falsity of the reports, and that there was no actual intent on the part of such other defendants to mislead the plaintiff. We do not think that under this evidence the district court would have been justified in instructing for the defendants on the plea of limitations, and in fact the peremptory instruction was not based upon that ground.

It is contended by the defendants that the plaintiff, on becoming a stockholder, obtained the right of access to the books and that even a cursory examination of the books would have disclosed the falsity of the reports; that he must, therefore, be held, on account of such means of knowledge, to have actually discovered the fraud at or about the time when he bought the stock. Assuming that a stockholder has an unlimited right to examine the books of the bank, still we cannot adopt the theory that the plaintiff, immediately on purchasing the stock, was under any legal obligation to make such examination for the purpose of ascertaining whether he had been defrauded in the purchase. It is true that in this state rather a strict construction has been placed upon this section of the statute of limitations, and it is here the law that the statute begins to run, not only from the actual discovery of the fraud, but from the time of the

discovery of such facts as would put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to such discovery. (*Parker v. Kuhn*, 21 Neb. 413; *Wright v. Davis*, 28 Neb. 479; *Gillespie v. Cooper*, 36 Neb. 775; *State v. Boyd*, 49 Neb. 303.) In *Gillespie v. Cooper* it was also said that the party defrauded must be diligent in making inquiry; that means of knowledge are equivalent to knowledge. But it was stated in the same connection that a clue to the facts, which if followed up diligently would lead to a discovery, is in law equivalent to a discovery. None of the cases holds, nor are we aware of any case elsewhere which holds, that a man must be so keenly on the scent of efforts to defraud him that, without knowledge of any fact which would lead a prudent man to suspect that he had been defrauded, he is bound to make investigations which he is not obliged to make for other purposes, merely because it is in his power to make such investigations. There was some proof introduced and some tendered tending to show that Mr. Gerner, considering that he was a stockholder only and not a director, took quite a keen interest in the affairs of this bank, and was somewhat active concerning the same. But giving such evidence its utmost effect, it could have been no more than a question for the jury whether or not he thereby became apprised of any fact which imposed upon him the active duty of resort to an examination of the books. Certainly, in the absence of all grounds of suspicion, he cannot be held, as a matter of law, to have been compelled to make such examination. To hold stockholders to such a degree of diligence would in the case of many corporations cause the real business of the corporation to be seriously impeded by the invasion of stockholders for such purposes, and in the case of banks would seriously impair the right of secrecy which customers possess as to the state of their accounts.

Before entering upon the more difficult questions relating to the merits of the case it will be convenient at

this time to dispose thereof so far as concerns the defendants Thompson, Phillips, Stuart, and Hamer. None of these defendants signed either of the reports which the plaintiff claims misled him. In order to charge them the plaintiff alleged that the reports were made with the knowledge, assent, and co-operation of the defendants last named, and were, as each of them knew, false and untrue. The nature of the evidence on this point is accurately stated in the instruction of the trial court, as follows: "Plaintiff has failed in his evidence to produce a particle of testimony even tending to show that either Thompson, Hamer, Phillips, or Stuart knew, assented, or co-operated in the making or publishing of the said reports; and there is no attempt in the evidence on the part of the plaintiff to contradict the testimony given by each one of them touching their having no connection with the said reports on which plaintiff grounds his cause of action for deceit. The evidence utterly fails to show that either Thompson, Hamer, Phillips, or Stuart was guilty of any dishonest or fraudulent conduct in the making and publishing of said reports, or either of them." The plaintiff seeks to avoid the effect of failure of proof in this respect by the argument that the four directors not joining in the reports were bound as directors to know the condition of the bank, and conclusively presumed, therefore, to know the falsity of the reports, and that the reports being a corporate act, are their act as well as that of those actively participating.

We shall hereafter have occasion to discuss the duties of directors of national banks, but such discussion is not immediately pertinent to the question before us. The reports relied on as constituting the false representations were made by virtue of section 5211 of the Revised Statutes of the United States, requiring reports to be made to the comptroller of the currency "verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors." The statute further requires their publica-

tion. While in a technical sense, the report being required of the association, it is a corporate act, nevertheless it is not such a corporate act as is or must be performed by the directors acting as a board. Nor are all the directors required to therein participate. It is not necessary that the president and cashier should both take part. The report may be verified by either of these officers, and it is sufficient if it be attested by the signatures of three of the directors. The language clearly shows that in attesting such directors act as individual directors and not as a board. Being a corporate act, a report made by the designated officers would probably bind the corporation. In *Prescott v. Haughey*, 65 Fed. Rep. 653, it was said that false representations in such a report, if made under color of office, were entirely outside of the official duties of the directors; that neither the law nor the obligations of their office made it any part of their duty to utter and publish false and fraudulent advertisements and reports. It follows from this, if it were not true independently thereof, that a director cannot be held liable because he did not join in such an *ultra vires* act. The corporation may be bound by the act of its constituted officers, but when it is sought to charge officers individually for *ultra vires* acts or for misconduct it is only those who participate therein who are liable, in the absence, of course, of conspiracy or indirect participation, which was here not only unproved, but was affirmatively disproved. As to Thompson, Stuart, Phillips, and Hamer, it follows that the judgment must be affirmed.

The peremptory instruction of the district court as to the remaining defendants proceeded on the ground that the reports relied on as constituting the false representations were made for the information of the comptroller of the currency and published for the information of those dealing with the corporation itself, and that they constituted no representation to other classes of persons—as to one contemplating an investment in the stock

of the corporation; that, therefore, Gerner had no right to rely on the statements. We do not think that this position is sound. It certainly is not true, as contended by the defendants, that the sole object of the report is the information of the comptroller of the currency, because that object would be fully satisfied with the requirement that the report should be transmitted to him. In addition to this, a newspaper publication is required by the statute, and the corporation is required to furnish to the comptroller proof of such publication. As seen, publication is not necessary for the information of the comptroller, and it certainly is not required for the mere amusement of the public. We think the object is to afford public information to all persons having or contemplating business transactions into which the condition of the bank enters as a material factor. *Merchants Nat. Bank of Hillsboro v. Thoms*, 28 W. L. B. [O.] 164, while not the decision of a court of last resort, is enforced by so clear and so able an opinion that it logically carries more weight than many decisions of higher courts. It was there held that the purpose of requiring publication was of the general character we have indicated; and that one who was induced to lend money to a stockholder on the security of stock in the bank had his remedy against the officers fraudulently making the false reports. In *Graves v. Lebanon Nat. Bank*, 10 Bush [Ky.] 23, it was held that persons who were induced to become sureties on the bond of a cashier in reliance on such a report, which by its falsity concealed the cashier's past dishonesty, were by reason thereof discharged from liability. In *Prewitt v. Trimble*, 92 Ky. 176, a purchaser of stock was held entitled to a rescission of the contract, the vendor of the stock in that case being an officer who joined in the report. In *Tate v. Bates*, 24 S. E. Rep. [N. Car.] 482, a depositor was held entitled to relief. Such also was the case in *Scale v. Baker*, 70 Tex. 283. *Morse v. Switz*, 19 How. [N. Y.] 275, is another case where the purchaser of stock was held entitled to relief for fraud in

the published reports. The last case is criticised by the defendants because it cites *Bedford v. Bagshaw*, 4 H. & N. [Eng.] 537, and that case was overruled by the house of lords in *Peek v. Gurney*, 6 L. R. H. L. [Eng.] 377. The reasoning in *Morse v. Switz* proceeds, however, on independent grounds, and *Bedford v. Bagshaw* went much further than any of the cases we have cited. In that case the listing of stock on the stock exchange was treated as a public representation that the stock was not less than two-thirds paid, the rules of the stock exchange requiring such payment as a condition of listing; while the case overruling it was to the effect that a prospectus of an intended company is for the purpose of inviting persons to become allottees of shares, and that, having served that purpose, its function is exhausted, and it may not be relied on by the purchaser of shares after the organization of the company. It will be seen that the two English cases are both entirely aside from any question now before us. In none of the cases has the court held that only those dealing directly with the bank as depositors or holders of its circulating notes are entitled to the information given by the report. While that doctrine has been argued in other cases, as in this, we cannot find that it has ever been sustained; and we have no doubt that the object of congress in requiring publication was as broad as we have above stated it. That being the object of the law, such reports become a public representation to all classes of persons falling within that object. This discussion argumentatively disposes of the further contention of the defendants that they are not liable because the publication was not voluntary, but was one required by law. We know of no rule of law which, holding men responsible for voluntary statements, excuses them for misrepresentations in statements which the law requires them to make for the very purpose that they may be relied on.

At this point the cases of Mosher and Outcalt diverge from that of Yates. As already stated, Mosher was the

president of the bank and Outcalt its cashier. The proof shows that the affairs of the bank were largely conducted by Mosher without particular supervision by other officers. There is also some proof of direct falsification of the bank's records by Mosher himself. Outcalt verified the reports. It can hardly be that the president and cashier of a bank, actively controlling and managing its business, can be excused for gross ignorance of the bank's condition. Moreover, the falsifications here complained of were not in the books of the bank, but in making up the report from those books, there being most glaring differences between the daily balance book of the bank, showing at a glance its condition on the days to which the reports related, and the reports themselves. Very clearly, if Gerner had a right to rely on the reports, there was sufficient evidence, at least to go to the jury, for the purpose of charging Mosher and Outcalt, and the judgment as to them must be reversed.

The directors attesting the reports were Mosher, Holmes, and Yates. Holmes died before the action was begun, and, as already stated, the case seems to have been abandoned as to his administratrix. Yates was merely a director. He was not otherwise an officer or employé of the bank, and his liability, if any exists, depends upon his action as a director alone. It therefore becomes necessary to consider what was meant by the use of the word "attest" in section 5211 of the Revised Statutes, requiring reports to be attested by the signature of at least three of the directors. It will be observed that the word "attest" could not have been there used merely in the sense of witnessing the signature of the president or cashier. The language is not that such signature shall be attested, but that the report shall be verified by the oath or affirmation of the president or cashier, and attested by the signature of at least three of the directors. It is the report itself and not the act of the president or cashier which is so attested. Furthermore, in the following section national banks are re-

quired to report to the comptroller, within ten days after declaring any dividend, the amount of such dividend and the amount of net earnings in excess thereof, and "such report shall be attested by the oath of the president or cashier of the association." In the latter section the word "attest" is certainly used in the sense of certifying in the manner indicated, to the correctness of the report, and its use in that evident sense in such close juxtaposition to the language we are considering reinforces the conclusion that by the attestation is meant something more than the mere witnessing of the report. It is true that it has been frequently held in this court that in an action for false representations it is not necessary to aver or prove a *scienter*. (*Foley v. Holtry*, 43 Neb. 133; *Johnson v. Gulick*, 46 Neb. 817; *Moore v. Scott*, 47 Neb. 346.) But it does not follow that one making a statement is charged absolutely with the consequences of its falsity in fact regardless of the form of the statement and the circumstances under which it is made. Indeed, in the cases cited the language used in one, and implied in the others, is that one is liable for the consequences of the false statement only when it is made as a positive representation of an existing fact. In *Moore v. Scott*, the statement was qualified by the person's making the representation giving the source of his information as "a reliable person" and stating his belief on that ground, and it was held that he was not responsible thereby for the truth of the ultimate statement, but only for the truth of his receiving such information from a reliable person. We must therefore inquire whether Yates attested this report as a positive statement that the condition of the bank was as represented therein, or whether, on the other hand, the attestation was qualified. The majority of the court is of the opinion that it was positive. Commissioner RYAN and the writer think it was qualified. The question involves a consideration of the duties of directors in national banks, and as that question depends upon the construction of the national

banking act, the federal decisions on the point conclude us. The question was considered with great care in *Briggs v. Spaulding*, 141 U. S. 132, and while four justices there dissented on the ground that directors should be held to a higher degree of accountability than the majority opinion declares, we are bound to accept the opinion of the majority as controlling. The law there declared is substantially as follows: That the degree of care required of directors depends upon the subject to which it is to be applied, and each case is to be determined from all its circumstances; that directors are not insurers of the fidelity of the agents whom they appoint, nor can they be held responsible for the misconduct of such agents unless the loss resulting is a consequence of their own neglect of duty; that directors of a national bank must exercise ordinary care and prudence in the administration of the affairs of the bank, and this includes something more than officiating as figure-heads. They may commit the banking business to the officers, but this does not absolve them from the duty of reasonable supervision; nor should they be permitted to shield themselves from liability because of want of knowledge of wrong-doing, if that ignorance is the result of gross inattention. The remaining points decided in the case cited relate to the application of the particular facts of that case to the rules laid down. Following the case cited the circuit court for the northern district of New York has held that where the affairs of a bank were managed solely by the cashier, who was reputed and universally believed to be honest and capable, directors who knew little of the business of banking were not guilty of negligence because they failed to examine the books, there being no grounds of suspicion known to them. (*Warner v. Penoyer*, 82 Fed. Rep. 181.) This being the rule of duty imposed on national bank directors, we think it follows that when a director attests a report he does so as a director and with a view only to such knowledge of the condition of the bank as the exercise of his duties

as a director imposes upon him. The verification by the oath of one of the chief active officers of the bank has of course a more extended scope as a representation; but the director is not required to make a special examination for the purpose of attesting, and attests a report only as the result of such knowledge as the proper discharge of his duties as director imposes upon him; that is, reading into the report, as we must, the director's legal duty, the words on these reports, "correct, attest," mean, in effect, "we, as directors, certify to the correctness of the foregoing report, basing our certification on the knowledge which we possess by virtue of a proper discharge of our duties as directors."

It is not, therefore, an absolute certification of the correctness of the report, but is qualified by the limited means of knowledge which a director may lawfully possess. Looking into the evidence with regard to Yates, we find that he was actively engaged in other business requiring practically all his time; that he had never been engaged in the banking business; that he had never kept books of a bank, and in attesting the reports he relied upon the president, cashier, and employés for their correctness. They were brought to his office and he signed them, assuming, that they were correct. He was himself a depositor and lost money through the failure of the bank, and had the utmost confidence in the bank to the time it failed. The foregoing is from his own testimony. Examining this proof, together with the general testimony as to the manner in which the bank was managed, we think there was evidence sufficient to go to the jury to determine whether Yates' ignorance of the condition of the bank and the falsity of the reports was the result of that gross inattention which in *Briggs v. Spaulding* is held necessary to charge the director with a personal liability. It seems that he attended generally the meetings of the directors, but that he took no other steps to investigate the conduct of the business, reposing confidence and depending altogether on the supposed in-

tegrity of the officers of the bank. Whether under the circumstances he was justified in so doing, in assuming the reports to be correct and in attesting them, we think was fairly a question of fact under the rules laid down in *Briggs v. Spaulding*, and therefore it was error to peremptorily instruct the jury to find in his favor. The judgment as to him must be reversed. Affirmed as to Thompson, Phillips, Stuart, and Hamer. Reversed and remanded as to Mosher, Outcalt, and Yates.

JUDGMENT ACCORDINGLY.

NORVAL, J.

While we are all agreed as to the judgment that should be entered herein, the majority of the court do not concur in the proposition expressed by IRVINE, C., to whom was assigned the duty of preparing the opinion of the court, that the attestation of reports of a national bank to the comptroller of the currency by the directors thereof does not amount to an absolute representation that such report is true, just, and correct. The learned commissioner cites in support of the doctrine announced *Briggs v. Spaulding*, 141 U. S. 132. This case is not controlling upon the question before us, and is distinguishable from the case at bar. That was a suit by a receiver of a national bank against its directors to recover losses and damages sustained by the bank by reason of the alleged neglect of duty and wrongful conduct of the defendants, while the present action was not instituted for and in behalf of the Capital National Bank or by an individual creditor thereof, but by one who was induced to purchase stock of the bank in reliance upon the false report of the condition of resources and liabilities of the corporation made under oath of its president and cashier and attested by certain of its directors. That the result probably would have been different in *Briggs v. Spaulding*, *supra*, if that suit had been grounded as the present one, or had been brought by a creditor to recover loss occasioned by his having been induced to make deposits in

the bank through the false statements as to its financial condition made to the comptroller, is clearly inferable from the following excerpt from the majority opinion prepared by Chief Justice Fuller: "The theory of this bill is that the defendants are liable, not to stockholders nor to creditors, as such, but to the bank, for losses alleged to have occurred during their period of office, because of their inattention. If particular stockholders or creditors have a cause of action against the defendants individually, it is not sought to be proceeded on here, and the disposition of the questions arising thereon would depend upon different considerations. * * Treated as a cause of action in favor of the corporation, a liability of this kind should not lightly be imposed in the absence of any element of positive misfeasance and solely upon the ground of passive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequence of omission on their part." A bare majority of the court concurred in the decision in *Briggs v. Spaulding, supra*, four of the justices having dissented therefrom. The able dissenting opinion of Justice Harlan filed therein, in which Justices Gray, Brewer, and Brown concurred, held that the directors of a national bank could not abdicate their duties and functions, and leave the administration and managements of its affairs solely to executive officers, but that the law requires of directors "such diligence and supervision as the situation and the nature of the business requires. Their duty is to watch over and guard the interests committed to them. In fidelity to their oaths, and to the obligations they assume, they must do all that reasonably prudent and careful men ought to do for the protection of the interest of others intrusted to their charge." But if the rule of the majority in *Briggs v. Spaulding, supra*, as to the degree of diligence required of directors of national banks be accepted as sound, yet it is without controlling force in the present action. As to creditors of the corporations, and others not connected

with the bank, most certainly a higher degree of diligence is required of the directors than obtains in a controversy between them and the bank itself. In the case to which reference has been made the wrecking of the bank was not traceable to the false reports made by the directors to the comptroller; hence the question whether the bank directors are individually liable for any losses occasioned by their having attested false statements as to the condition of the corporation was not involved in the case, or necessary to a decision.

The defendants in the present suit, who as directors attested the reports made by the Capital National Bank to the comptroller of the currency, by such act vouched for, or certified to, the absolute truthfulness of the statements therein contained, and not that the report was correct so far as the directors knew or had been advised by the proper performance of their duties as directors. The means of information, this record shows, were accessible to them. It was their duty to know whether the reports were correct or not. For them to have ascertained the untruthfulness of the reports required no extended examination of the books of the bank or into the condition of its affairs. A mere comparison of any report with the daily balance sheet of the bank for the same date would have revealed the absolute falsity of such report. It is no answer to say that they were not aware of the insolvent condition of the bank. Section 5147 of the Revised Statutes of the United States requires: "Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves upon him, diligently and honestly administer the affairs of such association." The scope of the obligation assumed by the director of a national bank is indicated by the oath he is required to take. He is under obligation not only to honestly, but diligently, administer the affairs of the corporation in which he is a director. He may not sit supinely by and permit the executive officers, which he has helped to elect, to rob and plunder the bank, and then

excuse himself from individual liability by showing that he was unaware of the true condition of the bank or what was transpiring around him. The law demands and requires that he diligently administer the affairs of the association. In the language of Severens, J., in *Gibbons v. Anderson*, 80 Fed. Rep. 345: "The idea which seems to prevail in some quarters, that a director is chosen because he is a man of good standing and character, and on that account will give reputation to the bank, and that his only office is to delegate to some other person the management of its affairs, and rest on that until his suspicion is aroused, which generally does not happen until the mischief is done, cannot be accepted as sound. It is sometimes suggested, in effect, that, if larger responsibilities are devolved upon directors, few men would be willing to risk their character and means by taking such an office; but congress had some substantial purpose when, in addition to the provision for executive offices, it further provided for a board of directors to manage the bank and administer its affairs. The stockholders might elect a cashier, and a president as well. The banks themselves are prone to state, and hold out to the public, who compose their boards of directors. The idea is not to be tolerated that they serve as mere gilded ornaments of the institution, to enhance its attractiveness, or that their reputation should be used as a lure to customers. What the public suppose, and have the right to suppose, is that those men have been selected by reason of their high character for integrity, their sound judgment, and their capacity for conducting the affairs of the bank safely and securely. The public act on this presumption, and trust their property with the bank in the confidence that the directors will discharge a substantial duty. How long would any national bank have the confidence of depositors or other creditors if it were given out that these directors whose names so often stand at the head of its business cards and advertisements, and who are always used as make-weights in its

solicitations for business, would only select a cashier and surrender the management to him? It is safe to say such an institution would be shunned and could not endure. It is inconsistent with the purpose and policy of the banking act that its vital interests should be committed to one man, without oversight and control." (See *Williams v. McKay*, 40 N. J. Eq. 179; *Martin v. Webb*, 110 U. S. 7.)

In our view, whether the attesting directors possessed knowledge of the falsity of their reports is wholly immaterial. They were in fact false and untrue, and those who deposited money with the bank or who purchased stock of the corporation in reliance upon the truthfulness of the contents of those reports were as much deceived and damaged thereby as though the directors when they signed the reports knew them to be false. That they were innocent of the true situation or condition of the affairs of the bank is wholly an unimportant consideration, since proof of a *scienter* is not necessary to a recovery. This court has frequently asserted that to maintain an action for false representations it is not essential that it be shown that they were intentionally or knowingly made by the defendant. This is the rule in ordinary causes, and no valid reason can be suggested or pointed out why the same principle should not apply in actions for deceit against the directors of a banking corporation. Certainly no case has come under our observation which has made an exception in their favor.

In *Miller v. Howard*, 32 S. W. Rep. [Tenn.] 305, it was disclosed that the directors of a national bank on its suspension issued a circular stating that the bank was solvent and would open within sixty days, and authorized the officers to receive money on special deposit and keep it in the bank vaults subject only to the check of the depositor. Subsequently a receiver for the bank was appointed and the money deposited pursuant to said circulars was turned over to him. It was held that the directors were personally liable for the amount of such

deposits. Wilkes, J., in the course of his opinion, used this apposite language: "Directors are not mere figure-heads, with no duties to perform, and with the liberty of leaving matters of this character to their president and cashier, and relieving themselves of liability and duty, by placing special funds they are under obligation to deliver to special depositors in the hands of third persons, and then leaving it to their depositors to litigate with such third persons over their claims and rights. * * * This is not a case of want of ordinary care on the part of the directors, but a case of positive, active, misconduct, which resulted in injury to complainant, and for which they are liable to him."

In *Cross v. Fisher*, 65 L. T. Rep. n. s. [Eng.] 114, with the knowledge and consent of the directors of a building society, advertisements were issued by the secretary inviting the loaning of money to it. Money advanced to the society was paid to the secretary, who receipted therefor, but did not enter the proper amount on the books of the society, and by reason thereof the secretary was enabled to appropriate to his own use a large sum of money, and upon his absconding it was discovered that the sum borrowed by the society was in excess of the amount allowed by its rules. It was held, in an opinion by Mathew, J., that the directors were personally liable for the amounts borrowed by the society in excess of its borrowing powers.

Merchants Nat. Bank of Hillsboro v. Thoms, 28 W. L. B. [O.] 164, discloses the following state of facts: The executive officer of a national bank made reports to the comptroller of the currency, under oath, of the assets and liabilities of the corporation, and the same were attested by three of the directors. These reports were published according to law and disclosed the bank to be in a highly prosperous financial condition, while in fact the statements in said reports were almost entirely false and the bank at the time was almost insolvent. Relying upon the truth of the reports plaintiff loaned a stockholder of

the bank money and received as collateral security a number of shares in said bank, which would have been ample security had the reports been true, but in fact the stock when the loan was made was worthless. The borrower was insolvent and the loan was made solely on the credit of the stock so pledged and upon the value thereof as the same appeared from the said reports. Plaintiff brought an action for deceit against the attesting directors of the insolvent bank, and the court held they were individually liable for the damages sustained.

Tate v. Bates, 118 N. Car. 287, was an action by the state treasurer of North Carolina against the directors of an insolvent bank personally to recover for his loss of deposits. Tate claimed that he was induced to make the deposits, and permitted the same to remain in the bank, by false and misleading published statements sworn to by the president and cashier and verified by three directors showing that the bank was solvent, its capital unimpaired, and that it had a surplus on hand. The court, in the opinion, say: "The directors are conclusively presumed to know the condition of the bank. (*Hauser v. Tate*, 85 N. Car. 81, 39 Am. Rep. 689; Morse, Banks & Banking sec. 137; *Finn v. Brown*, 142 U. S. 56; *United Society of Shakers v. Underwood*, 9 Bush [Ky.] 609, 15 Am. Rep. 731; and other cases cited in *Solomon v. Bates*, 118 N. Car. 311.) If the directors did not know the bank was insolvent, it was their duty to have known it. It was fraudulent for them to put forth official statements that the bank was solvent, when they did not know it to be true, and they are liable to those who were deceived thereby, into having dealings with the bank, or making deposits therein, for any losses sustained. If this were not so, the directors of a bank would be privileged to be negligent, and the more ignorant they could manage to be about its condition the more secure they would be from any liability."

Solomon v. Bates, 118 N. Car. 311, was precisely like the preceding case. In the last case it was contended that

the petition did not state a cause of action for deceit, because it did not charge that the defendants intended to deceive the plaintiff. The court, in the course of the opinion, said: "It is sufficient to allege that, the bank being insolvent, the defendants caused false and fraudulent statements of the condition of the bank to be published, representing it to be solvent and with capital stock unimpaired, and declaring dividends, all this with a view to conceal its insolvent condition and induce the public to make deposits, whereby the plaintiff was deceived and made one deposit which he is now seeking to recover. Indeed, the directors are liable for injury caused by relying upon a statement issued by them which they did not know to be true, as well as when they knew it to be false. (*Hubbard v. Weare*, 79 Ia. 678; *Huntington v. Attrill*, 118 N. Y. 365; 42 Hun [N. Y.] 459; 3 Thompson, Corporations, sec. 4244.)"

Notwithstanding this opinion has now reached an unusual length we cannot refrain from making the following quotation from the decision in *Seale v. Baker*, 70 Tex. 289: "Directors of banking corporations occupy one of the most important and responsible of all business relations to the general public. By accepting the position and holding themselves out to the public as such they assume that they will supervise and give direction to the affairs of the corporation, and impliedly contract with those who deal with it that its affairs shall be conducted with prudence and good faith. They have important duties to perform towards its creditors, customers, and stockholders, all of whom have the right to expect that these duties will be performed with diligence and fidelity, and that the capital of the corporation will thus be protected against misappropriation and diversion from the legitimate purposes of the corporation. * * * It is the duty of the directors to know the condition of the corporation whose affairs they voluntarily assume to control, and they are presumed to know that which is their duty to know and which they have the means of knowing.

If the representations are false, but relied and acted on by a customer to his damage, to hold that in such case the directors who made such false representations are not liable because they were ignorant of the falsity of such representations, would be to award a premium for negligence in the performance of important and almost sacred duties voluntarily assumed, and to license fraud and deception of the most flagrant and pernicious character. It is a familiar principle of the law that an action for damages lies against a party for making false and fraudulent representations, whereby another is induced to do an act from which he sustains damage. If the representations are untrue, it is immaterial that they may have been made without fraudulent intent, and it is sufficient that they were made to the general public, if the appellant was induced thereby to deposit money in the bank."

The following authorities to some extent sustain the doctrine that a director of a bank is liable for damages resulting from permitting a statement to be held out to the public that the institution was solvent, even though the director was unaware that such report was false: *Delano v. Case*, 121 Ill. 247; *Kinkler v. Junica*, 84 Tex. 119; *German Savings Bank v. Wulfekuhler*, 19 Kan. 60; *Salmon v. Richardson*, 30 Conn. 360; *Morse v. Switz*, 19 How. Pr. [N. Y.] 275. Upon principle and authority the conclusion is irresistible that directors cannot escape liability for damages resulting from false statements made by them of the conditions of the bank, even though they were at the time ignorant that such statements were false. The judgment as to Thompson, Stuart, Phillips, and Hamer should be affirmed, and reversed as to Mosher, Outcalt, and Yates.

HARRISON, C. J., SULLIVAN, J, and RAGAN, C., concur in the foregoing opinion of NORVAL, J.

CITY OF AUBURN V. JOHN W. MAYER, JR.

FILED FEBRUARY 23, 1899. No. 8741.

Liquors: LICENSE: SUSPENSION: REPAYMENT OF FEE. Where a liquor license was issued, an appeal then taken and the license suspended, the appeal finally determined in favor of the applicant and the license reissued, *held*, following the principle of former cases, that the licensee was entitled to repayment of such proportion of the license fee as the time when his enjoyment of the license was suspended bore to the license year.

ERROR from the district court of Nemaha county. Tried below before STULL, J. *Affirmed.*

B. Frank Neal and *A. J. Burnham*, for plaintiff in error.

G. W. Cornell and *W. H. Kelligar*, *contra.*

IRVINE, C.

This action was begun by Mayer against the city of Auburn in the county court to recover certain unearned license money and money paid for an occupation tax. Mayer had judgment, and the city took the case on error to the district court, where the judgment was affirmed. The city now brings the case here. The facts are undisputed. Mayer applied for a license to sell intoxicating liquors. The license was granted, but subsequently an appeal was taken to the district court by remonstrators, and in consequence of mandamus proceedings for that purpose the council was compelled to revoke the license. The application afterwards coming on to be heard in the district court there was a decision in favor of the applicant and a new license was accordingly issued. The license money here in controversy is the proportionate part of the annual charge for the period when the operation of the license was suspended by the appeal.

It has been too long and too well settled by decisions of this court to permit of any change, except through legis-

lation, that the license fee is not paid for the privilege of asking for a license, but for the license itself, and that where the license fails through no fault of the applicant, he is entitled to have refunded the unearned portion. (*State v. Johnson*, 12 Neb. 470; *Lydick v. Korner*, 15 Neb. 500; *State v. Weber*, 20 Neb. 467; *Chamberlain v. City of Tecumseh*, 43 Neb. 221; *School District v. Thompson*, 51 Neb. 857.) This rule has been applied where a license improperly issued has been ultimately revoked. Indeed, it is sought to distinguish the present case from those cited on the ground that the rule has been laid down with reference to invalid licenses alone. No such distinction can be drawn from the cases, and it at once strikes the mind as incongruous and unjust that one who has without right enjoyed for a certain time a license should be permitted to recover the fee for the remainder of the period, while one possessing a license ultimately determined to have been rightfully issued may not recover back for a portion of the time when he has unjustly been prevented from enjoying the license. As to the occupation tax, it is conceded that the ordinance imposing it is of such a character as to make applicable whatever may be determined as to the license.

AFFIRMED.

JOHN LANHAM V. FIRST NATIONAL BANK OF CRETE.

FILED FEBRUARY 23, 1899. No. 8717.

Review. No question of law is presented in this case. Evidence *held* to sustain the verdict.

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

E. S. Abbott, for plaintiff in error.

F. I. Foss and *Norman Jackson, contra.*

IRVINE, C.

This was an action by Lanham, under the provisions of the act of congress relating to usury in contracts with national banks, to recover the penalty for usurious interest alleged to have been paid. Demurrers to the three counts of the petition were sustained, the action dismissed, and the case brought to this court for review. It was here held that as to one payment pleaded in the third count of the petition a cause of action not barred by the statute of limitations was pleaded. (*Lanham v. First Nat. Bank*, 42 Neb. 757.) After the cause had been remanded an answer in the form of a general denial was filed and a trial had which resulted in a verdict for the defendant. The case is again brought here by the plaintiff, and the sole question presented is the sufficiency of the evidence to sustain the verdict. The evidence on neither side was very satisfactory, but on examination we are convinced that it was of such a character as to forbid interference with the action of the jury thereon.

AFFIRMED.

FERDINAND C. FISKE V. SCHOOL DISTRICT OF THE CITY OF LINCOLN.

FILED FEBRUARY 23, 1899. No. 8688.

1. **Schools and School Districts:** SCHOOLHOUSE: CONTRACTS. A board of education has power to contract with an architect to prepare general drawings and specifications for a schoolhouse, as a preliminary to determining whether a building, and if so what kind, shall be constructed, although for want of funds devoted to building purposes it may at that time have no power to erect the building.

2. ——: ——. Such preliminary steps are not a part of the work of construction.

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

Stewart & Munger, for plaintiff in error:

Defendant's power to contract is not made to depend upon the fact of there being money in the treasury at the time sufficient to liquidate the indebtedness so incurred. (*Police Jury v. Britton*, 15 Wall. [U. S.] 566; *Brenham v. Bank*, 12 Sup. Ct. Rep. 559; *Claiborne County v. Brooks*, 4 Sup. Ct. Rep. 489; *Merrill v. Town of Monticello*, 138 U. S. 673; *Hill v. City of Memphis*, 134 U. S. 198; *Allen v. Intendant*, 89 Ala. 641; *Falout v. City of Indianapolis*, 1 N. E. Rep. [Ind.] 392.)

The architect's services in the preparation of the general drawings and specifications, as a preliminary to deciding on a building, are not a part of the erection of the building. (*Van Dorn v. Mengedoht*, 41 Neb. 525; *Foster v. Tierney*, 91 Ia. 253.)

Ricketts & Wilson, contra.

References: *Hunter v. Peters*, 4 Neb. 254; *Harris v. School District*, 8 Fost. [N. H.] 28; *School District v. Stough*, 4 Neb. 360; *School District v. Hamilton County*, 12 Neb. 241; *Gehling v. School District*, 10 Neb. 239; *State v. Sabin*, 39 Neb. 570; *Mizera v. Auten*, 45 Neb. 239; *Nevil v. Clifford*, 24 N. W. Rep. [Wis.] 65; *Brown v. School District*, 10 Atl. Rep. [N. H.] 119; *Appeal of Luberg*, 17 Atl. Rep. [Pa.] 245; *Wheeler v. Alton*, 23 Atl. Rep. [N. H.] 89; *School District v. School District*, 12 Neb. 241; *Tullock v. Webster County*, 46 Neb. 211.

IRVINE, C.

Fiske, an architect, brought this suit against the school district of the city of Lincoln to recover for services in the preparation of certain plans, drawings, and specifications for school buildings. The petition alleged a contract for plans and specifications for three ward buildings and a high school building. It appears from the petition that Fiske had received his pay for his work in connection with the three ward buildings, and the contro-

versy relates only to the plans and specifications for the high school building. A general demurrer to the petition was sustained and the action dismissed.

The petition alleges a contract in the form of a written proposal by plaintiff, and its acceptance. By this proposal plaintiff undertook to furnish architectural services and to take supervision of the work "at following rates: For full professional services (including supervision), 3 per cent upon the cost of work. For partial services as follows: Preliminary studies, 0 per cent; preliminary studies, general drawings, and specifications, 1½ per cent; detail drawings, ½ per cent; supervision, 1 per cent." The proposal also contained the following: "In case of abandonment of the work, the charges to be based on the lowest responsible bid." It is alleged that plans were submitted for a high school building of the estimated cost of $90,000, and were by the board of education accepted; that thereafter the board undertook to erect a cheaper building, and other plans were prepared and accepted for a building of a less cost; that bids were received and a responsible bid made for the sum of $75,515, which was the lowest bid. Recovery was sought for the value of preliminary studies, general drawings, and specifications for the more expensive building, and for preliminary studies, general drawings and specifications, and detail drawings for the cheaper building. It is also charged that all plans were finally abandoned.

In support of the judgment of the district court it is first argued that the contract set out is not a contract with the district, but one with certain persons claiming to be a building committee. It is true that the written acceptance of plaintiff's proposal as pleaded is signed on behalf of the district only by three persons styling themselves a building committee; but it is further alleged that the contract was ratified by the board of education, so that on demurrer the objection made has no force, provided the board of education itself had authority to enter into such a contract. On that question the argu-

ment of defendant in error is based entirely on the assumption that the contract was for a step in the erection of a schoolhouse, and that it falls within the rule of *School District v. Stough*, 4 Neb. 360, and later cases, holding that a school district may contract for the erection of schoolhouses only with regard to funds on hand for that purpose. It is then said that the petition fails to show the possession of funds especially dedicated to building purposes. Plaintiff in error contends that the rule invoked applies only to what he styles "country districts," and that in cities a board of education has wider powers. This question we need not consider. As to a portion at least of the work sued for we are satisfied that it does not fall under the head of construction. The contract was severable in its terms. It contemplated preliminary studies and general drawings and specifications, and also detail drawings and supervision. It contained a method for determining the price in case of abandonment of the scheme. The work of an architect may or may not, according to circumstances, fall under the head of building operations. It is perfectly clear that if a man whose artistic tastes led him toward fondness for architecture should employ an architect to make purely fanciful designs for the gratification of that taste, he would not thereby be indulging in building or in any feature thereof. Again, drawings prepared by an architect for the benefit of an architectural museum or institution of learning and for display there would have nothing to do with actual building. Certain periodicals, for the delectation of their readers, habitually publish elevations and plans of possible houses, and these are presumably prepared by architects, but such an architect, by making such plans for publication, does no work of construction. On the other hand, an architect who prepares plans according to which a building is actually constructed may be said to furnish work in the construction of such building, especially when he superintends the construction. But the preparation of plans is often necessary as a pre-

liminary, merely to assist an owner in determining whether he shall build, and if so, how. While the project remains in this stage the work cannot be said to be of a structural character. In the project of building a schoolhouse the initiative must be taken by the officers of the district, and they must have authority to incur reasonable expense in such initiatory steps. To ascertain what sort of a building is required and its probable cost is one of those steps. If bonds must be authorized, plans which will inform the electors in this matter are almost an essential, certainly a proper, preliminary. It is true that in *Von Dorn v. Mengedoht*, 41 Neb. 525, it was held that an architect who prepares plans and superintends construction furnishes labor in the erection of a building and is entitled to a mechanic's lien therefor; but there the superintendence was emphasized as if an essential element. Perhaps if the building be actually constructed, the drawing of plans then enters into the construction, but this we do not decide. What we hold is that the preparation of plans and specifications, merely in anticipation of erecting a building,—an anticipation which may or may not be realized,—is not essentially a building operation, and may be authorized by a school district even before the actual building could be undertaken. The distinction has been sharply drawn in Pennsylvania, where it is held that an architect who superintends construction may have a mechanic's lien for his work, but that one who merely prepares plans to enable the builder to determine the kind of a building he will erect does no work "for or about the construction of the building," and has, therefore, no lien. (*Bank of Pennsylvania v. Gries*, 35 Pa. St. 423; *Price v. Kirk*, 90 Pa. St. 47.) So in Texas, the architect's fees cannot be considered as a part of the estimate of construction. (*Smith v. Dickey*, 74 Tex. 61.)

Whether, in view of the special provision for ascertaining the price of the services in case of abandonment, the plaintiff would be entitled to anything for the first

set of plans, which were not pursued so far as to obtain bids, we need not, and prefer not, at this time to decide. Whether he was entitled to anything for detail drawings for the second building may perhaps depend upon proof of facts with reference to the profession of which we cannot take notice. It is, however, clear that under the allegations of the petition he could recover at least for the preliminary studies and general drawings for the building for which bids were received. The board had as much authority to contract for such work as it would have to employ some one to draw a proposition looking to a vote for building bonds, or to pay for the advertising of such an election.

REVERSED AND REMANDED.

ELLEN LINDSAY, APPELLEE, V. WILLIAM B. PALMER, APPELLANT.

FILED FEBRUARY 23, 1899. No. 8713.

Forgery. Evidence examined, and *held* to sustain a finding that a deed was forged.

APPEAL from the district court of Dakota county. Heard below before EVANS, J. *Affirmed.*

M. B. Davis, for appellant.

Jay & Welty, contra.

IRVINE, C.

Ellen Lindsay brought this action against Palmer, alleging that plaintiff and Mary Jane Lindsay had been the owners of certain described land; that in 1883 a deed purporting to have been executed by them was placed upon record, the deed running to one Summerville; that the defendant claimed through *mesne* conveyances from

Summerville; that in fact plaintiff had never executed or delivered said deed and never authorized its execution. The answer presented an issue as to the forgery of the deed. The district court found for the plaintiff and quieted title in her. The defendant appeals.

The main question is one of fact—the sufficiency of the evidence to sustain the finding that the deed was forged. The plaintiff testified positively that she did not sign the deed, or authorize its signature, and that she knew nothing of its existence until shortly before this suit was begun. Defendant relies on certain cases holding that the presumption of genuineness from the certificate of the acknowledging officer cannot be rebutted by the testimony of the supposed grantor alone. In this case the officer was on the stand as a witness, and we are impelled to quote the essence of his testimony. He had known the grantors for a long time. "I remember some person calling on me to make a deed for the property in question and for the Lindsay girls to Summerville. I knew Summerville as well. I remember that I made the deed—prepared the deed in my office on that request one evening, but did not take the acknowledgment of it until the next morning or day. My impressions are—but I am not clear about that—that it was neither of the grantors that called on me to make the deed, but another person who called at the office."

Q. Do you remember who that person was?

A. No, I do not remember clearly who that was. I remember that I was somewhat solicitous about the matter on account of the impecunious circumstances of the grantee, and wondered whether the girls were getting their money from him. But the next morning I took the deed and went up to this part of town where one of the Orrs lived then, as they always have in the Orr property, to take the acknowledgment of the grantors. I remember very clearly that I did that.

Q. Ellen Lindsay was present at the time?

A. Well, I say she was present, but I say that from

the knowledge I have of my official integrity when I have written it here on this deed, but I cannot say it with absolute certainty from recollection of seeing her as I now see her. But I have no hesitation in saying that she was either there in person or—Well, that is my testimony, that she was there, both of them.

Q. What is or was your practice with reference to the acknowledgment of instruments as you acknowledged that, without the parties having executed the instruments?

A. Well, my practice was that I prided myself somewhat on being very particular about that, with this qualification: Mr. Stott and Mr. Chambers and another one or two, who were dealing somewhat largely in real estate, and I took a good many acknowledgments of their wives, and I did not always do that in that case—or in their cases—that is, go to the wife in each case or have her come to the office to write her name on the deed. But in no case do I believe I ever took an acknowledgment without the grantor signing it in my presence or telling me that they had signed it except in those cases that I have mentioned. And in those cases they told me—the wives had told me to do that thing when their husbands presented deeds for my acknowledgment with their signatures—I knew them well—to not give them that trouble. In other cases I have no recollection of ever allowing myself to do that. I do not believe I ever did it. But this is a long time ago, and I only swear to it with that degree of certainty that human minds will bear reasonably.

On cross-examination the witness was asked: "Had she [the plaintiff] been absent, and Mary Jane present, and she had told you that it was all right, you would have acknowledged the deed? A. Well, that is within the line of possibilities."

We have quoted this for a twofold purpose: First, to show that any presumption from the certificate of acknowledgment was in this case overthrown by the testi-

mony of the officer himself, that from complacency, and to avoid causing people trouble, he did habitually with some persons make false official certificates, and that he might have done so in this case if plaintiff's cotenant had so requested. Further, we quote it in the hope that other officers, seeing the case, may have a juster sense of the responsibilities resting upon them and may avoid a laxity of action in this respect that we fear is not altogether unknown in the state. The evidence not only supports the finding, but it would hardly support any other. The defendant pleads an estoppel, by charging that plaintiff, knowing of the existence of the deed, permitted him and his grantors to purchase from the grantee under the forged deed and to make improvements on the property. The proof is that plaintiff had no knowledge of the existence of the deed until after defendant's rights had accrued, and there is no proof whatever that she knew of the different purchases or of the making of any improvements.

AFFIRMED.

UNION PACIFIC RAILWAY COMPANY V. REUBEN VINCENT.

FILED FEBRUARY 23, 1899. No. 8719.

1. **Parties**: DEFECT: WAIVER. A railroad company made with two persons a contract, in form joint, for the transportation of horses, a portion of which belonged to one of the shippers and the remainder to the other. None was owned in common. The horses of one were injured, and he sued, naming the other as a defendant because he refused to join as plaintiff. No objection was made for defect of parties until the trial began. *Held*, Without deciding how an action in such case should be brought, that the railroad company could not complain because one of three situations must exist: The suit was sufficiently brought by the person whose stock was injured, as the real party in interest; or else it was sufficient to make the other a defendant alleging that he would not join as plaintiff; or if he must necessarily have joined as plaintiff, the defect appeared on the face of the petition and was waived by not demurring on that ground.

2. ———: ———: EXPLANATION. Section 42 of the Code of Civil Pro-

cedure, requiring a person who should have been joined as plaintiff, but who refuses, to be made a defendant, the petition stating the reason, requires the reason for not joining him—that is, his refusal—to be stated, and not his reason for such refusal.

3. **Depositions:** EXCEPTIONS. An exception other than for incompetency or irrelevancy, made to a deposition, must be filed before the trial commences, but unless one of the parties so demands, it need not be ruled on prior to the trial.

4. ———: TIME OF FILING. To secure a reversal error must affirmatively appear. Therefore, when it appears that exceptions to depositions were filed the day the trial began, it will not be presumed that they were filed after the commencement of the trial, although it appears they were not called to the attention of the court until jurors had been called into the box.

5. **Common Carriers:** CONTRACTS. In an action on a contract of shipment, not naming the carrier, evidence examined, and *held* to sustain a finding that the defendant was the carrier making the contract.

6. **Pleading:** NEGLIGENCE. A general averment that the defendant was negligent, without setting out the negligent acts or omissions, is sufficient, unless the pleading be attacked by motion.

7. **Review:** OFFER OF PROOF. Assignments of error based on the exclusion of testimony are unavailing, unless when the ruling was made the party complaining made a tender of the proof he expected to elicit.

8. **Common Carriers:** LIMITING LIABILITY. The rules announced in *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 463, and *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb. 356, with reference to contracts limiting the liability of common carriers, reaffirmed.

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

W. R. Kelley and *E. P. Smith*, for plaintiff in error.

A. Hazlett and *F. N. Prout, contra.*

IRVINE, C.

Reuben Vincent began this action against the Union Pacific Railway Company and Lafayette Simpson, alleging that the Union Pacific Railway Company was a common carrier from Beatrice, in this state, to Portland, Oregon, and contracted with Vincent and Simpson to

safely carry a car load of horses from Beatrice to Olympia, Washington; that in said car were nineteen horses, ten of which belonged to plaintiff in severalty and nine to Simpson; that in transit, and at a point in Idaho, certain of plaintiff's horses were injured and one was killed by the negligence of defendant company in handling its train; that Simpson refused to join as a plaintiff and was therefore made a defendant. Damages were sought because of the injury to plaintiff's horses. Plaintiff had judgment and the railway company brings the case here for review.

The defendant company urges as a ground of reversal that the contract of shipment was a joint contract of Simpson and Vincent, and that they should have joined as plaintiffs. This point was raised by objection to the introduction of evidence and otherwise during the trial. The case is in this aspect certainly unusual. It appears from the petition itself that the contract was made with both Simpson and Vincent; that no horses were by them owned in common, but some belonged to one and the rest to the other. A recovery is sought for injury to those belonging to Vincent alone. We need not consider what is the correct practice in such case. There are only three possible views of the law, and according to any one the railroad company cannot now complain. It might perhaps be said that as the Code of Civil Procedure requires an action to be brought in the name of the real party in interest, and as that party has been defined to be the person entitled to the avails of the action (*Gerner v. Church*, 43 Neb. 690; *Kinsella v. Sharp*, 47 Neb. 664), the action might properly be brought by Vincent alone. Again, it might be claimed, as is claimed in argument, that the defendant is entitled to have all the parties to the contract in court, to avoid a splitting of causes and multiplicity of actions. If so, the case would seem to fall within section 42 of the Code, which provides that "if the consent of one who should have been joined as plaintiff cannot be obtained, he may be made a defend-

ant, the reason being stated in the petition." Such was the course here taken. It is said that the reason was not here so stated, but we take it that what the statute demands is that the reason for not joining such person as plaintiff be stated—that is, that he refuses to join; not the reason for his refusal, which he is not obliged to give, and which the plaintiff has no means of ascertaining and often cannot state. It is said in the briefs that no service was had on Simpson, and that he had not appeared prior to the making of the objection. There is nothing in the record to show that there had been no service on Simpson, and immediately after the interposition of the objection and ruling thereon Mr. Hazlett entered his appearance for Simpson. Thus, if the ruling was, when made, erroneous, it was, as the event showed, without prejudice, because Simpson did appear and was bound by the judgment. It is argued that because Mr. Hazlett appeared for the plaintiff the usual presumption of authority will not be indulged to appear for a defendant. There is shown nothing antagonistic in the interests of Simpson and Vincent, so that one man might not represent both, and we must presume that Mr. Hazlett entered his appearance in pursuance of authority and with regard to his duties as an officer of the court. But a third view is presented, which is that in such a case, an action on a contract, in form joint, section 42, above referred to, cannot apply, and that it is essential that all joining on one side of the contract shall join as plaintiffs to the action. If that were true, which we do not decide, the defect of parties plaintiff appeared on the face of the petition, and not having been raised by demurrer on that ground, was waived. (Code of Civil Procedure, secs. 94, 96.)

Error is assigned on the suppressing of a deposition which the defendant company had taken, and which was, although it had been suppressed, offered on the trial and excluded. The special ground of this assignment is that the exception to the deposition was not made and filed

before the commencement of the trial. The record does not affirmatively disclose a violation of section 390 of the Code, which requires exceptions other than for incompetency or irrelevancy to be made and filed before the commencement of the trial. The motion to suppress was filed the day the trial began, but from the transcript it would appear that it was made and ruled on before the jury was impaneled. From the bill of exceptions it would seem that it was called to the attention of the court after some jurors had been called into the box but before the jury was impaneled. By section 391 of the Code it is only when one of the parties so demands that exceptions to depositions must be decided before the trial commences, otherwise it is sufficient if they be filed before the trial. Therefore we need not determine whether the trial begins, as defendant contends, when parties announce themselves ready, or whether only after the jury is sworn, as plaintiff argues. A judgment will not be reversed unless error affirmatively appears, and as the inference from the record is that the motion was filed before the trial, although on the same day, we cannot say there was error in ruling thereon after some jurors were in the box. What would be the rights of a litigant who suffered such a ruling by reason of a motion unreasonably delayed, as to securing a continuance, are not here presented, because the defendant suggested no surprise or unreadiness and asked no postponement after the deposition was suppressed.

The evidence shows that the horses were shipped from Beatrice to Olympia; that from Beatrice to Valley extends a line of road owned by the Omaha & Republican Valley Railway Company; that it there connects with the line of the Union Pacific Railway Company; that at Granger, Wyoming, there diverges from the latter line that of the Oregon Short Line & Utah Northern; that these were the lines of shipment, and that the horses were injured in Idaho, on the line of the Oregon Short Line & Utah Northern. The shipment was a through

shipment, and the bill of lading so provided. The Union Pacific Company denied that it had made the contract or undertaken the transportation of the horses except as an intermediate carrier between the Omaha & Republican Valley and the Oregon Short Line. This made the principal issue of fact, and was by the jury, under instructions not complained of except as unfounded on the evidence, determined in favor of plaintiff. Ordinarily, the railroad undertaking the shipment is named in the contract, but here the contract is very peculiar. It is headed "Union Pacific System," and also bears at the top the words "Union Pacific, the Overland Route." It is dated "Beatrice Station," and begins, "This agreement, entered into on the day above stated, between the company controlling and operating the line at and from said station." Thus the question of fact seems to be what was the company, not owning, but controlling and operating, the line at Beatrice. An effort was made to show that the Omaha & Republican Valley Railway Company was a distinct corporation, owning, controlling, and operating the line from Beatrice to Valley, and that the Union Pacific had no control over either that line or the Oregon Short Line, so that it neither contracted to transport the horses to Olympia nor were they injured on its line. It was, however, shown that the Union Pacific owned the greater part of the stock of the Omaha road; that all three lines already named were operated under the name of Union Pacific System; that while they had separate officers, the same men occupied corresponding offices for each company; that the general offices were the same, although separate books were kept at the same desks, and there were many minor details disclosed indicating that there was such a close communion of interests and management as to indicate that all three lines were operated by a single concern, and that was the defendant company. Thus it was shown that in 1893 all the lines passed under the control of the same receivers in a single action. The general manager for these re-

ceivers testified as follows: "Do you know how the Union Pacific System handles the Omaha & Republican Valley Railway Company's lines? I believe I do. By what authority? By authority given them by the board of directors of the Omaha & Republican Valley line, I presume." By the testimony of another witness it is shown that the Union Pacific System was a somewhat informal consolidation of various companies, all more or less under the control already of the Union Pacific Company. While there was an attempt to show that "Union Pacific System" was merely a name, a "trade-mark," as witnesses styled it, it is impossible to understand how a trade-mark can, with or without authority, manage and control a railroad. There is ample in the evidence to support the theory that the scheme was devised, to use a homely expression, for the purpose of hitting if it was a deer and missing if it was a calf, and to warrant the conclusion reached by the jury that in this instance the calf had been struck.

It is said that there was no sufficient averment of negligence. Assuming that it was necessary to aver and prove negligence in such a case, it was here sufficiently averred by a general charge that the company negligently handled the car containing the horses in giving momentum to its train, so that the horses were injured. While the nature of the negligence should be pleaded, a general averment is sufficient, unless the pleading be attacked by motion. (*Omaha & R. V. R. Co. v. Wright*, 49 Neb. 456.) It is said that the petition shows that the horses were injured in giving momentum to the train, and that this being a necessary act, it could not have been negligently done; but the averment was that the act was performed in a negligent manner. It is argued that there was no evidence of negligence, but we are satisfied that the evidence was on this point sufficient to go to the jury, again assuming that it was necessary to prove negligence.

Several assignments of error relate to the exclusion of

evidence offered by the defendant, chiefly bearing on the *quantum* of damages. We cannot reach the merits of these assignments, because in no case was there made a tender of the proof. This, by an uninterrupted course of decisions, is necessary to preserve for review a ruling excluding proof.

The contract of shipment contained restrictions and limitations upon the liability of the company, both as to the amount of damages recoverable and the liability for any damage. It is unnecessary to set these out. They have all been passed upon in former cases. It is argued that these restrictions are not contrary to the law of the state, and if they are, that the state law is not here applicable, because the shipment was of an interstate character, and subject to regulation by congress alone. Every phase of this argument has been met and determined adversely to the defendant in *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 463, and *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb. 356. It would be useless to renew the discussion or restate the particular questions.

Some other specific assignments of error are relied on, but they have been directly or logically disposed of by what has been already said.

AFFIRMED.

CHARLES REICHERT, APPELLANT, V. PAUL KELLER ET AL., APPELLEES.

FILED FEBRUARY 23, 1899. No. 8762.

Right of Way: ABANDONMENT: TRESPASS. The construction of a fenced lane across the right of way of a railroad company and beneath a bridge carrying the tracks, so as to provide a subway for the passage of live stock, is not so foreign to the purposes of a grant of land for railroad purposes that the grantor can complain thereof as an abandonment of the right of way granted or as a trespass upon his reversionary rights.

APPEAL from the district court of Saunders county. Heard below before SEDGWICK, J. *Affirmed.*

C. Hollenbeck, for appellant.

J. E. Frick, W. J. Courtright, and *J. B. Sheean, contra.*

IRVINE, C.

The petition in this case against Paul Keller and the Fremont, Elkhorn & Missouri Valley Railroad Company states a complaint against the defendants for obstructing a drainage ditch of plaintiff and for also obstructing a passage-way for live stock across the right of way of the railroad company. The answers, admitting certain facts, amounted to general denials of the wrongful acts charged. The object of the proceeding was to restrain the defendants from maintaining the obstructions. There was a general finding for the defendants, the case was dismissed, and the plaintiff appeals.

While on some points the evidence was conflicting, the facts, as determined from the uncontradicted evidence, and by the court's finding on controverted points, are as follows: Reichert owns a tract of land across which passes, from east to west, the line of the railroad. The company's right is derived from a deed made by Reichert in 1887, which, it is conceded, did not pass the fee, but only what is usually, but inaccurately, styled an easement—more technically, a right of way. The strip granted for that purpose is one hundred feet wide. A few feet west of the eastern boundary of Reichert's land he had, prior to the construction of the railroad, made a ditch for drainage purposes, running north and south, and apparently about two feet wide at the bottom and not more than four at the surface. In constructing the railroad the track was carried upon a bridge across this ditch. The bridge is about twelve feet long and its center is almost over the ditch. Keller owns land on each side of the railroad and immediately adjoining Reichert

to the east. To afford Keller a passage or runway for his live stock across the right of way of the railroad the company constructed for him two fences, parallel and six feet and one-half apart. These formed a lane beginning on Keller's land where it cornered upon that of Reichert, then extending northwesterly until it reached the bridge, passing under the bridge adjacent to its eastern end and to the east of the ditch, and thence turning northeasterly so as to debouch again on Keller's land north of the right of way, and where it on that side meets Reichert's. Thus both ends of the lane are entirely opposite land occupied by the railroad and not within Reichert's grant, but the greater part of its course is over that part of the right of way granted by Reichert, and it extends, where it passes under the bridge, as much as nine feet upon that land. A substantially similar state of affairs had existed for about four years prior to the bringing of this suit. It is charged that the defendants had obstructed the flow of water in the ditch. The proof shows that Keller, to afford a firmer pathway for his cattle, had placed under the bridge a quantity of bricks, but while the evidence is conflicting, there is much to show that this was to the east of the ditch and that, in any event, the ditch was lower under the bridge than either north or south thereof, and that the flow of water was in no way impeded. We take it from the briefs that the appellant now concedes that the finding adverse to him is sustained by the evidence on this point.

The charge that the defendants had interfered with a passage-way for plaintiff's stock has absolutely no support in the evidence. The proof shows that there remains to the west of the ditch a sufficient passage-way under the bridge to permit of a runway on that side sufficient for all such purposes, and at least as wide as Keller's. It also appears that the railroad company offered to construct such a runway for plaintiff, and, if preferred, to box in or tile the ditch so as to give him all the space

not occupied by Keller's lane for a runway. This plaintiff refused, giving as a reason that he had no use for a passage-way. This proof is not contradicted. It is, however, sought to impeach the decree of the district court on the ground that the company's right is only to a way for railroad purposes; that, subject to that use, the exclusive dominion over the land granted by Reichert remains in him. It is then argued that a runway for Keller's stock is not within the purposes of the grant, and its construction is a trespass upon the reserved rights of Reichert. It is useless on this question to enter upon an exhaustive discussion of the privileges of railroad companies under similar grants. The grant certainly passed the exclusive right to the use of the land for all purposes necessary or reasonably convenient for the proper construction and operation of a railroad. A subway for stock, to permit its free passage from one side of the tracks to the other, is, we think, within the scope of the company's rights. We might take notice of the fact, even had it not been proved, that such subways conduce to safe and convenient operation of the railroad, by avoiding the necessity of crossings at grade. It is true that it has been held that passage-ways for the passage of unattended live stock are not within the statute requiring railroads to provide farm crossings. (*Omaha & R. V. R. Co. v. Severin*, 30 Neb. 318.) But that is immaterial. Crossings whereby the farmer may drive his stock from one side to the other are within the statute; and if the railroad company can provide a free and safe subway, it may avoid the dangers attendant upon a grade crossing, or at least decrease its use and consequent dangers. Thus both railroad company and the public are protected from dangers incidental to railroad operation, and a device which serves such a purpose is certainly not foreign to the purposes for which the land was acquired. Such a structure is as much a part of the construction of the railroad line as a cattle-guard, or even a highway crossing. It is quite certain that Reich-

ert suffers no damage or even inconvenience by the structure complained of. He relies on a purely technical right derived from real estate conveyancing, and which, if it exists, must be because of so narrow a construction of a grant in favor of the grantor, and against recognized principles of construction, as would lead, if logically carried out, to forbidding a railroad company to do more than to build its tracks and run its trains, and which would thereby forbid many of the most necessary precautions and public conveniences expected of well regulated railroads. The district court properly refused the injunction.

AFFIRMED.

WILLIAM WINCHESTER, APPELLEE, V. MARY M. ROYS ET AL., IMPLEADED WITH WALTER G. CLARK, ADMINISTRATOR, APPELLANT.

FILED MARCH 8, 1899. No. 8793.

Affirmance of Judgment Upon Conflicting Evidence.

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

Congdon & Parish, for appellant.

Francis A. Brogan, contra.

PER CURIAM.

In this case there is involved nothing but questions of fact determined by the district court upon conflicting evidence, and accordingly its judgment is

AFFIRMED.

NEBRASKA NATIONAL BANK OF OMAHA ET AL., APPELLANTS, V. WALTER G. CLARK, ADMINISTRATOR, APPELLEE.

FILED MARCH 8, 1899. NO. 8749.

1. **Corporations**: LOANS BY DIRECTORS: PREFERENCES. Directors of a corporation each made a loan of money to it with the understanding or agreement that in payment or enforcement of the debts thereby created no one should have or obtain a preference over another. It was subsequently ordered, all being present and acting, that negotiable promissory notes be executed and delivered to the parties evidencing the debts which originated in the loan transactions. *Held*, That the latter adjustment was under such circumstances and attendant facts as evinced the intention to annul and abrogate the agreement which accompanied the loans.
2. ———: ———: ———: JUDGMENTS. A director of an insolvent corporation may not through any advantage gained by reason of, or which may be taken of, his directorship obtain or secure a preference of debts of the corporation to him or in which he is materially interested, but a judgment for such debt secured without any such advantage will be upheld even though it may work a preference of the debt.
3. ———: ———: ———: ———. One of the directors of the corporation who had made it a loan, and who, under the order of the managing board relative to issuance of promissory notes to members who had made loans to the company, was entitled to receive such a note, died and his son was appointed administrator of the estate, also became a director of the company, and applied for, and there was executed and delivered to him as administrator, a note of the corporation in the amount of the loan debt. The corporation became insolvent, and thereafter there was recovered a judgment against it, and in favor of the administrator, by default for the amount due on the note. *Held*, From the evidence, that there had been no advantage taken by the son of deceased director, and administrator of his estate, of the former's position of director of the corporation to obtain in the suit and judgment on the note a preference over other creditors of the corporation.

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

Warren Switzler, for appellants.

Congdon & Parish, *contra*.

HARRISON, C. J.

It appears herein that about twelve years since Andrew Gilchrist, Milton Hendrix, Victor G. Langtry, Hugh G. Clark, and George J. Hunt, with a common purpose and pursuant to an agreement to so act, purchased lots and lands in and adjacent to Florence, which was a village near Omaha. Subsequently the parties named organized a corporation, "The Omaha and Florence Land & Trust Company," and lands and lots theretofore purchased by the parties pursuant to the agreement or common intention to which we have before referred were conveyed to the company and the parties, and each party received non-assessable stock of the corporation to the amount equal to the agreed value of the property he had transferred to the corporation. The individual members who composed the corporation apparently became thoroughly impressed and imbued with the idea of the ultimate great success of the business venture, the active furtherance of which had suggested and moved the formation of the company, and the favorable thought induced correspondent action. Each member loaned to the company quite a considerable sum of money, and the aggregate of these sums was invested in the real estate operations of the corporation. At the time the loans were made to the company it was agreed among the individuals who made them that at no time should one be paid in advance of, or more at any time than, the other, and if it ever became necessary to enforce payment all should stand on an equal footing in all particulars, and neither, in point of time nor otherwise, have or be granted a preference over another. Subsequently one of the members of the company requested of the board of directors that there be executed and delivered to him a promissory note evidencing the indebtedness of the company to him in the amount of the loan which he had made it. The request was considered and refused. It was afterward, or at another and later meeting of the directors, renewed and, after full de-

liberation, granted. It was of the evidence that the refusal of the request when first presented was prompted by the consideration, or based upon the conclusion, that if granted it would be, or involve, an abrogation of the agreement or understanding which prevailed in regard to the uniformity in the manner and order of the payment of the loans, and that when it was granted it was believed and understood that such would be, and was, its effect. Pursuant to a vote of the directors which allowed such action, promissory notes were at times, when applied for by members who had advanced money to the corporation, executed and delivered to them. These notes were in the ordinary form and negotiable, and were some of them sold and duly transferred. In at least one instance the claim against the company in favor of a member which arose from the transaction of loan was by the holder assigned to third parties and the notes were, on application therefor, executed and delivered to the assignees. Hugh G. Clark died without having asked for a note of the corporation in the amount of his loan to it, and Walter G. Clark was appointed administrator of his estate; after which it was thought proper, and for the welfare of all interested, that he should become an active working member and director of the corporation. To effect this he delivered fifty shares of the stock of the company of the number which belonged to the estate, to the corporation, and they were canceled and the same number of new shares were issued directly to him, not in his representative capacity, but individually. Some time afterward it was concluded that this arrangement was not exactly right and the new shares were annulled and shares issued in favor of the estate or its administrator, and Walter G. Clark purchased one share of stock from some person and thus became a member of the corporation. After the company had become insolvent a holder of one of the notes to which we have referred instituted an action thereupon, and when Walter G. Clark, or his counsel, received information of the commencement of said suit, an

action was immediately begun for him, as administrator of the estate of his deceased father, to recover the amount due from the company to the estate on the note which had been given it against the company. Judgments against the company were rendered in these suits. The appellants herein had become owners of notes issued in the transactions between the company and its members, which we have hereinbefore set forth, and sued to enforce a recovery of the sums due, but at such times, in the course of terms of the courts during which judgments which were rendered, would be, and were in the regular settled legal view and marshalling of the liens of the judgments, subject and inferior to that of appellee. To adjust the liens of the judgments and have them adjudged equal in rank or priority was the object of the present actions, and from an adverse decision of the trial court of the questions litigated the parties who instituted the suits have appealed to this court.

It is urged for appellants that inasmuch as when the loans were made to the company by its individual members there was an agreement that none of them should in payment have or obtain a preference, that this agreement ran with the debts and the notes and must now be recognized and given force, the effect of which would be to place these judgments on an equality in respect to rank as liens. The trial court in its decree set forth a finding that the agreement was made, but also adjudged that it was wholly annulled and set aside by the acts of all the parties. The latter was stated as a matter of law. Whether to be viewed as a matter of fact or law, it is true that an examination of the evidence discloses that the parties, when it was ordered that negotiable promissory notes of the company be issued to all parties for the amounts of the loans, contemplated and believed the agreement to be at an end and destitute of any further effect. They first refused to issue the notes, on the ground that it would end the agreement, and when they finally ordered their execution and delivery they did it with the

idea that the agreement would be destroyed, and it seems but just and right to give recognition to the belief, which must have been based upon a correspondent intention; hence this argument must be overruled.

A further argument is to the effect that inasmuch as Walter G. Clark was personally interested in the estate of which he was the administrator, and individually was a director of the company at the time the judgment in his favor as administrator was obtained, and the corporation was then insolvent, he could not by his judgment obtain a preference over other creditors of the company. The judgments in question were all by default, for the reason shown in this cause that the company had no defense against their renditions, and there was evidence to support a finding that the suit by the administrator was wholly adversary and hostile, and the judgment was by default for the sole reason that the company had no defense to make. The contract of loan by which the indebtedness of the company to Hugh G. Clark arose was one which a corporation might make with one of its directors, if on close scrutiny it proved to be in good faith (*Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548); and it is not claimed that there was any bad faith or unfairness in the one herein involved. It is the doctrine announced in this court that directors of an insolvent corporation cannot take advantage of their positions to obtain a preference of debts which the corporation owes them, nor can they prefer debts to third persons on which they are bound as sureties. (*Stough v. Ponca Mill Co.*, 54 Neb. 500; *Tillson v. Downing*, 45 Neb. 549; *Ingwersen v. Edgecombe*, 42 Neb. 740.) Here it was a debt to the estate of a deceased director which it was sought by a judgment to enforce, and in a suit by an administrator who was then a director of the then insolvent corporation and also a son of the deceased director; but it was shown that neither the plaintiff in the suit nor any director actively participated as directors in the default in the action or the rendition of the judgment. The record indicates that they

were without blame, and their acts in regard to the suit and judgment were entirely fair; nor does the record disclose that the administrator took any, or the slightest, advantage of his position as director, or information gained by reason thereof, to institute the suit or secure a judgment on the claim of the estate prior to any other creditor. He, or his counsel, gained notice, as might any person not a director, that a suit had been commenced against the corporation by one of its creditors, and an action was begun to recover the amount due the estate, which resulted in a judgment which is herein called into question. There was nothing shown from which it can be asserted that any advantage was taken of the position as director to gain any advantage or preference, and this being true, the judgment must be allowed to have the place in priority which it would ordinarily have, and the decree in the present case must be

AFFIRMED.

S. R. MCCONNELL ET AL. V. JOHN S. LEWIS, JR.

FILED MARCH 8, 1899. NO. 8774.

1. **Sale:** BREACH OF WARRANTY: DAMAGES: PLEADING. An answer in an action on an account for goods and merchandise sold and delivered admitted the sale, but alleged that it was with a warranty of quality and that the property was worthless; also alleged damages. *Held*, A pleading of warranty, a breach thereof, and damages, and that there might be shown general damages in this case, that the property was of a market value less than it would have been if as represented, and that the pleader was not confined to proof of its entire worthlessness.

2. ———: ———: ———. If the sale of a warranted article of personalty is an executed one, the purchaser may retain the property, and in an action by the vendor for the purchase price recover damages which have arisen through breach of the warranty.

3. **Evidence:** SAMPLES OF GOODS: SALES. The action of the trial court, by which certain evidence was admitted, examined and determined not erroneous.

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

F. W. Burdick and *Frank M. Northrop,* for plaintiffs in error.

Barnes & Tyler and *James Britton, contra.*

HARRISON, C. J.

The plaintiffs instituted this action to recover the amount alleged to be their due from defendant on account of a sale of personal property by them to him. The defendant, in answer, admitted the sale, but pleaded that it was accompanied by a warranty of the quality of the article sold, which was some leather for use in his business of harness-maker, also a breach of warranty and damages thereby. Of the issues there was a trial, which resulted in a verdict and judgment by which defendant was allowed damages, and the cause is presented to this court in an error proceeding in behalf of the plaintiffs.

It is urged in argument that the trial court erred in its refusal to charge the jury as requested for plaintiffs in instructions 1, 2, and 3 prepared and presented for them. In the answer of the defendant there was a statement that the leather purchased "was entirely worthless and of no value," and in each of the instructions to which we have just referred it was sought to have the jury directed that, unless the proof was to the effect that the leather was of no value, there was no defense established and the plaintiffs were entitled to a verdict for the full amount of the account. We do not deem the argument tenable. The allegations of the answer were of a warranty, its breach and damages, and evidence of each allegation was competent and material, and if there was evidence of a warranty and a breach thereof, then any general damages might be proved to the extent of a whole or partial warranted value of the leather, and if shown,

they might be allowed. The defendant could not be held to proof of an entire lack of value and none other.

Another contention is with reference to the refusal of the trial court to give instructions 4, 5, and 6 requested for plaintiffs. By these instructions it was sought to have the jury directed that if the defendant knew when he received and used the leather, or by an examination might have discovered, that it was not as recommended, it then became his duty to notify the plaintiffs of such conditions, and if he had failed so to do, he could not successfully urge a claim for damages. To this it must be said that there was evidence to show that the sale was an executed one. The action was against him on an account of the consideration of a completed sale, and he could retain and use the leather and in an action on the account assert, prove, and recover his damages. (28 Am. & Eng. Ency. Law 810 and cases cited in note.)

It is also urged that the trial court erred in the admission in evidence of certain pieces of the leather in connection with the testimony of witnesses relative to the quality. The witnesses who were shown these pieces were competent to testify of the quality of leather, and it was further proved that what were introduced were fair samples of all the leather involved in the suit. We think, for the purpose and under the circumstances and conditions offered, the pieces of leather were properly received in evidence. No sufficient cause for reversal has been shown and the judgment will be

AFFIRMED.

LAWRENCE VIX V. FRANK E. WHYMAN.

FILED MARCH 8, 1899. No. 8797.

1. **Review:** ASSIGNMENTS OF ERROR. Alleged error in the admission of evidence of which there is no assignment in the petition in error will not be examined.

2. **Sales:** ACTION BY PURCHASER TO RECOVER OVERPAYMENT: VERDICT FOR PLAINTIFF. Evidence *held* sufficient to sustain the verdict.

3. **Allegations and Proof:** VARIANCE: REVIEW. A variance between the allegations of the petition and the proof on an immaterial point does not furnish cause for reversal of a judgment.

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

John P. Maule, for plaintiff in error.

A. E. Howard and *J. C. McNerney, contra.*

HARRISON, C. J.

This action was instituted by the defendant in error to recover an amount which he claimed he had overpaid the plaintiff in error in the purchase from the latter of some hogs. The overpayment, it was alleged, was made by reason of a mistake in the computation of the weight of the hogs at the time they were delivered to defendant in error. The answer was a general denial. The result of a trial was a judgment for defendant in error, the reversal of which is sought in an error proceeding to this court.

It is argued that there was an erroneous admission of evidence during the trial. Of this subject there will be no examination, since in regard to it there is no assignment of error. (*Grand Island & W. C. R. Co. v. Swinbank*, 51 Neb. 521.)

Of the argument that the verdict was not supported by the evidence it must be said that an examination of the evidence reveals a sufficiency thereof to fully sustain the verdict, and it follows that it will not be disturbed. (*Ashland Land & Live Stock Co. v. May*, 51 Neb. 474.)

The petition declared upon a payment based upon a mistake in the aggregate of the weights of a "couple of loads of hogs." The evidence disclosed that the hogs were hauled to the station in three wagons and the weights were of the three loads and not of a "couple" (or

two) as stated in the petition. It is urged that the evidence in relation to the three loads does not tend to establish the allegations of the petition, which, as we before set forth, were with reference to a "couple of loads." The evidence of both parties was in regard to a sale of sixteen hogs, the weight, and a mistake therein which, it was asserted for defendant in error, resulted in the overpayment. That the hogs were hauled in two or three wagons, or that there were any particular number of loads, was not a material point of the litigated issues; hence that the petition was in terms of a "couple of loads" and the evidence showed three could not affect the final decision of the rights of the parties. The judgment must be

AFFIRMED.

WESTERN UNION TELEGRAPH COMPANY V. CALL PUBLISHING COMPANY.

FILED MARCH 8, 1899. No. 8610.

1. **Telegraph Companies:** ASSOCIATED PRESS: REPORTS: CONTRACTS. The circumstances under which the contract by which the telegraph company agreed to transmit to the other party to the contract the news reports of the Associated Press examined, and *held* not to show the contract to be elemental of the consideration of the agreement by the Associated Press to furnish the news reports to the party to the first mentioned contract other than the telegraph company.

2. **Public Service Corporations:** INTERSTATE COMMERCE: DISCRIMINATION IN RATES. A public service corporation is amenable to the rules of the common law relative to discrimination in rates between patrons for like intrastate or interstate services rendered under like conditions, the latter in the absence of congressional legislation on the subject, and courts will enforce the rules of general jurisprudence in such matters.

3. ———: ———: ———. The evidence in regard to the difference in night and day rates for several certain classes of services *held* to furnish a basis for ascertainment of the measure of the dif-

ference in night and day rates in the services involved in litigation, in the absence of evidence to show reason for a greater distinction.

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

Estabrook & Davis and *Ames & Pettis*, for plaintiff in error:

In order to constitute an unjust discrimination there must be a difference in rates under substantially similar conditions as to service. (*Western Union Telegraph Co. v. Call Publishing Co.*, 44 Neb. 326.)

Where it is shown that a difference of rates exists, but that there is a substantial difference in conditions affecting the difficulties or expense of performing the service, no cause of action arises without evidence to show that the difference in rates is disproportionate to the difference in conditions. (*Western Union Telegraph Co. v. Call Publishing Co.*, 44 Neb. 326.)

The petition is demurrable. (*Swift v. Philadelphia & R. R. Co.*, 58 Fed. Rep. 858; *Gatton v. Chicago, R. I. & P. R. Co.*, 63 N. W. Rep. [Ia.] 589; *Murray v. Chicago & N. W. R. Co.*, 62 Fed. Rep. 24.)

John M. Stewart, contra.

References: *Cox v. Lehigh Valley R. Co.*, 4 Int. Com. Rep. 582; *In re Excessive Freight Rates*, 4 Int. Com. Rep. 68; *Railroad Commission of Florida v. Savannah, F. & W. R. Co.*, 5 Int. Com. Rep. 40; *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263.

HARRISON, C. J.

In this action a recovery was sought of damages alleged to have accrued to the defendant in error by reason of unjust discrimination against it and in favor of another patron of the plaintiff in error in the rates charged for contemporaneous services. There was a trial of the

issues joined in the district court and the plaintiff was awarded a judgment. In an error proceeding in this court the judgment was reversed and the cause remanded. A second trial in the district court resulted in a judgment for defendant in error, and the cause has been again removed to this court by the telegraph company. The opinion rendered at the former hearing is reported in 44 Neb. 326, and contains an extended statement of the facts, to which we now refer the reader. We deem it unnecessary to again set them forth herein; as developed during the second trial, they were in the main similar to what appeared during the first. Wherein they were dissimilar or different, or such new facts as were shown at the second hearing, we will, to the extent necessary, state them in the connection in which they may be material.

The defendant in error, hereinafter designated the Call Company, purchased of the *Daily State Democrat*, and there was assigned to the former an "Associated Press certificate," by which it became entitled to receive daily and print certain press or news dispatches which were to be transmitted to it from Chicago by the plaintiff in error, hereinafter styled the telegraph company.

When the Call Company purchased the certificate of the *Democrat* it immediately opened negotiations with the Associated Press relative to the dispatches and the contract for furnishing and reception of them. It appears that as the contracts were usually made the Associated Press agreed to furnish the dispatches for a certain stated sum, which was inclusive of the charges of the telegraph company for transmission; that the former collected the whole amount and settled with the latter. The Associated Press demanded, however, that the Call Company make its own contract with the telegraph company, which was done. It is now claimed that as this was demanded by the Associated Press a compliance with such demand was an essential of the contract between it and the Call Company and it became and was

a part of the consideration for such contract. To this we cannot agree. It is plainly disclosed that the Associated Press did not desire to become bound for the payment of the charges of the telegraph company for dispatches sent to the Call Company, and that this moved the demand to which we have referred; that the transaction amounted to no more than a sale of the dispatches to the Call Company and it providing the means of transmission by its own contract, and that it should do so was not elemental of the consideration between it and the Associated Press.

It is argued that the petition did not state a cause of action. The reasons given for this contention are that the pleading attacked declared upon a contract for interstate business; that the regulation of such business rests exclusively with congress; that the statutes of Nebraska, by which it was sought to establish rules on the subject, were ineffective; that there was no regulative national law applicable and no rules of the common law in force or recognized as national rules or enforceable within the nation as an entirety, or within the states composing it or any one thereof, which, in the absence of statutory enactment by congress, might be invoked and be governable. In the case of *Gatton v. Chicago, R. I. & P. R. Co.*, 63 N. W. Rep. [Ia.] 589, the subject of the existence in the United States of the common law as national law was discussed, and it was decided in the negative. In the opinion in *Swift v. Philadelphia & R. R. Co.*, 58 Fed. Rep. 858, it was said: "Congress has not adopted the common law of England as a national municipal law. The courts of the United States have many occasions to enforce the common law, but in every instance it has been as the municipal law of the state by which the subject-matter was affected." The decision was to the effect that the common law was not in force as a national rule, and the exaction of unreasonable charges by a common carrier was a matter to be regulated by national law, and in the absence of any such law the com-

mon law as in force in a state could not prevail. In the opinion in *Murray v. Chicago & N. W. R. Co.*, 62 Fed. Rep. 24, the matter was fully considered, and it was decided that the courts of the United States would recognize and enforce, in the absence of congressional legislation, the rules of general jurisprudence in any case and define the duties and obligations of the parties thereunder. In *Chicago, M. & S. P. R. Co. v. Solan*, 169 U. S. 133, the proposition that there was in full force a law of general jurisprudence and that it might be applied in a state court or in a federal court was given full recognition. (See, also, on this subject 6 Am. & Eng. Ency. Law [2d ed.] 285, 286.) We are satisfied from a review of the subject that in actions of the nature of the present, in the absence of national legislation, the principles of the common law or general jurisprudence of the state of the action are applicable and may be asserted and enforced, and in this state the common-law right of action is accorded full force and scope. (*Chicago, R. I. & P. R. Co. v. Witty*, 32 Neb. 275; *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb. 356; *Missouri P. R. Co. v. Tietken*, 49 Neb. 130; *Chicago, B. & Q. R. Co. v. Gardiner*, 51 Neb. 70; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 463; *Union P. R. Co. v. Vincent*, 58 Neb. 171.) It follows that this argument is without avail.

In the former decision it was determined: "Where it is shown that a difference in rates exists, but that there is also a substantial difference in conditions affecting the difficulty or expense of performing the service, no cause of action arises without evidence to show that the difference in rates is disproportionate to the difference in conditions. A jury cannot be permitted to find such disproportion without evidence." One of the questions presented at this time is, if it be conceded that a difference in conditions under which the services were rendered was shown, was there evidence produced during the second trial which would uphold a conclusion by the jury that the difference in the rates charged was disproportionate

to the difference in conditions? With reference to the change in facilities for transmission of messages which was in part at least made necessary to handle the increased business properly it must be said that after the change in the facilities was made patrons to whom the same matters were furnished must have them at uniform rates, but there was herein still the one difference in the conditions that one patron must be furnished the services at a specific or fixed time in each instance, while to the other the time was immaterial, or to the one it must be in the daytime and to the other not, and in this case it was shown practically to have been services for one in the day and to the other at night. During the second trial there was shown that the difference between day and night rates for what are known as commercial and ordinary messages was that the night rate was two-thirds of the day rate; that it had been one-half, but this produced so much night business of this nature that the night rate was increased. It was also shown that on special news dispatches to certain newspapers, one directly involved herein and the other incidentally, the difference between day and night rates to each was one-half. It was further of evidence that on services rendered the press association in transmission of news from various parts of the United States to Chicago, when being gathered for its patrons, the difference between the day and night rate was one-half. Of one of these at least there was no evidence during the first trial, and of another there was no discussion in the briefs; hence no notice in the opinion. To the extent disclosed by the record the reasons for the relative charges for day and night dispatches were the same, or were not materially dissimilar in the several classes of services. There was then here tangible information from which the jury was warranted or might, within proper rules, draw the inference that as to the class of services directly involved in this controversy a like difference should prevail, or at least there were no grounds for a greater distinction than was shown in the

classes as to which there was evidence on the subject. Within this view the verdict of the jury was not wrong and must be allowed to stand. The judgment must be

AFFIRMED.

JABEZ R. HUNTER V. UNION LIFE INSURANCE COMPANY OF OMAHA.

FILED MARCH 8, 1899. No. 10547.

1. **Rules of Court:** CONSTRUCTION. If there is room for construction, that given to its rules by a court or a judge thereof will generally be accepted as conclusive.
2. **Bill of Exceptions:** EXTENSION OF TIME: NOTICE. Notice of an application to a judge of the district court for an extension of time within which to prepare and serve a bill of exceptions is not indispensable to jurisdiction.
3. **Rules of Court.** The rules of this court are not necessarily governable in matters before the district courts or the judges thereof. The portion of section 899, Code of Civil Procedure, which made them so was applicable, when enacted, to the courts as then organized and the existing conditions, but the constitutional changes in the organization of the courts and the changes in the conditions have rendered it inapplicable.
4. **Bill of Exceptions:** ALLOWANCE: NOTICE. No notice of the presentment of the bill of exceptions to the trial judge for settlement and allowance is required unless amendments to the bill have been proposed and not accepted.

MOTION by defendant in error to quash bill of exceptions. *Overruled.*

W. W. Morsman, for the motion.

E. Wakeley and *Montgomery & Hall, contra.*

HARRISON, C. J.

In this action a motion to quash the bill of exceptions has been presented and the questions raised thereby submitted for decision. The record discloses that at the

time the motion for a new trial was overruled the court allowed forty days for the preparation and service of a bill of exceptions; that a motion was made that additional time be granted for the preparation of the bill of exceptions, and on hearing the motion was sustained and forty days additional time was allowed and an order entered to such effect. The bill was prepared and presented to counsel for defendant in error, who returned it to the counsel for plaintiff in error with the following objections to its allowance indorsed thereon: "The defendant in the above entitled cause now objects to the signing of the bill of exceptions proposed by the plaintiff, and to which these objections are attached, for the following reasons: "The proposed bill of exceptions was not served upon the defendant's counsel within the time required by law; that is to say, the court allowed, at the time of entering judgment, forty days from the adjournment of court in which to serve the bill of exceptions, which period of forty days expired on the 24th day of February, 1898. On the 21st day of February, 1898, the plaintiff made application to the judge of the court who tried the case for the enlargement of the time in which to serve his bill of exceptions, and said judge made an order enlarging the time forty days; but this application and order were made without notice to defendant, and in the absence of defendant, who had no knowledge of the application or of the order, all in violation of rules 6, 7, 8, and 9 of this court, for which reason defendant avers the order of the judge enlarging the time as aforesaid is void." It was then presented to the trial judge, who settled and allowed it.

It is contended that the bill of exceptions was not served on the defendant in error within the time allowed by the court, and this is based upon the proposition that the order of the judge for the extension of the time was void for the reason that no notice of the motion was given the opposite party; hence the judge had no jurisdiction of the matter. The governable section of the

statute is 311 (Code of Civil Procedure), and it is 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* of the term of court at which judgment is rendered or at which the motion for a new trial is ruled on, and submit the same to the adverse party or his attorney of record for examination and amendment if desired. Such draft must contain all the exceptions taken upon which the party relies. Within ten days after such submission the adverse party may propose amendments thereto and shall return said bill with his proposed amendments to the other party, or his attorney of record. The bill and proposed amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill to the judge who heard or tried the case, upon five (5) days' notice to the adverse party, or his attorney of record, at which the judge shall settle the bill of exceptions. If no amendments are proposed, or if proposed and allowed, the proposed bill may be presented with the amendments, if any, to the judge for settlement without notice to the adverse party or his attorney of record. When settled, the bill must be signed by the judge, with his certificate to the effect that the same is allowed. In case of the death of the judge or when it is shown by affidavit that the judge is prevented by sickness, or absence from his district, as well as in cases where the parties interested shall agree upon the bill of exceptions (and shall have attached a written stipulation to that effect to the bill), it shall be the duty of the clerk to settle and sign the bill in the same manner as the judge is by this act required to do; and shall thereupon be filed with the papers in the case, and have the same force and effect as though signed by the court. In cases where a party seeking to obtain the allowance of a bill of exceptions has used due diligence in that be-

half, but has failed to secure the settlement and allowance of the same as herein required, it shall be competent for the judge who tried the cause, upon due showing of diligence and not otherwise, to extend the time herein allowed, but not beyond forty days additional to that herein provided, making such specific directions in that behalf as shall seem just to all parties. *Provided*, That any person or officer, or the presiding officer of any board or tribunal before whom any proceeding may be had, shall, on request of any party thereto, settle, sign, and allow a bill of exceptions of all the evidence offered or given on the hearing of such proceeding. *Provided further*, This act shall apply to all cases now pending or hereafter brought." It has been stated by this court that notice of an application for extension of time is not necessary to confer jurisdiction. (*McDonald v. McAllister*, 32 Neb. 514; *First Nat. Bank of Denver v. Lowrey*, 36 Neb. 290.) It was stated by MAXWELL, J., in the opinion in *Greenwood v. Cobbey*, 24 Neb. 648: "The words, 'it shall be competent for the judge who tried the cause, on due showing of diligence and not otherwise, to extend the time herein allowed,' etc., were designed to confer power upon the judge, when sufficient reasons appeared to satisfy him that the party had used due diligence, to extend the time in which the bill may be prepared. The stenographer is a member of the judge's own court, employed there to reduce the oral proceedings to writing, and the judge may know as a fact that such stenographer has been too busily engaged to prepare the bill, or other facts may be within his own knowledge sufficient to convince him that the party seeking the preparation of the bill has used due diligence. This evidence need not be in the form of an affidavit, deposition, or in writing. It is addressed to the judge, and without a gross abuse of discretion is not subject to review. * * * This ruling would seem to be applicable in this case. This court will not review the grounds upon which a judge may have granted additional time as provided by the statute in which to prepare a bill of exceptions."

No notice is required by the governing section of the Code of Civil Procedure. (See quotation therefrom herein.) The presentation is to the judge as contradistinguished from the court. The hearing provided for is in all features an *ex parte* one. But it is further contended that there were rules of the district court wherein the proceedings in this cause were had which made it necessary that a notice to adverse parties of all motions in an action be given, and these rules must be held applicable to the motion for an extension of time for preparation of a bill of exceptions. To this, if it be conceded for the sake of argument that the rules of the district court might be applicable, it must be said that the judge who granted the extension of time evidently construed the rules as not requiring a notice of the motion therefor, and they were open to a construction. They were not absolute, and it was not entirely certain that they applied to a motion in such proceedings, and his interpretation of them must be recognized and prevail. (*Gannon v. Fritz*, 79 Pa. St. 303.) It is further argued in this connection that section 899 of the Code of Civil Procedure, which is as follows: "The judges of the supreme court shall, during the month of the first January after this Code shall take effect, and every two years thereafter, meet at the capitol of the state, and revise their general rules, and make such amendments thereto as may be necessary to carry into effect the provisions of this Code; and they shall make such further rules consistent therewith as they may deem proper. The rules so made shall apply to the supreme court and the district courts," coupled with the rule of this court that "Every application for an order in any case shall be in writing, and, except as to motions for rehearing, shall be granted only upon the filing thereof at least two days before the hearing, and due proof of service of notice on the adverse party or his attorneys, at least three days before the hearing, which in all cases must be fixed for one of the session days provided for by rule 1,"—made it obligatory that a notice

be served; that the section of said Code made the rule of this court applicable to the proceedings in the district court or before the judge.

It might be said here that the language of section 899 makes the rules applicable to "district courts" and not to judges, and that there is an almost universally recognized difference or distinction between duties to be performed by a judge and such as are made incumbent upon a court, and that the language of the section which made rules prescribed by this court applicable to the district courts referred to the duties and proceedings of and in the courts and not of and before the judges in the performance of duties as judges and not as courts. Section 899 of the Code of Civil Procedure was in force when the judges of the supreme court were also the judges of the district court, and was no doubt enacted with that fact and condition in view and was wholly consonant therewith, both in terms and spirit; but when a change, which was by a constitution, was made and the supreme and district courts were no longer presided over by the same judges and different conditions prevailed, the portion of the section of the Code of Civil Procedure which made the rules of this court the rules for the district courts lost its force and became wholly inapplicable. That this resulted has not been openly expressed by this court, but is shown by the course which has been pursued in the adoption of rules which, while in their substance thoroughly applicable to methods of procedure in this court in many provisions and directions, could have no possible application to matters in the district courts. We are satisfied that the rules of this court are not necessarily to be followed by or in district courts, or in matters before the judges thereof in which the latter are empowered by statute to act out of term time.

It is further urged that there should have been notice to defendant in error of the presentment of the bill of exceptions to the judge for settlement and allowance, and inasmuch as there was not, the bill should be

quashed. A reference to section 311 of the Code of Civil Procedure, which we have set forth herein, will disclose that the lawmakers provided that if no amendments are proposed to the bill, or if proposed and allowed, the bill may be presented for allowance without notice to the adverse party or his attorney. The legislators, in the passage of the law, had the subject of notice of the presentment of the bill for allowance in contemplation and made specific provision in regard to it, and it is not for the courts, by rule or construction, to attempt to alter or amend their work, but to administer it as enacted. There being no amendments to the bill proposed, no notice of its presentment for allowance was necessary. (*Brownell v. Fuller*, 54 Neb. 586; *McDonald v. McAllister*, 32 Neb. 516.)

MOTION OVERRULED.

COOTE MULLOY V. STATE OF NEBRASKA.

FILED MARCH 8, 1899. No. 10476.

1. **Information:** CONVICTION OF LOWER OFFENSE. An information will sustain a conviction of a lower offense involved in that charged.
2. ———: ———: ASSAULT. An information for an assault with intent to commit great bodily injury, framed under section 176 of the Criminal Code, will sustain a conviction for an assault and battery, when the information discloses, by proper averments, that such minor offense was in fact included in the commission of the one charged.
3. ———: ———. Section 487 of the Criminal Code is not confined in its application to prosecutions for crimes for the punishment of which the statute had then made provision, but extends as well to prosecutions for offenses subsequently created.
4. ———: ———. Under said section, where the crime charged embraces different degrees,—that is, includes one or more lesser offenses,—the accused, when justified by the evidence, may be convicted of any one of the lesser degrees or offenses.

ERROR to the district court for Box Butte county. Tried below before KINKAID, J. *Affirmed.*

G. M. Sullivan, for plaintiff in error:

Under a charge that accused committed an assault with intent to inflict great bodily injury he cannot be convicted of assault and battery. (*Smith v. State*, 34 Neb. 689; *State v. McDevitt*, 29 N. W. Rep. [Ia.] 461; *State v. McAvoy*, 35 N. W. Rep. [Ia.] 631; *Turner v. Muskegon*, 50 N. W. Rep. [Mich.] 310; *Territory v. Dooley*, 1 Pac. Rep. [Mont.] 747; *State v. Marcks*, 58 N. W. Rep. [N. Dak.] 25.)

C. J. Smyth, Attorney General, and *W. D. Oldham, Deputy Attorney General*, for the state.

References: *Murphey v. State*, 43 Neb. 34; *State v. Graham*, 52 Ia. 720; *State v. Schele*, 52 Ia. 608; *State v. White*, 45 Ia. 325; *Whitner v. State*, 46 Neb. 144.

NORVAL, J.

The essential part of the information filed by the county attorney in the district court of Box Butte county, and upon which the defendant in this case was tried and convicted, charged "that one Coote Mulloy, on the 11th day of January, in the year of our Lord one thousand eight hundred and ninety-seven, in the county of Box Butte and state of Nebraska, in and upon one William Mitchell, then and there being, unlawfully, feloniously, and purposely did make an assault on the said William Mitchell, and did strike, beat, and wound the said William Mitchell, with the intent of him, the said Coote Mulloy, to inflict a great bodily injury on the person of the said William Mitchell, contrary," etc. The defendant was found guilty of an assault and battery. Motions in arrest of judgment and for a new trial were made and overruled, and the court thereupon sentenced the defendant to pay a fine of $45 and the costs of prosecution. He has brought the case to this court for review.

The court below instructed the jury that they might find the defendant guilty of assault and battery, if justified by the evidence. It is insisted that this constituted

reversible error, for the alleged reason the information is insufficient to permit the conviction of the defendant thereunder of the offense of which he was found guilty. The information was framed under section 17*b* of the Criminal Code, which declares: "That if any person assault another with intent to inflict a great bodily injury, he shall be punished, on conviction thereof, by imprisonment in the penitentiary for not less than one (1) year, nor more than five (5) years." It is very evident that the offense for which punishment is provided in said section necessarily includes a simple assault. The proposition is too plain to admit of discussion, and is well sustained by the authorities. (*Orton v. State*, 4 Greene [Ia.] 140; *Bryant v. State*, 41 Ark. 359; *Lewis v. State*, 33 Ga. 131; *People v. Warner*, 53 Mich. 78; *State v. Grimes*, 29 Mo. App. 470; *Guy v. State*, 1 Kan. 448; *State v. Triplett*, 52 Kan. 678; *Stewart v. State*, 5 O. 241.)

But it is strenuously urged that the offense described in said section 17*b* does not comprehend the lesser offense of assault and battery, and hence the conviction of such lesser offense was unauthorized. The statute, we have seen, embraces a simple assault, since the offense provided for by the section cannot be committed where no assault has been made, but might be perpetrated without a battery. While the section quoted does not necessarily comprehend a battery, it does include it in every case where the assault with the intent to commit great bodily injury is accompanied by a battery. This must be so, else there could be no conviction of the offense described in the section of the Criminal Code under consideration when the felonious assault is accompanied with, or followed by, an actual battery. It will be observed that the information before us charges not only an assault, but in express terms states that the defendant did "strike, beat, and wound" the prosecuting witness in the commission of the felonious assault. The offense charged is within the purview of the statute, and it is a well recognized principle of law that an information for a higher offense

will support a conviction of a lower offense embraced in a higher one. (Criminal Code, sec. 487; *Curry v. State*, 4 Neb. 545; *People v. Odell*, 1 Dak. 197; *Tyra v. Commonwealth*, 2 Met. [Ky.] 1; *Bolding v. State*, 23 Tex. App. 172; *State v. Schele*, 52 Ia. 608; *People v. Prague*, 72 Mich. 178.) The crime set forth in the information is one of a higher grade and greater enormity than the crime of assault and battery. But the greater includes the lesser. As the information contains all the substantial averments necessary to let in proof of an assault and battery, it is sufficient to sustain a conviction of that offense.

In *State v. Johnson*, 58 O. St. 417, it was decided that a conviction for an assault and battery was proper under an indictment charging an injury to the person of another with intent to maim or disfigure.

In *State v. Klein*, 53 Pac. Rep. [Wash.] 364, it was held that where an information for assault with a deadly weapon is sufficient to charge an assault and battery, a conviction may be had for the latter offense.

In *Fleming v. State*, 18 So. Rep. [Ala.] 263, the indictment charged a felonious assault, and it was ruled that the accused could be convicted thereunder for an assault and battery with a weapon.

In *State v. Keen*, 10 Wash. 93, it was decided that actual violence, alleged as a fact in an information for assault with intent to commit rape, will justify a conviction of assault and battery.

Under an indictment for felonious assault it has been ruled that a conviction of assault and battery may be had. (*Chacon v. Territory*, 34 Pac. Rep. [N. M.] 448; *Corley v. State*, 20 S. E. Rep. [Ga.] 212.)

Counsel for the accused cite *State v. McDevill*, 69 Ia. 549, and *State v. McAvoy*, 73 Ia. 557, to support the contention that the information was insufficient to sustain the verdict returned. The first of these cases is to the effect that the offense of assault and battery is not necessarily included in the crime of assault with intent to commit rape. In that case the court refused to instruct the

jury that they might find the defendant guilty of an assault and battery. But that offense was not charged in the indictment, nor was it necessarily included in the crime therein set forth, since there might be an assault with intent to commit rape without an assault and battery. That case is in accord with our views herein. Had it been charged that a battery was committed in attempting to perpetrate the rape, then the indictment would have stated all the elements essential to the offense of assault and battery and warranted a conviction for that offense. This is the effect of *State v. McAvoy, supra*, which was a prosecution for an assault with intent to commit rape, the opinion in the case containing this language: "It was held by this court in *State v. Graham*, 52 Ia. 720, that while assault and battery is not necessarily included in the crime of assault with intent to commit murder, still, as it was charged in the indictment that the assault was accompanied with actual violence to the person of the one assaulted, the defendant was properly convicted of assault and battery. But the defendant can be convicted of an offense distinct from the one specifically charged in the indictment only when such offense is an essential element of that charged, or when it is shown by proper averment in the indictment that a minor offense was in fact included in the perpetration of the one charged. The crime of assault and battery is not necessarily included in an assault with intent to commit rape; for that offense might be committed without doing any actual violence to the person of the one assailed, although in the majority of cases, perhaps, an actual battery is involved in the commission of the offense. To justify the conviction of assault and battery, then, on an indictment charging an assault with intent to commit rape, it must be averred in the indictment that the attempt was accompanied by some actual violence to the person of the woman." The information in the case at bar contains all averments essential to charge the offense of assault and battery, and therefore a conviction for that offense was permissible.

(*State v. Hutchison*, 64 N. W. Rep. [Ia.] 610; *State v. Maloney*, 72 N. W. Rep. [N. Dak.] 927.)

Turner v. Muskegon, 50 N. W. Rep. [Mich.] 310, cited by counsel for defendant, is not in point here. There the accused was charged with an assault with intent to do great bodily harm, and he was convicted of an assault and battery. The prosecuting attorney, after verdict, asked leave to amend the information by inserting appropriate language charging a battery, and the same not having been granted, a mandamus was applied for. The writ was denied. The court, in its opinion, say: "The offense for which the respondent was tried is a statutory offense, and does not include the lesser one of battery. There is no charge in the information of the respondent having committed a battery, and no one can be convicted of an offense which is not charged in the information, where the elements of the offense are not embraced in some greater offense charged. * * * It is plain that the information could not be amended so as to include the offense for which the jury convicted the respondent. The statute allows certain amendments to be made before the jury are sworn, and also others enumerated after verdict, but an amendment of this nature is not one which the statute permits." That case is distinguishable from the one at bar, in that the information therein failed to charge a battery, while all the elements constituting that offense are plainly set forth in the information before us.

State v. Marcks, 58 N. W. Rep. [N. Dak.] 25, and *Territory v. Dooley*, 1 Pac. Rep. [Mon.] 747, to some extent sustain the position for which contention is made by defendant's counsel, but we decline to follow in the direction they seemingly point. On principle, as well as authority, the conclusion is irresistible that the information authorized the verdict returned by the jury.

It is argued that the offense created by section 17*b* is a new and independent crime, not consisting of different degrees, within the meaning of section 487 of the Criminal Code, and therefore the accused, if not convicted of

the specific offense charged, must be acquitted. It is true said section 17*b* was enacted subsequent to the balance of the Criminal Code, and created a new and substantive offense (*Smith v. State*, 34 Neb. 689); but it does not follow that the provisions of said section 487 of the Criminal Code are not applicable to prosecutions like the present one. Said section provides: "Upon an indictment for an offense consisting of different degrees the jury may find the defendant not guilty of the degree charged, and guilty of any degree inferior thereto," etc. The language quoted does not by any fair interpretation limit the operation of the section to the prosecutions instituted for crimes for the punishment of which provision at the time of its adoption had been made by statute. It is applicable to an indictment or information for any offense embracing different degrees; that is, where the greater crime charged includes one or more minor offenses, the jury may find the accused guilty of any minor offense embraced in the one charged in the indictment or information. The crime described in section 17*b* consists in different degrees, within the purview of said section 487. It embraces felonious assault, and also includes assault and battery, when it is alleged and proven that the assault was accompanied by a battery. The felonious assault described in the information comprehends and includes not only the lesser offense of a single assault, but assault and battery as well. This being true, the district court had jurisdiction under the information filed to convict the accused of assault and battery. The motion made to relieve him from the costs made in that court was properly denied.

AFFIRMED.

LOUIS SLOBODISKY V. CARA E. CURTIS, INTERVENER.

FILED MARCH 8, 1899. NO. 10340.

1. **Review:** JURISDICTION OF SUPREME COURT. The filing of a petition in error in the supreme court is alone insufficient to invest jurisdiction. It is indispensable to jurisdiction that there should be filed with the petition in error, and within the time fixed by statute, a transcript of the proceedings of the district court containing the final judgment sought to be reviewed.
2. ———: ERROR: ABANDONMENT OF APPEAL. Where a party files a petition in error within the time limited by the law for the prosecution of error proceeding, he thereby abandons the appeal which he had previously docketed in the case.
3. ———: MOTION FOR NEW TRIAL: DISMISSAL. The mere failure to file a motion for a new trial in the court below is not of itself sufficient reason for dismissing a petition in error by the supreme court.
4. ———: ———: ORDER ON CLERK OF COURT. The ruling of the district court on a motion to require its clerk to pay out moneys in his hands may be reviewed, although there was made no motion for a new trial.
5. **Equitable Assignment.** An order drawn on a particular fund creates an equitable assignment thereof, although not accepted by the drawee.

ERROR from the district court of Douglas county. Tried below before DICKINSON, J. Heard on motion to dismiss petition in error and on merits of the case. *Motion overruled. Judgment below affirmed.*

Byron G. Burbank, for plaintiff in error.

George W. Doane and *W. G. Doane, contra.*

NORVAL, J.

A submission herein was first taken on the motion of Cara E. Curtis, intervener, to dismiss the petition in error, which was overruled without the filing of an opinion, and the cause has been submitted on the merits. We will first consider the questions presented by the motion to dismiss.

The first ground of the motion is that Louis Slobodisky filed in June, 1898, a petition in error in this court upon the same record, and containing the same assignments of error, and that he subsequently voluntarily dismissed the same. The former error proceeding was not a bar, for the reason that it was not prosecuted upon the record herein filed. In fact no transcript of the record accompanied, or was filed with, the first petition in error; therefore, this court never acquired jurisdiction over the subject-matter. This is the plain and obvious import of section 586 of the Code of Civil Procedure, which declares: "The plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified." Of this section, in *Garneau v. Omaha Printing Co.*, 42 Neb. 847, it was said: "It is clear, under the foregoing provision, that a cause cannot be docketed in this court, either on appeal or error, until a transcript of the proceedings in the trial court is filed. The transcript of the record is the foundation of the proceeding here, and until the same is filed this court acquires no jurisdiction to hear and determine the cause. Until then there is no case to review." This decision is in line with the prior and subsequent adjudications of this court on the subject. (*City of Brownville v. Middleton*, 1 Neb. 10; *Ward v. Urmson*, 40 Neb. 695; *Baker v. Kloster*, 41 Neb. 890; *Dane County Bank v. Garrett*, 48 Neb. 916; *Wachsmuth v. Orient Ins. Co.*, 49 Neb. 590; *Brockman Commission Co. v. Sang*, 52 Neb. 506.)

The second ground of the motion is equally untenable as the one just noticed. It is based upon the fact that the present cause was docketed as an appeal. It is claimed that the appeal is still pending and undetermined, and that a party cannot prosecute both error and appeal from the same judgment at the same time. The appeal is not pending. Before the final submission of the case, and within the time limited by law for prosecuting an error proceeding, the present petition in error was filed, which constituted an abandonment of the appeal

and an election to proceed in error. (*Burke v. Cunningham*, 42 Neb. 645; *Woodard v. Baird*, 43 Neb. 310; *Monroe v. Reid*, 46 Neb. 316; *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900; *Shaw v. Robinson*, 50 Neb. 403; *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369; *Thomas v. Churchill*, 48 Neb. 266; *Childerson v. Childerson*, 47 Neb. 162.)

The third and last ground of the motion to dismiss is that no application for a new trial was filed in the court below. The omission in that respect is no valid cause for dismissing the error proceeding. (*Cheney v. Wagner*, 30 Neb. 262; *Gaughran v. Crosby*, 33 Neb. 33; *Erck v. Omaha Nat. Bank*, 43 Neb. 613.) The reason for the rule is that a motion for a new trial is not in every case indispensable to a review in the appellate court. There are many cases in which one or more questions are raised by the record independent of a motion for a new trial.

Now as to the merits of the controversy. Louis Slobodisky brought an action against the Phœnix Insurance Company of Brooklyn on a policy of fire insurance of $2,000. Under a specific instruction of the district court a verdict was returned against the plaintiff, who prosecuted error from the judgment entered thereon dismissing his action. On review this court rendered a judgment of reversal and remanded the cause for a new trial. After the mandate was filed in the court below the action was settled, the insurance company paying the clerk of that court, for the use and benefit of Slobodisky, the sum of $2,700 and the costs. Thereupon Cara E. Curtis filed in said court a claim for a lien upon said moneys for the sum of $610.66, by virtue of a certain lease upon lot 8, block 38, in the city of Omaha, and recorded in the office of the register of deeds of said county, wherein is reserved a lien upon the property of Slobodisky, from which the fund in controversy was derived, to secure the payment of rent on said real estate of Curtis; also by virtue of an assignment made by Slobodisky to secure unpaid rents out of the moneys in dispute. Notice of the

lien was served upon Slobodisky, and Cara E. Curtis also filed the motion asking the court for an order directing the clerk to pay her the sum of $610.66 from the moneys of Slobodisky in his hands. A hearing was had upon said motion, and the order sought was granted. The correctness of that decision is assailed by Slobodisky.

Counsel for Miss Curtis, the intervener, insists that we are precluded from reviewing the order for which error is prosecuted, since no motion for a new trial was filed in the court below. It has been often asserted by this court that a motion for a new trial is essential to a review of alleged errors occurring upon a trial of a cause. By this it is not meant that a motion for a new trial must be made in the court below to entitle a party to review any case by petition in error, although language in some of our opinions is seemingly in conflict with this statement. The motion is indispensable where a review of alleged errors and rulings occurring during the trial is sought, but the rule has not been extended to every order or decision. Thus it has been held that no motion for a new trial is necessary to review an order sustaining a demurrer to a pleading (*Hays v. Mercier*, 22 Neb. 656; *O'Donohue v. Hendrix*, 13 Neb. 255; *Scarborough v. Myrick*, 47 Neb. 794), a decision on a motion to vacate an award (*Graves v. Scoville*, 17 Neb. 593), a ruling on a plea in abatement (*Bohanan v. State*, 15 Neb. 209), a judgment affirming or reversing in an error proceeding the decision of an inferior court or tribunal (*Newlove v. Woodward*, 9 Neb. 502; *Leach v. Sutphen*, 11 Neb. 527; *Dryfus v. Moline, Milburn & Stoddard Co.*, 43 Neb. 233; *Weitz v. Wood Reaping & Mowing Machine Co.*, 49 Neb. 434), or an order dismissing an appeal (*Claflin v. American Nat. Bank*, 46 Neb. 884). While the precise question of practice now under consideration has never been passed upon by this court, the principle which should control the decision thereof is not new to the jurisprudence of this state, but has been frequently recognized and applied. In many cases we have considered the rulings of the district court on motions for

change of venue and for continuances where the order was not assigned for error in the motion for a new trial, and times almost without number this court has reviewed decisions upon applications to discharge attachments and to set aside the sales of real estate in the absence of a motion for a new trial. In *Claflin v. American Nat. Bank*, 46 Neb. 884, it was said: "It is undoubtedly true that rulings which properly form the basis, grounds, or causes for a new trial are not available as errors in the appellate tribunal unless assigned in a motion for a new trial; and this is as far as the cases cited by counsel for defendant in error go. Rulings which do not pertain to the trial in such a sense as to make them assignable as causes for a new trial, such as rulings upon demurrers, motions addressed to pleadings, and motions to dismiss, need not be called to the attention of the trial court by a motion for a new trial, to make them available in error proceedings." This principle should be applied and extended to the case at bar. No motion for a new trial was essential to review the order directing the clerk of the district court to pay out moneys held by him for the use of one of the parties litigant. The statute does not contemplate that an application for a new trial should be made to the court below to entitle the appellate court to pass upon the order from which error is prosecuted.

The statute of the state of California relating to the subject of new trials is substantially the same as our own; and in *Harper v. Hildreth*, 99 Cal. 270, the court observed: "A new trial is defined by section 656 of the Code of Civil Procedure to be 'a re-examination of an issue of fact in the same court, after a trial and decision;' and this issue of fact is defined by section 590 of the Code of Civil Procedure to be that arising upon the pleadings. There is no authority in the Code for the new trial of a motion, but if after the decision of the motion it is desired to present any new facts for the consideration of the court, the proper practice is to ask for leave to renew the motion. If it is desired to review the action of the court upon an

appeal, it is sufficient to present the order in connection with a bill of exceptions containing the matter upon which the court based its action. A motion which does not ask for a decision upon an issue of fact that arises upon the pleadings is not the subject of a new trial, and it needs little reflection to see that if every motion which is made in the courts on a trial, or with reference to an action, could be followed by a motion for a new trial of such motion, the case itself would be inextricably involved in the determination of these motions, and the final judgment in the action indefinitely postponed." This doctrine is sound. A motion for a new trial is not necessary to save the ruling of the trial court on motions. (*Parker v. Waugh*, 34 Mo. 340; *Bruce v. Vogel*, 38 Mo. 100; *McDonald v. Cooper*, 32 Kan. 61; *Deere v. Eagle Mfg. Co.*, 49 Neb. 385.)

The record discloses that on March 1, 1889, Cara E. Curtis leased in writing to Slobodisky lot 8, block 38, in the city of Omaha, for a period of twenty years from and after said date, at the annual rental for the first five years of the term of $400, payable monthly in advance. The lease provided for a revaluation at the expiration of each five years as a basis for ascertaining the amount of rent, conditioned, however, that the annual rent should not be less than $400. The lease also provided that the lessor should pay all taxes, general as well as special, upon the lot and the buildings and improvements thereon, or which should thereafter be erected or placed thereon. It was also stipulated that the lessee, as security for the rents and the performance of the agreements contained in the lease, should erect and complete on said premises, without mechanics' liens, a dwelling-house, which, with other improvements, should be insured in some company approved by the lessor, all policies to be drawn requiring loss to be paid to the lessor as security for the payment of ground rent, taxes, insurance, and all other dues for which provision was made in the lease. The right was reserved to Slobodisky to determine the lease at the end

of any five-year period at his option. It was further provided that "the whole amount of ground rent reserved and agreed to be paid for said above described premises, and each and every installment thereof, and all delinquent taxes, duties, assessments, and insurance, * * * with interest thereon at ten per cent per annum after due, shall be, and is hereby declared to be, a valid and first lien upon any and all buildings and improvements on said premises, or that may at any time be erected or put on said premises by said lessee, and upon the rents thereon, and upon his interest in this lease and the premises hereby demised." The other provisions of the lease need not be mentioned. Slobodisky entered into possession of the lot under the lease, and erected a dwelling thereon 40 feet wide by 60 feet long, with an ell 16 feet in width and 30 feet in length, all three stories in height. This building was covered by the policy of insurance made the basis of the original action. The building, during the life of the policy, was injured or destroyed by fire, and the $2,700 already mentioned was paid to the clerk of the court below in settlement of the damages. On April 6, 1893, Slobodisky gave an order on the insurance company for $450, as payment of ground rent, which was not accepted by the latter. It is under and by virtue of this order, and the provisions and stipulations contained in the lease, that Curtis claims a lien on the funds, or money, paid by the insurance company into court. The order in question was given subsequent to the fire, and being by its terms payable out of the moneys due on the policy, constituted an equitable assignment of the amount of the fund specified in the order, although the order was never accepted by the insurance company. (2 Am. & Eng. Ency. Law [2d ed.] 1059; *Schollmier v. Schoendelen*, 78 Ia. 426; *Nesmith v. Drum*, 8 W. & S. [Pa.] 9; *Tripp v. Brownell*, 12 Cush. [Mass.] 376; *Foss v. Lowell Five Cents Savings Bank*, 111 Mass. 287.) The amount collected by this order, with interest thereon, represents the exact sum which the court below directed its clerk to pay Miss Curtis.

It is strenuously insisted by counsel for Slobodisky that Miss Curtis took possession of the demised premises and converted to her own use improvements placed thereon by him and of a value largely in excess of the fund in dispute. It is uncontradicted that she conveyed the lot, or her interest therein, to J. Ralston Grant, and this transfer is relied upon as constituting the act of conversion. Prior to the execution of such conveyance a mechanic's lien against the property was filed, a decree of foreclosure thereof had been entered against Slobodisky, and his interest in the premises had been sold thereunder to satisfy such lien. It is true the sale had not then been confirmed, but was subsequently approved, and a deed ordered to the purchaser, which wiped out all of Slobodisky's interest in the property from the date of the sale, since the confirmation related back to that time. Moreover, the evidence adduced on the hearing tended strongly to prove that plaintiff had forfeited the lease and the improvements by violating the terms of the lease and by abandoning the demised premises. The district court rightfully refused to permit Slobodisky to set off against the fund in controversy the damages he claimed to have sustained by reason of the alleged conversion of the improvements. The order is

AFFIRMED.

EUGENE O'NEILL V. NELLIE C. FLOOD.

FILED MARCH 8, 1899. No. 9130.

1. **Review:** ABSTRACT OF RECORD. In a cause submitted under section 1 of rule 2 of the supreme court on an agreed printed abstract the court will not look beyond the abstract, and unless error affirmatively appears therefrom the judgment below will be affirmed.

2. ———: ———. Where a cause brought to this court on error is submitted under section 1 of rule 2, the printed abstract must

include the petition in error, or an abstract of the assignments of error therein contained, and a failure in that regard will work an affirmance of the judgment.

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

G. W. Doane, W. G. Doane, and *J. J. Boucher,* for plaintiff in error.

Lee Helsley and *George W. Shields,* for defendant in error.

Nelson H. Tunnicliff, Elmer E. Thomas, and *James P. English,* for heirs of Isabella O'Neill, deceased.

NORVAL, J.

This is an error proceeding to review the judgment of the district court of Douglas county. The cause was submitted to this court under section 1 of rule 2, providing, *inter alia,* for the submission of a cause at any time upon written stipulation of the parties on printed briefs, accompanied by, or containing, an agreed printed abstract of the record in the cause upon which the case is to be determined. The transcript of pleadings and proceedings as certified by the clerk of the court below only has been printed, which the parties stipulated is a true and correct printed abstract of the record in the cause. Neither the assignments of error nor an abstract thereof has been printed, which is a non-compliance with said section of the rule. The rule contemplates and requires more than the printing of an agreed abstract of the transcript lodged in this court. There must be printed an agreed abstract of the record, which means the record in this court, and, in a case brought here for review on error, includes the petition in error. Such pleading is an essential part of the record. It is well settled by repeated adjudications that where a cause is submitted under said section of rule 2 the court will not look beyond the abstract; that is,

the abstract must be so complete in itself as to require no examination of the record to determine the questions sought to be presented. (*Closson v. Roman*, 50 Neb. 323; *North Platte Water-Works Co. v. City of North Platte*, 50 Neb. 853; *Home Fire Ins. Co. v. Skoumal*, 51 Neb. 655; *Wheeler v. Parker*, 51 Neb. 847; *Shewell v. City of Nebraska City*, 52 Neb. 138; *Zink v. Westervelt*, 52 Neb. 90; *Grand Lodge A. O. U. W. v. Higgins*, 55 Neb. 741.) It logically follows from the foregoing cases that we cannot examine the petition in error, and as neither it nor an abstract of the assignments of error therein contained has been printed, no question is presented for review. The judgment is accordingly

AFFIRMED.

MEYER, BANNERMAN & COMPANY V. WILLIAM G. KEEFER ET AL.

FILED MARCH 8, 1899. No. 8768.

Attachment of Mortgaged Chattels: VALIDITY: PARTIES. A mortgagee of chattels upon which an order of attachment has been levied cannot question the existence of the grounds for the issuance of the writ. To the attachment debtor alone belongs that right.

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

John P. Maule, for plaintiffs in error.

A. N. Sullivan, contra.

NORVAL, J.

Meyer, Bannerman & Co. commenced an action in the county court of Cass county, aided by attachment, to recover from William G. Keefer the sum of $817.83 for goods alleged to have been sold and delivered. The affi-

davit for attachment sets forth several of the statutory grounds for the issuance of the writ, a proper bond was filed by the plaintiffs, an order of attachment was issued, and property of the defendant was seized thereunder. Subsequently he filed a motion to dissolve the attachment for the reason the allegations contained in the affidavit for attachment are untrue, and because said affidavit is defective and deficient, in that it omitted to state any specific act upon which the charges are based. This motion was heard and overruled by the court. Subsequently the First National Bank of Plattsmouth and Nancy J. Keefer were permitted to intervene in the cause and, as mortgagees in possession of the property when the writ was levied, they moved to dissolve the attachment for the reason that the averments in the affidavit upon which the attachment was sued were untrue. This motion was sustained by the county court, the attachment dissolved, and the attached property was ordered to be restored to the bank and Nancy J. Keefer. The plaintiffs prosecuted a petition in error to the district court, where the action of the county court was affirmed, and by appropriate proceeding they bring the record here for review.

It is argued that the county court erred in allowing the bank and Nancy J. Keefer to intervene. In our view it is unnecessary to consider this question or venture an opinion thereon. It is obvious that they had no right to move for a dissolution of the attachment, and the sustaining of their motion was clearly erroneous. (*Rudolf v. McDonald*, 6 Neb. 163; *Deere v. Eagle Mfg. Co.*, 49 Neb. 385; *Ward v. Howard*, 12 O. St. 158; *First Nat. Bank of Madison v. Greenwood*, 79 Wis. 269; 1 Shinn, Attachment & Garnishment sec. 350.) The debtor alone had the right to assail the attachment on the ground that the affidavit on which the writ issued was untrue. The interveners might have replevied the property or sued for the conversion thereof, but they cannot be heard to question the existence of plaintiffs' alleged grounds for attach-

ment. The judgment of the district court affirming the order of the county court dissolving the attachment is reversed and the attachment is reinstated.

REVERSED.

GEORGE V. BROWN, APPELLEE, V. MARY A. JOHNSON ET AL., APPELLEES, AND CLARK & LEONARD INVESTMENT COMPANY, APPELLANT.

FILED MARCH 8, 1899. No. 8767.

1. **Review:** RULING ON MOTION: TRANSCRIPT. The appellate court cannot consider a ruling made by the court below on a motion, where such motion is not included in the transcript.
2. **Mortgage Foreclosures:** DECREE: DEFICIENCY JUDGMENT. In a suit to foreclose a real estate mortgage the failure of the court in rendering its decree of foreclosure to determine the issue tendered as to the liability of one of the defendants for a deficiency judgment does render the decree interlocutory, or erroneous, or invalidate the sale made thereunder.
3. ———: ———: ———. The liability for a judgment in deficiency may be litigated after the coming in of the report of sale.

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

S. L. Geisthardt, for appellant.

Abbott, Selleck & Lane, contra.

NORVAL, J.

This is an appeal by the Clark & Leonard Investment Company from an order confirming the sale of real estate made under a decree of foreclosure. The suit was instituted by George V. Brown to foreclose a real estate mortgage executed by Mary A. Johnson and Peter I. Johnson to the Clark & Leonard Investment Company to secure the payment of $700 and interest, and by the mortgagee assigned to plaintiff. The Johnsons, John H. McClay,

Hiram D. Upton, and the mortgagee were made defendants. The issue tendered to the investment company by the petition of plaintiff was based upon the alleged contract of guaranty by it of the payment and collection of the mortgage debt. The prayer of the petition included a demand for a deficiency judgment against the mortgagee and the Johnsons. On November 9, 1895, the investment company filed a motion for security for costs on the ground that plaintiff was a non-resident of the state. Separate demurrers were interposed to the petition by McClay and the Johnsons, which the court overruled on December 16, 1895. Two days later, and while said motion for security for costs was on file and undetermined, the defendants were adjudged in default and a decree of foreclosure was entered for the amount found due, and it was further adjudged that the investment company was liable to the plaintiff for whatever deficiency might exist after the sale of the mortgaged premises. On February 5, 1896, an order of sale was issued on the decree, and on the same day the investment company moved for a vacation of said decree, because the same was irregularly and prematurely entered upon the pretended default of said moving defendant while in fact it was not in default, and the motion for security for costs was pending and undetermined and before the cause stood for trial. Upon the hearing of this motion the decree was vacated and set aside, so far as the same affected the investment company only, and an application to recall the order of sale herein was denied. The property was sold by the sheriff under the decree, and the investment company moved the vacation of the sale for the following reasons: (1.) The court erred in overruling the motion of the defendant to vacate the decree. (2.) The court erred in denying the motion to recall the order of sale. (3.) The decree as modified by the court did not settle all the issues in the case. (4.) The court had no jurisdiction to sell the property under the decree. (5.) The decree was prematurely entered without the knowledge

or consent of the investment company. These objections were overruled, and the sale was approved and confirmed. It is from this order that the present appeal is prosecuted.

The first ground of the motion is not well taken, since the record shows beyond dispute that the decree of foreclosure was vacated as to the investment company for the reason assigned in the fifth objection to the confirmation of the sale, namely, that the decree was prematurely entered against it. The journal entry of the proceedings below recites that the court declined to sustain the application to recall the order of sale; but the second objection to the sale relating to that matter cannot be considered for the obvious reason no copy of the application or motion is contained in the transcript filed in this court. (*Goldsmith v. Wix*, 43 Neb. 573; *Ball v. Nelson*, 45 Neb. 205; *Lewis Investment Co. v. Boyd*, 48 Neb. 604.) Although the decree as modified did not determine all the issues involved, it did adjudicate and pass upon every issue raised as to all the defendants other than the investment company, and as to it, all matters save and except as to its liability for any deficiency remaining after the sale of the mortgaged property, and possibly the right of redemption, the determination of which questions could in no manner, as to the other defendants, affect the validity of the decree or the order of the sale of the premises to satisfy the mortgage debt. The litigation of the liability for a deficiency could be as appropriately and satisfactorily carried on, and the question adjudicated, after the sale, as prior to the rendition of the decree. The usual and better practice is not to determine the liability of a defendant in a foreclosure for a deficiency judgment until after the report of the sale, when, for the first time, it can be definitely ascertained that a deficiency actually exists. The contention is not well founded that the effect of the order of modification was to leave the previous decree of foreclosure an interlocutory order upon which no valid sale could be made. The sole effect of the sub-

sequent order, and it in express terms so provides, was to vacate the decree as to the investment company alone. The other defendants were not interested or concerned in the questions tendered it; therefore, as to the principal defendants, the original decree remained intact and was final and enforceable, and not interlocutory merely. The plaintiff might have omitted to make the investment company a party defendant, or dismiss the suit as to it, and in neither event could it be successfully asserted that the decree was not final and conclusive as to the other parties. The validity of the decree, or its finality as to them, is not affected by the fact that the issue or issues tendered to the investment company remain undetermined. It had no right to have the same litigated and adjudicated before a decree of foreclosure could be entered in the case. No rights of the investment company have been determined, taken away, or injuriously affected by the decree as modified. The order confirming the sale must be

AFFIRMED.

GEORGE KNIGHTS V. STATE OF NEBRASKA.

FILED MARCH 8, 1899. No. 10561.

1. **Criminal Law**: INSTRUCTIONS: ASSUMING FACTS. In the trial of a criminal case the court is not ordinarily justified in assuming the existence of any material fact put in issue by the plea of not guilty; but there is not an assumption of any fact in an instruction plainly professing to be a mere statement of the material averments of the information.

2. ———: ———: INSANITY: BURDEN OF PROOF. In a criminal prosecution it is reversible error to instruct the jury upon the question of insanity that the burden of proof shifts from the prisoner to the state during the progress of the trial.

3. ———: ———: ———. But the court in its charge may properly say that when the presumption of sanity encounters opposing proof the burden is upon the state to satisfy the jury, by evidence beyond a reasonable doubt, that the accused was sane at the time he committed the alleged criminal act.

4. ———: ———: ———. One suffering under a defect of reason to such an extent that he was incapable of distinguishing between right and wrong with respect to a particular act is not amenable to the laws against crime for having committed such act.

5. ———: ———: ———. And it is prejudicially erroneous to inform the jury in a criminal case, where the defense is insanity, that want of capacity on the part of the prisoner to understand the nature of the act in question, at the time of its commission, is necessary to render him irresponsible.

6. ———: COUNSEL FOR STATE. Whether the court might properly permit private counsel in a criminal case to make an argument to the jury on behalf of the state when such counsel did not appear in his professional character until the evidence was closed, *quære.*

7. ———: EVIDENCE OF OWNERSHIP. It is competent to prove the ownership of a store building by parol evidence when it does not appear that such building is real estate.

8. ———: EVIDENCE OF OTHER CRIMES. Where a person is charged with the commission of a specific crime, testimony may be received of other similar acts, committed about the same time, for the purpose only of establishing the criminal intent of the accused.

9. **Arson:** INSURANCE: EVIDENCE OF CONTRACT. On the trial of a person informed against for burning property with intent to prejudice an insurance company, where the accused refuses to produce the policies of insurance, secondary evidence is competent to show the contents of the policies, that they were made out and delivered by an authorized agent of the companies, and that defendant was claiming indemnity under them.

ERROR to the district court for Washington county. Tried below before POWELL, J. *Reversed.*

Duffie & Van Dusen and *Jesse T. Davis,* for plaintiff in error.

C. J. Smyth, Attorney General, and *W. D. Oldham, Deputy Attorney General,* for the state.

SULLIVAN, J.

In the district court of Washington county George Knights was convicted of the crime of arson and sentenced to imprisonment in the penitentiary for a term of twelve years. The first count of the information

charged the burning of an insured stock of merchandise owned by the defendant, and the second charged the burning of a leased store building in which the property was kept. The jury found in favor of the state upon both counts.

Exception was taken to the fifth instruction on the theory that it assumes that the merchandise in question was insured and that the insurer was a corporation. This paragraph of the charge plainly professes to be a statement of the facts necessary to be established to warrant a conviction; and it seems to us that neither a casual nor critical reading of it could possibly lead a person of average intelligence to suppose that the existence of any essential fact was assumed by the court. Doubtless a more perspicuous presentation of the issues might have been made; but the thought of the instruction is evident and the language sufficiently apt.

In relation to the defense of insanity, upon which the prisoner relied, the court said to the jury in the twelfth instruction: "You are instructed that the law presumes that every person is sane, and it is not necessary for the state to introduce evidence of sanity in the first instance. When, however, any evidence has been introduced tending to prove insanity of an accused, the burden is then upon the state to establish the fact of the accused's sanity, the same as any other material fact to be established by the state to warrant a conviction. If the testimony introduced in this case tending to prove that the defendant was insane at the time of the alleged burning described in the information raises in your mind a reasonable doubt of his sanity, at the time of the alleged burning, then your verdict should be acquittal." It is contended that this instruction gave the jury to understand that the burden of establishing his insanity rested upon the defendant up to a certain point in the trial, and was then shifted from him to the state. *Snider v. State*, 56 Neb. 309, is cited as authority for this contention. Whatever may be said of the meaning of the instruction con-

sidered in the *Snider Case*, there can be no room to doubt that the court, in the instruction now under consideration, stated the correct doctrine in unmistakable terms. In this case the jury were informed that the law presumes sanity, but that when the defendant produced evidence tending to prove insanity, the state was charged with a burden which did not previously rest upon it. The court did not say, nor imply, that the burden of proving insanity was ever on the accused, or that there was a shifting of the burden from him to the state. The substance of what the court did say was, that when the legal presumption of sanity encountered opposing evidence, the law then, for the first time, imposed on the state the *onus* of showing the prisoner's sanity by the proper measure of proof.

The thirteenth instruction was also excepted to, and its correctness is now vigorously challenged. It is as follows: "You are instructed that insanity which renders a person irresponsible for an act is such a diseased condition of the mind as renders the person incapable of understanding the nature of such act and incapable of distinguishing between right and wrong with respect to such act. So in this case, if the evidence introduced tending to show that the defendant was at the time of the fire incapable of understanding and knowing what he was doing, and that at such time he could not distinguish between right and wrong, raises in your mind a reasonable doubt of the defendant's sanity at the time of such fire, then you should acquit him." By this instruction the jury were plainly told that they might acquit the defendant, on the ground of insanity, only in case (1) he was at the time of the fire incapable of understanding the nature of his act, and (2) that he was at the same time incapable of distinguishing between right and wrong with respect to that act. Such is not the law, and the giving of this instruction was an error fatal to the conviction. Ordinarily, insane persons comprehend the nature of their acts. When they take life or destroy

property they usually know what they are doing, and often choose means singularly fitted to accomplish the end in view. The jury in this case may have believed that the defendant applied a lighted match to the property in question understanding well that combustion would follow and that the store building and its contents would be reduced to ashes, and they may have refused, for that reason, to acquit him, although reasonably doubting his capacity to distinguish between right and wrong with respect to the act. In the answer of the English judges to the questions propounded by the House of Lords, as a result of the acquittal of McNaghten for the killing of Drummond (*McNaghten's Case*, 10 Cl. & Fin. [Eng.] 200), Chief Justice Tindal, speaking for himself and his associates, among other things, said that there is no criminal responsibility where, "at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong." The rule thus announced has been, since 1843, the unquestioned law in England, and it is now the generally accepted doctrine of the American courts. It was recognized by this court in *Wright v. People*, 4 Neb. 407, and has been since frequently approved. (*Hawe v. State*, 11 Neb. 537; *Hart v. State*, 14 Neb. 572; *Thurman v. State*, 32 Neb. 224.) In *Hawe v. State* it was said: "And where an individual lacks the mental capacity to distinguish right from wrong, in reference to the particular act complained of, the law will not hold him responsible."

Another assignment of error earnestly pressed upon our attention relates to the action of the court in permitting W. S. Cook, Esq., a member of the Washington county bar, to make the opening argument for the state. We gather from the record that Messrs. Frick & Dolezal had been appointed by the court at a former term to assist the county attorney in conducting the prosecution;

that Mr. Dolezal was present at the trial and an active participant therein; that Mr. Cook, who was the local agent of the companies which had insured the property in question, was a witness for the state and sat during the trial with the county attorney and his assistant, advising and consulting with them. Before the evidence was closed he did nothing, so far as we can learn, to indicate that he was connected with the case in the character of an attorney for the state. When his right to make an argument was challenged he made it appear that he had recently formed a law partnership with Mr. Dolezal, whereupon the defendant's objection was overruled and an order entered substituting the new firm for the old. As the question argued cannot arise when the cause is again tried, we need not decide it; but it will not be out of place to remark here that we seriously doubt the propriety of the court's action. The statute provides that the county attorney, in the trial of any person charged with a felony, may, under the direction of the court, procure such assistance "as he may deem necessary for the trial." This would seem to contemplate the selection and appointment of assistant counsel before the commencement of the trial. The spirit and policy of our laws recognize the right of a defendant in a criminal case to be informed in advance not only of the nature of the accusation, but also of the forces that are to be marshaled against him. In public prosecutions fairness is a cardinal virtue which the representatives of the state should not be permitted to ignore. A defendant should not be forced to submit the question of his guilt or innocence to a jury organized with special reference to their capacity or inclination to receive and assimilate the arguments of private counsel called from ambush after they have been chosen. Sometimes a peremptory challenge may be used most effectively to exclude from the jury-box a friend, relative, or client of one of the attorneys for the state. We are entirely satisfied that the failure of Mr. Cook to appear in the character of an attorney in the earlier stages of the

case was not intended to be tactical; but it may, nevertheless, have given the state an unfair advantage over the defendant. In selecting a jury for the trial of a criminal case a defendant usually makes his adjustments with reference to the relation of individual jurors to opposing counsel, so far as he may know what they are. This is his right. The peremptory challenges are his to use for his own advantage as reason or instinct may suggest.

We pass now to the testimony of Mr. Unland touching the ownership of the store building described in the information. It is contended on behalf of the defendant that the court received parol evidence tending to prove the title to real property, and that its action in this regard was prejudicial error. It is, of course, true that every fact must be established by the best evidence attainable, and that secondary evidence is not admissible until some legal excuse has been given for failing to produce the original. But here the ownership of land was not in issue, and there was no proof whatever that the building in question was real estate. Mr. Unland testified that he built it and that it was his property. To hold that the ruling of the court was erroneous we would have to presume that building was realty. This we cannot do.

The next error assigned relates to rulings of the court in admitting evidence tending to show that on the night the Unland building was burned the defendant set out other fires in adjacent buildings. The testimony was properly received, not for the purpose of showing the commission of distinct crimes, but to establish a criminal design on the part of the defendant. The state was not only required to show that the defendant ignited the Unland store, but it was required to go further and satisfy the jury that the act was intentional and not an accident. The effect of the evidence was properly limited by an instruction, and its submission to the jury was not legally prejudicial. (*State v. Raymond*, 53 N. J. Law 260; *Commonwealth v. McCarthy*, 119 Mass. 354; *Pierson v. People*, 79 N. Y. 424; Rice, Criminal Evidence 453.)

Other assignments of error have reference to the means employed to prove that the stock of merchandise and store building mentioned in the information were insured at the time of the fire. We think the evidence introduced was the best obtainable, and that is all the law requires. The policies were in possession of the defendant, and he refused to produce them after being notified to do so. It was then competent to show their contents, that they were made out and delivered by an authorized agent of the companies, and that the defendant was claiming indemnity under them. (*State v. Mayberry*, 48 Me. 218; *McGinnis v. State*, 24 Ind. 500; *State v. Gurnee*, 14 Kan. 111; Rice, Criminal Evidence 46.) The petition in error contains many other assignments, but as they have not been discussed by counsel they will not be considered. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CATE & FORISTALL V. FRANK HUTCHINSON.

FILED MARCH 8, 1899. No. 8785.

1. **Pleading:** INCONSISTENT DEFENSES. An answer in an action on an account for services which contains a general denial of the essential facts of the petition and avers that the charges in the itemized account are unreasonable and unjust does not present inconsistent defenses.

2. ———: ———. A defendant may plead as many grounds of defense as he may have, provided they are not so repugnant that if one be true another must be false.

3. ———: AMENDMENTS. Prejudicial error cannot be predicated on an order allowing a pleading to be amended when the amendment does not change the issues, nor affect the *quantum* of proof as to any material fact.

4. **Physicians:** ACTION FOR SERVICES: EXPERT EVIDENCE. In an action to recover for services rendered it is error to exclude the testimony of a witness who has shown himself qualified and competent to testify as to the character and value of the services.

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

W. A. Bergstresser and *George B. France,* for plaintiffs in error.

Cole & Brown, contra.

SULLIVAN, J.

Cate & Foristall are licensed physicians and surgeons engaged in the practice of their profession at Nelson, in this state. They brought this action against the defendant to recover the sum of $176.04, claimed to be a balance due on account for medical services rendered the Hutchinson family in the year 1894. The first defense pleaded in the answer was in substance a general denial; the second that many of the visits included in the itemized account were gracious acts of friendship and not made in the performance of a professional duty; the third alleged that the charges made in the plaintiffs' account were "unreasonable, unjust, exorbitant, and far in excess of the amount charged by physicians in good standing in the community for like services." The second and third defenses were assailed by motion and stricken out before the trial. A trial of the cause to a jury in the district court resulted in a verdict and judgment against Hutchinson for $1. The plaintiffs being dissatisfied with the amount of the recovery bring the record here for review.

It appears from the bill of exceptions that after the plaintiffs had submitted their evidence in chief, and while the defendant's third witness was on the stand, the court made an order restoring to the answer the third defense which had been previously stricken therefrom. Upon this action of the court error is assigned. It is contended that the first and third defenses are inconsistent and that, under the issues as they stood when the trial was commenced, the value of the plaintiffs' services

was not in dispute. We are not able to perceive that a general denial of every essential fact in the petition is inconsistent with an averment that the charges in the itemized account were unreasonable and unjust. Both statements may have been true. Under the Code system of pleading a defendant may rely on as many defenses as he may have. The only limitation upon this rule is the one resulting from the requirement in regard to verification, which implies that the defenses shall not be so repugnant that if one be true another must be false. (*Blodgett v. McMurtry*, 39 Neb. 210; *Home Fire Ins. Co. v. Decker*, 55 Neb. 346.) But the question of inconsistent defenses does not properly arise in this case. Neither the order eliminating, nor the one restoring, the third paragraph of the answer changed or affected the issues in any respect. The plaintiffs alleged that they had rendered professional services to the defendant's family and that the charges therefor were reasonable and just. The general denial imposed upon them the necessity of establishing these allegations by competent proof. The services of a physician are supposed to be valuable, and the law implies a promise on the part of the one for whom they were rendered to pay a reasonable compensation therefor. (*Shelton v. Johnson*, 40 Ia. 84; *Garrey v. Stadler*, 67 Wis. 512; *Tucker v. Mayor*, 4 Nev. 20; *Starin v. Mayor*, 106 N. Y. 82; *Vilas v. Downer*, 21 Vt. 419.) What is reasonable is, however, a question to be determined by the jury. The measure of the recovery will depend upon the *quantum* and character of the evidence. When the plaintiff produces evidence to prove the value of his services the defendant may, of course, under a general denial, show that the services were valueless, or of less value than that claimed.

Another ground upon which the plaintiffs insist they are entitled to a reversal of the judgment is the exclusion of the following questions and answers contained in the deposition of Dr. Ruth Wood:

Q. 36. Now, referring to the condition of the patient

at the time of the operation, what would you say as to the prospects of the patient's recovering or dying, what were they?

A. I stated at the bedside that there were two chances to one that she might not live, and it would certainly be so if she was not well cared for.

Q. 37. Then the result would warrant you saying, in a professional sense, that the patient had been well cared for, would it or would it not, the sickness extending over May, June, and July?

A. It is impossible for any other physician to indicate what complications might have arisen during that length of time in any case. They become subacute and chronic in that length of time. Subacute cases need not be seen more than once in two or three days, neither in chronic cases oftener than that length time. A case of this kind must have become subacute and chronic, for an acute case could not have existed that long and live.

Q. 38. Assuming the fact then that the woman is well, you would say that she had had proper medical treatment, would you or would you not?

A. I have to reiterate what I have said before. I feel satisfied with the outcome that she lived.

Q. 39. You feel then that the result proved the wisdom of your judgment in advising or suggesting rather the employment of Dr. Cate in the case, do you?

A. Yes.

Q. 40. State what is the fee for a visit to a patient in a town or city.

A. Ordinarily $2 in all cities of first and second class. I do not know about others. I have never lived in a small place.

Q. 41. In the case of Mrs. Hutchinson, you would have charged full fee for each and every visit, would you, had you been the physician in attendance?

A. The answer is so contingent upon circumstances, and yet the question embracing the clause, 'if you had been the attending physician,' yes, I would have charged

for my visits. If I had thought it necessary to make a visit I would have charged for it.

Q. 42. Now, do you know whether they had a competent nurse in charge of Mrs. Hutchinson?

A. No, I do not.

No reason was given why the foregoing testimony was not submitted to the jury, but as it was offered before the third paragraph of the answer was restored, it seems probable that it was withheld on the assumption that the value of the plaintiffs' services was not in issue. Dr. Woods had performed a surgical operation on Mrs. Hutchinson, was familiar with her ailment, and so peculiarly qualified to give testimony bearing upon the reasonableness of Dr. Cate's professional charges. The skill of the physician, the difficulty of the case, the responsibility involved, and the measure of success are elements which cannot be ignored in actions of this character. We think that this portion of the deposition should have gone to the jury and that its exclusion was prejudicial error. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY V. GEORGE W. JOHNSTON.

FILED MARCH 8, 1899. No. 8786.

1. **Delivery of Property to Carrier:** EVIDENCE: BILL OF LADING. The bill of lading and way-bill made by the authorized agent of a common carrier of freight are competent evidence tending to prove that the articles therein described were delivered to such carrier for shipment.

2. **Findings of Jury:** CONFLICTING EVIDENCE: REVIEW. The conclusion deduced by a jury from fairly conflicting evidence will not be set aside where there is nothing to indicate that such conclusion was the result of rash, partial, or intemperate action.

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

Montgomery & Hall, for plaintiff in error.

Frank T. Ransom, contra.

SULLIVAN, J.

This action was brought to recover the value of one easy chair which it is claimed was delivered by the plaintiff George W. Johnston to the defendant the Chicago, Milwaukee & St. Paul Railway Company for transportation from Chicago to Omaha and lost in transit. The defense was a general denial. A jury impaneled to try the cause found for the plaintiff and judgment was rendered on the verdict.

The errors assigned are all grounded upon the proposition that the verdict is not sustained by sufficient competent evidence. It appears from the bill of exceptions that in February, 1894, Johnston, who was then residing in Omaha, directed his agent at Detroit to ship to him certain household furniture which he had previously stored in the latter city. The shipment was made via the Michigan Central Railroad Company to Chicago, and thence to Omaha over the defendant's line. The bill of lading issued by the initial carrier enumerates the articles received by it and, among other things, acknowledges the receipt of four rockers and one easy chair. The defendant's clerk at the transfer house in Chicago checked over the list of articles found on the way-bill of the Michigan Central Company and noted each item on the expense bill rendered to the defendant. Included in the list so checked and noted were four rockers and one easy chair. These articles are also described in the way-bill of freight forwarded from the defendant's transfer house in Chicago. The chair in question is described as a large square, upholstered chair with patent spring

rockers on a square base. John O'Connor, a witness for the defendant, testified that he checked the goods received by the defendant from the Michigan company and that the chair in controversy was not included in the consignment. Similar testimony was given by William McKeague, who checked the goods at Omaha from the car to the depot. Mr. Johnston, as a witness in his own behalf, testified that among the articles of furniture left by him in store at Detroit were the easy chair and three or four rocking chairs. Counsel for the company contend that the employés of the defendant applied the description "one easy chair," as contained in the bill of lading and way-bills, to one of the rockers included in the shipment, and that these documents are, therefore, without evidential value. This contention is bottomed on a theory and not upon any established fact. It is evident that the consignment contained some article of furniture not properly classified as a rocking chair. There is no proof that any such article was ever delivered to the consignee. There is evidence that the plaintiff had in store at Detroit, and that he delivered to the Michigan carrier for shipment, four rockers and one easy chair. From the description in the defendant's way-bill and from the notation on the expense bill rendered to it at Chicago it appears that those articles came into its possession; but there is no evidence that four rockers and one easy chair were delivered to the plaintiff at Omaha. But conceding that the easy chair should be regarded as a rocker under different designation, the jury would have been warranted, nevertheless, in finding that the defendant received for shipment one rocker which it did not deliver. The verdict is supported by sufficient evidence and the judgment is

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. SOPHIA OTTILLIA O'NEILL.

FILED MARCH 8, 1899. No. 8769.

1. **Eminent Domain:** RAILROADS: ADJACENT LANDOWNERS: DAMAGES. When a railroad has been constructed and put in operation, an adjacent landowner may sue at once for consequential damages to his property and recover in the action full compensation for all injuries which he has sustained, or which will ever afterwards accrue, from a prudent and careful operation of the road.
2. ———: ———: ———: ———: TIME TO SUE. But such action need not be commenced immediately. A party may wait, within the period of limitation, until the extent and character of the injury to his property has been ascertained by experience and made susceptible of absolute proof.
3. ———: MEASURE OF DAMAGES. Where property has been taken or damaged for a public use, the owner is entitled to recover as compensation the difference between the value of such property immediately before and immediately after the completion of the improvement from which the injury results.
4. ———: ———. The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property.
5. **Striking Out Evidence Erroneously Admitted.** Where evidence improperly received is afterwards stricken out and expressly withdrawn from the consideration of the jury, the error involved in its reception is ordinarily cured.
6. **Pleading:** SEPARATE CAUSES OF ACTION. Where distinct causes of action are blended in the petition, the only appropriate remedy is a motion for an order requiring a separate statement and designation.
7. **Review:** QUESTIONS NOT RAISED BELOW. It is a general rule, to which the record in this case presents no exception, that objections not urged in the trial court will not be considered here.

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

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

W. J. Bryan, T. S. Allen, S. B. Pound, and *Roscoe Pound, contra.*

SULLIVAN, J.

In 1887 the plaintiff Sophia Ottillia O'Neill bought lot 8, in block 14, of Kinney's O Street Addition to the city of Lincoln, and soon afterwards built thereon a two-story dwelling-house, which she occupies as a family residence. The house fronts on P street, which runs east and west through the city and seems to have been at one time a much traveled thoroughfare. In 1892 the defendant the Chicago, Rock Island & Pacific Railway Company constructed and put in operation a line of railroad across P street and about 225 feet west of plaintiff's property. Shortly after the track was laid a depot was constructed on the right of way just south of P street, rendering the same impassable. This action was brought to recover damages to the premises above described occasioned by the construction and operation of the defendant's road and by the obstruction of P street and the deflection of public travel therefrom. The trial of the action to a jury resulted in a verdict in favor of the plaintiff.

The defendant complains of the admission of testimony in regard to the specific annoyances and inconveniences to which the plaintiff had been subjected in the use and occupancy of her property. We have carefully read this evidence and think there was no error in its reception. It is undoubtedly true that an action might have been brought and tried as soon as the road was put in operation, and that in such action all the damages which the plaintiff had sustained or ever would sustain from a careful and prudent operation of the road would have been then recovered. But it is also true that she was not required to sue immediately. It was her privilege to wait until the extent and character of the permanent injury to her property had been ascertained by experience and made susceptible of absolute proof. (*Penn*

Mutual Life Ins. Co. v. Heiss, 141 Ill. 35.) The constitution (art. 1, sec. 21) provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." While injuries of the character here in question are, within the meaning of the provision quoted, injuries inflicted for a public use, they are not to be ascertained by proceedings in condemnation, but by an action brought for that purpose within the time fixed by the statute of limitations. (*Gottschalk v. Chicago, B. & Q. R. Co.*, 14 Neb. 550; *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb. 123; *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240; *Omaha & N. P. R. Co. v. Janecek*, 30 Neb. 276; *Rigney v. City of Chicago*, 102 Ill. 64; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203.) In such an action the measure of recovery is the difference between the value of the land before and its value after the road was constructed and put in operation. To assist the jury in reaching a conclusion upon this question they may take into account a variety of circumstances.

In *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb. 90, it is said in the fourth point of the syllabus: "That in ascertaining such depreciation the cuts or fills made in the street in front of the property, the proximity of the track to the front of the lot, the danger of fire from passing trains, the probability of damage to the house on the lot from jars caused by passing cars and engines, the inconvenience to the occupants of the property arising from the presence and proper and ordinary use of the railway track for all time, the annoyance to such occupants from smoke, cinders, and dust from passing trains and engines, the annoyance caused by the roar of trains, the sounding of whistles and the ringing of bells, and every other fact and circumstance that would have influenced the market value of the property in the mind of a good-faith intending purchaser thereof, would have all been proper elements for consideration in determining the damages to plaintiff's property." Such was the character of the evidence offered by the plaintiff and submitted

to the jury in this case. Its purpose and tendency was to show the extent to which the plaintiff's property had been injured by the operation of the road, and by the permanent obstruction of P street. The court, in a charge which is an accurate and admirable presentation of the law upon every issue in the case, directed the jury that the plaintiff's damage was the depreciation in value of the property in question caused by the construction and operation of defendant's road. It may be that evidence in regard to the bursting of the plumbing and the quickened action of the water-meter in plaintiff's house was improperly received, but if so, no prejudice resulted, for it was afterward withdrawn and the jury instructed to disregard it.

It is contended that the evidence in relation to the obstruction of P street should not have been received, because that was an act done after the construction of the road and, therefore, constituted a separate cause of action. Conceding that the construction of the depot platform should be regarded as an independent injury, it does not follow that the judgment should be reversed.

The defendant may have had reason to apply for an order requiring the plaintiff to separately state and number her causes of action; but no such motion was made, and it is now too late to take advantage of what was at most a mere defect in the form of the petition. Whether the closing of the street be considered as a substantive ground of action, or as a mere evidential fact, the testimony in question was properly admitted.

It is insisted that the witnesses for the plaintiff in estimating the damages were not limited to damages occasioned by the company's acts, and may, in giving their answers, have taken into account depreciation from other causes. Invariably the questions were directed to the value immediately before and immediately after the road was constructed. The witnesses could not have misunderstood them. Besides, the objection now urged was not made during the trial. In view of the evidence the

verdict seems reasonable and just. There appears to be no material error in the record and the judgment is therefore

AFFIRMED.

AUGUST JOHNSON, APPELLEE, V. PAUL KLEIN, APPELLANT.

FILED MARCH 8, 1899. No. 8750.

1. **Review Without Bill of Exceptions.** Where a bill of exceptions has been quashed the evidence cannot be considered by this court.
2. ———. Where questions relied on for a reversal of the judgment cannot be determined without reviewing the evidence, and the bill of exceptions has been quashed, the judgment will be affirmed.

APPEAL from the district court of Saunders county. Heard below before SEDGWICK, J. *Affirmed.*

V. L. Hawthorne, for appellant.

J. O. Detweiler, contra.

SULLIVAN, J.

This action was brought by August Johnson against Paul Klein in the district court of Saunders county to foreclose a purchase-money mortgage. The defendant filed an answer denying that the plaintiff was entitled to maintain the action and denying that any of the conditions of the mortgage had been broken. The plaintiff filed a reply, and the issues joined having been tried to the court, resulted in a decree of foreclosure. The questions upon which the appellant relies for a reversal of the judgment rendered against him cannot be determined without reviewing the evidence taken at the trial. The bill of exceptions having been heretofore quashed on the motion of Johnson, the evidence is not legally before us and cannot be considered. The judgment must therefore be

AFFIRMED.

STATE OF NEBRASKA, EX REL. HERMAN E. PANKONIN ET AL., V. COUNTY COMMISSIONERS OF CASS COUNTY.

FILED MARCH 8, 1899. No. 10447.

1. **Streams: BOUNDARIES: BRIDGES: EXPENSE OF REPAIRS: STARE DECISIS.** The adjudication in *Dutton v. State*, 42 Neb. 804, *held* to determine this case.

2. ———: ———: ———: ———. Ordinarily, where a stream of water constitutes the boundary line between two political subdivisions, each subdivision holds to the middle of the stream and accordingly is liable for bridge repairs, as laid down in *Dutton v. State*, 42 Neb. 804, irrespective of the volume of flowage being nearer one bank than the other.

ERROR from the district court of Cass county. Tried below before RAMSEY, J. *Affirmed.*

Allen Beeson and *J. L. Root*, for plaintiff in error.

A. J. Graves, contra.

RYAN, C.

Certain taxpayers of Cass county sought in the district court of Cass county by mandamus to compel the commissioners of said county to repair the north half of the bridge at Louisville across the Platte river, which forms the boundary line between Cass and Sarpy counties. On issues duly joined it was held by the said district court that the liability of each of said counties had been determined and settled in *Dutton v. State*, 42 Neb. 804, and the writ was denied. In this we think the trial court held correctly, and shall therefore merely refer to the opinion in the case just cited for a fuller statement of facts than above given, if a fuller statement is desired.

It is now insisted, however, that the ruling in the case just cited should be modified because the waters of the Platte river opposite Louisville flow nearer the northern than the southern bank of said stream. There has

been cited no adjudication in support of this contention, and opposed to it are the following cases: *Dunlieth & Dubuque Bridge Co. v. County of Dubuque*, 55 Ia. 558; *Rowe v. Smith*, 51 Conn. 266; *In re Spier*, 3 N. Y. Supp. 438; *Flynn v. City of Boston*, 26 N. E. Rep. [Mass.] 868. We have been able to find no case holding differently from those above cited, and *Flynn v. City of Boston, supra*, is fortified by a large number of adjudications. We therefore assume that in this case the ordinary rule applies, that where a stream of water constitutes the boundary line between two political subdivisions of a state, each holds to the middle of the channel,—that is, to a line parallel to and midway between the banks,—and accordingly, under the authority of *Dutton v. State, supra*, each is liable for bridge repairs. The judgment of the district court is

AFFIRMED.

SABINA S. WAKELEY, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

FILED MARCH 8, 1899. NO. 8799.

1. **Municipal Corporations:** TAXATION: EQUALIZATION: NOTICE. Notice of the sitting of the city council as a board of equalization under section 21, chapter 13, page 121, Session Laws 1889, by publication for at least six days prior thereto is an indispensable prerequisite to legal action.
2. ———: PAVEMENTS: VOID ASSESSMENTS. The mere fact that an owner of adjacent property signs a petition for paving a street in a prescribed manner does not furnish grounds for the presumption that the petitioner assents to irregular or void proceedings of the city council in the performance of such duties as may devolve upon it after the pavement shall be completed.
3. ———: ———: ———: VOLUNTARY PAYMENTS. A void special assessment is not validated by the mere fact that payments thereon have been voluntarily made.

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

E. Wakeley and *A. C. Wakeley,* for appellant.

W. J. Connell, Lee S. Estelle, and *E. H. Scott, contra.*

RYAN, C.

Appellant was denied relief in the district court of Douglas county, wherein she sought a perpetual injunction against the collection of a special assessment upon lots 5 and 6, in block 12, in the city of Omaha. One side of lot 5 faces upon the paved street with respect to which the assessment was made, and the opposite side of lot 5 forms the line of separation between lots 5 and 6. At the time the equalization of assessment was made upon these lots, section 21, chapter 13, Session Laws 1889, was in force, and among its provisions were the following: "The city clerk shall complete the assessment roll for the city on or before the second Monday of October in each year, * * * and when such roll is completed, the council shall hold a session of not less than five days as a board of equalization, giving notice of said sitting for at least six days prior thereto, in three daily papers of the city, * * and in all cases before any special taxes that may be levied, except for constructing wood sidewalks, shall be finally levied, it shall be the duty of the council to sit as a board of equalization, for the purpose of equalizing any such proposed levy of special taxes or assessments, and correcting any error therein, giving notice of such sitting in the same manner as above provided in this section. * * * And thereupon such assessments and special taxes shall be finally made." It was proved on the trial that preceding the assessment and levy under consideration there was but one publication in one daily paper in the city of Omaha, two publications in another, and that probably there was not a third paper of daily issue in the city. The city council had therefore no jurisdiction to make the adjustment, levy, and assessment attempted. (*McGavock v. City of Omaha,* 40 Neb. 64; *Bellevue Improve-*

ment Co. v. Village of Bellevue, 39 Neb. 876; *Smith v. City of Omaha*, 49 Neb. 883; *Ives v. Irey*, 51 Neb. 136; *Hutchinson v. City of Omaha*, 52 Neb. 345; *Leavitt v. Bell*, 55 Neb. 57; *Medland v. Connell*, 57 Neb. 10.)

It is, however, urged that appellant should not be heard to allege the above-noted lack of jurisdiction, because of certain of her own acts. These were, first, that she signed the petition for the paving of the street. But this signing was before the pavement was put down and could have had no reference to a waiver of compliance with statutory requirements regulating the proceedings whereby the levy and assessment were to be made after final completion of the work. The other fact upon which appellee relies is that appellant paid without protest three of the ten annual installments into which the assessment was divided. The brief of appellee comments thus upon this branch of the case: "The plaintiff knew that this tax was a lien on her property; that it amounted in law to a judgment against herself and property. She proceeded to discharge the lien to pay that which amounted to a judgment, and all this with the certain knowledge of the steps necessary to be taken by the city council, and yet no complaint for five years." If this statement of the principle involved is correct, the analogy is destructive of appellee's argument. If a judgment had been rendered against Mrs. Wakeley in a case wherein she had never been served with a summons and had never appeared, would the mere fact that subsequent to the date of the so-called judgment she made one or more payments estop her to deny the validity of the judgment when by process of law it was attempted to collect the balance; and, if so, on what principle could the estoppel be founded? As to the payments actually made, she might, under some circumstances, be denied affirmative relief, but why should she be held concluded against asserting the invalidity of the balance of the judgment when payment thereof is sought to be coerced? The partial payments which prevent the running of the statute

of limitations are treated as acknowledgments of the continued validity of that which at one time was concededly valid, but that is no argument for treating as valid that which was always void. The case at bar is not strengthened by this illustration, which we think very apt. The payments were purely voluntary, and no fact has been pleaded or proved which suspends appellant's right at any time to discontinue her generosity. The judgment of the district court is reversed and the cause is remanded with instructions to enter a decree as to lots 5 and 6 aforesaid in conformity with the prayer of appellant's petition.

REVERSED AND REMANDED.

FIRST NATIONAL BANK OF GREENWOOD V. RAILSBACK BROTHERS & SPELTS.

FILED MARCH 8, 1899. No. 8784.

Action Against Bank for Failure to Honor Check: DAMAGES: EVIDENCE. Proof by the drawer of a check that when such check was presented the drawer had with the drawee subject to check a sufficient deposit wherewith to pay such check, and that, subsequently, the drawer was compelled to pay the amount of the check to the holder thereof because the drawee unwarrantedly refused payment thereof, is sufficient proof to sustain a judgment for damages to the amount of the payment so made by the drawer and such other damages as are alleged and proved.

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

A. N. Sullivan, for plaintiff in error.

Byron Clark and *C. A. Rawls, contra.*

RYAN, C.

This action was brought in the county court of Cass county by G. J. Railsback and others doing a grain busi-

ness at Greenwood as a partnership firm under the name and style of Railsback Bros. & Spelts. By appeal the case came into the district court of that county, wherein, upon a trial had without a jury, there was a finding and judgment in favor of the above described plaintiffs. On February 6, 1894, the firm of Railsback Bros. & Spelts was a depositor in the First National Bank of Greenwood, and on that day drew its check, payable to Sam Atkinson or order, for the sum of $480. This check was transferred by indorsement to A. C. Loder, by whom it was presented to the bank for payment, which was refused. Shortly afterward the bank was garnished as a supposed debtor of Atkinson, and upon its answer as such garnishee was required to pay the said sum of $480, which it did in the garnishment suit of Welton against Atkinson. Loder, after the bank had refused to pay the check, brought suit for the amount thereof against the firm of Railsback Bros. & Spelts, and a judgment having been recovered as prayed, said firm paid it, and brought this action for the amount of its said payment and for damages occasioned by the refusal of the bank to honor the check above referred to. The uncontradicted testimony of Loder was that he purchased the check from the payee, Atkinson, in the evening of the day of its issue. On the following morning he presented it for payment, which was refused by A. D. Welton, acting as teller for the bank, who testified that the reason for dishonoring this check was that, when presented, its drawer had on deposit but $125. He admitted, however, that before the presentation of this check there had been deposited by Railsback Bros. & Spelts two checks drawn by that firm on the Columbia National Bank of Lincoln, each of which was for $500; that he gave the firm credit for that amount and afterwards sent to it a deposit slip showing that amount had been placed to the credit of the firm. He further testified that he had been with the bank for four and one-half or five years and that during this time Railsback Bros. & Spelts always received credits for checks on the Columbia

National Bank as ordinary deposits in its business; that he had been to Plattsmouth the night previous to the date of the check and had procured the institution of a suit by his grandfather against Atkinson; that when the check was presented he was expecting the appearance of an officer to garnish the bank, and refused to cash the check because he meant to hold the money until service of the garnishment could be made, and took advantage of the fact of the deposit being in checks to treat them as though deposited for collection. The answer of the bank as garnishee was made by this witness, who said that it was the opinion of the officers of the bank that the transfer of the check by the payee to Loder was fraudulent. It is very evident from this and other evidence concerning this transaction that the district court was justified in concluding that there were sufficient funds of Railsback Bros. & Spelts to pay their check when it was presented, but that payment was refused under a false pretense merely that Mr. Welton might compel the application on his granfather's claim of the amount by the check required to be paid to Atkinson or his order. This course of dealing the bank resorted to at its peril. By the evidence it was satisfactorily shown that Loder was the holder of the check in good faith, and that he had compelled the drawer to pay it to him. There was a claim in the answer that the action of Loder against Railsback Bros. & Spelts was collusive, but we have found no evidence to support that claim. It was also pleaded in the answer that the bank had offered to defend against Loder's action, but that this offer was refused except upon unreasonable conditions. We find in the record a written offer to defend, which, it was testified, had been seasonably made to Railsback Bros. & Spelts, but we find no evidence of the refusal to permit a defense to be made, neither do we find an assent so unreasonably conditioned that it was tantamount to such a refusal. With reference to the notice above referred to the only evidence was that of the bookkeeper of the

bank, Mr. Welton, who testified that he served on Railsback Bros. & Spelts a written notice whereby the bank requested said firm's permission to control the case of Loder against the firm aforesaid by the selection of counsel and the calling of witnesses, and an offer to assume responsibility for results if its demand was complied with. Mr. Weston testified that he did not know of any acceptance of this proposition, but that the firm served a notice on him in the matter, in which notice there was a proposition to allow the bank to defend. At this point in his testimony there was an objection sustained that the notice being in writing, no oral evidence was admissible. The witness had not the notice with him and it was never produced. This testimony is not very satisfactory, but it discloses the facts that the bank had notice of the pendency of the action of Loder against Railsback Bros. & Spelts in time to defend; that the bank was notified to defend, and that it never did defend. As there was no proof of collusion or any unfairness, and as there is suggested in this case no defense which the bank would have interposed had it attempted to defend against the claim of Loder, we are not at liberty to assume that the court improperly rendered judgment against Railsback Bros. & Spelts. The facts disclosed by the evidence in this case warrant the conclusion that the bank, without justification, withheld payment of the check held by Loder, and that Loder was entitled to a judgment for the amount of such check against the drawer thereof.

It is, however, insisted that the court improperly assessed damages against the bank for the withholding of payment of the check when no special damages had been proved. Facts showing that damages had been sustained were properly pleaded, and we think from what we have already said that it was shown that the bank unwarrantedly refused to perform a duty which it owed to the drawer of the check. There was no way in which special damages could be proved, but the case falls within the rule laid down in *Bank of Commerce v. Goos*, 39 Neb. 437,

with reference to general damages. The judgment of the district court is

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. ALONZO J. VAN BUSKIRK, ADMINISTRATOR.

FILED MARCH 8, 1899. No. 8782.

Death by Wrongful Act: PLEADING: PECUNIARY INJURY. In an action for damages under the provisions of chapter 21, Compiled Statutes, a petition is fatally defective which discloses no survivor entitled by law to support by the person deceased, and in which, with reference to such survivor as is described, there is no averment of pecuniary injury.

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

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

J. W. James and *Seth F. Crews, contra.*

RYAN, C.

In this case there was a verdict and judgment in the district court of Dundy county against the Chicago, Burlington & Quincy Railroad Company, and this judgment defendant has brought the case into this court for review upon its petition in error. The action was brought by Alonzo J. Van Buskirk, administrator of the estate of Charles P. Van Buskirk, deceased, and it was alleged in the petition that, without fault on his part, the intestate named had suffered death through the negligent operation of the company's railroad. The seventh paragraph of the petition was in this language: "The said Charles P. Van Buskirk has neither wife nor children, but left Alonzo J. Van Buskirk, Mary P. Van Buskirk, his par-

ents, and Gertrude G. Eledge, Lewis G. Van Buskirk, * * * brothers and sisters, who are heirs at law and next of kin, who have been damaged in the sum of $5,000." There was no other averment than that just quoted from which it was attempted to show damages to have been caused to his next of kin by the death of the intestate. In *City of Friend v. Burleigh*, 53 Neb. 674, it was laid down as the rule sustained by authorities that under the provisions of chapter 21, Compiled Statutes, it was necessary to aver a loss of means of support, where, from the relation of the survivors of the deceased to him, the law would not presume that from his death such survivors had been deprived of their means of support. The petition in this case was defective in this particular, and the judgment of the district court is reversed.

REVERSED AND REMANDED.

NORFOLK NATIONAL BANK, APPELLEE, V. JOHN F. FLYNN ET AL., APPELLANTS, AND NEW YORK LIFE INSURANCE COMPANY, APPELLEE.

FILED MARCH 8, 1899. No. 8748.

Life Insurance: ASSIGNMENT OF POLICY: EVIDENCE. The evidence in this case examined, and *held* insufficient to show an assignment of a policy of life insurance or of rights conferred by its provisions.

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

George L. Whitham, for appellants.

George E. Pritchett and *James H. McIntosh, contra.*

RYAN, C.

The Norfolk National Bank filed its petition in the district court of Douglas county, wherein it prayed that a

policy of insurance issued by the New York Life Insurance Company, one defendant, on the life of John F. Flynn, another defendant, might be decreed the property of plaintiff, who, as assignee of such policy as it was alleged, was entitled to be subrogated to the rights of Honnora Flynn, and that the defendant insurance company might be restrained by injunction from paying to the Flynns anything on account of said policy. This policy was dated August 4, 1879. By its terms its tontine dividend period was to be completed August 4, 1894, after which period the accumulations were secured to Honnora Flynn in either one of five different optional methods named. Of these the third was "To withdraw the entire equity,—*i. e.* the accumulations that belong to this policy, —in cash." By its petition plaintiff alleged that the policy had been assigned to it as security for the payment of a promissory note owing to plaintiff by John F. Flynn; that said note had never been paid; that Flynn had neglected and refused to pay premiums as they fell due; that payment of these had been made by plaintiff; and that within the time fixed by the terms of the policy for making such election plaintiff, as assignee of the policy, had notified the insurance company that plaintiff elected to receive the benefit accruing August 4, 1894, under the third subdivision of said policy, to-wit, "To withdraw the entire equity—*i. e.* the accumulations that belong to this policy." There was a decree as prayed, and the accumulations above referred to having been found to be equal to $634.18, the insurance company was required to pay to plaintiff the said sum, to be applied on the indebtedness due to it from John F. Flynn. It was further adjudged that John F. Flynn and Honnora Flynn had no interest, right, or title in the policy, and these parties have appealed.

There were presented by the evidence and in argument several questions which we shall not consider, for, in our opinion, there is at the threshold a question which, in the view we take of it, renders unnecessary the consider-

ation of any other, and that question is whether or not the policy ever was assigned to the bank. In reference to the loan as to which plaintiff claims this policy was assigned as security, Mr. Bucholz, plaintiff's cashier, testified that about May 14, 1888, John F. Flynn wanted to borrow $1,000 and offered to give the policy as collateral security, and that it was finally understood that Flynn might bring it down and the bank would make the loan; that on that day Flynn signed the note and got $1,000 then or soon afterward; that a few days after the date of the note Flynn brought the policy to the bank and left it there, promising to come in within a few days and fix up the arrangement. The cashier testified that at the time he took the policy he did not understand that it was necessary for Honnora Flynn to assign it, and that he never spoke to her about doing so. There was no evidence tending to show that Mrs. Flynn ever assigned the policy herself; indeed, the testimony of the president of the bank is that when he asked Mrs. Flynn to assign it, which was after the maturity of the $1,000 note above referred to, she refused to make the assignment. There was no evidence that John F. Flynn was specially authorized to assign the policy as agent for his wife, and the only proof of general agency to be found in the record is the following question propounded to the cashier and his answer thereto: "Q. What do you know, if anything, with reference to her husband acting as her agent generally in her matters,—in business matters? A. I never knew that she did any business for herself. He always did the business." There was never any assignment by Mr. Flynn. His testimony was to the effect that the policy was left at the bank simply for safe-keeping. As the district court found in favor of the bank, we shall assume that the transaction as described by the cashier was correctly described, and therefore that the note was first made and that the money was paid then or a few days afterward when Mr. Flynn deposited the policy as collateral security. We have already shown that the right

of election of Mrs. Flynn under the policy could not be exercised until more than six years after the loan was made. This loan was payable in ninety days. It was not then paid, but it has been renewed and has not yet been paid. While the bank had the policy in its possession it paid three of the annual premiums as they fell due thereon, but there was no notice to Mrs. Flynn that these ought to be met, though there is evidence that such notice was given to Mr. Flynn. Mrs. Flynn, in her testimony, denied that she authorized her husband to assign, transfer, or deposit the policy as security. Her testimony was that, as she understood it, her husband, John F. Flynn, took the policy to the bank to consult the president of the bank, who was a lawyer, with reference to the validity of a renewal of it after it had once lapsed; that her husband explained afterward that he had left it at the bank for safe-keeping, and that she supposed these statements were true. This policy was for $2,500. It was payable at the death of John F. Flynn to his wife, Honnora Flynn, if at that time she should be living, otherwise to the Flynn children, of whom there were five in number. This policy had been in existence almost nine years, when, as alleged, it was deposited with the bank as collateral security for a debt owing by John F. Flynn. None of the parties for whose benefit it had been issued and maintained was aware of this alleged disposition of it. Upon the death of the insured it would at any time have furnished to his widow and children a means of subsistence to the extent of $2,500. The bank, by virtue of its mere possession of this policy, assumed to exercise the rights, not of John F. Flynn, but of Honnora Flynn, and thereunder, in consideration of receiving $634.18, undertook to surrender this policy with all its possibilities of protection to Mrs. Flynn and her children, and this it did because it claimed the policy had been assigned to it. The question of this assignment is one of fact, and we can find no evidence of an assignment authorized or executed by Mrs. Flynn. The attempt of the bank to deprive her of

the benefit of this policy without her consent was an attempted wrong, and upon it can be based no just claim for compensation or consideration because of premiums advanced to carry the policy until its benefits could be commuted to a cash payment to the bank. On the face of it such a policy was not intended as a mere accumulation of savings. It was a judicious provision for his family in event of the death of the insured. To deprive this wife and mother of this provision there should have been at least acquiescence on her part in the alleged assignment; and, in some way, there should have been established the right, in her stead, to deprive her and her children of the benefits of the policy upon the death of the head of the family. There was not sufficient evidence to meet either of these requirements, and the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

MARY D. BEARDSLEY, APPELLEE, V. WILLIAM E. HIGMAN, APPELLANT, ET AL.

FILED MARCH 8, 1899. No. 8809.

1. **Judicial Sale:** SHERIFF'S RETURN: MISTAKE. A judicial sale is not void because the sheriff in making his return thereof by mistake recites that he received the order of sale on a date different from that on which he actually received it.

2. ———: APPRAISEMENT. It is error for a sheriff to cause real estate to be reappraised before he has twice advertised and offered it for sale, unless the first appraisement has been set aside by the court

3. ———: ———: ALIAS ORDER. An order of a district court setting aside a sale, but retaining the appraisement made of the property and directing an alias order of sale, is not void if erroneous; and it is not erroneous where the property has only been once offered for sale.

APPEAL from the district court of Dawes county. Heard below before BARTOW, J. *Affirmed.*

George M. Pardoe and *W. E. Gantt*, for appellant.

Lewis & Beardsley and *Albert W. Crites, contra.*

RAGAN, C.

In the district court of Dawes county a decree foreclosing an ordinary real estate mortgage was rendered in favor of Mary D. Beardsley against William E. Higman and others on June 5, 1895. The clerk of the district court of said county issued "an order of sale," to which was attached a certified copy of the foreclosure decree, and delivered the same to the sheriff. The latter caused the property to be appraised, advertised, and sold, and it was purchased by Mrs. Beardsley. This sale was by the court on her motion set aside, the order providing that the appraisement made be retained, and that the clerk issue an alias order of sale for the property. This alias order of sale was issued, the property again sold, purchased by Mrs. Beardsley, the sale confirmed, and from this order Higman has appealed.

1. It is first insisted that the alias order of sale is void, and in support of this remarkable contention it is said that the alias order does not show that any action was ever pending in the district court of said county wherein the parties named in the order of sale were parties to any suit in said court. The alias order of sale is directed to the sheriff of Dawes county and recites: "In a certain action in the district court pending, wherein Mary D. Beardsley is plaintiff and William E. Higman and others are defendants, you are hereby commanded * * * to sell;" and in order that counsel for appellant may not be again misled as to what the transcript which they have filed here shows, they are respectfully referred to page 22 of the record of this case on file in this court,

where they will find the alias order of sale with the recitation just quoted.

2. A second argument is that the alias order of sale is void because it "does not show upon its face that any decree was rendered in said court in favor of said plaintiff and against said defendants foreclosing said mortgage and ordering the sale of the property described in the same for the satisfaction thereof." The alias order of sale already quoted, found on page 22 of the record in this case, recites that the plaintiff Beardsley in said action recovered of the defendant Higman and others in said action by a consideration of said court a judgment for the sum of $6,088.88 and costs taxed at $13.30, and said order of sale commands the sheriff to advertise and sell certain described real estate for the purpose of satisfying the judgment.

3. A third argument is that "said order of sale is void on its face for the reason that no copy of said decree is set out therein, nor is any copy attached thereto, nor any reference made in said order to the decree of the court ordering the sale of said premises for the satisfaction of said mortgage." Attached to the alias order of sale found on said page 22 of the record is a certified copy of the mortgage foreclosure decree.

4. The sale under consideration was made on January 20, 1896. The sheriff in making his return of said sale recited in said return: "Received this order this 5th day of June, 1895." It is now said that the sale is void because of this recitation. A casual inspection of the record shows that this date—June 5, 1895—was a clerical mistake. This was the date of the original order of sale, not the date of the alias order; but this sale was not void because the sheriff in making his return thereof by mistake recited that he received the order on a date different from that on which he actually received it.

5. Another argument is that the sale made of the real estate by the sheriff on January 20, 1896, was void "for the reason that no appraisement was made of the prop-

erty and filed by the sheriff of said county before advertising and making said sale." The property was appraised by the sheriff and two disinterested freeholders, residents of said Dawes county, duly sworn to make the appraisement, etc., on June 14, 1895, and the sale under consideration was first advertised on December 19, 1895.

6. Another argument is that the sale made by the sheriff under the alias order of sale was void because he did not cause the property to be reappraised. The real estate had already been once appraised and once offered for sale, and unless that appraisement had been set aside, it would have been error for the sheriff to cause the real estate to be reappraised before it had been twice advertised and offered for sale. (Code of Civil Procedure, sec. 495.) When the court made an order setting aside the first sale it did not set aside the appraisement made, but by its order expressly retained that appraisement and directed the sheriff to advertise and offer the property for sale under such appraisement. It is said by counsel for appellant that the district court was without jurisdiction to make that kind of an order. We do not think it was. Indeed, the order of the court retaining the appraisement was unnecessary. The order was superfluous. It added nothing whatever to the statute, for unless the first appraisement made had been vacated by the court, the sheriff could not cause the property to be reappraised until he had twice advertised and offered the property for sale under the appraisement.

The foregoing are the only arguments which we deem it necessary to notice. The decree is

AFFIRMED.

JOHN L. TIDBALL, ADMINISTRATOR, ET AL. V. ISAAC N. YOUNG, ADMINISTRATOR, ET AL.

FILED MARCH 8, 1899. No. 8787.

1. **Administrator's Bond:** OBLIGEE. To constitute a valid administrator's bond some person or officer must be named therein as obligee.

2. ———: ———: COUNTY JUDGE. A writing purporting to be an administrator's bond, signed by principal and sureties, approved and filed by the probate court, in which no person or officer is named as obligee is neither a statutory nor a common-law bond. It is simply a promise in writing made to no one, and is void.

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

F. I. Foss and *W. R. Matson*, for plaintiffs in error.

E. S. Abbott, contra.

RAGAN, C.

Jarett Young died in Saline county, Nebraska, leaving a will, which was duly admitted to probate, and one Boomgarden qualified therefor and was appointed executor of Young's estate. Subsequently Boomgarden resigned and one George D. Stevens was appointed administrator with the will annexed. For the faithful performance of his duties as such administrator Stevens as principal and one Band and one Bridges as sureties executed and filed with the probate court of said county a writing, denominated in this record a "bond," which was duly approved as the bond of said Stevens as administrator with the will annexed by said probate court. Stevens' authority as administrator with the will annexed was extinguished by an order of the probate court removing him as such administrator and Isaac N. Young was appointed administrator instead, who duly qualified by giving his bond and accepting the trust. He then

brought this suit in the district court of Saline county against Stevens as principal and Band and Bridges as sureties to recover the value of certain personal property belonging to the Jarett Young estate, which it is alleged Stevens, while he was administrator with the will annexed, took possession of and converted to his own use, or at least had neglected and refused to account for and turn over to the present administrator. Young, administrator, based this action on the bond which it is alleged that Stevens as principal and Band and Bridges as sureties executed and filed in the probate court at the time Stevens was appointed administrator with the will annexed. It seems that during the pendency of this action Stevens died; at any rate his death was suggested and his administrator, John L. Tidball, was made defendant to this action in place of Stevens, deceased. The trial in the district court resulted in a judgment in favor of Young, administrator, against Tidball, administrator of Stevens' estate, and against Band and Bridges, to review which the parties below have filed here a petition in error.

The writing or paper sued on here as a bond executed by Stevens as principal and Band and Bridges as sureties, so far as material here, is as follows: "Know all men by these presents, that we, George D. Stevens, as principal, and Charles Band and W. A. Bridges, as sureties, all of the county of Saline and the state of Nebraska, are held and firmly bound in the penal sum of $4,000, lawful money of the United States, well and truly to pay we bind ourselves, our heirs, executors, administrators, and assigns, and each of them, firmly by these presents." It is to be observed that this so-called bond is without an obligee. Nowhere in the bond is any person mentioned as an obligee, nor is there any blank left in the bond for the filling in of the name of an obligee. The bond simply recites that the principal and sureties are held and firmly bound in a certain sum of money, to pay which they bind themselves. The bond recites that

Stevens had been appointed administrator with the will annexed of the estate of Jarett Young, deceased, and then recites generally that if Stevens, as such administrator, shall perform his duties, the obligation shall be null and void; otherwise remain in full force and effect. Section 311, chapter 23, Compiled Statutes, provides: "All bonds required by law to be taken in or by order of the probate court shall be for such sum and with such sureties as the judge of probate shall direct, except when the law otherwise prescribes; and such bonds shall be for the security and benefit of all persons interested, and shall be taken to the judge of probate, except where they are required by law to be taken to the adverse party." Section 179 of said chapter provides: "Every administrator, before he enters upon the execution of his trust and before letters of administration shall be granted to him, shall give a bond to the judge of probate," etc. An essential thing in every administrator's bond is an obligee. The promise of the principal and sureties signing such an instrument must be made to some person or officer. The instrument on which this action is based does not comply with the statute. It is not the bond which the statute requires an administrator to give. It is neither good as a statutory bond nor as a common-law bond. It is a promise in writing made to no one. It is simply void. *Sacra v. Hudson*, 59 Tex. 207, was a suit on a paper alleged to be a guardian's bond, and in the alleged bond no one was named as obligee, although the bond recited that the principal and sureties "are held and firmly bound unto ——," and the court held that this instrument was not a good guardian's bond, either under the statute or at common law, and that a suit could not be maintained thereon, because no one was named in the bond as obligee. The court said: "It is the duty of courts to construe and enforce contracts. To make contracts for parties is something quite beyond their province. * * * None of the cases go to the length of supplying necessary parties to bonds. If the

name of the obligee may be omitted without affecting the validity of the bond, why may not the amount of the bond also be left blank? By the same reasoning, why may not both the amount and the payee be omitted? Or the signature of the principal and the sureties be dispensed with?"

It may be that the county judge who accepted and approved this writing as the bond of Stevens, administrator, may be liable upon his bond to the present administrator of the Young estate, if the latter estate has been prejudiced by the negligence of such county judge. But this we do not decide. It may be that if Stevens, during his lifetime, and while pretending to act as administrator for Young's estate, obtained possession of and converted to his own use the assets of that estate, the Stevens estate is now liable to the Young estate therefor. But no one is liable to the Young estate on this instrument alleged to be the bond of Stevens, administrator. The instrument made the basis of this suit is alleged to be a bond and contract of the parties who signed it. It is not a contract. It is an imperfect and unfinished instrument in writing, and no action can be maintained thereon. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

HIRAM J. PALMER, ADMINISTRATOR, V. DE WITT C. HOWARD.

FILED MARCH 8, 1899. No. 8781.

Affirmance of Judgment: REVIEW. The record presents no question of law. Evidence examined, and *held* to sustain the verdict of the jury.

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

W. H. Platt, for plaintiff in error.

J. H. Woolley, contra.

RAGAN, C.

Hiram J. Palmer, administrator, has filed a petition in error here for the review of a judgment pronounced against him in favor of De Witt C. Howard by the district court of Hall county. The record presents no question of law. It is insisted by counsel for plaintiff in error that the evidence does not sustain the verdict of the jury. The evidence is not very satisfactory, but we are compelled to say that we think it sustains the jury's verdict, and the judgment must be, and is,

AFFIRMED.

JOHN J. DAVIS V. EDWIN CULVER.

FILED MARCH 8, 1899. No. 8773.

1. **Replevin**: GENERAL DENIAL: EVIDENCE. Under a general denial in replevin the defendant may prove any fact which amounts to a defense to the plaintiff's cause of action.
2. **Note**: INNOCENT PURCHASER: EVIDENCE. Evidence examined, and *held* to sustain the finding of the jury that the plaintiff in error and his assignor purchased the note in suit after its maturity.
3. ———: PAYMENT. When the action was brought there was nothing due on the note.
4. **Replevin**: GENERAL DENIAL: SET-OFF. In a replevin action for property covered by a chattel mortgage given to secure the payment of a note owned by plaintiff the defendant, under a general denial, may show that plaintiff at the commencement of the suit was, and still is, indebted to him for labor in an amount equal to the amount due on the note.

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

C. S. Rainbolt and *Daniel F. Osgood*, for plaintiff in error:

Usury should be specially pleaded. (*Dix v. Van Wyck*, 2 Hill [N. Y.] 522.)

An account cannot be adjusted in replevin. (*Whitworth v. Thomas*, 83 Ala. 308; *Otter v. Williams*, 21 Ill. 118; *Stow v. Yarwood*, 14 Ill. 427; *Keaggy v. Hite*, 12 Ill. 101; *Streeter v. Streeter*, 43 Ill. 155; *McIntire v. Eastman*, 76 Ia. 455.)

Set-off is not generally allowed in replevin. (Waterman, Set-Off 169; *Kennett v. Fickel*, 21 Pac. Rep. [Kan.] 93.)

Set-off, if allowable, must be specially pleaded. (*Whitworth v. Thomas*, 83 Ala. 308.)

J. R. Webster, *Theodore F. Barnes*, *C. H. Bane*, and *Macfarland & Altschuler*, *contra*.

RAGAN, C.

On April 12, 1894, Edwin Culver executed and delivered his note for $18, due thirty days after date, to M. L. Thomas. The note was payable to the order of the payee and drew interest at the rate of ten per cent per annum from maturity. Thomas indorsed and delivered this note to the Lincoln Coal Company, and the latter indorsed and delivered it to John J. Davis. The note was secured by chattel mortgage. John J. Davis brought replevin for the mortgaged property. Judgment for the defendant, and Davis prosecutes error.

1. The first argument is that the court erred in permitting the defendant below to show that the note was tainted with usury. The answer was a general denial, and the argument is that such a defense could not be shown under such a plea. Whatever may be the rule in other jurisdictions the practice here is that under a general denial in replevin the defendant may prove any special matter which amounts to a defense to the plaintiff's cause of action. (*Merrill v. Wedgwood*, 25 Neb. 283;

Cool v. Roche, 15 Neb. 24; *Blue Valley Bank v. Bane*, 20 Neb. 294; *Richardson v. Steele*, 9 Neb. 483; *Best v. Stewart*, 48 Neb. 859; *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb. 68; *Jenkins v. Mitchell*, 40 Neb. 664.)

2. The second argument is, in effect, that the verdict for the defendant below is not supported by sufficient evidence, as upon any theory of the case there was something due from Culver upon the note. Plaintiff in error here claims to be an innocent purchaser before maturity of the note which the mortgage in controversy was given to secure; or, rather, his precise claim is that he purchased the note from one who was an innocent purchaser before due without notice that the note was tainted with usury. This note matured on May 12, 1894. It was indorsed by the payee and delivered to the coal company on September 13, 1894; but there was written upon the note the following: "Extended to September 13, 1894." The evidence on behalf of plaintiff in error is that this writing was put on the note by the original payee thereof at the request of Culver, the maker of the note, and in pursuance of an agreement between them that the note should be extended to that date. This, however, is denied by Culver. We think the jury were justified in taking Culver's testimony as true, and therefore it follows that whatever title the Lincoln Coal Company had to this note it acquired after its maturity. Thomas, the original payee of the note, swears that he sold and indorsed this note to the Lincoln Coal Company. His evidence, however, is entirely overthrown by that of the officers of the coal company. They say that Thomas owed them a coal bill of $6.65, and that he indorsed the note in suit and left it with the coal company as security for what he owed it; that on September 13, 1894, the plaintiff in error here paid Thomas' coal bill and took up the note, Thomas being present. As to the other argument,—that there was something still due on the note from Culver at the time this suit was brought,—the evidence shows that while Culver gave Thomas the note for

$18 he only received $15 in money. By agreement between the parties Culver was to pay $2.50 per month interest on this $15, or interest at the rate of sixteen and two-thirds per cent, payable monthly, and that in pursuance of that usurious contract he had paid $12.50 in money to Thomas, leaving a balance of $2.50 on the note; that after Davis, the plaintiff in error, became the owner of the note, Culver, who is a blacksmith, did work for him of the value of $2.75, and that when this suit was brought Davis was indebted to him, Culver, in that amount for said work. Applying that indebtedness on the note it discharged the same. The jury correctly found that at the time the suit was brought there was nothing due upon the note.

It is insisted on the argument that this $2.75 due from Davis to Culver could not be set off in this action against what was due on the note. We fail to appreciate the force of this contention. If this was a suit at law upon the note, Culver could have pleaded as a set-off the $2.75 due him from Davis, the holder of the note. In order for Davis to recover in this action it was incumbent upon him to show that there was some amount due him from Culver on the note when the action was brought, and under a general denial it was competent for Culver to show that he was entitled to be credited for the work he had done for Davis; and that, therefore, there was nothing due Davis on the note. Let the judgment of the district court be

AFFIRMED.

JOSEPHUS MOORE, APPELLANT, V. SYLVANUS MOORE ET AL., APPELLEES.

FILED MARCH 8, 1899. No. 7942.

1. **Vendor and Vendee:** PARENT AND CHILD. Evidence examined, and *held* not to establish the existence of an oral contract between

appellant and his father and mother that on the death of the survivor of them the title to their real estate should vest in appellant.

2. **Executors and Administrators:** CLAIM AGAINST ESTATE: EVIDENCE. Evidence examined, and *held* not sufficient to sustain a finding that any sum of money was due appellant from his father and mother's estate.

APPEAL from the district court of Dawson county. Heard below before NEVILLE, J. *Affirmed.*

Francis G. Hamer, for appellant.

Rice & Johnston, Elwood Hunt, and *J. M. Forristall, contra.*

RAGAN, C.

In the district court of Dawson county Josephus Moore brought this action against Sylvanus Moore and others. In his petition Josephus Moore alleged that from 1878 until his death, which occurred in October, 1886, his father, Hamilton Moore, was the owner in fee of and resided upon the southeast quarter of section 12, township 9 north, and range 19 west, in Dawson county, Nebraska; that his father was old and infirm for a number of years before his death and unable to take care of himself, and required the constant care and attendance of others; that he resided with his father from 1872 continuously until just before his death, supported him and his mother until her decease, and in so doing expended large sums of money and performed much labor; that all this was done by him in pursuance of an oral agreement between his father and mother upon one part and himself on the other that upon the decease of the father and mother he, Josephus Moore, should have said quarter section of land as compensation; that in pursuance of the agreement he, Josephus Moore, was to enter upon the possession of said described land and remain in possession thereof until the death of his father and mother and thenceforth forever; that in pursuance of said oral agreement he did enter

upon said real estate, made valuable improvements thereon, and that his father and mother resided upon said real estate with him, and that he provided for them and supported them until the decease of the survivor of them; that his mother died in March, 1884, and that shortly before his death the father went to Indiana to visit the scenes of his early years, and while there became and was of a weak mind and failing intellect, and in disregard of his agreement with his son, Josephus Moore, and while under the illegal influence of certain of Josephus' brothers and sisters, the father conveyed said real estate, without consideration, to two of said sisters; that the value of the labor and money expended by him upon said real estate and in caring for his said father and mother was $5,125. The prayer of the petition was that the deed made by his father, Hamilton Moore, in Indiana might be declared void and the title to the real estate be decreed to be in him, Josephus Moore, or that if for any reason the court could not make such a decree his, Josephus Moore's, claim for money and labor and care expended in behalf of his father and mother might be decreed a valid lien upon the premises, and that they should be sold for the satisfaction thereof. The district court found that the evidence was insufficient to establish an oral contract between Hamilton Moore and his wife with their son, Josephus Moore, as he alleged in his petition; that the possession of the land in controversy was in the said Hamilton Moore from the time he entered the same under the United States homestead laws until the deed made in Indiana to the parties made defendants to this action; that the possession of said real estate never was in Josephus Moore, and that the deed made by Hamilton Moore in Indiana to the parties made defendants was executed and delivered by him of his own free will and accord, and that no undue influence was used to induce him to so convey the land, but that the deed was based upon a valid consideration, and at the time the said deed was made said Hamilton Moore was of sound mind. The

court entered a decree dismissing the petition of Josephus Moore, and he has appealed.

1. The evidence in the record abundantly sustains each and every finding made by the district court, and would sustain no other finding. It would subserve no useful purpose to quote all this evidence. Hamilton Moore, his wife, and their two sons, Josephus and Russell, came to the state of Nebraska about 1873. They came from the state of Indiana, where Hamilton Moore left some sons and daughters living, who were at that time married. When Hamilton Moore and his wife came to Nebraska their sons, Josephus and Russell, were unmarried, and so remained for a number of years. Hamilton Moore acquired title to the land in dispute by patent from the United States government under the homestead act of congress. In support of appellant's claim that an oral contract existed between himself and his father and mother whereby he was to have the title to the father and mother's homestead on the death of the survivor of them in consideration that he would support and care for them during their natural lives, and that he had in all respects carried out his contract, a number of witnesses testified that in conversations with the father and mother, and especially with the mother, each of the old people had said that upon their death the farm was to be appellant's; that the farm was appellant's; that appellant was taking care of and supporting them, and other conversations of similar import. No one testified to having heard made any such a contract as the appellant alleged in his petition, nor did any one testify that either of the old people said that such a contract existed, as appellant alleged. Some time before her death the mother went to Indiana, where she died in March, 1884. In October and November, 1884, she wrote the appellant long letters, but not a word is said in either of these letters about the title to the family homestead belonging to the appellant; not a word in the letters in reference to any contract between the father and mother that upon

the latter's death the appellant should have the homestead; and yet in one of these letters she expresses the opinion that she will never be well again. In December, 1885, the mother was dead, the father was still in Nebraska, and in that month the appellant wrote a letter to a brother of his living in Indiana, and in this letter he said: "Last Monday father went to Davidson's to board. I will not have him about me any more. If any of you want to pay me $500 ready money I will waive all right to the estate and be done with him and it; otherwise I will take a thousand dollar claim to the courts. If you want a hand in this business you had better see to it at once." In January, 1886, appellant writes another letter to a brother or sister in Indiana, in which he speaks of Russell, his brother, being in jail on a charge of larceny and that his wife was without anything to eat. He said: "I had the county to provide for her, all except fuel. I told Davidson to take her a load of corn and charge it up to the rent on the place [the place was the father's homestead and rented to Davidson], and if it is sold I think I should have whatever portion falls to Russell to partially reimburse me for what I have paid out for him. * * * I think father's farm had better be sold. It would bring about $2,500." On July 6, 1884, a letter is written to the appellant by one of his sisters living in Ohio in answer to a letter which the appellant had written her in June of the same year. From this letter it would appear that the writer was present when her mother died. She said: "Mother wanted Eliza [another child] to have all that they left after her and father's expenses were paid. It was hard for her to talk. I thought I would help her. I said, 'You want Josephus to have the rest?' She said, 'No; he has a farm of his own.' She seemed to think you was most perfect. I wish I was there to talk with you." In December, 1885, the appellant wrote a letter to his brother in Indiana, in which he said: "Father has made an article of agreement with W. J. Davidson, renting the farm to Davidson for

two years, * * * by which Davidson is not bound to give father a bushel of wheat, corn, or potatoes, but father has to pay taxes and help buy a threshing machine, and the article deprives me of the privilege of looking after the place entirely. * * * This I can break up if he still continues to cause me so much trouble. I will attempt to take the place out of his control as long as I have to take care of him, and if I fail, then I will sue for pay for taking care of him during the last ten years and save what I can that way." In December, 1885, a sister of the appellant in Indiana writes him a letter, in which she says: "I got your letter a few days ago. Was sorry to hear of you and father having trouble about the control of the place. * * * Dear brother, do not think of ever suing for taking care of him. I will take him and take care of him the rest of his life and want nothing for it." The district court made no mistake in finding that the appellant had not established the existence of the oral contract between himself and father and mother which he pleaded in his petition.

2. The evidence on behalf of the appellant tended to show that he broke up some of the land in controversy, put some improvements of small value thereon; that his father and mother lived on the place with him, the appellant; that he boarded and took care of them; that the father was a cripple and unable to work and unable to help himself, and that the appellant dressed him and undressed him, put him to bed, and gave him the care that a helpless old man would need. On the other hand, the evidence shows that the mother, while she remained in Nebraska, was a hale, healthy, intelligent old lady, was a midwife and made money practicing that profession; that she did the work usually done by housewives on farms; that the old gentleman, though crippled with rheumatism, was a very industrious man; that he worked in the garden and chopped wood and did such chores as he was able to do; that the appellant, until he married, lived with the old people instead of their living with him;

that while he managed and controlled the farm for a number of years he also took the rents and profits of the same; that while he was living with his father and mother and managing their farm he was also the owner of two quarter sections of land near the family homestead, and that he was carrying on some farm operations on these lands and improving them; and the evidence is undisputed that at the time the old people came to Nebraska they brought $1,800 in money with them, and after that money was sent out here to the family in Nebraska from the children in Indiana. There is no evidence in this record which would justify us in finding that there was any sum of money whatever due to the appellant from his father and mother, or their estate, much less that the appellant was entitled to a lien upon this land for any reason whatsoever. If the estate of his father and mother is indebted to him, he must go to the probate court with that claim. This court has no probate jurisdiction. The decree of the district court is right—altogether right—and is

AFFIRMED.

CHASE COUNTY V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED MARCH 8, 1899. No. 8780.

1. **Illegal Taxes:** RECOVERY FOR PAYMENTS. The statutes provide two methods of recovering back illegal taxes paid under protest. When the tax is imposed on land not subject thereto or which has been twice assessed for the same year, the person paying the tax must present a claim to the county board, and if it be not allowed, he must, if he wishes further to contest, appeal to the district court; but if the tax be levied for an illegal or unauthorized purpose, or if the tax be bad for any other cause not falling within the first class, he may maintain an original action therefor. *Chicago, B. & Q. R. Co. v. Nemaha County*, 50 Neb. 393, followed.

2. **Taxation:** LIMITATION. When taxes levied by a county exceed the

maximum permitted by the constitution, the excess is levied for an illegal and unauthorized purpose. *Chicago, B. & Q. R. Co. v. Nemaha County*, 50 Neb. 393, followed.

3. ———: ———. The constitution permits a levy of taxes by a county in excess of 15 mills on the dollar valuation in only two classes of cases: First, to pay debts existing when the constitution was adopted; and secondly, when authorized by a vote of the people. This brings within the general limitation taxes levied to pay judgments rendered against the county on debts not contracted before the constitution was adopted, when such additional levy has not been authorized by vote of the people.

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

Charles W. Meeker, for plaintiff in error.

J. W. Deweese, *W. S. Morlan*, and *F. E. Bishop*, *contra.*

IRVINE, C.

For the year 1894 the county board of Chase county levied taxes to the aggregate of 16.3 mills on the dollar valuation, being apparently 1.3 mills in excess of the limit authorized by the constitution. The Chicago, Burlington & Quincy Railroad Company paid the tax so assessed against its property in the county, under protest, and then brought this suit in the county court to recover that part of the amount so paid in excess of what would have been due on a levy of 15 mills. In the county court the action was dismissed. An appeal was taken to the district court, where the county interposed a demurrer to the petition. This was overruled, and the county electing to stand on the demurrer, judgment was entered for the plaintiff. The county brings the case here.

The county contends that the case is one of a claim against the county, which must be presented to the county board, and if disallowed, taken to the district court by appeal; that, therefore, neither the county court nor the district court acquired any jurisdiction in an original action. In support of this view there are cited

various cases* sustaining the statute requiring that claims against counties shall be prosecuted in the manner indicated, and reliance is largely placed on *Richardson County v. Hull*, 28 Neb. 810. That was a case where it was claimed that taxes had been levied upon land not subject to taxation, and it was there held that a claim must be presented to the county board, and further proceedings must be by appeal to the district court. *Chicago, B. & Q. R. Co. v. Nemaha County*, 50 Neb. 393, was a case like the present. The statutes on the subject were there closely considered, and it was held that the form of procedure depends on the nature of the defect in the tax. Where it is claimed that the land is not subject to taxation, and for certain other defects, procedure must be by filing a claim. But if it be claimed that the tax was imposed for an illegal or unauthorized purpose, or for other reasons not within the first class, an original action may be brought. It was also there held that taxes levied in excess of the constitutional limit are levied for an illegal and unauthorized purpose. This disposes of the question of jurisdiction and brings us to the merits of the case.

The constitution, article 9, section 5, provides: "County authorities shall never assess taxes the aggregate of which shall exceed one and a half dollars per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people of the county." The petition which was demurred to negatives the existence of either of the cases authorizing a greater levy. This would seem to be conclusive against the county. It is, however, disclosed by the petition that of the total levy of 16.3 mills, 5 mills was for a judgment fund, and it is argued that the limitation extends only to current

**Brown v. Otoe County*, 6 Neb. 111; *Stenberg v. State*, 48 Neb. 299; *State v. Buffalo County*, 6 Neb. 454; *Dixon County v. Barnes*, 13 Neb. 294; *Richardson County v. Hull*, 28 Neb. 810; *Burlington & M. R. R. Co. v. Buffalo County*, 14 Neb. 51; *Heald v. Polk County*, 46 Neb. 28.

county purposes and does not prevent a county from imposing, if necessary, taxes in excess of the limit in order to perform its duty of paying judgments. Article 6, chapter 77, Compiled Statutes, is invoked in support of this argument. That article provides for the prompt payment of judgments against a county, and imposes a duty of levying a tax for that purpose, and provides that such duty may be enforced by mandamus. The statute cannot be given an effect which would extend or conflict with the constitutional provision, and it does not necessarily require any such construction. *State v. Weir*, 33 Neb. 35, may seem at first to countenance the argument advanced. That was an application for a mandamus to compel the county board to include in its estimate the amount of certain allowed claims belonging to the relator. One defense was that the board had already in its estimate included sufficient to require a levy to the limit. This court held that this was no excuse for not paying the relator. The levy had not been made, and the effect of the case is merely that the duty of paying such indebtedness cannot be evaded by making estimates for future expenses sufficient to exhaust the taxing power. That this was the entire scope of the case is evident from the last part of the opinion, where it is intimated that were it shown that the payment of the claims would restrict the revenues for other purposes so as to interfere with the current government of the county, payment by installments only might be required. It also appears from the fact that the syllabus, prepared by the author of the opinion, states distinctly the constitutional limitation and does not indicate that the court was establishing an exception thereto. *Jackson v. Washington County*, 34 Neb. 680, is also relied on. There a special levy had actually been made to pay a judgment. The action was for an injunction to prevent the enforcement of the tax. It was decided that such a special levy might be made during the year, and need not necessarily be made or included in the annual levy. It did not appear that the special

levy together with the annual levy exceeded the limit, and as the board had made the levy, it is to be presumed that it did not exceed that limit.

There is indeed no room for construction of the constitutional provision. The aggregate of taxes to be imposed by a county can exceed 15 mills only in two cases: First, when levied to pay a debt existing at the adoption of the constitution; second, when authorized by vote of the people. In all other cases the limitation applies, and no statute and no general equitable considerations can permit it to be disregarded. The fact that there were excepted from the operation of the section debts existing when the constitution was adopted shows that it was not the intention to except debts not at that time existing. Nothing could be plainer. The object of the exception is evident. It was to avoid the impairment of contracts by taking away a means of enforcement existing when they were made. It was not a general purpose to permit any burden to be imposed if county officers could contrive to in some way pledge the credit of the county.

AFFIRMED.

JOSEPH K. LANGDON V. HATTIE S. WINTERSTEEN.

FILED MARCH 8, 1899. No. 8783.

1. **Motion for New Trial:** AFFIDAVITS: REVIEW. Affidavits used on the hearing of a motion for a new trial, in order to be considered in this court, must be embodied in a bill of exceptions.
2. **Value of Goods:** EVIDENCE: WITNESSES. To lay a foundation for the admission of testimony as to the value of goods in common use it is sufficient to show that the witness, by purchasing and by pricing similar goods, is in a general way familiar with their value. The weight of the opinion then given is for the jury.
3. **Review:** ASSIGNMENTS OF ERROR: EVIDENCE. Where error is assigned to the admission of a large number of written instruments *en masse*, the assignment is bad unless all were improperly admitted.

4. **Instructions**: PHRASEOLOGY: REVIEW. An instruction is not prejudicially erroneous, although awkward in phraseology, and ungrammatical, provided its meaning is clear.

5. **Chattel Mortgages**: FORECLOSURE SALE. It is the duty of a mortgagee of chattels, in selling under foreclosure, to give a reasonable opportunity to persons desiring to purchase to see the goods and to offer bids. Failing in this the mortgagor may hold him accountable for the sacrifice thereby resulting.

6. **Instructions**: REPETITIONS. It is not error to refuse an instruction the substance of which has been already given.

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

George Arthur Murphy, for plaintiff in error.

F. N. Prout and *Alfred Hazlett, contra.*

IRVINE, C.

Hattie S. Wintersteen brought this action against Langdon to recover damages for the conversion of a stock of millinery goods. Langdon, besides a general denial and plea of *res judicata*, the merits of which are not presented for review, pleaded that the plaintiff had executed to him a mortgage on the goods; that he had taken possession and regularly sold them, and that they were insufficient to pay the debt secured by the mortgage. The plaintiff in reply pleaded that the mortgage was one executed by her to replace one which her husband, without title or authority, had previously made, and that she had made it under the promise that an extension of six months would be granted on the indebtedness; that Langdon, before any default had occurred, had seized the goods and sold them on an insufficient offer and at a great sacrifice. The mortgage in evidence shows that it was to secure a note due six months after the making thereof. It also contains the usual clause for possession and foreclosure if at any time the mortgagee shall feel unsafe and insecure. The plaintiff had a verdict and judgment,

The defendant complains in the first place that he was compelled to proceed with and complete the trial at an unseemly hour of the night, when his sole counsel was sick and for that reason unable to properly present the case. Of such fact there is no competent proof in the record. The only thing on the subject appears in certain affidavits which are in the transcript but not embodied in a bill of exceptions. If they were used on the hearing of the motion for a new trial, that fact should be made to appear by embodiment in the bill of exceptions; otherwise the affidavits cannot be considered here. (*Morsch v. Besack*, 52 Neb. 502, and cases there cited.)

Complaint is next made of the admission of the testimony of a Mrs. Hollenbeck as to the value of the goods in controversy. The ground of the objection is that her competency was not shown. It appeared that she had frequently priced and bought similar articles at retail, and in a general way knew their values. This was sufficient. The weight of her testimony was for the jury. No very precise or extended knowledge of values of articles of common use is essential to justify the trial court in admitting opinion evidence of this character.

It is assigned that the court erred in admitting a large number of exhibits, consisting of invoices of goods bought by the plaintiff for her stock. The assignment relates to the whole mass of documents, and cannot permit an examination of the propriety of admitting each one separately. They came in on the redirect examination of the plaintiff after a cross-examination which was largely directed to bringing into question the fact of plaintiff's having purchased goods of the character and to the amount she had testified in chief, also towards showing that the stock was old, and being millinery, consequently of little value. The invoices were admitted after proof by the witness that she had actually bought and received the goods as therein stated, and some showed very recent purchase. The trial court restricted their use to the purposes indicated and practically told

the jury they must not be considered as proving present values. There was no error in admitting some, at least, and the whole assignment must therefore fail. (*Sigler v. McConnell*, 45 Neb. 598.)

The defendant complains of the second instruction, given at the request of plaintiff. It is said that it is so awkwardly constructed as to be erroneous for that reason; that it is argumentative, and that it does not state the law. It is very long, is far from being a brilliant literary production, and is not even overnice in its correlation of verbs and subjects. The meaning is nevertheless so clear that it is hardly open to misconstruction, and so long as bad English does not obscure the sense, a judgment cannot be reversed therefor. To summarize the instruction it told the jury that, although a mortgage be valid in its inception, still the mortgagee, in foreclosing and selling thereunder, must proceed fairly and give an opportunity to bidders to inspect the goods and interpose their bids, and, therefore, if the jury should find in this case that no opportunity had been given persons who were prepared to bid to do so, and if the sale was conducted in undue haste and unfairly, the plaintiff might recover. By another instruction the jury was required to deduct the amount of the debt from the value of the goods and give damages only for the difference. There was evidence tending to show that the goods were sold *en bloc* immediately after the sale was opened, and that other persons intending to bid were not given opportunity to do so, although approaching as rapidly as possible. Counsel do not point out in what way the instruction misstates the law, and in view of its application we do not think it does. Nor do we think that it was to such a degree argumentative as to justify a reversal.

Finally, complaint is made because the court refused an instruction to the effect that if the mortgagor, without consent of the mortgagee, was selling the goods, then the mortgagee was justified in feeling insecure and might, under the terms of the mortgage, foreclose. This

was correct and applicable to the evidence, but the substance of the instruction had already been stated in the sixth instruction given by the court of its own motion.

AFFIRMED.

JOHN T. HAMBLETON V. IRVIN A. FORT.

FILED MARCH 8, 1899. No. 8795.

1. **Real Estate Agents:** COMMISSIONS. Under a real estate broker's contract to find a purchaser it is not essential to his earning commissions that he literally bring the vendor and vendee together, or that he even inform the vendor of the identity of the proposed purchaser. It is sufficient if by his influence on the mind of the vendee he be the efficient cause of the two assuming the relations of vendor and vendee.

2. ———: ———: QUANTUM MERUIT. Evidence set forth in the opinion *held* sufficient to sustain a recovery by a broker on a *quantum meruit*.

3. **Exclusion of Testimony:** REVIEW: OFFER OF PROOF. Exceptions to the exclusion of testimony are unavailing unless there be tender made of the proof which it was sought to elicit.

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

French & Baldwin, for plaintiff in error.

Wilcox & Halligan, contra.

IRVINE, C.

Fort sued Hambleton to recover $125 as commissions earned as real estate broker in procuring a purchaser for land owned by Hambleton in Lincoln county. He recovered judgment for $96, and the defendant has brought the case to this court by proceedings in error. The first question raised, and the principal one in the case, is the sufficiency of the evidence. The contract as alleged was to find a purchaser or sell the land, but there is no proof

of authority to make a sale, and it is clear that plaintiff did not himself effect the sale, so the question is, did he perform such services in procuring a purchaser as entitled him to compensation? The evidence is conflicting, but taking it, as we must in view of the verdict, in the light favorable to plaintiff, it shows the following state of facts: For some years Fort had acted as the agent of Hambleton in paying the taxes on the land, and Hambleton had frequently written to him asking that he find some one who would buy, and communicate thereon. Fort had negotiated with several persons, and finally obtained an offer from one Dikeman for a portion of the land, but Hambleton rejected this offer. Fort undoubtedly directed Dikeman's attention to the land as open to purchase and first interested Dikeman in the matter. He did not, however, disclose Dikeman's name or identity to Hambleton. Hambleton went to North Platte and there met Dikeman, Fort not then intervening to bring them together, and through direct negotiations a sale was effected of a portion of the land. It seems that Hambleton had learned of Dikeman at his home in Des Moines through a former owner of the land who knew that Dikeman owned other land in the immediate vicinity and was able to purchase. Fort's services, then, consisted only in first directing the purchaser's attention to the land and securing his favorable interest. While the case is undoubtedly on the border-line, we think this was enough to sustain the verdict. The broker, it is often said, must be the procuring cause of the sale, but it is not held that he must be personally present when vendor and vendee meet, and introduce them, in the familiar sense of the word. It is enough if he be the cause of their coming together in the relation of vendor and vendee. They may meet by chance, and finally effect a sale, but if the broker be the means of putting the vendee's mind into the mood of purchasing, he certainly in that case procures the purchaser. It has accordingly been held that where the broker has rendered some service, he may

recover on a *quantum meruit*, although the sale was in the end effected by the unaided efforts of the owner,—unaided, that is, at the time of the sale (*McMurtry v. Madison*, 18 Neb. 291); also, that where a broker advertised the land and a stranger, seeing the advertisement, mentioned it to one who looked up the owner and purchased, this was sufficient (*Anderson v. Cox*, 16 Neb. 10). It is not then essential to the broker's right to compensation that he bring about directly the actual meeting, or that he even inform the vendor as to the prospective purchaser, provided his influence on the purchaser cause him to become such. This is recognized in *Burkholder v. Fonner*, 34 Neb. 1.

It is contended that in the light of the evidence as to the manner the sale was made there is no proof of the amount of recovery. The only direct testimony is that of the plaintiff, who was asked what were the usual and customary commissions for the sale of land in Lincoln county. The admission of the answer is assigned as error, but if it was erroneous at the time, the error was cured by the following question. The answer was "five per cent." Then he was asked what his services were reasonably worth in this transaction, and he answered, without objection, that they were worth "what the commission allows." The joint effect of the two answers is that his services in this particular matter were reasonably worth five per cent of the purchase-money. There could hardly be direct proof of the proportionate value of partial services. This must necessarily be left largely to the jury to find from all the circumstances. The recovery was within the direct evidence.

Complaint is made of the sustaining of objections to a number of questions propounded to witnesses by the defendant. As in no instance was a tender made of the evidence which it was sought to elicit, the exceptions on this ground are unavailing. This rule is established by a multitude of cases, to cite which would be useless.

The instructions are complained of chiefly because not

founded on the evidence. The discussion of the sufficiency of the evidence has met the most serious objections made to the instructions. One or more were, taken alone, inaccurate, but taken as a whole they fairly stated the law of the case.

AFFIRMED.

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

FILED MARCH 8, 1899. No. 9249.

1. **Sufficiency of Petition:** WHEN ASSAILABLE. The question of the sufficiency of a petition or information to state a cause of action is, when the defect is substantial, open for consideration throughout the proceeding, and may even be raised on a motion for rehearing.

2. ———: CAPACITY TO SUE: WAIVER. Want of legal capacity to sue refers to a general legal disability. If such do not exist, the failure of a plaintiff to show a right of action in himself goes to the sufficiency of the pleading to state a cause of action, and is not waived by failure to demur for want of capacity.

3. **Municipal Corporations:** INELIGIBILITY OF MAYOR: SUCCESSOR. The provisions of chapter 10, page 54, Session Laws 1897, the so-called charter of cities of the metropolitan class, examined, and *held* to demand that in case of ineligibility of the person receiving the highest number of votes at the first general election for mayor, the president of the council should exercise the office, and not the former incumbent.

REHEARING of case reported in 56 Neb. 1. *Action dismissed.*

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

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

IRVINE, C.

In this, an original action in quo warranto, opinions have already been filed on two occasions. On the first

the court discussed the merits of a demurrer to the answer of the respondent, and it was held, by a divided court, that the information stated a cause of action and the answer a defense. (*State v. Moores*, 52 Neb. 770.) The case was then referred for a trial of the issues, and later came before the court on motions, on the one side for a judgment of ouster, and on the other to set aside the referee's report in favor of the relator. (*State v. Moores*, 56 Neb. 1.) A judgment of ouster was ordered, but subsequently a rehearing was allowed and the case has again been submitted. The former opinions disclose, with full particularity, the nature of the case and of the pleadings, but as those opinions are somewhat voluminous, it may not be amiss to restate a few general facts pertinent to the questions on which the conclusion we have now reached depends. The relator alleges that he was, prior to the act of 1897 (Session Laws, p. 54, ch. 10), which created what is called a new "charter" for metropolitan cities, the duly elected, qualified, and acting mayor of the city of Omaha; that at the first election held under the act of 1897 the respondent Moores received the highest number of votes for the office of mayor and was declared elected; that he gave the bond, took the oath, and assumed to exercise the duties of the office. There were then alleged certain facts which it was claimed rendered the respondent ineligible. Under our procedure quo warranto may be maintained either by the prosecuting attorney or by a private individual. (Code of Civil Procedure, secs. 704-728.) But if the proceeding be not instituted by the public officer, it must be by a person who himself claims the office. (*State v. Stein*, 13 Neb. 529.) Therefore, a question which we logically meet *in limine* is whether the relator has shown in himself a right to the office, assuming that the respondent was ineligible. Until the motion for a rehearing this question escaped attention by counsel, or at least it was not argued. In the opinion by NORVAL, J., on the demurrer, which voiced the views of the majority, the following language was

used: "Under and by virtue of section 11, chapter 12*a*, Compiled Statutes 1895, a person elected mayor of a city of the metropolitan class is entitled to the office during the term for which he was chosen, 'and until his successor shall be elected and qualified.' Substantially the same provision is contained in chapter 10, Laws 1897." (*State v. Moores*, 52 Neb. 770.) This point was thus cursorily assumed, as it had not then been questioned, and the language quoted was not the deliberate expression of opinion on a controverted point. On the rehearing it has been urged that the relator, as the incumbent of the office under the former charter, was not entitled to hold over under the new until the time this action was commenced. On behalf of the relator it is argued that it is now too late to raise such a question. If the question goes to the sufficiency of the information to state a cause of action, it is not too late, although regularity of practice should require an earlier presentment of the point. In appellate proceedings the sufficiency in substance of the pleadings to support the judgment forms an exception to the almost universal rule that no question will be considered which was not presented to the court of first instance. When in an original action a motion for a rehearing presents that question to this court, we should not avoid a duty, imposed upon us in appellate cases, of vacating a judgment which has no support in the pleadings on which it has been based. If the question cannot be now raised, it must be because it goes, not to the sufficiency of the information to state a cause of action, but only to the legal capacity of the plaintiff to sue. The latter defect must, when it appears on the face of the petition, be suggested by special demurrer on that ground or it will be waived. (Code of Civil Procedure, secs. 94, 96.) In *Farrell v. Cook*, 16 Neb. 483, it was held that the want of legal capacity to sue involves only a general legal disability, such as infancy, idiocy, want of authority. Therefore, when the plaintiff is a natural person under no general disability to maintain actions, a failure

to state a cause of action in his own favor goes to the sufficiency in substance of the petition, and not to his legal capacity. (*Willard v. Comstock*, 58 Wis. 565; *Bond v. Armstrong*, 88 Ind. 65; *Frazer v. State*, 106 Ind. 471; *Campbell v. Campbell*, 121 Ind. 178.) The cases cited are all in point on principle, and we know of no authority to the contrary. The right of the relator to maintain the action depends upon his own right to the office; the statement of that right is essential to the statement of a cause of action; the right he claims is by virtue of having been mayor when the old charter was repealed. This is wholly a question of law.

The question must be determined by a construction of section 102 of the present charter in connection with other provisions *in pari materia*. The section referred to is as follows: "All general elective city officers including city councilmen, their appointees and existing boards, agents and servants, now lawfully holding office or intrusted with the care of public property, or affairs under the law and ordinances heretofore in force, shall, except as in this act otherwise provided, continue in office and the exercise of such trust until the first general city election herein provided for, and until the officers selected at such election shall have duly qualified, but such officers, agents, servants, and appointees may be removed from office, suspended, or discharged as provided by law or ordinance. All existing boards intrusted with property and business under authority of laws heretofore in force shall, at the expiration of their terms of office, except as herein otherwise provided, turn over such property, records, and accounts to such other officer or boards as are herein empowered or intrusted to succeed thereto or have possession thereof. Any officer continued in office under the provisions of this act beyond the date when his term would expire, under the law in force when elected or appointed, shall give additional bonds for the faithful discharge of the duties of his office for such extended term, the amount of such bond to be governed by this act or,

when not provided for herein, by ordinance. It shall be the duty of each of the respective boards and officers to prepare written detail abstracts of all tools, implements, and materials of every kind belonging to the city in their trust and care, also all work or storehouses owned or leased by the city for storage or other purposes, in duplicate, and to certify as members of such boards to the correctness thereof; such certified abstracts shall be delivered to the mayor, who shall file one of each of said copies for record with the city clerk, and the other copies shall be handed to the heads of the respective departments to be used as a basis for checking up the abstracts. *Provided*, That the provisions of this section shall not apply to the board of fire and police commissioners, but said board and the members thereof now acting shall cease to hold office upon the qualification of their successors appointed by the governor under the provisions of this act." (Compiled Statutes 1897, ch. 12*a*, sec. 102.) It is evident that the general purpose of this section was to continue in existence the essential governmental machinery of the city until officers could be selected and installed under the new act. This act with an emergency clause repealed the former charter, so that without this section the city of Omaha would have been without a municipal government from the time the new act was passed until the organization thereunder several weeks later. The object of the section was to bridge over this period. Some duties which the former act imposed on certain officers or boards were by the new imposed upon other officers, so that section 102 in general terms provided that those exercising duties under the old should continue to exercise those duties under the new until the officers upon whom the new charter imposed similar duties were elected and qualified. Upon the perfection of the new organization section 102 would have performed its functions and become obsolete.

By section 13 a special provision was made for an election of officers on a day as near as practicable to that

when the act took effect, and on a date other than that provided for subsequent elections. This and many other provisions throughout the act plainly disclose a legislative intent to as soon as possible supersede the former city government and the former officers, and to as promptly entirely replace them by the new organization. So far, however, as section 102 contemplated keeping in office the existing city officers until after the first election and the qualification of the new officers, its scheme was general only, not universal. By the express terms of the section it did not apply to fire and police commissioners who were to retire upon the appointment of their successors, and by section 167 the governor was required to appoint their successors immediately on the taking effect of the act—another indication that it was desired to continue existing officers only so long as might be necessary to prevent municipal anarchy. Moreover, the section provides that in its general scope it shall apply only to cases not "in this act otherwise provided;" that is, it was to apply only as a last resort in cases where without such provision there would be no provision for government.

This language directs attention at once to the rest of the act, to ascertain whether the contingency before us was otherwise provided against. Section 75 is as follows: "When any vacancy shall happen in the office of mayor by death, resignation, absence from the city, removal from office, refusal to qualify, or otherwise, the president of the council for the time being shall exercise the office of mayor with all the rights, privileges, powers, and jurisdiction of the regular mayor until such vacancy be filled or such disability removed, or in case of temporary absence, until the mayor shall return," etc. This seems at once to indicate a special provision as to the office of mayor, which should apply to the present case should the respondent be found ineligible. If not, then it must be either because ineligibility does not give rise to a "vacancy" in the sense in which the word is here used, or else because the general term "otherwise" is not broad

enough to cover a vacancy by that reason. The section is perhaps open to the construction that it refers only to the contingency of there being no one, such as an officer holding over, who could take the office. Such a construction might reasonably be placed on section 184, relating to vacancies in the office of police judge "by death, resignation, or otherwise." The word "otherwise," in connection with the special words there employed, should probably be restricted to other cases of similar character, and the special terms refer only to causes which end prematurely the term of an actual incumbent. But section 75 contains other special words. "Refusal to qualify" immediately precedes the general word "otherwise." A refusal to qualify by an elected officer therefore created a "vacancy" within the meaning of the section, and thus the meaning is extended to cases where the person who should otherwise take the office fails for some reason to do so, although to that time it has been occupied by another who might, if empowered to hold over, prevent a technical vacancy. That the term must have that effect is certain, unless we regard the refusal to qualify as relating only to the case of one already in office who refuses to requalify after a re-election or in order to hold over. If the legislature had intended such a marked and unusual restriction of the term it would certainly have used other and more restricted language. We would do violence to the language of the act should we read into it such a restriction. If, then, a refusal of an officer elected to qualify, and thus to assume the office in the first instance, creates a vacancy as the word is here used, a failure to qualify by reason of ineligibility must necessarily fall within the general term "otherwise." It creates a vacancy of entirely similar character. The majority opinion in *State v. Boyd*, 31 Neb. 682, seems at first to indicate a different construction, but on examination it is not opposed to our present conclusion. The language there construed was different. It was indeed held there that ineligibility did not amount to a "refusal to qualify,"

and we so hold. We now hold merely that a vacancy from either cause is of a character so similar to one caused by the other that a broad, general, inclusive term following one of the special reasons will include the other. In the *Boyd Case* the general term was "other disability," and the decision turned upon the force of the word "disability." The decision might there have been different if the general term had been "other reason" or "otherwise." "Disabilities," in their technical sense, were in the provision there considered specially mentioned, and the court restricted the general term to other disabilities of the classes specially mentioned.

When we observe the full and general force of the exception to section 102, which makes it applicable only where no other provision can apply, the existence of section 75, referring specially to the office of mayor and making a different provision, the unusually broad special and general terms of the latter section, and on perhaps broader and more potent grounds give effect to the manifest general purpose to end the old regime as speedily as possible and supplant it with the new, we cannot escape the conclusion that after the first city election and the time when the mayor who should be then chosen should have qualified, it was the intention that if the election should fail, or the person elected fail to qualify, then the president of the council should exercise the office. The former mayor, chosen under the repealed charter, was not expected to in that event continue in office.

DISMISSED.

NORVAL, J.

I agree to the entry of a judgment dismissing the proceeding.

SULLIVAN, J., dissenting.

It seems to me the decision of the court is the result of a strange perversion of the statutory provisions quoted

in the opinion. The argument which leads to the conclusion reached was not advanced by any of the learned counsel for respondent, and they will, doubtless, be amazed and much chagrined to learn that their client has at last succeeded in the action without effective aid from them. The assumption that section 102 was intended to apply only to exceptional cases and "as a last resort" is manifestly unwarranted. The language is sweeping, and plainly includes all the elective and appointive officers, agents, and servants holding office or intrusted with the care of public property or affairs under any general law or ordinance of the city, excepting those concerning whom some special provision had been made in the act. All persons lawfully holding public places under the charter of 1887 were to continue to exercise their functions under the act of 1897 until the election and qualification of their respective successors, except in cases where the new "act otherwise provided." The new act did otherwise provide for the board of fire and police commissioners. It did otherwise provide in section 17, which immediately conferred upon the mayor and council the power to remove certain officers of the city for cause, and to fill the vacancies thereby created. It did otherwise provide in section 103, which authorized the district court to remove any officer convicted of malfeasance or misfeasance, and provided that such officer, pending the proceedings against him, might be deprived of the right to exercise his trust. In these particular instances, and perhaps in others, the first sentence of section 102 was, for obvious reasons, made inapplicable. The office of the clause, "except as in this act otherwise provided," was to make the act congruous—to give its parts harmonious relation—and to prevent the claim being set up that every one who held an office or exercised a trust under the old law should possess an absolute and unqualified right, by virtue of the special provision, to continue in office and in the exercise of such trust until relieved by a qualified successor chosen under the author-

ity of the new charter. It is known, of course, to those familiar with the recent political history of the state that back of the provisions concerning the police and fire commissioners was a distinct legislative purpose to precipitately end the official existence of the members of the old board; but neither in the act nor out of it is there anything whatever to warrant the assertion that the legislature contemplated unseemly or unusual haste in disposing of public servants who held their places directly or derivatively from the local electorate. Section 75 was certainly not adopted as part of a general scheme to accelerate the displacement of officers who were to hold temporarily under the saving clause of the substituted charter. It was a permanent provision, and intended to be effective so long as the law should remain in force. It is familiar doctrine that in the absence of a clear legislative intention to precisely limit the tenure of an office so that at a particular time the authority of the incumbent shall cease, such incumbent is entitled to exercise his official functions until another person is qualified to assume them. In McCrary, Elections [3d ed.], section 314, it is said that both reason and authority support the proposition that there is an implied right to hold over, unless the contrary appears to be the plain requirement of the statute. Section 104 of chapter 26, Compiled Statutes 1897, provides: "Every officer elected or appointed for a fixed term shall hold office until his successor is elected, or appointed and qualified, unless the statute under which he is elected or appointed expressly declares to the contrary." Where is there an express declaration, or even reasonable implication, that the mayor of Omaha shall not hold his office and exercise its functions until a duly chosen and qualified successor is ready to take his place? Attention is directed in the majority opinion to section 75, where it is said that "when any vacancy shall happen in the office of mayor by death, resignation, absence from the city, removal from office, refusal to qualify, or otherwise, the president of the council" shall fill

such vacancy. It is then argued that, since a refusal to qualify by one who has been elected and is eligible creates a vacancy, a failure to qualify, by one who has received a plurality of votes, but who has not been elected because of ineligibility, must also create a vacancy and be comprehended within the meaning of the word "otherwise." Undoubtedly the legislature may, when not restrained by the constitution, declare what circumstance shall constitute a vacancy in office, but I have always understood that, in the absence of an express statute, a vacancy does not exist where there is a person lawfully in possession of the office competent to exercise its functions and invested with authority so to do. (Meachem, Public Officers sec. 126; *People v. Van Horne*, 18 Wend. [N. Y.] 515; *State v. Howe*, 25 O. St. 588; *State v. Harrison*, 113 Ind. 434; *People v. Tyrrell*, 87 Cal. 475.) In *Commonwealth v. Hanley*, 9 Pa. St. 513, it was held that where an officer elect dies before qualifying, his death does not create a vacancy. And in section 330 [3d ed.] of McCrary, Elections, it is said: "There are authorities of great weight holding that the power to fill a vacancy occurring in an office cannot be exercised until the office has once been filled during the term thereof; and that therefore no such power exists in a case where there has merely been a failure to elect within the time required by law." In the *Boyd Case* it was held that the election of an ineligible candidate to the office of governor was void, but that the failure of the election did not create a vacancy. It was also held in *Richards v. McMillan*, 36 Neb. 352, that the failure to elect a person qualified to hold the office of county treasurer did not create a vacancy within the meaning of section 101 of the general election law. In the first point of the syllabus it is said: "A county board is not authorized to declare vacant a county office and make an appointment to fill such vacancy on the sole ground that an officer elect is ineligible and therefore unable to qualify. The incumbent of such office has a right to qualify within ten days after it is

ascertained that his successor elect is ineligible, and upon qualifying in the manner provided by law will be entitled to hold over until a successor is elected and qualified." The section of the statute defining vacancies specifies nine events, upon the happening of any one of which a public office shall become vacant. Five of these are enumerated in section 75, and the other four are presumably included in the word "otherwise." A mere failure to elect does not of itself create a vacancy. The statute so states and this court has so decided. The decision on the demurrer was right. The judgment of ouster was in accordance with the law and the facts and should be adhered to. This important litigation, after its eventful career, should not end in a dog-fall.

CHARLES D. TATE V. STATE OF NEBRASKA.

FILED MARCH 8, 1899. No. 10542.

Unlawful Sale of Intoxicating Liquor: CONVICTION: REVIEW: EVIDENCE. No legal question of any novelty is involved in this case. Evidence *held* to sustain a conviction, instructions to be founded on the evidence, and certain evidence to be material and its admission not error.

ERROR to the district court for Cherry county. Tried below before KINKAID, J. *Affirmed.*

Clarke & Tucker, for plaintiff in error.

C. J. Smyth, Attorney General, and *W. D. Oldham, Deputy Attorney General*, for the state.

IRVINE, C.

The plaintiff in error asks a reversal of a judgment whereby he was sentenced to imprisonment for two years for the offense of selling intoxicating liquor to an Indian

not a citizen. The chief reason advanced for reversal is that the verdict is not sustained by the evidence. The evidence has been examined and found ample to sustain the conviction.

One instruction is criticised as not founded on any proof. There is some proof whereon to found it, and, moreover, it was not excepted to, nor is the giving of it assigned as error.

It is assigned as error that the court erred in admitting evidence of the defendant's occupation. The evidence on the point was to the effect that he was employed in a house of prostitution. To some of this evidence there was no objection, but it was admissible, if for no other reason, because the witnesses for the state had sworn that the liquor had been procured through visiting the house referred to; that the defendant followed them from the house and handed them the liquor a short distance away. To show that the defendant was connected with the establishment tended in some degree to aid the proof.

AFFIRMED.

ALICE HOLMES V. STATE OF NEBRASKA.

FILED MARCH 22, 1899. NO. 10520.

1. **Larceny**: VALUE OF PROPERTY: INFORMATION. A general verdict of guilty of the crime of larceny from the person, from which is omitted a statement of the value of the property alleged to have been stolen, is fatally defective.
2. ———: ———: VOID SENTENCE. A verdict which lacks a finding of an essential element of the crime charged will not support a sentence, and a judgment based thereon is void.
3. ———: ———: ———: REVIEW: ASSIGNMENTS OF ERROR. The question of the effectiveness of such a verdict will be examined and determined in an error proceeding to this court, although not of the assignments of the motion for a new trial.

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

Lee S. Estelle, for plaintiff in error.

C. J. Smyth, Attorney General, and *W. D. Oldham, Deputy Attorney General*, for the state.

HARRISON, C. J.

An information was filed in the district court of Douglas county in which the plaintiff in error was charged with the statutory crime of larceny from the person. The amount alleged to have been so stolen was stated as follows: "Forty-five dollars in money, of the value of forty-five dollars." The accused, who had been arrested, was arraigned, entered a plea of not guilty and was placed on trial. The trial jury returned a verdict of guilty, which was in terms as follows: "We, the jury, duly impaneled and sworn to well and truly try and true deliverance make between the state of Nebraska and Alice Holmes, the prisoner at the bar, do find the said defendant guilty of larceny from the person, as she stands charged in the information." Sentence was pronounced against the accused of confinement in the penitentiary for a designated term.

It is urged in an error proceeding to this court that the verdict was insufficient, in that it was general and did not find the value of the property or thing stolen, and being so defective furnished no basis for a judgment or sentence. The section of the Criminal Code under which the prosecution was instituted reads as follows: "Every person who steals property of any value by taking the same from the person of another without putting said person in fear by threats or the use of force and violence, shall be deemed guilty of grand larceny, and shall, upon conviction thereof, be punished by confinement in the penitentiary for not less than one nor more than seven

years." (Criminal Code, sec. 113*a*.) The section of the Criminal Code the provision of which it is asserted was governable, and under which the verdict herein was clearly insufficient, is worded as follows: "When the indictment charges an offense against the property of another by larceny, embezzlement, or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare in their verdict the value of the property stolen, embezzled, or falsely obtained." (Criminal Code, sec. 488.) We are satisfied, after an examination of the subject, that the section just quoted is applicable to all larcenies, and the crime charged in the information in the case at bar was a larceny. The verdict lacked one essential element, and without it could not support a judgment. The trial court could not impose the sentence which was adjudged, and such judgment was without force or void. (1 Bishop, Criminal Procedure sec. 1005; *In re McVey*, 50 Neb. 481.) The section (488) of the Criminal Code under consideration was evidently copied literally from the Code of Ohio. It is an exact reproduction of section 167 of said Code. In the case of *Armstrong v. State*, 21 O. St. 357, there was a trial of the accused on a charge in one count of the indictment of stealing a horse of an alleged value, and a second count for receiving a stolen horse of the same alleged value. There was a conviction, the verdict being a general one and without any finding of the value of the property. In an error proceeding to the supreme court it was stated in the opinion rendered, after quoting section 167 of the Criminal Code: "The Code now in force, on this subject, is peremptory. The only question is whether it applies to the offense of horse-stealing under the 27th section of the crimes act (S. & C. 412), which makes it a penitentiary offense whatever may be the value of the animal stolen. In all cases of larceny under other sections of the statute (S. & C. 408 and 439) there is an obvious reason for requiring the jury, on conviction, to return in their verdict the value of the property stolen, for that is what determines the grade of the offense, and

the kind of penalty imposed by the statute. The same is true of the crime of embezzlement. (S. & C. 426.) If this was the only reason for the requirement of the 167th section of the Criminal Code, there would be strong reason for doubting its application to the crime of horse-stealing, for it would have no practical effect. There is nothing in the crimes act giving the term 'larceny,' as used in the 167th section of the Code, any significance other than its ordinary meaning; for, while the word is used in the section making the stealing of property of thirty-five dollars in value a penitentiary offense, it is not used in the section affixing a less penalty for the stealing of property of less value, nor is it used in the section relating to horse-stealing. Horse-stealing is larceny, and the language employed in the 167th section of the Code is clearly broad enough to embrace that offense. It expressly includes in its provisions the offense of obtaining property by false pretenses, and the grade of punishment affixed to this offense by the statute, like that of horse-stealing, does not depend upon the value of the property obtained. Since, then, the section applies expressly to one of these offenses, we cannot well hold that it has no application to the other, for there is no reason for applying it in one case that is not equally strong in the other. The determination of the grade of punishment is not, then, the only reason for this provision of the Code. Although the value of the property stolen in one case, or falsely obtained in the other, may not affect the grade or kind of penalty imposed for these offenses, it may influence the degree of punishment to be inflicted. The statute gives a wide discretion to the court as to the degree of punishment to be adjudged, on conviction. In this view it may have been regarded as material to the substantial right of the defendant that the actual value of the property stolen or falsely obtained should be 'ascertained and returned' in the verdict, and that it should not be left as on a general verdict of guilty, according to respectable authorities it might be (1 Bishop,

Criminal Procedure sec. 719), to be implied to the amount stated in the indictment. But whatever reasons may have induced the enactment of the section, its terms are such, we are constrained to hold, that the offense for which the defendant was tried was embraced in its provisions. To hold the reverse would virtually be a judicial repeal of the section."

We are entirely satisfied with the reasoning employed in the opinion from which we have just quoted, and think it stated the correct rule. In the case of *McCoy v. State*, 22 Neb. 418, the prisoner was tried on the charge, and declared guilty by general verdict, of the crime of larceny as bailee and no value of the property was stated in the verdict. In an opinion of this court it was said, after quoting section 488 of the Criminal Code: "This provision of the Code, although clearly applicable to the case at bar, was wholly ignored. Its provisions are mandatory and cannot be evaded. The verdict, therefore, conferred no authority upon the trial court to enter a judgment or sentence by which plaintiff in error was convicted of felony." (See, also, *McCormick v. State*, 42 Neb. 866; *Fisher v. State*, 52 Neb. 531.) That the verdict in the case at bar lacked an essential element was not presented by the assignments in the motion for a new trial, or by any plea in the trial court. The attention of that court does not seem to have been challenged or directed to the fact of the defectiveness of the verdict; it is, however, of the assignments of the petition in error. It is argued for the state that the record being as we have stated, no advantage can now be taken of the matter of the lack of finding in the verdict. The trial court might have set aside the verdict of its own volition, if on examination it had discovered prejudicial error. (*Weber v. Kirkendall*, 44 Neb. 766.) We have no hesitancy in saying that in a case where there has been a sentence to imprisonment in the penitentiary, or sentence to punishment for a crime of the grade of a felony, this court will examine the question, if raised by the assignments of the petition in error,

of the existence of such a deficiency in the verdict as renders it insufficient in substance to sustain the sentence imposed. It follows that the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

H. H. LOCKWOOD, APPELLEE, V. GEORGE COOK ET AL., APPELLANTS.

FILED MARCH 22, 1899. No. 8841.

1. **Judicial Sales:** APPRAISEMENT: REVIEW. "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." *Brown v. Fitzpatrick*, 56 Neb. 61, approved and followed.

2. ———: PURCHASE BY PLAINTIFF: PAYMENT OF BID: OBJECTION TO CONFIRMATION. In an action of foreclosure of a real estate mortgage there was a decree and sale. At the sale the plaintiff in the action, whose lien was the first one, purchased the property at a sum less than the amount to which he was entitled under the decree. On motion for confirmation of the sale, *held* not a forceful objection that the amount bid had not been paid to the officer in money; that it was unnecessary that the formality of handing the money to the officer by the plaintiff and purchaser and its return to him by the officer should be observed.

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

A. W. Martin, for appellants.

John L. Doty, contra.

HARRISON, C. J.

In this, an action to foreclose a real estate mortgage, a decree of foreclosure was rendered, and to enforce it an order of sale of the mortgaged premises was issued

and delivered to the sheriff, pursuant to the directions of which the property was appraised and sold, the plaintiff in the action being the purchaser. After the appraisal, and prior to the sale, an objection to the appraisal was filed for the appellants, the ground of which was that the appraisement was too low. Subsequent to the sale an affidavit in support of the objection to the appraisal was filed. A motion for confirmation of the sale was made and objections thereto were presented for the appellants, and at the hearing there seems to have been included the objection to the appraisal. The record does not disclose a hearing of this objection other than as one of the objections interposed to the motion for confirmation.

One argument urged here is that the appraisal was too low; that it was less than the real value in money of the property. In the absence of an attack on the appraisement on the ground of fraud, an assertion that there was a valuation which was too low does not furnish a sufficient reason for the impeachment thereof. (*Brown v. Fitzpatrick*, 56 Neb. 61; *Vought v. Foxworthy*, 38 Neb. 790; *Mills v. Hamer*, 55 Neb. 445.)

The purchaser was, as we have before stated, the owner of the mortgage being foreclosed; and one objection to the confirmation of the sale, and which is now urged, was that the amount of the bid for the property was not deposited with, or paid to, the officer who conducted the sale. The sale was for an amount less than the mortgage debt. The sum adjudged to be due by the decree and the lien foreclosed was the first one. The sale was for less than the amount decreed to be due the plaintiff, who was also the purchaser. In such a sale it is unnecessary that the formality of payment in money of the amount of the bid be made by the plaintiff and purchaser to the officer and by the officer returned to the purchaser. The bid and purchase by the plaintiff would work the extinguishment of a like amount of the decree. This was sufficient to sustain the sale. (Wiltsie, Mortgage Foreclosure sec.

480; *Sage v. Central R. Co.*, 13 Western Jurist [Ia.] 218; *Jacobs v. Turpin*, 83 Ill. 424; *Fidelity Insurance, Trust & Safe Deposit Co. v. Roanoke Iron Co.*, 84 Fed. Rep. 752.)

It is insisted that the fact that the amount of the bid, at least in a sufficient sum to cover the costs, had not been paid furnished ground for setting the sale aside. There are many methods by which the officer might obtain payment of the costs. That he had failed to do so at the time of his return or of request for confirmation was no potent cause for unconditional refusal to confirm the sale. The order of confirmation must be

AFFIRMED.

H. H. LOCKWOOD, APPELLEE, V. GEORGE COOK ET AL., APPELLANTS.

FILED MARCH 22, 1899. NO. 8842.

Affirmance under rulings in case preceding. (*Lockwood v. Cook*, 58 Neb. 302.

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

A. W. Martin, for appellants.

John L. Doty, contra.

HARRISON, C. J.

The questions in this case do not differ from those adjudicated in the decision in the case of the same title (*Lockwood v. Cook*, 58 Neb. 302), and in which an opinion is filed of this date; and in accordance with the views expressed, the order of the district court must be

AFFIRMED.

ALBERT MILLER, APPELLEE, V. RENFREW STEVENSON ET AL., APPELLANTS.

FILED MARCH 22, 1899. No. 10210.

1. **Quieting Title:** FINDING THAT MORTGAGE HAD BEEN PAID. Evidence examined, and *held* to sustain the findings.
2. **Subrogation:** PLEADING. The pleadings and issues joined *held* to be inconsistent with and not to present the question of the right to subrogation.

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

Bartlett & Baldrige, for appellants.

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

HARRISON, C. J.

Albert Miller, the appellee herein, who purchased at a sale under process in an attachment suit the undivided one-half of lot 19, in Cain Place, in Omaha, instituted this action to quiet title and secure a partition, and was awarded a decree, from which this appeal has been perfected.

On or about April 14, 1890, Renfrew Stevenson and certain other parties formed a partnership and purchased some land, which was platted into lots, nineteen in all, and the whole was named Cain Place. The purchase was from one Martha M. Ish, who conveyed the property to Orrin R. Cain in trust for the partnership. Cain and the appellee were partners and entered into a contract with the firm of Stevenson, Bohn & Spotswood to erect dwelling-houses on eighteen of the lots in Cain Place. This contract was performed, and Miller and Cain, who claimed to not have received full payment for building the houses and to recover a balance alleged to be due, commenced and prosecuted to the end the attachment

proceedings which resulted in the sale of the undivided one-half of lot 19, in Cain Place, to the appellee. Lot 19 had been left vacant. Orrin R. Cain conveyed the title to lot 19 to Bohn, and Stevenson and Bohn conveyed the undivided one-half of said lot to William S. Roberts, who conveyed to Thomas Rowland by quitclaim deed, and Rowland conveyed to one John Stevens, Sr. When the land was purchased of Martha M. Ish, two notes evidencing a portion of the purchase price were executed and delivered to her, one in the sum of $11,050 and the other $11,450, and to secure their payment a mortgage on the land sold was executed and delivered. The note for $11,450 was subsequently sold to Edward or Sarah Ainscow and the mortgage in part assigned. During the time the eighteen houses were in process of construction one A. J. Whidden, secretary of the Star Union Lumber Company, was treasurer of the partnership, the owner of Cain Place, and Stevenson, of the partnership, was vice-president of the Star Union Lumber Company. One John R. Davis was its president and Ben W. Davis a stockholder and director. John R. Davis was also president of the Davis Lumber Company, and he and Ben W. Davis were its owners, directors, and officers. The place of business of the Davis Lumber Company was in Wisconsin, and the Star Union Lumber Company was a branch house located in Omaha. The latter company furnished the lumber which was used for the erection of the eighteen houses in Cain Place, and it also made advances or loans of money to the partnership, the owners of Cain Place. During the course of the transactions more or less connected from which originated the present litigation the Star Union Lumber Company assigned its assets to the Davis Lumber Company, and the latter assumed and agreed to pay the debts of the former.

To convey information in regard to the issues litigated we deem it best to quote to some extent from the pleadings. It was of the allegations of the petition:

"1. The plaintiff alleged that on April 14, 1890, Steven-

son, Bohn, and Spotswood formed a partnership and acquired title to an undivided one-half of lot 19 in Cain Place, in Omaha, Douglas county, Nebraska, together with other property; that the title was first conveyed to Spotswood and by him to one Orrin R. Cain, and by Cain to Stevenson and Bohn; that all of these persons held the title in trust for said partnership; that subsequently Spotswood conveyed his interest to Stevenson and Bohn; that all of said instruments were duly recorded in the office of the register of deeds of Douglas county, Nebraska, and were legal and valid conveyances of the parties hereto.

"2. That on March 28, 1891, Bohn conveyed to Roberts the title to the undivided one-half of said lot 19, which deed was recorded June 15, 1891, in the office of the register of deeds, and was wholly without consideration and for the benefit only of the partnership.

"3. That on January 2, 1894, Roberts conveyed said title to Thomas Rowland, which deed was recorded April 7, 1894, and was a quitclaim deed in form and wholly without consideration, and procured from said Roberts by said Rowland, knowing Roberts held the title in trust for said partnership, and was procured for the purpose of cheating and defrauding the creditors of said firm.

"4. That on January 3, 1894, Rowland conveyed the title to John Stevens, Sr., defendant, which deed was recorded April 27, 1894, and was wholly without consideration, and made for the purpose of preventing the creditors of said partnership from recovering payment out of the assets of said partnership, and was fraudulent in fact.

"5. That Spotswood executed a purchase-money mortgage upon said lot and other property, which has been paid. Nevertheless, the Davis Lumber Company, a corporation, defendant, had fraudulently procured an assignment of two notes, whereon an alleged balance of $3,487.71 was claimed to be due it, and then assigned the notes and mortgage to George A. Davis, defendant; that the assignment was made February 6 and recorded Febru-

ary 14, 1894; that the Davis Lumber Company claims the said mortgage valid upon said lot 19 and other property, although said notes have been fully paid, and that the assignment to the Davis Lumber Company and George A. Davis were without consideration and fraudulent and were made for the purpose of defeating the claims of the creditors of the firm of Stevenson, Spotswood & Bohn.

"6. That John R. Davis and George A. Davis are brothers; that Rowland is in the employ of the Davis Lumber Company; that John Stevens, Sr., is a brother-in-law of John R. and George A. Davis; that the conveyance of Roberts to Rowland and Rowland to Stevens, Sr., and the assignment to the Davis Lumber Company of said notes, and the assignment by the Davis Lumber Company to George A. Davis of the note and mortgage securing them, were without consideration and a part of a fraudulent scheme to cheat and defraud the creditors of said partnership and prevent the collection of their just demands against the partnership."

There followed allegations relative to the attachment suit and the sale of the undivided one-half of lot 19, in Cain Place, and its purchase by appellee; also some other facts to make appear his right to a partition.

In the answer it was pleaded:

"The defendants Thomas Rowland, George A. Davis, John Stevens, Sr., John R. Davis Lumber Company answered on April 10, 1897. They admitted the statements and allegations in paragraph 1 of the petition.

"2. Defendants admit that on March 28, 1891, Bohn conveyed to Roberts the undivided one-half interest in lot 19; that said deed was duly recorded on June 15, 1891. Defendants deny that the deed was without consideration and for the benefit of the partnership, and allege that they had no knowledge whereon to form a belief that said transfer was without consideration and for the benefit of the partnership.

"3. Defendants admit that on January 2, 1894, Roberts conveyed said undivided one-half of lot 19 to Rowland;

denies the deed was without consideration; that Rowland knew Roberts held the title in trust for said Bohn and the partnership; denies that Rowland or any of the defendants knew the deed was procured by Roberts from Bohn without consideration; denies that the deed was procured by Roberts from Bohn or by Rowland from Roberts for the purpose of cheating or defrauding the creditors of Stevenson, Bohn & Spotswood individually or as a partnership; defendants admit and allege the fact to be that said transfer was made to the said Rowland in trust for the said John R. Davis and for his use and benefit.

"4. Defendants admit that on January 3, 1894, Rowland conveyed the title to the undivided one-half of lot 19 to John Stevens, Sr.; denies said deed was without consideration or for the purpose of preventing the creditors of the partnership from recovering the judgment out of its assets, and denies that said transaction was fraudulent in law or in fact.

"5. Defendants allege that at the time of the transfer John R. Davis and the Davis Lumber Company were indebted to Stevens, Sr., in about $80,000; that said transfer by Rowland to Stevens, Sr., was made to secure said indebtedness, together with other property; that said money so secured had been loaned by Stephens, Sr., prior to that time; defendants allege that said money had not all been paid, and that there yet remained due the said Stevens, Sr., a large amount of money which said transfer was to secure.

"6. Defendants say that on May 6, 1890, for a valuable consideration, Spotswood executed and delivered to Martha M. Ish, guardian of James C. Ish, his promissory note, due ninety days after date, with interest at eight per cent per annum until paid, interest payable semiannually, for $11,050; that said note was afterwards indorsed 'without recourse, pay to the order of James C. Ish, Martha M. Ish, guardian;' that at said time James C. Ish was of age and the guardianship had expired; that on

January 30, 1894, for a valuable consideration, Martha M. Ish and James C. Ish transferred and assigned said promissory note and mortgage securing the same to the Davis Lumber Company.

"7. That on May 6, 1890, for a valuable consideration, Spotswood executed a note to said Ish, guardian, for $11,450, due ninety days after date, having terms similar to the preceding note; that before its maturity Ish, guardian, for a valuable consideration, indorsed and transferred said note to Sarah Ainscow; that afterward, on January 30, 1894, said Ainscow transferred to the Davis Lumber Company, for a valuable consideration, said last described note and the mortgage securing the same; that on May 6, 1890, to secure the above notes, Spotswood, the owner of said premises, executed and delivered to Ish, guardian, a mortgage deed upon the following described premises in Douglas county, Nebraska, beginning at a point 2,450⅜ feet north of the southwest corner of the southwest quarter of section 10, in township 15 north, thence east 920 feet, thence north 189⅜ feet to the line of said quarter section, thence west 920 feet, thence south 189⅜ feet to the place of beginning, containing four acres, be the same more or less, which said property included lot 19, in Cain Place, described in plaintiff's petition; that no action at law or suit in equity had been commenced to recover said debt or any portion thereof, although it is wholly due; that there is due on said notes $3,490.10, with interest at eight per cent from January 30, 1894, no part of which has been paid; that failing to pay said sum, the mortgage deed has become absolute; that the mortgage deed provided that in case of default in the payment of principal or interest, or any part thereof, said Ish, guardian, or her assigns, are authorized to sell said premises, or such part thereof as was necessary to satisfy the part due with interest; that said condition has become active; that before the commencement of this suit said Davis Lumber Company sold and transferred said mortgage for a valuable consideration to

George A. Davis, defendant herein, which assignment was made on February 6, 1894, and said mortgage is a valid lien on lot 19.

"8. Defendants admit that John R. and George A. Davis are brothers, that Rowland is an employé of the Davis Lumber Company, and Stevens, Sr., is a brother-in-law of John R. Davis.

"9. Defendants allege that the other undivided one-half of lot 19 was transferred to George A. Davis to secure an indebtedness which John R. Davis owed said Davis at that time, which indebtedness was due and owing."

There were further allegations of the answer, but they need no notice here.

The reply was as follows:

"The plaintiff Miller alleges that the partnership was in the actual possession of lot 19 at the time Roberts made his deed to Rowland, and that each and all of the answering defendants knew and had full knowledge of that fact, and the further fact that Rowland held the title to the undivided one-half of lot 19 in trust for the use of said partnership, and that he personally claimed no interest therein; that the partnership was in possession of said lot at the time Rowland conveyed to Stevens, Sr.; that Rowland paid no consideration whatever for said land, but was simply a convenient conduit through which the title might pass in furtherance of the fraudulent scheme to cheat and defraud the creditors of said partnership, and particularly Cain and Miller, from collecting the amount due them of said partnership.

"2. Plaintiff admits the execution of the notes of $11,050 and $11,450 dated May 1, 1891, set forth in the answer, and that the last mentioned note was transferred to Sarah Ainscow, but alleges the fact to be that said transfer was to the said Sarah Ainscow in trust for one Edward Ainscow, who was the real owner thereof; that said notes were secured by the mortgage set forth in the petition of the plaintiff, and that each of said notes were

fully paid and satisfied and constitute no lien upon said premises.

"3. Plaintiff denies each and every allegation in said answer contained, except such allegations as are admitted herein to be true. This reply relates simply to that part and portion of said answer which was not stricken out by the court on the motion of the plaintiff."

We will quote in part the decree:

"That, under all the facts, circumstances, and evidence in the case, the plaintiff is entitled to recover herein against the defendants herein.

"2. That in May, 1890, Ish, guardian, sold and conveyed to Spotswood lot 19, in Cain Place, in Omaha, Douglas county, Nebraska, together with other property; that Spotswood received the title in trust for a partnership composed of himself and the defendants William G. Bohn and Renfrew Stevenson; that shortly thereafter he executed and delivered a deed to said premises to Stevenson and Bohn, who held the land in trust for the partnership; that Bohn conveyed an undivided one-half interest in said land to his cousin, Roberts, defendant herein, who likewise held said title in trust for said partnership and never held the same as owner of said land.

"3. That the Davis Lumber Company, on January 2, 1894, procured from said Roberts a quitclaim deed to the undivided one-half of said lot 19, which said deed to the defendant Rowland, who was an employé of the Davis Lumber Company, and who received said title and held the same for said Davis Lumber Company with full knowledge and notice that the said Roberts held said title in trust for said partnership, was fraudulent as a matter of law.

"4. That the said Davis Lumber Company, on January 3, 1894, caused said Rowland to convey said title to the defendant Stevens, Sr., who received said title to said undivided one-half of lot 19 with full knowledge and notice that said Davis Lumber Company had procured said deed to be made by Roberts to said Rowland, as here-

inbefore set forth; that neither the said Rowland nor the said Stevens were *bona fide* purchasers of said undivided one-half of lot 19, in Cain Place.

"5. That the said deed from Roberts to Rowland and the said deed from Rowland to Stevens, Sr., were fraudulent in law and void, and should be canceled of record.

"6. That when the said Spotswood received the said title to said land, including the undivided one-half of lot 19, he executed a purchase-money mortgage of $22,500 to Martha M. Ish, guardian of James C. Ish, a minor; that the said Martha M. Ish, guardian, conveyed one note of $11,450 to Sarah Ainscow for the sole use and benefit of her brother, Edward Ainscow, and retained the other note of $11,050; that Cain Place was platted into nineteen lots, and dwelling-houses were erected on eighteen of those lots; that the said mortgage on said land was paid at and during the erection of said eighteen houses, except said lot 19.

"7. That the said Star Union Lumber Company, from time to time, paid cash to the said Ish and delivered lumber to said Ish, and finally settled with the said Ish by executing and delivering its notes to the said Ish, who retained the original note and mortgage until said notes were paid, as security for his debt; that the Star Union Lumber Company paid the note held by the said Sarah Ainscow by delivering lumber to said Ainscow in the sum of about $600 in excess of the amount due on said note held by said Sarah Ainscow prior to its failure in September, 1893.

"8. That at the time the Star Union Lumber Company failed it assigned all its property to the Davis Lumber Company, and in consideration thereof the Davis Lumber Company assumed and agreed to pay all the indebtedness of the Star Union Lumber Company, and did thereafter pay to said Ish the sum of $500 in cash to take and satisfy the balance due on said note given by said Star Union Lumber Company to said James C. Ish, in full settlement of the balance due said Ish prior to its assignment to the Davis Lumber Company.

"9. The court further finds, from all the facts, circumstances, and evidence in the case, that said mortgage made by said Spotswood to said Martha M. Ish, guardian of said James C. Ish, a minor, has been fully paid and satisfied, and that the assignments made by said James C. Ish and Sarah Ainscow to the Davis Lumber Company were without consideration, null and void, and of no force and effect.

"10. The court further finds that the Star Union Lumber Company had no interest whatever in the said undivided one-half of said lot 19, in Cain Place, by reason of any lien or interest therein, but that the said Star Union Lumber Company was simply a creditor of said partnership of Stevenson, Spotswood & Bohn, and have never reduced their said claim against said partnership to judgment, and said Davis Lumber Company has no greater rights than said Star Union Lumber Company.

"11. That at the time said Star Union Lumber Company paid certain money to said James C. Ish and delivered certain lumber to Martha M. Ish on account of said James C. Ish, and made full settlement with said James C. Ish and delivered to the said Ish its notes representing the balance unpaid on the note retained by Ish, and at the time the said Star Union Lumber Company agreed with the said Edward Ainscow, for whose use and benefit the mortgage had been assigned to his sister, Sarah Ainscow, to pay the balance to the said Ainscow upon the note held by him, there was no agreement or understanding between the said Ish and the said Star Union Lumber Company, and between the said Ainscow and the said Star Union Lumber Company, that the said Ish or the said Ainscow should assign said notes and mortgage to said Star Union Lumber Company, but on the contrary it was the intention and design of said Star Union Lumber Company to pay and satisfy said notes and mortgage, and that it was not contemplated by or understood by either of the parties thereto that the said Star Union Lumber Company was purchasing either of said notes or was to have an assignment of said mortgage.

"12. That said notes secured by said mortgage were past due at the time of the failure of the said Star Union Lumber Company, in September, 1893, and at the time of the assignment by Ish and Ainscow of said mortgage to said Davis Lumber Company, in March, 1894, and that the said Davis Lumber Company received said notes and assignment of said notes and mortgage from the said Ish and Ainscow with full knowledge and notice in law that the said notes had been paid, and said mortgage should be canceled of record."

There were further findings in the decree, but on points other than we need specifically notice at this time.

It is contended for appellants that the evidence was of such effect that there should have been, and should be now, a finding contrary to the one made by the trial court with reference to the litigated points of whether the debt evidenced by notes and mortgage which were given to Mrs. Ish when the land, which, when platted, was known as Cain Place, was purchased of her, was paid, and in fact discharged, or whether what was done constituted, in effect, a purchase of the securities, and the assignments then made were valid, effectual, and enforceable. The evidence has been presented here by printed abstract. It is somewhat complicated and is conflicting, but a careful examination of it leads to the conclusion that the finding of the district court to the effect that the debt of the notes and mortgage was paid is supported by evidence, or it is not clearly wrong; hence we will not disturb it. The appellants, it will be seen by portions of the answer herein quoted, rested their defense on the claim that the notes and mortgage had not been paid, but in effect bought and assigned; but now it is argued for them that if the assignment must fail, then they are entitled to invoke the doctrine of subrogation and to relief by reason of it. To this it must be said that they rested their defense on the rights derived from what they pleaded was in effect a purchase of the notes and mortgage and the assignment of them, and expressly denied any payment.

Subrogation herein must have rested in payment and some reasons recognized in equity for placing the parties in place of the ones on whom the debt rested and practically in whose stead payment was made. There was no such defense proffered or interposed, and it can be of no avail now.

The finding of the district court, as to which it may be said there is more of doubt than any other, is the one which underlies or is the basis of the portion of the decree by which it was determined the asserted transfer of the title to the property to John Stevens, Sr., was effected was fraudulent; but when the evidence which has more particular reference to this transfer is considered in connection with all the facts and circumstances of the whole transaction and the intent which the court decided was elemental of it, also the relationships of the parties, the claims made in the pleadings, and the evidence and lack of it, we cannot say the finding was without support, or rather that it was manifestly wrong. (*Millard v. Parsell*, 57 Neb. 178.) The judgment must be

AFFIRMED.

JOB P. KIRBY, APPELLEE, V. JOHN SHRADER ET AL., APPELLANTS.

FILED MARCH 22, 1899. No. 8839.

1. **Mortgage Foreclosure:** PLEADING: ACTION AT LAW. Where the answer to a petition to foreclose a real estate mortgage is a general denial, there can be no decree of foreclosure, in the absence of proof that no action at law has been brought for the recovery of the debt.

2. ———: ———: ———: EVIDENCE. The introduction as evidence of the note and mortgage alone is insufficient to sustain the allegation of the petition that no action has been brought at law.

APPEAL from the district court of Saunders county. Heard below before SEDGWICK, J. *Reversed.*

Clark & Allen, for appellants.

Daniel F. Osgood, contra.

NORVAL, J.

This appeal is prosecuted by the defendants from a decree foreclosing a real estate mortgage. The petition is in the usual form, and contains the allegation that no proceedings at law have been had for the recovery of the debt secured by the mortgage in question, nor any part thereof. The defendants answered by a general denial. The note, and the mortgage securing the same, together with an assignment of the mortgage by the mortgagee to the plaintiff, constituted the entire evidence adduced on the trial in the court below, and it is contended that these alone were insufficient to support the decree. The precise question was passed upon in *Jones v. Burtis*, 57 Neb. 604, in which case it was distinctly ruled that where the answer to a petition to foreclose a real estate mortgage consists of a general denial, a decree in favor of the plaintiff cannot be sustained, in the absence of proof showing that no action at law had been brought for the recovery of the mortgage debt. It is conceded by counsel for plaintiff that if the doctrine announced in the case mentioned is followed, the decree must be reversed. It is strenuously argued that *Jones v. Burtis, supra*, should be overruled, because the general denial in an answer to a petition to foreclose a mortgage does not put in issue the averment that no proceeding at law had been had for the recovery of the debt, and that the burden of establishing such allegation could be cast upon the plaintiff only by means of a special denial. An able argument was made at the bar in support thereof, which raised a doubt in the mind of the writer of the soundness of our former holding, but my associates are of the opinion that *Jones v. Burtis* was correctly decided, and the rule there announced must be regarded as the settled law of this state.

It is urged that the introduction of the note and mortgage as evidence was sufficient proof that no action at law had been instituted for the recovery of the debt, since the note contained no indorsement showing that it had ever been filed in any court. This argument is deemed unsound. Except as to justices' courts there is no statute in this state requiring that in an action brought on a promissory note that said plaintiff shall file such note in court. So that the omission of filing marks on the note in question is insufficient to sustain the allegation of the petition that no action had been brought at law. The decree is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JAMES CUMMINS V. BETSEY TIBBETTS.

FILED MARCH 22, 1899. No. 8770.

1. **Guaranty**: STATUTE OF LIMITATIONS. The statute of limitations begins to run against a contract of guaranty the same moment an action accrues thereon.
2. ——: ——. An action on the contract set out in the opinion, guarantying the payment of a certain promissory note, was barred in five years from the maturity of such note.

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

J. C. Watson, R. D. Stearns, E. C. Strode, and *John V. Morgan,* for plaintiff in error.

J. R. Webster, contra.

NORVAL, J.

This was an action instituted by James Cummins on May 5, 1894, upon a guaranty in writing, a copy of which follows:

"In consideration of $45, I hereby guaranty the payment of a certain promissory note, dated November 22, 1886, payable two years after date, to J. Busacker, for the sum of $200, and said note being signed by Ira Tibbetts and James Cummins. I hereby charge my separate estate with the payment of said note, and the consideration of this guaranty having been given for the use and benefit of my separate estate. BETSEY TIBBETTS."

There is no controversy over the facts. On November 26, 1886, Ira Tibbetts and James Cummins executed and delivered to J. Busacker their promissory note for $200, due in two years from date. Subsequently Betsey Tibbetts signed the guaranty above set forth, and the same was attached to said note and was held and retained by the payee, or his agent, until about June 10, 1889, when Cummins paid the note and received the same with the contract of guaranty. Under the facts stated, the jury, in obedience to a peremptory instruction by the court, returned a verdict in favor of defendant, and from the judgment rendered thereon a petition in error has been prosecuted by the plaintiff.

It would hardly seem possible, under the terms of the guaranty and the undisputed facts, that the defendant was liable on the guaranty, at least without a reformation of the terms of the instrument; and this was not sought by the pleadings filed in the case. By the strict terms of the undertaking Betsey Tibbetts guarantied the payment of the note in question. The note having been paid by one of the makers, the guaranty was fulfilled. The guarantor did not promise that Ira Tibbetts would pay the note, but guarantied the payment thereof generally; that is, that one of the makers, or both together, or some one for them, would satisfy the debt evidenced by the note. When the note was thus paid, the terms of her obligation were fully met and satisfied, and she was released from liability.

It is argued that the guaranty was given for the sole benefit of the plaintiff. The instrument cannot be so

read without disregarding the plain terms of the contract. It does not purport to indemnify plaintiff against the payment of the note. The guaranty was made to no one personally, but was delivered to the payee of the note, and the contract of guaranty should be read as though the same had been written upon the back of the note at its inception. The guaranty was for the benefit of the payee. He, or his transferee, could have maintained an action thereon upon the maturity of the note. A cause of action upon the guaranty accrued the moment default was made in the payment of the note, and as this suit was brought more than five years after the note matured, the statute of limitations had run against the cause of action. This is true though Mrs. Tibbetts be regarded as first surety and plaintiff second surety only, since the guaranty was not to plaintiff, but to any holder of the note. Cummins could avail himself of the benefit of the guaranty by paying the note, which would subrogate him to the rights of the original payee; and as the action was barred as to him, it was likewise barred as to plaintiff.

It is argued that the statute of limitations did not commence to run against plaintiff until he paid the note. This would doubtless be true had the guaranty been given for his benefit alone, or had the grantor promised that Ira Tibbetts would pay the note, but such was not the scope of the terms of the obligation assumed by the defendant. The judgment is right, and it must be

AFFIRMED.

JAMES PHILAMALEE V. STATE OF NEBRASKA.

FILED MARCH 22, 1899. No. 10504.

1. **Larceny: DEFINITION: INSTRUCTIONS.** While an instruction defining larceny is erroneous which omits to charge that the taking must be with a felonious intent, the instruction need not use the word "felonious," if words of equivalent import or meaning are employed.

2. **Instructions.** Instructions must be considered together.

3. ———: CRIMINAL LAW: TESTIMONY OF ACCUSED. In a criminal prosecution it is not reversible error for the court to instruct the jury that they have the right to take into consideration the interest of the defendant in the result of the trial in determining the weight to be accorded his testimony.

4. ———: REQUESTS. A party cannot, ordinarily, be heard to complain that the trial court did not present particular features of a case to the jury, where he has not requested an appropriate instruction upon that subject.

ERROR to the district court for Cedar County. Tried below before EVANS, J. *Affirmed.*

C. A. Kingsbury and *Sullivan & Griffin*, for plaintiff in error.

C. J. Smyth, Attorney General, and *W. D. Oldham, Deputy Attorney General*, for the state.

NORVAL, J.

James Philamalee was prosecuted in the district court of Cedar county under an information charging the crime of robbery, and upon the trial was convicted of grand larceny and sentenced to imprisonment in the penitentiary for the period of one year. He has brought the record here for review, alleging as grounds for reversal that certain instructions were erroneous, and that the evidence is insufficient to sustain a conviction.

Complaint is made of the following definition of larceny contained in the seventh instruction: "Larceny is the wrongful and unlawful taking and carrying or leading away of a thing, without claim of right made in good faith, and without the owner's consent, with the intention of permanently converting it to a use other than that of the owner." The criticism made upon this instruction is that it omits the element of felonious intent. This court has more than once said, in effect, to constitute larceny the taking must be with felonious intent, and an instruc-

tion is erroneous which does not contain that ingredient of the crime of larceny. (*Thomson v. People*, 4 Neb. 524; *Mead v. State*, 25 Neb. 444; *Waidley v. State*, 34 Neb. 250; *Barnes v. State*, 40 Neb. 545.) We are satisfied that the doctrine of those cases is sound, but it does not follow that the instruction here assailed is erroneous. It is not essential that an instruction defining larceny should contain the word "felonious," but if the words or language employed bear the same import it will suffice. In the instruction before us the court told the jury that to constitute larceny the taking must not only have been wrongful and unlawful but "without a claim of right made in good faith, and without the owner's consent." This definition is clearly within the rule announced in the foregoing cases. (*Carrall v. State*, 53 Neb. 431.) Moreover, by the second instruction given at the request of the defendant it was expressly stated that the accused could not be convicted of larceny if the evidence failed to show a felonious intent to steal the property. Instructions should be considered together, is the rule, and when so construed the crime of larceny was sufficiently defined in the charge in this case.

The tenth instruction is assailed, which reads as follows: "The jury are instructed that when the defendant testified in this case he became as any other witness, and his credibility is to be tested by, and subjected to, the same tests as are legally applied to any other witness, and in determining the degree of credibility that shall be accorded to his testimony the jury have a right to take into consideration the fact that he is interested in the result of this prosecution, as well as his demeanor upon the stand, and the fact that he has been contradicted by other witnesses." The vice imputed to this portion of the charge is that it advised the jury they were at liberty, in weighing the testimony of the accused, to take into consideration his interest in the result of the prosecution. This court is committed to the doctrine laid down in the portion of the instruction just quoted. (*Johnson v. State*,

34 Neb. 257; *Housh v. State*, 43 Neb. 163; *St. Louis v. State*, 8 Neb. 405; *Murphy v. State*, 15 Neb. 383.)

The jury found the value of the property stolen to be $36.20. It is urged that this sum may have been fixed by a consideration of a preponderance of the evidence, and that the court should have instructed the jury that the accused was entitled to a reasonable doubt in determining the value of the property. They were advised by the charge of the court what the material allegations of the information were, and told that the state must prove every one of them beyond a reasonable doubt. If the defendant wished the jury especially instructed that he was entitled to the benefit of a reasonable doubt on the question of the value of the property, he should have tendered an appropriate instruction announcing the proposition. This he did not do, and he cannot now predicate error upon the failure of the court to instruct the jury upon that point. (*German Nat. Bank of Hastings v. Leonard*, 40 Neb. 676; *Barr v. City of Omaha*, 42 Neb. 341.)

We have read with considerable care the evidence contained in the bill of exceptions, and while the same is conflicting, that introduced by the state was sufficient to establish every element of the crime of grand larceny. No reversible error being disclosed, the judgment is

AFFIRMED.

PERKINS COUNTY V. KEITH COUNTY.

FILED MARCH 22, 1899. NO. 8833.

1. **Counties**: ALLOWANCE OF CLAIMS: CONSTRUCTION OF STATUTE. Section 37, article 1, chapter 18, Compiled Statutes 1897, regarding the audit and allowance of claims against a county by the board of county commissioners, is not a grant of power to such board, but is a provision regulating the exercise of the power granted in section 23 of said chapter.

2. **Formation of New County**: DIVISION OF PROPERTY. Where a new

county is formed out of the territory of a county previously organized, the county boards of the two counties are authorized by section 16, article 1, chapter 18, Compiled Statutes 1897, to meet and agree upon a division of the corporate property and of the corporate liabilities.

3. ———: ———: ACTIONS. If, in making such division, and as an incident thereof, a balance is found due from one county to the other, and such balance is definitely settled and agreed upon so that there remains nothing upon which the county board of the debtor county can thereafter exercise judgment or discretion, the claim may be the subject of an original action in the district court, and need not be presented to the county board for examination and allowance.

ERROR from the district court of Perkins county. Tried below before GRIMES, J. *Affirmed.*

George H. Hastings, B. F. Hastings, C. P. Logan, and *H. E. Goodall,* for plaintiff in error.

Albert Muldoon, Duffie & Van Dusen, Robert Ryan, and *J. W. McSay, contra.*

SULLIVAN, J.

The plaintiff the county of Keith, in its petition, alleged:

"1. That it was duly organized as a county in the year 1883; that its territory consisted of the territory now included in the county of Keith and the county of Perkins, the plaintiff and defendant in this action; that the county boundaries of the plaintiff county continued as above until on or about January 27, 1888, when the defendant county was duly organized and the officers of the defendant county assumed charge of its county government.

"2. That in accordance with section 16 of chapter 18 of the Compiled Statutes of Nebraska of 1897 the county boards of the said counties of Keith and Perkins proceeded to divide all the property, both real and personal, and all the debts and liabilities and choses in action of every kind belonging to county of Keith, the county from which the county of Perkins was formed, and it was

found by the said boards upon said division that there was due and owing to the plaintiff from the defendant the sum of twenty-five hundred and four and 65-100 dollars.

"3. That the county board of the defendant accepted the said amount as the amount owing plaintiff by defendant on account of the division above stated, and caused their acceptance to be spread upon their records in January, 1889.

"4. That the county board of the plaintiff accepted the said amount owing plaintiff by defendant on account of the division of property and liabilities as above stated.

"5. That said amount was accepted by the county boards of both the plaintiff and defendant counties as the amount justly owing plaintiff by defendant after charging defendant with its legal proportion of the liabilities of the plaintiff and crediting the defendant with its legal proportion of the property and choses in action of the plaintiff.

"6. That the defendant refuses to pay the said amount, or any part thereof, although often requested to do so.

"7. That no part of said amount has been paid, and there is now due the plaintiff from the defendant the sum of twenty-five hundred and four and 65-100 dollars ($2,504.65), together with interest on the same at the rate of seven per cent per annum from the 1st day of February, 1889."

Both by demurrer and answer the defendant the county of Perkins challenged the jurisdiction of the court to hear and determine the cause. The court held that it possessed jurisdiction, and, after hearing the evidence, found the issues in favor of the plaintiff and rendered judgment accordingly. The defendant prosecutes error.

It is perfectly plain that the petition was framed on the theory that the commissioners of the two counties had met to effect a division of their property and liabilities, and had, at such meeting, agreed that the defendant was indebted to the plaintiff in the sum of $2,504.65.

The evidence affords an inference that the facts alleged were true. An admission of the indebtedness claimed is found in the record of the proceedings of the county board of Perkins county; and the witness Sheridan testified that the demand in suit was a balance agreed to at a conference between representatives of Keith county and the commissioners of Perkins county. Presumably the representatives referred to by the witness were the plaintiff's commissioners, who alone had authority to treat with commissioners of Perkins county for the purpose of adjusting the difference between the two counties.

But the serious question in the case—the one to which attention is chiefly directed in the briefs of counsel—relates to the authority of the district court to entertain the action. On behalf of the defendant it is earnestly insisted that the county board of Perkins county is given exclusive original jurisdiction of the class of claims to which the one in controversy belongs. Section 23, chapter 18, Compiled Statutes 1897, confers on the county board of each county power "to examine and settle all accounts against the county, and all accounts concerning the receipts and expenditures of the county." Section 37 of the same chapter is in part as follows: "Before any claim against a county is audited and allowed, the claimant, or his agent, shall verify the same by his affidavit, stating that the several items therein mentioned are just and true, and the services charged therein, or articles furnished, as the case may be, were rendered or furnished as therein charged, and that the amount claimed is due and unpaid after allowing just credits." From the language just quoted it is entirely clear that section 37 is not a grant of power to the county board, but rather a provision regulating the exercise of the power granted in section 23. It results from this conclusion that an account is the only claim which a county board is authorized to "examine and settle" or audit and allow. It has been frequently held that the word "claim," as used in section 37, has a restricted signification; that it refers to

demands arising *ex contractu* and not to those founded upon torts. (*Richardson County v. Hull*, 24 Neb. 536; *Fuller v. Colfax County*, 33 Neb. 716; *Douglas County v. Taylor*, 50 Neb. 535.) In *Stringham v. Board of Supervisors of Winnebago County*, 24 Wis. 594, it was held, under statutory provisions quite similar to those above quoted, that the jurisdiction of the county board was limited to the examination and allowance of claims and demands arising out of some express or implied contract or of some fiduciary relation. While some of our decisions undoubtedly extend the meaning of the word "account" beyond the limits set by lexicographers, yet no case, we are sure, has gone to the length of holding that a single demand, the amount and validity of which has become unalterably fixed, must be presented to the county board to be audited and allowed. In *Kemerer v. State*, 7 Neb. 130, it was held that where the compensation of a public officer is definitely fixed by law the duty of the county board, in connection with his claim based on official services, is ministerial merely, "because," says GANTT, C. J., "the board has no judgment or discretion to exercise in the matter." In this case, according to the finding of the trial court, the commissioners of the two counties met in joint session, and after due deliberation agreed that as a result of the division of their property and liabilities the defendant was indebted to the plaintiff in the sum of $2.504.65. This amount, then, was established as a fixed and absolute charge against Perkins county. It was established by the county board as the result of an examination and adjustment of mutual demands. When the amount of the defendant's liability was settled by contract, there remained nothing in regard to the matter upon which its commissioners could exercise discretion. There was nothing to examine and adjust or audit and allow. It would be a work of supererogation for the commissioners to examine and allow a claim which, under the authority of the statute, they had already fully examined and legally allowed. The judgment of the

district court is manifestly just and technically right. It is

AFFIRMED.

HARRISON, C. J., dissents.

CHICAGO LUMBER COMPANY V. JOSEPH HUNTER.

FILED MARCH 22, 1899. NO. 8838.

1. **Chattel Mortgage:** GROWING CROPS: SALES. One who bargains for the future delivery of a quantity of corn to be taken from the stalk in a designated field is charged with notice of a then existing, and duly recorded, chattel mortgage in which such corn is described as a growing crop.
2. ———: ———: ———. When such corn is husked and delivered in execution of the contract, the purchaser is presumed to know that it is part of the crop covered by the mortgage.
3. ———: ———: DESCRIPTION OF PROPERTY. A description in a chattel mortgage, "50 acres of corn planted on the S. E. ¼ of sec. 17-1-8, being the N. 30 of the S. 80 acres and the south 20 of the N. 80 acres," accompanied by the further statement that the mortgaged property is in the possession of the mortgagor in N. county, and that any attempt on his part to remove the property from said county would be a sufficient reason for an immediate foreclosure, is sufficiently definite to impart constructive notice.

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

Buck & McConnell, for plaintiff in error.

Cole & Brown, contra.

SULLIVAN, J.

This action was brought by the Chicago Lumber Company against Joseph Hunter to recover possession of 1,300 bushels of corn. From a judgment rendered on a verdict in favor of the defendant the plaintiff prosecutes error.

The corn in question was raised by A. C. Johnson, who mortgaged it as a growing crop to the plaintiff on July 11, 1895. About November 1, while the corn was yet on the stalk and in the field, Hunter called on Johnson, and being informed that the latter had corn to sell, proceeded in the direction of the field for the purpose of ascertaining its quality. About an hour later he returned, expressed himself as being satisfied, and concluded a bargain for 500 bushels of white corn to be thereafter delivered. Part of the purchase price was immediately paid and the contract was afterwards fully executed on both sides. About November 15, Johnson sold Hunter 700 bushels of shelled corn, which was subsequently delivered and paid for. It is not very clear from the evidence whether at the time of the second purchase the parties had in contemplation any specific corn. It does, however, appear conclusively that all the corn sold by Johnson to the defendant was white corn, and that Johnson's entire crop of white corn was covered by the plaintiff's mortgage. It was held in *Gillilan v. Kendall*, 26 Neb. 82, contrary to the rule in other jurisdictions, that a chattel mortgage on a growing crop is not constructive notice of a lien upon the harvested product when offered for sale in the open market. We adhere to the principle announced in that decision, but think it can have no possible application to the first sale made by Johnson to Hunter. The plaintiff's mortgage was filed in the office of the county clerk of Nuckolls county, and was constructive notice to everybody that the plaintiff had a valid lien upon the crop of corn therein described. The defendant bought a portion of this crop, knowing at the time that it was on the stalk in the field. It would seem that he actually inspected it, but whether he did or not is immaterial. The sale was not merely a sale in general terms of 500 bushels of corn of a certain quality to be delivered in the future. It was a sale of specific corn —corn then on the stalk in a designated field. The law charged the defendant with knowledge of the fact that

all the corn grown in that field in 1895 was covered by the plaintiff's mortgage. It is true that Johnson had other corn, but he did not have any other white corn, and he could not legally perform his contract by delivering to the defendant yellow corn or calico corn, or even white corn grown upon other land than that pointed out to Mr. Hunter on the day the contract was made. On the evidence in the record now before us the court should have directed the jury to find for the plaintiff to the extent of the corn included in the first purchase.

It is asserted that the description of the mortgaged property contained in the mortgage is too vague and uncertain to impart constructive notice. We think otherwise. The description is "50 acres of corn planted on the S. E. $\frac{1}{4}$ of sec. 17-1-8, being the N. 30 of the S. 80 acres and the S. 20 of the N. 80 acres." It further appears from the mortgage that the property was in Johnson's possession, that he was a resident of Nuckolls county, and that any attempt on his part to remove the property from said county would be a sufficient reason for an immediate foreclosure. In *Buck v. Davenport Savings Bank*, 29 Neb. 407, it was said: "A description of property in a chattel mortgage which will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property, ordinarily, will be sufficient." Other cases illustrating the rule thus announced are *Peters v. Parsons*, 18 Neb. 191; *Wiley v. Shars*, 21 Neb. 712; *Rawlins v. Kennard*, 26 Neb. 181; *Smith v. Fields*, 79 Ala. 335; *Woodlief v. Harris*, 95 N. Car. 211. With the information furnished by the mortgage in question we see no reason to suppose that an honest effort to find the property described therein would have been utterly barren of results. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JULIUS OTTENS V. FRED KRUG BREWING COMPANY.

FILED MARCH 22, 1899. No. 8808.

1. **Payment:** EVIDENCE. Where, in an action on an account, payment is pleaded, it is proper to instruct the jury that they may consider evidence in regard to prior related transactions between the parties to aid them in determining whether the plea is sustained.
2. ———: ———: RECEIPTS. A receipt for rent for a particular month is presumptive evidence that the rent which previously accrued has been paid.
3. **Instructions:** ASSUMING FACTS. It is not error to refuse a proffered instruction which assumes the existence of a fact not proven.
4. **Payment:** APPLICATION: CHECKS. A bank check in the usual form is not, even when paid and returned to the drawer, an acknowledgment that the money therein mentioned has been received for, and applied to, a particular purpose.

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

Cobb & Harvey and *Samuel J. Tuttle*, for plaintiff in error.

Burr & Burr, contra.

SULLIVAN, J.

From April, 1893, to September 1, 1894, Julius Ottens occupied as a tenant of the Fred Krug Brewing Company a certain store building in the city of Lincoln and conducted therein a retail liquor business. The stipulated rental was $170 per month, payable monthly in advance. The first count of the petition is based on a promissory note given for a portion of the rent in arrears for either April or May, 1894. To this claim the answer presents no defense. The second count states a cause of action for the rent which accrued for August, 1894, that being the last month during which the defendant occupied the demised premises. The defense was pay-

ment. The cause was tried to a jury, and from a judgment rendered on a verdict in favor of the plaintiff the defendant prosecutes error.

Ottens' testimony was given in the form of a deposition, wherein, on direct examination, he stated that the note in suit represented a balance due upon the May rent. He further testified that payment of the rent which accrued prior and subsequent to the month of May had been made by checks drawn on the German National Bank. He was thereupon questioned by the plaintiff in regard to the payments for January, February, March, and April. The questions were objected to, and error is assigned on the ruling of the court requiring that they be answered. The rulings were obviously correct and made in recognition of the plaintiff's right to a reasonable cross-examination of an adverse witness. Neither was there any error in the refusal of the court to direct the jury to disregard the testimony concerning the manner of paying rent prior to August. The precise question in dispute was clearly stated in the tenth instruction given by the court on its own motion, and the jury were therein informed that all testimony in regard to business transactions between the parties prior to the month of August should only be considered to aid them in determining whether the plea of payment had been sustained. This was entirely proper and it was sufficient.

It was the plaintiff's theory that the note in suit was given for the April rent and that each payment thereafter made was properly applied on rent which had accrued for the month preceding the one in which such payment was made. To meet this hypothesis, and to show that the August payment was in satisfaction of the July rent, the defendant introduced as part of his deposition a check for $170, drawn by him in favor of the plaintiff on July 2 and paid by the bank on the following day. He also produced testimony tending to prove that when the deposition was filed in the office of

the clerk the check contained the words "for July rent," and that those words had been subsequently erased by an unknown and unauthorized person. Claiming that this evidence raised in his favor a presumption that the rent for July and for all the preceding months had been paid, the defendant tendered the following instruction: "It is a presumption of law, where a tenant shows a receipt for rent, that all previous rent has been paid to his landlord, and the jury are instructed that if they believe from the evidence that the defendant Julius Ottens has introduced a receipt or paid a check indorsed by the plaintiff, which they are instructed is equivalent to a receipt, for the rent of the premises in question for the months of July and August, 1893, then they are instructed that the presumption of law is that the rent for said premises for all back rents were paid, and they will find for the defendant, unless they shall believe from the evidence that such presumption has been removed by competent evidence." The refusal of the court to give this instruction is assigned for error. There can be no question about the correctness of the general proposition that a receipt for rent covering a particular month affords presumptive evidence that rent previously accruing has been paid (*Decker v. Livingstone*, 15 Johns. [N. Y.] 479; *Brewer v. Knapp*, 1 Pick. [Mass.] 332; *Patterson v. O'Hara*, 2 E. D. Smith [N. Y.] 58); and the defendant was entitled to have the jury so informed, but the instruction designed to convey that idea was unfortunately phrased, and the refusal to give it was not error. The assumption that there was a single check covering the rent for July and August was unwarranted. Moreover, the August check did not purport to be a receipt, and it is certainly incorrect to say that a check, which in its ordinary form is a mere order for the payment of money, is evidence of anything more than the receipt of the money which the drawee is directed to pay. Had the instruction been limited to the July check, and had it taken into account its condition when issued, which was a fact in

dispute, the refusal to give it would have been reversible error.

It is also urged as a ground for reversal that the evidence does not sustain the verdict. We think it does. We think the jury reached a correct conclusion and that the judgment should be

AFFIRMED.

HENRY HIER ET AL. V. ALLEN HUTCHINGS.

FILED MARCH 22, 1899. No. 8836.

1. **Habeas Corpus**: DISCHARGE OF PRISONER: UNLAWFUL REARREST: PENALTY. To entitle a party aggrieved to a judgment for the amount prescribed by section 361 of the Criminal Code it is merely required that the conditions described in said section be shown to exist. The amount of recovery is liquidated by the statute referred to.

2. **Review**: PARTIES: JOINDER: NEW TRIAL. Where parties seeking relief join in a motion for a new trial and in a petition in error, if relief must be denied as to one it must be denied as to all.

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

William Mitchell, for plaintiffs in error:

Defendant in error, without express authority of statute, cannot maintain in his own name an action for the penalty prescribed by section 361 of the Criminal Code, forbidding the rearrest of a prisoner who had been discharged on habeas corpus. (*Colburn v. Swett*, 42 Mass. 232; *Omaha & R. V. R. Co. v. Hale*, 45 Neb. 418; *St. Louis, A. & T. R. Co. v. State*, 19 S. W. Rep. [Ark.] 572; *Fleming v. Bailey*, 5 East [Eng.] 313; *Barnard v. Gostling*, 2 East [Eng.] 569.)

G. M. Sullivan and *R. C. Noleman, contra.*

RYAN, C.

In this action there was a recovery in the district court of Box Butte county of the sum of $500 under the provisions of section 361 of the Criminal Code. The jury found specially that constable Hier received notice, before taking Hutchings into his custody, that Hutchings had already been released on habeas corpus from the custody of an officer by whom he had been arrested upon a mittimus in the same case as that in which was issued the mittimus by virtue of which constable Hier arrested him and carried him to the county seat, a distance of about fifteen miles, and that said constable continued to hold Hutchings in custody after receiving the notice aforesaid. The section of the Criminal Code above referred to provides that in such case the party offending shall forfeit to the party aggrieved the sum of $500. The evidence fully sustained the findings of the jury, and it is not necessary that we should review it for the purpose of justifying this conclusion. In their nature these damages were general (*Bank of Commerce v. Goos*, 39 Neb. 437), and hence it was proper that the statute should liquidate them, as was done by the provisions of the section above cited. In principle the same question was decided adversely to the contention of the plaintiffs in error in *Clearwater Bank v. Kurkonski*, 45 Neb. 1, and in *Perkins v. Butler County*, 46 Neb. 314. The sureties on his official bond were joined as defendants with the constable, and the judgment was against all the defendants jointly. Whether or not this was proper we express no opinion, for the motion for a new trial and the petition in error were made jointly by the parties complaining. The judgment of the district court is

AFFIRMED.

J. W. TOMBLIN V. JONATHAN HIGGINS.

FILED MARCH 22, 1899. No. 7629.

1. **Payments on Usurious Note: CREDIT ON PRINCIPAL.** Payments on a promissory note which includes usurious interest should be credited upon the principal of said note, whether such payment be in the form of cash or of an independent note.

2. ———: ———. Where the note sued on is one which was given to obtain a credit actually indorsed upon a note which included usurious interest, this credit should be deemed to be upon the principal, rather than in extinguishment of the usurious interest on the note whereon said payment was indorsed, and accordingly it is *held* that the usury referred to does not render invalid the note sued upon.

REHEARING of case reported in 53 Neb. 92. *Reversed.*

W. S. Morlan, for plaintiff in error:

The court will apply all payments upon usurious loans as payments on the principal. (*Wright v. Laing*, 3 Barn. & C. [Eng.] 165; *Rohan v. Hanson*, 11 Cush. [Mass.] 44; *Keane v. Braden*, 12 La. Ann. 20; *Storer v. Haskell*, 50 Vt. 341; *Turner v. Turner*, 80 Va. 379; *Nelson v. Hurford*, 11 Neb. 465; *Knox v. Williams*, 24 Neb. 630; *Exeter Nat. Bank v. Orchard*, 39 Neb. 485; *Norfolk Nat. Bank v. Schwenk*, 46 Neb. 381; *Lanham v. First Nat. Bank of Crete*, 46 Neb. 663; *Montgomery v. Albion Nat. Bank*, 50 Neb. 652; *Hall v. First Nat. Bank of Fairfield*, 30 Neb. 99; *McGhee v. First Nat. Bank of Tobias*, 40 Neb. 92.)

J. H. Broady, contra.

References: *Floyer v. Edwards*, 1 Cowp. [Eng.] 112; *Scott v. Lloyd*, 9 Pet. [U. S.] 446; *Knox v. Williams*, 24 Neb. 630; *Nelson v. Hurford*, 11 Neb. 465; *Walker v. Bank of Washington*, 3 How. [U. S.] 62; *Snyder v. Mt. Sterling Nat. Bank*, 21 S. W. Rep. [Ky.] 1050; *McDonald v. Aufdengarten*, 41 Neb. 40; *Peterborough v. Childs*, 133 Mass. 248; *Brewster v. Bank of Ainsworth*, 43 Neb. 79; *Neal v. Rouse*, 19 S. W.

Rep. [Ky.] 171; *Davis v. Wakelee*, 156 U. S. 680; *McCulloch v. Maryland*, 4 Wheat. [U. S.] 316; *Osborne v. Bank of United States*, 9 Wheat. [U. S.] 738; *Doyle v. Holland*, 39 Neb. 87; *Coffman v. Miller*, 26 Gratt. [Va.] 701; *Walker v. Bank of Washington*, 3 How. [U. S.] 62; *Barnet v. Second Nat. Bank*, 98 U. S. 558; *Dreiseback v. Second Nat. Bank*, 104 U. S. 52; *Stephens v. Monongehala Nat. Bank*, 111 U. S. 197.

RYAN, C.

In this case an opinion has already been written which was reported in 53 Neb. 92. A rehearing was afterward allowed, and the cause having been reargued, we shall state the conclusion which we have reached and our reasons therefor. The condition of the issues presented is correctly set forth in the opinion above referred to and need not now be described. A very careful examination of the evidence has led us to conclude that by the tangled and numerous transactions involved we were led into an error on the first consideration of this case. The note sued on was dated March 14, 1891, and was due one day after date. It was for $500 and was made by Jonathan Higgins to J. W. Tomblin, Pt. This abbreviation referred to the official relation which Tomblin sustained to the First National Bank of Arapahoe, which was that of president, and to him as such representative of the bank the note was given. In respect to the history of this note Mr. Higgins testified that the cashier of the said bank agreed to let him have $500 or $1,000 to invest in cattle; that Higgins should take $500 and buy cattle with it, and when that was done, Higgins should mortgage the cattle and obtain $500 more to buy cattle with; that he bought the first $500 worth of cattle and went for the second $500 after this purchase, and the cashier or president of the bank then told witness that he could not have the other $500 unless he gave an additional note to credit on his existing mortgage note to the bank. In

explanation of this requirement Mr. Higgins testified that when he gave the note for $3,500 he honestly represented to the bank authorities that there was a prior mortgage on the real property $500 less in amount than it really was, and that the bank, having learned of this mistake when he came for the second $500 loan, required him to give a note for $500 so as to lessen the $3,500 loan that amount. This $500 note was secured by a chattel mortgage, and in consideration of its being given the $3,500 note was credited $500. The $3,500 note was the net result of several successive usurious loans from the bank to Higgins, but as he testified that all the interest on these loans, except $500, had been actually paid before the credit on the $3,500 note of $500, the question presented is whether this $500 credit is to be deemed solely applicable to the discharge of the $500 usury included in the $3,500 note, and, therefore, that the note of $500 be deemed invalid, or, on the other hand, should this $500 credit be applied on the principal of the $3,500 note? If the payment had been of $500 in cash the credit would have been applied on the principal rather than in extinguishment of interest. (*Nelson v. Hurford*, 11 Neb. 465; *Knox v. Williams*, 24 Neb. 630; *Exeter Nat. Bank v. Orchard*, 39 Neb. 485; *Norfolk Nat. Bank v. Schwenk*, 46 Neb. 381.) We can see no good reason why this rule should be departed from in this instance, when the sole effect of such departure would be to invalidate the note sued on. The parties treated this note as a payment, and it was so credited. In the above views we differ from the district court, and accordingly its judgment is reversed.

REVERSED AND REMANDED.

CITY OF OMAHA V. LUTHER A. HARMON.

FILED MARCH 22, 1899. No. 8779.

1. **Taxation:** ENFORCEMENT: CONSTRUCTION OF STATUTE. When the law imposing a tax provides a special remedy for enforcing it, the method so provided is generally exclusive, and if the only method adopted be illegal, the courts cannot substitute a different and legal method. Following *German-American Fire Ins. Co. v. Minden*, 51 Neb. 870.

2. **Municipal Corporation:** OCCUPATION TAX: VOID ORDINANCE. A city ordinance imposed an occupation tax and provided only an illegal method for its enforcement. *Held*, That the whole ordinance was thereby rendered inoperative. Following *German-American Fire Ins. Co. v. Minden*, 51 Neb. 870.

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

W. J. Connell and *Lee S. Estelle*, for plaintiff in error.

Congdon & Parish, contra.

RYAN, C.

In this case Luther A. Harmon recovered judgment for the amount of taxes by himself and his assignors paid the city of Omaha under protest. The ordinance, in compliance with the provisions of which these payments were made, was entitled "An ordinance to permit and regulate coal dealers in the city of Omaha and to repeal General Ordinance No. 1991." In the ordinance entitled as above every firm, person, or corporation was required, before engaging in the sale of coal, to pay a permit fee each year of $100. The failure to comply with the requirements of the ordinance subjected the offender to a fine of not less than five nor more than one hundred dollars for each offense.

The questions presented by the record were fully considered and determined in *German-American Fire Ins. Co. v. Minden*, 51 Neb. 870. It is therefore unnecessary for

us at this time to do more than restate the conclusions therein announced, and this restatement we shall make by quoting the fourth and fifth paragraphs of the syllabus, as follows:

"4. When the law imposing a tax provides a special means for enforcing it, the method so provided is generally exclusive, and if the only method adopted be illegal, the courts cannot substitute a different and legal method.

"5. A city ordinance imposed an occupation tax, and provided only an illegal method for its enforcement. *Held*, That the whole ordinance was thereby rendered inoperative."

From the same application of these principles as was made in the case cited it results that the ordinance requiring the payment of this tax was invalid, and the judgment of the district court rendered on that theory is

AFFIRMED.

JAMES GADSDEN, APPELLANT, V. GEORGE THRUSH, APPELLANT, AND SCHUYLER NATIONAL BANK ET AL., APPELLEES.

FILED MARCH 22, 1899. No. 8315.

1. **Usury:** NATIONAL BANKS. The exemption of national banks from the penalties of usury prescribed by statute of the state owes its existence to laws enacted by congress, and such exemption should not, by implication, be extended beyond the import of the federal statute.

2. ———: ———: MORTGAGES. In an action to foreclose a mortgage securing a note made to be used as collateral to a note owing to a national bank the mere fact that the proceeds of such collateral, when collected by the payee thereof, are to be used to discharge the said principal note to the bank does not justify the extension of the federal exemption of national banks from penalties for usury to such foreclosure proceedings.

REHEARING of case reported in 56 Neb. 565. *Judgment below reversed.*

Frick & Dolezal, for appellants.

Charles J. Phelps, George H. Thomas, J. A. Grimison, and *Miles Zentmeyer, contra.*

RYAN, C.

In this case a rehearing was granted the appellees William H. Sumner and the Schuyler National Bank. The opinion originally filed is reported in 56 Neb. 565, and therein will be found a general description of the relation of the parties and the pleadings filed by each. The present inquiry is with relation to the issues under which Sumner and the Schuyler National Bank seek relief, and accordingly we shall confine ourselves to the pleadings wherewith these parties are concerned. In his cross-petition William H. Sumner alleged that on August 8, 1890, the defendants George Thrush and Charles Thrush were indebted to the Schuyler National Bank in the sum of $5,000, evidenced by their promissory note to said bank; that said note was renewed from time to time, and on March 31, 1894, there remained due the sum of $3,229, for which amount George Thrush gave his promissory note to the bank, due 180 days after its date, and that no part of this note had been paid. It was further alleged by Sumner that on August 8, 1890, George Thrush and Mattie Thrush executed to him their promissory note for the sum of $5,000, due two years after date, with ten per cent interest per annum, payable annually, and that to secure the said note the makers of said note made a mortgage on certain described real property, which said mortgage was duly filed for record. In his said cross-petition William H. Sumner made the following averments: "This defendant further alleges that the note and mortgage so as aforesaid executed and delivered by the defendants

George Thrush and Mattie Thrush were executed and delivered to him as trustee for the use and benefit of the Schuyler National Bank and to secure the indebtedness of said Thrush to said bank; that said debt so secured on the 8th day of August, 1890, by said mortgage deed was a debt previously contracted; that said mortgage was made in good faith and in the name of this defendant for the benefit of said Schuyler National Bank. No proceedings at law have been had for the recovery of the debt secured by said mortgage, or any part thereof, and there is now due from the defendants George Thrush and Mattie N. Thrush to this defendant, for the use and benefit of the Schuyler National Bank, the sum of $3,229 and interest at ten per cent from September 27, 1894." The prayer of the petition of Sumner was that an account might be taken of the amount due on said note and mortgage; that the priority of liens might be determined and the lien of other defendants declared inferior to that of Sumner, and that said George Thrush and Mattie N. Thrush might be foreclosed of all equity of redemption or other interest in the premises mortgaged; that said premises might be sold according to law, and out of the proceeds thereof that the lien-holders might be paid the amount adjudged to be due them in the order of their priority; that the defendants George Thrush and Mattie Thrush might be adjudged to pay any deficiency which might remain after applying the proceeds of said sale to the payment of said debts, and for such other relief as might be just and equitable. Later the Schuyler National Bank was allowed to become a party to the litigation, and filed a cross-petition alleging substantially the same facts, and, on behalf of itself and Sumner, praying like relief with that above described as the prayer of Sumner. The defendants George Thrush and Mattie N. Thrush, in separate answers, admitted the making of the promissory note for $5,000 and of the mortgage securing the same on August 8, 1890, but denied every other allegation of the petition of Sumner. In addition they

averred that said note and mortgage were made to Sumner as part of a usurious transaction; that the same were held by Sumner as collateral security to usurious loans from time to time renewed at usurious rates, as in the answer more particularly described. Each successive usurious loan at twelve per cent per annum interest was described in a distinct paragraph, and these paragraphs were twenty-four in number. The first paragraph described a loan on August 9, 1889, and the twenty-fourth paragraph described the history of the note of $3,229, of date March 31, 1894. There was, therefore, a continuous chain of usurious transactions extending over the entire period between August 9, 1889 and March 31, 1894, and the relief sought was the application of the payments of interest on the sum in satisfaction of which the foreclosure was prayed. By reply Sumner denied the averments of the eleventh paragraph of the answer of each of the defendants Thrush, and the other paragraphs of his reply, substituting the appropriate figures to express the proper number referred to in each instance, were as follows: "That the interest payment mentioned in paragraph 10 of said answer was made to the Schuyler National Bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law." The reply of Sumner closed with this language: "He further says this court has no jurisdiction in this action to consider the questions raised in said answer as to each and every item of interest mentioned in said answer as paid to said Schuyler National Bank; that said items are not proper items to set-off or counterclaim, and cannot be adjudicated except in a suit brought expressly for that purpose under the provisions of section 5198 of the Revised Statutes of the United States." On the trial there was a decree of foreclosure, in which there was a finding of usury in the note of $3,229 to the amount of $229, and the defendants George Thrush and Mattie N. Thrush were denied their costs; in other words, the district court held that the statute of limitations and costs

were governed by the federal statute relating to national banks, and not by section 5, chapter 44, of the Compiled Statutes of Nebraska. The correctness of this ruling is the question presented by this appeal.

In the former opinion it was pointed out that the taking of real estate security for the loan of money constitutes no defense to a foreclosure; hence the citation of authorities on behalf of the bank to that proposition was not necessary. It was further pointed out in that opinion that the government might complain, and upon this proposition it is noticeable that the bank has cited no authorities and has made no argument. There was, in view of the last consideration named, an incentive to the bank to take the security upon real property as it did in this instance, so that it might appear upon the face of the note and mortgage that the bank originally had not been a party thereto, if the governmental authorities should insist upon a strict compliance with the provisions of the federal statute forbidding the taking of a real estate mortgage except in certain cases, in which that under consideration is not included. In *Norfolk Nat. Bank v. Schwenk*, 46 Neb. 381, NORVAL, C. J., quoted as of binding force upon this court the following language of Swayne, J., in *Farmers & Merchants Nat. Bank v. Dearing*, 1 Otto [U. S.] 29: "The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in anywise affect their operation, except in so far as congress may see proper to permit. * * * In the complex system of polity which obtains in this country the powers of government may be divided into four classes: Those which belong exclusively to the states; those which belong exclusively

to the national government; those which may be exercised concurrently and independently by both; and those which may be exercised by the states, but only with the consent, express or implied, of congress. Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the state retires and lies in abeyance until a proper occasion for its exercise shall recur. * * * It must always be borne in mind that the constitution of the United States 'and the laws which shall be made in pursuance thereof' are 'the supreme law of the land' (Constitution, art. 6), and that this law is as much a part of the law of each state, and as binding upon its authorities and people, as its own local constitution and laws. In any view that can be taken of the thirtieth section [Revised Statutes, 5198] the power to supplement it by state legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion. There was reason why the rate of interest should be governed by the law of the state where the bank is situated, but there is none why usury should be visited with the forfeiture of the entire debt in one state and with no penal consequence whatever in another. This, we think, would be unreason, and contrary to the manifest intent of congress." Conformably with the doctrine above announced it was held in *Norfolk Nat. Bank v. Schwenk, supra,* that a national bank is not liable to the penalties imposed by the usury laws of the state. We are now asked to go a step further and hold, in a suit to foreclose a mortgage securing a note made to, and held by, an individual in trust for the payment of a note owing to the bank, that the provisions of section 5198, Revised Statutes, are applicable, to the exclusion of the statute of this state with reference to usury. The cross-petition of Sumner, in effect, was for the foreclosure of a mortgage of which the proceeds were to be applied in payment of a note made to the bank. The principal note was not sued upon. It was referred to only as showing how much was required to be realized in the foreclosure suit. The

answers of each of the defendants Thrush showed that by reason of usury but little, if anything, was required to be realized from the foreclosure proceedings to satisfy what was due from George Thrush to the bank. It was not a suit, in any sense, upon the note which George Thrush had given the bank. That was his individual note. The note secured by mortgage was signed by Mattie N. Thrush, who owed nothing to the bank. She did not merely sign the mortgage to release her dower right, but she signed the note as one of its makers. In case of a deficiency by sale of the mortgaged property, she was individually liable, as it is now claimed, not to Sumner, but to the Schuyler National Bank, to which she was not indebted and had never agreed to pay a single cent. To her answer setting up payments of usurious interest which would release her from individual liability there was a reply, which, in effect, conceded the usury charged to have been contracted for and exacted in twenty-three instances, but sought to avoid the credits, to which, under the state law, she would have been entitled, by invoking the federal statute enacted for the protection of national banks as governmental instrumentalities. It is provided in section 5, chapter 44, Compiled Statutes of Nebraska: "If a greater rate of interest than is hereinbefore allowed shall be contracted for, received, or reserved, the contract shall not therefore be void; but if, in any action on such contract, proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall only recover the principal, without interest, and the defendant shall recover costs; and if interest shall have been paid thereon, judgment shall be for the principal, deducting interest paid." Sumner himself put in issue the amount which he was entitled to collect for the payment of the note made by George Thrush to the bank. By the answers and replies there was alleged, and practically admitted, the right to credits by reason of payments of usury by George Thrush on his indebtedness to the bank. It is now in-

sisted, however, that the trustees should stand for the bank and, in equity, that he is entitled to the same rights and exemptions from liabilities as are conferred by federal statute upon the governmental instrument referred to by Judge Swayne in *Farmers & Merchants Nat. Bank v. Dearing, supra.* There is no just reason for resorting to strained constructions to avoid the penalties of the statute of this state. As between these litigants we are not measuring equities. The withdrawal of this case from the operation of our statute, as indicated by Judge Swayne, must be sanctioned by some express provision of the federal statute. Section 5198, Revised Statutes of the United States, contains the following language: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred." Under the above section the forfeiture of the entire interest is of that which the note, bill, or other evidence of debt sued upon carries with it or which has been agreed to be paid thereon. In the case at bar the recovery by foreclosure was sought upon the note given by George and Mattie N. Thrush to William H. Sumner. There was no issue of usury on that note. It was concededly held by Sumner for a certain purpose,—that is, to be collected and the proceeds paid over on a note greatly reduced, if not discharged. To the foreclosure proceedings by Sumner, in which the bank joined, the federal statute was inapplicable, first, for the reason that the note secured by mortgage was not the note upon which usurious in-

terest was agreed to be paid, and second, the note and mortgage are held by Sumner and a foreclosure is sought by him. The bank, when it became a party, simply urged that the same relief prayed by Sumner should be granted. The rule is that the state statutes govern proceedings in the courts of the state, unless the federal statute with reference to a proper subject-matter prescribes a modification. It may be conceded that the interests of the general government require that it should take special care of national banks, but the federal government must, by clear provisions, assert its authority. There is no good reason why state courts should extend the operation of statutes affecting merely the remedy beyond the clear import of the language of congress, and there is no precedent for this that we have been able to find. If the bank had been one organized in the state of Illinois, Sumner would not have been permitted to commence his action of foreclosure in a federal court upon showing the conditions disclosed by the record in this case. No citation of authorities is necessary to demonstrate this proposition, and the reason of the rule is that the federal statute prescribes what parties have a standing to begin suits in the federal courts, and none other can. There is no enlargement of rights possible upon mere equitable grounds in such cases, and there should not be in this. For the reasons given we think the former opinion should be adhered to, and the order therein prescribed should govern the further proceedings in this case.

REVERSED AND REMANDED.

FERDINAND VAN HOUSEN V. HERMAN BROEHL.*

FILED MARCH 22, 1899. No. 8848.

1. **Accord and Satisfaction:** PLEADING. Where the defense to an action is accord and satisfaction, the plea, to be good, must aver an acceptance by the creditor, in satisfaction of his debt,

*Rehearing allowed.

of the property which the debtor alleges he delivered to him in full payment of the claim sued for.

2. ———: ———. Answer examined, and *held* not to state a defense.

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

George B. France, for plaintiff in error:

The answer does not sufficiently plead accord and satisfaction as a defense, because it fails to state that the property delivered to plaintiff was of any value, and because it fails to allege that plaintiff received the property in satisfaction of the claim against defendant. (*Davis v. Nokas,* 3 J. J. Marsh. [Ky.] 494; *Young v. Jones,* 64 Me. 563; *Cushing v. Wyman,* 44 Me. 121; *Sheets v. Russell,* 40 N. E. Rep. [Ind.] 30.)

Harlan & Taylor, contra.

References: 1 Ency. Pl. & Pr. 77, 79; *Bailey v. Cowles,* 86 Ill. 333; *Weeks v. Zimmerman,* 4 N. Y. Supp. 609; *Hasted v. Dodge,* 35 N. W. Rep. [Ia.] 462; *Jaffray v. Davis,* 124 N. Y. 164; *Bull v. Bull,* 43 Conn. 455; *Watson v. Elliott,* 57 N. H. 511.

RAGAN, C.

Ferdinand Van Housen sued Herman Broehl in the district court of York county upon a promissory note. As a defense to the action Broehl alleged in his answer that when he gave the note he secured its payment by a chattel mortgage upon five head of horses owned by him; that the payee of said note sold and delivered the same to one Henry Van Housen, Sr.; that while he was the owner of said note the defendant, at his request, delivered to him the five head of horses covered by the chattel mortgage, "with the express understanding and agreement between said Henry Van Housen, Sr., and this defendant that the said horses were to be accepted in full payment for said note and mortgage and the said mort-

gage was to be canceled of record." Broehl had a verdict and judgment. Van Housen prosecutes error.

Does this answer state a defense? The suit is upon a promissory note, the execution and delivery of which the defendant admits, but pleads payment,—not a payment in money of the amount due on the note, but a delivery to the creditor of certain property in settlement of the debt. The averment is that the debtor, at the request of the creditor, delivered to him five head of horses, in pursuance of an agreement between them that said horses were to be accepted by the creditor in full satisfaction of his debt. Giving this answer the liberal construction required by section 121 of the Code of Civil Procedure, the most that can be said for it is that the defendant and his creditor agreed that the latter would accept the horses in full satisfaction of the debt, and in pursuance of that agreement the debtor delivered such horses to the creditor; but there is no averment in the answer that the creditor did actually accept the horses, nor can this inference be drawn from a liberal construction of the language of the pleading. This answer is in the nature of a plea of accord and satisfaction, and such a plea, to be good, must aver an acceptance by the creditor in satisfaction of his debt of the property which the debtor alleges he delivered to him in full payment of the claim sued for. (*Goble v. American Nat. Bank*, 46 Neb. 891.) In support of his contention that the answer states a defense counsel for the defendant in error cite *Bailey v. Cowles*, 86 Ill. 333. In that case the plea was that the defendant was the owner of the equity of redemption of certain real estate purchased by the plaintiff at a judicial sale; that the defendant had the right to redeem from said sale; that, before the time of redemption expired, the plaintiff agreed that if the defendant would waive his right to redeem the real estate, the plaintiff would accept such a waiver in full satisfaction of his debt against the defendant, and that the defendant did then and there quitclaim to the plaintiff his right to redeem

said real estate; and that the plaintiff accepted said quit-claim in full satisfaction of his debt. The case cited is distinguishable from the one at bar, in that the plea in the cited case averred an acceptance by the creditor of the thing which he agreed to accept in satisfaction of his debt, while in the case at bar the answer merely alleges an agreement upon the part of the plaintiff to accept the horses in satisfaction of his debt and their delivery to him by the defendant, but does not allege that the defendant accepted the horses in pursuance of that agreement. The answer states no defense. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

HERBERT A. HUBBARD V. CHARLES M. SEITZ.

FILED MARCH 22, 1899. No. 8828.

Suit for Goods Sold and Delivered: VERDICT FOR PLAINTIFF: EVIDENCE. In a suit for groceries sold and delivered to the defendant the plaintiff testified that he furnished the defendant with groceries to the amount of $33.65, and that no part of the same had been paid. *Held*, The evidence sustains a verdict for the plaintiff.

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

Webster, Rose & Fisherdick, for plaintiff in error.

John M. Stewart and *William F. Schwind, contra.*

RAGAN, C.

Charles M. Seitz sued Herbert A. Hubbard in the district court of Lancaster county, had verdict and judgment, and Hubbard prosecutes error.

In his petition in the district court Seitz alleged that,

at the instance and request of Hubbard, he had sold and delivered to him groceries to the amount of $33.65, no part of which had been paid. The answer was a general denial. The defendant below did not appear at the trial. The plaintiff testified that he was in the grocery business; that he furnished the defendant with groceries to the amount of $33.65,—the amount sued for; that no part of the same had been paid. It is now insisted that this evidence is insufficient to sustain a finding in favor of the plaintiff below. The argument seems to be that the record contains no evidence showing that the plaintiff below sold and delivered the goods sued for to the defendant below, and no evidence as to the reasonable or fair market value of the goods. What we understand the plaintiff below to mean by saying that he furnished the defendant goods is that he sold and delivered them to him, and what we understand him to mean when he says that the goods furnished amounted to $33.65 is that that sum was the value of the goods,—either that they were reasonably worth that sum or that was the price at which they were sold to the defendant below. The evidence sustains the finding and the judgment is

AFFIRMED.

CHARLOTTE M. MILLER, APPELLEE, V. MARY H. NICODEMUS ET AL., APPELLANTS.

FILED MARCH 22, 1899. No. 8814.

1. **Mortgage Foreclosure: PROCEEDINGS AT LAW: PLEADING.** In a suit to foreclose an ordinary real estate mortgage an essential averment of the petition is that no proceedings at law have been had or commenced for the collection of the mortgage debt, or any part thereof.

2. ——: ——: ——: **EVIDENCE.** In such suit, when such averment is put at issue, the averment must be proved, or the decree will lack evidence to support it.

3. **Pleading:** AMENDMENTS: EVIDENCE. When a litigant files an amended pleading, the averments of which are inconsistent with the averments of his original pleading, the original is evidence in the case as an admission of the litigant contrary to his claim in the amended pleading.

4. ———: ———: ———. Such original pleading is not conclusive evidence, but competent, and to be given such weight as the trier of fact deems it entitled.

5. ———: EVIDENCE: PARTIES. Admissions made by a litigant in his pleading in a suit are competent evidence against those who subsequently come into the suit as his successors in interest to the matter in litigation.

APPEAL from the district court of Saunders county. Heard below before SEDGWICK, J. *Affirmed.*

Good & Good, for appellants.

H. Gilkeson, contra.

RAGAN, C.

In the district court of Saunders county Charlotte M. Miller brought suit against Mary H. Nicodemus, her husband, and others for the purpose of foreclosing an ordinary real estate mortgage executed by the defendants Nicodemus. The petition of Miller contained the averment that no proceedings at law had been had or commenced for the recovery of the debt secured by the mortgage sought to be foreclosed, or for any part thereof. The defendants Nicodemus filed an answer to this petition of Miller, in which they admitted all its averments to be true. After this answer was filed Nicodemus, the husband, died and the action was revived against his minor heirs, for whom a guardian *ad litem* was appointed. The latter answered for his wards, denying each and every allegation in Miller's petition. The widow Nicodemus filed, by leave of court, an amended answer, in which she denied all the allegations in Miller's petition. The trial resulted in a decree in favor of Charlotte Miller, and the

widow Nicodemus and the minor heirs of Nicodemus, deceased, have appealed.

1. The sole argument is that the decree is not supported by sufficient competent evidence. It is not claimed that the mortgage sought to be foreclosed was not executed and delivered by Nicodemus and wife, nor that the mortgage debt is not due and unpaid, nor is there any dispute as to the amount due thereon, but the contention is that the averment in Miller's petition, that no proceedings at law had ever been had or commenced for the collection of the mortgage debt, etc., was not proved. On the trial Miller introduced in evidence the answer filed in the case by Nicodemus and wife, in which, as already stated, they admitted the truth of every averment in Miller's petition. If this answer was competent evidence against each of the appellants, the finding of the court that the averment in Miller's petition, that no proceedings at law had been had or commenced for the collection of the mortgage debt, was true, is supported by sufficient evidence, and the decree must be affirmed. The sole question therefore is, was this answer competent evidence against the appellants and each of them? The averment in Miller's petition that no proceedings at law had been had or commenced for the collection of the mortgage debt, or any part thereof, was a material averment, and had it been omitted from the petition the latter would not have stated facts sufficient to entitle Miller to a decree of foreclosure. (*Bing v. Morse*, 51 Neb. 842.) And since the amended answer of the widow and the answer of the heirs denied this averment of the petition, Miller was not entitled to a decree of foreclosure, unless she introduced evidence which sustained this allegation. (*Jones v. Burtis*, 57 Neb. 604.) The amended answer of the widow denying all the allegations in Miller's petition was inconsistent with her former answer in which she had admitted the truth of the averments of said petition, and therefore her first answer was competent evidence against her. This first answer was evidence of the ad-

mission by herself of the truth of the averments made by Miller in her petition, and an admission inconsistent with the defense which was pleaded in her amended answer. (*Bunz v. Cornelius*, 19 Neb. 107; *Ludwig v. Blackshere*, 71 N. W. Rep. [Ia.] 356.) It was not conclusive evidence, but evidence to be considered by the court, as any other admission of a party against his interests, and given such weight as the court deemed it entitled. The decree then, so far as the widow Nicodemus is concerned, does not lack evidence to support it.

2. Was this answer competent evidence as against the minor heirs? If the title to this real estate was not in the husband Nicodemus at the time of his death, then the minor heirs had no interest in that real estate. They were not necessary parties to this proceeding, and the admission of the answer of their ancestor in evidence worked no prejudice to them. But we assume, because the record does not show to the contrary, that the title to this real estate was in the husband Nicodemus at the time of his death and that his minor children inherited the same from him. These minor heirs then are claiming under the former defendant Nicodemus, and the rule is that admissions made by a litigant in his pleading in a suit are competent evidence against those who subsequently come into the suit as his successors in interest to the matter in litigation. (*Earl of Sussex v. Temple*, 1 Ld. Raym. [Eng.] 310; *Countess of Dartmouth v. Roberts*, 16 East [Eng.] 334; 1 Greenleaf, Evidence sec. 178; *Townsend v. McIntosh*, 14 Ind. 57; *Rust v. Mansfield*, 25 Ill. 297; *Pensoneau v. Pulliam*, 47 Ill. 58.) The answer of Nicodemus, the father, which admitted the truth of the averments of Miller's petition, was competent evidence against his heirs who subsequently came into the foreclosure suit claiming through him and claiming to have succeeded to his rights to the real estate. This answer, or the admissions in this answer, constitute the only evidence in support of the averment in Miller's petition that no proceeding at law had been had or commenced for

the collection of the mortgage debt. This evidence was sufficient. The decree does not lack evidence to support it and is

AFFIRMED.

HARLEY ATKINSON V. STATE OF NEBRASKA.

FILED MARCH 22, 1899. No. 10527.

1. **Criminal Law:** INSTRUCTIONS: REASONABLE DOUBT. In a felony case it is reversible error for a court to charge the jury that it may find the defendant guilty if it entertain a reasonable doubt of the truth of each or all of the material allegations of the indictment.

2. ———: ———: ———. The law is that if the jury entertain a reasonable doubt as to the truth of any material allegation of the indictment, the prisoner is entitled to an acquittal.

3. **Assault:** JUSTIFICATION. When a citizen assaults one of a mob in the wrongful possession of and taking away his property for the purposes of injuring or destroying it, whether under all the circumstances he was justified in making the assault is a question for the jury.

4. **Hallowe'en:** PROTECTION OF PROPERTY FROM MOB: ASSAULT. An assemblage of men on Hallowe'en—night of October 31—engaged in moving, injuring, and destroying property is a mob engaged in violating the law, and the citizen may use such force as is actually necessary to protect his person and property from injury at its hands.

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

G. W. Fox and *E. A. Cook*, for plaintiff in error.

C. J. Smyth, Attorney General, and *W. D. Oldham, Deputy Attorney General*, for the state.

RAGAN, C.

Harley Atkinson, in the district court of Dawson county, was indicted for having on November 1, 1898, in said county, assaulted one William King with intent

then and there to inflict upon him great bodily harm. Atkinson was convicted, and to reverse the judgment pronounced thereon he has filed here a petition in error. The evidence, and especially that on behalf of the prisoner, tends to show that Atkinson lived with his family in Cozad, Nebraska, and on October 31, 1898, was operating a threshing-machine some six miles from his home. On the evening of that day he borrowed a buggy from the man for whom he was threshing, in which he drove to his home, which he reached about 9 o'clock at night. There was no place in his barn where a buggy could be stored, and he left it standing against the outside of his barn. During the night a crowd of men were parading the streets of Cozad, disturbing and injuring property and ignoring the efforts of the officers of the law and others to restrain them. Wagons, buggies, and water-closets were being moved and hauled away, and in some instances broken and injured by this crowd. The crowd wished to get possession of the buggy in which the prisoner had ridden to town. Some of the crowd tried to get the buggy about 10 o'clock that evening. The prisoner fired a gun over them at this time to frighten them away, and this enraged the crowd and it threatened to get possession of the prisoner's buggy at all hazards and to destroy it. The prisoner heard these threats. Some persons in the crowd threatened to shoot the prisoner, and to whip him, and some of the crowd tried to get hold of the prisoner for the purpose of hurting him. The prisoner knew of these threats and attempts. This crowd was repeatedly warned by the prisoner and others that the prisoner would shoot if an attempt was made to take his buggy. The crowd replied that they would have it if they did get shot, and that when they did get it they would destroy it. This disorderly mob paraded around until between 3 and 4 o'clock in the morning. At that time a man named King, one of the crowd, followed by the others thereof, took hold of the buggy and started to run away with it. The prisoner called to him to drop

it. This King refused to do. The prisoner then fired a gun over him with a view of frightening him. King still retained possession of the buggy and was moving off with it, when the defendant intentionally shot him in the leg with a shotgun, inflicting a flesh wound. The prisoner believed at the time he shot King that the crowd intended to immediately destroy the buggy if King got away with it, and he shot him for the purpose of stopping him and preventing the crowd from taking the buggy away and destroying it. The prisoner at this time was afraid to leave his house to procure an officer of the law to protect his property, because he was afraid of violence at the hands of this mob.

On the trial the district court, after instructing the jury as to the material allegations of the information, charged them as follows: "You are instructed that if you are convinced by the evidence, beyond a reasonable doubt, of the truth of each and all of said material allegations, then you may find the defendant guilty. If not so convinced, or if you entertain a reasonable doubt of the truth of each or all of said material allegations, then you should find the defendant not guilty." The giving of this instruction was prejudicially erroneous. By it the court in effect told the jury that to entitle the defendant to an acquital they must entertain a reasonable doubt as to the truth of each or all of the material allegations of the information. This is not the law. On the contrary, the law is that if the jury entertain a reasonable doubt as to the truth of any material allegation of the information, the prisoner is entitled to an acquittal.

Another instruction given by the court was as follows: "The court instructs the jury that an assault is an unlawful attempt coupled with the present ability to commit a violent injury upon another; and in this case, unless the jury believe from the evidence beyond a reasonable doubt that the defendant shot William King with a loaded shotgun, intending to shoot him and with the then present ability to shoot him, then the jury should

find the defendant not guilty." This instruction, in view of the evidence, was wrong. The prisoner did not contend that he did not shoot William King with a loaded shotgun, nor that he did not intend to shoot him, nor that he did not then and there have the present ability to shoot him, but the defense was that he shot him in defense of his property, and resorted to this means because he was afraid to leave his house to procure the assistance of the officers of the law for the protection of his property, as he feared that if he did so he would receive great bodily injury at the hands of this mob. By the instruction last quoted the court in effect took this defense of the prisoner from the jury and told them to convict the prisoner if they found that he, with ability to shoot, intentionally shot King with a loaded shotgun. We do not decide whether the prisoner was, under the circumstances detailed in the evidence, justified in shooting King. Whether he was or not was a question of fact for the jury, and this defense the prisoner was entitled to have the jury pass upon; and by the instruction under consideration the court took that theory entirely from the jury and in effect instructed them to find him guilty. We are not justifying the possessor of property for shooting one who is committing a trespass thereon. But here was a man in his own home, in the peaceable and quiet possession of his property. A howling mob of brawlers, masquerading under the name of "Hallowe'eners," is parading the streets of his town injuring and destroying property, threatening to take the property of this prisoner and destroy it, threatening him with bodily injury if he interferes, and this mob takes possession of his property and attempts to take it away. It was for the jury to say whether the prisoner, as a reasonable human being, was justified under the circumstances in making the assault he did for the purpose of protecting his property, for he certainly had the right to protect his own. The fact that this crowd was observing the barbarous practice of committing mischief and depredation

on the evening of October 31 did not deprive the prisoner of the right to defend himself and his property against their unlawful attacks, for no matter under what name they may have masqueraded, the crowd was a mob violating the law, and the county attorney of Dawson county would do no more than his duty if he caused each member of this crowd of midnight marauders to be indicted and punished. For the errors pointed out in the instructions the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

A. L. HOUGHTON & COMPANY V. AMMI B. TODD ET AL.

FILED MARCH 22, 1899. No. 8813.

1. **Agency: KNOWLEDGE OF AGENT: FRAUD.** The rule whereby an agent's knowledge is imputed to his principal is subject to an exception in the case of an agent who is engaged in an independent fraudulent scheme without the scope of the agency.
2. **Sales: SURETYSHIP.** Contract set out in the opinion construed as one of sale and not of suretyship.
3. **Authority of Agent: QUESTION FOR JURY.** Evidence *held* to present a case for the jury, on the theory of an agent's implied or apparent authority.

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

John S. Bishop, for plaintiffs in error.

Byron Clark and *C. A. Rawls, contra.*

IRVINE, C.

About January 30, 1894, a partnership was formed by Ammi B. Todd, James W. Sage, and Charles D. Dundas under the name of the Lincoln Bridge Company, its main

purpose being the construction of bridges. The agreement provided, among other things, that no material should be purchased or debts contracted without the consent of all the partners. Sage was, however, soon taken ill and the business was in fact conducted by Todd and Dundas. About the same time Dundas entered into a contract with the plaintiffs Houghton & Co., dealers in lumber, with an office in Kansas City and mills in Arkansas, whereby Dundas was to sell lumber for the plaintiffs, receiving as a commission the excess of prices obtained above fixed prices given him by the plaintiffs. This contract and the articles of partnership of the bridge company bear the same date, January 30. January 31 Dundas sent plaintiffs an order for five cars of lumber, suitable for the construction of bridges, and to be shipped to the county board of Lancaster county. The plaintiffs declined to accept this order. February 7 a letter was written to them as follows:

"You may send us the bills of the five cars of lumber for Lancaster county and we will pay the bills at the end of sixty days. Reference: German Nat. Bank of this city.

"Yours respectfully, THE LINCOLN BRIDGE CO.
"By C. D. DUNDAS, *Sec.*"

Dundas, the same day and under the letter-head of the bridge company, but signing this time individually, wrote plaintiffs: "The Lincoln Bridge Company will see to paying the bills as they come due for the five cars for Lancaster county. You had better ship them to the Lincoln Bridge Company and they can bill them to the county." This proposition was accepted. Plaintiffs shipped the lumber by boat and rail to Lincoln, consigned to the bridge company. It was apparently received by the bridge company, but in fact Dundas signed, or caused to be signed, the name of that concern to the receipts. The lumber was turned over to the county, claims were filed by Dundas on behalf of the bridge company, warrants were issued to the company, but deliv-

ered to Dundas, who indorsed the company's name and sold them. It seems that he sent a portion of the proceeds to plaintiffs and retained the rest. The bridge company at any rate did not receive it. The plaintiffs brought this suit to recover the unpaid purchase price. Dundas died soon after, and the case has proceeded against the surviving partners. Dundas had no authority to make the purchase, but had an individual contract with the county to furnish it with bridge lumber.

The district court directed a verdict for the defendants, holding that the contract was one of suretyship, that it was beyond the scope of Dundas' authority as a partner to bind the partnership by such a contract, and that, as he was plaintiffs' agent, the plaintiffs were charged with his knowledge of his own want of authority. We think it was error to direct a verdict. It is clear that Dundas was without authority to make the contract, whether it was one of sale or of suretyship, but there was sufficient evidence to go to the jury on the theory of apparent authority. True, Dundas was the agent of the plaintiffs, and, as a general rule, the knowledge of the agent is imputed to the principal. An exception to the rule is that where the agent is engaged in an independent fraudulent scheme for his own benefit, his knowledge will not be imputed to his innocent principal. (*Allen v. South Boston R. Co.*, 150 Mass. 200; *Thomson-Houston Electric Co. v. Capitol Electric Co.*, 65 Fed. Rep. 341; *Kennedy v. Green*, 3 Myl. & K. [Eng.] 699; *First Nat. Bank of Davenport v. Gifford*, 47 Ia. 575.) Many other cases might be cited, but the authorities are practically uniform in favor of the exception, generally stating it even more broadly. Now it is clear that Dundas was engaged in such a scheme, and was seeking to use the credit of the bridge company to make a sale which he had failed to make otherwise, the device being to defraud either the plaintiffs or his partners, and for his own benefit. The case falls within the exception, and plaintiffs' situation is to be determined by their actual notice and not by notice im-

puted from Dundas' knowledge. The district judge was in error when he construed the contract as one of suretyship. Plaintiffs had refused to sell to the county, whereupon the proposal was made, not that the bridge company would guaranty payment, but that the lumber should be shipped to it and it would pay. The arrangement entailed no privity whatever between plaintiffs and the county, the county was not obligated to plaintiffs, and the undertaking was absolute—one of sale.

It is contended that plaintiffs had actual notice of Dundas' want of authority. They did not know of the limitation in the articles, but it is said that the letter-heads conveyed equivalent information, because they bore the words, after the name of the company, "Construction of Bridges and Other Contract Work." We do not find these words on any of the letter-heads of letters bearing directly on the contract; but if such words were there, it would not be controlling. The construction of bridges is a business which may involve the purchasing of materials for such construction. If not it must be because of some particular custom of that business which there was no evidence to establish. From all the facts stated it would certainly be reasonable for the plaintiffs to infer that the bridge company was to construct bridges for the county, and that as the county had failed to buy the material, it had been arranged for the contractors to supply it. This would seem to be within the scope of the business and within the apparent authority of a partner, especially one described on the same letter-heads as "Secretary and Contracting Engineer."

We have not stated all the evidence, and mean to express no opinion whether the view indicated is that which should of necessity or propriety be accepted on a consideration of the whole case. What we hold is that the facts we have stated are sufficient to entitle the plaintiffs at least to go to the jury on the theory of apparent authority.

REVERSED AND REMANDED.

LOUIS J. B. BOURGEOIS V. CLARKE GAPEN ET AL.

FILED MARCH 22, 1899. No. 8697.

1. **Review:** SUPPLEMENTAL PETITION: HARMLESS ERROR. It is not prejudicial error to deny a plaintiff permission to file a supplemental petition if, in the subsequent course of the proceeding, he obtains the benefit of all matters therein pleaded.

2. **Recovery of Property Obtained by Fraud:** REIMBURSEMENT. The rule whereby one seeking to recover property obtained from him by fraud will not be required to reimburse the guilty party for moneys expended in pursuit of the fraudulent scheme, and to carry it into effect, will not be extended so as to relieve the party seeking to recover from discharging such burdens as would rightfully have devolved upon him if the transaction had been carried out in good faith.

3. **Mortgages:** BILL TO REDEEM: TRUSTS: REIMBURSEMENT. A made to B a deed absolute in form, with the agreement that it should stand as security for advances which B had made to protect the property against liens, and also for future advances. It was also agreed that B might sell or exchange the property and handle it as he saw fit in order to recover his money. B exchanged it for other property. There was evidence, supported by a finding in an interlocutory decree, that B had misrepresented the amount of money he had advanced and had secured a second deed by representing that he had effected an exchange for property which he could dispose of, and that subsequently he paid to A a small sum, saying it was the surplus proceeds after satisfying the debt. A, on learning what exchange had been made and that B still held title to the lot for which he had traded, brought a suit to declare a trust therein. *Held*, (1) That the suit was in effect a bill to redeem, and that A would be required, as a condition of reconveyance, to pay to B the amounts by B advanced, not only to discharge liens on the first property, but also all sums in good faith expended in repairs, in caring for it, and in efforts to sell and rent; (2) that as B had authority, uninduced by fraud, to exchange, A must also be charged with commissions and expenses incurred in making the exchange; (3) that he must also be charged with taxes paid on the property for which the exchange was made.

4. ———: ———: ACCOUNTING: REIMBURSEMENT. On a bill to redeem from a mortgage on vacant land which has no rental value, the mortgagor cannot, in the accounting, receive credit for either use and occupation, or for interest in lieu thereof.

5. ———; ———; ———: ———. In such a case the mortgagor will

not be credited on the accounting for a depreciation in value of the mortgaged property during a period when the mortgagee was resisting redemption and claiming absolute ownership.

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

Will H. Thompson, for plaintiff in error.

William D. Beckett and *E. Wakeley, contra.*

IRVINE, C.

This action was, in form, a proceeding to declare a trust and compel a conveyance by the defendants to Bourgeois, the plaintiff. Under appropriate pleadings the plaintiff offered evidence tending to prove that he was, in 1889, the owner of a certain lot in the city of Chicago, on which was erected a house; that there was an incumbrance thereon in the form of a mortgage for about $5,000. It seems that there were also judgments against Bourgeois, or claims of some kind, which were also liens on the property. Bourgeois then lived in Omaha. He was distressed by the condition of the property and consulted Gapen, a friend or social acquaintance, with regard to placing the matter in the hands of some one in Chicago, that it might be properly handled. Gapen referred Bourgeois to one Swisher, a relative of Gapen, and a power of attorney was executed to Swisher whereby the latter was authorized to sell and convey, to execute deeds, and to do everything necessary to be done for the purpose of disposing of the property. Bourgeois then went on a visit to France. While he was absent, claims against the property were pressed, and in order to save it Gapen advanced certain moneys, under the agreement with Swisher that he was to be repaid with interest at ten per cent. To secure him Swisher executed to him a deed, in form absolute. Bourgeois ratified this contract. After Bourgeois returned Gapen represented to him that he could not carry the property longer; that he had ad-

vanced $1,500; that he could trade it for other property in Chicago which could be disposed of, and that he would pay to Burgeois any surplus that might so arise after satisfying his own claim. Thereupon Bourgeois executed another deed to Gapen. Some time afterwards Gapen paid him about $150, which he represented to be the surplus agreed to be paid. It was later, however, discovered that Gapen had in fact exchanged the property for a lot in Omaha. Then Bourgeois began this action to have Gapen declared a trustee for him as to that lot, and tendering such sum as might be found due on an accounting. It was alleged that certain fraudulent conveyances had been made by Gapen to Wallace and by Wallace to Morris, and it was asked that these be vacated. It seems that Gapen had borrowed money from Wallace and had conveyed the Omaha lot to him as security; that he had repaid the loan, and at his request the reconveyance was made to Morris. The court vacated these deeds, and they need not again be referred to, unless perhaps as evidence directed to the issue of Gapen's good faith or lack thereof. On the part of the defendants the evidence tended to show that after Bourgeois returned from France, Gapen proposed to him that he make a deed whereby that made by Swisher, which it is conceded was a mortgage, should be rendered absolute, and that the second deed was executed for that purpose. It was calculated that the amount of Gapen's advances, together with remaining liens, would be a little more than the highest offer which had been obtained for the Chicago property. Gapen was, therefore, to take the property for his advances and assume the debts which were charges thereon. It was thought that one lien might be defeated. If so, Gapen was to pay the amount thereof to Bourgeois. This lien was defeated, and Gapen paid the money to Bourgeois. This is the payment which Bourgeois claimed represented the surplus. Gapen is in this respect corroborated by strong documentary evidence. Gapen claims that he thus became

the absolute owner of the Chicago property and had a right to do with it and its proceeds as he saw fit. The court found for the plaintiff, and ordered an accounting of Gapen's expenditures on the Chicago property. On the accounting all the evidence leading to the interlocutory decree was reintroduced, together with further evidence on the direct issues presented. The court, by its final decree, awarded to Gapen, not only what he had expended on the Chicago property, but also a broker's commission and other expenses of effecting the exchange, and taxes paid on the Omaha property. This it required Bourgeois to pay as a condition of redemption. Bourgeois seeks a reversal.

Bourgeois assigns as error certain orders whereby he was denied the right to interpose a supplemental petition after the interlocutory decree. These rulings were without prejudice, if the supplemental petition tendered no facts warranting relief other than was finally obtained. One thing pleaded was certain acts of Gapen which, it is claimed, operated as an acceptance of the terms of the interlocutory decree. As Gapen now accepts that decree with its consequences, Bourgeois has obtained all the benefit which could have resulted from the supplemental petition in that regard. The remaining averments relate to depreciation in the value of the property. This subject can be best treated at another stage of the opinion.

Bourgeois claims that his proof, sustained by the general finding for the plaintiff in the interlocutory decree, shows that Gapen was guilty of actual fraud, and that, under the rule in *Goble v. O'Connor*, 43 Neb. 49, plaintiff should, therefore, not be compelled to pay anything as a condition for relief, at least nothing advanced after the conveyance was made of the Chicago property. The doctrine of *Goble v. O'Connor* is that where one in the pursuit of a willful scheme to defraud expends money in procuring the plaintiff's property, he has no standing in equity to require indemnity from the party defrauded as a con-

dition of granting the latter relief. Is that case here in point? In the first place, an interlocutory decree is not *res judicata*, and the court on the final hearing may set it aside. If the findings in the final decree are inconsistent with those in the interlocutory, the former prevail. (*Ellis v. Harris*, 56 Neb. 398.) If the accounting, when taken with the findings in the interlocutory decree, proceeded on a basis inconsistent with *Goble v. O'Connor*, then perhaps we would be obliged to disregard the earlier findings and follow those of the final decree. But that is unnecessary here. It is conceded that the transaction began in good faith; that Gapen did advance some money on the Chicago property; that he took the conveyance by Swisher as security therefor. It follows that Gapen had a valid mortgage. Bourgeois admits that after he returned from France it was agreed between him and Gapen that the latter should proceed to handle the Chicago property, to pay charges against it, to repair, to rent if practicable, to sell or exchange it, to do anything in fact which he might see fit, and to hold the title as security for all expenses thereby incurred. Gapen then had the right to exchange it for the Omaha property or for anything else. If he had made full disclosures to Bourgeois, he might still have done as he actually did, and Bourgeois' right would be merely an equity of redemption in the Omaha property, charged with all such expenses. The fraud, if there was any, consisted in only two things: representing the amount advanced as greater than it really was at the time, but less than it would be when Gapen should have performed his agreement, and less than it in fact soon became; secondly, in concealing the fact of the exchange for the Omaha property. According to both sides, all parties thought the transaction closed with the conveyance of the Chicago property. Gapen thought his title had become absolute. Bourgeois thought it had been traded for other Chicago property, that the latter had been sold, and that, after paying his debt, he had received a mere pittance to represent

his equity. The utmost effect of the fraud, if successful, would have been to treat as absolute the Omaha title, which was in law a mortgage. When it is decreed a mortgage, Bourgeois gains all that would have been his if perfect good faith had been exercised. The principle which denies compensation to one who in the perpetration of an active fraud, and as a means of perpetrating it, expends money, does not extend to the forfeiture of all claims, even those arising independent of the fraud, and which would be debts enforceable if the fraud had not existed. This consideration disposes of the allowances made for expenditures on the Chicago property, and sustains the findings as to those items. Some attack is made on certain of these items as unnecessary expenditures. Gapen's plenary power to manage that property entitles him to all expenses thereby incurred in good faith. So far as we can see, the items allowed were reasonable expenditures for handling the property. No question can be made so far as the items represent liens discharged; that was the primary purpose of the arrangement. Repairs on the house in order to render it habitable, expenses of taking persons to see it with a view to buying, the expense of a watchman,—these constitute nearly all the rest of the charges, and, under the evidence, we think they were not only incurred in good faith, but were almost demanded. As, according to Bourgeois' own theory of the contract, Gapen was to exchange the property if he saw fit, we must also hold that the broker's commission and other expenses of the exchange were properly allowed. The taxes on the Omaha property were certainly a proper charge. If the exchange had not been made, Gapen might for his own protection have paid the taxes in Chicago and added them to the debt. Under his contract he was really bound to do so. Therefore, when the plaintiff follows his equity into the Omaha property, it must be charged with similar burdens, especially as it does not appear that the burden was increased by the exchange.

Plaintiff complains that he was allowed nothing for rents, and was denied a credit for depreciation in value of the Omaha property before his interest was discovered and while Gapen has been resisting redemption. The Omaha property is a vacant lot, agreed to be without rental value during the period in question. All efforts to rent the Chicago property had also been unavailing. Gapen's possession has been constructive at best. Under such circumstances rents are never allowed, for the very good reason that there are none and can be none to allow. But it is argued that, in the absence of rent, compensation should be given in the form of interest. In the circumstances of this property this cannot be permitted. (*Peugh v. Davis*, 113 U. S. 542.)

The contention that plaintiff should be allowed a credit to the extent of depreciation in value is, we think, not tenable. *Violet v. Rose*, 39 Neb. 661, is invoked on this point. That was a case where a vendor of land refused to make the conveyance when he should have made it, but finally did convey, and it was held that the vendee's measure of damages was the difference in value at the time the conveyance should have been made and when it was made. This rule was induced from that applied in analogous cases of sales. The principle involved seems to have a bearing on a case where a mortgagee vexatiously refuses to accept a redemption; but in the one case the anticipated value is an essential part of the bargain, in the other there is no contract of that character. Mortgagors and mortgagees contract with reference to the value at the time the mortgage is made, and both take their chances of fluctuations. The unearned increment, and a loss occurring, not by reason of waste, but because of a general and uncontrollable depreciation of values, are alike matters which the courts can never hope to adjust with perfect equity, and which they never have undertaken to adjust in accountings between mortgagor and mortgagee. *Peugh v. Davis*, *supra*, is a case in its general features strikingly like that at bar, as may be

seen by reference to the opinion therein on a former appeal. (96 U. S. 332.) It was there insisted, as here, that the mortgagor was entitled to a credit on account of depreciation during the period when the mortgagee was insisting that his title was absolute. It was held that such a credit could not be allowed in an accounting on the mortgage for the purpose of redemption. Indeed, generally speaking, the only penalty which the courts have visited upon a mortgagee who even vexatiously resists redemption is the taxation of costs against him. (*Snagg v. Frizell*, 3 Jo. & La. [Ir.] 383; *Slee v. Manhattan Co.*, 1 Paige [N. Y.] 48; *Still v. Buzzell*, 60 Vt. 478; *Turner v. Johnson*, 95 Mo. 431.)

While we have not taken up the assignments of error in their order, or even discussed them separately, we believe the conclusions expressed cover the whole of the argument.

AFFIRMED.

STATE OF NEBRASKA, EX REL. GERMAN SAVINGS BANK, V. JACOB FAWCETT, JUDGE.

FILED MARCH 22, 1899. No. 10604.

1. **Mandamus:** ALLOWANCE OF SUPERSEDEAS. Mandamus will not lie to control the discretion of a judge, as by requiring him to allow a supersedeas in a case where such allowance rests in his discretion.

2. ———: AMOUNT OF SUPERSEDEAS. Mandamus will, however, lie to compel a judge to fix the amount of a supersedeas bond where the statute gives an absolute right to a supersedeas.

3. **Order on Receiver to Sell Realty:** OBJECTION BY BANK. A banking corporation, a defendant in an action having for its object the impounding of its assets, their conversion into money, and their application to the payment of its creditors, may be heard to resist an application for an order on a receiver to sell its real estate.

4. ———: ———. Such an order is appealable.

5. ———: ———: ESTOPPEL. The bank is not estopped from resisting

such order or appealing therefrom by having consented to the appointment of a receiver in the first instance, when the order consented to did not fix the terms or conditions or time of the sale. These are matters on which the bank has a right to be heard.

6. ———: ———: SUPERSEDEAS. An order directing the receiver to sell the real estate of the bank is an order directing the sale of real estate, and is supersedable as of right under the third subdivision of section 677, Code of Civil Procedure.

ORIGINAL application for mandamus to require respondent to fix the amount of a supersedeas bond. *Writ allowed.*

Joel W. West, for relator.

Ralph W. Breckenridge, contra.

IRVINE, C.

This is an original application for a writ of mandamus to require the respondent, one of the district judges of the fourth district, to fix the amount of a bond to effect a supersedeas of an order made in a proceeding before him. The essential facts stand admitted of record. In 1896 the German Savings Bank, a corporation, was engaged in the banking business in Omaha under the state laws. In pursuance of the provisions of the banking act (Compiled Statutes, ch. 8) an application was made for the appointment of a receiver to wind up the affairs of the bank, it being charged that the bank was insolvent and was conducting its business in an unsafe manner. A receiver was appointed, and he took possession of the assets and has ever since been engaged in administering his trust. In January, 1899, the district court, the respondent presiding as judge, made, on the application of numerous depositors, an order directing the receiver, at a time fixed in the order and after advertising as therein specified, to sell all the assets of the bank remaining in his possession, including a large amount of real estate. The corporation took an exception to this order, and seasonably

asked the respondent to fix the amount of a supersedeas bond, so far as the order concerned real estate, under the third subdivision of section 677, Code of Civil Procedure. The respondent, believing the order was not, as a matter of right, supersedable, refused, and this suit is brought to coerce such action.

The case may be quickly narrowed in its scope, and much of the argument laid aside, by the simple statement that unless the order be one within the provisions of the third subdivision of the section cited, then there is no provision giving the relator the absolute right to a supersedeas. Unless that provision applies, the order could be superseded only in the discretion of the court. Such discretion cannot be controlled by mandamus, and, under the facts disclosed by this record, we certainly would not, even if we could in such an action, interfere with the action taken by the district judge. If, on the other hand, the order does fall within that provision, then the legislature has given an absolute right to a supersedeas on complying therewith, and we must award the writ. While it is true, as argued, that the allowance of a writ of mandamus is discretionary, still no court would be justified in refusing its aid when to deny it would deprive a party of an absolute substantial right guarantied by statute.

The section cited, so far as it may be applicable, is as follows: "No appeal in any case in equity, now pending and undetermined, or which shall hereafter be brought, shall operate as a supersedeas, unless the appellant, or appellants, shall, within twenty days next after the rendition of such judgment, or decree, or the making of such final order, execute to the adverse party a bond with one or more sureties, as follows: * * * Third—When the judgment, decree, or order directs the sale or delivery of possession of real estate, the bond shall be in such sum as the court, or judge thereof in vacation, shall prescribe, conditioned that the appellant, or appellants, will prosecute such appeal without delay, and will

not during the pendency of such appeal commit, or suffer to be committed, any waste upon such real estate."

As the order sought to be superseded expressly directs the receiver to sell real estate, it seems to fall *prima facie* within the section, and it is appropriate to look first to the arguments on behalf of the respondent to see whether any reason is given why it is not applicable.

It is contended that the order is not appealable. If not, then of course it is not supersedable. Section 275 of the Code of Civil Procedure makes appealable all orders "appointing receivers, giving them further directions, and disposing of the property." This is clearly an order giving further directions, and disposing, or ordering the disposition, of the property. But it is said that the banking act contains special provisions concerning such matters; that the ordinary procedure is not applicable. Indeed, the argument is that the banking act provides a summary method of winding up an insolvent bank, and if any order be appealable, it is only that appointing the receiver in the first instance; that thereafter the functions of receiver and court are administrative and their acts not subject to review. It is said that this is the clear policy of the act. If so the act is clearly unconstitutional, and we are by no means disposed to so hold. Sections 34 and 35 of the banking act provide that the attorney general shall apply for a receiver whenever it shall appear to the banking board, "from any examination or report," that certain facts exist. Provisions are then made for the liquidation of debts, conversion of assets, and complete winding up of the affairs of the bank. It would be monstrous to say that an inspection of a report, or a consideration of the result of an examiner's work, by an administrative board, should lead to a summary taking and disposition of property, without any hearing other than that on the application for a receiver. If the proceeding be judicial, it implies a right to be heard according to the usual procedure; if it be not judicial, then there is no due process of law, and the

powers could not, under the constitution, be conferred on a court. But an entirely similar argument was made in *State v. German Savings Bank*, 50 Neb. 734, which was an appeal from an order with reference to this same bank, and directing proceedings against the stockholders. That a case under the banking act is an adversary, judicial, and not an administrative proceeding was there distinctly held, as it was also held that an order directing the receiver falls within the general provisions of the Code and is appealable. That case is here in point.

It is also urged that the corporation consented to the order appointing the receiver, and cannot now be heard to resist this order, which is in effect one only to carry out the former. In *State v. German Savings Bank, supra*, it was held that the corporation remained a party to the suit, and might be heard on applications for further directions. It was, as a matter of safety, suggested that perhaps the corporation, by consent to such appointing order, might estop itself from resisting a subsequent order "clearly for the purpose merely of carrying out the order to which it did consent." If this order were solely for the purpose of carrying out the first, and if it involved no new features on which the relator had a right to be heard, then the exception there suggested would apply. But the order appointing the receiver did not direct him to sell the real estate. On the contrary, it contained this provision: "That such sale or sales of real estate, if any there be, among the assets of said defendant bank, be solely upon such terms and at such times as shall hereafter be ordered." The necessity or propriety of such a sale, the expediency and justice of the time and of the terms, are certainly matters on which the bank should have a hearing. The further order would not be merely to carry out the first, but would extend to matters not involved in any way in the consent given to the first order. It is argued, however, that section 35 of the banking act in itself confers the power of sale on the receiver, and that the direction of a sale of the real estate flows by

law from the appointment of a receiver. If the statute requires a sale of the real estate, regardless of what may appear in the proceedings after the appointment of a receiver, and makes that order for a provisional remedy conclude all rights, it is assuredly a piece of legislation foreign to the genius of a race which has for centuries insisted that property should be protected and not sequestered save by orderly judicial procedure. The section provides generally what the receiver of a bank shall do. Among other things, "sell all real and personal property belonging to the bank on such terms and conditions as the court or judge shall direct." The first order, unless indeed it provides terms and conditions of the sale, does not then authorize it. It is left to the court or judge, as a judicial act, to determine when and in what manner the assets shall be sold. The act, instead of being the arbitrary measure asserted, carefully guards the rights of those interested, by insuring action by the court or judge, and, of course, in the exercise of judicial functions, preliminary to a disposition of such assets. The phrase "terms and conditions" is perhaps ambiguous. If it means the time, the manner of advertising, and the manner of making the sale, then this order provided explicitly for all, and these were matters left for further directions, and therefore grounded an order based on adversary proceedings and appealable. If the phrase merely means the terms to the purchasers, then again this order provided a sale for cash, by deposit of a certain percentage with the bid and payment of the remainder on confirmation, and so included matter not within the order to which the relator had consented.

We are convinced that the order is not only appealable, but that it falls within the express terms of section 677, *supra*, and may be superseded as a matter of right. It was held in *Home Fire Ins. Co. v. Dutcher*, 48 Neb. 755, that an order appointing a receiver, while appealable, cannot be superseded as a matter of right. To this we adhere; but the inference is against the respondent.

That holding was based on the proposition that an order directing the delivery of possession of real estate to a receiver is not within the supersedeas statute, because the receivership is provisional; the receiver's possession is that of the parties through the court, and the order is in no sense final, and divests no rights. If so, then it follows that the order directing the receiver to finally dispose of the property is final so far as the property is concerned, and is an order which divests rights and falls within the statute. It has never been doubted that a decree of foreclosure of a mortgage falls within the clause of section 677 we have quoted. It directs a sale of the land to pay the mortgagor's debt, and so directs a divesting of his title. This case is analogous. Equity has here seized the property of the bank and directed its sale to satisfy the debts of the bank. The analogy is so close as to amount to identity rather than analogy. Nor is there any force in the argument that in this proceeding the receivership was the ultimate purpose of the suit, and the order appointing the receiver was, therefore, the final order divesting rights, and supersedable, if any order be. This argument is advanced to avoid the inference drawn from the *Dutcher Case*. The receivership was not the main purpose of the proceeding. Its main purpose was to impound the assets and apply them to the payment of debts, the receivership was only a means to that end, as it is in a foreclosure case where a receiver is appointed.

Let us suppose that the statute, instead of providing for a receivership, authorized direct actions by creditors and subjected the property to a lien in their favor. In a suit to foreclose such lien there can be no doubt that the order directing the sale would fall within section 677 and be supersedable as of right. The situation is not changed, nor the statute evaded, by resorting to the device of a receiver and so making two orders to accomplish the same purpose—one giving the receiver possession, the other directing him to make the sale.

It is said that the provisions of section 677 are wholly inadequate to such a case and that it therefore cannot apply. In *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co.*, 51 Neb. 659, it was said that the provision here invoked "evidently contemplates an appeal by the party in possession, the former owner whose title or right of possession will be divested by the order of sale or delivery of possession." That language was used with reference to an attempted supersedeas by a bidder at the sale who was unsuccessful in procuring confirmation in himself. It was held that the provision did not apply to his case. In the present case the appellant is the party whose title will be divested, and the receiver's possession is on its behalf as well as that of others. It is true that the statutory condition of the bond required is inadequate; but that is true in every case in which the statute is invoked. Nevertheless, this curious provision whereby one may supersede an order of sale or of confirmation, or any similar order, by merely giving a bond not to commit or suffer waste, and without in any other way protecting the creditor or purchaser, has been for many years the law of this state and must be enforced. According to tradition, it exists because of a draftsman's blunder in omitting other conditions in copying a statute which it was desired to follow. However that may be, the legislature enacted it in its present form, and repeated attempts to secure its amendment have proved futile. It seems to represent the desire and conscience of the state, and while the writer would not be disposed to extend it by construction, it is quite clear that by its terms it meets this case. The writer realizes fully the mischief which may result from appeals of this character accompanied by a supersedeas. The wisdom of permitting the appeal and of allowing a supersedeas are to his mind both more than doubtful; but the conclusion is unavoidable that the law permits both.

WRIT ALLOWED.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, APPELLANT, V. JOHN WESTERHOFF ET AL., APPELLEES.

FILED APRIL 6, 1899. No. 8817.

1. **Mortgages**: DEFAULT: RIGHT TO DECLARE DEBT DUE. A mortgage provided that if default was made in the payment of the interest on the debt, the payment of which was secured by the mortgage, the whole of the indebtedness should become due and collectible without notice of condition broken. *Held*, A contract within the power and right of the parties to enter into, and enforceable according to its terms. (*Eastern Banking Co. v. Seeley*, 55 Neb. 660.)

2. ———: ———: PLEADING: ADMISSIONS. *Held*, That a default in payments was admitted by the answers.

3. ———: INTEREST: COUPONS. An interest coupon which provides for a higher rate of interest from its maturity than is exacted on the principal sum by the note to which coupon is attached may be legal and may be enforced in strict accord with its terms.

4. ———: ———: PENALTY. A provision in a note and the mortgage by which the payment of the debt evidenced by the note is secured that in the default of the payment of the semi-annual interest installment the whole debt shall bear interest at a higher rate than it would by its terms otherwise bear, is in the nature of a penalty and will not be enforced.

5. ———: ———: JUDGMENTS. If parties have agreed upon a rate of interest less than seven per cent per annum for the forbearance of a debt, a judgment predicated upon the contract will bear interest at seven per cent per annum. (*Havemeyer v. Paul*, 45 Neb. 373.)

6. ———: ———: ———. If parties have contracted for a rate of interest greater than seven per cent per annum, a judgment which has for its basis said contract will bear the rate of interest fixed by the contract. (*Havemeyer v. Paul*, 45 Neb. 373.)

APPEAL from the district court of Seward county. Heard below before BATES, J. *Reversed.*

Samuel J. Tuttle, for appellant.

E. C. Biggs and *J. J. Thomas, contra.*

HARRISON, C. J.

On April 2, 1894, the appellee John Westerhoff and his wife executed and delivered to the appellant a prom-

issory note in the sum of $1,800, payable five years after date, to bear interest at the rate of six per cent per annum, payable semiannually. The note had attached to it ten coupons, each of which evidenced the indebtedness of the makers of the principal note for an installment of the interest which was to become due thereon. In the principal note appeared this sentence: "This note to draw nine per cent interest per annum after default in payment of principal or interest," and in each coupon there was the statement that "This note bears interest at nine per cent after due." To secure the payment of the note and interest there was made and delivered a mortgage on a piece of real estate, and in the mortgage was embodied the following provision: "And it is agreed that if default shall be made in the payment of the said notes, or any part of the interest thereon, promptly as they mature, * * * then all of the said notes, and the whole of the indebtedness secured by this mortgage, * * shall become due and collectible at once, by foreclosure or otherwise, and without notice of broken conditions. * * * And it is hereby agreed that after any default in the payment of the principal or interest, the whole indebtedness secured by this mortgage shall draw interest at the rate of nine per cent per annum." It appears that the note was executed for the amount of a loan made by the appellant to John Westerhoff, one of the appellees, that the agreed rate of interest of the loan was seven per cent per annum, of which one per cent per annum for the time of the loan, or $90, was collected at the time of the inception of the loan. The appellant commenced this action in the district court of Seward county on April 17, 1895, and alleged for cause that there had been default in payment of each of the two first installments of interest due on the note, whereby the whole indebtedness had become due and the conditions of the mortgage had been broken. A foreclosure was asked and the allowance of interest at the rate of nine per cent per annum on the whole sum from the date of the first default. In the

answer of the appellees, the Westerhoffs, the execution and delivery of the notes and mortgage were admitted, and it was pleaded that at a date subsequent to the maturity of the first interest coupon the amount thereof, with nine per cent per annum from its maturity, also the amount of the second coupon to become due, was tendered to the appellant; that of such tender there was a refusal; that like tender was made at a later date, but was refused, as was a third and still later one. These tenders were to different parties and at different places. The district court, on trial, dismissed the action and the mortgagee has appealed.

There are but two main questions presented in the appeal, viz.: Was the appellant entitled to enforce the note and mortgage as past due because of the default in the payment of the interest; and in this connection was there evidence of the default or a lack thereof? Second—If entitled to foreclosure, should the decree be for nine per cent per annum from the date of the default in payment of the interest coupon?

Of the latter branch of the first question it must be said that in the answer there were statements which in effect constituted an admission of the failure to pay the amount of the first coupon at its maturity, and as to the first and main point of that question, that it is well established that for any default in the payment of the installments of principal or interest provided in a note and mortgage, or either, the further provision of the accelerated maturity of the debt or portions thereof is not a forfeiture and may and will be enforced as the allowable contract of the parties. (*Pope v. Hooper*, 6 Neb. 178; *Lowenstein v. Phelan*, 17 Neb. 430; *Morling v. Bronson*, 37 Neb. 608; *Eastern Banking Co. v. Seeley*, 55 Neb. 660; Pomeroy, Equity Jurisprudence sec. 439; *Wheeler v. Howard*, 28 Fed. Rep. 741; *Whitcher v. Webb*, 44 Cal. 127.) And the tender of the overdue interest after the default did not deprive the mortgagee of his right of foreclosure. (*Swearingen v. Lahner*, 61 N. W. Rep. [Ia.] 431.)

In regard to the second question it must be said that the portions of both note and mortgage (in them there was coincidence) in which it was provided that on default in payment of either principal or interest the whole sum due should bear interest at nine per cent per annum, which was coupled with a further provision in the mortgage that in the event of such default the whole debt should become due and collectible, attached something additional to the amount which was to be paid for the use of the principal sum, not because of any default directly in its payment, but for default in payment of a sum or the sums to be given for its use. The amounts to be paid for the use of the principal sum had been definitely fixed and set forth in terms in both note and mortgage, and the additional amount to be borne because of default in payment of interest was within the principle approved by this court in *Upton v. O'Donahue*, 32 Neb. 565, and *Hallam v. Telleren*, 55 Neb. 255, of the nature of a penalty, and will not be enforced.

It follows from what has been said that the judgment of the district court will be reversed and the cause remanded to that court with instructions to enter a decree of foreclosure for the amount of the note and mortgage and interest at six per cent per annum from the commencement of the action,—this portion of the decree to bear interest at seven per cent per annum; also for the amount due on interest coupons with interest at nine per cent per annum from the defaults in payments, and interest at the same rate on this branch of the decree.

REVERSED AND REMANDED.

HARRISON, C. J., on motion for rehearing.

The adjudication by the district court of Seward county of the matters of litigation in this, an action of foreclosure of a real estate mortgage, was appealed to this court and submitted; and in an opinion reported in 58 Neb. 379, there was set forth the decisions of the questions

presented. A motion for a rehearing was filed, which is now pending. In one ground of the motion there is complaint of the portion of the opinion in which it was determined that the appellant was not entitled to nine per centum per annum interest on the principal of the debt secured by the mortgage from a maturity of it, which became of existence by reason of a failure to pay an installment of interest (for the provisions of the note and mortgage relative to interest, maturity of principal, and other facts, see the opinion to which we have referred), and it has been suggested that we have in the determination of this point announced a doctrine in conflict with that established by some of the late decisions of this court, and have returned to the doctrine on this subject of *Richardson v. Campbell*, 34 Neb. 181, which was overruled in *Havemeyer v. Paul*, 45 Neb. 373, wherein it was held: "Where a note provides for a lawful rate of interest from date until maturity, and a higher and lawful rate of interest afterwards, the rate of interest which the note draws from its date to maturity is the contract rate for that time; and the rate which the note draws after maturity is the contract rate from that date, within the meaning of section 3, chapter 44, Compiled Statutes 1893. First point of the syllabus in *Richardson v. Campbell*, 34 Neb. 181, overruled." To the same effect see *Omaha Loan & Trust Co. v. Hanson*, 46 Neb. 870; *Omaha Fire Ins. Co. v. Fitch*, 52 Neb. 88; *Crapo v. Hefner*, 53 Neb. 251. In the cases to which we have just referred, commencing with *Havemeyer v. Paul*, the sum of money loaned bore interest at a specified rate from the time loaned until its definitely fixed maturity; and it was provided in the contract of the parties that if the principal sum was not paid at its stated fixed maturity it should draw interest at an increased rate; or the lender said to the borrower, "You will pay me a designated rate of interest to a certain named date on this money, and if you do not then pay it to me, for the time subsequent which you keep it you

must pay for its use an increased rate of interest," and to this the borrower acceded, and this it was held is enforceable. In the case at bar a different question arises. It was not because the fixed date for payment of the principal had arrived, and default had been made, that the holder of the evidence of the indebtedness and its security sought relief under them, and for an increased rate of interest as provided in the contract, but it was by reason of the non-payment at the time agreed upon, and prior to the designated maturity of the principal, of an installment of the amount to be paid for the use of the principal and by which default the lender might claim a maturity—an accelerated maturity—of the principal, and collect the amount contracted to be paid for the use of the money increased by a further sum, added, not because of a failure to pay the principal when it was due, and for its further use or forbearance, but because of the failure to pay a stated portion of the sum due for the use of the principal. This is in the nature of a penalty for non-payment of the installment of interest, and not an amount paid as per contract for the use of the money borrowed. This is not in conflict with the doctrine of the cases to which we have alluded, nor is it a return to the discarded rule of *Richardson v. Campbell, supra.* In the opinion we stated: "It follows from what has been said that the judgment of the district court will be reversed, and the cause remanded to that court, with instructions to enter a decree of foreclosure for the amount of the note and mortgage and interest at six per cent per annum from the commencement of the action,—this portion of the decree to bear interest at seven per cent per annum; also for the amount due on interest coupons with interest at nine per cent per annum from the defaults in payments, and interest at the same rate on this branch of the decree." (*Connecticut Mutual Life Ins. Co. v. Westerhoff*, 58 Neb. 382.) This should be modified to read after the word "action": "To the date of the original contract maturity of the debt, and thereafter

the interest on the debt to date of decree and on the decree to be at nine per centum per annum; to be included in the decree the amount due on coupons with interest from the maturity of each at nine per centum per annum."

REVERSED AND REMANDED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. WILLIAM H. BOND, ADMINISTRATOR.

FILED APRIL 6, 1899. No. 8822.

Death by Wrongful Act: PECUNIARY INJURY: PLEADING. In an action for damages under the provisions of chapter 21, Compiled Statutes, a petition is fatally defective which discloses no survivor entitled by law to support by the person deceased, and in which, with reference to such survivor as is described, there is no averment of pecuniary injury. *Chicago, B. & Q. R. Co. v. Van Buskirk*, 58 Neb. 252, approved and followed.

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

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

J. W. James and *Seth F. Crews, contra.*

HARRISON, C. J.

In this action instituted in the district court of Dundy county it was alleged that the death of Maud Bond had been caused by reason of the carelessness and negligence of the plaintiff in error, and the defendant in error had been duly appointed administrator of the estate of the deceased person. In the petition there appeared the following statement relative to damages: "The said Maud Bond has neither husband nor children, but left William

H. Bond and Sarah C. Bond, her parents, and Susan C. Bond, John W. Bond, Clarence E. Bond, Jessie Bond, Mamie Bond, and Herman L. Bond, brothers and sisters, who are heirs at law and next of kin, who have been damaged in the sum of $5,000." Issues were joined, and as the result of a trial judgment was rendered against the company, and for it there has been presented to this court a petition in error.

The contention is that the averment of the petition in regard to damages was insufficient. A suit which was predicated upon the same facts and circumstances was commenced and tried in the district court of Dundy county with a like termination. The language of the petition in that case on the subject of damages did not differ in effect from the one in the case at bar. That case was removed to this court by petition in error and the same question of the sufficiency of the plaintiff's pleading was raised as in this. It was therein determined that in an action as was that under the provisions of chapter 21 of the Compiled Statutes, the statutory law in respect to damages for death of a person caused by a wrongful act, neglect, or default, a petition was wholly insufficient in which there was not shown to be a party survivor who was dependent upon, or legally entitled to, support by the person whose death had been so caused, if there was also in the pleading a lack of statement of pecuniary injury to the persons therein alleged as survivors. *Chicago, B. & Q. R. Co. v. Van Buskirk*, 58 Neb. 252. See, also, *City of Friend v. Burleigh*, 53 Neb. 674.) A re-examination of the matter has produced no change in our views on the subject of the sufficiency of the statement which was attacked in each case, and it follows that the judgment must be reversed.

REVERSED AND REMANDED.

OMAHA BREWING ASSOCIATION V. CHRISTIAN BULLNHEIMER.

FILED APRIL 6, 1899. No. 8824.

1. **Master and Servant:** ACTION FOR PERSONAL INJURIES: MISTREATMENT OF SERVANT: OPINION OF THIRD PERSON: COURT'S EXAMINATION OF WITNESSES. Assignment of error of the admission of certain testimony examined, and *held* well taken.
2. **Instructions:** EXCEPTIONS: REVIEW. There must be an exception to an instruction when given, to obtain a review of the alleged error of such action.

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

Hamilton & Maxwell, W. W. Morsman, and *George B. Lake,* for plaintiff in error.

Edward W. Simeral and *Weaver & Giller, contra.*

HARRISON, C. J.

In an error proceeding to this court the brewing association seeks a reversal of a judgment of the district court of Douglas county in favor of the defendant in error in an action wherein he recovered a sum as the damages for personal injuries alleged to have been suffered by him by reason of the negligence of the association. In the petition there was pleaded the corporate capacity and existence of the association, also that defendant in error was, and had been prior to March 12, 1894, "an engineer by trade," and as such employed by the association. For further statements we now quote from the petition:

"Plaintiff further says that on the 12th day of March, 1894, while employed by said defendant as aforesaid, that Gottlieb Storz, the president of said defendant corporation, ordered this plaintiff to go into the third cellar of said defendant's building for the purpose of doing some work upon the brine pipes in said cellar.

"4. That prior to said 12th day of March, 1894, by orders of said defendant, there had been a hole cut through the floor of said third cellar about eight feet square, which said hole opened into the second cellar about eighteen feet below that of the third cellar, and that through negligence and carelessness of the said defendant, its agents, servants, and employés said opening was left wholly and entirely without protection and unguarded and uncovered by railing of any kind or description.

"5. The plaintiff further states that said third cellar is at all times dark and unprovided with light, and plaintiff was compelled to carry a lighted candle, and that while examining the brine pipes which are attached to the sides and ceiling of the third cellar wall, and through no carelessness or negligence on his part, and not knowing of the existence of the hole in the floor of said cellar, as aforesaid, and while walking along the floor of said cellar, this plaintiff stepped into said hole and fell through the same, a distance of about eighteen feet, into the cellar below."

There were further allegations relative to the injuries received by the defendant in error, their character, etc., and the suffering endured by him. Issues were joined, and a trial thereof resulted, as we have hereinbefore indicated, in a judgment against the association.

One question raised and argued for the plaintiff in error is of the admissibility of a portion of the testimony of the defendant in error, who, in answer to an interrogatory in regard to what had been stated to him by Mr. Haubens, who, it was testified by defendant in error, was one of the corporation, assisted in the transaction of its business, was an officer of the association, stated that in a conversation between them as to what had caused Bullnheimer to quit the service of the association "I said to Mr. Haubens the way I get treated from Mr. Storz I can hardly stand it any longer. I stood it so long. I done my best, all I could, all I could do for him, and then Mr. Haubens said, 'It is a shame you get treated that way;

you been working so long for the company and always give satisfaction;' and he says, 'So far as,' he says, 'I should be paid if I should work or not.' I could earn my money if I only was around." This testimony was in relation to a business matter or transaction between the defendant in error and the association which transpired subsequent to the alleged injuries, and the witness testified of the stated opinion of another party relative to the shameful treatment by the association of the defendant in error in such after affair. The opinion of the conduct of the association or its officer or officers, as stated to have been expressed by Mr. Haubens, whether so voiced by him or any other person, and while an officer or agent of the association or wholly unconnected with it, was wholly incompetent and immaterial to the issues then on trial and was well calculated to prejudice the rights of plaintiff in error; hence the admission of the testimony was erroneous.

It developed in the testimony that prior to the time the hole in the floor through which the defendant in error fell was made some person had marked on the floor, with chalk, lines which were to be followed in sawing and taking out so much of the flooring as was necessary, and there had been an attempt during the course of the trial to show that the defendant in error had given directions for the chalk-marks and for making the hole in the floor. Immediately following an interrogation to defendant in error by his counsel in relation to the chalk-marks on the floor and the former's probable knowledge of them or conversation about them with the carpenter who was to observe them in the removal of the portion of the floor outlined by them, which question was objected to by counsel for the association, the presiding judge, after overruling the objection, interrogated the witness, and connectedly there were other occurrences, of all of which the following is the record:

I never made a chalk-mark and never was asked to make one.

The Court: Did you know where the chalk-marks were?

Objection by the defendant to the question propounded, as there is no evidence here tending to show that he knew anything about chalk-marks on the floor where this hole was cut.

The Court: You may state to the jury what the fact is in regard to that, whether you knew anything about it or not.

Objection by the defendant, as it is not competent for the court to examine a witness in the case.

The Court: It is competent for the court to see that justice is done. I don't propose to sit here like a Stoughton bottle and leave things untouched. If a point is overlooked, I propose to call it out.

Defendant excepts.

A. There wasn't any such thing.

* * * * * * *

The Court: Gentlemen of the jury, when on yesterday the plaintiff was upon the witness-stand and a question was put to the witness by the court as to the chalk-marks testified to, the question was objected to by the defendant's counsel; thereupon was a colloquy between the court and counsel in regard to the matter, and I wish to say to you that whatever was said by the court was not for you, or to you, but for counsel and to counsel. It was not intended to, nor will you allow it in any manner to, influence you or prejudice you for or against either party to the suit. It was intended solely and alone for counsel, as it was a question of the legal right of the court at any time to ask a proper question of a party or a witness upon the stand respecting any point or points involved in the case without first asking permission of counsel to do so.

It is argued that the court erred in questioning the witness and in its statements to the jury in answer to the objection which was interposed to its interrogatory. We have stated our views in regard to action of a presiding judge questioning witnesses as follows: "In the matter of the complaint that the judge of the district court who

presided during the trial of this case took too active a part therein, in that he interrogated the witnesses, etc., we have carefully examined this matter again, and discovered that in a number of instances he asked questions for what plainly appears to have been the purpose of a more clear understanding of the admissibility or non-admissibility of testimony to which an objection had been interposed, that the ruling on the objection might be correct. Such actions were entirely proper. In a number of other instances the trial judge questioned witnesses and elicited testimony which bore more or less directly on the main issues. It is undoubtedly necessary that the judge who presides should acquire as full knowledge of the facts and circumstances of the case on trial as possible, in order that he may instruct the jury, and correctly, to the extent his duty demands, shape the determination of the litigated matters, that justice may not miscarry, but may prevail; and doubtless it is allowable at times, and under some circumstances, for the presiding judge to interrogate a witness. The exact extent or when the exigencies may warrant an exercise of this right are matters which are not capable of very precise statement; but it may be said that the right here in question is one which should be very sparingly exercised, and, generally, counsel for the parties should be relied on and allowed to manage and bring out their own case. The actions of the judge in this respect should never be such as to warrant any assertion that they were with a view to assistance of the one or the other party to the cause." (*Bartley v. State*, 55 Neb. 294. See, also, prior opinion in the same case, 53 Neb. 348.) Questioning the witness, when considered in connection with the remarks that were made by the trial judge, was doubtless error, and that which was prejudicial, in that the jury, or individual jurors, might be induced by it all to conclude that the court had opinions in regard to the rights of the parties which were shadowed forth or indicated, to some extent at least, by its question and language in response to the

objection thereto; but the court, as we have quoted on the next day, admonished the jury that the matter was wholly one between it and the counsel and not to be considered by the jurors. This admonition was full and complete and must have robbed the prior happenings of any harmful force they may have possessed. (*Bartley v. State*, 53 Neb. 348; *Hoover v. State*, 48 Neb. 184.)

It is urged that the court erred in giving in charge to the jury instructions numbered 5 and 6. To instruction numbered 5 there was no exception at the time it was given; hence the assignment relative to it must be disregarded. The portion of the one numbered 6 which is claimed to be objectionable is as follows: "But if plaintiff has proved all the other facts necessary to a recovery, and has not shown by his own evidence in making out his case that he contributed to the injury by his own negligence, then your verdict should be for the plaintiff." Counsel insist that the effect of this was to exclude from the consideration of the jury all the evidence which might have tended to show contributory negligence which was given on behalf of defendant in error, except such as he himself personally gave. There is an inaptness of expression in the language we have quoted which renders it liable to the construction contended for by counsel; to say the least, it involves an ambiguity, and jurors may have interpreted it as does counsel, but, when read in connection with all the other portions of the charge which treated specifically of the same subject-matter of the issues, we doubt whether it can be given the importance as an error attached to it by counsel.

There are several other errors presented which refer to admission and exclusions of evidence to portions of the charge to the jury, and connected therewith a question is argued in which there is involved an attack on the sufficiency of the petition to admit of the litigation herein of one of the issues of which there was testimony and notice in the instructions, but as the cause must be remanded for a new trial, we deem it unnecessary to dis-

cuss these points; if errors, they will probably not occur again. It follows from what has been stated that the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

HUGH DOAK, APPELLEE, V. JAMES REYNOLDS ET AL., APPELLANTS.

FILED APRIL 6, 1899. NO. 8853.

Executions: APPRAISEMENT: LIST OF LIENS. If in the appraisement of real estate preliminary to a sale thereof under execution or to carry out a decree of foreclosure no incumbrances are deducted, that no certificates of liens were obtained or filed is not a forceful objection for a defendant, the owner of the equity, to confirmation of the sale; but if incumbrances are deducted, certificates of the liens must be obtained and the copy of the appraisement, inclusive of applications for certificates of liens and the certificates, filed with the clerk of the district court prior to the advertisement of notice of the sale.

APPEAL from the district court of Harlan county. Heard below before BEALL, J. *Reversed.*

R. L. Keester, for appellants.

John Everson, contra.

HARRISON, C. J.

In this, an action in the district court of Harlan county to foreclose a mechanic's lien, a decree was rendered and an order of sale of the premises, subjected to the operation of the lien, was issued, pursuant to the directions of which the sheriff of said county made a sale of the property, and after his return of the order objections to the confirmation of the sale were filed. On hearing, these objections were overruled and the sale confirmed. From the order of confirmation this appeal has been perfected.

The sale was of date March 2, 1896. The first publication of the notice of the sale was on January 30, 1896. One of the objections to the sale was that the requisite certificates of liens were not deposited or filed with the clerk of the district court prior to the publication of the notice of sale. The record discloses that the certificates of liens were filed March 2, 1896, the date of sale. It is provided by statute: "The officer holding such appraisement shall forthwith deposit a copy thereof, including his application to the officers enumerated in section three of this act, and their official certificates as in said section provided, in the office of the clerk of the court from which such execution issued." (Code of Civil Procedure, sec. 491*d*.) The provisions of the law are mandatory, and that they be observed is essential. (*Burkett v. Clark*, 46 Neb. 466; *First Nat. Bank of Broken Bow v. Hamer*, 51 Neb. 23; *Reuland v. Waugh*, 52 Neb. 358; *Walker v. Patch*, 52 Neb. 763.) It is true that where no incumbrances are deducted and no certificates of liens are obtained or filed, the defendants, owners of the equity, have no good reason to object, for it is not prejudicial; but if incumbrances are deducted, the certificates should be obtained and a copy of the appraisement, inclusive of applications for certificates and the certificates, filed at the prescribed time. (*Burkett v. Clark, supra.*)

There were other errors, or, to say the least, irregularities in the requisite preliminary proceedings of the sale, to which there were objections, which are now urged, but we do not deem it necessary to discuss them at this time. The order of confirmation must be reversed and the cause remanded. The sale should be set aside.

REVERSED AND REMANDED.

GLOBE LOAN & TRUST COMPANY, APPELLEE, V. ORLANDO S. WOOD ET AL., APPELLANTS.

FILED APRIL 6, 1899. No. 8856.

Executions: APPRAISEMENT: LIST OF LIENS. The provisions of section 491*d* of the Code of Civil Procedure, to the effect that a copy of an appraisement of real estate to be sold at judicial sale, inclusive of the applications to certain officers for certificates of liens and such certificates, shall be forthwith deposited in the office of the clerk of the proper court, are mandatory, and unless there is a compliance therewith prior to the advertisement of the notice of sale, any sale made may be vacated.

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

L. D. Holmes, for appellants.

G. W. Shields, F. C. O'Hollaren, and *Saunders & Macfarland, contra.*

HARRISON, C. J.

An appeal has been perfected herein from an order of confirmation of a sale of real estate made pursuant to a decree of foreclosure of a mortgage. Objections were made to the appraisal, also the confirmation of the sale. On hearing, the objections were overruled and a motion to confirm the sale was sustained and the order appealed from was entered. One objection interposed to the appraisal was that no certificates of the proper officers in regard to the liens which were deducted as incumbrances were obtained and filed as required by law. Section 491*d* of the Code of Civil Procedure provides: "The officer holding such appraisement shall forthwith deposit a copy thereof, including his application to the officers enumerated in section three of this act, and their official certificates as in said section provided, in the office of the clerk of the court from which such execution issued."

The requirements of the portion of the section of the Code just quoted are mandatory, and a non-compliance therewith may furnish cause for setting aside an order of confirmation of a sale and the sale. If liens are deducted in making the appraisement, the certificates should be obtained and filed as required, prior to the advertisement of the sale. (*Burkett v. Clark*, 46 Neb. 466; *First Nat. Bank of Broken Bow v. Hamer*, 51 Neb. 23; *Reuland v. Waugh*, 52 Neb. 353; *Walker v. Patch*, 52 Neb. 763.)

There were other objections to the appraisal and to confirmation of the sale presented in the district court which are argued here, but we do not deem their discussion essential at this time. For the reason indicated herein the order of confirmation is reversed and the cause remanded. The sale should be vacated.

REVERSED AND REMANDED.

JOHN F. DAILEY, ADMINISTRATOR, V. BURLINGTON & MISSOURI RIVER RAILROAD COMPANY.

FILED APRIL 6, 1899. No. 9611.

1. **Master and Servant:** RISKS OF EMPLOYMENT. An employé assumes the ordinary risks of his employment.

2. ———: CONTRIBUTORY NEGLIGENCE: DAMAGES. Notwithstanding a party has negligently placed himself in a position wherein he is exposed to injury, if another, after discovery of such condition, inflicts the injury by reason of failure to exercise ordinary care to avoid it, the former may have an action for damages against the latter.

3. ———: ———. A section-boss and men in charge of and running a hand-car on the track of a railway company remained on the track and attempted to remove the hand-car and prevent its endangering the safety of an approaching train and the persons thereon. Such facts alone were not conclusive of their contributory negligence.

4. **Pleading:** CONSTRUCTION: DEMURRER. A pleading may be said to

allege what can by reasonable and fair intendment be implied from its statements, and when assailed by general demurrer all it states is to be considered as admitted, and unless, when viewed in the light of the foregoing rule, there is no cause of action stated, the pleading must be upheld.

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

John D. Ware and *T. J. Mahoney*, for plaintiff in error.

Greene & Breckenridge and *J. C. Kinsler, contra.*

HARRISON, C. J.

This action was instituted by the administrator of the estate of William T. Dailey, deceased, to recover the damages alleged to have resulted from the negligence of the company by which the death of William T. Dailey was caused on February 17, 1896, while he was an employé of the company as what is termed a "section-boss," and engaged in the performance of his duties. To the petition there was interposed a general demurrer, which on hearing was sustained and the action dismissed, and a petition in error has been presented to this court in behalf of the plaintiff in the suit.

The petition was a somewhat extended and lengthy statement of the occurrences and circumstances upon which the action was predicated, and we deem it best not to quote it in full and to state herein but a few of the main facts. On February 17, 1896, William T. Dailey and two "section-men," employés of the company, went over a portion of the line of the company's road upon a hand-car, a part of the section to which they were employed to attend and keep in good condition. At the particular time in question the men were engaged in what is not inaptly termed in the petition "a required tour of inspection" of the particular part of the section of the line of road over which they then passed or ran the hand-car. They went to the northern termination of the section, and

there they stopped and looked northward along the line, in which direction they had a free and unobstructed view for a distance of about one-half of a mile. They could see no train or car approaching them from that direction, nor could they hear the sound of any. A section of a northerly-bound train had passed them, or had been seen by them, which had displayed a signal which to parties who understood it, of whom were the section-boss and men, signified that there was a second section of the train running on the same time as the first and which might be expected over the road from the south any minute or time. It was then due. With these matters in mind they started to run the hand-car southward a distance of about 900 feet to reach a place where there was a highway crossing of the railway where it would be suitable and convenient to remove the hand-car from the track, if it became necessary, and await the passage of the section of the train which was expected from the southern direction, but before they reached the highway crossing they were overtaken by a locomotive with one car attached coming from the northward and running at a high rate of speed, of the approach of which they were not properly warned; that they, after they became aware of the proximity of the locomotive, attempted to remove the hand-car from the track, but for lack of time could not do so. They stepped aside, the hand-car was struck by the engine, thrown from the track and against Dailey, and he was so injured by being struck by it that within a few minutes thereafter he died. The foregoing is but a summary of some of the main circumstances pleaded in the petition, in which was an amplified narrative of the matters, main and collateral, which connectedly constituted the alleged cause of action. There were also allegations of negligence attributed to the company and the absence of negligence of the plaintiff.

The contentions in regard to the insufficiency of the petition, according to the arguments advanced here, may be said to have been that the section-boss, as an employé

of the company, when he entered the employment, assumed all the ordinary risks incident thereto; that plaintiff's decedent, William T. Dailey, was, at the time of the occurrence, one result of which was his death, guilty of negligence, which primarily caused the accident or event, by running the hand-car southward on the track without watching or looking to the northward for an engine or a train, and also, after discovery of the approach of the locomotive, in attempting to remove the car from the track. In the examination of a pleading assailed by general demurrer it is to be borne in mind that all the facts are admitted, and all reasonable and fair intendments which can be implied from its allegations are to be indulged. (*Roberts v. Samson*, 50 Neb. 745.) It is true, as asserted by the counsel for the company, that an employé enters and continues the employment with the assumption of the risks ordinarily attendant upon the particular employment (*Chicago, B. & Q. R. Co. v. McGinnis*, 49 Neb. 649); and William T. Dailey assumed the risks ordinarily incidental to the performance of the duties and labor of a section-boss. In the argument on this branch of the case there is much said relative to the manner of the operation of the road, the running of trains regular and special, and many other things about which there is nothing in the pleading under consideration. These, if answered or shown in evidence, such of them as might be competent would be effective, but can have no force here in the argument on the demurrer. We are now confined to what appears from what is stated in the petition and are, by the demurrer thereto, given the force of admitted facts, and from these it cannot be successfully asserted that there was shown assumption of risks which entered into and were elemental of the event, one issue of which was the death of William T. Dailey, and which assumption would effectually bar the action. With what may be alleged in defense or shown in evidence we do not now have to deal. These must appear in subsequent stages of the proceedings in the suit, if they are ever reached.

The statement of the manner in which the section-boss and his men started to run the hand-car from the northern end of the section 900 feet to the highway crossing, and the circumstances and facts connected with such action, were duly detailed in the petition, and it was further stated connectedly that after the engineer on the locomotive which threw the hand-car from the track discovered the situation of the section-boss and his men, he failed to exercise ordinary care to avoid the occurrences which resulted in the injury of which complaint was made in the petition, or, in other words, that he was negligent, and the result was the accident and injury. It has been said: "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion." (*Baltimore & P. R. Co. v. Jones*, 95 U. S. 439.) The question of the existence of negligence is usually one of fact for the jury; where it is entirely clear, it is of law for the court, but when all the allegations of the pleading attacked by the demurrer relative to the situation at the place on the track from which the section-boss and the other men started on the hand-car to run 900 feet to the highway, together with all the pleaded concomitant facts and circumstances, and their reasonable and fair intendments are connectedly considered, it cannot be said as a matter of law that the plaintiff was negligent, but must be said that there was a statement under which the plaintiff was entitled to present the matter in evidential form and have the decision of a jury. If for the sake of the argument it be conceded that William T. Dailey was negligent, the further question to which we have before alluded is presented, of the alleged want of exercise of ordinary care by the engineer after it is averred he had discovered the perilous situation of the section-boss and the other men. It is a well-

established doctrine that notwithstanding a person may have so placed himself as to be liable to injury, yet if another, after knowledge of the fact, inflict injury because of the failure of the latter to exercise ordinary care to avoid it, the former may recover damages. (*Union P. R. Co. v. Mertes*, 35 Neb. 204; *Omaha Street R. Co. v. Martin*, 48 Neb. 65; *Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb. 563.) Viewed in the light of the above rule, it cannot be said that it was clearly shown by the facts pleaded that there had been the exercise of ordinary care on the part of the engineer, and there was such matter on this point in the pleading attacked as called for answer and evidential exposition.

Relative to the pleaded position of the parties at the time the attempt was made to remove the hand-car from the track just before it was struck by the locomotive, within the doctrine of this court announced of a similar set of circumstances there was sufficient pleaded to entitle the plaintiff to introduce his evidence and have the facts then passed upon by the court, or, if the evidence sustained the statements in the pleading, to have the verdict of the jury thereupon. The rule of this court to which we have just referred is to the effect that it cannot be said that the section-boss and the men were negligent in a contributory sense because they stayed on the track and attempted to take the hand-car therefrom, that it might not obstruct the way of the coming engine and car and jeopardize the safety of the approaching train and lives of persons thereon. (*Omaha & R. V. R. Co. v. Krayenbuhl*, 48 Neb. 553.) We must reach the conclusion that there was a cause of action stated in the petition. The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

REUBEN W. ROSS ET AL. V. GEORGE E. BARKER ET AL.

FILED APRIL 6, 1899. No. 8843.

1. **Findings of Fact and Conclusions of Law:** SEPARATE STATEMENT. The request for a separate statement of conclusions of fact and of law in the trial of a cause to a court without a jury, to render a compliance therewith compulsory, must be made not later than at the final submission of the cause.

2. **Pledge of Note Secured by Mortgage:** FORECLOSURE: RIGHTS OF PLEDGOR. If notes, accompanied by real estate mortgages by which the payments of the notes are secured, are pledged as collateral security for the payment of a debt and the mortgages are foreclosed by the pledgee, in actions to which the pledgor is not made a party, and the pledgee at the foreclosure sales purchases the properties, if it appear that such action was with the intent to acquire complete titles thereto, the pledgor may affirm the sales and demand credit on the principal debt for the amounts bid, less costs and expenses of the foreclosures, and if the said sums in the aggregate exceed the debt, may recover the excess.

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

William D. Beckett and *Edward H. Moeran*, for plaintiffs in error:

The district court erred in holding that when a note and mortgage are assigned as collateral security, and upon default the assignee or pledgee forecloses without making his principal debtor a party and bids in the property in his own name, it may be considered by the debtor as an absolute purchase, and he is entitled to have the amount of the bid credited upon his indebtedness. (Colebrooke, Collateral Securities 330; *First Nat. Bank of Jeffersonville, Ind., v. Ohio Falls Car & Locomotive Works*, 20 Fed. Rep. 65; *Hoyt v. Martense*, 16 N. Y. 231; *Dalton v. Smith*, 86 N. Y. 177; *In re Gilbert*, 104 N. Y. 200; *Bloomer v. Sturges*, 58 N. Y. 170.)

The court erred in refusing to state separately its conclusions of fact and its conclusions of law. (*Wiley v.*

Shars, 21 Neb. 715; *Sprick v. Washington County*, 3 Neb. 255; *Lowrie v. France*, 7 Neb. 191; *Howard v. Lamaster*, 13 Neb. 221; *Haller v. Blaco*, 14 Neb. 196; *Foster v. Devinney*, 28 Neb. 416; *Ross v. Miner*, 31 N. W. Rep. [Mich.] 185; *Thompson v. Russell*, 32 Pac. Rep. [Okla.] 56; *Nephi Irrigation Co. v. Jenkins*, 31 Pac. Rep. [Utah] 986; *Braden v. Lemmon*, 26 N. E. Rep. [Ind.] 476; *Farrar v. Lyon*, 19 Mo. 122; *Piercifield v. Snyder*, 14 Mo. 583.)

E. J. Cornish, contra.

References as to collateral security and mortgage foreclosure: *Haas v. Bank of Commerce*, 41 Neb. 754; *Easton v. German-American Bank*, 24 Fed. Rep. 523; *Wright v. Ross*, 36 Cal. 414; *Newport & Cincinnati Bridge Co. v. Douglas*, 12 Bush [Ky.] 573; *Bryan v. Baldwin*, 52 N. Y. 233; *Stokes v. Frazier*, 72 Ill. 428; *Hyams v. Bamberger*, 36 Pac. Rep. [Utah] 202; *Dimock v. United States Nat. Bank*, 25 Atl. Rep. [N. J.] 926; *Chouteau v. Allen*, 70 Mo. 290; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242; *Lucketts v. Townsend*, 49 Am. Dec. [Tex.] 737; *Marye v. Strouse*, 5 Fed. Rep. 483; *Taussig v. Hart*, 58 N. Y. 425; *Bank of the Old Dominion v. Dubuque & P. R. Co.*, 8 Ia. 277; *Fletcher v. Dickinson*, 7 Allen [Mass.] 23; *Stearns v. Marsh*, 4 Den. [N. Y.] 227; *Strong v. National Mechanics Banking Ass'n*, 45 N. Y. 718.

References as to requests for separate findings: *Miller v. Lively*, 27 N. E. Rep. [Ind.] 437; *Hartlep v. Cole*, 120 Ind. 247; *Levi v. Daniels*, 22 O. St. 38; *Blish v. McCormick*, 49 Pac. Rep. [Utah] 529; *Murphy v. Snyder*, 8 Pac. Rep. [Cal.] 2; *Haller v. Blaco*, 14 Neb. 196; *Doane v. Smith*, 51 Neb. 280; *Town v. Missouri P. R. Co.*, 50 Neb. 768; *Missouri P. R. Co. v. Vandeventer*, 26 Neb. 223; *Oxford Township v. Columbia*, 38 O. St. 94; *Heintz v. Cooper*, 47 Pac. Rep. [Cal.] 360; *Weaver v. Apple*, 46 N. E. Rep. [Ind.] 642; *Leach v. Church*, 10 O. St. 149; *Cottrell v. Nixon*, 109 Ind. 378; *Missouri, K. & T. R. Co. v. Wallis*, 38 S. W. Rep. [Tex.] 357; *Brock v. Louisville & N. R. Co.*, 21 So. Rep. [Ala.] 994.

HARRISON, C. J.

It appears herein that on or about May 25, 1887, George E. Barker, Frank B. Johnson, and Robert Garlichs borrowed from Reuben Ross, a resident of New York state, the sum of $100,000, and to evidence the indebtedness created by the transaction executed and delivered to him their promissory note. As security for the payment of the amount of the loan certain promissory notes and the real estate mortgages, by which their payments were secured, were transferred by the parties borrowers to the loaner and payee of the principal note. There were about 300 of the notes which were indorsed and delivered as collateral securities, and the amount of them, in the aggregate, was something more than $100,000. The mortgages were duly assigned. Subsequent to the completion of the transaction of loan Reuben Ross died, and the further matters of business relative to the affair were under the management and direction of the executors of his estate. After the loan was effected the interests of Robert Garlichs and Frank B. Johnson in the collateral securities were by assignment passed to the National Bank of Commerce. There had been foreclosures of many of the mortgages, and at the sales of the mortgaged premises Reuben Ross, or the executors, had become the purchasers. They had also compromised with some of the debtors of the collateral securities, by acceptance of renewals in some instances and by reception of conveyances of titles of the mortgaged properties in others. The executors sought in this action to recover an amount of the original loan indebtedness, which they asserted was due and unpaid. The defendants pleaded that more than sufficient to pay the entire principal debt and interest had been realized from payments, foreclosures, etc., of the collateral securities. The National Bank of Commerce intervened in the action and set forth its claimed rights, as assignee of the interests of certain of the parties to the loan, in the collateral securities. In the reply of the plaintiffs there

were statements relative to the foreclosures of the mortgages and the purchases at the sales of the mortgaged premises, or rather that they were "bid in" and the titles taken in the name of Reuben Ross during his life, and in the names of his executors thereafter, and the offer was made to convey all said titles to the principal defendants in this suit. Issues were joined, and a trial thereof had to the court without a jury. This was during the 24th, 25th, and 26th days of September, 1895, and the cause was then, so far as we can gather from the record, submitted.

On January 2, 1896, there was filed a decree, of which the following is the opening statement: "This cause heretofore coming on to be heard in its regular order upon the petition of the plaintiff, the answer of the defendant George E. Barker, the reply of the plaintiffs to the answer of George E. Barker, the petition of intervention of the National Bank of Commerce, the answer of said plaintiffs to said petition of intervention of the National Bank of Commerce, the reply of the National Bank of Commerce to said answer, and the evidence and argument of counsel, and a jury being waived in open court by all the parties hereto, was submitted to the court, on consideration whereof, and the court being duly advised in the premises, on this 2d day of January, 1896, finds." This entry discloses that the submission of the cause had been at a time prior to the decision. On the same day, January 2, 1896, there was filed for plaintiffs a request that the court state in writing and separately its conclusions of facts and law. This request was refused. There was a judgment for defendants, and the plaintiffs have removed the cause to this court.

It is argued that the trial court erred in its refusal of the request for separate statements of its conclusions of facts and of law, and in this connection we are referred to section 297 of the Code of Civil Procedure as providing for such a request, and it is urged that if it is made, there must be a compliance with it, and its refusal may furnish

a reason for a reversal of the judgment, if adverse to the party who preferred the request. Section 297 of the Code of Civil Procedure is as follows: "Upon the trial of questions of fact by the court it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall state in writing the conclusions of fact found, separately from the conclusions of law." It has been decided by this court that it is error to refuse to make and state separate conclusions and findings of law and fact if requested. (*Wiley v. Shars*, 21 Neb. 715.) But it is advanced for defendants in error that the request must be seasonably made, and if not so, may be refused, and that the request in this case was too late to force recognition. It has been said by this court that the request must be before judgment (*Wachsmuth v. Orient Ins. Co.*, 49 Neb. 590), and we are satisfied that it is proper, in order that the trial judge may examine and consider the questions of fact and of law and formulate and prepare the requisite statements, that the request should be made at the time of the trial, and not later than at the final submission of the cause for decision, or at a later time, to be fixed by the court. The judge should not be called upon, as in this case, at the same time of the rendition of his decree to then particularize in regard to every conclusion of fact and also of law. He undoubtedly might and may do so. We think it discretionary with him, if the request is made later than at the time we have indicated, whether he will comply with it or not, but it seems only right and compatible with true rules of procedure that if the judge must comply with such a request, the same be made at such a time as will enable him to comply with it conveniently, and with due consideration and preparation of his statements. It is stated in Elliott, Appellate Procedure, section 729: "Where the statute fixes the time within which a request shall be made, it

will generally be futile unless made within that time. If no time is fixed by law or by the rules of practice within which the request shall be made, then it must be made within a reasonable time, before action is required upon it. The trial court should be allowed a reasonable time and opportunity to consider and decide upon the questions involved, and to do what the request requires should be done." Also in regard to a request for special findings: "The request must be made at the commencement of the trial, in order to render it the compulsory duty of the court to find the facts specially." (Elliott, Appellate Procedure sec. 732; *Hartlep v. Cole*, 120 Ind. 247; *Miller v. Lively*, 27 N. E. Rep. [Ind.] 437.) We are satisfied that what we have hereinbefore indicated is the correct rule to establish in regard to the time at which the request should be preferred, and it follows that the refusal of the request in this case will not suffice for a reversal of the judgment.

The further question presented at this time is not one of practice, but of the merits. It is of the relative rights of the parties, where one who holds as collateral security a note secured by mortgage on real estate, on default in payment of the principal debt, forecloses by action the mortgage of the collateral security, to which action he does not make the principal debtor a party, and said holder of the collateral security at the foreclosure sale purchases the mortgaged property. Does he hold the title and property as collateral security, as he did the mortgage? Can his debtor redeem it by payment of the principal debt and can he also, if he so elects, allow the purchase to stand and ask and force a credit on his debt of the amount of the bid at the foreclosure sale by his creditor? As is stated in the brief for defendants in error, it appeared, or there was evidence to sustain the findings, that plaintiffs and Reuben Ross "(*a*) had extended the time of payment of certain collateral notes; (*b*) had canceled and surrendered to the makers certain other collateral notes, accepting in satisfaction thereof

deeds to the real estate theretofore mortgaged to secure the same; (c) had foreclosed certain other collateral notes and mortgages, and had themselves become the purchasers at the sheriff's sale of the lands mortgaged." Of the first two it may be said that this court has announced a rule by operation of which the amounts due on the collaterals involved in transactions of the nature described could be claimed as credits and must be allowed as such on the principal debt. "If a pledgee, without the consent of the debtor, renews or extends a note pledged as collateral, or surrenders such note and takes new security, he must account to his debtor as if he had collected it in full." (*Haas v. Bank of Commerce*, 41 Neb. 754.) Within the principle of the doctrine of that case the plaintiffs would be bound to account for the amounts of the notes extended; also those canceled and surrendered on the compromises and adjustments of the matters of indebtedness between the holders and the debtors of the collateral securities.

In regard to the actions to which the assignor of the collateral securities was not a party, in which there were foreclosures and sales and purchases of the property by the holders of the securities, we ascertain that the following doctrine has been asserted: "The holder of a negotiable promissory note, secured by mortgage, as collateral security for a debt, is entitled, upon default, to proceed with the foreclosure of the property included in the mortgage security, and to entry, and possession thereof, under appropriate proceedings. Such proceedings, however, do not change the relations of the parties to the contract of pledge, the land being simply substituted as collateral security in place of the notes and mortgage, and remaining subject to redemption. Nor, as between the pledgor and pledgee, is such foreclosure, entry, and possession a payment of the debt for which the notes and mortgage are held as collateral security." (Colebrooke, Collateral Securities, p. 330, sec. 183.) The foregoing statement made by the author of the text was evidently derived

from a number of decisions which are cited by him in its support and were announced in actions by the assignors of securities as collateral where there had been sale of the pledges and sales under foreclosures, if the collaterals were notes accompanied by mortgages, and the assignee or pledgee, if you please, had purchased at the sales, and the object of any suit, to which we now refer more particularly, was to redeem the pledge or the property which had been sold. The proposition upon which the decisions were based was that the assignee of the collateral securities held them in trust; his relation to the assignor was a fiduciary one, and the sale to the former left the property, as is stated in the quotation we have given, in his hands as security. The transfers of the real estate mortgages to Reuben Ross as collateral securities may not be inaptly termed mortgages of the mortgages, or it may be said that they were pledged, and it has often been decided that where notes, bonds, or shares of stock have been pledged or placed as collateral securities, that in default of payment of the principal debt they may, with due procedure, be sold, and if purchased by the pledgee the sale is voidable at the election of the pledgor, and he may redeem the securities or treat the sale as valid and have the amount of the bid or purchase price credited on the debt. If a mortgage, if pledged as collateral security, may be sold, and if the pledgee becomes a purchaser, the pledgor may redeem or affirm the sale at his option, we cannot perceive why the same rule should not be enforced if the mortgage is foreclosed, and in the event of the purchase of the property involved, by the assignee or pledgee, the property is still to be considered as collateral security and may be redeemed, it would seem that the option to affirm the sale should be just as applicable as if the sale had been of the mortgage itself. The reason for any distinction is not apparent, but in the case at bar it may be said that there arose a question of the intention with which the purchases at the foreclosure sales were made by or for

Reuben Ross, and after his decease his executors, and that a finding that the bids and purchases were with intent to effect complete transfers of the titles to the properties was sustained by the evidence, and we think clearly where this appears the pledgee may affirm the sales and have credit for the amounts of the bids, less costs and expenses of the foreclosures, and, as was adjudged in the trial court in this case, may recover the excess of the aggregate of the amounts of the bids over the amount of the principal debt. Whether the election by the pledgor to affirm the sales would exist, in a similar case, where nothing appears, except the facts of the bids and sales,—no other circumstances or evidential matters,—to disclose any particular intention, we need not decide at this time. Conformably to the views expressed the judgment of the district court must be

AFFIRMED.

GUS NORBERG V. ELI PLUMMER ET AL.

FILED APRIL 6, 1899. No. 8771.

1. **Evidence:** DOCUMENTS: FOUNDATION. It is error to admit in evidence a book account or a letter until the proper foundation therefor has been laid.

2. ———: AGENCY. Agency cannot be established by the mere declarations of the alleged agent, and in a proper case it is error not to so instruct the jury.

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

Gus Norberg and *C. C. Flansburg,* for plaintiff in error.

A. G. Greenlee and *S. L. Geisthardt, contra.*

NORVAL, J.

This action was brought by Eli Plummer, Roscoe A. Perry, and John Fitzgerald, partners as Plummer, Perry

& Co., against Gus Norberg, on an account for goods alleged to have been sold and delivered by plaintiffs to defendant. The petition, which contained the usual and necessary averments, was answered by a general denial. The trial resulted in a verdict and judgment in favor of the plaintiffs, and from the overruling of the defendant's motion for a new trial he has prosecuted this error proceeding.

It is disclosed that in 1892 one W. H. Cowgill effected a trade of some land, which he owned, for a stock of goods at Tobias, he giving, in addition to the land, the sum of $1,000 in money, which sum he obtained for that purpose by borrowing the amount from the United States National Bank of Holdrege. A note was given for the amount of the loan, which was secured by a bill of sale of the stock of goods from the seller to Mr. Norberg, who at the time was vice-president of the bank and engaged in the practice of the law at Holdrege. The bill of sale, for convenience only, was taken in defendant's name and without his knowledge or assent, although he was subsequently informed concerning the transaction. Cowgill took possession of the stock of goods and made purchases on time from the plaintiffs, who were wholesale grocers in the city of Lincoln. The goods were ordered from plaintiffs by Cowgill in the name of G. Norberg, and they were shipped by rail to Tobias in the same name, where they were received by Cowgill and placed in the store. The evidence tends to show that the defendant was not aware that the store was being run in his name, or that Cowgill had opened an account with the plaintiffs in the name of Norberg; that in October, 1892, Cowgill informed the officers of the bank that the stock should be replenished with sugar and coffee, and he was directed by the defendant to use sufficient money derived from the sales to purchase such staple groceries as sugar and coffee as might become necessary, but not to buy goods on credit; that thereafter merchandise was obtained by Cowgill from plaintiffs on time in the name

of the defendant, and that in December, 1892, said stock of goods at Tobias was destroyed by fire. This action followed.

The assignments of error may be properly grouped under the following heads: (1.) The rulings of the trial court relating to the admission of evidence. (2.) Alleged errors in the giving and refusing of instructions. (3.) The verdict is not sustained by the evidence. A portion of these only it is deemed necessary to notice in this opinion.

Complaint is made of the receiving in evidence of Exhibit B, offered by the plaintiffs, which purports to be a copy of an account against the defendant for merchandise. This exhibit was inadmissible. No foundation for its introduction had been laid. It had not been shown that the goods mentioned therein had been sold and delivered either to the defendant personally or to any authorized agent, or that the account was true and correct, or a copy of the books of the original entries of the plaintiffs, nor were such books introduced in evidence.

Plaintiff introduced on the trial a letter, of which the following is a copy:

"TOBIAS, NEBR., Nov. 30, '92.

"*Plummer, Perry & Co., Lincoln*—GENTLEMEN: Your statement of Nov. 23 rec'd, and I check with you except one item of October 14, $9.87. This I have not got on my books, nor can I find any bill for same. Kindly give me a statement of what it was so I may look it up. Kindly bear with me for a few days and I will hustle as hard as I can. Collections slow, and trade none, everybody husking corn.

"Yours truly,

G. NORBERG,
"By W. H. COWGILL."

This letter should have been excluded from the jury, because no foundation for its reception as evidence had been laid. It was not shown that the letter was written by the defendant, or even by Cowgill, who assumed to represent him. Objection to the admission of the letter

was seasonably made, and on proper ground, and the objection should have been sustained. For the same reason Exhibits F and G should not have been received as evidence. Each purported to be an order for goods, and signed in the same manner as the letter. The signatures of the defendant and Cowgill to those orders were not proven.

The defendant tendered the following instruction, which the court declined to give, which refusal is assigned for error: "1. The court instructs the jury that, as a matter of law, the mere declarations of an agent are not in themselves evidence of authority of such agency, and that in order to bind the principal by the acts, declarations, or contracts of the agent, proof of the agency must first be established, and although the jury may find from the evidence in this case that the plaintiff herein sold the goods in controversy upon the order of W. H. Cowgill, who signed himself as an agent of G. Norberg, and actually received the goods and receipted for the same in the name of G. Norberg, yet the court instructs you, as a matter of law, that in order to bind the defendant Norberg and render him liable to the plaintiff there must be proof, first, that the said Cowgill was in fact the agent of the said Norberg, and had authority to represent him in the conduct of said business; or second, that the said Norberg knew that said Cowgill was purchasing goods in the name of said Norberg, and with said full knowledge on the part of said Norberg he assented thereto." This instruction enunciated correct legal principles applicable to the case, and should have been given. The plaintiffs had introduced proof of the declarations of Cowgill and that he was defendant's agent. Such declarations alone, as suggested in the request, were insufficient proof of agency, and the jury should have been so advised. (*Burk v. Frye*, 44 Neb. 223; *Anheuser-Busch Brewing Ass'n v. Murray*, 47 Neb. 627; *Richardson v. School District*, 45 Neb. 777.) It was not claimed that the defendant personally bought or received the goods, the

contention of the plaintiffs being that Mr. Cowgill represented Norberg in the transaction and conducted the business for him at Tobias. Cowgill ordered goods for Norberg in the name of the latter. To charge the defendant therefor it devolved upon the plaintiffs to establish that Cowgill was Norberg's agent, or that the defendant had acknowledged that goods were being bought in his name by Cowgill and Norberg assented thereto. The refusal of the request was reversible error, as the substance thereof was not covered by any of the instructions given.

Certain instructions given are assailed in the brief, but they need not now be considered, nor is it essential that we review the evidence to ascertain whether it sustains the verdict. The judgment, for the errors indicated, is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

WILLIAM S. MARTIN, APPELLEE, V. INEZ C. HUMPHREY ET AL., IMPLEADED WITH CATHERINE D. BECKER, APPELLANT.

FILED APRIL 6, 1899. No. 8772.

1. **Contracts:** AGENCY: RATIFICATION. One will not be permitted to adopt that part of a contract, made by his agent without any antecedent authority, which is beneficial to him and repudiate the remainder. He must either adopt the whole or none.
2. **Deeds:** ASSUMPTION OF MORTGAGE. Where a deed stipulates that the grantee assumes and agrees to pay a mortgage against the premises, the grantee is personally liable to the mortgagee for the amount of such mortgage debt.

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

C. C. Flansburg, for appellant.

S. B. Pound and *Roscoe Pound, contra.*

NORVAL, J.

This suit was instituted by William S. Martin to foreclose two real estate mortgages, executed by the defendant Inez C. Humphrey and Albert H. Humphrey. A judgment for any deficiency remaining upon the sale of the mortgaged premises was prayed against the defendant Catherine D. Becker, to whom it is alleged that the property had been conveyed by the mortgagors, and that in the deed she had assumed and agreed to pay the mortgages. The answer of Mrs. Becker, after denying each averment of the petition, pleaded that the conveyance of the property to her was made without her knowledge, that she never accepted the deed, and did not assume the payment of the mortgage. Plaintiff replied by a general denial, and averred that Mrs. Becker had, subsequent to the transfer of the mortgaged premises to her, conveyed the same to Jacob Frankforter and Rebecca J. Frankforter, subject to the mortgages in question, and thereby ratified, accepted, and adopted the deed to her and the stipulations or covenants therein contained. The district court determined the issues in favor of the plaintiff, and especially found that Mrs. Becker assumed and agreed to pay the indebtedness secured by the mortgages, and rendered a decree of foreclosure, and that plaintiff, after the confirmation of the sale of the property, should have judgment against her for any deficiency which might remain to satisfy the amount found due plaintiff by the decree. Mrs. Becker appeals on the sole ground that the finding made by the court below that she is liable for the mortgage debts is not sustained by the evidence.

It appears from the record before us that after the execution by the Humphreys of the mortgages foreclosed in the present suit they traded the mortgaged premises to Anson U. Becker for property the latter owned, which was likewise incumbered. By the terms of the agreement each grantee was to assume in the deed the payment

of the incumbrance on the property received in exchange, and the deeds were accordingly so drawn and executed. The Humphreys, at the request of Mr. Becker, on October 7, 1892, conveyed to his wife, Catherine D. Becker, the property owned by the grantors, which deed was duly recorded, and contained the provision following: "Said property is deeded subject to two mortgages aggregating $1,750 and interest, which the grantee assumes and agrees to pay, together with the taxes of 1892 and thereafter." This is the clause upon which plaintiff bases the right to a deficiency judgment against Mrs. Becker. She claims she is not bound, because she was not present when the conveyance was made, that the deed was taken without her knowledge and consent, and that she never accepted the same. Mr. Becker, it is shown, received the deed and placed it on record. He had full authority to transact her business and had entire control of her affairs. He admits his purpose in taking the deed in his wife's name was to escape liability himself for the payment of the mortgages against the property. Mrs. Becker never repudiated the conveyance taken in her name. If she was not aware of the transaction at the time of the transfer, and did not know that the conveyance of the property had been taken in her name, yet she is nevertheless liable for the payment of the mortgage indebtedness, by reason of the fact that a year after the deed to her had been recorded she joined her husband in a deed conveying the property to the defendants Jacob and Rebecca J. Frankforter, and in such deed stipulating that the grantees should assume the payment of the mortgages. Mrs. Becker thereby recognized the authority of her husband in the transaction with the Humphreys, and adopted the deed for the property which had been taken in her name by Mr. Becker. The disposition of the premises constituted an acceptance of the deed. She could not ratify the transaction in part and repudiate it as to the rest. (*Esterly Harvesting Machine Co. v. Frolkey*, 34 Neb. 110; *Morrow v. Jones*, 41 Neb. 867; *Cool-*

idge v. Smith, 129 Mass. 554.) The disposition of the property obtained from the Humphreys was not only an acceptance by Mrs. Becker of the deed, but of the terms of the conveyance as well. Where the deed stipulates that the grantee assumes and agrees to pay the mortgage against the premises, the grantee is personally liable to the mortgagee for such debt. (*Keedle v. Flack*, 27 Neb. 836; *Hare v. Murphy*, 45 Neb. 809.) The judgment is

AFFIRMED.

ALBERT HARTSUFF, APPELLEE, V. THOMAS F. HALL ET AL., APPELLANTS.

FILED APRIL 6, 1899. No. 8823.

1. **Negotiable Instruments:** DAYS OF GRACE. A debtor is entitled to days of grace on a negotiable coupon interest note.
2. **Mortgages:** DEFAULT: TIME TO DECLARE DEBT DUE. Where a negotiable note secured by a mortgage provides that if default should be made in the payment of an interest note which was likewise negotiable in form, and made payable on the first day of a certain month, for ten days after it became due, the principal and interest notes, at the option of the holder, should at once become due and payable without notice, the option exercised on the 13th of said month was premature.
3. ———: ———: NON-PAYMENT OF TAXES: FORECLOSURE. In case a real estate mortgage contains a stipulation that if the taxes against the premises are not paid before the time the same became by law delinquent, the entire mortgage debt shall immediately become due and payable, the failure of the mortgagor to pay the taxes according to such stipulation is such a breach of the mortgage as will authorize the bringing of a suit to foreclose, although the mortgage debt, by its terms, has not yet matured, and the mortgagee, to protect his security, has himself paid the taxes after the same had become delinquent.
4. **Special City Taxes:** FORECLOSURE OF LIEN: BURDEN OF PROOF. Where a lien is sought to be enforced against real estate for a sale for non-payment of special city taxes, the burden is upon the person asserting the lien of showing its validity. *Leavitt v. Bell*, 55 Neb. 57, followed.

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

Henry W. Pennock, for appellants.

Read & Beckett, contra.

NORVAL, J.

This suit was instituted to foreclose a mortgage on certain real estate situate in the city of Omaha. From a decree in favor of plaintiff defendants have prosecuted an appeal.

The first contention of the defendants is that the suit was prematurely brought. The note the mortgage in question was given to secure was in the sum of $12,000, negotiable in form, dated April 28, 1892, and by its terms payable on May 1, 1897, with interest at seven and one-half per cent per annum from date, payable semiannually, according to the tenor of ten interest notes of $450 each, except one being for $457.50. This suit was instituted on May 13, 1895, or before the time the note by its terms had matured. The main note, however, contained a stipulation that "if default be made in the payment of any interest note, or any portion thereof, for the space of ten days after the same becomes due and payable, then said principal and interest notes shall, at the option of the said Hartsuff, or the legal holder of said note, become at once due and payable without further notice." The interest note, which was made payable on May 1, 1895, was not paid on that date, nor yet at the time of the institution of the present suit, and it is argued that such default, by the above quoted provision of the principal note, *ipso facto* made the whole debt at once due and payable, and authorized the bringing of the suit to foreclose the mortgage. We are unable to fully appreciate the force of the argument in support of this contention of the learned counsel for plaintiff. This coupon

note, like the principal note, was payable to Albert Hartsuff or order, and being negotiable, within the meaning of chapter 41 of the Compiled Statutes, by section 3 of said chapter was entitled to three days of grace in the time of payment; in other words, the coupon note payable May 1, 1895, did not mature until three days thereafter, and an action at law instituted thereon before May 5 would have been prematurely brought. (*Lantry v. French*, 33 Neb. 524.) It follows that this coupon note was not ten days overdue when this suit was commenced, within the meaning of the stipulation or clause in the principal note, to which reference has been made, and the right to foreclose the mortgage had not accrued by reason of the default in the payment of the interest note. We must not be understood as holding, or even intimating an opinion, that a debtor is in all cases entitled to days of grace on mere installments of interest. The rule we have announced is only applicable where the interest payment is represented by a note in form negotiable. The mortgage contained the following clause: "Now, if the said Amelia Hall and Thomas F. Hall shall well and truly pay, or cause to be paid, the sum of money in said note mentioned, with interest thereon, according to the tenor and effect of said note, and shall duly keep and perform all the other covenants and agreements herein contained on their part to be kept and performed, then these presents shall be null and void. But if said sum of money, or any part thereof, or any interest thereon is not paid when the same is due, or if the taxes and assessments against said premises are not paid at or before the time the same become by law delinquent, or if said mortgagors fail to keep and perform any of the covenants contained herein on their part to be kept and performed, then the whole of said sum and interest shall immediately become due and payable." It was alleged, and proven, that the taxes which had been levied against the mortgaged premises were permitted to become delinquent by the mortgagors. This

constituted a breach of the terms and condition of the mortgage, and the suit thereon was not prematurely instituted.

It is argued that plaintiff waived the right to declare a forfeiture by paying the taxes. We do not think this is true. He had the right to pay the delinquent taxes against the premises to protect his security, and in making such payment he was not thereby estopped from availing himself of the right to declare the mortgage debt due.

The record discloses that in the decree of the court below plaintiff was awarded a lien for special paving and curbing taxes against the mortgaged premises levied by the city of Omaha which he had paid. The burden was upon the plaintiff to establish the validity of these special taxes before he was entitled to a lien on account of their payment (*Leavitt v. Bell*, 55 Neb. 57); and he having failed to show that these special taxes were legally levied, the court below erred in giving plaintiff a lien against the real estate for the amount of such special taxes. The decree is accordingly reversed, and the cause is remanded to the district court with direction to enter a decree in favor of plaintiff for the amount of his mortgage debt, including interest, and the amount of all general taxes paid, with legal interest thereon.

REVERSED AND REMANDED.

A. L. HOOVER & SON V. COLUMBIA NATIONAL BANK.

FILED APRIL 6, 1899. No. 8834.

Assignee of Account: CONTRACT. An assignee of an account is bound by the contract entered into or ratified by his assignor, and an instruction which lays down a different rule is erroneous.

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

Gilkeson & Reese and *W. B. Comstock,* for plaintiffs in error.

E. E. Brown, William Leese, and *Roscoe Pound, contra.*

NORVAL, J.

This action was brought by the Columbia National Bank to recover $841.98 as an alleged balance due on an account in favor of the Interior Decorative Company and against the defendants A. L. Hoover & Son, which account had been assigned to plaintiff. From a judgment in favor of the bank in the sum of $570.39 the defendants have prosecuted an error proceeding.

Evidence was adduced in the court below tending to show that the defendants are the owners and proprietors of the Lindell Hotel in the city of Lincoln and the goods charged in the account were furnished by the Interior Decorative Company under a written contract whereby payment of the same was to be made in board and lodging furnished Dr. Appleget, manager of said company, and his wife and daughter; that the board and lodging were furnished as agreed, and the same charged against the items in the account; that subsequently another contract was entered into between the defendants and the Interior Decorative Company whereby the latter agreed to place a tile floor in the dining room of the hotel for the stipulated sum of $1,229, and the terms of the agreement required a first-class job in all respects; that payment was to be made by the cancellation of a note against said Appleget for the sum of $100 held by defendants, a lot in Arlington Heights Addition to Lincoln of the value of $300, and the balance to be paid in board and lodging to be furnished Dr. Appleget, wife, and daughter at the stipulated rate of $100 per month; that in pursuance of

said contract the Interior Decorative Company laid the tiling, but the material used was of an inferior quality, and the manner of performing the work was so unskillful that the job did not comply with the stipulations of the contract and was almost wholly worthless. It is conceded by plaintiff that the tile floor was defective, but it contends that it was the fault of defendants in failing to provide a sufficient and proper foundation, and that the provision in the contract relating to the board and lodging for the manager of the Interior Decorative Company and his family was never submitted to, or acted upon by, the directors of the company, and that they had no knowledge of the existence of such provision in the contract, and that Appleget had no authority to insert the same. On the other hand, the defendant insisted that the Interior Decorative Company ratified the contract relating to the tile floor. Upon the question of ratification the trial court gave the following instructions, which are assigned for error:

"1. This action is brought on book account, and the bringing of this action will not itself alone constitute a ratification of the contract. To constitute a ratification of the contract the jury must find the plaintiff, after knowledge of the alleged contract, undertook to take advantage of some facts alleged in the contract which it could not have had had it not been for the contract, and could only be obtained by undertaking to enforce the contract or some part of it, and can only happen in case the plaintiff has undertaken to enforce the contract or some part of it required by its terms to be performed by the defendants. You will therefore consider whether the plaintiff in this action has undertaken to enforce the contract, or some part of it as aforesaid, which is contained in the proposition of the Interior Decorative Company, and the alleged acceptance by the defendants, and if it has not, there is no ratification."

"8. If under the evidence you find that the contract alleged by the defendants was in fact made, and if you

further find that the plaintiff has not ratified the same, then the plaintiff would be entitled to recover, in such case, from the defendants the actual value of the goods, merchandise, and work furnished by the Interior Decorative Company to the defendants at the time and place when furnished, less any amount which may have been paid thereon, but in such case a payment made in board or in such note for $100 would not be a good payment nor proper to be credited upon the amount due plaintiff, unless you should further find from the evidence that such payment, even though made in board to manager, finally went to the corporation so that it received the benefit of it."

These instructions were erroneous, and highly prejudicial to the rights of the defendants. There was no evidence upon which to base them. It was not claimed that the plaintiff—the bank, the assignee of the account—had by any acts of it ratified the contract set up by the defendants. The contention of the latter was that the Interior Decorative Company had by its conduct recognized the validity of the contract and ratified the provisions thereof. These instructions wholly ignored the question of ratification by the plaintiff's assignor, and told the jury that plaintiff was entitled to recover if there had been no ratification of the contract by the bank, notwithstanding there was evidence tending to show that Dr. Appleget had authority to make the contract on behalf of his company, or at least plaintiff's assignee had ratified the same. It is said there is no evidence of ratification. Credit was given the defendants on the books of the company for board of Dr. Appleget and family and he was charged with the same. This constituted the ratification to that extent at least. An assignee of an account is bound by a contract entered into, or ratified by his assignor. For the errors indicated the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

WILLIAM R. MCALLISTER, APPELLANT, V. LAURA L. PITTS, IMPLEADED WITH LIZZIE FONNER, APPELLEE.

FILED APRIL 6, 1899. No. 8820.

1. **Review:** CONFLICTING EVIDENCE. A question of fact determined on conflicting evidence will not be disturbed on review, if the finding is sustained by sufficient evidence.

2. **Guaranty:** RELEASE. Where the guarantor of a promissory note tenders to the holder the amount due, which the latter declines to accept, stating that he will not hold the guarantor for the debt, but will look to the maker alone for payment, and the guarantor, in reliance on such promise or statement, omits to obtain indemnity, or otherwise changes his position with reference to the maker or suffers damages, he is discharged to the extent he has been thereby damaged.

APPEAL from the district court of Hall county. Heard below before THOMPSON, J. *Affirmed.*

W. A. Prince, for appellant.

References: *Hume v. Peploe*, 8 East [Eng.] 168; *Walker v. Barnes*, 5 Taunt. [Eng.] 240; *City Bank v. Cutter*, 3 Pick. [Mass.] 414; *McCreary v. Newberry*, 25 Ill. 496; *Reuben v. Dowd*, 46 Fed. Rep. 800; *Tompkins v. Batie*, 11 Neb. 147; *Wells v. Davis*, 2 Utah 411; *Myers v. Malcom*, 20 Ill. 621; *Whatley v. Tricker*, 1 Camp. [Eng.] 35; *Hanchet v. Birge*, 12 Met. [Mass.] 545.

W. H. Thompson and *O. A. Abbott, contra.*

References: *Harris v. Brooks*, 21 Pick. [Mass.] 195; *Wolf v. Madden*, 47 N. W. Rep. [Ia.] 981; *Rowley v. Jewett*, 9 N. W. Rep. [Ia.] 353; *White v. Walker*, 31 Ill. 422.

NORVAL, J.

This is an appeal by the plaintiff from the denial of his application for a judgment against one Lizzie Fonner for the amount of deficiency remaining unpaid the plaintiff after the sale of mortgaged premises under a decree of foreclosure. The undisputed facts may be briefly

summarized thus: On January 4, 1890, Charles D. Pitts gave his promissory note in the sum of $1,000, payable to the order of James Fonner, on or before four years after its date, with interest at the rate of ten per cent per annum, which note was secured by a mortgage on certain real estate situate in the city of Grand Island. The payee sold and indorsed the note to the defendant and appellee Lizzie Fonner. She afterward sold the note to plaintiff, indorsing the same as follows:

"For value received, waiving presentment for payment, protest and notice thereof, the payment of the within note at maturity, or any time thereafter, is guarantied.

"LIZZIE FONNER."

Plaintiff brought suit to foreclose the mortgage given to secure the note, a decree of foreclosure was rendered, the premises were sold thereunder, and a deficiency of $771.76 was found to exist. Plaintiff sought to hold Mrs. Lizzie Fonner for the amount of such deficiency, and upon the trial judgment was entered in her favor. Mrs. Fonner pleaded in her answer that she was released because the plaintiff, after the maturity of the note, for a valuable consideration had extended the time of payment without her consent. A perusal of the evidence fails to disclose that this defense was established upon the trial. It was alleged as a defense, and Mrs. Fonner so testified, that she received a notice from plaintiff in January, 1894, advising her of the maturity of the note in question, and urging prompt payment thereof; that shortly thereafter she went to the office of the plaintiff with sufficient money to pay the note and tendered Mr. McAllister the money, and he declined to accept the same, stating that he did not intend to hold her for it, or look to her for the payment of the note; that on March 6, 1894, she received from plaintiff a second notice regarding the note, whereupon she again went to Mr. McAllister's office with the money with which to pay the note. We quote her testimony as to what transpired at this last interview:

Q. After receiving that letter, what did you do, if anything?

A. I went over to McAllister again with the money.

* * * * * * *

Q. Then what did you do?

A. I went over to Mr. McAllister's office to proffer him the money.

Q. How did you proffer him the money?

A. I took my pocketbook out of my pocket and told him I wanted to straighten it up and pay it, and he says: "I don't intend to look to you for it at all."

Q. Did he accept the money?

A. No, sir; he didn't.

Q. State whether or not you had the money there to pay both the note and interest at that time, and offered it to him.

A. Yes, sir.

Q. State what you did there at the time you went to Mr. McAllister's office.

A. I had the cash money and offered it to him.

Q. Do you know how much money you had, or about how much?

A. I had something over $1,400.

Q. Now you say you offered him the money; how did you offer it to him?

A. I took my pocketbook out and I told him I wanted him to take the money and I wanted to pay the note; I didn't want to be bothered with it any longer. He says, "I don't intend to hold you for it, Mrs. Fonner," and I says, "Why did you write this second notice?" and he says, "That is a matter of form; on the first of the month I notify every one."

In the foregoing Mrs. Fonner is to a considerable extent corroborated by the testimony of John Fonner, who claimed to narrate a conversation which he had with the plaintiff with reference to the note in suit. Mr. McAllister, while on the witness-stand, positively denied having the conversation with Mrs. Fonner to which she testified,

and asserted that she never produced, tendered, or offered him any money in payment of the note. The trial court upon this conflicting evidence decided the issue in favor of Mrs. Fonner, and the established doctrine of the court is that a question of fact determined on conflicting evidence will not be disturbed or reviewed if sufficient to support the finding. This rule we are not at liberty to depart from. We must, therefore, in the further consideration of the case regard as a settled fact that which the testimony of Mrs. Fonner tends to establish. The mere tender of the amount due on a note by the maker, of itself, is insufficient to extinguish the obligation or to constitute a defense to an action upon the note. Tender alone could only affect the question of interest and costs. This principle is so firmly settled as not to require the citation of authorities in support thereof. But Mrs. Fonner was not the maker of the note in question, and was not primarily liable for the debt. She guarantied the payment of the obligation, and stood in the relation of surety to Mr. Pitts. She had the right to pay the note and be subrogated to the rights of the holder of the note and mortgage and proceed at once to enforce the payment of the debt against the maker and mortgagor. At the time the tender was made the mortgaged premises are shown to have been worth more than sufficient to pay the entire obligation. The property subsequently so depreciated in value as to be insufficient to pay one-half of the amount of the mortgage debt. By plaintiff refusing to accept the money from Mrs. Fonner when tendered, he lulled her into security, or at least prevented her from obtaining indemnity, and discharged her to the extent she was damaged by relying upon the acts and statements of the plaintiff. (*Harris v. Brooks*, 21 Pick. [Mass.] 195; *White v. Walker*, 31 Ill. 422; *Rowley v. Jewett*, 56 Ia. 492; *Wolf v. Madden*, 82 Ia. 144.) The judgment is

AFFIRMED.

HARRISON, C. J., not sitting.