REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1900.

VOLUME LX.

LEE HERDMAN,
OFFICIAL REPORTER.

LINCOLN, NEBR.:
STATE JOURNAL COMPANY, LAW PUBLISHERS.
1901.

SUPREME COURT OF NEBRASKA

DURING THE

PERIOD AND PREPARATION OF THIS REPORT.

CHIEF JUSTICES AND JUDGES.

T. L. NORVAL, CHIEF JUSTICE.

J. J. SULLIVAN,
SILAS A. HOLCOMB, } JUDGES.

OFFICERS.

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FRANK N. PROUT,† } ATTORNEYS GENERAL.

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HENRY M. LEAVITT,¶ } BAILIFFS.

* Until January 3, 1901.
† After January 3, 1901.
‡ Until May 1, 1900.
§ After May 1, 1900.
‖ Until October 1, 1900.
¶ After October 1, 1900.

DISTRICT COURTS OF NEBRASKA.

JUDGES.

First District—

C. B. LETTON.....Fairbury
J. S. STULL.....Auburn

Second District—

PAUL JESSEN.....Nebraska City

Third District—

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

Fourth District—

B. S. BAKER.....Omaha
I. F. BAXTER.....Omaha
CHARLES T. DICKINSON.....Tekamah
LEE S. ESTELLE.....Omaha
JACOB FAWCETT.....Omaha
W. W. KEYSOR.....Omaha
W. W. SLABAUGH.....Omaha

Fifth District—

B. F. GOOD.....Wahoo
S. H. SORNBORGER.....Wahoo

Sixth District—

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

Seventh District—

GEORGE W. STUBBS.....Superior

Eighth District—

GUY T. GRAVES.....Pender

Ninth District—

JAMES F. BOYD*.....Neligh

* Since January 3, 1901. Succeeded Douglas Cones.

Tenth District—
E. L. ADAMS.....Minden

Eleventh District—
JAMES N. PAUL*.....St. Paul
J. R. THOMPSON.....Grand Island

Twelfth District—
H. M. SULLIVAN.....Broken Bow

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

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

Fifteenth District—
J. J. HARRINGTON.....O'Neill
W. H. WESTOVER.....Rushville

*Since July 1, 1901. Appointed to succeed Charles A. Munn, deceased.

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOL. LIX.

The full name has been inserted whenever the same could be ascertained.—REP.

ADAMS, JAMES HENRY.
ALLEN, CLARENCE LUZERNE.
ANDREWS, GUY ASHTON.
BACKUS, CLYDE J.
BACON, MINOR SEYMOUR.
BARRY, FRANK WALTER.
BATTERSON, JULIA HARRIET.
BERG, EDWARD HENRY.
BERRY, FRANK A.
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BLAKE, CHARLES CENNIAL.
BOUGHN, CECIL RAYMOND.
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DAVIS, HERBERT WILLIAM, JR.
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DIMERY, MARTIN WOODFORD.
DODGE, NATHAN P.
DORSHIMER, J. E.
DOUGLAS, JUDSON BENJAMIN.
DRULINER, ROSS DEY.
DUFF, JOHN ALFRED.
DYE, OLIVER W.
DYSART, JOHN TWINEM.
EDLING, CHARLES A.
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EWART ROBERT HOWARD.
FINSON, WILLIAM LAWRENCE.
FORRISTALL, J. M.
FOSTER, CHARLES E.
FRENCH, CHARLES OSCAR.
GARRETT, HENRY Y.
GEGGUS, HARRISON LEWIS.
GOODRICH, MINER P.
GRIMM, JAMES JOY.
GUBSER, NICHOLAS JAMES.
HARVEY, EDWARD ROSCOE.
HATTEBOTH, WILLIAM H.
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HAWXBY, FREDERICK GEORGE.
HELTMAN, CHARLES C.
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HINMAN, ACKLEY BEACH.
HOBART, RALPH W.
HOGAN, VICTOR BENJAMIN.
HUMPHREYS, JAMES MARION.
HURST, W. E.
JACOBY, CHARLES A.
JOHNSON, ANTON.
JOHNSON, CHARLES WILLARD.
JOHNSON, OSCAR E.
JOHNSTON, W. H.
JONES, WATKINS WILSON
KUHN, JOHN G.
LAMPHIER, GEORGE LYMAN.
LARSON, THEODORE.
LEIDIGH, OLIVER GLESSNER.
LEIGH, H. G.
LINDBERG, CHARLES J.
LOCKE, ROSCOE JANVRIN.
LUNDBURG, ELMER RANDAU.
LYON, ALFRED BURDETTE.

McCarthy, William D.
McClenahan, Daniel Henry.
McCracken, Ralph Meek.
McDonald, Charles G.
McElhoes, Samuel Irad.
McMaster, F. A.
McNaughton, William Francis.
Maggi, Edward Gerard.
Mansfelde, Charles Herbert von.
Marshall, George C.
Meyer, Henry George.
Mick, John Edward.
Miller, Howard Schultz.
Mills, Frank Dawson.
Minor, Worth Lester.
Morgan, Raymond Beverage.
Morning, Charles A.
Morrison, Edwin Rees.
Mullen, Arthur F.
Mulligan, John Thomas.
Neary, Thomas E.
Newby, William L.
Ney, M. J.
O'Connor, William Bernard.
Olston, Otto.
Owen, John Mark.
Pancoast, Arthur Chester.
Paulson, Lewis Chris.
Pinkerton, Samuel Walter.
Reardon, Edward Emmet.
Richards, Frederic Arthur.
Saxton, Howard.
Schick, Roy R.
Scott, P. W.
Seacrest, Elam Winger.
Sloan, Thomas Louis.
Smith, Edward A.
Smith, Ernest John.
Stanard, Ezra C.
Stark, Herman Frederick.
Steele, Roy B.
Stewart, Charles Hudson.
Storey, John A.
Taylor, P. Emerson.
Thompson, Howard Clarence.
Thorgrimson, Oliver Bernhard.
Waldo, Hubert D.
Walker, J. F.
Wear, John. D.
Welch, Herman L.
Welsh, Martin Calhoun.
Wernimont, Henry G.
West, Dennison Phelps.
West, Raymond Benjamin.
Wheeler, William H.
Whelan, Edward H.
Wilhite, J. A.
Wilson, Claude Staley.
Wilson, Olin C.
Wray, Arthur G.

REPORTER'S NOTES.

See page xlix for Table of Cases Overruled.

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

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

The list of cases overruled, found on pages xlix to lv of this volume, was originally prepared and was kept up from the 37th to 58th volume, inclusive, by Hon. William Brandon Rose, formerly deputy reporter and present assistant attorney general. Great industry and nice discrimination were shown in the execution of his task. In volumes 59 and 60 only cases expressly overruled have been added to the list.

In the index to this volume the caption, "Appeal and Error," has been substituted for "Review." This has been done, under protest, in submission to the universal consensus of reporters. "Man yields to custom as he bows to fate." "Review," the generic, the better and more logical term, is made a cross-reference.

Particular attention is called to the note on pages 88, 89 and 90, being a list, believed to be complete, of every Nebraska decision bearing upon mechanics' liens; also to notes on pages 159, 326 and 671.

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STATUTES AND CONSTITUTIONAL PROVISIONS

CITED AND CONSTRUED.

STATE,

ORDINANCES.

City of Omaha.

HOUSE ROLL.

1899.

SENATE FILES.

1887.

SESSION LAWS.

1875.

1877.

1883.

1885.

1887.

1889.

1893.

1895.

CODE OF CIVIL PROCEDURE.

CRIMINAL CODE.

CONSTITUTION.

FOREIGN STATUTES.

ENGLAND.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1900.

PRESENT:

HON. T. L. NORVAL, CHIEF JUSTICE.
HON. J. J. SULLIVAN, HON. SILAS A. HOLCOMB, JUDGES.

HENNEY BUGGY COMPANY v. J. W. ASHENFELTER.

FILED MARCH 21, 1900. No. 9.154.

1. **Preferring Creditor.** The conveyance by a failing debtor of practically all his property to one of his creditors in satisfaction of his debt, the difference between the amount of said debt and the agreed value of said property being paid to said debtor in cash, with knowledge on the part of such creditor that such sale will result in hindering, delaying and defrauding the other creditors in the collection of their debts, is void as to such other creditors. *Switz v. Bruce*, 16 Nebr., 463, followed.
2. **Instructions.** Alleged errors in the giving of instructions and in the introduction of evidence examined, and *held* insufficient to work a reversal.

ERROR to the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

F. I. Foss, *B. V. Kohout* and *Norman Jackson*, for plaintiff in error.

W. C. LeHane and *D. E. Collins*, *contra.*

NORVAL, C. J.

In 1893 one George R. Fouke was engaged in various lines of business in Liberty, Gage county, this state. In that year he failed, his liabilities being far in excess of his assets. He sold practically all of his personal property to the Henney Buggy Company, one of his creditors, the consideration for such sale being the cancellation of his debt to it, amounting to over $1,800, and the payment to him by it of the difference between the amount of such debt and the agreed value of the property, such difference being $300. Fouke was then placed in possession of said property, consisting of stocks of goods of different character, as an employee of the company, and a former employee of his was appointed its general agent in the management and disposition of the same. After this sale, some of the other creditors of Fouke attached a portion of said goods; others obtained judgments against him, and levied executions upon the goods, the value of the goods so levied on being, according to the agreement of the parties hereto, $1,000. The goods so levied on were, while in the hands of the officer holding such writs, replevied by said Henney Buggy Company, it claiming title to them by virtue of said sale to it by Fouke. The defendant officer answered, setting up the fact that he held said goods by virtue of levies under said writs, and that the sale by Fouke to the buggy company was fraudulent and void as to the other creditors of Fouke. On this issue the case was tried in the lower court, resulting in a verdict and judgment in favor of the defendant officer, and said buggy company comes to this court by petition in error from such judgment.

There are over 150 errors assigned in the petition in error, not all of them, however, being urged in the brief of counsel. We shall notice such errors as are urged in the brief, so far as they may affect this decision, it being understood that others not noticed would not in anywise alter the conclusions arrived at by the court.

It will be observed that in the sale of this property by Fouke to the Henney Buggy Company a greater amount of goods was sold than sufficed to satisfy the debt of Fouke to it, the difference being paid by it to Fouke in cash. It is a well established principle of law that a debtor may prefer a creditor, and that such preference is not fraudulent, even though such creditor has knowledge of an intent on the part of such debtor to hinder, delay or defraud his other creditors, so long as such creditor takes only sufficient goods to satisfy the debt, or the value of which is not appreciably greater than the amount of such debt, and does not participate in such fraudulent intent. But, does a different rule obtain when, in a case like this, the creditor takes more goods than are sufficient to liquidate the debt, paying the difference between their value and the debt in cash? We are of the opinion that another rule does apply; that a creditor who purchases the whole of his debtor's goods—said debtor being in failing circumstances—paying the difference between the amount of the debt and the fair value of the goods in cash, occupies the same position as would a purchaser not a creditor; and that if such purchasing creditor knows, or has such knowledge as would induce an ordinarily prudent person to inquire into facts which would lead to knowledge that such debtor is attempting to defraud his other creditors by such sale, or to hinder and delay them in the collection of their debts, such a sale is void as to such creditors. Such was the holding of this court in the case of *Switz v. Bruce*, 16 Nebr., 463; and it seems to us that it is consonant with sound reason. It should be remembered that the rule that permits failing debtors to prefer creditors is not a general rule in itself, but is an exception to a more general rule, which is, that where a debtor in failing circumstances sells his goods with the intent to hinder, delay or defraud his creditors, and the purchaser has knowledge thereof, or is advised of sufficient facts to put a person of ordinary prudence upon inquiry which would

lead to such knowledge, such sale is fraudulent and void, whether such purchaser participates in such fraudulent intent or not. An examination of the record in this case discloses the fact that the Henney Buggy Company, through its agents, at the time the so-called sale was made to it by Fouke, had knowledge that such sale by him to it would inevitably have the effect to hinder and delay his other creditors in the collection of their debts, and that such sale to it, resulting in the cancellation of his debt to it, would prevent other of his creditors from collecting their debts, and would thus deprive them of their rights; hence we must conclude that on the undisputed facts, in fact upon evidence brought out by said plaintiff itself, such sale was fraudulent and void as to his other creditors.

It is claimed by plaintiff that this case falls within the rule of *Sunday Creek Coal Co. v. Burnham*, 52 Nebr., 364. In that case the creditor had taken from the debtor, in full satisfaction of his debt, property of a value not materially or appreciably greater than the amount of the debt, and this court decided that, under such state of facts, the validity of the sale was not affected by the existence of knowledge on the part of such creditor of an intent on the part of the debtor to defraud his other creditors, provided such creditor did not participate in such intent. This is doubtless the rule, or rather an exception to the general rule, as hereinbefore stated. But a different principle applies where the creditor not only receives from the debtor goods equal to the amount of the debt, but goes farther and voluntarily takes an amount of property greater in value than suffices to satisfy the debt, paying to such debtor the difference in money, at the same time having knowledge, or being in position to obtain knowledge, that such transaction would result in a fraud upon the other creditors. To the extent of the payment of the difference between the debt and the value of the goods, such creditor becomes a voluntary purchaser, and must be governed by the rule of

law applicable to such. If a part of such transaction is tainted with fraud, and is indivisible from the remainder (which is the case here), the whole transaction is tainted with fraud.

Numerous exceptions are taken to instructions given by the court below. Such objections are principally to those which announce a rule not materially differing from that hereinbefore stated, and we think that in none of them was any error perpetrated. To other instructions objections are urged that they are not sufficiently specific. If the instructions were open to these objections, counsel had ample opportunity to obviate such defects by proffering instructions which he may have deemed more definite, but as he failed so to do, such objections must be deemed to have been waived.

There are also numerous objections urged to questions propounded to said Fouke on his cross-examination, he having been called as a witness on behalf of plaintiff. Such objections are mainly to a class of questions asked him relative to the value of the property sold by him to said buggy company. Such questions took a wide range; but much latitude is permissible when a party to an alleged fraudulent transaction is upon the stand, and is being cross-examined by the opposite party. Further, as the sale by Fouke to the buggy company was, on the undisputed facts, fraudulent as to his other creditors, and therefore void, we fail to see how the evidence adduced could injuriously affect the plaintiff; hence, we are of opinion that no error could have accrued to it on the introduction of this testimony.

A careful examination of the record in the other respects complained of by plaintiff convinces the court that no prejudicial error occurred on the trial, for which reason the judgment of the lower court is

AFFIRMED.

HENNEY BUGGY COMPANY ET AL. V. PARLIN, ORENDORFF & MARTIN COMPANY.

FILED MARCH 21, 1900. No. 9,155.

Preferring Creditor: INSTRUCTIONS.

ERROR to the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

F. I. Foss, Norman Jackson and *B. V. Kohout,* for plaintiff in error.

Griggs, Rinaker & Bibb, contra.

NORVAL, C. J.

The controlling facts and the questions of law involved in this action are the same as in *Henney Buggy Co. v. Ashenfelter,* 60 Nebr., 1, decided herewith, and for the reasons given in the opinion filed in that case, the judgment of the district court in the present cause is

AFFIRMED.

WILLIAM BROWER, SHERIFF, V. FOLKERT FASS.

FILED MARCH 21, 1900. No. 11,071.

Rule Two: PRINTED ABSTRACT: FAILURE TO FILE BRIEF: AFFIRMANCE OF JUDGMENT. Where, in a cause submitted under rule 2 upon a printed abstract of the record, neither party files briefs, the judgment will be affirmed.

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

John P. Maule and *Ames & Ames,* for plaintiff in error.

John C. Watson, John V. Morgan and *Frank P. Ireland, contra.*

NORVAL, C. J.

This cause was submitted under rule 2 upon a printed abstract of the record. Neither party has filed briefs, and for this reason the judgment must be

AFFIRMED.

CHARLES GREEN ET AL., APPELLEES, V. JOHN W. PAUL ET AL., APPELLANTS.

FILED MARCH 21, 1900. No. 9,169.

1. **Judicial Sale:** APPRAISEMENT: OBJECTIONS TO CONFIRMATION: ATTENTION OF TRIAL COURT. Objections to the appraisement of property made for the purpose of judicial sale, or to the confirmation of such a sale, must be brought to the attention of the district court, and its ruling obtained thereon to entitle the same to be considered on review.
2. ———: VACATION. A judicial sale will not be vacated on the ground that the property was placed too low by the appraisers, unless the actual value so greatly exceeds the appraised value as to raise the presumption of fraud in making the appraisement.
3. **Owner of Equity:** OBJECTIONS TO CONFIRMATION. The owner of the equity of redemption of real estate can not be heard to object to the confirmation of the sale on the ground that prior liens against the property were not deducted by the appraisers in making the appraisement.
4. ———: NOTICE. The owner of the real estate about to be sold under a decree of foreclosure is not entitled to notice of the time and place of making the appraisement. *Maginn v. Pickard*, 57 Nebr., 642.
5. **Judicial Notice.** Courts of this state will take judicial notice that the city of Omaha is situated in Douglas county.

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

D. W. Merrow, for appellants.

William H. Crow, contra, cited: *Neligh v. Keene*, 16 Nebr., 407.

NORVAL, C. J.

This appeal is prosecuted by the defendant, Paul W. Horbach, from an order of the district court approving a sale of real estate made by a special master commissioner. Objections to the appraisement, and also a motion to vacate the sale upon the same grounds, were filed, but the record fails to show affirmatively that they were called to the attention of the district court, or that it ruled thereon. For this reason alone we would be entirely justified in affirming the order from which the appeal is taken. But we prefer to dispose of the case on the merits, since the result just indicated will be thereby reached. The objections to the sale and to the appraisement are the same, and will be considered together. These are:

"1. The appraised value of the real estate is unjust, unequitable and far below its money value.

"2. The officer making said appraisement failed to obtain from the proper county officers certificates showing all liens against the property prior to the lien in suit, and to deduct the same, if any, from the appraised value, as required by law.

"3. No opportunity was given defendant to appear before said officer and appraisers called by him or any of them to be heard upon the question of value of said property, and no notice of any kind was given of the time and place and fact of said proposed appraisal.

"4. Said appraisement does not show that the land attempted to be appraised is in Douglas county, Nebraska."

The evidence on the question of value of the premises fails to establish that the actual value of the property so greatly exceeded the sum fixed by the appraisers as to justify the inference that the appraisement was fraudulent; therefore, under the holdings of this court, the first objection to the appraisement and sale is unavailing. *Miller v. Lanham*, 35 Nebr., 886; *Vought v. Foxworthy*,

38 Nebr., 790; *Kearney Land & Inv. Co. v. Aspinwall*, 45 Nebr., 601. Plaintiff waived the obtaining of the certificates of liens, and the failure of the special master commissioner to obtain such certificates and to deduct the amount of liens against the property from the actual value constituted no valid cause for setting aside the sale or appraisement. *La Flume v. Jones*, 5 Nebr., 256; *Craig v. Stephenson*, 15 Nebr., 362; *Smith v. Foxworthy*, 39 Nebr., 214; *Nebraska Land, Stock-Growing & Inv. Co. v. Cutting*, 51 Nebr., 647; *American Inv. Co. v. McGregor*, 48 Nebr., 779.

The third objection to the appraisement and sale is without merit, since the owner of real estate which is about to be sold under a decree of foreclosure is not entitled to notice of the time and place of making the appraisement. *Maginn v. Pickard*, 57 Nebr., 642. The property is described in the appraisement as "The east half of lot six (6) in block one hundred and ninety-six and one-half (196½) in the city of Omaha, as surveyed, and lithographed." This description was sufficient to show that the appraised premises were situate in Douglas county, this state, since our courts will take judicial notice of the fact that the city of Omaha is situate in the county of Douglas. The order is

AFFIRMED.

SARAH FULTON V. IRA L. RYAN ET AL.

FILED MARCH 21, 1900. No. 9,108.

1. **Action on Promissory Note: PLEA OF COVERTURE: REPLY: PLEA OF NECESSARIES FURNISHED: PRELIMINARY JUDGMENT AGAINST HUSBAND: EXECUTION: RETURN NULLA BONA.** Where coverture is pleaded by a married woman to defeat a recovery on a promissory note it is proper for the plaintiff to set up in the reply any fact or facts which would avoid such defense, as that the note was given for necessaries furnished the family of the defendant, and that an execution had been issued against the property of the husband, and returned unsatisfied, or that the note was executed with special reference to and upon the faith and credit of the separate estate, trade or business of the wife.

2. **Estate of Wife Not Chargeable.** The separate estate of a married woman is not chargeable for necessaries for the family, until after a judgment has been entered therefor against the husband, and an execution returned unsatisfied.

3. **Instruction:** NON-REVERSIBLE ERROR. A judgment will not be reversed for the refusal of an instruction which withdraws from the jury a material issue raised by the pleadings, and the evidence adduced on the trial.

4. **Transcript:** PRESUMPTION OF VERITY: EVIDENCE ALIUNDE. The transcript of the record of the trial court imputes absolute verity, and can not be contradicted by extrinsic or original evidence in the appellate court.

5. **Objection to Testimony.** An objection to the admission of testimony can not be argued for the first time in the appellate court.

6. **Motion to Exclude Testimony Does Not Lie After Omission to Object.** It is not proper practice to permit a witness to answer a question without objection, and then move to have the testimony excluded.

7. **Contract:** ASSENT OF ALL PARTIES. A contract to be of any binding force must be assented to by all the parties to it.

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

Bush & Bush, A. Hardy and *T. H. Fulton,* for plaintiff in error:

The plaintiff can recover only on the cause of action set forth in his petition. It is not the province of a reply to introduce a new cause of action. *Warren v. Powers,* 5 Conn., 373; *Durbin v. Fisk,* 16 Ohio St., 533; *School District v. Caldwell,* 16 Nebr., 68; *Reinskoph v. Rogge,* 37 Ind., 207; *Bradley v. Johnson,* 45 N. J. Law, 487.

Counsel for the plaintiff in error argued, upon the foregoing authorities, that the petition in the court below was in the ordinary form upon a promissory note; that the answer, as against the allegations in the petition, stated a good and legal defense. But the reply contained new facts not contemplated by the petition; and, upon the trial of said action in the district court, the contest was almost entirely upon the facts set forth in said reply.

The plaintiff sought to fix the liability of the defendant under the allegation of the reply, that the note in suit was given by the defendant for necessaries furnished defendant, her husband and family. This was a complete departure from the case set forth in the petition.

The law is settled in this state that, unless judgment has been obtained against the husband in such cases and the execution returned unsatisfied, no recovery could be had against the wife.

Plaintiff's evidence entirely fails to refute the allegations of the answer and the evidence of the defendant, showing that the defendant was a married woman, and that the note in suit was not given upon the faith and credit of her separate property and business; and there is a complete failure of consideration.

Upon the question of the misconduct of the court counsel for plaintiff in error cited: *People v. Knapp*, 3 N. W. Rep. [Mich.], 927; Thompson, Trials, sec. 2555 and cases cited in note; *O'Connor v. Guthrie*, 11 Ia., 80.

Griggs, Rinaker & Bibb, contra, filed no brief.

NORVAL, C. J.

This action was brought against Sarah Fulton upon a promissory note. The petition was in the usual form for recovery upon such an obligation. The defendant for answer alleged that at the time the note was given she was a married woman; that she received no consideration therefor, and none inured to her separate estate; that in making the same she did not contract with reference to her separate property, nor did she intend to charge the same with the payment thereof; and that said note was not made by her upon the faith or credit of her separate estate, trade or business. Defendant further alleged that at the time the note was given plaintiff held a judgment against her husband in the county court of Gage county, obtained on the indebtedness represented by said note, which said judgment was some months af-

terwards by said plaintiffs satisfied and discharged; that at the time said note was given her husband was sick and absent from home, and during such absence, plaintiffs, by threats to make her trouble and to commence proceedings to take away her property, induced her to execute said note.

In reply it was alleged, substantially, that the judgment mentioned was for necessaries furnished defendant's husband for the use of the family, and that the consideration for said note was the canceling of said judgment, and that said note was made with special reference to the estate of said defendant. There is no allegation in the reply to the effect that, prior to the commencement of this action, an execution was issued on said judgment against the property of the husband, and that the same was returned unsatisfied. Plaintiffs had a verdict and judgment in the court below, from which the defendant comes to this court on proceeding in error. The petition in error contains numerous assignments of error, but, as all those not noticed in the brief are deemed waived, we will confine our investigation to those assignments of which complaint is made in the brief.

It is first claimed that the allegations in the reply constituted a departure in pleading, in that while the petition declared alone on the promissory note, the reply alleged that the same was given for necessaries, and further, that it was given with especial reference to her separate estate. We do not think any departure in pleading occurred. Coverture is a defense, and having been pleaded in answer to the cause of action set forth in the petition, it was proper to aver in the reply any fact that would avoid such defense, as that the consideration for the note was necessaries furnished the family, and that an execution had issued against the property of the husband and had been returned unsatisfied, or that the promissory note was made with special reference to and as a charge upon the separate property of the defendant; and it appears to us that the pleadings followed in log-

ical sequence, and that no departure occurred. That portion of the reply which attempted to avoid the defense of coverture on the ground that the original indebtedness represented by the note was for necessaries, is defective, for the reason that it does not set up the fact that execution against the husband on the indebtedness had been issued and returned unsatisfied for want of property on which to levy. *George v. Edney*, 36 Nebr., 604; *Small v. Sandall*, 48 Nebr., 318. But the other allegation, that the said note was given with reference to the separate property of the defendant, was sufficient to constitute an issue in the case, and was, in our opinion, properly pleaded in the reply to the defense of coverture set up in the answer.

On the trial the following instruction was requested by the defendant, and refused by the court, to which she excepts: "The court instructs the jury that the plaintiff can not maintain this action against the defendant upon the theory that their original account was contracted for necessaries furnished the family of defendant, but charged to her husband J. B. Fulton for that, it is not shown that any execution was ever issued against defendant's husband for such indebtedness and returned unsatisfied; that it is necessary as a condition precedent to maintaining this action, to show that a judgment had been maintained against the husband on account and execution duly issued thereon to the proper officer, and that said execution has been duly returned unsatisfied." We see no error in the refusal of the court to give this instruction. As the pleadings stood, the real issue in the case was, not that the original indebtedness was for necessaries furnished the family, but whether the note was given with reference to the separate property of the wife, which issue the tendered instruction ignored, hence there was no error in refusing the same. It is not reversible error to refuse an instruction tendered which withdraws from the jury a material issue made by the pleadings and evidence.

On the trial the defendant asked the court below to give the following instruction: "9. If the jury believe from the evidence that the plaintiffs or either of them while the husband of the defendant was away from home, called at the residence of the defendant and stated to her that unle s she would sign the note in suit, they, the plaintiffs, would commence legal proceeding against her and take away from her her property, and that defendant feared that plaintiffs would carry out such threats and on account thereof, and that only, executed the said note, then the court instructs the jury that there is a failure of consideration for the said note and your verdict must be for the defendant." It is claimed in the brief that this instruction was in fact given by the court, but was marked "refused," and it is argued that the jury, by observing that the same was marked "refused" upon the margin, did not give it the consideration it deserved, and that defendant was thereby prejudiced. The record, however, does not sustain the contention of counsel as set forth in the brief, but shows only that the instruction was offered by defendant, and refused. The transcript imports absolute verity. *State v. Hopewell*, 35 Nebr., 822. Now, the only error predicated upon this instruction is the eleventh specification of error in the petition in error, which is as follows: "11. The court erred in writing on the defendant's 9th instruction on the margin thereof the word refused." As the record shows that the instruction was refused, there was no error in marking on its margin the word "refused," hence no error arose therefrom, and, there being no error predicated on the refusal of the court to give the same, it is not proper to discuss that question.

Defendant alleges that the court erred in overruling her objection to a question asked her by plaintiff's counsel on her cross-examination, relative to the articles claimed to be necessaries sold defendant's husband, which constituted the consideration for the indebtedness against the husband, and upon which the judgment

against him was obtained. The question objected to as incompetent, irrelevant, immaterial and not proper cross-examination was: "Do you remember what the articles of furniture consisted of?" This objection was overruled, and an exception was taken, but the record fails to show that the defendant made answer thereto; hence no prejudice resulted from the ruling. The testimony of the witness complained of was given, without objection, in answer to the next succeeding question propounded to her, but, as no objection was at the time made to that interrogatory, error can not be predicated upon the admission of the testimony thereby elicited. An objection to the admissibility of testimony can not be raised for the first time in the appellate court. *Graham v. Frazier*, 49 Nebr., 90.

At the close of the cross-examination of the witness, a motion was made to strike out all evidence relative to the said articles sold to her husband, which motion was overruled. The record discloses no reason why defendant could not have objected to the evidence before it was admitted, and therefore it must be held that by permitting it to go to the jury without objection, she waived her right to have it stricken out. *Palmer v. Witcherly*, 15 Nebr., 98; *Oberfelder v. Kavanaugh*, 29 Nebr., 427; *Haverly v. Elliott*, 39 Nebr., 201; *Brown v. Cleveland*, 44 Nebr., 239.

On her cross-examination the defendant stated that she signed the note in question and sent it to the plaintiffs by her son, and that before she signed it she talked the matter over with him. One of the plaintiffs testified that prior to her signing the note she had a conversation with him in which she stated that she would talk with her son, and that whatever he counseled her to do in the matter she would do. This same witness testified that the son afterwards brought the note to him, and was permitted by the court, over the objections of defendant, to testify to what the son told him relative to the consideration for which his mother was giving the

note. It is claimed that this was error, for the reason that there was no evidence in the record that the son was the agent of the mother in the matter, and as the conversation between this plaintiff and the son was not in the presence of the mother, it was incompetent. As will be noted, there was evidence that the son was the agent of the mother, and the objection was, therefore, properly overruled.

It is further urged that the court erred in permitting one of the plaintiffs, over the objection of defendant, to state upon whose credit he took the note in question. His answer was that it was upon the credit of the defendant. It is argued that the matter of binding the separate estate of a married woman rests upon the intention of the woman alone, and does not depend upon the purpose of the one with whom she contracts. We take it that it is for both the parties to contract. Certainly, a contract would not be binding upon the woman unless she assented that the same should bind her separate property; but we can not imagine how a question of this nature put to the other contracting parties can be incompetent, or prejudicial to the parties whose separate property is sought to be bound by the contract. Both minds must assent to all contracts before they are binding on the parties; hence this question could not have been incompetent. Had defendant's counsel been apprehensive that the jury might be led astray by the answer to this question, he could have readily obviated it by requesting the court to instruct the jury that it must have also been the intent of the defendant to charge her separate estate with the debt, and the mere fact that plaintiffs took the note on the faith or credit of her separate property was not in itself sufficient to bind such property, but that she must have also intended to so charge her property.

It is further urged that the court below, after the jury retired to deliberate upon their verdict, was guilty of misconduct, in this, that after the court had adiourned

over until the following day, on an agreement that the jury might return a sealed verdict, the judge of the court returned to the court room, about nine o'clock in the evening, and gave them an additional instruction, which is as follows: "Gentlemen of the Jury: If you find for the plaintiff you will ascertain the exact amount due the plaintiff and insert it in the verdict. You have nothing to do with the costs." It is alleged in an affidavit on file that the judge informed the affiant that after he gave the jury this instruction, the jury changed their verdict and brought in another verdict, which the court gave to the sheriff. It is claimed that this constituted misconduct on the part of the court, for which a new trial should be awarded. The record shows that on the following day the jury returned into open court the verdict, on which judgment was rendered; hence it must be assumed that the jury themselves brought in the verdict. We see no action disclosed in the record on the part of the court that would constitute misconduct. The additional instruction given was proper, and there is nothing of record that would disclose that the court sought to influence the jury by any other means than giving this instruction. In said affidavit it is also stated that the sheriff stated to the witness that, after the verdict was handed to him by the clerk of the court, he, the sheriff, laid it upon the desk of the clerk of the court; but this is mere hearsay evidence, and as the record itself discloses that the jury themselves brought in the verdict, we must be governed by the record alone. We see nothing in the evidence offered by defendant which discloses any misconduct on the part of the court prejudicial to the plaintiffs, or to the effect that the court in giving the additional instruction did any thing more than to perform its duty. No prejudicial error being disclosed by the record, the judgment of the district court is

AFFIRMED.

ELIZABETH DUFRENE, EXECUTRIX, APPELLEE, V. ARTHUR JOHNSON ET AL., APPELLEES, IMPLEADED WITH MINNIE B. STEVENS, APPELLANT.

FILED MARCH 21, 1900. No. 9,111.

1. **Decree for Alimony:** LIEN UPON REAL ESTATE. A decree for alimony is a lien upon real estate the same as a judgment at law, and is enforceable in like manner.

2. **Record:** QUESTIONS NOT PRESENTED. Questions not presented by the record before the court for review will not be determined.

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

Will A. Corson and *Corson & Wakefield*, for appellants.

Hall & McCulloch, contra.

NORVAL, C. J.

This was a suit to foreclose a mortgage on block N, in Shinn's Second Addition to Omaha, executed in April, 1891, by Arthur Johnson and Minnie B. Johnson, at that time husband and wife. Subsequently to the giving of the mortgage, Minnie B. Johnson obtained a divorce from said Arthur, in the district court of Douglas county, and a decree for permanent alimony for a large sum of money payable in installments at various fixed dates, which decree for alimony became a lien on the premises in controversy, and junior to the mortgage lien. Minnie B. Johnson thereafter married one Stevens, and she intervened in the foreclosure suit, setting up her decree or judgment for alimony, and praying that she be awarded a lien for the payment thereof upon the mortgaged premises. A decree foreclosing the mortgage was entered, and to her was given a lien inferior to that of plaintiff, for the amount the court thereafter might find due upon her said alimony decree, which amount the court found it was unable at that time to determine. It was ordered that any surplus arising from the sale of the property over

and above the amount of the mortgage debt and costs should be paid into court to abide its further order in the premises. Minnie B. Stevens alone appeals.

It appears that subsequently to the term at which the decree of divorce and alimony was rendered, and prior to the institution of this suit, Arthur Johnson filed an application in said court praying a modification of the decree of alimony, which application is still pending in the district court, and is undetermined. The following propositions are contended for by the counsel for appellant:

First. The alimony decree, at the time of the trial of the foreclosure suit, was a valid lien on the mortgaged property, which had in nowise been suspended, set aside or modified.

Second. Said alimony decree could not be modified after the term at which it was rendered.

Third. Said alimony decree having been rendered by consent, could not be modified thereafter by the court without the consent of both parties thereto.

Fourth. That the district court has acquired no jurisdiction to hear and determine the application for modification of said alimony decree, for the reason that no summons or writ issued on said application has ever been served upon Minnie B. Stevens.

The last three propositions can not be considered at this time, for the obvious reason that there has been no modification of the alimony decree by the district court. Should the decree be modified, then, in a review of such action, in that case, said propositions could be properly presented to this court, and a decision invoked therein. They are not proper subjects of investigation at this time in this cause. The first argument of counsel for appellant, that the alimony decree is a lien on the real estate in dispute, is sound (*Nygren v. Nygren*, 42 Nebr., 408); and in the foreclosure suit the district court so found. But it has not adjudicated the amount of such lien, and until it has done so, appellant has not been prejudiced, since

she could enforce her decree by having execution issued thereon. The district court has made no determination of the question of lien against her, but merely reserved its decision on that point until a future time. Until it has decided adversely to the contention of appellant, she had better remain silent.

AFFIRMED.

SCHMITT & BROTHER COMPANY V. JEREMIAH MAHONEY ET AL.

FILED MARCH 21, 1900. No. 9,093.

1. **Idem Sonans.** The names "Schmitt & Brother Co." and "Schmidt & Brother Co." are *idem sonans*.
2. **Civil Code:** ABATEMENT AND REVIVOR. The provisions of the Code of Civil Procedure relative to abatement and revivor of actions are applicable to causes brought to this court.
3. **Statute:** DISSOLUTION OF CORPORATION DOES NOT ABATE ACTION. Under section 63, chapter 16, Compiled Statutes, a suit does not abate by the dissolution of a corporation plaintiff or defendant organized under the laws of this state.
4. **Domestic Corporation:** PROSECUTION IN CORPORATE NAME AFTER DISSOLUTION. A dissolved domestic corporation may, after such dissolution, prosecute any suit in its corporate name in the same manner and with like effect as if the corporation had not ceased to exist.
5. **Foreign Statute:** PRESUMPTION. In the absence of proof, the laws of a sister state will be presumed to be the same as those of this state.
6. **Comity of States:** SUIT BY FOREIGN CORPORATION. By comity of the states, corporations of one state may sue in the courts of another state, the same as can a domestic corporation, unless prohibited by legislative enactment.
7. **Replevin:** GENERAL DENIAL: PROOF. In a replevin under an answer consisting of a general denial, the defendant may prove any matter which is a defense to the cause of action of plaintiff, as that the defendant has a special interest in and right to the immediate possession of the property by virtue of a chattel mortgage.
8. **Value Not at Issue.** In replevin, where the value of the property is stated in the petition and admitted by the answer, the question of value is not open to proof.

9. **Instructions.** Instructions must be considered together.

10. **General Ownership:** FINDING. A finding in replevin of a general ownership in the defendant is not sustained by proof of a special interest in the property.

11. **Motion for New Trial:** REVIEW: ATTENTION OF TRIAL COURT. To review alleged errors in refusing instructions, they must be called to the attention of the trial court by a motion for a new trial.

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

Albert W. Crites, for plaintiff in error, against plea in abatement, cited: Civil Code, secs. 456-470; Compiled Statutes, ch. 16, secs. 62-70; Bates' Ohio Statutes, sec. 5679 *et seq.;* Bates, Pl. & Pr., 223.

Allen G. Fisher, contra, said that no pleading of any nature to the plea in abatement had been served or filed, and the facts stood admitted. Counsel cited: Compiled Statutes, ch. 16, sec. 67; 5 Thompson, Corporations, sec. 6754; 3 Ency. Pl. & Pr., 96; *Verein v. Funck*, 18 Ia., 473.

NORVAL, C. J.

This was an action of replevin, and the plaintiff, being unsuccessful on the trial in the court below, prosecuted error proceedings. The defendant Record filed a cross-petition in error, and subsequently a plea in abatement, setting up in said plea, in effect, that plaintiff, an Ohio corporation, was dissolved on March 6, 1895, by the judgment of the superior court of Cincinnati; that it appointed a receiver of the assets of said corporation, who subsequently made a final report of his doings, which was approved and confirmed by the court, and the receiver discharged. An authenticated copy of the said judgment and proceedings of the superior court of Cincinnati is attached to the plea in abatement and made a part thereof.

The plaintiff insists that there is no record of its dis-

solution by the order or judgment of any court, and that the transcript of the record appended to the plea in abatement and exhibited therewith, does not, in terms or in fact, adjudicate the dissolution of the plaintiff, but purports to dissolve another and different corporation. This contention is predicated on the single fact that in the record of the proceedings of the Ohio court, the corporation dissolved is described as "Schmidt & Brother Co." whilst plaintiffs' name is designated in some of the pleadings and proceedings in the case at bar as "Schmitt & Brother Co." This argument is not convincing. Plaintiff's name is spelled in different ways in the record before us. In the petition in the court below, the petition in error and motion for a new trial, as well as at some places in the journal entries, the name appears as "Schmitt & Bró. Co.," while in one of the answers filed, and at one place in the journal of the proceedings in the district court, the name is spelled precisely as in the record of the Ohio court; and in the instructions of the court plaintiff is designated as "The Smith Brothers Company." It is obvious that the names "Schmidt & Brother Co." and "Schmitt & Brother Co." are *idem sonans*. *Rupert v. Penner*, 35 Nebr., 598; *Carrall v. State*, 53 Nebr., 431; *Kinney v. Harrett*, 8 N. W. Rep. [Mich.], 708; *People v. Gosch*, 82 Mich., 22. It follows that the undisputed evidence discloses that plaintiff is a dissolved corporation and that such dissolution has existed for more than two years. The question presented is whether this action abated or can be further prosecuted. Sections 463, 467 and 468 of the Code of Civil Procedure follow:

"Sec. 463. Upon the death of the plaintiff in an action, it may be revived in the names of his representatives, to whom his right has passed. Where his right has passed to his personal representative, the revivor shall be in his name; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names.

"Sec. 467. An order to revive an action in the names of the representatives or successors of a plaintiff, may be made forthwith, but shall not be made without the consent of the defendant, after the expiration of one year from the time the order might have been first made; but where the defendant shall also have died, or his powers have ceased in the meantime, the order of revivor on both sides may be made in the period limited in the last section.

"Sec. 468. When it appears to the court by affidavit that either party to an action has been dead, or, where a party sues or is sued as a personal representative, that his powers have ceased for a period so long that the action cannot be revived in the names of his representatives or successors, without the consent of both parties, it shall order the action to be stricken from the docket."

The provisions of the foregoing sections are urged upon our attention by the defendant in support of his plea in abatement, his contention being that the plaintiff having ceased to exist as a corporation more than a year since, there can be no revivor without the consent of the defendant, and the action must be dismissed or stricken from the docket. Counsel for plaintiff, on the other hand, insists that the sections of the Code of Civil Procedure quoted are applicable to actions pending in *nisi prius* courts only, and do not relate in any manner to causes pending in this court on error or appeal. We are unable to appreciate the force of this argument. Unquestionably, the provisions of the Code of Civil Procedure are applicable to the revivor of actions in the supreme court, and this court has so treated them. *Bell v. Walker*, 54 Nebr., 222. This is not one of those actions which abate by the death of a party. Code of Civil Procedure, sec. 454 *et seq.* If there were no other statutory provisions in this state on the subject other than those to which reference has already been made, we would incline to the position that the action should have been revived and prosecuted by the stockholders of the plain-

tiff corporation within the period designated in section 466 of said Code, and that a revivor could not be had after that time without the consent of the defendant.

Counsel for plaintiff invoked certain sections of chapter 16, Compiled Statutes, entitled "Corporations," to which consideration will now be given.

Section 63 declares: "No suit or action, either at law or in chancery, pending in any court in favor of or against any banking or other corporation, shall be discontinued or abate by the dissolution of such corporation, whether such dissolution occur by the expiration of its charter or otherwise; but all such suits or actions may, in all courts of justice, be prosecuted by the creditors, assigns, receivers, or trustees, having the legal charge of the assets of such dissolved corporation, to final judgment or decree, in the corporate name of such dissolved corporation."

Section 67 of the same chapter provides: "Any corporation created by this chapter may, at any time after its dissolution, whether such dissolution occur by the expiration of its charter or otherwise, prosecute any suit at law or in equity, in and by the corporate name of such dissolved corporation, for the use of the party entitled to receive the proceeds of any such suit, upon any and all causes of action accrued, or which, but for such dissolution, would have accrued in favor of such corporation, in the same manner and with the like effect as if such corporation were not dissolved."

Section 70 reads: "Writs of error upon judgments at law may be sued out, and bills of review in chancery may be exhibited, in favor of or against any such dissolved corporation, and by its corporate name in the same manner and with the like effect as if such corporation were not dissolved, and process thereon against any such dissolved corporation shall be served in the manner prescribed in this subdivision."

This legislation confers ample authority upon every dissolved corporation to prosecute suits in its corporate

name as though the corporation had never been dissolved. The purpose and objects of the sections were to save every corporate right and power to defunct corporations, that the interests of its former stockholders as well as those of its creditors might be preserved. And the sections in question, being special provisions in regard to a particular subject, control any and all general powers. This is a familiar rule. *State v. Cornell*, 54 Nebr., 72.

It is true that the sections copied above from chapter 16, Compiled Statutes, were enacted with special reference to domestic corporations or those organized under the laws of this state, which should become dissolved. But, in the absence of evidence on the subject, the presumption must be indulged that there exists in the state of Ohio statutory provisions the same as those found in the sections quoted from chapter 16, Compiled Statutes. *Haggin v. Haggin*, 35 Nebr., 375; *Stark v. Olsen*, 44 Nebr., 646; *Chapman v. Brewer*, 43 Nebr., 890; *Scroggin v. McClelland*, 37 Nebr., 644; *Smith v. Mason*, 44 Nebr., 610; Bates' Annotated Ohio Statutes, secs. 5679-5686; *Tiffin v. Stoehr*, 54 Ohio St., 157. Therefore, the plaintiff, though dissolved, had the right to maintain this action, had it been brought in the state in which it received its corporate existence; and we have no legislative enactment which forbids a dissolved foreign corporation from suing in the courts of this state. By comity existing between the states, corporations of one state are permitted to transact business in another state, and it has been held that comity of suit as well as comity of contract exists in the several states unless denied by statute. *Bank of Augusta v. Earle*, 13 Pet. [U. S.], 517. We are constrained to hold that the suit is properly prosecuted in the name of the dissolved corporation and that the plea in abatement is not well taken. *Wehn v. Fall*, 55 Nebr., 547; *Lemmon v. People*, 20 N. Y., 562; *Glenn v. Liggett*, 135 U. S., 533; *Tiffin v. Stoehr*, *supra*.

The property in question consisted of saloon furniture purchased of plaintiff by the defendant Jeremiah

Mahoney, on credit, and the former insists that it was induced to make the sale by reason of certain false representations made by the latter as to his financial condition and responsibility. Mahoney executed to the defendant, the Chadron Banking Company, a mortgage on this property to secure a pre-existing debt, the mortgagee claiming and insisting that, as a part consideration for the giving of the mortgage, it released other security by it held. Plaintiff tendered to Mahoney $190, the amount paid by the latter on the purchase price, and attempted to rescind the sale. Demand was made for the property by plaintiff, which was refused, and thereupon this action was instituted against Mahoney, the bank, one Martin, and Rubel Bros. & Co. Augustine A. Record, as receiver of the bank, was permitted to appear and answer. The answers were general denials only. The John Skillito Company intervened, asserting the right of possession to a portion of the property by reason of a chattel mortgage thereon. The chattels were seized under the writ, and possession thereof delivered to plaintiff. The jury returned a general verdict finding "that the right of property and the right of possession of said property at the commencement of this action was in the defendant, the Chadron Banking Company, and we assess the value of said property and possession at the sum of $1,312, and that the said right of property has passed into defendant, Augustine A. Record, as receiver of the Chadron Banking Company, who now owns said right of property and right of possession. We also assess the damages sustained by him by reason of the detention of said property at the sum of five cents."

Upon the trial, the Chadron Banking Company was allowed to prove a special interest in the property arising by virtue of a note, and a chattel mortgage given by Mahoney to secure the payment thereof. It is strenuously argued by counsel for plaintiff that such evidence was inadmissible under an answer consisting of a general denial, and that any special interest which the bank had

in the property should have been specially pleaded. This doctrine we can not adopt. This court has frequently decided that under a general denial in replevin the defendant may prove any special matter which would defeat plaintiff's right to maintain the action. *Richardson v. Steele*, 9 Nebr., 483; *Cool v. Roche*, 15 Nebr., 24; *Burlington & M. R. R. Co. v. Young Bear*, 17 Nebr., 668; *Blue Valley Bank v. Bane*, 20 Nebr., 294; *Merrill v. Wedgwood*, 25 Nebr., 283; *Best v. Stewart*, 48 Nebr., 859; *Johnston v. Milwaukee & Wyoming Inv. Co.*, 49 Nebr., 68; *Horkey v. Kendall*, 53 Nebr., 522. It was, therefore, competent for the bank to prove a special interest in the property by virtue of a chattel mortgage and its right to immediate possession thereunder, as it tended to establish that the property was not wrongfully detained by said defendant when the suit was instituted, and that plaintiff was not then entitled to the immediate possession of the chattels. A different rule obtains in the case of an intervener who claims the right to the property, since he is, to all intents and purposes, a plaintiff disputing the right of both the original parties to the suit to the replevied property, and seeking an affirmative judgment, and must plead facts showing his right of possession to the goods.

Complaint is made of the 4th and 14th paragraphs of the instructions, which were to the effect that in case the jury found for the defendant, they should state in their verdict the value of the property to be $1,312, which sum was alleged in the petition to be the value of the goods and such allegations admitted by the answer to be true. These instructions were entirely proper, since the pleadings admitted said sum to be the value. The defendant was, therefore, by such admission, relieved from the necessity of introducing proof relative to value.

By instruction No. 7 the jury were told that if they found the property in controversy was obtained from plaintiff by reason of certain false representations of the defendant Mahoney, then the jury should find in favor of the former, and against the latter. The objection to

this direction of the court is that it left the jury in the dark as to what fact or facts would justify a finding in favor of the other defendants. And so it did, but the jury were fully and fairly advised on that subject by other paragraphs of the charge of the court, which was sufficient. The rule is that instructions must be considered as an entirety.

It is insisted that the evidence fails to sustain the verdict for the reason, among others, that not a particle of proof was adduced by the bank to show that it was the general owner of the property. This contention is absolutely sound. The evidence on behalf of the defense tends to show that the bank had a special interest in the property, yet the jury did not so find, nor did they determine the value of any special ownership, but found that the absolute right of property at the commencement of the action was in the bank, and assessed the value thereof. This court has ruled that proof of special interest in chattels will not sustain an allegation of general ownership, and, by a parity of reasoning, a finding of general ownership of chattels is not sustained by evidence of special interest therein. For the reason stated the verdict finds no support in the evidence, and the judgment must be reversed.

The cross-petition in error contains two assignments: First, the court erred in refusing the instruction requested by defendant. Second, there was error in not awarding defendant interest. These grounds are unavailing, since the defendant presented to the district court no motion for a new trial. The judgment is

REVERSED.

NORTHERN ASSURANCE COMPANY V. CHARLES A. HANNA.

FILED MARCH 21, 1900. No. 9,204.

1. **Fire Insurance Policy:** PROOF OF LOSS: ESSENCE OF REQUIREMENT: FAILURE DOES NOT FORFEIT INSURER'S CLAIM. A fire insurance policy requiring proofs of loss to be furnished within sixty days after the fire, and providing that no action should be maintained on the contract until the expiration of sixty days from the time of furnishing such proofs, contained no provision for a forfeiture in case proofs were not furnished within the time specified. *Held*, That time was not of the essence of the requirement in regard to furnishing proofs of loss, and that a failure to furnish such proofs within the prescribed period did not work a forfeiture of the insurer's claim for indemnity.
2. *German Ins. Co. v. Davis*, 40 Nebr., 700, distinguished.
3. ———: STIPULATION IN POLICY: SIXTY-DAY LIMIT. A stipulation in a contract of insurance that no suit shall be commenced on the contract "until sixty days after full compliance by the assured with all the foregoing requirements," is intended to give the insurer time to inquire into the cause of loss and make provision for payment.
4. **Presentation of Claim:** REFUSAL: ACTION WITHIN SIXTY-DAY LIMIT. If, upon presentation to it of a claim arising under such a contract, the insurer deny all liability and refuse absolutely to pay at any time, the insured may commence an action on the policy, without waiting for the period of limitation to elapse.

ERROR to the district court for Lancaster county. Tried below before HALL, J. *Affirmed.*

Charles Offutt and *Greene & Breckenridge*, for plaintiff in error:

The defendant in error should have read his policy and informed himself of the obligation resting upon him. *German Ins. Co. v. Heiduk*, 30 Nebr., 288; *Hankins v. Rockford Ins. Co.*, 70 Wis., 1; *Cleaver v. Traders Ins. Co.*, 65 Mich., 527; *Wierengo v. American Fire Ins. Co.*, 98 Mich., 621.

Lambertson & Hall, contra, argued that the time within

which proofs of loss should be furnished by the terms of the policy sued on in this case is not made of the essence of the contract, and no forfeiture of the contract is declared because of the failure to furnish the proofs within a given time, citing *German Ins. Co. v. Davis*, 40 Nebr., 700.

SULLIVAN, J.

In the district court of Lancaster county Charles A. Hanna, the plaintiff below, recovered a judgment against the Northern Assurance Company of London, England, on a fire insurance policy covering a stock of merchandise. It is insisted that the judgment should be reversed, because (1) proofs of loss were not furnished within the time fixed by the contract of insurance; (2) that there was neither averment nor proof of a waiver of the condition with respect to furnishing proofs of loss; and (3) that if the defendant is liable, the action was prematurely brought. We will consider these propositions in regular order.

It appears that the policy provided for the furnishing of proofs of loss within sixty days after the fire, and that such proofs were not furnished until after the time so limited. Counsel for the defendant claims that the provision in question is a condition precedent to the right of recovery, and cites a large number of authorities in support of his claim. Special stress, however, is laid on *German Ins. Co. v. Davis*, 40 Nebr., 700, 712, where, in an opinion by the present chief justice, it is said: "In the case under review the plaintiff, before he was entitled to recover, was required to establish by competent evidence either that notice and proofs of loss were furnished the company within the time stated in, and according to the requirements of, the policy, or that the defendant waived the same." We have no doubt about the correctness of the statement quoted as applied to the facts of the *Davis Case*. The policy in that case expressly pro-

vided for a forfeiture of all claims under it, if proofs of loss were not furnished within sixty days after the destruction of the insured property. The policy in this case contains no such provision. It declares that "the loss shall not become payable until sixty days after * * proofs of the loss herein required have been received by this company." Another provision is that no suit shall be commenced on the contract "until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." There is no forfeiture expressly provided for, and we are not authorized to supply one by construction. Our conclusion upon this branch of the case is that the time within which proofs of loss were to be furnished is not of the essence of the contract; and that the failure to furnish such proofs within the prescribed period did not work a forfeiture of plaintiff's claim for idemnity. The authorities supporting this view are abundant: *Rheims v. Standard Fire Ins. Co.*, 39 W. Va., 672; *Tubbs v. Dwelling-House Ins. Co.*, 84 Mich., 646; *Steele v. German Ins. Co.*, 93 Mich., 81; *Kenton Ins. Co. v. Downs*, 90 Ky., 236; *Niagara Fire Ins. Co. v. Scammon*, 100 Ill., 644; *Vangindertaelen v. Phenix Ins. Co.*, 82 Wis., 112; 13 Am. & Eng. Ency. Law [2d ed.], 328.

Having reached the conclusion that the furnishing of proofs of loss within sixty days from the date of the fire was not a prerequisite to a suit upon the policy, the defendant's second proposition may be conceded.

This action was instituted within thirty days after plaintiff had furnished proofs of loss, and it is insisted by counsel for defendant that the right of action had not then accrued. It is alleged in the answer that the company had denied liability on the policy, and had refused to pay the plaintiff's claim, before suit was commenced. This, according to the authorities, amounted to a waiver of the right secured to the insurer by the clause providing that sixty days should intervene between the furnishing of proofs of loss and the commencement of an action

on the policy. It has been sometimes said that stipulations like the one here in question are to be regarded as contracts for credit; but it is, perhaps, more accurate to say that they are intended to give the insurer time to inquire into the cause of loss and make provision for payment. *California Ins. Co. v. Gracey*, 15 Colo., 70; *Hand v. National Live-Stock Ins. Co.*, 57 Minn., 519; *German Ins. Co. v. Gibson*, 53 Ark., 494; *Cascade Fire & Marine Ins. Co. v. Journal Publishing Co.*, 1 Wash., 452; 13 Am. & Eng. Ency. Law [2d. ed.], 375. In *Star Union Lumber Co. v. Finney*, 35 Nebr., 214, it was held, in an opinion by MAXWELL, C. J., that the provision is never effective to defeat an action, and is to be construed merely as a stipulation exempting the insurer from costs during the specified period. Without accepting this view, or at this time dissenting from it, we hold, in conformity with the authorites here and elsewhere, that an unqualified denial of liability, and an absolute refusal to pay at any time, is a waiver by the insurer of the right to have a stipulated time within which to make payment. *Omaha Fire Ins. Co. v. Hildebrand*, 54 Nebr., 306; *Home Fire Ins. Co. v. Fallon*, 45 Nebr., 554. After the company had made its investigation touching the cause of the loss and had decided not to pay it at all, there existed no reason why the question of its liability might not be immediately determined. The supreme court of Arkansas, speaking upon this subject in *German Ins. Co. v. Gibson, supra*, p. 501, said: "It would be unreasonable to say that it [the insurer] still retained the right to have the ninety days in which to pay a loss that it never intended to pay. The object of the agreement that the company should have the ninety days was to give it time to pay after the loss was adjusted. Why should it have the time when it did not intend to pay? The denial of liability was inconsistent with such a claim and was a waiver of it." Language of like import is found in *Williamsburg City Fire Ins. Co. v. Cary*, 83 Ill., 453, and in *Cascade Fire & Marine Ins. Co. v. Journal Publishing Co., supra*. Counsel for defendant

thinks there is a distinction between a denial of liability on the ground that the policy was not in force when the loss occurred, and a denial grounded on a failure to furnish proofs of loss. We do not perceive the alleged distinction, and according to the adjudged cases, it does not exist. *Hand v. National Live-Stock Ins. Co., supra*; *California Ins. Co. v. Gracey, supra*; *Phillips v. Protection Ins. Co.*, 14 Mo., 167. The judgment is

AFFIRMED.

OMAHA NATIONAL BANK V. LOUIS KIPER ET AL.

FILED MARCH 21, 1900. No. 9,206.

1. **Demurrer:** CONSTRUCTION OF PETITION. A petition which is attacked for the first time in this court, on the ground that it does not state a cause of action, will be liberally construed.
2. **Trial to Court:** INCOMPETENT EVIDENCE. Where the trial is to a court without a jury, it is not reversible error to admit incompetent evidence.
3. **Collection of Draft:** DILIGENCE. A bank which undertakes to collect a draft is bound to keep within the authority conferred upon it, and exercise proper diligence to obtain payment.
4. **Collecting Agent:** NEGLIGENCE: MEASURE OF DAMAGES. In case a debt is lost through the negligence of a collecting agent, the measure of damages is the actual loss resulting from such agent's omission of duty.

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

Hall & McCulloch, for plaintiff in error:

The plaintiffs below distinctly fail to allege any damage resulting from the facts alleged, but simply allege another conclusion—that the defendant became and was lable to plaintiffs for the sum of said draft. That an execution had been issued and returned *nulla bona*, that the

judgment remains unsatisfied, and that damage has resulted to the plaintiff, are three allegations that are necessary to enable the plaintiff to set out a *prima facie* case. The failure to state a material fact raises a presumption against the pleader that it does not exist. *McClure v. Warner*, 16 Nebr., 447; *Humphries v. Spafford*, 14 Nebr., 488; *Burlington & M. R. R. Co. v. Kearney County*, 17 Nebr., 511; *Chicago, R. I. & P. R. Co. v. Shepherd*, 39 Nebr., 523. It has been held many times by this court that the question of the sufficiency of the petition may be raised in the supreme court.

Edson Rich, contra, argued that the petition itself stated a cause of action; among other things, in substance, the insolvency of Dow, immediately following the loss of the draft by the bank, and the further fact that, had the plaintiffs in error advised the defendants in error on either the 14th day of November or the 3d day of December, 1894, of the non-acceptance and non-payment of said draft, the plaintiff could or would have either collected or secured their said claim. That the plaintiffs failed to collect the same was wholly caused by the negligence of the plaintiffs in error. This certainly states a cause of action. It is never necessary to allege the issuance of an execution, or what attempts might be made to enforce the collection of a judgment in a case of this kind; neither is it necessary to put the claim in judgment. All that is necessary is to allege the insolvency and to prove this insolvency by any competent proof.

Where one has been guilty of a negligent act, the injured party does not need to prove that he could have collected the claim or would have made it, because proof of this kind is impossible. *Mound City Paint & Color Co. v. Commercial Nat. Bank*, 9 Pac. Rep. [Utah], 709; 1 Daniel, Negotiable Instruments, sec. 327; *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S., 276; 3 Sutherland, Damages, 17, 18.

SULLIVAN, J.

The defendants in error, who will be hereafter referred to as the plaintiffs, brought this action to recover of the Omaha National Bank damages resulting, it is claimed, from the bank's negligence in connection with a certain draft sent to it for collection. The cause was tried without the aid of a jury, and resulted in a finding and judgment against the defendant for the amount claimed in the petition.

The material facts are here set out: On November 9, 1894, the plaintiffs, who were partners doing business in the city of Chicago under the firm name of Kiper & Sons, drew a sight draft on F. T. Dow, an Omaha merchant, and forwarded it to the defendant for collection. On November 12 the bank notified the plaintiffs by letter that the draft had been presented and that the drawee had requested twenty days further time in which to make payment. On November 14 the plaintiff wrote to the bank, saying: "We are agreeable to your holding draft for Mr. Dow, and he can pay the same in twenty days from 12th inst., as per his request. Please have him accept draft for payment then, and hold the same for collection." This letter was received by the defendant on November 15, and on the same day it again presented the draft to Dow and requested him to accept it. He refused to give an acceptance due in twenty days, but proposed to give one due in thirty days, and the proposal was agreed to by defendant. The bank retained the acceptance, but did not advise the plaintiffs of the action it had taken. On December 4 the plaintiffs wrote the defendants, making some inquiry about the draft, and in due time received a reply which, in substance, stated that it could not be found, and must have been returned to the drawer. On December 7 Dow failed in business, of which fact Kiper & Sons were not informed until December 15. On December 10 the bank, replying to a letter written by the plaintiffs on December

8, said: "In reply to your letter of 12-8-'94 regarding draft on F. T. Dow which we hold for collection. Mr. Dow when we presented the draft the second time Mr. Dow claimed a 30 day extension and we allowed him to accept it payable Dec. 15, '94, intending to write you to confirm our action which we must have neglected to do. We will use our best endeavors to collect on the 15th." On December 17 the draft was returned to Kiper & Sons, who on the same day wrote the defendant, saying: "Draft against Dow which you return to us unpaid we send to you again in this letter, as there must have been some misunderstanding regarding your giving Mr. F. T. Dow extension until Dec. 15. We wrote you Nov. 14th that you could give him twenty days from Nov. 12th, as per his request. We did not hear from you, and about the time the twenty days extension was up we wrote you, and you then wrote us that you had no collection from us against Dow. We could not undertand this, as we sent you the collection again Nov. 14th. A few days ago we received a letter from you stating that you had given Dow until Dec. 15th for payment, and that you expected to collect the draft then and would remit. We are at a loss to understand why you returned the draft back unpaid, as you no doubt are aware that Dow has failed in business. We surely expect you to look after our interest in this matter, as you have extended time to Mr. Dow beyond the authority which we gave you." To this letter the bank, on December 19, sent a reply, which is, in part, as follows: "We will certainly look after your interests in matter of Dow collection; shall have our attorney see Dow and others at once. We feel our clerk was not doing just right when he allowed Dow to accept the draft Dec. 15, but he claims it was the best he could do."

The first assignment of error relates to the sufficiency of the petition to support the judgment. The pleading is, perhaps, inartificially drawn, but we think it states a cause of action for negligence. It states in substance the facts above detailed; alleges that Dow has been in-

solvent since December 7, and that the draft can not be collected from him; that plaintiffs could and would have collected, or obtained security for, their claim immediately, had they known that their debtor had refused to give an acceptance payable in twenty days. There is no direct averment that the plaintiffs have been damaged, but it is charged that the defendant has become liable to them, by reason of the facts pleaded, for the amount of the draft. The petition was not assailed in the trial court, and the rule is that it should now receive a liberal construction with the view of giving effect to the pleader's purpose. *Latenser v. Misner*, 56 Nebr., 340. A party who fails to disclose in the trial court his objections to an adversary's pleading can not well complain if this court is "to its faults a little blind and to its virtues very kind."

The fourth assignment of error is that the court erred in permitting Julius Kiper to testify to the contents of the letter written by plaintiffs to defendant on December 4, and the reply of the defendant thereto. There was, under the circumstances disclosed, no error in the ruling; but, if there had been, it would not warrant a reversal of the judgment, the cause having been tried without a jury and the evidence in question not being indispensable to a recovery.

The fifth specification of error is based on the ruling of the court refusing to exclude the following testimony of Julius Kiper: "Int. 13. What notice, if any, did the bank give you at the time that you forwarded the draft to them the second time, with the authority that they could accept a twenty-day acceptance of the draft by F. T. Dow, of his acceptance or non-acceptance of the same? Ans. 13. They gave us no notice whatever, and in fact had they notified us that Dow would not give a twenty-day acceptance. We would have withdrawn the draft at once; and gone to Omaha and attempted to get Mr. Dow to secure our claim." The contention of counsel is that the answer is not responsive to the question, that

it is incompetent, and the statement of a conclusion. The answer is irresponsive in part, but that objection was not made at the trial. The objection made was properly overruled. It is difficult to conceive upon what ground the court would be justified in striking the whole of the answer from the record. This further question was propounded to Mr. Kiper: "Int. 14. What course would you have pursued had the bank notified you promptly of the acceptance or non-acceptance by Mr. Dow of the twenty-day extension offered him?" An objection by defendant's counsel being overruled, the witness proceeded to state what steps he would have taken to obtain satisfaction of his claim. We see no valid objection to this testimony; but, if it were incompetent, it is perhaps needless to say, that its reception was not reversible error, since the cause was tried by the court without a jury.

It is finally contended that the evidence does not support the judgment. We think otherwise. The bank undertook to act as the agent of the plaintiffs in collecting their claim against Dow. It was bound to keep within the authority conferred upon it, and exercise proper diligence to obtain payment. 1 Am. & Eng. Ency. Law [2d ed.], 1066. If the debt was lost through its fault, it is liable. *Buell v. Chapin*, 99 Mass., 594. The measure of damages in such case is the actual loss resulting from the agent's omission of duty. If there is reasonable probability that the entire debt would have been collected but for the agent's negligence, the amount of the claim is the measure of recovery. *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y., 328. In the recent case of *Dern v. Kellogg*, 54 Nebr., 560, 565, it is said: "It is claimed that there was no proof of damages; that is, that it was not shown that had the bank been diligent the drafts could have been collected. In such cases it is usually impossible to show with certainty that if due care had been observed the collection would have been made. The law is not so rigid in its requirements for the protection

of the negligent agent. It is only necessary to show a reasonable probability that with due care the collection would have resulted. The burden then rests on the defendant to show that there was no damage." There was in this case probable grounds for believing that the loss of the draft was due to defendant's default, and that but for such default the loss would not have occurred. The question was for the trier of fact to decide; and we are satisfied that the decision given does not lack adequate evidence to support it. The judgment is

AFFIRMED.

STATE, EX REL. CHARLES L. BUGBEE, RELATOR, V. EDWARD P. HOLMES, RESPONDENT.

FILED MARCH 21, 1900. No. 11,016.

1. **Intervention:** CODE. Under section 50*a*, Code of Civil Procedure, any person who can, by proper averments, show that he has an interest in the matter in litigation may, without leave of court, become a party to the suit and obtain an adjudication of his claim.
2. ———: UNSUCCESSFUL SUITOR. An intervener against whom a judgment has been rendered must be accorded the rights which, under like circumstances, belong to any other unsuccessful suitor.
3. **Corporation:** SHAREHOLDERS. A corporation holds its property in trust for its shareholders, who, like other beneficial owners, may insist that it shall be properly managed and preserved from waste.
4. ———: ———: RIGHT OF INTERVENTION. Where the officers of a corporation fail and refuse to protect and conserve the corporate property, the shareholders may intervene in pending suits for the purpose of protecting their own interests.

ORIGINAL application for a writ of mandamus. Rehearing of case found on page 503, 59 Nebr. *Writ allowed.*

Frank Irvine, for relator:

There is no distinction between an order directing the

sale of real estate, and an order confirming such sale. *Kountze v. Erck*, 45 Nebr., 288.

No demand on corporate officers is necessary, where a demand would be useless.

A stockholder in a corporation may sue both at law and in equity in his own name in behalf of his interests and to vindicate a wrong done the corporation, when it can not or will not do so in its corporate capacity; and under like circumstances a stockholder may defend in his own name an action brought against the corporation. *Wilcox v. Bickel*, 11 Nebr., 154; *Fitzgerald v. Fitzgerald*, 41 Nebr., 374; *Morrill v. Little Falls Mfg. Co.*, 48 N. W. Rep. [Minn.], 1124; *Waymire v. San Francisco & S. M. R. Co.*, 44 Pac. Rep. [Cal.], 1086; *Park v. Petroleum Co.*, 25 W. Va., 108; *Park v. Oil Co.*, 26 W. Va., 486.

Tibbets Bros., Morey & Anderson, contra:

It is against public policy to allow party stockholders to intervene and complicate the action. *Farmers Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. Rep., 182, 186; Judge Caldwell's Address, St. Louis, 20th February, 1896.

SULLIVAN, J.

Earlier in the term there was a judgment denying an application for a mandamus. The opinion then filed contains a statement of the facts upon which it was held that the respondent, one of the judges of the third district, was right in refusing to fix the amount of a supersedeas bond. *State v. Holmes*, 59 Nebr., 503. At relator's instance, we have again examined the record, and have reached the conclusion that our former decision was unsound, and that the peremptory writ should have been granted. The petition of intervention and the motion resisting confirmation of the sale in question, taken together, show that Bugbee is a stockholder of the insolvent corporation; that the receiver, appointed at the

request and for the benefit of creditors, has dealt with the assets of the company in a reckless and improvident manner, and that, if his actions are permitted to go unchallenged, he will waste and dissipate a large amount of valuable property belonging to the bank. It likewise appears that the corporation is not represented in the suit; that if it has any officers who are competent to represent it, they refuse to act, and that the rights of stockholders are, therefore, unprotected.

The order of the court confirming the receiver's sale and disposing of the intervention is as follows: "This cause came on to be heard before the court on the motion of John E. Hill, receiver of the Lincoln Savings Bank and Safe Deposit Company, for the confirmation of sale of assets of the said defendant bank in compliance with the order of the court, heretofore made, together with the objections filed thereto, and the motion of Charles L. Bugbee to set aside and vacate said sale, before Edward P. Holmes, judge of the district court, sitting at chambers, on the 10th day of October, 1899.

"The court finds that the said Charles L. Bugbee has no right or standing to be heard in said cause or to object to the sale of such assets of the said defendant bank, for the reason that he is not a party in the above entitled cause, nor has at any time heretofore, obtained leave of court, to enter his appearance therein, to be made a party thereto, or to intervene in said cause, for the purposes of objecting to any proceedings or to obtain any rights or benefits in such proceedings.

"The court further finds that said sale was in all respects regular, legal and equitable and that it is for the best interests of the trust represented by said receiver that said sale be confirmed.

"It is therefore considered, ordered and adjudged and decreed that said sale, in all respects be confirmed; that the objections thereto be overruled, and that the motion to set aside said sale be overruled. To all of which the said Bugbee excepts, and forty days from the rising of

the court allowed to reduce his exceptions to writing. The said Bugbee prays an appeal, and prays the court to fix a supersedeas bond superseding the order herein made confirming said sale. For the reasons above given the court refuses to fix a supersedeas bond. To which ruling the said Bugbee excepts."

This order seems to have been made on the theory that Bugbee had not yet become a party to the action, and that he might be denied the right to intervene because he failed on the hearing to show facts which, in the opinion of the court, would entitle him to have the sale set aside. We think, however, that the intervention was effective, and that the relator was a party to the suit before the hearing was had. Under section 50*a*, Code of Civil Procedure, any person who has, or claims, an interest in the matter in litigation may become a party thereto and have his rights determined. This section does not contemplate intervention by leave of court. It gives, absolutely, to any person who can show by proper averments that he has an interest in the subject of the controversy, the right to become a party and to obtain an adjudication of his claims. The court has no authority to exclude from the case an intervener whose pleading discloses a direct interest in the matter of litigation; it must give judgment on the merits; it must decide in his favor or against him; and if against him, it must accord him the rights which belong to any other unsuccessful suitor.

The next question to be considered is whether the relator pleaded facts sufficient to show that he had an interest in the matter in litigation within the meaning of the statute. We think he did. As a stockholder he was entitled to have the corporate assets honestly and wisely administered. A corporation holds its property in trust for the shareholders, who, like any other beneficial owner, may insist that it shall be properly managed and preserved from waste. *Rabe v. Dunlap*, 51 N. J. Eq., 40; *Pearson v. Con-*

cord Railroad Corporation, 62 N. H., 537; *Fogg v. Blair*, 139 U. S., 118. This interest has been frequently held sufficient to justify, under proper circumstances, an intervention by a stockholder in jurisdictions where the right to intervene is not absolute. *Bronson v. La Crosse & M. R. Co.*, 2 Wall [U. S.], 283; *Morrill v. Little Falls Mfg. Co.*, 46 Minn., 260; *Waymire v. San Francisco & S. M. R. Co.*, 112 Cal., 646. Where the corporation can not, or will not, protect the interests of the stockholders, the latter may intervene for their own protection. The right has its foundation in necessity, and is given to prevent a failure of justice; for whatever is an injury to the corporation is, of course, an injury to the stockholders. But it is suggested by counsel for respondent that the receiver represents the corporation, and that he was in good faith executing his trust. The receivership was in the nature of an equitable execution; and, practically, the receiver represents the corporation no more than the sheriff represents the attachment defendant whose property he has seized. Besides, it appears from the petition of intervention and motion to vacate the sale that he has wasted, and is now wasting, the trust property. If this be true, it is time that some one else should take charge of the interests of the stockholders. If their rights are being sacrificed, it can make little difference to them whether the receiver's conduct is the result of bad judgment or bad motive.

The judgment heretofore rendered is set aside and the peremptory writ granted.

WRIT ALLOWED.

JEPPE JORGENSEN V. FRED R. KINGSLEY ET AL.

FILED MARCH 21, 1900. No. 9,197.

1. **Account Stated:** DEFINITION. An account stated is merely an agreement between persons who have had previous transactions, fixing the amount due as the result of an accounting.
2. **Illegal Contracts:** NOT ENFORCEABLE. Courts will not enforce contracts which are shown to be illegal.
3. **Defense of Usury:** ACCOUNT STATED: PLEA OF FRAUD. In an action on an account stated, the defense of usury is available without alleging that the balance claimed to be due, was agreed to in consequence of fraud or mistake.

ERROR to the district court for Kearney county. Tried below before BEALL, J. *Reversed.*

Stewart & Munger and *L. W. Hague*, for plaintiff in error:

An agreement to pay an illegal rate of interest for past forbearance is without consideration, and can not be enforced. No contract, no matter how binding its terms may be, will bind the promisor to pay usury. *Richards v. Kountze*, 4 Nebr., 200.

Ed L. Adams, contra:

To constitute a plea of usury, there must be a statement of the contract claimed to be usurious, with whom it was made, its terms and character, and the amount of interest agreed upon to be reserved, taken or received. *Bell v. Stowe*, 44 Nebr., 210. To illustrate the absurdity of the position taken by plaintiff in error in reference to the question, whether the contract is usurious, suppose that A had executed and delivered to B, for value, his promissory note at a legal rate of interest. The note had run for several years without being

paid. They get together and compute the balance due, and by mistake, or any other oversight, a new note is taken, and there is included in the note a sum in excess of the actual amount due; could we say the new note was tainted with the vice of usury? Not if we observe the rule, that there must be a contract and agreement for the one to take and the other to receive a compensation for the forbearance, greater than is permitted by law.

J. L. McPheeley also appeared of record for defendants.

SULLIVAN, J.

This action was brought by Kingsley Brothers, a banking firm doing business at Minden, to recover of Jeppe Jorgensen, one of their customers, a balance claimed to be due them upon an account stated. The answer alleged that the defendant had been for several years a borrower of money at the plaintiffs' bank under an arrangement whereby he was to pay interest at the rate of 10 per cent per annum on all overdrafts, and that such interest should be charged monthly to his account. It was further alleged that the account stated covered the transactions of the parties from February 2, 1890, to March 16, 1896, and that there was included in the balance agreed upon the sum of $365.20, which represented usurious interest on advances, computed sometimes at the rate of 30 per cent per annum. An itemized statement showing the amount of each overdraft, its duration and the amount of interest charged thereon at the end of each month is attached to and made, by averment, a part of the answer. At the trial of the cause, the court held that the answer did not state facts sufficient to constitute a defense; refused to permit Jorgensen to introduce his evidence, and directed the jury to return a verdict against him. It is now contended that these rulings were erroneous, and that the judgment rendered in favor of the plaintiffs should be reversed. The argument advanced in behalf of Kingsley Brothers is that no error was committed

by the trial court, because (1) the original agreement between the parties was not illegal, and (2) because an account stated is invulnerable unless assailed for fraud or mistake.

In regard to the first proposition, it is sufficient to remark that, inasmuch as no recovery was sought on the original contract, it can not be a material factor in the case. The vital and determinative question—and the only question with which we need concern ourselves—is whether the contract in suit is a valid and enforceable contract. An account stated is merely an agreement between persons who have had previous transactions fixing the amount due as the result of an accounting. *Claire v. Claire*, 10 Nebr., 54; 1 Am. & Eng. Ency. Law [2d ed.], 437; 1 Ency. Pl. & Pr., 87.

The defendant in the present case does not assert that he agreed to the balance claimed in consequence of any fraud or misapprehension, but insists that there is included in such balance usurious interest which the plaintiffs should not be permitted to recover. It is, of course, elementary law that courts will not enforce illegal contracts; and yet that is precisely what was done in this case. It appears by the averments of the answer that the balance sued for includes extortionate interest charges, and the court held that such charges were recoverable. The holding is contrary to the statute which declares that, if illegal interest be directly or indirectly contracted for, taken or reserved, the plaintiff's recovery shall be limited to the principal of the loan. Compiled Statutes, 1899, ch. 44, sec. 5. The account stated was, in part, a contract for the payment of usury; it was proscribed by the statute and should not have been enforced. No form of usurious contract possesses inviolable sanctity. The law against usury is founded upon public policy; and the policy of the state is not to be frustrated by the devices of the usurer. If the allegations of the answer be true, the decision in favor of plaintiffs requires the defendant to pay interest on his overdrafts at an unlawful

rate. The judgment is therefore reversed, and the cause remanded.

REVERSED AND REMANDED.

SOPHIA L. BENNETT ET AL. V. CHARLES C. MCDONALD.

FILED MARCH 21, 1900. No. 10,422.

1. **Evidence:** INFLUENCE ON JURY. The admission of immaterial evidence which could not have influenced the minds of the jury is not reversible error.

2. **Sale of Property:** FRAUD: RIGHTS OF CREDITORS: RES GESTÆ: CONVERSATIONS OF VENDOR AND VENDEE. In the trial of an action in which a sale of property is questioned as having been made in fraud of the rights of creditors, it is proper to receive in evidence conversations of the vendor and vendee in negotiating and consummating contracts out of which arose the consideration for the alleged fraudulent transfer.

3. ———: ———: ———: EVIDENCE: MOTIVES OR CONDUCT OF PARTIES. In the trial of actions in which a fraudulent transfer of property is alleged, any evidence which reasonably tends to illumine the transaction and explain the motives or conduct of the parties is admissible.

4. **District Court:** JUDICIAL NOTICE: CONTENTS OF BRIEF. The district court will not take judicial notice of the contents of a brief filed by one of the litigants in this court when the cause was pending here on appeal or error.

5. **Instructions Not Based on Evidence.** It is not error to refuse instructions which are not based on the evidence.

6. **Evidence Sufficient.** Evidence examined, and found sufficient to support the judgment.

ERROR to the district court for Douglas county. Tried below before DICKINSON, J. Rehearing of case found on page 234, 59 Nebr. *Judgment below affirmed.*

Hall & McCulloch, for plaintiffs in error:

This was a transaction between relatives, and the burden of proving actual consideration, and that the transaction was in good faith, was upon McDonald, the pur-

chaser. *Plummer v. Rummel*, 26 Nebr., 142; *Steinkraus v. Korth*, 44 Nebr., 777.

W. W. Morsman and *E. M. Morsman*, *contra*, as to *bona fides* of transaction between relatives and as to the burden of proof, cited: *Thompson v. Loenig*, 13 Nebr., 386; *Fisher v. Herron*, 22 Nebr., 185; *Bartlett v. Cheesbrough*, 23 Nebr., 767.

A preponderance was sufficient. *Stevens v. Carson*, 30 Nebr., 550; *Carson v. Stevens*, 40 Nebr., 112; *McEvony v. Rowland*, 43 Nebr., 97; *Steinkraus v. Korth*, 44 Nebr., 777. There is no authority for holding that the fact must be clearly proven. Such a rule requires more than a preponderance, and in a civil case, a preponderance is all that is required.

SULLIVAN, J.

This is the second hearing of this case. The events in which the litigation had its origin are chronicled in the former decision (*Bennett v. McDonald*, 59 Nebr., 234), reversing the judgment of the district court for what was conceived to be error in the admission of testimony given by McDonald as a witness in his own behalf. A further and more thorough examination of the record has given us a clearer and better view of the scope and purpose of the evidence held to have been erroneously admitted, and we are now convinced that we were entirely wrong upon both points decided adversely to the plaintiff.

In regard to the first point, it was said that the witness should not have been permitted to testify that he directed Conroy to invoice the stock in question at wholesale prices, because that fact was not relevant to the issue, and may have induced the jury to believe that the transaction under investigation was an honest one. It may be conceded that the evidence had no legitimate tendency to prove that the sale by Irish to McDonald was made in good faith and without any intent to hinder,

delay or defraud the vendor's creditors; but, considering the purpose for which the testimony was offered, and its absolute isolation from the other facts developed at the trial, we can not believe that it was heeded by the jury, or that it swayed them in the slightest degree in favor of the plaintiff's theory of the case. The invoice was made before the sale of the stock, and had, so far as the record shows, no relation to, or connection with, that transaction. It was not received in evidence and the jury were not advised of its contents. It had, in our judgment, no bearing whatever upon the good faith of either McDonald or Irish. The questions propounded to McDonald were evidently designed to lay the foundation for other evidence touching the value of the property in controversy, at the time it was seized by Bennett under the order of attachment. The foundation was not fully established, and the invoice was not used. It is possible, of course, that the jury may have regarded the direction given by McDonald to Conroy as evidence bearing upon the principal fact in dispute; but if so, they must have acted irrationally, and this we will not presume. Few verdicts would stand, if courts proceeded on the assumption that every item of irrelevant or immaterial evidence admitted during the trial of a cause was, through the perversity of the jury, permitted to tell in favor of the successful party.

We pass now to the consideration of the third and fourth assignments of error, which were sustained by our former decision. These assignments challenge the correctness of some rulings of the court admitting in evidence certain conversations between McDonald and Irish. It is contended by counsel for the defendants that proof of what was said between the parties is mere hearsay; and we were induced on the former hearing to so hold. A little reflection, with a fuller comprehension of the record, has satisfied us we were wrong. The alleged consideration for the transfer in question was an indebtedness, emerging, it is claimed, out of a series of transac-

tions between Irish, acting for himself, and McDonald acting as the agent of his wife. Whether this indebtedness was genuine or fictitious, real or simulated, was the nub and core of the whole controversy. To show that it was real, and that it was the ultimate and honest product of all the dealings between the parties, it was proper that every one of their business transactions should be dissected and its elements laid bare. The balance claimed to be due from Irish to McDonald was the result of a number of contracts, settlements and agreements for the correction of errors. To prove these things, it was necessary to show what the parties said to each other in relation to the several matters at the time they were under consideration. Such evidence was clearly original, and was, in fact, the only means by which it could be proven that contract relations existed between them. "Where there is a series of transactions," say the supreme court of Indiana, "bound together and resulting in one consummated contract, all that is said and done by the parties in the course of their negotiations, and as part of the consummated agreement, are competent in all cases where they are relevant and affect the question of consideration." *Colt v. McConnell*, 116 Ind., 249, 255. Authorities in support of our conclusion that the rulings of the trial court upon this branch of the case were correct are not wanting. *Kenney v. Phillipy*, 91 Ind., 511, 513; *Porter v. Waltz*, 108 Ind., 40; *Paul v. Berry*, 78 Ill., 158; *Kimball v. Huntington*, 10 Wend. [N. Y.], 675; Bradner, Evidence, 345.

There are some other assignments of error based on the admission and rejection of testimony, but they do not merit special consideration. In actions of this character, both parties are entitled to a wide range of evidence. Anything reasonably tending to illumine the transaction under investigation by explaining the motives or conduct of the parties is generally received, and given to the jury for what it is worth. In dealing with the evidence, the trial court exercised admirable judgment, and has made

a record which, for its size, is singularly free from rulings of doubtful propriety.

It is claimed that the law of the case as settled in *Bennett v. McDonald*, 52 Nebr., 278, was disregarded at the trial. The brief referred to in that decision is not in the record before us, and the district court was not bound to take judicial notice of its contents. The court, therefore, did not err in making its rulings in accordance with the general law.

It is argued that the verdict is contrary to the ninth instruction, which informed the jury that the written statements made by Irish to the McDonalds were not conclusive evidence that the business was profitable, and that it was necessary to show, in some way, an actual net gain. There was other evidence of profits. Besides, the jury might, under the instruction, base their finding on the written statements referred to, although regarding them as disputable evidence of the facts to which they bore witness.

The defendants tendered instructions whereby they sought to submit to the jury the theory that Irish and Mrs. McDonald were partners. These requests were properly refused, because there was no evidence tending to prove a partnership, and for other sufficient reasons which it is needless to mention.

The contention that the verdict is not supported by sufficient evidence can not be sustained. Two juries have found in favor of the plaintiff. Both verdicts were sustained by the trial court, and we see no special reason to doubt the justice of plaintiff's claim. The judgment heretofore rendered by this court is vacated, and the judgment of the district court

AFFIRMED.

WILLIAM VEITH, APPELLEE, V. NICHOLAS RESS ET AL., APPELLEES, IMPLEADED WITH GRAINGER BROTHERS ET AL., APPELLANTS.

FILED MARCH 21, 1900. No. 9,158.

1. **Appointment of Receiver:** WAIVER OF STATUTORY NOTICE. A court has power to appoint a receiver where the parties to a suit waive the statutory notice and consent to the appointment.
2. **Sufficiency of Petition.** A petition which shows that a partnership is insolvent, that there is dissension between the partners, probability of waste, and necessity for an accounting and dissolution, states facts sufficient to warrant the court in taking cognizance of the case.
3. **Receiver:** PARTNERSHIP ASSETS. In such case the court may appoint a receiver to take charge of the partnership assets.
4. ———: PARTNERSHIP PROPERTY: IN CUSTODIA LEGIS. When partnership property is in the hands of a receiver it is in the custody of the law, and is to be administered by the court for the benefit of all the firm creditors.
5. ———: GARNISHEE. In such case the receiver can not be sued, or summoned, as garnishee in respect to the property in his possession by virtue of his trust.
6. **Creditor:** ENTRY OF APPEARANCE: OBJECTION TO JURISDICTION. And a creditor who enters his appearance in the receivership case and invokes the powers of the court in his behalf with respect to the execution by the receiver of his trust, can not afterwards be heard to object to the jurisdiction of the court.
7. **Attorney of Party Not Proper Receiver.** An attorney representing parties interested in the property being administered by a receiver is not a proper person to be appointed, or to act, as the legal adviser of the receiver where the interests involved are, or are likely to be, conflicting.
8. **Evidence Sufficient.** Evidence examined, and found sufficient to sustain the findings of the court.

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

F. H. Woods, for Grainger Bros., appellants.

Willard E. Stewart, for Helena Lau, appellant.

Stevens & Cochran, for John Kranz, appellant.

Broady & Pettis, for William Veith and Nicholas Ress, appellees.

F. A. Boehmer, also appeared for appellants.

SULLIVAN, J.

William Veith and Nicholas Ress were retail grocers doing business in the city of Lincoln under the firm name of Veith & Ress. The business had not prospered, and on December 4, 1895, the partnership being insolvent, an action was instituted by Veith against Ress to obtain a dissolution, an accounting and a distribution of assets among creditors. The defendant waived notice and appeared voluntarily. By consent of the parties, Henry Schaal was appointed receiver and entered upon the execution of his trust. He received and adjusted the claims of creditors, and, in due time, made a report of his doings in that behalf to the court. To this report the appellants, who are creditors, filed objections, and in various ways invoked the action of the court, and obtained rulings and orders on the theory that the court was properly invested with jurisdiction of the cause, and authorized to administer the estate of the insolvent firm. During the pendency of the case instituted by Veith against Ress, Hans P. Lau, notwithstanding the fact that his claim had been allowed by the receiver and approved by the court, sued the partners in the county court and recovered judgment against them. Proceeding then by garnishment, he obtained, in the county court, an order on the clerk of the district court directing him to pay this judgment in full out of funds which had come into his hands as a result of a sale by the receiver of the partnership property. The garnisher afterwards filed a pleading in this case denying the jurisdiction of the court and claiming a first lien on the partnership assets.

It is contended that the court had no power to appoint a receiver, because the statutory notice had not been

given. Originally the only parties to the suit were Veith and Ress. The property embraced in the receivership belonged to them, and they were entitled, of course, to make any lawful disposition of it. The plaintiff asked to have it put into the hands of a receiver, and the defendant consented. This he had a right to do. The provision of the statute with respect to notice was for his benefit, and it was therefore competent for him to waive notice. It was so decided in *Farmers & Merchants Bank v. German Nat. Bank*, 59 Nebr., 229.

It is next contended that the petition does not state facts sufficient to warrant the court in taking cognizance of the cause. We think it does. It shows insolvency, dissension between the partners, probability of waste and necessity for an accounting and dissolution. This surely was enough. 15 Ency. Pl. & Pr., 1054; 2 Bates, Partnership, secs. 583, 593, 993; 3 Pomeroy, Equity Jurisprudence, sec. 1333.

The district court having obtained jurisdiction of the cause, and having, by its receiver, laid hold of the partnership property, the garnishment proceeding was ineffective; it accomplished nothing. The rule is that when partnership property is in the hands of a receiver, it is in the custody of the law and is to be administered by the court for the benefit of all the firm creditors. 2 Bates, Partnership, sec. 1006; *Jackson v. Lahee*, 114 Ill., 287; *Holmes v. McDowell*, 76 N. Y., 596. The possession of the receiver is the possession of the court by which he has been appointed, and he can not be sued, or summoned, as garnishee, in respect to property in his possession by virtue of his trust. 14 Am. & Eng. Ency. Law [2d ed.], 821. "The court," remarked Romilly, M. R., in *De Winton v. Brecon*, 28 Beav. [Eng.], 200, 203, "never allows any person to interfere either with money or property in the hands of its receiver, without its leave, whether it is done by the consent or submission of the receiver or by compulsory process against him."

But it is further contended in behalf of Lau that the

action by Veith against Ress was collusively brought; that it was designed to hinder and delay creditors, and that, therefore, the court should have renounced jurisdiction and established his judgment as a prior lien on the partnership assets. It is also argued that the appointment of the receiver was an equitable assignment and void for want of conformity with the statute regulating voluntary assignments. All of these matters were submitted to the trial court, and we are not prepared to say that its decision sustaining the receivership is contrary to the evidence. It may be that the suit was not instituted for the purpose disclosed by the petition, but rather for the purpose of evading the assignment law and to obstruct creditors in the enforcement of their claims; but the proof offered to sustain this hypothesis is, certainly, neither decisive nor convincing. In this connection it may not be out of place to remark that the appellants have probably forfeited their right to question the court's authority to administer the partnership assets for the benefit of all the creditors. At first they seem to have conceded that the court was proceeding properly, and induced it to go forward on that assumption. They contested the claims of other creditors, with the avowed object of increasing their own distributive shares of the fund in the hands of the receiver. By this conduct they have, it would seem, taken a position from which they can not recede. *Jackson v. Lahee, supra.*

One of the attorneys for the plaintiff was appointed as attorney for the receiver, and awarded $100 for his services. This allowance was resisted, and is complained of here. We think the court erred in appointing Mr. Pettis to act for the receiver over the protest of creditors. The interests of the debtor and creditor are conflicting, and the same attorney can not with propriety act for the receiver who represents both. The statute provides: "No person shall be appointed receiver who is party, solicitor, counsel, or in any manner interested in the suit." Code of Civil Procedure, sec. 271. The pol-

icy that requires the appointment of an impartial receiver would seem to dictate that his legal adviser be impartial too. We think the law upon this subject is correctly stated by Beach in his work on the Law of Receivers, Alderson's edition 1897. At page 274, the learned author says: "The same reasons which suffice to render the legal adviser of one of the parties to an action ineligible to be appointed receiver operate also to prevent him from being allowed to act as counsel for the receiver. Besides his interest in the final result of the controversy, his duty to protect and enforce the rights of one of the parties, being his client, will, in most cases, if he should also act as counsel for the receiver, be likely to impose upon him conflicting and inconsistent duties, such as can not be properly performed by one person."

Several of the appellants contend that the court erred in allowing the claim of the First National Bank of Lincoln. We perceive no error in the decision complained of. The evidence tends to show that the bank was a creditor of Veith & Ress, and that the amount allowed it was correct. There is in the record no evidence indicating that the claim should have been rejected either in whole or in part.

Grainger Bros. insist that the court wrongfully rejected a small portion of their claim. During the pendency of this case, they sued the individual partners and obtained judgment against them. This judgment was offered on the trial below as conclusive evidence of the amount due them from the firm. The court, however, was not bound to accept it as conclusive. It had jurisdiction of the matter and could determine for itself all controversies arising between the creditors and the receiver. The decision as to the amount due Grainger Bros. is supported by sufficient competent evidence and will not be disturbed.

John Kranz claims a preference over other creditors on the theory that Veith & Ress bought merchandise of him without any intention of paying for the same. The

property in question had been delivered to the partnership, but had not been commingled with the general stock. The claim for a preference can not be sustained, because there is no proof from which the trial court was bound to infer that the purchase was fraudulent. The absence of an intention to pay is not a necessary and inevitable conclusion from the fact that a purchaser of goods is insolvent.

For the error committed by the court in allowing Mr. Pettis $100 for services rendered by him as attorney for the receiver the decree will be reversed, and the cause remanded with direction to the district court to render a judgment conforming to the views expressed in this opinion.

REVERSED AND REMANDED.

CITY OF OMAHA V. FANNIE M. CROFT, TRUSTEE, ET AL.

FILED MARCH 21, 1900. No. 9,172.

1. **Municipal Corporation**: LIABILITY FOR ACTS OF OFFICERS: ULTRA VIRES: RATIFICATION: TRESPASS: DAMAGES. A municipal corporation is not civilly liable for the acts of its officers appointed to act for the corporation, which, in their nature, are wholly and necessarily outside of the powers of such officers; but such unauthorized acts may be adopted and ratified by other officers of such corporation, acting upon a matter or regarding a subject within the scope of their general powers and authority, although such unauthorized acts, in the manner performed, constituted a trespass; and when so adopted and ratified, the corporation would be liable for the damages occasioned thereby.

2. **Ratification**: QUESTION FOR JURY. The question of ratification or adoption of the unauthorized acts of the officers of a municipal corporation, by those having authority to act in the premises, is a question of fact, and, when properly submitted to a jury, its finding thereon will not be disturbed in this court, if supported by sufficient competent testimony.

3. **Civil Liability of Corporation**: OPENING OR WIDENING OF STREETS: CONDEMNATION. A municipal corporation is civilly liable in

damages for the wrongful acts of its officers, which relate to, and arise out of, matters or transactions within the general powers of the corporation, and in respect to which there may be a corporate liability, and if such officers, under the authority of the corporation to open or widen streets or boulevards, commit a trespass upon and seize and appropriate private property for such purposes, without complying with the statute providing for the condemnation of such private property, the corporation is liable in damages therefor.

4. **Suit for Damages:** DEDICATION IPSO FACTO. In a suit for damages for the seizure and appropriation of private property for street or boulevard purposes, a judgment in such action will work a dedication of the property so appropriated to the corporation for the purposes for which it was taken.

5. **Instructions.** An instruction to the jury set out in the opinion not approved, but *held* not to have misled the jury, and not prejudicial error.

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

W. J. Connell, for plaintiff in error.

Charles Ogden and *Joel W. West, contra.*

HOLCOMB, J.

Suit was instituted in the district court of Douglas county by plaintiff, defendant in error, to recover for the market value of land alleged to have been appropriated by the city of Omaha, plaintiff in error. The plaintiff alleged, in substance, that in the month of October, 1894, the defendant seized and appropriated to its own use a strip of land 50 feet in width and 330 feet in length, staked off and graded the same for boulevard, to plaintiff's damage in the sum of $6,500. It is also alleged that no sum had been paid by the city for said land, and no proceedings had been taken to condemn the same by the exercise of the right of eminent domain. The answer of the defendant city denies that it ever, in any manner, seized or appropriated the strip of land described in the petition, and says that if said strip of ground is traveled

by persons or vehicles, it is without the knowledge or authority of the defendant; that the defendant consents to the plaintiffs or others owning said land at once fencing or inclosing the same, and preventing any further travel thereon, which, if it exists or has existed, it charges, was with the consent, connivance or permission of the plaintiffs for the purpose of commencing and maintaining the action for damages against the city. The corporate character of the defendant is admitted, and a denial is entered as to the other allegations of the petition. The reply denies the affirmative allegations of the answer. In due time a trial was had to the court and a jury, resulting in a verdict and judgment against the city for $800, with interest thereon amounting to $74.66. The case is brought here for review of alleged errors committed in the court below.

On the trial of the case it is made to appear by the evidence that certain streets in the city of Omaha, by ordinance of the city council, had been widened and turned into a boulevard, and placed under the control and supervision of the board of park commissioners, whose creation, powers and duties are defined by section 101*b*, chapter 12*a*, of the Compiled Statutes of 1899, the same being the metropolitan city act of this state. Among other things, the section referred to provides for the appointment of a board of park commissioners, composed of five members, to be appointed by the judges of the district court, and defines their duties as follows: "It shall be the duty of said board of park commissioners to lay out, improve and beautify all lands, lots or grounds now owned, or hereafter acquired for parks, parkways or boulevards"; and also, "In each city of the metropolitan class there shall be a board of park commissioners who shall have charge of all the parks and public grounds belonging to the city, with power to establish rules for the management, care and use of public parks, parkways and boulevards, and it shall be the duty of said board from time to time to devise, suggest and recommend to

the mayor and council a system of public parks, parkways and boulevards or additions thereto, * * * and to designate the lands, lots or grounds necessary to be used, purchased or appropriated for such purpose. And thereupon it shall be the duty of the mayor and council to take such action as may be necessary for the appropriation of the lands, lots or grounds so designated, the power to appropriate lands, lots or grounds for such purpose being hereby conferred upon the mayor and council."

The boulevard mentioned began on Ames avenue, which seems to be one of the prominent streets of the city, and thence runs northward. Immediately south of Ames avenue, connecting with the boulevard mentioned, is a street known as Twentieth street, and upon which is situated the property, the subject of this controversy. A petition of the citizens of Omaha was presented to the council, praying for the extension of the boulevard southward along the said Twentieth street, and other streets not here necessary to mention. A committee of the council viewed the location, and recommended the extension of the boulevard as petitioned for, the report of the committee being accompanied by a proposition or recommendation from the board of park commissioners to the effect that the board agree to accept and maintain a boulevard on said Twentieth street, and other streets therein mentioned, whenever the mayor and city council would cause Twentieth street to be opened 100 feet wide, and cause the streets mentioned, including Twentieth street, to be graded to a uniform grade, and to dedicate such streets as boulevards, and place them under the charge and control of the park commission. An ordinance was then introduced and passed by the council providing as follows:

"Section 1. That the following named streets in the city of Omaha be and are hereby designated for a driving boulevard for carriages and light vehicles: Nineteenth street from Chicago street north to Ohio street; thence

west on Ohio street to north 20th street; thence north on 20th street to Ames avenue.

"Sec. 2. That said boulevard be and is hereby placed under the control of the park commission for the purpose of having said commission take charge of the said boulevard and to occupy, beautify and maintain the same in such a manner as the said park commission may determine; provided the mayor and council reserve unto themselves the right to control the use and traffic thereon.

"Sec. 3. That this ordinance take effect and be in force from and after its passage."

No action appears to have been taken by the council towards widening any of the streets over which the proposed boulevard was to extend. It appears that the Twentieth street mentioned in the ordinance quoted was sixty-six feet in width, except where abutted by plaintiff's land, an unplatted tract, the street there being only thirty-three feet in width, the land in controversy occupying the other half of the street, were it widened so as to be of uniform width during its entire length. Under the above ordinance the board of park commissioners took possession of the streets mentioned, and caused the same to be surfaced and graded to a proper level, and in so doing took possession of a strip of plaintiff's land thirty-three feet in width and 330 feet in length, thereby making the said Twentieth street of the uniform width of sixty-six feet.

It is conceded that the park commission was without authority to act for defendant city in the matter of widening streets, or appropriating private property for such purposes, and that such acts were in no way valid or binding upon the city, unless the same had been adopted or ratified by the proper city authorities, thus making such unauthorized acts those of the city itself; and the case was tried upon the theory that, before the city became liable for the acts of the park commission in seizing plaintiff's land and using the same for boulevard purposes, a ratification thereof must be shown to have been

made by the officers and agents of the city having authority to condemn the land in the first instance. The jury were instructed: "If the board of park commissioners did wrongfully appropriate said strip of land, the defendant city would not be liable for such strip unless such appropriation was afterwards ratified by the defendant city." The ordinance quoted authorized the park commission to take possession of the street mentioned, and maintain the same as a boulevard for driving purposes; and the evidence shows that, assuming to act under the authority given them by ordinance, they entered upon the plaintiff's land, seized the same, parked, surfaced and graded it, so as to make it suitable for the purposes intended, and maintained it as such, sowing grass-seed on the sidewalk space, grading up the centre, and continuously keeping employed, at the expense of the city, a person in charge of, and who was employed in sprinkling, keeping and maintaining in proper condition, such street as a boulevard; and that all of the expense in connection with such control, labor and supervision was, by ordinance of the city council, allowed and directed to be paid out of the proper funds of the city set aside for such purpose. It also appears that said street was maintained and kept open for public travel, and was in continuous use by the public, by pedestrians and vehicles, as a public highway. The question of ratification having been properly submitted to the jury, and resulting adversely to the contentions of the city, this court can not disturb such finding, if supported by sufficient competent testimony, which we think it is. The owner has been deprived of the use of his property. The city, through its officers and agents, has taken possession of it, and is using it for the benefit of the public. It is being used and maintained as a public thoroughfare. The unauthorized acts of the park commission have been adopted and ratified by the officers and agents of the city having authority to act in the premises. The city is in as full, complete and unrestricted possession of the property as it would be, and is using the

same for boulevard purposes to the same extent as it could, had the property been taken by proceeding in condemnation in the exercise of the right of eminent domain. This, in our judgment, constitutes an appropriation of the property, which renders the city liable to the owners for its fair market value.

Section 29 of the charter act (Compiled Statutes, ch. 12*a*) provides: "Whenever it shall become necessary to appropriate private property for the use of the city for * * * parkways, boulevards, * * * and such appropriation shall be declared necessary by ordinance, the mayor, with the approval of the council, shall appoint three disinterested freeholders of the city, who after being duly sworn to perform the duties of their appointment with fidelity and impartiality, * * * shall assess the damages to the owners of the property and parties interested therein respectively taken by such appropriation." Provisions are also made for the payment or deposit of the damages so assessed, and for appeals from such assessment. It is urged by counsel for the city that, in view of the provisions referred to for condemnation of private property for boulevard purposes, the acts of the park board and city council are void, and of no binding effect upon the city, and that no liability is created thereby. We do not think the principle invoked is applicable to the case at bar. If the acts of the park board were adopted or ratified by the city council, as we think they were, and the council was acting upon a matter or regarding a subject within the scope of their general power and authority, although such acts, in the manner performed, constituted a trespass, yet the city would be liable for the damages occasioned thereby. It is said by Judge Dillon, in the fourth edition, section 969, volume 2, of his excellent work on Municipal Corporations: "The principle that a municipal corporation is bound by the acts of its officers only when within the charter or possible scope of their general powers, and that acts which in their very nature are wholly and necessarily, under all

circumstances, outside of the powers of the corporation, or of the officers appointed to act for it, and therefore must be known to all persons to be so, are void as respects the corporation, is vital; and the opposite doctrine has no support in reason, and very little, if any, in the judgments of the courts." In section 971 the author lays down the following principle: "Cases such as those just mentioned are to be distinguished from others which resemble them in the circumstance of relating to wrongful acts, but which arise out of matters or transactions within the general powers of the corporation, and in respect of which there may be a corporate liability. Thus, if in exercising its power to open or improve streets, or to make drains and sewers, the agents or officers of a municipal corporation, under its authority or direction, commit a trespass upon, or take possession of, private property, without complying with the charter or statute, the corporation is liable in damages therefor." The numerous authorities cited by the author abundantly substantiate the principle enunciated. The rule is reasonable and is amply sustained. In the case of *Soulard v. City of St. Louis*, 36 Mo., 546, 552, in the opinion, it is said: "In this case the city proceeded to take and appropriate the plaintiff's property without pursuing the mode prescribed in its charter authorizing it to enter upon and use for its own purpose the land of another whenever it should be considered necessary or expedient for the furtherance of the public interests. The act done, then, was without authority of law; it was wrongful, and amounted to a trespass." Further on it is said: "A corporation is civilly responsible for damages occasioned by an act, as a trespass or tort, done at its command, by its agents, in relation to a matter within the scope of the purpose for which it was incorporated." In the syllabus of the same case, it is held: "A corporation is civilly responsible for damages occasioned by an act, as a trespass or tort, done at its command, by its agents, in relation to a matter within the scope of the purpose for which it was incorporated.

Where a municipal corporation opened a street through the lands of an individual without first having the land condemned and damages assessed in the manner provided by its charter, in an action against such corporation for the damages sustained the value of the land taken will be the measure of damages, and a judgment for such damages will work a dedication of the land to the corporation." See also, *Mayor and Council of Rome v. Jenkins*, 30 Ga., 154; *City of Denver v. Peterson*, 36 Pac. Rep. [Colo.], 1111.

Objections are made to the admission of evidence and several instructions, which relate to questions heretofore discussed, and they will not be further noticed.

Objection is also made to the instruction of the court to the jury with reference to the method or arriving at the amount of damages sustained, which is as follows: "If you find from the evidence and a preponderance thereof that the land in question was wrongfully and without authority of law taken by the board of park commissioners and appropriated without the consent of the plaintiff for boulevard purposes, and that defendant city afterwards ratified such taking, and you find the other material allegations in plaintiff's petition have been established by a preponderance of the evidence, then you would be authorized in allowing the plaintiff the highest market value of said strip of ground for any purpose for which it was adapted at the time of the taking by said board as you find the same to be established by a preponderance of the evidence, together with interest thereon at 7 per cent per annum from the first day of November, A. D. 1894." It is urged that the language is erroneous and prejudicial to the defendant city, wherein it is said to the jury: "You would be authorized in allowing the plaintiff the highest market value of said strip of ground for any purpose for which it was adapted at the time of the taking by said board, as you find the same to be established by a preponderance of the evidence."

The evidence disclosed that the tract of land was suitable for residence property, and also available for use for storage, warehouse or manufacturing purposes, because of its proximity to a belt-line railroad encircling the city. The court evidently intended the language, and it was probably so understood by the jury, as telling them that if the property was more suitable for one purpose than another, as shown by the evidence, they were authorized to return a verdict for its market value for that purpose for which it would bring the highest price.

In *Lowe v. City of Omaha*, 33 Nebr., 588, in the syllabus, it is held: "The market value is not what the property is worth solely for the purpose for which it is devoted, but the highest price it will bring for any and all uses to which it is adapted, and for which it is available." In the opinion, by Justice NORVAL, it is said: "If it [the property] was worth most in the market as a residence the plaintiff was entitled to have such value considered. But if it would have sold for the highest price for some other use to which it was adapted, she was entitled to that. The market value of anything is the highest price it will bring for any and all uses."

In a New York case, *In re Furman Street*, 17 Wend. [N. Y.], 649, 670, the writer of the opinion says: "In both cases the proper inquiry is, what is the value of the property for the most advantageous uses to which it may be applied."

The suit was brought to recover as damages the value of the land appropriated. Different witnesses testified as to its market value. The uses for which it was adapted entered into the valuations placed thereon, and the court very properly charged the jury upon that feature of the case. The plaintiff was entitled to recover, if at all, the value of the property for the most advantageous and valuable uses to which it was adapted, or for which it was available. This, in effect, was stated by the court; and, while we do not unreservedly approve of the language

used in the instruction as given, we are of the opinion that the jury was not misled by it, or a greater recovery was had than is warranted by the evidence, nor was the plaintiff prejudiced thereby.

In *Burlington & M. R. R. Co. v. Gorsuch*, 47 Nebr., 767, 775, it is said in the opinion: "Some of the instructions which were given, and to which objections were made and have been here urged, should probably not have been given in form and substance as they were, but the jury were not misled by them, nor did any prejudice result therefrom to the rights of the complaining party."

In *Carstens v. McDonald*, 38 Nebr., 858, 861, Chief Justice NORVAL, speaking for the court, says: "The giving of an erroneous instruction, when it does not have the tendency to confuse and mislead the jury, is not sufficient reason for vacating the judgment and granting a new trial." To the same effect is *Stein v. Vannice*, 44 Nebr., 132.

The jury returned a verdict fixing plaintiff's damages at $800, with interest thereon amounting to $74.66. The testimony of the different witnesses placed the value of the property at from $200 to $2,400. A disinterested witness engaged in the real estate business placed the value at $1,500. The jury saw the different witnesses, and heard their testimony as to the value of the property. They are the judges of their credibility, and the weight to be given to the testimony of each, and their verdict, in this respect, is supported by the evidence.

Perceiving no reversible error, the judgment of the lower court is

AFFIRMED.

ANDREW J. HANSCOM, APPELLEE, V. MAX MEYER ET AL., APPELLANTS.

FILED MARCH 21, 1900. No. 11,073.

1. **Definition of Newspaper:** EVIDENCE: OMAHA MERCURY. Evidence examined, and found that the Omaha *Mercury* is a weekly publication, circulating among various classes of people within the county and state; that its printed matter consists principally of legal notices and information regarding the courts, and of legal matters in general, and also advertising of a miscellaneous character, literature of a general kind, and a limited amount of general news of current events. *Held*, That such publication is a newspaper within the meaning of section 497 of the Code of Civil Procedure; that the fact that it also makes a specialty of some particular class of business, and conveys intelligence of particular interest to those engaged in such business, will not thereby deprive it of its general classification as a newspaper within the meaning of the statute.

2. ———: STATUTE. *Held, also*, That the principal distinguishing feature of a newspaper, in contemplation of the statute, is that it be a publication, appearing at regular or almost regular intervals, at short periods of time, as daily or weekly, usually in sheet form, and containing news; that is, reports of recent occurrences, political, social, moral, religious and items of a varied character, both local and foreign, intended for the information of the general reader.

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

James H. McIntosh, Lodowick F. Crofoot and *Charles S. Elgutter*, for appellants, for definition of newspaper, cited Bouvier's Law Dictionary; Abbott's Law Dictionary; Century Dictionary; *Beecher v. Stephens*, 25 Minn., 146; *Hull v. King*, 38 Minn., 349.

Our court has expressed itself as follows: "Legal advertisements should not be inserted in an obscure paper where the probabilities are that they will be seen by but few, when there is a paper of general circulation in the county, because the object of the law will be in part at least defeated." *State v. Holliday*, 35 Nebr., 327. To this point, counsel cited *Kerr v. Hitt*, 75 Ill., 51; *Kellogg v. Carrico*, 47 Mo., 157; *Kingman v. Waugh*, 40 S. W. Rep. [Mo.],

884; *Williams v. Colwell*, 43 N. Y. Supp., 720; *Linn v. Allen*, 44 N. E. Rep. [Ind.], 646. In the last case cited, the *Daily Reporter* was the newspaper in question. It had a circulation of three thousand copies, among judges, lawyers, bankers, collection and commercial agencies, real estate dealers, merchants and other professional and business men, and was kept on sale at public news-stands. Although devoted primarily to legal matters, it contained the proceedings of the board of public works and a complete record of deeds filed in the recorder's office, as well as of mortgages, mechanics' and other liens, assessments, and sheriff's sales of real estate, together with the quotations of local securities, railroad time tables, and one or more columns devoted to the general news of the day.

Measured by these standards, the scope of the Omaha *Mercury* (Exhibit A) is altogether too narrow to be classed as a newspaper.

George E. Pritchett, contra.

HOLCOMB, J.

In proceedings of foreclosure of a real estate mortgage in the district court of Douglas county, on an application for confirmation of a sale of real estate made in said action, the defendants, appellants, objected thereto, and moved to set aside the sale, on the ground that notice of sale by publication in the Omaha *Mercury* was insufficient, alleging that that publication was not a newspaper as provided by section 497 of the Code of Civil Procedure. The objection was overruled, and by appeal the case is brought to this court. The section referred to provides as follows: "Lands and tenements, taken in execution, shall not be sold until the officer cause public notice of the time and place of sale to be given, for at least thirty days before the day of sale, by advertisement in some newspaper printed in the county, or, in case no newspaper be printed in the county, in some newspaper in general circulation therein. * * * All sales made without such

advertisement shall be set aside, on motion, by the court to which the execution is returnable."

The point in issue is whether the Omaha *Mercury* is a newspaper within the meaning of the section quoted. In the affidavit in support of the motion to set aside, it is said: "That said Omaha *Mercury* published weekly at Omaha, Nebraska, is a class paper devoted specially to the interests of the lawyers of Douglas county, Nebraska. That said Omaha *Mercury* is a paper which is confined to the particular trade, calling or business interest of the lawyers of Omaha, has a limited circulation and is not a newspaper as by law provided and required." A copy of one issue of the paper is made an exhibit, which is said to be "a fair sample of said publication." The proprietor of the publication challenged makes affidavit that "he is the owner and proprietor of the Omaha *Mercury*, a newspaper printed and circulated every Friday in the city of Omaha, Douglas county, Nebraska, and elsewhere. That this affiant says that it is not true that said Omaha *Mercury* is a class paper, or that it is confined to the interests of the lawyers of Omaha, or Douglas county. That said Omaha *Mercury*, then known as the Omaha *Watchman*, was established in the year 1870, and has been published weekly ever since said date. That said paper contains each week news of a general character, such as is to be found in the average weekly paper published in Nebraska; that of late years it has made a specialty of the news of the courts, and of legal matters in general, but that it is not true that it is devoted to the legal profession in any sense which would render it a 'class publication.' That said paper has a large and valuable subscription list, and that its said subscribers are of all classes and professions; that said newspaper has a wide circulation in Douglas county and the state of Nebraska, but that it is also taken and paid for by various classes of people in a great number of the states of the Union. That for the past twenty years it has been the custom of lawyers and others, to publish legal notices in said paper—

so much so that the people of Douglas county and the state of Nebraska, and throughout the entire United States, look first in its columns for legal advertisements in which they are interested; that it has published in the past, and still continues to publish, the greater percentage of legal notices in Douglas county, including orders required to be published by the district and circuit court of the United States, and of the district and county courts of Douglas county, and that said paper is commonly designated by the judges of the aforesaid courts as the paper in which to publish the various orders required to be published by said courts."

Webster's Dictionary defines a newspaper to be "A sheet of paper printed and distributed, at short intervals, for conveying intelligence of passing events; a public print that circulates news, advertisements, proceedings of legislative bodies, public documents and the like. Burrill's Law Dictionary gives this definition: "A paper or publication conveying news or intelligence. A printed publication, issued in numbers at stated intervals, conveying intelligence of passing exents. The term 'newspaper' is popularly applied only to such publications as are issued in a single sheet, and at short intervals, as daily or weekly." It is difficult, if not impossible, to determine with clearness and exactness where the line of demarcation should be drawn between a newspaper in a legal and common acceptation of the term and the numerous publications devoted to some special purpose, which circulate only among a certain class of the people, and which are not within the purview of statutes requiring publication of legal notices in some newspaper. The daily and weekly newspapers common to all parts of the country, of general circulation among the people, without regard to class, vocation or calling, devoted to the gathering and dissemination of news of current events of interest to all, and usually espousing and advocating principles of some political party with persistency, if not at all times with consistency, are,

without doubt, newspapers within the meaning of the statute. On the contrary, many publications, such as literary, scientific, religious, medical and legal journals, are obviously for but one class of the people—and that class always but a small part of the entire public—are not newspapers within the legal and ordinary meaning of the word, and it would be manifestly unjust, as well as against the letter and spirit of the law, to recognize such publications as proper for the advertisement of legal notices; the object in all cases being to give wide and general publicity regarding the subject of which notice is required to be published. The paper in question partakes, in a degree, of the characteristics of each of the two classes mentioned. If, however, it has the distinguishing features required to make it a newspaper as ordinarily defined, the fact that it also makes a specialty of some particular class of business, and conveys intelligence of particular interest to those engaged in such business, will not thereby deprive it of its general classification as a newspaper within the meaning of the statute.

In *Lynch v. Durfee*, 59 N. W. Rep. [Mich.], 409, it is held: "A weekly paper, containing matters of general interest, and having a general circulation among professional and business men, is a newspaper within the meaning of How. St., sec. 5801, providing for the publication in a newspaper of certain notices in probate proceedings, though it is primarily devoted to disseminating matters of interest to the legal profession." In the opinion it is said: "But a newspaper, even in the days when these statutes were enacted, meant, what it means to-day, a sheet of paper printed and distributed at short intervals for conveying intelligence of passing events; a public print that circulates news, advertisements, proceedings of legislative bodies, public documents, and the like."

In *Linn v. Allen*, 44 N. E. Rep. [Ind.], 646, it is held that a periodical, ephemeral in form, issued daily except Sundays, devoted to the general dissemination of legal news, and containing other matters of general interest to the public, is such a paper.

In the case of *Railton v. Lander*, 18 N. E. Rep. [Ill.], 555, the evidence in the case showed that the Chicago *Daily Law Bulletin* was a paper published in Chicago, having a general circulation throughout the city of Chicago and the state of Illinois, among judges, lawyers and real estate brokers, merchants and business men generally. Its contents consisted, for the most part, of legal matters, but it contained advertisements not confined to any one calling, or trade, as well as news and information of a general secular character. The paper in question was held to be a secular newspaper of general circulation within the meaning of the statute.

To the same effect is *Williams v. Colwell*, 43 N. Y. Supp., 720, 724, decided in 1896, where the writer of the opinion has collated the more important cases up to that date upon the subject. Says the writer of the opinion, after reviewing the authorities: "The facts stated in the affidavit and stipulation read on the motion bring this case within the cases cited sustaining publications of legal notices. While the principal news published in the *Daily Mercantile Review* is of especial value to attorneys, bankers, brokers, commission merchants, and those engaged in the real estate business, yet it is shown by the affidavit and stipulation that several columns are devoted to general advertising, and to the publication of local and other news of general interest, and that it has a general circulation."

The paper in question has been established for a number of years, and is published weekly. As stated in an affidavit in the case, "Of late years it has made a specialty of the news of the courts, and of legal matters in general." It appears to have, according to the affidavit, a large and valuable subscription list, and to circulate among various classes of people throughout the county and state, as well as the United States. It has been recognized as a legal newspaper by the probate court of the county, the district court and the federal courts. Its printed matter consists principally of legal notices, information regarding courts, and a legal directory of the

Douglas county bar. Some advertising of a miscellaneous character, literature of a general kind, commonly designated plate matter, and what purports to be information of the actions of congress, two addresses by lawyers, and a limited amount of general news of current events, are found in its columns, although we are constrained to say that there is a dearth of the latter, as shown by the exhibit, which has rendered it more difficult to reach a correct conclusion in this case. The principal distinguishing feature of a newspaper, in contemplation of the statute, in our opinion, is that it be a publication, appearing at regular or almost regular intervals, at short periods of time, as daily or weekly, usually in sheet form, and containing news; that is, reports of recent occurrences, political, social, moral, religious, and items of a varied character, both local and foreign, intended for the information of the general reader. It is the one quality of "news," which gives it its general interest and secures for it a general circulation among people of different classes and callings, whom the statute seeks to reach by the requirement of notice by publication in a newspaper. It should be noted, too, that, in a degree, the presence of advertisements not appealing to any particular class, trade or profession, constitutes a factor tending to bring a publication, possessing the qualifications heretofore mentioned, within the designation of a newspaper of general circulation. While some effort has been made by the legislature to define a newspaper, and limit the publication of legal notices to papers which are most likely to have a *bona fide* circulation among the general public where published, so far nothing of a permanent nature has been accomplished. In the absence of such legislation, we are disposed to the opinion, under the evidence presented, that the Omaha *Mercury* is a newspaper within the meaning of the statute, and as defined by the authorities herein adverted to.

It follows that the ruling complained of is correct, and is

AFFIRMED.

HENRY EIKENBARY ET AL., APPELLANTS, V. WILLIAM B. PORTER, JR., ET AL., APPELLEES.

FILED MARCH 21, 1900. No. 11,155.

Electors of School District: BUILDING: AUTHORITY TO LEVY TAX: LIMITATIONS DEFINED BY STATUTE. The legislature has invested in the electors of a school district the power and authority to levy a tax for building purposes. It has limited and thrown restrictions around their actions regarding such matters for the protection of all taxpayers, and to prevent unjust and oppressive levies. In the exercise of the powers and authority given, and within the limitations defined by statute, the courts can not interfere solely on the ground that such action may be regarded as unwise or improvident, or that conclusions have been reached, which, by others, may be deemed improper under the conditions existing, and the circumstances surrounding, the actions complained of.

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

A. N. Sullivan, for appellants:

The right of electors of a school district at an annual meeting to impose a levy under certain circumstances for the construction of a schoolhouse is conceded to be at once a right and a duty. It is further conceded that, in the exercise of their discretion, they could legally make such a levy although their judgment in doing so might not meet with general approval. But the question presented by this record is, can the majority of a school district impose such a levy when there is absolutely no necessity for the construction of a schoolhouse, when the schoolhouse already in existence is in every respect as suitable as any one that they might construct; or to state the case as made by the record, can the majority of the electors at an annual meeting impose a levy for the construction of a schoolhouse, when such levy is made solely for the purpose of effecting a relocation? If this can not be done legally at an annual meeting, then this case

ought to be reversed and the tax complained of perpetually enjoined. If the electors possess the power to build one extra schoolhouse in a district already provided with one, then they possess the power to build an unlimited number. But the law provides for only one schoolhouse in each district, in county districts like this, and there is no legislative authority for such procedure as complained of in this case. There must be distinct legislative authority for every tax that is levied. This is a principle that admits of no exception whatever. Cooley, Taxation, 244, 252; *Norris v. Russell*, 5 Cal., 249; *Litchfield v. Vernon*, 41 N. Y., 123; *Allen v. Peoria R. Co.*, 44 Ill., 85.

H. D. Travis, contra:

It is the contention of the defendants that the electors of a school district are the sole judges of their necessities as to whether or not a schoolhouse or schoolhouses are needed; that the electors can vote a tax within the statutory limits for such purposes; that such action of the electors is final. The electors are the sole judges of the public necessity, and a court of equity has no supervisory power over them, and does not have jurisdiction to determine whether or not the judgment and discretion exercised by the electors was proper or not. Cooley, Taxation, 247; *Eddy v. Wilson*, 43 Vt., 362; *Wharton v. School Directors*, 42 Pa. St., 358; *Jenkins v. Andover*, 103 Mass., 94; *Kniper v. Louisville*, 7 Bush [Ky.], 599; *Mason v. Lancaster*, 4 Bush [Ky.], 406.

HOLCOMB, J.

At an annual meeting of the voters of School District No. 3, of Cass county a motion was made and carried to build a new schoolhouse, and that a tax of ten mills on the dollar valuation be levied on all taxable property in the district for such purpose. An injunction was sued out by certain taxpayers of the district, by which it was

sought to restrain the officers of the district from certifying such levy to the proper officer of the county, to be spread upon the tax-rolls. The plaintiffs, in their petition, allege, in substance, that the taxation complained of is illegal, unjust and oppressive, for the reason that said school district is well supplied with a schoolhouse having all modern improvements, and that the object and purpose is to secure, by indirection, the relocation and removal of said schoolhouse, it being alleged that, at said meeting, a motion to relocate the site for said schoolhouse was made but failed to carry; whereupon a motion was made and carried to levy the tax, of which complaint is made. On the hearing in the court below the temporary injunction was vacated and dissolved, and from the order of dissolution plaintiffs appeal to this court.

Section 12, subdivision 2, chapter 79, Compiled Statutes of 1899, relative to the annual meeting of a school district, provides: "The legal voters may also, at such [annual] meeting, determine the number of mills, not exceeding ten mills on the dollar of assessed valuation, which shall be expended for the building, purchase, or lease of school house in said district, when there are no bonds voted for such purpose, which amount shall be reported levied and collected as in the preceding section: *Provided*, that the aggregate number of mills voted shall not exceed twenty-five (25) mills."

On the hearing, evidence was submitted by the plaintiffs tending to establish the fact that the school building then in use was a well built, well preserved structure, and sufficient in all respects for the needs of the district. From the evidence, it may be said that the building had been in use for school purposes from twenty-three to twenty-five years; that it was a well built structure, had been repaired and kept in fair condition, and, as expressed by several witnesses, compared favorably with other schoolhouses throughout the county. It was provided with modern appliances, such as seats, desks, blackboards, etc., and had connected with it outbuildings

common to schoolhouses generally. There is some question whether the schoolhouse has sufficient capacity to accommodate the children of school age in the district; in fact, when there is a full attendance, it has not; but it appears to be reasonably comfortable and commodious for those usually attending. That it has deteriorated with age; is, in a degree, in a state of decay, and is not a modern building, is also apparent. The district comprises a settlement of thrifty, and well-to-do people, and much valuable real and other property is situated therein. A modern and more commodious school building, we think, would not be an unreasonable desire or vain ambition on the part of any of the patrons of the school.

It is urged that the levy complained of is unjust and oppressive, and was made because of a failure on the part of the electors to relocate the school site. The sentiment for relocation favored the removal of the school building near to a small railroad station located in the school district, but some distance from the site of the present building. A two-thirds vote being required for that purpose, and that number not voting in the affirmative, the motion was declared lost. On motion to levy the building tax, it appears that out of about fifty voters, thirty favored the motion and twenty opposed it. We are disposed to the opinion that the question of relocating the site, and that of constructing a new building, were, independently of each other, within the discretion of the electors, and that favorable action upon the former was not a necessary condition to favorable action upon the latter. The question of constructing a new building was one proper to be determined in either event, with or without a change of site, followed by a levy as provided by statute. There seems to be no question as to the legality of the meeting at which the tax was voted, the regularity of the proceedings, or the authority of the electors present, in any proper case, to levy such a tax. In Cooley, Taxation [1st ed.], page 247, the author

says: "In voting taxes all the local bodies act in a political capacity, and their action is to be favorably construed, and not to be overruled or set aside by judicial or any other authority, so long as they keep within the limits of the power bestowed upon them." And on page 249: "It is always to be assumed that all these inferior municipalities have decided wisely and well upon the matters of discretion submitted to them, and it is incompetent anywhere to attack the validity of their action upon the ground that the facts and circumstances which were laid before, and which surrounded them, did not call for the conclusion which they reached." In the case of *Wharton v. School Directors*, 42 Pa. St., 358, 364, where an action was brought to restrain the levy of a tax regularly voted, the writer of the opinion pertinently says: "Most of our tax laws entitle the citizen to a hearing before he is obliged to pay; not to a judicial hearing, indeed, but to an appeal to some special tribunal, generally the county commissioners, but the school law gives no such appeal. This is a reason why the ear of the courts should be open to well-founded complaints on the part of the citizen; but when he has no irregularity, no neglect of duty, no excess of authority to complain of—nothing, indeed, but an indiscreet exercise of a clearly granted discretion, he will vex the judicial ear in vain, for the judicial arm can redress no such wrong." To the same effect is *In re Powers*, 52 Mo., 218; *Jenkins v. Inhabitants of Andover*, 103 Mass., 94; *Eddy v. Wilson*, 43 Vt., 362.

The legislature has vested in the electors of a school district the power and authority to levy a tax for building purposes. It has limited and thrown restrictions around their actions regarding such matters for the protection of all taxpayers, and to prevent unjust and oppressive levies. In the exercise of the powers and authority given, and within the limitations defined by statute, the courts can not interfere solely on the ground that such action may be regarded as unwise or improvi-

dent, or that conclusions have been reached, which, by others, may be deemed improper under the conditions existing, and circumstances surrounding the actions complained of. The ruling complained of is in conformity with law, and is affirmed. Judgment accordingly.

AFFIRMED.

RUST-OWEN LUMBER COMPANY, APPELLANTS, V. ANNIE R. HOLT AND ISAAC J. HOLT, APPELLEES.

FILED MARCH 21, 1900. No. 9,184.

1. **Mechanic's Lien:** CONTRACTUAL RELATIONS. A mechanic's lien in favor of a principal contractor grows out of the contractual relations between the owner of the property improved, or his authorized agents, and such principal contractor, and the right thereto is based upon contract and for the purpose of securing debts due thereunder.

2. ———: STATUTE: LAND OF MARRIED WOMAN: CONTRACT WITH HUSBAND. Under our statute, which provides that "any person who shall perform any labor or furnish any material for the erection of any dwelling house, by virtue of a contract or agreement, expressed or implied, with the owner thereof, shall have a lien to secure the payment of the same upon such house and the lot of land upon which the same shall stand, a mechanic's lien can not be created upon the land of a married woman for work done or material furnished in improving such lands under a contract with her husband, where the husband acts merely for himself.

3. **Agency of Husband:** QUESTION OF FACT NOT PRESUMED FROM MARITAL RELATION. Whether or not the husband is the agent of the wife, is a question of fact to be determined as other like questions, and will not be presumed from the marital relations alone.

4. ———: WIFE'S KNOWLEDGE: MERE FAILURE TO DISSENT: INTENTION TO BIND HER REAL ESTATE. The mere fact that the wife has knowledge of the construction by her husband of a building on her property does not of itself necessarily establish the agency of her husband with authority to charge such property with a lien for the material used thereon; nor will her mere failure to dissent from the proposed transaction, import an intention to bind her real estate to the payment of the debt.

5. **Family Residence:** WIFE'S LAND: CONSTRUCTION BY HUSBAND. From the occupation by the wife with her husband of a build-

ing as a family residence, constructed by the husband on the wife's land, a conclusive presumption of ratification of the husband's acts does not thereby arise, so as to make effective a mechanic's lien, where none theretofore legally attached. At most, it is only a circumstance, to be considered with other facts and circumstances for the purpose of determining the question of the alleged ratification.

APPEAL from the district court of Gage county. Heard below before LETTON, J. *Affirmed.*

E. N. Kauffman and *A. D. McCandless*, for appellants:

When material is furnished for the erection of a dwelling house, upon the separate property of the wife, upon the order or request of the husband, with the wife's knowledge and consent, the material-man may have a lien for the material furnished and used in the erection of said dwelling house. *Burdick v. Moon*, 24 Ia., 418; *Rand v. Parker*, 73 Ia., 396; *Kidd v. Wilson*, 23 Ia., 464; *Thompson v. Shepard*, 85 Ind., 352; *North v. La Flesh*, 73 Wis., 520; *Heath v. Solles*, 73 Wis., 217; *Wheaton v. Trimble*, 145 Mass., 345; *Einstein v. Jamison*, 95 Pa. St., 403; *Dearie v. Martin*, 78 Pa. St., 55.

Mrs. Holt ratified the acts of her husband and is now estopped to deny his authority to contract these debts. *Schwartz v. Saunders*, 46 Ill., 18; *Higgins v. Ferguson*, 14 Ill., 269; *Greenleaf v. Beebe*, 80 Ill., 520; *Donaldson v. Holmes*, 23 Ill., 85; *Taylor v. Gilsdorff*, 74 Ill., 354; *Wheeler v. Hall*, 41 Wis., 447; *Wheeler v. Scofield*, 67 N. Y., 311; *Hackett v. Badeau*, 63 N. Y., 476; *Conklin v. Bauer*, 62 N. Y., 620.

L. W. Colby, contra:

It is a settled principle that the mechanic's lien is altogether the creature of statute and has no recognition at common law; and in order to entitle a person to a lien every requirement of the statute must be strictly complied with. *Frost v. Ilsley*, 54 Me., 345; *Tilford v.*

Wallace, 3 Watts [Pa.], 141; *Ehlers v. Elder*, 51 Miss., 495; *Childs v. Anderson*, 128 Mass., 108; *Freeman v. Cram*, 3 N. Y., 305; *Copeland v. Kehoe*, 67 Ala., 594; *Barnard v. McKenzie*, 4 Colo., 251; *Wehr v. Shryock*, 55 Md., 334; *Grant v. Vandercook*, 57 Barb. [N. Y.], 165; *Rees v. Ludington*, 13 Wis., 308; *Benton v. Wickwire*, 54 N. Y., 226.

Nebraska statutes require contract with owner. The terms of the statute, being opposed to the common law and to common right, as clearly appears from the numerous authorities cited, must be strictly complied with and should be strictly construed. *Cook v. Heald*, 21 Ill., 425; *Davis v. Livingston*, 29 Cal., 283; *Knapp v. Brown*, 11 Abb. Pr. [N. Y.], n. s., 118; *Miller v. Hollingsworth*, 33 Ia., 224; *Peabody v. Eastern Methodist Society*, 5 Allen [Mass.], 540.

The contract of a husband for materials can not in itself create a mechanic's lien upon the real estate of his wife. *Flannery v. Rohrmayer*, 46 Conn., 558; *Spinning v. Blackburn*, 13 Ohio St., 131; *Wendt v. Martin*, 89 Ill., 139; *Lauer v. Bandow*, 43 Wis., 556; *Ziegler v. Galvin*, 45 Hun [N. Y.], 44; *Kansas City Planing Mill Co. v. Brundage*, 25 Mo. App., 268; *Johnson v. Tutewiler*, 35 Ind., 353; *Copeland v. Kehoe*, 67 Ala., 594; *Barker v. Berry*, 8 Mo. App., 446; *Gilman v. Disbrow*, 45 Conn., 563; *Loomis v. Fry*, 91 Pa. St., 396; *Knott v. Carpenter*, 3 Head [Tenn.], 542; *Miller v. Hollingsworth*, 33 Ia., 224; *Washburn v. Burns*, 34 N. J. Law, 18; *Corning v. Fowler*, 24 Ia., 584; *Barto's Appeal*, 55 Pa. St., 386.

It has been very generally decided that a contract for buildings or improvements can not be implied from the wife's acquiesence in permitting them to be put upon her land on a contract with her husband, and in giving directions how they should be used and such contract be executed. *Fetter v. Wilson*, 12 Ky. [B. Mon.], 90; *Bliss v. Patten*, 5 R. I., 376; Phillips, Mechanics' Liens, sec. 101.

HOLCOMB, J.

The plaintiff, appellant, began an action in the court below, against Annie R. Holt, appellee, on an account, under a verbal contract alleged to have been entered into with Isaac J. Holt, her husband, acting as her agent, for lumber and material sold for the erection of a dwelling house on the wife's land; and sought to have a mechanic's lien decreed on the premises on which the building was erected. The husband was joined as defendant, as well as the cross-petitioner, Label, who sought to establish a like lien for a small bill of hardware—about $16—for the same building. The court found generally for the defendants Holt, and dismissed the action. From this judgment the plaintiffs and the cross-petitioner, Label, appeal to this court.

The wife was the owner of the property, an unimproved lot in the village of Wymore, upon which the building was erected, her title being evidenced by a deed duly recorded. She testified that she purchased the property with her own money, paying $100 in cash, and securing the remainder of the purchase price, $200 by a mortgage on the premises. The only substantial point of controversy is the agency or authority of the husband to charge the wife's real estate with the liens sought to be enforced.

It does not appear from the evidence whether the plaintiff relied upon its supposed right to a mechanic's lien upon the assumption that the husband owned the property, nor does it appear that any effort upon its part was made to ascertain in whom the legal title thereto rested. The original estimate introduced in evidence, among other things, says: "I have this day purchased of Rust Owen Lumber Co., the following bill of goods to be used on my lots in the erection of a building for dwelling house and for which I agree to pay $225 cash." This is signed by the husband individually, and without reference to the wife or her interest in the lots she then

owned. We think it is quite satisfactorily established by the evidence that the material was in the first instance sold to the husband on his personal account, and not as the agent of his wife. It can not be said that the husband had any express authority to obligate his wife to the payment of the account, or to charge her real estate with a lien for the improvements made by him thereon. Under the pleadings, unless an agency, express or implied, may be inferred from the facts and circumstances surrounding the transactions, the plaintiff is without a remedy as against the wife or her real property, which is sought to be charged with the lien.

It is said in *Copeland v. Kehoe*, 67 Ala., 594, 597: "A builder's or mechanic's lien is purely statutory. Its character, operation and extent must be ascertained by the terms of the statute creating and defining it. Of itself, it is a peculiar, particular, special remedy given by statute, founded and circumscribed by the terms of its creation, and the courts are powerless to take it up where the statute may leave it, and extend it to meet facts and circumstances, which they may believe present a case of equal merit, or a necessity of the same kind, as the cases or necessities for which the statute provides."

Sec. 1, chap. 54, the mechanic's lien law of this state, provides that any person who shall perform any labor or furnish any material for the erection of any dwelling house by virtue of a contract or agreement, express or implied, with the owner thereof, or his agents, shall have a lien to secure the payment of the same upon such house and the lot of land upon which the same shall stand.

A mechanic's lien in favor of a principal contractor, therefore, grows out of the contractual relations between the owner of the property improved, or his or her authorized agents, and such principal contractor, and the right thereto is based upon contract and for the purpose of securing debts due thereunder.

It is said in Boisot, Mechanics' Liens, sec. 276:

"Under statutes that give liens for work or material furnished by virtue of a contract with the owner of the land, a mechanic's lien can not be created upon the land of a married woman for work done or materials furnished in improving such land under a contract with her husband, where the husband acts merely for himself"; citing numerous authorities, among which is *Bradford v. Higgins*, 31 Nebr., 192.

From the evidence in this case, we think it may fairly be said that the wife was cognizant of the fact that her husband was engaged in the construction of the building upon the real estate owned by her; but that she took no part in the planning or construction of the building, or in the purchase of the material therefor, or in any way gave directions regarding the labor or material entering into the building. The family lived in rented property in the same town, and it appears that for most of the time the wife was unable to leave her home on account of illness. The evidence discloses that in the discussion of the subject by the husband and wife, it was understood that he was to pay for the material necessary for the building by working at his trade, that of carpenter and builder. The wife might very naturally acquiesce in having the proposed building erected by her husband to be paid for in such manner, and yet most strenuously object, if thereby her property was to be encumbered, and probably sold to satisfy the debt secured thereby. She and her husband both deny specifically that she authorized him to act for her, and say that whatever he did was on his own account. The trial court, doubtless, reached this conclusion, and, unless it is against the clear weight of evidence, the finding ought not to be overturned here, as has frequently been held heretofore. The wife's right to the control and disposition of her separate property, and to contract with relation thereto, is not to be ignored or regarded with indifference. In that respect, she stands upon an equality with all others capable of contracting. The material man may not sell to

whomsoever will buy, and then assert a lien upon real estate improved with such material, without reference to the authority of the person so purchasing to encumber the same. His rights are prescribed by statute, and he can only assert them by a compliance therewith, under a contract, expressed or implied, with the owner or her authorized agent. It is true, that a married woman, by remaining silent and acquiescing in a contract made by her husband assuming to act as her agent, and acting with her knowledge, is estopped from denying such agency. In this case, however, we find no element of estoppel. The husband did not contract as her agent, and the plaintiff was charged with notice by the public records that she was the owner of the land upon which the building was to be erected.

Whether or not the husband is the agent of the wife, is a question of fact, to be determined as other like questions, and will not be presumed from the marital relations alone. The mere fact that the wife had knowledge of the construction of the building by her husband on her property does not, in our judgment, of itself necessarily establish the agency of her husband with authority to charge such property with a lien for material used thereon; nor will her mere failure to dissent from the proposed transaction import an intention to bind her real estate to the payment of the debt. In *Ziegler v. Galvin*, 45 Hun [N. Y.], 44, 48, in a case similar to the one at bar, and in construing a like statute, the court says: "We are aware that this conclusion may result in a loss to the plaintiff and seem a hardship, inasmuch as her property has been benefited by the plaintiff's labor; but this reason cannot change the effect of the statute or be considered in construing the same. Contractors and sub-contractors must conform to its provisions, for they cannot be changed to meet the exigencies in individual cases. The wife who has a homestead coming to her through her mother may be willing, even pleased, to have her husband repair and improve the same, and

yet if she has no income or resources with which she can pay for the repairs or improvements, she might not have consented or be willing that they should be made if, in order to pay for the same, she had to submit to a sale of her homestead." The views thus expressed seem to be sound, and meet with our approval.

It is suggested that the wife ratified all of the husband's acts by occupying, with the husband, the house constructed on her land. We can not agree with counsel's contention in this respect. This is carrying the rule of ratification farther than we are willing to go. The building was intended as a family residence. The husband had obligations resting upon him as the head of the family, and it was incumbent upon him to provide them a home. As before stated, his wife could very properly consent to his constructing a building on her property for a residence, without intending thereby that he should act as her agent, or encumber her real estate, and thus entirely deprive her of it by its sale to satisfy such incumbrance.

In *Garnett v. Berry*, 3 Mo. App., 197, the syllabus reads: "Authorization or ratification of a contract to build a house on the wife's lot will not be presumed from the fact that the house was to be a residence for the wife and children, with the husband." In the opinion, says the court: "Plaintiff claims, in the present case, that the wife's authorization or her ratification of the contract may be assumed from the fact that the house was to be a residence for herself and children, with her husband. * * * But here it was no part of Mrs. Chamberlain's duty or care to provide a home for herself and her children. That was incumbent on the husband and father. The occupancy of the premises was his beneficial use, and not hers."

We do not think that from the occupation by the wife with her husband of a building as a family residence, constructed by the husband on the wife's land, a conclusive presumption of ratification of the husband's acts

thereby arises, so as to make effective a mechanic's lien, where none theretofore legally attached; at most, it is only a circumstance, to be considered with other facts and circumstances for the purpose of determining the question of the alleged ratification.

The judgment of the lower court is supported by sufficient competent evidence, and is therefore affirmed; this, however, without prejudice to a future action against the husband for the debt due on the accounts sued on.

AFFIRMED.

NEBRASKA DECISIONS.

MECHANICS' LIENS.

Eaton v. Bender, 1, 426; Ripley v. Gage County, 3, 397, McCormick v. Lawton, 449; Rogers v. Omaha Hotel Co., 4, 54; Meyers v. LePoidevin, 9, 535; Paine v. Putnam, 10, 588; Griggs v. LePoidevin, 11, 385, Hardy v. Miller, 395; Doolittle v. Goodrich, 13, 296, Scales v. Paine, 521; Great Western Mfg. Co. v. Hunter, 15, 32, Jones v. Church of Holy Trinity, 82, Buckstaff v. Dunbar, 114, Dohle v. Omaha Foundry, 436, Manly v. Downing, 637; Doolittle v. Plenz, 16, 153; Ballou v. Black, 17, 389, Foster v. Dohle, 631, Marrener v. Paxton, 634; Lepin v. Paine, 18, 629; White Lake Lumber Co. v. Stone, 19, 402, Marble v. Lumber Co., 732; Hassett v. Curtis, 20, 162; Ballou v. Black, 21, 131, Goodman v. Pence, 459; White Lake Lumber Co. v. Russell, 22, 126, Wallace v. Flierschman, 203, Hays v. Mercier, 656, Ansley v. Pasahro, 662, Hoagland v. Van Etten, 681; Harrington v. Latta, 23, 84; Colpetzer v. Trinity Church, 24, 113; Davenport v. Jennings, 25, 87, Shropshire v. Duncan, 485; Stewart-Chute Lumber Co. v. Missouri P. R. Co., 28, 39, Irish v. Lundin, 84, Irish v. Pheby, 231, Knutzen v. Hanson, 591, Howell v. Wise, 756, Howell v. Hathaway, 807; Morris v. Willits, 29, 569; McPhee v. Kay, 30, 62,

Bradford v. Peterson, 96, Bohn Mfg. Co. v. Kountze, 719, Millsap v. Ball, 728; Bradford v. Higgins, 31, 192, Pickens v. Plattsmouth L. & Inv. Co., 585; Windmill Co. v. Shay, 32, 19, Irish v. Pulliam, 24, Hibbard v. Talmage, 147, South Omaha Lumber Co. v. Central Inv. Co., 529; Stewart-Chute Lumber Co. v. Missouri P. Ry. Co., 33, 29, Pomeroy v. White Lake Lumber Co., 240, Idem v. Idem, 243, Hoagland v. Lusk, 376, Bank v. Bonacum, 820, Johnson v. Blazer, 841, Green v. Sanford, 34, 363, Jones v. Sherman, 452, Irish v. O'Hanlon, 786; Livesey v. Brown, 35, 111, Gray v. Elbling, 278, Herbert v. Keck, 508; Bloomer v. Nolan, 36, 51, Burlingim v. Cooper, 73, Henry & Coatsworth Co. v. McCurdy, 863; Henry & Coatsworth Co. v. Fisherdick, 37, 207, Pickens v. Plattsmouth Inv. Co., 272, Smith v. Parsons, 677, Noll v. Kenneally, 879; Waterman v. Stout, 38, 396, Holmes v. Hutchins, 601, Kilpatrick v. Kansas City & B. R. Co., 620, Sheehy v. Fulton, 691, Badger Lumber Co. v. Mayes, 822, Weir v. Barnes, 875; Byrd v. Cochran, 39, 109, Wakefield v. Latey, 285, Hoagland v. Lowe, 397, Burlingim v. Warner, 493; Zarrs v. Keck, 40, 456, Ballard v. Thompson, 529, Chappell v. Smith, 579; Scroggin v. National Lumber Co., 41, 195, Jarrett v. Hoover, 231, Van Dorn v. Mengedoht, 525, Cain v. Boller, 721, Bell v. Bosche, 853; Garlichs v. Donnelly, 42, 57, Barnacle v. Henderson, 169, Pickens v. Polk, 267, Bohn Sash & Door Co. v. Case, 281, Moore v. Vaughn, 696, Patrick Land Co. v. Leavenworth, 715, Union Stock Yards State Bank v. Baker, 880; Wells v. David City Improvement Co., 43, 366, Buchanan v. Selden, 559, Chapman v. Brewer, 890; Hines v. Cochran, 44, 12, Omaha Consolidated Vinegar Co. v. Burns, 21, Badger Lumber Co. v. Holmes, 244, Weir v. Thomas, 507, Pearsall v. Columbus Creamery Co., 833, Central Loan & Trust Co. v. O'Sullivan, 834; Blazer v. Rogner, 45, 588; Hansen v. Kinney, 46, 207, Specht v. Stevens, 874; Monroe v. Hanson, 47, 30, Livesey v. Hamilton, 644; Fuller v. Pauley, 48, 138, Drexel v. Richards, 322, Idem v. Idem, 732; Omaha Con-

solidated Vinegar Co. v. Burns, 49, 229, Cummings v. Emslie, 485, Rogers v. Central Loan & Trust Co., 676; Drexel v. Richards, 50, 509, Omaha Fire Ins. Co. v. Thompson, 580, Seieroe v. Homan, 601; Chicago Lumber Co. v. Anderson, 51, 159, Hersh v. Carmen, 781; Pardue v. Missouri P. R. Co., 52, 201, Western Cornice & Mfg. Works v. Leavenworth, 418, Cummins v. Vandeventer, 478, Frost v. Falgetter, 692, Nye v. Berger, 758; Wakefield v. Van Dorn, 53, 23, Congdon v. Kendall, 282, West v. Reeves, 472, U. S. Wind Engine & Pump Co. v. Drexel, 771; Goodwin v. Cunningham, 54, 11, Bogue v. Guthe, 236, Portsmouth Savings Bank v. Riley, 531; Badger Lumber Co. v. Holmes, 55, 473, Calkins v. Miller, 601; Watkins v. Bugge, 56, 615; Grand Island Banking Co. v. Koehler, 57, 649; Fiske v. School District, 58, 163, Henry & Coatsworth Co. v. Halter, 685; Miller v. Neely, 59, 539, Bullard v. Groff, 783.—REPORTER.

ROBERT MCCLELLAND V. CITIZENS BANK.

FILED APRIL 4, 1900. No. 9,195.

Contract: CHATTEL MORTGAGE SALE: NOTE: PUBLIC POLICY. A contract whereby one agrees not to bid at a chattel mortgage sale is contrary to public policy, and a note given in pursuance of such contract is unenforceable.

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

Warren Switzler, for plaintiff in error:

The note having been given in pursuance and fulfillment of an illegal contract is invalid, and will not be enforced. The note sued upon in this case represents the consideration of a deal whereby the holder thereof agreed to refrain from bidding at a public statutory sale under a chattel mortgage. Such a note can not be en-

forced. The court will assist neither party to such transactions, but leave them where it finds them. *Phippen v. Stickney*, 3 Met. [Mass.], 384.

George W. Shields, contra:

It is not enough, however, in order to avoid this obligation, that the note sued upon grew out of or had some remote connection with the illegal transaction; it must be the transaction itself.

In *Phippen v. Stickney*, 3 Met. [Mass.], 384, it appears that Stickney and Phippen entered into a written contract whereby Stickney was to purchase certain land to be sold at auction, the property to be purchased, however, for himself and Phippen. There was no contract that Phippen was not to bid. Stickney refused upon request to convey to Phippen, and Phippen sued for damages. The court, after a review of the authorities, said, that a contract may be made whereby one of several may purchase property sold at auction, for the benefit of all, and that unless fraud in fact is intended such a contract is not void, and Phippen was permitted to recover.

NORVAL, C. J.

In 1899 one Robert McClelland owned certain lots in the city of Omaha, which he leased to John W. Reece, who erected some buildings thereon. In the lease, Reece agreed to pay certain rent for said lots, at stated intervals. The lease contained the following clause: "At the termination of this lease, John W. Reece may remove at his own expense any and all buildings now in his possession or that he may have erected on said premises, providing all his obligations to Robert McClelland have been discharged." Reece gave a chattel mortgage on the buliding to the Citizens' Bank, the plaintiff in the lower court, to secure the payment of a note for $1,000 which he owed the bank, and afterwards sold the buildings to Nash & Boyd, they giving him a note for $1,016

as part of the purchase price, and agreeing to pay McClelland certain back rent unpaid by Reece and to pay McClelland rent in the future; and Reece agreed to take up the $1,000 note held by the bank. Afterwards, Nash & Boyd having failed to pay the rent, McClelland purchased the buildings from them, as consideration therefor, cancelling the rent account and agreeing to protect them against the $1,016 note given by them to Reece, which latter note was in the hands of the bank as collateral security for the $1,000 note of Reece to the bank, which remained unpaid. McClelland and the bank were in dispute as to who had priority of right in the buildings; the bank claiming a first lien thereon by virtue of its chattel mortgage; McClelland disputing this, and asserting rights under the lease and contracts with Reece, and Nash & Boyd, superior to those of the bank. Finally, in order to settle the dispute without litigation, it was agreed between McClelland and the bank that the latter should foreclose its chattel mortgage on the buildings, at which sale it would refrain from bidding; that McClelland should bid in the buildings at such sale, paying the bank a certain sum therefor, the amount to be paid, depending on certain contingencies not necessary to recite; and that the bank would then secure title to the $1,016 note of Nash & Boyd and deliver the same to McClelland without cost to him. Accordingly, sale was had under the chattel mortgage, and the property was bid in by McClelland for $500, for which amount he gave the bank his promissory note. After this note became due, suit was instituted by the bank upon it against McClelland, and he answered admitting the execution and delivery of the note, but setting up as a defense thereto the agreement of the bank not to bid at the chattel mortgage sale, also the agreement to turn over to him the $1,016 note of Nash & Boyd, and failure of the bank so to do; and, further, that although it had agreed not to bid at such sale, that it, in fact, did procure a third

party to bid against him thereat, although he was not aware of such fact until long after such sale.

At the trial in the district court, after proof of the matters set up in the answer, the court instructed the jury to return a verdict in favor of the plaintiff bank, and afterwards overruled defendant's motion for a new trial, and duly entered judgment on said verdict, from which judgment defendant comes to this court on petition in error. In this instruction to the jury, the court was in error. The contract between the bank and McClelland, wherein it agreed not to bid at such foreclosure sale, was void as against public policy. *McCann v. McLennan*, 3 Nebr., 25; *Hobbie v. Zaepffel*, 17 Nebr., 536; *Atlas Nat. Bank v. Holm*, 71 Fed. Rep., 489; Story, Equity Jurisprudence, sec. 293; *Doolin v. Ward*, 6 Johns. [N. Y.], 194; *Phippen v. Stickney*, 3 Met. [Mass.], 384; *Thompson v. Davies*, 13 Johns. [N. Y.], *112; *Gibbs v. Smith*, 115 Mass., 592.

It is argued there was, in the first place, no consideration for the agreement between the bank and McClelland that it would not bid at the foreclosure sale, the bank having, as a matter of law, a prior lien on the buildings in question; also, that the note was not given in consideration of such agreement, but for the buildings purchased at the sale; that the bank did in fact procure a bidder to compete with McClelland at such sale, although unknown to the latter, which amounted to a repudiation of this unlawful agreement on the part of the bank; therefore the defendant should be held liable on the note. The arguments are plausible, but are nothing more than refined distinctions whereby, if adopted, almost all agreements of that nature can be avoided by the party interested in reaping benefits therefrom. The only safe course for courts to pursue is to set the seal of disapproval upon all transactions whereby competition at sales of this character is attempted to be stifled. The note in suit is void and unenforceable in the hands of the payee.

It follows that the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMAS MURRAY V. ROLANDUS ROMINE.

FILED APRIL 4, 1900. No. 9,196.

1. **Ejectment:** ADVERSE POSSESSION: GENERAL DENIAL. In ejectment, proof of adverse possession is admissible under a general denial.
2. **Limitation:** EVIDENCE. A verdict based upon evidence sufficient to establish a holding of possession of property adversely, openly, notoriously, exclusively and continuously for a period exceeding ten years prior to the commencement of an action, under a claim of right, will not be disturbed, although the evidence introduced to establish such fact may not be inconsistent with a holding under a claim other than that of title.
3. ———: ———: TWO ESTATES CONNECTED AND CONTINUOUS. Possession of one occupant may be tacked to that of another, if one acquired possession from the other, and the possessory estates are connected and continuous.
4. ———: ———: COLOR OF TITLE. Color of title is not essential to adverse possession.
5. ———: ———: VERBAL TRANSFER. The right of one person holding possession adversely may be transferred to another verbally.
6. ———: ———: INSTRUCTIONS. Instructions examined, and *held* to have been properly given.

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

I. J. Dunn, for plaintiff in error:

It is well settled that the objection that the action is barred by the statute of limitations, must be raised either by demurrer or answer, or it will be waived. *Sturges v. Burton*, 8 Ohio St., 215; *McKinney v. McKinney*, 8 Ohio St., 423.

If the facts upon which the statute of limitations is predicated do not appear in the petition, but such plea is

interposed as a defense, the time when the statute began to run must be definitely stated; and a mere allegation that the action is barred is not sufficient.

T. J. Mahoney, also for plaintiff in error.

Wright & Thomas, contra:

Color of title not necessary. To defeat ejectment, possession adverse, open, notorious, exclusive and continuous is sufficient. *Gatling v. Lane*, 17 Nebr., 77; *Haywood v. Thomas*, 17 Nebr., 237; *Omaha & R. V. R. Co. v. Rickards*, 38 Nebr., 847.

Possession may be transferred orally. No deed is required, and no color of title. The possession can be tacked. *Weber v. Anderson*, 73 Ill., 439; *Smith v. Chapin*, 31 Conn., 530; *Chilton v. Wilson's Heirs*, 9 Humph. [Tenn.], 399; *Overfield v. Christie*, 7 Serg. & Raw. [Pa.], 173; *Paine v. Skinner*, 8 Ohio, 159; *Yetzer v. Thoman*, 17 Ohio St., 130; *Menkens v. Blumenthal*, 27 Mo., 198; *Cunningham v. Patton*, 6 Barr [Pa.], 355; *Marr v. Gilliam*, 1 Cold. [Tenn.], 511.

E. C. Page, also for defendant in error.

NORVAL, C. J.

This action is one of ejectment commenced in the district court of Douglas county by Thomas Murray against Rolandus Romine to contest the title to certain lands situate in that county. The petition contained the averments usual in actions of that nature. The answer was a general denial of the allegations of the petition; and, on the trial, defendant was permitted to introduce evidence over the objections of plaintiff tending to prove adverse possession for a term exceeding ten years.

It appears from the evidence that more than ten years prior to the commencement of the action, one H. M. Gillespie entered upon the tract in controversy, which is adapted exclusively for grazing. For one or two years he herded cattle upon it, and afterwards

fenced a portion thereof, and, during the time of his occupancy, pastured cattle on it in the grass season, cut hay from some portions, and excluded all others therefrom. Afterwards, for a valuable consideration, he transferred his possession to the defendant, also selling him the fence. Defendant, ever since, has occupied the land as his own, inclosed it and other land with a fence, except on one side thereof, which abuts upon the Platte river, the latter acting as a bar to the ingress or egress of persons or stock. The agreement by which the possession of Gillespie was transferred to defendant was oral. To complete the bar of the statute, it was necessary to tack the possession of Gillespie to that of defendant. There was a verdict and judgment for the latter, from which judgment plaintiff comes to this court on petition in error. Several errors are alleged, which will be noticed so far as it is considered necessary to a proper decision of the cause.

It is claimed that the court erred in permitting evidence of defendant tending to prove adverse possession without having pleaded the statute of limitations. Generally, the statute, to be available as a defense, must be pleaded, but an exception to this rule occurs in cases of ejectment, the reason for which is set forth in the case of *Staley v. Housel*, 35 Nebr., 160, it being there held that any defense is available under a general denial in an action of ejectment. Under the rule as there stated, it was not necessary that the statute be pleaded, hence no error occurred in permitting evidence of adverse possession to be introduced under the general denial contained in the answer.

It is also claimed that the defense of adverse possession was not established on the trial. We do not deem it necessary to review the evidence, but it is sufficient to say that it discloses that Gillespie, for some years prior to the time he transferred possession to the defendant, was in the actual, open, notorious and exclusive possession of the land; that in one way or another he occupied

it, either by herding cattle thereon, or by cutting grass upon it and fencing a portion of the tract, and did so adversely occupy it to the exclusion of all others. This was certainly evidence of adverse possession sufficient, if believed by the jury, to establish a claim of ownership in Gillespie, although it would not have been inconsistent with his holding the land under a claim of a different nature than that of ownership. The same may be said of the holding of the defendant from the time the possession was transferred to him. There was sufficient evidence of adverse possession to go to the jury, and as the weight thereof was for the triers of fact, we are not disposed to disturb the verdict. *Lantry v. Parker*, 37 Nebr., 353. It is also urged that, as defendant claims to have obtained from Gillespie the possession, the holding under the latter can not be tacked to that of defendant to make the term of holding sufficient as a defense to the cause of action of the plaintiff. We are persuaded that, at the time the transfer was made, the possession was all that Gillespie had, or that any one holding under the claim of right by adverse possession could have, until the lapse of the statutory period, so that by the transfer of the possession of Gillespie to defendant, the latter was entitled to tack the rights of the former to those of his own after such transfer, as the holding by the two was continuous, connected and uninterrupted. *Stettnische v. Lamb*, 18 Nebr., 619; *Lantry v. Wolff*, 49 Nebr., 374. Nor is it necessary that the holding of either Gillespie or defendant should have been under color of title, as has been decided by this court a number of times. *Gatling v. Lane*, 17 Nebr., 77; *Haywood v. Thomas*, 17 Nebr., 237; *Omaha & R. V. R. Co. v. Rickards*, 38 Nebr., 847; *Webb v. Thicle*, 56 Nebr., 752; *McAllister v. Beymer*, 54 Nebr., 247; *Lewon v. Heath*, 53 Nebr., 707. Nor was it necessary that the transfer of possession by Gillespie to defendant should have been in writing. *Lantry v. Wolff, supra; McNeely v. Langan*, 22 Ohio St., 32. The latter case is cited by this court in *Stettnische v. Lamb, supra.*

Numerous objections are urged to the instructions, mainly based upon the theory that in order to show adverse possession, defendant must have pleaded the statute of limitations. It has been heretofore shown that this defense is available in actions of ejectment without such plea. In other respects complained of, an examination of the instructions convinces the court that they stated the law fairly and clearly, and that no error occurred in giving any of them.

No reversible error having occurred on the trial, the judgment of the lower court is

AFFIRMED.

STATE, EX REL. GEORGE R. DICKINSON PAPER COMPANY, V. CUNNINGHAM R. SCOTT, JUDGE.

FILED APRIL 4, 1900. No. 11,136.

1. **Receiver:** ORDER TO SELL ASSETS. An order directing a receiver of an insolvent firm to sell assets other than real estate may not be superseded as a matter of right.

2. **Supersedeas:** DISCRETION: MANDAMUS. Mandamus will not lie to control the discretion of a court as to the allowance of a supersedeas resting in its discretion.

APPLICATION for mandamus to compel respondent to fix amount of supersedeas bond. *Writ denied.*

Holmes & Morgan and *H. S. Crane*, for relator.

A. N. Ferguson, contra.

NORVAL, J.

On August 10, 1893, the partnership or firm of Ackerman Bros. & Heintze was doing business in the city of Omaha, and on said day a suit was instituted in the district court of Douglas county by E. C. Ackerman and A. M. Heintze, two of the partners, against G. A. Ackerman, the other member of the firm, for an accounting and winding up of the business of the partnership. Thereafter John H. F. Lehman was appointed by the court re-

ceiver to take charge of the property and assets of the firm and collect the debts due it, and hold the same subject to the order of the court. The Carpenter Paper Company and the George R. Dickinson Paper Company, creditors of the firm of Ackerman Bros. & Heintze, attached a portion of the personal property of the latter and subsequently each attaching creditor obtained a judgment against said firm for the amount of its debts and an order of sale of the attached property. The above named creditors intervened in the said suit of *Ackerman v. Ackerman*, and thereafter a decree was entered therein which directed the receiver to sell the assets belonging to said firm on May 29, 1894. The sale did not take place until June 18, 1894, which sale was confirmed by the court, and the above named interveners prosecuted an appeal to this court which resulted in a judgment of reversal being entered at the September term, 1896. *Ackerman v. Ackerman*, 50 Nebr., 54. By that decision the sale of the assets by the receiver was held invalid on the ground that the sale occurred on a date other than that fixed by the decree. Subsequently on December 2, 1899, the district court entered of record an order *nunc pro tunc* in said cause as of and before June 18, 1895, the date of the receiver's sale, and after May 29, 1894, which authorized and directed the receiver to sell the assets of Ackerman Bros. & Heintze, on June 18, 1894. The George R. Dickinson Paper Company excepted to said order, and moved the court to fix the amount of the supersedeas bond for an appeal, which motion was denied. This is an application for a peremptory mandamus to compel the respondent, the then presiding judge, to fix the amount of a supersedeas bond.

The provisions relative to supersedeas on appeals in equity causes are contained in section 677 of the Code of Civil Procedure, which reads as follows:

"Sec. 677. No appeal in any case in equity, now pending and undetermined, which shall hereafter be brought shall operate as a supersedeas, unless the appellant, or appellants, shall within twenty days next after the rendi-

tion 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: *First*—When the judgment, decree, or final order appealed from, directs the payment of money, the bond shall be in double the amount of the judgment, decree, or final order, conditioned that the appellant, or appellants, will prosecute such appeal without delay, and pay all condemnation money and costs which may be found against him, or them, on the final determination of the cause in the supreme court. *Second*—When the judgment, decree, or final order directs the execution of a conveyance or other instrument, the bond shall be in such sum as shall be prescribed by the district court, or judge thereof in vacation, conditioned that the appellant, or appellants, will prosecute such appeal without delay; and will abide and perform the judgment or decree rendered, or final order which shall be made by the supreme court in the cause. *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. *Fourth*—When the judgment, decree, or final order dissolves or modifies an order of injunction, which has been, or hereafter may be granted, the supersedeas bond shall be in such reasonable 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 pay all costs which may be found against him, or them, on the final determination of the cause in the supreme court; and such supersedeas bond shall stay the doing of the act or acts, sought to be restrained by the suit, and continue such injunction in force, until the case is heard and finally determined in the supreme court. The undertaking given upon the allowance of the injunction shall be

and remain in effect, until it is finally decided whether or not the injunction ought to have been granted."

The order of the district court which relators desired to supersede does not direct the payment of money, nor the execution of a conveyance or other instrument, nor does it dissolve or modify an order of injunction, hence can not be superseded under subdivisions one, two and four of said section 677. This is plain. The third subdivision of the section provides for the giving of a supersedeas bond when the judgment, decree or order directs the sale or delivery of possession of real estate. It is perfectly clear that relator can not invoke the provisions of said subdivision, inasmuch as it does not appear that the order in question either directs the sale or delivery of possession of real property to any one. The conclusion is therefore irresistible that the statute does not give the relator the absolute right to a supersedeas. *State v. Fawcett*, 58 Nebr., 371, cited by relator, is not in point here, since in that case the order sought to be superseded directed the sale of real estate, and came within the express terms of the third subdivision of section 677 quoted above.

In *State v. Fawcett, supra*, it was held that mandamus will not lie to control the discretion of a court as to allowance of a supersedeas resting in its discretion. The record fails to disclose any abuse of discretion by the respondent in refusing a supersedeas, and the writ is denied.

WRIT DENIED.

PATRICK WELSH V. STATE OF NEBRASKA.

FILED APRIL 4, 1900. No. 11,028.

1. **Change of Venue:** CONTINUANCE: DISCRETION OF COURT. Application for change of venue, or a continuance is addressed to the sound discretion of the court; and its ruling thereon will not be disturbed, where no abuse of discretion is disclosed.

2. **Code of Civil Procedure:** SPECIAL TERM: SUMMONING JURORS. Whenever at any general or special term of the district court,

for any cause, there is no panel of petit jurors, the court may, under section 664 of the Code of Civil Procedure, direct the sheriff to summon persons having the qualifications of jurors to appear and serve as petit jurors.

3. **Rape:** COMPLAINT OF PROSECUTRIX. In a prosecution for rape it is competent for the state to prove that the prosecutrix made complaint of the injury to others immediately after the commission of the alleged offense.

4. **Examination of Witnesses:** DISCRETION OF COURT. The allowing of leading questions to be put to a witness rests in the sound discretion of the court.

5. **Instruction:** NO ERROR. It is not error to assume in an instruction the existence of a collateral fact established by uncontroverted evidence and which tends to prove one of the constituent elements of a crime.

6. ———: PHYSICAL CONDITION OF PROSECUTRIX. In a prosecution for rape, it is not reversible error to inform the jury that they are at liberty to take into consideration the physical condition of the prosecutrix at the time of the alleged assault, in arriving at their verdict.

7. **Impeachment of Verdict:** AFFIDAVIT OF JURORS. The affidavit of jurors relating to the arguments or statements made by them while deliberating upon their verdict may not be received to impeach the verdict.

ERROR to the district court for Holt county. Tried below before WESTOVER, J. *Affirmed.*

N. D. Jackson, for plaintiff in error, argued as to change of venue that the constitution guarantees to every person accused of crime an impartial trial, and our legislature has provided a way, when a community has become aroused and strong prejudice created against one so accused, for such a trial in an unprejudiced community. There is no rule better settled than the one that when the public sentiment of a whole community is aroused its effect upon a jury is to prevent a calm and dispassionate inquiry into the merits of the controversy; such is the rule in this state. *Richmond v. State*, 16 Nebr., 391.

As to special venire: To give effect to the provision of our law, which permits the calling of a special term of

court, and requires the judge to direct whether a jury shall be summoned, requires the order to be made at least fifteen days before the first day of the session, because a jury can only be drawn for the special term in the same manner as for the regular term. *McElvoy v. State*, 9 Nebr., 157.

As to statements of prosecutrix, counsel cited *Prince v. Samo*, 7 Ad. & El. [Eng.], 627.

As to instructions, the court, in its charge, assumed absolutely that Mrs. Yonke had recently given birth to a child. It is true that Mrs. Yonke had testified to having given birth to a child about five weeks previous to the time of the alleged assault, but the jury were at liberty to disbelieve the witness, and to find that portion of the testimony untrue. The court can not assume, in the trial of a criminal case, any fact to have been proven, even where there is no conflict in the testimony. *Heldt v. State*, 20 Nebr., 499.

The rule is well settled in this state that in charging a jury undue prominence should not be given to one branch or item of evidence by particular mention to the disparagement of the rest. *Markel v. Moudy*, 11 Nebr., 213.

R. R. Dickson, also for plaintiff in error.

Constantine J. Smyth, Attorney General, and *Willis D. Oldham, Deputy*, for the state.

The case of *McElvoy v. State*, 9 Nebr., 157, and *Clark v. Saline County*, 9 Nebr., 516, are the leading cases relied upon by counsel for the prisoner in support of the alleged error in overruling the motion to quash the panel of jurors. The court by an examination of *McElvoy v. State, supra*, will notice that the language of the learned justice who rendered that opinion, both in the syllabus of the case and in the opinion itself, was pure dicta. That the question was not before the court for determination under the rules of the practice in the supreme court, and that the conclusion reached in that case was not based

on that assignment of error at all, and, consequently the obiter thesis of the learned justice who wrote the opinion, which tended to transform this molehill of a technicality into a majestic mountain of statutory right, is not a binding precedent for this court to follow. *Clark v. Saline County, supra*, is but a repetition of these same obiter suggestions of the same jurist. In *Barton v. State*, 12 Nebr., 260, 265, also relied upon by counsel for the prisoner, the decision was adverse to the state because the public prosecutor demurred to the plea in abatement, and thereby admitted the truth of the allegations contained in said plea. This plea was held by Judge COBB, who wrote the opinion, to "contain all of the necessary allegations of a good plea in abatement, under a reasonably liberal construction, but also that it sufficiently negatives the suggestion, that possibly the grand jury that found the indictment was procured under the provisions of section 664." And further on in that opinion the judge says, "If it were true that the grand jury in question was in fact summoned under the extraordinary provisions of section 664, then we think that it was the duty of the district attorney under the provisions of section 446, of chapter 42, of the Criminal Code, to have replied to the said plea setting up such fact, rather than to have demurred generally, as he did, thereby admitting the facts of the plea if well pleaded."

The cause was argued orally by *N. D. Jackson*, for the plaintiff, and by *Willis D. Oldham*, for the state.

Jackson, for the prisoner, argued that upon the record it was apparent that the prisoner could not have a fair trial in Holt county, citing *Richmond v. State*, 16 Nebr., 391.

Oldham said that the case of *Richmond v. State* was a judicial maverick. No one could interpret its meaning. By and by some court would lariat it, and place a judicial brand upon it. God speed the day! Some people thought that a change of venue was one of the inaliena-

ble rights guaranteed by *Magna Charta*. It was nothing of the kind. It was a part of the procedure in a criminal trial controlled by the *nisi prius* court. That court is only answerable for an abuse of discretion. Holt county was larger than the whole state of Rhode Island. The just indignation of a few settlers in the immediate neighborhood of the outrage argued nothing for a widespread prejudice. *Oldham* read from the affidavit of Frank Campbell, in the record.

NORVAL, C. J.

The defendant, Patrick Welsh, was tried in the district court of Holt county on an information charging him with having, on the night of August 23, 1899, committed the crime of rape on one Katie Yonke; and from the judgment of conviction comes to this court on error. The crime was a most revolting one. We do not deem it necessary to enter into a detailed statement of the facts, but shall confine ourselves to the questions of law urged by defendant as grounds for reversal. No regular term of the district court was to be held in Holt county for some time after the offense was committed, so, at the request of numerous citizens of the county, the Hon. M. P. Kinkaid, one of the judges of the judicial district, called a special term of court for that county, to be held on the 5th day of September, 1899, for the trial of criminal cases in which felonies were charged, and for the hearing and disposition of *ex parte* matters in civil causes. By this order he also directed the clerk of the court to issue a venire to the sheriff requiring him to select and notify to appear and serve as petit jurors at said term, twenty-four men from the body of Holt county, having the qualifications of jurors, to appear on September 7th, 1899. No jury was drawn on this order, and no regular panel had been selected, so, when the court met, no jury was in existence or appeared. The court met pursuant to this order, whereupon defendant filed a motion for a change of venue, on the ground of local prejudice and

bias, which motion was supported by affidavits. These were met by a counter showing of the state. This motion was overruled, and a trial was held in Holt county. After this motion was denied, the presiding judge was called away from the county on some urgency, and the Hon. W. H. Westover, another judge of the same judicial district, took his place upon the bench, and conducted the further proceedings in the case. There was submitted to the court an application of the defendant for a continuance of the cause until the next regular term of court to be held in the county, which motion was denied and an exception to the ruling entered. Thereupon, on September 13th Judge Westover issued an order to the sheriff, reciting, substantially, that the court was in session, that there was no jury present, none having been drawn or summoned; and directing the sheriff to summon twenty-four good and lawful men having the qualifications of jurors to appear before said court on September 19th, 1899, to serve as petit jurors at said special term. Pursuant to said order, the sheriff duly summoned twenty-four persons as jurors, who duly appeared, and from this panel was selected the jury which tried and convicted the defendant. Before trial, defendant filed his motion asking the court to quash the panel, upon the following grounds:

1, Because the jury was not selected and drawn in the manner provided by law;

2, Because the persons summoned to serve as jurors were not persons whose names were selected by the board of county supervisors of Holt county as required by law;

3, Because the persons summoned to serve as jurors were not persons whose names were drawn by lot by the clerk of the district court, or his deputy, by the sheriff or his deputy, or by the coroner or by either of such officers out of the box or receptacle as required by law;

4, Because the persons summoned to serve as such jurors have appeared solely at the request of the sheriff

of said county and are not persons whose names are contained in any order issued by the clerk of the district court of said county commanding the sheriff to summon the persons therein named to serve as jurors;

5, Because no jury has been selected, drawn and summoned for attendance at this term of court;

6, Because the jury in attendance at this term of court is not drawn from the body of the county, nor does such jury contain a proportionate number from each precinct in the county.

This motion was overruled by the court, and an exception noted.

On the rulings of the court on the motions for change of venue, for continuance and to quash the panel, defendant predicates error, as also on rulings of the court in the introduction of evidence, in the giving of one instruction, and on alleged misconduct on the part of certain members of the jury while deliberating on the verdict. These alleged errors will be considered in their order, at such length as the court deems important.

Defendant, in support of his motion for a change of venue, filed numerous affidavits of persons residing in the town of O'Neill and in various other parts of the county; also, copies of the different newspapers published in said county. From these affidavits it would appear that a considerable degree of excitement over the alleged crime existed in the county, particularly at and in the vicinity of the county seat, O'Neill. Many of the affiants testified that they had heard threats of personal violence to the defendant on the part of residents of O'Neill; also, expressions of opinion that defendant was guilty of the crime charged against him, and a desire that he be convicted of it and punished to the full extent of the law; that there was an extreme degree of bias, hatred and prejudice against defendant by many of the residents of the county, and particularly in O'Neill and vicinity. The articles introduced from the newspapers, generally condemned the crime very strongly, some of them stating very pointedly the belief on the part of the

writers that the defendant was guilty of the crime and should be punished with severity. This evidence was traversed by the state, as will hereinafter more fully appear.

It is insisted by defendant's counsel that this case falls within the rule established by this court in *Richmond v. State*, 16 Nebr., 388, wherein, on affidavits filed by defendant, it was held that the trial court abused its discretion in refusing defendant's motion for a change of venue. In that case, numerous affidavits were filed from which it appeared that there was an intense feeling of bias against the accused in the town, which contained about one-fourth of the population of the county wherein the alleged crime was committed, and that, by reason of such intensity of bias, he could not obtain a fair and impartial trial in that county. In that case the state also made a counter-showing on affidavits, none of its witnesses, however, denying that there was a strong prejudice against the defendant, although many of them gave as their opinion that there was not such a feeling against him as to preclude a fair trial being had; nor could it be inferred that many of the affiants testifying for the state had as favorable opportunities to form correct estimates of public opinion as had those who made affidavits filed on behalf of defendant. On such showing, this court held that there was an abuse of discretion by the trial court and awarded a new trial.

In the case at bar the state introduced affidavits of numerous persons who seem to have had ample opportunities to ascertain, and who apparently did investigate and ascertain the public feeling both in O'Neill and in Holt county generally, relative to defendant and the crime charged against him. From them, it appears that Holt county contains an area greater than that of the state of Rhode Island, that the population thereof is near 20,000, while that of O'Neill is only about 1,200, and the total population of towns in said county being only 3,500, the remainder of the population of the county being an

agricultural one widely scattered; that very few persons who reside outside of the towns were acquainted with the case, or seemed to have any feeling in regard to the matter, such as would result in prejudice to the defendant. While many of these affiants admit that a few people in and about O'Neill may have been prejudiced against defendant, they deny that this feeling could be attributable to any large portion of the populace of the town or its vicinity, or of the county, but that the feeling of the people generally was, at the time the motion was heard, that the law should take its due course, and he be accorded a fair and impartial trial. It was also testified that while some of the residents of the town and the county were doubtless prejudiced against him, others were friendly to him; but that the general feeling was, as we have said before, that a fair and impartial trial should and could be had upon its merits. If these affidavits were true—and the lower court was judge of their truthfulness, and of the weight to be given to the evidence of those who testified—it is clear that there was ample evidence on which to base the conclusion that a very healthy condition of public opinion existed in Holt county and in O'Neill at that time, touching the administration of justice in this particular case, and that the defendant could have a fair and impartial trial, notwithstanding a small portion of the community might be prejudiced against him as an individual. It would be a sad reflection upon public opinion and the moral tone of that county, should it have been possible that a crime of the heineous character of the one charged against defendant could have been committed within its boundaries without having resulted in an almost unanimous condemnation thereof, and a desire on the part of all good citizens that its perpetrators should receive speedy justice at the hands of the courts. Nor would it be anomalous should a portion of the populace have conceived and expressed a strong prejudice and bias against the alleged criminal, particularly should the evidence be con-

vincing and clear, as appeared to be the fact in this case. But such prejudice must be so general as to convince a court that a defendant can not have a fair and impartial trial in the county where the crime is alleged to have been committed, before it is justified in ordering a change of venue. In this case the lower court had ample evidence from which to reach the conclusion that no such bias, prejudice or hatred against the defendant existed in the community as would preclude him from having a fair and impartial trial, and as an application for change of venue is addressed to the sound discretion of the court (*Smith v. State*, 4 Nebr., 277), we can not say that there was such an abuse of discretion as to call for a reversal of the sentence.

It is urged that while the evidence as to bias, hatred and prejudice may have been traversed by the state, the evidence of defendant's witnesses relative to threats of personal violence were not denied by the affidavits filed by the state. But we think otherwise. There was adduced evidence to the effect that, although there was a strong feeling by part of the community against defendant when he was arrested, the witnesses stated that at the time of the hearing of the motion such prejudice had died out; and also that the feeling against defendant existed on the part of a few only of the inhabitants of the county. From evidence of this class the court was certainly justified in believing that, although there may have been threats of personal violence, the number of those holding such views was so small, as compared with those of the great body of law-abiding citizens, as not to create a sentiment against defendant, such as would preclude him from having a fair trial in that county, particularly when no attempt of personal violence was shown to have been made. While the constitutional right of a person accused of crime to a fair trial should always be jealously guarded by the courts, it is also their duty to the state to insist that persons accused of crime should have a speedy trial, in order that the de-

mands of justice shall not be deferred until the prosecution becomes worn out by needless delays and the ends of justice be thus defeated. In this case we are persuaded the lower court should be sustained in its promptness of action, rather than condemned therefor, for the record is convincing that the defendant had a fair and impartial trial, on the part of both court and jury, and received nothing but justice at their hands. The decision on the motion for the postponement of the trial until the next regular term of court, requires no extended comment. The motion was based upon the same facts as presented by the application for a change of venue, and the foregoing discussion is applicable to the assignment of error directed against the refusing of a continuance. The ruling is not prejudicially erroneous.

It is next urged by defendant that the jury was not a legal one, because it was not drawn according to the provisions and requirements of law. It is evident that the court obtained its authority to order the panel from section 664 of the Code of Civil Procedure, no jury having been drawn as provided by sections 658, 659 and 660 of said code. Said section 664 is applicable to juries drawn in criminal cases, as will appear from the decisions of this court hereinafter cited. The term of court at which accused was convicted, though a special one, was legal, for the district judge has power, under section 25, chapter 19, Compiled Statutes, 1897, to call special terms of court for the transaction of any business he may deem necessary. This power is doubtless conferred upon judges for the purpose, among others, of expediting trials in criminal cases of persons who are incarcerated and unable to give bail, as well as for the purpose of rendering speedy justice in all cases. Doubtless it would have been better had the judge directed that the jury be summoned in the manner prescribed by section 658 *et seq.* of the Code of Civil Procedure, but the omission so to do did not have the effect to invalidate the term of court. The term being legal, and there being no

jury present, because of such failure of the judge to direct the drawing and summoning of one in the regular manner, the court had power under said section 664 to call a jury through an order to the sheriff directing him to summon one, as was done in this case, for the section says, "whenever at any general or special term, * * * for any cause there is no panel of grand jurors or petit jurors or the panel is not complete, said court may order the sheriff, deputy sheriff, or coroner to summon without delay good and lawful men, having the qualifications of jurors," etc. This court has frequently held this section to be applicable to criminal as well as to civil cases. *Dodge v. People*, 4 Nebr., 220; *State v. Page*, 12 Nebr., 386; *Pflueger v. State*, 46 Nebr., 493; *Barney v. State*, 49 Nebr., 515; also that it should be construed in connection with section 465*a* of the Code of Criminal Procedure. *Barney v. State, supra.* We are therefore of the opinion that the order of the court directing the sheriff to summon from the body of the county a jury, there being no regular panel at the time, was valid, under said section 664. The authority conferred by this section should be sparingly exercised and exigencies should not be purposely created by the courts for its exercise. This defendant suffered no injustice through such proceeding, and the lower court must be sustained in its action. In cases where a jury is drawn in the manner prescribed by said section 658 et seq. of the Code of Civil Procedure the provisions thereof must be observed. That they are mandatory we do not doubt, particularly those provisions which require that the panel must consist of persons drawn, as nearly as may be from all portions of the county, in proportion to their population, and this we understand to be the rule laid down in most of the cases of this court cited by counsel for defendant in support of the proposition that the panel in this case was illegal. But no such requirement is prescribed by section 664, hence it was unnecessary that the jury in this case be so selected. There is no conflict in

these various provisions of the Code, but their exercise depends upon circumstances. The only case cited by counsel for defendant to which we deem it advisable to advert directly is that of *McElvoy v. State*, 9 Nebr., 157. We do not regard that case as in point here. The observation of the learned judge who wrote the opinion in that case on the point in controversy here is clearly dictum, for the reason that it was held that defendant had waived his right to question the regularity of the manner in which the panel was drawn. The case was reversed solely upon another point. All of the observations of the court as to the manner in which the jury was drawn are clearly outside the issue in the case, as it came here, and are not a proper construction of the section of the Code therein mentioned. We are clearly of the opinion that in this case such an exigency existed as authorized the lower court to call a jury under the provisions of section 664, and that the panel was valid.

Upon the trial, the state was permitted to prove that the prosecutrix, the morning after the commission of the alleged offense, informed Mr. and Mrs. Jantice of the alleged assault upon her, and that the same was made by the defendant and one Michael Begley. This testimony was proper as tending to corroborate the prosecutrix. *State v. Meyers*, 46 Nebr., 152; *Oleson v. State*, 11 Nebr., 276. The form of the questions by which this testimony was elicited, was objectionable as being leading. But the matter of allowing interrogations of a leading character to be put to witness, rests in the sound discretion of the trial court; and a clear abuse of such discretion must exist to work a reversal of a cause. No prejudice to the accused is perceived in permitting leading questions to be put and answered.

We have carefully and critically examined other rulings of the lower court in the introduction of evidence complained of by the defendant, and without adverting to them at length, fail to find any errors therein prejudicial to defendant, and such as would justify this court in granting a new trial.

Objections are made to the following instructions to the jury:

"The charge made against the defendant is, in its nature, a most heinous one, and well calculated to create strong prejudice against the accused; and the attention of the jury is directed to the difficulty growing out of the nature of the usual circumstances connected with the commission of such a crime in defending against the accusation of rape.

"It is your duty to carefully consider all the evidence in the case, and the law as given you by the court, in arriving at what your verdict shall be in this case. You must find on the part of the woman, not merely a passive policy of equivocal submission to the defendant. Such resistance will not do. Voluntary submission on the part of the woman, while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape.

"If the carnal knowledge was with the voluntary consent of the woman no matter how tardily given, or how much force had theretofore been employed, it is not rape, and in determining whether she did resist to the extent of her ability in this case, you may take into consideration her physical condition at the time of the alleged rape, and the further fact that she had but recently given birth to a child."

It is strenuously insisted that the foregoing was erroneous in that the instruction assumed that the prosecutrix had but recently given birth to a child. This criticism we are unable to sustain. The undisputed evidence adduced on the trial was that Mrs. Yonke, the complaining witness in the case, had given birth to a child not over five weeks prior to the alleged assault. Therefore the paragraph in the charge of the court did not, in the particular suggested, assume a fact not established by the proofs. But it is said that in a criminal cause the court can not assume any fact proven, even when established by uncontroverted testimony. This principle was

broadly laid down in *Heldt v. State*, 20 Nebr., 492. But the statement was a mere dictum and entirely outside of that case. A court may not in an instruction assume a constituent element of a crime as proven; but it may assume the existence of a collateral fact in a criminal case established by uncontroverted evidence. *Debney v. State*, 45 Nebr., 856. The fact that the prosecutrix had recently been delivered of a child, was not a constituent element of the crime of rape, but was a collateral fact merely bearing upon the issue whether one of the elements of the offense charged against the accused had been proven. It was shown by the evidence that the prosecutrix was physically weak, at the time of the alleged assault, and it was not out of place to direct the jury that they might take that fact in consideration in forming, or arriving at their verdict. This was proper. *Richards v. State*, 36 Nebr., 17; *Thompson v. State*, 44 Nebr., 366. The reference in the instruction to the physical condition of Mrs. Yonke, did not give undue prominence to one branch or item of evidence to the exclusion of others. The instruction as a whole was most favorable to the accused.

It is further urged that the verdict is not supported by the evidence, but was the result of the passion and prejudice of the jury and the community where the case was tried. An examination of the evidence is convincing that the objection is without merit, if not frivolous.

It is finally insisted that the judgment should be reversed on account of misconduct of the jury while deliberating upon their verdict. By affidavits of some of the jurors it appears that while considering their verdict certain of them suggested that the accused should be convicted because Michael Begley had been found guilty, it having been shown that Begley and the defendant both ravished the prosecutrix. The testimony of the jurors in the matter just indicated, is incompetent to impeach their verdict. No reversible error appearing in the record, the judgment is

AFFIRMED.

LANCASHIRE INSURANCE COMPANY V. ABBIE BUSH ET AL.

FILED APRIL 4, 1900. No. 9,220.

1. **Judgment:** ERROR: SUBSTANTIAL RIGHT OF PARTY. A judgment will not be reversed because of an error or defect in the proceedings which does not affect the substantial rights of the complaining party.

2. **Statute:** VALUED POLICY: MEASURE OF RECOVERY: TOTAL LOSS. Under the valued policy law (Compiled Statutes, 1899, ch. 43, sec. 43), the statute fixes the worth of the property insured conclusively at the valuation written in the contract of insurance, and in case of total loss, that sum is the measure of recovery.

3. ———: ———: PARTIAL LOSS. Under such a policy, in case of a partial loss, the actual damage is the measure of recovery.

4. ———: ———: MEASURE OF RECOVERY: TWO FIRES: TOTAL LOSS. If, under a valued policy, the property insured is totally destroyed as the result of two or more fires, the measure of recovery for the final loss is the amount written in the contract less amounts paid in settlement of previous losses.

5. **Partial Loss:** OCCUPANCY: VACANCY CLAUSE. After a partial loss under a fire policy which renders the building untenantable, the insured is not guilty of a breach of the vacancy clause of the contract where he permits the property to remain unoccupied pending the period during which the insurer is authorized to exercise his option to repair the damaged building.

6. **U. S. Constitution:** POWER TO CLASSIFY SUBJECTS. There is nothing in the constitution of the United States, or of this state, which forbids classification of subjects for the purpose of legislation. The power to classify is subject only to the limitation that the classification must not be arbitrary.

7. **Statute:** ATTORNEY FEE: PUBLIC POLICY: CONSTITUTIONAL LAW. The provisions of section 3 of the valued policy law (Compiled Statutes, 1899, ch. 43, sec. 45), permitting the taxation as costs of a reasonable attorney's fee upon rendering judgment against an insurance company on a contract insuring real estate, is grounded on considerations of public policy and is constitutional.

ERROR to the district court for Lancaster county. Tried below before HALL, J. *Affirmed.*

Wellington H. England and *Halleck F. Rose*, for plaintiff in error:

The valued policy law does not apply to this case, because the petition declares for a partial loss only. The amount written in the policy is taken to be the value in cases of total loss only, where it is required to ascertain the value of the insured building in its entirety. In all other cases findings of the value must be supported by competent testimony. Session Laws, 1899, p. 425, ch. 48; Compiled Statutes, ch. 43, secs. 43-45.

The courts can not enlarge the provisions of the valued policy act. It must be followed literally, without departure from its terms. The language of the act is clear, and admits of but one meaning. There is no room for construction. It is not allowable to interpret that which has no need of interpretation. In this case any departure from the language used would be an assumption of legislative powers. *United States v. Hartwell*, 6 Wall. [U. S.], 395; *Martin v. Swift*, 120 Ill., 489; *Furey v. Town of Gravesend*, 104 N. Y., 405; *Dodge v. Love*, 49 N. J. Law, 235; *Townsend v. Brown*, 24 N. J. Law, 80; *Smith v. State*, 66 Md., 215; *Rich v. Keyser*, 54 Pa. St., 86; *Tynan v. Walker*, 35 Cal., 634; *Woodbury v. Berry*, 18 Ohio St., 456; *In re Hinkle*, 31 Kan., 712; *Newell Universal Mill Co. v. Muxlow*, 115 N. Y., 170; *Frye v. Chicago, B. & Q. R. Co.*, 73 Ill., 399.

The courts will construe strictly all statutes passed in modification or derogation of the common law, assuming that the legislature has, in the terms used, expressed all the change it intended to make in the old law, and will not, by construction or intendment, enlarge its operation. *Hollman v. Bennett*, 44 Miss., 322.

Section 3 of the valued policy law (Session Laws, 1889, ch. 48; Compiled Statutes, ch. 43, sec. 45), directing the taxation of an attorney fee to plaintiff on rendition of judgment on a policy insuring real estate, is violative of that clause in section 1, of the fourteenth amendment

of the constitution of the United States, which declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws," and therefore void. The section of the statute directing the taxation of an attorney's fee to a successful plaintiff, is violative of the provisions of the constitution of the state prohibiting special legislation regulating the practice of courts of justice; that all laws relating to proceedings and practice of courts shall be uniform; that all courts shall be open and justice administered without denial; and that no person shall be deprived of property without due process of law. *Moore v. Herron*, 17 Nebr., 703; *Garneau v. Omaha Printing Co.*, 42 Nebr., 847; *Coburn v. Watson*, 48 Nebr., 257.

Abbott, Selleck & Lane, for Abbie Bush, defendant in error:

It is contended that the valued policy law, so called, does not apply to this case for the reason that the loss, which the evidence shows to have been a total loss, was not occasioned at one time and by a single fire. Had the property been wholly destroyed by the first fire, July 31, there could be no doubt that the liability of the insurance company, under the law, would have been the amount written in the policy, to wit, $1,800. *German Ins. Co. v. Eddy*, 36 Nebr., 461; *Insurance Co. of North America v. Bachler*, 44 Nebr., 549.

It is difficult to see how that liability became changed by the fact that the total destruction of the property was delayed until Sept. 23, assuming that the policy remained in force at that date. The first loss was a partial loss, and settled for upon that basis. The amount agreed upon was deducted from the face of the policy, and "the amount written in the policy" thereupon became the difference between the face of the policy and the amount indorsed thereon as paid. This seems too clear for argument or illustration. If the risk as thus constituted was greater than the company wished to carry, it was op-

tional with it to cancel same at any time before a loss should occur thereunder, upon compliance with certain plain provisions of the law and the policy. *German Ins. Co. v. Rounds*, 35 Nebr., 752.

Willard E. Stewart, for William McWhinnie, defendant in error:

Cross-petitioner's right to recover is not dependent on that of the plaintiffs. The mortgage clause was an independent contract between the insurance company and the mortgagee. *Hanover Fire Ins. Co. v. Bohn*, 48 Nebr., 743.

SULLIVAN, J.

The Lancashire Insurance Company issued to Abbie Bush and Mabel B. Davis the contract of insurance upon which this action is grounded. The property insured was real estate, being a dwelling house in Crystal Springs Addition to the city of Lincoln. The amount of insurance written in the policy was $1,800, and it was stipulated that the loss, if any, should be payable to William McWhinnie, mortgagee, as his interest might appear. On July 31, 1894, the insured building was partially destroyed by fire. Arbitrators chosen by the parties to ascertain the actual amount of the injury, determined that the property was damaged to the extent of $748.80. This sum was paid by the company and accepted by the insured and the mortgagee as full compensation for the loss sustained. The building was not restored to its former condition, but remained vacant and untenantable until September 23, 1894, when a second fire completed the work of the first by reducing the remnant to ashes. This action was then instituted to recover of the company the difference between the amount paid on account of the first loss and the amount for which the property was insured. The jury, in obedience to a peremptory instruction from the court, returned a verdict in favor of Bush, Davis and McWhinnie for the sum of $1,147.98, and judgment was rendered accord-

ingly. The court, also, allowed the plaintiffs $150 as an attorney fee and taxed the same to the company as part of the costs. A reversal of the judgment is contended for upon four grounds.

It is first insisted that the court erred in permitting McWhinnie to assert his claim both by petition and answer. It is not clear that the petition, in which he was named as a party plaintiff, was filed by his authority; but if it was so filed, we can not see that the judgment should for that reason be set aside. By section 145 of the Code of Civil Procedure, it is made the duty of the court in every stage of an action, to disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the complaining party; and it is therein further declared that "no judgment shall be reversed or affected by reason of such error or defect." It does not appear that the company was, or that it could have been, prejudiced in the slightest degree by reason of the failure of the court to strike McWhinnie's name from the petition. There is, therefore, no merit in the first assignment of error discussed in the briefs.

The next question for decision is whether the loss occasioned by the second fire was a total loss within the meaning of the valued policy law which took effect July 1, 1889. The first section of the act is as follows: "Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire, tornado, or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured, and the true amount of loss and measure of damages." Compiled Statutes, 1899, ch. 43, sec. 43. This statute is grounded on public policy. It is designed to prevent over-insurance and to avoid the evils resulting therefrom. *Oshkosh Gas-Light Co. v. Germania Fire Ins. Co.*, 71 Wis., 454; *In-*

surance Co. v. Leslie, 47 Ohio St., 409. To accomplish the end in view, the legislature has provided that, in case the insured property is entirely destroyed, the insurer shall abide by the valuation written in the policy. The statute, which is to be regarded as part of the contract, fixes conclusively the worth of the building which is the subject of insurance. If the property is wholly destroyed, its actual value is not to be determined by evidence, agreement or arbitration. The damages are liquidated and the measure of recovery already ascertained. But if a partial loss occur the policy-holder is entitled to actual damages only, because the law has not fixed the value of any part of the insured property. In this case the insurer paid the actual damages resulting from the first fire. It does not claim to have paid anything more. When the second fire occurred and the building was wholly destroyed, the owners were entitled to recover as damages its true value less the amount previously paid. The true value of the entire structure being indisputably fixed at $1,800, and it being conceded that the actual loss caused by the first fire was $748.80, the conclusion is inevitable that the value of the remainder was $1,051.20. To receive evidence for the purpose of ascertaining the amount of the loss occasioned by the second fire, would violate the policy of the law, which is to make the insurer pay the amount of the risk upon which it has taken premiums. We are not able to see any force in the argument that the statute does not apply because the property was destroyed by two fires instead of one. Neither are we able to see that the adjustment of the first loss relieves the company from the obligation imposed upon it by the law and its contract. It made no bargain with the insured of which it is deprived by the judgment of the district court. Indeed it is believed that it could have made no bargain by which, in the event of a total loss of the insured property, it could escape from its obligation to pay the full amount of the indemnity for which the policy was written. As before remarked,

the statute rests on considerations of public policy, and it is probable that the insured could not, even by express contract, relinquish the benefit of its provisions. *Reilly v. Franklin Ins. Co.*, 43 Wis., 449; *Emery v. Piscataqua Ins. Co.*, 52 Me., 322.

Another contention of the company is that the policy was not in force at the time of the second fire. This claim is based on the following provision of the contract: "This entire policy unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the * * building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days." The policy also provided that the company might, at its option, repair the building and restore it to its former condition. This option was not exercised until about the time of the second fire, and, consequently, the plaintiffs could not have made the building habitable, without trenching on the insurer's rights. They were not responsible for the fact that the property was vacant. But aside from this consideration, we think it very clear that there was no forfeiture under the clause above quoted. It could not have been contemplated by the parties that the building should be occupied, when, as a result of its partial destruction by fire, it became unfit for occupancy. If the company was dissatisfied with the risk after July 31, its remedy was by a cancellation of its contract. That it did attempt to put an end to its liability just prior to the second fire, indicates that it considered the policy in force on the untenanted building, and evidences a construction of the instrument which seems just and reasonable.

The question remaining yet to be considered is the validity of the statute under which the court acted in taxing an attorney fee of $150 against the company as part of the costs. The third section of the valued policy law is as follows: "The court upon rendering judgment against an insurance company upon any such policy of insurance shall allow the plaintiff a reasonable sum as

an attorney's fee, to be taxed as part of the costs." Compiled Statutes, 1899, ch. 43, sec. 45. It is argued by counsel for the company that this provision of the act goes beyond the limits of valid legislation; that it is partial and oppressive, and denies to insurers of real property the equal protection of the laws. In *Insurance Co. of North America v. Bachler*, 44 Nebr., 549, the law was assailed as being unconstitutional, but the court held, in an opinion by Commissioner RAGAN, that it was a warrantable exercise of legislative power. In other cases judgments of the district court were affirmed on the assumption that the law authorizing the taxation of attorneys' fees against insurance companies was a constitutional and valid law. *German Ins. Co. v. Eddy*, 37 Nebr., 461; *Hanover Fire Ins. Co. v. Gustin*, 40 Nebr., 828; *Home Fire Ins. Co. v. Skoumal*, 51 Nebr., 655; *Hartford Fire Ins. Co. v. Corey*, 53 Nebr., 209; *Home Fire Ins. Co. v. Weed*, 55 Nebr., 146. These decisions are vigorously attacked, but we are convinced, as the result of further investigation of the subject, that they are sound and should be adhered to. There is nothing in the constitution of the United States, or of this state, which forbids classification of subjects for the purpose of legislation. *Barbier v. Connolly*, 113 U. S., 27; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S., 96; *State v. Farmers & Merchants Irrigation Co.*, 59 Nebr., 1. The power of the legislature to classify is subject only to the limitation that the classification must not be arbitrary. There must be some just reason for the creation of the class to be exclusively affected by legislative action. In *State v. Farmers & Merchants Irrigation Co., supra*, page 3, it was said: "The rule established by the authorities is that, while it is competent for the legislature to classify, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified." "The differences which will support class legislation,"

says Mr. Justice Brewer in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S., 150, 155, "must be such as in the nature of things furnish a reasonable basis for separate laws and regulations." What reason existed at the time of the adoption of the valued policy law to induce the legislature to segregate insurers of real estate from other litigants and to subject them to burdens from which other unsuccessful suitors are exempt? The reason is not far to seek. It is a matter of common knowledge that corporations engaged in the business of insuring real estate, have been long accustomed to vexatiously and oppressively resisting payment of claims arising under their policies. The reports of this court bear abundant evidence to the fact that no other class of litigants has so persistently endeavored to escape liability from their contract obligations by interposing technical and unconscionable defenses to actions instituted against them. The legislature was, we think, within its constitutional power in selecting this class of insurance companies from all other litigants, and subjecting them, if unsuccessful, to the payment of attorneys' fees, because experience and observation had shown that the defenses upon which they generally rely, are without merit and constructed out of some of the forfeiture clauses with which their policies are thronged. The law in question was designed to repress an evil practice, to advance public interest and promote justice. It was an exercise of legislative power justified by considerations of public policy. Similar statutes have been held valid in other jurisdictions. *Kansas P. R. Co. v. Mower*, 16 Kan., 573; *Atchison, T. & S. F. R. Co. v. Matthews*, 58 Kan., 447; *Peoria, D. & E. R. Co. v. Duggan*, 109 Ill., 537; *Perkins v. St. Louis, I. M. & S. R. Co.*, 103 Mo., 52; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Ia., 312; *Wortman v. Kleinschmidt*, 12 Mont., 316; *Cameron v. Chicago, M. & S. P. R. Co.*, 63 Minn., 384; *Vogel v. Pekoc*, 157 Ill., 339. The judgment of the district court is

AFFIRMED.

ANDREW M. HENDERSON ET AL., APPELLEES, V. CITY OF SOUTH OMAHA ET AL., APPELLANTS.

FILED APRIL 4, 1900. No. 11,264.

City of First Class: PETITION: ORDINANCE: JURISDICTIONAL PREREQUISITE. The presentation to the city authorities of a city of the first class having less than 25,000 inhabitants of a petition signed by persons owning a major part of the foot frontage of the lots abutting upon the portion of the street to be improved, is a jurisdictional prerequisite to authorize such city by ordinance to charge the entire cost of paving such street against property abutting thereon.

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

R. B. Montgomery, for appellants:

Should the court adhere strictly to the rule laid down in *Von Steen v. City of Beatrice,* 36 Nebr., 421, and later in *Harmon v. City of Omaha,* 17 Nebr., 548, there is not foot frontage enough represented by the signers to constitute a valid petition. It would seem that the rule is rather a harsh one, especially in this case, where the greatest publicity was given to each step taken, and where, at least, a very large majority of the owners of property knew that the improvement was being made and have since derived the benefit accruing therefrom.

A. H. Murdock and *J. A. Beck, contra:*

In an action wherein the validity of special taxes is brought in question the record of the city council must show that all of the jurisdictional prerequisites necessary to be taken for the levy of valid taxes have been complied with. *Smith v. City of Omaha,* 49 Nebr., 883; *Liebermann v. City of Milwaukee,* 61 N. W. Rep. [Wis.], 1112; *Harmon v. City of Omaha,* 53 Nebr., 164.

SULLIVAN, J.

Appellees, who were plaintiffs below, own real estate situate in what is known as paving district number 3 of the city of South Omaha. They brought this action in the district court of Douglas county against the appellants to enjoin the collection of a special assessment made against their property to defray the cost of paving that portion of Twenty-fourth street which comprises said paving district. It is alleged in the petition, and admitted by the answer, that South Omaha, in 1891, was a city of the first class having less than twenty-five thousand inhabitants; and it is, by the evidence, conclusively shown that the ordinance creating paving district number 3, and providing that the entire cost of the improvement should be charged against the property in the district abutting said street, was passed and approved without any petition therefor having been first presented to the mayor and city council. The trial court found the issues in favor of the plaintiffs and rendered a decree in accordance with the prayer of the petition. The decision is right and must be affirmed.

The presentation to the city authorities of a petition signed by the requisite number of persons owning property in the paving district, was essential to confer jurisdiction upon such authorities to pave the street and charge the entire cost of the improvement to the abutting property. This proposition is settled by our own cases, and it is decisive of this controversy. *Von Steen v. City of Beatrice*, 36 Nebr., 421; *State v. Birkhauser*, 37 Nebr., 521; *Harmon v. City of Omaha*, 53 Nebr., 164; *Leavitt v. Bell*, 55 Nebr., 57. Since the conclusion reached upon the point considered leads to an affirmance of the judgment, an examination of other questions discussed in the briefs of counsel is unnecessary and would be unprofitable. The judgment of the district court is

AFFIRMED.

JULIA F. COOK, APPELLEE, V. WESTCHESTER FIRE INSURANCE COMPANY, APPELLANT, IMPLEADED WITH O. V. PALMER & CO. AND CHARLES COOK, APPELLEES.

FILED APRIL 4, 1900. No. 9,200.

1. **Contract of Insurance.** A contract of insurance which does not express the real intention of the parties thereto, may be reformed.

2. **Evidence.** Evidence examined, and found to sustain a finding that the insurer intended to deliver an effective contract insuring the owner of the building described in the policy.

APPEAL from the district court of Washington county. Heard below before DICKINSON, J. *Affirmed.*

Charles Offutt and *W. W. Morsman*, for appellant.

W. W. Morsman: This court has, in two cases, decided since the decree was entered in the case at bar, settled the question involved. In *Home Fire Ins. Co. v. Wood*, 50 Nebr., 381, 385, wherein the facts were much like the case at bar, it is said: "That a court of equity will relieve against a mutual mistake there can be no question; but it will not reform a policy of insurance or other contract on the ground of a mistake of fact, unless the proof is clear, convincing and satisfactory, and free from reasonable controversy. The burden is upon the party alleging the mistake to establish it upon the trial." In *Slobodisky v. Phenix Ins. Co.*, 52 Nebr., 395, it is said in the syllabus: "An insurance policy, like any other written contract, may be impeached by either party thereto for fraud or mistake, and parol testimony is competent to reform the policy so as to make it recite the actual agreement between the parties. In order to authorize the reformation of a written contract it must be made to appear what the actual contract between the parties was; that the written contract exhibited does not express the contract

made; and these facts must be established by clear, convincing and satisfactory evidence."

The decree of the court below upsets the most elementary rules in relation to the reformation of contracts in equity. The evidence does not establish a single one of the essential facts requisite to the exercise of that jurisdiction. There was a total and complete failure of proof. There was nothing in the nature of a mutual mistake of fact.

Walton & Mummert, contra:

The cases cited by appellant do not apply to the actual case as it is here. With due respect to counsel, we are forced to differ from his statements that "the facts" in the case of *Home Fire Ins. Co. v. Wood*, 50 Nebr., 381, are "much" like those in the case at bar. The facts are entirely unlike. In that case the original contract was made as intended, and the question was whether the statement by the insured that he intended to carry about $5,500 stock and that he intended afterwards to take out more insurance, was sufficient notice of the additional insurance which he afterwards did take out, so as to prevent a forfeiture of the policy. The contract there conformed exactly to the facts as they existed at the time that the policy was made out. Future intentions or designs were not naturally a part of the policy as they might or might not be put into action. The insured failed to give notice of the other subsequent insurance, which by the terms of his policy was his duty to do and therefore forfeited his policy.

Both counsel for appellant and appellees cited and commented upon *Trustees of St. Clara Academy v. Delaware Ins. Co.*, 66 N. W. Rep. [Wis.], 1140.

SULLIVAN, J.

This is an appeal from a judgment of the district court of Washington county reforming and enforcing a contract of insurance. The property covered by the policy

in suit consisted of a stock of merchandise and a two-story frame store-building. The personal property belonged to Charles Cook, and the realty to his mother, Julia F. Cook. Charles, who was doing business under the trade name of O. V. Palmer & Co., occupied his mother's store, and was her agent for the purpose of keeping it insured. E. B. Carrigan, a local agent for the Westchester Fire Insurance Company, called on Mr. Cook and solicited his business. Cook told him to write $500 on the goods and $1,000 on the building. A few days later, four policies enclosed in an envelope were handed to Cook, who, without reading or examining them, put them in his safe and did not again see them until after the loss of the insured property. The cost of insuring the store-building was charged to Mrs. Cook's account by her son at the time the policy was issued. The premium is still retained by the company and there has been, so far as the record shows, no offer to pay it back. All the policies were written in favor of O. V. Palmer & Co. Payment of the one covering the store-building was refused on the ground that the owner of the property had not been insured. This action to reform the policy was instituted by Mrs. Cook against the company, and resulted in a finding that the contract did not express the real intention of the parties, and in a decree rectifying and enforcing it.

Counsel for appellant insist that the judgment should be reversed because there is no clear proof that the policy was issued to O. V. Palmer & Co. in consequence of a mutual mistake. The authority of the court to grant the relief prayed for, if the evidence is sufficient, is conceded. The rule governing this class of actions is well settled; it is established in this state by repeated adjudications. In *Slobodisky v. Phenix Ins. Co.*, 52 Nebr., 395, it is tersely and accurately stated as follows: "In order to authorize the reformation of a written contract it must be made to appear what the actual contract between the parties was; that the written contract exhibited does not express the

contract made; and these facts must be established by clear, convincing and satisfactory evidence." Having unreservedly accepted appellant's view of the law, let us now apply it to the facts and see whether the trial court gave effect to the intention of Carrigan and Cook. The intention of the agents was, of course, the intention of their principals. If the minds of the agents came together upon the same proposition, then there was a valid and enforceable contract between the plaintiff and defendant; and if such contract is not properly evidenced by the policy, that instrument should be reformed and made to speak the truth.

In addition to the facts already stated, it appears that Mrs. Cook was the fee owner of the real estate insured; that her title was of record; that Charles intended to insure it for his mother's benefit and supposed, until after the fire, that the policy was issued to her, and in her name. It further appears that there was no written application to the company and no representations, written or oral, on the subject of ownership. Mr. Carrigan was called as a witness and testified:

Q. How came you to write this policy in the name of O. V. Palmer & Company?

A. I did not know just who the real owner of the property was, and wrote it up in a hurry, and just wrote it all together. * * *

Q. You thought that Charles Cook or O. V. Palmer & Co. owned the property, when you wrote the policies?

A. Why, I didn't take any particular thought on the subject.

Q. Well, did you think that or not? If you did not, say so.

A. Why, yes. That is the impression I had.

This testimony of the company's agent, it seems to us, shows very clearly that it was his intention to insure the owner of the property. He did not know who the owner was, and did not have any belief or conviction in regard to the matter. He had an impression—an idea without

any adequate basis—that the building was owned by O. V. Palmer & Co., and, being in a hurry, made out the policy in that name without investigation or inquiry. The first answer above quoted leaves no room to doubt that Carrigan's purpose was to insure the real owner and that the policy would have been issued to the plaintiff if her ownership had been known. Our faith in the business morality of underwriters will not permit us to believe, on the evidence in this record, that the defendant issued the policy in suit intending that its validity should depend upon the correctness of a mere conjecture. A more reasonable deduction, and one more creditable to the company, is that it was acting in good faith; that it intended to give a consideration for the premium it received, and that its primary purpose was not to insure O. V. Palmer & Co., but rather to indemnify the holder of the title, the person having an insurable interest in the property. We think the trial court was entirely justified in finding that the insurer intended to deliver a binding and effective contract by insuring the owner of the building. The case is quite like *German Fire Ins. Co. v. Gueck*, 130 Ill., 345, in which a decree reforming a fire policy was sustained. The judgment appealed from is

AFFIRMED.

JOSEPH P. FRENZER v. JAMES RICHARDS.

FILED APRIL 4, 1900. No. 9,183.

1. **Assignment of Error:** INSTRUCTIONS. An assignment of error directed against a group of instructions will be considered no further than to ascertain that one of the instructions complained of, was properly given.

2. **Verdict:** INSTRUCTIONS: ASSIGNMENT OF ERROR: REVIEW. Where the error in the giving of instructions is not so assigned that it can be reviewed, a verdict in accord with such instructions must be permitted to stand.

3. **Usury**: BORROWER: TENDER OF PRINCIPAL: PLEDGE: RIGHT OF POSSESSION. A borrower under an usurious contract who pledged property as security for the loan and who has paid or tendered the principal of the loan, is entitled to the possession of the property pledged, divested of the lien.

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

Clair & Cowles and *C. S. Lobingier*, for plaintiff in error.

B. G. Burbank, contra.

SULLIVAN, J.

James Richards sued Joseph P. Frenzer to recover the possession of specific chattels. The order of delivery was not executed, and the action, proceeding as one for damages only, resulted in a verdict and judgment in favor of the plaintiff. The property in controversy was certain jewelry which Richards deposited with Frenzer as security for a loan of $150. Whether the money loaned belonged to the defendant or to one Dr. Roy, is a matter involved in considerable doubt. It is certain, however, that the jewelry was held by Frenzer and that the interest payments, amounting to five per cent per month, were made to him. After a large amount of usurious interest had been paid, the rights of Dr. Roy, if he had any, were transferred to Mrs. Hitchcock; but the custody of the pledge was not changed. The plaintiff paid the defendant $126 as interest. He tendered him $24 more and then brought suit to recover possession of the jewelry. The principal contention of the defendant is that he was a mere agent of both Roy and Hitchcock, and that his agency had been terminated before the offer to pay the last $24 was made. The plaintiff insists that he had no business relations at any time with either Dr. Roy or Mrs. Hitchcock, and that from the beginning to the end of the transaction he dealt with Frenzer as the lender of the $150 and the pledgee of the property. It is conceded by

counsel for defendant that the jury, under the instructions of the court, were warranted in finding in favor of the plaintiff, but he earnestly insists that the instructions were erroneous and that the judgment should be, therefore, reversed.

In the motion for a new trial, the fifth specification is as follows: "The court erred in giving the first, second, third and fourth instructions which he gave on his own motion." One of these instructions related to the burden of proof, was favorable to the defendant, and was obviously correct. The trial court was not bound to examine the other instructions covered by the assignment and we are not at liberty to do so. Such is the rule established by our decisions. *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Nebr., 68; *Graham v. Frazier*, 49 Nebr., 90; *Flower v. Nichols*, 55 Nebr., 314; *McIntyre v. Union P. R. Co.*, 56 Nebr., 587; *Spirk v. Chicago, B. & Q. R. Co.*, 57 Nebr., 565. In *Johnston v. Milwaukee & Wyoming Investment Co., supra*, it is said: "Errors in respect to giving instructions must be separately assigned in the motion for new trial. If assigned in group, and any one of the group against which the assignment is directed is without error, the assignment must be overruled." In view of the condition of the record, the charge of the court is to be regarded as the law of the case (*World Mutual Benefit Ass'n. v. Worthing*, 59 Nebr., 587); and the verdict being in accordance therewith, must be permitted to stand. We have read the evidence and are of opinion that there is no just ground for the claim that it is insufficient to sustain the verdict. Defendant's own testimony shows that the plaintiff had a contract right to make all payments to him.

The contention that an action to recover possession of the jewelry, or damages for its conversion, would not lie without a tender or payment of legal interest on the loan, can not be sustained. The provision of the interest law relating to usurious contracts is as follows: "If a greater rate of interest than is hereinbefore allowed shall be con-

tracted for or 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." Compiled Statutes, 1899, ch. 44, sec. 5. It has been frequently held in other jurisdictions, and it is the law of this state (*Eiseman v. Gallagher*, 24 Nebr., 79), that a borrower will not be given affirmative relief against the lender in a court of equity, unless he has first paid or tendered the amount of the loan with legal interest. These decisions are grounded on the maxim that he who seeks equity must do equity. 1 Pomeroy, Equity Jurisprudence, sec. 391. This maxim does not control courts in the enforcement of legal rights by legal remedies. Courts of law never impose conditions on suitors which the law does not prescribe. When a borrower of money has paid on an usurious contract the full amount borrowed, he owes nothing more. The lender is entitled to receive nothing more; the debt is paid, and, in contemplation of law, the contract is discharged. When the debt is paid, the mortgage or other security held by the lender is extinguished (*Knox v. Williams*, 24 Nebr., 630); and a proper tender is, of course, equivalent to payment. *Norton v. Baxter*, 41 Minn., 146; *Stewart v. Brown*, 48 Mich., 383. The true construction of section 5 aforesaid is that payment of the principal of the loan satisfies the contract and destroys its vitality. It can not afterwards be employed either for attack or defense. The law will not permit a pledgee to hold property as security for a debt which has been paid. The security can not survive the debt. On the merits, as well as for technical reasons, the judgment should be

AFFIRMED.

ROBERT HARE V. E. W. MURPHY.

FILED APRIL 4, 1900. No. 9,213.

1. **Registry Law.** The purpose of the registry law is to furnish record evidence of the state and condition of land titles.
2. ———: PERSONAL CONTRACTS TO PAY DEBTS. There is no law requiring or authorizing the registration of personal contracts to pay debts.
3. ———: ———: LIEN: FAITH OF RECORD. An agreement to pay a debt, although evidenced by a recorded instrument, is not conclusive in favor of a party who, in purchasing a lien against property, has acted on the faith of the record.
4. **Deed:** ASSUMPTION CLAUSE: GRANTEE: ESTOPPEL. The grantee in a deed containing an assumption clause, is not estopped from denying the validity of the contract of assumption as against a party who, relying on the recitals in the instrument as spread upon the public records, purchased the debt secured by a mortgage on the land.

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

F. S. Howell, for plaintiff in error:

Where one of two innocent parties must suffer a loss by the fraud of another, the loss must fall upon the one whose acts had furnished the means for the commission of the fraud. *Dinsmore v. Stimbert*, 12 Nebr., 438.

A deed found on record, such as the one in suit, is presumptive evidence of the liability of the grantee therein named. *Heil v. Redden*, 26 Pac. Rep. [Kan.], 2; *Belmont v. Coman*, 22 N. Y., 438, 78 Am. Dec., 213; *Bowman v. Griffith*, 35 Nebr., 361; 3 Devlin, Deeds, sec. 1056.

The delivery of the deed in the presence of Murphy and Schuster to Callender, was a delivery of the deed, for by such act Schuster was at least deprived of the further control over said deed. The title passed then and there. *Adams v. Ryan*, 17 N. W. Rep. [Ia.], 159.

The acceptance of the deed by defendant through Callender, his agent, makes a valid acceptance of the deed

and binds him to the performance of the contents. Jones, Mortgages, sec. 752; *Bishop v. Douglass*, 25 Wis., 696; *Taylor v. Whitmore*, 35 Mich., 97; *Fairchild v. Lynch*, 10 Jones & Sp. [N. Y.], 265.

The plaintiff was an innocent purchaser of the mortgage and notes, as found by the court, and as such will be protected. *Hayden v. Snow*, 9 Biss. [U. S. C.], 511; Jones, Mortgages, sec. 764; *New Orleans Canal & Banking Co. v. Montgomery*, 95 U. S., 16; *Carpenter v. Longan*, 16 Wall., 271; *Kilmer v. Smith*, 77 N. Y., 226; *Hayden v. Drury*, 3 Fed. Rep., 782; *Pierce v. Faunce*, 47 Me., 507.

Wilcox & Halligan and *Thomas C. Patterson, contra:*

A grantee is not liable on a covenant to assume and pay a mortgage, if inserted in the deed without his knowledge and he repudiates it as soon as he knows of its existence. *Cordts v. Hargrave*, 29 N. J. Eq., 446; *Kilmer v. Smith*, 77 N. Y., 226; *Albany City Savings Institution v. Burdick*, 87 N. Y., 40; *DeyErnand v. Chamberlain*, 88 N. Y., 658; Jones, Mortgages, sec. 752.

SULLIVAN, J.

When this case was here before, a judgment in favor of Murphy, the defendant below, was reversed and the cause remanded for further proceedings. *Hare v. Murphy*, 45 Nebr., 809. The opinion then filed contains a detailed account of the transactions out of which the litigation arose. At this time it will suffice to say that the plaintiff, Robert W. Hare, being the assignee and owner of a real estate mortgage, filed in the district court of Lincoln county his petition, in which he alleged that Murphy had purchased the premises covered by the mortgage and, in the deed of conveyance, had assumed and agreed to pay the mortgage debt. This allegation was denied by the answer. The cause was tried to a jury and resulted in a verdict and judgment in favor of the defendant. It appears from the evidence that the defendant had bar-

gained for the mortgaged premises and had in fact delivered to Schuster, the owner, some stock which was the agreed consideration for the transfer. At the same time, Schuster made out a deed and handed it to one Callender, who caused it to be recorded and afterwards delivered it to Murphy. When Murphy received the deed, he discovered the assumption clause upon which this action is grounded and, thereupon, returned the instrument to Callender and notified him that it would not be accepted. The conveyance was not again tendered to the defendant, and he did not at any time take possession of the land which it assumed to convey. The plaintiff claims to have bought the mortgage in question, and the obligation secured thereby, on the faith of the contract of assumption which he found spread upon the public records of the county in which the land is situate. He now contends: (1) that the deed was actually delivered and accepted and became a binding contract between the parties thereto; and (2) that the defendant, by reason of his failure to expunge the record of the conveyance, is not now permitted, as against the plaintiff, to deny the validity of the assumption clause. We will briefly consider these propositions.

The deed delivered did not express the agreement of the parties and Murphy was, therefore, warranted in refusing to accept it. If Callender was acting for Schuster, which seems probable, the return of the conveyance to the former was, beyond all doubt, an effective repudiation of the attempted transfer. There was certainly sufficient evidence to justify the jury in finding as they did, that, as between Schuster and Murphy, the deed, although recorded, was without force or legal efficacy. As the rights of Hare are derivative and depend altogether on the transaction between Schuster and Murphy, it is quite clear that there can be no recovery in this case unless Murphy is, by the doctrine of estoppel, precluded from showing that the assumption clause is void because the deed was never vitalized by delivery and acceptance.

The records of Logan county, it is true, evidence the fact that the defendant has agreed to pay the mortgage debt, but such evidence is not indisputable. The purpose of the registry law is to furnish record evidence of the state and condition of land titles. One dealing with land may rely upon those records and act on the information which they give. There is, however, no law requiring, or authorizing, registration of mere personal contracts to pay debts, and no rule making record evidence of such contract exclusive in favor of a party who has acted on it. A grantee's contract to pay a charge against the real estate conveyed to him, is, in its nature, precisely the same whether it be inserted in the deed of conveyance or rest in parol. In either case it binds the grantee personally, and does not create any right or interest in the land. It is not within the purview of the registry act, and, existing as a separate contract, could not go upon the records, even though witnessed and acknowledged. Hare was no more justified in relying on the record of the deed as evidence of Murphy's liability than he would have been if the agreement in some other form had been exhibited to him by Schuster. According to the finding of the jury, the defendant did not agree to pay the mortgage debt, and hence the judgment of the district court is right and should be

AFFIRMED.

HILKE MARY TIETKEN, APPELLEE, V. JOHN F. TIETKEN, APPELLANT.

FILED APRIL 4, 1900. No. 9,699.

1. **Divorce**: EVIDENCE: EXTREME CRUELTY. Evidence examined, and found to support the decree of the trial court granting a divorce from the bonds of matrimony, on the ground of extreme cruelty practiced by the husband towards the wife.

2. ——: ——: ALIMONY. *Held*, also, that the evidence supports the judgment rendered, awarding the wife permanent alimony in the sum of $1,000.

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

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

The district court below, upon the evidence, certainly allowed excessive alimony in this case.

The court will consider the ability of the husband, the estate, the situation of the parties. *Small v. Small*, 28 Nebr., 843; *Cochran v. Cochran*, 42 Nebr., 612; *McGechie v. McGechie*, 43 Nebr., 523.

Sloan & Moran, contra.

HOLCOMB, J.

This cause is submitted upon briefs of counsel and a printed abstract of the record and evidence, as provided by rule 2.

The plaintiff instituted proceedings to obtain a divorce from defendant, from the bonds of matrimony, upon the grounds of excessive intoxication, habitual drunkenness, and extreme cruelty upon the part of, and practiced by, the defendant towards the plaintiff, and also for permanent alimony. The answer, except as to the allegation of the marriage, consists of a general denial. Upon the trial in the lower court, it was found that the charges in the petition of cruelty and drunkenness were true, and that the defendant had been guilty of extreme cruelty towards the plaintiff. A decree of divorce as prayed was granted and the plaintiff awarded $1,000 permanent alimony. From the decree defendant appeals. The plaintiff also complains of the amount awarded as alimony, which, it is urged, is inadequate, and not commensurate with plaintiff's equities, as disclosed by the evidence.

It is suggested by the defendant that the evidence is not sufficient to sustain the decree of divorce. With this contention we can not agree. While the testimony on

this branch of the case is limited, both as to the number of the witnesses testifying, and the transactions about which they speak, the evidence sustains the judgment. The defendant's excessive use of intoxicants is made to appear from the evidence, and while this of itself may not be sufficient to sustain the charge of habitual drunkenness, it was a contributory cause to the other charge, to-wit, that of extreme cruelty. That he was guilty of extreme cruelty, is, we are satisfied, fairly established by the uncontradicted evidence. It is shown that at different times he inflicted physical punishment and bodily injury upon his wife; in one instance, by striking her in the face with his fist with such force as to draw blood; in another instance, by striking her with a crutch carried by him. It also appears that at different times he threatened to abuse and maltreat the plaintiff, and was only prevented therefrom by others, or by plaintiff escaping from him. There need be no hesitancy in pronouncing the evidence sufficient to support the decree of divorce on the ground of extreme cruelty. *Walton v. Walton*, 57 Nebr., 102; *Berdolt v. Berdolt*, 56 Nebr., 792; *Vocacek v. Vocacek*, 16 Nebr., 453.

The parties were married in 1890, and lived together only about six and a half years. Each had been married before. The plaintiff was fifty-six years of age, and the defendant was sixty-three, at the time of the divorce proceedings in 1897.

It appears that the defendant is a cripple, having lost a foot in a railroad accident, and was obliged to use crutches. The trial court found that the value of his property was $9,679, and "that, in consideration of the physical condition of the defendant and ability to perform manual labor and earn subsistence and support by labor or otherwise," permanent alimony should be awarded in the sum of $1,000. Defendant's property consisted principally of a farm of 160 acres in Otoe county, and a half interest in a farm of 160 acres in Nemaha county. Different witnesses valued the lands at from $30

to $45 per acre. There was some evidence of an incumbrance by way of a trust deed upon the home farm, which the defendant claimed was for the benefit of his two sons, then 24 and 26 years of age respectively. The trust deed was executed in 1870, and on its face was given to secure a note of $3,000 in favor of one Otto, therein named as beneficiary. If the ages of the sons were correctly given, they were not yet born at the time the trust deed was executed. It was barred by the statutes, and we think the court rightly disregarded it in determining the value of the defendant's property and his ability to pay alimony. The evidence was insufficient to establish as against the wife's right to alimony, the alleged obligation to his sons as a valid and legal incumbrance on the land. While the defendant is entitled to much consideration because of his age and physical condition, we are not unmindful of the claims of the plaintiff for alimony, growing out of the marriage relations existing between them. She, too, has equities in her favor, which are also to be kept in view. The sum awarded by the trial court, is, if erroneous at all, inadequate and not commensurate with the defendant's ability to pay and the property owned by him. The defendant's contention for a reduction in the amount of alimony awarded is, under the evidence, untenable. The judgment of the lower court is affirmed, with interest on the amount allowed as alimony at the rate of 7 per cent from the date of the decree. An order will be entered in this court for the payment of the alimony in four equal installments, in three, six, nine and twelve months respectively from this date.

JUDGMENT ACCORDINGLY.

JAMES WOOLWORTH, APPELLEE, V. EDWIN PARKER ET AL., APPELLANTS, AND MILTON L. TRESTER, APPELLEE.

FILED APRIL 4, 1900. No. 11,185.

Foreclosure: APPRAISEMENT: OBJECTIONS. Objections were entered and motion made to vacate and set aside an appraisement of real property in foreclosure proceedings of a real estate mortgage for the reason that the appraisement was obviously below the actual value of the property; that the appraisement was fraudulent in itself; and that to permit the appraisement to stand would work an actual fraud on the defendants. Similar objections were made to confirmation of sale. Evidence examined, and *held* that the appraisement was not so low as to be presumptively fraudulent. *Held*, further, that the appraisement made is not materially disproportionate to the actual market value of the property, and no sufficient cause exists to justify its vacation or being set aside.

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

George A. Adams, for appellant.

Abbott, Selleck & Lane and *Mockett & Polk, contra.*

HOLCOMB, J.

After decree in foreclosure proceedings of a real estate mortgage, an order of sale was issued to the sheriff to sell the land as upon execution to satisfy such decree. Appraisers were called as by law provided, who, with the sheriff, appraised the gross value of the property in question at the sum of $3,000. The defendants, after appraisement as aforesaid, filed objections to the same, and moved to set the appraisement aside, assigning substantially, as reasons therefor, that the appraisement was so obviously below the actual value of the property that the appraisement was fraudulent within itself, and that to permit the appraisement to stand would work an actual fraud on the defendants, by permitting the property to sell for $2,000, when it is actually worth $4,000 more.

The property passed to sale, notwithstanding the aforesaid objections, and upon motion for confirmation of sale the same objections were interposed. The motion to set aside the appraisement and objections to the confirmation of sale were overruled, and the sale confirmed. From this ruling the case is brought here for review. In support of the defendants' objections to the appraisement, several affidavits as to the value of the property were filed, as well as counter-affidavits on the part of the plaintiffs, all of which are preserved by bill of exceptions. From this evidence, it appears that six witnesses testified that the property was worth $3,500; six, that it was worth $3,000; and two, that it was worth $2,500.

The gross appraisement being for the sum of $3,000, it can hardly be said that the appraisement was so low as to be presumptively fraudulent. From an examination of the evidence, it appears that the appraisement made is not materially disproportionate to the actual market value of the property, and no sufficient cause exists to justify its being vacated or set aside.

The ruling complained of is supported by the evidence, is right and is therefore

AFFIRMED.

T. J. MACKAY ET AL. V. STATE OF NEBRASKA.

FILED APRIL 18, 1900. NO. 11,137.

Connempt: DISAVOWAL: EXTENUATION. A disavowal by contemnor of intention to commit a contempt of court, when made in good faith, though insufficient to purge the contempt, is, at least, receivable in extenuation of the offense.

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

McGilton & Herring, A. W. Jefferis and *James H. McIntosh*, for plaintiffs in error:

Presumptions and intendments will not be indulged in

a contempt case to sustain a judgment of conviction. *Hawes v. State*, 46 Nebr., 149; *Cooley v. State*, 46 Nebr., 603; *Beckett v. State*, 49 Nebr., 210.

The averments of the answer must be accepted as conclusive, and they completely exculpate the defendants. Such was the rule laid down in the *Percival Case*, and followed in subsequent cases. *Percival v. State*, 45 Nebr., 741; *Rosewater v. State*, 47 Nebr., 630. Such is the rule everywhere. *People v. Few*, 2 Johns. [N. Y.], 290; *Ex parte Biggs*, 64 N. Car., 202; *Wells v. Commonwealth*, 21 Gratt. [Va.], 500; *In re Walker*, 82 N. Car., 95; *Wilson v. State*, 57 Ind., 71; *In re May*, 1 Fed. Rep., 737.

Intent is a question of fact, which may be averred as a fact and proven as a fact. If there was no intentional interference with the court there was no contempt of court under the charge. *In re Moore*, 63 N. Car., 397; *Weeks v. Smith*, 3 Abb. Pr. [N. Y.], 211; *In re Woolley*, 74 Ky., 95; *Des Moines Street Ry. Co. v. Des Moines Street R. Co.*, 74 Ia., 585; *Morss v. Sewing Machine Co.*, 38 Fed. Rep., 482.

No appearance *contra.*

NORVAL, C. J.

In 1899 there was pending in the district court of Douglas county a case entitled, "In the matter of the application of Benjamin F. Dodd and Annie E. Dodd for a writ of habeas corpus on behalf of Clara Blain Dodd, Minnie Fay Dodd, Rosa Allen Dodd and Marvel Dodd, minor children of the petitioners." Of its nature we have no judicial knowledge, as the record before us is entirely silent in that respect. While said case was pending and undetermined in said court, T. J. Mackay, W. P. Harford and Hurbert C. Herring joined in writing, signing and transmitting to the Hon. Cunningham R. Scott, judge of said court before whom said case was pending, the following letter:

"*To the Hon. Cunningham R. Scott*—DEAR SIR: We, members of the executive board of the Nebraska Chil-

dren's Home Society, respectfully desire to present for your careful consideration the following facts in the case of the Dodd children, now in your hands for settlement.

"We are personally acquainted with the case from the beginning, and beg you to understand that in trying to retain these children our society is actuated solely by their solicitude for the future of the same. At the time when the parents of these children asked our society to provide for them, the family were in most destitute circumstances and dependent upon their neighbors for support, the father having made application to be admitted to the Soldiers' Home, thus throwing wife and children upon the charity of the public or the care of the county officials. We heard all the testimony in the case when the parents first made their appeal to have their children returned to them, and that testimony confirmed us in the belief that the parents were not only unable to provide for their large family, but unworthy as well, the main motive of their desire to regain their daughters being that they might go around the streets and saloons with their older deformed sister, to collect pennies and nickels from sympathetic people; thus enabling their parents to live in idleness. The dangers to which these girls, now pure and innocent, will be thus exposed, must become apparent at once to you, and if you can give the matter your personal attention, you will discover that these parents are now unable to support even themselves, and that by restoring these children to said parents, you are dragging them away against their will from comfortable loving homes to a wretched hovel where are no comforts and where these girls will have every incentive to wrong living, and no help towards a life of purity and respectability."

A complaint against said Mackay, Harford and Herring was filed in said district court, which alleged that in writing and transmitting said letter they intended to unduly influence said judge in his determination of the issues in the case pending before him, and to hinder the

due administration of justice; further, that certain of the statements made in said letter were false and malicious, without foundation in fact, and made for the purpose of deceiving said judge, and that the senders thereof must have known that certain of said statements were untrue, and were guilty of contempt in writing and transmitting the same as aforesaid.

The writers of the letter appeared and filed their answer to the complaint. It contained, among others, the following language:

"These defendants admit that they wrote and sent to Cunningham R. Scott the letter described in said complaint; and aver that by doing so these defendants did not know nor suspect that they might thereby be guilty of any contempt of court, nor did they intend any contempt of court thereby. On the contrary, these defendants, in writing and sending said letter, were actuated solely and exclusively by motives of kindliness and Christian charity for said children. They believed that said letter would encourage and promote a full judicial investigation of all the facts in respect to the relations of said society to said children; and aver that by said letter these defendants had no thought of attempting, and did not attempt to hinder the due administration of justice in the matter described in said complaint as pending before said court." These statements, with others, except the words "These defendants admit they wrote and sent to Cunningham R. Scott the letter described in said complaint," were, on motion, stricken from the answer, and error is predicated on this ruling of the court, the accused having been adjudged guilty of contempt. We are persuaded that error was committed in striking from the answer the allegation quoted. The rule in cases of constructive contempt is, if language alleged to be contemptuous is capable of an innocent construction, courts are bound to adopt that interpretation. *Percival v. State*, 45 Nebr., 741; *Rosewater v. State*, 47 Nebr., 630. In certain cases, one charged with contempt of court may purge

himself thereof by his answer given under oath. 7 Am. & Eng. Ency. Law [2d ed.], 74. The disavowal of the defendants of any intent on their part to hinder the administration of justice in said court, or to unduly influence it, if it did not purge them of contempt, at least was permissible in extenuation of the offense. 7 Am. & Eng. Ency. Law [2d ed.], 75 and cases there cited. The allegations of the answer above quoted, therefore, if they did not have the effect to purge the defendants of contempt, must be regarded, if true, as in some degree palliating the offense, if any was committed in writing and transmitting the letter in question. It was error to strike these allegations from the answer, and for this reason the sentence is reversed and the cause remanded. Other exceptions taken in the petition in error and urged in the brief are not decided.

REVERSED AND REMANDED.

HIGH SCHOOL DISTRICT NO. 137, HAVELOCK, NEBRASKA, V. LANCASTER COUNTY, NEBRASKA.

FILED APRIL 18, 1900. No. 11,165.

1. **Taxation:** CONSTITUTION: VALUATION: RATE. The constitution of this state requires not only that the valuation of property for taxation, but the rate as well, shall be uniform.

2. **High School:** STATUTE: NON-RESIDENT PUPILS: TUITION: ARBITRARY SUM. Sections 1 and 3, chapter 62, Session Laws, 1899 (Compiled Statutes, ch. 79, subdiv. 6, secs. 5 and 7), which provide that pupils residing without the limits of high school districts in the state may attend such schools free of charge to them, and that an arbitrary sum shall be paid out of the general fund of the county, as compensation to such high school district for such tuition, which sum may, in any case, fall below, or exceed, the cost of such tuition, contravene sections 1, 4 and 6, article 9, of the constitution, which declare, among other things, that the legislature may provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises; that the

legislature shall have no power to release or commute taxes; and that all taxes for municipal purposes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

ERROR to the district court for Lancaster county. Tried below before CORNISH, J. *Affirmed.*

C. W. Corey and *Robert Ryan*, for plaintiff in error:

It was said in *Pleuler v. State*, 11 Nebr., 547: "To justify a court in pronouncing an act of the legislature unconstitutional, it must be clear and free from reasonable doubt that it is so—not a doubtful and argumentative implication." Or, in other words, a statute should not be held invalid unless it is clearly forbidden by the paramount law. Such substantially has been the holding of all courts speaking upon this subject. *Cooper v. Telfair*, 4 Dallas [U. S.], 14; *Sharpless v. The Mayor*, 21 Pa., 147; *Adams v. Howe*, 14 Mass., 340; *City of Lexington v. McQuillan*, 9 Dana [Ky.], 513; *Santo v. State*, 2 Ia., 165; *State v. County Judge*, 2 Ia., 280; *Fisher v. McGirr*, 1 Gray [Mass.], 1; *Sears v. Cottrell*, 5 Mich, 251; *Tyler v. People*, 8 Mich., 333; *Hill v. Higdon*, 5 Ohio St., 243." This doctrine was reiterated afterward by this court in *In re Creighton*, 12 Nebr., 280, and in *Van Horn v. State*, 46 Nebr., 62, was clearly recognized.

T. C. Munger and *J. L. Caldwell, contra:*

The act of 1899 violates section 1, article 9, and section 4, article 9, and section 6, article 9, of the constitution. This court has often declared that taxes shall be levied with uniformity and equality. *Clother v. Maher*, 15 Nebr., 1; *Turner v. Althaus*, 6 Nebr., 54; 25 Am. & Eng. Ency. Law, 60.

This court has also often declared that no exemption from taxation can be tolerated. *State v. Poynter*, 59 Nebr., 417; *State v. Graham*, 17 Nebr., 43; *Union P. R. v. Saunders County*, 7 Nebr., 228; *O'Kane v. Treat*, 25 Ill., 557; *Dyar v. Farmington*, 70 Me., 515; *Fletcher v. Oliver*, 25 Ark.,

289; *Gunnison v. Owen*, 7 Colo., 467; *Sanborn v. Rice*, 9 Minn., 258; *Wells v. Weston*, 22 Mo., 384.

But the constitution of Nebraska, article 9, section 6, allows municipal corporations to assess and collect taxes for corporate purposes. This is a restriction of the power of a municipal corporation, such as a county, to collect taxes for any other than corporate purposes. This is the general doctrine when the constitution does not so expressly provide. Cooley, Taxation [2d ed.], pp. 689-692.

Our constitution is adopted in this clause from the constitution of Illinois, and we adopt the construction placed on this clause by that state. *Magneau v. City of Fremont*, 30 Nebr., 843; *City of York v. Chicago, B. & Q. R. Co.*, 56 Nebr., 572.

And in Illinois the same clause is held to be a limitation restricting the taxation to proper corporate purposes. *Harward v. St. Clair*, 51 Ill., 130 (1869); *Primm v. Belleville*, 59 Ill., 142; *Sleight v. People*, 74 Ill., 47; *People v. Trustees*, 78 Ill., 136.

In *Town of Belle Point v. Pence*, 17 S. W. Rep. [Ky.], 197, the Kentucky court held that a law authorizing children outside of a school district to attend it free of tuition, was violative of the constitution of that state. Similar cases involving the same principle that laws are invalid when imposing taxation or a public burden which is not for corporate purposes are given below; as allowing a city to pay for improving a city harbor; granting aid to a state normal school out of local school funds; imposing the cost of a county court house on certain townships in the county; requiring a county to pay for a bridge for a city within it, or a county to pay for an armory for state militia, and other similar illustrations. *Hasbrouck v. Milwaukee*, 13 Wis., 37; *State v. Haben*, 22 Wis., 660; *People v. Ulster*, 94 N. Y., 263; *In the Matter of Lands*, 60 N. Y., 398; *Simon v. Northup*, 40 Pac., 560; *Hubbard v. Fitzsimmons*, 57 Ohio St., 436; *Farris v. Vannier*, 6 Dak., 186; *Wells v. Weston*, 22 Mo., 384.

C. W. Corey and *Robert Ryan*, in reply:

The power of apportionment is included in the power to impose taxes and is vested in the legislature; and, in the absence of any constitutional restraint, the exercise by it of such power of apportionment can not be reviewed by the courts. *People v. Mayor of Brooklyn*, 4 Comst. [N. Y.], 419. The constitutions of some of our sister states contain special provisions designed to guard against an inequitable exercise of this power and to secure equality in the distribution of the public burdens. A violation of any such provisions would undoubtedly be cognizable by the courts. But in this state such restraints have not been deemed necessary and the people have been content to leave the wisdom and justice of the legislature, unrestrained by specific regulations, the subject of determining how the public burdens shall be apportioned among them. *Providence Bank v. Billings*, 4 Peters [U. S.], 513, 561, 563; *Thomas v. Leland*, 24 Wend. [N. Y.], 65; *Town of Guilford v. Supervisors of Chenango*, 13 N. Y., 143 *Bank of Rome v. Village of Rome*, 18 N. Y., 38; *Brewster v. City of Syracuse*, 19 N. Y., 116.

A. G. Greenlee also appeared for plaintiff in error.

NORVAL, C. J.

This suit was brought in the district court of Lancaster county to test the constitutionality of sections 1 and 3, chapter 62, of an act of the legislature approved April 1, 1899, entitled, "An act to provide free attendance at public high schools of non-resident pupils; to provide for the expense thereof, and to amend section 3 of subdivision 6, sections 2 and 7 of subdivision 14, and 2 of subdivision 17, chapter 79, Compiled Statutes of Nebraska for 1897, and to repeal said original sections now existing," Session Laws 1899, ch. 62; Compiled Statutes, ch. 79, subdivision 6. The sections mentioned are as follows:

"Sec. 1. That all regularly organized public high

schools determined by the state superintendent of public instruction to be properly equipped as to teachers, appliances, and course of study, shall hereafter be open to attendance by any person of school age residing outside of the district, resident of the state, whose education can not profitably be carried further in the public school of the district of his residence; *Provided,* * * * that said pupil has completed the common school course prescribed by the state superintendent for work below the high school; *Provided,* further, such non-resident pupils shall be subject in all respects to the same rules and restrictions as those which govern resident pupils attending such high school, and attend the nearest high school of approved grade, or any high school of approved grade in the county of their residence; *Provided,* further, when any high school shall be unable to furnish accommodations to non-residents without constructing or renting additional buildings, the board of education may refuse admission to such pupils.

"Sec. 3. The school board of each school district of this state whose high school is attended by pupils under the provisions of this act, shall, at the close of each school year, report in such form as the state superintendent may prescribe, to the county board of each county in which such pupils are residents, the number of pupils attending such high school from said county and the length of time of attendance of each pupil in weeks as hereinafter specified, and said county board shall, at the first regular meeting after the filing of such report, allow said district the sum of seventy-five cents for each pupil reported for each week during any part of which said pupil shall have been in attendance, and order a warrant drawn on the general fund of said county in favor of said school board for such sum, and the teacher's register shall be *prima facie* evidence of attendance of pupils set forth in such claim."

Under this act, High School District No. 137, of Havelock, Nebraska, filed a petition in the district court of Lancaster county, on appeal from the disallowance of its

claim against the county for tuition for pupils attending its high school, resident within said county, but outside said high school district. To this petition a general demurrer was sustained, and, the plaintiff electing to stand on its petition, the action was dismissed, and it comes to this court on error.

It is argued that inasmuch as a taxpayer inside the high school district must, under this act, pay the difference, if any, between the cost of tuition of non-resident pupils and the seventy-five cents per week allowed by section 3 of the act to be paid out of the general fund of the county, and must also pay his proportionate share of the seventy-five cents per week, with the other taxpayers of the county, in addition to bearing the whole of the expense of educating those pupils resident within the limits of the high school district, the law violates section 1, 4 and 6 of article 9 of the constitution. Said sections are as follows:

"Sec. 1. The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, inn-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates.

"Sec. 4. The legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever.

"Sec. 6. The legislature may vest the corporate author-

ities of cities, towns and villages, with power to make local improvements by special assessment, or by special taxation of property, benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

Before entering at large upon the discussion of the questions presented by the record, we would say that it does not appear to the court that the constitutional objections urged against this act are in any wise mitigated by the provision in section 3 thereof which grants to the school district, as compensation for the tuition of such non-resident pupils, the fixed and arbitrary sum therein named. Such sum may fall below, or exceed, the cost of such tuition, and is therefore not a factor tending to mitigate or off-set any objections that are raised in the case. So far as it affects the question, the act may have as well provided that such tuition might be without cost to a taxpayer resident outside such school districts. An act providing that non-resident pupils should be taught free of cost to taxpayers outside the limits of the district would, in our opinion, violate section 4 of article 9 of the constitution, for it would, in effect, release from their proportionate share of the taxes necessary to pay the cost of tuition of such non-resident pupils all portions of the county lying outside the limits of such high school district, and would be taxing one portion of a county for the benefit of another portion. *Town of Belle Point v. Pence*, 17 S. W. Rep. [Ky.], 197.

We will now discuss the constitutional questions thus involved, keeping in view the oft repeated principle of this court that the judiciary will not declare an act of the legislature unconstitutional unless it is clear that such act is inhibited by the fundamental law. *State v. Poynter*, 59 Nebr., 417, and cases cited. It will be observed that section 1 of the constitution, quoted, prescribes among other things, substantially, that the legislature shall provide

such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, etc. Section 6 provides, substantially, that, for all corporate purposes, except certain ones therein enumerated, all municipal corporations may be invested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same; and section 4 prohibits the legislature from releasing or discharging any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of the taxes to be levied for state purposes, or due any municipal corporation, and from commuting any such taxes, in any form whatever. For the purposes of this case, assume that the seventy-five cents per week allowed to be collected by the act, from the county generally, be insufficient to meet the expenses of educating the non-resident pupils in a given high school district, it is plain this difference must be made good by levying and collecting taxes on the property of the taxpayers resident in the school district, and this difference can not be collected from taxpayers of the whole county. Then the taxpayers within the school district will pay a greater proportion of these taxes than would those residing within the county, but outside the school district, and while the valuation of the property of those within the school district and those without it might be uniform, yet the rate of taxation, for the same purpose, would be higher on the property within, than upon that without the school district. Again, assume that the seventy-five cents per week exceeds the cost of tuition of such non-resident pupils, then the excess would accrue to the high school districts, and the taxpayers thereof would profit at the expense of those outside the limits of the high school district, and, in either case, the rule of uniformity prescribed in section 6 of said article of the constitution

would be violated; indirectly, perhaps, but it would be violated.

It is argued that section 1, of the article of the constitution under discussion, relates to uniformity of valuation only, and not to uniformity of rate of taxation. If that be true, then the provisions confer a barren right only, for the legislature could, under such construction, authorize municipal corporations to levy a higher rate of tax for a given purpose upon one subdivision of the corporation and a lower rate on other subdivisions, whereby some of the subdivisions, while their property might be uniform in valuation with all other subdivisions, would yet pay a much greater proportion of the taxes so levied. We are not disposed to so construe this section, but believe that it was intended, particularly when construed in connection with section 6, that for the same municipal purposes, the rate, as well as the valuation, should be uniform, and that it is not within the province of the legislature to evade the inhibition either directly or indirectly. Cooley, Taxation [1st ed.], 133. The high school district and all other portions of the country are, for the purposes of this act, an integral whole, such districts being a portion thereof, and giving effect to either of the assumptions above made, we would say that it clearly comes within the constitutional inhibitions named.

We quite agree with counsel for plaintiff that, under this act, the county is the proper unit of taxation; but we have already shown that, in event the cost of tuition should exceed or fall below the amount provided by section 3 of the act to be raised by taxing the property of the whole county, it would indirectly violate the rule of uniformity prescribed in section 6 of the article of the constitution named. It would also violate section 4 of said article, as an advantage would accrue to the taxpayers resident in the one or the other of the two portions of the county affected thereby, and it would clearly be a commutation of the taxes to be paid by the taxpayers resident in the one or the other of the two localities. It

may be true that such commutation would be brought about indirectly, that is, in case the cost of tuition exceeded the amount provided to be paid by the general tax upon the whole county, the taxpayers resident within the school district would be compelled to supply the deficiency by another levy upon the property within such district, whence it would follow that the difference would be a commutation in favor of those portions of the county outside the district; or, in case the cost of tuition should fall below the specified amount, the taxpayers within the limits of the district would profit at the expense of those without its limits; and it is clear that in either event a commutation of taxes would result. The cases stated are of course only assumptions, but they are the natural result of the system sought to be inaugurated by the act in question. It would seem clear and convincing that the act violates the provisions of the constitution cited, in the respects named, and that legislation of the character of the act in question can not be upheld by the court. *Clother v. Maher*, 15 Nebr., 1; *Turner v. Althaus*, 6 Nebr., 54; *State v. Poynter*, 59 Nebr., 417; *State v. Graham*, 17 Nebr., 43; *Union P. R. Co. v. Saunders County*, 7 Nebr., 228.

It is not deemed necessary to consider whether the fact that under this act, the taxpayers of such districts are compelled to pay the whole of the expense of educating pupils resident in such district and in addition thereto the proportion of the expense of educating non-resident pupils, affects the question of the constitutionality of the act; for, in our view, the act contains sufficient objections outside of this to render it invalid, and a discussion of this question would seem unnecessary. It is not doubted that, in a proper case, double taxation may be constitutional, and that taxation of overlying districts may also, in a proper case, be unobjectionable, so far as constitutional provisions are concerned; but it is not deemed necessary to enter into a discussion of this question at this time.

For the reason named, the judgment of the lower court is right and is

AFFIRMED.

STATE OF NEBRASKA v. THOMAS DENNISON.

FILED APRIL 18, 1900. No. 11,198.

1. **Lottery:** DEFECTIVE INFORMATION. An information drawn under section 225 of the Criminal Code, charging the defendant with opening and establishing a lottery, and which omits to allege the capacity in which the defendant acted, whether as owner or otherwise, is defective.

2. **Information:** VERDICT: PROCEDURE. When an information in a criminal cause fails to state a crime, on a trial had thereunder, it is not the proper practice, when the court discovers the defect, to direct a verdict of not guilty, but the jury should be discharged from further consideration of the case.

3. ———: AMENDMENT. It is not error to refuse to allow the county attorney to file an amended information, where the complaint before the examining magistrate failed to state a crime.

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

George W. Shields and *I. J. Dunn*, for the state:

Defendant insisted that the information was bad, because it failed to allege in what capacity the defendant acted in opening the lottery, whether in the capacity of owner, or otherwise. The court held that it was necessary to a good information that the information set out whether defendant acted in the capacity of owner, or whether he acted in the capacity of "otherwise," but neither the court nor the attorney for the defendant indicated what, in their judgment, is the meaning of the term "otherwise" as used in this section of the statute; whether it means one of the same general class as "owner," and if so, who may be included in said class, or whether the word "otherwise" as used here means the same as when used generally in the ordinary affairs of life. The court in sustaining defendant's objection

seemed to rely upon the rule laid down in the case of *Jansen v. State*, 19 N. W. Rep., 374, decided by the supreme court of Wisconsin. The supreme court of that state in the case referred to was construing a statute which read "that if any tavern keeper or other person," etc. The court held that the rule of "*noscitur a sociis*" applied; and that the general words "other person" following the special words designating a particular class of persons recognized by the law in a particular way, with reference to the subject being legislated upon, meant only persons belonging to the same or a similar class, and did not include all persons. With the rule of law laid down by the Wisconsin court, we have no quarrel whatever; but we assert that the rule as applied to the Wisconsin statute has no application to the case at bar. While it has been held as a general rule by the courts that general words in a statute following specific words designating a particular class will be modified and controlled by the special words, this rule is by no means universal, neither is it without important exceptions.

The rule above stated will not be adhered to when by so doing the plain intent of the legislature will be contracted, limited or entirely destroyed. In the case of *Von Rueden v. State*, 71 N. W. Rep., 1048, a Wisconsin case much later than the one in 19 N. W. Rep., *supra*, the supreme court of that state thoroughly discuss the rule, its application, limitations and exceptions.

The court erred in instructing the jury on its own motion to return a verdict of not guilty in said cause. If there was nothing before the court upon which the defendant could be convicted, then, surely, there was nothing before it on which he could be found guilty.

The court erred in denying plaintiff's application to file an amended information in said cause. The quashing of an indictment and the discharge of a defendant thereon, on the ground that the grand jury finding the indictment was illegally constituted is no bar to subsequent indictment or prosecution of the defendant for the same of-

fense. The same rule is recognized in *State v. Scott*, 68 N. W. Rep. [Ia.], 451; *State v. Butcher*, 44 N. W. Rep. [Ia.], 239; *State v. Merchant*, 38 Ia., 375; *State v. Doe*, 50 Ia., 541; *State v. Reilly*, 78 N. W. Rep. [Ia.], 680.

Albert S. Ritchie and *Ed P. Smith, contra.*

Albert S. Ritchie: The motion to quash this information was properly sustained for the reason that the information charged more than one specific offense, and was, therefore, bad for duplicity. This information is open to the objection of duplicity for the reason that it charges these offenses to have been committed on the 16th day of January, 1899, and also on other days between that date and the 26th day of January, 1899. It is the rule without exception, that the *continuando* can be used only where a series of acts all taken together constitute but one offense, as, for instance, the maintaining of a nuisance; but where each act by itself constitutes a violation of the law and would be sufficient, if proved, to sustain a verdict of guilty against the defendant, then the *continuando* can not be used, for the reason that several distinct and specific offenses are thereby charged and it is not permissible to join the same in one count of an information. Neither can this *continuando* be rejected as surplusage. This rule was laid down in this court in the case of *State v. Pischel*, 16 Nebr., 490. In that case the information charged the defendant in these words: "On the 22d day of October, in the year of our Lord one thousand eight hundred and eighty-two, * * * and on all the several days between the said 22d day of October in the year aforesaid and the first day of April, in the year of our Lord one thousand eight hundred and eighty-three," etc.*

NORVAL, C. J.

We are asked by the state to pass judgment upon cer-

*The indictment in *State v. Pischel*, with the exception of name and dates, was a substantial copy of the indictment in *People v. Sweetser*, 1 Dak., 308. See opinion, pp. 192-195.—REPORTER.

tain proceedings had in the district court of Douglas county upon an information filed therein against one Thomas Dennison, the essential portions of which are as follows:

"That on the 16th day of January, in the year of our Lord one thousand eight hundred and ninety-nine, and on divers days between the said 16th day of January, 1899, and the 26th day of January, 1899, Thomas Dennison, late of the county of Douglas aforesaid, in the county of Douglas and State of Nebraska aforesaid, then and there being in said county, did then and there unlawfully and wilfully for gain, open and establish a certain lottery and scheme of chance known as policy, in which money was to be and was drawn, paid and distributed by the hazard and turn of a wheel of chance known as a policy wheel."

The defendant filed a motion to quash this information for duplicity, which was overruled, and after a plea of not guilty, a jury was empaneled and trial proceeded. Defendant then objected to the introduction of any evidence on the ground that the information did not state a crime under section 225 of the Criminal Code, this being the section, as stated by the county attorney, in open court, under which the prosecution in the case was had. Thereupon, the court, of its own motion, instructed the jury to return a verdict of not guilty. The state then asked leave to file an amended information, which request was denied. It then asked the court to discharge the jury, without prejudice to a future prosecution, which application was also overruled. The jury then rendered a verdict of not guilty, in accordance with the instruction, and the defendant was discharged from custody. The state brings the case here on error, alleging that the lower court erred:

First, In sustaining the defendant's objection to the introduction of evidence on the ground that the information charged no offense;

Second, In instructing the jury on its own motion to return a verdict of not guilty;

Third, In denying the application of the state to file an amended information; and,

Fourth, In refusing to proceed with an examination for the purpose of determining whether probable cause existed for holding defendant to the next term of court.

1. It will be observed that the state at the trial elected to consider the information as being drawn under section 225 of the Criminal Code. If it charged a crime under said section, it would be under the following language:

"If any person * * * shall open, or establish, as owner, or otherwise, any lottery, or scheme of chance, in this state." It will be noticed that the information is silent as to the capacity in which defendant acted in opening and establishing the forbidden business, while the statute denounces the act when committed by any person as "owner, or otherwise." It is therefore necessary to determine whether or not it is essential to allege and prove the capacity in which a person may act who is charged with this crime, under this section. If it is, the information was defective, and the lower court properly sustained defendant's objection to the introduction of any evidence thereunder.

The question is fraught with difficulties, for the reason that section 224 of the Criminal Code is also applicable to lotteries, the essential differences in the two, so far as is necessary to notice here, being that section 224 is confined to lotteries within this state, while section 225 extends to those either within or outside the state; and further, that while in section 224 the act is denounced against "any person," in section 225 the act of opening or establishing a lottery within the state is prohibitory against any person "as owner, or otherwise," and it further forbids any person "as owner or agent" from conducting a lottery established either within or outside the state. There seems to be no doubt that, in an information drawn under section 224, it is not necessary to allege the capacity in which a person may act in conducting a lottery or scheme of chance, the mere act on the part of

any person of doing any of the things therein denounced being sufficient to constitute a crime. Neither does there seem to be any doubt that under the latter part of section 225, reading as follows, "If any person, * * * shall be in any wise concerned in any lottery or scheme of chance, by acting as owner or agent in this state, for or on behalf of any lottery or scheme of chance, to be drawn, paid, or carried on, either out of or within this state, every such person shall be fined," it would be necessary to charge that such person was acting as either owner, or agent of the owner, of such lottery, for the term "every such person" must refer to every one who is concerned as either owner or agent of any such lottery, and to no other persons than those so acting. This term "every such person" of course also refers to the term "as owner, or otherwise," employed in the portion of section 225 in question. Now, the fact that, in one portion of said section 225, the term "as owner, or otherwise" is employed, while in the other portion thereof, the more limited term "as owner or agent" appears, must have some significance, otherwise the same term would have been used in both clauses of the section. The word "otherwise" is extremely broad in its meaning, and is evidently intended to signify something more than members of the class "owners," else its employment would be absurd, for no matter how slight may be a person's proprietary interest in a business, he is an owner, and for that reason, we do not think, as is contended by counsel, that the word "otherwise" is merely intended to apply to those who may have a proprietary interest in such scheme of chance. We are inclined to believe that, taking this section as a whole, and in connection with section 224, it was the intention of the legislature, by the use of the words "or otherwise" after the word "owner," to mean any person who opens or establishes a lottery in any capacity, whether as agent, employee or other representative of the owner of such lottery. But it does not follow from this construction of the statute, as urged by the state,

that it is unnecessary to either allege or prove the capacity in which a person accused of such crime carries on such business. It would seem to be a more reasonable construction to say that the legislature, by employing the terms "owner, or otherwise," and "owner or agent" in section 225, while in section 224 it employed the term "any person" only, intended that, in prosecutions under section 224 it is not necessary to allege or prove the capacity in which such scheme is conducted, while under section 225 such allegation is requisite. Any other interpretation would be to hold that these more specific terms were needlessly used; but we are bound to give a meaning to words employed in legislative acts, if by so doing a reasonable construction can be given to all of them, and it is obvious that one of the reasons for the insertion of the specific terms, "owner, or otherwise" and "owner or agent" in the one section, while in the other section the term "any persons" is used, is that it was the legislative will that the capacity in which such person acted should be stated, if prosecuted under one section, while, if prosecuted under the other section such allegation is not necessary. This being the conclusion reached, it was not error on the part of the lower court to exclude evidence under the information claimed to allege a crime under section 225, and which did not allege the capacity in which the defendant acted in opening and establishing the lottery therein mentioned.

2. On the second point urged, that the court erred in instructing the jury to return a verdict of not guilty, counsel for the state is right; for, if the information did not state a crime (and we have so held) there was nothing on which the jury could pass, and the proper practice would have been to have discharged the jury from further consideration of the case.

3. As the record stands, the court ruled correctly in denying the application of the state for leave to file an amended information. The complaint filed before the committing magistrate, which is a part of the record in

this case, contains the same defect as appears in the information, and for that reason no valid information could be founded thereon.

4. As the record does not disclose that the state asked the district court to hold a preliminary examination in the case, that question can not be considered.

EXCEPTION SUSTAINED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT, V. SCHOOL DISTRICT NO. 10, KEARNEY COUNTY ET AL., APPELLEES.

FILED APRIL 18, 1900. No. 9,386.

School District: INCORPORATED CITY WITHIN ITS LIMITS. Unless a school district includes within its limits an incorporated city having more than fifteen hundred inhabitants, it is not subject to the provisions of subdivision 14, chapter 79, Compiled Statutes, 1895.

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

J. W. Deweese and *F. E. Bishop*, for appellant.

Ed L. Adams, Hague & Anderbery and *E. C. Dailey, contra.*

SULLIVAN, J.

This case presents a question of statutory construction. In the year 1896 there was levied against the property of the Chicago, Burlington & Quincy Railroad Company, located in the school district of Minden, a tax of twenty-five mills on the dollar of the assessed valuation for general school purposes, and a further tax of ten mills for the payment of district bonds. To enjoin the collection of a portion of such tax, the company filed a petition in the district court of Kearney county alleging that the

levy was in excess of the limit prescribed by law, and that the maximum tax authorized by the statute could not exceed twenty mills on the dollar for all school purposes. The trial court sustained a general demurrer to the petition and gave judgment in favor of the defendants. The correctness of the decision is challenged by this appeal.

The defendant district comprises the city of Minden and some unincorporated territory contiguous thereto. The city has less than 1,500 inhabitants, but the population of the district exceeds 1,500. The appellant contends that the population of the district determines the class of districts to which it belongs, while appellees insist that the population of the city is the determining factor. Both parties are agreed that if the district is not governed by subdivision 14, chapter 79, Compiled Statutes of 1895, the limit of lawful taxation has not been passed. The first section of the subdivision referred to is as follows:

"Sec. 1. That each incorporated city in the state of Nebraska, or those hereafter incorporated as such, having a population of more than fifteen hundred inhabitants, including such adjacent territory as now is, or hereafter may be, attached for school purposes, shall constitute one school district, and be known by the name of 'the school district of (name of city,) in the county of (name of county,) in the state of Nebraska,' and as such, in that name, shall be a body corporate and possess all the usual powers of a corporation for public purposes, and in that name and style may sue and be sued, purchase, hold, and sell such personal and real estate, and control such obligations as are authorized by law, and the title to all school buildings or other property, real or personal, owned by any school district within the corporate limits of any city, shall, upon the organization of a district under the provisions of this subdivision, vest immediately in the new district; and the board of education by this subdivision provided, shall have exclusive

control of the same for all purposes herein contemplated; *Provided*, That any territory not included within the corporate limits of any city, and containing territory or a number of children sufficient to constitute a school district under the provisions of this chapter, may, by petition signed by at least a majority of the legal voters of such territory, and a majority of the board of education of such city, be by the county superintendent erected into a separate district under the conditions imposed by this chapter; *Provided, further*, That in case any city above described shall embrace more than one entire school district, and the fractional part of another school district shall extend within the corporate limits of said city, the fractional part so embraced within said corporate limits shall be exempt from the provisions of this subdivision, until such a time as a majority of the legal voters of said fractional part shall petition the board of education of said city to be included in said district, and upon the receipt of such petition by said board, the said fractional part shall be included within the said district, for all purposes of this subdivision."

This is not a very lucid expression of the legislative will, but we are of opinion that it has been correctly interpreted by the trial court. It seems to us that the basis, or chief component, of the district contemplated by the section quoted, is an incorporated city having a poulation of 1,500 or more. If this were not so, the erection of the outlying territory into a separate district might leave the original district without the requisite population and thus destroy its rank. The section was amended in 1897, and incidentally its meaning so clarified as to leave no further room for doubt that the phrase "having a population of more than fifteen hundred inhabitants" relates to and is descriptive of the city, and not of the district. The judgment is right and is

AFFIRMED.

EUGENE H. PEARSON, APPELLEE, V. BADGER LUMBER COMPANY ET AL., APPELLANTS.

FILED APRIL 18, 1900. No. 9,225.

1. **Confirmation of Sale:** OBJECTION IN SUPREME COURT. An objection to the confirmation of a sale not made in the trial court and raised for the first time in this court will not be considered.

2. ———: NOTICE. A notice of sale which states that the sale is to be made by virtue of an order issued out of the district court in a certain case, entitling it, is a sufficient compliance with the statute.

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

Charles E. Magoon, for appellant.

S. L. Geisthardt, contra.

Frank Irvine, who was not of counsel in the *nisi prius* court, argued the case for appellant, and called the attention of the court in his brief to the fact that the property did not sell for two-thirds of its appraised value.

SULLIVAN, J.

This is an appeal from an order confirming a sale of real estate made under a decree of foreclosure. The Badger Lumber Company was the owner of the property. The president and directors of the Insurance Company of North America had a first mortgage on a portion of it, which will for convenience be hereinafter designated as "tract A." Upon the other portion of it, which will be hereafter referred to as "tract B," the Philadelphia Mortgage & Trust Company had a first mortgage. Eugene H. Pearson had a second mortgage on both tracts. Pearson brought this suit to foreclose his mortgage, and the other mortgagees having, by intervention, become parties to the action, asked for and obtained a decree foreclosing their mortgages. Afterwards, in the same case, another

decree was rendered establishing the lien of Pearson's mortgage and providing for its payment out of the surplus remaining after the satisfaction of the first decree.

Two questions discussed by counsel for appellant merit brief consideration. It is first contended that the motion to vacate the sale should have been sustained because the property did not sell for two-thirds of its appraised value. It appears from the record that tract A was appraised at $12,000, and tract B at $10,000. The sheriff's return to the order of sale shows that tract A was sold to the Philadelphia Mortgage & Trust Company for $6,667, and tract B to the president and directors of the Insurance Company of North America for $8,000. After the case was brought, by appeal, to this court, the district court made an order correcting its record to show that tract A was sold for $8,000 and tract B for $6,667. The authority of the district court to make this order is discussed at some length by counsel, but we do not find it necessary to determine the point. The objection that the property did not sell for two-thirds of the appraised value was not presented to the trial court, and can not be raised here for the first time. *Ecklund v. Willis*, 42 Nebr., 737; *Broadwater v. Foxworthy*, 57 Nebr., 406. In reaching this conclusion we have not overlooked the fact that the motion to vacate the sale states that the property did not sell for two-thirds its actual value in money. It is also stated in the motion that "the real money value of the interest of the Badger Lumber Company in said lands and tenements is $32,000." At the hearing of the motion affidavits were read showing that the appraisement was too low, but it does not appear that any claim was made that the property did not bring at the sale two-thirds of its value as fixed by the appraisers. We think it very clear that appellant did not intend by its motion to raise this point, and that the trial court failed to rule on it, without being itself in fault. The objection that the sale was not justified by the appraisement, is apparently a recent conception of counsel, for there is

no reference to it in the original brief. It was probably suggested by the order of the district court amending its record.

It is next insisted that the order of confirmation should be reversed because the notice of sale was incorrect, misleading and calculated to deter bidders. The notice states that the sale is to be made by virtue of an order issued out of the district court of Lancaster county in a case wherein Eugene H. Pearson is plaintiff and the Badger Lumber Company et al. are defendants. The law requires nothing more. Code of Civil Procedure, sec. 497. There was only one decree in the case which provided for a sale of the property. The judgment in favor of Pearson did not direct a sale, but merely provided for the disposition of a portion of the proceeds of the sale to be made under the first decree. The notice was sufficient. The order of confirmation is

AFFIRMED.

EQUITABLE BUILDING & LOAN ASSOCIATION, APPELLEE, V. GEO. E. BIDWELL ET AL., APPELLANTS.

FILED APRIL 18, 1900. No. 9,218.

1. **Contract with Corporation:** ESTOPPEL. One who has entered into a contract with a body assuming to act as a corporation, is not permitted, when sued on such contract, to question the capacity of such body to contract or to sue.

2. **Statute:** ARTICLES OF INCORPORATION: FILING WITH CLERK. Under section 126, chapter 16, Compiled Statutes, 1895, a corporation, previous to the commencement of any business, except its own organization, must file its articles of incorporation for record in the office of the county clerk in the county or counties in which the business is to be transacted.

3. **Record:** COPY: PROOF. And such record, or a certified copy thereof, is primary proof of the right of the association to transact business.

4. **Building and Loan Association:** STIPULATION IN MORTGAGE: WITHDRAWAL OF VALUE OF SHARES. A borrower from a building and loan association, whose mortgage stipulates that in

case of foreclosure he shall receive credit for the withdrawal value of his shares of stock on a basis fixed by the by-laws, is entitled on foreclosure to have the withdrawal value of his stock fixed and credited according to his contract.

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

Shull & Farnsworth, John T. Spencer and *J. Fowler*, for appellants:

When the cause came to trial, not only was there no attempt to give any credit for the withdrawal value of the shares of stock, but the by-laws, which were as much a part of the contract as the note itself, were not even introduced in evidence; and the note, articles of incorporation and by-laws were abandoned and the case tried upon a claim for so much money had and received, and credit given for payments made thereon. Suppose a man sues on a promissory note drawing ten per cent interest. Issue is joined and cause comes to trial. Plaintiff can not find the note; and, therefore, says to the court: "We abandon our suit on this note and we ask judgment on an account. There can not be prejudice, as we will take less interest than the note draws"; and the court should say: "Well, if you take less interest, there can be no prejudice, and I will let you try it that way." In spite of the rate of interest, would defendant not be prejudiced? He was ready for trial on one issue. He is compelled to try it on another without change of pleadings, and simply on the theory no prejudice could arise. A party can not state one case and prove another. *Clarke v. Omaha & S. W. R. Co.*, 5 Nebr., 314; *Young v. Filley*, 19 Nebr., 543.

Jay & Welty and *Swan, Lawrence & Swan, contra.*

SULLIVAN, J.

This action was instituted by the Equitable Building & Loan Association to foreclose a real estate mortgage. Some of the defendants are the mortgagors and the others

are owners of incumbrances on the property covered by plaintiff's mortgage. The district court gave plaintiff a first lien on the premises described in the petition, and from that judgment the defendants have appealed. They first contend that the association has not shown that it possesses legal capacity either to contract or to sue. This contention can not be sustained. The mortgagors are not permitted to deny the validity of the plaintiff's mortgage (sec. 144, ch. 16, Compiled Statutes, 1899; *Holland v. Commercial Bank*, 22 Nebr., 571; *Livingston Loan & Building Ass'n v. Drummond*, 49 Nebr., 200), and the other defendants being in privity with them are also bound by the estoppel. But if this were not so, there is another reason why the alleged want of corporate capacity does not entitle defendants to a reversal of the judgment. The plaintiff is a Nebraska corporation; its home office is in Dakota county, and there its articles of incorporation are recorded. At the time it was organized, section 126, chapter 16, Compiled Statutes, 1895, was in force and provided as follows: "Every corporation, previous to the commencement of any business, except its own organization, when the same is not formed by legislative enactment, must adopt articles of incorporation, and have them recorded in the office of the county clerk of the county or counties in which the business is to be transacted, in a book kept for that purpose." At the trial the plaintiff produced a copy of the record of the articles, duly certified by the county clerk, and the same was received in evidence. This was competent and primary proof; and it established completely the right of the association to make contracts and enforce them by suit. Code of Civil Procedure, sec. 408; *Hall v. Aitkin*, 25 Nebr., 360; *Farmers Loan & Trust Co. v. Funk*, 49 Nebr., 353. In addition to this there was introduced in evidence a certificate issued by the banking department, under section 148*c*, chapter 16, Compiled Statutes, 1895, authorizing the plaintiff to do business in this state as an incorporated building and loan association.

Another argument pressed vigorously on our attention by counsel for defendants is that the evidence does not entirely support the judgment. The plaintiff has filed no brief in the case, and we are not advised of its views upon this point. It seems quite probable that the recovery is not excessive, but we are unable to find in the record any evidence whatever that the amount awarded the association is the actual balance due on its loan to the principal defendants. It is provided in the mortgage that the amount due the plaintiff, in the event of a foreclosure, shall be the original debt, all monthly installments on the borrower's stock, interest, premiums, fines, charges and penalties due at the date of the decree, together with any sums paid by the association for insurance, taxes or assessments on the mortgaged property, which aggregate sum shall be credited with the withdrawal value of the borrower's shares of stock as fixed by the by-laws of the company. The by-laws were not introduced in evidence, and, therefore, the withdrawal value of the borrowers' shares was not determined in the mode prescribed by the contract, nor in any other manner. The borrowers, it is true, were credited with the actual amount paid by them to the association, but we have no means of knowing that such amount represents the withdrawal value of their stock. Probably it exceeds such value, but there is no basis in the record for saying that it does. The judgment rests, in part, on mere conjecture, and it must, therefore, be reversed.

REVERSED AND REMANDED.

EQUITABLE BUILDING & LOAN ASSOCIATION, APPELLEE, V. Z. M. BAIRD ET AL., APPELLANTS.

FILED APRIL 18, 1900. No. 9,218.

Adjudicated by Another Case: CONTRACT WITH CORPORATION: ESTOPPEL: ARTICLES OF INCORPORATION: RECORD: BUILDING AND LOAN ASSOCIATION. This case is governed by the principles announced in *Equitable Building & Loan Association v. Bidwell*, decided herewith.

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

Shull & Farnsworth, John T. Spencer and *J. Fowler*, for appellants.

Jay & Welty and *Swan, Lawrence & Swan, contra.*

SULLIVAN, J.

The questions presented by the record are identical with those in *Equitable Building & Loan Association v. Bidwell*, just decided. On the authority of that case the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

HUGH J. JEWETT ET AL., APPELLANTS, V. AUSTIN BLACK ET AL., APPELLEES.

FILED APRIL 18, 1900. No. 9,227.

1. **Ejectment:** EQUITABLE DEFENSE: TRIAL TO COURT. Where the answer to a petition in ejectment presents an equitable counter-claim which is traversed by a reply, the issues of fact thus arising are triable to the court without a jury.
2. **Evidence:** OBJECTION. An objection to the introduction in evidence of a written instrument signed by several persons, on the ground that it is "incompetent, irrelevant and immaterial," is too general to call in question the due execution of the instrument or the genuineness of the signatures thereto.

3. **Executory Contract:** EQUITABLE OWNERSHIP. An executory contract for the sale of land vests the equitable ownership of the property in the purchaser, and in such case the seller retains the legal title as security for the deferred installments of the purchase price.

4. **Time Essence of Contract.** In equity, time will be regarded as of the essence of a contract when it clearly and affirmatively appears that the parties intended that time should be essential.

5. **Evidence:** FORFEITURE: WAIVER. Evidence tending to show that forfeiture was waived, will not be considered where the question of waiver is not raised by the pleadings.

APPEAL from the district court of Jefferson county. Heard below before STULL, J. *Reversed.*

W. P. Freeman and *John Heasty*, for appellants:

In ejectment, when the defendant alleges an equitable defense, and prays for affirmative relief, the issue presented thereby is equitable in its nature, and is triable by the court without the intervention of a jury, and such issue should be determined first, for upon the right of the defendant to recover upon his equitable counter-claim will depend the necessity of proceeding with the legal issue. 7 Ency. Pl. & Pr., 810; *Estrada v. Murphy*, 19 Cal., 248; *Kahn v. Old Telegraph Mining Co.*, 2 Utah, 174; *Sussenbach v. First Nat. Bank*, 5 Dak., 477; *Swasey v. Adair*, 88 Cal., 179; *Carmen v. Johnson*, 20 Mo., 108; *Hynds v. Safford*, 39 Barb. [N.Y.], 625; *Murray v. Walker*, 31 N. Y., 399. *Smith v. Moberly*, 15 B. Mon. [Ky.], 73; *South End Mining Co. v. Tinney*, 35 Pac. Rep. [Nev.], 90; *Van Orman v. Spafford*, 16 Ia., 186; *Delay v. Chapman*, 2 Ore., 245; *Cooper v. Smith*, 16 S. Car., 333; *Smith v. Bryce*, 17 S. Car., 539; *Adickes v. Lowry*, 12 S. Car., 108; *Allen v. Logan*, 96 Mo., 598; *Jones v. Moore*, 42 Mo., 419; *Goodman v. Nichols*, 44 Kan., 22; *Steele v. Boley*, 7 Utah, 64; *Downer v. Smith*, 24 Cal., 124; *Blum v. Robertson*, 24 Cal., 129; *Smith v. Smith*, 80 Cal., 329; *Dewey v. Hoag*, 15 Barb. [N. Y.], 365.

Hugh J. Dobbs and *E. H. Hinshaw, contra:*

An action in ejectment is an action at law. The prin-

ciple of law which declares that legal titles to land are cognizable only in courts of law is as old as English jurisprudence. It is always enforced by the courts; and it is held to be the duty of the court, even though the question is not presented by the pleadings, or in briefs or argument of counsel, to recognize and give it effect. *Hipp v. Babin*, 19 How. [U. S.], 278; *Lewis v. Cocks*, 23 Wall. [U. S.], 466. In all such cases the adverse party has a constitutional and common-law right to a trial by a jury of which he can not be deprived, where the remedy at law is complete. Sedgwick & Wait, Trials of Title to Land, paragraphs 496 and 170; *Tillmes v. Marsh*, 67 Pa. St., 507. Moreover, an equitable title is not sufficient to support an action in ejectment. In such cases it is the legal and not the equitable title which is involved. *Dale v. Hunneman*, 12 Nebr., 221; *Malloy v. Malloy*, 35 Nebr., 222; *Real Estate & Trust Co. v. Kragscow*, 47 Nebr., 592. In this class of cases, therefore, courts of law alone have jurisdiction.

Time is not the essence of the contract unless it is expressly so declared by the parties themselves. *Willard v. Foster*, 24 Nebr., 205. The general rule in this state is that the parties may make time the essence of the contract, so that if there be a default in payment on the day the same is due, without any just excuse and without any waiver, afterward, the court will not interfere to keep the party in default. *Langan v. Thummel*, 24 Nebr., 265; *Patterson v. Murphy*, 41 Nebr., 818; *Brown v. Ulrich*, 48 Nebr., 409; *White v. Atlas Lumber Co.*, 49 Nebr., 82; *Whiteman v. Perkins*, 56 Nebr., 181. If time is the essence of the contract, that element may be waived. *Whiteman v. Perkins, supra.*

J. N. Rickards, also for appellees.

SULLIVAN, J.

This is an appeal from a judgment of the district court enforcing specific performance of a contract for the sale of a half section of land in Jefferson county. On Jan-

uary 1, 1891, Hugh J. Jewett, the owner of the property, sold it to John H. Sanford for the sum of $2,560. Of this sum part was paid when the contract was executed and a portion of the remainder was to be paid on the first day of January in each of the four succeeding years. On June 1, 1891, Sanford sold the premises to Austin and Jerry Black, the appellees herein, for the sum of $4,800, to be paid in small installments. The Blacks bought the land for the purpose of occupying and improving it. They took possession with Sanford's consent, did considerable breaking, built two dwelling houses and otherwise increased the value and usefulness of the property. They have also paid to their vendor $400 of the purchase price. They were not in default on their contract prior to November 1, 1892. Their vendor had, however, made default on his contract with Jewett by failing to pay the second installment of the purchase price which became due January 1, 1892. After Sanford had been in default for some months he surrendered his contract to plaintiff, who notified the Blacks that there had been a forfeiture of their rights and then commenced an action of ejectment against them. The defendants answered setting up an equitable counter-claim and demanding a specific execution of the surrendered contract. A trial of the cause, without the intervention of a jury, resulting in a decree which, after fixing the amount due to Jewett under his contract with Sanford, provides "that upon payment to plaintiff by the defendants Black of the several sums, interest and costs herein found to be due him, or upon the payment of said sums into court for his use and benefit, that said plaintiff make, execute and deliver to defendants Black a warranty deed as against all persons claiming by, under or through the said Jewett." From this decree the legal representatives of the plaintiff prosecute this appeal.

In limine is raised a question of jurisdiction. Counsel for defendants contend that the petition determines the character of the action, and that the plaintiff having

sued for the possession of the property in controversy, the judgment rendered in the action is not subject to review by appeal. To this proposition we can not agree. The answer of the defendant states facts which it is claimed constitute a cause of action against the plaintiff for specific performance of a contract. That is the action which has been tried; it is the action in which judgment has been rendered. It is the case presented by the record for review. Upon this point the decision in *Hotaling v. Tecumseh Nat. Bank*, 55 Nebr., 5, is of controlling authority.

The first argument advanced by counsel for plaintiff is that the execution of the contract between Sanford and the defendants was not proven. The instrument was received in evidence over plaintiff's objection that it was "incompetent, irrelevant and immaterial." It was, we think, properly received and it was the duty of the court to consider it. The objection interposed did not call in question the due execution of the document or the genuineness of the signatures thereto. *Gregory v. Langdon*, 11 Nebr., 166; *Rupert v. Penner*, 35 Nebr., 587; *Chicago, R. I. & P. R. Co. v. Archer*, 46 Nebr., 907; *Maul v. Drexel*, 55 Nebr., 446; *Krull v. State*, 59 Nebr., 97.

Another argument of counsel for appellants is that the court could not rightfully enforce specific performance because Jewett had no right of action against defendants to recover the purchase money due on his contract. It is also insisted that the court erred in awarding specific performance without requiring payment to Jewett of the entire sum due on the contract between the defendants and Sanford. If there had been no forfeiture of the contracts, it is very clear that Jewett would have no just claim upon the money due from the Blacks to their vendor. An executory contract for the sale of land vests the equitable ownership of the property in the purchaser. The seller in such case retains the legal title as security for the deferred installments of the purchase price. *Hendrix v. Barker*, 49 Nebr., 369. By the contract

of January 1, 1891, Sanford became the owner of the real estate in controversy subject to a vendor's lien in favor of Jewett. By the contract of June 1, 1891, the defendants became the equitable owners of the property subject to two vendors' liens, one in favor of plaintiff and the other in favor of Sanford. Jewett held the legal title in trust, first for Sanford and then for the Blacks. When the amount due on the first contract was tendered to Jewett, it became his duty, if still bound, to make proper conveyance to his vendee. The decree, however, requires the transfer to be made to the Blacks. Of this Mr. Sanford may have cause to complain, but not Jewett, unless the contracts upon which the Blacks rely have been forfeited and are null.

We will now consider the effect of Sanford's failure to make the payments due on January 1, 1892 and January 1, 1893. The contract contains the following provision: "In case the second party or his legal representatives shall pay the several sums of money aforesaid, punctually and at the times above limited, and shall strictly and literally perform all and singular his agreements and stipulations aforesaid, after their true tenor and intent, then the party of the first part, his heirs or assigns, shall execute, make and deliver to said party of the second part his heirs or assigns, on the surrender of this contract, a deed conveying said premises in fee simple, with covenants of warranty. And in case the second party shall fail to make the payments aforesaid, and each of them punctually, and upon the strict terms and times above limited, and likewise to perform and complete all and each of his agreements and stipulations aforesaid, strictly and literally without any failure or default, then this contract so far as it may bind said first party, shall become utterly null and void, and all rights and interests hereby created or then existing in favor of the second party, or derived from him shall utterly cease and determine, and the rights of possession, and all equitable and legal interests in the premises hereby contracted

shall revert to and revest in said first party, without any declaration of forfeiture or act of re-entry, or any other act of said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid, or services performed, as absolutely, fully, and perfectly as if this contract had never been made. And the said party of the first part shall have the right, immediately upon the failure of the party of the second part, to comply with the stipulations of this contract, to enter upon the land aforesaid, and take immediate possession thereof, together with the improvements and appurtenances thereto belonging. And the said party of the second part, covenants and agrees that he will surrender unto the said party of the first part the said land and appurtenances without delay or hindrance."

It is now firmly established everywhere that time may be made the essence of a contract. And it will be so regarded, even in equity, if it affirmatively and clearly appear that the parties intended that time should be essential. In 3 Pomeroy, Equity Jurisprudence [2d ed.], sec. 1408, it is said: "Time may be essential. It is so whenever the intention of the parties is clear that the performance of its terms shall be accomplished exactly at the stipulated day." No particular form of words is necessary to express the intention of the parties. If they have clearly indicated their purpose that the contract shall be void if not performed within the prescribed time, that is sufficient. It is the business of the courts to enforce agreements actually made and not to make new ones, or relieve parties from obligations which they have deliberately assumed. Between the plaintiff and Sanford it was expressly stipulated that time should be of the essence of the contract, not, of course, by the use of these very words, but by the employment of terms almost as explicit. *Morgan v. Bergen*, 3 Nebr., 209; *Langan v. Thummel*, 24 Nebr., 265; *Brown v. Ulrich*, 48 Nebr., 409; *White v. Atlas Lumber Co.*, 49 Nebr., 82; *Whiteman v. Perkins*, 56

Nebr., 181; *Kimball v. Tooke*, 70 Ill., 553; *Barnard v. Lee*, 97 Mass., 92; *Cheney v. Libby*, 134 U. S., 68. The result of this conclusion, which we reach with great reluctance, is, that Sanford's contract was forfeited upon his failure to make the payment which became due January 1, 1892.

But counsel for defendants contend that the forfeiture, if there was one, has been waived; and that the judgment of the trial court is, therefore, not erroneous. We will not now determine whether the facts proven justify the conclusion that there was a waiver, because that question is not raised by the pleadings. The answer of the Blacks shows affirmatively that there was a forfeiture, and they have not attempted to plead a waiver.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

C. J. RICHARDSON, APPELLEE, V. JENNIE OPELT, IMPLEADED WITH MISSOURI, KANSAS & TEXAS TRUST COMPANY, APPELLANT.

FILED APRIL 18, 1900. No. 9,224.

1. **Parties to Action:** CHRISTIAN NAME: INITIALS AND CONTRACTIONS: ACTION ON WRITTEN INSTRUMENT. Ordinarily, all actions must be prosecuted and defended by the true names of the parties thereto, and not by the initials or a contraction of the first or Christian name or names. The rule, however, has its exception; and in actions upon promissory notes or other written instruments, whenever any of the parties thereto are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it is sufficient to so designate such person, instead of stating the Christian or first name or names in full. Code of Civil Procedure, sec. 23.

2. **Foreclosure of Chattel Mortgage:** DUPLICITY. In a petition in equity for the foreclosure of a lien on personal property created by a chattel mortgage given to secure several promissory notes, and for a personal judgment in case of deficiency after the sale of the property mortgaged, but one cause of

action is stated, although different notes evidence the debt sought to be satisfied by the foreclosure proceedings.

3. **Plea in Abatement:** PRIOR ACTION PENDING. When the pendency of a prior suit is pleaded in abatement, the case must be the same, or it will not be sustained. There must be the same parties or such as represent the same interest; the same rights must be asserted and the same relief prayed for. This relief must be founded on the same facts, and the essential basis of the relief must be the same in both actions. As a general rule, where a judgment in a prior suit would be a bar to a judgment in the second suit brought in the same or another court of concurrent jurisdiction, the plea of other suit pending will be held good.

4. **Division of Action.** In every action, a party thereto seeking to enforce a claim, legal or equitable, must present to the court all the grounds upon which he expects judgment in his favor. He can not divide his demand and prosecute by different actions. This principle, however, does not extend so as to require distinct actions, each of which would authorize by itself independent relief to be prosecuted in a single suit, although they might be considered together.

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

Thomas Ryan, for appellant, cited on separation of causes of action: *Schuyler Nat. Bank v. Bollong*, 24 Nebr., 821.

The pendency of a suit in a court having jurisdiction of the subject-matter and of the parties is a bar, during such pendency, to the commencement or maintenance of another suit between the parties to such prior action, or their assigns, to a second suit in relation to the same subject-matter. If the rights of any party be transferred to a third party pending such litigation, the assignee becomes the privy of his assignor and must come into the original action if he desires to assert or maintain his rights as a holder of the rights so acquired by and assigned to him. The plaintiff need not notice such transfer. *State v. North Lincoln Street R. Co.*, 34 Nebr., 634, 639; *Chase v. Miles*, 43 Nebr., 686; *Lincoln Rapid Transit Co. v. Rundle*, 34 Nebr., 564; *Holsworth v. O'Chander*, 49 Nebr., 42; *Wales*

v. Jones, 1 Mich., 254; *Bond v. White*, 24 Kan., 45; *Gamsby v. Ray*, 52 N. H., 513; *Rogers v. Hoskins*, 15 Ga., 270; *Thomas v. Freelon*, 17 Vt., 138.

C. A. Atkinson and *Talbot & Allen, contra:*

In order that the pendency of a suit may be set up to defeat another, the case must be the same, with the same parties, the same rights asserted, the same relief demanded, founded upon the same facts and the basis of relief the same. *The Haytian Republic*, 154 U. S., 118. This decision clearly sets forth the law and is supported by the following authorities, among many others that might be cited: *Watson v. Jones*, 13 Wall. [U. S.], 679; *McReady v. Rogers*, 1 Nebr., 124; *Secor v. Sturgis*, 16 N. Y., 548; *Marsh v. Masterton*, 101 N. Y., 548; *Sanderson v. Peabody*, 58 N. H., 116; *People v. Seneca Lake Grape & Wine Co.*, 52 Hun [N. Y.], 174; *Spence v. Insurance Co.*, 40 Ohio St., 517; Story, Equity Pleading, secs. 737-739; *Osborn v. Cloud*, 23 Ia., 104.

HOLCOMB, J.

The plaintiff, appellee, began an equitable action in the lower court, the object and purpose of which were to foreclose a chattel mortgage executed by appellant, Jennie Opelt, upon a varied assortment of hotel furniture used in the Hotel Windsor, in the city of Lincoln, and which mortgage was given to secure several promissory notes, aggregating the principal sum of $2,400. The petition alleged, in substance, the making of the said notes, and the mortgage to secure the same, and that said notes were given to one F. G. Richardson and indorsed to Clara M. Richardson, and by her indorsed to the plaintiff, who, it is alleged, is the *bona fide* holder and owner thereof for value. The assignment of the mortgage to the indorsees of the notes is also pleaded. There is a prayer for an accounting, and that the goods so mortgaged be sold to satisfy the amount found due, and for judgment against the maker in case of deficiency. By supplemental pleadings, the appellant, the Missouri,

Kansas & Texas Trust Company, was brought into the case as defendant, it appearing that this corporation had or claimed to have some interest in the property mortgaged by virtue of a subsequent mortgage given by the defendant Opelt, covering the same property as the first mortgage. The two defendants joined their interests and each interposed substantially the same defense.

A motion was made to require the plaintiff to set out his name in full, and the overruling of this motion is assigned as a cause of complaint. It appears from the pleadings that the action is founded on the notes and mortgage mentioned, and that in the indorsement of the notes and in the assignment of the mortgage to the plaintiff, it was by his initials, as C. J. Richardson, and not his full given name. We are of the opinion that the plaintiff brought himself within the exception to the general rule requiring actions to be prosecuted and defended by the true names of the parties thereto. Section 23 of the Code of Civil Procedure provides that "in all actions * * * upon promissory notes, or other written instruments, whenever any of the parties thereto are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it shall be sufficient to designate such person by the name, initial letter or letters, or contraction of the first name or names, instead of stating the Christian or first name or names in full." The objection to the name by which plaintiff prosecutes his action, being manifestly without merit, need not further be considered.

It is also urged that the plaintiff should be required to separately state and number his alleged several causes of action. We think this objection is also without merit. The action was, in the main, brought to foreclose the chattel mortgage mentioned. The cause of action arises from the breach of the conditions of the mortgage. It is the failure of the mortgagor to meet these conditions which gives rise to a cause of action. The notes are merely evidence of the indebtedness. They are the form

in which the indebtedness appears, and which the mortgage secures. The action is not based primarily upon the notes as separate contracts, but upon the mortgage and the debt secured thereby in its entirety. But one cause of action is stated in the petition and the contention of appellant to the contrary can not be sustained.

The only real and substantial point of controversy in the case, however, as we view it, is the third objection by appellants, which we now give attention. Both defendants pleaded in their answers, as cause for abatement of plaintiff's action, a prior suit, pending between the same parties and regarding the same subject-matter. As to the plea in abatement, both answers allege in substance that the defendant trust company, prior to the bringing of the present action, commenced an action in the same court against the defendant Opelt, and one F. G. Richardson and Clara M. Richardson, mentioned in the pleadings, in which action summons was served on all the defendants, and by motions and otherwise they appeared in such case, and that the court acquired jurisdiction over them and of the subject-matter of said action, which it is alleged was and is still pending and undetermined; that in said action, the defendant trust company, while the legal title to the notes and mortgage sued on by the plaintiff was vested in and held by said Clara M. Richardson, began its action, in which it claimed to have a superior mortgage on the same property, and asked that enforcement and collection of plaintiff's mortgage be enjoined, and that the holder of the legal title be enjoined from proceeding to collect and enforce the same against the property therein, and in the trust company's petition, described, and that a restraining order was issued accordingly; that the trust company also in said action alleged that it was the owner and holder of a certain mortgage upon the same property, and that such allegation was one of the principal issues in said case. It is also alleged that the F. G. Richardson mentioned, procured from the

defendant, Jennie Opelt, four certain promissory notes and indorsed them to the trust company as collateral security for the sum of $3,500, and that said notes were secured by a chattel mortgage made by the said Opelt to the said F. G. Richardson, which was assigned to the trust company, and covered all of the property described and alleged to be covered by plaintiff's mortgage, and that such mortgage is a prior lien to that of the plaintiff's lien. The plea in abatement sets forth with much particularity and detail, the nature, substance and subject-matter, as well as the proceedings had in the former suit. Without further quoting from the same, we will assume for the purpose of the present inquiry that the plea is proper in form, and, if supported by the evidence, should be sustained. By reference to the pleadings in the former suit, which are preserved as evidence in the bill of exceptions, it appears that the defendant trust company held a second mortgage of near $5,000 on the real property known as the Windsor hotel, heretofore mentioned; that the owner thereof, one Barnes, had leased the premises for a term of years at a monthly rental of something over $400 to the F. G. Richardson mentioned, and that after the making of said lease, the lessor Barnes assigned the same to the trust company as collateral security for its indebtedness against Barnes, secured by a second mortgage as hereinbefore stated. In time, the lessee Richardson sublets or re-leases the hotel property to the appellant Opelt, who assumes the conditions, terms and agreements of the original lease, and at the same time the said Richardson sells the hotel furniture and fixtures to his lessee Opelt, taking in payment therefor notes and a mortgage on the property sold, and which are the subject-matter of the action to foreclose by plaintiff in the present suit. Something over a year after the sale of the chattel property mentioned and the mortgage thereon to secure the purchase price, appellant Opelt gave a second mortgage on the same property to secure four notes, aggregating about $1,200, and which seem to have grown

out of the varied and numerous transactions between the parties. The rentals due under the original lease held by the trust company were in arrears, and the second chattel mortgage given by defendant Opelt to F. G. Richardson, and the notes secured thereby, were assigned as collateral security by the said Richardson, who was liable as the original lessee for the amounts accruing under the lease. The amount due under the second mortgage and the lease rentals held as additional security, had assumed large proportions at the time the defendant trust company began the suit which is pleaded in abatement of the present action. In the first suit, the trust company, as plaintiff, narrated in detail the transactions above briefly referred to, alleged the insolvency of Richardson and Opelt, the transfer of the first mortgage, and the notes secured thereby, to Clara M. Richardson, who, it is alleged, is the daughter of F. G. Richardson, and that such transfer was colorable only, and for the purpose of defrauding the plaintiff in that suit, and depriving it of its lien on the chattel property by virtue of the second mortgage, and prayed "that an injunction issue, restraining the sale of said property described in said first named chattel mortgage or the taking of said property under said chattel mortgage for the purposes of foreclosure, that the assignment thereof from said Frederick G. Richardson to his daughter, Clara M. Richardson, be declared null and void, and that it be set aside and held for naught; that an accounting be taken of the amount yet due from the said Frederick G. Richardson to plaintiff and judgment therefor; that the lien of the first of said chattel mortgages be declared junior and inferior to the lien of the plaintiff, and that the amount found due on the said chattel mortgage No. 59,710 [the second mortgage], be declared a first lien on said chattel property; that it be declared in full force and effect, valid and subsisting, and that on the final hearing of this case the injunction be declared and decreed perpetual," etc.

Both defendants appeared in the case by motion and

otherwise. The defendant F. G. Richardson answered to the merits, and the defendant Clara M. Richardson answered by alleging that she had sold and transferred the notes and mortgage sought to be affected, and disclaimed further interest in the action. It appears, however, that the transfer was made *pendente lite*, and we are disposed to the view that the plaintiff in this action, although a non-resident of the state, is in privity with his grantor Clara M. Richardson, and succeeds only to such rights as she then held, and would be bound to the same extent by the proceedings had in the first action. However, we do not here deem it necessary to, nor do we, decide that point. In view of the two suits thus begun, can the first case be successfully pleaded in abatement of the present action? It is to be noted that the principal issue involved and the matter sought to be litigated in the prior suit, is for an accounting and personal judgment against F. G. Richardson, the original lessee of the hotel, in favor of plaintiff as assignee of the contract of lease. It is true that an attempt is made to allege equitable grounds for subordinating the first mortgage on the furniture and fixtures to the second mortgage on the same property, held by the trust company, as collateral security. Upon what legal principle this is sought to be accomplished is not made clear by the pleadings, but we are not now specially interested in this phase of the question, and pass it by. At most, all that can be said is, that the issue was sought to be raised as to priority of the two mortgages. No attempt was made by the plaintiff to recover judgment on the indebtedness secured by its second mortgage, or have the property therein mentioned sold to satisfy the same. In fact, it was alleged in the petition in equity, and urged as a cause for a proceeding in injunction, that to take the property under either of the mortgages would destroy and render valueless plaintiff's interest in the lease held by it, by stripping the hotel of its furnishings and fixtures, for which the real property was being used.

It is said by Justice NORVAL, writing the opinion in the case of *State v. North Lincoln Street R. Co.*, 34 Nebr., 634, 637: "It may be safely stated that, as a general rule, the pendency of a former action between the same parties may be shown in abatement, where a judgment in such suit would be a bar to a judgment in the second suit brought in another court of concurrent jurisdiction." A judgment in the first action now under consideration could scarcely operate as a bar or preclude a judgment in the second suit. The latter suit has nothing to do with the lease which is the basis of the first action. The utmost that could be determined in that action under the pleadings presented by the plaintiff's petition, and the relief asked, would be the adjudication of the priority of the two chattel mortgages therein described, and leave to the respective parties the enforcement of their demands thereunder by resorting to such proceedings as they might see proper to institute in a separate action in the future.

In *Watson v. Jones*, 13 Wall. [U. S.], 679, 715, Mr. Justice Miller, speaking for the court, says: "When the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties, or at least such as represent the same interest; there must be the same rights asserted, and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same." It is also held, "that the true test of the sufficiency of a plea of 'other suit pending' in another forum was the legal efficacy of the first suit, when finally disposed of, as 'the thing adjudged,' regarding the matters at issue in the second suit." *The Haytian Republic*, 154 U. S., 118, 124. Applying the test thus given, it is quite apparent that "the thing adjudged" in the first suit would have no legal efficacy in determining the amount the plaintiff in the second suit would be entitled to, or his right to foreclosure of his lien and a sale of the property mortgaged to satisfy the debt. The two actions are

obviously different in subject-matter, and each is independent of the other. See also *McReady v. Rogers*, 1 Nebr., 124; *Wilch v. Phelps*, 16 Nebr., 515; *Morgan v. Mitchell*, 52 Nebr., 667.

It is contended by appellant that all matters in relation to the first mortgage could and should have been litigated in the first suit, and because of the failure of the defendant so to litigate her rights under her mortgage, she and her assignee are now estopped from further litigating such rights. It is very true that the defendant was in a position to have tendered an issue which would have fully determined her rights under the mortgage, but we do not think her failure so to do would warrant the conclusion that she, or those in privity with her by virtue of the assignment, should now be considered as having adjudicated all of the rights held by them under the mortgage. Their right to an action at law or in equity was independent of any of the issues raised in the first suit, and is in nowise dependent on a final determination therein. In *Stark v. Starr*, 94 U. S., 477, 485, the rule is stated as follows: "It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piece-meal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible. But this principle does not require distinct causes of action,—that is to say, distinct matters,—each of which would authorize by itself independent relief, to be presented in a single suit, though they exist at the same time and might be considered together."

Another test that is frequently given for the purpose of determining the question is whether the evidence necessary to prove one cause of action would establish the other.

Applying either of the rules above given, the plaintiff is not precluded from prosecuting to final judgment his cause of action in the case at bar for a foreclosure of his mortgage lien and a judgment for any deficiency remaining after sale of the property mortgaged.

It follows from what has been said that the judgment of the lower court is in conformity with law and should be

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. NEBRASKA SAVINGS & EXCHANGE BANK, APPELLANT, ET AL.

FILED MAY 2, 1900. NO. 11,187.

Receiver of Bank: ORDER OF COURT: ABUSE OF DISCRETION. An order of court directing a receiver of a bank to sell its assets will not be disturbed where no abuse of discretion is shown.

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

Constantine J. Smyth, Attorney General, for the state.

E. J. Cornish, for Nebraska Savings & Exchange Bank, appellant, cited Compiled Statutes, 1899, chapter 8, sections 34 and 35, and argued it would not be a proper exercise of the discretion of the court to appoint a receiver on the application of the attorney general and immediately thereafter order a sale of all the assets at auction to the highest bidder. The general intent of the statute should be followed.

V. O. Strickler, contra.

NORVAL, C. J.

This is an appeal by the Nebraska Savings & Exchange Bank from an order of the district court of Douglas county directing the receiver of said bank to sell at public auction all its assets remaining in his hands. The

only complaint made in the brief of the bank is that the lower court abused its discretion in entering this order. We have examined the evidence and can not say that any abuse of discretion appears therein. This receiver was appointed more than four years ago and it would seem that the assets should be speedily sold and the receivership wound up. The order is

AFFIRMED.

STATE, EX REL. FIRST NATIONAL BANK OF PLATTSMOUTH, v. BASIL S. RAMSEY.

FILED MAY 2, 1900. No. 11,263.

Bill of Exceptions: SERVICE. Where no order is made fixing a time for preparing a bill of exceptions including the evidence adduced on the hearing of a motion to set aside a default and vacate a decree, such bill must be served within fifteen days from the final adjournment of the term at which the motion was determined.

ORIGINAL application for mandamus to compel respondent, a district judge, to settle and allow bill of exceptions. *Writ denied.*

A. N. Sullivan, for relator.

H. D. Travis and *C. S. Polk, contra.*

NORVAL, C. J.

This is an original application to this court for a peremptory writ of mandamus to compel the respondent, late judge of the district court for Cass county, to settle and allow a certain bill of exceptions tendered to him by relator, in a suit pending in said district court wherein relator was plaintiff and John C. Peterson and others were defendants. It seems that a decree was entered in the cause against defendants upon default at the September, 1898, term of the district court of Cass county, and during the same term of court on a motion of defendants the default was set aside, the decree vacated and defendants were permitted to file answers. Subsequently, at the

June term, 1899, of said court, the cause was tried, and taken under advisement, and a final decree was entered on January 3, 1900. Plaintiff presented a motion for a new trial, which was overruled, an exception was entered and forty days was given plaintiff to reduce its exceptions to writing. On February 3, 1900, a bill of exceptions was tendered the respondent, including therein sixty pages containing evidence relating solely to the motion to set aside the default, which the respondent refused to incorporate in, or make a part of, the bill of exceptions.

This decision was entirely right. The hearing was had, and decision on the motion to set aside the default and vacate the first decree rendered, at the September, 1898, term of the district court, and a bill of exceptions preserving the evidence adduced on such hearing, should have been reduced to writing and submitted to opposing counsel within fifteen days from the final adjournment of said term of court, unless additional time was by the court allowed for that purpose. No such draft of a bill of exceptions was prepared within fifteen days from the final adjournment of the September, 1898, term of the district court, nor until February 3, 1900. The respondent, therefore, properly excluded from the prepared bill, the evidence adduced on the hearing of the motion to vacate the default. *State v. Dickinson*, 56 Nebr., 251.

WRIT DENIED.

STATE OF NEBRASKA V. THOMAS DENNISON ET AL.

FILED MAY 2, 1900. NO. 11,197.

1. **Criminal Pleading:** INFORMATION: DUPLICITY. An information is bad for duplicity which charges in a single count that on a certain date and on divers days between that and a subsequent date, the defendant did publicly and privately open, set on foot and carry on a lottery. The offense is not a continuing one, but each day the lottery is carried on constitutes a separate and distinct crime.

2. **Amendment of Criminal Pleading:** DEFECT IN RECORD. This court can not review the decision of the district court in refusing the county attorney permission to file an amended information in a criminal cause where such proposed amended information is not before us.

3. **District Court as Examining Magistrate:** JUDICIAL DISCRETION. It is discretionary with the district court whether it will sit as an examining magistrate, and its ruling in that regard will not be disturbed where no abuse is shown.

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

George W. Shields and *I. J. Dunn*, for the state.

Ed P. Smith and *John A. Sheean, contra.*

NORVAL, C. J.

In the district court of Douglas county the county attorney filed an information against Thomas Dennison and John Dennison, charging them with having committed an offense under section 224 of the Criminal Code of this state. That particular portion of the information on which this court is asked to pass judgment is as follows: "That on the 16th day of January, in the year of our Lord one thousand eight hundred and ninety-nine, and on divers days between the said 16th day of January, 1899, and the 26th day of Jaunary, 1899, Thomas Dennison and John Dennison, late of the county of Douglas aforesaid, in the county of Douglas and state of Nebraska aforesaid, they then and there being in said county, did then and there unlawfully for gain, open, set on foot, carry on, promote, make and draw, publicly and privately, a lottery and scheme of chance known as and called policy, for various sums of money, with intent then and there to make said drawing and disposal of said money dependent upon chance by numbers; contrary to the form of the statute," etc. Defendants filed a motion to quash this information, on the ground that more than one crime is charged in the same count. This motion was sustained,

whereupon the state asked permission of the court to file a new information, which request was overruled. So far as the record shows, no new information was tendered to the court. The state then moved the court to proceed with a preliminary examination, to determine whether there was probable cause upon which to hold defendants to the next term of court, which motion was overruled, the reason being, as the record recites, that the court could not, on account of pressure of business, at that time proceed with a preliminary hearing, and for the further reason that such a hearing would be unnecessary for the purposes of detaining defendants, and that one could be better had before a magistrate upon a new and sufficient complaint. It is further recited that, should the court proceed upon a preliminary hearing, it would have to be done upon some charge or complaint, and if upon the information, it could not be had because it had been quashed, and not upon the complaint filed before the committing magistrate in this case, because that, like the information, was subject to the same objections that had been urged and sustained as to the latter.

The state comes to this court on exceptions, contending that three prejudicial errors were committed in the rulings above mentioned, viz.: First, in quashing the information; second, in refusing to allow the state to file an amended information; third, in declining to proceed with the examination of defendants to determine whether there was probable cause to hold them to answer at the next term of the district court. The lower court did not err in sustaining the motion to quash the information. It is alleged that the defendants committed the crime charged on a certain day, and on divers other days between that and a subsequent date. This is not a continuing offense, like adultery, but under section 224 of the Criminal Code each day a lottery was carried on a separate crime was committed. *State v. Pischel*, 16 Nebr., 490; *Smith v. State*, 32 Nebr., 105; *Wendell v. State*, 46 Nebr., 823; *Barnhouse v. State*, 31 Ohio St., 39; *State v.*

Temple, 38 Vt., 37; *People v. Hamilton*, 101 Mich., 87. The information in the respect stated was bad for duplicity, and the motion to quash was properly sustained.

It is also argued that the information is bad because it charged in a single count at least two separate and distinct offenses as having been committed on each day mentioned in the information. This point is well taken. Section 224 of the Criminal Code declares: "If any person shall open, set on foot, carry on, promote, make, or draw, publicly, or privately, any lottery, or scheme of chance," he shall upon conviction be liable for the penalty prescribed by the section. The doing of the forbidden act or acts either publicly or privately is made an offense. It will be observed that the information, in a single count, alleges that the defendants did "open, set on foot, carry on, promote, make and draw, publicly and privately, a lottery and scheme of chance." It being charged in the same count that the defendants carried on a lottery and made drawing both publicly and privately, the information was bad for duplicity.

We can not pass upon the question as to whether the court erred in refusing to permit the state to file a new information, since the record does not show that a new one was tendered, and as we can not know but what a new information may have contained the same defects, or others equally fatal, it is impossible for us to determine whether the court erred in that respect or not, and that point will therefore not be considered.

It is discretionary with a district court whether it will sit as a committing magistrate or not. As the record appears, we do not believe that the lower court abused its discretion in refusing to sit. The reasons for such refusal seem amply sufficient.

EXCEPTIONS OVERRULED.

F. ASHPOLE, APPELLEE, V. FRANK HALLGREN ET AL., APPELLANTS.

FILED MAY 2, 1900. No. 9,217.

1. **Review:** OBJECTION BELOW. On an appeal from an order confirming a sale, the court will consider only objections specially made in the district court.

2. **Error:** PRESUMPTION. Error in the proceedings of the district court will not be presumed, but must be affirmatively shown.

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

Francis G. Hamer, for appellants.

Roberts & St. Clair, contra.

NORVAL, C. J.

This appeal is prosecuted from an order confirming the sale of real estate under a mortgage foreclosure. The first point made in the brief of appellants is that there is no decree, and without one there can be no valid sale. This objection is made for the first time in this court, which is too late. *Toscan v. Devries*, 57 Nebr., 276. Moreover, the record fails to show that a decree of foreclosure was not rendered. It is true no copy of the decree is before us, but the certificate of the clerk of the trial court attached to the transcript does not show that the entire record was brought to this court. Error is never presumed, but must be made to appear affirmatively. What has been said applies to the second objection made against the sale, namely, that there is no finding of the several amounts claimed to be due. This objection is therefore overruled.

The following points are argued in the brief of appellants for vacating the sale:

1. The interest of Frank Hallgren, and others, and not that of the owner of the premises, was appraised.

2. A copy of the affidavit of publication of the notice

of sale is not attached to the sheriff's return on the order of sale.

3. The appraisement is signed by the sheriff, while his deputy certifies that the appraisers were called and sworn by him.

4. The sheriff's return and deputy's certificate contradict each other.

5. No notice was given defendants of the time the premises were to be appraised.

These objections were not brought to the attention of the trial court before confirmation, and are not available here. We are mindful of the fact that one of the objections to the sale made below was that the notice of sale was published only twenty-eight days, but this was insufficient to challenge the attention of the district court to the point that a copy of the affidavit of publication of the sale notice was omitted from the return of the sheriff. The appeal has doubtless accomplished the purpose of the appellants, and no error appearing of record, the order of confirmation is

AFFIRMED.

ED REYNOLDS V. WILLIAM M. SMITH.

FILED MAY 2, 1900. No. 9,208.

Preferring Creditor. An insolvent corporation may not prefer a creditor of one of its officers and stockholders. *Ingwersen v. Edgecombe*, 42 Nebr., 740; *Tillson v. Downing*, 45 Nebr., 549; *Seeds Dry-Plate Co. v. Heyn Photo-Supply Co.*, 57 Nebr., 214, followed.

ERROR to the district court for Wayne county. Tried below before ROBINSON, J. *Reversed.*

Wright & Thomas and *Wright & Stout*, for plaintiffs in error.

Milchrist & Robinson and *A. A. Welch, contra.*

NORVAL, C. J.

This case was tried in the court below, without a jury, on an agreed statement of facts, from which we gather that, in May, 1895, one Hood and wife purchased a stock of goods from one William M. Smith, giving him therefor their certain promissory notes. After conducting business for some months succeeding this purchase, the Hoods and one Zienert formed a corporation under the name of the Wayne Clothing Company, turning over to it said stock of goods in payment for its share of stock. Of this corporation Zienert was president, and Hood secretary and treasurer. After the corporation was formed, it, by its said president and secretary, executed and delivered to Smith its promissory notes for the amount of the debt owing by Hood to Smith for said stock of goods, that debt being the only consideration on which said notes were based, and secured their payment by a chattel mortgage on the goods. There is nothing in the statement of facts to show that by this transaction the debt from the Hoods to Smith was cancelled. This mortgage was afterwards foreclosed by Smith, he bidding in the property at the sale. It appears, as a necessary conclusion from the facts agreed upon, that at the time this chattel mortgage was executed, said corporation was in debt to an amount exceeding its assets, and was in fact insolvent. After the foreclosure sale, and while Smith was in possession of the goods, they were attached in a suit instituted by one of the creditors of the corporation, and Smith replevied them from the sheriff, Ed Reynolds, the defendant below. On trial, judgment in favor of Smith was rendered, and the sheriff brings this case to this court on petition in error.

In rendering its judgment in favor of Smith, the lower court erred. While the notes and mortgages mentioned were directly from the corporation to Smith, there was no novation, but the debt of the Hoods to Smith still existed, so far as the record discloses, and the legal effect

of this transaction was therefore nothing other than that of the corporation constituting itself a surety for the debt of the Hoods, one of whom was an officer and stockholder in the corporation. By the foreclosure proceedings, the creditor of an officer and stockholder of the corporation was preferred to its general creditors, it being insolvent. The transaction, then, was a fraud upon these other creditors, and illegal. *Ingwersen v. Edgecombe*, 42 Nebr., 740; *Tillson v. Downing*, 45 Nebr., 549; *Seeds Dry-Plate Co. v. Heyn Photo-Supply Co.*, 57 Nebr., 214. An insolvent corporation can no more legally prefer a creditor of one of its officers than it can such officer or stockholder directly.

Under the facts as agreed upon, the judgment must be reversed, and the lower court is instructed to render judgment in accordance with this opinion.

REVERSED AND REMANDED.

WABASKA ELECTRIC COMPANY V. CITY OF WYMORE.

FILED MAY 2, 1900. No. 9,256.

1. **Pleading:** FACTS. A pleading should state facts and not mere conclusions.

2. **Injunction:** PETITION. A petition for an injunction should disclose with definiteness and particularity the threatened injury which the court is asked to restrain the defendant from committing.

3. ———: REMEDY AT LAW. An injunction will not lie to enjoin the breach of a contract where the party complaining has a plain and adequate remedy at law.

4. **City of Second Class:** ELECTRIC LIGHT. A city of the second class, having less than 5,000 inhabitants, has no authority to regulate the rates and charges which an electric light company may charge its customers for lights.

5. **Ultra Vires.** In attempting to legislate upon matters beyond its jurisdiction, the governing body of a city does not represent the city; does not act as its agent, nor by color of its authority.

6. ———: ACTION FOR DAMAGES. An action can not be maintained against a city for an act done by its officers outside the actual and apparent scope of their authority.

7. **Mayor and Council: INJUNCTION.** If a mayor and council of a city threaten to exceed their authority and adopt an ordinance which will be prejudicial to the rights of an individual, an injunction, in a proper case, may issue against them, but not against the city.

ERROR to the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

Hazlett & Jack, for plaintiff in error.

A. D. McCandless, contra.

SULLIVAN, J

The Wabaska Electric Company commenced an action against the city of Wymore, alleging in its petition that the defendant is a city of the second class having less than 5,000 inhabitants; that the plaintiff is the assignee and owner of a contract whereby it secured the exclusive privilege for twenty-one years to construct and operate in said city an electric light plant for the purpose of furnishing the city and its inhabitants with electric lights. It is further alleged: "3. Plaintiff further says, that the said city is endeavoring to harass the operations of said plaintiff by passing or proposing to pass ordinances which will deprive the plaintiff of the right to operate its plant in such a manner that the same shall be self-sustaining. 4. That the said defendant, by virtue of said ordinance, is under contract to locate and use six arc lights upon the streets of said city, and to pay monthly rental therefor of eight dollars ($8.00) per month for each light, which said plant was in successful operation, with the said lights prior to said January 1st, 1890. 5. Plaintiff further says, that the defendants threatened to and unless restrained by the court, will discontinue the use of said lights as provided by said ordinance, and further

threaten to, and unless restrained by this court, will enact an ordinance governing the plaintiff's private contracts with its consumers, and establishing rates which will be wholly inadequate for the service rendered; this plaintiff says he has no other adequate remedy at law, except in a court of equity."

The prayer of the petition is that the defendant be enjoined from violating its contract and from attempting to regulate plaintiff's charges for supplying its customers with lights. The court, on demurrer, decided that the facts stated did not constitute a cause of action and gave judgment on the merits in favor of the defendant. The judgment is right and must be affirmed.

The first allegation above quoted is the statement of a conclusion and not the statement of a fact. The injunction provided by the Code "is a command to refrain from a particular act." The third paragraph of the petition does not show specifically the contemplated action which it is claimed will prevent the plaintiff from receiving just returns upon its investment. The threatened wrong is not pointed out with such definiteness and particularity as to justify the allowance of an injunction. In *Blakeslee v. Missouri P. R. Co.*, 43 Nebr., 61, 65, it is said: "The pleading in an action of injunction to obtain the relief should set forth the particular act or acts, from the doing, or threatening to do, which it is asked of the court to command the party to refrain."

The averment that the defendant is threatening to discontinue the use of the six arc lights for which it agreed to pay $48 a month, does not disclose any ground for equitable relief. The mere disuse of the lights would not, of itself, be prejudicial to the company; and it is not alleged that the city intends to withhold payment of the monthly installments in violation of its contract. But if a breach of the agreement in this particular were contemplated, an injunction would not be granted, for there is in such case a plain and adequate remedy at law. *Terry v. Beatrice Starch Co.*, 43 Nebr., 866; *Carstens*

v. McDonald, 38 Nebr., 858; *Drummond v. Crane*, 159 Mass., 577.

There remains to be considered the fifth paragraph of the petition, wherein it is stated that the city intends to adopt an ordinance interfering with the plaintiff's private contracts and reducing its rates and charges so low as to make the operation of the electric light plant unprofitable. In dealing with this feature of the case it is not necessary to determine whether the city was authorized by its charter, as it existed in 1889, to grant to any person, company or corporation, an exclusive franchise for the erection and operation of an electric light plant. The plant has come into being; it is now established, and the owner thereof has the right to furnish light to its private customers on such terms as may be mutually satisfactory to the parties concerned. The defendant has plainly no power or authority to regulate the plaintiff's charges for lights furnished to the inhabitants of Wymore. The legisture has, of course, the right to fix the price at which gas or electric lights shall be supplied by one who enjoys a monopoly of the business by reason of having an exclusive franchise (*Munn v. Illinois*, 94 U. S., 113; *Spring Valley Water Works v. Schottler*, 110 U. S., 347); and such right may be delegated to the governing body of a public or municipal corporation. But the power of regulating the charges for electric lights is not found among the grant of powers contained in defendant's charter. There is no such authority given, either expressly or by implication, and, therefore, it does not exist. *Lewisville Natural Gas Co. v. State*, 135 Ind., 49; *In re Pryor*, 55 Kan., 724; *City of St. Louis v. Bell Telephone Co.*, 96 Mo., 623; *Spaulding v. City of Lowell*, 23 Pick. [Mass.], 71. In the last mentioned case Shaw, C. J., speaking of the powers of municipal corporations, said, page 74: They "can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplish-

ment of the purposes of their association." The adoption of the ordinance referred to in the fifth paragraph of the petition, being entirely beyond the power of the city authorities, and being an act which would, according to the showing of the plaintiff, result in irreparable injury, should, doubtless, be enjoined, if the proper parties were before the court. *People v. Sturtevant*, 9 N. Y., 263; *People v. Dwyer*, 90 N. Y., 402; *Spring Valley Water-Works v. Bartlett*, 16 Fed. Rep., 615; *Roberts v. City of Louisville*, 92 Ky., 95; High, Injunctions, sec. 1241. But the mayor and city council are not parties to this suit, and we do not understand that an action will ever lie against a city for an act done by one of its officers outside the scope of his authority. The mayor and council have power to enact ordinances, but that power is plainly limited by the law under which the city is organized. In attempting to legislate upon matters beyond its jurisdiction, the governing body of a city does not represent the city; does not act as its agent, nor by color of its authority. It is like any other agent who transcends his authority, and it, and not its principal, must answer for the wrongful act done or threatened. If the authorities of Wymore are threatening to do an illegal act obviously beyond the scope and limit of their agency, the injunction must go against them and not against the city. The judgment of the district court is

AFFIRMED.

JOHN W. JAMES V. THOMAS S. HIGGINBOTHAM.

FILED MAY 2, 1900. No. 9,938.

Motion for New Trial: ASSIGNMENT OF ERROR. A judgment will not be reversed for error of law occurring at the trial, unless it is alleged in the petition in error, and shown by the record, that the court erred in overruling the motion for a new trial.

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

Sloan & Moran, S. J. Stevenson, S. B. Pound and *Roscoe Pound,* for plaintiff in error.

John C. Watson, John V. Morgan, John W. Dixon and *E. F. Warren, contra.*

SULLIVAN, J.

Thomas S. Higginbotham sued John W. James in the district court of Otoe county and obtained a verdict and judgment against him. The rulings of the court, assigned for error in the petition in error, were all made during the progress of the trial. It may be that some of these rulings, or all of them, were prejudicially erroneous, but, conceding that fact, the judgment must, nevertheless, be affirmed. The decision of the court on the motion for a new trial, is not alleged as error and can not, therefore, be considered. Reviewing courts are authorized to consider only the errors specified in the petition in error. All others are waived. To justify the reversal of a judgment for errors of law occurring at the trial, it must appear, not only that the alleged errors were committed, but also that the court erred in denying the application for a new trial. We believe it has never been held in a law case that a judgment should be reversed for error occurring at the trial, unless there was, in addition to such error, averment and proof of error in the order denying the motion for a new trial. Regardless of antecedent errors, an application for a new trial may be properly denied for the reason that it was not filed during the trial term, or within three days after the verdict was returned (*Bradley v. Slater,* 58 Nebr., 554), or on the ground that the errors committed were not the errors assigned. Whether or not there was error in the order overruling the motion for a new trial in this case, we can not decide, because that question is not presented by the record for decision. And without deciding that a new trial should have been granted by the district court,

we can not, of course, reverse the judgment and thus, in effect, vacate the verdict. The following cases are referred to in support of our conclusion: *Carson v. Funk*, 27 Kan., 524; *Clark v. Schnur*, 40 Kan., 72; *Struthers v. Fuller*, 45 Kan., 735; *Dryden v. Chicago, K. & N. R. Co.*, 47 Kan., 445; *Wright v. Darst*, 55 Pac. Rep. [Kan.], 516; *Douglas Co. v. Sparks*, 7 Okla., 259, 54 Pac. Rep., 467; *Beall v. Mutual Life Ins. Co.*, 7 Okla., 285, 54 Pac. Rep., 474; *City of Terre Haute v. Fagan*, 52 N. E. Rep. [Ind.], 457; *Armstrong v. Elliott*, 49 S. W. Rep. [Tex.], 635. The judgment of the district court is

AFFIRMED.

CHARLES T. JENKINS V. STATE OF NEBRASKA.

FILED MAY 2, 1900. No. 10,596.

1. **Plaintiff in Replevin:** STATUTORY BOND: POSSESSION OF PROPERTY. A plaintiff in replevin who has given the statutory bond, is entitled to the possession of the property in dispute during the pendency of the action.

2. **Appeal:** VACATION OF JUDGMENT BELOW. When an appeal is docketed in the district court, the judgment appealed from is vacated and annulled; and the litigants are, with respect to their legal rights, where they were at the commencement of the suit.

3. ———: RESTITUTION. When a judgment is vacated by appeal, after having been carried into execution, the appellant is entitled to have restitution.

4. **Order of Restitution:** CONTEMPT. A party who willfully fails to comply with a lawful order for restitution may be proceeded against as for a criminal contempt.

5. **Contemnor May Purge.** One who is in contempt of court by reason of disobeying an order to restore the subject of litigation, may purge himself of such contempt by showing that his failure to comply with the order was not attributable to mere contumacy, but was due to an inability (not voluntarily created) to comply with such order.

ERROR to the district court for Butler county. Tried below before SEDGWICK, J. *Affirmed.*

REHEARING of case reported in 59 Nebr., 68.

Charles T. Jenkins and *Burr & Burr*, for plaintiff in error.

W. W. Stowell and *George P. Sheesley, contra*, argued: In replevin cases, other than of distress, the ownership is determined by the result of the suit. Pending this, the property was regarded as in the custody of the law, though in the plaintiff's possession. Wells, Replevin, sec. 470; *Bruner v. Dyball*, 42 Ill., 34; *Bardy v. Keeler*, 56 Ill., 152; *Stevens v. Tuite*, 104 Mass., 332; *Miller v. White*, 14 Fla., 435; *Milliken v. Selye*, 6 Hill, 623.

SULLIVAN, J.

This case is before us on rehearing. The former opinion (*Jenkins v. State*, 59 Nebr., 68), contains a sufficient statement of the facts upon which our decision is grounded. The defendant has, in his supplemental brief, exhaustively reviewed the authorities touching the power of the district court to make the order for restitution and to enforce it by proceeding against him for contempt; but he has entirely failed to convince us that the conclusion heretofore reached upon that question is erroneous. Further investigation and reflection has only strengthened and confirmed us in our conviction that the order complained of was made by the trial court in the exercise of jurisdiction, and is, therefore, valid and enforceable. The plaintiff in the replevin suit has given the statutory bond and was entitled to the possession of the property in controversy during the pendency of the action. The appeal vacated the judgment in favor of Jenkins and extinguished absolutely and irrevocably every right and advantage resulting from the decision of the county court in his favor. *Campbell v. Howard*, 5 Mass., 376; *Curtiss v. Beardsley*, 15 Conn., 518; *Bender v. Lockett*, 64 Tex., 566; *Moore v. Jordan*, 65 Tex., 395; *Lucas v. Dennington*, 86 Ill. 88; *Rogers v. Hatch*, 8 Nev., 35.

The docketing of the cause in the district court did not merely arrest the execution of defendant's judgment and leave the parties where they were at the moment the appeal became effective; it went farther and left them, with respect to their legal rights, where they were when the suit was instituted. *Murphy v. Merritt*, 63 N. Car., 502; *Patton v. Gash*, 99 N. Car., 280; *Minneapolis Harvester Works v. Hedges*, 11 Nebr., 48; *O'Leary v. Iskey*, 12 Nebr., 136. In 2 Ency. Pl. & Pr., 325, it is said: "The vacation of the decree, judgment, or order appealed from restores the cause pending the appeal to the state in which it stood before the decision was made."

If the appeal merely suspended the right to enforce the judgment, *Creighton v. Keith*, 50 Nebr., 810; *Runyan v. Bennett*, 4 Dana [Ky.], 599; *Board of Commissioners v. Gorman*, 19 Wall. [U. S.], 661; *Robertson v. Davidson*, 14 Minn., 427, and other cases holding that whatever is done under a judgment before it is superseded is not undone by the supersedeas, would be in point. But since the effect of an appeal to the district court is to blot out the judgment or order appealed from, those cases are not pertinent. The judgment in favor of Jenkins having been annulled by the appeal, it was his duty to make prompt restitution of the proceeds of the wheat; and the district court having jurisdiction of the parties and the subject of the suit, was vested with ample authority to enforce, in a summary manner, the performance of that duty. *Anheuser-Busch Brewing Ass'n v. Hier*, 55 Nebr., 557; *Flemings v. Riddick*, 5 Gratt. [Va.], 272; *Northwestern Fuel Co. v. Brock*, 139 U. S., 216; *First Nat. Bank v. Elliott*, 60 Kan., 172; *Gott v. Powell*, 41 Mo., 416; *Jones v. Hart*, 60 Mo., 362; *Yott v. People*, 91 Ill., 11; *Keen v. Saxton*, 17 N. J. Law, 313; 18 Ency. Pl. & Pr., 882. The order directing Jenkins to make restitution was a lawful order, and it was his duty to comply with it, if it was within his power to do so. If he willfully disobeyed the order, the court had authority to punish him for contempt. *People v. Neill*, 74 Ill., 68; *Knott v. People*, 83 Ill., 532; *Dawley v. Brown*, 43

How. Pr. [N. Y.], 17; *Anonymous*, 2 Salk., 588; *Doe v. Williams*, 29 Eng. C. L., *381; *Greer v. McClelland*, 1 Phila. [Pa.], 128; 18 Ency. Pl. & Pr., 896; Cobbey, Replevin, sec. 718. Section 669 of the Code of Civil Procedure confers upon every court of record authority to punish, as for criminal contempt, any "willful disobedience of, or resistance wilfully offered to any lawful process or order of said court." The defendant might, of course, have purged the contempt by showing that his failure to make restitution was not attributable to mere contumacy, but was due to an inability (not voluntarily created) to obtain the necessary funds. This he did not do. The evidence given at the trial justified the court in finding that Jenkins had resources and was, at that time, without any valid excuse for not restoring to Myatt or paying into court the proceeds of the wheat; and it did not err in adjudging him to be guilty of contempt, and adjudging that he be committed to the jail of Butler county until he should purge himself of the contempt by complying with the order of restitution. The judgment of affirmance is adhered to.

AFFIRMED.

MRS. ANNIE K. KAMPMAN, APPELLEE, V. BASCUM NICEWANER ET AL., APPELLANTS.

FILED MAY 2, 1900. No. 9,233.

1. **Confirmation of Sale:** VACATION OF ORDER. A court of equity, when justice requires it and its powers are seasonably invoked, may vacate an order confirming a judicial sale and discharge the purchaser who has become such through fraud, accident or mistake.

2. ———: EQUITABLE RELIEF. An order confirming a judicial sale adjudicates only the proceedings under the order of sale; it has no relation to such grounds for equitable relief as were unknown to the parties and to the court at the time the order of confirmation was entered.

3. **Judicial Sale:** APPRAISEMENT OF PROPERTY. Where no attack has been made on an appraisement of property for the purpose of

a judicial sale, an order setting aside such appraisement is unauthorized.

4. ———: SECOND APPRAISEMENT. There is no authority in the law for a second appraisement of property for the purposes of a judicial sale, unless such property remains unsold for want of bidders, after having been twice advertised and twice offered for sale under the first appraisement.

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

J. F. Boyd, for appellants:

That appellee had full knowledge of each succeeding step of the proceedings through her agent, can not be questioned, and this fact is clearly established by the evidence in this case. Notice to the agent being notice to the principal, she is bound by it. *Pereau v. Frederick,* 17 Nebr., 117; *Merriam v. Calhoun,* 15 Nebr., 569; *Wullenwaber v. Dunigan,* 30 Nebr., 877.

Even if her agents had no authority to make the bid for appellee, it must be conceded that she through them had notice of the nature of this bid before confirmation, and, without protest or objection thereto, asked to have the sale confirmed and deed executed. No objection whatever being made until after the sheriff had commenced proceedings, by attachment in the district court, this delay by appellee amounts to a ratification and confirmation of the sale, and she is estopped from denying the validity of the bid made by her agents in her behalf. *Prine v. Syverson,* 37 Nebr., 860; *Swartz v. Duncan,* 38 Nebr., 782.

H. D. Kelly and *Fred H. Free, contra:*

A judicial sale can be set aside for irregularities and an *alias* order of sale issued, and a new appraisement made. *Nebraska Loan & Trust Co. v. Hamer,* 40 Nebr., 281.

The appellee did not act through any authorized agent, as the facts disclosed.

The record discloses that there was no laches on the part of appellee. At the very term of court at which the first sale was confirmed she moved the court to set the sale aside for the reason that there was a grave mistake and irregularities in the sale. Appellants have cited the case of *Swartz v. Duncan*, 38 Nebr., 782. This case is not in any way in point. The facts in the case are that the plaintiff there rested on his rights for a term of five years or more without any objection. In the case at bar there is a repudiation of the acts of the parties, a disclaimer and motion to set aside, all made within the very term of court at which the first confirmation was had.

SULLIVAN, J.

Annie K. Kampman employed H. D. Kelly, Esq., of the Madison county bar, to act for her in foreclosing a mortgage covering real estate situate in Antelope county, and directing him, in case the property should be sold under a decree of the court, to bid the amount of her claim, but under no circumstances to bid more than that amount. In pursuance of his employment, Mr. Kelly, in behalf of his client, commenced an action in the district court against the owner of the land and others having interests therein, obtained a decree of foreclosure, and caused an order of sale to be issued for its enforcement. He then wrote H. L. McGinitie of Neligh as follows:

"An order of sale has been issued in the case of Annie K. Kampman vs. Bascom Nicewaner in the district court of your county and is no doubt now being advertised for sale. Will you kindly look the matter up and bid the land in in the name of the plaintiff for two-thirds of the appraised valuation in case there are no other bidders, but in case there are other bidders, then bid the land up to the amount of our claim and oblige."

Mr. McGinitie, acting under the authority of this letter, attended the sale and caused the mortgaged premises

to be struck off to Mrs. Kampman for the sum of $934. The appraised value of the property was $1,368.11, and the amount of plaintiff's claim at the time of the sale was $574.73. After the sale had been confirmed Mr. Kelly discovered that the land had been bought in in violation of his client's instructions and thereupon, and during the same term at which the order of confirmation was entered, moved the court to rescind its action and direct a resale of the property. This motion was sustained and the sale and appraisement were set aside. The property was afterwards reappraised; its valuation was fixed at $581.97, and it was sold to the plaintiff for $662.31. From an order confirming the second sale, E. C. Coon, the owner of the property, prosecutes this appeal.

Under the circumstances disclosed by the record the court was undoubtedly warranted in revoking the order of confirmation and releasing the plaintiff from her bid; not because the authority conferred upon Kelly, to bid the amount of the mortgage debt, was incapable of being delegated (*Renwick v. Bancroft*, 56 Ia., 527; *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y., 117; *Grady v. American Central Ins. Co.*, 60 Mo., 116; *McKinnon v. Vollmar*, 75 Wis., 82), nor because the plaintiff could not be bound beyond the limits of the authority actually given to her agent (*Markey v. Mutual Benefit Ins. Co.*, 103 Mass., 78; *Hatch v. Taylor*, 10 N. H., 538; *Cruzan v. Smith*, 41 Ind., 288; *Inglish v. Ayer*, 79 Mich., 516; 1 Am. & Eng. Ency. Law [2d ed.], 995; Meacham, Agency, sec. 283), but for the reason that it is clearly within the power of a court of equity, when justice requires it, and its action is seasonably invoked, to vacate a judicial sale and discharge a purchaser who has become such through fraud, accident or mistake. *Paulett v. Peabody*, 3 Nebr., 196; *Frasher v. Ingham*, 4 Nebr., 531; *Norton v. Nebraska Loan & Trust Co.*, 35 Nebr., 466, 40 Nebr., 394; 12 Am. & Eng. Ency. Law [1st ed.], 235; 12 Ency. Pl. & Pr., 89. Foreclosure sales are made by the court, which is always fair and just

to those with whom it deals; it is not bound to hold purchasers to the performance of unconscionable contracts, or any contract which has been entered into through a venial error, especially if the rights of third parties have not intervened and the litigants are left where they were before. The fact that there has been a confirmation of the sale is not at all important; that is an adjudication touching only the regularity of the proceedings under the order of sale; it has no relation to such grounds for equitable relief as were unknown to the parties and to the court at the time the order of confirmation was entered. *Taylor v. Courtnay*, 15 Nebr., 190; *McKeighan v. Hopkins*, 19 Nebr., 1.

The trial court was entirely right in setting aside the sale to Mrs. Kampman and releasing her from her bid, but it was manifestly wrong in vacating the first appraisement. There is no authority in the law for a second appraisement of property for the purposes of a judicial sale, unless such property shall remain unsold for want of bidders, after having been twice advertised and twice offered for sale under the first appraisement. Sec. 495, Code Civil Procedure; *Burkett v. Clark*, 46 Nebr., 466; *Beardsley v. Higman*, 58 Nebr., 257; *Scottish-American Mortgage Co. v. Nye*, 58 Nebr., 661. There was no attack made on the first appraisement and there existed no legal reason for setting it aside. The order of the court went too far; it deprived appellant, E. C. Coon, of a substantial right; it resulted in his land being sold for less than two-thirds of its lawfully ascertained value, although such land had never failed to sell, under the first appraisement, for want of bidders. The error indicated rendered all subsequent proceedings irregular and makes a reversal of the second order of confirmation imperative.

REVERSED AND REMANDED.

O. C. TARPENNING V. WILLIAM KING.

FILED MAY 2, 1900. NO. 9,232.

1. **Forcible Entry and Detainer:** GRAVAMEN OF ACTION. The gravamen of the action of forcible entry and detainer, is the unlawful and forcible entry upon and detention of real property.
2. ———: OWNER HAVING POSSESSORY RIGHT, ENTERING VI ET ARMIS. The action of forcible entry and detainer may be maintained by one who has been deprived of the possession of real property by an unlawful and forcible entry thereon made by a person having the absolute title and present right of possession.

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

O. C. Tarpenning, for himself:

The executor by pleading in the lower court says the deceased conveyed the homestead through fraud. Had this been true plaintiff in error was entitled to the value of land at the time of being evicted of his title. 2 Warvelle, Vendors, 967, 968; *Carver v. Taylor*, 35 Nebr., 429.

S. H. Sornborger and *G. W. Simpson, contra:*

The plaintiff had already invoked the appropriate remedy and recovered for all the injuries complained of in this case. That suit was wholly inconsistent with the contention of the plaintiff herein. The two remedies, one against Brodahl's estate, and the other against King, are not concurrent. These two actions could not have been prosecuted at the same time, hence they can not be prosecuted in succession. No greater inconsistency can be imagined than an action against the Brodahls for a failure of title and possession, and one against King for the possession of the same land. When the plaintiff recovered judgment in the one instance he certainly is not entitled to prosecute another action based on the same wrong. His election is final. *Fowler v. Bowery Savings Bank*, 113 N. Y., 450, 10 Am. St. Rep., 489, and

note; *Terry v. Munger*, 121 N. Y., 161; *First Nat. Bank v. McKinney*, 47 Nebr., 149; *Pollock v. Smith*, 49 Nebr., 864.

SULLIVAN, J.

This action was brought by O. C. Tarpenning against William King under the provisions of chapter 10, title 30, of the Code of Civil Procedure. The land in controversy being part of the public domain, Olof Brodahl, who had been a soldier in the regular army, attempted to acquire title to it under the act of congress allowing additional homestead rights to the volunteer soldiers of the civil war. He obtained a final receipt from the local land office and then, without waiting for a patent to issue, sold and conveyed his rights to the plaintiff, who took possession of the property and enclosed it with a substantial fence. The defendant afterwards instituted a contest against Brodahl before the register and receiver of the land office, but whether such contest resulted in the cancellation of Brodahl's entry, does not appear. It does, however, appear conclusively that after the proceeding had been pending for some time, the defendant broke down the plaintiff's fence, forcibly entered upon the land and excluded him from the possession thereof. Tarpenning then filed a claim against the estate of Brodahl, who had previously died, for damages resulting from the failure of his title. This claim was compromised; it was allowed in part with the understanding that Tarpenning should retain whatever rights he had acquired by virtue of the Brodahl deed and his possession under it. The district court found the issues in favor of the defendant and gave judgment accordingly. The only argument advanced in support of the decision, is that the plaintiff, having recovered damages on the theory that his title had failed, and that he had been evicted, is now precluded from asserting that his title is valid and his right of possession superior to that of the defendant. Undoubtedly the filing and allowance of the claim against Brodahl's estate, was legal evidence

against the validity of plaintiff's title, but we do not see upon what principle it could operate as an estoppel in favor of the defendant. He did not claim through Brodahl and could, therefore, gain nothing by the transaction between the plaintiff and Brodahl's executors. But the decisive question in this case is not whether Tarpenning has a good title to the land, but whether the defendant may retain the possession which he acquired by force.

The purpose of the action was not to determine the actual ownership of the property or the legal right to its possession. The ground of complaint was that the entry and detention were unlawful and forcible, and the defendant could not justify by showing either an absolute ownership or a possessory right. "Where the proceeding is for a forcible entry or for a forcible detainer," say the supreme court of Wisconsin, in *Newton v. Leary*, 64 Wis., 190, "it is the nature of the entry or detainer which constitutes the cause of action, and not the nature of the title which the respective parties have in the premises." In *McCauley v. Weller*, 12 Cal., 500, 524, it is said: "Questions of title or right of possession can not arise; a forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution, though the fee simple, title and present right of possession are shown to be in the defendant." Our statute in plain terms makes the character of the entry and detention the test of the plaintiff's right when the complaint charges that the defendant's possession was obtained forcibly and is being held by force. Section 1019, Code of Civil Procedure, provides that if the justice shall determine "that an unlawful and forcible entry has been made, and that the same lands and tenements are held by force, * * * then said justice shall cause the party complaining to have restitution thereof." "One great object of the forcible entry act," says GANTT, J., in *Myers v. Koenig*, 5 Nebr., 419, 422, "is to prevent even rightful owners from taking the law into their own hands

and attempting to recover by violence, what the remedial powers of a court would give them in a peaceful mode." The defendant's entry upon the land here in controversy was unlawful and forcible. That proposition is settled by *Brown v. Feagins*, 37 Nebr., 256. That such an entry when followed by a possession forcibly maintained, gives a right of action, is fully established by the authorities cited. There is nothing in the record tending in the slightest degree to prove that such right of action has been relinquished or forfeited, and consequently the plaintiff was entitled, on the undisputed evidence, to a finding and judgment in his favor. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

FIRE ASSOCIATION OF PHILADELPHIA V. JAMES A. RUBY ET AL.

FILED MAY 2, 1900. No. 10,600.

1. **Demurrer Ore Tenus:** CONSTRUCTION OF PLEADING. Where a petition is not attacked by motion or demurrer, but objections for the first time are raised to the introduction of any evidence because of its alleged insufficiency, and the case has passed to trial on the issues formed, a reviewing court will give to such pleading a liberal construction, to the end that the same may be upheld, if possible.

2. **Petition on Official Bond:** CONSTRUCTION OF PLEADING. In a petition in an action against a sheriff and his sureties on his official bond, based on an alleged default in the conditions of the bond by the principal in the performance of his official duties, an allegation that the bond was executed as required by law is sufficient to include or cover the performance of every act essential to the making and approval of the bond, and will support a judgment against the officer and the sureties on his official bond; and where the words "entered into" are used in place of "executed," *held*, that the term "entered into" as used is interchangeable with, and equivalent to, the word "executed," and embraces within its meaning the same acts as the word "executed," and, with other proper averments, states facts sufficient to constitute a cause of action against the obligors.

3. ———: ALLEGATION OF APPROVAL: SURETIES. In an action based on an official bond against a principal and his sureties thereon,

for an alleged default in its conditions by the principal in the performance of his official duties, the approval of such bond, not being for the benefit of the sureties, or in their interest, or for their protection; an averment of the approval of the bond, or words equivalent thereto, is not necessary in stating a cause of action against the obligors.

4. **Former Holding Overruled.** First paragraph of syllabus in *Fire Ass'n of Philadelphia v. Ruby*, 58 Nebr., 730, overruled.

ERROR to the district court for Phelps county. Tried below before BEALL, J. *Reversed.*

REHEARING of case reported in 58 Nebr., 730.

Dryden & Main and *G. Norberg*, for plaintiff in error.

S. A. Dravo, Rhea Bros. & Manatt, C. H. Roberts and *C. St. Clair, contra.*

HOLCOMB, J.

An opinion in this case was filed June 21, 1899, and is reported in 58 Nebr., 730. The case has also once prior thereto been before this court. *Fire Ass'n of Philadelphia v. Ruby*, 49 Nebr., 584.

A rehearing has been allowed on the application of the plaintiff in error, thereby requiring a re-examination of one of the questions involved. All questions in the case have heretofore been disposed of to our entire satisfaction, save the one of the alleged insufficiency of the petition to support a judgment against the sureties on the official bond of the defendant Ruby, as sheriff of the county where the action was commenced. We deem it, therefore, unnecessary to consider any other point to which our attention has been called, than this one.

In the former opinion, in the first paragraph of the syllabus, it was held that "in an action on the official bond of a sheriff, the petition should disclose the execution and approval of the bond, or facts showing a waiver of the approval of the bond, or facts which estop the sureties from urging its non-approval." *Fire Ass'n of*

Philadelphia v. Ruby, supra. Because of the want of an averment covering the point mentioned in the syllabus quoted as to approval, the petition was deemed insufficient, and a judgment dismissing the action as to the sureties affirmed.

The petition under consideration alleges, "that the defendant, J. A. Ruby, was duly elected and qualified as sheriff of Phelps county, Nebraska, for the term commencing January 1st, 1890; that being required by law to give bond for the faithful performance of his duties, said J. A. Ruby as principal, and the other defendants herein as sureties, entered into a bond in the sum of ten thousand dollars as required by law for the faithful performance of his duties as such sheriff. A copy of said bond is hereto attached, marked 'Exhibit A,' and made a part hereof. That during the term for which said Ruby was elected so as aforesaid, to-wit: on the 15th day of September, 1890, in the performance of official duties as sheriff of said county, he," etc., the allegations quoted being followed by a statement of the acts complained of.

The petition was not attacked in the trial court, either by motion or demurrer. In their answers, the defendants allege that "said amended petition does not state facts sufficient to constitute a cause of action." An objection was entered against the introduction of any evidence because of the alleged insufficiency of the petition, which was overruled and the case proceeded to verdict and judgment on the issues presented by the pleadings. If the petition states a cause of action against the sureties on the sheriff's bond, all other questions having heretofore been determined adversely to the defendants, the judgment of the lower court must be reversed, and the cause remanded for a new trial.

The provisions of the Code of Civil Procedure as to the pleadings, as well as in all other respects, are to receive a liberal construction, to the end that justice may be administered to parties litigant. Sec. 1, Code Civil Procedure; *Kepley v. Irwin*, 14 Nebr., 300.

It has frequently been held by this court that where a petition is not attacked by motion or demurrer, but objections for the first time are raised to the introduction of any evidence because of its alleged insufficiency, and the case has passed to trial on the issues formed, this court will give such pleading a liberal construction, to the end that the same may be upheld if possible. *Peterson v. Hopewell*, 55 Nebr., 670; *Norfolk Beet-Sugar Co. v. Hight*, 56 Nebr., 162. We regard the rule as wholesome and salutary, and one to be given effect wherever applicable. Of the same import are the holdings of the courts of last resort of other states. *Mills v. Vickers*, 50 Pac. Rep. [Kan.], 976; *Whitbeck v. Sees*, 73 N. W. Rep. [S. Dak.], 915.

In the former opinion of this court, by NORVAL, present C. J., it is said, p. 731: "Had the plaintiff alleged that the defendants executed the bond, it might include, or cover, the performance of every act essential to the making and approving of the bond." We assume this to be a correct expression of the law as to pleadings founded upon official bonds of the character under consideration, and the proposition is supported by both reason and authority.

Bouvier thus defines the word "execute": "The term is frequently used in law; as, to execute a deed, which means to make a deed, including especially signing, sealing and delivery." Anderson's Law Dictionary defines the word "execute" as follows: "In strict legal understanding, when said of a deed or bond, always means to sign, seal and deliver." Under each definition, it will be noted, every act essential to a complete making and delivery of the instrument is included in the word "execute." *Robert v. Good*, 36 N. Y., 408; *Prindle v. Caruthers*, 15 N. Y., 425; *Clark v. State*, 125 Ind., 1.

Reasoning from the hypothesis given, we will examine the petition in the case at bar. As has been heretofore noted, the petition does not in terms allege the making, that is, the signing of the bond, or its approval, filing

or delivery. Nor does it allege by direct words the execution of the bond, which doubtless would comprehend all essential acts necessary to make it a valid and binding obligation on the signers thereof. What is alleged in this respect is, that the defendant Ruby, in qualifying, was required to give bond for the faithful performance of his duties, and that he as principal, and the other defendants as sureties, "entered into" a bond as required by law for the faithful performance of his duties as such sheriff, a copy of the bond sued on being attached to, and made a part of, the petition.

If, from the language used, it may fairly be inferred that all acts necessary to constitute a full and complete execution of the bond, including such intermediary steps as are essential to its validity and effectiveness, are alleged, then, as in the hypothetical statement, a good cause of action is stated by the petition. The only words used from which this deduction may be drawn are contained in the allegation that the defendants "entered into" the bond mentioned. The term "entered into" is of common use in legal phraseology, has a well defined meaning, and is frequently found in statutes, opinions of courts, and legal publications generally. Ordinarily, it is equivalent to the phrase "to become bound; or obligated by a bond, recognizance, contract," etc. In the Century Dictionary the words "To enter into recognizances" are defined thus: "[In law] to become bound under a penalty, by a written obligation before a court of record, to do a specific act." Other lexicographers give substantially the same definition. In the statutes of Nebraska the words "entered into" appear to be used interchangeably with, and as equivalent to, the word "execute." Cobbey's Statutes, 1891, secs. 243, 5005, 5071, 5254, 5478 and 5521. In *Matthews v. Council*, 96 Ga., 780, a petition alleging that "defendants entered into an administrator's bond," etc., was held good on demurrer for want of a cause of action. To the same effect are *Greenville Co. v. Runion*, 9 S. Car., 1; *Condit v. Baldwins*, 19 N. J.

Law, 144, and *Board v. Parsons*, 22 W. Va., 308. We conclude therefore that the averment that the defendants entered into the obligation sued on, is equivalent to the allegation that they executed the bond, and comprehends all acts essential to its making and delivery, and that the petition states facts sufficient to constitute a cause of action.

The plaintiff in error also contends that it is unnecessary in the petition to allege approval of the bond upon which suit is brought, or words equivalent thereto. This point of the controversy is perhaps disposed of in the views already expressed; for if, as we are disposed to think, the words "entered into," as used in the pleading quoted, are equivalent to, and interchangeable with, the word "execute," they would embrace all the acts essential to a complete execution of the bond, including the intermediate act of approval. Since, however, in the former opinion, the case was affirmed as to the defendant sureties on the bond, because the petition did not state a cause of action against them, in that it did not contain an allegation that the bond was approved, or equivalent words or acts, showing a waiver of approval, or estoppel by reason of non-approval, it would be more appropriate in this opinion to directly dispose of that question also. We are to determine whether, in an action on an official bond against the principal and the sureties thereon, for a breach of its conditions, the approval of the bond by those charged with that duty, is a material averment which must be alleged and proved. While the approval of an official bond is essential as a step to the qualification of the person holding a public office, and a material allegation in a pleading by one whose title to office is challenged or in question, yet, the approval is not for the benefit of a surety, or in his interest, or for his protection. Therefore, in a suit upon an obligation signed by him, and under which his principal has assumed to discharge the duties of his office, such surety can not be heard to urge the want of approval to his advantage, or as a ground

of release from the obligation entered into; and as to him, at least, it is immaterial whether or not approval by the proper officer has been had upon such obligation, or whether it has been approved at all. In *Holt County v. Scott*, 53 Nebr., 176, 191, Chief Justice HARRISON, writing the opinion, says: "These provisions relative to approval of the bond were not for the benefit of the sureties of bonds, but for the convenience and better security of the public and the parties who may be directly interested. The sureties had signed the bond and delivered it to the principal therein for the purpose for which it was used, and they have no reasonable or tenable ground for complaint in that some matters which were not of their concern, or not to be exercised in their behalf, were neglected and not observed. * * * Provisions which require the approval of official bonds are for the benefit of the obligee who alone can take advantage of a failure to observe them. Such failure is never a ground upon which the obligor or his sureties can escape liability after a breach of the conditions of a bond." In Mecham, Public Officers, sec. 313, the rule is stated as follows: "Approval being thus for the protection of the public only, it is well settled that where, by virtue of the bond, the officer has been inducted to the office, his sureties can not escape liability for his defaults because the bond was not approved by the proper officer, or was not approved at all." In *Skellinger v. Yendes*, 12 Wend. [N. Y.], 306, it is stated in the syllabus, that "neither the constable nor his sureties can object * * * that the sureties had not been approved by the clerk." Chief Justice Savage, writing the opinion, says, p. 308: "Nor is there any reason why the sureties should not be liable, notwithstanding the want of a compliance with the statute provisions; in this case it seems that the town clerk neglected to endorse his approval of the sureties. That provision was intended for the benefit of those who should put executions into the hands of the constable, and has no connection with the liability of the sureties. Their signature was all that was necessary

to make them liable. If the bond was not approved and filed, the omission might be considered a refusal to serve, and the vacancy might be filled; but there is nothing in the language or the policy of the statute which renders void any such instrument executed for the security of the execution creditors." To the same effect is *Place v. Taylor*, 22 Ohio St., 317. In *Moore v. State*, 9 Mo., 334, it is held: "A bond given by a collector is valid against him and his securities although not approved by the county court," quoting with approval *Jones v. State*, 7 Mo., 81, wherein the same principle is sustained. In *State v. Fredericks*, 8 Ia., 553, it is held: "In an action on a school fund commissioner's bond, it is not necessary, in order to make it a valid statutory bond, to aver and prove in the first instance, that the sureties were approved by the clerk and sheriff of the county." This view of the law is quite generally accepted and upheld by the courts of last resort in the different states. *Sprowl v. Lawrence*, 33 Ala., 674; *Marshall v. Hamilton*, 41 Miss., 229; *McCracken v. Todd*, 1 Kan., 148; and other cases cited in *Holt County v. Scott, supra;* also *State v. Cromwell*, 7 Blackf. [Ind.], 70.

From a consideration of the foregoing, we are led to the conclusion that an averment of the approval of an official bond, or words equivalent thereto, in an action against a public officer and the sureties upon his official bond, is not necessary in stating a cause of action against the obligors; and that the conclusion reached as announced in the first paragraph of the syllabus in this case, reported in 58 Nebr., 730, should be and is hereby overruled. The cause is reversed as to all the defendants, and remanded to the district court for further proceedings in conformity with law.

REVERSED AND REMANDED.

NORVAL, C. J.

I adhere to the opinion filed on the former hearing.

GARWOOD P. BUTTS V. KINGMAN & COMPANY ET AL.

FILED MAY 16, 1900. No. 9,211.

1. **Petition.** The petition examined, and *held* to state a cause of action.

2. **Motion for Judgment:** PLEADING LIBERALLY CONSTRUED. When a party files a motion for a judgment on the pleadings, after the jury is impaneled and sworn, the pleading so attacked will be liberally construed, so as to sustain it if possible.

3. **Interest in Property:** RIGHT OF ACTION. One who has an interest in property which has been converted by another obtaining possession thereof through a replevin suit may maintain conversion against the latter, since his remedy is not upon the replevin bond, if he be a stranger to the obligation.

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

B. N. Robertson, for plaintiff in error.

J. H. McIntosh, contra:

The plaintiff's recourse was upon the replevin bond, and not against the party into whose hands the property replevied finally came. In a replevin suit when a bond is given under the statute, and the property delivered to the plaintiff in the action, the bond takes the place of the property. As was said in an early case in Ohio, from which our replevin act is taken, "the bond takes the place of the property to the extent of the interest of the defendant in replevin." *Jennings v. Johnson*, 17 Ohio, 154; *Williams v. West*, 2 Ohio St., 87; *Crittenden v. Lingle*, 14 Ohio St., 182; *Rockey v. Burkhalter*, 68 Pa. St., 221.

NORVAL, C. J.

In the district court of Douglas county Garwood P. Butts filed his petition, the substantive parts of which are as follows:

"On the 16th day of February, 1894, the defendants

commenced an action in replevin in the county court of Douglas county, Nebraska, in which the Moline, Milburn & Stoddard Company was plaintiff, and the B. H. Osterhoudt Spring Wagon Mfg. Company, Samuel Hamilton, and G. P. Butts, were defendants, said G. P. Butts being the plaintiff in this cause of action, was made a party to the action commenced in the county court as aforesaid by intervention, but the bond in replevin did not run in his favor, and said action commenced in the county court as aforesaid was commenced in the name of the said Moline, Milburn & Stoddard Company, for and in the behalf of, and for the benefit of the said defendants herein, the defendants herein having previous to the commencement of said action, obtained from the Moline, Milburn & Stoddard Company, an assignment as collateral security, of all of its rights, title and interest in and to the property replevied, said property consisting of * * * and in the said replevin suit, the property taken under the writ of replevin was delivered by the sheriff into the possession of the defendants herein, and defendants have appropriated all of said property to their own use and benefit; with full notice of the plaintiff's lien on the said property; that the value of the property so taken and appropriated by the said defendants is the sum of four hundred forty dollars ($440).

"Plaintiff alleges that the said replevin suit, started by the defendants herein as aforesaid in the county court, was removed to the district court of Douglas county, Nebraska, by appeal, in which court, on the 22d day of June, 1895, it was adjudged that the plaintiff herein had, at the commencement of the replevin suit, a special interest in said property, and was entitled to the possession thereof, and that the value of said interest was the sum of one hundred forty-two dollars and fifty cents ($142.50), and thereupon a judgment was rendered in said replevin suit in favor of the plaintiff herein and against the Moline, Milburn & Stoddard Company, for

the return of the property so replevied, or, in case a return can not be had, that this plaintiff have and recover from the said Moline, Milburn & Stoddard Company, the sum of one hundred forty-two dollars and fifty cents ($142.50), together with his costs in that behalf expended, taxed at forty-nine dollars and twenty-eight cents ($49.28). Plaintiff alleges that on September 23, 1895, an execution and order for the return of the said property was issued upon said judgment and delivered to the sheriff of Douglas county, Nebraska, and that on the 8th day of October, 1895, said execution was by the sheriff returned wholly unsatisfied.

"Plaintiff further states that it was by and through the means of the replevin suit commenced in the county court by the defendants herein in the name of the Moline, Milburn & Stoddard Co. as plaintiffs, that the said defendants herein obtained the possession of the said chattel property as herein alleged, and through the instrumentality of such suit that they were enabled to appropriate and apply to their own use all of the said personal property, and that because of the action taken by the said defendants herein, plaintiff has been damaged in the sum of two hundred dollars ($200). Wherefore, plaintiff asks judgment," etc.

To this petition defendants answered by a general denial, and further alleging that the Moline, Milburn & Stoddard Company had prosecuted a petition in error from the judgment of the district court, which plaintiff alleged was in his favor. The reply denied this allegation. After the jury was impaneled, defendants filed a motion for judgment in their favor on the pleadings, which motion was sustained and judgment was entered accordingly, and from it the plaintiff below comes to this court on error proceedings. This ruling was in effect holding that the petition does not state a cause of action. We shall confine ourselves to the objections made to the petition in the brief of defendants.

It is contended that the petition does not state a

cause of action for two reasons: first, that the allegations therein do not show a right to the property in question superior to that of defendants; second, that plaintiff's recourse was upon the replevin bond, and not against the party into whose hand the property replevied finally came.

On the first point, it is argued that the petition should on its face have shown that plaintiff had in the property a right superior to that of defendants. Grant this, yet we think the petition does show this sufficiently for the purpose of this case, and it must be liberally construed, coming to us as it does upon a judgment rendered on a motion for judgment on the pleadings submitted after the jury were impaneled to hear the case. The petition alleges that in the former action it was adjudged that plaintiff had, at the commencement of the replevin suit, a special interest in said property, and was entitled to possession thereof, and then sets out the value of that interest, for which amount plaintiff recovered judgment. This we think is sufficient to establish the fact that plaintiff's special interest was superior to the rights of defendants, and as they had deprived plaintiff of the possession of the property, this act amounted to a conversion, to the extent of the value of this interest, if the value of the property equalled or exceeded that sum.

As to the second proposition, we do not think it necessary to discuss whether, as between the parties to a replevin bond, the bond takes the place of the property or not, for in this case the undertaking did not run to plaintiff and he could not sue upon it. Being a stranger thereto, his remedy was a suit in conversion against the tort-feasor, for which reason this suit was properly brought. *Wilcox v. Brown*, 26 Nebr., 751. Judgment for defendants on the pleadings was erroneously entered, and it is accordingly

REVERSED.

LINCOLN MEDICAL COLLEGE, APPELLEE, V. W. A. POYNTER ET AL., APPELLANTS.

FILED MAY 16, 1900. NO. 11,230.

1. **Practice of Medicine:** STATE BOARD OF HEALTH: CERTIFICATE TO PHYSICIANS: OBJECT OF LAW. The law governing the practice of medicine in this state and authorizing the state board of health to issue certificates to physicians and surgeons, is a police measure. It was not intended, by that act, to protect medical schools or medical practitioners from competition in business.
2. **Incorporated Medical College:** RIGHT OF ACTION. An incorporated medical college can not maintain an action to restrain the state board of health from issuing a certificate as required by article 1, chapter 55, Compiled Statutes, 1899, licensing a physician and surgeon to practice medicine in this state.
3. **Action of State Board:** INJUNCTION. After the state board of health has placed a construction upon the law under which it is authorized to issue certificates to physicians and surgeons (Compiled Statutes, 1899, ch. 55, art. 1), injunction will not lie to annul its decision and restrain the issuance of a certificate in accordance with such decision.

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

Constantine J. Smyth, Attorney General, and *Willis D. Oldham, Deputy,* for appellants:

The police power of the state, as vested in the legislature, is defined in *Powell v. Commonwealth*, 114 Pa. St., 265.

The act of a lawmaking power interfering with the right of a citizen to follow his or her avocation, is always a questionable exercise of legislative power. *Ex parte Whitwell*, 98 Cal., 73; 35 Am. St. Rep., 156.

The testimony in this case discloses that the board had entered judgment in Dr. Drasky's favor prior to the commencement of this action by ordering and directing a certificate to issue to him to practice medicine. The principle is a fundamental one that injunction will not issue to prevent the doing of an act which has already been performed.

Doyle & Stone and *W. G. Hastings,* for intervener, B. W. Drasky.

Strode & Strode and *C. S. Rainbolt, contra:*

Mandamus is likened to injunction with respect to the propriety of its issuance against executive officers or boards. *Gaines v. Thompson,* 7 Wall., 352; High, Injunctions, 3d ed., sec. 1310.

Referring now to the authority of the board of health to grant, or to refuse, a certificate, let us quote the language of a recent decision of this court in a mandamus case: "It may be likened unto the authority which may be exercised by an officer in the approval or non-approval of a required bond or undertaking. The right of examination, and of passing on the financial sufficiency of the instrument, and the sureties thereon, may be or exist and in it there may be somewhat of the exercise of the discretion,—a judicial weighing of the matter, if you please; yet in some instances, where the form and substance of the bond are without question, it has been said mandamus will lie to secure an approval." *Jackson v. State,* 57 Nebr., 188.

We think, therefore, an injunction will lie to restrain the board from issuing a certificate. *Normand v. Otoe County,* 8 Nebr., 18; *Morris v. Merrell,* 44 Nebr., 423; *City of Omaha v. Megeath,* 46 Nebr., 502. We do not contend that the law was enacted for the benefit of plaintiff or any other corporation or individual. But we do contend that every person, either natural or artificial, has an interest in every valid law upon our statute books; each must comply with the law's requirements, and each is entitled to the law's protection.

SULLIVAN, J.

The district court of Lancaster county, at the instance of the Lincoln Medical College of Cotner University, rendered a decree perpetually enjoining the members of the state board of health, and the secretaries of said board,

from issuing to Brestislaw W. Drasky a certificate authorizing him to engage in the practice of medicine and surgery in this state. It appears that the board had, before the commencement of the action, determined, upon proofs submitted to it, that Drasky was a graduate of a legally chartered medical college in good standing and entitled to the statutory credential. The trial court decided that the medical college at which Drasky was graduated did not meet the requirements of chapter 55, Compiled Statutes, 1899, and that the evidence submitted to the board of health did not justify the conclusion reached and decision made by that body. Of the questions discussed in the briefs of counsel, we shall consider only two. On behalf of appellants it is insisted that the Lincoln Medical College has no legal interest in the matter in controversy and is, therefore, not entitled to maintain the suit. The only interest asserted by plaintiff is thus stated in its petition:

"6. If said defendants are permitted to thus disregard the law and issue to said Drasky a certificate to practice medicine in this state and thereby establish a precedent and advertise to the world that they have disregarded the law and will continue to do so, it will cause students to leave plaintiff's Medical College and attend some other college of a lower standard where the degree of M. D. is granted upon the attendance of only three courses of lectures and will prevent prospective students from matriculating and buying scholarships in plaintiff's said college, and will have the effect to cause plaintiff to either discontinue its business or lower its standard and will cause plaintiff great financial loss and damage and will work great and irreparable injury to this plaintiff and plaintiff has no adequate remedy at law."

Fairly paraphrased the averment quoted declares that the action of the defendants in Drasky's case will induce medical students to matriculate at institutions having a lower standard of education than that established by the plaintiff, and that the plaintiff will be thereby exposed

to unfair competition. The purpose of the law is not to protect medical schools or medical practitioners from competition in business; it is a police measure designed, as was said in *State v. Buswell*, 40 Nebr., 159, to prevent imposition upon the afflicted by quacks and pretenders. The plaintiff does not stand within the shelter of the act and hence can claim nothing under it. It is, we suppose, the theory of the law that one who has, as a medical student, attended a certain number of lectures during a period of four years is a less formidable menace to the lives and health of people, who may be induced to employ him as a physician or surgeon, than is a person who has attended the same number of lectures during a period of three years; but however that may be, it is quite certain the plaintiff has no legal interest in the matter; it is not charged with the duty of enforcing the law, and can not be permitted to assume that function, even from motives of benevolence; it bears no commission from the state authorizing it to take up the cudgels *pro bono publico*. It being, as counsel for defendants have pointed out, "an artificial person devoid of a tangible body, without a soul, an immune from the pains, aches and organic troubles which can be cured or intensified by medical treatment, can look with perfect complacency upon the practice of medicine by all members of the profession, realizing that however numerous the monuments erected to the want of skill on the part of the practitioner, it can never be numbered among the victims." But if plaintiff could rightfully appeal to the law to protect it from business competitors, it has not shown in this case that there exists the relation of cause and effect between the act complained of and the injury apprehended. It does not claim that loss of patronage will result from the delivery of the certificate to Drasky, which is the act enjoined; but rather that it will suffer by the decision of the board, an act already completed, accomplished and beyond recall. The substance of plaintiff's contention is simply this, that the state board of health has placed a con-

struction on the law regulating the practice of medicine which is prejudicial to its interests and which ought to receive judicial condemnation. The office of an injunction is to prevent action; it can not reach back and undo what has been already done. The decision of the board has been made; it is a past act; and, whether right or wrong, it can not be annulled by injunction. The threatened injury is obviously not the proximate consequence of the act enjoined. The judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA V. OMAHA NATIONAL BANK ET AL.

FILED MAY 16, 1900. No. 10,586.

1. **Error:** TRIAL DE NOVO. When the reversal of a judgment is grounded on error in the trial occurring anterior to the verdict, the verdict is nullified and the cause, when remanded, stands for trial *de novo*.

2. **Mandate:** MANDAMUS. If the district court mistakes or misconstrues the mandate of this court, its obedience may be enforced by mandamus.

ERROR to the district court for Douglas county. Tried below before BAKER, J. Original application for mandamus to compel the district court to obey the mandate of this court heretofore issued herein. *Writ allowed.* NORVAL, C. J., *dissenting.*

Constantine J. Smyth, Attorney General, and *Willis D. Oldham, Deputy,* for the state.

Constantine J. Smyth: After the reversal of an erroneous judgment the parties in the court below have the same right which they originally had. *Phelan v. San Francisco,* 9 Cal., 15. The reversal of a judgment generally for a specified error alleged to be the only error is the reversal of the whole judgment, and not only of the part held to be erroneous. *Davis v. Headley,* 22 N. J. Eq., 115. Where a cause is remanded without special directions and the court below

is merely directed to proceed in conformity with the opinion expressed by the appellate court, such cause stands for trial upon the merits, the same as if no appeal had been taken. *Updike v. Parker*, 11 Ill. App., 356.

When a cause is "reversed and remanded for further proceedings," the judgment of the court below, as to the parties to the record, is entirely abrogated, and the cause then stands in the court below precisely as if no trial had occurred. *Chickering v. Failes*, 29 Ill., 303; *Palmer v. Wood*, 35 N.E.Rep. [Ill.], 1122; *Schumann v. Helberg*, 62 Ill. App., 218. Where a decree of a probate court on final settlement of an administrator's account is reversed generally and remanded, the decree is vacated *in toto* and the parties stand in the same position as if it had never been rendered. *Jones v. Dyer*, 20 Ala., 373. Counsel for the defense insists that the only remedy is by appeal. If that be true, then the litigant might never be able to reap the reward of a successful litigation in this court. A trial court might continue to disobey your honors' mandates, and enter such judgments as it saw fit, if the contention of counsel be correct. But it is not. A litigant has a right to have your honors' commands in his favor obeyed promptly. If this were not true, the position of this, the highest court in the state, would be a pitiable one. It would have the power to issue orders but no power to enforce them. That, however, is not your position. You are not required to sit supinely by, while your commands are flouted by either counsel or lower court. You have the power to enforce those commands, and to compel obedience to your judgment in a summary manner. *Sibbald v. United States*, 12 Pet. [U. S.], 491; *In re Washington & G. R. Co.*, 140 U. S., 91; *United States v. Fossatt*, 21 How. [U. S.], 445.

R. S. Hall, Connell & Ives and *John L. Webster, contra:*

The district court was at liberty to consider and decide any matter left open by the mandate, and certainly the question of whether or no there should be a trial *de novo*

of all the questions of law and fact in this case was left open by the mandate. *In re Sanford Fork & Tool Co.*, 160 U. S., 247; *Woolman v. Garringer*, 2 Mont., 405; *Ervin v. Collier*, 3 Mont., 189; *Commissioners for Montgomery County v. Carey*, 1 Ohio St., 463; *Cox v. Pruitt*, 25 Ind., 90.

Mandamus will not lie to review the action of a court, which is judicial and discretionary in its nature. But the remedy, if an error has been committed, is by appeal. *People v. Pratt*, 28 Cal., 166; *State v. Kinkaid*, 23 Nebr., 641.

SULLIVAN, J.

This is an application for a mandamus directing the district court of Douglas county to vacate a judgment which the state contends was rendered in disregard of the mandate of this court. There is no dispute about the facts. At a former term we disposed of the case of *State v. Omaha Nat. Bank*, 59 Nebr., 483, by reversing the judgment of the district court and remanding the cause for further proceedings. After the mandate went down and the district court was again possessed of the action, the attorney general withdrew his motion to dismiss the cause. Thereupon the defendants moved for a judgment on the verdict and their motion was sustained. Was this action of the court warranted by the judgment of reversal? Clearly not. The effect of a reversal depends altogether upon the reasons which brought it about. When a judgment of reversal is grounded on an error occurring after the trial the proceedings on the hither side of the error are wiped out, and the parties are put back where they were when the first false step was taken. That is the point from which the further proceedings are to start—the point from which the action is to progress anew. *Backus v. Burke*, 52 Minn., 109; *National Investment Co. v. National Savings, Loan & Building Ass'n*, 51 Minn., 198; *Commissioners of Montgomery County v. Carey*, 1 Ohio St., 463; *Nelson v. Hubbard*, 13 Ark., 253; *Cox v. Pruitt*, 25 Ind., 90; *Ervin v. Collier*, 3 Mont., 189; *Woolman v. Garringer*, 2 Mont., 405; *Felton v. Spiro*, 47 U. S. App., 402.

The error which induced this court to reverse the judgment against the state lay back of the verdict. One of the judges thought no verdict should have been rendered, but that the action should have been dismissed; another thought that the verdict was the result of an erroneous instruction, while the third member of the court expressed no opinion and took no part in the decision. It thus appears, construing the mandate in the light of the opinions, that the judgment of the district court was reversed because the verdict was the product of judicial error. It other words it was clearly determined that the verdict was an unlawful verdict; and for that reason alone the judgment was reversed. A reversal under such circumstances necessarily nullified the action of the jury and blotted out absolutely and forever all proceedings of the court from the point where the first fatal error was committed. The district court was as powerless to reanimate the verdict as it was to revitalize the judgment. An attempt to do either would be an attempt to exercise a revisory power over the decisions of this court. After the attorney general withdrew his motion to dismiss the action it was the manifest duty of the district court to empanel a jury and try the cause anew. In rendering judgment on the verdict which had been discredited and condemned, the district court failed to execute the mandate of this court; and it becomes our duty to enforce obedience by mandamus. There is no doubt about the authority of this court to issue the writ in this class of cases. *Perkins v. Fourniquet*, 14 How. [U. S.], 313; *In re Washington & G. R. Co.*, 140 U. S., 91; *In re City Nat. Bank of Fort Worth*, 153 U. S., 246; *Mason v. Pewabic Mining Co.*, 153 U. S., 361; *In re Sanford Fork & Tool Co.*, 160 U. S., 247. In the last case cited, Gray, J., speaking for the court, said, p. 225: "If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this

court." In the same case it is further remarked, p. 256: "The opinion delivered by the court, at the time of rendering its decree, may be consulted to ascertain what was intended by the mandate; and, either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and act accordingly."

We are asked by the attorney general to instruct the district court as to the principles of law applicable to the facts of the case. I am of the opinion that we should comply with this request; that we should indicate now our views on the questions which, through no fault of the litigants, we failed to decide in the error proceeding. My associates, however, think otherwise; they think that, having failed to speak as a court when it was our duty so to do, we should remain silent, regardless of consequences, until opportunity is again presented for an authoritative utterance.

It is said by counsel for the bank that a mandamus should not issue because the mandate contained no specific direction for further proceedings. Such direction was unnecessary. The capital fact to be noted is that this court decided that the verdict was an illegitimate product of the trial, and for that reason only reversed the judgment. In disregarding our decision and dealing with the verdict as valid and binding on the parties, the lower court violated an implied command which was clear, definite, certain and intelligible as though it had been formally expressed in precise terms.

A peremptory writ will issue directing the district court of Douglas county forthwith to vacate the judgment rendered by it in favor of the defendants, the Omaha National Bank and J. H. Millard, and to forthwith award a new trial of the action.

WRIT ALLOWED.

HOLCOMB, J., concurring.

In concurring in the opinion by Mr. Justice SULLIVAN, it is, perhaps, due from me to say that I regard the matter

in controversy herein as involving a rule of practice in cases remanded to the district courts of the state by this court. The question might have arisen in any case. It has arisen in this one. While my qualifications to take part in the court's deliberations have been questioned, because of my alleged connection with or relation to the institution of the case, heretofore while occupying the office of governor, I do not regard the objection as of sufficient weight or merit to require an expression of views on the subject from me at this time. My duty to participate in the proceedings taken I regard as imperative in the discharge of obligations imposed, and the right so to do beyond reasonable doubt.

NORVAL, C. J., dissenting.

I dissent from the judgment just rendered. The state sued the Omaha National Bank and J. H. Millard in the district court of Douglas county to recover the sum of $201,884.05. There was a trial of the cause to a jury, who, in obedience to a peremptory instruction of the court, returned a verdict in favor of the defendants and the judgment entered thereon, on a petition in error prosecuted by the state, was reversed at the last term of this court, and the cause remanded to the trial court for further proceedings. *State v. Omaha Nat. Bank*, 59 Nebr., 483. A mandate was issued, which contained no specific directions to the district court, but stated that the judgment below was reversed and the cause remanded for further proceedings, and commanded the court, "without delay, to proceed in said cause accordingly to law." This mandate was filed in the court below and entered of record therein, and subsequently the state withdrew its motion to dismiss without prejudice. Afterwards the defendants moved for judgment in their favor on the verdict of the jury theretofore returned in the case, which motion was sustained and judgment was accordingly rendered against the state. The attorney general has filed a motion in this court to recall its mandate and issue a

new one in the cause directing the district court to vacate the second judgment entered on the verdict of the jury and render a judgment for the state as prayed in its petition, or to grant a new trial of the cause in accordance with the opinion of Judge SULLIVAN filed at the time the judgment of reversal was entered. The attorney general has since filed an amendment to his said motion praying a peremptory writ of mandamus to the district court of Douglas county and to the Hon. Benjamin S. Baker, one of the judges thereof, who presided at the time the judgment assailed was rendered:

"1. Commanding the said court and said judge to set aside and hold for naught the judgment heretofore rendered in this cause by said court on the 13th day of March, 1900, and filed for record on the 19th day of March, 1900, and to set aside and hold for naught the order rendered on said 13th day of March, and filed on said 19th day of March, sustaining the motion of defendants for judgment on the verdict rendered at the first trial of this cause.

"2. Commanding the said court and the said judge to enter judgment in said cause for the state as prayed for in its petition in said cause, or

"3. Commanding the said court and the said judge to forthwith grant the plaintiff a new trial in said cause according to the principles of law enunciated in the opinion of Hon. John J. Sullivan, in this cause, or,

"4. Commanding the said court and the said judge to forthwith grant plaintiff a new trial of said cause according to law."

The motion to recall the mandate and to issue a new one should be denied for more than one reason. The judgment pronounced by this court in the cause at a former term merely reversed the decision of the district court and remanded the cause to that court for further proceedings, and the mandate issued conforms strictly to the judgment of reversal; and to now issue a new mandate containing specific directions to the court would be improper with-

out a modification of the judgment of reversal, which the state has not asked, and moreover such modification at a subsequent term of this court has no power to make, except to correct clerical errors, and it is not alleged that any such errors have crept into the record. *Ex parte Sibbald v. United States*, 12 Pet. [U. S.], 488. Again, the application for a peremptory writ of mandamus commanding the district court to vacate its last judgment, alleged to have been entered in disregard of this court's mandate, is a confession that a proper mandate has been already issued, and is a waiver of the motion of the state to recall the mandate heretofore issued in this cause. One can not seek the enforcement of a writ, or judicial process, and at the same time assail it as not being sufficiently specific. This is too plain to require argument or the citation of authorities to sustain the proposition stated.

The next question which confronts the court is whether mandamus can be invoked for any one of the four purposes sought by the state. It is urged by the attorney general that the effect of our judgment of reversal was to grant a new trial, while counsel for the defendants insist that the trial court was bound to proceed in the cause from the point at which the first error was committed. The general doctrine is that where a judgment is reversed for some error committed by the trial court subsequent to the verdict that further proceedings are to begin at such point of error. But the rule is otherwise where the reversal is predicated upon errors occurring prior to the verdict. In such case a new trial of necessity must be had, as the judgment of reversal wipes out and obliterates the verdict, and there is no provision of statute for the reconvening of the jury to retry the cause. The evidence must again be adduced before another jury, unless one is waived by the parties. The judgment or reversal herein was concurred in by two members of this court, the writer taking no part in the decision. Chief Justice HARRISON voted for a reversal on the sole ground that

the court below erred in not permitting the state to dismiss its action before verdict, while Judge SULLIVAN was of the opinion that there was prejudicial error in the instruction. The decision of the two members of the court was reached by different courses of reasoning, neither concurring in the ground of reversal adopted by the other, yet both of them united in holding that the judgment of the trial court should be reversed and the cause remanded for further proceedings. Under the constitution of this state it requires a majority of the members of this court to pronounce a decision, therefore it is clear that the views of neither Chief Justice HARRISON nor Justice SULLIVAN expressed in their separate opinions filed herein can be regarded as the law of the case; but it does not follow from this that the judgment or decision of the trial court was affirmed, as argued by counsel for defendants. On the contrary, the judgment of that court by the united decision of two members of this court was in express terms reversed, although each predicated a reversal upon a different point of law. The judgment having been reversed generally and the cause remanded without any direction as to the future proceedings to be taken or had therein, the verdict was thereby as completely obliterated and wiped out as though the judgment of reversal and the mandate issued thereon had in express terms so specified. *Phelan v. City of San Francisco*, 9 Cal., 15; *Davis v. Headley*, 22 N. J. Eq., 115; *Updike v. Parker*, 11 Ill. App., 356. Had the cause been reversed and remanded with specific directions, *Beals v. Western Union Telegraph Co.*, 53 Nebr., 601, would be applicable. The conclusion is, therefore, irresistible that the defendants had no right to a judgment on the verdict which this court had in effect vacated and annulled, and furthermore that the plaintiff was not entitled to judgment, without trial, in accordance with the prayer of its petition. The state can not insist upon a retrial of the case in accordance with the views enunciated by Judge SULLIVAN in his opinion, since they were not concurred in by any

other member of the court. As it would be mere *dicta* to express an opinion at this time as to the law which should govern the district court in the future progress of the cause, I refrain from doing so.

That the district court erred in rendering judgment on the verdict after the filing of the mandate for the purposes of this case is conceded. The proposition is therefore presented whether the state is entitled to relief by the extraordinary writ of mandamus. It is not necessary to look to the decisions of other states in deciding the present question of practice, since abundant authority upon that subject is nearer at hand. That the district court erred in rendering a judgment in favor of the defendants upon the verdict and in refusing the state a new trial is granted, yet mandamus is not the appropriate procedure to right the wrong. The judgment on the discredited verdict was reviewable on petition in error. Code of Civil Procedure, sec. 584. Therefore a plain, complete and adequate relief at law was open to the state by appellate proceedings, and mandamus will not lie.

Section 646 of the Code of Civil Procedure, relative to proceedings upon mandamus, declares: "This writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of law." This is the command of the legislature, and the statute has frequently been applied by this court. Mandamus is not a proceeding to correct errors, and can not be invoked in any case where the statute has provided a plain and adequate remedy at law. *State v. Nemaha County*, 10 Nebr., 32; *State v. Powell*, 10 Nebr., 48; *State v. Kinkaid*, 23 Nebr., 641; *State v. Mayor of Omaha*, 14 Nebr., 265; *McGee v. State*, 32 Nebr., 149; *State v. Cotton*, 33 Nebr., 560; *State v. Churchill*, 37 Nebr., 702; *State v. Laflin*, 40 Nebr., 441; *State v. Merrell*, 43 Nebr., 575; *State v. Piper*, 50 Nebr., 25; *Nebraska Telephone Company v. State*, 55 Nebr., 627. In the case last cited, it was said, p. 633: "It is a familiar principle that a litigant will not be permitted to invoke

the extraordinary remedy of mandamus where an express statute affords him an adequate remedy for the redress of the grievance of which he complains." In line with our own decisions is the following statement of the doctrine taken from 13 Ency. Pl. & Pr., 530: "Mandamus will not lie when there is a remedy by appeal or writ of error; that is, it will not take the place of an appeal or writ of error, and is not the proper remedy to be resorted to to compel an inferior court or judicial tribunal to reverse a decision already made; and the writ does not lie to reverse judicial action. The relator must show that he can not appeal, to make out a right to a mandamus."

But it is urged that mandamus will lie to compel an inferior court to obey the mandate of an appellate court. This course has been followed by some courts when the mandate alone—or when construed in the light of the opinion filed in the case wherein the mandate issued—in specific terms orders or directs the trial court to proceed in a certain way and it has refused so to do; but we do not know of a single case where mandamus has been granted to compel obedience to a mandate where neither it nor the decision contains specific instructions or directions to the trial court. In the case at bar the mandate directed the district court merely to proceed in the cause "according to law." It was left to the trial court to determine for itself, in the first instance, what steps were lawful, and if it erred in its decision it could be corrected by this court in the proper appellate proceeding. If the district court should deny either party a trial by jury, that would not be proceeding in the cause "according to law," yet that court could not be compelled by mandamus to retrace its steps. Again, should the district court upon a trial of the cause to a jury give an erroneous instruction, it would fail to proceed "according to law," yet mandamus would not be the appropriate remedy. So the entry of the second judgment on the verdict which had been annulled by the judgment of this court was not in accordance with law, nevertheless mandamus is no

more the appropriate remedy to set aside such judgment than in the cases we have mentioned. The authorities relied upon to sustain the position of the majority are readily distinguishable.

In *Perkins v. Fourniquet*, 14 How. [U. S.], 328, it appears that an appeal was prosecuted from the circuit court of the United States for the southern district of Mississippi to the United States supreme court, and the decree of the circuit court was affirmed, with costs and damages at the rate of six per cent per annum. A mandate issued to the circuit court, reciting the judgment of affirmance, and directing it to be carried into execution. After the filing of the mandate in the circuit court an execution was issued commanding the marshal to levy the amount of the original judgment in the circuit court, with interest at eight per cent, and damages at the rate of six per cent in addition. The amount of the decree, with interest at six per cent, was paid the marshal, and an application was made to the circuit court to order the satisfaction of the decree, or to quash the execution in the hands of the marshal, which application the court denied; and from this order an appeal was prosecuted from the circuit court to the supreme court of the United States. This order of the circuit court was reversed, and a mandate issued, directing the lower court to enter the decree satisfied. Thus it will be seen that the mandate contained a specific direction to the trial court, and left nothing for its discretion, but directed it to carry into execution the decree of the supreme court, which was recited in the mandate. Whether a mandamus would lie in such a case was not involved; the question of the disregarding of the mandate was reviewed in an appellate proceeding.

In re Washington & Georgetown R. Co., 140 U. S., 91, was a mandamus to the supreme court of the District of Columbia commanding it to vacate a judgment, so far as it related to interest, and to enter a judgment on the mandate of the United States supreme court in accord-

ance with the terms thereof, and without interest. In that case a writ of mandamus was properly granted, since the mandate contained a specific direction to an inferior court to enter a certain judgment, and left nothing to its discretion.

In re City National Bank, 153 U. S., 246, was an application for mandamus directing the circuit court of the United States for the northern district of Texas to vacate or modify its decree entered upon the mandate of the supreme court of the United States on the disposition of an appeal from the lower court. The writ was denied, on the ground that the mandate had not been disregarded, as it contained no specific direction to the lower court as to the manner in which it should proceed.

In *Mason v. Pewabic Mining Co.*, 153 U. S., 361, the question as to whether a mandamus would lie to an inferior court to compel the enforcement of a mandate of the appellate court was not involved nor decided, it being held in that case that an appeal was an appropriate remedy.

In *In re Sanford Fork & Tool Co.*, 160 U. S., 247, the supreme court of the United States denied a motion for a writ of mandamus, for the reason that the circuit court had not, in the opinion of the supreme court, disobeyed any of the commands of the mandate in that case issued on a former appeal. It was properly held that no question once considered and decided by that court could be re-examined at any subsequent stage of the same case. It was further ruled that if the circuit court should mistake or misconstrue the decree of the supreme court, or should not give full effect to the mandate, its action could be controlled, either upon a new appeal, or by writ of mandamus to execute the mandate of the supreme court; but that the circuit court could consider and decide any matter left open by the mandate of the supreme court; and its decision in such matters could be reviewed by a new appeal only. For the reasons stated the writ should be denied.

HERBERT B. WALDRON ET AL. V. FIRST NATIONAL BANK OF GREENWOOD.

FILED MAY 16, 1900. No. 10,271.

1. **Mortgage Foreclosure:** RECEIVER. Where mortgaged property is probably insufficient to discharge the debt, the court may, in an action to foreclose the mortgage, on the application of the mortgagee, appoint a receiver.

2. **Deficiency Judgment:** SOLVENCY OF DEFENDANT. And in such case it is immaterial whether a deficiency judgment against the parties liable for the debt, is collectible.

3. **Finding:** EVIDENCE: REVIEW. The finding of a court, grounded on substantially conflicting evidence as to the value of property, will not be disturbed.

4. **Judicial Discretion:** PRESUMPTION. It will be presumed, in the absence of a showing to the contrary, that the discretionary powers of the district court have been wisely exercised.

ERROR to the district court for Cass county. Tried below before RAMSEY, J. *Affirmed.*

Samuel M. Chapman and *Frank Irvine,* for plaintiffs in error.

Samuel M. Chapman: We submit it is an elementary rule of law that to obtain a receiver for mortgaged premises, during foreclosure proceedings, the grounds therefor must be full and clear, and two things must be made to appear: First, that the mortgaged premises are inadequate to satisfy the mortgage debt; second, that the debtors are personally insolvent. Unless these two facts are made to appear clearly, a court of equity will not interfere. Maxwell, Pl. & Pr., p. 743; *First Nat. Bank v. Gage,* 79 Ill., 207; 2 Jones, Mortgages, 1576.

C. S. Polk and *Roscoe Pound, contra:*

Is the finding of the lower court that the property in controversy was not sufficient to discharge the mortgage debt, sustained by the evidence? The entire tract com-

prises 480 acres, upon all of which the plaintiff has two mortgage liens.

The mortgage of Oren B. Taft is a first lien upon the east half of the northwest quarter of section eighteen. Upon this mortgage of $1,200, interest to the amount of $88.90 was due at the time of hearing (12). Counsel state in brief that the answer of Taft shows no interest due (13). But no such document appears in the record, and we submit that this court will not try the cause on evidence other than that submitted to the trial court. The next lien is the mortgage set up in the first cause of action in the plaintiff's petition—three notes aggregating $6,000, upon which the unpaid interest then amounted to $1,150 (11-12). Third comes the judgment lien of the defendant Teegarden (admitted in brief, pp. 3 and 13) for $630. Fourth, there is a lien set up in plaintiff's second cause of action—notes aggregating $3,232, upon which there was unpaid interest to the amount of $294.98. To summarize:

First lien (Taft)	$1,288 90
Second lien (Plff.)	7,150 00
Third lien (Teegarden)	630 00
Fourth lien (Plff.)	3,526 48
Total	$12,595 38

This total is secured, as has been seen, by eighty acres.

Now let us turn to the remaining 400 acres. Here the first lien is the mortgage of the Mutual Benefit Life Insurance Company, securing $6,000, upon which $680 was due as interest at the time of the hearing. As to this, counsel claims that the answer of the company shows a smaller sum to be due. But such answer nowhere appears in the record, and we are not advised whether it so states nor whether it relates to the time when the hearing was had. Second is the plaintiff's first mortgage, principal and interest amounting to $7,150 (11-12). Third comes the Teegarden judgment for $630. Fourth, the

plaintiff's second mortgage, securing principal and interest, $3,526.48. Besides these items, it appears that the property had been sold for taxes for 1894, and that the face of the tax-sale certificate was $87.29. Other taxes were also outstanding, the amount whereof does not appear. To summarize:

(1) Taxes disclosed	$87 29
(2) Mut. Ben. Life Ins. Co	6,680 00
(3) Plff's first mortgage	7,150 00
(4) Teegarden	630 00
(5) Plff's second mortgage	3,526 48
	$18,073 77

In other words, we find liens to the amount of $18,073.77 exclusive of the taxes for 1894, of which over $11,000 are drawing ten per cent interest, against 440 acres of land.

But if it is thought fairer to lump all of the liens upon the whole tract of 480 acres, the matter stands no better.

Taxes disclosed	$87 29
Taft mortgage	1,288 90
Mut. Ben. Life Ins. Co. mortgage	6,680 00
Plff's first mortgage	7,150 00
Teegarden's judgment	630 00
Plff's second mortgage	3,520 48
Total	$19,356 67

Which sum, more than half of which was and is drawing ten per cent interest, is secured by 480 acres of land.

SULLIVAN, J.

This action was commenced in the district court of Cass county by the First National Bank of Greenwood to foreclose two real estate mortgages. At plaintiff's instance an order was made, before judgment, appointing a receiver on the ground that the mortgaged property was probably insufficient to discharge the mort-

gage debt. To secure a reversal of this order, the Waldrons, who were defendants below, prosecute error to this court. The assignments in the petition in error are as follows: "The court erred in finding 'that the property in controversy (being the real estate herein in this petition described with all its improvements) is inadequate security for the debts of the plaintiffs herein and the mortgages and judgments prior to plaintiff's said lien. 2d. The court erred in finding the defendants liable for deficiency judgment have not sufficient property over and above their debts and exemptions to pay the probable deficiency judgment in the case. 3. That the court erred in finding for the defendant in error and in appointing a receiver for the plaintiffs in error's property when the evidence and proof in said cause show that the owner of the mortgaged premises is solvent and that the premises are adequate security for the payment of the plaintiff's demand against the same, and that no grounds exist for the appointment of said receiver."

By the foregoing specifications three points are presented for decision. They are these: (1.) Is the evidence sufficient to warrant the conclusion of the trial court that the plaintiff's security is probably inadequate? (2.) Does the evidence show that the defendants, who are personally liable for the debt, are insolvent? (3.) May a receiver be appointed in a foreclosure suit, if the debtor is financially responsible? Our answer to the third question will render a decision of the second unnecessary. By section 266 of the Code of Civil Procedure it is provided that the district court, or a judge thereof, may appoint a receiver in an action brought to foreclose a mortgage "when the mortgaged property is in danger of being lost, removed, or materially injured, or is probably insufficient to discharge the mortgage debt." Construing this statutory provision it was held in *Philadelphia Mortgage & Trust Co. v. Goos*, 47 Nebr., 804, 815, following *Jacobs v. Gibson*, 9 Nebr., 380, that a mortgagee who brings suit to foreclose his mortgage "is entitled to have his debt satisfied

out of the property pledged as security for its payment, without being forced to resort to other remedies he may have." This being the established rule it is altogether immaterial whether a deficiency judgment against the Waldrons would be collectible.

With respect to the first question raised by the petition in error, and discussed at length by counsel for both parties, we deem it sufficient to say that the evidence is substantially conflicting, both as to the value of the property and the amount of the liens and incumbrances against it. The greater number of witnesses support the contention of appellants that the security is adequate; but questions of fact, and especially questions of value, are not to be decided by mere count of witnesses. Recent cases illustrating this principle are *Nebraska Loan & Building Ass'n v. Marshall*, 51 Nebr., 534, and *Lincoln Land Co. v. Phelps County*, 59 Nebr., 249. In passing upon plaintiff's claim that its security was probably inadequate, the district court was vested with a discretion which, in the absence of a satisfactory showing to the contrary, we will presume was wisely exercised. *Jacobs v. Gibson, supra.*

The order appointing the receiver is supported by the testimony of a considerable number of witnesses and should be

AFFIRMED.

WILLIAM MEDLAND, APPELLEE, V. PHEBE R. E. E. LINTON ET AL., APPELLANTS.

FILED MAY 16, 1900. No. 9,209.

1. **County Treasurer: PRIVATE SALE OF REAL ESTATE: FILING OF RETURN WITH CLERK.** A legal private sale of real estate by the county treasurer for delinquent taxes can not be made without the county treasurer first complying with the provisions of section 112, chapter 77, article 1, Compiled Statutes, 1899, by filing with the county clerk a return showing the lands and lots sold at public auction, to whom sold, and for what sums; and any attempted sale of real property for taxes

at private sale without compliance with the provisions of said section invalidates the sale so attempted to be made. *State v. Helmer*, 10 Nebr., 25, adhered to and followed.

2. ———: EXHIBITING RECORD: CERTIFICATE. When the county treasurer undertakes to comply with the provisions of the section mentioned by carrying to the office of the county clerk the records of the treasurer's office, showing sales of real estate for taxes at public sale, and, in the presence of the county clerk, making a certificate on such sales record to the effect that he thereby made a return, and that the list of property as shown on the record has been sold by him at public sale as required by law and signing his name thereto, and then on the same date returning said record with the certificate thereon to the county treasurer's office, *held*, that such acts were not a compliance with the statute, but were a mere subterfuge and evasion of the law, and, in fact, no return at all.

3. **Filing:** DEFINITION. The law requires such return to be filed in the office of the county clerk. The filing of a paper, as used in the section quoted, means its delivery to the proper officer and the reception of it by him to be kept on file.

4. **No Return:** NO AUTHORITY. Where no proper return of lands sold for taxes at public auction is made, the county treasurer is without authority to dispose of real estate for taxes at private sale, and any sale thus made is invalid.

5. **Claimant Under Invalid Sale:** RECOVERY. A party claiming under an invalid sale of real estate for taxes can not recover the penalty of twenty per cent interest and attorney's fee, as in the case of a valid tax sale.

6. ———: SUBROGATION TO RIGHTS OF COUNTY: STATUTORY INTEREST ONLY. Where parties claim a lien for taxes paid at such sales, they are subrogated only to the rights of the county, and can recover interest only at the rate provided by statute for delinquent taxes.

7. ———: COUNTY TAXES: CITY TAXES. In this case, *held*, that interest could be recovered on state and county taxes paid at the rate of ten per cent per annum, and on city taxes at the rate of twelve per cent per annum.

8. **Unplatted Tract:** SPECIAL BENEFITS. An unplatted tract of land within the limits of a city is subject to taxation for special benefits received to pay costs of local improvements, the same as though it were platted into lots and blocks.

9. **Special Assessments:** PRESUMPTION. In making special assessments for benefits received it is presumed that the authorities arrived at the amounts thereof with reference alone to the benefits accruing to the property assessed, and that the owners

are required to contribute to the cost of the improvement only in proportion as their property is specially benefited thereby.

10. ———: AUTHORITY. The doctrine of special assessments for benefits conferred applies especially to property in cities, and the city of Omaha had the power and authority, given by the legislature, to levy special taxes on the property in controversy for benefits received in opening, extending and grading a street upon which it abutted.

11. **Notice.** A notice of the sitting of the city council as a board of equalization for the purpose of equalizing a proposed special assessment, correcting errors, hearing complaints, etc., is sufficient if it comply substantially with the provisions of the statute requiring such notice.

12. **Definition of Week.** A week means a period of time, beginning on Sunday and ending on Saturday following, and where a notice is required to be published beginning the first week of a certain month, *held*, that if it is published first during the first full week of such month beginning on Sunday and ending on Saturday, the requirements of the statutes are satisfied, even though the publication was not made during the first seven days of the month.

13. **Levying Special Taxes:** RECORD. In levying special taxes or assessments for benefits received, as authorized by section 6, article 9, of the constitution, *held*, that the record must show affirmatively a compliance with all essential conditions to a valid exercise of the taxing power, and any omission of such facts will not be supplied by presumptions. *Smith v. City of Omaha*, 49 Nebr., 883, followed.

14. **City Council:** SESSION. The city council, acting as a board of equalization for the purpose of equalizing a proposed levy of taxes for special benefits received, correcting errors, hearing complaints, etc., must be and remain in session, ready to hear complaints, for at least one day from 9 A. M. till 5 P. M. and during the hours advertised for its meeting. *Hutchinson v. City of Omaha*, 52 Nebr., 345, followed.

15. **Meeting of Board:** ADJOURNMENT: CALL OF CHAIRMAN: NOTICE. Where by the record a sitting of a board of equalization is shown to have been held only a small part of the time advertised for its meeting, when an adjournment or recess is taken subject to the call of the chairman, and no meeting is held for several days, when, without a new notice, another meeting is held and a like adjournment is taken, and a third meeting is held several days later at which final action is taken, *held*, such action taken is no proper meeting of the board of equalization as required by law and the published notice, and is without authority, and a special levy of taxes so made is thereby invalidated.

16. **Final Action:** AFTER ONE SESSION. Final action in making any special assessments for benefits received in opening, extending and grading streets can not be taken until there has been a sitting of the board of equalization for at least one day and during the hours from 9 A. M. till 5 P. M.

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

John T. Cathers and *W. A. Redick*, for appellant.

John T. Cathers: The statutes relating to the publication of the delinquent tax list, and the selling of property by the county treasurer, are mandatory, and must be followed literally by the county treasurer, and his failure to comply with the law renders all the proceedings in relation thereto invalid. *Miller v. Hurford*, 11 Nebr., 383; *Ledwich v. Connell*, 48 Nebr., 172; *Smith v. City of Omaha*, 49 Nebr., 883.

If the county treasurer did not comply with the law in selling the land, the court erred in allowing twenty per cent interest and attorney's fees. *Pettit v. Black*, 8 Nebr., 52; *Lynam v. Anderson*, 9 Nebr., 367; *Jones v. Duras*, 14 Nebr., 40; *Dillon v. Merriam*, 22 Nebr., 151; *Steyeman v. Faulkner*, 42 Nebr., 53. The burden of proof is on the plaintiff to prove that the tax is legal. *Merrill v. Wright*, 41 Nebr., 351.

A board of equalization must be and remain in session ready to hear complaints during the hours advertised for its meeting. *Hutchinson v. City of Omaha*, 52 Nebr., 345.

H. W. Pennock, contra:

It is objected that the return made by the county treasurer to the clerk, of the public tax sale for the year 1890, was insufficient to comply with section 112 of the revenue law. The object of this section is twofold:

First. It provides for a permanent record to be kept by the county treasurer showing the lands sold, the names of the purchasers and the sum or sums for which each tract was sold. This is the general record of tax sales kept by the treasurer to indicate the condition of

such sales in his county. If the land has been redeemed, it is noted on this record; if a tax deed has been issued, that fact is also noted on the sales book.

Second. The latter half of this section provides for a "return" to be made by the treasurer to the clerk on or before the first Monday of December, following the public tax sale. It would seem also to provide for a "certificate" of the treasurer.

If the revenue act of 1879 be examined in all of its parts, it will be apparent that the provision for a return of the treasurer to the clerk subserves but one purpose, viz.: It is an official declaration that the public tax sale has closed, and that private tax sales, under section 113, may begin.

Return means report of an officer. It signifies the bringing back of some original document with the officer's certificate indorsed thereon, showing what has been done by such officer. Anderson's Law Dictionary, p. 898.

The word week, as used in the statute, means a period commencing on Sunday morning and ending Saturday night. Anderson's Law Dictionary, p. 1111; *Ronkendorff v. Taylor*, 4 Pet. [U. S.], 361.

On the question of notice counsel cited: *McEneney v. Town of Sullivan*, 125 Ind., 407; *Mayor v. Bouldin*, 23 Md., 328; *City of Ottawa v. Macy*, 20 Ill., 413; *Lyman v. Plummer*, 75 Ia., 353; *Clinton v. City of Portland*, 26 Ore., 410; *State v. City of Bayonne*, 52 N. J. Law, 503.

HOLCOMB, J.

An action was begun in the district court of Douglas county by plaintiff, appellee, for the foreclosure of a tax lien upon certain property in the city of Omaha, described in the petition, for state, county and city taxes, including special assessments against the property, on account of the opening, extending and grading of a certain street in said city. Several defenses were interposed at the trial by appellants, all of which were directed to the alleged invalidity of the tax sale and the special assess-

ments referred to. A decree was rendered for the plaintiff for the principal sums paid at the tax sale and subsequently thereto, with interest and attorney fees, and the property was directed to be sold to satisfy the decree so rendered. From this decree defendants appeal. The several objections to the judgment of the trial court will be noted in their order.

It is first urged that the sale for taxes, being at private sale, was without authority and invalid, for the reason, as alleged, that the law had not been complied with, in that no report had been made to or filed with the county clerk, of lands sold at public auction, as required by section 112, article 1, chapter 77, of the revenue laws of the state. The section referred to requires that "the treasurer shall keep a sale book, showing the lands sold, the name of the purchaser, and the sums for which each tract was sold, and on or before the first Monday of December following the sale of real property he shall file in the office of the county clerk of his county a return thereof, as the same shall appear on the said sale book, and such certificate shall be evidence of the regularity of the proceedings." Before lands and lots can be legally sold at private sale, under the provisions of the section quoted, the treasurer must file with the county clerk a return, showing the lands and lots sold at public auction, to whom sold, and for what sum; and any attempt to sell real property for taxes at private sale without compliance with the provisions of said section invalidates the sale so attempted to be made. The force and effect of the provisions quoted is no longer an open question in this state. The construction given was put upon it as early as 1880, when, in the case of *State v. Helmer*, 10 Nebr., 25, it was determined "that the county treasurer had no right or power to sell real estate for taxes at private sale until after his report of sales of real estate at public sale is made and filed in the office of the county clerk." The ruling just mentioned has been adhered to and reaffirmed in *Adams v. Osgood*, 42 Nebr., 451, and *Johnson v. Finley*, 54 Nebr., 733.

In the case at bar it is disclosed by a stipulation of the parties, preserved in the record, that the only attempt at compliance by the county treasurer with the statutory requirements under consideration, was in taking the records of his office showing the public sales of real property for taxes due that year into the office of the county clerk and, presenting such record to the county clerk, in his presence making a certificate thereon at the end of the record of sales to the effect that he thereby made a return, and that the list of property as shown on the record had been sold by him at public sale as required by law, and then signing his name to such certificate; after which, and on the same date, according to the stipulation, the said book or record containing said list of lands, with the certificate thereon, was taken back to the county treasurer's office, and that no other or different return of public sales was made for the year mentioned. This, in our judgment, is neither in letter nor in spirit a compliance with the section of the statute referred to. It is, in fact, a mere subterfuge or evasion of the law, and is no return at all, and can not be countenanced as such. It would be much more reasonable and logical to construe the statute as directory only, and hold that a compliance therewith is not essential to the validity of the sale of real property at private tax sale, than to treat as a compliance with the law the acts of the county treasurer as they are disclosed by the stipulation in the record in this case. As has heretofore been noted, this question is already settled by a construction of the section quoted, and a substantial compliance with its provisions is necessary in order that a private sale of lands for taxes may be valid. The law requires that this return, or report, shall be filed in the office of the county clerk. To file, in law, means "to leave a paper with an officer for action or preservation; and, to indorse a paper, as received into custody, and give it its place among other papers—to file away." Anderson, Law Dictionary. In modern usage, "filing a paper consists in placing it in the proper official's custody

by the party charged with this duty, and the making of the proper indorsement by the officer." *Stone v. Crow*, 2 S. Dak., 525, 528. "A paper is said to be filed when it is delivered to the proper officer and by him received to be kept on file. (Bouvier, Law Dictionary.) And the derivation and meaning of the word, as defined in the dictionaries, carries with it the idea of permanent preservation; becoming part of the permanent records of the public office where it is filed. (Rapalje & Lawrence, Law Dictionary; Century Dictionary.)" *People v. Peck*, 67 Hun [N. Y.], 560, 570; *Gorham v. Summers*, 25 Minn., 81; *Pfirmann v. Henkel*, 1 Bradw. [Ill.], 145. There being no proper return of lands sold at public auction, as by law required, the treasurer was without authority to dispose of the lot of land in controversy at private sale, and the tax sale thus made is, therefore, invalid. By the subsequent proceedings had thereunder, the plaintiff was not in a position to recover the penalty of twenty per cent interest and attorney's fee, as are allowed in cases of valid tax sales. Under the holdings of this court, at most, he is entitled to subrogation to the rights of the county, and to enforce a lien against the property upon which the taxes were paid for the principal sums paid, with interest thereon as provided by the statute.

In *Stegeman v. Faulkner*, 42 Nebr., 53, 54, it is held that "a purchaser at an invalid tax sale is not entitled to have taxed in his favor an attorney's fee as part of the costs of the foreclosure of the lien to which he has by payment become subrogated." In the opinion by RYAN, C., page 56, it is said: "As the rights of the appellant to foreclose are measured by the rights of the county in the same respect, it logically follows that the provision as to attorney's fees can not be held to apply to such a foreclosure as the plaintiff was entitled to in this action."

In *Dillon v. Merriam*, 22 Nebr., 151, it is held that "where for want of authority of the treasurer to sell land for taxes, no title passes to the purchaser; he is merely subrogated to the rights of the county, and to the same

rate of interest that the county would be entitled to recover." See, also, *Adams v. Osgood, supra.*

Section 105, article 1, chapter 77, of the revenue law provides that all unpaid taxes upon real property after delinquency occurs shall draw thereafter ten per cent interest. Section 86, chapter 12*a*, Compiled Statutes, 1893, being the then charter act for metropolitan cities, provides that delinquent city taxes shall draw interest at one per cent a month. The plaintiff, therefore, is entitled to recover for state and county taxes paid principal with interest at the rate of ten per cent per annum; and for city taxes paid, the principal with interest at the rate of one per cent per month, or twelve per cent per annum.

The legality of the special assessments against the property in question, which were paid by plaintiff and for which he claims a lien upon the land, is also challenged. It is urged, in substance, that because the land was unplatted and the special assessments apparently large, the same effectuated a confiscation of the property, and, therefore, the taxes are illegal and unenforcible. It appears that, while the tract of land has never been platted into lots and blocks, it lies well within the city limits, and is evidently subject to special assessments for benefits, under the doctrine of assessments for local improvements in municipalities, such as is the city of Omaha. We are not apprised of the value of the land. The assessments appear to have been made with sole reference to the special benefits accruing to the land, and, in so far as fixing the amount thereof, the land was assessed in accordance with law, and in the same manner as were special assessments made on other property benefited by the local improvements, for the expense of which the assessments were made. While the assessments, $152.23 for opening and extending the street, and $743.70 for grading, may appear quite high, without knowledge as to the value of the property or the benefits derived from the improvements made, it can not be said either that the

assessments were unreasonable, extortionate or illegal, or that they were not entirely within the power and authority of the city making the levies for the purposes mentioned. It is to be presumed that the authorities, in making these special assessments, arrived at the amounts thereof with reference alone to the benefits thereby accruing to the property, and that the owner was required to contribute to the expenses of the improvements made only in proportion as his property was specially benefited thereby. In support of the contention of appellants that these assessments were illegal, our attention has been called to the *Washington Avenue Case*, reported in 69 Pa., 352. We do not think that authority in point. In the case cited, it was sought by special assessments to pay for grading, macadamizing and otherwise improving a public highway through the farming country of that state, by levying a tax upon the farms within one mile of the proposed highway. This, it was held by the supreme court of that state, was so unreasonable and unjust as to make the levy unconstitutional and clearly in excess of the legislative power of taxation. The rule, however, is different when applied to improvements of streets, alleys, etc., in cities, and is uniformly so recognized. In the case referred to, it is stated in the syllabus: "The legislature may enact a law providing a just assessment on proper objects according to benefits conferred, and not imposing unfair and unequal burdens. Assessing a tax to pay for streets, etc., in towns in proportion to the frontage on the street, is a reasonable exercise of the taxing power according to the benefits received." It is under the doctrine just stated that the assessments complained of were made. Authority under section 6, article 9, of the constitution, is given by statute therefor, and it is not material whether the property assessed is laid out in lots and blocks or is an unplatted tract. The city acted entirely within the scope of its power and authority, and the objection of appellants in this respect can not be sustained.

It is also argued that the notices of the sitting of the

board of equalization, which was required to act upon the proposed special assessments, were insufficient. This objection we hold untenable. The notices were directed "to the owners of lots and lands abutting on or adjacent to streets, alleys or avenues, situated in whole or in part within any of the districts hereinafter named," and stated that the city council would sit as a board of equalization for the purpose of equalizing the proposed levy of special tax or assessment, correcting errors, hearing complaints of owners, etc. The notices appear to contain all the information and more than is required by section 85, chapter 12*a*, Compiled Statutes, 1893 (the charter act which was then in force), and were published for the required period of time. The purposes for which the board of equalization sat and the time of sitting are apparent from the notices, and, in our judgment, sufficient to meet the requirements of the statute. In *Lyman v. Plummer*, 75 Ia., 353, it is held: "When notice of a special assessment on city property to pay for street improvement is necessary to be given to the respective owners, and the city has provided by ordinance for giving such notice by publication in a newspaper of general circulation published in the city, notice given in accordance with the provisions of such ordinance is sufficient." In support of the rule the opinion cites *Stewart v. Palmer*, 74 N. Y., 183; *Macklot v. City of Davenport*, 17 Ia., 379. See, also, *City of Ottawa v. Macy*, 20 Ill., 413; *State v. City of Bayonne*, 52 N. J. Law, 503. A comparison of the notices in question with the statute referred to brings them within the rule above announced.

It is contended that the tax sale is invalid because the advertisement of the delinquent tax list was not first published till October 10, 1891. The law requires that the notice shall be published, commencing the first week in October preceding the sale to be made, on the first Monday of November following. Compiled Statutes, 1899, chapter 77, article 1, section 109. It is contended that the first publication affecting the case at bar was

not made until Saturday, October 10, 1891. This, in our opinion, is a compliance with the provisions of the section referred to. The requirement that the notice shall be published commencing the first week in October, is met by publication during the first week of the month as distinguished from the first seven days. The word "week," in its legal significance, as we understand the term, means a period of time commencing on Sunday morning and ending on Saturday night. By common consent, and in computing time throughout Christendom, Sunday is recognized as the first day of the week. The first week, therefore, would be a period of time of seven days duration, beginning on Sunday and ending on Saturday following. In *Rokendorff v. Taylor*, 4 Pet. [U. S.], 348, 360, an interpretation of the word is given which we are disposed to think is correct, and which we adhere to. It is said in this opinion by McLean, J., that "a week is a definite period of time, commencing on Sunday and ending on Saturday." See, also, Anderson, Law Dictionary. The 10th day of October occurring during the first week of that month as herein defined, and the publication having been begun on the day mentioned, it was commenced in the first week in October preceding the sale, and was, therefore, in compliance with the statute in that respect.

Finally, it is urged that the special assessments are invalid because it does not appear that the board of equalization was in session and remained so during its deliberations as required by law; and especially so because it is not shown that a sitting of such board was held on the day mentioned in the published notice for the meeting, from 9 A. M. until 5 P. M. of said day. It is provided by law that before any special taxes may be levied, the city council shall sit as a board of equalization for not less than one day, from 9 A. M. till 5 P. M., for the purpose of equalizing the proposed levy, correcting errors, and hearing all complaints which may be made by the owners of property, which it is proposed to assess. Compiled Statutes, 1893, ch. 12*a*, sec. 85. The record in

this case discloses due publication of the notice of the sitting of the board on July 17, 1890, from 9 A. M. till 5 P. M. It is further shown that on the date as published the city council, pursuant to the notice, convened as a board of equalization; that some little business was transacted, a motion being passed to defer action regarding other streets than the one in question, pending the final determination of a case then pending in the supreme court; and a committee of the council being appointed to report the districts, and the boundaries of the same, that were proposed to be taxed in each case of opening or extending streets. The board thereupon took a recess subject to the call of the chairman. This occurred on July 17, the date mentioned in the notice. No further meeting appears to have been held or business done until August 26, when some further proceedings were had regarding certain proposed special assessments, whereupon another recess was taken, subject to the call of the chairman. Again, on September 16, a meeting of the board was held, and final action was taken regarding the levy of the special taxes complained of. The foregoing meetings were held with reference to the special levies on the property in question for opening Park street. The record as to the special levy for grading the same street is substantially the same, except the difference in the dates. Can it be said that the action of the city council, sitting as a board of equalization with respect to the matters herein involved, is a compliance with the statute last cited? We think not. The non-compliance with the plain provisions of the law, and the gross irregularities, are so apparent as at once to lead to the conclusion that the entire proceedings, subsequent to the publishing of the notice of the meeting of the board, are null and of no effect, and that the special tax levies and all subsequent acts thereunder were thereby invalidated, and no legal tax sale could be made by virtue of the void levy. "It is a rule of construction peculiarly applicable to special assessments authorized by section 6, article 9, of the constitu-

tion that the record must show affirmatively a compliance with all the conditions essential to a valid exercise of the taxing power, and that the omission of such facts will not be supplied by presumptions." *Smith v. City of Omaha*, 49 Nebr., 883. Copious citations in support of the rule laid down in the above case are found in the opinion written by POST, C. J. In *Hutchinson v. City of Omaha*, 52 Nebr., 345, it is held: "A board of equalization must be and remain in session ready to hear complaints during the hours advertised for its meeting." In the opinion in the case last cited it is said by IRVINE, C., speaking for the court, p. 350: "Furthermore, the record discloses that there never was a sitting of the board of equalization in any proper sense of the term. The notice was that the council would sit as a board of equalization at the office of the city clerk on the 4th day of December, 1891, from 9 A. M. to 5 P. M. About the first hour named a majority of the members of the council appeared at the place designated and appointed a chairman. They one by one drifted away, and an entry was made that a recess had been taken subject to the call of the chairman. The chairman himself remained for the purpose of receiving written protests, but the board was not there to hear them. Some days thereafter, without any new notice, the chairman, by casual meetings on the streets, called the board together and the session was resumed and the scheme of assessment agreed upon. Such a proceeding can not be tolerated. Property owners are entitled to have the board in session during the hours advertised, and when they do not in fact sit they can not conceal their dereliction under the subterfuge of a recess and a subsequent meeting without notice."

It is urged in the case at bar that because the record is silent as to the time the board took a recess subject to the call of the chairman, it is presumed that they were in session at the first meeting during all the hours they were required to sit by the published notice as well as by the section of the statute governing the subject. The fair

inference from reading the record is that they were in session but a very short time, transacting no other business than that heretofore mentioned, and then adjourned for an indefinite and undetermined period. Final action in making any special assessments of the character under consideration can not be taken until there has been a sitting of the board for at least one day and during the hours mentioned in said section 85. This is a condition essential to a valid levy (*Hutchinson v. City of Omaha, supra*), and is in the nature of a jurisdictional step in making such assessment. Its performance must affirmatively appear from the record. *Smith v. City of Omaha, supra.* The law never assumes jurisdictional facts. *Morrill v. Taylor*, 6 Nebr., 236, and cases there cited. The board of equalization acted in a *quasi*-judicial capacity, and its actions are subject to review by higher judicial tribunals. *Webster v. City of Lincoln*, 50 Nebr., 1. Even had jurisdiction been acquired by the meeting of the board pursuant to the notice, it would seem that it lost such jurisdiction by adjournment without day and reconvening without new notice or with no notice at all.

For the reasons given, the judgment of the lower court is reversed, and the case remanded for further proceedings in conformity with the views herein expressed.

REVERSED AND REMANDED.

TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, V. ANDREW J. SNOWDEN.

FILED JUNE 7, 1900. NO. 9,205.

1. **Accident Insurance:** CLASSIFICATION: GENERAL AGENT. A classification of the occupation of an applicant for accident insurance by the general agent of the company on full information of the facts binds the insurer.

2. **Verdict:** CONFLICTING EVIDENCE. A verdict returned upon conflicting evidence will not be disturbed on review unless manifestly wrong.

ERROR to the district court for Buffalo county. Tried below before GREENE, J. *Affirmed.*

Charles Offutt and *W. W. Morsman*, for plaintiff in error.

W. W. Morsman: I am aware of the case of *Pacific Mutual Life Ins. Co. v. Snowden*, 12 U. S. App., 704, a suit for the same injury. In that case the insurer seems to have contended that the statements of the assured in the application were warranties, and defeated a recovery *in toto*. There is nothing in the report of the case to show that there was any provision for payment of so much indemnity as the premium, at the proper rates, would have purchased, in case of injury in an occupation more hazardous than that in which the assured was insured; nor does it appear that it was contended by counsel, or considered by the court, that a cotemporaneous oral agreement was attempted to be substituted for the written agreement of the parties. But whatever may have been in the record and before the court, the opinion (rather intemperate in tone), I submit, is not sound. If a plaintiff suing at law upon a promissory note plainly calling for eight per cent interest pleaded and offered oral evidence that the parties agreed upon ten per cent, the reception and submission of the evidence to a jury by the court would not be a more palpable error than this record presents.

H. M. Sinclair, contra:

Where a certain trade or business or occupation is insured, the insurer is to be taken as consenting and agreeing that all its customary incidents shall be allowed. *Turley v. North American Fire Ins. Co.*, 25 Wend. [N. Y.], 374; *Cotton v. Fidelity Co.*, 41 Fed. Rep., 506; *Moulor v. American Life Ins. Co.*, 111 U. S., 335; *Northwestern Mutual Life Ins. Co. v. Hazelett*, 105 Ind., 212; Bliss, Life Insurance, sec. 386; *Carson v. Jersey Ins. Co.*, 43 N. J. Law, 300.

Had the defendant in error a right to plead and prove the actual facts as to how and why the classification in the policy was made, and what was the meaning given it by the parties themselves when made? That this can be done there would seem to be no doubt, both upon principle and authority. *Motsinger v. State*, 123 Ind., 498; *Mason v. Ryus*, 26 Kan., 464; *Cosper v. Nesbit*, 45 Kan., 457; *Coates v. Sulau*, 46 Kan., 341; *Gallagher v. Black*, 44 Me., 99; *Stoops v. Smith*, 100 Mass., 66; *Swett v. Shumway*, 102 Mass., 368; *Keller v. Webb*, 125 Mass., 88; *Macdonald v. Dana*, 154 Mass., 152; *Adamant v. Bank*, 5 Wash., 232; *Wolfert v. Pittsburg, C. & St. L. R. Co.*, 44 Mo. App., 330; *Ellis v. Harrison*, 104 Mo., 270; *Kendrick v. Beard*, 81 Mich., 182; *Aultman v. Clifford*, 55 Minn., 159; *Sanford v. Newark*, 37 N. J. Law, 1; *Hart v. Hammett*, 18 Vt., 127; *Steadman v. Taylor*, 77 N. Car., 134; *Jenny Lind Co. v. Bower*, 11 Cal., 194; *Beason v. Kurz*, 66 Wis., 448; *Rhodes v. Cleveland Rolling Mill Co.*, 17 Fed. Rep., 426; *Chalfant v. Williams*, 35 Pa. St., 212; *McDonald v. Unaka Timber Co.*, 88 Tenn., 38.

NORVAL, C. J.

This case was before us at a former term. *Travelers Ins. Co. v. Snowden*, 45 Nebr., 249. The action was upon an accident policy of insurance providing for the payment of $5,000 in case of death of insured through external violence and accidental means, or one-third of that amount in the event he should suffer the loss of a hand. The policy also stipulated that Andrew J. Snowden, the plaintiff below, is insured "under classifications preferred, being a cattle dealer or buyer and shipper (not tender or drover, not on ranch or farm by occupation), * * * that if the insurer is injured in any occupation or exposure classed by this company as more hazardous than that here given, his insurance shall be only for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard." The policy was issued subject to the numerous conditions on the back thereof,

among them being the following: "This insurance does not cover * * * voluntary exposure to unnecessary danger; entering or trying to enter or leave a moving conveyance using steam as a motive power; riding in or on any such conveyance not provided for the transportation of passengers." Subsequent to the reversal of the first judgment plaintiff, by permission of the trial court, filed an amended petition, which, *inter alia*, averred, in effect, that plaintiff, at and prior to the issuance of the policy, was engaged in buying and shipping cattle to market over railroads, accompanying them in their transportation; that plaintiff went to the defendant's local agent at Kearney, Sylvester S. St. John, and informed him fully of his business and the manner in which he conducted the same, to wit, "that he was engaged in buying and shipping cattle to market over the railroads and usually accompanied and attended them on the way, and applied to said agent for a policy of insurance in the defendant company that would cover accidents while he was so engaged in the shipping and attending his cattle to market as aforesaid; that the said agent was uncertain about the classification of a risk for this purpose, and so informed plaintiff, but submitted the said application, with the facts of occupation and business, together with the further fact that the insurance wanted should cover accidents while engaged in shipping and attending the cattle to market as aforesaid, to the general agent of defendant company at Omaha, Nebraska, who, on consideration thereof, classified plaintiff's occupation as that of a cattle dealer, or broker and shipper, and made out the policy hereinafter set forth, and represented to the plaintiff that it was in accordance with his application, and covered accidents sustained while engaged in shipping and attending his cattle to market as he had desired; that the plaintiff, relying on said representations, paid the defendant the premium thereon, and received and accepted the policy." The defendant moved to strike from the amended petition

the foregoing averments, or the principal portion thereof, as being surplusage, redundant, immaterial and irrelevant, which motion was denied, and on the same day the defendant filed an answer, which admitted the execution and delivery of the policy of insurance in question, denied plaintiff was injured during the life thereof, put in issue other averments, and alleged, substantially, that such injury was occasioned by plaintiff's own voluntary exposure to unnecessary danger and was received while, and in consequence of, his entering, or trying to enter, or while riding on top of, a moving conveyance using steam as a motive power. The second trial of the cause resulted in a verdict and judgment for plaintiff in the sum of $2,424.50, and the defendant has prosecuted error.

It is disclosed by the evidence that when the policy was issued, as well as at the time of the injury, plaintiff was engaged in the occupation of buying and shipping cattle; that in September, 1889, and before the expiration of the insurance, plaintiff shipped from Cushing to Omaha several car loads of cattle over the Deadwood branch of the Burlington & Missouri River railroad. He accompanied the cattle for the purpose of caring for them while in transit. The train was a long one, the cars in which were plaintiff's cattle being next to the engine. The train reached Seward about midnight, where it stopped and plaintff got out of the caboose and walked near the track with prod-pole in hand to look after his stock. Finding one of the steers down he attempted to get him up, and while thus engaged the engineer gave the signal for starting, whereupon plaintiff attempted to climb to the top of one of the freight cars, as he had not sufficient time in which to go to the caboose. Before he had reached the top of the car the train started forward suddenly, and with such force as threw plaintiff between the cars, causing the loss of one of his hands. There was also introduced, over objections of defendant, evidence tending to establish the allegations of the amended petition already set out. The fifth and sixth

instructions given by the court on its own motion, which were excepted to by defendant, follow:

"No. 5. The court instruct the jury that if you believe from all the evidence in the case, that Snowden went to the agent of defendant and informed him of his business, and that he was a shipper of cattle, and as such shipper accompanied his cattle in transit, and that he wanted insurance to cover said business, and that the local agent communicated all of said facts to the general agent of defendant, and that, with full knowledge of all the facts, said defendants issued the policy in suit and informed plaintiff that said policy covered his said business and the risks incident thereto, and that thereupon said Snowden paid the premium demanded by the defendant, then the court instructs the jury that having insured plaintiff as a shipper of live stock defendant insured him against accidents which would or might result in the doing of anything incident to said business; and if you find from the evidence in this case that said Snowden did inform said defendant of his business, and that he did accompany his stock to market, and you further believe that at the time of the injury Snowden was doing that which was incident to, or a part of the business of shipping stock to market, and that said Snowden was doing such things only as an ordinarily prudent man would have done under the circumstances, and while so acting was without fault on his part injured, then the defendant company is liable, and you will find for the plaintiff. If, however, you believe from the evidence that at the time of the injury said Snowden was voluntarily exposing himself to unnecessary danger, then you will find for the defendant.

"No. 6. If you find for the plaintiff you will allow him one-third of five thousand dollars, together with seven per cent interest thereon from December 15, 1889."

The trial court declined to give a peremptory instruction tendered by the defendant to return a verdict in its favor, as were also refused the following requests to charge submitted by it:

"4. If the jury believes from all the facts and circumstances in evidence that the plaintiff received the injury which resulted in the loss of plaintiff's hand, while he, the said plaintiff, was entering or getting upon, or trying to enter, get into or upon a moving conveyance, to-wit, a railroad car using steam as a motive power, or that the said injury resulted directly therefrom, the jury must find for the defendant.

"5. If the jury believe from all the facts and circumstances in evidence, that the plaintiff received the injury which resulted in the loss of plaintiff's hand, while he, the said plaintiff, was riding in or upon a moving conveyance, to-wit; a railroad car using steam as a motive power, and which said car was not provided for the transportation of passengers or that said injury resulted directly therefrom, the jury must find for the defendant.

"7. If the jury believe from all the facts and circumstances in evidence, that the plaintiff received the injury which resulted in the loss of his hand while he, the said plaintiff, was tending cattle in shipment, then, and in such event, the plaintiff cannot recover."

While the petition in error contains many assignments predicated on the giving and refusing of instructions, the overruling the motion of defendant to strike from the amended petition the several averments therein, which we have quoted, and the admission of testimony in support of said allegations, said assignments, for convenience, will be considered together, since they practically raise the same question, namely, whether it was competent for the plaintiff to plead and prove the facts relative to the issuance of the policy and the classification therein of the risk.

The defendant insists that evidence to establish the averments of the petition was inadmissible, because it tended to vary or contradict the terms of the policy. We do not understand that the evidence varied the written contract, but was adduced to show that the classification of the risk in the policy was so understood and meant

by the party to cover plaintiff's occupation or business. He truly stated the same to the defendant who classified the risk and informed him that the policy covered his case. Upon this assurance the premium was paid, and the defendant can not be heard to say that plaintiff's risk was improperly classified or that the policy did not cover his injury. The precise question was passed upon in *Pacific Mutual Life Ins. Co. v. Snowden*, 12 U. S. App., 704. That was an action upon a similar policy to recover for the same injuries by the present plaintiff. In that case, as in this, Snowden stated to the agent of the insurer his business, and the policy classified the occupation as "cattle dealer or broker, not tender or drover, not on farm or ranch." Judge Caldwell, in delivering the opinion of the court, observed, page 709: "The contention of the company is, that, under the description of the plaintiff's occupation in the application, he was not insured while going with his cattle and caring for them when taking them to market; and that the assurance given to the plaintiff by the defendant's agents at the time when the policy was issued to the contrary does not bind the company. The book said to contain the defendant's definition and classification of different occupations with the rate of premium established for each is published by the defendant for its own use and furnished to its agents for their information and guidance. Neither the book nor any portion of its contents is carried into the application or policy, or even referred to. How applicants for insurance are to possess themselves of knowledge of the contents of this book, or, indeed, that there is any such book, does not appear. The agent testifies that this book, so far as he knows, was never shown to the plaintiff. When the plaintiff applied for insurance he could do no more than state fully and truthfully what his occupation was, and what he did in pursuit of it, and leave it to the agent to classify the risk and fix the rate of premium. This is precisely what was done. There is no claim that the plaintiff did not

give full and exact information as to what his occupation was, which the agent says was already known to him. Upon these facts the description of the plaintiff's occupation made by the agent, and the classification of the risk thereunder, and the assurance given the plaintiff that his policy covered injuries received while accompanying his cattle to market, bind the defendant as effectually as if these representations and assurances had been written into the policy. But it is said the plaintiff states in his application for the policy that 'I understand this company's classification of risks.' How did he understand it? Certainly not by intuition. He had no book. His understanding of it, then, must have been acquired from the representations made to him by the defendant's agents. Under such circumstances, the classification of the risk, so far as related to the policy in suit, must be such as these agents represented it to be when the plaintiff purchased the policy, and not what it may appear to be according to a classification made by the defendant which was not shown to the insured and of which he was ignorant. In many cases the insured is required to state facts respecting the risk within his own knowledge, and in such cases he must state them truly; but where he states them truly and the insurance agent writes them down differently, the insured is not prejudiced thereby, and the rule is the same where he answers a question or makes a statement about a matter peculiarly within the knowledge of the insurance company, and his answer or statement is dictated by, or based upon information derived from, the company's agent. The time has long since passed in this country when an insurance company can perpetrate a fraud upon the insured by accepting the premium, and when the loss occurs, avoid its payment upon the ground that its agent departed from his private instructions, or misinterpreted them, or exceeded his authority in a matter in which the company had held him out to the public as having authority. Within the apparent scope of his authority,

acts and assurances of the agent are the acts and assurances of the company itself. In 2 American Leading Cases [5th ed.], 917, the learned author states the rules as follows: 'Through the interested or officious zeal of the agents employed by the insurance companies,' they, 'in the wish to outbid each other and procure customers, not unfrequently mislead the insured by a false or erroneous statement of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers.' This statement of the law is quoted approvingly and emphasized by Mr. Justice Miller in delivering the unanimous opinion of the supreme court in the case of *Insurance Company v. Wilkinson*, 13 Wall. [U. S.], 222, 235, 236. This is now the accepted doctrine. *Eames v. Home Ins. Co.*, 94 U. S., 621; *New Jersey Mutual Life Ins. Co. v. Baker*, 94 U. S., 610; *Insurance Company v. Mahone*, 21 Wall. [U. S.], 152. The cases in the state courts which support the rule here laid down are too numerous to require or justify citation. According to the testimony of the defendant's own agent, the plaintiff's policy describes, and was intended to describe, his occupation as precisely that in which he was engaged when he received his injury, and he classed and intended to class the risk of such occupation as 'preferred.' The insured paid for the policy on the faith of the correctness of the agent's description of his occupation and classification of the risk, and the law will not permit the company after an injury has occurred to change the definition of the plaintiff's occupation and the classification of the risk to his prejudice. The company is bound by the terms of the contract as it was understood and entered into by its agent with the insured." With that decision we are satisfied, and its applicability to the case at bar

is obvious. It follows that there was no reversible error in permitting the plaintiff to prove the allegations of his petition or in the giving or the refusing of instructions.

It is also argued that the findings of the jury are not supported by sufficient evidence. There was proof adduced tending to establish that the injury was received while the plaintiff was endeavoring to get upon a moving train, as well as evidence to the effect that the train had not started when he undertook to climb upon the car. The jury having returned a verdict for the plaintiff upon conflicting evidence, by a familiar rule its finding can not be disturbed upon review. The judgment is

AFFIRMED.

TALITHA T. SMITH, APPELLEE, V. ELI M. SMITH, APPELLANT.

FILED JUNE 7, 1900. No. 10,419.

Alimony. The amount allowed as permanent alimony should be just and equitable, due regard being had to the rights of each party, and should be made payable at such time or times as, considering the ability of the husband, the estate of the wife and the situation of the parties, would seem just.

APPEAL from the district court of Cass county. Heard below before RAMSEY, J. *Decree modified.*

Samuel M. Chapman, for appellant.

H. D. Travis, contra.

NORVAL, C. J.

This cause was advanced and submitted upon an agreed printed abstract of the record in pursuance of the rules of this court. The suit was for divorce and alimony. A decree of divorce was entered in behalf of the plaintiff, and the defendant was adjudged to pay within twenty days the sum of $1,450 as permanent alimony

in addition to $150 previously allowed plaintiff as suit money, and defendant was also decreed to pay $200 as fees to plaintiff's attorney. The defendant has appealed from that portion of the decree relating to permanent alimony and attorney's fees.

A careful perusal of the printed abstract discloses that the evidence on the question of value of the defendant's property was more or less conflicting. There was evidence conducing to show that his real estate was of the value of $3,000 and that he owned personal property of the amount of $2,500. He owed considerable. The allowance of $1,450 was justified by the evidence, although $1,000 would have been a more reasonable allowance in view of the testimony adduced by the defendant. We are persuaded the district court erred in requiring the entire amount of alimony to be paid in so short a time as twenty days. To pay it would necessitate the sale of the farm; and would embarrass the defendant financially. The decree is modified by requiring the defendant at his election to pay within sixty days the sum of $1,200 as permanent alimony, or in lieu thereof the sum of $1,450 in four equal annual payments, the first of which to be made July 1, 1900, and a like sum on July 1 of each succeeding year until the full sum of $1,450 is fully paid. Interest to be computed at seven per cent from July 1, 1900, on any balance that may thereafter remain unpaid.

The allowance of $200 as attorney's fees was reasonable and proper, and the decree in that respect, as well as to costs, is upheld.

DECREE MODIFIED.

STATE OF NEBRASKA, EX REL. THOMAS B. PARKER, V. BOARD OF COUNTY COMMISSIONERS OF SALINE COUNTY.

FILED JUNE 7, 1900. No. 11,287.

1. **Vacancies in Office:** STATUTE. The provisions for filling vacancies, in a law creating an office, control those of general laws as to vacancies.

2. ———: COUNTY ATTORNEY: APPOINTMENT. A vacancy in the office of county attorney should be filled by appointment, and the appointment holds until his successor is elected and qualified.

3. ———: ELECTION. Election for county attorney can be held only in even numbered years. *State v. Rankin*, 33 Nebr., 266, followed.

ERROR to the district court for Saline county. Tried below before STUBBS, J. *Affirmed.*

T. B. Parker, for himself; *E. S. Abbott*, counsel.

J. I. Foss, B. V. Kohout and *J. A. Wild, contra.*

NORVAL, C. J.

This was an application for a writ of mandamus to compel the respondent, the board of county commissioners of Saline county, to approve the bond of relator as county attorney of said county. It appears that at the general election held in said county in November, 1898, one A. W. Martin was duly elected county attorney for the term of two years beginning in January following; that he qualified and entered upon the discharge of the duties of his office; that in August, 1899, said Martin died and Hon. W. H. Morris was appointed by the county board to fill the vacancy; that, in December, 1899, said Morris resigned his office and removed from the state; that at the general election in November, 1899, the name of the relator, Thomas B. Parker, was written upon the official ballots, and votes were cast for him for the office of county attorney, and he received a majority of all the votes cast at said election for that position and to him

was awarded a certificate of election. The sole question presented by this record is whether a vacancy occurring in the office of county attorney must be filled by election or by appointment by the county board. We passed upon the same proposition in *State v. Rankin*, 33 Nebr., 266, adversely to the contention of the present relator. But that decision is directly attacked, and the doctrine there enunciated is assailed as unsound. We have carefully examined the grounds of that decision, in the light of the criticism made thereon, in the brief of relator, and we are all of the opinion that *State v. Rankin* was correctly decided, and that it controls the decision herein. The judgment is accordingly

AFFIRMED.

STATE OF NEBRASKA, EX REL. FRANK B. HIBBARD, V. JOHN F. CORNELL, AUDITOR OF PUBLIC ACCOUNTS.

FILED JUNE 7, 1900. No. 11,220.

1. **Salaries:** STATUTE: APPROPRIATION. Bills making appropriations for salaries of officers of the state government are prohibited by section 19, article 3, of the constitution from containing a provision on any other subject.
2. ———: OFFICERS NOT FIXED BY CONSTITUTION. This constitutional restriction is not confined alone to officers created by the constitution, but extends to all officers of the state government, whether their salaries are fixed by the constitution or their compensation is left to legislative discretion.
3. **Constitution:** LEGISLATIVE INTERPRETATION. While a practical interpretation of the constitution by the legislature will not be lightly disregarded in doubtful cases, yet, when the language of the constitution is free from ambiguity, an interpretation thereof by the legislative department can not be invoked to nullify the fundamental law.
4. **Deputy Food Commissioner.** The deputy food commissioner created by chapter 35, Session Laws, 1899, is an officer of the state government, and not a mere employee.
5. **Appropriation:** CONSTITUTION. Section 12 of said chapter 35, making appropriation for the salary of deputy food commissioner, is inimical to section 19, article 3, of the constitution, since other portions of said act contain legislation upon another subject.

ORIGINAL application for mandamus to require the respondent to draw his warrant for the salary of the deputy food commissioner. *Writ denied.*

Constantine J. Smyth, Attorney General, and *Willis D. Oldham, Deputy,* for the state.

Alfred M. Post and *Eugene J. Hainer,* for relator:

Government, in the broadest sense of the term, is frequently employed as synonymous with state or body politic, likewise as applicable to the administration, or persons charged with the execution of the law. It is, however, in its technical or constitutional meaning "that form of fundamental rules and principles by which a nation or state is governed" (Rapalje, Law Dictionary); and in the latter restricted or concrete sense of the term it is evidently employed in this connection.

Although the precise question herein involved does not appear to have been determined, like constitutional restrictions have been by this court uniformly held applicable alone to officers named in the constitution itself, and never to such mere subordinates, or agents, of the executive officers of the government as the deputy food commissioner, or deputy commissioner of labor, etc. Such indeed was the contemporaneous interpretation by every department of the state government, an interpretation which by a subsequent uniform and consistent course of the several departments has become the fixed and settled policy of the state. *State v. Weston,* 4 Nebr., 234; *In re Appropriations,* 25 Nebr., 662; *Douglas County v. Timme,* 32 Nebr., 272.

Among the many legislative and executive acts evidencing interpretation of the constitutional restrictions here involved in accordance with the foregoing contention may be cited: 1. "An act regulating the state library"—fixing the salary of the state librarian and authorizing the state auditor to quarterly draw his warrant for such salary as it became due and annually appropri-

ating $200 for the use of the library. Laws, 1871, p. 52. 2. The creation of the office of bookkeeper in the offices of the secretary of state and commissioner of public lands and buildings by provision of the act making appropriations for salaries of officers of the government (Laws, 1877, p. 237), and the creation and appropriation from time to time for salaries of insurance deputy, bond clerk and stenographer for the auditor of public accounts. 3. Act creating the office of superintendent of the reform school and making appropriations for the salary thereof. Laws, 1879, p. 413. 4. Act creating the office of superintendent of census and making appropriation for salary thereof. Laws, 1885, p. 97. 5. Act creating the office of state veterinary surgeon, making appropriation for salary thereof. Laws, 1885, p. 73. 6. Act creating state board of pharmacy and making provisions for the payment of salaries of its secretaries. Laws, 1887, p. 507. 7. Act to provide for stenographers for the judges of the supreme court and making appropriations for the salary thereof. Laws, 1887, p. 381. 8. Act creating the office of commandant of the soldiers' and sailors' home and making appropriation for salary thereof. Laws, 1887, p. 622. 9. Act creating office of commissioner and deputy commissioner of labor and making appropriation for salary thereof. Laws, 1887, p. 470. 10. Act creating a state board of health, providing for compensation of secretaries and fees to be paid by applicants for certificates. Laws, 1891, p. 280-6; Laws, 1897, p. 278. 11. Act creating office of commissioner general for Nebraska at the Columbia Exposition and making appropriation for salary thereof. Laws, 1891, p. 395. 12. Act creating a state board of dentistry and providing for means to carry out its provisions and to pay its secretaries. Laws, 1895, p. 197. 13. Act creating board of directors of Trans-Mississippi Exposition and making appropriations for salary thereof. Laws, 1897, p. 367. The money appropriated by the foregoing and acts of like character has been in every instance paid out upon warrants drawn by respond-

ent and his predecessors in office without recorded objection. The contemporaneous construction of a constitutional provision, which has for many years been adhered to by the legislative and executive departments of the government, will not be lightly disregarded by the court, and will, even in doubtful cases, generally be held conclusive. *State v. Holcomb*, 46 Nebr., 88; *State v. Harrison*, 116 Ind., 300. Another and quite as simple a solution of the question is found in the fact that the deputy food commissioner, the creature of his principal and depending upon the pleasure of the latter for his tenure, is not within the inhibition relied upon, for the reason that he is a mere employee, and in no constitutional sense of the term an officer. *Somers v. State*, 58 N. W. Rep. [S. Dak.], 804, 59 N. W. Rep., 962; *Gibbs v. Morgan*, 39 N. J. Eq., 128; *State v. Johnson*, 27 S. W. Rep. [Mo.], 399.

William B. Price, contra.

T. J. Mahoney, amicus curiæ, argued upon matters not decided by the court.

NORVAL, C. J.

This is an original application for a peremptory writ of mandamus to require the respondent, as auditor of public accounts, to audit and adjust the claim of relator against the state for salary as deputy food commissioner. Relator was appointed to said position by the governor on or about July 1, 1899, in pursuance of chapter 35, Laws, 1899. This act is entitled "An act creating a food commission; defining its powers and duties and of the officers and agents thereof; regulating the manufacture and sale of foods including imitation butter and imitation cheese and dairy products; providing for a system of reports, inspection and permits and fixing fees for the same; providing penalties for violation of this act; making an annual appropriation for carrying this act into effect; and repealing all acts and parts of acts in conflict herewith."

The act purports, *inter alia*, to create a food commission; to make the governor the food commissioner, with authority to appoint a deputy food commissioner at a salary of $1,500 per annum, payable monthly, together with his expenses actually and necessarily incurred in discharging the duties of his office; to authorize such deputy to employ a clerk at a salary not to exceed $75 a month; to define the duties of the food commission and its commissioners; to require dealers in imitation butter and imitation cheese to make reports; to provide for permits for dealers and manufacturers of certain articles and for the inspection thereof; to prescribe fees, and to provide for their payment into the state treasury and penalties for the violation of the provisions of the act. The 12th section declares: "There is hereby annually appropriated out of the funds of the state not otherwise appropriated, for the purpose of carrying into effect the provisions of this act, the sum of five thousand dollars ($5,000). Provided, that the amount paid out shall in no case exceed the amount received by the state, as provided for in this act." The respondent refuses to audit the claim, for the reason that said section 12 of the act contravenes section 19, article 3, of the constitution, which provides, *inter alia:* "Bills making appropriations for the pay of members and officers of the legislature, and for the salaries of the officers of the government, shall contain no provision on any other subject." This provision of the fundamental law is plain enough. It requires that legislative acts which appropriate money from the state treasury to pay officers and members of the legislature, and for salaries of state officers, shall contain no other subject of legislation. This restriction upon the power of the lawmaking body must be observed and enforced.

It is argued that the restrictive or prohibitory features of said section of the constitution are applicable alone to officers named in the fundamental law. To this doctrine we are unable to assent. Certainly, the language of the section contains no such distinction, and the courts have

no right to make it by interpolating words into the section. Moreover, said section could not have been intended by its framers to be applicable alone to state officers created by the constitution, since it requires no appropriation of moneys from the treasury by the legislature to pay such officers. As to them the constitution itself makes the appropriation. *State v. Weston*, 4 Nebr., 216. It follows that if the constitutional provision under consideration is not meaningless, it applies to those officers of the state government whose salaries are not fixed by the constitution, but whose compensation is left to the discretion of the legislature. It is true, the legislature more than once has created an office, and in the same act attempted to make an appropriation for the payment of the salary thereof, which constitutes a legislative construction of the section of the constitution we are considering adverse to the views we have expressed, and if the section would admit of more than one interpretation, the legislative construction would probably be controlling. But the interpretation by the legislative department can not be invoked, since the meaning of the constitutional provision is not involved in doubt.

In argument it is also suggested that the deputy food commissioner is in no constitutional sense an officer, but is a mere employee. The provisions of chapter 35 will not justify such an interpretation. The governor, who is a state officer, is made the food commissioner, and it would seem strange to designate the deputy appointed by the governor a mere employee. Section 2 of said chapter provides that "said deputy food commissioner shall hold his office," etc. Section 3 requires such deputy to give a bond "conditioned for the faithful discharge of his duties and the accounting for all money and other property that may come into his hands by virtue of his office." Further, it is provided that said deputy shall make an annual report to the governor the same as other state officers. There is no escaping the conclusion that the deputy food commissioner is an officer of the state

government, and not a mere clerk or employee. It follows that section 12 of said chapter 35 conflicts with section 19, article 3, of the constitution, and is void.

A brief has been filed by Hon. T. J. Mahoney on behalf of persons not party to the record, who claim to be indirectly interested in the decision, in which it is argued that the act creating the food commission is inimical to section 26, article 5, of the state constitution, which declares that "no other executive state office shall be continued or created, and the duties now devolving upon officers not provided for by this constitution shall be performed by the officers herein created." Having reached the conclusion that no warrant can be drawn in payment of relator's salary by reason of the invalidity of section 12 of said chapter 35, the constitutional question urged upon the attention of the court by Mr. Mahoney will not now be considered.

WRIT DENIED

STATE OF NEBRASKA V. BEE PUBLISHING COMPANY.

FILED JUNE 7, 1900. No. 11,399.

1. **Constructive Contempt:** COMMON LAW: STATUTE. The common law power of the courts to punish for constructive contempts is, in this state, expressly confirmed by legislative enactment.

2. ———: RIGHTS OF LITIGANT. Every litigant is entitled, not only to a just decision of his cause, but to a decision rendered by a court which is, at the time, entirely free from physical and moral coercion.

3. ———: FREEDOM OF PRESS: CONTROL OF JUDICIAL ACTION. The press and the public have the right to freely discuss, criticise and censure the decisions of the courts; but they have no right, while a cause is pending, to attempt, by threats or other form of intimidation, to control judicial action.

4. ———: NEWSPAPER CORPORATION. A newspaper corporation which deliberately seeks to influence judicial action by the publication of articles threatening the judges with public odium and reprobation in case they decide a pending cause in a particular way, is guilty of constructive contempt.

ORIGINAL jurisdiction. This was a criminal proceeding in contempt, brought on the relation of the attorney general. The offending articles appear in the opinion. The defendants, upon their request, were awarded separate trials, but not as a matter of right. The defendant the Bee Publishing Company answered, admitted the publication; but entered a plea of *non possemus*, by reason of being a corporation. It also pleaded, in justification, that the matters published were items of news, and of common report at the time of publication. It further pleaded that the case commented upon in the offending article was *res adjudicata*. The defendant Edward Rosewater, in open court, admitted the publication of the offending articles, and that he was the editor of the *Omaha Bee*. He also waived his constitutional right, and consented to be sworn as a witness on behalf of the state. He was sworn accordingly and testified, *inter alia*, on his own motion and on cross-examination by Mr. Oldham, to the following effect, that is to say: That witness dictated the article first set out in the information, but had no knowledge of the other articles until after the citation herein was served upon him; that Mr. Connell, of counsel in the case of *State v. Kennedy*, had shown him his brief for the purpose of editorial comment as witness supposed; and such brief was the occasion of the article which he had dictated. In general terms, he denied any interest in the transaction but the public good. The object of the articles was to reach public opinion and through it the court. The court held that it would take judicial cognizance of its own records, and that the action of *State of Nebraska v. Kennedy* was then pending before the court. Both cases were submitted upon the pleadings and proof and argued together. *Bee Publishing Company, defendant, convicted and fined $500 and costs.*

Willis D. Oldham, Deputy Attorney General, for the state, said: This was an information filed on behalf of the state. The defendants were, respectively, the editor and

publisher of the *Omaha Bee*, a newspaper with an extensive circulation within the jurisdiction of this honorable court. The articles published related to a matter now pending before this court for a determination. They were evidently designed to influence the decision. It mattered not whether they would have that effect. The question was not what would the effect be, but what was their designed effect. In law, every man is presumed to intend the natural and probable consequences of his own acts; and his intent was not to be gathered from his plea of the baby act. *I did not mean to* would pass very well in the nursery, but it had no place in a court of justice. *Ignorantia facti excusat*—ignorance of fact excuseth—was hornbook law. But the maxim, *Ignorantia juris quod quisque tenetur scire, neminem excusat*—ignorance of law, which every one is held to know, excuseth no one—was black letter law, founded on the gravest reasons of public policy. If the defendant Rosewater was ignorant of the fact that the case of *State v. Kennedy* was pending, the ignorance of that fact might excuse him. But he could not be ignorant thereof. He himself testified that Connell had shown him his brief, for the purposes of editorial comment; and that brief had been the basis of the article which he dictated. The defendant Rosewater, having knowledge of the fact, must know the law which regulated his own conduct. Rosewater was the vice-principal of the Bee Publishing Company, and his knowledge was theirs. The liability of a corporaton in a case of this kind was settled in the Massachusetts case cited by the state. It mattered not whether or not the conduct of the governor and the attorney general had been correct. The court would take care of that. Louis XVI. was justly condemned to the guillotine; but that righteous condemnation did not excuse the merciless rabble of Parisian *canaille* and *sans-culottes* that clamored for his death in the galleries of the national convention; and sought to forestall its judgment.

In the mind's eye, we might behold the ancient counterpart of the subject of this contempt proceeding when we reflect on another scene which took place about one thousand eight hundred and sixty-seven years ago (according to Usher), and which is being acted this year in a little town of the Bavarian Tyrol—a mob howling for the blood of the Man of Nazareth. The cowardly procurator tried to effect a change of venue, on the court's own motion, to Herod, tetrarch of Galilee. When this device failed, he disregarded the prudent advice of Mrs. Pilate, and yielded to what our friend from Omaha would call an enlightened public opinion. It was the idea of keeping any deliberative body free from this outside clamor that made that great commoner, Thomas B. Reed, threaten to clear the galleries when speakers were applauded.

If a plea of *res adjudicata* could be successfully made in *State v. Kennedy*, that fact made it no less an action pending. You might as well say that because a common traverse or *nil debet* could be successfully maintained against a declaration upon an action of debt there was no action pending.

The defendant Rosewater said that only four states had sustained actions for constructive contempt in cases of this kind. The speaker had found forty-seven decisions in the states and territories; and had not reached the bottom yet.

The state cited: *Ex parte Barry*, 85 Cal., 603; *People v. Stapleton*, 18 Colo., 568; *In re Chadwick*, 109 Mich., 588; *People v. Wilson*, 64 Ill., 195; *Territory v. Murray*, 7 Mont., 251; *Commonwealth v. Kneeland*, 20 Pick. [Mass.], 206; *Myers v. State*, 46 Ohio St., 473; *State v. Morrill*, 16 Ark., 384; *In re Woolley*, 11 Bush [Ky.], 110; *In the Matter of Moore*, 63 N. Car., 397; *Telegram Co. v. Commonwealth*, 172 Mass., 294; *State v. Circuit Court*, 38 L. R. A., 558; Blackstone, book 4, p. 283; *Respublica v. Oswald*, 1 Dall. [U. S.], 319; *Ex parte Jones*, 13 Ves. [Eng.], 237; American Law Review, May, 1900; *State v. Faulds*, 17 Mont., 140.

The authority to punish for contempt is a necessary incident, inherent in the very organization of all legislative bodies, and of all courts of equity, independent of statutory provisions. *Tenncy's Case*, 3 Fost. [N. H.], 162; *State v. Matthews*, 37 N. H., 453; *Anderson v. Dunn*, 6 Wheat. [U. S.], 204; *State v. Copp*, 15 N. H., 212; *Mariner v. Dyer*, 2 Greenl. [Me.], 165; *Stewart v. Blaine*, 1 McArth. [D. C.], 453; also *Stewart v. Ordway*, decided therewith; *Yates v. Lansing*, 9 Johns. [N. Y.], 396; 1 Burr's Trial, 352; *Ex parte Adams*, 25 Miss, 883; *People v. Freer*, Coleman & Caine's Cases [N. Y.], 283.

Stewart Rapalje, a learned law writer of New York city, published in 1884 a work on contempt, in which he says: "It is conclusively settled by a long line of decisions that at common law, all courts of record have an inherent power to punish contempts committed *in facie curiæ*, such power being essential to the very existence of a court as such, and granted as a necessary incident in establishing a tribunal as a court. And this power extends to the punishment of willful contempts committed by corporate bodies as well as individuals. Each superior court being the judge of its own power to punish contemnors, no other court can question the existence of that power, and the facts constituting the contempt need not be set out in the record." Rapalje, Contempts, p. 1.

Publications which have a tendency to prejudice pending causes can not be permited. *Pool v. Sachcverel*, 1 Williams P. [Eng.], 675; *Farley's Case*, 2 Ves. Sr. [Eng.], 520; *Anonymous*, 2 Atkyns [Eng.], 469; *Respublica v. Oswald*, 1 Dall. [U. S.], 319; *Bayard v. Passmore*, 3 Yea. [Pa.], 438; *In the Matter of Sturoc*, 48 N. H., 428.

In *Pool v. Sacheverel*, *supra*, an advertisement in a newspaper, offering a pecuniary reward for legal proof of marriage, was held contempt, as tending to subornation of perjury. In *Sturoc's Case*, *supra*, the offense was a written communication left at the office of a newspaper published at the shiretown. The article appeared the

same week that the *nisi prius* court was in session, and at that session the cause was pending which was the subject of the article. The editor testified that the writer said he was not particular that the article be published that week, and did not care if it was not published at all. The defendant disavowed any ill-intention; denied that he knew the action was pending at that session; and the court gave him full credit, but imposed a fine of $30 to show that such publications, in such circumstances, were illegal and not to be tolerated.

The intention of a publication will not justify it, if it be, in the opinion of the court, contempt against the court. *People v. Freer*, Coleman & Caine's Cases [N. Y.], 283.

Edward Rosewater, appearing in his own behalf, said: The proceeding in contempt was an arbitrary one, borrowed from monarchical times and countries; it was inimical to the genius of our government and foreign to the spirit of our institutions. There never had been an original proceeding in contempt before the supreme court of the United States, or before forty of the supreme courts of the states of the Union. A court should be chary in the exercise of a power whose abuse might tend to cripple the power of the press as a guide of public opinion. The press had a sacred duty to perform in such matters, for a faithful performance of which it would be held to a strict account before the great tribunal of mankind. If an article was not libelous, disrespectful or meddlesome *per se*, and if this character did not appear upon its face, unaided by the innuendoes of a criminal pleader, the defendant should not be convicted of a contempt. Such was the sound rule, and such had been the former holdings of this court. The defendant admitted that, if an action was pending before the court, a journal had not the right, directly or indirectly, to attempt to influence the decision of the court. But in this case no action was pending. What was the history of the trans-

action? The supreme court, in *State v. Moores*, 55 Nebr., 480, had declared that part of the act of 1897 (Compiled Statutes, ch. 12*a*) which vested in the governor the power to appoint police commissioners in cities of the metropolitan class void. It had drawn a red line through that part of the law, and it was a complete erasure; that part of the act no longer existed. The decision was *res judicata*. In *State v. Kennedy* there was an attempt to revive a question forever put to rest by the decision in *State v. Moores, supra*. If that case was still pending, as much any other case heretofore decided by this august tribunal might be regarded as pending. It was conceded by the state that a journal might comment upon a case after the decision had been made, being answerable only in action for libel, where it could have the benefit of a trial by jury. If *State v. Moores* could still be regarded as pending, then any person could commence a proceeding to open up any ancient case; and have any person commenting upon this extraordinary proceeding committed for contempt. If any one was guilty of a contempt of this court, it was the governor of the state, who, in the face of a decision made two years ago, had appointed a board of police commissioners without authority of law, and the attorney general, who had commenced the strange proceeding in *State v. Kennedy*. The legislature of 1899 had created an insurance bureau, making the governor insurance commissioner, with power to appoint a deputy. This law your honors have decided unconstitutional. His former deputy is now an officer of your court. Why does his excellency not appoint a new deputy and commence *quo warranto* proceedings against the auditor? If he did this, would the editor of the *Omaha Bee* be committed as for contempt for commenting on the absurdity of such proceedings? This court, by repeated rulings, had held itself to be a court of enumerated powers and limited jurisdiction. It was the creature of the constitution. It possessed no power not given by its creator or which was not necessarily incident to power actually

granted. The court had no common law jurisdiction in contempt cases. *Kilbourn v. Thompson*, 103 U. S., 168.

Edward W. Simeral, for the Bee Publishing Company, said in part: The court could go to its own volumes for precedents; but these precedents did not support the contention of the state. They said in so many words that, if an article was not libelous on its face,—if it required an innuendo to apply it to the court, no contempt would lie. The attorney general did not call attention to these decisions, but counsel for defendant would, and cited: *Rosewater v. State*, 47 Nebr., 630; *Percival v. State*, 45 Nebr., 741.

The first case cited by the state is *People v. Wilson*, 64 Ill., 195. The deputy attorney general did not note the fact that that case had been overruled in *Storey v. People*, 79 Ill., 45.

Constantine J. Smyth, Attorney General, on behalf of the state, said the case was presented to the court by the defendants on false issues. It had been said that it involved the liberty of the press. But it did nothing of the kind. What was meant by the liberty of the press? Our constitution told us in section 5, article 1. The liberty of the press then was no greater than the liberty of the individual, and that liberty was to speak, write and publish on all subjects, being responsible for the abuse of that liberty. It was in contradistinction of the system, described by George Kennan as existing in Russia, where they had a press censor who culled manuscripts before they went to press. The defendants in this case had written and published without let or hindrance, so far as this case was concerned; and, therefore, the liberty guaranteed to them by the constitution had not been abridged or interfered with in the least. The question to be determined was not, therefore, whether these defendants might print and publish, but whether they had abused this liberty. If they had, and had thereby vio-

lated a law of the state, why should they not be held responsible? Did they belong to a privileged class, a class which may violate the law with impunity? They may have formed that opinion. If so, it was time they were awakened from this dream, and brought face to face with the reality that they had no license to trample upon the law and to violate the rights of parties litigant. The law against contempt was not, and never was, a part of kingly prerogative. It was not a judge-made law. On the contrary, it was as old as *magna charta*, had its birth with the choicest principles of common law, and was as salutary as any other of the great principles of institutional law. The power of courts of superior jurisdiction, created by the constitution, to punish for contempt is necessarily inherent in such court. "A court," said the supreme court of Wisconsin in *State v. Circuit Court*, 38 L. R. A., 554, 558, "without this power would be at best a mere debating society, and not a court. These principles have been recognized in all courts from time immemorial." Blackstone, in his fourth book, page 238, mentioned among the instances of contempt of court those committed away from the presence of the court by parties writing or speaking contemptuously of the court or judges acting in their judicial capacity. The supreme court of New Jersey, in *In re Cheeseman*, 49 N. J. Law, 115, said that words uttered or published outside of the courts and designed to bring contempt upon the courts in the exercise of their judicial functions, or to pervert, in any pending cause, the due administration of justice, have always constituted a contempt of court. Judge Freeman, one of the most noted American law writers, said in a note to *Percival v. State*, 50 Am. St. Rep., 573: "It is also conceded that the efficiency of the courts and the stability of government, at least among a free people, are dependent upon their confidence in the integrity of the courts and their ability and willingness to deal impartially with the questions committed to their consideration; and that to impute to the courts, or the

judges presiding over them, corrupt motives in the discharge of their judicial functions, in cases still pending before them, is a contempt of court, and may be punished as such."

The attorney general said he could not better portray the viciousness of the procedure adopted by the defendants than by quoting the following apt language. Mr. Justice Brown, of the supreme court of the United States, in an address recently delivered before the New York State Bar Association, and published in the May number of the American Law Review, quoted Franklin's arraignment of this usurped power of the "court of the press," Franklin said: "It may receive and promulgate accusations of all kinds, against all persons and characters among the citizens of the state, and even against all inferior courts; and may judge, sentence and condemn to infamy, not only private individuals, but public bodies, with or without inquiry or hearing, at the court's discretion. This court is established in favor of about one citizen in five hundred, who, by education or practice in scribbling, has acquired a tolerable style as to grammar and construction. * * * This five-hundredth part of the citizens have the privilege of accusing and abusing the other four hundred and ninety-nine parts at their pleasure; or, they may hire out their pens and press to others for that purpose." After saying that the court is not permitted to know the name of his accuser, or of seeing his witnesses, he says: "Yet, if an officer of this court receives the slightest check for misconduct in this his office, he claims immediately the rights of a free citizen by the constitution, and demands to know his accuser, to confront the witnesses, and to have a fair trial by a jury of his peers." Justice Brown adds: "As this article was written 110 years ago, it is evident that the abuses of which we complain are of long standing." 34 Am. Law Review, 323.

With regard to the power of the court the attorney general said: This court was not compelled to look to the

common law only for its power to punish the defendants if they are found guilty of contempt. The people of this state, through their legislature, have conferred that power in express terms upon your honors. Section 669 of the Code says that "Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of any of the following acts: * * * Any willful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings or process pending before the courts." What was meant by the due administration of justice? It was administration according to the rules that have generally obtained in courts of justice. Both parties must have a right to be heard. Whatever was intended to influence the decision must be presented in court in accordance with rules established for the government of such matters. No analysis was necessary of the articles alleged to be contemptuous in this case to show the purpose for which they were published. They could have but one purpose, and that was to create a prejudice in the public mind against one of the parties to a pending suit—to force the court to render a certain decision therein and to give the public to understand that the court, if it decided in favor of one of the parties, would be influenced by improper motives. It was part of that purpose to impute scorn and reproach to two of the judges composing this court, and thus lessen the respect in which this court was held by the people of the state, and to destroy the confidence and integrity, the ability and the willingness of the members of this court to deal impartially with questions committed to its consideration. It was not meant that the articles had that effect. But they did not necessarily have to have such an effect in order to be contemptuous. They were calculated to have that effect, and could have been written for no other purpose. And hence they come within all the definitions of what constitutes contempt of court.

SULLIVAN, J.

This proceeding for contempt, instituted by the attorney general at the request of the court, is based upon certain newspaper articles relating to the case of *State v. Kennedy,* 60 Nebr., 300, which was, at the time of the publications, pending before us for decision. The defendant is a corporation engaged in the publication of a newspaper which has a general circulation throughout the state. The editor is Edward Rosewater, who has also been cited to show cause why he should not be punished for contempt, and who has, at his own request, been awarded a separate trial. Some of the articles were obviously designed to prevent one member of the court from participating in the decision, while others threatened two members of the court with public odium and reprobation in case they should give judgment in favor of the state. One article, which was entitled "Worthy of Serious Consideration," after declaring that Judge HOLCOMB, before coming to the bench, had expressed an opinion upon the question involved in the *Kennedy Case,* proceeds as follows: "Having prejudged the case, Judge Holcomb must certainly realize that it would be in conflict with the spirit, if not the letter, of the constitution and the laws for him to use his judicial position to sustain himself in his former declarations. To set the precedent by participating in this case, after having formed and expressed an opinion, would lower the standard of the tribunal in which impartial and equal justice is expected to be administered and whose unbiased interpretation of the constitution is the bulwark of our free institutions." Soon afterward the following article appeared: "Fusion ward heelers in Omaha are again giving advance tips to the effect that the fusion judges of the supreme court will hand down a decision at their sitting two weeks from next Tuesday, ousting the present fire and police commissioners and seating the pretended board appointed by Governor Poynter. Has it not come to a pretty pass

when supreme court decisions are retailed in this manner in third ward resorts and street corners?" A little later there was published an article entitled "Politics in the Courts" (reprinted from the *Grand Island Journal*), which is as follows: "It is reported that the fusionists in Omaha are preparing to profit by the action of the fusion supreme court when it reverses the ruling of the court in the fire and police commission case. If Judges Sullivan and Holcomb lend their aid to the scheme of the Omaha bunco steerers, they will be a disgrace to the legal profession and the laughing stock of every lawyer in the land. It is to be hoped that the fusion members of the supreme court will prove more manly than their heelers at the metropolis would have them be." Another article, entitled "The Ethics of Justice," published May 8, 1900, is too long for insertion in this opinion, but its character is sufficiently indicated by the following excerpt: "A due appreciation of the sacred duties of the judicial office and the inviolable right of every citizen to speedy and impartial justice should counteract all pressure of political partisans anxious to use the judicial ermine to cloak their schemes for political power and preferment. If it does not, then Nebraska's motto, 'Equality before the law,' becomes a delusion and a snare." Defendant appeared in court by counsel and defended the accusation against it upon the grounds: (1) that no disrespect to the court, or to any member of the court, was intended; (2) that the case of *State v. Kennedy* was not pending; and (3) that the publications were made with good motives, and were not calculated to obstruct the due administration of justice.

The *Kennedy Case* was pending; of that we have judicial knowledge, and the defendant must surely have known that the case was in court and undetermined, for it appears that the attorney for the respondents brought his brief to Mr. Rosewater's office and that the article headed "Worthy of Serious Consideration" immediately followed the meeting between the editor and the lawyer. It also

appears from the evidence that the article was written for the express purpose of calling public attention to the alleged impropriety of Judge HOLCOMB participating in the decision of the court. The first and third defenses are puerile. They amount only to a denial that the defendant intended to violate the law. Under the conceded facts the course pursued by it was indefensible; its conduct is not susceptible of an innocent construction. The statute declares that any willful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceeding or process pending before any court shall constitute a criminal contempt and be punishable as such. Code of Civil Procedure, sec. 669. This statute is merely declaratory of the law as it has existed for hundreds of years. It is a legislative recognition of the authority of the courts to deal in a summary manner with persons who do any wanton, deliberate or intentional act calculated to embarrass them in the discharge of their important duties. In the history of American jurisprudence there can be found no case in which this power has been harshly or oppressively exercised by a court of final jurisdiction. Indeed, such courts have not often called publishers to account for constructive contempts, because it has rarely happened that a public journal, wielding any considerable influence, has deliberately employed outlaw methods in attempting to control judicial action. The exceptional cases which we have examined are these: *People v. Stapleton*, 18 Colo., 568; *People v. Wilson*, 64 Ill., 195; *In re Hughes*, 43 Pac. Rep. [N. Mex.], 692; *State v. Morrill*, 16 Ark., 384; *State v. Faulds*, 17 Mont., 140; *State v. Frew*, 24 W. Va., 416.

Cases of this kind originating in the lower courts are very numerous. We will not take the time to cite them or any of them. As said by the supreme court of Iowa in the case of *Field v. Thornell*, 106 Ia., 7, 15, it seldom happens "that an honorable journalist so far forgets his self-respect as to trespass upon the rights of the judiciary, or seek to control or improperly influence its conclusions."

We have, of course, no desire to restrain, in the slightest degree, the freedom of the press or to maintain the dignity of the court by inflicting penalties on those who may assail us with defamatory publications. Our decisions and all our official actions are public property, and the press and the people have the undoubted right to comment on them and criticise and censure them as they see fit. Judicial officers, like other public servants, must answer for their official actions before the chancery of public opinion; they must make good their claims to popular esteem by excellence and virtue, by faithful and efficient service and by righteous conduct. But while we concede to the press the right to criticise freely our decisions when made, we deny to any individual or to any class of men the right to subject us to any form of coercion with the view of affecting our judgment in a pending case.

In the Iowa case above cited it is said, p. 15: "Courts are constantly passing on questions affecting the life and liberty of the citizen, as well as the rights of property; and the freedom of the judiciary to investigate and decide is quite as important to the well-being of society as the freedom of the press." "Men," said one who knew them well, "are flesh and blood and apprehensive." Few stand unmoved by the clamor of the multitude. Various motives, of course, conspire to make people deny, and even to disguise from themselves, the fact that they are amenable, in any degree, to the force of popular opinion. But it is folly to deceive ourselves, and it is futile to attempt to deceive others. Threats of public clamor have before now swayed the judgments and flexed the purposes of resolute men; and it will be well to remember that what has happened may recur. Men have in the past yielded to the demands of an angry populace, and it is quite possible that they may yield again. Moral fiber is not stronger now than it ever was before. Courts are charged with the function of administering justice, and it is their duty not only to give to every suitor his de-

mandable right, but to give him assurance that no banned and hostile influence shall operate against him while his cause is under consideration. A litigant is entitled not only to a just decision, but to a decision altogether free from the suspicion of having been coerced. Nothing else will satisfy him; nothing less can fill the measure of his expectations. He has no standard with which to gauge judicial firmness; and if the court has been exposed to influences calculated, as in the *Kennedy Case*, to tell against him, he will not know whether an adverse decision is the voice of the law or an echo of the mob. Our views upon this matter are well expressed in the following excerpt from the opinion of Lawrence, C. J., in *People v. Wilson, supra*, p. 214: "A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration, but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice. Even if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless a disturbing influence has been thrown into the council chamber which it is the wise policy of the law to exclude." Equally pertinent are the following remarks of Elliott, J., in *People v. Stapleton, supra*, p. 580: "Judges are human; they are possessed of human feelings; and when accusations are publicly made, as by a newspaper article, charging them directly or indirectly with dishonorable conduct in a cause pending before them and about to be determined, it is idle to say that they need not be embarrassed in their consideration and determination of such cause, they will inevitably suffer more or less embarrassment in the discharge of their duties, according to the nature of the charges and

the source from which such charges emanate. When a judge tries and determines a cause in connection with which public charges against his judicial integrity have been published, the public as well as parties interested are frequently led by the publication of the charges to distrust the honesty and impartiality of the decision; and thus confidence in the administration of justice is impaired. It is not only important that the trial of causes shall be impartial, and that the decisions of the courts shall be just, but it is important that causes shall be tried and judgments rendered without bias, prejudice, or improper influence of any kind. It is not merely a private wrong against the rights of litigants and against the judges—it is a public wrong—a crime against the state—to undertake by libel or slander to impair confidence in the administration of justice. That a party does not succeed in such undertaking lessens his offense only in degree."

We feel quite sure that the publications here in question have not in the least deterred us from discharging with fidelity our duty in the case of *State v. Kennedy*. But they were manifestly intended to overawe and intimidate us. They appear to have been put forth for the purpose of preventing a decision in favor of the state. They were, under the circumstances, palpable acts of journalistic lawlessness, calculated to weaken the independence of the court and destroy confidence in its judgment. To justify them is to deny the supremacy of the law and assert the doctrine of newspaper absolutism. To admit that publishers may promote their interests in pending litigation by resorting to methods not available to others, is to strike down our much vaunted principle of "equality before the law" and to declare that journalists, who choose to become malefactors, are a privileged class and entitled as such to go unwhipped of justice. But the law recognizes no such distinction; it never has recognized such a distinction. It accords to publishers no rights but such as are common to all. They have just the

same rights as the rest of the community have, and no more. *King v. Root*, 4 Wend. [N. Y.], 113. A distinguished judge has said: "A man who speaks in a newspaper has no greater right than he who speaks out of it. A newspaper is no sanctuary behind which a person can shield himself for breaking the laws of the land."

We have not acted in this case out of any spirit of resentment. Indeed, we have no reason to feel specially aggrieved, for the offensive articles do not charge us, or any of us, with official misconduct. Their natural tendency, however, was to interfere with and obstruct the due administration of justice; and it was the unanimous opinion of the court, when the citation issued, that it was our duty to take notice of them and call the defendant to account. And it is still the judgment of the members of the court who take part in this decision that we acted wisely, and that we could not have ignored the defendant's attempt to coerce our decision without being guilty of a craven faithlessness to duty. Whatever may have been the motive of the publishing company, its conduct was plainly unlawful. The articles in question did not, it is true, bring about a miscarriage of justice in the *Kennedy Case*, but their manifest tendency was in that direction. We can not escape the conclusion that the necessity for this proceeding has resulted from the fact that the services of the journalist were enlisted by interested parties to press upon the attention of the court, in a very important case, illegitimate arguments—reasons for a decision which, it is well understood, counsel could not, with propriety, advance. The defendant is guilty as charged in the information, and it is the sentence of the court that it pay a fine of $500 and the taxable costs. It will, however, have leave to move for a modification of the judgment during the present term upon showing that it has published a fair and truthful account of the cause and occasion for this proceeding.

Since the above was written it has been suggested that the testimony of Edward Rosewater was not intended to

be regarded as a part of the proceedings in this case. Granting that, our conclusions must remain unchanged. The guilt of the defendant is conclusively established without considering Mr. Rosewater's testimony.

NORVAL, C. J., for the reasons heretofore stated by him, having refrained from taking part in the hearing, offered no opinion.

STATE OF NEBRASKA, EX REL. CONSTANTINE J. SMYTH, ATTORNEY GENERAL, V. FRANK A. KENNEDY ET AL., RESPONDENTS, AND WILLIAM J. BROATCH ET AL., INTERVENERS.

FILED JUNE 7, 1900. No. 11,226.

1. **Res Adjudicata:** SOVEREIGNTY. When a state invokes the judgment of a court for any purpose, it lays aside its sovereignty and consents to be bound by the decision of the court, whether such decision be favorable or adverse.
2. **Courts:** SOVEREIGN POWER. Courts possess a portion of the sovereign power; they are authorized by the constitution to decide between litigants; and authority to decide implies, always, power to make their judgments effective.
3. **Public Officer:** PRIVITY: PREDECESSOR. A public officer is regarded as being in privity with his predecessor when both derive their authority from the same source.
4. **Judgment:** REX NUNQUAM MORITUR. A judgment against a public officer in regard to a public right binds his successor in office.
5. **Disrespectful Brief.** Briefs containing matter disrespectful to the court will be stricken from the files.

ORIGINAL action in the nature of a quo warranto asking for judgment of ouster against the fire and police commissioners of the city of Omaha. *Writ denied.*

Constantine J. Smyth, Attorney General, and *Willis D. Oldham, Deputy,* for the state.

Frank T. Ransom, Wright & Stout and *Ed P. Smith,* for the interverners Broatch, Miller, Peabody and O'Connor:

The ordinary rules of *res adjudicata* do not apply; (*a*) Because *res adjudicata* and estoppel by judgment can not

be pleaded against the state appearing in its sovereign capacity; (*b*) because the decision against the state in quo warranto actions is not final and conclusive. It is obnoxious to the very idea of sovereignty that estoppel or *res adjudicata*, or the statute of limitations can be applied. The court will find the rule stated in many cases, that the state can not be estopped; and it will find the contrary rule laid down, in general terms, that the state will be bound by adjudications as any other litigant. Neither rule, stated in its broad terms, is correct; but an examination of the cases which support either rule discloses the fact that those cases which have applied the doctrine of estoppel or *res adjudicata* to the state have been cases in which the state has been seeking to enforce its contract or property rights, rights growing out of or relating to its corporate capacity. So far as we are able to find, not a single case in the United States has ever held that the state could be estopped in matters relating to its sovereignty. In the case of *United States v. State Bank*, 96 U. S., 30, 36, Justice Swayne clearly points out the distinction. He says, in substance, in these cases (where negotiable paper was involved) the rules of law applicable to the individual were applied to the United States, and that the doctrine of estoppel was correctly applied in those cases, because the action related to matters pertaining to their corporate capacity. He then adds: "Their sovereignty is in nowise involved." The same doctrine has been recognized in *Fendall v. United States*, 14 Court of Claims [U. S.], 247; *Hunter v. United States*, 5 Pet. [U. S.], 173; *Johnson v. United States*, 5 Mason [U. S.], 425.

In all criminal actions, the state, of course, appears in its sovereign capacity. But there can be no plea of estoppel or *res adjudicata*. This is recognized by the common law and by nearly every constitution in the United States, because by the common law it is established that no man should be put in jeopardy twice; and like provision is found in all the constitutions, except those states in which a common law rule has been held to

apply. If the ordinary doctrines of estoppel and *res adjudicata* had applied against the state in the criminal action, there was no need of the express provision of the English law that a man should not be twice put in jeopardy. If the doctrine of *res adjudicata* or estoppel had applied to the state appearing in its sovereign capacity, there would have been no need of the special provision in the constitution of this country which provides that no man shall be put in jeopardy twice for the same offense, but these provisions would have been meaningless and useless incumbrances to the constitution. This is a special limitation upon the rights of sovereignty, and it is contained in the special provision limiting the sovereignty. It is not, however, extended to actions in the nature of quo warranto.

W. J. Connell, for the respondents and for the mayor and city council of Omaha:

Res adjudicata rules the state the same as the citizen. No plea of *res adjudicata* in criminal actions? True, if you condescend to quibble. And it is also true that in civil actions there is no plea of former jeopardy or *autrefois acquit*. In the criminal court the judge discharges the prisoner because *Nemo debet bis puniri pro uno delicto*,* and in the civil court he bids the defendant go without day because *Nemo debet bis vexari pro una et eadem causa*.† Both the pleas and the maxims are one and the same thing in substance and principle, each being clothed in the language peculiar to the special tribunal in which it is used. *State v. Behimer*, 20 Ohio St., 576; Wharton, Pleading & Evidence, 574.

McCoy & Ohmsted, as *amici curiæ*, filed a brief against the granting of the writ.

SULLIVAN, J.

This action was evidently instituted to secure a decision

*No one ought twice to be punished for the same offense.
†No one ought twice to be vexed for one and the same cause.

overruling the case of *State v. Moores*, 55 Nebr., 480. The *Moores Case* lays down the doctrine that whatever the court may conceive to be the spirit of the constitution is to be regarded as part of the paramount law. While the decision, by recognizing and enforcing the asserted right of local self-government, is conceded to rest upon a sound political principle, it was rendered by a divided bench and, as a judicial pronouncement, has been much criticised. If it is to be acquiesced in and accepted as a rule of construction, the constitution of the state is to be fully known, only, by studying the theories of the judges who are chosen to expound it; it will expand or contract with every fluctuation of the popular will which produces a change in the personnel of the court; and the limitations upon legislative power will be as unknown and unknowable as were the rules of equity in the days when the chancellor's conscience was the law of the land. It is the opinion of the writer that the decision is thoroughly vicious; that it strikes a lethal blow at a co-ordinate branch of the government and ought to be repudiated and condemned. But since the members of the court who participate in this decision are not in accord upon the question of constitutional law here involved, further discussion of that question is unnecessary, and would be unprofitable. There is another point in the case upon which we are agreed and which is decisive of the controversy. The judgment must be in favor of the respondents whether the ordinance under which they claim is valid or void.

Briefly stated, the facts in the case of *State v. Moores* were these: Acting under the provisions of sections 166 and 167 of chapter 12*a*, Compiled Statutes of 1897, which conferred, or assumed to confer, upon him authority to appoint fire and police commissioners for cities of the metropolitan class, Governor Holcomb appointed James H. Peabody, D. D. Gregory, William C. Bullard and R. E. L. Herdman as fire and police commissioners for the city of Omaha. The persons so appointed duly qualified

and entered at once upon the discharge of their official duties. Afterwards there was filed in this court by the state, on the relation of the attorney general, an application for a writ of quo warranto against the governor's appointees, the purpose of the action being to obtain an adjudication upon the validity of the sections of the statute under which they had been commissioned. While this action was pending the mayor and council of Omaha provided by ordinance for a board of fire and police commissioners and appointed respondents herein, Matthew H. Collins and Victor H. Coffman, together with two other persons, namely, Peter W. Birkhauser and Charles J. Karbach, to act as members of such board. The persons so appointed by the city authorities intervened in the action and asserted their claims. They contended that the ordinance under which they had been commissioned was valid, and that the statute under which Peabody, Gregory, Bullard and Herdman had been appointed was void. The cause was regularly submitted for decision, and the court, upon due consideration, decided that the ordinance was valid and that sections 166 and 167 of the city charter, so far as they assumed to confer upon the governor authority to appoint fire and police commissioners, were contrary to the scope and purpose of the constitution and, therefore, void. By the judgment rendered the appointees of the governor were declared to be intruders and were ousted from the offices which they held, and the appointees of the mayor and council were installed in their places. This judgment was executed, and it is still in force. The case now before us was commenced during the present term of the court. It also is an information in the nature of a quo warranto, whereby the state, on the relation of the attorney general, demands of the respondents, who are members of the board of fire and police commissioners of Omaha, holding under the authority of the mayor and council, an exhibition of the authority under which they are assuming to act. After the cause was pending, Gov-

ernor Poynter, acting on the assumption that sections 166 and 167, aforesaid, are not in any respect violative of the supreme law, appointed James H. Peabody, William J. Broatch, Harry C. Miller and John J. O'Connor as members of the board of fire and police commissioners for the city of Omaha. Those persons have intervened in the action and filed a pleading in which they assert their claims to the offices held by the respondents. So it appears that we are again called upon to adjudicate between the appointees of the governor and the appointees of the mayor and council the identical matters which were adjudicated in the first case.

One of the defenses interposed by the respondents is that the judgment in the *Moores Case*, whether right or wrong, is binding and conclusive upon the parties to this litigation. Counsel for the interveners, on the other hand, contend that while the doctrine of *res adjudicata* applies to ordinary suitors, it has no application to a sovereign state. The question thus raised is an important one and we have given it careful consideration, reaching the conclusion, after much reflection and thorough investigation of the authorities, that when a state invokes the judgment of a court for any purpose, it lays its sovereignty aside and consents to be bound by the decision, whether such decision be favorable or adverse. While the state as a political community is not obliged to submit to the jurisdiction of its own courts, it ought, in reason and justice, to be bound whenever it voluntarily appears in court and without reservation submits a matter in controversy for adjudication. The courts possess a portion of the sovereign power; they have authority to decide between litigants; and authority to decide implies, always, power to make their judgments effective. It is said by Mr. Justice White in *New Orleans v. Citizens Bank*, 167 U. S., 371, 399, that "the very essence of judicial power is that when a matter is once ascertained and determined it is forever concluded when it arises again under the same circumstances and conditions

between parties or their privies." It is claimed by counsel for the interveners that there is a distinction between the effect of a judgment for or against a state, when appearing as a suitor in its corporate capacity, and the effect of a judgment upon a matter pertaining to its sovereignty. The authorities, excepting perhaps *State v. Cincinnati Gas Light & Coke Co.*, 18 Ohio St., 262, give no countenance to the claim. In 7 Comyns' Digest, title "Quo Warranto," 201, it is said: "The judgment in quo warranto is final; for it is in the nature of a writ of right. And, therefore, if judgment be against the king, the king shall be forever bound as to the thing adjudged." In 3 Blackstone's Commentaries, p. 263, the author says: "The judgment on a writ of quo warranto (being in the nature of a writ of right) is final and conclusive, even against the crown." "And such substantially," said Lewis, P., in *Shumate v. Fauquier County*, 84 Va., 574, "is the effect of a judgment in the more modern proceeding by information in the nature of a quo warranto." In *McClesky v. State*, 4 Tex. Civ. App., 322, 23 S. W. Rep., 518, which was a proceeding by information in the nature of a quo warranto to dissolve the incorporation of a town, it was held that a former judgment in favor of the respondents in a similar proceeding was, under the doctrine of *res adjudicata*, binding and conclusive on the state. *People v. Holladay*, 93 Cal., 241, 27 Am. St. Rep., 186, was an action by the state, on the relation of the attorney general, to abate an alleged nuisance caused by the erection of fences and construction of buildings upon Lafayette Park in the city of San Francisco. It had been previously determined in an action between Holladay and the city and county of San Francisco that the property in question was not public ground, and the determination was held to be conclusive upon the state, it having been represented in the first cause by the municipality, which was a public agent acting within the scope of its authority. In delivering the judgment of the court De Haven, J., said, p. 248: "The city and county

of San Francisco is a municipal corporation created by the legislature of the state, and has conferred upon it by the state full power and jurisdiction over the public squares within its territorial limits, with the right to sue and be sued, and this necessarily includes the authority to maintain and defend all actions relating to its right to subject to the public use such squares or land claimed by it to have been dedicated for such purposes; and in any action brought by it for the purpose of vindicating and protecting the public rights in such squares, or land claimed as such, the state would be bound by the result, because in such action the city and county would in fact represent the people of the state by virtue of the authority given it to maintain such actions for the purpose of preserving the public rights of which it is the trustee." And further along in the opinion this language is used: "The rule that the citizens shall not be twice vexed for the same cause of action is as binding upon the state as upon other litigants; and the legislature, in conferring upon the city power to maintain and defend in the courts the rights of the state to streets and squares within its limits, must be presumed to have done so with reference to this well known maxim, and to have intended that the state should be bound by the result of such litigation." This decision is a direct authority against the contention of counsel for the interveners, for it is a case in which the state went into court to enforce its laws and vindicate the rights of the public to use and enjoy what was claimed to be a public park. To the same effect is *People v. Smith*, 93 Cal., 490, which was an action to abate a nuisance upon land alleged to be a public street. The controversy, of course, pertained to the sovereignty of the state, but the state was, nevertheless, held to be affected by the doctrine of *res adjudicata*. The principles which controlled the California decisions are precisely the same as those which governed the decision in the case of *Holsworth v. O'Chander*, 49 Nebr., 42. The last named case is really decisive of the question which

we are now considering. The essence of the decision is that a judgment against a public officer in regard to a public right is, under certain circumstances, binding upon the public; and that such officer is in privity with his predecessor. We reproduce here a portion of the opinion: "We can not upon this record doubt that the judgment here pleaded would have been a complete bar to a subsequent proceeding by Barnes, the plaintiff's predecessor, in his official capacity to restrain the further interference by defendant's grantor with the alleged highway. The acts charged as the basis of the former action, and the interposition therein by the overseer named of his official character in justification was but the assertion, in behalf of the public, of a public right, by its accredited representative, acting within the scope of his authority. It was, in legal effect, an act of the public, not as a body corporate it is true, but according to its more comprehensive definition, which includes the people or community at large, without regard to the territorial limits of any town or county. The public is, in that enlarged sense of the term, a distinct legal entity, capable of acquiring rights by adverse use, and it may in turn lose such rights by nonuser. It was in that sense privy to the claim asserted in its behalf, and is accordingly concluded by the adverse result." The overseer of highways, against whom the first judgment was rendered, represented the state; he was acting in his official capacity and within the scope of his authority; and the judgment was binding upon his successor who, in relation to the matter in dispute, was exercising a portion of the sovereign power. The second overseer derived his powers from the state; he did not derive them from his predecessor; and he was bound and his authority limited only because the state was bound and its authority limited by the first judgment in favor of O'Chander. Quite like the case of *Holsworth v. O'Chander* is the recent case of *O'Connell v. Chicago T. T. R. Co.*, 184 Ill., 308, 56 N. E. Rep., 355, in which it was held that a judgment against a public corporation binds

the public. In the case of *State v. Moores, supra*, it was decided that the state, acting through its governor, could not appoint fire and police commissioners for Omaha. That judgment is conclusive upon the state and, as a matter of course, is binding upon the governor and those claiming through or under him.

One other matter calls for a passing notice. The original brief of counsel for respondents conveyed quite plainly his apprehension that political considerations might be a factor in the decision of the case. No judge conscious of his own integrity will listen to such suggestion. No self-respecting court will tolerate an argument which proceeds on the assumption that the goad and spur are necessary to compel it to discharge honestly its constitutional duty. We know, as well as counsel, that the supreme and inexorable obligation of a court to truly interpret the will of the lawgiver has no possible relation to questions of party expediency. It is surely not necessary to instruct us as to that. We believe thoroughly in the rectitude of our own intentions; we feel sure of the inflexibility of our purpose to administer justice uninfluenced by considerations of party advantage; and we will not permit counsel to deal with us on the theory that we may perhaps be contemplating a betrayal of our trust. Whatever may be the effect of our decisions upon party interests, we shall still resolutely endeavor to act in obedience to the maxim, *Fiat justitia ruat cœlum*, and it will not be necessary for counsel to point out that it is the duty of the court to do its duty. The offensive brief has been stricken from the files. *Kelley v. Boettcher*, 27 C. C. A., 177, 82 Fed. Rep., 794. The application for a judgment of ouster against the respondents is denied.

JUDGMENT ACCORDINGLY.

Upon the point last discussed HOLCOMB, J., concurs; upon the other questions considered he expresses no opinion.

NORVAL, C. J., concurring.

I adhere to the conclusion reached by the majority of the court in *State v. Moores*, 55 Nebr., 480. In my view that decision rests upon sound legal principles, and that the arguments of the majority opinion have never been successfully answered, and are believed to be unanswerable. Believing as I do, that the act under which the governor's appointees were named is violative of the constitution, the respondents should not be deprived of their offices. The writ should also be denied on the ground that the judgment in *State v. Moores, supra*, is conclusive against the parties to this record.

GEORGE BALTES, APPELLANT, V. FARMERS IRRIGATION DISTRICT ET AL., APPELLEES.

FILED JUNE 7, 1900. No. 11,385.

1. **Irrigation Districts:** BONDS. Section 2, chapter 78, Session Laws of 1899, authorizing irrigation districts, under certain circumstances, to use their bonds, instead of the proceeds thereof, in acquiring or constructing irrigation ditches or canals, is a valid enactment.

2. ———: LEGISLATURE: SALE: RATIFICATION. The legislature may ratify or validate a sale or exchange of district irrigation bonds which was not authorized at the time such sale or exchange was made; and it may provide a method of disposing of such bonds different from the one existing at the time they were voted.

3. **Election:** NOTICE: CLOSING POLLS. Where it affirmatively appears that an election was fairly conducted; that it was held on the day and within the hours fixed by law; that due notice was given and that a majority of the electors entitled to vote voted in favor of the proposition submitted, the failure to keep the polls open for the entire time required by the statute will be deemed a harmless irregularity.

4. **Officers:** CONTINUING DUTY. Where the officers of a *quasi*-public corporation are required immediately to perform a certain act for the benefit of the corporation, the duty will, ordinarily, be regarded as a continuing one.

5. **Issuing Bonds:** DUTY OF OFFICERS. A statute which directs offi-

cers of a *quasi*-public corporation to immediately issue bonds which have been voted, and which also provides that they "may sell the bonds from time to time" and "before making any sale the board shall, at a meeting, by resolution declare its intention to sell a specified amount of the bonds," imposes upon such officers a duty which continues until such provision is complied with.

APPEAL from the district court of Scott's Bluff county. Heard below before GRIMES, J. *Affirmed.*

John S. Kirkpatrick, for appellant.

Wright & Stout and *F. A. Wright*, *contra.*

SULLIVAN, J.

This action was instituted by George Baltes to prevent the Farmers Irrigation District from exchanging its bonds at their par value for an irrigation system partially completed, and for the labor and material necessary to carry the unfinished work to completion. The district was formed under the act of 1895, for the purpose of purchasing the partly constructed irrigation works of the Farmers Canal Company, and completing the same. The bonds in question were voted in 1897. They have been offered for sale and remain unsold for want of bidders. The principal contention of the plaintiff is that they can not be exchanged, because the law, as it stood at the time they were voted, authorized the district to dispose of them by sale, and not otherwise. Comprehension of the question thus raised, and of the other questions considered, will be aided by bringing into view the several provisions of the statute relating to the authority of irrigation districts to issue bonds.

Section 10, chapter 70, Session Laws of 1895, declares that the board of directors shall have the right "to acquire by purchase any irrigation works, ditches, canals or reservoirs already constructed or partially constructed for the use of said district. In case of purchase the bonds of the district hereinafter provided for may be used at

their par value in payment." Section 13 of the same chapter is, in part, as follows: "For the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of this act, the board of directors of any such district must, as soon after such district has been organized as may be practicable, estimate and determine the amount of money necessary to be raised, and shall immediately thereupon call a special election, at which shall be submitted to the electors of such district possessing the qualifications prescribed by this act, the question of whether or not the bonds of said district shall be issued and the amount so determined; *Provided* such bonds shall not be issued for more than the actual estimated cost of said ditches. Notice of such election must be given by posting in three public places in each election precinct in said district for at least twenty days, and also by publication of such notice in some newspaper published in the county where the office of the board of directors of such district is required to be kept, once a week for at least three successive weeks. Such notice must specify the time of holding the election, the amount of bonds proposed to be issued, and said election must be held, and the result thereof determined and declared in all respects as nearly as practicable in conformity with the provisions of this act governing the election of officers; *Provided*, that no informalities in conducting such an election shall invalidate the same if the election shall have been otherwise fairly conducted. At such an election the ballots shall contain the words 'Bonds—Yes,' or 'Bonds—No,' or words equivalent thereto. If a majority of the votes cast are 'Bonds—Yes,' the board of directors shall immediately cause bonds in said amount to be issued." Section 14 is as follows: "The board may sell said bonds from time to time in such quantities as may be necessary and most advantageous to raise the money for the construction of said canals and works, the acquisition of said property

and rights, and otherwise to fully carry out the object and purposes of this act. Before making any sale the board shall at a meeting, by resolution declare its intention to sell a specified amount of the bonds and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes, and notice of the sale to be given by publication thereof at least twenty days in a daily newspaper published in each of the cities of Omaha and Lincoln and in any other newspaper, at their discretion. The notice shall state that sealed proposals will be received by the board at their office, for the purchase of the bonds till the day and hour named in the resolution. At the time appointed the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder and may reject all bids; but said board shall, in no event, sell any of said bonds for less than ninety-five per cent of the face value thereof." Section 24 originally declared: "The cost and expense of purchasing and acquiring property and constructing the works and improvements herein provided for shall be wholly paid out of the construction fund." In 1899 this section, so far as it is material to the present inquiry, was amended so as to read: "The cost and expense of purchasing and acquiring property and constructing the works and improvements herein provided for shall be wholly paid out of the construction fund, or in the bonds of said district at their par value, after having first advertised the same for sale as in this act provided and having received no bids therefor of ninety-five per cent or upwards of their face value." Session Laws, 1899, ch. 78, sec. 2.

It will be readily noticed, in comparing the old section with the new, that the only effect of the amendatory act is to authorize irrigation districts, under certain circumstances, to use the bonds, instead of the proceeds thereof, in acquiring or constructing irrigation ditches or canals. We do not see why this legislation is not entirely valid. When the bonds were voted, the defendant district had

power to dispose of them by sale, or by exchanging them for irrigation works wholly or partially constructed. Afterwards the legislature added authority to exchange the bonds for the labor and materials necessary to carry on the work of construction. The legislature might have authorized the district to issue bonds and sell or exchange them without a vote of the electors; and it might, undoubtedly, ratify and validate a sale or exchange which was not authorized at the time it was made. The adjudged cases upon this point are numerous and harmonious. *Belo v. Forsythe County*, 76 N. Car., 489; *State v. Mayor of Charleston*, 10 Rich. Law [S. Car.], 491; *Knapp v. Grant*, 27 Wis., 147; *Atchison v. Butcher*, 3 Kan., 104; *Thompson v. Perrine*, 103 U. S., 806; *Utter v. Franklin*, 172 U. S., 416. We do not doubt the authority of the legislature to confer new powers upon irrigation districts at any time, or to restrict or abrogate altogether some of the powers previously granted. The fundamental misconception underlying the plaintiff's argument is that the district electors are the source of power. The truth, of course, is that the legislature is the fountain of authority; and the district, in its corporate capacity, may do, not what the electors permit, but what the law sanctions.

Another ground upon which it is claimed the defendants should be enjoined from issuing the bonds is that the election was irregularly conducted, and the notice thereof insufficient. Section 13 of the act discloses that the notice must specify the time of holding the election and the amount of bonds proposed to be issued. The notice here assailed did this, and also embraced the proposition upon which the vote would be taken. It satisfied completely the requirements of the law. The polling places, according to the election notice, were to be kept open from 2 o'clock P. M. to 6 o'clock P. M. It is contended that they should have been open from 8 o'clock in the morning to 6 o'clock in the evening. Admitting for the purposes of this case that plaintiff's view of the statute is correct, we are, nevertheless, constrained

to hold that the alleged irregularity did not vitiate the election. In section 13 aforesaid it is "*Provided*, that no informalities in conducting such election shall invalidate the same if the election shall have been otherwise fairly conducted." It appears affirmatively from the record before us that the election in question was fairly conducted; and that a majority of the electors not only voted, but voted in favor of the proposition to issue bonds. This being so, the result was unaffected by the failure of the election officers to open the polls at 8 o'clock in the morning. "It is," says Judge Dillon, "a canon of election law that an election is not to be set aside for a mere informality or irregularity which can not be said in any manner to have affected the result of the election." Dillon, Municipal Corporation, par. 197, note. In *Piatt* v. *People*, 29 Ill., 54, 72, Mr. Justice Breese thus clearly states the principle which should govern courts in passing upon the validity of elections claimed to have been irregularly conducted: "The rules prescribed by the law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain with certainty the result. Such rules are directory, merely—not jurisdictional or imperative. If an irregularity, of which complaint is made, is shown to have deprived no legal voter of his right, or admitted a disqualified person to vote—if it casts no uncertainty on the result, and has not been occasioned by the agency of a party seeking to derive a benefit from it—it may well be overlooked in a case of this kind, when the only question is, which vote was the greatest." The forms which must be observed in order to render the election valid are those which affect the merits. Other cases recognizing the doctrine just stated are *De Berry v. Nicholson*, 102 N. Car., 465; *Seymour v. City of Tacoma*, 6 Wash., 427; *Cleland v. Porter*, 74 Ill., 76; *Fry v. Booth*, 19 Ohio St., 25.

A further and final objection to the issuance of the bonds is that the authority of the district board in the

premises has been extinguished by the efflux of time. This contention is based on the language of section 13 of the act of 1895, which declares that, if the proposition to issue bonds be adopted, "the board of directors shall immediately cause bonds in said amount to be issued." This provision of the statute imposed upon the officers of the district a duty to be performed for the benefit of the district. Such duty should, if possible, have been performed at once; but failure to act promptly did not release the officers from their obligation, nor nullify the action of the electors, which was in the nature of a command to their servants. The duty was a continuing one, and its performance might be coerced whenever the bonds could be disposed of in the manner prescribed by the statute. This is apparent from the provisions of section 14, which authorizes the board to "sell said bonds from time to time in such quantities as may be necessary and most advantageous to raise the money for the construction of said canals," etc., and this provision is emphasized by the further statement that "Before making any sale the board shall, at a meeting, by resolution declare its intention to sell a specified amount of the bonds and the day and hour and place of such sale."

The judgment of the district court denying plaintiff's application for an injunction is

AFFIRMED.

NEBRASKA MOLINE PLOW COMPANY, APPELLANT, V. FRED FUEHRING ET AL., APPELLEES.

FILED JUNE 7, 1900. No. 9,269

1. **Order for Money:** EQUITABLE ASSIGNMENT. An order for the payment of money which is not immediately effective does not operate as an equitable assignment.
2. **———:** RIGHTS OF GARNISHING CREDITORS. And if, before such order becomes effective, the fund against which it is directed is seized by attachment or garnishee process, the rights of the attaching or garnishing creditor are superior to those of the person holding such order.

3. Check: APPROPRIATION OF FUND. A check drawn upon a particular fund is an appropriation of so much of the fund as may be necessary to pay the check.

4. ———: IN FUTURO: VESTED RIGHT. A check directed against a fund to be afterwards created by depositing money in bank does not vest in the payee of the check any right to, or control over, such money until it has been so deposited.

APPEAL from the district court of Seward county. Heard below before BATES, J. *Reversed.*

Geo. W. Lowley and *D. C. McKillip*, for appellant.

Biggs & Thomas and *Norval Bros.*, *contra.*

D. C. McKillip, for Pitkin & Co., appellees.

SULLIVAN, J.

This is an appeal from a judgment of the district court of Seward county. The controversy is between the Nebraska Moline Plow Company, claiming an attachment lien on a fund in the hands of Norval Bros., and the S. K. Martin Lumber Company, claiming to be the equitable assignee and owner of the same fund. The only facts essential to a clear understanding of the question decided are these: On March 9, 1894, the appellant sued Fred Fuehring to recover money due on a contract, and at the same time garnished Norval Bros., who had in their hands, as Fuehring's agents, $2,990 of Fuehring's money. On the day the action was commenced, and a short time before the process in garnishment was served, the lumber company, through its agent, W. H. De Bolt, obtained from Fuehring the check and order here set out:

"GOEHNER, NEB., March 9th, 1894.

"*Mr. B. Norval*, DEAR SIR:—Please deposit the money at the State Bank for open account.

"Yours truly, FRED FUEHRING.

"I give Mr. De Bolt one check for $2,000.00 and see that he get his pay."

"SEWARD, NEBRASKA, March 9th, 1894. No. —

"The State Bank of Nebraska:

"Pay to S. K. Martin Lbr. Co. or bearer, $2,000.00 two thousand dollars. FRED FUEHRING."

The trial court found that the execution of these papers constituted an equitable assignment of $2,000 of the fund in the hands of Norval Bros., and accordingly gave judgment in favor of the S. K. Martin Lumber Company, it having, by intervention, become a party to the action between the plow company and Fuehring.

There is a vast amount of evidence in the record, and much discussion of it in the briefs, but we think the only question for decision arises upon the foregoing statement. If the order and check were immediately effective; if they operated at once to vest the intervener with an equitable property in $2,000 of the money in the hands of the garnishees, then, of course, that part of the fund did not belong to Fuehring, and was not subject to seizure on process against him. It is conceded that a check drawn on a particular fund is an appropriation of so much of the fund as may be necessary to pay the check. *Fonner v. Smith*, 31 Nebr., 107. But the contention of counsel for appellant is that there was, in this case, no evidence of an intention to make a transfer that would pass, irrevocably and at once, the ownership of any part of the fund then in the hands of Fuehring's agents. This view of the matter impresses us as being altogether sound. In *Christmas v. Russell*, 81 U. S., 69, 84, the court, speaking through Mr. Justice Swayne upon the subject of what constitutes a present appropriation, said: "An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fundholder can safely pay, and is compellable to do so, though forbidden by the assignor." It seems plain that there was in this case no appropriation of the money,

or any part of the money, in the hands of the garnishees. They were not directed to pay the intervener, but to deposit the money in the bank. The order was not irrevocable; it might have been countermanded; and, in fact, it was revoked; it was a mere direction by a principal to his agent, and, therefore, subject to recall. Suppose Norval Bros. had paid the money to the bank notwithstanding the revocation of the order; upon what ground could they have successfully defended a suit by Fuehring for conversion? The money in the custody of the agents was not designed to go immediately to the intervener; it was first to go to the credit of Fuehring in the bank; it was to reach the bank through the instrumentalities employed by Fuehring for that purpose. His command to his agents was, we think, in substance a promise by himself, and did not divest him of dominion over the fund. We think the case is within the doctrine of *Fairbanks v. Welshans*, 55 Nebr., 362, in which it is held: "An agreement of a debtor to pay his creditor's claim out of the moneys of a particular fund, but which gives the creditor no present right in or control over such fund or any part thereof, does not operate as an equitable assignment of any part of such fund to the creditor."

Another view of the matter leads to the same conclusion. The check was directed against a fund in the bank. That fund was to be created by depositing in Fuehring's "open account" the money in the hands of the garnishees. In that account there was already at least $152.36; how much more does not appear. Manifestly, then, the check was not intended to be an assignment of a part of the fund held by Norval Bros., but the assignment of a different fund—a fund to be created by commingling the money in the bank at the time the check was issued with the money to be afterwards deposited in pursuance of the order. On the undisputed evidence we are of opinion that the intervener has failed to establish its title. The judgment is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

FREDERICK HIER V. ANHEUSER-BUSCH BREWING ASSOCIATION.

FILED JUNE 7, 1900. No. 11,323.

1. **Reversal of Judgment:** RESTITUTION. Upon the reversal of a judgment which has been executed it is the duty of the court to compel restitution.

2. **Action to Recover:** SET-OFF. In an action to recover back money obtained by executing a judgment, which was afterwards reversed, the defense of set-off is not available.

ERROR to the district court for Saline county. Tried below before HASTINGS, J. *Reversed.*

F. I. Foss and *B. V. Kohout*, for plaintiff in error.

E. S. Abbott, contra.

SULLIVAN, J.

This proceeding in error is brought to reverse a judgment recovered by the Anheuser-Busch Brewing Association against Frederick Hier in the district court of Saline county. The case is the outgrowth of other litigation, the history of which will be found in *Anheuser-Busch Brewing Association v. Hier*, 52 Nebr., 424, 55 Nebr., 557. The claim which accrued to Bennett Hier by reason of the association having executed its judgment against him, and having failed to make restitution when the judgment was reversed, has been assigned to Frederick Hier, who instituted the present action for its enforcement. The trial court, by a general finding, decided the issues of fact in favor of the defendant, and set off its judgment against the plaintiff's claim on the theory that the two demands should be deemed compensated and reciprocally extinguished to the extent that they equaled each other. We are of opinion that the asserted right of set-off should have been denied. Upon every material point the findings of fact are supported by sufficient evidence, and must, therefore, be permitted to stand. Nevertheless, the judgment should have been in favor of the

plaintiff instead of against him. While plaintiff has not distinctly characterized his cause of action, it would seem to be necessarily founded on contract. The execution of the decree against Bennett Hier was a lawful act, and no subsequent event could change its nature and make it wrongful. *Field v. Anderson,* 103 Ill., 403; *Zimmerman v. Winterset Nat. Bank,* 56 Ia., 133. The defendant having without any positively tortious act, obtained money which, in equity and good conscience, belonged to Bennett Hier, the law conclusively presumes a promise to make restitution. This constructive promise, springing from a legal duty, is the basis of plaintiff's claim; and hence, under ordinary circumstances, there could be no doubt about defendant's right to plead a set-off. But, upon general principles, it seems to us the law of set-off is not applicable to cases of this kind. The statutory provisions on the subject of set-off, and the equitable doctrine of compensation, were designed to effect, in one action, an adjustment of certain co-existing cross-demands. They were not intended to take away or restrict the power of the court to enforce restitution. Bennett Hier was deprived of his money by an erroneous judgment of the district court. When that judgment was reversed, justice required that the wrong done by the court's mistake should be righted. The court, without authority and in violation of law, took the money of one litigant and gave it to the other; and it can not now, with any show of judicial propriety or decency, permit a suit for restitution to result in a ratification of its own wrong. When a party applies to a court for restitution of what he has lost by an erroneous decision, his rights must, it would seem, be determined by the same principles whether the application be by motion or by petition. The requirements of justice must, of course, be the same in the one case as in the other. Our attention has not been called to any case in which it is held that a court will aid a suitor in holding on to an advantage gained through its own misconstruction of the law; and we suppose no

such case can be found in the books. The supreme court of North Carolina, having occasion to consider this question in *Perry v. Tupper*, 71 N. Car., 385, 387, used the following language: "The defendant having been put out of possession by an abuse of the process of the law, the law must be just to itself, as well as to the defendant, by restoring him to that of which he was wrongfully deprived. When the defendant is restored to the possession, then, and not until then, will the court be in condition in which it can honorably to itself pass upon the further rights of the parties." And again, in *Lytle v. Lytle*, 94 N. Car., 522, 525, the court said: "It is well settled, that where a party is put out of the possession of land, in pursuance of a judgment or order improvidently granted, and the judgment is afterwards declared void or set aside, the court will promptly, as far as practicable, restore the party complaining to the possession of the land. The law forbids injustice, and it will not allow its process to work injury to a party against whom it goes by improvidence, mistake or abuse. It will always restore such party promptly, and place him as nearly as may be in the same plight and condition as he was before the process issued."

Our conclusion is that the right to plead a set-off did not exist, and that the judgment should, therefore, be reversed.

REVERSED AND REMANDED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. JOHN V. FARWELL, JR.

FILED JUNE 7, 1900. NO. 10,962.

1. **Locus in Quo**: EVIDENCE. The jury may take into account the result of their observations at the *locus in quo* and make it, in connection with the other evidence, the basis of their verdict.

2. ———: INSTRUCTION TO DISREGARD. An instruction by which the court directs the jury to disregard evidence obtained by a view of the *locus in quo* is erroneous.

ERROR to the district court for Lancaster county. Tried below before TUTTLE, J. *Reversed.*

W. F. Evans, and *Billingsley & Greene,* for plaintiff in error:

The view is evidence. *Carroll v. State,* 5 Nebr., 35; *Omaha & R. V. R. Co. v. Walker,* 17 Nebr., 432.

Market value of real estate is defined as the price that it will command when the purchaser is willing to buy and the owner to sell. The measure of damages, and the subject of inquiry, in a condemnation proceeding is the "market value" of land. *Chicago, R. I. & P. R. Co. v. Buel,* 56 Nebr., 205; *Chicago, B. & Q. R. Co. v. O'Connor,* 42 Nebr., 90; *Blakeley v Chicago, K. & N. R. Co.,* 25 Nebr., 207; *Chicago, K. & N. R. Co. v. Wiebe,* 25 Nebr., 542; *Omaha S. R. Co. v. Todd,* 39 Nebr., 818; *Fremont, E. & M. V. R. Co. v. Bates,* 40 Nebr., 381.

Tibbets Bros., Morey & Anderson, contra:

The ninth instruction of the court, as to the object of the jury's view of the premises, correctly lays down the law. Abbott, Trial Brief, 73; *Wright v. Carpenter,* 49 Cal., 607.

Even though market value be the test of damages, testimony as to value other than market value is admissible. *Davis v Northwestern E. R. Co.,* 170 Ill., 595, 48 N. E. Rep., 1058.

The compensation for land taken through the exercise of eminent domain is not necessarily restricted to the market value.

Market value is an indefinite term. "Actual value," "intrinsic value" and "market value" are terms that have been discussed by political economists, and conclusions reached are very wide apart.

SULLIVAN, J.

There was recently filed in this case an opinion holding that the information acquired by a jury in viewing the property which is the subject of litigation, or the place where any material fact occurred, is itself evidence and not merely a means by which to estimate the probative value of evidence produced in the presence of the court. *Chicago, R. I. & P. R. Co. v. Farwell*, 59 Nebr., 544. Instructed by the oral argument and excellent brief of counsel for defendant in error, we have again carefully examined the grounds of our decision, without being able to reach a conclusion different from the one already announced. Upon the question in controversy judicial opinion is divided, the greater number of adjudged cases supporting the theory that the impressions gathered by the jury in making an inspection are not evidence. This court is, we think, committed by *Carroll v. State*, 5 Nebr., 31, and *Omaha & R. V. R. Co. v. Walker*, 17 Nebr., 432, to the doctrine that the jury may take into account the result of their observations at the *locus in quo* and make it, in connection with the other evidence, the basis of their verdict. This is the rational rule; by its adoption a fact is recognized and a fiction abolished. In whatever capacity men act they will not reject the evidence of their own senses; and it is futile and almost foolish to direct them to do so. The human mind has its limitations; and neither faith in human testimony nor cautionary instructions from the presiding judge will make jurors accept as true what their own senses assure them is false. This is so plain a fact that courts have little excuse for feigning ignorance of it. Discussing this question a learned author says: "It may well be questioned whether a direction to a jury that the view is simply for the purpose of enabling them to understand and apply the testimony is of any practical value, since it is hardly probable that a jury, upon any such theoretical distinction, will ignore the facts of which they have gained personal knowledge,

or merely apply those facts to the testimony recited in court." 2 Jones, Evidence, sec. 411. The following cases which we have consulted hold that a view is substantive evidence: *Kansas City & S. W. R. Co. v. Baird*, 41 Kan., 69; *City of Topeka v. Martineau*, 42 Kan., 387; *Tully v. Fitchburg R. Co.*, 134 Mass., 499; *Smith v. Morse*, 148 Mass., 407; *Foster v. State*, 70 Miss., 755; *Rutherford v. Commonwealth*, 78 Ky., 639; *People v. Bush*, 68 Cal., 623; *Springer v. City of Chicago*, 135 Ill., 552; *Peoria Gas Light & Coke Co. v. Peoria Terminal R. Co.*, 146 Ill., 372. In the case last cited, which was a condemnation proceeding, the court said, p. 382: "It has been frequently held by this court that the results of the personal view of the premises by the jury in condemnation cases are in the nature of evidence, and may be taken into consideration by them in passing upon the testimony of the witnesses; and that where the evidence is conflicting, they may be resorted to by the jury as bearing upon the weight to be given to the variant and conflicting estimates given by the various witnesses, so that, if the verdict of the jury is supported by the evidence, it will not be disturbed simply because it is contrary to what appears to be the preponderance of the testimony." It is suggested that cases such as the one from which the foregoing excerpt is taken are not authority for the proposition that a view is evidence, because in that class of actions the right of either party to have the jury inspect the property is an absolute right. We are not able to see any reason for making a distinction between the effect of a view which, during the trial, is a demandable right of the litigants and a view which is had under an order of the court made in the exercise of its discretionary power. It would seem, on principle, that the impressions received by the jury should bear the same relation to the testimony of the witnesses in one case as in the other. The principal objection to the doctrine that a view is to be regarded as auxiliary proof is that it impairs to some extent the value of a review by appellate proceedings. In considering this

objection Professor Jones remarks "that for hundreds of years the courts have allowed jurors to inspect real and personal property, and to base their conclusions, both upon the evidence given in court and the information obtained by their own senses." 2 Jones, Evidence, sec. 411.

It is common practice here and elsewhere to permit the jury to inspect persons and things which give mute testimony tending to establish or disprove a fact in issue. In criminal cases, and in actions to recover damages for personal injuries, wounds and lesions are frequently exhibited in court. In bastardy cases the illegitimate child has sometimes been shown to the jury. *State v. Woodruff*, 67 N. Car., 89.* In a Minnesota case the plaintiff was required to walk across the room so that the jury might see how the injury, of which he complained, affected him. *Hatfield v. St. Paul & D. R. Co.*, 33 Minn., 130. In 12 Am. & Eng. Ency. Law [1st ed.], 367, the rule upon the subject is thus stated: "It is well settled that persons and things may be produced in court for the inspection of the jury, and that articles and persons so produced form part of the evidence submitted." So it seems that the right to a review, in an appellate court, of the evidence upon which the jury have found their verdict, has never been a perfect one. Considering the extreme reluctance of courts to disturb the finding of a jury upon conflicting evidence, it must be conceded that there is no very substantial impairment of the right of review involved in the doctrine that an inspection of property is auxiliary evidence. This conclusion is not in conflict with the point actually decided in *Neal v. State*, 32 Nebr., 120, but it implies, doubtless, that the judgment in that case was wrong.

The giving of the ninth instruction was not error without prejudice. The court might, it is true, have refused

**Hutchinson v. State*, 19 Nebr., 262; *Ingram v. State*, 24 Nebr., 33, 34, 37; *Watkins v. Carlton*, 10 Leigh [Va.], 560; *State v. Smith*, 54 Ia., 104; *Warlick v. White*, 76 N. Car., 175; *Finnegan v. Dugan*, 14 Allen [Mass.], 197; *Gilmanton v. Ham*, 38 N. H., 108.—REPORTER.

to award a view of the premises; but, having exercised its discretion in that behalf, it could not, on a mistaken notion of the law, strike out or impair the value of the evidence which came to the jury by the inspection.

The judgment of reversal will stand.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. DOUGLAS COUNTY, V. ALBYN L. FRANK.

FILED JUNE 7, 1900. No. 11,384.

1. **Enactment of a Law**: EVIDENCE: ENROLLMENT: AUTHENTICATION: APPROVAL. The enrollment, authentication and approval of an act of the legislature are *prima facie* evidence of its due enactment.

2. ———: ———: JOURNALS. The legislative journals may be looked into for the purpose of ascertaining whether a law was properly enacted.

3. ———: ———: SILENCE OF JOURNAL. The silence of the legislative journals is not conclusive evidence of the non-existence of a fact, which ought to be recorded therein, regarding the enactment of a law.

4. ———: ———: DEFECT: MUTILATION. When the legislative journals are defective, mutilated or incomplete, their silence will not, as against the enrolled bill on file in the office of the secretary of state, be taken as evidence that the yeas and nays on the final passage of the bill were not recorded as required by the constitution.

5. ———: EVIDENCE ALIUNDE. In such case, it may be shown by extrinsic evidence that on the final passage of a bill the yeas and nays were taken and duly recorded.

6. **Constitutional Law**: GENERAL LAW: LOCAL EFFECT. A law, general in character, although affecting but one city or county, is not violative of the provision of the constitution against special legislation.

7. **Fees**: STATUTE: AMENDMENT. The act of 1899 (Session Laws, ch. 31), amending section 3, chapter 28, Compiled Statutes, 1897, entitled "Fees," does not amend or change section 1 of said chapter.

8. **Deputies**: STATUTE: AMENDMENT. Nor does such amendatory act trench upon or amend section 43, chapter 19, Compiled Statutes, 1899, respecting the appointment of deputies by clerks of the district court.

9. **Clerk**: COMPENSATION: STATUTE: CONSTITUTION. The act of 1899 (Session Laws, ch. 31), amending section 3, chapter 28, Compiled Statutes, 1897, entitled "Fees," limiting the compensation which the clerk of the district court may receive for his services, is germane to the section amended, and its provisions are within its title.

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

George W. Shields, for plaintiff in error:

Courts will not declare an act unconstitutional, unless it appears to be so beyond a reasonable doubt. *Pleuler v. State*, 11 Nebr., 547.

But is it essential that there should be affirmative proof that the house journal ever did contain a record of concurrence? *Hull v. Miller*, 4 Nebr., 505; *State v. Moore*, 37 Nebr., 13; *State v. Liedtke*, 9 Nebr., 490.

As to special legislation: *State v. Stuht*, 52 Nebr., 209; *County of Douglas v. Timme*, 32 Nebr., 272.

The next point made by the respondent in the court below is that the law in question amends section 1 of chapter 28, and also amends section 43 of chapter 19, both of the Compiled Statutes of 1897; and, because the bill (House Roll 251) did not contain these two sections as amended, nor repeal them, it is inimical to that part of section 11, article 3, of the constitution, providing that "no law shall be amended, unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." I shall not claim that the bill is valid if it can be said that it amended either of the sections last above referred to, but I insist that it does not amend nor attempt to amend either of those sections. This court has said in deciding many cases that the object of the constitutional provision last

above referred to was to give certainty to the law by removing all apparently conflicting provisions. *State v. Wish*, 15 Nebr., 448; *State v. City of Kearney*, 49 Nebr., 325; *State v. Babcock*, 23 Nebr., 128; *Fenton v. Yule*, 27 Nebr., 758.

The bill is not broader than its title. *State v. Lancaster County*, 6 Nebr., 485; *Boggs v. Washington County*, 10 Nebr., 297; *Bonorden v. Kriz*, 13 Nebr., 121; *Herold v. State*, 21 Nebr., 50; *Perry v. Gross*, 25 Nebr., 826; *Poffenbarger v. Smith*, 27 Nebr., 788; *Stoppert v. Nierle*, 45 Nebr., 105; *Affholder v. State*, 51 Nebr., 91; *State v. Cornell*, 54 Nebr., 72.

Ed P. Smith and *Greene & Breckenridge, contra:*

Was House Roll No. 251 passed by the legislature in the manner and form required by the constitution? Constitution, art. 3, sec. 10; Cooley, Constitutional Limitations [5th ed.], p. 169; *Ryan v. Lynch*, 68 Ill., 160; *Steckert v. East Saginaw*, 22 Mich., 104; *People v. Commissioners*, 54 N. Y., 276; *Cohn v. Kingsley*, 38 L. R. A., 74; *Oakland Paving Co. v. Hilton*, 69 Cal., 479; *Koehler v. Hill*, 60 Ia., 543; *Hunt v. State*, 22 Tex. App., 396; *State v. Buckley*, 54 Ala., 599; *Town of South Ottawa v. Perkins*, 94 U. S., 260; *Post v. Supervisors*, 105 U. S., 667; *People v. Mahaney*, 13 Mich., 481; *Rode v. Phelps*, 80 Mich., 598; *Moody v. State*, 48 Ala., 115.

The enrolled bill can be impeached by the house and senate journals, and can not be impeached by anything else. Such is the rule laid down with emphasis in the cases of *In re Granger*, 56 Nebr., 260; *State v. Abbott*, 59 Nebr., 106; *Webster v. City of Hastings*, 59 Nebr., 563.

If the requirements of the constitution with respect to the enactment and passage of bills were observed in the case of House Roll 251, it is inherently unconstitutional and void. House Roll No. 251 is special legislation. Section 15 of article 3 of the constitution prohibits the "creating, increasing and decreasing fees, percentage or allowances of public officers during the term for

which said officers are elected or appointed." Section 16 provides: "Nor shall the compensation of any public officer be increased or diminished during his term of office." It is held in *County of Douglas v. Timme*, 32 Nebr., 272, that the provision quoted from section 16 "applies alone to those officers whose offices were created by the constitution." The office of the clerk of the district court is not created by the constitution, and if the construction given section 16 is followed, then section 15 applies to offices created by the legislature; and it is insisted that, so far as this respondent is concerned, this act is as absolutely a special law as though Albyn L. Frank had been named therein, because the legislature will be credited with knowing, not much it is true, but at least that there was but one county in the state of Nebraska having more than one hundred thousand inhabitants.

The additions in House Roll No. 251, to section 3 of chapter 28 of the Compiled Statutes of 1897, are not germane to the section amended. House Roll No. 251 is amendatory of other sections besides section 3 of chapter 28, not contained or referred to therein. *Trumble v. Trumble*, 37 Nebr., 340.

SULLIVAN, J.

This proceeding in error brings before us for review a judgment of the district court denying the application of the relator for a writ of mandamus requiring the respondent, Albyn L. Frank, as clerk of the district court for Douglas county, to make a report, under oath, of the fees received by him as such clerk during the quarter ending on the first Tuesday of January, 1900. The question for decision is the validity of an act of the last legislature amending section 3 of chapter 28, Compiled Statutes of 1897. The original act on the subject of fees was adopted in 1865 under the title "An act to regulate the salaries and fees of certain officers in the territory of Nebraska." The first section declared then, as it declares now, that "The salaries and fees of the several

officers hereinafter named shall be as follows." Originally the third section did nothing more than fix the charges and compensation of the clerk of the district court for official services. But in 1899 there was grafted upon this section the following amendment: "If the fees of said clerk shall exceed sixteen hundred ($1600) dollars per annum in counties having less than twenty-five thousand inhabitants or if the fees shall exceed three thousand ($3,000) dollars per annum in counties having more than twenty-five thousand inhabitants and less than fifty thousand inhabitants, or if the fees shall exceed thirty-five hundred ($3500) dollars per annum, in counties having more than fifty thousand inhabitants and less than one hundred thousand inhabitants, or if the fees shall exceed five thousand ($5,000) dollars per annum in counties having more than one hundred thousand inhabitants, said clerk shall pay such excess into the treasury of the county in which he holds his office. Provided also that the clerk of the district court of each county shall on the first Tuesday of January, April, July, and October of each year make a report to the board of county commissioners under oath showing the different items of fees received, from whom, at what time, and for what service, and the total amount of fees received by such officer since the last report, and also the amount received for the current year. Provided further that if the county board of commissioners think necessary, said clerk may be allowed one deputy at a compensation not to exceed one half that allowed his principal; and such other assistants at such a compensation and for such time as aforesaid board may allow, and that none of said clerks, deputies or assistants shall receive any other compensation than that accruing to their office." Counsel for respondent concede that their client is within the provisions of the foregoing amendment, and that he must, if the act is valid, render to the county board of Douglas county a sworn statement of the fees which he received during the last quarter of 1899. It is, however, insisted

with great earnestness and confidence that the act is of no validity because, in its adoption, the legislature disregarded certain mandatory provisions of the organic law.

The first two objections to the statute may be considered together. They are (1) that the journal of the house of representatives does not show the concurrence of that body in a certain senate amendment which became a part of the enrolled bill; and (2) that upon the final passage of the bill in the house the yeas and nays were not entered upon the journal, as required by section 10, article 3, of the constitution. There is some contrariety of judicial opinion touching the power of the courts to annul a statute for a failure on the part of the legislature to evidence its proceedings in the manner prescribed by the constitution; and the adjudged cases are almost evenly divided as to what constitutes the best evidence of the statutory law. Some courts, among them the supreme court of the United States, hold that the enrolled bill on file in the office of the secretary of state, bearing the certificate of the presiding officers of the two branches of the legislature and the approval of the governor, imports absolute verity and precludes any inquiry into the procedure by which it was adopted. *Field v. Clark*, 143 U. S., 649; *Standard Underground Cable Co. v. Attorney General*, 46 N. J. Eq., 270; *Sherman v. Story*, 30 Cal., 253, 256; *Weeks v. Smith*, 81 Me., 538; *Ex parte Wren*, 63 Miss., 512; *State v. Glenn*, 18 Nev., 34; *People v. Marlborough Commissioners*, 54 N. Y., 276; *Williams v. Taylor*, 83 Tex., 667. The rule in other jurisdictions is that the enrollment, authentication and approval of a bill, found in the proper repository, are only *prima facie* evidence of its due enactment; and that the legislative journals, if properly kept, contain the authentic history of the measure. *Henderson v. State*, 94 Ala., 95; *People v. Loewenthal*, 93 Ill., 191; *State v. Francis*, 26 Kan., 724; *People v. Mahaney*, 13 Mich., 481; *Osburn v. Staley*, 5 W. Va., 85; *Meracle v. Down*, 64 Wis., 323; *State v. Platt*, 2 S. Car., 150. While there is much reason for holding that a knowledge of the

legislative journals should not be essential to a knowledge of the written law, this court is now too firmly committed to the doctrine of the cases last cited to justify us in accepting the certificates of the legislature as conclusive evidence that it has performed its constitutional duty. *State v. McLelland,* 18 Nebr., 236; *State v. Robinson,* 20 Nebr., 96; *State v. Moore,* 37 Nebr., 13; *In re Granger,* 56 Nebr., 260; *Webster v. City of Hastings,* 56 Nebr., 669; *State v. Abbott,* 59 Nebr., 106; *Webster v. City of Hastings,* 59 Nebr., 563. These cases hold that the records of the lawmaking body may be looked into for the purpose of ascertaining whether a statute has been constitutionally enacted; but they do not decide, or give countenance to the claim, that the silence of the journals, or either of them, is conclusive evidence of the nonexistence of any fact which ought to be recorded therein. What they decide is that the journals are unimpeachable evidence of what they contain; not that their silence convicts the legislature of having violated the constitution. Every presumption is in favor of the regularity of legislative proceedings; and it is rather to be inferred that the journals are imperfect records of what was done than that the legislature failed to perform the more solemn and important duties enjoined upon it by the constitution. In *Ex parte Howard-Harrison Iron Co.,* 119 Ala., 484, 491, 24 So. Rep., 516, cited in *State v. Abbott, supra,* it is said: "Of course the presumption is that the bill signed by the presiding officers of the two houses and approved by the governor is the bill which the two houses concurred in passing, and the contrary must be made to affirmatively appear before a different conclusion can be justified or supported. So here, it must be made to affirmatively appear that amendments of the house bill in question were adopted by the senate and were not concurred in by the house." The enrolled bill has its own credentials; it bears about it legal evidence that it is a valid law; and this evidence is so cogent and convincing that it can not be overthrown by the production of a leg-

islative journal that does not speak, but is silent. Such seems to be the conclusion reached by a majority of the courts; and such, certainly, is the trend of modern authority. To hold otherwise would be to permit a mute witness to prevail over evidence which is not only positive, but of so satisfactory a character that all English and most American courts regard it as ultimate and indisputable. But it is argued that whatever may be the effect of a failure to record the ordinary proceedings of the legislature, the vote of either house, upon the final passage of a bill, can not be supplied by presumption, because the constitution in express terms requires that the yeas and nays shall be entered upon the journal. This view of the matter is supported by a considerable number of adjudged cases, and for present purposes we will assume that it is correct. What then is the situation with which we have to deal? From the evidence given at the trial, the district court made special findings of fact. Among them is this:

"IV. The court further finds that said chapter 31 of the Session Laws of 1899, known as House Roll No. 251, originated in the house of representatives and the same was placed on its final passage in said house on March 17, 1899, and that the yeas and nays were at the time called and duly entered on the journal of said house; that said bill was then transmitted to the senate where the same was duly considered and passed with amendments thereto, on the 31st day of March, 1899."

Counsel for Frank insist that it is the duty of this court to take judicial notice of the legislative journals, and that a finding contrary to our judicial knowledge can not stand. They also contend that, since the house journal does not show the yea and nay vote upon the final passage of the bill, we are bound to declare, without further inquiry, that the constitutional requirement was not observed, and that the law is, therefore, null. In other words, respondent's position is that we must look in the office of the secretary of state for a record of the vote,

and, if we do not find it, must say that it does not exist now, and that it never did exist. We are not willing to go quite so far for the purpose of overthrowing a duly authenticated act of the legislature. The finding of the trial court is amply supported by competent evidence, and is not contradicted by any fact of which this court has cognizance. It appears clearly from the bill of exceptions that the yeas and nays were entered upon the journal at the proper time, and that a part of the journal has been since lost or abstracted. This evidence does not impeach the journal; it merely shows what the journal was; it establishes a lost record; and it was, under the circumstances, rightly received for that purpose. *State v. Mason*, 43 La. Ann., 590. It undoubtedly is, as counsel claim, our duty to take judicial notice of the legislative journals. In this case we have made a very careful examination of the journal of the house. For so important a public record, it is, we must say, strangely fashioned—wonderfully made. It consists of loose sheets of paper bound together with a frayed and fragile twine. The vote on roll call is shown by attaching with a pin, or mucilage, a printed list of the members voting yea and nay, to a piece of paper showing the question upon which the vote was taken. The sheet containing the record of the vote on House Roll 251, the bill here in question, indicates that some other paper was once fastened to it with a pin. The other paper, which, according to the evidence, showed the yea and nay vote, is gone; the pin has disappeared and counsel for respondent insist that the law has gone with it. "And these things," says Victor Hugo, in *Les Miscrables*, "took place, and the kings regained their thrones, and the master of Europe was put in a cage, and the old regime became the new, and the light and the shadow of the earth changed places, because, on the afternoon of a summer day a peasant boy said to a Prussian in a wood, 'Go this way, and not that.'" Those were momentous consequences of a trival and commonplace event; but if we were to adopt the views of

counsel for respondent, we would have in this state a condition of affairs capable of producing at any time, and likely to produce at some time, a situation which would exhibit almost as striking a disproportion between cause and effect. If counsel are right in their contention, then our most important statutes are liable to be annulled by the accidental displacement of a pin; municipal bonds may be invalidated and men may lose their property and their liberty; divorces may prove worthless and marriages may become null and children be bastardized, because some clerk, charged with the duty of journalizing legislative proceedings, has by mischance used mucilage instead of paste. The doctrine is monstrous; its acceptance is unnecessary and might prove disastrous. When the journals are defective, mutilated or incomplete, their silence should not, as against the enrolled bill, be taken as evidence that the yeas and nays were not recorded as required by the constitution. The condition of the house journal, as a record of legislative action upon House Roll 251, does not justify us in accepting it as an unimpeachable witness; and we accordingly hold that the bill was passed in strict conformity with constitutional procedure.

Another objection to the law is that, so far as it affects respondent, it is special legislation, because he is the only clerk of the district court in a county having more than one hundred thousand inhabitants. We regard this question as being settled in favor of the relator by *State v. Stuht*, 52 Nebr., 209, in which it was held that a law, general in character, although affecting but one city, is constitutional.

It is claimed that the act is unconstitutional because it amends section 1 of chapter 28 and section 43 of chapter 19, Compiled Statutes, 1899, without embracing such sections as amended and without repealing the original sections. Counsel evidently mistake somewhat the scope and purpose of the law. Section 1 of chapter 28 declared, before the adoption of the amendatory stat-

ute, that the clerk of the district court should charge and receive for his services the compensation fixed by the third section of the act. That is precisely what section 1 declares now. It has not been amended; its meaning has not been changed; the clerk may still charge and receive for his services the compensation fixed by the third section. Section 43 of chapter 19, Compiled Statutes of 1899, is as follows: "The clerk of the supreme court, and of the several districts in this state, shall have power to appoint deputies; and deputies of the district clerks shall be residents of the counties in and for which they act. Such deputies shall be sworn faithfully to perform the duties of their office, before they enter upon those duties." The amendatory act provides that the county board may, in its discretion, allow the clerk of the district court "one deputy at a compensation not to exceed one half that allowed his principal." The purpose of this provision, in our judgment, was not to limit the number of the clerk's deputies, but to authorize the county board to pay one of such deputies out of the receipts of the clerk's office. This construction is reasonable and should be adopted, so that effect may be given to the presumption that the legislature kept within its constitutional orbit. Section 43 has not been affected in any way by the new legislation; it remains as it was before House Roll 251 became a law.

One further argument against the validity of the act of 1899 is that the amendatory legislation is foreign to the subject of the section amended. The original section determined the compensation of the clerk; it gave him the entire amount earned as the reward of his services. And the main idea, the dominant thought, of the amendatory act was also to fix the clerk's compensation. It had, therefore, a most intimate relationship with the primary object of the section amended. The other provisions of the act are incidental and subsidiary to the main purpose of the legislature, which was to reduce the clerk's salary and require him, under certain circumstances, to turn

over to the county a portion of the earnings of his office. The amendment was germane to the section amended, and it was clearly embraced within the title of the amendatory act.

The judgment is reversed, and the cause remanded, with direction to the district court to award the peremptory writ.

REVERSED AND REMANDED.

CONNECTICUT FIRE INSURANCE COMPANY OF HARTFORD V. EDWIN JEARY ET AL.

FILED JUNE 7, 1900. No. 9,203.

1. **Forfeiture:** POLICY OF INSURANCE. Forfeitures are looked upon by the courts with ill-favor, and will be enforced only when the strict letter of the contract requires it; and this rule applies with full force to policies of insurance.
2. ———: CONSTRUCTION. Courts will construe policies of insurance more strongly against the party by whom the contract has been drafted, and who has had the time and opportunity to select, with care and ingenuity, and with a view to its own interests, the language in which the contract is couched.
3. ———: CONDITION. Where it is conditioned in a policy of insurance "That the assured shall take an inventory of the stock hereby covered at least once a year, and shall keep books of account correctly detailing purchases and sales of said stock, and shall keep all inventories and books securely locked in a fire-proof safe, or other place secure from fire in said store, during the hours that said store is closed for business. Failure to observe the above conditions shall work a forfeiture of all claims under this policy," *held*, that such provisions should be construed conjointly, and that, to work a forfeiture of the policy, there must be a failure to perform all the conditions named, and not any particular one of them.

ERROR to the district court for Cass county. Tried below before RAMSEY, J. *Affirmed.*

Charles Offutt and *W. W. Morsman*, for plaintiff in error.

Beeson & Root and *Edwin Jeary, contra.*

HOLCOMB, J.

The plaintiff in error (defendant below) resists payment of loss under a policy of insurance issued by it covering a stock of merchandise, which was destroyed by fire during the term for which the policy was written. As presented to this court, the only question involved is the liability of the insurance company under the provisions or covenants commonly known as the "iron safe clause," which are found in a "rider" attached to the insurance policy at the time it was written and delivered to the assured. The provisions referred to are as follows: "It is expressly warranted that the assured shall take an inventory of the stock hereby covered at least once a year, and shall keep books of account correctly detailing purchases and sales of said stock, and shall keep all inventories and books securely locked in a fire-proof safe, or other place secure from fire in said store, during the hours that said store is closed for business. Failure to observe the above conditions shall work a forfeiture of all claims under this policy." It appears that a fire occurred in less than one year, and that no inventory has been taken; that books of account, although kept, were not preserved as provided by the clause quoted, and were destroyed in the same fire which burned the insured stock of goods. It will readily be noted that the defense interposed is of the most technical character, and, it may be said, has but little, if any, real and substantial merit. The failure of assured to take and preserve an inventory, and keep books of account, as provided, in a fire-proof safe or other secure place, which is relied upon to operate as a release of the company under its policy of indemnity, in nowise changes the character of the risk assumed or increases its hazard to the smallest extent. Compliance with the provisions quoted could serve no other purpose than as affording a particular means of establishing the amount of loss or damage in the event a loss should occur. It was an attempt to preserve or perpetu-

ate evidence by which the liability of the indemnitor was to be fixed should a fire occur during the life of the policy of insurance. All that can be said in its favor is that the parties undertook by this particular method to ascertain and determine the extent of a loss, if one should occur. It is not even suggested in this case that the actual loss sustained was less than the amount named in the policy. In fact, it appears that the loss far exceeded the sum for which the property was insured. It may well be doubted whether a stipulation of this kind is not an independent contract, entirely without consideration, and that its terms can not be invoked to defeat a recovery for loss under the contract of indemnity. We are, however, not disposed to enter into a discussion of this phase of the subject, and do not undertake to decide the question.

It is not claimed that there has been a failure to comply with any condition mentioned, except with regard to the manner of preserving the books of account. The defense being purely technical, a strict construction of the terms of the warranty is not only proper, but all that the defendant is entitled to ask in the adjudication of its liability upon the contract which it is sought to have forfeited. If the defendant is entitled to a forfeiture of the policy at all, it is because it is so denominated in the contract; and a strict enforcement of its terms gives to it the release contended for. It is a matter of every-day knowledge that these forfeiture clauses are prepared with much care, skill and ingenuity, and are frequently resorted to more for the purpose of avoiding, on technical grounds, contracts of indemnity entered into in the best of faith by the assured, and for which he is willing and does pay an ample consideration for the protection sought, rather than of subserving any useful purpose in determining the substantial rights of the parties, as affected by the essential elements of the risk assumed and the indemnity granted. It is with no hesitancy that the courts declare such forfeiture clauses are to be looked upon with ill-favor, and to be enforced only when the

strict letter of the contract requires it. In *Springfield Fire & Marine Ins. Co. v. McLimans*, 28 Nebr., 846, this court has held that forfeitures are not favored, and should not be enforced unless the courts are compelled to do so, and that such rule applies to insurance policies. In that case the court cites with approval *Dickenson v. State*, 20 Nebr., 72; *Estabrook v. Hughes*, 8 Nebr., 496; *Hibbeler v. Gutheart*, 12 Nebr., 526. In *Phenix Ins. Co. v. Holcombe*, 57 Nebr., 622, 623, it is said: "Forfeitures are not favored, and in contracts of insurance a construction resulting in a loss of the indemnity for which the insured has contracted will not be adopted except to give effect to the obvious intention of the parties." See, also, *Hanover Fire Ins. Co. v. Dole*, 50 N. E. Rep. [Ind.], 772, and authorities therein cited. In *Bailey v. Homestead Fire Ins. Co.*, 16 Hun [N. Y.], 503, where it is held that a clause against the property being incumbered does not invalidate the insurance by an incumbrance on a part of the property only, the judge writing the opinion says: "The defense suggested is founded on the merest technicality. The provision is inserted in a few brief words at the close of a long paragraph relating mostly to matters entirely foreign to the particular provision relied on, and not calculated to attract the attention of the insured, but to operate as a trap to enable the company to receive its premium, but in case of loss to insure a strong probability, in many cases, of being able to interpose a technical defense, which operates as a surprise upon the party who has relied upon his policy as intended to be a fair contract of indemnity. Under the circumstances of this case, therefore, the insurance company has no right to complain if its technical defense is met by a technical answer." Other authorities might be cited in further support of the above rule, but it seems unnecessary.

With reference to the covenants relied on in the case at bar to relieve the defendant, it may be said, in brief, that it is provided that the assured shall take an inven-

tory within one year, keep books of account of purchases and sales, and that the books and inventory shall be kept in a fire-proof safe, or other safe place secure from fire, in said store, during the hours the business is closed, and that if these conditions are not complied with, the policy shall be forfeited. The question then is, what action or actions of the assured, or his failure to act, will work a forfeiture of the policy of insurance under the strict terms of the clause quoted? Will a failure to comply with any one condition or all of them together be necessary in order to work a forfeiture? If an inventory is required to be taken, when must it be done to comply with the contract? If the books of account and the inventory which is to be taken at least once a year are to be kept in a fire-proof safe, or other safe place, when is the limit of time after which the non-observance of one or both will work a forfeiture of the policy? Will the failure to preserve books of account in a fire-proof safe, or other place secure from fire, in the store building alone defeat recovery, or is a failure to comply with all the conditions necessary? Doubtless these provisions are intended to provide some means for preserving that which would be evidence of the value of the goods lost or damaged by fire, if one should occur. At the time the policy was issued it is presumed that the insurance company was acquainted with the property insured and the character of the same, and wrote the insurance with reference thereto. The stock of goods, in the course of business, would change by purchases and sales; and the more definitely to determine the effect of these constantly occurring changes, the company has regarded it to its interest to fix a time, a period within which an inventory must be taken, which, with the books, of account, shall show the stock on hand at the time of its taking and the purchases and sales subsequent thereto, and which inventory and books shall be preserved in the manner specified. It would serve no good purpose to take an inventory in a day or week, or even within a month, and a

year was named as the limit of time to perform this act. The time, therefore, for taking an inventory of the stock of goods insured did not expire until a year after the policy was written, and as the loss occurred in less time, no default in this condition, or any condition dependent thereon, is shown or can rightfully be claimed. The books of account were kept as provided for in the warranty. They were not, however, preserved as therein required, and the vital question that presents itself is whether the failure to comply with this one of the different conditions imposed will defeat a recovery. It is conceded by both parties that the representations made were not concerning matters then in existence, but were of a promissory character only, and to be carried out some time in the future. We have assumed that these conditions were valid and enforceable, and a substantial compliance therewith essential to the right of recovery in case of loss of the property insured. In construing these and similar clauses in insurance policies there is much diversity of opinion among the different courts which have passed upon the subject. Counsel for appellant has called our attention to a number of cases which hold broadly and generally that such stipulations are valid, and that a full and complete compliance with their terms on the part of the assured is necessary and required before a recovery can be had. These decisions are based upon what is said to be the general and underlying principles of the right of the parties to enter into such a contract as they may desire, and the duty of the courts to enforce the contract as made. There is no attempt to construe the language used other than in a liberal and general way, and, as it occurs to us in some cases, more favorably to the insurer than the assured. In Kentucky such stipulations are held to be independent of the contract of insurance, and, therefore, void for want of consideration. *Phœnix Ins. Co. v. Angel*, 38 S. W. Rep. [Ky.*] 1067; *Mechanics*

*Has not appeared in 100 Kentucky report, its chronological place.—REPORTER.

& Traders Ins. Co. v. Floyd, 49 S. W. Rep. [Ky.], 543. Courts of other states have construed similar provisions as interdependent, holding that the one requiring books of account to be kept and preserved took effect concurrently with that requiring an inventory, and that no default in any of the conditions could exist until the expiration of the time allowed for taking the inventory. *Hanover Ins. Co. v. Dole, supra; Citizens Ins. Co. v. Sprague*, 35 N. E. Rep. [Ind.], 720.

We are of the opinion, however, that in this case more cogent reasons exist for holding that there was no breach in the conditions of the warranty sufficient to forfeit the policy at the time the loss occurred, and that the defendant's contention to the contrary must fail for the reasons hereafter assigned. It will be noted that these provisions, constituting, as we have seen, a promissory warranty, are joined together by the conjunction "and," followed by the penalty of forfeiture to the effect that "failure to observe the above conditions shall work a forfeiture of all claims under this policy." The insurance company had the power to separate the conditions imposed, making each independent of the other, the clause being of its own creation; but it has not chosen to do so. By its own language it has made a series of acts to be construed together, and a failure to perform not one but all the conditions is required to work a forfeiture of the policy. This being the case, it is not the duty of the court to give to the language used a more favorable construction to the company than the fair import of the words will warrant. The reverse of the proposition is true, and it behooves us to construe the terms imposed most strongly against the company. It is their language. It has been carefully prepared and well worded in the company's interest. They impose the conditions upon the assured, and a proper conception of the rights of both parties to the contract requires the adoption of such a rule of construction. Having in view, however, the situation of the parties and the purposes sought to be accom-

plished by the contract of insurance, can it be said from the language used that it was the intention of the parties that the policy should be forfeited by the mere failure to comply with one only of the conditions of the warranty? We think not. We are not disposed to impute to the company a desire to avoid responsibility under a fair contract by it voluntarily entered into upon a pretext so slight and with so little substantial reason therefor. It ought not to be presumed that a forfeiture of the entire policy, leaving to the assured no protection against contingencies from which consequences grave and serious in their character might flow, was contemplated by either party, except for weighty and important considerations. By a fair and reasonable construction of the contract of the parties to this action, a forfeiture was provided for, not for a failure to comply with one of the several conditions mentioned, but for all of them taken together. Had it been desired to have any other construction placed on its provisions, it would have been no difficult matter to so word the conditions of the warranty as to make a failure to comply with any one or more of them grounds for the forfeiture of the entire policy. This has not been done, and we are not disposed to give a broader or more liberal construction than the language used requires. The views herein expressed seem to be consonant with both reason and authority.

We are not entirely without light upon the subject as to the views of other courts upon what we regard as kindred questions. In a very recent case in the supreme court of Iowa, in construing a clause in a policy of insurance against incumbrances upon the property insured, it is stated in the syllabus: "A policy insuring both real and personal property provided that if 'the property should thereafter become mortgaged or incumbered,' the policy should be void, and also declared that it should be forfeited if other insurance was taken out 'on any of said property.' *Held*, That since the provision for forfeiture for mortgaging did not provide a forfeiture for mortgag-

ing 'any' of the property, but treated 'the property' as a whole, the policy would not be forfeited for a mortgage given on a part of the property only." *Born v. Home Ins. Co.*, 81 N. W. Rep., 676. Says Judge Given in the opinion of the court, p. 678: "It is a familiar rule that forfeitures are not favored, that contracts will be strictly construed to avoid forfeitures, and that the burden is upon him who claims a forfeiture to clearly show that he is entitled to it. The language of the policy is, 'or if the property shall hereafter become mortgaged or incumbered' the policy becomes null and void. It is the property, not a part of it; not the real nor the personal, but the whole property, the mortgaging of which renders the policy void." To the same effect is *Bailey v. Homestead Fire Ins. Co.*, 16 Hun [N. Y.], 503 heretofore quoted.

In our own state, this court, in construing like clauses as to incumbrances, has not adopted the same line of reasoning as the courts whose opinions have last been referred to. It is here held that where different classes of property are insured for specific sums, although the premium is paid in one sum in gross, the policy as to the different classes of property is separable and divisible, and a mortgaging of one class of property in violation of the terms of the policy will not prevent a recovery as to all other classes upon which no incumbrance existed. The rule was announced in the case of *State Ins. Co. v. Schreck*, 27 Nebr., 527, and has since been followed. In that case the insurance was upon certain buildings on a farm, and also covered a lot of personal property described in the policy. The policy provided that "any other insurance or any incumbrance upon any of the property hereby insured existing at the date of this policy not made known in the application, or if any subsequent incumbrance is imposed, * * * this policy shall be void." A mortgage was placed upon the real estate, on which the insured buildings were located, in violation of the terms of the incumbrance clause, and it was held that the policy of insurance was separable and

divisible, and that an incumbrance upon the real estate, while preventing a recovery for the loss sustained by the burning of the buildings, would not preclude a recovery for the loss of the personal property insured. While the rule announced in our court is apparently in conflict with the views of the other courts on the same subject herein referred to, the divergence of opinion is not as marked as first appearances would indicate. Each has a different basic point for the course of reason adopted. In this court the policy as to different classes of property insured for specific sums is held to be divisible, and a separate contract as to each class of property insured in so far as the clause against insurance shall apply, while the other cases undertake to analyze and define the meaning, force and effect of the words employed in the provisions against incumbrance. While neither are controlling of the provisions under consideration, they are useful in so far as they may aid us in a correct solution of the questions herein involved. Recurring to the language of the warranty in the case at bar, it is provided that if the conditions are not performed the policy shall be forfeited. There are two separate and distinct acts to be done: one is to keep books of account, and the other is to take an inventory at a certain time. To accomplish the object sought it is also provided that the books while being kept and the inventory when taken are to be kept in a fire-proof safe, or other place secure from fire, in the store building containing the property insured. These different steps to be taken are all more or less important, if valuable at all. The inventory, it would seem, is regarded as important as any other act required, and until there has been a default or breach in that condition, who is at liberty to say, under the wording of the penalty, that a forfeiture of all rights under the policy was the deliberate contract of the parties to be enforced by the courts upon application therefor? The answer is rendered less difficult when there is kept in view the rules for the proper construction of provisions of this character as

heretofore announced in this opinion. It is not said, by the words used or the fair import of the same, that if one condition is not complied with, a forfeiture will ensue, but the plural is used, and clearly refers to all the conditions preceding and not to any particular one of them.

From the foregoing observations the conclusion is reached that a ground for forfeiture of the policy as contended for does not exist, and that the company is liable to the assured under its contract of indemnity. Our attention has been invited by counsel for assured to the proposition that a waiver of the causes for forfeiture, if existing, has been established, and also to certain parts of the testimony as preserved in the bill of exceptions in support of the contention thus made. In view of the conclusions reached, we have thought it unprofitable to consider this feature of the case, and consequently have not taken the necessary time to investigate the proposition.

The judgment of the lower court is right and is

AFFIRMED.

CONTINENTAL INSURANCE COMPANY OF NEW YORK v. WASHINGTON WAUGH & SON.

FILED JUNE 7, 1900. No. 9,201

1. **Fire Insurance Policy**: WARRANTY: ITEMIZED INVENTORY: BOOKS OF ACCOUNT. Where there was attached to, and made a part of, a policy of insurance a warranty providing, in substance, that the assured would take an itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of the policy, one should be taken in detail within thirty days of the issuance of the policy; and, second, that the assured will keep a set of books of account from date of inventory, as provided for in the first section of this clause, and during the continuance of the policy; and the evidence showing that no inventory had been taken within twelve months prior to the issuance of the policy, *held*, that the assured was not required to keep books of account until the taking of the inventory provided for, and that thirty days were given to per-

form that act, and where a fire occurred in less than thirty days from the issuance of the policy, no breach existed in either of the conditions in said warranty providing for the keeping of books of account and their preservation in a fire-proof safe, or other place secure from fire, in the building containing the insured stock of goods.

2. ———: LOSS: DEFENSE. Where, in a controversy over the liability of an insurance company under a policy of insurance after a loss has occurred, certain grounds are assigned as a reason for denial of liability, the company, after litigation has begun, can not be heard to urge other and additional grounds as reasons for their refusal to pay the loss sustained.

3.. **Warranty Clause:** INVENTORY. Where the warranty clause provided for the taking of an inventory within thirty days after the date of the policy of insurance, if one had not been taken within twelve months prior to the issuance of such policy, and that the assured would keep such inventory and also the last preceding inventory, if such has been taken, in a fire-proof safe, or other place not exposed to fire, in the store building, and an inventory had not been taken within twelve months prior to the issuance of the policy, *held*, that the clause referring to "the last preceding inventory, if such has been taken," did not apply to inventories taken more than twelve months prior to the issuance of the policy of insurance.

ERROR to the district court for Cass county. Tried below before RAMSEY, J. *Affirmed.*

Chas. Offutt, Byron Clark and *W. W. Morsman*, for plaintiff in error.

Edwin Jeary and *Beeson & Root, contra.*

HOLCOMB, J.

In the main, this case is presented for review on substantially the same grounds as those of *Connecticut Fire Ins. Co. v. Waugh*, 60 Nebr., 353, and *Connecticut Fire Ins. Co. v. Jeary*, 60 Nebr., 338, in which opinions are filed concurrently with this one. The three cases are very similar in their general aspects, and, with some few exceptions, all that is said in the case last above mentioned applies with equal force to the one at bar. The covenants relied upon to operate as a release from liability by rea-

son of the alleged breach of the same are contained in the following printed matter, which is attached to the policy of insurance: "Warranty to keep books and inventories, and to produce them in case of loss. The following covenant and warranty is hereby made a part of this policy: 1st. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within 30 days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned. 2nd. The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory as provided for in the first section of this clause, and during the continuance of this policy. 3rd. The assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fire-proof safe at night, and at all times when the building mentioned in this policy is not actually open for business; or, failing in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building. In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

We are of the opinion, from a careful reading of the terms of the above warranty and the evidence, that there existed at the time of the fire which destroyed the insured property no default in the conditions imposed on the assured which would preclude a recovery. The insurance was written February 21, 1895. The loss occurred March 4, following, or less than thirty days from the execution and delivery of the policy of insurance. The evidence shows that no inventory had previously been taken since

September, 1893, save perhaps a partial or incomplete inventory or estimate of the stock on hand, which was made about February 1, 1894, or more than one year prior to the issuance of the policy. Under the terms of the warranty, as fixed by the defendant in the clause quoted, the assured was given thirty days within which to take an inventory if none had been taken within twelve calendar months prior to the issuance of the policy. By the clear and unambiguous wording of these provisions, the books of account were to be kept only from the date of the inventory provided for. Under any ordinary and fair rule of construction, the assured was not required to keep books of account until the inventory had been taken, and thirty days were given in which to perform that act. The fire occurred within less time. There existed no legal obligation on the assured to preserve books of account in a fire-proof safe, or other place secure from fire, in said building until the expiration of the time in which an inventory was to be taken. It may be urged that the inventory taken more than a year previous was, in contemplation of the parties, a compliance with the provisions requiring an inventory once in every twelve months, and that none was required to be taken within thirty days from the time the insurance was written. This view can not be accepted without doing violence to the language used, and reading into the warranty something which it does not contain.

It is also claimed, as we interpret the brief of counsel for plaintiff in error, that there existed a breach of the conditions of the warranty because the inventory taken in September, 1893, or the so-called inventory or estimate of stock on hand made about February 1, 1894, was not preserved in the manner required in the third paragraph of the warranty. We are disposed to the view that the company's liability can not be affected by this objection, if it is intended as such, and that the defendant is estopped from urging the same, for the reason that no such objections were raised after the fire occurred as a reason

for its action in denying liability under its policy of insurance. Having assigned as a reason for refusal to pay the alleged failure of the assured to preserve his books of account, and presenting that objection alone as justification for disavowing liability under its contract of indemnity, it can not, after litigation is begun, be heard to urge other and additional grounds for refusing payment for the loss sustained. *Ballou v. Sherwood*, 32 Nebr., 666; *Railway Co. v. McCarthy*, 96 U. S., 258. But if it be contended that the objections noted were properly assigned as a reason for refusal to pay, and the record is not entirely free from doubt on this point, we deem it sufficient reply to say that it was not the intention of the parties to treat either of these inventories as of value, and because thereof it was provided that an inventory should be taken within thirty days from the date of the policy. The clause wherein it is said, "The assured will keep such books and inventory, and also the last preceding inventory, if such has been taken," etc., evidently refers to an inventory taken within the twelve calendar months prior to the issuance of the policy. If not, why the requirement to take a new inventory immediately or within thirty days? If it was the duty of the assured to preserve the inventory taken in 1893, it could be urged with equal force that if the last inventory had been taken in 1890, and was not preserved in the manner prescribed in the warranty, the assured could not recover for his loss. We do not think this provision is capable of such construction. The most natural view to take, as we understand the language used, is that an inventory is to be taken at least once in each calendar year; that the inventory preceding the issuance of the policy, if taken within twelve calendar months from that date, with the books of account, is to be preserved in the manner specified. If an inventory has not been taken within the time mentioned, then one shall be taken within thirty days from the date of the policy, which, with the books of account to be kept from the date of such inventory, is to be preserved as

therein provided for. There was no breach existing in either of the conditions mentioned, and the plaintiff's right of recovery is established by the record.

The judgment rendered in the court below is right and should be

AFFIRMED.

CONNECTICUT FIRE INSURANCE COMPANY OF HARTFORD v. WASHINGTON WAUGH & SON.

FILED JUNE 7, 1900. No. 9,202.

Stare Decisis: FORFEITURE: POLICY OF INSURANCE: CONSTRUCTION: CONDITION.

ERROR to the district court for Cass county. Tried below before RAMSEY, J. *Affirmed.*

Charles Offutt and *Byron Clark*, for plaintiff in error.

Edwin Jeary and *Beeson & Root, contra.*

HOLCOMB, J.

The controversy in this case involves the identical propositions raised in the case of *Connecticut Fire Ins. Co. v. Jeary*, 60 Nebr., 338, decided at the present sitting of the court. The decision in that case is controlling of the disposition of the present one. Following the course of reasoning therein adopted, and upon the authority of that case, the judgment of the trial court should be

AFFIRMED.

JAMES L. MCLAIN ET AL. V. LEONARD F. MARICLE ET AL.*

FILED JUNE 7, 1900. No. 10,214.

1. **Removal of Schoolhouse:** INJUNCTION. In an action by injunction, brought to restrain officers of a school district from removing to another location a schoolhouse situated in said district, the right of plaintiffs to maintain the action is established, if it ap-

*Rehearing allowed. See case next following.

pear that they are resident taxpayers of the district, and the proposed removal, if unauthorized, would involve a waste and an unwarranted expenditure of public funds; and no other or greater interest need be shown.

2. **Electors:** QUALIFICATION. Under the provisions of section 4, subdivision 2, chapter 79, Compiled Statutes, 1899, defining the qualifications of voters at a meeting of the voters of a school district as follows, "Every person, male or female, who has resided in the district forty days and is twenty-one years old, and who owns real property or personal property that was assessed in the district in his or her name at the last annual assessment, in the district, * * * shall be entitled to vote at any district meeting," *held*, that the wife of a person owning a homestead on which the family were residing was not, by reason of her homestead interest, or "estate of homestead" in said land, an owner of real estate in said district within the meaning of said section.

3. ———: MAJORITY VOTE. Where the statute provides that a "schoolhouse site may be changed to a point nearer the geographical center of the district by a majority vote of those present," *held*, that of those present at such meeting at least a majority thereof must cast their votes in favor of the proposition to legally adopt it.

4. **Errors:** REVIEW: APPEAL. Alleged erroneous rulings in the trial of a case in the court below, regarding the rejection or admission of evidence, will not, in proceedings by appeal, be reviewed in this court. *Ainsworth v. Taylor*, 53 Nebr., 484, followed.

ERROR to the district court for Boone county. Tried below before KENDALL, J. *Affirmed.*

H. C. Vail and *Reeder & Albert*, for plaintiffs in error.

Spear & Mack, W. M. Robertson, E. J. Clements and *T. J. Doyle, contra.*

HOLCOMB, J.

Proceedings were instituted in the court below to restrain the defendants, who are school officers of school district No. 4 of Boone county, from removing the schoolhouse in said district to a point where, defendants claim, a relocation was had at an annual meeting of the voters of said school district held prior to the commencement

of the action. A temporary order of injunction was granted, and, upon a final hearing of the merits of the case, judgment was rendered dissolving the injunction and dismissing the action. From this judgment the plaintiffs appeal.

It is contended by counsel for defendants that the petition for an injunction is without merit, and does not show such interest in the subject-matter of the action by plaintiffs as entitles them to maintain an equitable action, such as is sought to be maintained by these proceedings. We do not think the contention well taken. The plaintiffs are shown to be residents and taxpayers of the school district, and as the contemplated removal of the school building to the new site, if unauthorized, would be an unwarranted and unlawful expenditure of the public funds of the district, they have such an interest in the matter as will entitle them to bring a suit, one of the objects of which is to prevent such an unwarranted expenditure, and no other interest is required to be alleged. *Solomon v. Fleming*, 34 Nebr., 40; *Normand v. Commissioners of Otoe County*, 8 Nebr., 18. At the annual school meeting at which the vote on relocating the school site was taken there were, according to the evidence, twenty-seven votes cast in favor of the proposed location and twenty-six in the negative. It is pleaded in the answer, and the allegation is supported by the evidence, that the proposed location was nearer to the geographical centre of the school district than was the site where the school building then stood. Some evidence is brought into the record tending to show that at the annual meeting a year prior to the one in question some action was taken regarding a relocation, which, if it establishes the fact that a valid relocation was then had, the last relocation would not be nearer the geographical centre, and a two-thirds vote would be necessary to effect a valid removal to the location in controversy. The pleadings raise no issue as to any prior attempt to relocate the school site, other than the one in controversy; nor is there sufficient evidence from which

the conclusion can be drawn that such was the case. That some action was taken at a prior meeting upon the subject of a relocation is apparent from the evidence, but whether this only authorized the school officers to investigate the subject, or was in the nature of a preliminary action with a view of later on submitting the question to the voters, or was a direct vote on the proposition of removal, is something we can not determine from the record. Certain it is that it can not be said from what is before us that there was in the district, at the time the vote was taken which is made the subject of this litigation, any other site than that where the building was then situated, and which was treated by the patrons of the district as the lawful location. It is very evident that this was the view of the parties to this action, in making up the issues and submitting evidence in support thereof. Hence we dismiss this phase of the case from further consideration. The statute regulating the subject of a relocation or removal of a school site is as follows: "The qualified voters in the school district, when lawfully assembled, shall have power * * * to designate a site for a school house, by a vote of two-thirds of those present, and to change the same by a similar vote at any annual meeting; *Provided*, That in any school district where the school house is located three fourths of one mile or more from the center of such district, such school house site may be changed to a point nearer the geographical center of the district by a majority vote of those present at any such school meeting." Compiled Statutes, ch. 79, subdiv. 2, sec. 8.

It is urged by the plaintiffs that no valid relocation was accomplished, for the reasons following: First, it is claimed that in order to effect a relocation there must be a majority of those present and qualified voting in favor of the proposition before it can be said to be lawfully carried. In this we hold counsel to be right. The statute says: "such school house site may be changed to a point nearer the geographical center of the district by a major-

ity vote of those present." This, we think, is capable of but one construction, and that is, of those present entitled to vote upon the question, at least a majority thereof must cast their votes in favor of the proposition. The views thus expressed seem to us to be in harmony with the decisions of this court upon kindred provisions of the statute relative to the submission of different propositions to a vote of the people.

It is next contended that, there being three women present, who, it is claimed, were qualified voters, and who did not vote, the motion to relocate the school site did not receive the majority required by statute. We are of the opinion that counsel are in error in the views expressed as to the persons mentioned being qualified voters. Their right to vote is based on their homestead right in and to real estate occupied by them with their husbands, it being admitted that the legal title to the lands rests in their husbands, and that they possessed no other interest therein save their statutory homestead right. Counsel says: "Our contention is that their homestead interest in the lands of their respective husbands made them owners of real property within the meaning of the statute." We do not think the homestead right or interest of a wife in lands owned by her husband constitutes her as "one who owns real property in the district," within the meaning of section 4, subdivision 2, chapter 79, Compiled Statutes, fixing the qualifications of the voters in a school district at a meeting of the electors thereof.

The homestead right, or "estate of homestead," is a special or particular interest in real estate created by statute, and the character of the interest thus acquired has a marked variance in the different states. The primary object to be attained under the different homestead statutes is to preserve in the owner and his family, or those dependent upon him for support, the homestead, free from forced or involuntary sale, or from otherwise dispossessing the occupants thereof against their will and consent. Its provisions are restrictions and limitations

against alienation. It is said the title is burdened or incumbered by the homestead right, but otherwise remains unchanged. Says Waples in his work on Homestead and Exemption, p. 121: "The husband conveys no land to his wife by declaring homestead; he lets her in to equal control as to alienation, and equal right to enjoyment and to that protection which the law gives to all homestead holders. But when the state's purpose, relative to homestead conservation, has been accomplished, the land title is as before." Under the laws of this state, the wife succeeds to an estate for life in the homestead of her deceased husband (Compiled Statutes, 1899, ch. 36, sec. 17), and we think the view generally obtains that she has a freehold estate therein; but this interest, in our judgment, does not constitute her the owner of real property within the meaning of the statute. The homestead estate of the surviving wife is, by the authorities, quite generally regarded as analogous to the right of dower, which the wife possesses in the lands which her husband died seized of. Waples, Homestead & Exemption, sec. 3, p. 260; also, *Holbrook v. Wightman*, 31 Minn., 168, 172, wherein it is said: "We think, therefore, that the plainer and less artificial construction of the language is that the survivor takes a life-estate in the homestead premises analogous to that of dower, and we believe this to be the construction which is generally placed upon it by those charged with the duty of executing the law;" citing Potter's Dwarris, Statutes, 179, note; *Edwards' Lessee v. Darby*, 12 Wheat., 206, 210. It will not, we apprehend, be seriously contended that the inchoate right of dower of the wife in her husband's lands constitutes her an owner of real estate within the meaning of the section referred to. The word "owner" ordinarily has a well understood and clearly defined meaning. An owner is "he who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases,—even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which

restrains his right." Bouvier's Law Dictionary; *Turner v. Cross*, 18 S. W. Rep. [Tex.], 580; *Johnson v. Crookshanks*, 21 Ore., 339. The limitations and restrictions thrown around the control and alienation of the homestead do not, in our judgment, change the general rule as to the ownership thereof, or constitute the joint occupant an owner of the premises in the ordinary and general acceptation of the term, nor within the purview of the legislation providing for homesteads and their conservation. Without pursuing the inquiry further, or entering into an extended discussion of the proposition, we are content to express ourselves as being clearly of the opinion that counsel's contention in this respect is untenable.

It is also urged that the trial court erred in its ruling in respect to the admission of evidence as to the alleged want of proper qualification of one of the persons present and who voted in favor of the relocation of the school site at the annual meeting heretofore spoken of, and that the case ought to be reversed for that reason and remanded for a new trial. It is sufficient to say regarding this contention that upon appeal, as in the present case, this court will not review alleged errors committed in the trial court in the rejection or admission of evidence offered upon the trial of the case therein. *Ainsworth v. Taylor*, 53 Nebr., 484; *National Life Ins. Co. v. Martin*, 57 Nebr., 350; *Te Poel v. Shutt*, 57 Nebr., 592; *Troup v. Horbach*, 57 Nebr., 644.

The judgment of the lower court is right and should be

AFFIRMED.

JAMES L. MCLAIN ET AL. V. LEONARD F. MARICLE ET AL.

FILED OCTOBER 3, 1900. No. 10,214.

1. **Rebuttal Testimony**: OBJECTION: TESTIMONY IN CHIEF: OFFER: RULING: PREDICATION OF ERROR. Where an objection to a question as improper rebuttal testimony is properly sustained, and the testimony is desired as a part of the main case, it is re-

quired that it should be offered as such, and a ruling thereon obtained, before error can be predicated on the exclusion of such testimony.

2. **Pleading: EVIDENCE: CHANGE OF SCHOOLHOUSE SITE: ILLEGAL VOTING AT SCHOOL-MEETING.** Under the allegation in a petition that at an annual school meeting the qualified voters of said district have never voted, by a majority vote of those present, to change a schoolhouse site, etc., *held*, that such allegation is insufficient to admit proof that a person illegally voted at such meeting in favor of the proposition.

ERROR to the district court for Boone county. Tried below before KENDALL, J. *Affirmed.*

H. C. Vail and *Reeder & Albert*, for plaintiffs in error.

Spear & Mack, Wm. M. Robertson, E. J. Clements and *T. J. Doyle, contra.*

HOLCOMB, J.

An opinion in this case was filed June 7, 1900. By inadvertence and oversight, for which an apology is tendered, the writer treated the case as brought to this court on appeal, and disposed of an alleged erroneous ruling of the trial court on the admission of evidence upon such mistaken conception, when, by the record, it was brought here by a proceeding in error. The error fallen into on the point mentioned has brought about a rehearing.

The ruling complained of relates to a decision of the trial court as to the admissibility of evidence offered on the trial of the case. In the introduction of testimony in rebuttal, a witness for the plaintiff was asked if a certain Mrs. Stevens had voted at the annual school meeting. The testimony was objected to as immaterial, and not proper rebuttal testimony, and the objection sustained. The plaintiff then offered to show by the witness that Mrs. Stevens voted at the annual meeting on the proposition to change the schoolhouse site; that she voted in favor of the proposition; that she was not, at the time of said vote, nor for more than forty days prior thereto,

a resident of said district. The offer was objected to as incompetent, irrelevant and immaterial under the issues, seeking to try a collateral matter, and not proper rebuttal testimony. The objection was sustained. We find no error in the ruling complained of. The proposed testimony was clearly improper as rebuttal evidence. Were it at all admissible, it was as a part of plaintiffs' main case, and if plaintiffs desired to introduce it as such, they should have so stated to the court, and asked permission to introduce the testimony as a part of their main case and secured a ruling thereon. Having failed to do so, they can not predicate error on its exclusion by the court in response to an objection well founded.

We are also persuaded that the proposed testimony was inadmissible as a part of plaintiffs' main case under the allegations of the petition. The only possible allegation in the petition under which it could have been admitted is that "the qualified voters of said district have never voted by a majority vote of those present or by a majority of two-thirds of those present at any such meeting at any school meeting of said district to choose a site for a schoolhouse in said district," etc. From the petition, answer and reply, and the stipulation of the parties in the record, it is apparent that the issue raised by the allegation quoted was whether a majority of the voters present had voted for a change of site, there being certain women present, who, it is claimed, were voters because occupying homesteads with their husbands, the legal titles to which were in their husbands, and who did not vote. There is no allegation in the petition of illegal voting, and none to support proof of the character proposed. The allegation that a majority of the voters did not vote to change the schoolhouse site is insufficient to authorize the admission of testimony tending to prove that illegal votes were cast. The question asked, and the testimony offered, were immaterial to the issues, and no error arose in refusing them. *Dunphy v. Bartenbach*, 40 Nebr., 143.

The conclusions reached on the prior hearing as to the other questions involved we regard as correct, and the judgment should stand

AFFIRMED.

HARLAN COUNTY V. FRANK W. HOGSETT.

FILED JUNE 20, 1900. No. 9,236.

1. **Answer: REPLY: IMPLIED ADMISSION.** All material facts pleaded in an answer, not denied by a reply, must be taken as true.
2. **Highway: DAMAGES: TIME.** Damages for lands appropriated for a highway accrue at the date of the condemnation proceedings, without regard to the time when the road is actually opened.

ERROR to the district court for Harlan county. Tried below before BEALL, J. *Reversed.*

J. G. Thompson, for plaintiff in error.

John Everson, contra.

NORVAL, C. J.

Frank W. Hogsett filed a claim against Harlan county, with the county board, in the sum of $600, for damages by reason of a location of a public highway over and across section 16, town 1, range 18 west. The claim was rejected by the county board, and Mr. Hogsett, hereafter called plaintiff, appealed to the district court, where he filed a petition, which the defendant answered, setting up new matter as a defense. No reply was filed by plaintiff. In the court below he recovered $200 damages.

The judgment is entirely erroneous under the pleadings. The answer alleged that the highway was established by the county board on November 4, 1892, at which time and until August 5, 1893, one Henry Stewart was the owner and in possession of said section 16; and that he, on November 14, 1892, filed with the county board of Harlan county a claim for damages by reason of the loca-

tion and establishment of said highway. No reply having been filed, the foregoing averment must be taken as true. *Consaul v. Sheldon*, 35 Nebr., 247; *National Lumber Co. v. Ashby*, 41 Nebr., 292; *Van Etten v. Kosters*, 48 Nebr., 152; *Scofield v. Clark*, 48 Nebr., 711. In addition, the undisputed evidence shows that Henry Stewart was the owner of the land when the road was established, and that plaintiff purchased the same a long time thereafter. The former, and not the latter, was entitled to compensation, as plaintiff obtained no assignment from Stewart of the damages sustained on account of the location of said highway. It makes no difference that the road was not actually opened until after plaintiff purchased the land. When opened, it related back to date the road was established. It is the date of the location and establishment of the highway which controls. Should the road never actually be opened, it would not prevent the recovery of damages by the landowner. In the condemnation of land for a right of way of a railroad, interest is recoverable from the date of the condemnation proceedings. *Sioux City R. Co. v. Brown*, 13 Nebr., 317; *Berggren v. Fremont, E. & M. V. R. Co.*, 23 Nebr., 620; *Atchison & N. R. Co. v. Plant*, 24 Nebr., 127. This is upon the principle that the land is regarded as appropriated as of that date. Upon the same rule damages by reason of the location of a highway accrue at the date of the condemnation proceedings. The judgment is

REVERSED.

SULLIVAN, J., concurs in the result.

HENRY POHLMAN ET AL. V. EVANGELICAL LUTHERAN TRINITY CHURCH OF CLATONIA PRECINCT, GAGE COUNTY.

FILED JUNE 20, 1900. No. 9,255.

1. **Finding:** CONFLICTING EVIDENCE. A finding based upon conflicting evidence, will not be disturbed on review.
2. **Threatened Continuing Trespass:** INJUNCTION. The destruction of a fence, and threatened repetition thereof by a trespasser as often as the fence should be replaced, entitles the owner to relief by injunction against the invader, even though the latter may not be insolvent.
3. **Description of Land:** METES AND BOUNDS. A definite description of lands in a deed designating the initial point, courses and distances, and followed by a statement of the number of acres conveyed, passes the quantity of land embraced in the specific boundaries, though greater or less than the number of acres stated.
4. **Description in Deed:** INTENTION OF PARTIES. In a suit between others than original parties, the description in a deed, if unambiguous, governs, and the intention of the parties to the conveyance can not take the place of calls.
5. **Possession:** TITLE BY PRESCRIPTION: TACKING. Possession can not be tacked to make out title by prescription where the adverse occupant did not come in under another, and the deed under which the last occupant claims title does not include the land in dispute or show any privity between him and his grantor in regard thereto.

ERROR to the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

Hazlett & Jack, for plaintiffs in error.

Griggs, Rinaker & Bibb, contra.

NORVAL, C. J.

This suit was instituted by the Evangelical Lutheran Trinity Church of Clatonia precinct, Gage county, to enjoin Henry Pohlman and Henry Holsing from entering or trespassing upon certain real estate alleged to belong

to plaintiff, and from destroying the fence around said premises. A temporary injunction was issued, which was made perpetual upon the final hearing of the cause. The defendants prosecute error.

Plaintiff acquired title to the tract by deed of general warranty from the prior owner. It thereafter erected a church building and parsonage on the premises at the cost of several hundred dollars, inclosed the same with a fence, and used and occupied the premises for religious purposes. The defendants assert that the grantor in the deed to plaintiff only intended to convey five acres of land, while a larger tract was actually described in the conveyance. They also claim title to the portion of the premises in excess of five acres by reason of adverse occupany for more than ten years. The testimony, in many respects, was conflicting, in which case the rule is that a finding based thereon will not be disturbed on review.

It is argued that injunction will not lie, as plaintiff had a complete remedy at law to recover damages. It was shown that defendants tore down and destroyed the fence, and threatened to continue doing so as often as plaintiff should restore the same. This threatened continued trespass was sufficient to give a court of equity cognizance of the cause, though the defendants may not be insolvent. *Shaffer v. Stull*, 32 Nebr., 94.

The church claims under a deed from one Paul Bartos, a former owner of the property, in which conveyance the description was by metes and bounds as follows: "Beginning at the southeast corner of the southeast quarter of section thirty (30), town six (6) N., range five (5) east in Gage county thence north four hundred and twenty-five (425) feet thence west one thousand and fifty (1050) feet thence south four hundred and twenty-five (425) feet to the south line of said section, thence along said line one thousand and fifty (1050) feet to the place of beginning, containing five (5) acres more or less." Subsequently Bartos conveyed to Frederic A. Pohlman said southeast quarter of section 30, with the following reser-

vation contained in that deed: "Except five acres more or less of said quarter section, bounded and described as follows: Beginning at the southeast corner of said section (30) thirty, thence north four hundred and twenty-five (425) feet, thence west one thousand and fifty (1050) feet, thence south four hundred and twenty-five (425) feet, to the south line of said section, thence east along said line one thousand and fifty (1050) feet, to the place of beginning, which last described premises have been conveyed to John F. Hobelman, August Vonderfecht and William Schlake, trustees of the Evangelical Lutheran Church." Afterwards, the grantee in the last deed and his wife contracted to convey to Henry Lohmeyer the said southeast quarter of section 30 "except five acres deeded to trustees of the Evangelical Lutheran Church." This bond also stipulated that "It is hereby especially agreed that if more than five acres have been deeded to said Lutheran Church, then said Pohlman and wife will give a rebate to said Lohmeyer for each and every acre and part, above said five acres, at same rate as the consideration in this bond." Thereafter said Pohlman and wife executed a warranty deed to said Lohmeyer for said southeast quarter of section 30, "except ten acres more or less of said quarter section, bounded and described as follows: Beginning at the southeast corner of said section thirty (30), thence north four hundred and twenty-five (425) feet, thence west one thousand and fifty (1050) feet, thence south four hundred twenty-five (425) feet, to the south line of said section, thence east along said line one thousand and fifty (1050) feet, to the place of beginning."

The defendants claim title through the conveyance from Bartos to Pohlman, and from the latter to Lohmeyer, as well as adverse occupancy for the statutory period of ten years. It will be observed that in these transfers of title the deeds expressly excepted and reserved title to the premises described in the deed, under and through which the plaintiff below claims title. It is

true, in the conveyance from Bartos to the trustees of the church it was specified that the premises conveyed contained five acres, more or less, while the actual description, as written in the deed, was for more than five acres. If this deed only conveyed title to the church for five acres, it is conceded that plaintiff below has no standing in court, since the tract in actual dispute is the excess of five acres. The land being described in the deed to the church by metes and bounds, such description controls, and the church acquired title to the tract embraced in the specific boundaries, though the deed stated that a less number of acres were conveyed. *Silver Creek Cement Corporation v. Union Lime Co.*, 35 N. E. Rep. [Ind.], 125; *Jones v. Webster*, 27 Atl. Rep. [Me.], 105. But it is asserted that the parties only intended to convey five acres of the ground to the church, and evidence was adduced tending to establish the contention. This evidence was wholly incompetent as against plaintiff, since this suit was not between the original parties to the deed. Bartos alone could tender such an issue. This principle was recognized and applied in *Gillespie v. Sawyer*, 15 Nebr., 536. The first two paragraphs of the syllabus of that case are as follows:

"1. In an action between others than the original parties to a deed, the intention of the parties to the conveyance cannot be inquired into for the purpose of ascertaining the land sought to be conveyed, if the calls in the deed refer to fixed monuments or points.

"2. Where there is a call in a deed, which was in fact not intended by the parties, and is unambiguous, the intention of the parties cannot be made to take the place of the call, neither is parol proof competent to locate the land."

The conclusion is, therefore, irresistible that the church acquired title to all the land embraced in the specific description contained in the deed from Bartos to it. The evidence is sufficient to justify the finding that the defendants did not acquire title to the disputed tract by

prescription. Neither of them can tack to the line of his possession that of a former occupant, since the land in controversy was not conveyed to either by the deed of his grantor, but is in express terms excepted from the conveyance. The defendants did not obtain possession through or under a prior occupancy; hence the rule relating to tacking possession can not be invoked. *Stettnische v. Lamb*, 18 Nebr., 619; *Lantry v. Wolff*, 49 Nebr., 374; *Dhein v. Beuscher*, 53 N. W. Rep. [Wis.], 551. Moreover, the evidence shows that the possession of Pohlman was not only interrupted before the expiration of ten years, but that his possession was permissive and not adverse. This prevented the running of the statute. *Roggencamp v. Converse*, 15 Nebr., 105; *Hull v. Chicago, B. & Q. R. Co.*, 21 Nebr., 371; *Johnson v. Butt*, 46 Nebr., 220. The deed from Bartos to Pohlman was executed June 3, 1882, and the record discloses that in May, 1892, the trustees of the church entered upon the land in dispute and surveyed the same, and the fence destroyed by defendants was built with reference to said survey; also, that Pohlman accounted to plaintiff through the preacher for crops raised on the land.

The decree is right and is

AFFIRMED.

IDA A. BRADFORD, ADMINISTRATRIX OF THE ESTATE OF LOUIS BRADFORD, DECEASED, APPELLANT, V. ADOLF ANDERSON ET AL., APPELLEES.

FILED JUNE 20, 1900. No. 9,258.

1. **Constructive Notice.** Actual knowledge of the existence of a real estate mortgage is as binding as constructive notice thereof.
2. ———: SENIORITY OF LIENS. When one furnishes materials for the erection of a house with actual knowledge of an outstanding unrecorded mortgage, his lien for materials is junior to the lien of the mortgage.
3. **Finding: EVIDENCE.** A finding unsupported by evidence will be set aside.

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

Montgomery & Hall, for appellant.

Wright & Thomas and *V. O. Strickler, contra.*

NORVAL, C. J.

On February 2, 1893, Adolf Anderson and wife gave a mortgage on certain real estate in the city of Omaha to John L. Pierson to secure a note for the sum of $250, which mortgage was not filed for record until July 28, 1893. Subsequently, it is claimed, the mortgage was assigned to Victor Danielson, but the assignment was never recorded. On February 2, 1893, the Andersons borrowed $800 from the Fidelity Trust Company, and on the same day gave a mortgage to secure the payment thereof upon the same property, which was recorded on February 16, 1893. Seven days later this mortgage was assigned to George F. Hubbard, but the assignment was not placed on record. After the execution of the two mortgages, the Andersons purchased of Louis Bradford material for the erection of a house on the mortgaged premises. The first materials were delivered on February 13, 1893, and the aggregate value of all the materials so furnished was $403. Of this sum $235.10 was paid in cash and by materials returned. A mechanic's lien was filed for the balance remaining unpaid on November 14, 1893, and this suit was instituted by Bradford on March 23, 1895, to foreclose said mechanic's lien. Plaintiff having died the cause was revived in the name of the administratrix of his estate. Hubbard and Danielson intervened, by permission of the court, and each filed an answer and cross-petition setting up his mortgage and praying a foreclosure thereof. The averments in the pleadings of the interveners were put in issue by the reply. The court below found that the suit was not commenced as against Hubbard and Danielson until after two years from the date of

the filing of the mechanic's lien, and that as to them such lien was thereby barred; that Hubbard's mortgage was the first lien on the premises and the mortgage held by Danielson was the second lien. A decree of foreclosure of the several liens, with their priorities established as above, was entered.

It is insisted that the court erred in finding that plaintiff's cause of action was barred as to the intervening defendants. The finding on that question was doubtless based upon the fact that they were not summoned or made parties defendant until more than two years had elapsed after the perfecting of the mechanic's lien. The assignments of the mortgage to Hubbard and Danielson respectively never having been placed on record, it is insisted that plaintiff had no knowledge of their interest in the premises and that the statute of limitations can not be invoked in their favor. We do not feel called upon at this time to review our decisions upon the point or pass upon the question, as the case can more easily be disposed of on other grounds.

As to the mortgage given to the Fidelity Trust Company, there is ample evidence to sustain the finding that the same was the first lien on the property, although the mortgage was not recorded until after Bradford had delivered to Anderson some of the materials. The evidence reveals the fact that Bradford had actual notice of the existence of this mortgage at the time he delivered the first item of materials. Anderson informed the manager of Bradford's business not only that he was about to make a loan on the property, but had actually mortgaged it to the trust company before any materials were furnished. Therefore, it was quite immaterial when the mortgages were recorded. Hubbard was entitled to the first lien on the property. This must be so, when section 16, chapter 73, Compiled Statutes, is considered. It declares: "All deeds, mortgages, and other instruments of writing which are required to be recorded, shall take effect and be in force from and after the time of delivering

the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages, and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages, and other instruments, shall be first recorded; *Provided*, That, such deeds, mortgages, or other instruments shall be valid between the parties." It is obvious that under this section a mortgage is effective from the date of its execution as to all persons having actual knowledge of the execution of the mortgage, but only from the date of the record of the instrument is it effective as to creditors and subsequent purchasers in good faith having no notice of the mortgage. This doctrine does not conflict with the holding in *Henry & Coatsworth Co. v. Fisherdick*, 37 Nebr., 207, or *Kilpatrick v. Kansas City & B. R. Co.*, 38 Nebr., 620. In the former case Holmes' mechanic's lien was given priority over the mortgage of Drexel for the obvious reason, as stated in the opinion in that case, p. 216, "A party taking a mortgage on real estate is bound to know whether material has been furnished or labor performed in the erection of improvements on the real estate within the four immediate prior months. Drexel's mortgage was a lien only on the interest of Mrs. Bond in the mortgaged property." Holmes commenced furnishing material on August 5, 1889, which was prior to the existence of the mortgage to Drexel, which, while it bore date August 1, 1889, was not in fact executed until about August 26, the day it was recorded. A sentence is to be found here and there in the opinion in that case which taken alone might lead one to infer that where materials are furnished for the erection of a building prior to the recording of a pre-existing mortgage, the lien of the material-men will have priority, but it was never intended to so announce the rule. In *Kilpatrick v. Kansas City & B. R. Co., supra*, the mortgage was by a railroad company existing wholly on paper, which at the time had acquired no property, right

of way, or franchise whatever, and had taken no steps towards the acquisition of either, further than filing articles of incorporation, and the election of officers. The mortgagee was to furnish substantially all the money necessary for the construction of the proposed railroad, and the money loaned was turned over to the officers of the railroad company to be by them expended in the work of construction. It was held that the mortgagee was a promoter or builder of the railroad, and that the lien of the mortgage was not entitled to priority over the lien for the labor and material employed in the construction. Manifestly that case does not in the least militate against the conclusion reached herein.

The following cases cited by plaintiff are not in point here: *Pickens v. Plattsmouth Investment Co.*, 37 Nebr., 272, 282; *Bohn Sash & Door Co. v. Case*, 42 Nebr., 289; *Chapman v. Brewer*, 43 Nebr., 896; *Wakefield v. Van Dorn*, 53 Nebr., 25. They cite with approval *Henry & Coatsworth Co. v. Fisherdick, ubi supra*, on some one of the many propositions decided therein, but the question involved in this case was determined in none of them.

It is clear that Danielson should not have been awarded the second lien, for the reason it was not established that the note and mortgage given by Anderson to Pierson had ever been transferred or assigned to Danielson. The answer and the cross-petition of the latter alleged that the note and mortgage had been transferred and assigned to him and that he was the owner thereof. These averments having been put in issue by the reply, it devolved upon Danielson to establish them on the trial, as to plaintiff. Such proof, however, was not required as to the Andersons, as they did not by any pleading controvert the averments in Danielson's cross-petition. The decree as to Hubbard is affirmed; as to Danielson it is modified, by giving him the third lien, and plaintiff the second lien.

DECREE MODIFIED.

GRAND ISLAND MERCANTILE COMPANY V. HOMER L. MCMEANS.

FILED JUNE 20, 1900. No. 9,262.

1. **Verdict: EVIDENCE.** Evidence examined, and *held* to sustain the verdict.
2. **Preponderance of Evidence.** The mere fact that the testimony of the plaintiff is contradicted in every essential particular by that of the defendant does not necessarily determine that the former has failed to make out his case by a preponderance of the evidence.
3. **Instructions.** The instructions examined, and *held* not to have made a comparison between the testimony of one witness and that of another, or to have reflected on the evidence adduced by the defendant.

ERROR to the district court for Hall county. Tried below before THOMPSON, J. *Affirmed.*

W. H. Thompson, for plaintiff in error.

J. H. Woolley and *Charles G. Ryan, contra.*

NORVAL, C. J.

Homer L. McMeans was the ticket and freight agent of the Union Pacific Railroad Company at Grand Island. A car load of sugar was received at said point over said railroad from San Francisco consigned by the shipper, with notice to deliver the sugar to the Grand Island Mercantile Company. The freight rate thereon from the initial point of shipment to Omaha was $202, which sum was paid by the consignor. For some reason not to us apparent the rate from San Francisco to Grand Island was $307.04, or $105.04 more than the Omaha rate for hauling the car a considerably shorter distance. McMeans, without the remainder of the freight having been paid, in violation of the rules of his company, delivered the car of sugar to the defendant, and the former was compelled to, and did, pay the remainder of the freight

to the railroad company. He instituted this action to recover the amount so paid from the Grand Island Mercantile Company, and was successful in the court below.

The first contention is that there is an entire failure of any proof tending to show an oral request of the defendant to pay the freight charges, or a promise of the defendant to reimburse McMeans for the amount of freight advanced. The evidence is to the effect that on the arrival of the sugar at Grand Island the car was not set on the switch for unloading because of the unpaid freight, and Mr. Peterson, the president of the defendant, was so notified, who told plaintiff to have the car placed upon the switch and his company would pay the freight charges. In compliance with this, McMeans caused the car to be set on the switch, and the defendant accepted and received the consignment of sugar. Plaintiff having violated the rules and regulations of the railroad company in delivering the freight before the charges had been paid, became liable therefor to his employer, and he having paid the freight charges to the railroad company, the defendant became liable to him for the amount so paid. Whether the railroad company was entitled to a larger sum for hauling the car from San Francisco to Grand Island than was the rate thereon from the initial point of shipment to Omaha is not a material question at this time, since the defendant obtained the car on the agreement to pay the charges. Plaintiff having been compelled to pay them himself, the law raised the promise on the part of the defendant to reimburse him therefor. It follows that the trial court committed no error by the exclusion of certain exhibits offered by the defendant, and that the evidence sustains the verdict. We have examined the other rulings on the introduction of evidence and find no prejudicial error therein.

Exception is taken to instruction 8, which is as follows: "8. If you find from the evidence that the plaintiff paid the money as alleged in plaintiff's petition, and that said money was so paid at the request of the defendant, then

you are instructed that the law implies a promise on part of defendant to repay the same to plaintiff, and then, and in that case, if you find that the same has not been repaid, you should find for the plaintiff for the sum so paid with interest at 7 per cent from date of such payment." It is not pointed out in the brief of defendant wherein the foregoing instruction is faulty. It seems to be applicable to the evidence, and is within the issues tendered by the pleadings.

The trial court properly informed the jury, in the ninth and tenth instructions, that they had nothing to do with the question as to what constituted a just and reasonable freight rate from San Francisco to Grand Island. The defendant agreed to pay the freight charges, with knowledge of their amount, and having obtained the sugar on that promise, it can not urge that the rate was exorbitant to defeat a recovery in favor of the plaintiff.

Complaint is also made of the fifth instruction, which reads: "The jury are further instructed that it does not necessarily follow that a plaintiff has failed to establish his case by a preponderance of proof because he has testified to a state of facts which are denied by the testimony of the defendant. In such a case, in arriving at the truth, the jury have a right to take into consideration every fact and circumstance proven on the trial, such as the situation of the parties, their acts at the time of the transaction and afterwards, so far as they appear in evidence; their statements to others, if any proven in relation to the matters in question, as well as their statements to each other, as well as their appearance on the witness stand and their manner of testifying in the case." This portion of the charge was not, as suggested by counsel, in disparagement of the testimony of defendant, nor did it tend to strengthen that of plaintiff. It is true that he did not fail to make out his case by a preponderance of the evidence, merely because his testimony, in every essential matter, was contradicted by that adduced by his adversary. The preponderance of the evidence is not

determined by such a rule. Many matters enter into the solution of the question, as the jury were properly advised by the court below. The fifth instruction did not, as urged in argument, compare the testimony of any witness or party with that of another witness or party. *Argabright v. State*, 49 Nebr., 760, cited by the defendant, is inapplicable here. There the trial court, in its instructions, specifically named certain witnesses for the defense and cautioned the jury that, if they had testified falsely as to any material matter, their testimony should be wholly rejected where uncorroborated by other credible evidence. Manifestly it was error to so advise the jury. But no instruction of that import was given in the case at bar.

The sixth instruction was apt. The evidence was so conflicting that it would have sustained a verdict for either party.

No reversible error having been called to our attention, the verdict and judgment are

AFFIRMED.

MARGARET E. DOVEY ET AL. V. ELIZABETH MCCULLOUGH ET AL.

FILED JUNE 20, 1900. No. 10,465.

1. **Appeal:** SUPERSEDAS BOND. An appeal to this court does not operate as a stay of proceedings, unless the appellant shall execute a supersedeas bond within twenty days from the entry of such decree, conditioned as required by section 677 of the Code of Civil Procedure.
2. **Appraisement:** OBJECTIONS: TIME. All objections to the appraisement of property, to be available, must be made before the sale.
3. ———: COPY: FILING WITH CLERK. A copy of the appraisement is required to be filed with the clerk of the district court before the property is advertised for sale.

ERROR to the district court for Cass county. Tried below before RAMSEY, J. *Affirmed.*

A. N. Sullivan, for plaintiffs in error.

C. S. Polk and *Jesse L. Root, contra.*

NORVAL, C. J.

This is an error proceeding to review an order confirming the sale of real estate under a decree foreclosing a tax lien. The grounds urged in the court below for vacating the sale were: (1.) That an appeal had been prosecuted from the decree of foreclosure and a supersedeas bond given. (2.) The property was appraised too low. (3.) Lots 10 and 11 were appraised together. (4.) No copy of the appraisement was filed in the office of the clerk of the district court within the time required by law. The same points only are raised by the petition in error. The appeal from the decree of foreclosure did not stay the carrying into effect its provisions, as no supersedeas bond was given by the appellants within twenty days after the decree was rendered, as section 677 of the Code of Civil Procedure required.

No objection to the appraisement having been made before the sale, this court is not called upon to determine whether the premises were appraised too low, or whether each lot should have been separately appraised. A copy of the appraisement was deposited by the sheriff in the office of the clerk of the district court before the property was advertised for sale. This was all the law required. The order of confirmation is

AFFIRMED.

YOUNG MEN'S CHRISTIAN ASSOCIATION OF LINCOLN V. FRANK RAWLINGS.

FILED JUNE 20, 1900. No. 10,805.

Witness: CREDIBILITY: RECORD OF CONVICTION. The record of conviction of an offense below the grade of a felony is not admissible to affect the credibility of a witness.

ERROR to the district court for Lancaster county. Tried below before HOLMES, J. *Affirmed.*

Ricketts & Wilson and *F. M. Hall*, for plaintiff in error:

Three classes of crimes at common law rendered the prepetrator infamous. They were treason, felony and *crimen falsi.* The crime charged in the information in this case clearly falls within the definition *crimen falsi.* The following definitions have been given by the courts and law writers of *crimen falsi:*

"The crime of deceiving or falsifying. At common law, any offense involving falsehood, and which might injuriously affect the administration of justice by the introduction of falsehood and fraud." Anderson's Dictionary of Law.

The crime charged belongs to the class known as infamous, which includes every species of the *crimen falsi,* such as forgery, perjury, subornation of perjury, and offenses affecting the public administration of justice.

"At common law, any crime which may injuriously affect the administration of justice, by the introduction of falsehood and fraud." Bouvier's Law Dictionary.

At common law, conviction of such a crime rendered the party infamous and wholly unworthy of credit. Now, by statute, the competency of the party as a witness is restored; but his conviction may still be shown for the purpose of affecting his credibility. *Webb v. State,* 29 Ohio St., 351, 358.

Where the testimony of a witness is material, it is reversible error to exclude an offer to show by his cross-examination that he has been convicted of a crime, there being no objection on the ground that a direct question should be asked. *Perham v. Noel,* 47 N. Y. S., 100, 20 App. Div., 516.

Billingsley & Greene, contra.

NORVAL, C. J.

This cause was before us at the January term, 1896, when a judgment recovered by the plaintiff was reversed. 48 Nebr., 216. The last trial resulted in a judgment in favor of defendant. To obtain a reversal thereof, this error proceeding is prosecuted by the unsuccessful party.

The action was upon a subscription contract. The answer put in issue each and every averment of the petition. The defendant was a witness in his own behalf. He had been previously adjudged guilty of contempt of court by reason of his having attempted to bribe a juror, and was fined therefor $100. For the purpose of affecting his credibility in the present case the plaintiff offered in evidence said judgment of conviction, to which defendant objected; the objection was sustained and the offered testimony excluded. Upon this ruling alone a reversal is sought. Section 330 of the Code of Civil Procedure declares: "Facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility." Section 338 of said Code provides: "A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof." It is obvious that, if it were not for the last section quoted, the proof tendered was admissible under section 330, as tending to affect the credibility of the defendant as a witness. But said section, in its scope and purpose, is modified by section 338. It allows the admission of a witness that he had been convicted of a felony, or the record of such conviction, to be received as evidence. Said section clearly excludes the idea that the conviction of an offense below the grade of a felony is admissible to affect the credibility of a witness. Argument can not make it plainer. The defendant not having been convicted of a felony, the testimony offered was properly excluded.

AFFIRMED.

ANDREW HAWKINS V. STATE OF NEBRASKA.

FILED JUNE 20, 1900. No. 11,130.

1. **Murder:** INFORMATION: COUNTY ATTORNEY. A prosecution for murder may be by information filed by the county attorney.
2. **Venue:** CIRCUMSTANTIAL EVIDENCE. The venue of a homicide may be established by circumstantial evidence.
3. ———: LOCUS CORPORIS. In a prosecution for murder, evidence of the finding of the body of the person alleged to have been murdered, in an old well which had been subsequently filled, situate in Frontier county, is sufficient, in the absence of other proof, to warrant the jury in concluding that the homicide was committed in that county.
4. **Assignment of Error.** The assignment in a petition in error of "errors of law occurring during the trial, duly excepted to," is insufficient to present for review the rulings of the trial court admitting or excluding testimony.
5. ———. An assignment in a petition in error should specifically indicate the ruling of which complaint is made.
6. ———: INSTRUCTIONS. Instructions should be assigned specifically in the petition in error.

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

W. R. Starr and *J. L. White*, for plaintiff in error, on the question of venue, cited: Constitution, Bill of Rights, sec. 11; *Olive v. State*, 11 Nebr., 1; *State v. Crinklaw*, 40 Nebr., 759.

Constantine J. Smyth, Attorney General, Willis D. Oldham, Deputy, and *W. S. Morlan, contra*, on proof of *corpus delicti*, cited: *McCulloch v. State*, 48 Ind., 109; *People v. Palmer*, 109 N. Y., 110; *Gray v. Commonwealth*, 101 Pa. St., 380; *Marion v. State*, 20 Nebr., 233. As to statements of deceased being part of *res gestæ*: *Hunter v. State*, 40 N. J. Law, 537; *Commonwealth v. Werntz*, 29 Atl. Rep. [Pa.], 272; *State v. Thompson*, 132 Mo., 322; *State v. Vincent*, 24 Ia., 571; *Lambert v. People*,

29 Mich., 71; *Driscoll v. People*, 47 Mich., 413. As to incumbering the record with repeated instructions: *Olive v. State, supra; Binfield v. State*, 15 Nebr., 489; *Comstock v. State*, 14 Nebr., 208; *Kerkow v. Bauer*, 15 Nebr., 167; *Kopplekom v. Huffman*, 12 Nebr., 100.

NORVAL, C. J.

Andrew Hawkins was charged in an information filed in the district court of Frontier county with having murdered one Thomas Jensen. The accused was tried, a verdict of murder in the first decree was returned, and life imprisonment in the penitentiary was the punishment imposed. The record of the proceedings is here for review.

Thomas Jensen at the time of his death was a widower about 70 years old, and at various times resided at Indianola, in Red Willow county. He was possessed of considerable means, and loaned his money on real estate mortgages in Kansas and Nebraska. He would frequently leave Indianola and not return for months. In the fall of 1897, he returned to Indianola from an extended absence; and about the middle of December of that year he was seen alive in that village, when he disappeared. His relatives instituted a search for him in the summer of 1898, and currency having been given to the rumor that perhaps Jensen had been foully dealt with, a general search for his remains was instituted by the people of Frontier county, which resulted in the finding of the body of Jensen on August 9, 1898, in the bottom of a deep well in a canyon situate on lands adjoining the accused in Frontier county and about four miles from the Red Willow county line. Suspicion at once was directed towards Hawkins. A coroner's inquest was held, at the close of which a warrant was issued against Hawkins, upon which he was arrested for the crime of murder. The county attorney filed an information in the district court of Frontier county, and conviction followed.

It is urged that the court below had no jurisdiction to try the cause or sentence the accused, for two rea-

sons: First, there was no presentment or indictment by a grand jury, but that Hawkins was tried and convicted upon an information filed by the county attorney, and second, the offense was not committed in Frontier county.

The first contention is not new. The question has been considered and decided by this court in *Miller v. State*, 29 Nebr., 437; *Bolln v. State*, 51 Nebr., 581, where it is ruled that prosecutions for felonies may be had on informations filed by the county attorney.

The other objection lacks merit. It is true no witness testified that Jensen was murdered in Frontier county, the conviction being based largely upon circumstantial evidence. It is uncontradicted that Jensen's body was found in an old well, which had been partially filled, in Frontier county, several miles from the county line, conclusively showing that the body was thrown into the well by some one. This evidence, unexplained, was sufficient to justify the jury in concluding that the homicide was committed in Frontier county. *Commonwealth v. Costley*, 118 Mass., 1. The venue in a criminal case may be established by circumstantial evidence, like any other fact. *State v. West*, 69 Mo., 401; *Weinecke v. State*, 34 Nebr., 14.

It is urged that the evidence is insufficient to sustain a conviction in this case. That the lifeless body found in the well was that of Thomas Jensen, and that he was murdered by some one, was not questioned by defendant, and the *corpus delicti* is clearly established by the evidence. Frank Green, S. R. Smith and Dr. Chase, the coroner, testified to the recognition of the features of the body as that of Thomas Jensen. An overcoat and shoes found with the body were identified by T. J. Crouch as those owned by Jensen. Writing in a memoranda book found in the pocket of the coat taken from the well was identified by A. H. Kidd as the handwriting of the deceased. Dr. J. M. Parott identified the false teeth taken from the mouth of deceased as a set he had repaired for

Thomas Jensen in Stockville. The identification of the body was complete.

Evidence was introduced tending to show that on December 13, 1897, the day on which witnesses for the state testified to having last seen Jensen alive, the deceased told at least two persons that he was going from Indianola to the defendant's home that evening, a distance of several miles, and one person testified he saw the accused, Jensen, and another person riding together on the road between Indianola and the defendant's home; that early in February, 1898, Hawkins purchased the land on which the well was located and filled in about 12 feet of the well with manure and straw; that he had threatened the life of Jensen. These facts with others disclosed by this record were ample to convict the accused of the crime. The jury could have had no doubt of his guilt, and upon the record before us we entertain none.

Complaint is made in the brief of defendant of various rulings of the court on the admission and exclusion of testimony. The assignments in the petition in error relating thereto are as follows:

"3. Errors of law occurring during the trial, duly excepted to.

"10. The court erred in the admission of incompetent testimony over the objections of the plaintiff.

"11. The court erred in excluding testimony offered by the plaintiff, material to the case."

These assignments in the petition in error are entirely too general to present to this court any question for review. *Madsen v. State*, 44 Nebr., 631; *Moore v. Hubbard*, 45 Nebr., 612; *Murphy v. Gould*, 40 Nebr., 728; *Houston v. City of Omaha*, 44 Nebr., 63; *Wanzer v. State*, 41 Nebr., 238; *Cortelyou v. Maben*, 40 Nebr., 512; *Wiseman v. Ziegler*, 41 Nebr., 886.

It is insisted that the judgment should be reversed for errors in the giving and refusing of instructions. These are assigned in the petition in error thus:

"12. The court erred in giving instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 on its own motion.

"13. The court erred in refusing to give instructions 1, 6, 7, 9 and 10 asked by the plaintiff."

This court has said repeatedly that an assignment of error as to the giving or refusing of instructions *en masse* is unavailing unless well taken as to all the instructions in the group. More than one of the instructions given, of which complaint is made, is free from error and at least one of the requests to charge was properly refused. The assignments are overruled, with the suggestion that a careful examination of the instructions given, as well as refused, convinces us that the court below committed no error prejudicial to the accused in its rulings relating to instructions. The defendant was accorded a fair and impartial trial, and was convicted upon sufficient evidence and in accordance with the law.

AFFIRMED.

STATE OF NEBRASKA V. WALTER P. BYRUM.

FILED JUNE 20, 1900. No. 11,221.

1. **Enactment of Law:** PRESUMPTIVE EVIDENCE. The General Statutes of 1873 are presumptive, but not conclusive, evidence of enactment of a law published therein.

2. ———: ENROLLED LAW: PRINTED PUBLICATION: VARIANCE. When there is a variance between an enrolled law deposited with the secretary of state and a printed publication thereof, under legislative authority, the enrolled act governs and controls.

3. **Amendatory Act:** REPEAL: CONSTITUTIONAL REQUIREMENT. A purely amendatory act must set out the section as amended, and, in addition, contain a provision for the repeal of the old section sought to be amended.

4. ———: ADULTERY: INVALID LAW. The act of 1875 (Session Laws, p. 2), amendatory of certain sections of the Criminal Code, including section 208, relating to adultery, is invalid, since it contained no provision for the repeal of the sections amended as by the constitution required.

5. **Construction of Statute:** MEANING OF WORDS. In construing a statute, words should be given their usual meaning.

6. **Definition of Adultery.** Under section 208 of the Criminal Code a single act of sexual intercourse by a married man with an unmarried woman constitutes the crime of adultery.

ERROR to the district court for Stanton county. Tried below before GRAVES, J. Writ of error by the state. *Exceptions sustained.*

Constantine J. Smyth, Attorney General, Willis D. Oldham, Deputy, G. A. Eberly and *W. W. Young*, for the state:

The term "adultery," as used in the Criminal Code of this state, is properly defined as "voluntary sexual intercourse of a married person with a person other than the offender's husband or wife." Bouvier's Law Dictionary, Rawle's revision, vol. 1, title "Adultery"; 2 Wharton, Criminal Law, sec. 1721*a*; *Bailey v. State*, 36 Nebr., 808.

The statute provides for three classes of cases: first, where a man commits adultery; second, if he deserts his wife and lives and cohabits with another woman in a state of adultery; third, if living with his wife he shall keep any other woman and wantonly cohabit with her in a state of adultery. *Lord v. State*, 17 Nebr., 527; Criminal Code, sec. 208.

This court has recognized the fact that it is a crime committed against the wife of the guilty husband; and this is the reason assigned for the rule which makes her a competent witness against her husband where he is charged with adultery. *Owens v. State*, 32 Nebr., 167, 174.

John A. Ehrhardt and *John B. Barnes, contra:*

If the court holds that the portion of the statute which reads, "If any married man shall commit adultery," is sufficient without any further words to base a criminal charge upon, then this court is driven to the common law definition of adultery in order to aid the statute. We can not go anywhere else, and the common law states the rule to be that an act of sexual intercourse between

a married man and an unmarried woman is not adultery on the part of the man. 1 Am. & Eng. Ency. of Law [2d ed.], 747; *Ohio v. Connoway*, Tappan [Ohio], 90; *State v. Armstrong*, 4 Minn., 251.

It is the living and cohabiting together in a state of adultery that constitutes the offense. Maxwell, Criminal Procedure, p. 94.

It is the married man, who, living with his wife, keeps another woman and wantonly cohabits with her in a state of adultery.

The information charges none of these several situations. *Sweenie v. State*, 59 Nebr., 269.

The information must charge the language of the statute. Maxwell, Criminal Procedure, p. 70.

NORVAL, C. J.

An information was filed by the county attorney of Stanton county in the district court of that county charging "that Walter P. Byrum, on the 19th day of June in the year of our Lord one thousand eight hundred and ninety-nine, in said county and state aforesaid, being then and there married to and the lawful husband of one Lizzie Byrum then alive, did then and there commit the crime of adultery with one Lena Ackels an unmarried woman, by he, the said Walter P. Byrum then and there having carnal knowledge of the body of her, the said Lena Ackels." The defendant interposed to the information a general demurrer, which the court below sustained and dismissed the cause. This is a proceeding brought by the county attorney, under section 515 of the Criminal Code, to review said decision. The main question is whether a single act of sexual intercourse by a married man with a single woman is adultery subjecting him to the penalty prescribed by section 208 of the Criminal Code. This section in its original form was passed by the legislature in 1873, and as carried into the General Statutes of that year reads as follows:

Sec. 208. If any married woman shall hereafter com-

mit adultery, or desert her husband, and live and cohabit with another man, in a state of adultery, she shall, upon conviction thereof, be imprisoned in the jail of the county, not exceeding one year, and if any married man shall hereafter commit adultery, desert his wife, and live and cohabit with any other woman, in a state of adultery; or if any married man, living with his wife, shall keep any other woman, and notoriously cohabit with her, in a state of adultery; or if any unmarried man shall live and cohabit with a married woman, in a state or adultery; every person so offending, shall be fined in any sum not exceeding two hundred dollars, and be imprisoned in the jail of the county not exceeding one year." The enrolled bill in the office of the secretary of state discloses that the word "or" appears in the section following the word "adultery" and preceding "desert." The omission of the disjunctive conjunction from the published law changes somewhat the meaning of the section, since if the section is read without "or" inserted at the place indicated it would require a married man to "commit adultery, desert his wife, and live and cohabit with any other woman in a state of adultery"—all of these things—to become amenable to the penalty prescribed by this section; while if the section is construed with the word "or" inserted, the commission of any one of the acts designated in the section quoted constitutes the crime of adultery. As the information in this case does not charge that the defendant deserted his wife and lived and cohabited with another woman, it therefore is important whether the enrolled bill or the published statutes controls. The General Statutes of 1873 were printed and published by the authority of the legislature, and such fact is presumptive evidence of the general laws of this state in force at the close of the session of the legislature of 1873. But it is very evident that where there is a variance between an enrolled law and the printed publication thereof, authorized by the legislature, the latter must yield to the former. No erroneously printed statute or law, by

legislative sanction, can take the place of, or override, the law as actually passed, enrolled, approved and deposited in the office of the secretary of state, the proper custodian. There is no escaping the conclusion that section 208, as the same originally passed, made a married man amenable to its provisions who either committed a single act of adultery or who deserted his wife and lived and cohabited with any other woman in a state of adultery.

The legislature of 1875 attempted to amend said section 208 so as to read thus:

"Sec. 208. If any married woman shall hereafter commit adultery, or desert her husband and live and cohabit with another man in a state of adultery, she shall, upon conviction thereof, be imprisoned in the jail of the county not exceeding one year; and if any married man shall hereafter commit adultery, or desert his wife and live and cohabit with any other woman in a state of adultery, or if any married man living with his wife shall keep any other woman and wantonly cohabit with her in a state of adultery, or if any unmarried man shall live and cohabit with a married woman in a state of adultery, every person so offending shall be fined in any sum not exceeding two hundred dollars, and be imprisoned in the jail of the county not exceeding one year." Session Laws, 1875, p. 11.

But the amendment of 1875 is invalid, because the act of 1875 contained no provision for the repeal of the original section attempted to be amended. *Reynolds v. State*, 53 Nebr., 761. At the last session of the state legislature held in 1899 said section 208 was amended. But this last amendment not having become effective at the time the adulterous act was charged in the information to have taken place, such amendment is not applicable in this case, but the information must stand or fall under the original section 208 quoted above, not as it appears in the General Statutes of 1873, but as it actually passed, as disclosed by the enrolled bill. To charge a crime of adultery thereunder, against a married man, it is not

essential that the information aver that the accused deserted his wife and lived and cohabited with another woman in a state of adultery, since the statute declares that "if any married man shall hereafter commit adultery," he shall be liable upon conviction to the penalty prescribed by said section 208. A single act of sexual intercourse by a married man with a single woman constitutes the crime of adultery. But it is argued that this doctrine is opposed to the common law definition of adultery. At common law adultery was not a crime, but adultery was punishable by the Ecclesiastical courts, and according to the Ecclesiastical law, unlawful sexual intercourse by a married man with another woman, whether she be married or single, constitutes adultery. But we are not driven to the Ecclesiastical law for the definition of adultery. Prior to the enactment of the Criminal Code there had existed in Nebraska a statute authorizing a divorce "when adultery has been committed by any husband or wife." Revised Statutes, 1866, ch. 16, sec. 6. Without any legislative definition of the word "adultery" as used in the divorce statute, divorces had been frequently granted upon proof of a single act of adultery committed by the husband or wife with a person of the opposite sex whether married or single. In passing the Criminal Code in 1873, the legislature must have had in view the meaning of adultery as used in the divorce statute as adopted by the courts and employed the word in the same sense in section 208. In construing a statute, words should be given their usual and well recognized meaning. There is no escaping the conclusion that the information charged a crime. 2 Wharton, Criminal Law, sec. 1721; Bishop, Statutory Crimes, secs. 655, 656; *Bailey v. State*, 36 Nebr., 808; *Commonwealth v. Call*, 38 Mass., 509; *Helfrich v. Commonwealth*, 33 Pa. St., 68; *State v. Fellows*, 50 Wis., 65; *Cook v. State*, 11 Ga., 53; *State v. Glaze*, 9 Ala., 283; *White v. State*, 74 Ala., 31; *Miner v. People*, 58 Ill., 59; *State v. Hutchinson*, 36 Me., 261; *Territory v. Whitcomb*, 1 Mont., 359; *Holdren v. State*, 29 Ohio St., 651.

The exceptions of the county attorney are accordingly sustained.

EXCEPTIONS SUSTAINED.

ANDREW J. MCARTHUR V. STATE OF NEBRASKA.

FILED JUNE 20, 1900. No. 11,231.

1. **Intoxicating Liquor:** DISTINCT SALES: JOINDER IN INFORMATION: ELECTION. Several unlawful sales of intoxicating liquors may be joined in the same information, and the state will not be required to elect upon which count it will rely for a conviction.
2. ———: LIMITATION. A prosecution for the sale of intoxicating liquors without a license must be brought within eighteen months from the commission of the offense.
3. **Instruction:** PREJUDICE. A judgment will not be reversed for the giving of an erroneous instruction where it is manifest that the complaining party could not have been thereby prejudiced.
4. **Reasonable Doubt:** CONJECTURE. The definition of a reasonable doubt contained in the instructions did not permit the jury to enter the field of conjecture, but confined them to the consideration of the evidence adduced on the trial.

ERROR to the district court for Custer county. Tried below before SULLIVAN, J. *Affirmed.*

C. L. Gutterson and *Wall & Williams*, for plaintiff in error.

Constantine J. Smyth, Attorney General, Willis D. Oldham, Deputy, and *L. E. Kirkpatrick, contra.*

NORVAL, C. J.

An information filed in the court below contained 24 counts charging the defendant with as many different sales of intoxicating liquors without a license. Before verdict, the state dismissed as to 17 counts, and the accused was found guilty on the remaining 7 counts, and was fined $100 for each of the offenses of which he was convicted. The defendant filed a motion prior to the trial

to require the county attorney to elect upon which count he would proceed to trial, which motion was denied, and the ruling is now assailed. The decision on this point was proper. *Burrell v. State*, 25 Nebr., 581. In that case the indictment charged the defendant with 15 distinct violations of law by selling intoxicating liquors, and it was ruled that the several offenses could be joined in the same indictment, and a conviction could be had for each offense. It logically follows that the state was not required to elect the count under which it would claim a conviction.

Complaint is made of the giving of the instruction number 4 which, *inter alia*, told the jury that before they could return a verdict of guilty, they must find that the intoxicating liquors were sold at the time stated in the information, or "within eighteen months prior to the time charged in the information." This direction of the court was technically wrong and conflicts with section 256 of the Criminal Code, which provides, "nor shall any person be prosecuted, tried, or punished for any misdemeanor or other indictable offense below the grade of felony, * * * unless the indictment, information, or action for the same shall be found or instituted within one year and six months from the time of committing the offense, * * * or within one year for any offense the punishment of which is restricted to a fine not exceeding one hundred dollars, and to imprisonment not exceeding three months." The defendant was charged with misdemeanors, upon conviction of which the statute authorized the imposing of a fine not less than $100 nor more than $500 for each offense, or imprisonment not to exceed one month in the county jail. Compiled Statutes, ch. 50, sec. 11. The statute of limitations would run against the offenses charged against the accused in 18 months from the time of the commission thereof. The jury should have been so informed. The prisoner was not prejudiced by the instruction, for it was established beyond controversy that the unlawful sales were all made by him

within the statutory period of limitations. Had there been proof of sales of liquor more than 18 months prior to the filing of the information, prejudice would have resulted from the instruction. A judgment will not be reversed for the giving of an erroneous instruction which could not have prejudiced the unsuccessful litigant. *Converse v. Meyer*, 14 Nebr., 190.

The fifth instruction is criticised. It was thus: "By a reasonable doubt, as the term has been herein used, is not meant a doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict. A juror should not create sources of material of doubt by resorting to trival or fanciful suppositions or remote conjectures as to probable states of facts differing from that established from the evidence. The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinarily prudent men with a conviction upon which they would act in their own most important affairs and concerns of life." The vice imputed to the instruction, as stated by counsel, is that "impliedly this language tells the juror that he may create sources of material doubt by resorting to trivial or fanciful suppositions or remote conjectures as to probable states of facts so long as they do not differ from that established from the evidence. If the things mentioned do differ as stated, they are prohibited; if they do not differ, they are not prohibited."

The criticism on the charge is not merited. The instruction did not allow the jury to enter the field of conjecture or to wander outside of the evidence, but confines them to the testimony adduced on the trial in arriving at their verdict.

No other points are argued, and no reversible error appearing on the face of the record, the judgment is

AFFIRMED.

STATE OF NEBRASKA, EX REL. GERMAN SAVINGS BANK, v. JACOB FAWCETT, JUDGE.

FILED JUNE 20, 1900. No. 11,289.

1. **Receiver:** CONFIRMATION OF SALE: SUPERSEDEAS. An order confirming the sale of real estate by the receiver of an insolvent bank is appealable and may be superseded by the bank.
2. ———: MANDAMUS. Mandamus will lie in a proper case to compel fixing the amount of the penalty of a supersedeas bond to be given on appeal from an order confirming the sale of real estate.

ORIGINAL proceeding in mandamus to compel the respondent, a district judge, to fix the amount of the penalty in a supersedeas bond on an appeal from confirmation of a sale of realty. *Writ allowed.*

Constantine J. Smyth, Attorney General, and *Joel W. West,* for relator.

Ralph W. Breckenridge, contra.

NORVAL, C. J.

Several years since, on application of the attorney general, a receiver was appointed for the German Savings Bank. The receiver qualified and entered upon the discharge of the duties of his trust. The district court of Douglas county, having jurisdiction of the proceedings, ordered the receiver to sell the remaining assets in his hands. In pursuance of this order the receiver on February 15, 1900, sold the assets, including several tracts of land, and made report of his sale. The court entered a rule requiring that cause be shown by a day named why the sale should not be confirmed, and directing that notice of such order be given the bank, which was done by service upon Joel W. West, the attorney of record of the bank, and who had represented it from the time the receiver was appointed. Mr. West, for and in behalf of

the German Savings Bank, and in its name, filed objections to the receiver's sale, which were not sustained by the court, and the sale was approved and confirmed. Thereupon Mr. West, in the name of the bank, and as its counsel, asked the district court to fix the amount of the penalty of the supersedeas bond, which request was denied and this application followed for a peremptory writ of mandamus to compel the respondent as the presiding judge to designate the penalty of the bond.

There is no room to doubt that the order confirming the sale of real estate by the receiver is not only appealable, but may be superseded, as well, by the bank, and it is for the trial court to fix the amount of the penalty of the supersedeas bond. *Kountze v. Erch*, 45 Nebr., 288; *State v. German Savings Bank*, 50 Nebr., 734; *State v. Fawcett*, 58 Nebr., 371. Mandamus will lie to compel the fixing of the amount of such bond. *State v. Holmes*, 59 Nebr., 503. But before the writ will issue it must appear that the respondent was requested by the relator to fix the penalty of the bond, and the application has been denied. As already stated, Joel W. West, for and on behalf of the bank, demanded of the respondent that he designate the penalty of the supersedeas bond. This much is conceded. The contention of the respondent is that Mr. West was counsel for some of the stockholders of the bank, and for whom, and not in good faith for the bank, he requested the fixing of the supersedeas bond. That issue was tendered to the district court when the application for the supersedeas bond was made, which issue was determined against the relator, and it is argued that this is final and conclusive. The question is not free from difficulties. Doubtless, the district court had a right, upon the proper issue tendered, to determine whether an attorney, who appears in a cause before it, has the authority so to do; and the decision on the question, when not appealed from, ordinarily becomes *res judicata*. We are unwilling to apply the rule here, since the act of the attorney was to secure an appeal and supersedeas,

and in such a case the decision of the district court as to his right to appear for the bank and whether he in good faith represented it is not conclusive in the proceeding. It is for this court to determine for itself whether the relator demanded of the respondent that he fix the amount of the supersedeas bond. The bank, being a corporation, could not personally appear before the district court, but could be represented by its officers or by counsel duly empowered. The evidence shows that Mr. West was employed by the corporation as its attorney at the time the receiver was appointed, and had authority to represent the bank in any and all steps taken in the cause, and he has, at the various stages of the proceeding, represented it before the courts. Thrice before this he has appeared for the bank in this court in matters connected with the receivership, with his authority to do so unchallenged. His general employment authorized him to take the necessary steps to appeal from the order of confirmation and to have the amount of supersedeas bond fixed. Moreover, his right to represent the bank was fully recognized by the service upon him of the rule to show cause. It may be that others than the bank may be greatly benefited by the appeal and the giving of the supersedeas bond, but that is no reason why the writ should be refused. It is true it is time the affairs of the bank were closed up, and this court is willing to lend its aid in that direction, when in its power to do so. The respondent should fix the amount of the supersedeas bond. Judgment will be entered accordingly.

WRIT ALLOWED.

NEBRASKA TELEPHONE COMPANY V. JOHN JONES.

FILED JUNE 20, 1900. No. 9,031.

1. **Personal Injury:** CONTRIBUTORY NEGLIGENCE: QUESTION OF FACT. While the plaintiff, an old man, seated on a load of baled hay, was driving a spirited team down a steep hill he encountered the stump of a telephone pole which stood in the middle of the traveled road and, being thrown to the ground, was severely injured. At the time of the accident he was endeavoring to prevent the wagon from pressing upon the horses and was not thinking of the obstruction in the highway. *Held*, That whether he was, under the circumstances, guilty of contributory negligence, was a question of fact for the jury.
2. ———: CONFLICTING EVIDENCE: VERDICT. In an action for damages resulting from an injury caused by an obstruction in a road over which plaintiff was driving, a verdict in favor of the plaintiff, based upon conflicting evidence, will not be disturbed.
3. **Evidence:** VERDICT. Evidence examined, and found to support the verdict.
4. ———: ERROR WITHOUT PREJUDICE. A judgment will not be set aside for error in admitting immaterial evidence where it appears that such evidence had no harmful or mischievous tendency.
5. **Error:** TENDER OF PROOF. A party, to avail himself of an error of the court in refusing to permit a witness to answer a question, must make an offer to prove the facts sought to be elicited.
6. **Motion for New Trial:** NEWLY-DISCOVERED EVIDENCE: DILIGENCE. It is not error to overrule a motion for a new trial grounded on newly-discovered evidence, where it is not shown that the moving party, before the trial, used due diligence to procure the evidence which he claims to have discovered since the trial.
7. ———: AFFIDAVITS: PRACTICE. A motion for a new trial on the ground of newly-discovered evidence should, ordinarily, be supported by the affidavit of the party making the application, as well as by the affidavit of his attorney; and the affidavit of the new witness should also be produced, or its absence satisfactorily accounted for.

REHEARING of case reported in 59 Nebr., 510. *Judgment below affirmed.*

W. W. Morsman, for plaintiff in error.

John P. Breen, contra.

SULLIVAN, J.

In an action by John Jones against the Nebraska Telephone Company, grounded on negligence, the district court of Sarpy county awarded plaintiff damages in the sum of $1,507.65. The defendant prosecuted error to this court and at the last term secured a reversal of the judgment against it. *Nebraska Telephone Co. v. Jones*, 59 Nebr., 510. Afterwards a rehearing was allowed; and, the cause having been again regularly submitted, is before us for decision. In the former opinion, which contains a statement of the essential facts, it is said the evidence convicts the plaintiff of contributory negligence and that he is, therefore, not entitled to recover of the defendant compensation for the injuries sustained. The facts are not disputed. The plaintiff, an old man, seated on a load of baled hay, was driving a spirited team down a steep hill on a summer afternoon. The wagon pressed upon the horses and the driver, either unintentionally while reaching for the brake, or else intentionally and with the view of arresting the forward movement of the wagon, "drew the team to one side," and thus brought one of the front wheels against the stump of a telephone pole which stood in the middle of the traveled track. The injuries complained of were the direct and immediate result of this accident. The plaintiff knew the stump was in the road; he had frequently observed it; he knew it was dangerous and had predicted that some one would, sooner or later, run against it and be hurt. It is said that Mr. Jones, at the moment of the accident, was not thinking of the stump; and that his inattention to a known danger was negligence *per se*. It would seem that the mind of the plaintiff was distracted from one peril by the sudden appearance of another. The danger from the stump was apparently lost sight of in the presence of the more formidable danger resulting from the pressure of the loaded wagon upon the high-strung horses. It may be that an

ordinarily prudent man, in the situation in which Mr. Jones found himself, would have kept his attention on the stump and avoided it; but we are certainly not prepared to say, as a matter of law, that he would have done so. What would constitute ordinary care under the circumstances, is plainly a question of fact, and not a question of law. The finding of the jury that plaintiff was not guilty of contributory negligence rests upon sufficient evidence, and we would be going far out of our way to disturb it.

Union P. R. Co. v. Evans, 52 Nebr., 50, was a case in which the plaintiff sued on account of an injury resulting from a fall upon an inclined platform. He was perfectly familiar with the dangerous character of the place where the accident occurred; and nothing extraordinary had happened to divert his attention from the danger. However, according to his own admission, he gave no particular heed to what he was doing. This court, sustaining a judgment in his favor, said, p. 55: "The defendant in error was well acquainted with the approach to the platform, had walked over it very frequently, but his knowledge of the approach and its condition as to steepness of incline would not bar him of his recovery if injured because of its unsafeness occasioned by such steepness, provided he was at the time, all the circumstances considered, exercising ordinary care. The company presented its depot platform and approach thereto as reasonably safe and suitable for the use and passage of the public in transacting business with it. The approach had been used for years by numerous persons, and often by defendant in error, in its then condition. It cannot be said as a matter of law that it was contributory negligence that he used it again."

Much like the *Evans Case* is *Doan v. Town of Willow Springs*, 101 Wis., 112, where it was held that a traveler who drives over a highway, without thinking of defects of which he has knowledge, is not, as a matter of law, guilty of contributory negligence. In the course of the

opinion the court said, p. 116: "Nor was it error for the court to instruct the jury that the fact that the plaintiff had driven over the highway at the point in question with knowledge of its defective and dangerous condition was not conclusive in law that he was guilty of contributory negligence. True, the plaintiff testified that he was not thinking when the accident occurred; that he did not know why, but he just happened not to be thinking; that any man was liable to go along the road without thinking of a bad place therein. Within the repeated rulings of this court, this would not have been sufficient to justify the court in taking the case from the jury. *Cuthbert v. Appleton*, 24 Wis., 383; *Wheeler v. Westport*, 30 Wis., 392; *Spearbracker v. Larrabee*, 64 Wis., 578; *Simonds v. Baraboo*, 93 Wis., 40." Other authorities supporting the rule that knowledge of the existence of a defect in a highway does not *per se* establish negligence on the part of a traveler who is injured in consequence of such defect are *George v. City of Haverhill*, 110 Mass., 506; *Bouga v. Township of Weare*, 109 Mich., 520.

In the former opinion we said that the evidence was probably sufficient to justify the jury in finding that the defendant was guilty of negligence as charged in the petition. We have no inclination to recede from this position. The evidence was sufficient.

The first and second assignments of error relate to the reception of evidence which defendant claims is immaterial. The evidence in question does not seem to have any bearing upon any of the issues, but its admission could not possibly have prejudiced the company. It was manifestly harmless; it had no mischievous tendency.

The third assignment of error is: "The district court erred in sustaining the objection of the plaintiff to a question propounded by your petitioner to its own witness, as follows: 'Where was the old telephone line located through that field at that time?'" Upon this point it is sufficient to say that the defendant is not in a position to avail itself of error in the ruling complained of. It made

no offer to prove by the witness, Henry S. Eby, where the telephone line was located at the time referred to.

The district court did not err in denying defendant's application for a new trial based on newly-discovered evidence. There was, according to the showing made, no evidence discovered after the trial which could not have been produced at the trial by the exercise of ordinary diligence. The motion was also properly overruled for the reasons stated in *Draper v. Taylor*, 58 Nebr., 787 (points 4 and 5 of syllabus), and in *Barr v. Post*, 59 Nebr., 361—point 3 of syllabus.

The judgment of this court, heretofore rendered, is set aside and the judgment of the district court is

AFFIRMED.

ELIZABETH SUTTON V. STELLA J. SUTTON ET AL.

FILED JUNE 20, 1900. No. 9,080.

1. **Ejectment:** EQUITABLE DEFENSE. A defendant, in answer to a petition in ejectment, may show, by his pleading, that he is the equitable owner of the property and entitled to affirmative relief.

2. **Pleading:** REPLY: DENIAL. A reply which states that an answer does not state facts sufficient to constitute a defense to plaintiff's cause of action stated in his petition is not a denial of the matters pleaded in the answer.

3. **Bill of Exceptions:** PRESUMPTION. In the absence of a bill of exceptions, it will be presumed that an issue of fact raised by the pleadings received support from the evidence, and that such issue was correctly determined.

ERROR to the district court for Thayer county. Tried below before HASTINGS, J. *Affirmed.*

J. B. Skinner and *Frederick Shepherd*, for plaintiff in error.

Frank Irvine and *O. H. Scott*, *contra.*

SULLIVAN, J.

This action for the recovery of real property was brought by Stella J. and Ira T. Sutton against Elizabeth Sutton in the district court of Thayer county. The petition states that the plaintiffs have a legal estate in the premises, that they are entitled to the possession thereof, and that the defendant unlawfully keeps them out of the possession. The answer, after denying in general terms the averments of the petition, alleges that the land in controversy was entered by Tingley W. Sutton, the father of the plaintiffs and husband of the defendant, under the timber culture act, on July 12, 1880; that trees were planted and cultivated as required by that act until March 29, 1886, at which time Mr. Sutton died intestate; that the land was the family homestead of the Suttons from the time it was entered until final proof was made, and is still occupied by the defendant as her home. It is also alleged that the planting and cultivation required by the act of congress was done by Sutton during his lifetime and by his widow since his death. There is a prayer for an assignment of dower and for general relief. The reply is as follows: "Now come the above named plaintiffs and replying to the defendant's amended answer, say that paragraphs two, three and four do not state facts sufficient to constitute a defense to plaintiff's petition for the cause of action therein stated. And further reply say that they admit that Tingley W. Sutton named in defendant's answer entered the land therein described under the timber culture act on the 12th day of July, 1880, and admit that said defendant is the widow of said Tingley W. Sutton and that the plaintiffs herein are the only children of said Tingley W. Sutton, and that there are no descendants of children, or other heirs, of said Tingley W. Sutton, except said plaintiffs. And further replying, deny that said defendant has any dower or homestead interest, in said premises."

It was doubtless sufficient for defendant to deny generally the title alleged in the petition, but she was not obliged to stop there; it was proper for her to go farther and show by her pleading that she was the equitable owner of the property and entitled to affirmative relief. *Dale v. Hunneman*, 12 Nebr., 221. The reply was not, in our judgment, a denial of the matters pleaded in the answer; it was, and was manifestly intended to be, an admission of the facts stated and a denial of their legal sufficiency to constitute a defense to the action. The lower court, according to the record, found the issues in favor of the plaintiffs, and by its judgment confirmed their title and awarded them possession of the land. The evidence given at the trial is not before us, and, consequently, we should first inquire whether there was under the pleadings any issue of fact which, if found in plaintiff's favor, would be decisive of the controversy. If there was such an issue, the presumption is that it was correctly determined and that the judgment is therefore right. It seems to us that, notwithstanding the averments of the answer, admitted by the reply, the court might have found from the evidence that the plaintiffs were possessed of the legal title to the land, and entitled to its possession. Evidence may have been given at the trial showing that all the rights of the defendant in or to the property had been voluntarily transferred to the plaintiffs after the patent was issued, or that there was a former adjudication in plaintiffs' favor, or that the homestead character of the land was disputed and, on conflicting evidence, decided by the officers of the land department against the defendant. Conceding that Mrs. Sutton belonged to the class of persons designated by the act of congress to succeed to the rights of a deceased entryman, we can not say that the decision of the district court is shown by the record to be erroneous. The judgment is therefore

AFFIRMED.

GURDON W. WATTLES V. LUCIUS W. COBB ET AL.

FILED JUNE 20, 1900. No. 9,272.

Chattel Mortgage on Growing Crop: UNCERTAIN DESCRIPTION. A chattel mortgage on 340 acres of corn, which was part of a growing crop of 425 acres, *held* void for uncertainty of description, the mortgaged property being neither uniform in quality nor capable of identification.

ERROR to the district court for Thurston county. Tried below before EVANS, J. *Affirmed.*

Brome & Burnett, for plaintiff in error.

A. C. Abbott, McNish & Oleson, M. C. Jay and *Guy T. Graves, contra.*

SULLIVAN, J.

This action was instituted by Gurdon W. Wattles to foreclose six chattel mortgages given to him by Lucius W. Cobb and Larkin B. Cobb. The controversy brought here for decision is between the plaintiff and the defendant, Frank B. Hutchins, trustee, and relates to certain corn raised in 1895 upon the premises hereinafter described. Wattles claims a lien upon the corn by virtue of a mortgage from the Cobbs, bearing date May 20, 1895, and containing the following description: "40 acres of wheat, 65 acres of oats, 40 acres of barley, 340 acres of corn. All of said crops now growing on lands leased from F. B. Hutchins, trustee, described as follows: N. ½ N. E. ¼, Sec. 1, T. 25, R. 5; S. ½ S. E. ¼ Sec. 26, T. 26, R. 5; N. E. ¼, E. ½ of N. W. ¼, E. ½ of S. W. ¼, N. ½ of S. E. ¼, and S. E. ¼ of S. E. ¼ of Sec. 35, T. 26, R. 5, and S. W. ¼, S. ½ of N. W. ¼, and N. E. ¼ of S. E. ¼ of Sec. 36, T. 26, R. 5." Hutchins claims title under a bill of sale executed by the Cobbs on May 4, 1895. The bill of sale, according to its terms, transferred 430 acres of corn upon the identical land described in plaintiff's chat-

tel mortgage. Upon this land there was actually grown in the year 1895 about 425 acres of corn. Whether there is any infirmity in Hutchins' title we need not determine, for the reason that plaintiff has failed to show any right to, or interest in, the property in dispute. His chattel mortgage, as far as it relates to the corn, is clearly void for uncertainty of description. The corn was not uniform in quality and there is nothing in the record to indicate what 340 acres was covered by the mortgage.

To make a valid contract requires a meeting of the minds of the contracting parties. In this case the court can not say from the evidence that the minds of the mortgagors and mortgagee ever came together so as to create a lien upon any particular corn. We can not see how the plaintiff could have maintained replevin even against the Cobbs. It would hardly be contended that an agreement to sell 340 acres out of a tract of 425 acres would be capable of specific enforcement. Such a contract would not give the purchaser an equitable ownership in any of the land. Neither could the mortgage here in question give the mortgagee a lien upon any specific personalty. Our conclusion, that the description contained in the mortgage, so far as the corn is concerned, was void for uncertainty, is, we think, supported by the following cases: *Price v. McComas*, 21 Nebr., 195; *Wood Mowing & Reaping Machine Co. v. Minneapolis & Northern Elevator Co.*, 48 Minn., 404; *Souders v. Voorhees*, 36 Kan., 138; *Clark v. Voorhees*, 36 Kan., 144; *Pennington v. Jones*, 57 Ia., 37; *Krone v. Phelps*, 43 Ark., 350; *Atkinson v. Graves*, 91 N. Car., 99; *Williamson v. Steele*, 3 Lea [Tenn.], 527; *Richardson v. Alpena Lumber Co.*, 40 Mich., 203; *Cass v. Gunnison*, 58 Mich., 108; *Blakely v. Patrick*, 67 N. Car., 40; *Stonebraker v. Ford*, 81 Mo., 532. The judgment is

AFFIRMED.

WILLIAM L. PARK, APPELLEE, V. AUGUST ACKERMAN, APPELLANT.

FILED JUNE 20, 1900. No. 9,275.

1. **Irrigation Ditch:** INTERFERENCE: INJUNCTION. Injunction is the appropriate remedy to prevent a party from obstructing, or unlawfully interfering with, an irrigation ditch of which the owner is in actual possession.

2. **Evidence.** Evidence examined, and found to sustain the judgment.

APPEAL from the district court of Lincoln county. Heard below before GRIMES, J. *Affirmed.*

T. Fulton Gantt, for appellee.

J. G. Beeler, contra.

SULLIVAN, J.

This is an appeal from a judgment of the district court of Lincoln county enjoining the defendant, August Ackerman, from obstructing and interfering with a lateral irrigation ditch which the plaintiff, William L. Park, constructed upon what he claims to be a part of his own land. The pleadings present no question of adverse occupancy. The issue, and the only issue, to be determined is whether the ditch is upon the plaintiff's farm or upon the defendant's lots which are located in one of the additions to the city of North Platte. After a careful reading of the record we reach the conclusion that Ackerman's contention is really not supported by any evidence. We are also of opinion that the trial court was warranted in finding that Park was in the exclusive possession of the disputed strip at and before the commencement of the suit. Under the facts disclosed an injunction was certainly the appropriate remedy.

The judgment of the district court is clearly right and is

AFFIRMED.

MISSOURI, KANSAS & TEXAS TRUST COMPANY v. PAUL F. CLARK.

FILED JUNE 20, 1900. No. 11,253.

1. **Pleadings:** AMENDMENT AFTER REVERSAL. After the reversal of a judgment for error occurring subsequent to the trial, and where the findings or verdict were not disturbed, it is not error for the trial court, on the cause being remanded, to refuse to permit amended pleadings to be filed, unless under the special circumstances of the case such refusal amounts to an abuse of discretion.
2. **Reversal:** TRIAL DE NOVO. When, in an error proceeding, a judgment is reversed for error occurring at the trial, the cause, when remanded, must necessarily be tried *de novo*.
3. ———: FIRST MATERIAL ERROR. When, in an error proceeding, the judgment of a trial court has been reversed, that court should retrace its steps to the point where the first material error occurred; from that point the trial should progress anew.
4. **Use and Destruction of Property:** INTEREST: MARKET VALUE. Regardless of the character of the action, interest is recoverable in all cases for the use or destruction of property when the amount which is due the plaintiff may be known or ascertained approximately by reference to market values.

ERROR to the district court for Lancaster county. Tried below before FROST, J. *Affirmed.* NORVAL, C. J., dissenting.

Robert Ryan, for plaintiff in error.

Charles S. Allen, *J. R. Webster* and *J. M. Stewart*, *contra.*

SULLIVAN, J.

This cause, which is now before the court for the second time, was instituted by Paul F. Clark to recover of the Missouri, Kansas & Texas Trust Company the rental value of a hotel in the city of Lincoln, from July 15, 1891, to February 15, 1895. The petition alleges that defendant took and retained possession of the premises wrongfully, and that the rental value thereof, during the time

aforesaid, was $400 a month. The company by its answer asserted the rights of a mortgagee in possession; and the reply denied the existence of any such right. The cause was tried without the aid of a jury, and the court, having stated in writing its findings of fact, gave judgment thereon in favor of the defendant. Clark thereupon prosecuted error to this court and obtained a reversal of the decision of the district court on the ground that he was entitled to recover and that the findings did not support the judgment rendered. *Clark v. Missouri, Kansas & Texas Trust Co.*, 59 Nebr., 53. The opinion contained no special directions to the lower court, which was by the mandate "commanded without delay to proceed in said cause according to law." After the district court became again possessed of the action it denied an application of the defendant for leave to amend its answer by inserting therein an allegation to the effect that its possession of the hotel was lawful under certain provisions of its mortgage which were constructively known to the plaintiff at the time his title was acquired. This ruling is assigned for error.

The contention of the defendant is that when this court reversed the judgment the cause stood for trial *de novo* in the district court. To this proposition we can not agree. The books are full of decisions to the contrary. When a judgment is reversed for an error occurring at the trial, the cause must necessarily be tried again. There is no other way to cure the mistake. But if the error upon which a judgment of reversal is based intervened after the trial, there is no good reason for a retrial of the issues. A conclusion having been once reached which was satisfactory to and accepted by the parties, it ought to be permitted to stand. When the judgment of a trial court has been reversed in an error proceeding, the court should retrace its steps to the point where the first material error occurred; it should put the litigants back where they were when the initial mistake was committed; justice requires that much, but it does not require more.

A new trial should be awarded only in cases where it is necessary to restore to the complaining party what he has lost by the error which induced the appellate court to set the judgment aside. The doctrine of the adjudged cases upon this subject is thus clearly stated by the supreme court of Arkansas in *Nelson v. Hubbard*, 13 Ark., 253: "When a judgment is reversed for error in the proceedings of the court below, and remanded to be proceeded in according to law, and not inconsistent with the opinion of this court, it is always understood that the proceedings in the court below, prior to the fault or error which is ascertained by this court to exist, are in no wise reversed or vacated by the adjudication of the appellate court; but the fault or error adjudicated is the point from which the cause is to progress anew." Other cases to the same effect are: *Backus v. Burke*, 52 Minn., 109; *National Inv. Co. v. National Savings, Loan & Building Ass'n*, 51 Minn., 198; *Commissioners v. Carey*, 1 Ohio St., 463; *Cox v. Pruitt*, 25 Ind., 90; *Ervin v. Collier*, 3 Mont., 189; *Felton v. Spiro*, 47 U. S. App., 402; *Woolman v. Garringer*, 2 Mont., 405; *German-American Bank v. Stickle*, 59 Nebr., 321; *Troup v. Horbach*, 57 Nebr., 644; *Oliver v. Lansing*, 51 Nebr., 818.

The defendant having failed to move seasonably for a new trial, and the judgment of reversal having left the findings of fact untouched, it was the duty of the district court to render judgment on those findings. This it did, adding interest to the ascertained rental value of the property. The defendant insists that the allowance of interest was unauthorized and cites in support of its position the case of *Wittenberg v. Mollyneaux*, 59 Nebr., 203. That case was correctly decided. It was an action to recover damages which were not only unliquidated, but were incapable of even approximate ascertainment by reference to the ordinary standards, such as calculation and market value. The damages in the present case were not speculative or dependent upon uncertain elements; the property had a rental value which was easily ascer-

tainable. The court made this finding: "The court further finds that during the time the said defendant company was in possession of the said premises as such mortgagees, it collected the sum of twelve thousand dollars, as rental for said property or might have collected the same by the exercise of proper diligence and that the said sum of twelve thousand dollars was the fair and reasonable rental value of said premises during the time the said defendant company was in possession as aforesaid, exclusive of any increased rentals on account of any improvements made by the said defendant company upon said property during the period of such possession." That the action was in tort and not on contract is no sufficient reason for refusing the plaintiff interest. Interest on demands based on market values susceptible of easy proof is recoverable in actions *ex delicto*. It was so held in *Fremont, E. & M. V. R. Co. v. Marley*, 25 Nebr., 138, and *Union P. R. Co. v. Ray*, 46 Nebr., 750. In the former case, which was brought to recover damages to a growing crop resulting from the negligence of the defendant, MAXWELL, J., delivering the opinion, said, p. 146: "If the plaintiff below had sustained loss of property through the fault of the railroad company, it certainly would be only justice that he should be paid for such loss as soon thereafter as the amount thereof could be ascertained. If the company failed to pay, then it should pay for the use of the money. The plaintiff, therefore, if entitled to damages, was entitled to interest thereon." Had this action been brought on an implied promise to pay rent, it would hardly be contended that the rental value, when fixed by the jury, should not bear interest. Why should the plaintiff recover less for the use of his property in a case where the law promises just compensation than in a case where the law promises a reasonable rent? The amount which is due to the plaintiff from the defendant is precisely the same in each case and is to be ascertained in the same manner. It can not be said that one claim is for unliquidated damages and the other is not. Regardless of the

character of the action we think interest is recoverable in all cases for the use or destruction of property when the amount which is due the plaintiff may be known or ascertained approximately by reference to market values. *De Lavallette v. Wendt*, 75 N. Y., 579; *Sullivan v. McMillan*, 37 Fla., 134; *Gulf, C. & S. F. R. Co v. Dunman*, 6 Tex. Civ. App., 101; *International & G. N. R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App., 186; *Mobile & M. R. Co. v. Jurey*, 111 U. S., 584; 1 Sutherland, Damages, 610; 1 Sedgwick, Damages [8th ed.], secs. 299, 300. Had this been an action to recover possession and for *mesne* profits, it would certainly have been proper to give the plaintiff interest on the rental value of the premises during the time they were wrongfully withheld. *Dana v. Fiedler*, 12 N. Y., 40, 51; *Walrath v. Redfield*, 18 N. Y., 457; *Vandevoort v. Gould*, 36 N. Y., 639; *Richmond v. Bronson*, 5 Den. [N. Y.], 55; *Jackson v. Wood*, 24 Wend. [N. Y.], 443; *Sopp v. Winpenny*, 68 Pa. St., 78; *Huston v. Wickersham*, 2 Watts & Serg. [Pa.] 308; *Drexel v. Man*, 2 Pa. St., 271, 276.

The defendant having had the use, for several years, of property having a rental value, we think it is bound to pay interest on the amount which it collected, or which, by the exercise of diligence it might have received, as rent. If the law does not allow interest in cases of this kind, then it denies to the injured party complete indemnity for the loss which he has sustained through the tortious act of another; it favors the wrongdoer rather than his victim. The case before us happens to be one of peculiar hardships; but it does not justify us in establishing a bad precedent. We see no way by which the defendant can avoid the consequences of what was technically a wrongful act. The plaintiff is entitled to insist on his advantage; the defendant has made a mistake and it must pay the penalty; "the court awards it, and the law doth give it." The judgment is

AFFIRMED.

NORVAL, C. J., dissenting.

I dissent. The judgment of the district court on the

former hearing was reversed, and the cause was remanded to the lower court without any special directions as to further proceedings. This being true, the findings on which the reversed judgment was predicated were, to all intents and purposes, vacated and set aside, and it was permissible to introduce new evidence or amend the pleadings, the same as if there had never been a trial of the case. The reversal being general when the mandate went down to the district court the cause was for trial *de novo*. So say the authorities. *Rush v. Rush*, 170 Ill., 623; *Perry v. Burton*, 126 Ill., 599; *Chickering v. Failes*, 29 Ill., 294; *Cable v. Ellis*, 120 Ill., 136; *West v. Douglas*, 145 Ill., 164; *Cahn v. Tootle*, 48 Pac. Rep. [Kan.], 919; *Updike v. Parker*, 11 Ill. App., 356; *Laithe v. McDonald*, 7 Kan., 254, 266; *Crockett v. Gray*, 31 Kan., 346; *State v. Newkirk*, 49 Mo., 472; Elliott, Appellate Procedure, sec. 380. Had the judgment been reversed with directions to enter a proper judgment on the findings previously made by the trial court, then the action of that court in refusing the defendant leave to amend its answer would have been proper. My associates erroneously treat the case as though the judgment was not reversed generally.

BRITISH AMERICA ASSURANCE COMPANY v. C. KELLNER ET AL.

FILED JUNE 20, 1900. No. 9,214.

1. Verdict: EXCESSIVE DAMAGES: EVIDENCE. Evidence examined, and verdict of jury for plaintiff in the sum of $950.29 found to be excessive, and the judgment thereon not supported by the evidence.

2. ———: REMITTITUR. Leave given plaintiff, defendant in error, to file, within forty days, a remittitur in the sum of $96.59, in which case judgment with costs is affirmed.

ERROR to the district court for Madison county. Tried below before ROBINSON, J. *Affirmed upon filing of remittitur.*

C. J. Garlow, for plaintiff in error.

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

HOLCOMB, J.

Suit was instituted by the defendant in error to recover on a policy of insurance issued by the plaintiff in error, which resulted in a verdict in favor of the assured for the sum of $950.29.

At the time of the rendition of the verdict the jury also returned special findings to the effect that the property insured had suffered no depreciation by reason of age and wear, and fixing its value at $1,700.

It is stipulated in the record that the plaintiff is entitled to recover, if at all, for one-half of the value of the property insured, the same being an elevator building for storing and shipping grain. It is likewise stipulated that the *pro rata* value of certain machinery destroyed, which was covered by the policy of insurance, was $50.

A motion for a new trial was overruled, and judgment entered on the general verdict returned by the jury. We are asked to review the proceedings had in the trial court, the only ground of error assigned being the alleged excessive verdict of the jury, which, it is contended, is not supported by the evidence.

The plaintiff in error urges that the value of the property insured, at the time of the loss by fire, as shown by the evidence, was much less than the amount fixed by the jury. But three witnesses testified as to the value of the property insured. The husband and agent of the plaintiff, who procured the insurance to be written, testified that the elevator was worth, at the time of its destruction, $3,000. The valuation thus placed on the property is so palpably erroneous as to render it of little, if any, evidential weight.

Two other witnesses, each having considerable experience in the construction of elevators, and being ac-

quainted with the value of such structures, placed the value of the property, after allowing for depreciation by reason of age and wear, at the sum of $1,109, and $1,510, respectively.

The witness fixing the higher valuation, viz., $1,510, and whose evidence was in the nature of expert testimony, testified that such a building, when new or in a condition as good as new, was worth $1,758, and that, in arriving at the valuation placed thereon by him, he had allowed for depreciation the sum of $248, or 2 per cent per year for the period during which the elevator had been in use. He also, in substance, testified that the depreciation, in order to be accurately determined, must be considered in connection with the state of repair in which the building had been kept; that if a building were kept in good condition, and in perfect repair, it would depreciate but little, if any.

The witness Kellner, the husband and agent of the plaintiff, testified that the property had always been kept in first-class No. 1 condition, and was in good repair and condition at the time it was burned. He also testified that a year or two before the property was burned he purchased it, and that it was then thoroughly "overhauled," and was just the same as new; that since that time he had kept it in an excellent state of repair. This evidence is uncontradicted, and from it the jury doubtless reached the conclusion announced in their special finding, that there was no depreciation in value.

While no doubt there was some depreciation in value, it appears in this case to be very slight, and we are not prepared to say that the jury was not justified from the evidence in finding as they did, that there was none. An examination of the evidence on this point has led us to believed that the depreciation was inconsequential, and that the amount of the depreciation, as fixed by the two expert witnesses, was of general application to all similar structures, rather than as applying specifically to the building in controversy. It may also be noted that the

value of the building, as fixed by one witness, without allowing for depreciation, was $1,758, while the jury found the value to be only $1,700.

It further appears from the uncontradicted evidence, that the foundation of the building was but little injured by the fire, and that its value should be deducted from the value of the entire structure as found by the jury. The value of this foundation, as fixed by one witness, was $208, from which should be deducted $25 for damage to same and clearing up rubbish, leaving a net valuation of the undestroyed foundation in the sum of $183. This seems not to have been taken into account at the trial, and the value of the building as found by the jury should be diminished in that sum, which would leave the value of the property actually destroyed at $1,517.

The evidence, we think, will not support a judgment for a greater sum than half the amount last mentioned, together with the value of the machinery as stipulated, viz., $50, and interest on the two sums from the time the loss was due and payable to the date of the judgment, or for the period of nine and one-half months. The sums above mentioned, with interest, aggregate $853.30.

The evidence being insufficient to support a verdict and judgment for a larger sum, the judgment of the trial court should be reversed. Leave, however, is given the plaintiff (defendant in error), to file with the clerk of this court, within forty days from the filing of this opinion, a remittitur of the principal sum of the judgment rendered, in the sum of $96.59, in which case the judgment will be affirmed with costs.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA, EX REL. FRANK H. YOUNG, APPELLANT, V. WILLIAM H. OSBORN, ASSESSOR, APPELLEE.

FILED JULY 12, 1900. No. 11,436.

1. **Mandamus:** ASSESSOR: PARTY. In a proceeding to compel an assessor to assess property for taxation at its fair value it is unnecessary to bring in any taxpayer of the taxing district as a party.
2. **Duty of Assessor.** Except as otherwise provided by law the assessor is required to value property for taxation at its fair value.
3. **Uniform Valuation.** The valuation of property for taxation must be uniform.
4. **Pleading:** FACTS: CONCLUSIONS. Ultimate facts should be pleaded and not mere legal conclusions.
5. **Mandamus:** RELATOR: PRIVATE PERSON. A private individual, not shown to be either a citizen or to be beneficially interested in the enforcement of the laws, can not invoke mandamus to compel an officer to perform a public duty.
6. ———. Mandamus will not issue where the law affords a plain and adequate remedy.

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

O'Neill & Gilbert, for relator.

James Ledwich, L. E. Kirkpatrick and *C. L. Gutterson, contra.*

NORVAL, C. J.

This was an application by Frank H. Young, as receiver of Broken Bow Water Works Company, to the district court of Custer county for a peremptory mandamus to compel the respondent, as assessor of the city of Broken Bow, to assess the property in said city at its fair cash value.

The information charges that in an action pending in the circuit court of the United States in and for the dis-

trict of Nebraska, wherein the executors of the estate of Denis C. Gately, deceased, and others were plaintiffs and the Broken Bow Water Works Company was defendant, Frank H. Young, the relator herein, was appointed by said court the receiver of said company; that he duly qualified as such, entered upon the discharge of said trust and as such receiver is in full and undisputed possession of all the property, rights and franchises of said Broken Bow Water Works Company; that relator has been duly authorized by said circuit court to commence and maintain this action; that William H. Osborn, the respondent, is the elected, qualified and acting assessor of the city of Broken Bow, and as such is pretending to perform the duties required of him by law.

The information further avers: "That heretofore, to-wit:—on the 23rd day of April, A. D. 1888, the city of Broken Bow, Custer county, Nebraska, by its mayor and city council duly authorized for the purpose, entered into a contract with the Broken Bow Water Works Company, which contract is embodied and contained in an ordinance of the said city, known as ordinance seventy-six, of the compiled and published ordinances of the said city, which said ordinance was duly and legally passed and adopted on the said 23rd day of April, A. D. 1888, which said ordinance your relator prays may be taken as a part of this petition.

"Your relator further shows unto the court that it is provided by section six of the said ordinance, as follows: 'And a sufficient tax, not to exceed seven mills on the dollar, shall be levied and collected annually upon all taxable property upon the assessment roll of said city, to meet the payments under this ordinance, when and as they shall respectively mature during the existence of any contract for hydrant rentals, and shall be levied and kept as a special fund known as the "Water Fund," and shall be irrevocably and exclusively devoted to the payment of hydrant rentals under this ordinance, and shall not be otherwise employed.'

"Your relator further shows unto the court that the revenues of the said Water Works Company growing out of the matter of hydrant rentals under the provisions of the said ordinance is one of the material and principal sources of revenues of the said Water Works Company, and under the provisions of the said contract your relator, as the receiver of the said Water Works Company, is entitled to receive from the said city the proceeds of a tax of seven mills levied upon all the taxable property in the said city, when properly and legally assessed as required by the laws of the state of Nebraska governing assessments.

"Your relator further shows to the court that the respondent William H. Osborn, regardless of and in violation of his duties as such assessor of the city of Broken Bow, has entered into an agreement and understanding with the other assessors of Custer county, Nebraska, that he will not return the property of said city at its fair cash value as required by law, but that after determining the fair cash value of the said property he will enter the same upon the assessment roll of said city and return the same to the county clerk of Custer county, Nebraska, at one-fourth of the fair cash value of the said property, as the same has been found and determined by him, and pursuant to said agreement and understanding the said respondent has determined the fair cash value of the property in the said city, and regardless of his duties and obligations and the requirements of law in that regard he has entered the same upon the assessment book for the said city at one-fourth the true value thereof, as found and determined by him.

"Your relator further shows that the said action of the said assessor works a great and irreparable injury and damage to your relator and your relator is without an adequate remedy at law in the premises, and a tax of seven mills on the dollar of the taxable property of said city at its fair value is requisite and necessary to meet the amount due your relator under said contract."

The respondent demurred to the information because it did not state facts sufficient to constitute a cause of action, and also for defect of parties defendant. Both grounds of the demurrer were sustained, and relator electing to stand on his pleading, the action was dismissed.

The learned district court erred in ruling that there was a defect of parties. The proceeding was against the respondent to enforce the performance of an official duty, which he, and he alone, could lawfully discharge. That the proposed action sought to be coerced would probably affect the interests of the taxpayers of the city of Broken Bow is no reason why such taxpayers should be made parties to this proceeding. After the assessment is made, if they are dissatisfied, they can seek relief before the board of equalization. Suppose a county treasurer should refuse to perform some official duty enjoined upon him by law, a taxpayer of the county could invoke relief by mandamus, but it would not be necessary for the relator to make the other taxpayers of the county parties to the mandamus proceeding; and the same principle is applicable here.

We now proceed to a consideration of the question whether the information, or petition, stated facts sufficient to entitle the relator to the relief demanded.

Section 4, chapter 77, article 1, Compiled Statutes, declares that "Personal property shall be valued as follows: First—All personal property, except as herein otherwise directed, shall be valued at its fair cash value," etc.

Section 5 of the same chapter and article reads thus: "Sec. 5. Real property shall be valued as follows: First—Each tract or lot of real property shall be valued at its fair value, estimated at the price it would bring at a voluntary sale thereof, where public notice had been given, and a payment of one-third cash and the balance secured by a mortgage upon the property. Second—Leasehold estates, including leases of school and other lands of the state, shall be valued at such price as they

would bring at a fair voluntary sale for cash. Third—Where a building or structure owned by a lessee is located on land leased from another, the same shall be valued at such a price as such building or structure would sell at a fair voluntary sale for cash." The meaning of these provisions is obvious. They make it the duty of the assessor, ordinarily, to value for taxation real and personal property at the fair value thereof, except as the statute may otherwise provide. There is another cardinal rule of taxation, and that is that "every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises." Constitution, art. 9, sec. 1. And this rule of uniformity applies not only to the rate of taxation but as well to the valuation of property for the purposes of raising revenue. *High School Dist. No. 137 v. Lancaster County*, 60 Nebr., 147. The constitution forbids any discrimination whatever among taxpayers. *State v. Graham*, 17 Nebr., 43; *State v. Poynter*, 59 Nebr., 417. Thus if the property of one citizen is valued for taxation at one-fourth its value, others within the taxing district have the right to demand that their property be assessed on the same basis. The rule of uniformity is satisfied if observed by each jurisdiction imposing the tax. *Jones v. Commissioners*, 5 Nebr., 561; *Turner v. Althaus*, 6 Nebr., 54; *Pleuler v. State*, 11 Nebr., 547. So far as the information discloses, there has been no violation of the rule of uniformity guaranteed by the fundamental law by the respondent in assessing the property within the city of Broken Bow. On the contrary, it is to be inferred that all the property in that tax district was uniformly assessed at one-fourth, instead of its full cash value. Plaintiff has stated in the information no sufficient ground for relief. The application for the writ is framed upon the theory of the right of redress of a private wrong rather than the enforcement of a public duty which the respondent owes the public. That is, that the property in the city of Broken Bow is assessed so far below its real value as to raise insufficient revenue to pay

an amount claimed to be due plaintiff from the city of Broken Bow for the rent of hydrants. It will be observed that the information does not plead or set out the terms of any contract entered into by the Broken Bow Water Works Company with the city relating to the rent of hydrants. It is not averred the number of hydrants the city has rented or the price agreed to be paid therefor. There is no fact pleaded from which it can be inferred that any sum of money is due from the city to the relator. It is true that it is alleged that under the provisions of a contract, not pleaded in substance or otherwise, relator, as receiver of said water works company, is entitled to receive from the city the proceeds of taxable property of the city when assessed at its fair value. But this is the pleading of a mere conclusion. The ultimate facts should have been pleaded, instead of the averment of mere conclusions. *Rainbolt v. Strang*, 39 Nebr., 339. It is plain that relator has not shown himself to have been injuriously affected by the act of the respondent.

The rule is, where it is sought to compel the performance of a ministerial duty by a public officer, any citizen interested in the execution of the laws may be the informer. *State v. Shropshire*, 4 Nebr., 411; *State v. Stearns*, 11 Nebr., 104; *State v. Cummings*, 17 Nebr., 311; *State v. City of Kearney*, 25 Nebr., 262. The information does not state facts from which it can be inferred that relator is a citizen of Broken Bow, or that either he or the Broken Bow Water Works Company has taxable property in said city. So in no view of the case does the information state sufficient facts to entitle relator to relief by mandamus.

Again, mandamus may not issue in any case where the remedy at law is plain and adequate. Code of Civil Procedure, sec. 646. It is not made to appear that the relator has not a complete remedy at law. On the other hand, it is obvious the board of equalization could grant him complete relief, as it is not alleged that the property in Custer county outside of the city of Broken Bow was assessed at less than its fair value. It is merely stated

that respondent entered into an agreement with the other assessors of the county that he would not return the property in the city at its fair cash value, but at one-fourth of such value. But there is no averment that the other assessors were to likewise assess and return the property in their respective districts below its fair cash value, or that they would do so. The presumption must be indulged, unless the contrary fully appears, that a public officer has honestly discharged his duty. So we must presume that all the assessors of Custer county outside of the city of Broken Bow assessed and returned the property in the mode prescribed by law; and if they did so, the county board of equalization has the power to equalize the assessment of the county by raising the assessed valuation of property in the city of Broken Bow so that the valuation throughout the county shall be uniform. For the reason stated the writ was properly denied. The judgment is accordingly

AFFIRMED.

LOZEIN F. HILTON V. STATE OF NEBRASKA.

FILED JULY 12, 1900. No. 11,455.

Verdict: INTEREST. Interest is allowable on the amount found due by a verdict from the date of its rendition to the time judgment is entered thereon.

ERROR to the district court for Lancaster county. Tried below before HOLMES, J. *Affirmed.*

E. Wakeley, for plaintiff in error.

C. J. Smyth, Attorney General, contra.

NORVAL, C. J.

This cause was before us on a former occasion, when the judgment of the district court was reversed and the cause remanded with directions to the court below to

render a judgment on the verdict, and certify therein that Hilton was principal and that the other defendants were sureties. *Blaco v. State*, 58 Nebr., 557. After the mandate went down, the district court entered judgment on the verdict as rendered, including interest on the amount found due by the jury at 7 per cent from the date of the verdict to rendering of the first judgment.

The only error assigned is the including of interest in the judgment. Numerous authorities are cited to sustain the proposition that the allowance of interest was unauthorized. We refrain from considering the question anew, since the point has been twice passed upon by this court. *Fremont, E. & M. V. R. Co. v. Root*, 49 Nebr., 900; *Clark v. Missouri, Kansas & Texas Trust Co.*, 59 Nebr., 53.

The 8th paragraph of the syllabus of the case first cited reads: "Where the rendition of judgment on a verdict for the plaintiff in an action of contract or tort is delayed during the pendency of a motion for a new trial on behalf of defendant, it is not error to render judgment for the amount of the verdict and interest from its date to the date of rendition of judgment."

In the other cases cited there was a trial to the court, with a finding that a certain sum of money had been collected as rents by the defendant as mortgagee while in the possession of the mortgaged premises. The district court ignored this finding and rendered judgment for the defendant, which was reversed by this court and the cause remanded, when the trial court entered judgment on said finding for the plaintiff, including interest from the date of the finding. This action of the court below as to awarding interest was approved in an opinion by SULLIVAN, J. The allowance of interest on the amount found due by the verdict is in harmony with the decisions to which reference has been made, and the judgment is accordingly

AFFIRMED.