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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

SEPTEMBER TERM, 1900—JANUARY TERM, 1901.

VOLUME LXI.

LEE HERDMAN,

OFFICIAL REPORTER.

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In behalf of the people of Nebraska.

SUPREME COURT OF NEBRASKA

DURING THE

PERIOD AND PREPARATION OF THIS REPORT.

CHIEF JUSTICE AND JUDGES.

T. L. NORVAL, CHIEF JUSTICE.

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

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HENRY M. LEAVITT, } BAILIFFS.

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JOHN S. STULL.....Auburn

Second District—
PAUL JESSEN .....Nebraska City

Third District—
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LINCOLN FROST.....Lincoln
EDWARD P. HOLMES.....Lincoln

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CHARLES T. DICKINSON.....Tekamah
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CONRAD HOLLENBECK.....Fremont

Seventh District—
GEORGE W. STUBBS.....Superior

Eighth District—
GUY T. GRAVES .....Pender

Ninth District—
JAMES F. BOYD .....Neligh

Tenth District—
ED L. ADAMS.....Minden

Eleventh District—

JAMES N. PAUL ..... St. Paul
JOHN R. THOMPSON ..... Grand Island

Twelfth District—

HOMER M. SULLIVAN ..... Broken Bow

Thirteenth District—

HANSON M. GRIMES ..... North Platte

Fourteenth District—

GEORGE W. NORRIS ..... McCook

Fifteenth District—

JAMES J. HARRINGTON ..... O'Neill
WILLIAM H. WESTOVER ..... Rushville

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In Memoriam.

SAMUEL MAXWELL.

SAMUEL MAXWELL was born at Lodi, Seneca County, New York, May 20, 1826, and died at Fremont, Nebr., February 11, 1901. He was educated in common schools and under private tutors; removed to Michigan in 1844, taught school, farmed, and held local offices; went to Nebraska in 1855, and in 1856 pre-empted 160 acres of government land, which he improved; returned to Michigan in 1858, completed his law studies and was admitted to the bar in 1859; returned to Nebraska and began law practice. He was a delegate to the first Republican territorial convention; member of territorial legislature, 1860-65; member of the constitutional conventions of 1867, 1871 and 1875; member of state legislature, 1866; member of several state commissions; judge of the supreme court of Nebraska, 1872-94; member of congress, 3d district, 1897-99, being elected as the nominee of the Silver Republicans, Populists, Democrats and Prohibitionists. Author of Maxwell's Nebraska Digest, 1877; Practice in Justice Courts; Pleading and Practice; Criminal Procedure; Code Pleading. His Code Pleading has been adopted as a text-book in the Catholic University at Washington. Judge MAXWELL was a Scotchman by race and a member of the Presbyterian church. He was thrice married. His last wife survives him. Judge MAXWELL was the father of seven children, among whom is Henry E. Maxwell of the Omaha bar.

Be it remembered, That at a session of the supreme court of the state of Nebraska, begun and holden at the supreme court room, on the 7th day of May, A. D. 1901, the following proceedings were had in memory of HON. SAMUEL MAXWELL:

HON. MANOAH B. REESE, ex-Chief Justice:

MAY IT PLEASE YOUR HONORS: Your committee, to whom was assigned the sad duty of preparing and presenting a suitable and

proper expression of the court and bar, upon the life, services and death of the late judge and jurist, HON. SAMUEL MAXWELL, beg leave to submit the following:

Resolved, That the supreme court and the bar of the state of Nebraska unite in expressing our profound grief on account of the death of HON. SAMUEL MAXWELL, who was for many years an honored member of this court, the stamp of whose mind and industry is indelibly impressed upon the jurisprudence of the state.

Resolved, That in his death the whole people of the state have suffered an irreparable loss. His was a life of uprightness and probity of character which was worthy of imitation by all. As a lawyer, his strong and inflexible adherence to truth, to justice, and the ethical landmarks of the profession rendered him a safe guide and preceptor to the younger members of the bar of the state. His familiarity with the great minds of the profession and his love for the established principles of the law rendered him a safe counselor to those who are recognized as the leaders of the profession. As a judge, both on the district and the supreme bench, all felt that justice would be impartially administered and that no right would be lost and no wrong protected on account of the poverty or want of influence of one or the wealth or station or connection of the other of the litigants before his court.

Resolved, That, while his well-recognized ability placed him in the front rank of the lawyers and judges of the country, yet he manifested in his whole life that simplicity of conduct and character which elicited and fostered the most profound respect, and commanded the admiration of all, and endeared him to those with whom he was most closely associated.

Resolved, That, while we sincerely mourn his death and deplore his loss, yet it is with pardonable pride that we can point to his career, in the legislative halls, at the bar and on the bench of this state, beginning with it in its earliest territorial organization, and terminating only with his death,—a life of labor, of industry and of constant and faithful endeavor.

M. B. REESE.
A. M. POST.
GEO. L. LOOMIS.

Your committee move the adoption of the foregoing resolutions, and that they be spread upon the records of this court as a lasting memorial to the life, character and services of JUDGE MAXWELL.

MAY IT PLEASE THE COURT: In the presentation of this report as one member of the committee, I feel constrained to give expression to my personal estimate of JUDGE MAXWELL.

It was my good fortune to become his neighbor and acquaintance some thirty years ago, when we were practitioners in the same court.

Judge Lake, who is a member of this committee, was the judge of our district court. While, as is the case with all rival members of the local bar, we had our "ups and downs," each one striving for the ascendency in the causes where our clients' interests conflicted, yet I am not aware that, from our earliest acquaintance to the last breath of his life, there was ever a moment of time when our mutual good feeling was in the least impaired.

Prior to the formation of this acquaintance he had represented his constituency in the legislative halls of both the territory and the state—but of this I knew nothing except as shown by the journals and records of the various sessions in which he served as a member. In 1872 he was elected as one of the three judges of the state. The duties of those officers at that time were to serve in the capacity of judges of the district court in the three judicial districts of the state and, when through with that work, for the season, meet together, as judges of this court, and pass upon their own work, performed while upon the district bench.

JUDGE MAXWELL'S district was large, comprising nearly all of that part of the state lying north of the Platte river. The main line of the Union Pacific railroad was practically the only railroad track in the district. All that vast territory, with the exception of the counties through which that road had been constructed, had to be reached by stage coach, by carriage, by buckboard or on horseback. I have heard it said that within a single year of his labors in that district he was required to travel about ten thousand miles in going to and returning from his courts, a considerable portion of which was accomplished by the primitive methods to which I have referred, and that in all kinds of weather and at all seasons of the year. This is said in no spirit of disparagement of his associates who were equally faithful. These conditions continued until November 1st, 1875, when—by the adoption of our present constitution—the judges were relieved of their labors upon the district bench and were permitted to turn their whole attention to the administration of the law in this court. The business of the court rapidly increased from that day to the time of his retirement from it, the first of January, 1894. During all of that time—twenty-one years—JUDGE MAXWELL devoted his best energies, with the most laborious application, to the forming, molding and shaping of the jurisprudence of the state of which we are all proud. My close personal association with him for six years in those labors made known to me some traits of his character which

were most admirable. His quick and clear perception of the decisive turning points in a cause was most remarkable. By a kind of intuition he seemed to comprehend and fathom the questions involved upon hearing a mere statement of the issues and evidence as contained in a record. His wonderful industry and persistent toil, aided by this peculiar faculty of mind, enabled—or rather caused—him to be the leader of the court without reference to whom his associates were. The reports of this court will doubtless show that for the twenty-one years of his labors upon this bench he wrote more opinions, covering a greater number of pages in the reports each year, than any one of his associates. Again, while his judgment was clear and his knowledge was second to none laboring with him, he was never inclined to insist upon his views unless he was thoroughly convinced that he was right. In that event he possessed a sufficient degree of firmness. I think I but speak the truth when I say that when a judge has, as he believes, mastered the facts, evidence, issues and law of a case to his entire satisfaction, he is not particularly anxious to spend much unneccessary time in rehearings and rearguments. The motion and brief for a rehearing—especially if the whole of the territory of a cause is re-presented—is, to say the least, a little tiresome. Such never seemed to be the case with JUDGE MAXWELL. I have often known of the Judge making haste in the morning to reach the consultation room before the hour for opening court in order that he might study the motions and briefs for rehearing and especially in those cases which had been assigned to, and in which the opinion had been written by, him. Were a shadow of doubt raised in his mind as to the correctness of any material or substantial point in the case, it was his invariable rule to ask that a rehearing be granted and that the case be re-examined. Substantial justice was the ruling passion of his mind and he never gave his assent to a decision in which a wrong was allowed to stand if the application of any legal rule would or could prevent it. This rendered him somewhat unpopular with a certain class of the members of the bar of the state, but you seldom, if ever, heard of any aspersions upon his honesty or his integrity. By an examination of the reports of our state, at this date, we will find many decisions by him which, when made, were criticised, but when now considered, in the light of the development of the subject of the application of legal rules to new conditions, we find to be eminently just and correct.

In addition to his labors in connection with the courts of the state he has left charts which we may follow with safety in his books on Code Pleading, the law of Pleading and Practice, the rules of Criminal Procedure and the rules of Practice in Justice Courts; all of which are recognized as standard authorities by the bench and bar of the whole country. He has served his district and state faithfully and well in the halls of congress, and thus rounded out a well spent life by effective service in both the legislative and judicial departments of his country.

The life and character of JUDGE MAXWELL may well and properly be taken as a pattern and guide by the young men of our state. Never seeking to eclipse others in brilliancy, it is true, yet at all times, that which was far greater and better, seeking the very best interest of the whole people and never wavering from the straight line of personal rectitude. Never forcing his opinions upon others, yet always sought and consulted on account of his mature and well developed judgment. Never beating down the younger members of the bar who were laboring under the embarrassments of defective legal training, but, upon the other hand, advising, aiding and assisting them in every legitimate way possible. Always faithful, always true, always candid, he possessed the confidence and esteem of those who appreciated upright manhood. True to his convictions and never a trimmer, or time server, he was loved most by those who knew him best.

But, JUDGE MAXWELL is dead. We pause in the rush of business to do honor to his memory. The labors of the court and of his former associates are suspended in order that a just and proper tribute may be offered over his long and silent home. We love to dwell upon his good works and we cherish his memory.

May his precepts be followed and his lines of life be well considered.

HON. ALFRED M. POST, ex-Chief Justice:

MAY IT PLEASE THE COURT: It was my privilege nearly twenty years ago, at JUDGE MAXWELL'S request, to present to a political convention his name for renomination to the position so long honored by him as a member of this court. Well do I recall his gentle admonition, in the performance of that pleasing service, to offer no assurance in his behalf save that of a patient and conscientious devotion to duty, and a steadfast purpose to do justice in the administration of the law. And those of us to whom was given the enjoyment of

an intimate association with him on the bench, and at the bar, recognize in that injunction the supreme and master motive of his mind throughout his long and distinguished public service. JUDGE MAXWELL was endowed with a rare faculty for dispatching the laborious work of the bench, and his ability to grasp the controlling question at issue, however complicated, however obscured by specious pleas and cunning sophistry, was the wonder and admiration of his associates. But after all the secret of his strength, if indeed it may be called a secret, was in his power to discern wherein lay the real merits of the controversy, and his ability to administer justice in the application of sound legal principles, in the wholesome manner which proves the sound head and honest heart. To the minds of counsel zealous in the cause of clients, and at times even to his associates on the bench, that trait of character may have seemed almost a fault. But however it may then have impressed us, viewed from the standpoint of the present, it is in my judgment, which it affords me pleasure to here record, evidence of the highest and rarest quality of the judicial mind.

It must not, however, be inferred that JUDGE MAXWELL was wont to administer justice unrestrained by rule. On the contrary, indeed, no judge of our day has done more to inspire a wholesome respect for the law. Denied the advantage of a college training he was nevertheless in the broad and catholic sense of the term a scholar. A tireless worker professionally, he was a devoted student in other lines of thought, and his varied and comprehensive knowledge of literary and scientific subjects did not fail to impress his associates. He had learned, too, in life's wide school what many over-educated minds have failed to grasp, the great truth that the law as a system is not an end unto itself but a means to justice among men. And in the light of that truth he pursued his way to results amid conflict of authority and confusion of principles with a directness that marks the master mind, and, which if at times unusual, rarely failing to excite the admiration of the bar and the emulation of the bench.

Although entertaining a profound respect, amounting even to reverence, for the great minds who have enriched the literature of the profession, he was in no sense an idolater. Error to him was not consecrated by antiquity. He criticised without hesitation and rejected without fear doctrines hoar with age if fundamentally wrong or ill adapted to conditions of the new commonwealth for which he builded so well.

His opinions, which will long be accepted as authority by posterity of state and country, may lack the grace of rhetoric, the elegance of diction which adorn the work of others; but their deficiency in that regard is doubly compensated for in their virility, in the force and vigor of his reasoning, in the rugged, wholesome nature reflected by and which is an essential part of them. As said by Judge Story of a deceased brother, long a distinguished member of the federal judiciary: "His mind was solid rather than brilliant, sagacious and searching rather than quick and eager, comprehensive and at the same time cautious, patient in inquiry, forcible in conception, clear in reasoning. He made it a matter of conscience to discharge every duty with scrupulous fidelity and zeal. His honesty was a deep and vital principle not measured by rule. He was a Christian, full of religious sensibility and religious humilty. But what made religion most attractive in him and gave it occasionally a sublime expression was his cheerful, unobtrusive and gentle character."

By whatever standard tested JUDGE MAXWELL was the peer of the great minds who, with him, assisted in laying the foundation and rearing the structure of this our proud young state, and whose labors and genius have done so much to enrich and exalt the profession, Marquett, Mason, Poppleton, Savage, Hayward and others now rest with him.

In the fullness of years, crowned with the respect of a grateful and appreciative people, he has laid aside life's cares.

"Like one who wraps the drapery of his couch about him and lies down to pleasant dreams."

May we who survive him be found as faithful to our trust, as worthy of the commendation of those who are soon to follow us.

HON. GEO. L. LOOMIS:

MAY IT PLEASE THE COURT: As a member of your committee, I wish to add a few brief words to what has already been said by others better qualified than I to speak of the life and services of SAMUEL MAXWELL. So much might be said,—might be truthfully said,—and must be said in anything like a complete review of his public life and services as to preclude the attempt at this time.

As many esteem greatness, that is, measured by the false standards of greatness now so often used, JUDGE MAXWELL was not a great man; but, measured by the standard of rugged manhood, of moral character, of personal worth, fidelity to every trust, honesty,

industry, integrity, power of application, results accomplished by personal effort, and by all those attributes of heart and mind that tend to make the true man, he was indeed a great man.

Coming to this new territory as a young man of limited education and positively no means, by force of honest work and personal worth he soon became one of its strong men. As a member of the legislature, to which he was three times elected, he procured the passage of the act authorizing a revision of the territorial statutes, then suggested General Estabrook as a suitable person to make such revision, and at the next session he procured the enactment of the revision into law; and thus to him are we indebted for the Revised Statutes of 1866.

We are also indebted to him for the motto of our state, EQUALITY BEFORE THE LAW, a motto which to him expressed a living principle embodying the sacred right of every person within our borders, a right to be constantly borne in mind and worthy to be engraved on the great seal of state.

As an active and leading member of each convention that has framed a constitution for our state, the impress of his thought can be seen on every page of our organic law.

But I must not dwell on his public services. They are a part of the history of the state. Enough to say that as a member of three legislatures, of two constitutional conventions, and for twenty-one years of this court, he did more than any other one man to shape our territorial and state laws.

But as unsullied as was JUDGE MAXWELL'S public life throughout its long extent of more than thirty years, during which time the foul breath of suspicion was never breathed against his name, and no motive of his was ever questioned, his private life was equally as pure, and shines with equal lustre.

A devout believer in the Christian religion he was the same in his home as in his church; the same on every day of the week as on Sunday. Religion with him was something for the living to live by, and not alone for the dying to die by. One of the common scenes on the streets of Fremont, during the thirty years of his residence there, was JUDGE MAXWELL of a Sunday morning driving in from his suburban home, two miles or more distant, to attend church; and seldom the day so stormy or bad that he was not found in his accustomed place in the house of worship. His faith was of the kind that admits of no doubt, but looks with serenest confidence

to the future. He believed in a personal God, and a personal accountability to God; and, let me ask, what more potent influence can there possibly be to keep and direct one in a life of rectitude and honor?

I remember some years ago of listening to a lecture by him on the coming of Christ as foretold in prophecy, and the proofs of His divinity. The lecture showed a critical study, and a wonderful knowledge and understanding of the Bible, both Old Testament and New, and also that his faith not only rested upon evidence that to his mind could not be questioned, but was sustained by his reason and judgment as a man.

There is a glory brighter far than any that can be acquired by the holding of public office. It is the glory of honest manhood. And the glory which shines from every page of JUDGE MAXWELL'S public life, without a stain to mar its perfect purity, is no brighter than that which shines in his private life reflected from a character in which is blended all the manly virtues, chiefest among which is an unfaltering faith in God. To whom can we point the young lawyer of today as a worthier example to follow? Surely he lived the life of the righteous, and his last end was peace.

And when the sudden summons came, so unexpectedly, while sitting at his breakfast table in the early morning, and the stricken man was assisted by the good wife to his room, realizing at once that his hour was come, he calmly gave directions as to what he wished done when he was gone, and then, within an hour, with all arrangements made, and the last words of farewell spoken, without a regret, and in the serenity of the faith that had been his stay in life and was his hope in death, he was prepared to say:

"My soul is ready to depart,
No thought rebels, the obedient heart
Breathes forth no sigh;
The wish on earth to linger still
Were vain when 'tis God's sovereign will
That we shall die."

HON. WILLIAM V. ALLEN:

MAY IT PLEASE THE COURT: I do not know that I can add anything of value to the eloquent remarks which have just been submitted by the distinguished gentlemen who have preceded me, former associates and neighbors of the dead jurist and statesman, whose life and virtues we here commemorate, and whose death we sincerely mourn. I first met JUDGE MAXWELL seventeen years ago, shortly after my arrival in the state, and I was then deeply impressed with

the thought that he was physically a very feeble man, but from frequently meeting him subsequently in this chamber and elsewhere, I became convinced that he had great vitality and an unusual capacity for labor, and that he was a most industrious, conscientious and painstaking judge. I knew him more intimately when he became a member of the 55th congress, and was present when he took the oath of office, and I cheerfully bear personal testimony to his great industry and the fidelity with which he discharged every duty incumbent upon him. He was ever at his desk when the house was in session, and in the committee room when the committees of which he was a member were at work. He was conspicuous for his devotion to the public service, and was the author of many valuable bills, which, if they had been enacted into laws, would have proved of great benefit to the state and the nation.

JUDGE MAXWELL did much—very much—to lay deeply and securely the foundation of jurisprudence in this state that the superstructure thereafter to be erected by other hands might be ample and secure. His works on pleading and practice have done much in imparting useful information to young men just entering on a professional career, and in lightening the labors of the busy practitioner and the judge on the bench. In every relation in life, public and private, our departed friend was a high-minded, honorable and conscientious man. While perhaps not a Mansfield or a Marshall, a Blackstone or a Kent, a Miller or a Story, he was pre-eminently a jurist of great ability, learning and aptitude for the profession of which he was an honored member, and did his full duty in shaping and molding the jurisprudence of the country. Our dead friend was not an educated man in the academic sense of the word; he was not, as I understand it, graduated by any technical college or university, but he was a graduate of the great university of nature, where, after all, the most useful knowledge we possess must be obtained.

JUDGE MAXWELL was withal a Christian, and lived and died in the full faith of the Christian religion. He believed in the immortality of the human soul, in which the millions who sleep in the bosom of the earth believed, and in which the millions of the present believe. He knew the Christian's reward so aptly expressed in the language of the Bible:

Blessed are the dead which die in the Lord from henceforth: Yea, saith the Spirit, that they may rest from their labors; and their works do follow them.

He also knew the vanities of life and that all earthly glory must end in the grave as expressed by Gray in his Elegy Written in a Country Church Yard:

> The boast of heraldry, the pomp of power,
> And all that beauty, all that wealth e'er gave,
> Await alike the inevitable hour;—
> The paths of glory lead but to the grave.

JUDGE MAXWELL will long be missed and mourned by the people of Nebraska, and by none more sincerely than by those of us who knew and loved him well for his many excellences of head and heart.

I trust we may profit by the splendid example he has left us, and have the full assurance that he has safely entered the portals of eternity to enjoy the rich and full reward of the just.

WILBUR F. BRYANT:

MR. CHIEF JUSTICE, HONORABLE JUDGES AND MEMBERS OF THE BAR: Let the book-reviewer, the legal critic and the state historian speak of JUDGE MAXWELL, the jurist. Praise and censure will find in time the golden mean of justice.

Allow me to speak of SAMUEL MAXWELL the man. For twenty years I knew and loved him as a friend, and reverenced him as a child reveres a parent. To fully appreciate that grand old man, one must have known him as it was my pleasure to have known him; must have seen him in the relation of neighbor, of husband and of father; must have profited by his counsel; must have received his mild reproof; must have been an eye and ear witness to the evidence of his probity, industry, temperance and strict devotion to duty. He was a Christian gentleman. This is the proudest epitaph that can be written upon a tomb. SAMUEL MAXWELL carried this character into every relation of life. He was firm as a friend, social and charitable as a neighbor, kind as a husband, affectionate and indulgent as a parent; as a public servant, able, faithful, honest and industrious. His character had for its corner-stone a direct relation between creed and deed. SAMUEL MAXWELL did not believe that this little chemical engine upon which we stand and which we call the earth was rushing through space at the rate of seven hundred miles a minute with no engineer to guide it. He believed in a God who notes everything, from a blazing star to a falling sparrow. He did not believe humanity to be a "vibrian, a conglomeration of gases, a mere mould holding chemicals, a mere bundle of phosphorus and

carbon." On the contrary, he believed himself to be an immortal and accountable being; and, so believing, he lived as beneath the gaze of his great Taskmaster's eye.

Civilized men change their creeds and their decalogues as often as they do the fashion of their dress; and SAMUEL MAXWELL, judged by this Parisian code, was a little old-fashioned.

Four thousand years ago the afflicted patriarch of Uz inquired: "If a man die shall he live again?" Since Job and his three friends discussed the mysteries of Divine Providence, one hundred and twenty generations of men have come and gone, like the leaves of the forest. In each generation the question propounded by the Arabian Emir has been repeated. Its echo has been the answer. For the solution of this problem Reason has been blind and Philosophy dumb.

We live in a materialistic age. America now is as Rome was in the century immediately preceding the Christian era, as France was in the last half of the eighteenth century. That elegant, erudite and genteel trimmer, Marcus Tullius Cicero, in his philosophical works, argues for the immortality of the human soul. But we learn from his private correspondence that his profession was insincere. Caius Julius Cæsar, high priest of Rome, stood up in the Roman Senate to declare that to die was *dissolvere cuncta mala mortalium; locum esse ultra neque curæ neque gaudio*—to dissolve all the evils of mortals; neither is there any place beyond it for care or for joy,—that is to say, physical death is the end of man.

In France Rousseau and Voltaire had taught mankind that the religion of Jesus Christ was but a fable. This avowal had for its logical outcome the worship of Reason and the Reign of Terror.

In this age of ours, when man is wise above what is written; when Genesis has been revised by the uncertain light of Geology; when wise men have put protoplasm in place of God, and a chimpanzee in place of Adam; when the Gospel of the Nazarene, according to Matthew, Mark, Luke and John, is pushed aside to give place to the Gospel of dirt, according to Darwin, Tyndall, Haeckel and Büchner; when a large minority of our educated countrymen are agnostics; when the sophomore and the drayman, alike, can repeat by rote the anarchistic ravings and atheistic rant of Johann Most and the coarse blasphemy of Robert G. Ingersoll; when that green, slimy, slippery, frog, which men miscall higher criticism, has hopped up the church aisle and sits upon the pulpit-cushion; when hell is reduced to a

skating-rink; when so-called clergymen are guilty of a grievous contempt of court by presuming to sit in judgment on the eternal justice of God, how refreshing it is to remember a simple layman, like SAMUEL MAXWELL, to whom the child-faith of the Man of Nazareth was a sublime and ever-living reality!

O venerable shade of my departed friend, how often have I stood in your presence condemned before the tribunal of my own conscience! And now that you are gone, I feel led to exclaim, in the words of the Hebrew Prophet: "My father, my father, the chariot of Israel and the driver thereof."

MR. CHIEF JUSTICE NORVAL:

It is not my purpose to pronounce an extended eulogy upon JUDGE MAXWELL. I shall, in a few words, contemplate him as a jurist, as a former member of this court, rather than as a man in all the relations that word implies. Such elements of mind and heart as exemplify him as a judge will be pertinent. He will be considered solely as a potent and positive force, who for more than twenty years shaped the jurisprudence of this state.

He was elected a member of this court in the fall of 1872, which position he held continuously until January, 1894. His first opinon reported is *McClary v. The Sioux City & Pacific R. Co.*, 3 Nebr., 44; his last, *State of Nebraska v. Hastings*, 38 Nebr., 584. His services as a judge of this court are represented by decisions filed between the dates of these two, reported in six and thirty volumes of the state reports. When he entered upon his official duties, few principles of law were fixed by decisions of this court. His industry and care during those years assisted in making plain difficult questions of law, both general and fundamental. He brought to the office a sound mind, a clear understanding of law, and an enlightened conscience. He possessed exceptional energy and industry, never tiring, never willing to leave a subject until its underlying principles were known and their relations to each other fully understood. He wrote more than a proportionate share of the opinions of the court, as an examination of the reports will disclose. To his decision he usually gave painstaking care, aiming constantly at thoroughness. The law on its practical side appealed to him more strongly than the theoretical and ideal phase, which is so attractive to some minds, who forget that we must deal with humanity as it is rather than with it as it should be. He fully understood that laws are made *by* men, and must there-

fore bear the imperfections of their makers; that they are made *for* men, and must be interpreted with respect to human limitations. He was a practical man, because he understood humanity.

From constant intercourse with all sorts and conditions of men, he knew humanity in the concrete. He saw men as they are. He saw the seams in the garment as well as the lustre upon the surface; that the man with the crown and the man with the hoe are only men. He understood that self moves the one as well as the other, and is an ever present factor in the human equation. These things he learned, not from books, not wholly from contemplation, but more from men as he had seen and known them. He knew them as Lincoln knew them, not from a study of a few individuals of one social grade, but from a wide knowledge of many, as he had met them in all stations in life. He knew them as men, with all their vagaries and limitations, as well as virtues; not as constant factors, as foot-pounds or ethical units, but as men full of idiosyncrasies and of noble qualities as well. Hence through all his decisions, the practical predominates over the mere ideal or theoretical, whether he deals with men or simply with their rights and duties.

He brought to the office a wide acquaintance with the fundamental principles of law, gathered by his own exertions rather than by the assistance of the schools. To this a life of constant study and contemplation added to the end. This knowledge saved him, ordinarily, from that danger of exaggeration which constantly besets the judge, owing to the fact that he is seldom called upon to decide other than minute points of law in any one case, and seldom has time or opportunity to contemplate the law as a connected and harmonious whole. Seldom were principles warped from their true proportions, but their relations to other principles were kept well in mind.

Another temptation to which a judge is occasionally exposed he could not always escape. It may sometimes happen that, if the law shall continue to be a body of fixed rules and principles on which men may rely in their intercourse with their fellows, and with the state, an individual must suffer. This seldom occurs, but occasionally it is true. As a rule if JUDGE MAXWELL erred in his decisions, it was in this class of cases. In doing justice in the concrete he sometimes forgot the abstract. The moral law had a firm hold on him, and sometimes, when the civil law would work an injustice, he resorted to the former. Such mistakes were of the heart rather than of the head. Under such circumstances, a man weighed more than

an abstract principle of law. In such cases, his motto, constantly repeated through a long line of decisions, was "substantial justice."

To add more would be merely a repetition of what has already been better said by others.

The resolutions and addresses accompanying them, with this response, will be entered upon the record of this court and published in the official report.

In Memoriam.

CHARLES A. MUNN.

HON. CHARLES A. MUNN, judge of the eleventh district, was born in Allegan County, Michigan, February 17, 1865, and died in Lincoln, Nebraska, June 8, 1901. He was left an orphan in childhood; and was self-educated. He came to the state in 1884; was admitted to the bar in 1887; and was elected judge of his district in 1899. His home was in Ord, Valley County, Nebraska, where his widow and son George reside. Previous to his election as judge he was three times elected county attorney of Valley County.—REPORTER.

ACT PROVIDING FOR COMMISSIONERS OF THE SUPREME COURT.

(Laws, 1901, chapter 25, page 331.)

AN ACT to provide for the appointment, tenure, qualifications, duties and salaries of commissioners of the supreme court, and stenographers therefor.

Be it enacted by the Legislature of the State of Nebraska:

SECTION 1. The supreme court of this state, is hereby authorized to appoint by the unanimous vote and order of the judges of said court, nine (9) commissioners of said court and such stenographers as the court may, from time to time, deem necessary for the aid of such commissioners.

SECTION 2. No person shall be appointed as such commissioner who is not a practicing lawyer in good standing, possessing the qualifications required for the office of judge of the supreme court of this state, and none of said commissioners shall practice law while holding such position.

SECTION 3. Each of said commissioners and stenographers shall hold his position for the period of two years from and after his appointment, unless his appointment be withdrawn by the supreme court by the unanimous vote and order of the judges thereof, before the expiration of said time.

SECTION 4. The said commissioners shall each receive a salary of twenty-five hundred ($2500.00) dollars per year. Said salaries shall be paid in the same manner and at the same time as the judges of the supreme court are paid.

SECTION 5. Said stenographers shall each receive a salary of one thousand ($1,000.00) dollars per year. Such salaries shall be paid at the same time and in the same manner as the judges of the supreme court are paid.

SECTION 6. All vacancies occurring in the position of commissioners or stenographers therefor, shall be filled in like manner as an original appointment.

SECTION 7. The supreme court shall prescribe by general rule, the mode of hearing and procedure before said commissioners, as well as the duties of such commissioners and stenographers.

SECTION 8. Whereas, an emergency exists, this act shall take effect and be in force from and after its passage and approval.

Approved March 19th, 1901.

REPORTER'S NOTES.

A table of statutes and constitutional provisions cited and construed can be found numerically arranged on pages lxxv-lxxxii.

See page lxvii for cases overruled. The initiative in the preparation of this list has been duly recognized in the Reporter's Notes to volume 60. In making additions thereto for this volume such cases only have been inserted as present a patent intentional overruling, together with the decision overruled. The listing of cases containing apparently conflicting dicta would subserve no useful purpose.

Attention is called to the rules for citations and abbreviations on pages xii and xiii of volume 46 of Nebraska Reports. These rules were drafted by William B. Rose, and have only been slightly modified in the 59th and 60th and the present volume, to wit: Nebr. for Nebraska; Colo. for Colorado. Idaho, Ohio and Utah are not abbreviated.

The syllabus of each case is prepared by the judge writing the opinion. The catchwords or the headlines are prepared by the reporter. The first, second and third paragraphs of the syllabus to *Ames v. Parrott,* p. 847, will illustrate the use of a headline; the fourth, fifth and sixth paragraphs will illustrate the use of catchwords. A succinct and comprehensive headline is not always a possibility. The objection to a headline is that it is too much like the paragraph. The arguments in its favor may be found in Green Bag, vol. I, p. 437, and vol. II, p. 215.

Attention is directed to foot-notes on pages 143, 295, 444, 549, 750, 817 and 892.

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NOTE.—The insertion in the following list of a case from another state would necessitate a change in its title. Hence this note. An act of the legislature of Ohio, adopted in 1835, provided: "That if any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison, or causing the same to be done, kill another, every such person shall be deemed guilty of murder, in the first degree," etc. In 1857 the supreme court of the state construed that statute, holding the adverb "purposely" as a modifier of the verb "kill" to apply to every intervening clause. Opinion by Bartley, C. J., *Robbins v. State*, 8 Ohio St., 131. The effect was to make intent a necessary ingredient of murder in both degrees. In 1875 the Ohio law became ours by adoption. Criminal Code, section 3, amended in 1893. In 1897 our supreme court held that our legislature, in adopting the Ohio law, did not adopt the construction of her court, but that such decision stood—on a par with any decision of our own court—subject to revision; and they, then and there, overruled it. Opinion by POST, C. J., *Morgan v. State*, 51 Nebr., 131. The Ohio decision is mentioned with disapproval in a dictum by the Oregon supreme court, opinion by Kelly, C. J., *Brown v. State*, 7 Ore., 186.—REPORTER.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1900.

PRESENT:

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

PEOPLE'S BUILDING, LOAN & SAVINGS ASSOCIATION OF NEW YORK v. ISRAEL PEARLMAN.

FILED DECEMBER 5, 1900. No. 10,875.

Printed Abstract. Where a cause is submitted in this court under section 1 of rule 2, and the printed abstract contains no specification of the errors relied on for a reversal, no question is presented for decision, and the judgment will be affirmed.

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

R. B. Windham and *J. B. Strode,* for plaintiff in error.

Matthew Gering, contra.

PER CURIAM.

This was a law action instituted in the county court of Cass county and removed thence by appeal to the dis-

trict court, where the plaintiff, Israel Pearlman, obtained a money judgment against the defendant, the People's Building, Loan & Savings Association of New York. When the cause reached this court it was advanced and submitted under the first section of rule 2, upon an agreed abstract of the record. This abstract does not contain a specification of any of the errors upon which defendant relies for a reversal of the judgment, and hence there is no question properly before us for decision. The case is ruled by *O'Neill v. Flood*, 58 Nebr., 218, and *Manning v. Freeman*, 58 Nebr., 485. The judgment is

AFFIRMED.

PHILADELPHIA MORTGAGE & TRUST COMPANY, APPELLEE, V. JANE G. HUTCHINS ET AL., APPELLANTS.

FILED DECEMBER 5, 1900. No. 9,319.

Mortgage Foreclosure: CONFIRMATION: TIME. A mortgage foreclosure sale may be confirmed, though the sheriff did not make the sale within sixty days from the time he received a copy of the decree.

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

A. B. Coffroth, for appellants.

S. L. Geisthardt, contra.

NORVAL, C. J.

This is an appeal from an order confirming a sale of real estate. The only objection urged against the sale is that the same was not made and the order of sale returned until the expiration of more than sixty days after its date. The order of sale was nothing more than a certified copy of the decree, and the fact that the sale was made and the order of sale was returned more than

sixty days after the sheriff received the copy of the decree did not invalidate the sale. *Amoskeag Savings Bank v. Robbins*, 53 Nebr., 776. The order is

AFFIRMED.

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

FILED DECEMBER 5, 1900. No. 11,515.

1. **Res Adjudicata:** FORMER APPEAL. Ordinarily, this court will not re-examine questions of law presented and determined on a prior appeal of the same cause.

2. **Levy of Taxes:** GENERAL FUND OF SCHOOL DISTRICT: COLLECTION: WARRANT. Taxes levied to create a general fund of a school district constitute a fund against which warrants may be drawn within the amount of such levy, although the money may not have been collected and on hand in the fund with which to pay the same.

3. **Admission of Testimony:** RULINGS OF TRIAL COURT. Rulings of the trial court on the admission of testimony upheld.

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

A. C. Ricketts and *H. H. Wilson*, for plaintiff in error.

Stewart & Munger, contra.

NORVAL, C. J.

This case is before us for the second time. A statement of the facts will be found in the opinion as reported in 58 Nebr., 163, and need not be repeated here. On the former hearing it was decided that architectural plans, specifications and detail drawings provided by Fiske were not parts of a building, and therefore did not fall within the provisions of the school law which require school officers to have the authority of the voters of the district before erecting school buildings, etc., but that the board might use money out of the general fund to

procure plans and specifications as an aid either to the legal voters in voting on the question of bonds for the purpose of raising money for a school building, or as a preliminary to determine what kind of buildings should be constructed, had the voters already authorized them to erect such a structure. On the last trial of the case in the district court plaintiff was successful, and the school district brings error here, claiming that the evidence below establishes the fact that bonds had already been voted for the erection of the building, which bonds were afterward found to be illegal; that the plans in question were prepared with the intention of erecting a building previously determined on, but which was abandoned because of the illegality of the bonds, and that these facts make these plans a part of the building. It does not occur to this court that it is material whether these plans were prepared before or after the bonds were voted, or whether they were made with a view to be used in the building of a structure already determined upon, or not. We are satisfied with the doctrine declared on the former hearing, and upon the rehearing of the same (59 Nebr., 51), and do not think the facts proved or sought to be proved by defendant take the case out of that rule. Further, the principle therein laid down is the law of the case, and for that reason will not be made a subject for re-examination. *Leavitt v. Bell*, 59 Nebr., 595; *Todd v. Houghton*, 59 Nebr., 538; *State v. Commissioners of Cass County*, 60 Nebr., 566; *Ripp v. Hale*, 45 Nebr., 567; *Coburn v. Watson*, 48 Nebr., 257; *Fuller v. Cunningham*, 48 Nebr., 857; *Omaha Life Ass'n v. Kettenbach*, 55 Nebr., 330.

We have examined the arguments of counsel wherein it is sought to take this case out of the doctrine of the law of the case, but we are convinced that the rule applies, and that the court below committed no error in either admitting or rejecting evidence relative to this issue. It is contended, however, that, although it may be held that the indebtedness incurred by the district

for these services is payable out of the general fund, that at the time the contract was made and the indebtedness created there was no money in this fund with which to pay for them, and that for that reason the contract of the board was void. There is no express limitation of the kind suggested by statute placed upon school boards, and in the absence thereof this court would be very reluctant to declare such a rule. To do so would cripple many school districts, for out of this fund most of the money which goes toward maintaining public schools must come, and it is not always possible to have money in this fund at all times during the school year to maintain them and keep them open to pupils. The taxes had been levied to create the general fund and the amount of such levy had not been exhausted. This was sufficient to constitute a fund against which warrants may be drawn. *Zimmerman v. State*, 60 Nebr., 633. No error occurred in the refusal of the court to admit evidence tending to show the condition of the general fund at the time the contract was entered into, and at subsequent times.

The evidence discloses that a portion of the plans furnished were what are commonly known as blue prints, and not the original drawings prepared by the architect. On the trial the blue prints were received in evidence; to their introduction objection was made by defendant, and it is claimed that this ruling constituted reversible error, because the blue prints were not the best evidence. It is further claimed that the fact that the original drawings were not delivered to the school district precluded plaintiff below from recovering, as the furnishing of the blue prints alone did not constitute a delivery. On the first point it is urged that the blue prints are analogous to letterpress copies of letters, which this court has frequently ruled are not the best evidence. This contention, however, is not tenable, for the blue prints offered in evidence were the very plans that were delivered to the school board, and are, therefore, the best and not

secondary evidence. We think the blue prints were "plans," as required by the terms of the contract, and that the question of whether they were the original drawings and plans or merely *fac simile* copies of the same is not material, particularly as the contract was one for services to be rendered by plaintiff rather than for certain plan or plans. Further, the board accepted these blue prints, and never made any objection to them, nor is any complaint made even now that these plans were in anywise defective or incomplete.

We have examined the other objections made by counsel, and we are of the opinion that no error occurred at the trial for which the judgment should be reversed, and it is therefore

AFFIRMED.

CHARLES W. OAKES, APPELLEE, V. A. C. ZIEMER ET AL., IMPLEADED WITH SARAH GRUNINGER, APPELLANT.*

FILED DECEMBER 5, 1900. NO. 11,543.

1. **Constructive Service: OPENING DECREE: TENDER OF ANSWER.** To entitle a defendant to have a decree entered on constructive service opened up under section 82 of the Code of Civil Procedure he must present a full answer to the merits of plaintiff's cause of action.
2. **Answer: DENIAL: INFORMATION AND BELIEF: MATTER OF RECORD.** An answer is sufficient which denies, on information and belief, material allegations of the petition which are matters of public record.
3. ———: **INCONSISTENT DEFENSE.** One will not be allowed to plead inconsistent defenses in an answer.
4. **Opening Decree: BENEFIT TO MOVING PARTY.** A decree will not be opened up where the moving party could not be benefited thereby.

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

Ricketts & Ricketts, for appellant.

I. H. Hatfield and *S. L. Geisthardt, contra.*

*Rehearing allowed.

NORVAL, C. J.

In 1896 Charles W. Oakes brought suit in the district court for Lancaster county to foreclose a tax lien upon a certain lot in the city of Lincoln. One A. C. Ziemer and wife, the owners of said lot, were made defendants, as were also Sarah Gruninger and others. Service was had upon Gruninger by publication, she being a non-resident, and it is conceded that she had no personal knowledge of such suit until about the time she commenced this proceeding. A decree was afterwards rendered against said defendants, foreclosing said tax lien, and under the order of court the premises were sold and the same were bid in by the plaintiff for a sum less than the amount of his lien, the sale was confirmed and a deed duly made and delivered. In May, 1900, Gruninger filed a motion to open up the decree and judgment under section 82 of the Code of Civil Procedure, said motion being supported by a proper affidavit. For answer, as provided in said section, she alleged, first, that she had no sufficient information concerning the facts stated in plaintiff's petition whereon to admit the correctness thereof, and, therefore, for the purpose of placing the plaintiff on proof, denies the allegations contained in plaintiff's petition; that she asks that a hearing may be had as to the truthfulness of the allegations contained in the petition; that an accounting may be taken of the amount due, if anything, to the plaintiff, and that she may be permitted to redeem from the amount, if anything due, by virtue of the alleged tax sale and tax certificate. Further, by way of a cross-petition, she set up a mortgage made by Ziemer and wife to her, which she asks to be foreclosed, again asking leave to redeem from the lien of plaintiff. She further alleges that the judgment taken by one of her co-defendants was for a larger amount than was actually due him, and asks that an accounting may be had of that, although she does not allege that the lien of her mortgage is junior to that of said co-defendant. An an-

swer showing a defense to the cause of action set forth in the petition is a condition precedent to a right to have such judgment rendered on constructive service opened, as will appear from a reading of said section 82 of the Code. The lower court refused to open the decree on this showing, and she appeals from the order denying her motion.

This ruling was right for two reasons: (1.) It is not the office of a denial on information and belief to put in issue the truth or falsity of an allegation whose truth or falsity depends on facts contained in public records. Whether a tax lien of the nature of the one set out in the petition existed against this property was a matter of public record, and to these records she had access at all times; hence, if she is ignorant of the truth or falsity of the allegations contained in the petition, it is her own fault, and she can not, therefore, be heard to say that she has no information whereon to admit its correctness, and for that reason denies it. The denial in this answer was either a sham, or it admitted the allegations of the petition. Maxwell, Code Pleading, 386; 1 Ency. Pl. & Pr., 813 and note 4. The tendering of a sham answer does not meet the requirements of the statute. (2.) The two allegations of her answer are in conflict, as are also the allegations of her cross-petition and her answer. She can not deny that plaintiff has a lien on the premises superior to that of her mortgage, and then, founding her right on such mortgage, ask to redeem from such lien. These inconsistencies will be resolved against her in a court of equity, and she must be held to have admitted the allegations of the petition; hence she has no defense to the cause of action therein set out, and no right to be heard in the case.

As a further right to open the decree, her counsel insists that the same is void, for the reason that the petition fails to state a cause of action. An examination of the petition convinces us that, while the pleading was probably vulnerable to a motion to make more definite

and specific, its allegations were amply sufficient to sustain the decree rendered thereon. Further, if the decree is void, she can hardly find cause of complaint in that fact, but has her clear remedy in a different course of action.

It is insisted that, although she may have no defense to the cause of action set out in the petition, she has a right to have the decree opened because of an alleged error in the amount found due Webster, one of her co-defendants. The decree as to plaintiff could not be vacated for that reason, nor the sale thereunder set aside. The liens of Gruninger and Webster were both junior to the tax lien of plaintiff, and as the property did not bring a sufficient amount on the sale thereof to satisfy plaintiff's lien, Gruninger could reap no benefit by the setting aside of the decree so far as the same relates to the cross-petition of Webster. It follows the lower court was right in refusing to open the decree, and its order is therefore

AFFIRMED.

STATE OF NEBRASKA, EX REL. SAMUEL J. GORDON, V. FRANK E. MOORES, MAYOR, ET AL.

FILED DECEMBER 5, 1900. No. 11,592.

1. **Compensation of Constitutional Officer.** The compensation or salary of an officer created by the constitution can not be increased or diminished during his official term.

2. **Police Judge Constitutional Officer.** The office of police judge or police magistrate of an incorporated city is called into existence by the constitution.

3. **Holding Over:** PART OF TERM. Holding over beyond the fixed term of an officer pending the election of a successor in pursuance of the requirements of the constitution is as much a part of the term of office as that which precedes it.

4. ———: INCREASE OR DIMINUTION OF SALARY. Where a person lawfully continues in an office created by the constitution, by virtue of his original election and qualification, after the expiration of the fixed term, but before his successor is elected and qualified, the salary, of such officer holding over, can not be increased or diminished.

ERROR from the district court for Douglas county. Tried below before ESTELLE, J. *Reversed.*

J. W. Eller and *A. W. Jefferis,* for plaintiff in error.

W. J. Connell, contra.

NORVAL, C. J.

This action is in mandamus originally brought in the district court for Douglas county. In November, 1895, relator was duly elected police judge of the city of Omaha, by virtue of which election he was entitled, by the charter of said city, to serve in such capacity for two years, from the first Tuesday in January, 1896, until the first Tuesday in January, 1898. Under the charter existing at that time, his salary was fixed at $2,500 per annum. In 1897 the legislature enacted a new charter for the city, wherein the term of that office was attempted to be fixed at three years, and the salary diminished to $1,200 per annum. The city election under said new charter was held on the 20th day of April, 1897, and it was provided by such charter that the term of office of the person elected police judge at such election should extend from the third Monday succeeding his election to the third Monday in March, 1900. Relator, at the election held on the said 20th of April, 1897, received a plurality of the votes cast for police judge. Afterwards, in the case of *State v. Stuht,* 52 Nebr., 209, it was decided that the legislature had no power to make the term of police judge longer than two years, the term fixed for that class of officers under the constitution, and held the portion of the charter in that respect void. As no election was held in November, 1897, relator held over under the provisions of section 20, article 6, of the constitution. His salary at the rate of $2,500 per annum was paid until the first Tuesday in January, 1898, since which time the city has refused to pay him at a higher

rate than $1,200 per annum, the amount fixed by the act of 1897; and this action was brought to compel the payment of the difference between the amount fixed by the old charter and that designated by the new. Relator was unsuccessful in the lower court, and brings error to reverse the judgment.

Section 16, article 3, of the state constitution declares: "Nor shall the compensation of any public officer be increased or diminished during his term of office." This provision of the fundamental law has been construed to apply alone to officers created by that instrument, and as to such officers their compensation or salary, as the same existed when the official term began, could be neither increased nor diminished during such term. *County of Douglas v. Timme*, 32 Nebr., 272. A police magistrate or police judge of an incorporated city or town is a constitutional officer. Constitution, art. 6, sec. 1. Therefore the provisions of section 16, article 3, are applicable to the office of the police judge of the city of Omaha, and the salary of such officer can not lawfully be increased or diminished during the official term. The only question, therefore, necessary to determine, out of the multitude argued by the parties, is, whether or not the term served by the relator subsequent to the first Tuesday in January, 1898, is a part of his term of office, within the purview of that portion of section 16, article 3, of the constitution to which reference has already been had. If the time relator served subsequent to the first Tuesday in January, 1898, is a part of his term of office, if he has had but one term of office, and not two terms, then he is entitled to compensation at the rate of $2,500 per annum, regardless of whether that part of the charter of 1897, which attempted to fix the salary of that officer at a lower rate, is or is not valid, which latter question we do not decide.

This controversy arises by reason of the fact that two sections of the constitution, the one relating to executive officers and the other applicable to judicial officers,

differ in form; and counsel contend that, because of a difference in the wording of the two sections, a different construction should be placed upon the one governing judicial to that placed upon the one relative to executive officers. Section 1, article 5, which falls within the present discussion, is as follows: "The executive department shall consist of a governor, * * * who shall each hold his office for the term of two years from the first Thursday and [after] the first Tuesday in January next after his election, and until his successor is elected and qualified." It is conceded that, if one of the officers mentioned in the section above quoted, hold over his fixed term, such holding over would be a mere continuance of his former term, and would entitle him to the protection of section 16, article 3, above quoted; and doubtless that is the law. *State v. Boyd*, 31 Nebr., 682; *State v. Smith*, 87 Mo., 158; *Eddy v. Kincaid*, 28 Ore., 539; *Baker City v. Murphy*, 30 Ore., 405; *Gosman v. State*, 106 Ind., 203; *People v. Tilton*, 37 Cal., 614.

In *Baker City v. Murphy, ubi supra*, Wolverton, J., in delivering the opinion of the court, observed, page 415: "One thing, however, is palpably manifest, that the right to hold over is by virtue of the previous appointment or election and qualification; it is a right accorded by statutes regulating the tenure of office. The holding does not come to an end on the day of the expiration of the statutory period, unless there comes a duly elected and qualified officer to cut it off, or unless his recognized successor is inducted into the office. In one sense, the holding over is *pro tempore*, because the time of the holding is dependent upon the election or appointment of a successor; and in another it may be considered as the occupancy of a successor's term, which is shortened by that length of time. But the holding for the technical term and the holding over is a recognized right arising from one appointment or one election. The tenure of office is indivisible. It cannot be considered as a broken term, or as a double term; it is one continuous holding;

and the holding over, abiding the election of a successor, it seems to us, is as much a part of the term of office as that which precedes it, and the interpretation of the bond in question must be governed accordingly."

A case much in point here is *State v. Smith*, 87 Mo., 158, 160. Black, J., in the course of his opinion, says: "It is true the law by which the relator was appointed fixed the term of office at four years, and contemplates that at the expiration of that time a new appointment will be made, but the same law also contemplates that the appointing power may not be promptly exercised, and to prevent a vacancy the incumbent is made to hold over until such appointment is made. This is a contingency contemplated by the law, and enters into every such appointment, and the time he holds over the designated period is as much a part of the term of his office as that which precedes the date at which the new appointment should be made. We have seen this is so for all purposes of holding the office, and in suits against the officer and his sureties on his official bond, and it must also be true with respect to the emoluments of the office."

The office of police judge, however, falls within section 20, article 6, of the constitution, which is as follows: "All officers provided for in this article shall hold their offices until their successors shall be qualified and they shall respectively reside in the district, county or precinct for which they shall be elected or appointed. The terms of office of all such officers, when not otherwise prescribed in this article, shall be two years. All officers, when not otherwise provided for in this article, shall perform such duties and receive such compensation as may be provided by law." It is argued that, by reason of the difference in the phraseology of these two provisions, it was intended by the framers of the constitution that the hold-over term of a judicial officer should not be considered a part of his regular or fixed term, but should be considered a new or distinct term;

that if the framers of the constitution had intended the tenures of office of the two classes of officers to be the same, they would have used the same form of expression in both sections. Arguments based upon the mere forms of sentences, or the collocations of sentences in a paragraph, are usually weak, and we think that in this case they are exceptionally so. One of the arguments of counsel for respondents is that the fact that the sentence which provides that judicial officers shall hold their offices until their successors are qualified precedes the one which fixes the length of their term, is significant, when it is remembered that in the section relating to executive officers the length of term precedes the provision that they shall hold their office until their successors are elected and qualified. It is also argued that the fact that a provision foreign to the matters in controversy, that with respect to the residence of judicial officers, is interpolated between the provision relating to length of term and that relating to their holding over, serves also to differentiate the meaning of this section from the one concerning executive officers, which is compact, having no provisions foreign to these two injected into it. We fail to see the force of this argument. The framers of the constitution had command of the whole of the English language, one which is explicit, by which to express their meaning, and had they intended that a different rule should obtain relative to hold-over executive and judicial officers, it is reasonable to presume that they would have used language clearly expressing such purpose. Obviously they had in mind a uniformity of meaning, rather than a diversity. Nor do we apprehend they supposed it was necessary to adopt a dead uniformity of forms, in order that a uniform construction of constitutional provisions might be obtained. The meaning of section 20, article 6, seems clear enough, though doubtless a more compact form of expression might have been adopted, as did obtain in section 1, article 5, regulating the terms of executive officers. But

until a reason more convincing than the arguments based on the mere form of the sentence, or lack of uniformity of expression, is adduced to support the contention that the constitution builders desired diversity in meaning when uniformity would subserve the same ends, we are constrained to hold that, so far as relates to the question in controversy, no difference obtains between the tenure of an executive officer holding over after the expiration of the term to which he was elected or appointed, and that of a judicial officer, but in either class the holding over and the regular term constitute one term of office, within the meaning of section 16, article 3.

It follows that in refusing the writ of mandamus prayed for the district court erred, and its judgment is therefore

REVERSED.

HENRY D. RHEA V. STATE OF NEBRASKA.

FILED DECEMBER 5, 1900. NO. 11,634.

1. **Bill of Exceptions:** MOTION TO QUASH. A motion to quash a bill of exceptions is of no avail where no bill of exceptions has been settled in the cause.

2. **Habeas Corpus:** PETITION: WANT OF PROBABLE CAUSE. A petition for habeas corpus, when based upon alleged want of probable cause, should set out all the testimony taken before the examining magistrate.

3. **Motion for New Trial:** FAILURE TO FILE: DISMISSAL OF PETITION. The failure of a litigant to file a motion for a new trial can furnish no sufficient cause for dismissing his petition in error out of the appellate court.

4. **Committing Magistrate:** PROBABLE CAUSE: EVIDENCE NEED NOT BE SUFFICIENT TO CONVICT. Evidence which would justify a committing magistrate in finding that probable cause existed for holding a defendant to appear before the district court to answer a criminal charge need not necessarily be sufficient to uphold a verdict of guilty when he is placed on trial.

ERROR from the district court for Dawson county. Tried below before GRIMES, J. *Affirmed.*

Harry B. Fleharty and *Henry D. Rhea*, for plaintiff in error.

Constantine J. Smyth, Attorney General, Paul Pizey and *W. A. Stewart, contra.*

NORVAL, C. J.

Henry Rhea was arrested on complaint filed with a justice of the peace in Dawson county, charging him with embezzlement of certain moneys. On the preliminary hearing the justice found that there was probable cause, and held him to the district court in the sum of $500, to answer the accusation. In default of bail he was committed to jail. Thereupon he commenced habeas corpus proceedings before the county judge, setting forth in the petition for the writ all the evidence introduced on the preliminary hearing, and claiming in his petition, among other things, that no evidence sufficient to support the finding that there was probable cause to hold him to answer to the charge of embezzlement was introduced before the justice of the peace. On the hearing before the county judge, as appears by the record, no evidence aside from that taken before the justice of the peace was adduced; no witnesses were called, excepting two, who were examined for the purpose of identifying the original complaint. The county judge found that Henry Rhea was unlawfully detained, and ordered him discharged from custody. The state, without having filed a motion for a new trial, removed the proceeding to the district court upon error. The record in the county court was filed in the district court, but no bill of exceptions was settled or allowed. Two motions were made by counsel for Rhea, one to quash and dismiss the petition in error, the other to quash what is called therein the "pretended bill of exceptions," which motions were overruled by the district court; and on the hearing on the merits it found that the county court erred in discharging the petitioner, set aside its

findings and judgment, and ordered that Rhea be remanded to the custody of the sheriff. Petitioner prosecutes error proceedings, alleging that the district court erred (1) in overruling the motion to quash and dismiss the petition in error, and (2) in overruling the motion to quash the pretended bill of exceptions.

The second ground for error may be dismissed with the statement that there was no attempt made by the state to settle a bill of exceptions. The only evidence contained in the transcript filed by the state in the district court was that taken at the preliminary hearing in the justice's court, and as it was a part of the petition for the writ filed by Rhea in the county court (*State v. Ensign*, 13 Nebr., 250), it was properly made a part of the record certified by the county court and filed in the district court. It may be as well to remember then that no bill of exceptions was ever settled in the case, or filed in the district court.

Several grounds are alleged in the motion to dismiss the petition in error, the principal one being that, as no motion for a new trial was filed by the state in the county court there was nothing to review, and that the district court should, therefore, have sustained the motion to quash and dismiss the proceedings. That no motion for a new trial was filed in the county court was insufficient reason for dismissing the petition in error out of the district court. *Shickle v. Kent*, 34 Nebr., 568; *Gaughran v. Crosby*, 33 Nebr., 33; *Erck v. Omaha Nat. Bank*, 43 Nebr., 613; *Biart v. Myers*, 59 Nebr., 711.

It is, however, further urged that the district court erred in ordering the petitioner remanded to the custody of the sheriff, for the reason that the evidence taken before the justice of the peace, which is made a part of the petition for the writ, is not sufficient to show probable cause to hold him on the charge of embezzlement. The facts are, briefly, that Rhea is an attorney at law; that while acting in that capacity for one Prutsman, he came into the possession of money belonging to the latter in

something over $330; that Prutsman, by himself and by his attorney, demanded the money of Rhea, who acknowledged that he had collected it for Prutsman, but claimed that on the afternoon on which he collected it he went into a saloon, remaining there until some time in the following forenoon, and that after he had left the saloon he discovered that he had lost the money, excepting two cents. How it was lost was not explained by Rhea, although he himself took the stand on the trial and testified at some length. It is claimed that, under the rule announced in *Hamilton v. State*, 46 Nebr., 284, the evidence taken was not sufficient to justify a finding that there was probable cause to believe that there had been a fraudulent appropriation of the money by Rhea. It will be observed that in that case the defendant had already been convicted in the district court on a charge of embezzlement, and that this court was considering the sufficiency of the evidence to sustain the verdict. If the court there had been passing upon the point of whether probable cause had been shown, a very different question would have been presented. Evidence that would justify a committing magistrate in finding that probable cause existed for the detention of a defendant need not necessarily be sufficient to sustain a verdict of guilty when he is placed on trial; and for that reason the case relied upon is not in point. We are of the opinion that, taking the whole of the evidence together, it was sufficient to justify the justice of the peace in holding Rhea for trial on the charge preferred against him, and for that reason the county court erred in ordering his discharge. Since evidence adduced on the preliminary trial is made a part of the petition for the writ and such evidence disclosed probable cause, the application or petition for habeas corpus failed to state a cause of action. It is further urged, however, that the evidence discloses that for his compensation Rhea was to receive a certain per cent of the money so collected by him; that he was, therefore, a part owner of the property and could

not be guilty of embezzlement of that which belonged to him. Whether the point would be a good defense upon the trial we will not stop to inquire. Sufficient to say that there was evidence enough to make out a case of probable cause.

The judgment of the district court is

AFFIRMED.

FRED RENARD V. A. E. WYCKOFF ET AL.

FILED DECEMBER 5, 1900. NO. 11,685.

1. **Abstract of Record:** CONTENTS. An agreed printed abstract must include the petition in error, or an abstract of the assignments of error.

2. ———: ———: COURT WILL NOT LOOK BEYOND ABSTRACT. Where a case is submitted on an agreed printed abstract, the court will not look beyond the abstract.

ERROR from the district court for Burt county. Tried below before ESTELLE, J. *Affirmed.*

Gillis & Bowes, for plaintiff in error.

Hopewell & Singhaus, *F. S. Howell* and *Ira Thomas*, *contra.*

NORVAL, C. J.

A judgment of the district court is before us for review by petition in error. The cause has been submitted under section 1, rule 2, which provides "for such submission on printed briefs accompanied by or containing an agreed printed abstract of the record and evidence upon which the case is to be determined." The printed abstract herein does not contain the petition in error nor an abstract of the assignments of error. No question, therefore, is presented for review. *O'Neill v. Flood*, 58 Nebr., 218; *Manning v. Freeman*, 58 Nebr., 485. The judgment is

AFFIRMED.

GEORGE BURKE ET AL. V. FIRST NATIONAL BANK OF PENDER.

FILED DECEMBER 5, 1900. No. 9,323.

1. **Directing Verdict:** SUFFICIENCY OF EVIDENCE. It is not error to direct a verdict for plaintiff in a case where a verdict in favor of the defendant could not, for want of sufficient evidence, be permitted to stand.
2. **Sale of Mortgaged Property:** ELECTION OF REMEDIES. Where mortgaged property has been sold by the mortgagor without the knowledge or consent of the mortgagee, such mortgagee may either disavow the sale and retake the property, or ratify it and recover the proceeds of the sale.

ERROR from the district court for Douglas county. Tried below before POWELL, J. *Affirmed.*

Hall, McCulloch & Clarkson, for plaintiffs in error.

Brome & Burnett, contra.

SULLIVAN, J.

This action was brought by the First National Bank of Pender to recover of George Burke and Frazier the sum of $967, which, it is conceded, came into their hands as the proceeds of a sale of cattle made by them in the course of their business as live stock commission merchants. The jury, in obedience to a peremptory instruction, found the issues in favor of the plaintiff and, judgment having been rendered on the verdict, the defendants bring the record to this court for review. The cattle in question were owned by F. J. Coil, who, in February, 1895, consigned them with other cattle to the defendants at South Omaha, where they were sold. The bank claims the proceeds of the sale under a chattel mortgage executed by Coil to its assignor, George F. Phillips, on September 19, 1894. Another ground upon which it asserts title to the money is thus stated in the petition: "That said cattle were prior to said sale segregated by

the mortgagor Coil from other cattle shipped to defendants at that time in the presence and to the knowledge of said defendants, and defendants directed by said Coil to apply the proceeds of the sale of said cattle to the payment of said mortgage given to said Phillips." The action was defended on the theory that the cattle were not covered by the plaintiff's mortgage, but were covered by a prior mortgage given by Coil to George Burke and Frazier and by them transferred to the American Bank Trust Company of Sioux City, Iowa. The allegation of the petition above quoted was denied and the proof with respect to it was somewhat conflicting. But the evidence upon the other branch of the case justified the action of the trial court in directing a verdict for the bank. It is very clear that the Phillips mortgage was a lien on the cattle and that the other mortgage was not. Had the case been submitted to the jury, a finding in favor of the defendants could not be permitted to stand. This being so it was not error to direct a verdict. *Hards v. Platte Valley Improvement Co.*, 46 Nebr., 709. George Burke and Frazier having sold property upon which plaintiff had a lien, it might, of course, elect to ratify the sale and sue them for the proceeds; and this is precisely what it has done. *Jones v. Hoar*, 5 Pick. [Mass.], 285; *Gordon v. Bruner*, 49 Mo., 570; Bliss, Code Pleading, sec. 13. In this view of the case it is not necessary to consider the alleged errors in excluding evidence in relation to admissions of Coil made at the time the cattle were sold. The judgment is

AFFIRMED.

STATE OF NEBRASKA V. BANK OF COMMERCE OF GRAND ISLAND, MODERN WOODMEN OF AMERICA ET AL., APPELLEES, AND HENRY W. MERRIAM ET AL., APPELLANTS.

FILED DECEMBER 5, 1900. No. 10,701.

1. **Petition:** DEMURRER. A petition which, in apt language, charges that the defendant is indebted to the plaintiff in a sum named is not demurrable because it also states that the ownership of the claim is disputed and in litigation between the plaintiff and another party.
2. **Election of Remedies.** Before a case can arise for the application of the principle of election of remedies there must be (1) two coexisting remedies; and (2) those remedies must be so inconsistent that a party can not logically choose one without renouncing the other.
3. ———. If the law gives but one remedy to a party, he is not precluded from resorting to that because he has attempted to avail himself of another to which he was not entitled.
4. **Insolvent Bank:** CREDITOR: FILING CLAIM WITH RECEIVER: LIMITATION. A court may, in its discretion, permit a creditor to share in the assets of an insolvent bank, although his claim was not filed with the receiver within the time which was by a general order limited for the presentation of claims.
5. **Limitation:** OTHER CREDITOR: ACTUAL NOTICE. The failure of a creditor to file a claim within the time fixed by the order of the court does not warrant another creditor who knows of such claim to act on the assumption that it will not be presented.
6. ———: ———: BELATED CLAIM. A creditor who has not been deprived of any legal right by the allowance of a belated claim against an insolvent bank can not complain of the order of the court allowing such claim.

APPEAL from the district court for Hall county. Tried below before THOMPSON, J. *Affirmed.*

John L. Webster and *James H. McIntosh*, for appellants.

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

W. H. Thompson and *A. R. Talbot, contra.*

SULLIVAN, J.

This case comes here by appeal from an order of the district court of Hall county recognizing and enforcing

the claim of appellee, a belated creditor, to share with other creditors in the assets of an insolvent bank which is in the hands of a receiver and being wound up in accordance with the provisions of the state banking law. Compiled Statutes, 1899, ch. 8. The Modern Woodmen of America, a fraternal insurance organization incorporated under the laws of the state of Illinois, had, prior to July 19, 1895, through its head banker, David C. Zink, deposited with the Bank of Commerce of Grand Island the sum of $27,269.33, no part of which has ever been checked out or otherwise withdrawn. In June, 1895, Zink's term of office as head banker expired and his official authority was thereupon extinguished. On January 20, 1896, the Bank of Commerce became insolvent and suspended business. The insurance association, the appellee herein, did not present its claim to the receiver within the time limited by the order of the court for the presentation of claims, nor for more than two years thereafter. It knew that the affairs of the bank were being wound up, but refrained from filing a claim because its managing officers were of opinion that the Union National Bank of Omaha, which it had sued, and which it is still pursuing in the federal court, had become liable to it for the amount of the deposit in the Grand Island bank. The claim against the Omaha bank is grounded on a paper transaction between the cashier of that bank and the cashier of the Bank of Commerce. Briefly stated the transaction was this: On January 6, 1896, the Bank of Commerce, being in financial distress and desiring to conceal from the public the fact that it was indebted to the Modern Woodmen of America in a large amount, obtained from the cashier of the Union National Bank the following certificate:

"January 6th, 1896.

"I, Charles E. Ford, cashier of the Union National Bank of Omaha, Nebraska, do hereby certify that at the close of business on the 31st day of December, A. D. 1895, the Modern Woodmen of America had on deposit

in this bank the sum of $27,269.33, designated 'General Fund.' CHARLES E. FORD, *Cashier.*"

This certificate was sent to the appellee to enable it, in accordance with its usual custom, to prepare and publish an annual statement showing its assets and liabilities, together with the names of its depositaries. The certificate was false; it was made by Ford for a fraudulent purpose and without authority from his principal. The fund in the Grand Island bank was never transferred to the Omaha bank, and it was not intended that it should be. Neither Ford nor O. J. Smith, the cashier of the Bank of Commerce, intended that the transaction should have any legal efficacy. It was not intended to create any new rights or liabilities, and as between the two banks it is clear, of course, that the effect of the transaction could not go beyond the intentions of those who participated in it. Since the fund in question was never in the hands of the Omaha bank, it is certainly not liable to the appellee upon an implied promise; and it does not appear that it made, or that its cashier attempted to make, any express agreement to pay the money. Neither does it appear that the gratuitous and unauthorized act of Ford in issuing the certificate above set out would preclude the bank from denying liability. In the light of the record before us we do not see how the appellee can succeed in the case pending in the federal court. Surely it can not succeed upon any theory which implies that the Bank of Commerce has been absolved from its obligation to the insurance association. Appellants, who are creditors and stockholders of the insolvent bank, object to the appellee's claim, because its allowance will result in reducing the dividends which they will receive as creditors and increase their liability as stockholders.

Their first contention is that the petition does not state a cause of action. The facts heretofore stated are clearly set forth, but in explanation of the delay in presenting the claim to the receiver it is alleged "that it was a disputed question by and between the Union National Bank

of Omaha, Nebraska, and the said Modern Woodmen of America, as to who was in fact the owner of the said indebtedness; whether or not the said indebtedness was owing from the said Bank of Commerce to the said Modern Woodmen of America, or whether or not the same was owing from the said bank to the said Union National Bank of Omaha, and that said question has been in a state of litigation ever since, and is now." That the ownership of the claim and the liability of the Bank of Commerce to the Modern Woodmen of America were disputed questions does not by any means negative or break the force of the facts pleaded. All the facts stated in the petition are consistent with appellee's right to have its claim adjudged to be a charge upon the assets of the insolvent bank.

The next contention is that appellee having, with full knowledge of the essential facts, elected to proceed against the Union National Bank, it can not now retrace its steps, but is conclusively bound by its election. It may be conceded that if the doctrine of election is here applicable, the appellee has forever lost its remedy against the Grand Island bank by choosing to pursue a different one. But we are of opinion that the doctrine does not apply to this case. "The defense of waiver by election," says Wells, J., in *Connihan v. Thompson*, 111 Mass., 270, 272, "arises where the remedies are inconsistent; as where one action is founded on an affirmance, and the other upon the disaffirmance of a voidable contract, or sale of property. In such cases any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties, once for all." Before a case can arise for the application of the principle of election there must be (1) two co-existing remedies; and (2) those remedies must be so inconsistent that a party can not logically choose one without renouncing the other. Apt illustration of the rule is found in some of the cases cited by counsel for appellants in which it is held that one who has sued on the

theory that an unauthorized act done in his name has been ratified can not afterwards maintain an action on the theory that such act and the assumed agency of the person by whom it was performed have been repudiated. *Crook v. First Nat. Bank of Baraboo*, 83 Wis., 31; *Equitable Life Assurance Society v. May*, 82 Ga., 646; *Fowler v. Bowery Savings Bank*, 113 N. Y., 450. In the present case there never was but one remedy of which the appellee could avail itself. Its officers thought otherwise; and perhaps they think so still, but that does not change the fact, nor alter in any way the rights of these litigants. One is not precluded from resorting to a remedy which the law gives him because he has attempted to avail himself of one to which he was not entitled. It is not enough that he supposes he has two remedies and that he acts upon that supposition; he must have them in fact. 7 Ency. Pl. & Pr., 364. In *Bunch v. Grave*, 111 Ind., 351, 352, it is said: "A party who imagines he has two or more remedies, or who misconceives his rights, is not to be deprived of all remedy, because he first tries a wrong one." In *Snow v. Alley*, 156 Mass., 193, 195, Holmes, J., speaking of the doctrine of election, uses this language: "Election exists when a party has two alternative and inconsistent rights, and it is determined by a manifestation of choice," citing *Metcalf v. Williams*, 144 Mass., 452. "But the fact," he goes on to say, "that a party wrongly supposes that he has two such rights, and attempts to choose the one to which he is not entitled, is not enough to prevent his exercising the other, if he is entitled to that. There would be no sense or principle in such a rule." In *In re Van Norman (Bennett v. Lapp)*, 41 Minn., 494, 496, Mitchell, J., delivering the opinion, said: "The rule is as undoubted as it is familiar that, where a party has inconsistent rights or remedies, he may claim or resort to one or the other, at his election, and that when once made his election is irrevocable. But we think it is equally true that a mere attempt to pursue a remedy or claim a right to which a party

is not entitled, and without obtaining any legal satisfaction therefrom, will not deprive him of the benefit of that which he had originally a right to resort to or claim." In *Agar v. Winslow*, 123 Cal., 587, 590, Commissioner Gray, after saying that where there exists an election between inconsistent remedies a party is confined to the remedy which he first prefers or adopts, continues as follows: "Before one can exercise an option or preference between two things, both those things must have an actual existence. The defendant, therefore, can not defend in this action of unlawful detainer on the theory that plaintiff, in beginning the suit in ejectment, exercised his right of election between two remedies, unless he makes it appear that both these remedies were open to plaintiff." We have quoted thus extensively from the decisions of other courts, not because we have at any time regarded the question under consideration as a debatable one, but because the learned counsel for appellants have given it much attention in their brief, and are evidently persuaded that it should be resolved in their favor.

A further argument for a reversal of the order of allowance is that the appellee is barred by the doctrine of estoppel from asserting its claim. The following definition of an estoppel *in pais* was approved by this court in *Burke v. Utah Nat. Bank*, 47 Nebr., 247, 253: "To establish an estoppel *in pais* it must be shown: first, that the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give, or the title he proposed to set up; second, that the other party has acted upon or has been influenced by such act; third, that the party will be prejudiced by allowing the truth of the admission to be proved." How have appellants brought their case within the doctrine thus stated? They knew that appellee had a claim against the Bank of Commerce; they knew that

such claim might be yet presented to the receiver and that the court might, in its discretion, allow it. Their expectation with respect to appellee's future conduct has, doubtless, been disappointed, but they have not been deceived. They should not have permitted the conclusion to impose itself upon them that the right to file a claim had been abandoned because it had not been promptly asserted. Besides it does not appear that they have been prejudiced in any way by the action taken under the belief that appellee had waived its claim. They say that they made a second payment on their stockholders' liability, but they do not show that they have paid more than the amount legally due, or that they could have successfully defended an action brought against them by the receiver. Neither does it appear that appellee had the slightest reason to suppose that appellants' conduct as stockholders would be influenced by its failure to seasonably claim its share of the bank assets. No estoppel has been proven.

The order appealed from is

AFFIRMED.

STATE OF NEBRASKA V. STANDARD OIL COMPANY.

FILED DECEMBER 5, 1900. No. 11,074.

1. **Anti-Trust Law:** NATURE OF ACTION UNDER. The action provided for in section 4 of the "Anti-trust law" (Compiled Statutes, 1899, ch. 91*a*), to prohibit foreign corporations from doing business in this state, in contravention of our laws, is a civil action both in substance and form.
2. ———: QUO WARRANTO: INJUNCTION. A foreign corporation, by reason of having done one or more of the criminal acts mentioned in section 2 of the "Anti-trust law" (Compiled Statutes, 1899, ch. 91*a*), may, by injunction or quo warranto, be excluded from the state.
3. **Statutory Construction.** In construing an act of the legislature all reasonable doubts must be resolved in favor of its constitutionality.
4. **Anti-Trust Law:** DECLARATORY OF COMMON LAW. Sections 3 and 4

of the "Anti-trust law" (Compiled Statutes, 1899, ch. 91*a*), providing for ousting corporations by civil action from the exercise of powers and privileges which have been abused, is declaratory of the common law.

5. **Foreign Corporations:** RIGHT: COMITY: REVOCATION. Foreign corporations do business here not by right, but by comity, and the state may, at pleasure, revoke the privilege which it has granted such corporations.

6. ———: REVOCATION OF PRIVILEGE: PENALTY. The revocation of the privilege given a foreign corporation to do business here is not the infliction of a penalty.

7. ———: EVIDENCE: REQUISITION. A foreign corporation doing business in violation of the "Anti-trust law" (Compiled Statutes, 1899, ch. 91*a*), may be required, under section 394 of the Code of Civil Procedure, to furnish evidence against itself in an action brought to exclude it from the state.

ORIGINAL proceeding in injunction. Application for an order requiring the defendant to allow the attorney general to inspect and copy its books and records to obtain evidence to maintain the allegations of the petition herein. *Motion sustained.*

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

This action is civil and not criminal in its nature. *Mitchell v. State*, 12 Nebr., 538. If the court should reach the conclusion that this is a criminal action, it would have the effect of practically annulling the law. Then we could not subpœna the defendant to come into court to produce evidence against himself or itself, as the case might be. He could stand upon his constitutional rights, and effectively bar every avenue leading to the discovery of the truth. In a word, it would be practically impossible to prove that the defendant was a trust, or connected with one, within the meaning of the anti-trust law. This is precisely what was held in *Boyd v. United States*, 116 U. S., 616.

The constitution confers original jurisdiction on the supreme court of all civil cases to which the state is a party and this jurisdiction can not be limited or extended by the legislature. If the above proposition be true, then

the supreme court has jurisdiction of this case, if it be a civil suit, even though it be a special proceeding, or even though the legislature attempted to confer original jurisdiction on some other tribunal. In a word, the legislature can not take away from the jurisdiction of the supreme court, or in any way affect the jurisdiction conferred upon it by the constitution. This, we think, is amply sustained by the reasoning of the following two cases: *Miller v. Wheeler*, 33 Nebr., 765; *State v. Hall*, 47 Nebr., 579. It is true that in those cases the question was whether or not the legislature could enlarge the jurisdiction of the supreme court. But we apprehend that the reasoning by which the court in those cases reached the conclusion that the legislature may not increase the court's original jurisdiction, sustains the converse proposition, that the legislature may not decrease that jurisdiction as conferred by the constitution. Apart from authority it seems to us that it must be fundamental, that the legislature can not take away that which the constitution confers.

Alfred D. Eddy, John M. Thurston, McCoy & Olmsted and *Woolworth & McHugh, contra:*

The act under which this proceeding is brought is a penal statute, which makes a violation of its provisions a crime by specifically designating such violation as a misdemeanor. The test to determine whether a statute is penal is to inquire whether its main purpose is to give compensation for an injury, or to punish a wrongdoer. *Adams v. Fitchburg R. Co.*, 67 Vt., 76; *Woolverton v. Taylor*, 132 Ill., 197.

This is not a civil case to which the state is a party, but a criminal case, for the reason that this proceeding is brought under a statute to visit upon the defendant a punishment provided for criminal acts. *Maloney v. American Tobacco Co.*, 72 Fed. Rep., 801; *Boyd v. United States*, 116 U. S., 616; *Lees v. United States*, 150 U. S., 476; *State v. Chicago, B. & Q. R. Co.*, 37 Fed. Rep., 497; *Wis-*

consin v. Pelican Ins. Co., 127 U. S., 265; *Thurston v. Clark*, 107 Cal., 285; Rapalje & Lawrence, Law Dictionary, p. 21; Burrell, Law Dictionary, p. 294.

In an action, civil in form, brought to enforce a penalty or forfeiture as a punishment for an act which is made criminal, the constitutional immunities under which a person can not be compelled to testify against himself and is protected from unreasonable service and search prohibit the court from ordering the defendant to submit his books and papers for inspection. *Thurston v. Clark, supra; Boyd v. United States, supra.* These immunities extend to corporations. *Smyth v. Ames*, 169 U. S., 466, 522, and authorities therein cited.

Even if the case were civil, defendant could not be compelled to furnish evidence which would have a tendency to expose it to a penal liability. *United States v. National Lead Co.*, 75 Fed. Rep., 94; *Currier v. Concord Railroad Corporation*, 48 N. H., 221; Greenleaf, Evidence, sec. 451.

SULLIVAN, J.

This is an original action instituted by the plaintiff to prevent the Standard Oil Company, an Indiana corporation, from continuing to do business in this state. The question now before us for decision arises on the attorney general's application for an order requiring the defendant to permit him to inspect and copy its books and records for the purpose of obtaining evidence to sustain the averments of the petition. Section 394 of the Code of Civil Procedure, under which the motion is made, provides: "Either party or his attorney may demand of the adverse party an inspection and copy, or permission to take a copy of a book, paper, or document in his possession or under his control, containing evidence relating to the merits of the action or defense therein. Such demand shall be in writing, specifying the book, paper, or document with sufficient particularity to enable the other party to distinguish it, and if compliance with the

demand within four days be refused, the court or judge, on motion and notice to the adverse party, may in their discretion order the adverse party to give the other, within a specified time, an inspection and copy, or permission to take a copy of such book, paper, or document; and on failure to comply with such order, the court may exclude the paper or document from being given in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such, as the party by affidavit alleges it to be. This section is not to be construed to prevent a party from compelling another to produce any book, paper, or document when he is examined as a witness." The motion is resisted on the ground that the purpose of the action is to enforce a penalty or forfeiture, and that to grant the order would be to require the defendant to furnish evidence against itself in a criminal case. We are of opinion that the action is in substance, as well as in form, a civil controversy, and that the motion may be granted without violating that provision of the constitution which declares: "No person shall be compelled, in any criminal case, to give evidence against himself." Constitution, art. 1, sec. 12. The petition charges that the defendant has violated the "Anti-trust law" (Compiled Statutes, 1899, ch. 91*a*), and asks that it be, for that reason, enjoined from further prosecuting its business here. The first section of the act in question defines a trust; the second characterizes as misdemeanors and conspiracies against trade, all acts by any person or persons carrying on, or creating or attempting to create a trust, and provides punishment for the commission of such acts. The third section declares that any domestic corporation which has violated the statute shall forfeit its charter, and may be ousted from its franchises by quo warranto. The fourth section, so far as material to the present inquiry, is as follows: "Every foreign corporation or person not a resident of this state, violating any of the provisions of this act, is hereby denied the right and prohibited from doing any

business within this state; and it shall be the duty of the attorney-general and each county attorney within his county, to enforce this provision by injunction, or other proper proceedings, in any county in which such foreign corporation or non-resident person does business, in the name of the state on his relation." It will be noticed that the second section of the law, in plain terms, prescribes penalties for the acts therein denounced as criminal; and it will be also observed that the third section provides a civil remedy on behalf of the state for the commission of these same acts. It is true that the forfeiture of the charter of a domestic corporation is a consequence of violating the law, but it is not a penal consequence.

The proceeding by quo warranto is a civil remedy; it is the means employed by the state to cancel and recall a privilege which the corporation proceeded against has abused. *State v. Nebraska Distilling Co.*, 29 Nebr., 700; *Ames v. Kansas*, 111 U. S., 449; *State v. City of Topeka*, 31 Kan., 452; 2 Beach, Private Corporations, sec. 840. The fourth section is in substance like the third. It provides that a corporation domiciled in another state may, by reason of having done one or more of the criminal acts mentioned in the second section, be excluded from the state. The attorney general is authorized to proceed against it by injunction or quo warranto. The latter remedy, which is included in the phrase "other proper proceedings," may, with propriety, be resorted to for the purpose of preventing a corporation created in one state from doing business in another contrary to law. Code of Civil Procedure, title 23; *State v. Western Union Mutual Life Ins. Co.*, 47 Ohio St., 167; 2 Beach, Private Corporations, sec. 841. In construing an act of the legislature all reasonable doubts must be resolved in favor of its constitutionality. If sections 3 and 4 provide penalties for crime, they violate the constitution and are absolutely void, for they deny the right of trial by jury (Constitution, art. 1, secs. 6, 11; *State v. Moores*, 56 Nebr., 1)

and the right to a trial on an indictment or information. Constitution, art. 1, sec. 10. Furthermore, a corporation can violate the law only by transgressing section 2. That section declares the penal consequences of the transgression, and it would not be competent for the legislature to add another penalty and enforce each by a separate action. Constitution, art. 1, sec. 12. The true construction of sections 3 and 4 is that they are merely declaratory of the common law, and that they provide for ousting corporations by civil action from the exercise of powers and privileges which have been abused. The action is no more criminal than is an action for damages resulting from the commission of a crime. *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App., 1, 44 S. W. Rep., 936. Section 4, so far as it relates to citizens of other states, is an unlawful discrimination in favor of the citizens of this state, and invalid in any view of the case. There is another reason why the motion should be sustained. Foreign corporations do business here not by right, but by comity. *Paul v. Virginia*, 8 Wall. [U. S], 168; *Western Union Telegraph Co. v. Mayer*, 28 Ohio St., 521. The state grants them a privilege which it may revoke at pleasure. When they exercise their franchises in contravention of our laws, the privilege is revoked and, that fact being ascertained, judgment may be rendered excluding them from the state. The revocation of the permission given a foreign corporation to do business here is not the infliction of a penalty; it is not the deprivation of a right. The privilege is like any other license, and the withdrawal or cancellation of it in consequence of the commission of a crime is not punishment in a legal sense. *Martin v. State*, 23 Nebr., 371; *Miles v. State*, 53 Nebr., 305; *State v. Harris*, 50 Minn., 128.

THE MOTION IS SUSTAINED.

NORVAL, C. J., expressed no opinion.

LESTER M. STRONG V. STATE OF NEBRASKA.

FILED DECEMBER 5, 1900. No. 11,449.

1. **Instruction**: DISPARAGING SUGGESTIONS: PROVINCE OF JURY: IMPEACHING TESTIMONY. An instruction pregnant with disparaging suggestions not based upon the evidence and invading the province of the jury by undertaking to fix for them the probative value of impeaching testimony is erroneous.

2. ———: HYPOTHETICALLY UPON FACTS. A court should instruct hypothetically upon the facts which the evidence tends to prove, and permit the jury to make their own deductions and decide for themselves whether witnesses are credible and whether their testimony is forceful or weak.

ERROR from the district court for Buffalo county. Tried below before SULLIVAN, J. *Reversed.*

Hamer & Hamer, R. A. Moore and *H. M. Sinclair*, for plaintiff in error.

Constantine J. Smyth, Attorney General, and *Willis D. Oldham, Deputy, contra.*

SULLIVAN, J.

The plaintiff in error, having been convicted of an assault with intent to commit a rape upon Caroline Hansen, was, by the district court of Buffalo county, sentenced to imprisonment in the penitentiary for a period of seven years. It appears from the record that on the evening of November 12, 1899, between eight and half past eight o'clock, the prosecutrix was violently assaulted by a young man who had, by falsehood and deceit, induced her to get into his buggy and ride with him to the outskirts of the city of Kearney. On the following morning the defendant was arrested and brought into the presence of Miss Hansen, but she then failed to recognize him as her assailant. It was on the trial virtually conceded that a crime had been committed, and the real question in controversy was whether the prisoner was the criminal. The prosecutrix testified that he was the man who assaulted her, and denied that she had on a

previous occasion stated in the presence of Anna and Hattie Wilson that she was unable to identify him. The Wilsons being called as impeaching witnesses testified that Miss Hansen had made the imputed admission. At the conclusion of the trial the court was asked to charge the jury on behalf of the defendant that the testimony of the Wilsons should be considered, tested and its worth estimated under the rules and by the standards applicable to the testimony of other witnesses. This request was refused, but in its stead the court gave instruction number 8, which is as follows: "The witnesses Mrs. and Miss Wilson have testified to facts tending to show that the prosecuting witness made statements to them, or in their presence, concerning the identity of her alleged asasilant different from those made in her testimony. You should consider the testimony of these witnesses. If the prosecuting witness outside of court has voluntarily made statements concerning the identity of her alleged assailant different from those made in court, then this should have the effect of weakening her testimony here with you and should be given the effect of weakening her identification of the defendant made here in court in your presence. The extent to which such statements, if any, made out of court weakens her testimony here is for you to determine. If you believe from the evidence that the alleged statements were clearly and understandingly made by the prosecuting witness to the Wilsons, and that they have been accurately remembered and correctly and fully related by the said witnesses in their testimony, then the testimony of the Wilsons should be given great weight as tending to break down and destroy the testimony of the prosecuting witness as to the identification of the defendant. But if it appear that the Wilsons have not correctly remembered the statements of the prosecuting witness, or if she at the time did not clearly express the thought in her mind, or if the Wilsons did not correctly understand her, or if they have intentionally misquoted what she said, or

have been influenced to believe that she made statements which she did not make, then the force of their testimony would not be so great." The giving of this instruction was, in our judgment, prejudicial error. The statement which it is claimed the prosecutrix made to the Wilsons was in relation to a matter which was not only relevant to the issue, but of vital importance; and the defendant was entitled to have the evidence of these witnesses go to the jury without comment calculated to depreciate or discredit it, and free from any intimation that the presiding judge viewed it with suspicion. The instruction was pregnant with disparaging suggestions; it was not based upon the evidence, and it invaded the province of the jury by undertaking in a vague way to fix for them the probative value of the impeaching testimony. There is nothing whatever in the record to indicate that the Wilsons had been induced to believe what was not true, and yet the jury were by the instruction authorized to find that their story was an invention of some one hostile to the state and that they were unconscious of its real character. In *St. Louis, A. & T. H. R. Co. v. Huggins*, 20 Ill. App., 639, the court instructed the jury that if they believed that employees of the defendant company had testified under fear of losing their employment, that fact might be considered in weighing their evidence. This instruction was held to be reversible error, there being no evidence to support the existence of such fear. *Lewis v. Christie*, 99 Ind., 377; *Zenor v. Johnson*, 107 Ind., 69; *Wickersham v. Beers*, 20 Ill. App., 243, and other cases, lay down the rule that it is error to caution the jury that admissions are liable to be misunderstood, incorrectly remembered or inaccurately reported. Many of our own decisions hold, and the rule is believed to be universal, that instructions must be based upon and applicable to the evidence. It is also the doctrine of most of the state courts that instructions should not be argumentative, nor interfere in any way with the freedom of the jury in determining the weight of the evidence or the credibility

of the witnesses. *Walrath v. State*, 8 Nebr., 80; *Heldt v. State*, 20 Nebr., 492; *Long v. State*, 23 Nebr., 33; *Johnson v. State*, 34 Nebr., 257; *Argabright v. State*, 49 Nebr., 760; *Burnet v. Cavanagh*, 56 Nebr., 190; *Chase v. Buhl Iron Works*, 55 Mich., 139; *In re Stickney's Will (Fox v. Martin)*, 104 Wis., 581, 80 N. W. Rep., 921. In the last mentioned case Marshall, J., delivering the opinion of the court, took occasion to remark, page 587, that an "argumentative discussion of principles, full of suggestions as to evidentiary facts, pointing to their probable existence, though there be no evidence to support that view, is quite likely to result in a miscarriage of justice, especially where the situation of the parties is such as to stimulate sympathy for the one and prejudice against the other. In such circumstances juries will easily reach a conclusion that suggested probabilities in favor of the weaker party exist and are of sufficient probative power to warrant a finding of the existence of the ultimate fact in issue." These views of the learned judge meet our approval and seem quite applicable to this case. The proper course is to instruct hypothetically upon the facts which the evidence tends to prove, and to permit the jury to make their own deductions and decide for themselves whether witnesses are credible and whether their testimony is forceful or weak. The office of a charge in our procedure is to state pertinent principles of law, rather than to point out the logical force or infirmities of the proof. Special instructions designed to aid the jury in determining what facts the evidence proves are, like some elaborate definitions of a reasonable doubt, of questionable utility in most cases and often positively mischievous.

Other questions have been discussed by counsel, but as none that seem worthy of special notice are likely to arise on another trial, we do not think it necessary to pass upon them.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

BLUE VALLEY LUMBER COMPANY V. ABNER CONRO & SON.

FILED DECEMBER 5, 1900. No. 9,271.

1. **Voluminous Evidence:** FINDINGS OF TRIAL COURT: DUTY OF COUNSEL. Where the testimony is voluminous, relating to many subjects, and it is claimed that certain findings of the trial court are not supported by the evidence, it is the duty of counsel arguing in favor of the proposition to call our attention to that portion of the testimony which in any way relates to the subject upon which it is claimed the erroneous finding rests. Where a trial court makes a finding of facts, it is not unreasonable to hold that there exists some testimony relating to the subject, which may be pointed out, even though it is claimed the evidence does not support the conclusions reached.

2. **Plea of Estoppel.** Plea of estoppel pleaded in the reply *held* sufficient to support the introduction of evidence in that respect.

3. **Facts:** ESTOPPEL. By a written agreement Conro & Son, lumber dealers, sold to the Blue Valley Lumber Company a large quantity of lumber in the rough, at a stipuulated price therein named. As a part of the same contract a companion agreement was entered into for planing-mill work to be done by Conro & Son at their planing-mill, located where the lumber was, as directed by the lumber company, at a certain price by the thousand feet according to the nature of the work done, with charges also for sorting and handling the lumber. The lumber, when dressed in the planing-mill into suitable material of different kinds and grades, under the direction of the company and as sold by it, was to be shipped by Conro & Son, who were to collect the amounts due on account of such shipments and credit the sums so collected on the original contracts of purchase, until the whole amount due or to become due had been paid. After the lumber company had sold to the trade, and had shipped on its orders to whomsoever were the buyers, about two-thirds of the lumber included in the original contracts, it assigned its contracts to one Jaynes, who had, until a few days prior, been its general manager, and who as manager had effectuated the purchase under the original contracts. In the assignment contract it was agreed that before it should become valid and binding the lumber company should be released from all obligations under its original contracts; it was further agreed that, as to the lumber which had been delivered under the original contracts, the lumber company would account to Jaynes at a stipulated price by the thousand feet, and for the mill work done thereon at the same prices mentioned in the original contracts. Against these charges the lumber company was to be credited with all cash, accounts and bills receivable, received and held by Conro & Son (two accounts being excepted), and whatever

balance was found to be due Conro & Son on their original contracts the lumber company agreed to pay Jaynes in cash or good paper. With a duplicate of the assignment contract Jaynes went to Conro & Son and solicited a release of the Blue Valley Lumber Company from its obligations under the original contracts, representing that the balance due them for the lumber delivered and the planing-mill work done would soon be adjusted as provided for in the assignment contract. Conro & Son executed a release on condition that the Blue Valley Lumber Company would faithfully perform the conditions mentioned in the assignment contract, and took a transfer of the assignment contract as collateral security. The release was delivered to and accepted by the lumber company. The balance due Conro & Son not being paid, they brought suit for the same on the assignment contract held by them as collateral security. As a defense the lumber company pleaded and sought to prove, as a set-off, that Jaynes was, at the time the assignment contract was transferred to Conro & Son as collateral security, indebted to the company in the sum of $5,000. *Held*, Under the pleadings and the evidence, that the lumber company was estopped from claiming a set-off as against Conro & Son for the amount due them under the contract; that Conro & Son relied on, and had a right to rely on, the provisions in the assignment contract for the payment of the balance due them by the lumber company, undiminished by any set-off by reason of the indebtedness of Jaynes to the lumber company pleaded in the answer.

4. **Evidence:** FINDING. Evidence examined, and found to sustain the findings and judgment of the trial court.

5. ———: ———. Where the testimony is conflicting, this court will not disturb the findings based thereon, unless clearly unsupported by sufficient competent evidence.

ERROR from the district court for Douglas county. Tried below before FAWCETT, J. *Affirmed.*

Brome & Burnett, for plaintiff in error.

John P. Breen, contra.

HOLCOMB, J.

On January 9, 1892, Conro & Son, defendants in error, wholesale lumber dealers of Rhinelander, Wisconsin, under a written contract, sold to the Blue Valley Lumber Company of Omaha, plaintiff in error, about 6,000,000 feet of pine lumber in the rough, at the agreed price of $12 per thousand feet; about 900,000 feet of an inferior

grade, and about 85,000 feet of culls for $4.50 per thousand feet. A quantity of shingles and lath were also included in the contract of sale at a certain price per thousand, as therein named. Contemporaneous with the sale contract of the lumber mentioned a companion agreement was entered into, both agreements being part of an entire contract, by which Conro & Son agreed to dress in their planing mill, located at the same place, the rough lumber heretofore mentioned, into suitable material of different kinds and grades ordinarily used in the trade. Under the planing-mill contract, so much per thousand, according to the kind of lumber, was to be paid for the planing or dressing, which was to be done as directed by the purchaser, the Blue Valley Lumber Company. There were also in this agreement provisions for charges for sorting and handling the lumber required in its preparation for sale and shipment to the trade generally. Under these contracts it seems to have been contemplated that the rough lumber, when dressed under the planing-mill contract into suitable material and different grades, and as sold to the trade by the Blue Valley Lumber Company, the purchaser under the contract mentioned, and as by them directed, was to be shipped by Conro & Son, who were to collect the amounts due on account of such shipments and credit the Blue Valley Company with the amounts so collected, and in this manner Conro & Son were to receive payment of the sums due them for the sale of the lumber, and the planing-mill work to be performed thereon. On the 4th day of August following, and after about two-thirds of the lumber purchased had been sold by the Blue Valley Lumber Company, and shipped by Conro & Son at their direction to whomever might be the purchaser, they assigned all their right and interest in the contract mentioned to one Fremont N. Jaynes, who until August 1 had been the general manager of the Blue Valley Lumber Company, and who, as general manager, had effectuated the contract of purchase first mentioned. In

the contract of assignment of August 4, which will hereafter be designated the Jaynes contract, it was substantially the agreement of the parties thereto that all of the rights of the Blue Valley Lumber Company under the original contracts of purchase were sold and transferred to Jaynes; that the contract of assignment was not to be effectual or binding until there had been procured a release from Conro & Son in favor of the Blue Valley Lumber Company of all the obligations assumed by it under its original contracts of purchase. With respect to that part of the contract which had been executed, that is, of the lumber originally contracted for which had been delivered and sold to the trade by the Blue Valley Lumber Company, it was agreed the company should account to Jaynes for all such lumber so delivered and sold at so much per thousand feet, ranging in price from $35 per thousand feet for the grades called A and B select, down to $7.50 per thousand feet for the lower grades. Dimension stuff, shingles and lath were to be accounted for at the same prices named in the original contract of purchase with Conro & Son. For the planing-mill work it was to settle with Jaynes at the same prices mentioned in the planing-mill contract. Against these items charged to the Blue Valley Lumber Company for lumber delivered to it and sold were to be placed the following credits: first, all moneys received by Conro & Son from all sources on account of said contracts; second, the amounts of all open accounts and bills receivable held by Conro & Son for shipments of lumber, except two accounts specifically mentioned; and third, it was agreed that if the amount of moneys received by Conro & Son, with the amount of unpaid accounts and bills receivable held by them, were not sufficient to pay Conro & Son for the amount due them for the lumber already delivered and sold by the Blue Valley Lumber Company, and the planing-mill work done thereon, then the Blue Valley Lumber Company, as soon as the amount of the balance could be definitely ascer-

tained, would settle with Jaynes, the assignee, for the amount thereof in cash or good paper. With this contract of assignment it appears that Jaynes, on or about August 15, went to Conro & Son, at their place of business, and solicited a release in favor of the Blue Valley Lumber Company, as called for by the terms of the contract of assignment. What was called a conditional release was obtained on August 15, which was given in consideration of the assignment contract being transferred to Conro & Son as collateral security, and in which they agreed to release the Blue Valley Company from any and all liability under said original contracts "upon the said Blue Valley Lumber Company faithfully performing and carrying out the provisions of the said contract" of assignment. The Jaynes contract was assigned to Conro & Son "as collateral security to the performance of the agreement therein contained by me to be performed." After these transactions, Conro & Son instituted suit against the Blue Valley Lumber Company on the Jaynes contract for the balance alleged to be due them, which it was claimed was the sum of $10,447.27. In the answer of the Blue Valley Lumber Company it is pleaded "that it has at all times and in all respects complied with said contract, so as aforesaid made on said 4th day of August, 1892, but this defendant alleges that on said 4th day of August, 1892, there was no sum due said F. N. Jaynes on account of and for said contract, but to the contrary thereof, on said 15th day of August, 1892, there was, and ever since said date has been, due, owing and unpaid from said F. N. Jaynes to this defendant the sum of five thousand dollars ($5,000.00) on account of and for the adjustment of the matters set forth in and with respect to which said contract was made, and for moneys loaned by this defendant to said F. N. Jaynes," and judgment is prayed for in said sum of $5,000. In reply it was pleaded that as to the amount of money claimed to be due from Jaynes to defendant it does not "constitute a counter-claim, set-off or

defense to this action, and that defendant can not in this case, by reason of the nature of the contracts sued upon and the conduct of defendant in obtaining the contract and conditional release of August 15, 1892, mentioned in the petition, maintain any counter claims or set-off in this case not inherent or connected with the so-called 'Jaynes contract.'" On the trial of the case to the court without a jury it was found that there was due to plaintiff from the Blue Valley Lumber Company $6,649.61, with interest, making in the aggregate $8,148.09, for which judgment was rendered. The trial court also found "that in executing the said conditional release the plaintiff relied upon, and had reason and a right to rely upon, adjustment and settlement being made upon the so-called 'Jaynes contract,' and the amount found due thereon paid over to the plaintiff, undiminished by any counter-claim or set-off existing at the time between the said Jaynes and the defendant company not growing out of the contract itself." As a conclusion of law the court held the defendant company is estopped from setting up or maintaining, in this action, any counter-claim or set-off against the plaintiff unconnected with the so-called Jaynes contract. From the judgment rendered, the Blue Valley Lumber Company prosecutes error proceeding in this court.

But two questions of controlling importance are argued by counsel in their briefs which will be considered. As to each of the two questions it is insisted by plantiff in error that the court erred in its findings for the want of sufficient evidence to support the same. With relation to this subject, counsel for plaintiff in error asserts that there is no evidence to support the conclusions reached, but does not call our attention to any portion of the bill of exceptions, which is composed of about 700 pages of testimony and nearly a thousand exhibits. Counsel for defendant in error says that the evidence not having been pointed out, it can not be expected that we search through such a voluminous record to ascertain whether

or not the findings are supported by the evidence; and counsel for plaintiff in error retorts by saying that he is unable to point out that which does not exist; and thus we are left to make our own examination of the record, unaided by counsel. We think it counsel's duty to at least call our attention to that portion of the testimony which in any way relates to the subject upon which it is claimed the erroneous finding rests. It is true, evidence which does not exist can not be pointed out; yet we think it not unreasonable to hold that when the trial court makes a finding of fact, there exists some testimony relating to the subject which counsel should be able to point out as the evidence relied on, even though it is maintained it does not support the conclusion reached by the trial court. However, we have made our own examination of the record, which we regard as sufficient to direct us as to a proper disposition of the case.

It is urged that the finding of the trial court as to plaintiff in error being estopped from pleading a set-off held by it against Jaynes is unsupported by the evidence and unwarranted by the pleadings. The trial court held substantially to the view that, under the peculiar nature of the contract with Jaynes, the circumstances surrounding its execution, and the procurement of the release in favor of the Blue Valley Lumber Company from all obligations under its original contracts, it was estopped to interpose any set-off in its favor and against Jaynes as against Conro & Son, until they had been paid what was due them by the terms of the contract of assignment. We regard this holding of the trial court as entirely correct and supported by the pleadings and the evidence.

It is pleaded in the reply that, by reason of the nature of the contract and the conduct of the defendant in obtaining it and the conditional release, it can not maintain a set-off not inherent in or connected with the Jaynes contract. While conclusions rather than facts are pleaded, a liberal construction for the purpose of promoting justice will, we think, render the plea suffi-

cient to support the introduction of evidence in that respect. As to the evidence on the plea of waiver or estoppel, it is entirely clear from the contract itself, the agreement of the parties, and the manner in, and the purpose for, which the release was obtained, and the acceptance thereof by the Blue Valley Lumber Company, that it should not be permitted to interpose the defense sought. One of the principal objects to be obtained by the contract of assignment was the release of the Blue Valley Lumber Company from its obligations under the original contracts. By the terms of the Jaynes contract the Blue Valley Lumber Company agreed to settle with Jaynes in cash or good paper for whatever balance might be found to be due Conro & Son. The object of this part of the agreement could be none other than that of effecting a settlement with and payment to Conro & Son for that part of the original contracts which had been executed, obtaining a release of the Blue Valley Lumber Company as to all other obligations then existing under such contracts, and having Jaynes substituted as to all liability in respect of the performance and fulfillment of its conditions and obligations in the future. The evidence discloses that immediately upon the execution of the Jaynes contract in duplicate he proceeded to Rhinelander, Wisconsin, for the purpose of obtaining a release in favor of the Blue Valley Lumber Company of its obligations under the original contracts, and was there joined by an attorney representing the company, who, as soon as the release was procured, accepted the same and returned with it to Omaha. The release was obtained upon the representation that the Blue Valley Lumber Company would, without delay, settle for the balance due Conro & Son according to the terms of the Jaynes contract, and was executed upon the expressed provision that the Blue Valley Lumber Company would faithfully comply with the obligation it had assumed in the Jaynes contract. The Blue Valley Lumber Company accepted the release with knowledge of these provisions,

which are stated in the instrument, and it can not now, we think, be heard to say that because Jaynes was indebted to it at the time of the execution of the contract, it will not perform that which it had agreed to do. Conro & Son relied upon the provision in the Jaynes contract as to a settlement of the balance found due them under the original contracts, and, as rightly found by the trial court, had a right to rely thereon. The Blue Valley Lumber Company has had the benefit of the release thus obtained, and ought not to be permitted to accept the benefits of one part of the contract and escape the burdens of another, as against those who, by its own acts and the terms of its own contract, have been led to execute such release, relying upon a fulfillment of the contract as a consideration for the execution of the release. Such a result would be wholly inequitable, and to us seems repugnant to the idea of good faith and fair dealing between individuals under the obligations of contracts. That an assignee of a non-negotiable chose in action takes it subject to set-off, counter-claim or other valid defense between the original parties, is a rule of general application and is not to be controverted. This principle has been embodied in the statutes. There are, however, exceptions to the general application of the rule, and we think the present case falls within the exception rather than the rule. In this case the only reasonable conclusion to be deduced is that the transactions connected with the assignment contract, the agreement to settle in cash or good paper for the balance when ascertained, its transfer to Conro & Son as collateral security, and the manner of procurement from them of a release of the Blue Valley Lumber Company from its obligations under the prior contract, were all calculated to lead Conro & Son to believe that the balance due them, when ascertained, would be provided for by the lumber company, so that the account to the date of the assignment contract would be fully, finally and completely settled, leaving the further execution of the remainder of

the original contracts a matter between Jaynes, as assignee thereof, and Conro & Son. Conro & Son relied on these provisions and executed the release by reason thereof. The assignment contract contemplated two principal objects, one, the substitution of Jaynes for the Blue Valley Lumber Company under the original contracts; and the other, the release of the Blue Valley Lumber Company from its obligations thereunder. To accomplish the latter, the balance due Conro & Son for the part of the contract performed was to be ascertained and provided for as mentioned. A duplicate of the assignment contract was given Jaynes and used, as the company must have known and intended it should be used, in securing Conro & Son's consent to the substitution and the release of the Blue Valley Lumber Company from its obligations under the original contracts. It was so used; and that Conro & Son relied on its provisions for the payment of the balance due them under the original contracts to the extent that they had been carried out is made clear by the wording of the release. The release was accepted with knowledge of the reliance by Conro & Son in the Blue Valley Lumber Company making good the balance due as provided for. The whole transaction had the effect of leading Conro & Son to believe the balance found due would be paid as provided, irrespective of any set-off or other demand at the time existing against Jaynes and in the company's favor. It would be manifestly unjust to afterwards permit the Blue Valley Lumber Company to interpose as a defense a set-off held by it against Jaynes at the time the assignment contract was executed. The rule of estoppel is applicable and will not, in our judgment, permit it to be done. The views herein expressed are abundantly supported by authorities, of which the following may be cited: *King v. Fowler*, 16 Mass., 397; *Bank v. Jerome*, 18 Conn., 443; *Kemp v. M'Pherson*, 7 H. & J. [Md.], 320; *Hall v. Purnell*, 2 Md. Ch., 137; *Jaques v. Esler*, 4 N. J. Eq., 461; *Henry v. Brown*, 19 Johns. [N. Y.], 49; *L'Amo-*

reux v. Vischer, 2 N. Y., 278; *Clarke v. Roberts*, 25 Hun [N. Y.], 86; *Trow v. Braley*, 56 Vt., 560.

It is also urged that the trial court's findings of fact as to certain items of charges are unsupported by the evidence. We think the evidence supports the findings. There was a large mass of evidence, and, as mentioned, nearly a thousand exhibits. In the conclusions reached the court reduced the amount from $10,477.27, claimed by plaintiff, to $6,649.61, for which with interest judgment was rendered. In the reduction made are included, no doubt, all the items to the allowance of which valid objection could be urged. The testimony was in many respects conflicting, and this court will not disturb the findings based thereon unless clearly unsupported by sufficient competent evidence.

The judgment should be, and accordingly is,

AFFIRMED.

MISSOURI PACIFIC RAILWAY COMPANY V. ABSALOM TIPTON.

FILED DECEMBER 5, 1900. No. 9,288.

1. **Assignment of Error.** An assignment of error as follows, "Errors of law occurring at the trial and duly excepted to by the said defendant at the time," is too general to call attention to any particular instruction given or refused and excepted to, and is insufficient to present to the trial court the question of the correctness of its rulings on the giving or refusal of such instructions. *Phœnix Ins. Co. v. King*, 52 Nebr., 562.

2. **Instruction:** GIVING: REFUSAL: ERROR: ATTENTION OF TRIAL COURT. The giving or refusal of instructions can not be considered in review of the case by proceeding in error, unless the objections thereto were first presented to the trial court and its attention challenged to the instructions excepted to.

3. **Negligence:** INJURY TO FRUIT TREES: MEASURE OF DAMAGES. In an action for negligence for injury to a number of growing fruit trees by fire, a recovery may be had by ascertaining as the amount of damages the difference in value of the fruit trees as standing, immediately before and after the injury complained of. *Fremont, E. & M. V. R. Co. v. Crum*, 30 Nebr., 70.

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

Bailey P. Waggener, C. W. Seymour and *James W. Orr*, for plaintiff in error:

The true rule of damages in a case of this kind is that, when the property destroyed or injured is so closely connected with the real estate on which it stands or to which it is attached that it has no value separate and independent of the real estate, the measure of damages is the difference in value between the real estate before the injury and after it. *Rowe v. Chicago & N. W. R. Co.*, 102 Ia., 286; *Louisville, E. & St. L. C. Co. v. Spencer*, 149 Ill., 97; *Dwight v. Elmira, C. & N. R. Co.*, 132 N. Y., 199; *Ward v. Chicago, M. & St. P. R. Co.*, 63 N. W. Rep. [Minn.], 1104; *Missouri P. R. Co. v. Haynes*, 42 Pac. Rep. [Kan.], 259; *St. Louis & S. R. Co. v. Hoover*, 43 Pac. Rep. [Kan.], 854; *Baltimore & O. R. Co. v. Countryman*, 44 N. W. Rep. [Ind.], 265; *Sherman v. Hannibal & St. J. R. Co.*, 54 Mo. App., 223; *Carner v. Chicago, St. P., M. & O. R. Co.*, 43 Minn., 375.

Fremont, E. & M. V. R. Co. v. Crum, 30 Nebr., 70, and *Kansas City & O. R. Co. v. Rogers*, 48 Nebr., 653, are not in point, for this reason: The rule of damages regarding the destruction of fruit trees is very different from the rule where forest or timber trees are destroyed. The value of a fruit or shade tree consists in its connection with the soil. The value of a timber tree begins upon its severance from the soil. A recovery may be had for the value of the thing destroyed, where it has a value which may be accurately measured without reference to the soil in which it stands. But fruit trees do not have such a value.

John C. Watson, also for plaintiff in error.

Sloan & Moran, contra:

As to measure of damages, see *Bailey v. Chicago, M. &*

St. P. R. Co., 54 N. W. Rep. [S. Dak.], 596, particularly the opinion of Bennett, P. J.

HOLCOMB, J.

The plaintiff, defendant in error, recovered a judgment in the trial court for the sum of $1,064.85, as and for damages on account of the destruction of a large number of bearing cherry trees by fire alleged to have been wrongfully and negligently caused by the defendant—plaintiff in error—in the operation of its locomotives attached to its railway trains.

It is urged by counsel for defendant that the judgment should be reversed because of alleged erroneous instructions given and refused, and also for the reason the evidence is insufficient to support a recovery. We are precluded from reviewing the instructions excepted to, which are argued in this court for the first time, for the reason that the same were not pointed out or called to the attention of the trial court in the motion for a new trial. Counsel argue that having assigned as one of their grounds for a new trial "errors of law occurring at the trial and duly excepted to by the said defendant at the time," the same is sufficient to raise the question as to the correctness of the ruling of the court on instructions given and refused. We think the rule is otherwise firmly established by the prior utterances of this court on the subject. The assignment is too general to call the attention of the trial court to any particular instruction. If it can be said to apply to all, it is to all instructions to which exceptions were taken at the trial, and is equivalent to assigning as error the giving of instructions *en masse*. Such assignment, to be sustained, must be sound as to all instructions to which exceptions are taken. In the case at bar, there is no claim of error as to several instructions excepted to, the error, if any, being waived, their giving is presumably correct; and, applying the rule as to assigning error to instructions *en masse*, the objections can not be sustained. This as-

signment, however, has not only been held in this court as insufficient to present to the trial court the question of the correctness of its rulings on the giving or refusal of instructions (*Phœnix Ins. Co. v. King*, 52 Nebr., 562), but it has also been frequently held that the giving or refusal of instructions can not be considered on an appeal of the case, unless the objections thereto were first presented to the trial court and its attention challenged to the instructions excepted to. This has not been done in the present case, and the ruling on instructions given and refused can not, therefore, be reviewed in this proceeding. *Barr v. City of Omaha*, 42 Nebr., 341; *Wier v. Burlington & M. R. R. Co.*, 19 Nebr., 212, 213; *Becker v. Simonds*, 33 Nebr., 680; *Barton v. McKay*, 36 Nebr., 632; *Hanover Fire Ins. Co. v. Schellak*, 35 Nebr., 701; *Hedrick v. Strauss*, 42 Nebr., 485.

In the case at bar, the same principle is involved with reference to the introduction of evidence, and its sufficiency to support the verdict, as in the ruling on the instructions of which complaint is made, and a proper conclusion as to the one necessarily disposes of the other on its merits.

On the trial of the case the plaintiff was permitted to prove the difference in the value of the trees, for the injury and destruction of which the action was instituted, immediately before and after the fire, as the measure of damages sustained. It is insisted by counsel for defendant that the true rule by which the damages are to be measured is the difference in the value of the real estate upon which the trees were growing immediately before and after the injury complained of; and a number of authorities in support of the proposition are cited. It is true that in many jurisdictions the rule contended for by counsel has been adopted; but we think this court is committed to the doctrine that a recovery may be had under evidence showing the value of fruit trees, shade or ornamental trees, or young growing timber, as they stood as live, growing trees before the injury complained

of, and their value, if any, immediately thereafter. We find no substantial objection to this mode of ascertainment of damages, and regard the extent of the injury sustained susceptible of proof by this method with as reasonable degree of certainty and accuracy as the one contended for. Says Bennett, P. J., in a specially concurring opinion in *Bailey v. Chicago, M. & St. P. R. Co.*, 54 N. W. Rep. [S. Dak.], 596, 599: "So I say, when there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury alone is the purpose of all remedies. Such a standard of damages is reasonable, and does justice to both parties. The inquiry should be, how much was the plaintiff injured by the destruction of the trees? In an action like the one at bar the true measure of damages, in my opinion, is the amount of injury which the plaintiff has actually suffered." The action was based upon the theory of damages to the growing trees, rather than as an injury to the freehold, and, in such case, the proper mode of estimating the loss sustained as heretofore approved by this court has been followed.

It is argued that a different rule should be applied to the loss of fruit trees than that of growing timber, and that for that reason the prior utterances of this court with regard to injury to growing timber do not necessarily determine the questions involved in the present controversy. We think the same rule as to measurement of damages should govern in both cases. In this we are supported by the authorities cited by defendant. *Dwight v. Elmira, C. & N. R. Co.*, 30 N. E. Rep. [N. Y.], 398. Being committed to the rule that a recovery may be had by ascertaining, as the amount of damages, the difference in value of the fruit trees as standing immediately before and after the injury complained of, we observe no sufficient reason for departure therefrom, and upon such authority hold the evidence objected to as competent and admissible for the purposes for which it was intended, and sufficient to support the verdict and judgment ren-

dered. *Fremont, E. & M. V. R. Co. v. Crum*, 30 Nebr., 70; *Kansas C. & O. R. Co. v. Rogers*, 48 Nebr., 653. In support of the same rule we also cite: *Bailey v. Chicago, M. & St. P. R. Co., supra; Montgomery v. Locke*, 13 Pac. Rep. [Cal.], 401; *Wallace v. Goodall*, 18 N. H., 439.

The judgment of the district court is

AFFIRMED.

PHILADELPHIA MORTGAGE & TRUST COMPANY, APPELLEE, V. BUCKSTAFF BROTHERS MANUFACTURING COMPANY ET AL., APPELLANTS.

FILED DECEMBER 5, 1900. No. 9,318.

Order of Sale: CONFIRMATION: LIMITATION. A failure to return an order of sale in the execution of a decree in foreclosure proceedings within sixty days, is no sufficient reason for withholding confirmation of a sale made thereunder.

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

A. B. Coffroth, for appellants.

S. L. Geisthardt, contra.

HOLCOMB, J.

On a motion to confirm a sale of real estate made by the sheriff in pursuance of a decree entered in foreclosure proceedings, objections were interposed on the ground that the order of sale was not returned within sixty days. A failure to return an order of sale in the execution of a decree in foreclosure proceedings within sixty days is no sufficient reason for withholding confirmation of a sale made thereunder. *Amoskeag Savings Bank v. Robbins*, 53 Nebr., 776; *Philadelphia Mortgage & Trust Co. v. Hutchins*, 61 Nebr., 2, decided at the present sitting.

The judgment is

AFFIRMED.

KATHARINE M. ANTES V. STATE INSURANCE COMPANY OF DES MOINES, IOWA, ET AL.

FILED DECEMBER 5, 1900. No. 9,324.

1. **Premium Note:** DEFENSE. The failure of an insured to pay at maturity a note given for a premium due on a policy of insurance is a complete defense, as to liability for loss of property insured during default, where it is provided that the policy, because of non-payment of such note, shall lapse and be of no force and effect, unless the conditions are waived by the insurer.
2. **Policy of Insurance:** MORTGAGE CLAUSE. Under a mortgage clause attached to a policy of insurance as follows, "Loss, if any, payable to Katharine M. Antes of Canandaigua, N. Y., as her interest may appear, she being the mortgagee," *held*, that the mortgagee stood in no more favorable light than as assignee of the policy to the extent of her interest in the insured property, by virtue of her mortgage, and that the contract of insurance is with the mortgagor, its validity depending upon performance or waiver of the conditions which it contains.
3. **Domestic Contract:** CONSTRUCTION. A contract is to be construed by the laws of the state in which it is made. The contract under consideration *held* to have been made and entered into in this state; and its validity is to be determined by our laws.

ERROR from the district court for Antelope county. Tried below before ROBINSON, J. *Affirmed.*

N. D. Jackson, for plaintiff in error.

C. J. Garlow and *Charles H. Kelsey, contra.*

HOLCOMB, J.

Suit was instituted by plaintiff as mortgagee to recover for a total loss by fire under a policy of insurance issued by the defendant. The mortgage clause is as follows: "Loss, if any, payable to Katharine M. Antes of Canandaigua, N. Y., as her interest may appear, she being the mortgagee," and was indorsed on the policy at the time of its execution and delivery. The answer pleaded "that the contract of insurance sued on in this cause contains a stipulation that 'no insurance, whether

original or continued, shall be considered as binding until the actual payment of the premium; nor shall this company be liable for any loss under this policy occurring at a time when any note or part thereof, given for a part or whole of this premium, shall be due and unpaid,' " and that a note had been given for a part of the premium, which was long past due and wholly unpaid, and that the entire premium was earned in full at the time of the alleged loss, and by reason of the non-payment of the premium the policy was not in force, and no cause of action exists in favor of the plaintiff. A reply was filed, to which a demurrer was interposed and sustained. It is the ruling on the demurrer of which complaint is made. The questions involved in the ruling sustaining the demurrer will appear in the further discussion of the case.

The failure of an insured to pay at maturity a note given for the premium due on a policy of insurance has been held to be a complete defense as to liability for loss of the property insured during the default, where it is provided that the policy, because of non-payment of such note, shall lapse and be of no force and effect, unless the conditions are waived by the insurer. *Home Fire Ins. Co. v. Garbacz*, 48 Nebr., 827; *Phenix Ins. Co. v. Bachelder*, 32 Nebr., 490. It is, however, claimed and pleaded in the reply that the mortgagee had no notice of the non-payment of the premium note, and that, as to her, she is in a different position than would be the insured mortgagor, were he alone interested in a recovery. We regard the mortgagee as standing in no more favorable light than as assignee of the policy of insurance to the extent of her interest in the property insured by virtue of her mortgage thereon, and her rights with respect to the litigation are to be gauged by, and rest upon, the contract of insurance entered into by the insured and insurer. There are times, it is true, when a mortgagee of insured property may claim where no right would exist in favor of the insured mortgagor, but this arises

out of the terms and nature of an agreement between the insurer and mortgagee, and which do not enter into the present case, where the mortgagee can only claim through, and by reason of, the original contract of insurance with the mortgagor. The contract of insurance is with the insured alone, with direction to pay the mortgagee in case of loss as her interest as such may appear, and its validity depends upon performance or waiver of the conditions which it contains. 2 Wood, Insurance [2d ed.], sec. 370; *Scania Ins. Co. v. Johnson*, 25 Ins. L. J. [Colo.], 525; *Brunswick Savings Institution v. Commercial Union Ins. Co.*, 4 Pulsifer [Me.] 313. The reply also pleads certain provisions of the statutes of Iowa, requiring that as to all policies of fire insurance written in that state, where a note for the premium has been given, before cancellation of the policy for non-payment of such premium note, thirty days' notice thereof must be given to the insured, and that no such notice was given by the defendant in regard to the policy sued on.

It is claimed that the policy in suit should be construed according to the laws of Iowa, in which state the defendant company is incorporated and has its principal place of business. It is nowhere pleaded that the contract was entered into in that state, and the pleadings, taken together, we regard as admitting of no other conclusion than that the contract was entered into in this state, and at the place where the property insured was located. The pleadings disclose that the policy of insurance was not to be effective until countersigned by the company's agent at Neligh, Nebraska, where the property was located, and that on the same day it was signed by him as agent at the place mentioned it was delivered to the insured. The contract having been made and entered into in this state, the *lex loci* must govern, and its validity must be determined by our laws, rather than those of the state of Iowa. *Joslin v. Miller*, 14 Nebr., 91; *Miller v. Wilson*, 146 Ill., 523; *Heaton v.*

Eldridge, 56 Ohio St., 87; *Equitable Life Society v. Pettus*, 20 Ins. L. J. [U. S. Cir. Ct. for Mo.], 961.

The judgment of the district court is

AFFIRMED.

IN RE ADMISSION TO THE BAR.

FILED DECEMBER 18, 1900.

1. **License to Practice:** ACT OF 1895: POWER OF SUPREME COURT: DISTRICT COURTS. Since the passage of the act of 1895 (ch. 6) the power to license to practice in the courts of Nebraska has been taken from the district courts and lodged exclusively in the supreme court.
2. **Admission to Practice:** CITIZENSHIP. No one but a citizen of the United States and a resident of the state of Nebraska can be admitted to practice generally in the courts of said state.
3. **Foreign Attorneys:** STATE COMITY: DISCRETION OF COURTS. A practicing attorney, in good standing in the courts of record of a sister state, a territory or a foreign country, having an interest in a cause pending in any of the courts of this state, may, in the discretion of such courts, and as a matter of courtesy, be permitted to appear in said court for some of the purposes of such cause.
4. **Application for Admission:** STATUTE: MINORS. To entitle a person to apply for admission to the bar of this court under the provisions of section 2, chapter 7, of the Compiled Statutes, he must, at the time of making his application, have attained to the age of twenty-one years.
5. **Statute:** ADMISSION: QUALIFICATIONS: TWO YEARS' STUDY: GRADUATION: FOREIGN COLLEGE. Under the provisions of said section 2, attentive study of the law in the office of a practicing attorney for the full period of two years, or regular graduation from the College of Law of the University of Nebraska, is absolutely required; and study in any other law school, or otherwise than in such office, will not be considered.
6. **Practicing Attorney:** MEANING OF TERM. The "practicing attorney," in whose office the statute requires the studies of the applicant to be duly pursued, is one who resides and practices in this state.

PER CURIAM.

Upon the report of the commission appointed at the present term pursuant to the requirements of a rule of this court, to pass upon and report the qualifications of

applicants for admission as attorneys and counselors, some questions have arisen which it is necessary for us now to determine.

1. In 1895 the legislature passed an act (ch. 6) to regulate the admission of attorneys at law. Prior thereto they had been licensed to practice in the several courts of this state upon such investigation into the character and qualifications of the applicants as each court deemed proper to prescribe. The act above referred to did not in express terms repeal sections 3 and 9 of chapter 7 of the Compiled Statutes, entitled "Attorneys," and it appears that some of the district courts are still assuming the power to admit to practice generally persons who present certificates of admission from the courts of other states and of territories; and that thereafter such persons apply to this court for admission on a motion made as a matter of course. Such action upon the part of a district court is wholly without authority of law, and such admissions, together with any action taken in reliance thereon, are wholly void. The plain intention of the legislative power, and the necessary effect of the act above referred to, was to vest the power to admit persons to practice as attorneys and counselors of the courts of this state, solely in the supreme court. The act is complete in itself and results in repealing sections 3 and 9 above referred to.

2. A necessary qualification for admission to practice generally is that the applicant must be a citizen of the United States and a resident of this state. An alien can not well take the oath required of attorneys and counselors by section 4 of said chapter 7. Furthermore, such persons and practicing attorneys who reside in other states or any of the territories are, as a rule, out of the jurisdiction of the courts of this state, and beyond the reach of its process in case their professional action is called in question and the disciplinary power of the court is invoked against them.

3. Such alien or non-resident attorney may, however,

as a matter of comity, be permitted, by any court of record in which there is pending any cause in which he may be interested, to appear for some of the purposes of said cause, upon being fully satisfied as to his professional character and standing at the bar of the place of his residence. Of course, it is not permitted to such an attorney to commence actions or sign pleadings or papers on behalf of any litigant. Such powers are expressly reserved to the duly admitted attorneys and counselors of the state.

4. Application has been made by minors for present examination with a view to admission when they shall have attained the age of majority. Such is not the spirit and intent of the statute. The age of majority, with the attendant right of controlling one's own actions free of the claim of the parent or guardian, are necessary to admission to the bar of this court; and it is contemplated that the report shall follow on the examination, and show that at that time the applicant had all the qualifications prescribed by the act of the legislature. Any other course would require a subsequent report, showing that at the time thereof the applicant had not only the requisite age, but also continued to sustain the moral character required by the statute.

5. Persons have applied for examination on the strength of a course of study in schools of law other than the College of Law of the University of Nebraska. In the opinion of the commission, the only exception made to the requirement of the statute for two years' study in the office of a practicing attorney is in the case of regular graduates of our own state institution. In this view the court fully concurs. Admission to the practice is a privilege and not a right, and the power which grants the privilege can annex the terms and conditions on which the same may be exercised. The provisions of the statute are plain as to the terms on which examination can be had, and study, otherwise than therein provided, can not avail the applicant.

6. The provision of said section 2, as to the study of the law "in the office of a practicing attorney," also requires construction. The language of the statute does not expressly require that such attorney shall be one residing and practicing in this state. But such was doubtless the intention of the legislative power. The reasons for such a construction seem plain. Such an attorney is an officer of this court, whose standing and character is, or easily may be, known to the court. He owes to this court a duty which is not obligatory upon the attorneys of another state. Our rules require a certificate of such attorney, as the preceptor of the applicant, as to compliance with an express requirement of the statute. Such certificate can properly come only from one of the court's own officers; and be made under the sanction of the oath which such officer is required by law to make. These considerations, aside from any as to the propriety of a student coming from the state of his study, instead of seeking original admission therein, seem to us to control the matter.

The object of the statute was evidently to secure a higher standard of legal attainments, and a full knowledge of the moral character of those who seek to exercise the powers of a great profession. With that object the court is, of course, in full sympathy; and it can be attained only by placing on its provisions a reasonably strict construction.

PLUMMER, PERRY & CO. ET AL., APPELLANTS, V. CHARLES H. ROHMAN ET AL., APPELLEES.*

FILED DECEMBER 18, 1900. No. 9,294.

1. **Statute of Limitations:** PLEA BY THIRD PARTY. Ordinarily, a third party may not interpose the defense of the statute of limitations.

2. **Homestead:** FRAUDULENT ALIENATION. The family homestead to the value of $2,000 is not the subject of fraudulent alienation.

*Rehearing allowed.

3. Office of Reply. The office of a reply is to deny the facts alleged in the answer as a defense, or to allege matters in avoidance of such defense not inconsistent with the cause of action set out in the petition.

4. ———: NEW CAUSE OF ACTION. A new cause of action may not be set forth in a reply.

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

A. G. Greenlee, Stevens & Cochran, Elmer J. Burkett and *Ricketts & Wilson*, for appellants.

Frank H. Woods, for Grainger Bros.

Burr & Burr, contra.

NORVAL, C. J.

This suit was commenced in the district court for Lancaster county by Plummer, Perry & Co., to subject certain real estate situate in the city of Lincoln to the lien of a judgment theretofore obtained by said company against one Charles H. Rohman. The latter had been engaged in the grocery business in said city, in partnership with one Milton McGoogan. The firm failed in business, and on the afternoon of the same day, said Rohman and wife conveyed to one Charles Burr the property in controversy; and Burr and wife immediately conveyed the same to Eda M. Rohman, the wife of said Charles H. Rohman. This property was at that time of the value of about $4,000, was the residence of Rohman and wife, and the title to it had stood in his name for several years prior to such conveyance; and in several instances had been included in lists of assets by him furnished to commercial agencies for the purpose of obtaining credit in his business. The transfer from Rohman and wife to Burr and from Burr and wife to Mrs. Rohman was without consideration, this being the means taken to place the title of the property in Mrs. Rohman. The day following this transfer said Plummer, Perry &

Co. commenced an action in the district court against Rohman and his partner on account of an indebtedness of the firm for goods, and attached this property, in which cause they afterwards obtained judgment and an order directing the sale of the property so attached. Other firms subsequently commenced actions, and levied like attachments and obtained judgments, and in this action are made defendants. In the petition in the case before us said Plummer, Perry & Co. set forth facts hereinbefore recited, and further, the issuance and return of an execution unsatisfied, and allege that said Eda M. Rohman paid no consideration for the conveyance of said property to her, but that said conveyance was made solely for the purpose of transferring property from said Charles H. Rohman to her; that said conveyance, as well as that to Burr, was wholly without consideration, and made for the sole purpose of hindering and defrauding the creditors of said Charles H. Rohman in the collection of their just claims against him; that his wife, as well as Burr, well knew that said transfers were made with such fraudulent intent, and that said Rohman and his partner were insolvent; and praying that the deed be canceled and that the premises be sold to satisfy the judgment. The other judgment creditors, by cross-petitions, set up substantially the same facts, and to these, and the petition, said defendant, Eda M. Rohman, answered, alleging in substance that said premises were the homestead of the defendants; that at various times prior to the date of the transfer said answering defendant had, out of her separate property, advanced various sums of money to said Rohman, the total at the time of said transfer aggregating $2,200, which sum was owing her on said date, when she demanded repayment of said sum, which said Rohman was unable to do; that it was then agreed that he would transfer title to her, in full discharge of all said indebtedness, and that said conveyance was the result of said agreement. Said answer set forth the particulars of such advances to said Charles H. Rohman,

one of the items being the payment by her of a mortgage of some $1,300, due against the property in question, and that at the time of such payment it was agreed that said mortgage should be assigned to her, or that the place should stand as security to her for the repayment of this sum. In reply to this answer said Plummer, Perry & Co. and the cross-petitioners allege, among other things, substantially, that at all times since the purchase of this property by said Charles H. Rohman the title thereof stood in his name, with his wife's knowledge and consent; that he did business on the faith and credit of his being the owner thereof; that said plaintiffs sold the goods, for which their judgment was obtained, upon the faith of and relying upon the fact that said Charles H. Rohman, the husband, was the owner of said property, and further alleging that, if said debt from Rohman to wife ever existed, it was not evidenced by writing, and that more than four years had elapsed between the date of its maturity and the date of the transfer of said property. On the trial the lower court found the facts, and we think properly, substantially as recited in the answer, and further found that, for a number of years prior to the commencement of this suit said Charles H. Rohman was engaged in the mercantile trade in the city of Lincoln, and obtained credit in carrying on and conducting said business, and contracted indebtedness to said several defendants and interveners herein; that he obtained credit in said business by reason of the fact that the property in controversy was allowed to stand in his name as the owner, the indebtedness to his wife not being specially made known to his creditors; but that said wife had no knowledge of the financial standing of her husband, or of the condition of his business, or that, by reason of the title standing in his name, he was obtaining credit, or that he was in any manner withholding from the commercial world any facts concerning his indebtedness to his wife; that she had no knowledge of his insolvency, but had implicit faith in his integrity and

business ability, and, therefore, failed to demand and take security on the homestead and property in controversy for the advances so made; and the court further found as follows: "But the court finds that whether or not the said Eda M. Rohman would be estopped from accepting such transfer in payment of such indebtedness should not be determined, and is not passed upon in this case, for the reason that estoppel has not been pleaded by the several defendants and interveners herein as provided by law." Upon the findings and conclusions adduced therefrom the lower court rendered a decree in favor of said defendant, Eda M. Rohman, and from which said Plummer, Perry & Co. and two other judgment creditors, Reid, Murdoch & Co. and Grainger Bros., appeal to this court.

It is not seriously contended that the fact that the statute of limitations had probably run on this indebtedness from Rohman to his wife could be successfully pleaded in bar of her right by a creditor, it being a mere personal privilege and one that her husband only could avail himself of or waive, as he thought proper, and the court will, therefore, not discuss that question at length. *Baldwin v. Boyd*, 18 Nebr., 449; *Dayton Spice-Mills Co. v. Sloan*, 49 Nebr., 622. There remains, then, but one proposition to determine, and that is, whether the matter in estoppel set out in the several replies was so pleaded as to make it the duty of the lower court to pass upon the question of estoppel sought to be raised. The husband could, of course, convey his homestead to his wife, and it would be immaterial whether his purpose was or was not to defraud his creditors. *Munson v. Carter*, 40 Nebr., 417; *Bloedorn v. Jewell*, 34 Nebr., 649; *Roberts v. Robinson*, 49 Nebr., 717; *Mundt v. Hagedorn*, 49 Nebr., 409.

The court having found that the indebtedness of $2,200 was valid, said finding being based upon evidence, it remains then to determine whether the appellants could, by the reply, avail themselves of any of the facts found as an estoppel of the wife to claim title to the prop-

erty over and above the homestead right of herself and husband. The cause of action set up in the petition was that the conveyance of title to this property from Rohman to his wife was without consideration and made for the sole purpose of hindering and defrauding his creditors, while the reply alleges that, if the transfer was for a consideration, then the wife could not avail herself of it, for the reason that she had permitted him to obtain credit by representing to creditors that he was the owner of the property, and by concealing the fact of his indebtedness to his wife.

The question then is, are the facts set up in the reply by way of estoppel such a departure from the cause of action set forth in the petition as to constitute a new cause of action? The mere statement of the facts would make it appear so; for by the reply plaintiff practically admits the very opposite of the facts relied on in the petition, and seeks by an estoppel to avoid the consequence of these facts. It is not the office of a reply to set out a new cause of action, particularly when the facts so pleaded constitute a departure from the cause of action set forth in the petition, or a new cause of action. *Piper v. Woolman*, 43 Nebr., 280; *Wigton v. Smith*, 46 Nebr., 461; *Hastings School District v. Caldwell*, 16 Nebr., 68; *Savage v. Aiken*, 21 Nebr., 605. This court has ruled in a number of cases that the reply may set out any new matter of defense to the allegations of the answer not inconsistent with the cause of action set out in the petition. *Paxton Cattle Co. v. First Nat. Bank*, 21 Nebr., 621; *Mollyneaux v. Wittenberg*, 39 Nebr., 547; *Cobbey v. Knapp*, 23 Nebr., 579; *Anderson v. Imhoff*, 34 Nebr., 335. That this is the proper rule we do not doubt. But in the case at bar, the facts alleged by way of estoppel necessarily admit the existence of facts the very opposite of those relied upon in the petition as plaintiff's cause of action; hence the matter of estoppel is inconsistent with the cause of action set out in the petition, and, therefore, not properly pleaded in the reply. Had the plaintiff below desired to

depend upon the matters therein alleged, they should have been made a cause of action in the petition. To the latter argument, however, it is insisted that the plaintiff below could not anticipate that the defendant Mrs. Rohman could avail herself of the defense set forth in her answer, and for that reason could not know in advance that it would be necessary to allege matters in estoppel sought to be availed of in the reply, and for that reason these matters were more logically left for the reply. Plaintiffs, however, knew, before they commenced the suit, whether they had furnished the goods to the husband of Mrs. Rohman on the faith and credit of his being the owner of the property in controversy, and could and should have set out that fact in their petition. It is further argued that, although it may be true that the matters of estoppel were improperly pleaded in the reply, the case falls within the rule announced in *Gregory v. Kaar*, 36 Nebr., 533, that where a new cause of action is presented by reply, but when no objection is made on that ground, and the issues presented are submitted on their merits, the objection that the cause of action was first stated in the reply will be held to have been waived. We find, however, that objection was made to the introduction of evidence to sustain these allegations of the reply, and are, therefore, of opinion that no waiver of the right to object in this court to the order of pleading has occurred.

A careful reading of the evidence convinces us that the findings of the court are amply sustained by the evidence, and that the court did not err in refusing to consider the matters of estoppel thus set out, and that the judgment of the lower court is right, and it is, therefore,

AFFIRMED.

SCHUYLER BUILDING & LOAN ASSOCIATION, APPELLEE, V. HARRIET FULMER ET AL., APPELLANTS.

FILED DECEMBER 18, 1900. No. 9,310.

1. **Decree of Foreclosure:** SALE OF MORTGAGED PROPERTY: FINAL ORDER. A decree foreclosing a real estate mortgage, with the usual provision for a sale of the mortgaged property, is a final order or judgment within the meaning of the Code.

2. **Vacation of Decree:** POWER OF DISTRICT COURT: STATUTE. A district court is without power to vacate a decree entered by it at a prior term foreclosing a mortgage, except for the causes and in the manner prescribed by statute.

3. **Motion for New Trial:** LIMITATION: Except on the ground of newly-discovered evidence, a motion for a new trial must be filed within three days after the judgment is rendered.

APPEAL from the district court for Colfax county. Heard below before MARSHALL, J. *Reversed.*

George R. Doughty, for appellants.

C. J. Phelps, contra.

NORVAL, C. J.

This suit was instituted in the district court of Colfax county by the Schuyler Building & Loan Association, to foreclose a certain mortgage to it executed and delivered by Harriet Fulmer and Henry M. Fulmer. The Fulmers filed an answer to the petition, setting up usury in the transaction. Trial was had on the issues in the case on August 10, 1896. The court found that the condition of the mortgage had been broken by the Fulmers, that there was due plaintiff thereon the sum of $363, and directed the sale of the property, in the case of failure to pay the amount due within twenty days, the decree being in the form usual in foreclosure suits. On September 28 following, and during the same term, plaintiff filed a motion in the case, asking the court to set aside the findings and order so made, on the ground that the same

were not supported by sufficient evidence, and were contrary to law. Shortly afterwards the court adjourned *sine die*, without having acted upon this motion. At the next regular term, however, the court granted the motion, set aside its former decree, and thereupon entered a new decree against the Fulmers in a larger amount, to-wit, in the sum of $893.60, and directed the mortgaged premises sold, as was ordered done in the first decree. The Fulmers appealed, claiming that the district court had no jurisdiction either to set aside the first decree by it rendered, or to enter the second decree, since the one first entered was a final judgment and, as such, could not be set aside, even at the term when pronounced, except by the court of its own motion, or upon the granting of a motion for a new trial, which motion should have been filed within three days of the entry of said decree, it not having been based on newly-discovered evidence, as provided by the Code; that the district court had no jurisdiction to set it aside at a succeeding term, except on a motion for a new trial having been properly filed by the plaintiff, and that the proceeding was, therefore, void. To this counsel for plaintiff answers as follows: "The finding and order of sale, called a decree, in this, as in all foreclosure suits under our Code, is not a judgment. It does not finally dispose of the case. The sale follows under the order entered, and is reported, and if confirmed, then, and not until then, is the real final judgment in the case entered. Up to that time the case is open for such corrections, amendments and orders as justice to the parties may require." To this course of reasoning we can not assent. It is too clear to need the citation of authorities, that a decree in foreclosure cases is a final judgment. The reports of this state teem with appeals and cases brought here on error proceedings from decrees so entered, and we do not remember that any counsel has ever before so much as doubted the proposition that such decrees are final judgments. Such decrees are final orders or judgments within the mean-

ing of the Code and are reviewable before sale and confirmation. This being the case, the lower court could only set aside the first decree entered by granting a motion for a new trial, which should have been filed within three days after the entering of said decree. That not having been done, and the term of court at which the first decree was entered having terminated without any action on the part of the court to set it aside on its own motion, it lost jurisdiction to vacate or in anywise modify it. Hence the action of the lower court in attempting to set aside the decree of August 10, and in entering the second decree, was void and of no effect, and said second decree is, therefore, set aside and reversed, and the former decree reinstated.

REVERSED.

TRUMAN BUCK, APPELLEE, V. JOHN STUBEN ET AL., APPELLANTS.

FILED DECEMBER 18, 1900. NO. 9,320.

1. **Finding:** EVIDENCE. A finding made on evidence fairly conflicting will not be disturbed on review.

2. **Reversal:** PREJUDICIAL ERROR. Prejudicial error must be shown, to justify the reversal of a decision of the trial court.

APPEAL from the district court for Sarpy county. Heard below before SLABAUGH, J. *Affirmed.*

John P. Breen and *Charles S. Lobingier*, for appellants.

James B. Meikle and *Frank H. Gaines, contra.*

NORVAL, C. J.

This is an appeal from an order confirming a judicial sale of real estate sold in mortgage foreclosure. The decree under which the sale was made contained the following: "And it is further ordered that the part of said premises lying outside of the right of way of said Omaha & Southwestern Railway Company be first offered for

sale, and in case that part shall not sell for enough to pay the amount due the plaintiff, that the same shall be first sold separately, but if necessary, the whole parcel of land described in said mortgage shall be sold and the proceeds applied in payment of the plaintiff's claim as aforesaid." No further description of the right of way mentioned is contained in the decree, though a description of the whole tract is given by government survey. It is objected that the provision quoted is not sufficiently definite to enable the sheriff to ascertain from the decree, and point out to intending purchasers the tract of land lying outside of said right of way. A further objection was made to the appraised value of the land, it being claimed that it was appraised much below its actual value, so much so that fraud must be presumed in such appraisement. On the hearing of the motion in the court below to set aside the sale the affidavits of about one hundred persons were taken by the parties relative to the value of the property in question, which were conflicting. There was ample evidence adduced on which the district court was justified in finding that the property was not appraised too low, and this it did. This finding we are not disposed to set aside. *Nebraska Loan & Building Ass'n v. Marshall*, 51 Nebr., 534.

The objection first urged against the sale can not be successfully presented, since it is not shown that the complaining party has been prejudiced by the decision. *Kane v. Jonasen*, 55 Nebr., 757. On the contrary, the record discloses that the entire tract, including the right of way, did not sell for enough to pay the debt, and defendants were interested alone in the portion not included in the right of way. The description could not have prejudiced them. Moreover, the description of the right of way in the decree was sufficient, inasmuch as a stranger could easily have located the right of way from the railroad constructed therein. The order assailed is

AFFIRMED.

EMIL C. ACKERMAN ET AL., APPELLEES, V. GUS. A. ACKERMAN ET AL., APPELLEES, IMPLEADED WITH GEORGE R. DICKINSON PAPER COMPANY, APPELLANT.

FILED DECEMBER 18, 1900. No. 11,359.

1. **Amendment of Court Records:** EVIDENCE. A court has the power at a subsequent term to amend or correct its records to conform to the facts, and may proceed upon any satisfactory evidence.
2. ———: SUBSEQUENT TERM: RECOLLECTION OF JUDGE: QUÆRE. Whether a correction of the record may be made at a subsequent term from the personal recollection alone of the trial judge not decided.
3. **Finding:** EVIDENCE. A finding without any evidence to sustain it will be set aside.

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

Holmes & Morgan, for appellant.

A. N. Ferguson, contra.

NORVAL, C. J.

This case was here on a former appeal, wherein it was held that a sale made by the receiver appointed by the court, of certain property belonging to the estate, was void, for the reason that the order directing the sale provided that it take place on May 29, 1894, whereas the sale was made on June 18 and 19, 1894. *Ackerman v. Ackerman,* 50 Nebr., 54. After the decision above mentioned was handed down, the receiver moved the court for an order *nunc pro tunc,* to make the records show that an order was in fact made directing the receiver to sell the property upon the 18th day of June, it being claimed that such an order was made by the court after its order directing the sale on the 29th day of May, but for some reason had not been placed of record by the officers of the court. The same judge who made the order of sale

heard the motion and, upon hearing, entered the following:

"This cause coming on to be heard this 24th day of November, 1899, upon the motion of A. N. Ferguson, as attorney for John H. F. Lehman, late receiver now deceased, as well also as his attorney, for the administrator of the estate of said Lehman, and for Charles J. Karback, and Fred Metz Sr., the sureties upon the bond of the receiver in the above entitled action for John H. F. Lehman, for a *nunc pro tunc* order to make that of record which was in fact made authorizing said receiver to advertise and sell the assets of the firm of Ackerman Bros. & Heintze to take place on June 18, 1894, as of and before said date. Both parties appearing in open court by their respective counsel, and after hearing the evidence and argument of counsel, and the court being fully advised in the premises, does find that between the 29th day of May, 1894, and before the 18th day of June, 1894, and before said sale, the court authorized and directed said receiver by an order to advertise to sell said property at public sale, as by the decree of the court, so ordered; and that said sale was made upon said order on June 18th and 19th, 1894; that said order was never journalized or made of record in the above case, through some oversight or mistake, though the same had been in fact made prior to said sale.

"It is therefore ordered, adjudged and decreed by the court that it be entered of record *nunc pro tunc* as of and before the date of June 18, 1894, to-wit: that said John H. F. Lehman, receiver in said cause, be, and he is hereby authorized and directed to sell the assets of the firm of Ackerman Bros. & Heintze on the 18th day of June, 1894, and proceeding thereafter until such sale is completed, and that this order be journalized and recorded as of and before said 18th day of June, 1894, and after May 29th, 1894, as the same should have been and was done, except the journalization of said order."

From this order one of the creditors, the George R.

Dickinson Paper Company, appeals, claiming that there was no evidence offered on the hearing of the said motion in support thereof, and the order of the court is without evidence to sustain it. A bill of exceptions is attached to the transcript, duly certified to contain all the evidence offered on the hearing of the motion, and we are of the opinion that no evidence was before the lower court on which to base said order. There is conflict of authorities concerning the nature of the evidence necessary to entitle courts to alter or amend their records, where the proceeding to alter or amend or correct is had at a term subsequent to the one at which such record was made. Many courts hold that to make such alterations or corrections there must be something of record, as the judge's minutes, or some paper writing in the cause, from which the court can ascertain that such alteration or correction should be made. This court, however, has adopted the rule, which seems the better one, that in the exercise of its power of correction of its records the court is not confined to an examination of the judge's minutes, or written evidence, but it may proceed upon any satisfactory evidence. *School District v. Bishop*, 46 Nebr., 850 and cases there cited; *In re Wight*, 134 U. S., 136; *Jacks v. Adamson*, 56 Ohio St., 397; 17 Ency. Pl. & Pr., 931 and note 2.

It is contended by counsel for the deceased receiver's estate that the court, in part at least, made the order from its personal recollection of the facts, and that the order needed no further evidence than that. Whether the personal recollection of the judge alone is sufficient it is not necessary to decide, as there is nothing of record to show that the order was based upon such recollection.

It is further contended that the return of the receiver of the order of the sale constitutes evidence of the existence of such an order, the return, introduced on the hearing, reciting, "in compliance with the order of the court I have sold on June 18th & 19th." etc. We do not think that this is evidence of the existence of such order. It

is rather the construction which the receiver may have placed upon an order of the court, and he may have believed that by selling on the 18th day of June he was complying with an order of the court directing him to sell on a day other than the 18th. For the reason that the record is entirely destitute of evidence on which to base this order, we must overrule it, and remand the matter to the lower court, when it is to be presumed that evidence can and will be produced which will justify the correction of the record to conform to the facts.

ORDER REVERSED.

SIOUX CITY BRIDGE COMPANY, APPELLEE, V. DAKOTA COUNTY ET AL., APPELLANTS.

FILED DECEMBER 18, 1900. No. 11,416.

1. **Tax Levy:** SITUS. A village can not levy a tax on property the *situs* of which is not within the corporate limits. *Chicago, B. & Q. R. Co. v. Cass County*, 51 Nebr., 369, and *Chicago, B. & Q. R. Co. v. City of Nebraska City*, 53 Nebr., 453, followed.
2. ———: ———: JURISDICTION: VALID FROM INVALID TAX. A tax levied on a whole property, part of which is within and part without the territorial limits of the body imposing the same, is invalid as to that part levied on the portion without the jurisdiction, which renders the whole assessment void, unless the tax assessed against the part within the jurisdiction of the taxing body can readily be separated from the portion without it.
3. **Assessment:** SITUS OF PROPERTY: JURISDICTION. A property owner is not required to appear before a taxing board in opposition to the assessment of a tax on property whose *situs* is not within the jurisdiction of such board.
4. **Void Assessment:** TENDER. Where an assessment is wholly void, no tender of any sum is necessary to relief against the tax.

APPEAL from the district court for Dakota county. Heard below before EVANS, J. *Reversed in part.*

W. E. Gantt and *William P. Warner*, for appellants.

Benjamin T. White and *James B. Sheean, contra.*

NORVAL, C. J.

This suit was commenced in the district court of Dakota county by the Sioux City Bridge Company, to enjoin the collection of taxes assessed upon a certain bridge and its approach, the property of plaintiff, by the authorities of the village of South Sioux City. A portion of section 22, township 29, range 9, is included in the corporate limits of said village, and is bounded on one side by the Missouri river, the government survey having followed the meanderings of the river. Plaintiff's bridge crosses the Missouri river at this point, and its western end is adjacent to this portion of section 22. To reach the bridge an approach of considerable length is required, a large portion of which, at least, is within the corporate limits of said village. The whole of said approach and the west half of said bridge were assessed as being within the corporate limits of the village for the years 1896, 1897, 1898 and 1899, and said company brought this suit to restrain the collection of them, claiming that the whole of said taxes was void, for the alleged reason that said bridge and a portion at least of said approach were without the jurisdiction of the village. On trial, the following findings of fact were entered, decree being had thereon accordingly:

"1. The court finds that the plaintiff's bridge described in the petition filed herein consists of the bridge structure of spans supported by five piers and an approach, the approach being composed of dirt embankment and trestle-work over which the traffic is conducted to the bridge proper.

"2. The court finds that the west pier of said bridge, being the pier described in the testimony as 'pier five,' is situated about eight feet easterly from the meander line of the Missouri river at said point, which meander line is the eastern boundary of section twenty-two (22) in [township] twenty-nine (29) of range nine (9) east of the 6th P. M. in Dakota co[illegible]ty, Nebraska.

"3. The court finds that in the year 1858, at the time the said meander line was surveyed, marked and fixed by the government surveyors and for some time subsequent thereto the high-water bank at the point where said bridge crosses said river was located under or easterly from the present location of said 'pier five.'

"4. The court finds that in 1887, at the time of the building of said bridge and at the time of the location of said 'pier five,' the high-water bank of said river was about ninety (90) feet westerly from said 'pier five' and that said high-water bank has continued practically unchanged as to its distance from said pier until the present time and is now about ninety (90) feet westerly from said 'pier five.'

"5. The court finds that there is an artificial embankment, constructed during the building of said bridge and subsequent thereto, running from said 'pier five' back to the said high-water bank over which the high water from said Missouri river has never flowed since it was erected in 1888, but the waters from the river at its high stages flow back to the high-water bank on each side of said artificial embankment.

"6. The court finds that in the year 1888, during the spring rise of said Missouri river, the water was entirely around and covered the present site of said 'pier five' and that in the fall of said year there was no water around the present site of said 'pier five' and that the low water mark of said Missouri river at the place where the said bridge is located is and has always been easterly from said 'pier five.'

"7. The court finds that for the year 1896 no return or schedule of property was returned by the plaintiff or by any person for it to the assessor for assessment. That the assessor as by law required returned the said property for assessment as one bridge and that prior to the filing of this case no appeal was ever prosecuted, which changed or complained of said assessment and return made by said assessor.

"8. The court finds that the approach of said bridge except a small portion thereof, is within the village of South Sioux City, Dakota county, Nebraska.

"9. The court finds that for the years 1897, 1898 and 1899 the plaintiff by its agent has returned said bridge for assessment under two heads as follows:

'Bridge, $72,000.00.

'Approach to bridge, $3,000.00.'

and that the assessor and officers of said county of Dakota have listed and assessed the same as if all of said bridge and approach were within the corporate limits of said village of South Sioux City.

"10. The court finds that the plaintiff has never tendered to the defendant county, or its treasurer, or any one for it, the taxes justly due the said village of South Sioux City, nor have the same been tendered to the said village, or to any one for it, except as the same are tendered by the amended answer filed in this case during the progress of the trial.

"11. The court finds that the tax listed, assessed and levied against bridge property and the plaintiff for the year 1896 is a proper charge, and that the injunction heretofore granted restraining its collection should not have been granted and should now be dissolved.

"12. That the taxes listed, assessed and levied against the approach of said bridge for the years 1897, 1898, and 1899, was and is a proper charge against said approach and the plaintiff, and the injunction heretofore granted restraining the collection should not have been granted and should now be dissolved as to the tax against the approach for said years.

"13. The court finds that the taxes listed, assessed and levied for village purposes for the years 1897, 1898 and 1899 upon the valuation of that portion of said bridge resting upon the piers is not a proper charge against said property or against the plaintiff and that the plaintiff is entitled to an injunction as to the tax levied or listed for such purposes against said portion of said bridge structure."

Upon the findings the lower court rendered a decree that the whole tax for the year 1896 was valid, and therefore refused an injunction as to the collection of the tax for that year. As to the subsequent years involved in the litigation, the court decreed that the bridge being without the limits of the village, the tax upon it was void, and the defendants were accordingly enjoined from collecting the same. As a large portion of the approach was within the corporate limits of the village, the tax as levied for those years upon that structure was decreed valid, and the court refused to enjoin their collection. From this decree both parties appeal to this court, and the whole case is before us for consideration.

It will be noted that the findings numbered 2, 3, 4, cause the principles of law governing this case to fall within the decision in *Chicago, B. & Q. R. Co. v. Cass County, supra*, wherein it was held that a railroad bridge, no part of which touched any portion of a school district, could be assessed by said district. It was ruled that the boundaries of the district were the high-water bank or meander line of the government subdivision of land included in it, the meander line and the high-water bank coinciding at that point. It is conceded by counsel for defendant that this case falls within the doctrine therein announced; but the decision itself is attacked as not a proper rule, and we are asked to hold that the boundary of the village is either the line of low water in said river, or the middle thread of the stream. We are satisfied with the principles announced by that decision, which have also been followed in *Chicago, B. & Q. R. Co. v. City of Nebraska City*, 53 Nebr., 453. It is possible, however, that in the *Cass County Case* the learned commissioner who prepared the opinion somewhat confused the terms "high-water bank" and "meander line," as he uses the same interchangeably—an error doubtless growing out of the fact that the two lines coincided at the point where the bridge under consideration in that case was located. The decision, in effect, held that the boundary of the

school district is the line of high water, or the high-water bank, and with that conclusion we are satisfied. It is, therefore, unnecessary to further discuss the question more in detail than to say that the bridge structure in controversy here is wholly without the corporate limits of the village, and is not taxable by it. The court below was right in enjoining the defendants from collecting any taxes so levied upon said bridge structure.

The next question for discussion is, was it error to declare valid the whole of the tax levied for the year 1896 upon both bridge and approach, according to finding of fact No. 7, wherein it appears that for the year 1896 no schedule of property was returned by plaintiff to the assessor; but that the latter assessed both bridge and approach as one structure, and that no appeal was ever taken from the assessment or the taxes levied thereon? The lower court, doubtless, reached the conclusion that plaintiff was estopped from questioning the validity of this tax; that a portion of this bridge was (for we assume that the approach is a part of the bridge) within the corporate limits of the village, the county commissioners had jurisdiction of the matter; and, having acquired jurisdiction, its action in levying the tax upon the whole structure was adjudicated, since no appeal was taken from the assessment. This conclusion is proper, if the fact that a portion of the property sought to be assessed being without the jurisdiction of the corporation did not render the act of the authorities wholly void. If its act was for that reason invalid, then no duty devolved upon plaintiff to appeal from the assessment. If the whole of this property was without the limits of the village, there is no doubt that such attempted assessment would be void. *Chicago, B. & Q. R. Co. v. Cass County, supra.* Does the fact, that the *situs* of a portion of the property sought to be assessed was within the village limits, take the case outside of the rule therein announced? As is well said in counsel's brief, the point here presented is one going to the very power, authority and jurisdiction of

the taxing authorities, and is not a question of mere irregularity occuring while exercising a valid power. We are inclined to adopt the rule that, because the citizen has the right to assume that municipalities, through their officials, will properly perform their duties (one of which is to know the boundaries of the corporate territory), there is no obligation imposed upon a property owner to appear before the taxing body and complain should it attempt to assess as a whole property, part of which is within and part without the territorial limits of the municipality, and that such tax, being void in part, because of want of jurisdiction, which jurisdiction it was the duty of the officials to know, the whole of such assessment is void, unless the amount of tax assessed against that portion within its jurisdiction can be readily separated from the portion without. *Arthur v. School District*, 30 Atl. Rep. [Pa.], 299; *Mills v. Johnson*, 17 Wis., 622; *Crane v. City of Janesville*, 20 Wis., 321; *Hebard v. Ashland County*, 55 Wis., 145; *Hutchinson v. Omaha*, 52 Nebr., 345. As this court will not resolve itself into a taxing board, and as the record presents no data from which to determine what portion of this tax is valid and what part invalid, we must hold the whole void, and it necessarily follows that the court erred in refusing a perpetual injunction as to the taxes assessed for the year 1896.

Did the court correctly hold that the tax levied on the bridge proper for 1897, 1898 and 1899 was void, and that the assessment upon the approach was valid? This portion of the decree was based upon finding of fact No. 9, wherein it was found that plaintiff returned the bridge for the years separately from the approach, though the officers assessed the same as if all of said bridge and approach were within the corporate limits of said village, but declared that the taxes upon the approach were valid, to the extent of the value placed upon it by plaintiff, to-wit, $3,000. Plaintiff, by making its return, was not estopped to question the validity of the tax (*Chicago, B.*

& Q. R. Co. v. Cass County, supra); and, by the same authority, it was doubtless right in holding the attempt to assess the bridge void. Was that portion of the decree sound declaring the tax upon the approach valid? If the attempt to assess the bridge and approach as a whole in 1896 was void, for the reason that a portion of said structure, taking it as a whole, was without the corporate limits of the village, as we have already determined, then for the same reason any attempt to tax the whole of the approach was also void, for by finding of fact No. 4 at least ninety feet of said approach is east of the high-water bank of the Missouri river, and, therefore, outside of the limits of said village, and as we have no means of separating that portion of the tax upon this approach which is void from that portion levied upon the part of the approach which is within the limits of the village, the whole of the tax is invalid, and the court erred in declaring any of the taxes assessed for said years 1897, 1898 and 1899 on either said bridge or said approach to be valid.

No tender of any amount of these taxes so attempted to be levied was made by plaintiff before suit, though during the trial an amended pleading was, by leave of the court filed, wherein plaintiff offered to pay such taxes as the court might decree to be valid; and it is argued that for the reason that no tender was made before suit commenced it can not be maintained. This tax is wholly void, not merely irregular, and, therefore, no tender was necessary. *Morris v. Merrell*, 44 Nebr., 423; Cooley, Taxation [2d ed.], 764, note 1; *Yocum v. First Nat. Bank of Brazil*, 38 N. E. Rep. [Ind.], 599; *Wells County v. Gruver*, 17 N. E. Rep. [Ind.], 290; *De Fremery v. Austin*, 53 Cal., 380.

Considerable discussion has taken place in the briefs as to whether the approach to this bridge was a part of the bridge, that is, whether the two constitute one structure, or two. So far as pertains to this litigation, we think the question immaterial. The corporate authori-

ties of the village can tax no more of the property of plaintiff than is situate within the corporate limits. It has a right to tax all that portion within its limits, but not an inch more. Doubtless, no more difficulty will be encountered in arriving at the value of that portion within the territorial limits of the village than would occur were the structure a railroad, which, being a whole, might have one mile of its road-bed within the village and several thousand miles outside it.

The decree is accordingly

REVERSED IN PART AND AFFIRMED IN PART.

BULLARD & HOAGLAND V. C. L. CHAFFEE.

FILED DECEMBER 18, 1900. No. 11,522.

Garnishment: RESIDENCE OF CREDITOR. It is the settled doctrine of this court that one can be garnished only in the state where the debt is payable, if that be the place of residence of his creditor.

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

Ed. P. Smith, for plaintiffs in error.

Martin Langdon, contra.

NORVAL, C. J.

This is an error proceeding brought to review a judgment of the district court of Douglas county. The cause was submitted on an agreed printed abstract of the record in pursuance of section 1, rule 2. The brief of counsel for plaintiff contains a very clear and concise statement of the case, which we adopt: "Bullard & Hoagland is a partnership carrying on a retail lumber business in Omaha. William Cameron & Co. are wholesale dealers in lumber located at Waco, Texas, and carrying

on business from that point. C. L. Chaffee is also a dealer in lumber, residing and doing business in Omaha. Bullard & Hoagland brought suit in justice court of Douglas county against Cameron & Co., to recover damages for the failure of Cameron & Co., to deliver certain lumber sold to Bullard & Hoagland. An affidavit for an attachment was filed on the ground that Cameron & Co. were non-residents of the state of Nebraska, and C. L. Chaffee was garnisheed as having money in his hands or as being indebted to Cameron & Co. Service was had on Cameron & Co. by publication. Chaffee appeared in answer to the garnishment summons and his examination disclosed that he was indebted to Cameron & Co. in an amount exceeding the claim of Bullard & Hoagland, but he also testified that the money which he owed Cameron & Co. was payable in Waco, Texas. On this showing the justice dismissed the action for want of jurisdiction and released the garnishee, holding the money was not subject to garnishment. The case was then carried to the district court, and in that court Chaffee filed objections to the jurisdiction of the court over the fund on the ground that the same was payable in Texas. The district court sustained the objections and released the garnishee. From this order releasing the garnishee, these proceedings in error are prosecuted."

One question is presented for consideration, viz.: Can a debtor be garnished in this state, if the debt he owes is payable in another state, his creditor also being a resident in that other state? The brief of plaintiff very ably presents the arguments which go to sustain the affirmative of this proposition, and decisions of courts which adhere to that rule are carefully collated and presented. On the proposition there is a conflict in the decisions. Were the questions open to discussion in this state, it would be a pleasure for us to amplify upon the subject, but, unfortunately for plaintiff, this court has adopted the opposite rule, and, as it can be upheld by both reason and authority, it is not the inclination of the

court to change it. Both views have their advantages and defects, as will appear in the elucidation of the matter. The leading case in this state is *American Central Ins. Co. v. Hettler*, 37 Nebr., 849, the opinion being by MAXWELL, C. J. The action was begun in Saline county by the holder of an insurance policy, to recover for loss under its terms. The defendant set up in its answer that its principal place of business was in St. Louis, Missouri; that it had a regularly appointed agent in Chicago, Illinois, also one in Crete, Nebraska; that by the terms of the policy any loss under it was payable at Crete; that after the loss the company was garnished in Chicago, in a suit commenced there against Hettler, plaintiff in that action, service being had on him by publication; that it had answered in said garnishment proceedings, admitting that it owed Hettler, but that judgment had not yet been rendered in the case. Under this state of facts we held that the Illinois court had no jurisdiction to entertain garnishment proceedings against the company; that the debt being payable in Crete, Nebraska, that being the place of residence of the principal debtor, there was no money or property of his in the hands of the insurance company in the state of Illinois subject to garnishment proceedings; and in so holding we but followed other decisions of this court. *Mathews v. Smith*, 13 Nebr., 178; *Wright v. Chicago, B. & Q. R. Co.*, 19 Nebr., 175; *Turner v. Sioux City & P. R. Co.*, 19 Nebr., 241. Decisions of other states upholding the same rule are easily obtainable. *Hamilton v. Plumer*, 34 N. W. Rep. [Mich.], 278; *Louisville & N. R. Co. v. Dooley*, 78 Ala., 525; *Taylor v. Life Ass'n*, 13 Fed. Rep., 493. No doubt, objection can be made to this rule. It is possible that under it no garnishment of a debt can be had where the debtor and creditor live in different states, the debt being payable in the state wherein the creditor is resident. Of course, it does not follow from that fact that the creditor of such a creditor is remediless. However, the opposite rule has also its drawbacks; quite as objectionable, obviously, as the rule

already adopted by this court. Some of the difficulties encountered in these jurisdictions are well represented in one of the cases cited by counsel for plaintiff, as the court found itself involved in a case where questionable application of legal maxims must be resorted to to save a garnishee from paying his debt twice, the case being *Lancashire Ins. Co. v. Corbetts*, 165 Ill., 592, 36 L. R. A., 640. The court, while it announced the law to be that a debt could be garnished in any jurisdiction where the garnishee might be sued by his creditor, recognized the difficulty mentioned, and, because the court of another state already rendered garnishment judgment against the garnishee in a suit instituted by another creditor of its creditor, refused to sustain a judgment rendered in favor of the plaintiff in the action decided by it. This, although the justice who wrote the opinion conceded that the rule, that where courts have concurrent jurisdiction the one first acquiring jurisdiction will retain it until the matter is finally disposed of, does not apply to courts in different states. The court obviously rested its decision on the doctrine that the garnishee is not to be placed in any worse position by the garnishment than he occupied as the debtor of the principal defendant. The court further disclaimed that to refuse to render judgment against the garnishee was to discriminate against its own citizens, but asserted that, as the citizens of that state had the same facilities for obtaining judgment and satisfaction as the citizens of other states, the maxim, *Qui prior est tempore, potior est jure,* was applicable. The decision seems also to have been rested somewhat upon the doctrine of comity between states, whereby the judgments of the courts of one state are recognized by those of other states. Unfortunately, sometimes, for litigants, courts refuse to set aside the doctrine that the courts will protect the rights and interests of citizens, even at the expense of the rights and interests of the citizens of other states, or to hold that such doctrine must give place to the maxim that he who is first in time

is strongest in right. Hence, from this conflict of law has flowed the evil occasionally that a debtor has, by garnishee process, been compelled to pay his debt twice, notwithstanding the rule that the garnishee is not to be placed in any worse position by garnishment process than he would occupy as debtor of the principal defendant. While we are not entirely satisfied with the doctrine to which this court is committed, we are constrained to adhere to that rule, that a debtor can be garnished only in the state where the debt is payable, if that be the place of residence of his creditor, as long as it appears that no greater evils can flow from it than from the one holding that the garnishment process may issue in any jurisdiction where the garnishee may reside, regardless of the place where his debt may be payable, or his creditor may reside. It is true that our holding prevents garnishment process from issuing where a debtor resides in this state, his debt being payable in another state, the latter being the place of residence of his creditor; but that is a defect in the law readily remedied by legislative enactment.

The order of the district court is

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GERMAN SAVINGS BANK, APPELLANT.

FILED DECEMBER 18, 1900. No. 11,627.

1. **Judicial Sale:** CONFIRMATION: BRIEFS: ASSIGNMENT: WAIVER. Objections to the confirmation of a judicial sale, not argued in the briefs, are waived.

2. **Motive of Party to Suit:** LEGAL RIGHTS: INQUIRY. The motive which induces a party to defend a suit brought against him will not be inquired into, but rather his legal rights in the premises.

3. **Error:** REVERSAL. To obtain a reversal of an order of the trial court, prejudicial error must be shown.

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

Joel W. West, for appellant.

Ralph W. Breckenridge, contra.

NORVAL, C. J.

This is an appeal by the German Savings Bank from an order of the district court for Douglas county confirming a sale of real estate of the bank sold by its receiver, pursuant to the direction of the court. Upon the report being filed, citation was issued to show cause by a certain date why such sale should not be confirmed, which was directed to be served upon said bank, and it was accordingly served upon Mr. West, as attorney for said bank. Upon the day fixed for hearing, said bank appeared by its said counsel and filed objections to such confirmation, supporting the same by affidavits and other evidence. A counter-showing was made by the receiver, conflicting with the evidence offered by the bank, through its attorney. On these proofs the court, on the 24th day of February, 1900, announced and entered of record its ruling that no sufficient cause had been shown why said report should not be approved and the sale confirmed; whereupon the bank, through its attorney, took an exception, and asked for an order of the court fixing the amount of a supersedeas bond, and the court continued the further hearing of the matter until March 8, 1900. After this continuance the receiver and certain creditors of the bank presented motions to strike from the files and records of the cause the objections to the confirmation of said sale, as well as the affidavits in support thereof, filed by its purported attorney, and they, as well as the receiver, objected to the court fixing a supersedeas. On the question of Mr. West's authority to appear for the bank a considerable amount of testimony was taken, from which it was found that said West was not authorized to appear

for the bank, but was in fact acting for certain stockholders in the bank, whose purpose in contesting the sale was to delay the final settlement of the bank's affairs and thus prevent action against the stockholders on their statutory liability. The court sustained said motions to strike, and refused a supersedeas to said bank, and thereupon the court, without vacating its findings as to the regularity of the sale, entered the order of confirmation, from which this appeal is prosecuted. Afterwards, said bank began mandamus proceedings in this court, to compel the lower court to fix the amount of the supersedeas bond, and, on the hearing, said writ was issued as prayed (*State v. Fawcett*, 60 Nebr., 393), and the present case now comes to this court on appeal from the order confirming said sale. In the brief filed by counsel for the bank, the objections made as to the regularity of the sale are not argued; hence all such objections are waived. *Gill v. Lydick*, 40 Nebr., 508; *Glaze v. Parcel*, 40 Nebr., 732; *Madsen v. State*, 44 Nebr., 631.

The only complaint urged by counsel in his brief is the order of the court sustaining the motion to strike from the files his objections to the sale, and the evidence filed in support thereof. It is insisted that the ruling assailed was, in effect, a denial of its right to appear and defend. The court below doubtless erred in sustaining this motion, for the evidence offered in its support went as much to the motives of the bank in continuing this litigation, which has been tedious and exacting almost beyond the limits of patience, as to its right to do so; and of course its motive, or that of those who perhaps have encouraged it in this course, is not to be inquired into, provided it has the right, to resist every step in the cause, and doubtless that right is accorded it under the law. Moreover, the citation was served upon Mr. West, as attorney for the bank, which was a recognition of his authority to appear and represent it in resisting the sale. *State v. Fawcett, supra.*

That part of the order of the court whereby the motion

to strike said objections and the evidence offered to support them was sustained is, therefore, reversed, but as, before this motion to strike was heard and sustained, the appellant had a hearing, from which the court found that said objections had not been sustained, and all the evidence produced by the parties on that question is before us, we do not deem it necessary to remand the case for a new hearing in regard to such objections, as from an examination of the record and evidence we are satisfied that the lower court was right in overruling said objections, and in entering its order confirming said sale, and its order in that respect is

AFFIRMED.

JERRY K. ROSS, APPELLEE, V. DANIEL MCMANIGAL, APPELLANT.

FILED DECEMBER 18, 1900. No. 9,331.

1. **Title to Land:** RIGHT TO MAINTAIN ACTION. A party, whether in actual possession or not, may maintain a suit to establish his title to land against any adverse claimant.
2. **Finding:** TESTIMONY. A finding based upon substantially conflicting testimony will not be disturbed.
3. **Tenant Can Not Dispute Landlord's Title.** Before a tenant can initiate an adverse holding and set the statute of limitations running in his favor, he must either yield up possession, or else distinctly repudiate the relation created by the lease and bring home to the lessor knowledge of the fact that the tenancy has been terminated.

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

Andrew R. Oleson and *Clark C. McNish,* for appellant.

F. S. Howell, contra.

SULLIVAN, J.

Jerry K. Ross, claiming to be the owner of the real estate described in the petition, instituted this action in

the district court for Washington county, to quiet and confirm his title against an adverse claim of ownership set up by the defendant, Daniel McManigal. All the disputed questions were resolved in favor of the plaintiff, and he was awarded the relief for which he prayed. The first argument made for a reversal of the judgment is that the defendant being in possession of the property and the plaintiff out of possession, the court was without authority to adjudicate upon their rights in this form of action. This contention can not be sustained. It is now firmly settled in this state, contrary to some early decisions, but in accordance with the plain purport of the statutes (Compiled Statutes, 1899, ch. 73, sec. 57), that a party, whether in actual possession or not, may maintain a suit to establish his title to land against any adverse claimant. *Foree v. Stubbs*, 41 Nebr., 271; *Hall v. Hooper*, 47 Nebr., 111; *Eayrs v. Nason*, 54 Nebr., 143.

The only other question relied upon for a reversal is that the evidence does not warrant the conclusion of the trial court, that the litigants sustained to each other the relation of landlord and tenant from 1874 to 1896, the period in which McManigal claims his adverse occupancy of the premises ripened into a perfect title. While the greater number of witnesses testified for the defendant upon this point, we are disposed to think that the conflict in the testimony is of so substantial a character that we would not be justified in disturbing the findings made by the able and careful trial judge, who had far better means of determining the weight and value of the evidence than we possess. If McManigal entered upon the land of Ross's tenant and did not afterwards surrender possession, he could not acquire an adverse title under the statute of limitations, unless Ross knew that he was holding adversely. It is an ancient principle of the common law, founded upon considerations of expediency and justice, that a tenant must deal in good faith with his landlord. He is bound to surrender possession of the demised premises at the expiration of the

lease, and if he fail to do so, it will be presumed that he continues to hold in the character of a tenant. This presumption, it is true, is not an irrebuttable one, but it can not be overcome by evidence of a secret purpose on the part of the tenant to hold adversely. *Thrall v. Omaha Hotel Co.*, 5 Nebr., 295; *Lausman v. Drahos*, 10 Nebr., 172; *Schields v. Horbach*, 49 Nebr., 262. Before he can initiate an adverse holding and set the statute of limitations running in his favor, he must either yield up possession or else distinctly repudiate the relation created by the lease and bring home to the lessor knowledge of the fact that the tenancy has been terminated. *Smith v. Hitchcock*, 38 Nebr., 104; *Johnson v. Butt*, 46 Nebr., 220; *Pulford v. Whicher*, 76 Wis., 555; *Rigg v. Cook*, 9 Ill., 336; Am. & Eng. Ency. Law [2d ed.], 811. The failure to pay rent, even in the absence of a demand, does not make the possession adverse; it does not raise a presumption that the lessee has renounced the title under which his tenure commenced. The findings, which were against the defendant on every contested point, justify the conclusion that the possession of McManigal from 1874 to 1896 was the possesion of Ross, and that consequently the action was not barred by limitation.

The judgment is

AFFIRMED.

GOTTLIEB BANTLEY V. ELIAS BAKER ET AL.

FILED DECEMBER 18, 1900. No. 9,335.

1. **Clerk of Court: FIDUCIARY CAPACITY: ORDER OF COURT: RECEIVING MONEY.** Money paid to the clerk of the court pursuant to an order or judgment of the court is received by such clerk in his official capacity.

2. ———: ———: ———: **NOTES IN CUSTODIA CLERICI.** Where, in an action for specific performance, the decree provides that notes evidencing part of the purchase price shall be deposited with the clerk of the court pending the execution of a deed by the vendor, such clerk is neither charged with the duty, nor given the right, to collect or receive in his official capacity the money due upon the notes.

3. **Decree:** NON-PERFORMANCE OF CONDITION: CONTRACT OF SALE: SPECIFIC EXECUTION: DEFENSE. The non-performance of some condition in a decree for the specific execution of a contract of sale is no defense to an action against the clerk of the court for conversion of money paid to him in accordance with the requirements of the decree, if it be made to appear that the party for whose benefit the condition was inserted has waived it.

4. **Action on Official Bond:** LIMITATION. An action on an official bond is not barred until the expiration of ten years from the time the cause of action accrued.

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

C. H. Bane and *A. A. Altschuler*, for plaintiff in error.

Morning & Berge, contra.

SULLIVAN, J.

This was an action by Gottlieb Bantley upon the official bond of Elias Baker, who was at one time clerk of the district court of Lancaster county. The defendants demurred to the petition on the ground that it was deficient in substance. The court sustained the demurrer and, the plaintiff having declined to amend his pleading, judgment on the merits was given against him. It appears from the record that in 1882 Richard C. McWilliams obtained a decree in said court against Bantley enforcing specifically a contract of sale. That decree, so far as it is material in this case, is as follows: "And this cause then coming on to be heard upon the petition and proofs the court finds that the plaintiff is entitled to the specific execution of the contract set forth in said petition, and thereupon the plaintiff produces in court the sum of $900 and the three several promissory notes of plaintiff in the sum of $500 each, each payable on or before one, two and three years from their date, respectively, and dated the fifteenth (15th) day of June, A. D. 1882, with interest at seven (7) per centum per annum,

secured by purchase money mortgage on said premises, and said sum of money and said notes and mortgage are by the court directed to be paid to and filed with the clerk of this court, and the same is by the plaintiff so done and thereupon it is by the court considered that said defendant convey the premises described in said petition, to-wit: The southeast quarter of section twenty-four (24)) in township numbered ten (10) north of range seven (7) east of the sixth principal meridian, by good and sufficient warranty, and with release of dower free from incumbrances, and with good title, and that in default thereof that this decree shall have the same operation and effect as such deed. That upon defendant making and delivering such deed the clerk pay to the defendant said sum of money and deliver him such notes and mortgage; but that said money, notes and mortgage remain in control of the clerk until such deed be made and delivered, and that plaintiff recover of and from the defendant his costs herein expended, taxed at $....." The money, notes, and mortgage mentioned in the decree were immediately turned over by McWilliams to A. D. Burr, who was clerk of the district court for Lancaster county during the years 1882 and 1883. The amount due upon the note first maturing was afterwards paid to Burr during his official term, and the amounts due upon the other notes, were paid to his successor, Edward R. Sizer. Baker succeeded Sizer and on January 9, 1892, received from him all the money paid by McWilliams to either Burr or Sizer for the use of Bantley. This money having been converted by Baker to his own use, the plaintiff seeks in this action to recover of his bondsmen. The main defense relied upon by the sureties is that the money in question was not received by their principal by virtue of his office as clerk of the district court. That money paid to the clerk of the court pursuant to an order or judgment of the court is received by the clerk in his official capacity, is no longer a disputable proposition in this state. *Wheeler v. Barker*, 51

Nebr., 846; *Dirks v. Juel*, 59 Nebr., 353. The $900 mentioned in the decree came into the possession of Burr by virtue of his office, and it was his duty to hand it over to his successor. When it came into Baker's custody, his duty with respect to it was an official duty, for a breach of which his sureties are liable. But in regard to the money paid by McWilliams upon the notes, we reach a different conclusion. The clerk was required by the decree to file the notes and mortgage and keep them in his office until Bantley should execute a proper deed. He was then to deliver them to Bantley. Under no circumstances was the clerk required to collect the notes or receive payment of the same. In receiving payment of them he was, therefore, not engaged in the performance of a duty imposed by law or contemplated by the decree. The money paid upon the notes was not held by Sizer in his official capacity, and hence Baker had no right, and was under no obligation, to receive it as clerk of the court. Not being charged by law with the custody of these funds, his sureties are not liable for his default.

The claim that this action was barred by limitation is without merit. This court is, by *Merriam v. Miller*, 22 Nebr., 218, and *Alexander v. Overton*, 22 Nebr., 227, committed to the doctrine that an action on an official bond may be commenced within ten years from the time the right to sue accrued. The present cause of action did not accrue until Baker converted the $900 to his own use. Prior to that event there was no breach of the bond. There was never a right of action in favor of the plaintiff on the official bond of either Burr or Sizer for the $900, because they were guilty of no official misconduct in connection with it. *Barker v. Wheeler*, 60 Nebr., 470.

It is said that the plaintiff has not complied with the conditions of the decree and is, therefore, not yet entitled to recover the $900 paid to the clerk for his use by McWilliams. Upon this point it is sufficient to say that the condition of the decree was for the benefit of

McWilliams, and that, according to the averments of the petition, he has waived it.

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

REVERSED AND REMANDED.

HOLCOMB, J., took no part in the opinion.

MARY H. PARROTTE V. CITY OF OMAHA ET AL.

FILED DECEMBER 18, 1900. No. 9,341.

1. **Metropolitan City:** MAYOR AND COUNCIL: OPENING STREET: SPECIAL TAX. The mayor and council of cities of the metropolitan class have authority to raise, by special taxation of property benefited, a fund to defray the cost and expense of opening a street within the corporate limits.
2. **Special Tax:** INJUNCTION: ONUS PROBANDI. A party seeking to enjoin the collection of a special tax has the burden of showing that the taxing power was not lawfully exercised, or that there are fatal infirmities in the proceedings leading up to the tax levy.

ERROR from the district court for Douglas county. Tried below before POWELL, J. *Affirmed.*

Hamer & Hamer, for plaintiff in error.

W. J. Connell, contra.

SULLIVAN, J.

This action was instituted by Mary H. Parrotte and others to enjoin the collection of a special tax levied by the mayor and council of the city of Omaha to defray the cost of opening Twenty-ninth avenue from Farnam street to Half-Howard street in said city. The petition alleges: "The plaintiff Mary H. Parrotte is the owner of the following described property in said county and state, to-wit: The west 44 feet of lot four (4), block eleven (11),

McCormick's addition; which said property faces on 29th avenue and extends along said street 173 feet." It is also alleged that the assessment complained of is void for various reasons. The answer admits the corporate character of the defendant city; admits the location and ownership of the property as stated in the petition; admits the opening of Twenty-ninth avenue by the city authorities and the levy of a special tax upon said property to defray the cost and expense of the improvement. The other material averments of the petition are denied. The court found the issues in favor of the defendants and refused to enjoin the enforcement of the tax. The record upon which the case is submitted in this court does not include the evidence given at the trial; it comprises only the petition, answer and decision of the court.

The brief of counsel for Parrotte is an admirable restatement and condensation of the petition in error, but does not profess to discuss or reason upon a single one of the alleged errors to which it reproachfully points. Stimulated, however, by the mere suggestion of error, we have examined with some care each of the fourteen points relied on for a reversal of the judgment; but our diligence and industry have not been rewarded by the discovery of any judicial aberration from which the plaintiffs, or any of them, have suffered. The constitution (art. 9, sec. 6) provides: "The legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment, or by special taxation of property benefited." The Omaha charter enacted in pursuance of this provision of the fundamental law conferred upon the mayor and council the authority which they assumed to exercise in opening Twenty-ninth avenue and in raising a fund with which to defray the cost and expense of the improvement. It may be, as counsel claims, that there are fatal infirmities in the proceedings leading up to the tax levy, but if so, the record does not disclose them. The mayor and council had power to levy and collect the tax in question; and in cases

of this kind the burden is on the plaintiff to show that such power was not lawfully exercised.

The judgment is

AFFIRMED.

LUCIAN C. JOHNSTON V. FLORENCE M. CRAIG ET AL.

FILED DECEMBER 18, 1900. NO. 9,346.

1. **Recitation of Facts**: CONFIRMATION: EXPIRATION OF STAY: PENDING APPEAL. A decree of foreclosure directed a sale of the mortgaged property, and also found the defendant personally liable for a possible deficiency. The defendant asked and obtained a stay of the order of sale and prosecuted an appeal to this court, giving a supersedeas bond conditioned as required in cases where the judgment directs the payment of money. *Held*, That it was not error to confirm a sale of the property made under the decree of foreclosure after the expiration of the stay, but during the pendency of the appeal.

2. **Judicial Sale**: APPRAISEMENT: MOTION TO VACATE: ABSENCE OF BILL OF EXCEPTIONS. An order denying a motion to vacate an appraisement of property for judicial sale on the ground that the appraiser's valuation was too low will, in the absence of a bill of exceptions embodying the evidence given at the hearing, be presumed to be correct.

ERROR from the district court for Kearney county. Tried below before BEALL, J. *Affirmed.*

Stewart, Hague & Anderbery, for plaintiff in error.

M. D. King and *Ed L. Adams*, *contra.*

SULLIVAN, J.

This proceeding in error brings up for review an order of the district court for Kearney county confirming a sale of real estate made in execution of a decree of foreclosure. The decree not only directed a sale of the mortgaged property, but fixed the liability of Johnston for any deficiency that might remain after the proper application of the proceeds of the sale. This decree was rendered on May 17, 1895, and within twenty days thereafter John-

ston filed with the clerk of the court a written request for a stay of the order of sale. About the same time he executed to the plaintiff a bond for an appeal containing the following recital and condition:

"Whereas on the 17th day of May, 1895, a decree was rendered in the district court of Kearney [county] in favor of Florence M. Craig and against Lucian C. Johnston finding said Lucian C. Johnston liable for deficiency judgment in foreclosure of mortgage in an action pending therein wherein Florence M. Craig was plaintiff and J. M. Bell et al. are defendants, and the said Lucian C. Johnston intends to appeal said cause to the supreme court, and whereas said district court has prescribed the sum of $50.00 as the amount of the bond to obtain a review of said judgment in the supreme court:

"Now therefore the condition of this obligation is such that if said Lucian C. Johnston shall prosecute such appeal without delay and pay all condemnation money and costs which may be found against him on the final determination of the cause in the supreme court, then this obligation shall be null and void, otherwise to remain in full force and effect."

After the expiration of nine months from the date of the decree an order of sale was issued, the property was sold and the sale confirmed.

The first contention of counsel for Johnston is that the order of confirmation should be reversed because the sale was made while the case was pending in this court. It is true, of course, that the pendency of an appeal, when a supersedeas bond has been given, suspends the execution of the decree; but we think Johnston is not in a position to insist that he has appealed from the decision of the court directing a sale of his property. The character of the appeal bond and the request for a stay of the order of sale indicate clearly that he did not complain of the foreclosure of the mortgage, nor desire a reversal of that part of the decree. His evident intention was to appeal only from the provision binding him

personally for the payment of a possible deficiency. The bond was conditioned as required in cases where the court has directed the payment of money, and it was not conditioned as required in cases where it is sought to arrest the execution of a judgment directing the sale of land. Johnston having deliberately waived his right to appeal from the decree of foreclosure, and having exercised and enjoyed the alternative right of obtaining a stay by filing with the clerk a written request therefor, he can not now justly insist that the proceeding by which the cause was removed to this court shall be given greater effect than it was originally intended to have. The court did not err in confirming the sale; it did not invade Johnston's right to a stay during the pendency of the appeal, for that right was voluntarily abandoned and irrevocably lost before the appeal was perfected.

Alleged undervaluation of the mortgaged property by the appraisers is another ground upon which a reversal of the order of confirmation is claimed. There was no bill of exceptions settled by the trial judge, and consequently the evidence upon this point did not become a part of the record. The presumption is that the conclusion of the district court was warranted by the proof.

The order is

AFFIRMED.

NORVAL, C. J., not sitting.

HENRY GERNER V. CHARLES E. YATES ET AL.

FILED DECEMBER 18, 1900. No. 11,249.

1. **Verdict:** BETWEEN DEFENDANTS: CONFLICTING EVIDENCE: SAME AS TO BOTH. A verdict in favor of one defendant and against another, based upon conflicting evidence, which is the same as to both defendants, can not be permitted to stand as to either.

2. **Banks:** FINANCIAL CONDITION: PUBLISHED REPORT: MISSTATEMENT: ACTION FOR DECEIT. A published report of the financial condition of a bank in which the resources and liabilities are equally inflated is not such a material misrepresentation as will support an action for deceit, unless by such report the condition of the bank is made to appear to be better than it actually is.

3. **National Bank:** STATEMENT: OVERDRAFTS: FALSE DESCRIPTION. A published statement of the financial condition of a national bank in which a portion of its overdrafts is described as "loans and discounts" is materially false.

4. ———: REPORT TO COMPTROLLER: ACTION FOR DECEIT: BASIS. A report of a national bank to the comptroller of the currency which complies with the law and regulations of the comptroller can not be made the basis of an action for deceit because the item of interest on rediscounts was deducted from undivided profits instead of being made to appear specifically in such report.

5. ———: ———: FINANCIAL CONDITION: LIABILITY OF DIRECTOR. In an action for deceit against the officers of a national bank who published a false report as to its financial condition, upon which plaintiff relied, one of the directors can not escape liability on the ground that there was no special reliance upon him, if it appear that the plaintiff relied on the report and the entire directorate.

6. **Discharge in Bankruptcy:** DEFENSE TO ACTION FOR FRAUD: FIDUCIARY CAPACITY. A discharge in bankruptcy is no defense to an action based upon the defendant's fraud or other misconduct while acting as an officer or in any fiduciary capacity.

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

Halleck F. Rose and *Billingsley & Greene*, for plaintiff in error.

Chas. O. Whedon and *J. W. Deweese, contra.*

SULLIVAN, J.

This was an action brought by Henry Gerner against Charles E. Yates, Charles W. Mosher and Richard C. Outcalt in the district court of Lancaster county. On the first trial the defendants were successful, but the judgment in their favor was reversed by this court and the cause remanded for further proceedings. *Gerner v. Mosher*, 58 Nebr., 135. A second trial of the issues resulted in a verdict and judgment in favor of Yates and against Mosher and Outcalt. Gerner brings the record here for review complaining of the decision in favor of Yates; and Mosher and Outcalt have filed a petition in error asking for a reversal of the judgment against them.

The verdict is an anomaly; it is in irreconcilable conflict with itself. It is in effect a declaration by the jury that the material allegations of the petition are both true and false. It is such an evident absurdity that it can not, if based upon conflicting evidence, support the judgment in favor of either the plaintiff or Yates. The contention of defendants is that one of the material averments of the petition is not sustained by any proof and that, therefore, the judgment should be affirmed as to Yates and reversed as to Mosher and Outcalt.

Comprehension of the questions raised will be aided by reproducing here a portion of the opinion of Commissioner IRVINE reversing the first judgment. "The petition alleges that Mosher was the president of the Capital National Bank, Walsh its vice-president, and Outcalt its cashier, and that the other defendants named, together with Mosher, constituted its board of directors. The petition is in two counts, the first alleging that on May 18, 1887, a report was made by the defendants, to the comptroller of the currency, of the resources and liabilities of said bank as they existed May 13, 1887; that said report was sworn to by Outcalt as cashier and attested as correct by Mosher, Holmes, and Yates as directors; that the defendants caused said report to be published in the *State Journal*, a newspaper published in Lincoln, 'for the purpose of inducing others, and particularly this plaintiff, to deal with said corporation and to repose in it and them, its directors and managing officers, and to induce others, and particularly this plaintiff, to purchase its capital stock and make investments therein, and represented and held out said statement to be a true statement of the financial condition of said corporation.' The report is then set out in terms, and it is alleged that said report was false, in that it overstated the mortgages, stocks and bonds held by the bank to the amount of $30,000, the amount due the bank from reserve agents, about $76,000, and its loans and discounts $50,000; that said report and false representations were made

by said four defendants with the knowledge, assent, and co-operation of all the other defendants, and the same were, as they and each of them well knew, wholly false and untrue; that plaintiff believed said representations to be true, and on the faith thereof purchased from Charles Hammond on July 11, 1887, fifty shares of the capital stock of said corporation for the sum of $6,250; that it would have been worth said sum had the said report been correct; but in fact the bank was insolvent and the stock worthless; that January 22, 1893, the bank failed; that the stockholders have been assessed one hundred cents on the dollar on their stock, and judgment rendered against the plaintiff for said assessment; that notwithstanding that the bank had no net earnings, dividends were from time to time declared, and suit has been brought against the plaintiff to recover dividends by him received. The second cause of action is, substantially, pleaded in the same manner, charging a false report of the condition of the bank September 30, 1889, and the purchase by the plaintiff, in reliance on that report, in November, 1889, of fifty shares of stock from Henry E. Lewis for the price of $7,250." The plaintiff alleged that the first report was false in three particulars and the second in two.

The defendants insist that the evidence neither shows, nor tends to show, that any material fact stated in either report was false. We shall consider in their order the several averments of the petition charging the defendants with having made false representations, and determine whether any of them is supported by competent proof. The first is as follows: "That instead of said bank having $44,018.84 of mortgages, stocks and bonds, other than United States bonds to secure circulation, it had no more than $14,018.84 of such securities as assets." The jury might have found that this allegation was established by the evidence, but they could not have done so without at the same time finding that the liabilities of the bank were less than they appeared to be by the pub-

lished report. In other words, if the statement was false, the resources and liabilities were equally inflated; and thus the actual condition of the bank—the net worth of the property—was truly disclosed. Whether there was or was not an inflation of the resources and liabilities in the published report is not material. According to the undisputed testimony of the witness Boggs, the actual and apparent value of the stock and assets of the bank was the same in either case. The representation was not actionable, because it was not false in any material respect.

It is charged that the report was also false because, "instead of having the sum of $119,280.88 due it from approved reserve agents, it had no more than $43,344.52 due from said source." The evidence, however, conclusively shows that the latter sum was due the bank from two reserve agents, the Chemical National Bank of New York and the Commercial National Bank of Chicago, and that there was due from other reserve banks $86,926.82, or altogether, $130,271.34.

It is further alleged in the first count of the petition that the Capital National Bank, "instead of having $771,-972.87 of loans and discounts, had no more than $721,-972.87 of such assets." It is indisputably established by the admission of Gerner and other evidence that the bank's overdrafts, at the time the first report was made out, amounted to $58,071.35 and that $50,000 of this sum appeared in the report under the head "loans and discounts." Counsel for plaintiff contends that it should not have appeared under that head, and that the report was, therefore, false. That overdrafts are loans is, of course, too obvious to admit of dispute; and that they are regarded by bankers as first class loans and frequently reported to the comptroller of the currency under the caption "loans and discounts" is shown by the evidence of Charles T. Boggs and Oscar Callahan, who were the only witnesses who testified on that point. These witnesses also testified, and their testimony is not contra-

dicted, that the value of the assets and stock of the bank was not in any way affected by the fact that $50,000 of the amount reported as loans and discounts was made up of overdrafts. The argument of defendants upon this branch of the case is that the representation with respect to the amount of loans and discounts was neither false nor material. This view of the matter does not commend itself to our judgment. The report conveyed to the plaintiff and to the public generally a false impression. It in effect declared that the loans and discounts made in the usual way at the bank counter amounted to $771,972.87, and that the entire amount due from customers who had been permitted to overdraw their accounts was only $8,071.35. It may be that loans in the form of overdrafts were as safe and profitable as any others, but of this plaintiff was entitled to judge for himself. He might be of opinion that a bank whose volume of business was no greater than that of the Capital National Bank and which permitted its depositors to overdraw their accounts to the extent of $58,017.35 was recklessly managed. It is reasonable to infer that had he known the true character of the bank's loans, the contract with Hammond would not have been made. It is not always easy to determine when a representation is material; but the general rule seems to be that it is to be regarded as material if the complaining party would not have done the act by which he was injured, had he known that the representation was false. *Graves v. United States*, 165 U. S., 323, is cited in support of the contention that it was proper for the bank to report overdrafts as loans and discounts. We have examined that case with care, but are not able to see that it is in point. So far as it has any bearing at all upon the question now under consideration, its implication is plainly against the defendants. We can not escape the conclusion that the statement of the report in regard to overdrafts and loans and discounts was a false representation of material facts.

In the second count of the petition it is alleged that

"instead of said bank having due to it from approved reserve agents $76,238.34, it had not more than $36,238.34, and the amount of said bank's reserve funds was in said statement falsified more than $46,958." The books of the bank show conclusively that this allegation is not true. While there was not due from the reserve agents named in the schedule on the back of the report sent to the comptroller the amount appearing in the published report, there was more than that amount due from those agents and other approved reserve agents. Counting clearing house receipts which were entitled, under the national banking act (U. S. Revised Statutes, sec. 5192), to be considered as reserve funds, the bank had at the time in question reserve funds amounting to $93,923.95, which was $2,008.60 in excess of the reserve required by law.

It is also alleged in the second count that the published statement of September 30, 1889, "failed to show payment of interest on funds by said bank borrowed during the preceding month, which aggregated $2,895.64, said item being wholly omitted and the item of undivided profits being falsified, raised and increased in the sum of $2,895.64." The item omitted from the report appears on the bank's books as a resource, while undivided profits, discount, interest and exchange, amounting to $17,107.37, appear on the books as liabilities. Instead of entering on the report to the comptroller the item of interest paid as a resource, it was deducted from the aggregate of the items of liability just mentioned, and the balance, being $14,211.73, was entered on the report as undivided profits. The result was precisely the same as though all the items had been set out. We know of no law or regulation established by the comptroller of the currency, which required the item of interest on rediscounts to appear specifically in the report.

The contention that Yates is not liable because Gerner did not specially rely upon him in purchasing stock of Hammond and Lewis is, we think, without merit. The

evidence tended to show that the plaintiff relied on the reports and the entire bank directorate. How he could have done this without relying in some measure upon Yates, we are not able to understand.

The action is not barred by the statute of limitations. It was an action for relief on the ground of fraud and the statute did not begin to run until the fraud was discovered. Code of Civil Procedure, sec. 12. The defendants intentionally conveyed to the public the impression that they had actual knowledge of the facts stated in the reports which they attested. They had no such knowledge, and they were aware of it. By representing as true that of which they were consciously ignorant, they committed a fraud for which they are liable in a common law action of deceit. A man is guilty of willful falsehood when he asserts as of his own knowledge a matter of which he knows he is ignorant. *Hexter v. Bast*, 125 Pa. St., 52; *Nauman v. Oberle*, 90 Mo., 666; *Bullitt v. Farrar*, 42 Minn., 8.

Richard C. Outcalt pleaded a discharge in bankruptcy, but the trial court held that, under the facts of this case, such a discharge was not a defense. On the authority of *Chapman v. Forsyth*, 2 How. [U. S.], 202, the ruling is approved.

The evidence failing to conclusively establish the correctness of the judgment in favor of Yates, it is reversed as to all the defendants.

REVERSED AND REMANDED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1901.

PRESENT:

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

DEPARTMENT NO. 1.
HON. WILLIAM G. HASTINGS,
HON. GEORGE A. DAY,
HON. JOHN S. KIRKPATRICK,

DEPARTMENT NO. 2.
HON. SAMUEL H. SEDGWICK,
HON. WILLIS D. OLDHAM,
HON. ROSCOE POUND,

DEPARTMENT NO. 3.
HON. EDWARD R. DUFFIE,
HON. JOHN H. AMES,
HON. I. L. ALBERT,

} COMMISSIONERS.

LINCOLN STREET RAILWAY COMPANY ET AL. V. CITY OF LINCOLN ET AL.

FILED JANUARY 4, 1901. NO. 10,609.

1. **Street Railway:** ORDINANCE: CHARTER OF CORPORATION: SPECIAL ASSESSMENT: PAVEMENT. Where, under the provisions of the constitution and the statute requiring the consent of a majority of the electors of a city before a street railway company is authorized to construct and operate a street railway in such city, an ordinance is adopted submitting to the electors the proposition of giving their consent to the construction and operation of a proposed street railway, and in which ordinance

it is provided "said railway track shall be so constructed as to present the least practical obstruction to the ordinary public use of the streets, and that it shall, when required, conform to the established grades of the streets as now or hereafter to be established when such streets are brought to grade; and further, said railway company shall be subject to all reasonable regulations in construction and use of said railway which may be imposed by ordinance," *held*, assuming that such provisions became a part of the charter of the corporation, having the elements of a contract with respect thereto, that an exemption from special assessment was not created, and the legislature was not thereby prohibited from imposing a liability on such corporation to pave the part of the street occupied by its tracks in conformity with the improvement of the remainder of the street, or, in the event of its neglect or refusal so to do, to authorize the levy of special assessments or taxes against the property of such railway company for the costs and expenses necessary to pave such right of way to conform to the remainder of the street improvements.

2. **Grant of Franchise:** STRICT CONSTRUCTION: CLAIM OF EXEMPTION. The charter or grant of franchise rights to a corporation is to be construed strictly, and a claim of exemption can not be sustained which is not in express terms granted or clearly implied from the terms of the grant.

3. **Constitution:** SPECIAL CHARTERS: PROHIBITION: EXCEPTION: FRANCHISE: GENERAL LAW: RESERVED POWER: ALTERATION AND AMENDMENT. Under the constitution and laws of this state, special charters to corporations, with the exceptions mentioned, are prohibited. Corporations receive their franchises only by general law, and are subject to all the legal rules and statutes as to the reserve power of the lawmaking body of alteration and amendment; the laws of the state and the articles of incorporation are considered in the nature of a grant and constitute the charter of the company.

4. **Statutory Provisions:** CONSENT OF ELECTORS: CHARTER CONTRACT. The provisions for obtaining the consent of a majority of the electors of a city before a street railway company is authorized to construct and operate a street railway over the streets of such city do not authorize the city to grant a charter to, or enter into a contract in respect thereto with such street railway company.

5. **Scope of Charter.** The charter rights are derived from the state, and the provisions of the ordinance, under which the consent of a majority of the electors is secured, obligate the street railway company to construct its street railway within the time and in the manner stated, and make it subject to such regulations as might lawfully be established by ordinance; the

corporation is thereby privileged or permitted to enter upon the streets of the city for the purpose of constructing its tracks and to carry out the purposes of its organization, and it thereby derives no other or greater right than a privilege, license or permission to enter upon the streets for such purpose. Its grant of corporate franchises or privileges is not determined by such ordinance, but by general law.

6. **Power of Legislature.** The right of the legislature to require street railway companies in cities of a certain class to pave the part of the streets occupied by their tracks in conformity with the improvement of the remainder of the streets, or, in case of their failure or neglect to perform such duty, to authorize the municipal authorities to make such improvement, and, by the levy of a special assessment, charge the cost and expense thereof against such street railway company, which shall be a lien on its property, is a reasonable exercise of the reserve power vested in the legislature, and in nowise violates or impairs the obligation of a contract with respect to the charter of such street railway company.

7. **Police Power:** QUÆRE. Whether or not the power may be exercised as a police regulation or as a taxing power belonging to the legislature, not finally determined.

8. **Charter:** SPECIAL LEGISLATION. Where, by the charter provisions governing cities of the first class, it is provided that street railway companies in such cities shall be required to pave that part of the street occupied by the tracks of such companies, and in case of their failure or refusal, the city is authorized to perform such work and levy the cost and expense thereof as a special assessment against the property of such companies, such act will not be deemed special or class legislation, because not applying to all street railways in cities of different classes throughout the state.

9. **City of First Class:** ACT OF 1887: CONSTITUTION. By the provisions of the act of 1887 governing cities of the first class, requiring a street railway company to pave its right of way, and in case of its refusal and neglect so to do, authorizing the municipal authorities to perform the work and to levy and collect the cost and expense thereof as a special assessment against the property of such railway company, a tax is not imposed by the legislature upon a municipal corporation or the inhabitants or property thereof for corporate purposes, and the act is not violative of section 7, article 9, of the constitution.

10. **Act of 1887:** JUDGMENT IN PERSONAM: CONSTITUTION: INVALID PORTION OF ACT: QUÆRE. The provisions of the act of the legislature of 1887, authorizing a judgment *in personam* for the amounts levied as special assessments to pay the cost and ex-

penses of paving the right of way of a street railway in cities of the first class, do not, even if invalid, render the entire act unconstitutional. The remainder of the act is complete and enforceable, independent of the provisions authorizing a personal judgment. Whether or not the act with regard to a personal judgment is invalid is not determined.

11. **Right of Redemption:** CONSTITUTION: SELF-EXECUTING PROVISIONS. The act is not unconstitutional because no provisions are made for the redemption from sales of real estate for nonpayment of taxes or special assessments as provided for by section 3, article 9, of the constitution. Under the constitutional provisions, the right of redemption is made secure to all those whose property as therein mentioned may be sold for nonpayment of taxes or special assessments, and the right is secured in the absence of statutory provisions more definitely pointing out the mode by which the redemption may be made. The constitutional provisions are held to be self-executing.

12. **City of First Class:** CHARTER: ACT OF 1889: CITY COUNCIL LEVY. Under the city charter act of 1889, governing cities of the first class, an ordinance was passed by the city council creating paving districts and providing for the improvement of the streets therein, and the payment of the cost thereof by special assessment upon abutting property owners, the special assessment being levied by resolution, as provided for in section 74; after which the city council sat as a board of equalization to equalize the assessments, correct errors, etc., and thereupon made the final levy, but not by ordinance. *Held*, That such levy was valid, and that an independent ordinance making the final levy was not required. *Held further*, The provisions of subdivision 2 of section 68, Session Laws, 1887, relating to the levy by ordinance of special assessments and other taxes authorized by statute, do not apply to levies of special assessments or taxes for special benefits received because of local improvements.

13. **Method of Power Conferred.** Where the method for exercising the power conferred by statute upon municipal corporations is specially prescribed, that method must be followed in order to validate the action taken thereunder; but where no particular method for the exercise of the power is specified, the city authorities may act by resolution or other appropriate manner, and such action will be as effectual as it would be by ordinance for the same purpose.

14. **Petition:** SIGNATURES. In four certain paving districts the jurisdiction of the city council to act is challenged on the ground of the alleged insufficiency of the respective petitions of property owners. The council acted on such petitions, finding them sufficient, and thereupon engaged in the work of paving the streets in such district. *Held*, That as to a street railway

company, which is required to pave its right of way to conform to the remainder of the street improvement, it is immaterial whether or not the paving petitions had the required number of signatures. The authority to require the street railway company to pave its right of way does not depend upon the jurisdiction of the city council to establish paving districts and engage in the work of improving the streets therein by reason of the petition asking for such improvement; but on the statutory ground that, when streets are improved by the city authorities, it is incumbent upon street railways occupying parts of the streets to pave in conformity therewith the portion they occupy, and, upon failure or refusal so to do, the council is authorized to perform the work, and, by special assessment, make the cost thereof a charge upon the property of such street railway company.

15. **Paving:** GRADING. Where a city engages in the work of paving its streets, and, as a part of the general improvement, grading is done in order to accomplish the main object, *held*, that the cost of grading, being a part of the general improvement, is properly charged as being incidental to, and a part of, the work of paving, and that special assessments against a street railway company for the cost of paving its right of way may properly include the cost of grading also, the grading being incidental and necessary to accomplish the main object of paving the street.

16. **Rate of Interest.** Under the statute, taxes levied as special assessments in cities of the first class draw interest at the rate of twelve per cent per annum from the time of delinquency, and a decree enforcing a tax lien arising therefrom will draw interest at the same rate after rendition.

17. **Perpetuity of Tax Lien.** The lien of taxes in favor of a city levied as special assessments for street improvements is not barred by section 11 or 13 of the Code, but is perpetual, and may be enforced without regard to the provisions of the section mentioned.

18. **Street Improvements.** Where street improvements are made and the cost of paving that portion of the same occupied by street railway companies is levied as special assessments against the property of several street railways as separate properties, and the different street railways are afterwards consolidated and merged into one property and operated as one street railway system, the old companies losing their individuality and identity and the new company assuming the burdens and obligations of the constituent companies, *held*, that as between the consolidated company and the municipal authorities levying such special assessments the liens arising by reason of the several assessments against the different constituent companies and

properties attach to the new property owned and operated by the substituted company as one property in its entirety, and may be enforced by the sale of the property without dismemberment and separating it into fractional properties as it existed before consolidation.

19. **Mortgage:** PRIORITY OF LIENS. Where, however, a mortgage was placed upon a street railway property, and afterwards another company, against which certain liens for taxes levied as special assessments existed, was consolidated with the mortgagor company, *held*, that the lien of the mortgage on the property covered thereby, without the consent of the mortgagee, could not be impaired by the agreements and acts of consolidation, and that the tax lien on the property consolidated and merged into the new company and with the property mortgaged could not be made prior to the mortgage lien on all the property after consolidation; that the tax and mortgage liens attached to the specific properties embraced in the levy and the mortgage respectively; and that the respective liens and their priority could be preserved unimpaired only by separating the different properties into their constituent parts as before consolidation, and awarding to each a lien according to priority.

20. ———: ———. Under the provisions of section 77 of chapter 13*a*, Compiled Statutes, 1887, which provides that "no mortgage, conveyance, pledge, transfer or incumbrance of any such property, of any such company or person, or of any of its rolling stock or personal property, created or suffered by any such company or party, after the time when any street or part thereof upon which any such street railway shall have been laid, shall have been ordered paved, repaved, macadamized or repaired, shall be made or suffered except subject to the actual or prospective lien of said special taxes, whether actually levied or not, if such levy be in contemplation," *held*, that the lien of a mortgage attaching to a street railway property before street improvements were projected or in contemplation was prior to the lien of taxes levied thereafter as special assessments for the costs and expenses of paving the right of way of such street railway company to conform to the improvement of the remainder of the street.

21. **Tax Lien:** ORDINANCE. Under an ordinance providing for the payment of certain sums by a street railway in obtaining a permit to lay its tracks in streets already paved, and requiring that a bond be given as security for the discharge of the liability assumed, *held*, that there is no authority for making the sums due under the provisions of such ordinance a lien on the property of a street railway company, as in the cases of taxes levied as special assessments.

22. **Municipal Corporation:** SUIT IN CORPORATE NAME: PRESUMPTION. A municipal corporation is authorized to sue and be sued by its

corporate name; and where an action is brought by a city in its corporate name by its proper law officers, it will be presumed that the action is authorized until the contrary appears.

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

William B. Hornblower, John H. Ames and *James Byrne*, for plaintiff in error:

Sections 76 and 77 of the act of 1887 violate section 7, article 9, of the constitution. *State v. Wheeler*, 33 Nebr., 563.

The right granted by the city to the railway company to use the streets was a contract. The act of 1887 impaired the obligation of such contract, and is inimical to the federal constitution. *Chicago v. Sheldon*, 9 Wall. [U. S.], 50; *Coast L. R. Co. v. Mayor*, 30 Fed. Rep., 646; *Milhau v. Sharp*, 27 N. Y., 611; *Mayor v. Second Avenue R. Co.*, 32 N. Y., 261; *People v. O'Brien*, 111 N. Y., 1, 40; *Brooklyn Central R. Co. v. Brooklyn City R. Co.*, 32 Barb. [N. Y.], 358, 364; *Appeal of North Beach & M. R. Co.*, 32 Cal., 499.

The right conferred by the city upon a railway company to occupy the streets is a grant whose terms, once having been complied with, can not be altered, either by the city or the legislature. *Coast L. R. Co. v. Mayor, supra.*

The power reserved in section 1 of the article of the state constitution, entitled "Miscellaneous Corporations," does not authorize an act of the legislature impairing the obligation of contracts. There is a limitation to reserved powers. *Sinking-Fund Cases*, 99 U. S., 700, 720; *Shields v. Ohio*, 95 U. S., 319, 324; *Commonwealth v. Essex Co.*, 13 Gray [Mass.], 239; *City of Detroit v. Detroit & Howell Plank Road Co.*, 43 Mich., 140.

Even if the reserved power existed in the case at bar, it could be exercised only for the amendment or repeal of the general incorporation laws. *Trust Co. v. Citizens S. R. Co.*, 82 Fed. Rep., 1; *Braceville Coal Co. v. People*,

35 N. E. Rep. [Ill.], 62; *Foxworthy v. City of Hastings*, 23 Nebr., 772; *Touzalin v. City of Omaha*, 25 Nebr., 817, 825.

A law or ordinance requiring a street railway company to pave streets is not an exercise of police power. The limit of the exercise of police power in such case must be regulated with reference to the comfort, safety and welfare of society. Cooley, Constitutional Limitations [6th ed.], 710; *Horbach v. City of Omaha*, 54 Nebr., 83.

Harwood, Ames & Ames, also for plaintiff.

Charles O. Whedon and *Joseph R. Webster*, *contra*.

The franchise conferred upon the plaintiff in error was obtained by virtue of the general incorporation law, which was subject to amendment at any time. Constitution, art. Miscellaneous Corporations.

Corporate franchises in the American states emanate from the government. What was granted by the city of Lincoln to the plaintiff in error was a mere license. *Chicago C. R. Co. v. People*, 73 Ill., 541.

There was no contract between the city and the plaintiff in error. The company's franchise was subject to such conditions as the legislature might impose for the public good. *Sioux City S. R. Co. v. Sioux City*, 138 U. S., 98.

The administrative powers of the city over the streets was conferred upon it for public purposes. It is an unalienable right, which the municipality can not bargain away. *State v. St. Paul C. R. Co.*, 81 N. W. Rep. [Minn.], 200.

E. C. Strode, *N. C. Abbott* and *D. J. Flaherty*, also for defendants.

HOLCOMB, J.

The Lincoln Street Railway Company and the New York Security & Trust Company, mortgagee of its property in trust, by proceedings in error to obtain a review of the trial had in the district court, pray a reversal of

the judgment therein rendered in favor of the city of Lincoln, plaintiff in the court below, for the sum of $108,526.58, principal and interest, and $2,915.60, penalties, for taxes or obligations in the nature of special assessments levied by the city of Lincoln on the property of the street railway company, plaintiff in error, as well as certain assessments levied against other street railway companies operating street railway lines in the city, which were, after the assessments, and before proceedings for a recovery thereof were instituted, consolidated with, and merged into, the company against which this action is brought. A recovery is sought for the cost of paving that part of the paved streets occupied by the street railways, including, in most instances, the cost of grading, and is based upon many different assessments in different paving districts and against the several companies operating various lines of railway, and covering a period of several years from and including the years 1888 to 1895. The amount found due is adjudged to be a first lien on all the lines of the defendant company situated in and near the city of Lincoln now or at any time during the existence of the tax liens mentioned in the petition owned by the defendant company, or of which it became possessed by the several agreements of consolidation; also, other lines in and near the city, constructed before or during the pendency of the action, which became the property of the defendant by purchase or otherwise, including its franchise, track, ties, road-bed, right of way, side-tracks, appurtenances, buildings, real estate, etc., belonging to the defendant company, all as one property. It is further adjudged that the defendant trust company's mortgage or trust deed is subject to the lien of the plaintiff city for the amount of the tax liens so as aforesaid found to be due. The decree is adjudged to draw interest at the rate of twelve per centum per annum, and the property ordered sold if the sums found due were not paid within a short time therein stated. The correctness of the judgment is challenged by the

plaintiffs in error upon several distinct and different grounds, but primarily for the reasons, as alleged, the enforcement of the claim of the city is violative of different provisions of the federal and state constitutions, in that it impairs the obligation of a contract, and the legislation authorizing the assessments contravenes different sections of the fundamental law of the state. The particular objections interposed, and which appear necessary to a rightful determination, will be considered in the further discussion of the case.

The authority for making the several assessments against the defendant and constituent companies afterwards consolidated with it is founded in the provisions contained in sections 76 and 77 of chapter 11 of the Laws of 1887, entitled "An act to incorporate cities of the first class having less than sixty thousand inhabitants, and regulating their duties, powers, and government."

Section 76: "All street railway companies now existing or hereafter created, in any city governed by this act or that shall hereafter be organized thereunder, shall be required to pave or repave between and to one foot beyond their outer rails, or in case said railway use more than one track in any street, they shall pave between and to one foot beyond their outer rails where such company owns at their own cost. Whenever any street shall be ordered paved or repaved by the mayor and city council of such city, such paving or repaving shall be done at the same time, and shall be of the same material and character as the paving or repaving of the street upon which said railway track is located, unless other material be specially ordered by the board of public works. Such street railway companies shall be required to keep that portion of the street required by them to be paved in repair, using for said purpose the same material as the streets upon which the track is laid at the point of repair, or such other material as the board of public works may require and order upon streets in cities governed by this act. * * * The track of all railway companies, when

located upon the streets or avenues of the city, shall be kept in repair and safe in all respects for the use of the traveling public, and such companies shall be liable for all damages resulting by reason of neglect to keep such tracks in repair, or for obstructing the streets or avenues of such city."

Section 77: "In the event of the refusal or neglect of such street railway companies to pave, repave, or repair when so directed by the mayor and council, upon the paving or repaving of any street upon which their track is laid, the mayor and council shall have power to pave, repave, or repair the same and the cost and expense of such paving, repaving, or repairing may be collected by levy and sale of any real or personal property of said street railway company, the same as special taxes are collected. Special taxes for the purpose of paying the cost of any such paving, repaving, macadamizing, or repairing of any such street railway may be levied upon the track, including the ties, iron, road-bed and right of way, side tracks, and appurtenances, including buildings, and real estate belonging to any such company or person, and used for the purpose of such street railway business, all as one property, or upon such part of such tracks, appurtenances, and property as may be within the district paved, repaved, macadamized, or repaired, or any part thereof, and shall be a lien upon the property upon which levied from the time of the levy until satisfied. No mortgage, conveyance, pledge, transfer, or incumbrance of any such property of any such company, * * * created or suffered by any such company or party, after the time when any street or part thereof, upon which any such street railway shall have been laid, shall have been ordered paved, repaved, macadamized, or repaired, shall be made or suffered, except subject to the actual or prospective lien of such special taxes, whether actually levied or not, if such levy be in contemplation. * * * The railroad track, or any other property upon which such special taxes shall be levied, or

so much thereof as may be necessary, may be sold for the payment of such special taxes in the same manner and with the same effect as real estate upon which such special taxes may be levied may be sold. It shall also be competent for any such city to bring a civil action against any party owning or operating any such street railway and liable to pay said taxes to recover the amount thereof or any part thereof delinquent and unpaid, in any court having jurisdiction of the amount and obtain judgment and have execution therefor, and no property, real or personal, shall be exempt from any such execution. * * * No defense shall be allowed in any such civil action, except as goes to the ground work, equity, and justice of the tax, and the burden of proof shall rest upon the party assailing the tax. In case part of such special tax shall be shown to be invalid, unjust, and inequitable, judgment shall be rendered for such amount as is just and equitable, and costs shall follow the judgment. * * * The provisions of this act in regard to the levy, collection, and enforcement of special taxes to pay the cost of paving, repaving, macadamizing, or repairing of any such street railways shall apply to all such special taxes hereafter levied."

It is argued by the learned counsel for the defendant and the mortgagee trust company, and with much plausibility, that the enforcement of the legislative provisions just quoted as against these defendants is an impairment of the obligations of a contract, and is, therefore, obnoxious to the provision of the federal constitution in respect to such matter. This contention is built upon the theory that in the ordinances submitting to the electors of the city the proposition of granting consent to the different companies to construct and operate street railways over the streets of the city there were certain provisions having within them the elements of a contract, which entered into the charter or franchise rights of such companies in the use of the streets of the city, and by the terms of which the defendant company is exempt from

any obligation of the nature sought to be imposed by the assessments under consideration.

By section 1, article 11, of the constitution, under the title "Miscellaneous Corporations," it is provided: "No corporation shall be created by special law, nor its charter extended, changed, or amended, * * * but the legislature shall provide by general laws for the organization of all corporations hereafter to be created. All general laws passed pursuant to this section may be altered from time to time, or repealed."

Section 2: "No such general law shall be passed by the legislature granting the right to construct and operate a street railroad within any city, town, or incorporated village, without first requiring the consent of a majority of the electors thereof."

Pursuant to the constitutional provisions above quoted, the legislature, by suitable enactment, has provided for the incorporation of street railway companies, and by article 7, chapter 72, page 562, Compiled Statutes, 1887, it is provided that the consent of a majority of the electors of the city in which it is proposed to construct and operate a street railway must first be procured, and the manner of the procurement of such consent is therein prescribed; and such act provides, among other things, after the proposition has been submitted to the electors and ascertained to have been carried, that a certificate to that effect shall be required to be made out by the city clerk by direction of the council, and given to the chief officer of the corporation, who shall cause the same to be recorded in the office of the county clerk, where articles of incorporation are recorded, and in the same book; "and thereupon such street railroad company shall be authorized to proceed and construct and operate such street railroad, as described in its articles of association, or any portion thereof, subject to such rules and regulations as may be established by ordinances of such city." Sec. 5.

In the ordinance adopted submitting to the electors of

the city the proposition of giving their consent to the use of the streets by the several corporations mentioned in these proceedings, as required by the statute and constitution, before such corporation would have the right to construct and operate a street railroad within the city, it was provided as follows: "Said railway track shall be so constructed and maintained as to present the least practical obstruction to the ordinary and public use of the streets, and that it shall, when required, conform to the established grade of the streets as now or hereafter to be established when such streets are brought to grade. And further, said railway company shall be subject to all reasonable regulations in construction and use of said railway which may be imposed by ordinance."

Conceding for the time being, and for the present purposes only, that in the ordinance, submitting the question of consent of the electors of the city to the use of the streets for a street railway, the provisions quoted entered into and became a part of the charter of the corporation and defined the terms of the grant or franchise obtained by the company, we are unable to find anything therein contained which was intended, or could, by any reasonable rule of construction, be said, to exempt the company from liability to pave and repair its right of way, as required by the section of the statute quoted.

It is a well recognized and generally accepted rule of construction, that where exemptions are claimed under grants of franchise rights, the language will be strictly construed, and a claim of exemptions can not be sustained which is not, in express terms, granted or clearly implied from the terms of the grant. *Delaware Railroad Tax*, 18 Wall. [U. S.], 206; *Bank v. Commonwealth*, 10 Pa. St., 451; *Railway Company v. Philadelphia*, 101 U. S., 528.

Says Judge Cooley, in his work on Taxation (2d ed., p. 205): "It is also a very just rule that, when an exemption is found to exist, it shall not be enlarged by construction. On the contrary it ought to receive a strict

construction; for the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant;" and on page 207: "The most striking illustration of the rule of strict construction of exemptions is seen in the case of special assessments for local improvements, such as the paving and repair of streets, etc. It is almost universally held that a general exemption from taxation will not extend to such assessments."

In *Western Paving & Supply Co. v. Citizens Street Railroad Co.*, 128 Ind., 525, it is held that a charter having the elements of a contract granted to a street railway company is to be strictly construed against the company, and that it has no doubt rights under such charter; for where there are doubts, they are construed against the grantee and in favor of the city.

Says the supreme court of Illinois, that though a railroad company is exempt by its charter "from all taxation of every kind except as herein provided," it is liable for special taxes levied on its right of way for street paving adjacent thereto. *Illinois C. R. v. City of Decatur*, 38 N. E. Rep., 626.

In the language of the ordinance quoted and relied on, we are unable to find any words from which it may be inferred that it was the intention to exempt the defendant company from the charges sought to be imposed in the present instance, and unless the exemption is clearly expressed, the doubt, if any there be, must be resolved against the company. We find no words of limitation or restriction by which it may be said the legislature deprived itself of the right to impose upon the street railway company the burden of paving and repairing, or paying the cost thereof, that part of the paved streets of cities of the class mentioned composing its right of way and occupied by its tracks. In these several ordinances, under which the consent of the electors was se-

cured, it was specially provided that the railway company should construct and maintain its tracks, so as to present the least practical obstruction to the ordinary public and general use of such streets, and be subject to all reasonable regulations in the construction and operation of its railway. It is a matter of common knowledge that by charters, statutes and ordinances of regulation street railway companies are usually required to pave and keep in repair their right of way over the street in conformity with the improvements made by the local authorities. The reports are filled with decisions upon the subject; statutes are numerous imposing the obligation, and the fact that the exercise of the power is of such general application is of itself evidence that the requirement is regarded as a reasonable and just one. The railway company is given the prior and almost exclusive use of the portion of the streets occupied by its tracks, the public surrendering its right to use such portion for the benefit of the company; and that it should be required to keep the part of the street it occupies in good repair, and in uniform condition as to grade and pavement as that of the remainder of the street, seems to be founded in rudimentary principles of justice and fairness as between the company and the public at large. Not only is there an entire absence of words from which the exemption claimed can be inferred, but, on the contrary, it would seem the requirement as to paving can only be regarded in the light of a reasonable regulation contemplated by the language of the ordinance relied on. It is quite clear that the provisions are incapable of any reasonable construction which will create the exemption claimed. None of the authorities cited appear to us as going to the extent of holding that similar provisions in ordinances, admittedly granting franchise rights, secure to a corporation immunity from burdens such as are sought to be imposed in the case at bar, or the enforcement of which would impair the obligation of a contract. Nor are we disposed to the view that provisions such as are under

consideraton are restricted and refer only to the obligation of a street railway company to not interfere or obstruct the city in the prosecution of municipal improvements upon streets occupied by such railway company, as contended for by plaintiff's counsel. A proper construction must be determined from the language used and the circumstances and purposes of its adoption, and the object to be accomplished thereby. It contained no words of restriction or limitation as to obligations of the company under its franchise; no mention is made, nor is there a basis for an inference of exemptions from taxation or other assessments of any character. It provided only, and was declaratory of the provisions of the statute, that the corporation should be subject to rules and regulations, established by ordinance of the city.

This brings us directly to the question of the nature, scope and legal effect of the ordinance under which defendant claims exemption, which it is desired briefly to consider. Counsel for defendants insist that the ordinance establishes a contract with respect to its franchise, defines its terms and grants property rights, which are infringed upon by the statutes afterwards enacted requiring the company to pave the part of the streets occupied by its tracks. We observe no authority in the statute giving to the city the right to grant charters to street railway companies, and as all such authority must be derived from the statute, we must conclude that, unless it is found there, it does not exist. By the constitutional provisions quoted, special charters are prohibited, and corporations receive their franchises only by general law, and subject to all legal rules and statutes as to the reserved right of the lawmaking power of alteration and amendment. The laws of the state and the articles of incorporation are considered in the nature of a grant, and constitute the charter of the company. *Abbott v. Omaha Smelting Co.*, 4 Nebr., 416; *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Nebr., 279. In the case of a street railway corporation, the grant by the legislature under general law

is by the constitution ineffectual, without such company first obtain the consent of a majority of the electors to the construction and operation of a proposed street railway over the streets where such railway is to be constructed. The statute provides how such consent may be secured. Compiled Statutes, 1887, p. 562, ch. 72, art. 7. It is therein provided how the question shall be submitted. No authority is given the city except to submit the proposition. It is not authorized to grant a charter upon any terms whatever. There is, we think, a marked distinction between a provision enacted for the purpose of securing the consent of a majority of the electors of a city for a street railway corporation chartered under the general laws to construct and operate a street railway over the streets of such city, and authority to the city as a municipal corporation to grant to such corporation a charter to construct its railway over the streets under terms and stipulations entered into by such city. While it is essential that the consent of a majority of the electors be secured before any charter or franchise rights can accrue to a street railway company, the provisions of the constitution and the statutes requiring such consent can not be made the basis of a contract respecting corporate rights and privileges between the city and such company. The charter rights are derived from the general law. The consent of a majority of the electors can only be regarded as a condition precedent, on the happening of which is dependent the right to construct and maintain on the streets a railway, and does not enlarge or restrict the grant arising by virtue of the general laws, or in other respects affect the legislature in the exercise of its lawful authority. The property rights of the defendant company, its right of an easement in the streets for the purposes of its creation, and its corporate franchise derived under the law, are all recognized and respected. If contention of counsel be correct, and the ordinance and its acceptance constitutes a contract between the city and defendant with respect to its franchise, then it is in the

power of the authorities of the different towns and cities to enter into contract relations with respect to such franchise, which in effect creates special charters, nullifies the constitutional provisions referred to, and renders impotent the legislature as to all future legislation in regard to such matters. This clearly is not the law. If it were sought to deprive the defendant of any of its "vested rights," many of the authorities cited would be applicable and carry great weight. Defendant assumes that the city has granted it a charter, and that in that charter it is exempted from any assessment, either as special benefits, or as a reasonable regulation and an exercise of the reserve power of the legislature. We think it in error in both respects. The provisions relied on do not, in our judgment, warrant the inference that the burdens sought to be imposed were exempted; nor do the corporate rights and privileges of the defendant have their origin in the ordinance under which the consent of the electors was obtained, but in the general laws of the state. The ordinance, so far as the provisions relied on are concerned, should, it seems to us, be regarded as one of regulation authorized by statute, and not of contract creating vested rights. Says the eminent author of Constitutional Law, Judge Cooley, in *Detroit v. Howell Plank Road Co.*, 43 Mich., 140, 145: "Legislators cannot thus bind the hands of their successors where the elements of contract, concession and consideration do not appear; and the doctrine that they may do so by contract is one so exceptional and so liable to abuses that courts will not be astute in discovering the existence of a contract between the state and those who claim franchises under it, where the essential elements of a contract are not manifest. All questions of doubt are to be solved in favor of the state in such cases, and 'to be in doubt is to be resolved.'"

With authorities cited by counsel in support of the doctrine against impairment of contract obligations we entirely agree, but are unable to conclude therefrom that any contract right in the case at bar is in any way im-

paired. Where cities are authorized, and do in fact, grant charters under conditions and agreements establishing a contract, the rule invoked would apply; but in the absence of authority to enter into such agreements, or where no agreement in fact exists, other rules must be resorted to in determining the rights of contesting parties. The distinction we are endeavoring to draw is clearly recognized in nearly all the cases cited, and especially in *Coast-Line R. Co. v. Mayor*, 30 Fed. Rep. [Ga.], 646. In that case it appears the city was authorized and did enter into a contract with the railway company, which contained mutual stipulations under which the railroad should be constructed and operated, among others, in the event of paving by the city of the whole or any portion of the street used by the railway company, the portion of the track between the rails should be paved and kept in good repair by the company at its own expense and cost. It was there held, not only that the city had authority, but that the contract was valid under the laws of the state at the time made, and that afterwards different terms could not be imposed on the corporation to its injury and for the benefit of the other contracting party. It is said in the opinion: "The reservation of the state to withdraw the franchise of this railroad company cannot be disputed, and that reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges and immunities 'derived by its charter directly from the state.' But rights and interests acquired by the company, not constituting a part of the contract of incorporation, stand upon a different footing. It is competent for the state, in the exercise of its reserve power, to alter the act incorporating the company in all particulars constituting the grant to it of corporate rights, privileges and immunities. These flow from the state and should properly be kept under its control." The holding in that case was placed distinctly on the ground of the authority of the city to enter into the contract which it

did, and that such contract gave to the railway company rights in no wise connected with its franchise from the state. Also, in *Chicago v. Sheldon*, 9 Wall. [U. S.], 50, 55, wherein it is said: "A contract having been entered into between the parties, valid at the time, by the laws of the state, it is not competent even for its legislature to pass an act impairing its obligation, much less could any decision of its courts have that effect. A point is made, that the legislature have not conferred, or intended to confer, authority upon the city to make this contract. We need only say that full power was not only conferred, but that the contract itself has been since ratified by this body."

No authority being conferred upon the city to contract with a street railway company with respect to the grant of its corporate rights and franchises, we think it follows that by the provisions of the ordinances under which the consent of a majority of the electors was secured, the railway company obligated itself to construct a railway within the time and manner therein stated, and be subject to such regulations as might lawfully be established by ordinance in conformity with the statute in that regard, and was thereby privileged or permitted to enter upon the streets of the city for the purpose of constructing its tracks so as to carry out the purposes of its organization; that by such ordinance, it derived no other or greater right than a privilege, license or permission to enter upon the streets for such purpose; and that its corporate franchises and privileges were not determined and fixed by such ordinances but by general laws.

In *Chicago C. R. Co. v. People*, 73 Ill., 541, it is held that a franchise emanates from the state, and where a company is incorporated by the legislature with power to construct and operate a railway in a city upon the consent of the city, in such manner and upon such conditions as the city may impose, and the city by ordinance grants the privilege of constructing and operating the same, the grant by the city is a mere license and not a franchise.

In the opinion it is said: "But in the case at bar the grant in the ordinance is not a franchise, but a mere license, a permission to construct a railway in a certain street within a limited period. A franchise, according to the definition given by Blackstone, is a royal privilege or branch of the king's prerogative, subsisting in the hands of the subject, and, being derived from the crown, must arise from the king's grant. 2 Blackstone, 17. Corporate franchises in the American states emanate from the government, or the sovereign power, owe their existence to a grant, or, as at common law, to prescription, which presupposes a grant, and are vested in individuals or a body politic. The grant or license given by the ordinance comes within no definition of a franchise. Besides, a municipal body, it is understood, possesses no power to confer a franchise. *Davis v. Mayor*, 4 Kernan [N. Y.], 506."

In *State v. Jacksonville St. R. Co.*, 10 So. Rep. [Fla.], 590, it is stated in the third syllabus: "It is within the power of the legislature to delegate to municipal corporations the right to license or permit railroad companies to lay railroad tracks in the streets in such manner as not to divert them from their original uses; but a difference exists between the power of a municipal corporation to grant a corporate franchise and the right to permit a corporation vested with such franchise to place railroad tracks in the public streets. If the municipal body can ever grant a corporate franchise, such power must be expressly conferred by the legislature." In the opinion of the court it is said: "The legislature has undoubtedly supervision and control of highways and streets, and may authorize the construction of a railroad, operated either by steam or animal power, across or along them. This results from the dominant power which the state possesses over all its highways; and it may be done without the consent of municipal authorities. 2 Dill., Mun. Corp., 656; Elliott, Roads & S., pp. 562, 563; Pierce, R. R., p. 246; Lawson, Rights, Rem. &

Pr., sec. 4003; *Eichels v. Railway Co.*, 78 Ind., 261; *Railroad Co. v. Mayor, etc.*, 45 Ga., 602; *Hodges v. Railway Co.*, 58 Md., 603." And further on in the same opinion it is said: "Here it may be proper to say that there is a material difference between the power of a municipal corporation to grant a corporate franchise, or authority to construct a street railroad and take tolls and emoluments for services, and the right to license or permit corporations vested with such franchises to lay tracks in streets in such manner as not to divert them from their original uses. If the municipal body can ever exercise the power to grant such corporate franchises, it must be expressly conferred by the legislature. The cases of *Davis v. Mayor*, 14 N. Y., 506, and *People's Railroad v. Memphis Railroad*, 10 Wall. [U. S.], 38, were decided, we understand, upon the theory that the municipal bodies had no such power."

We now reach what we conceive to be the most cogent reason for upholding the validity of the sections of the statute assailed by defendants. We are convinced that the power therein exercised is one reserved to the legislature by the constitution, and of which it is incapable of divesting itself; and for stronger reasons, it could not authorize a city council to act in such a manner as to deprive it of such power. The right being reserved to the legislature by the constitution, it is empowered to alter, amend or repeal the laws respecting street railways in such manner as is approved by its wisdom and judgment; and this right extends, not alone to laws providing for the incorporation and organization of such companies, but also to those which seek to control, regulate and otherwise affect such corporations in the enjoyment of their franchises.

Says Judge Field, of the United States supreme court, with reference to a reservation in a statute that the charter of every corporation should be subject to amendment, alteration or repeal by legislative authority: "The reservation affects the entire relation between the state and the corporation, and places under legislative control

all rights, privileges and immunities derived by its charter directly from the state." *Tomlinson v. Jessup*, 15 Wall. [U. S.], 454, 459. Of like import is *Railroad Co. v. Maine*, 96 U. S., 499, in which the opinion was written by the same eminent jurist. In speaking on the same subject Judge Cooley, in *Detroit v. Detroit & Howell Plank Road Co.*, 43 Mich., 140, 147, says: "But for the provision in the constitution of the United States which forbids impairing the obligations of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the state where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired."

The right to alter or amend is not an unrestrained right, but a power which is to be exercised subject to fundamental principles controlling all valid legislation. Says Mr. Justice Swayne, in *Shields v. Ohio*, 95 U. S., 319, 324: "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases." Or, as is said in *Commonwealth v. Essex Co.*, 13 Gray [Mass.], 239, 253: "Where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or

rights which have become vested under a legitimate exercise of the powers granted."

No property or vested rights are endangered or lost to the defendant by the sections of the statute objected to. The power invoked is a regulation to which all, in some form or other, are subjected in bearing the burdens incident to the growth and development of the municipality. As before intimated, the requirements are only reasonable and appropriately attach and belong to a street railway company in the conduct of its business over the paved streets of the city. For both the validity and reasonableness of the exercise of the legislative power objected to we have precedent well supported by authority.

In *Conway v. City of Rochester*, 51 N. E. Rep. [N. Y.], 395, under a law quite similar to the one now under consideration, it was held in a contest between the city authorities and abutting property owners whose property had been assessed for special benefits for paving a street, that the law made it mandatory upon the city council to require the street railway company to pave its right of way, and that the burden which thus rested on the company could not be shifted to abutting property owners.

In *Wood v. Common Council*, 56 N. Y. Supp., 105, the views expressed in the *Rochester Case* were reiterated and followed. In that case it is held that the provisions of the statute requiring street railway companies to pave between their tracks and two feet from the outside thereof, applies to all street-surface railway companies, whether incorporated prior or subsequent to the act; that the omission in a charter of a street railway company of a provision compelling it to pave streets along its tracks does not vest in it or its successors a perpetual exemption from such obligation subsequently imposed by the legislature under the power given it by the constitution providing that all general laws creating corporations may be altered from time to time; and that a city council was without power to exempt street railway companies from

the provisions of the general laws of the state requiring pavement by them of the streets along their tracks. Although cautioned against giving weight to this case because the decision was rendered by a tribunal of inferior jurisdiction, we find many points in it having an intimate bearing on the case at bar, and regard its reasoning as logical and sound, and the propositions considered as a correct exposition of the law.

Storrie v. Houston City St. R. Co., 46 S. W. Rep. [Tex.], 796, was a case involving the rights of a mortgagee of a street railway property, legislation affecting the corporation, mortgagor, having been enacted subsequent to the execution of the mortgage. The charter or law governing the city of Houston provided that the cost of a street improvement should be charged against abutters, and that a street railway shall be liable for costs of paving between the rails and for six inches on each side. It was there held that the company was liable for paving to the extent stated, notwithstanding a resolution by the city council providing that costs of the improvement should be wholly defrayed by the abutting property owners. The constitution of that state provided that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the legislature or created under its authority shall be subject to the control thereof." It was held that the legislature had the right to amend the city charter so that the street car company became liable for the costs of paving six inches on each side of its tracks, in addition to its former liability of paving between the rails, and that such law was not unconstitutional as impairing the obligation of a contract in reference to a prior mortgage executed while the constitutional provision was in force. Says Brown, J., after quoting the provision of the constitution: "This provision of the constitution was in force at the time the street railway company acquired its rights in the streets of Houston and before the mortgage of the trust company was executed.

The rights of both the street railway company and the mortgage company were acquired subject to the control of the legislature upon this question. The legislature had the right to enact the law of 1891, amending the charter of Houston, by which the liability of the street car company for the cost of paving the street was enlarged. That act does not violate the constitution of this state nor of the United States."

In *Sioux City St. R. Co. v. Sioux City*, 43 N. W. Rep. [Ia.], 224, in an opinion afterwards affirmed by the supreme court of the United States (138 U. S., 98), it was held that, although the charter of a street railway company required it to pave inside its rails, a subsequent ordinance passed by the city in pursuance of an act of the legislature, requiring it to pave one foot outside of its rails is not in violation of the obligation of a contract, assuming the charter to have been a contract; and did not thereby preclude the city from imposing additional burdens which were authorized by the laws of the state. At the time of the organization of the street railway company, there was a provision in the Code of Iowa which read as follows: "The articles of incorporation, by-laws, rules, and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be at time altered, abridged, or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good." In support of the same general principles, we cite *City of Philadelphia v. Passenger R. Co.*, 33 Atl. Rep. [Pa.], 126, and *City of Lansing v. Lansing City E. R. Co.*, 66 N. W. Rep. [Mich.], 949.

We therefore conclude the sections objected to were enacted by the legislature in the exercise of a valid power belonging to it; that no rights or privileges possessed by

the defendant company or those consolidated with it were invaded or impaired by such legislation; and that the legislature had the right to impose the liability by said sections created, notwithstanding the ordinance under which defendant claims exemption from such liability. We do not think the law in this respect contravenes any provision of either the federal or state constitution.

It is also argued by the city that the legislation imposing the obligation on the defendant to pave its right of way under the circumstances prescribed may properly be sustained on the grounds of the taxing power for benefits received from local improvements, and also under the police power of the state. Because of the many questions raised in the case, the consideration of which we regard as of more pressing importance in its disposition, for want of time and in view of what has already been said, we do not deem it advisable to fully consider these questions. Many strong and substantial arguments may be advanced in support of the proposition that the power is properly exercised as a police regulation. "The regulation," says Judge Cooley, "must have reference to the comfort, safety or welfare of society." The comfort and safety of the public are certainly largely affected by the condition of the surface of a public street over which is run street cars propelled by electricity. Convenience in locomotion and freedom from accident on such streets materially depend upon the evenness of the surface of the streets, and minimizing, as far as practicable, of all obstructions by reason of street railway tracks. It is especially manifest that at all street intersections a level crossing, capable of convenient, easy and rapid transit of both vehicles and foot passengers, is of the utmost importance to the safety of the traveling public. And for the same reason, though in a lesser degree, should there be, throughout the entire distance traversed by such street railway, free access across the streets at all points to adjoining property, as well as to facilitate the passing of vehicles traveling in different directions. It

would seem that on the ground of the taxing power the legislation could be sustained. Certainly it is within the province of the legislature to provide for the taxation of street railways for property specially benefited by local improvements. *Appeal of North Beach & M. R. Co.*, 32 Cal., 499; *Cicero & P. St. R. Co. v. City of Chicago*, 52 N. E. Rep. [Ill.], 866; *Atchison, T. & S. F. R. Co. v. Peterson*, 51 Pac. Rep. [Kan.], 290. The more difficult question arises by reason of the fact that the legislature has apportioned and fixed with certainty and definiteness the portion of the streets which are to be paved at the cost of the street railway company and charged to it as a special benefit for the improvement made by the paving of the street. In whatever power the authority rests, if we are permitted to speculate regarding the matter, we would say some of the elements of the several powers spoken of entered into the considerations which moved the legislature to act. The act was an exercise of the power of reasonable regulation. It is entirely fitting and proper that the street railway company should be required to pave that part of the streets occupied by its tracks. The public comfort and safety were promoted by the exercise of such power, and the material benefits accruing to a street railway company by the paving of a street occupied by it was doubtless an inducement, which, in no small degree, actuated the legislative mind in framing the law imposing the obligation to pave at its own cost the part of the street occupied by a street railway company. While it is not an abutting property owner, in the strict sense of the word, it is an owner of property lying within and forming a part of the improvement actually made, and for the sake of uniformity, appearance, use and convenience, safety and comfort of the public, and benefits received, should, in the nature of things, bear such burden. The right of the legislature to thus provide for the cost and expense of such improvement by special assessment, and to fix the amount and apportion the charge to be borne by the different parcels

of property, by the giving of notice before the assessment is made, is distinctly recognized in *Spencer v. Merchant*, 100 N. Y., 585, a case where the reasons for the conclusions reached were not nearly so strong as in the present instance, and which case was afterwards removed to the United States supreme court (*Spencer v. Merchant*, 125 U. S., 345), and the principle enunciated by the state court received the approval of the latter tribunal. As stated, however, we do not finally decide these two questions, preferring to ground our conclusions upon the broad and fundamental doctrine of the right of the legislature to impose the burdens as a reasonable exercise of its reserve power.

It is also argued that the act is unconstitutional because it is in the nature of a special law or class legislation, applying only to a portion of the street railways of the state. We regard the law as in no way conflicting with the provisions referred to. It is quite well settled in this jurisdiction that laws which are general and uniform throughout the state, operating alike upon all persons and localities of a class, or upon those who are brought within the relations and circumstances provided for, are not objectionable for want of uniformity or as class legislation. *State v. Berka*, 20 Nebr., 375; *County of Lancaster v. Trimble*, 33 Nebr., 121. "The classification of the cities of the state into classes and sub-classes, and the conferring upon them of corporate powers by acts of the legislature of a general nature, yet the provisions of which are applicable to but one of such classes or sub-classes, is not repugnant to any provision of the constitution." *State v. Graham*, 16 Nebr., 74. "An act is general and not special if it operates alike on all persons or localities of a class, or who are brought within the relations or circumstances provided for, the classification so adopted by the legislature having a basis in reason and not being purely arbitrary." *Livingston Loan & Building Ass'n v. Drummond*, 49 Nebr., 200. To the same effect are: *Hunzinger v. State*, 39 Nebr., 653; *McClay v. City of Lin-*

coln, 32 Nebr., 412. If, as had been repeatedly held, and correctly so, we think, it is competent for the legislature to classify the cities of the state, and provide different laws for the government of each class, then we think it logically follows that the inhabitants and property, including that of corporations within each of the different classes, are controlled by the charter provisions applicable to that class, even though differing from provisions in some other charter, and that the enactment of laws and regulations affecting alike all street railways of any one class can not be said to be obnoxious to the constitution because of lack of uniformity.

It is also urged that the statute violates the constitution wherein it is provided that "the legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes." This section has received consideration from this court in *State v. Wheeler*, 33 Nebr., 563 and *German-American Fire Ins. Co. v. City of Minden*, 51 Nebr., 870, 874. Speaking with reference to the first case, it is said in the latter: "It is quite evident that it [the act considered in the first case] was held bad because it was an attempt by the legislature, not to empower municipal corporations to impose a tax for corporate purposes, but to impose by the legislature itself a tax for corporate purposes on the inhabitants and property of the municipal corporation, this being forbidden by section 7, article 9, of the constitution." If, then, the legislation now objected to is, in effect, the imposition of a tax by the legislature itself on the property of the defendant, and not an authority to the city to do it, the act would be void. We are constrained to the view that the act does not itself attempt to impose any tax on the defendant company. It is primarily a regulation requiring it, in certain instances, to pave its right of way to conform to the street improvement as directed by the city authorities, and upon failure and refusal so to do, provides that the city is authorized and empowered to assess

its property for the costs and expenses of making such improvement. It purports only to authorize the city to levy the proper assessments after paving has been determined upon, and the refusal of the street railway company to discharge the obligation resting upon it to pave at its own expense its right of way in conformity with the improvement made by the city on the remainder of the street. Although the question is not directly raised, the validity of legislation of the character under consideration is recognized in *Horbach v. Omaha*, 54 Nebr., 83, where under the police power it is held the legislature may authorize the city to require owners of lots, upon which stagnant water may accumulate, to fill and grade the same, and upon refusal, the city is authorized to perform such work and levy a special tax sufficient to pay the cost and expense as other special taxes are levied and collected. The two cases, for the purposes of the question under consideration, are similar in principle, and differ only, if at all, in the nature of the power exercised. The legislature has not undertaken, nor can it itself impose a tax for municipal purposes for street paving required to be done by a street railway; nor is the city authorized to do so until after the improvement has been determined upon and projected, nor until the street railway company shall have neglected and refused to comply with the legislative requirement. This is not imposing a tax by the legislature upon municipal corporations or the inhabitants or property thereof for corporate purposes.

The constitutionality of the act of the legislature under consideration is by the defendant company also questioned, because, first, the act provides for a judgment *in personam*, and, second, that no provisions are made for redemption after sale of property on which the lien rests in conformity with section 3, article 9, of the constitution, in respect of the right of redemption from sales of real estate for taxes and special assessments.

The first question, we think, is prematurely presented, and is not necessarily involved in a proper disposition of

the case upon the record as presented to us. At most, the act in this respect would be invalid in so far only as it affects the city's right to a personal judgment against the defendant. The right given, or attempted to be given, to a personal judgment only provides an additional remedy by which satisfaction may be obtained for obligations created by the levy of special assessment, and, if invalid, would leave the remainder of the act complete in itself and capable of enforcement to the extent of the sale of the property to which the lien attached if valid in other respects. Conceding all that is contended for by the defendants in respect of the invalidity of the act authorizing a personal judgment for the amount due for special assessments for paving, the act providing for a lien for such sums, and the enforcement of the same by a sale of the property, is not thereby and for that reason void and of no effect. In the case at bar, all that is sought to be accomplished is the enforcement of the lien under the statute on the property specifically mentioned therein. When a personal judgment is sought, if one should be, the defendant can more properly interpose the defense now presented. For the purposes of this case, and the enforcement of the lien, the act, we are satisfied, is constitutional. The objections therefore can not be upheld.

As to the second proposition, section 3 of article 9 of the constitution is as follows: "The right of redemption from all sales of real estate for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof; *Provided*, that occupants shall in all cases be served with personal notice before the time of redemption expires." Under the above provision, the right of redemption is made secure to all those whose property as therein mentioned may be sold for non-payment of taxes or special assessment, and this guaranty is made secure to the parties entitled thereto in the absence of statutory provisions more definitely pointing out the

method by which the redemption may be made. This view of the constitutional provision quoted must have been entertained and borne in mind by this court when, in its prior utterances, it has declared that the right to foreclose a lien for taxes for general revenue exists in favor of the tax purchaser without any notice of redemption under his tax certificate in accordance with the constitutional provision quoted (*Van Etten v. Medland*, 53 Nebr., 569); and where it is declared, as it has been, that a county may enforce its lien for taxes for general revenue purposes after delinquency, when the right to a sale of the property has accrued, by an ordinary equitable action in foreclosure, as was done in the case of *Grant v. Bartholomew*, 57 Nebr., 673. We apprehend no insurmountable difficulty will be encountered in holding the section of the constitution quoted as self-executing, and giving to all parties who come within the provisions of that section the right to redeem real estate sold for taxes as provided therein. No difficulty would be experienced in redeeming from sale of real estate in foreclosure proceedings of a lien for taxes, after sale and before confirmation, by paying the judgment, interest, costs and accruing costs; and we see no reason why a further extension of time after sale in which redemption might be had would in any way prevent consummation of the object contemplated by the section, and at any time within the period therein mentioned; nor do the constitutional provisions appear inadequate to fully conserve the rights of parties in regard thereto. The proceedings are in a court of equity, and it has control over all the steps therein taken until the rights of all parties have been fully adjudicated and finally determined under the provisions of both the constitution and the statute. The objections raised as to the question just considered are untenable.

The method of procedure adopted by the city council in levying the special assessments against the defendant, as well as the constitutent companies consolidated with it, is made the basis for the contention that the levy as

made is void, and for that reason imposes no liability against the property against which the taxes are sought to be enforced in this action. It is argued that because these levies were made by resolution of the city council, and not by ordinance, they can not be sustained. It appears from the record that the different paving districts were created by ordinance providing for the improvement of the streets included therein, and the payment of the costs and expenses thereof by special assessment to be levied upon the property benefited in such districts. Among other things, section 68* of the city charter act (Session Laws, 1887, ch. 11) provides that the city shall have the power by ordinance, first, to levy taxes for general revenue purposes; and, second, to levy any other tax or special assessment authorized by law. These two subdivisions are followed by others to the number of sixty-three, some of which, it is quite obvious, were not to be complied with or action taken thereunder "by ordinance," as indicated by the first part of the section quoted, which, if given a literal construction, applies to all of the subdivisions alike.

By subdivision 63 it is provided, in substance, that the city council shall have power to open, grade, pave, and otherwise improve the streets within the city in such manner as they may deem proper; and shall have power to levy and collect special taxes and assessments on abutting property to pay the costs and expenses of such improvements; that they shall have power to pave, and, for that purpose, to create suitable paving districts; and that the cost of paving, when done upon the petition of abutting property owners, shall be assessed upon the lots specially benefited, and the total cost shall be levied at one time.

By section 74, chapter 14, Session Laws, 1889, it is provided, with reference to special assessments of taxes for local improvements, that such assessments shall be

*The reference is to Session Laws, 1887, pp. 235-265. This section, as amended, appears as 67 on pp. 207-218, Compiled Statutes, 1899.—REPORTER.

made by the city council at any meeting by resolution, stating the cost of construction, or repairs, or improvements, and the benefits accruing to the property in the district to be taxed; that the vote thereon shall be by yeas and nays and recorded in a book kept for that purpose, with notice of the time and the purpose for which the meeting is held; and it is further provided that, after such assessment, the council shall sit as a board of equalization, as provided for by section 50.

Under section 50 the council is given power to act as a board of equalization to equalize the assessments, correct errors, etc., and shall have the same power as the board of county commissioners have in similar cases; that in all cases, before special taxes shall be finally levied, it shall be the duty of the council to sit as a board of equalization for the purpose of equalizing such proposed levy of special taxes or assessments, correcting any errors, etc., and shall continue in such session for not less than two days; shall hear complaints; and that it shall be its duty to equalize any such assessments, by correcting errors therein, and thereupon said assessment and special tax shall be finally levied.

Regarding the method for exercising the power conferred by statute upon municipal corporations, we understand the rule to be in this state that where a special mode of action is prescribed, that method must be followed in order to validate the action taken thereunder; but where no particular method for the exercise of the power is specified, city authorities may act by resolution or other appropriate manner, and such action will be as effectual as it would be by ordinance for the same purpose. *Fulton v. City of Lincoln*, 9 Nebr., 358; *McGavock v. City of Omaha*, 40 Nebr., 64; *State v. Birkhauser*, 37 Nebr., 521. With respect to the authority given by subdivision 63 of section 68, *supra*, to pave streets and levy assessments therefor, we regard that subdivision as respects the subject of levy of special taxes, as independent of subdivision 2. By the provision of subdivision 2, for the

levy of taxes, it is evidently meant such special assessments and taxes the levying or imposition of which is to be performed by an independent act or ordinance complete in itself, and of such taxes as are more permanent and continuing in their nature than those of special assessments for local improvements. It is at once obvious by an inspection of the different subdivisions of section 68 that they can not refer back to the preamble contained in the beginning of section 68, authorizing the city by ordinance to do certain acts, followed by sixty-three subdivisions. Many of these subdivisions, while classed as such, in fact are sections, "as much so as the other sections in the chapter." *State v. Babcock*, 23 Nebr., 134. Classing many of these subdivisions as sections, as we think they should be, we find complete, ample and independent authority for the levying of the tax, and in the manner adopted by the council. The authorization given by section 74, *supra*, to levy special assessments in the first instance by resolution, which is to become the permanent levy except as it may be modified by equalizing assessments and correcting errors, negatives the idea that the legislative intendment was to thereafter require another ordinance to complete the levy. It also appears to us, from a consideration of all sections related to the subject, that the legislature intended that after the levy had been made by resolution, as recited by section 74, and the council should sit as a board of equalization for the purposes mentioned, it should "thereupon," and without the delay incidental to the passage of a formal ordinance, make the final levy substantially after the manner of county commissioners, who levy taxes for general revenue purposes after performing their duties as a board of equalization. Again, it is provided by ordinance that a paving district should be created, in which ordinance provisions are made for the improvement of the streets by levying special assessments on property benefited thereby, the enactment of which may, we think, be followed by the successive steps necessary to carry

the provisions of such ordinance to a final conclusion by resolution or other proper action; and yet all such action is embraced in the original ordinance, and may be said to be under, by or pursuant to the same, within the meaning of the statute.

In four of the paving districts, viz., Nos. 6, 7, 10 and 11, the validity of the levy of the special assessments is challenged on account of the alleged insufficiency of the petitions of property owners praying for the creation of such districts and the improvement of the streets therein lying; it being urged that the action of the council in respect to such levies is void for want of jurisdiction. Most all of the facts upon which the judgment of the trial court is based were stipulated by the parties. With respect to the question now under consideration, it appears that the necessary number and foot frontage of petitioners as property owners joined in a request for the creation and improvement of the several paving districts; but as to the four above mentioned, the necessary number of owners of foot frontage did not individually sign the respective petitions, but were represented thereon by others, whose authority for representing those for whom they signed did not appear of record. Whether or not such authority was in fact given by the owners at the time, or whether the signatures were afterwards sanctioned and ratified, does not appear. It is reasonable to suppose that the city council investigated the sufficiency of the different petitions and found them to have been duly executed and legally presented. On their face all these petitions were sufficient. The record on which the city council acted, as it appears, affirmatively shows the required petition necessary to give the council jurisdiction to act in the matter. No protest or objection to the sufficiency thereof was presented. The case is not one where there is an entire absence of any petition, or where the petition on its face shows a want of the required number of signers to give the council authority to act; nor is it a case where the alleged insufficiency of the peti-

tions was presented to the council and an appeal taken from adverse action thereon. Even if some of the signatures were unauthorized, it is highly probable that the same were thereafter sanctioned and ratified by the owners, so as to preclude them from questioning the authority of the city council to act; and if such be the case, we are at a loss to understand upon what principle of the law the defendant in a collateral proceeding at this late date can complain. The attack in this respect, made on the action of the city council, is in a collateral proceeding, and if, after the lapse of a decade, when all have acquiesced and acted upon the assumption that the council had authority and jurisdiction to act, and much valuable property has borne the burden of the tax levied, been sold and transferred in faith of the legality of such proceedings, it may now be shown that owners of property were represented on the petition without authority, and thus render void all the proceedings had thereunder, the rule as to jurisdiction acquired by inferior tribunals has been carried to an extent, the disastrous consequences of which can scarcely be comprehended.

There exists, we apprehend, a clear and definite distinction between the rule recognized in this court, that in the levy of special assessments the record must affirmatively show compliance with all the conditions essential to a valid exercise of the taxing power, and the circumstances of the present case, where, in another proceeding, irregularity is sought to be established and made the basis for declaring the action taken without jurisdiction and therefore void. The rule laid down in *Ellis v. Karl*, 7 Nebr., 381, would seem applicable to the proposition under consideration. It is there held that a petition for relocation of a county seat, when determined by the board to be sufficient, can not afterwards, and in a collateral proceeding, be attacked on the ground that a large number of the names attached to the petition were fictitious, forged, or names of non-residents, leaving of the genuine signatures an insufficient number to authorize

the calling of an election. Neither the genuineness nor the sufficiency of the petition being questioned before the board, it was held that a suit could not be maintained to restrain the removal of the county seat because of the defects of the petition. However, as we view the case, so far as the defendant is concerned, it is immaterial whether or not the paving petitions had the required number of signatures. Upon the improvement of the street by the city council, it became the duty of the street railway company to pave its right of way in conformity with such improvement under the provisions of the statute, entirely aside from, and independent of, the question of the petition praying for the establishment of paving districts and the improvement of the streets therein. The authority to require the street railway company to pave its right of way does not depend upon the jurisdiction of the city council to establish paving districts and engage in the work of improving the same by reason of a petition asking for such improvement; but on the statutory ground that, when streets are improved by the city authorities, it is incumbent upon street railways occupying a part of the streets so improved to pave in conformity therewith the portion they occupy, and upon failure or refusal so to do, the council is authorized to perform the work, and by special assessment make the cost thereof a charge on the property of such railway company. The city council has authority to pave and otherwise improve a street independent of the provisions providing for the creation of paving districts, and levying special assessments for the cost of local improvements on abutting property owners specially benefited thereby. *State v. Birkhauser*, 37 Nebr., 521. The power to levy the tax upon the street railway company for the cost of paving between its tracks is independent of the power to create districts and improve the streets therein upon petition and at the cost of the property owners abutting thereon. The difference in the source of authority is fully recognized in the following cases: *Conway v. City of Rochester*,

51 N. E. Rep. [N. Y.], 395; *Storrie v. Houston City St. R. Co.*, 46 S. W. Rep. [Tex.], 796; *State v. Jacksonville St. R. Co.*, 10 So. Rep. [Fla.], 590.

In the assessments levied against the defendant's property are certain items of charges for cost of grading streets which are included as a part of the cost for the general improvements made at the time of the paving of such streets. It is argued that inasmuch as the statute recognizes grading as a distinct improvement, for which special assessments may be levied, the charge thereof can not be charged as expenses of paving under the authority given by the statute to collect the costs and expenses for paving the right of way, when a street railway company fails and neglects to perform its obligation in that respect. It is true, we think, that grading as a distinct and independent improvement may be engaged in by the authorities of a city, and the cost thereof levied against property benefited in the manner provided for by law; and in a case where the improvement consists only of bringing the streets to an established grade, some doubt would probably arise as to authority to require a street railway company to pay the cost of such grading as to its right of way under the provisions of the statute authorizing the levy of costs and expenses of paving, as in the case at bar. In this case, however, as we understand the record, the scheme or plan contemplated and had for its main object the paving of the streets, and the grading necessary to accomplish that purpose would, under such circumstances, be regarded as incidental to the main purpose, and a proper charge as and for the cost and expense of paving that part of the street required to be improved by a street railway company, and as such may be properly levied as a special tax and assessment for paving under the provisions of the statute under which the city acted. We understand the general rule to be that where there is a requirement to pay the cost of paving, as mentioned in the statute, by such requirement there is included and contemplated all inci-

dental work necessary and required to accomplish the main object, and that the cost of grading, when done as a part of the general paving improvement, is properly assessed as a part of the cost of such paving in contemplation of the statute. In this view we are supported by a number of decisions which seem to us to be founded in reason and sound in law. *Schenley v. Commonwealth*, 36 Pa. St., 29; *Dean v. Borchsenius*, 30 Wis., 236, 244; *Williams v. Mayor*, 2 Mich., 560; *Steckert v. City of East Saginaw*, 22 Mich., 104; *State v. Council of Elizabeth*, 30 N. J. Law, 365.

With respect to the items of charges under consideration, it also appears that the defendant company appeared before the city council acting as a board of equalization in pursuance to notices issued for that purpose and entered objections and protests against the assessment of these items as proper charges for the improvements for which the assessments were made, which objections were overruled by the city council, and from which ruling no appeal was taken. The city council was exercising authority conferred upon it in adjudicating such matters, and the defendant, we think, is estopped in this action from contesting the justness of these charges. Had it been dissatisfied, it should in a direct proceeding have sought a review and modification of the action of the city council in including such items as proper charges to be levied and collected as special assessments, and having neglected so to do, the question must be considered as having been finally adjudicated in these proceedings. *Webster v. City of Lincoln*, 56 Nebr., 502.

Complaint is made because interest was computed on the different levies for special assessments at the rate of twelve per centum per annum, and the judgment rendered decreed to draw interest at the same rate. We think this action was in strict accord with the provisions of the statute, and in conformity with the well settled rule of this and other jurisdictions with respect to the

rate of interest allowed on delinquent taxes levied for either general revenue purposes or as special assessments. In *Osgood v. Grant*, 44 Nebr., 350, it is held that, as to general revenues where delinquent taxes draw interest at the rate of ten per centum per annum, such rate was proper, and that the statutory rate continued after the judgment was rendered. We see no difference in principle in the case at bar and the one referred to. By the different provisions of the statute heretofore alluded to, it is specially provided that the cost and expense of paving a street railway right of way, where the company neglects or fails in its obligation, shall be levied as a special assessment and collected as other taxes and special assessments. In cities of the class that plaintiff belongs to, the statutory provision is that all delinquent taxes, both general and special, shall draw interest at the rate of twelve per centum per annum from the time they become delinquent. The reason for the legislature fixing a higher rate of interest on delinquent taxes than is ordinarily the rule is discussed to some extent in *Kittle v. Shervin*, 11 Nebr., 65, 72, by Judge COBB, writing the opinion of the court, and it is perhaps unnecessary for us to attempt to elaborate thereon. The statute unmistakably provides for the rate, and the action of the court in this regard is in strict conformity therewith. Statutory enactments of the character under consideration are very general, as will be seen by reference to the following authorities on the subject: *Ex parte Lynch, Trustee*, 16 S. Car., 32; *Craig v. Flanagin*, 21 Ark., 319; *Mulligan v. Hintrager*, 18 Ia., 171; *Nance v. Hopkins*, 78 Tenn. [10 Lea], 508; *Potts v. Cooley*, 56 Wis., 45; *Tobin v. Hartshorn*, 69 Ia., 648.

It is also claimed that many of the different assessments sought to be recovered in this action are barred by the statute of limitations, and we are cited to section 11 of the Code providing that an action shall be brought within four years on a contract not in writing, and upon a liability created by statute other than a penalty or a

forfeiture; and section 13, limiting the time as to a recovery for the two latter causes to one year. We understand the lien in cases of this kind to be perpetual in its character, and the provision as to limitation of actions in general can not be invoked when it is sought to enforce such lien. It is specially provided by section 50 that the lien created by the levy of special assessments and taxes shall be perpetual. We hardly think the legislature would do so foolish an act as to continue the lien indefinitely, while at the same time an action for its enforcement was barred under the general statute of limitations. The subject has received a construction in *Wygant v. Dahl*, 26 Nebr., 572, wherein it is said: "Whatever may be the remedy for the collection of delinquent taxes, * * * the tax lien thereon has been constantly preserved, constantly recognized and reiterated by the legislature on every proper occasion; and this right and lien is recognized as unaffected by the lapse of time, if it is within the sense of language to accomplish it." A clear distinction is recognized between a lien enforcing a private right and one enforcing a public right. This case being of the latter class the statutes can not be invoked as a ground for barring the action for the enforcement of the lien created by the provisions of the statute.

The foregoing covers in the main the essential points presented in regard to the validity of the sections of the statute assailed and the legality of the several acts of the city authorities taken in pursuance of legislative authority. We now approach, for consideration, the case in another aspect, namely, the nature and extent of the several liens arising by virtue of the statute and the action of the city council, and the property against which the lien attaches, as well as the question of priority of liens as between the plaintiff city and the defendant mortgagee.

In the fourth conclusion of law it is held by the trial court, in substance, that the consolidation of the several companies imposed upon the consolidated company all

duties, obligations and liabilities of the constituent companies, as well as giving it the rights and privileges of such companies; that under the articles of consolidation the defendant company assumed all legal liabilities, and hence would be liable for all taxes and assessments legally levied against each of the constituent companies, and the liens arising thereby upon merger by consolidation attached to the new property in its entirety or as one property. The conclusion reached by the trial court in this respect is excepted to, and it is asserted with much positiveness that the liens created by the several levies attached only to the property and lines of the company against which assessed, and the fact of after consolidation can not have the effect of extending such liens to all the property brought together by the act of consolidation. In other words, it is contended that the liens created by the several levies against different properties are not affected by the after acts of consolidation and can only be enforced as against the property to which they attached at the time and by virtue of the levy as then made. These questions have caused us not a little labor and investigation in an effort to apply sound legal principles and reach a correct conclusion. We are disposed to the view that, ordinarily, a lien on specific property afterwards merged with other property by companies consolidating will not extend to such other property on which it was not a lien at the time of the consolidation. This of course is subject to the rule of betterments and accessions. That such a lien can not be diminished or impaired is a rudimentary principle of justice acknowledged by all, and which principle in this state has been incorporated into the statutes. The lien in question may be regarded as one for taxes. It is so denominated in the statute and is treated as other taxes levied for general purposes or as special assessments. It is made to cover all the property of a street railway company against which it is assessed as one property. The object of the statute in preserving liens on property consolidated unimpaired is obviously for the

benefit of those entitled to such liens. The consolidated company, by operation of law, assumes all the burdens of the constituent companies and correspondingly succeeds to all benefits, rights and privileges. In the several acts of consolidation of the different street railway companies, by express terms, the new company assumed all the contracts and indebtedness of the constituent companies. While the several sums due for taxes levied by special assessments did not arise under contract, nor are they items of indebtedness in the technical sense of the term, yet it seems apparent that the consolidated company, by its own acts, burdened itself with all obligations of the companies merged into it by the act of consolidation. It certainly did so by operation of law. It was charged with notice of these several assessments, and doubtless had actual notice as well. By the several acts and agreements of consolidation, the object to be accomplished was to bring the several companies into one new company. The old companies lost their identity and individuality and became merged into the new company. The property was by such acts brought together as one complete whole, and has since been operated as such. The constituent companies and their several properties have been swallowed up by the new one. The tax lien, says the law, shall exist against the property as one property. The different parts before consolidation as a whole have been joined, so that at the time of the suit but one property existed against which the action could be directed. It would be difficult, indeed, if not impossible, to divide the new property into fractional parts so as to correctly represent the constituent companies. While in a measure, it is probably true, that it can be divided up again, and if required should be as far as possible, if any rights are to suffer by not doing so. But can the consolidated company be heard to complain and demand as a legal or equitable right that the division shall take place, the liens separated, and the property sold in fractional parts and by piecemeal? Tax liens existed against the prop-

erty of each of the constituent companies when consolidated with another company. The defendant company acquired the property of the electric company, against which certain of the liens existed, and it would seem that as to such acquired property the lien against the defendant would by that act extend over the acquired property as though it had been purchased, or added to the original property by extension of its own tracks. And for the same reason, the lien of the electric company would, in bringing the two properties together and making of them but one property, extend over the lines of the new company "as one property," the liens being for taxes, and against the property as a whole, and by consolidation the new company being substituted, as it were, for the company merged into it, it would follow as a logical deduction that the substituted company's property is likewise charged with the lien on all its property in its entirety and as one entity or one piece of property. Not only does this result follow because of the nature of the lien attaching to all the property against which assessed and the company substituted therefor, but also on the ground of public policy, which requires, except as against those having conflicting liens whose rights are prejudiced, that such property shall be kept intact and operated as a whole for the benefit of the people in the discharge of a duty which such corporation owes to the public. The rule is, we think, and ought to be, that the sale of parts and parcel of a line of street railway ought not to be required and enforced, except where, to preserve vested rights and maintain unimpaired liens thereon, it becomes imperative to do so.

In Elliott on Railroads it is said at section 790: "While it is probably true that there may be a lien on the right of way of a railroad for a local assessment, where such assessment is authorized by statute, the manner of enforcing such assessment is not clearly settled. The right of way of a railway company is a part of the company's property, without which it could not perform the duties

it owes to the public. To subject a portion of the right of way to a sale to enforce a local improvement would greatly embarrass, if not entirely destroy, the ability of the company to perform its public functions. The rights of the public are regarded as superior to the rights of any individual, or group of individuals. Local assessments are usually levied on a small portion of a railway right of way, varying from a few feet in length to miles in length. To permit such portion to be sold would prevent the operation of the road, and, on grounds of public policy, it is held that the ordinary remedy of enforcing the collection of a local assessment by a sale of the property benefited does not apply to the enforcement of an assessment against the right of way of a railway company. While there is a conflict of authority on this subject, the decided weight is that the right of way, if sold to pay the assessment, must be sold as a whole and not in broken fragments. 'The public have a right to have a railway remain an entirety, and it would be destructive to public interest to permit it to be broken up into disjointed and practically useless fragments.' "

The views above expressed are supported by the following authorities: *Farmers Loan & Trust Co. v. Canada & St. L. R. Co.*, 127 Ind., 250; *Plymouth R. Co. v. Colwell*, 39 Pa. St., 337, 80 Am. Dec., 526. The principle that railroad property is assessed as a unit requires the conclusion that the lien for taxes attaches to the entire property. *Georgia v. Atlantic & G. R. Co.*, 3 Woods [C. C.], 434, 437; *Thompson v. Abbott*, 61 Mo., 176.

By different acts of consolidation all of the street railway companies against which special assessments were levied, except the Rapid Transit Company, were consolidated with and merged into the defendant railway company at the time of the execution of the mortgage under which the defendant trust company claims. By these several acts of consolidation, and the merging of the old into the new, the liens before existing upon the property of the constituent companies extended to the new com-

pany's property as one property. This being true, it is at once apparent that the mortgagor could give no greater rights to the mortgagee than it then possessed, and, therefore, the mortgage was made and accepted subject to the lien then existing for the said several assessments against the property in its entirety. It also appears by the record that in the trust company mortgage, which covered at the time of its execution all the property of all save the Rapid Transit Company, were provisions for the payment of liens against the property mortgaged for special assessments to pay cost of paving, for which it was stipulated the bonds to be sold in an amount necessary for that purpose should be a first lien on that property. The mortgagee has by these provisions recognized the existence of the liens attaching to the property at the time of the execution of the mortgage, and can not now be heard to object to the enforcement of the same.

At the time of the execution of the mortgage the Rapid Transit Company, against which certain liens existed for special assessments, was an independent company, which was afterwards consolidated with the defendant company, and the question therefore arises as to the relative rights of the city and the mortgagee with reference to their respective liens against the property. The liens are conflicting and must be adjusted according to some recognized principle of law. Can the lien of the city for special assessments levied on the property of the Rapid Transit Company extend to all the property of the new company after consolidation prior to and in disregard of the lien theretofore created on the property of the original company by virtue of the said mortgage?

By section 8, article 7, chapter 72, Compiled Statutes, 1899, it is specially provided, with respect to street railway corporations being merged into a new corporation by consolidation, "That all the rights of creditors and all liens upon the property of either of said corporations shall be and hereby are preserved unimpaired, and the respective corporations shall continue to exist so far as

may be necessary to enforce the same." At the time of the consolidation the trust company possessed a lien on the property of the defendant company to the extent of the sum due on the bonds sold and secured by the mortgage held by it as trustee. The city held a lien against the same property for special assessments levied, and also a similar lien on the property of the Rapid Transit Company consolidated with it. The liens were conflicting, and to retain each unimpaired necessitated a finding of the several sums due against the respective properties and the priority of each. We do not understand upon what principle of law the lien existing against the property of the Rapid Transit Company can be made a prior lien upon the property mortgaged to the defendant trust company. This, it seems to us, would be an impairment of the lien to that extent in violation of the statutory provisions quoted, as well as the fundamental principle against the impairment of the obligation of a contract without the consent of the parties thereto. We do not think it a sufficient answer to say that the value of the property acquired by consolidation from the Rapid Transit Company exceeded the tax lien with which it was burdened, and which therefore might be spread over the entire property without prejudice to the interest of the mortgagee. Of the value of each of the properties we are not fully informed by the record. We are, however, satisfied that the defendant trust company may rightfully insist that the property on which it holds a lien shall not be charged, beyond the terms of its contract, with a lien not existing when its rights thereto attached. As between conflicting equities and lien-holders the rule is settled and well grounded in principles of equity that the liens follow the property into the consolidated company, and one can not take precedence, by reason of such consolidation, over other liens already existing. The lien of the defendant trust company on all of the property of the street railway company before consolidation can not be subordinated to the lien of the levy for special

assessments on other property afterwards acquired by consolidation, and in this respect we think error was committed.

It is also urged that the trial court erred in awarding the city a prior lien for certain special assessments levied after the mortgage lien was created. The statute on the subject is as follows: "No mortgage, conveyance, pledge, transfer or incumbrance of any such property of any such company or person, or of any of its rolling stock or personal property, created or suffered by any such company, or party, after the time when any street or part thereof, upon which any such street railway shall have been laid, shall have been ordered paved, repaved, macadamized or repaired, shall be made or suffered, except subject to the actual or prospective lien of such special taxes, whether actually levied or not, if such levy be in contemplation." (Compiled Statutes, 1899, ch. 13*a*, art. 1, sec. 79.) The lien on the property assessed is only by virtue of the statute. The legislature has, for reasons no doubt appearing to it as sufficient and satisfactory, enacted that the tax lien should be prior if the improvement is in contemplation, whether the taxes are actually levied or not. By the language used it is contemplated that if the improvement has been projected and is under way, that is, if the street "shall have been ordered paved," no lien shall be created except subject to the prospective lien. The language of the statute excludes the idea that under all circumstances the lien for special assessment shall be superior to all other liens. If force and effect be given to the language of the statute, and the words used be taken in their ordinary and natural meaning, the conclusion is irresistible that an incumbrance placed on the property before street improvements are projected is prior to a lien for special assessments levied thereafter for such improvement. It is not for us to engage in judicial legislation or trench on the clearly expressed meaning of the language used by the legislature in its enactment of law. The legislature having deter-

mined under what circumstances special assessments levied on property of street railway companies for street improvements should be a first lien on the property assessed, it follows under any recognized rule of construction that valid liens on the property before any improvements are made or contemplated within the meaning of the section can not be subordinated to the statutory lien. We observe no escape from this conclusion.

Counsel for the city insists that the general provisions, as to assessments levied generally being liens on the property assessed prior to all others, should likewise govern in the case at bar. We can not so construe the law without ignoring entirely the language quoted, and this we are not at liberty to do. Were it not for such language, and relying only on the general provisions with reference to special assessments, we could readily agree with counsel in this regard. The principle of subordination of liens for taxes to liens created by contract has been also recognized by the legislature in the act providing that a general lien for taxes shall exist in favor of the state on all the personal property of the tax debtor from and after the time the assessment books are placed in the hands of the county treasurer or tax collector for collection; and yet it is held that a mortgage in good faith executed on such property prior thereto is a superior lien to that of the lien for taxes. *Reynolds v. Fisher*, 43 Nebr., 173; *Farmers Loan & Trust Co. v. Memminger*, 48 Nebr., 17; *Chamberlain Banking House v. Woolsey*, 60 Nebr., 516.

Certain sums were charged against the defendant company as and for special assessments for the purpose of securing certain obligations assumed by the company under an ordinance providing for the laying of its tracks in streets which had already been paved. The ordinance provides substantially as follows: That when a street railway company desires to construct its tracks upon any of the paved streets of the city, it shall file with the council a written application for a permit, in which should be

stated where the proposed track is to be laid, and it should also contain an agreement to abide by and conform to all requirements of the ordinance; that upon the filing of such application, the council shall cause an estimate to be made of the cost of the paving between the rails of such proposed track, and the company is required to pay for such privilege as follows: If the proposed tracks are constructed within one year after the cost of such paving has been levied and assessed, then the company is to pay the whole of the original estimated cost of paving between the rails of its tracks; if constructed after one year and within two years, then it should pay nine-tenths of such cost; and for each year after, a reduction of one tenth of the original cost shall be made. The company is also required to remove and relay paving displaced in such track construction at its own expense; the amount to be paid, it is provided, may be made by paying the whole sum due within fifty days from the date of the levy or date of the permit for such proposed construction, or in equal annual installments of one-tenth of the original cost, deferred payments to bear interest the same as special assessments upon real estate for paving; payments to be made to the city treasurer and by him apportioned between the intersection and district paving funds, according to the amounts of such taxes in intersections and districts; and the same apportioned to the district funds to be divided among the several parcels of real estate assessed with the cost of such paving in accordance with the ratio of such assessments as a credit upon the assessments thereon; that such company shall also execute and deliver a good and sufficient bond to the city for double the amount charged, with good and sufficient sureties, conditioned, that the company would pay the sums of money due as provided and comply with all the provisions of the ordinance; that upon the filing of the bond and compliance with the preceding requirements of the ordinance, the council may grant a permit to such company to construct its tracks as desired, and

the company thereupon be authorized to proceed with the work. It will be observed that there is nothing in the ordinance which authorizes the levying of a tax, or the making of the sums due under the permit granted, a lien upon any of the property of such company. The company was required to give a bond for the faithful performance of the obligations it assumed in securing the permit, and it is quite evident that reliance was placed upon such security, and not upon a lien which if it might be created in fact never was. It is not to be doubted that the liability was a civil one existing against the company, to be enforced as all other civil liabilities, with the additional security given by the bond required to be executed in connection with the privilege obtained to lay the tracks in the streets already paved. There is no authority, however, for the levying as a special assessment the amounts due under the terms of the ordinance; nor do we understand that such was in fact done. The sum due, it appears, was simply entered upon the records of the city by the clerk as though it had been levied as a special assessment. No authority existed for making the several sums due under the ordinance a lien on the property of the defendant, as would be in the case of levies of special assessments under the statute for paving a right of way in conformity with a street improvement. Without authority, no lien can exist. Says Judge Cooley in his work on Taxation (2d ed., p. 448): "Municipal corporations, it need hardly be said, have no authority to create liens, by ordinance or otherwise, when none has been expressly conferred upon them." This rule is supported by *City of Philadelphia v. Greble*, 38 Pa. St., 339; *Eschbach v. Pitts*, 6 Md., 71; 2 Desty, Taxation, 734. It is quite clear, and, as we understand, conceded by counsel for the city, that no legal grounds exist for holding the sums due under the terms of the ordinance a lien upon the property of the defendant company.

There is no force in the argument that the action is

brought without the authority of the city. The city is by statute authorized to sue and be sued in its corporate name. The action is brought by it by its proper law officers, and the authority therefor, until the contrary is shown, will be presumed. It is not required in the first instance to plead or prove that the city authorized the bringing of the action.

A mistake in computation of interest of some $6,000 is admitted, and a remittitur has been filed; but as the cause must be reversed for reasons hereinbefore given, this matter can be corrected in a subsequent proceeding.

The judgment must be reversed and the cause remanded for further proceedings according to law and in conformity with the views expressed herein.

REVERSED AND REMANDED.

CITY OF OMAHA V. JOHN I. REDICK.

FILED JANUARY 23, 1901. NO. 9,299.

1. **Real Estate:** ACTION FOR VALUE: TITLE: CONTRACT. In the absence of an express or implied contract one can not maintain an action to recover the value of real estate while the legal title thereto is in the defendant.

2. **Public Street:** PRIVATE LAND: CONDEMNATION: RECOVERY OF VALUE: INVESTMENT OF TITLE. Where the city appropriates for a street the lands of an individual, who subsequently sues the municipality and recovers their value, such judgment has the effect to invest the city with title to the lands.

3. **Statute of Limitations.** The statute of limitations does not begin to run until the cause of action has accrued.

4. **Election of Remedies.** The principle of election of remedies can be applied only where there are two or more co-existing remedies, and these must be so inconsistent that a party can not logically choose one without renouncing all others. *State v. Bank of Commerce of Grand Island*, 61 Nebr., 22.

5. ———: ESTOPPEL. If the law affords but a single remedy, a party is not precluded from resorting thereto merely because he sought to avail himself of another remedy to which he was not entitled. *Supra.*

ERROR from the district court for Douglas county. Tried below before FAWCETT, J. *Affirmed.*

W. J. Connell and *E. H. Scott*, for plaintiff in error.

William A. Redick, contra.

NORVAL, C. J.

In 1876 John I. Redick conveyed to the city of Omaha a certain tract of land, which now constitutes a portion of Harney street in said city. The deed was executed by Redick through mistake of fact, one Gibson having represented to him, falsely, that he had a contract with the city to grade and improve the street, and that if the strip of land was conveyed by Redick, that portion of the street which included such strip would be graded and improved, and thus enhance the value of neighboring land owned by Redick. Relying on these representations, Redick made the conveyance mentioned. In 1877 or 1878, the city having failed to improve the street, Redick brought action against it in the district court, alleging his conveyance and an agreement on the part of the city to improve the street, its failure to do so, and asking as damages the value of the property conveyed. The answer was a general denial, and judgment was had for the defendant, the latter never having in fact a contract with Gibson to improve the street. In 1886, however, the city took possession of this strip of land, and graded, guttered, paved and opened it as a street, and is now in possession of it as such. In 1890 Redick commenced suit in the United States circuit court to cancel the deed, on the ground that it had been obtained from him by mistake of fact on his part, and through the false representations before mentioned. The suit resulted in a decree in 1892 in his favor, directing that the city should pay him, within ninety days, the value of said land, or in case of its failure to do so, the deed be canceled. It failed to pay him for the land, as required by such decree; there-

upon, in 1892, Redick presented to the city council a written demand that it deliver to him possession of the land, or take proper proceedings to condemn it. It failed to do either of these things, and he brought this action, which resulted in a judgment in his favor, and the city brings the record here for review.

We proceed to examine the objections raised by the petition in error in their order of presentation.

It is first contended that when the city went into possession of the property in 1886 Redick had an election of remedies, viz., either to sue for the value of the property, or to bring an action to cancel the deed; and having elected to have the deed canceled, he can not now sue to recover its value. The argument is untenable, for the reason that he did not in 1886 have a choice of remedies. So long as the deed was in existence and uncanceled, the legal title to the property was in the city, and with the legal title went the right to possession. No action for value would lie, there being neither an express or implied obligation on its part to pay for the property. His only remedy was a suit to set aside the deed. So soon as the deed was canceled by the suit commenced in 1890, the possession of the city became wrongful, and then, and not until then, did Redick have a choice of remedies. He could then bring ejectment, or the action he has brought. It is insisted, however, that to permit the maintenance of this action is equivalent to allowing him to retain title, and at the same time to recover the value of the property; but we do not think so. A judgment for its value has the effect to invest the city with title to the land. The action is analogous to actions for conversion of personal property. Lewis, Eminent Domain, sec. 623; *Pope v. Benster*, 42 Nebr., 304; *City of Omaha v. Croft*, 60 Nebr., 57.

The next contention is that the action is barred by the statute of limitations, it being assumed that his cause of action accrued in 1886, when the city went into possession of the property. As before stated, he had no

cause of action for value until the deed was canceled in the suit instituted in 1890, judgment in which suit was not entered until 1892, and as the present action was commenced in 1895, no statute could have run against it.

The last point made is that the issues involved in this case are identical with those in the action commenced in 1877, and the judgment in that action is a bar to this. With this we cannot agree. He had no right of action in 1877, for either value or damages. In bringing that action he merely mistook his remedy; wherefore judgment in that case could not preclude him from bringing an action when his cause of action subsequently accrued. *State v. Bank of Commerce of Grand Island*, 61 Nebr., 22.

No error having been pointed out, the judgment of the lower court will be

AFFIRMED.

CONNECTICUT TRUST & SAFE DEPOSIT COMPANY, APPELLANT, V. E. A. FLETCHER ET AL., APPELLEES.

FILED JANUARY 23, 1901. No. 9,304.

1. **Promissory Note:** INDORSEMENT: PLEDGEE WITHOUT NOTICE. Where a negotiable promissory note is indorsed and transferred before due, as collateral security for a loan of money then made, the pledgee without notice is a holder for value.
2. **Collateral Security:** TRANSFER TO TRUSTEE. Collateral security may be transferred by agreement to a third party as trustee.
3. **Decree of Foreclosure:** SUBSEQUENT SUIT BY HOLDER OF NOTE: BAR. A decree of foreclosure in a suit brought by a mortgagee who had previously transferred the notes secured by the mortgage to a holder for value is not a bar to a subsequent foreclosure proceeding by the holder of such note.

APPEAL from the district court for Franklin county. Heard below before BEALL, J. *Reversed.*

C. C. Flansburg, for appellant.

J. P. A. Black, F. I. Foss, C. E. Budlong and *E. A. Fletcher, contra.*

NORVAL, C. J.

At all times hereinafter mentioned the Connecticut Trust & Safe Deposit Company and the Loan & Guarantee Company of Connecticut were, and are, corporations with principal offices located at Hartford, in the state of Connecticut. They will be hereinafter referred to as the trust company and loan company, respectively. The business of the loan company was that of loaning money, principally upon the security of western farm mortgages. It carried on a large business in this state. During part of said time Dawes & Foss was a firm of attorneys doing business at Crete in this state, and for a number of years said firm, and after its dissolution, in 1890, through said Foss, negotiated the loans made by said loan company in this state. The firm of Dawes & Foss, and afterwards Foss, collected the interest as it became due upon said loans, remitting same to the said loan company, in many instances also collected the principal and remitting it in the same way, transmitting to the mortgagors the interest coupons, or the notes and mortgages, which it received from the loan company after the payments were received by the company. The firm and Foss also acted as attorneys for the loan company in foreclosing a large number of such mortgages, probably two hundred, and acted very generally as the agents and attorneys of said company in this state. In 1886 said loan company negotiated a loan, through said Dawes & Foss, to one E. A. Fletcher of Franklin county, in the sum of $1,400, taking the note of said Fletcher and his wife for said amount, due April 1, 1891, with interest coupons due semi-annually after date, which loan was secured by a mortgage on real estate situate in said Franklin county. In January, 1886, an agreement was entered into between said trust company and said loan company, a copy of which follows:

"This agreement, made and entered into this 1st day of January, 1886, by and between the Loan and Guarantee

Company of Connecticut, a corporation organized under the laws of the state of Connecticut and located in the city of Hartford, in said state, and the Connecticut Trust & Safe Deposit Company, a corporation organized under the laws of the state of Connecticut and located in said city of Hartford, witnesseth:

"That whereas the said Loan & Guarantee Company of Connecticut is desirous of issuing and selling its own debentures, and of securing the same by pledge of mortgages of real estate and other evidence of indebtedness, which said debentures are to be issued in series of not less than $25,000.00 each, and all the debentures comprising each series to be made payable at the same date:

"Now, therefore, for the purpose of securing the payment of the principal and interest of such debentures, the said Loan & Guarantee Company of Connecticut agrees to deposit with and transfer to the said Connecticut Trust & Safe Deposit Company notes and bonds, secured by first mortgages of real estate worth at least two and one-half times the amount of any and all of said notes and bonds, to an aggregate amount of at least ten per cent, more than the total amount of each series of debentures issued, to be held in trust by said Trust & Safe Deposit Company for the benefit of the purchasers and holders of said debentures until their maturity and payment in full.

"The character and value of the said mortgage loans deposited as security are not known to the trustee except as appears by the papers accompanying the loans and as certified to by the Loan & Guarantee Company and upon which basis the trustee makes its certificate.

"It is further expressly understood and agreed by and between the parties hereto, that the Loan & Guarantee Company shall be entitled to receive the interest upon the securities held in trust by the said Trust & Safe Deposit Company to secure the debentures of the said Loan & Guarantee Company as long as the interest upon the said debentures shall be properly paid, but no longer;

and in case any of the securities so held in trust shall make default in interest for a period of thirty days, it shall be the duty of the said Loan & Guarantee Company to substitute for the securities in default of other mortgage securities of the same face value. Said Trust Company agrees at any time to deliver to said Loan & Guarantee Company any of the securities held in trust by it to secure any series of said debentures, upon substitution and transfer to it by said Loan & Guarantee Company of other securities of equal or greater face value in the place of any such to be withdrawn.

"And in case default shall be made by said Loan & Guarantee Company in the payment of the interest coupons on any of its own debentures, and such default shall continue for sixty days, or if default shall be made in the payment of the principal of any of its said debentures, then said trustee may at once proceed to collect or sell, in such manner as said trustee may deem to be best, the securities held by it in trust to secure such payment, as rapidly as may be done, and apply the proceeds thereof, after payment of all costs and expenses and a reasonable compensation for services, to the redemption and payment of such interest coupons or debentures as are in default, and to pay over the balance, if any there be, to said Loan & Guarantee Company, or if there be not enough received from such collection or sale to satisfy said debentures, proceed at the option of said Trust Company to endeavor to collect the balance necessary for the full payment thereof, by due process of law, from said Loan & Guarantee Company.

"It is further agreed that whenever said Loan & Guarantee Company shall produce and surrender to said Trust Company any debentures of any series on which said Trust Company as trustee has placed its certificate, and shall satisfactorily show that the same have been redeemed or withdrawn from sale and cancelled, the said Trust Company will surrender and deliver to said Loan & Guarantee Company of Connecticut an amount of the

securities held in trust proportionate to the amount of debentures surrendered and cancelled.

"And the said Connecticut Trust & Safe Deposit Company agrees to receive and hold in trust said securities as hereinbefore mentioned, applying or surrendering the same only in accordance with the foregoing agreement; and upon all such debentures so issued, for which it holds the securities as aforesaid in trust, to place its certificate that such deposit of securities has been made; and that for such services so rendered it will charge a reasonable compensation, which said Loan & Guarantee Company of Connecticut agrees to pay.

"In witness whereof the parties to this agreement have hereunto caused their names to be subscribed and their seals affixed, the day and year above named, at the city of Hartford.

"THE LOAN & GUARANTEE COMPANY OF CONNECTICUT,
"By WILLIAM L. MATSON, *President.* [L. S.]
"CONNECTICUT TRUST & SAFE DEPOSIT COMPANY,
"By M. H. WHAPLES, *Treasurer.*" [L. S.]

After the receipt of this Fletcher loan by the loan company, and long before its maturity, it transferred it to said trust company, in pursuance of said agreement, turning over to it the note together with the mortgage, which latter was assigned to said trust company, but the assignment was never by it recorded in Franklin county. The note was indorsed as follows:

"For value received we hereby sell, assign and transfer the within bond, together with all interest in and rights under the mortgage deed securing the same, without recourse.

"THE LOAN & GUARANTEE COMPANY OF CONNECTICUT,
"By WM. L. MATSON, *President.*"

After the trust company took possession of said note, coupons and mortgages, the interest upon the debentures secured thereby was paid and the trust company cut from the collateral notes in its possession, among which

was Fletcher's note, the due interest coupons and delivered them to the loan company, which forwarded them to Dawes & Foss, or to Foss, after the dissolution of the firm, who forwarded them to Fletcher, the latter having paid the interest to said Dawes & Foss, or to Foss. After the maturity of the note, the same not having been paid, Foss commenced suit in the district court of Franklin county, in the name of the loan company, to foreclose the mortgage. As a matter of fact, Foss did not have possession of the note or mortgage, the same being in the hands of the trust company, and although the suit proceeded to decree, neither the note nor mortgage was offered in evidence, nor were they ever in possession of said Foss. Afterwards, Fletcher and wife conveyed the mortgaged premises to one Furst, who paid into the office of the district clerk of Franklin county a sum sufficient to discharge the amount of the said decree, and the decree was duly discharged of record by the clerk, and a receipt of record was duly entered by said Foss in the name of the guarantee company. In January, 1893, the clerk of the district court executed a formal satisfaction piece, which was duly recorded in the county clerk's office, and later an order was made by the court satisfying and discharging the *lis pendens* which had been filed in the cause. The trust company retained in its possession said note and mortgage until November, 1895, when suit was instituted in its name in Franklin county to foreclose the mortgage. Furst was a defendant, and set out the facts of the former foreclosure by the guarantee company, and the payment and discharge of the decree as hereinbefore recited, and claimed that the action of Foss and the loan company in the matter was binding on the trust company. Upon the issues made the case went to trial, and the court entered a decree in favor of the defendant Furst and against said trust company, which appeals to this court.

Upon evidence almost identical with that offered in this case, so far as the relations of Foss with the loan

company are concerned, we have held that Foss was undoubtedly the agent of said company to collect the principal of loans as they matured (*Root v. Fast*, 58 Nebr., 498); and we have no doubt of the correctness of that holding. Were the evidence relative to the transfer of the note and mortgage to the trust company similar to that in the case cited, we should not hesitate to affirm the decree of the lower court, and would do so any how if our sympathies for the defendant who paid his money in good faith, believing that he was canceling the mortgage in question, were to control our decision. But the evidence is of such character as to constrain us to hold that the court below erred in finding that either the loan company or Foss was the agent of the trust company, to collect the principal sum due on the loan or that any act of the trust company would justify the defendant in relying on Foss's authority to act as either agent or attorney. The contract between the loan company and the trust company, quoted above, made the trust company the holder for this mortgage and note in trust as security for the payment of the debenture bonds of the loan company. The note and mortgage being held in pledge, that fact entitled the holder; the trust company, to all rights and privileges of a holder for value before maturity. *Koehler v. Dodge*, 31 Nebr., 328. It is also doubtless true that a transfer of collateral security may be made to a third party as trustee by agreement. *City Bank v. Perkins*, 29 N. Y., 554. But it is claimed by defendant that because the agreement between the two companies obligated the loan company, if the note and mortgage were not paid at maturity, to take them up and substitute others in their place, the transfer was conditional, and for that reason it could not be considered a holder for value. We can not so conclude from that fact. The condition was not complied with, and the trust company was entitled to hold the papers, and to proceed to collect the debt from the mortgagor, exactly as it would have been entitled to collect any note held as collateral se-

curity, if the loan secured by them was not paid. Hence we can not reach the conclusion that the condition was such as to make the trust company any less a holder for value than would be the holder of any paper held as collateral security. The evidence fails to show any act or agreement on the part of the trust company from which a legal conclusion can be reached, that either the loan company or Foss was its agent to collect the principal of this note. The prior foreclosure was not a bar to this suit. *Todd v. Cremer*, 36 Nebr., 430.

The decree of the lower court must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ORIENT INSURANCE COMPANY, APPELLANT, V. SALVADOR HAYES ET AL., APPELLEES.

FILED JANUARY 23, 1901. No. 9,305.

1. **Finding of Fact:** REVIEW. A finding of fact based on fairly conflicting testimony will not be disturbed on review unless manifestly wrong.
2. **Collection:** AUTHORITY OF ATTORNEY: POSSESSION OF NOTE AND MORTGAGE. An attorney may have authority to collect for his principal a note and mortgage without having the same in his possession.
3. **Evidence.** Evidence examined, and *held* to sustain the finding of the trial court.

APPEAL from the district court for Franklin county. Heard below before BEALL, J. *Affirmed.*

C. C. Flansburg, for appellant.

J. P. A. Black, *F. I. Foss* and *H. Whitmore*, *contra.*

NORVAL, C. J.

On March 1, 1890, Salvador Hayes and Mary J. Hayes, his wife, borrowed of the Loan & Guarantee Company

of Hartford, Connecticut (hereinafter called the guarantee company), the sum of $1,300 and secured the payment thereof by a mortgage on real estate in Franklin county. F. I. Foss, of Crete, Nebr., negotiated the loan for the lender. The loan was evidenced by a note of $1,300, dated March 1, 1890, due March 1, 1895, with interest at 7 per cent per annum, payable semi-annually. Coupons for the interest were attached to the note. To secure the said debt which said note evidenced, the real estate of the said Salvador Hayes and Mary J. Hayes was mortgaged. Said note was made payable at the office of the guarantee company. The mortgage, after acknowledgment, was filed and recorded on March 6, 1890. On April 16, 1890, the Orient Insurance Company (hereinafter called the insurance company), appellant herein, claims to have purchased the said note of the guarantee company, paying therefor the full face of said note and accrued interest, amounting to $11.38; and that it was thereupon duly indorsed by the guarantee company, without recourse, delivered to the insurance company, and that it remained in the possession of the latter until June 8, 1895, when, not having been paid, it was sent out for collection. After the alleged transfer of said note to the insurance company, and on or about November 21, 1892, said Foss, assuming to act for the guarantee company, filed a petition in the district court of Franklin county against the mortgagors, praying foreclosure of the said mortgage, which suit was brought in the name of the guarantee company, as plaintiff. On February 28, 1893, a decree of foreclosure was entered therein, the court finding that by agreement of parties there was due the guarantee company the sum of $1,630, and that there was due to Charles C. White, as receiver of Dawes & Foss, the sum of $145, which was a second lien; and then followed the usual order of sale for the amount found due, if not paid on a specified date. Before the order of sale issued, and on December 12, 1893, the appellee, Elvira J. Sipes, together with her husband, Robert J.

Sipes, now deceased, purchased the mortgaged premises of Salvador Hayes and Mary J. Hayes; and on or about March 5, 1894, the said Robert J. Sipes, for and on behalf of himself and wife, paid to the clerk of the district court of Franklin county, $1,968.85, and the clerk of said court duly receipted to him therefor, and afterwards, on March 26, 1894, the clerk executed a satisfaction certificate to Sipes, and delivered the same to the county clerk of Franklin county, and on the same day the said satisfaction certificate was duly recorded. The note and mortgage were, on June 8, 1895, forwarded to C. C. Flansburg, an attorney at Lincoln, Nebraska, for collection, and on November 9, 1895, a petition was duly filed in the office of the clerk of the district court of Franklin county, praying for a foreclosure of said mortgage. The defendants, Salvador Hayes and Mary J. Hayes, filed their answer, admitting the execution of the note and mortgage and pleading the payment thereof as hereinbefore stated; that the guarantee company was the agent of the insurance company, and as such foreclosed the mortgage in the district court of Franklin county in 1893, in its own name; that F. I. Foss was the general agent of the guarantee company, its vice-president and general attorney, and as such agent and attorney was fully authorized to collect, by law, any and all moneys due from any and all parties in the state of Nebraska; that it was the custom and usage of said guarantee company to appoint agents to do its business, and said Foss was the agent and attorney for that purpose; that if the plaintiff actually owned the note and mortgage, it was careless and negligent in not recording an assignment of it in Franklin county, and in not notifying the defendants, the mortgagors, that the plaintiff had treated the guarantee company as its agent, in the collection of interest and principal, in other cases, as well as in this, and plaintiff had thereby held out to the world, or allowed the guarantee company to do so, to every person doing business with it, that the said loan and guarantee company were

the owners of the mortgage and that, therefore, it is estopped from claiming any right to said note. Elvira G. Sipes filed a separate answer, alleging substantially the same facts, in addition thereto the purchase of the premises, by Robert J. Sipes and herself, subject, however, to the decree of foreclosure then entered; and the decease of Robert J. Sipes. Plaintiff filed its reply, and at the December, 1896, term of said court a decree was entered finding in favor of all the defendants and against the plaintiff, and that the note and mortgage together set forth in the plaintiff's petition were duly foreclosed at a prior term of said court, and then proceeded to dismiss the case and cancel and discharge the lien of the mortgage. From this decree plaintiff appeals.

Counsel for the insurance company, in his brief, concedes the necessity of establishing that it was the owner of the note and mortgage for value before maturity, since if such fact is not disclosed by the evidence, or if there is sufficient evidence to support the lower court in holding that it was not such holder, the decree must be affirmed. The facts concerning Foss's right to represent and to act for the loan company are so nearly identical with those brought out in the case of *Root v. Fast*, reported in 58 Nebr., 498, as to make it unnecessary to review the evidence concerning his relations to that concern. We shall content ourselves with merely stating that the evidence is overwhelmingly conclusive that he was the agent and attorney of the loan company, and was clearly acting within the limits of his authority in foreclosing the mortgage upon default in payment of interest, and also in collecting the judgment and receipting the docket. It remains, therefore, to examine the record relative to the question of whether the insurance company was a holder of the note and mortgage for value before maturity. The evidence of two witnesses is practically relied upon by it to establish such fact. One is Charles B. Whiting, president of the insurance company, the other F. E. Johnson, president of the loan company, whose

depositions plaintiff introduced. The direct testimony of these two sustains the contention that said insurance company was such owner and holder of the note and mortgage, but the surrounding circumstances and the evidence of the two persons named on cross-examination justified the lower court, in our opinion, in holding the contrary. As a circumstance, we might cite that, on cross-examination, Whiting was asked why he did not have the assignment of the mortgage from the loan company recorded in Franklin county, and among his reasons for not so doing he states: "As we considered the mortgage companies good we did not think it was necessary to send them out and have them recorded." Now, as a matter of fact, the note was indorsed by the loan company without recourse. Further, he testifies that the company kept this note in its safe for five years after it purchased it, without having received a dollar of the principal, and less than sufficient money to pay the first installment of interest, yet never notified the maker of such delinquency, or attempted in any way to collect the same, or to ascertain its condition. Further, it appears from the evidence that many of the directors of the insurance company are also directors of the loan company, evidence which tends to show a very close connection between the two corporations. Now, all of these are circumstances which go far to militate against the truth of the direct testimony of Whiting relative to the purchase by his company of this note and mortgage. A still more convincing circumstance is connected with F. E. Johnson, the president of the loan company, who substantiates Whiting's testimony, that the note and mortgage were transferred to the insurance company, for value, in April, 1890. Yet five years after this occurrence (and it should be remembered that the note was indorsed without recourse) Johnson sends to the mortgagor the following communication:

"THE LOAN & GUARANTEE COMPANY OF CONNECTICUT.

"HARTFORD, CONN., Jan. 23d, 1895.

"DEAR SIR: Please note below a memorandum, showing the condition of a loan made to Salvador Hayes, dated March 1st, 1890, principal due March 1st, 1895 with interest payments due March 1st and September 1st in each year, and past due interest payments since March 1st, 1890, as shown on our register. That we may be assured of its accuracy, will you examine the same, and if found correct, sign your name at the foot of this page and mail the memorandum below to us in the enclosed envelope.

"If any error appears in our statement, please note it on the bottom of the memorandum.

"Each and every of the above payments are due and payable to the Loan & Guarantee Company at its office in Hartford, Connecticut on the respective days mentioned, and should be therefore sent to us and to no one else at least five days before due. All remittances should be by bank draft on New York or post office order.

"Please notify us promptly of any changes of ownership or of postoffice.

"FRANK E. JOHNSON, *President.*"

Now, if Johnson truthfully testified when he stated that the note and mortgage in question had been sold and transferred, without recourse, to the insurance company nearly five years prior to the date of this communication, why did he notify the maker that each of these payments therein mentioned are due and payable to the loan company, and should be sent to it and to no one else? Indeed, the evidence shows conclusively that, from the time of the first default in the interest, the loan company was the only one which took any interest in the condition of this loan, up to June, 1895, when it appears the papers were sent by the insurance company to its attorney for foreclosure. If the loan company had parted with the title to the same, without having incurred any liability as indorser, why should he be exer-

cised as to the condition of the same? And, on the other hand, if the insurance company was a *bona fide* holder thereof, why should it sit supinely down for five years after a default in interest occurred, and make absolutely no effort to collect it, or even so much as to ascertain its condition? Surely, evidence of the character indicated amply justified the finding that the insurance company was not the holder of the note for value before maturity, but that, as a matter of fact, it was being used as a cover behind which to collect this note and mortgage twice.

It is further urged that the fact that Foss, at the time he foreclosed the mortgage, had neither it nor the note in his possession, and that neither of them was surrendered to be cancelled, precludes the defendant from setting up the payment of the decree as a payment of the note. Doubtless it is a circumstance militating against the claim of defendant, but it is not conclusive. And we are persuaded the evidence justified the court in finding that Foss had authority to sue and collect this note and mortgage, whether the same was in his possession or not.

The decree is accordingly

AFFIRMED.

I. J. DUNN V. DOUGLAS COUNTY.

FILED JANUARY 23, 1901. No. 9,339.

1. **Witness Before Grand Jury**: FEES. One subpœnaed to attend as a witness before a grand jury is not entitled to fees, merely because, in answer to the writ, he went to the court house or building in which the grand jury was sitting.
2. **Evidence**: VERDICT. Evidence examined, and *held* to sustain the verdict.

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

J. J. O'Connor and *I. J. Dunn*, for plaintiff in error.

***Phil E. Winter**, Howard H. Baldrige, George W. Shields* and *Elmer E. Thomas, contra.*

NORVAL, C. J.

The amount in controversy is $4. I. J. Dunn presented to the county board of Douglas county his claim for $10 as witness fees for attendance as a witness before the grand jury of said county in February, 1895. The county board audited the claim and allowed him for three days' attendance as a witness at the statutory rate of $2 a day. Dunn appealed to the district court, where, on a trial to a jury, a verdict was returned in his favor for $6, upon which judgment has been rendered. The case is before us on petition in error.

It is argued that the verdict and judgment are contrary to the evidence. A careful perusal of the record convinces us that this contention is not well founded. Mr. Dunn was subpœnaed to appear before the grand jury as a witness. In response to the command of the writ he went to the court house on five different days, but did not every day go to the room or place where the grand jury was sitting, nor did he report his presence to the foreman of that body, to the bailiff or to the county attorney. On two days the latter officers desiring Mr. Dunn's presence before the grand jury sought, but were unable to find him. For those two days the trial jury were justified in not allowing him witness fees. One subpœnaed to attend as a witness before a grand jury does not perform his full duty by merely going to the court house, especially in a county like Douglas, where several divisions of the court are in session at the same time, but should go to the room or place where the grand jury is in session and report to the bailiff in charge, the foreman or the county attorney. It is disclosed that the business of the grand jury was delayed two days on account of the absence of Mr. Dunn. The verdict is not only justified by the evidence, but would have sustained no other finding. For the same reason there was no reversible error in the giving and refusing of instructions.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BANK OF COMMERCE OF GRAND ISLAND ET AL., APPELLEES, IMPLEADED WITH HERSCHEL A. EDWARD ET AL., APPELLANTS.

FILED JANUARY 23, 1901. No. 10,058.

1. **Preferred Creditor:** MONEY DUE ON COLLECTION ACCOUNT. Money collected by a bank for another on notes or drafts and retained is held in trust for the owner, and does not become a part of the assets of the bank, and if the bank thereafter becomes insolvent, and a receiver is appointed, the one for whom the collection is made is a preferred creditor.
2. **Trust Funds:** CONVERSION: PROCEEDS: RIGHTS OF BENEFICIARY: INNOCENT HOLDER. Where trust funds are wrongfully converted the beneficiary is entitled to the funds, or the proceeds thereof, so long as he can definitely trace them, until they reach the hands of an innocent holder.
3. ———: ———: MIXING: PAYMENT FROM COMMON FUND: PRESUMPTION. Where trust money has been wrongfully commingled by a trustee with his own, and he makes payment from the common fund, it will be presumed that he paid out his own, and not trust money.
4. **Beneficiary:** EXTENT OF PREFERENCE. The claim of a beneficiary for trust money may be preferred to the extent of the cash found among the assets of an insolvent trustee at the time of his failure, where it is not affirmatively shown that the cash assets are not part of the trust fund. Rule applied.
5. **Appeal:** ADMISSION OF TESTIMONY: REVIEW. In a cause brought to this court on appeal, the rulings of the trial court on the admission of testimony can not be reviewed.

APPEAL from the district court for Hall county. Heard below before THOMPSON, J. *Affirmed.*

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

H. E. Clifford and *Charles G. Ryan,* for appellees.

James H. McIntosh, John L. Webster, W. H. Thompson and *W. H. Platt, contra.*

NORVAL, C. J.

On January 9, 1896, the Bank of Commerce of Grand Island was doing a banking business in the city named.

On that day one Dell Thompson presented to the cashier of said bank a certain draft or check, in the sum of $2,000, and as a part of the transaction the cashier of the bank executed and delivered to him a paper, in words following:

"GRAND ISLAND, NEB., January 9, 1896.

"Received of Dell Thompson for collection sight draft on Piqua Natl Bank, Piqua, Ohio, drawn by Odd Fellows M. A. & A. Asso. in favor of Ida M. Spencer, also policy No. 21622 of Odd Fellows M. A. & A. Asso., both of above amt. $2000.

"O. J. SMITH, *Cash.*"

Thompson also testified that at the time he delivered the draft to the bank, through its cashier, he exhibited to the latter a power of attorney executed by Ida M. Spencer, empowering him, Thompson, to collect, receive and receipt for said draft. Said instrument further recited that said Thompson was given absolute authority in the premises, as fully as the maker could have, and further authorized him to pay out of the proceeds of the draft certain debts of herself and her late husband. He further testifies that he wished the cashier to pay him the amount of the draft in full, but that the cashier refused to do so, offering only to receive it as a collection, and the receipt quoted was the result of this proposal. At the same time, Thompson, at the suggestion of the cashier, executed and presented a check, signed by him as "trustee," for the sum of $20, for which amount a draft was made out by the bank and by him sent to Mrs. Spencer, and by her used. Thompson testifies that Smith, the cashier of the bank, requested him to make this check as it was made, saying that he would carry the check as "cash" until the proceeds of the draft arrived, when the amount so advanced by the bank could be deducted therefrom. On the same day an account was opened by the bank on its books, in the name of Dell Thompson, trustee, the account credited with the face of the draft, and the draft then became a cash asset of the

bank and was entered upon the books as cash, and debited with the $20 represented by the check of Thompson. Thompson denies that there was ever any agreement or understanding between him and the cashier, or other officer of the bank, that an account should be opened in his name as trustee. Smith is deceased, and the testimony of Thompson in that regard is uncontradicted by any direct evidence. Two other small checks, amounting to some $5, were afterwards drawn by Thompson, to cover the cost of collection of the draft and other expense. This draft was by the bank forwarded to its regular correspondent at Omaha, the Union National Bank of Omaha, and it received credit for the amount there on the books of the latter bank. Between this time and January 14th following the Union National Bank shipped to the Commercial Bank the sum of $2,000 in currency; but it is not disclosed by the record whether this sum was or was not the avails of this draft. Nothing further than what has been recited has been disclosed as to the subsequent history of the draft, except that a few days after this it was returned by the Omaha bank, owing to a defective indorsement, which was, however, corrected, and the draft returned to the Omaha Bank, and with it a letter in which Smith states, among other things, "she [referring to Mrs. Spencer] is in very destitute circumstances and Mr. Thompson being a friend of hers advanced her a little money for her immediate needs until this draft could be collected. * * * Would like credit for it if you can do so, as we have paid out part of the money." Mrs. Spencer died on January 12, and Thompson was appointed administrator of her estate. The bank failed on January 20, following, and a receiver was duly appointed. At the time of its failure, as disclosed by the record, it had on hands in cash, new overdrafts, new bills receivable, and cash in other banks, something over $5,000, which were new assets received by it after the date it received said draft from Thompson. The latter, as such administrator, duly filed with the re-

ceiver of the bank a claim for the amount of this draft, less the sums advanced on it by the bank, demanding that the same be by the receiver made a preferred claim, and the receiver refusing so to do, the former petitioned the court below to have it declared a preferred claim. His prayer was granted, and the receiver appeals to this court.

It is a well recognized principle in this state that money collected by a bank for another on notes or drafts is held in trust for the owner who is a preferred creditor in case the bank goes into liquidation, and such money does not become a part of the assets of the bank or pass to the receiver of such bank. *Anheuser-Busch Brewing Ass'n v. Morris*, 36 Nebr., 31; *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Nebr., 786; *State v. Midland State Bank*, 52 Nebr., 1.

It is urged that this case falls within the principles announced by this court in *State v. Bank of Commerce*, 54 Nebr., 725, 728, and for that reason the judgment must be reversed. There the law was stated as follows: "But we think the correct doctrine, and the one supported by the decided weight of authority, is that the beneficiary of a trust fund, solely because of the character of his claim, is not entitled to the payment of the same in full, to the exclusion of other creditors, out of the assets of the insolvent trustee's estate; that when trust funds are wrongfully converted, the beneficiary is entitled to the funds themselves, or to the proceeds of the investment of them, so long as he can definitely trace them and before they reach the hands of an innocent holder; that when a trustee wrongfully commingles trust money with his own and makes payments from the common fund, it will be presumed that he paid out his own money, and not the trust money; that it will be presumed the cash assets on hand when the trustee failed and the receiver took possession of his estate were part of the trust money; that when trust funds are wrongfully converted, and not only do not remain in the hands of, and

are not found among the assets of, the wrong-doer, but are actually traced out of his hands and shown to have been dissipated, then the beneficiary of the trust fund is not entitled to have his claim allowed as a preferred one against the estate of the insolvent wrong-doer. If the trust property consisted of money, the claim of the beneficiary of the trust fund may be preferred to the claims of other creditors, to the extent of the cash found among the assets of the insolvent trustee at the time of his failure, unless it affirmatively appears that such cash assets were not part of the trust fund." And in that case the controverted claim was allowed as a preferred one only to the extent of the cash on hand. It is contended, however, that the power of attorney presented by Thompson to Smith at the time the draft was left with the bank is a general one, and not special, and under it he had the power to deposit the proceeds of this draft, if he thought proper, it following from the evidence that he did in fact deposit the draft, an account being open on the books of the bank on the strength thereof, thus making him a general and not a preferred creditor of the bank. To this we reply, the power is special and not general, but that the extent of the latter becomes unimportant, when the record discloses ample evidence on which to base the finding of the court that the draft was accepted by the bank for collection, and not otherwise. It is contended that the avails of this draft were not traced into the assets of the bank, but that in fact the bank received credit for the amount thereof by the Omaha bank, which credit went to liquidate an indebtedness of the Bank of Commerce to the Omaha bank. It is true that the evidence shows a credit by the Omaha bank, but it is also shown that the sum of $2,000 in currency was sent the Bank of Commerce by the Omaha bank a very short time after the receipt of this draft, and there is no evidence to establish the fact that this currency was not the proceeds of the draft; and in the absence of evidence to the contrary, the presumption is that it is such proceeds, and by this evidence is upheld

the finding of the court that the bank received the proceeds of the draft.

It is contended that, although it should be found that Thompson had no authority under his power from Mrs. Spencer to open a general account, as her agent, with the bank, yet she, by accepting the sums of money advanced by the bank, and he by beginning this suit, ratified such acts. As before stated, there is ample evidence from which to support the finding of the court below that this draft was never received by the bank as a deposit, but for collection only, and that the bank merely advanced the sums of money mentioned on the security of this draft; and that being the case, no question of ratification can arise.

It is obvious that the lower court was right in its findings and judgment; that the evidence discloses a sufficient fund in the hands of the bank at the time of its failure to pay this draft, and that it will be presumed, in the absence of a showing to the contrary, that the proceeds of this draft were a part of this fund, and that the judgment making this a preferred claim against said bank, to the extent of the cash on hand at the time of such failure, is right. The lien of such claim extends to the cash on hand at the time of such failure, including, however, the amount of deposit in other banks, and to no other assets of the bank. We make this observation for the reason that the judgment below may be construed to extend the lien of Thompson's claim to other assets of the bank than the cash items alluded to.

This being a proceeding on appeal, and not in error, the objection that the lower court erred in admitting the evidence of Thompson as to what took place between him and Smith, the cashier of the bank, Smith being now deceased, can not be considered. However, the court has carefully examined the evidence, and is of the opinion that the judgment is based upon sufficient competent evidence, aside from that of Thompson, to sustain the judgment.

AFFIRMED.

CHARLES SHARP V. STATE OF NEBRASKA.

FILED JANUARY 23, 1901. No. 11,259.

1. **Verification of Information:** CLERK OF DISTRICT COURT. A clerk of the district court may properly take verifications of information in criminal cases.
2. ———: INFORMATION AND BELIEF. It is sufficient if an information is verified by the county attorney, on information and belief.
3. **Filing Information:** LEAVE OF COURT. It is unnecessary to obtain leave of court before filing an information in a criminal case.
4. **Charge of Larceny:** DESCRIPTION. An information charging larceny sufficiently described the stolen property as "fifty-five coats, each coat of the value of five dollars, fifty-five vests, each vest of the value of three dollars, sixty pairs of trousers, each of the value of five dollars; four overcoats, each of the value of ten dollars."
5. **Charge of Burglary:** RESULTANT LARCENY: MISTRIAL: BAR. The crime of burglary, and the larceny resulting therefrom, are not so connected in law as to preclude a conviction for larceny, merely because the accused may have been prosecuted for the burglary resulting in a mistrial.
6. **Mistrial:** BAR: QUÆRE. Whether a mistrial resulting from the discharge of a jury because of the illness of one of its members constituted former jeopardy not decided.
7. **Proof:** VARIANCE: SPECIAL OWNERSHIP: GENERAL OWNERSHIP. Proof of special ownership in property, the subject of larceny, will sustain a conviction of larceny under an information charging general ownership.
8. **Evidence:** DE FACTO CORPORATION. Evidence examined, and *held* to establish the existence of a *de facto* corporation.
9. **Objections:** ERROR. Other objections examined, and *held* not to constitute error.

ERROR from the district court for Lancaster county. Tried below before FROST, J. *Affirmed.*

C. L. Hoover and *John O. Yeiser*, for plaintiff in error.

Constantine J. Smyth, Attorney General, Willis D. Oldham, Deputy, and *Thomas C. Munger, contra.*

NORVAL, C. J.

Charles Sharp was convicted in the district court of Lancaster county of the crime of larceny. Prior to his arrest he had been apprehended in Sarpy county on an information charging burglary by breaking into a certain railway car with intent to steal personal property therein contained. For this latter offense he had been tried twice before his prosecution for the larceny. The first trial resulted in a mistrial; on the second the jury was discharged on account of the sickness of a member. Afterwards occurred his arrest in Lancaster county, he being charged with larceny of the goods contained in said car, such goods having by him been removed into Lancaster county. After his arrest for larceny a *nolle prosequi* was entered as to the charge of burglary by the county attorney of Sarpy county. The defendant was convicted of the crime of larceny in Lancaster county, and comes to this court from such judgment, on error. The numerous specifications of error will be considered in the order presented in his brief.

The information on which the conviction was had was sworn to before the clerk of the district court. Counsel for the accused urged that this officer has no authority so to do, and that the court below erred in overruling a motion to quash the information made on that ground. This court decided to the contrary in *State v. Lauver*, 26 Nebr., 757. The clerk of the district court is a judicial officer, within the meaning of the sections of the Criminal Code under consideration. Section 36, chapter 19, Compiled Statutes, provides that all courts have power to administer oaths, either by any judge, justice or clerk thereof. The act of the clerk in administering the oath is, therefore, only that of a judicial officer. The cases cited by counsel as upholding the rule that a clerk of the district court is not a judicial officer are those decided by this court wherein informations have been sworn to before notaries public—officers unknown to the common law—and such cases are not in point.

The verification of the information, which was by the county attorney, was upon information and belief only. This is urged as error, a motion to quash for that reason having been overruled. We do not think there was any error in the ruling. The conclusion reached in *Richards v. State*, 22 Nebr., 145, is to the contrary. It is contended that this part of the decision is a *dictum*. We can not agree with counsel, and are satisfied with the rule. It would be unreasonable to require prosecuting officers to verify such pleadings positively, as it is not to be presumed that they have personal knowledge of the facts therein alleged. Except in extremely rare instances, a prosecuting officer acts solely upon evidence of third parties—at most he can have only an opinion, or belief, of the truth of the allegations. Such opinion or belief may have for its base the evidence of witnesses, yet it is an opinion or belief only. It was certainly not the intention of the legislature that he should verify informations only in cases where he had personal knowledge of the facts alleged. His statement in an affidavit that the facts alleged are true, when such statement is based solely upon evidence derived from other sources than his personal knowledge, is as much an opinion, a belief, as would be his statement that he "believed" the allegations to be true. In either form it would be an opinion only, in ninety-nine cases out of a hundred, unless we infer that the legislature intended to restrict the power of the prosecuting officer to cases only where he had personal knowledge of the facts. The verification is sufficient in that form, if made by the prosecuting officer. *Washburn v. People*, 10 Mich., 372; 1 Bishop, New Criminal Procedure, sec. 713, and cases cited.

Error is predicated upon the fact that the information was filed by the prosecuting attorney without his having first obtained leave of court so to do. No cases are cited upholding so seemingly absurd a rule. Neither is any reason advanced, except by way of a sort of analogy between this and the presentation of an indictment by a

grand jury. We fail to find any real analogy existing between the two means of charging crimes, which would lead us to believe that a rule of the kind contended for is necessary to protect individuals in the exercise of their personal rights. No such practice, to our knowledge, is or has ever been in operation in the state, and we see no reason why it should be.

It is urged that the description of the property alleged to have been the subject of the larceny is not sufficient, and that the court erred in refusing to quash the information for that reason. The property was described in the information as "fifty-five coats, each coat of the value of five dollars; fifty-five vests, each vest of the value of three dollars; sixty pairs of trousers, each of the value of five dollars; four over coats, each of the value of ten dollars." The description of the property, as above quoted, is sufficient, as will appear from the case of *Barnes v. State*, 40 Nebr., 545, and the authorities therein cited.

A plea in abatement was entered, setting up his arrest and trial upon the charge of burglary, as a bar to this action, which plea the court overruled, and error is predicated on such ruling. It is conceded that, under the rule of this court announced in *Hurlburt v. State*, 52 Nebr., 428, the district court for Lancaster county had jurisdiction to try him for larceny, the goods stolen in Sarpy county having been by him removed to Lancaster county, were it not that the district court for Sarpy county had already taken jurisdiction of the charge of burglary, which act it is claimed deprived the district court for Lancaster county of jurisdiction. In other words, it is claimed that the two acts of burglary and larceny are so connected in law as to constitute one transaction, and that the court first exercising jurisdiction over the one charge will deprive any other court of jurisdiction over the other, because of the statement of the rule in the *Hurlburt Case, supra*, that when property is stolen in one county, and it is afterwards found in possession of the

thief in another county, he may be prosecuted and convicted in either county, but not in both. With the contention of counsel we can not agree, either regarding the weight of authority, or from the standpoint of logic. The overwhelming weight of authority is to the contrary. *State v. Ingalls*, 68 N. W. Rep. [Ia.], 445; *Josslyn v. Commonwealth*, 6 Met. [Mass.], 236; *State v. Warner*, 14 Ind., 572; *Wilson v. State*, 24 Conn., 56; *Howard v. State*, 8 Tex. App., 447; *People v. Parrow*, 80 Mich., 567; *State v. Kelsoe*, 76 Mo., 505.

Sound reason also upholds the proposition that the burglary and the larceny are not so connected as to make them one transaction. The mere fact that they are committed at nearly the same time does not necessarily so connect them. A burglary may exist without any larceny having been committed. So may a larceny have existed without a burglary having been committed. It is never necessary to prove a burglary in order to establish the guilt of one accused of the crime of larceny. Nor is there any necessity to ever prove a larceny, for any other purpose than to show intent, in cases of burglary. There is a manifest fallacy in arguing that mere propinquity of time constitutes a necessary connection between the two acts, so much so as to make them one transaction, in law. On the contrary, they are distinct and separate crimes, neither of which is necessary to the other, so far as their essential criminal features are concerned. The fact that the district court of Sarpy county had taken jurisdiction of the burglary therefore in no manner deprived the district court of Lancaster county of jurisdiction over the crime of larceny.

The defendant alleged as a bar to this action his trial in Sarpy county on the charge of burglary. Our view of the matter of the connection of the two crimes, as already set forth in the last preceding paragraph, renders it unnecessary to comment further on this point. It is not well taken, whether there was or was not a former jeopardy.

In the information the goods stolen were alleged generally to have been the property of the railway company, and the evidence established a special ownership only—that of a common carrier. While it is admitted that a special ownership is sufficient to sustain a conviction of larceny, it is urged that such special ownership must be alleged, otherwise the variance is fatal. No valid reason lies at the bottom of this contention. Counsel seem to rest their argument upon decisions of this court in replevin cases, where it is held that if a special property is relied upon it must be so stated in the affidavit. But this is specifically required by statute in such cases. Code Civil Procedure, sec. 182. We are aware of no such restrictions in cases like the one at bar, or of decisions holding such allegations to be necessary, in the absence of a specific statutory requirement.

The railway company alleged to be the owner of the property stolen was averred to be a corporation, and it is contended that such corporate existence was not proven. An examination of the record convinces us that sufficient evidence was adduced to establish a *de facto* corporation, within the rule announced in *Braithwaite v. State*, 28 Nebr., 832.

A witness for the state was asked, on cross-examination, if he had been convicted of a felony, to which he returned an affirmative answer. The defense then asked him of what particular charge of felony he had been convicted. To this objection was made by the state, and was sustained. This ruling is urged as error. As counsel for defendant adduce no reason or authority to sustain the contention, and as we can imagine no reason, or believe that the ruling could have been prejudicial, we must conclude that the objection is frivolous. Numerous objections to admission of evidence are made, all of which, on examination we pronounce without merit.

Certain misconduct on the part of the prosecuting officer during the trial is alleged. Without going into par-

ticulars, it is sufficient to state the matters set out have been decided to the contrary in numerous well considered cases by this court, and there exists no reason to depart from them.

Other objections are raised, all of which have been carefully considered, but none of them are of sufficient importance to merit the attention of the court, further than the observation that they are not well taken.

The defendant had a fair trial, his conviction was an act of justice; there are no errors in the record, and the judgment of the lower court is

AFFIRMED.

WILLIAM A. STEWART V. EDWIN BOLE.

FILED JANUARY 23, 1901. No. 11,636.

1. **Pleading:** DEMURRER: MOTION. The indefiniteness of a pleading is no ground for demurrer, but the point should be raised by motion to make more definite and certain.
2. **Official Misconduct:** ABSTRACTION OF BALLOTS. It is official misconduct for a county clerk to permit to be abstracted from his office ballots committed to his official care which were cast at the last preceding election.
3. ———: DEFENSE: EVIDENTIAL VALUE OF BALLOTS. He can not urge as a defense to a proceeding to remove him from office that the ballots so abstracted possessed no evidential value.

ERROR from the district court for Hitchcock county. Tried below before NORRIS, J. *Affirmed.*

W. R. Starr and *John T. McClure*, for plaintiff in error.

Webster S. Morlan, contra.

NORVAL, C. J.

This was a proceeding instituted before the county board of Hitchcock county, by an elector of that county, to remove from the office of county clerk one W. A. Stewart, under the provisions of article 2, chapter 18, Com-

piled Statutes, to which office he had been duly elected. The complaint filed contained two charges, one accusing him of having permitted one John W. Cole to take certain ballots of Hitchcock county, cast at the last general election, from the office of said clerk and mutilate them, to prevent them from being used as evidence in a certain quo warranto proceeding then pending in the district court of said county, the other making the same charge, except that he is accused of aiding and assisting said Cole and one Brown in so taking said ballots. On a hearing Stewart was adjudged guilty of a willful neglect of duty and removed from office, and he brings the record here on error from the district court of said county, that court having affirmed the findings of said board.

But two errors on the part of the lower court are alleged, one going to the sufficiency of the pleading, the other to the weight and sufficiency of the evidence. We will examine the objection to the pleading first. As the same objection applies to both charges, it is unnecessary to copy both, and we will therefore content ourselves with setting out the first, which, omitting the matters of inducement, follows:

"Said accused as such county clerk has been guilty of willful neglect of duty.

"Specification 1. On the 31st day of January, 1900, there was and ever since has been, and now is, pending in the district court of said county, a certain action wherein one Henry Lehman is relator and the said accused is respondent; said action being a quo warranto proceedings instituted by the said Henry Lehman for the purpose of ousting said accused from his said office as county clerk of said county, and in said action the ballots, poll-books, and returns from the various election precincts of said county, used and voted at the general election held on the 7th day of November, 1899, were material and necessary evidence for the said relator to maintain his said cause of action and said accused at the time of entering upon the duties of his said office,

to-wit: on the 4th day of January, 1900, received from his predecessor in office and had in his custody as said county clerk the ballots and poll-books used and voted at said general election, and as such officer it was his duty to safely keep and preserve said poll-books and ballots for a period of twelve months from the time of said election. At the time said accused received said ballots and poll-books on said 4th day of January, 1900, said ballots and poll books were in packages securely bound and sealed and delivered into the care and custody of said accused on said 4th day of January, 1900, in the office of the county clerk of said county and said accused well knowing the premises, knowingly, wilfully and unlawfully, for the purpose of destroying said evidence permitted one John W. Cole, the attorney for said accused in said quo warranto proceedings, to take from and away from the office of the county clerk of said county, said ballots and retained away from said office in the sole custody of him the said John W. Cole for the space of two days, during which time the said John W. Cole, with the knowledge and consent of said accused, broke the seals of the packages containing said ballots and opened and examined said ballots and otherwise mutilated and destroyed said ballots and then deposited the same by the side of a public highway in the open prairies of said county at a great distance from the office of the county clerk of said county, to-wit: about six miles, and there left said ballots without the same being in the custody or charge of any one, or all of which was done with the knowledge and consent of said accused and for the purpose of mutilating and destroying said ballots and preventing them from being used as evidence in the quo warranto proceedings herein before mentioned."

It is contended the complaint is insufficient, in that it did not charge that Stewart permitted this act of taking the ballots from his office to be done upon some certain day between the time he was inducted into office and the day the complaint was filed. It is doubtless true

that the complaint did not designate the day the act complained of was committed. But, in the absence of a motion to make more definite, it was sufficient, particularly as the evidence fixes the time on a day subsequent to his having been inducted into office. It is not claimed that the indefiniteness complained of in anywise misled Stewart in his defense; hence there was no prejudicial error in overruling the demurrer to the complaint, or in overruling objections to the introduction of evidence upon the trial. Moreover, the complaint discloses that the abstracted ballots first came into Stewart's hands on January 4, 1900, therefore the act charged must have been committed after that date and between the time he took the office and the filing of the complaint, which was sufficient.

The second assignment of error urged in the brief is that the district court erred in affirming the findings and judgment of the county board, for the reason that they are not supported by sufficient proof. The evidence is too long to quote, but in our opinion it was ample upon which to base the findings of the county board. Part of the evidence is substantially this: Cole was employed as the attorney for respondent in the quo warranto proceedings mentioned in the complaint. On the 31st day of January, 1900, Stewart purposely left his office open and went across and down the street, thus affording Cole an opportunity to enter the office; and it appears that the latter did so during said clerk's absence, taking with him an empty grip, or "telescope"; that at the time he entered said office the ballots were in a box in the vault of said office and accessible to him; that soon after Cole left said office the ballots were missed, and an examination disclosed the fact that they had been taken from said office; that the next day an officer, in whose hands had been placed a warrant for the arrest of Cole on the charge of stealing the ballots, met him, after dark, on a road several miles from the county seat; that upon being asked to stop, he failed

to do so, but urged his horses forward, and was not apprehended until at the end of a hard chase of a half mile or more. That after he was arrested and brought to the county seat, a search of the route over which the chase extended, disclosed the missing ballots, in a gunny sack, lying near the road over which his team had run. This evidence, and much more, not abstracted, connected Cole with the ballots and also was sufficient to show that Stewart, the interested party in the quo warranto proceeding, gave Cole opportunities for the theft of the ballots. There was also further evidence that immediately after the arrest of Cole he and Stewart, with others, met in consultation, during which Cole assured them that they were in no danger of conviction, because "they had no evidence; that the loopholes were too big, too wide and too many," and that all that was necessary for them to do was for certain factions to stand together and try to throw suspicion as to the missing ballots upon a certain other faction in the county, by making it appear that the latter faction had taken the ballots, and that they would come out safely. Certainly, such evidence, if believed by the county board, was amply sufficient to sustain its finding that this clerk had been guilty of willful neglect of his duty in failing to keep in his custody said ballots.

It is, however, contended that, as it was shown by the evidence that the plaintiff in the quo warranto proceedings, Lehman, had, on a night prior to the time the ballots were sealed and placed in the custody of Stewart, slept in the same office where the vault containing them was located, the ballots being unsealed; that this rendered them incompetent as evidence in the quo warranto proceedings; and it would therefore be no dereliction of duty to permit or connive with Cole in abstracting them from the vault, they being only so much "waste paper." A sufficient answer to that objection is that the evidence on the question of whether the vault was accessible to Lehman is conflicting, there being evidence to the effect

that the vault was locked, and that he had no key that would unlock it; hence the mere fact that he slept in this office, with the vault containing the ballots locked, would not render them incompetent. Furthermore, the act of the attorney of accused in abstracting these ballots from the vault and keeping them at a distance from the county seat for two days, ending in an effort to get them out of sight when caught with them in his possession, would indicate that up to that time the ballots were considered of value somewhat above that of "waste paper," at least. Moreover, whether the ballots were competent evidence or not is wholly unimportant. They were committed to Stewart's official care and keeping, and he had no legal or moral right to permit them to be abstracted, no matter what might have been their value as evidence. The argument advanced by Stewart in justification of his conduct, carried to its legitimate extent, would sustain him in destroying any record in the county clerk's office that was of no evidential value. To him the law had not committed the power of determining the evidential value of records in the county clerk's office.

The district court was entirely right in sustaining the finding of the county board, and the judgment of the court below is

AFFIRMED.

HOME FIRE INSURANCE COMPANY OF OMAHA V. MICHAEL S. COLLINS.

FILED JANUARY 23, 1901. No. 9,357.

1. **Contract of Insurance:** CONDITION: VIOLATION BY CHANGE OF TITLE: NUDUM PACTUM. A condition in a contract of insurance forbidding a "change of the title, interest or possession of the assured," is violated by a conveyance of the insured property, even though there be no consideration for the transfer.

2. **Incumbrance:** ASSUMPTION: VALUABLE CONSIDERATION. The assumption by the grantee of an incumbrance upon property conveyed to him, is a valuable consideration for the conveyance.

3. **Delivery of Instrument:** QUESTION OF FACT: INTENTION OF PARTIES. The delivery of an instrument is a question of fact to be determined by ascertaining the intention of the parties thereto.

4. **Deed:** TRANSFER OF TITLE: DELIVERY. Whenever it is intended that a deed shall, by virtue of what is said and done, operate to transfer the title, then, in contemplation of law, it has been delivered.

5. **Recording of Deed:** DELIVERY: ACCEPTANCE. The recording of a deed by the grantor is evidence both of delivery and acceptance, if the conveyance is beneficial to the grantee.

6. **Evidence.** Evidence examined and found insufficient to support the verdict.

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

Byron G. Burbank, for plaintiff in error.

M. A. Hartigan, contra.

SULLIVAN, J.

Michael S. Collins sued the Home Fire Insurance Company in the district court of Adams county on a contract of insurance and obtained a verdict and judgment against it. As a defense to the action it was in the answer alleged that the insured property had been deeded by Collins to his wife without the knowledge or consent of the insurer and in violation of the terms of the policy. The clause forbidding alienation declares that "this entire policy shall be void if * * * the property be sold or transferred or incumbered, * * * or in case any change shall take place in the title, possession or interest of the assured in the above mentioned property, * * * or if the assured shall not be the sole and unconditional owner in fee of said property, * * * then, in each and every one of the above cases, this entire policy shall be null and void." The plaintiff denied that there had been any breach of the condition quoted, and the issue thus raised was resolved in his favor. The vital question in the case, and the only question that merits serious con-

sideration, is the sufficiency of the evidence to warrant the conclusion reached by the jury. The essential facts are not disputed.

On March 7, 1895, Collins and wife, in the office of their attorney, and after consultation with him, executed a warranty deed to John T. Powers, who, at the same time and as part of the same transaction, signed and acknowledged a like conveyance to Mrs. Collins. These conveyances were taken by Collins to the office of the register of deeds and were recorded. When recorded they were returned to Collins, who took them home and placed them among his papers. There has been no change in the possession of the insured property, which was a barn situated upon the family homestead. The cost of recording the instruments was paid by Collins. There was a valuable consideration expressed in each of the deeds, but none was in fact paid by Powers, who was merely used as a medium for the transmission of the title from Collins to his wife. The motive for making and recording the deeds was to put the property beyond the reach of Collins's creditors, or else to mislead them as to its ownership. Mrs. Collins was not a witness, and it does not appear whether the deeds were ever in her manual possession, or whether she actually paid her husband any consideration for the land. The first argument of counsel for the plaintiff is that the deeds, being deeds of general warranty, are void for want of a valuable consideration. One answer to this argument is that the transaction was in substance a conveyance from Collins to his wife, which, for aught that appears to the contrary, may rest upon the consideration expressed in the deeds. Another answer is that Mrs. Collins assumed the payment of an incumbrance upon the land, which of itself would be a sufficient consideration. A third answer is that, even without a consideration, the legal title would pass to the grantee (*Farmers & Merchants Ins. Co. v. Jensen*, 56 Nebr., 284; *M'Crea v. Purmort*, 16 Wend. [N. Y.], 460; *Morse v. Shattuck*, 4 N. H., 229; *Kendrick v.*

Mutual Benefit Life Ins. Co., 124 N. Car., 315; *Beach v. Packard*, 10 Vt., 96; *Bever v. North*, 107 Ind., 544; *Jensen v. Crosby*, 83 N. W. Rep. [Minn.], 43; Tiedeman, Real Property, 801); and, since the statute of uses is not part of the law of this state (*Farmers & Merchants Ins. Co. v. Jensen*, 58 Nebr., 522), such a transfer would work a change of title within the meaning of the clause against alienation. *Farmers & Merchants Ins. Co. v. Jensen*, 56 Nebr., 284.

The next proposition contended for by plaintiff is that the deeds were not delivered. Delivery is a question of fact to be determined by ascertaining the intention of the parties. Whenever it is intended that a deed shall, by virtue of what is said or done, operate to transfer the title, then it is effective; in contemplation of law it has been delivered. The testimony of Collins and all the circumstances given in evidence indicate an intention to divest Collins of the legal title to the insured property and vest it in his wife. In our opinion there was nothing said or done satisfactorily evincing a contrary purpose. The deed from Powers was apparently executed on the theory that Collins had been divested of the legal title. The recording of the deeds was evidence both of a delivery and acceptance. *Bowman v. Griffith*, 35 Nebr., 361; *Issitt v. Dewey*, 47 Nebr., 196. Powers testified:

Q. So then the fact is simply this, and nothing more: That you were called into Mr. Hartigan's private office and he stated to you that Mr. Collins and his wife had made a deed to you and asked you to make a deed from yourself to Mrs. Collins? A. Yes, sir.

Q. And you did it?

A. I did.

Q. Now that is the fact, isn't it?

A. Yes, sir.

Q. Mrs. Collins was there?

A. Yes, sir.

Q. Mr. Collins was there?

A. Yes.

M. S. Collins testified that he made the deed to Powers; that Powers transferred the title to Mrs. Collins, and that she had ever since held the paper title. Opposed to the evidence tending to show delivery are four circumstances: (1) That Powers paid no consideration; (2) that Collins took the deeds to the office of the register of deeds and paid for recording them; (3) that the deeds were returned to him by the registrar and have since remained with his other papers; and (4) that there has been no change in the possession or control of the property. In view of the relationship of the parties and the motive for making the deeds, we are disposed to think that these circumstances were not of sufficient probative force to justify the jury in finding in favor of the plaintiff. Had it appeared directly or by fair inference that the parties never intended that the deed should be effective, their intention would prevail, and in that case the conclusion of the jury would be permitted to stand. *Koppelmann v. Koppelmann*, 57 S. W. Rep. [Tex.], 570.

We reverse the judgment, not because the necessary effect of making and recording the deeds was to change the title of the assured, but because the evidence in the record is insufficient to justify a finding that the title did not pass from Collins to his wife.

REVERSED AND REMANDED.

BANKERS LIFE ASSOCIATION OF DES MOINES V. BOARD OF COMMISSIONERS OF DOUGLAS COUNTY.

FILED JANUARY 23, 1901. No. 9,360.

1. **Taxes**: RECOVERY FROM COUNTY: COMPLIANCE WITH STATUTE. One who seeks to avail himself of the statutory right to recover from a county taxes not paid under compulsion, must show a substantial compliance with the statute.

2. **Tax Receipt**: SPECIFIC OBJECTION: CLAIM FILED WITH BOARD. In such case the party must state specifically to the tax collector the ground of his objection and have it noted in the tax receipt which is to be attached to the claim filed with the county board.

3. **Petition: PROOF: SPECIFIC OBJECTION.** In an action to recover taxes paid under protest, the claimant must allege in his petition and prove at the trial that he made specific objection to the tax at the time he paid it.

4. **Bill of Exceptions: EVIDENCE.** In the absence of a bill of exceptions, duly allowed, this court can not consider the evidence adduced at the trial.

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

O. B. Ayres, for plaintiff in error.

H. L. Day, contra.

SULLIVAN, J.

This action, according to the averments of the petition, was brought by the Bankers Life Association of Des Moines, Iowa, to recover the sum of $108.13, which it paid to the treasurer of Douglas county to prevent the enforcement of what is claimed to be a void tax. The cause was submitted upon an agreed statement of facts, from which the court found that the plaintiff had paid the money as alleged and was entitled to recover back the sum of $42.38, that amount having been "erroneously collected." From a judgment rendered in accordance with the findings the association prosecutes error.

We are of opinion that the petition is defective in substance; that it does not state a cause of action for any part of the money paid to the county treasurer, and that the county would be entitled to a reversal but for the fact that it has acquiesced in the decision. It is not alleged in the petition or claimed by counsel for the association that the ground of protest was stated to the treasurer at the time the tax was paid. Such a statement is required by the statute, and is an essential step in the proceeding to recover money paid in satisfaction of a void tax. *City of Omaha v. Kountze,* 25 Nebr., 60; *Davis v. Otoe County,* 55 Nebr., 677. Section 144 of the revenue law (Compiled Statutes, 1899, ch. 77) requires

as a condition of relief that the claimant "shall file a statement in writing, duly verified, with the county board, setting forth the amount of tax paid under protest, the grounds of such protest, and shall attach thereto the receipt taken for said taxes." As was said in *Davis v. Otoe County, supra*, the protest to the tax-gatherer is the basis of the claim for repayment; and in the statement filed with the county board, as well as in the petition in the district court, if the case is appealed, the claimant can assign no "other, further, or different reasons than were sufficiently set forth in the document on which the action is predicated, the notice of protest." One who seeks to avail himself of the statutory right to recover from the county taxes not paid under compulsion must show a substantial compliance with the statute. If the ground of the objection is that the property upon which the taxes were levied was not liable to taxation, that fact must be stated to the collector and noted in the tax receipt which is to be attached to the claim filed with the county board. There being in the present case no averment in the petition, or proof at the trial, that the plaintiff made any specific objection to the tax, it was not, according to the decisions cited, entitled to any relief against the county.

There is another reason why the judgment must be affirmed. The agreed statement of facts is not in the record, the judge who tried the cause having made no order allowing a bill of exceptions.

AFFIRMED.

WILLIAM H. STREETER, APPELLANT, V. JOHN STALNAKER, APPELLEE.

FILED JANUARY 23, 1901. No. 9,370.

1. **Public Roads:** UNITED STATES LAND: CONDEMNATION. Under the provisions of section 2477, Revised Statutes of the United States, lands of the general government not reserved for public purposes may be taken and used for public roads.

2. ———: DEDICATION: PRESCRIPTION. Evidence of long continued use by the public tends to show the establishment of a road by dedication over the public domain. So also does the surveying, marking out, platting and improvement of a road by the public authorities.

3. **Evidence:** JUDGMENT. Evidence examined, and found to support the judgment.

APPEAL from the district court for Hamilton county. Tried below before SEDGWICK, J. *Affirmed.*

Hainer & Smith, for appellant.

J. M. Day, John A. Whitmore, and *John J. Roach, contra.*

SULLIVAN, J.

The only controverted question in this case is whether there exists a highway across a quarter section of land occupied and claimed by the plaintiff, William H. Streeter, by virtue of an entry made by him in 1894, under the timber culture act. John Stalnaker, who is the overseer of road district No. 51, in Hamilton county, asserts the existence of a public way over the land, and asks that the plaintiff be enjoined from obstructing it. The court decided in favor of the defendant, and from a careful examination of the record we are well satisfied that the decision is warranted by the proof.

In 1877 the county board of Hamilton county, in compliance with a petition presented to it, appointed J. R. Thomas a special commissioner to inquire into the expediency of establishing a road leading to the wagon

bridge across the Platte river south of Central City. Mr. Thomas employed chainmen and an axeman and proceeded to survey, plat and mark out a road over the land now in controversy. His report was filed with the county clerk and was accepted by the county board. Afterwards, in the same year, culverts were built by the road overseer to make the road passable; and it has been traveled ever since to some extent by people going to Central City to trade or to Hoard's ranch with grain. "The road," in the language of one witness for the defendant, "has been traveled constantly, not all of the time by all of the people, but by a portion of the people all the time." It is doubtless true that the travel has diverged to some extent from the line of the road as located by Thomas, but we think the evidence quite sufficient to justify the conclusion that the deviation was not substantial. In order to show that the road was established by user it was not necessary to prove an exact adherence to the line of the survey at all points. It was enough to show that there was no permanent or material deflection. *City of Beatrice v. Black*, 28 Nebr., 263.

It is said that the public could not acquire an easement by user in the land in question because it belonged to the general government, which is not affected by the statute of limitations. As we understand counsel for defendant, they do not claim that the public acquired any rights by adverse occupancy of the disputed strip. Their contention is that the road was established by dedication and acceptance; and this view of the matter we think is correct. In 1866 congress passed an act declaring that "the right of way for the construction of highways over public lands not reserved for public uses, is hereby granted." U. S. Revised Statutes, sec. 2477. By this act the government consented that any of its lands not reserved for a public purpose might be taken and used for public roads. The statute was a standing offer of a free right of way over the public domain, and

as soon as it was accepted in an appropriate manner by the agents of the public, or the public itself, a highway was established. *McRose v. Bottyer*, 81 Cal., 122. What the Hamilton county authorities did was perhaps insufficient to show the establishment of a road under the general road law, but was enough, we think, to indicate an acceptance of the government's bounty, and that is all that was required to create an easement. *Vance v. Burlington & M. R. R. Co.*, 12 Nebr., 285; *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S., 426; *United States v. Brooks*, 10 How. [U. S], 442.

In this case there was not only evidence of user, general and long continued, but also proof that the public authorities has assumed control over the road and had worked and improved a portion of it. Both facts were competent evidence tending to show an acceptance of a dedication. *Adams v. Iron Cliffs Co.*, 78 Mich., 271; *Witter v. Damitz*, 81 Wis., 385; *State v. Waterman*, 79 Ia., 360, *Waggeman v. Village of North Peoria*, 160 Ill., 277.

The judgment of the district court being supported by sufficient evidence is

AFFIRMED.

JOHN M. CARTER V. BENJAMIN A. GIBSON.

FILED JANUARY 23, 1901. No. 11,390.

1. **Cestui Que Trust:** JUDGMENT AGAINST TRUSTEE: WAIVER. A *cestui que trust* by taking a judgment against his trustee for the price of trust property wrongfully sold, thereby ratifies the sale and waives his right to pursue the purchaser.
2. **Judgment:** PLEADINGS: PROOF: PRESUMPTION. Nothing appearing to the contrary it will be presumed that the judgment appealed from was within the pleadings and justified by proof.

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

A. M. Russell, for plaintiff in error.

E. H. Wooley and *J. C. McNerney*, *contra.*

SULLIVAN, J.

This action, as appears from the opinions in 29 Nebr., 324, and 47 Nebr., 655, was brought by John M. Carter against Benjamin A. Gibson to establish a trust in real estate and for an accounting. The case was referred to Mr. D. O. Dwyer to make findings of fact, and upon his report a decree was rendered establishing plaintiff's title to a portion of the property described in the petition. The second paragraph of the decree is as follows: "The court finds upon the issues joined and the report of the referee that the defendant is indebted to plaintiff in the sum of $4,151.09, over and above every and all claims, demands, counter claims and set-off of the defendant Gibson due from the plaintiff to defendant Gibson. It is further considered by the court that the plaintiff recover from the defendant the sum of $4,151.09 and the further sum of $——, costs, being the costs accruing in said case in favor of the plaintiff from the commencement of this suit, and all judgments heretofore rendered in this cause against the plaintiff and in favor of the defendant, trustee, are hereby set aside and held for naught." Later in the term the court, by consent of counsel for both parties, but without the knowledge or consent of the plaintiff, added to the decree the following provision: "The court further finds, adjudges and decrees that all of the persons who purchased property described in the referee's report as his exhibit 'A' are *bona fide* purchasers and obtained full and complete title to the premises purchased by them as against any and all claims of both the trustee, Benjamin A. Gibson, and the *cestui que trust*, John M. Carter, and have full and complete title to the premises so purchased by any of such purchasers who made their purchase prior to the commencement of this action and that neither the said trustee nor the *cestui que trust* have any claim or demand against said purchasers, but their title to said premises is full and complete as against the said trustee and

cestui que trust, free and clear of any claim or demands of either of them." The plaintiff afterwards moved to eliminate this provision, but the court denied the motion, and its ruling is assigned for error.

The record contains neither the pleadings, the evidence given at the trial nor the findings of the referee. The decree, standing alone, is not very intelligible, but we are inclined to think that it transfers from Gibson to Carter the legal title to the trust property remaining unsold, and requires the former to pay the latter all moneys which he received for lands sold in violation of the trust. If this construction is correct, the plaintiff has no just ground for complaint. By taking a judgment against the defendant for the price of the property wrongfully sold, he ratified the sales and thereby waived his right to pursue the purchaser. *State v. Bank of Commerce*, 61 Nebr., 22. Having lost his remedy against the defendant's grantees, the plaintiff is not prejudiced by a judgment quieting their titles. In an action to recover from a trustee the proceeds of a sale of real property there would seem to be no impropriety in quieting the vendee's title as against any adverse claim of the *cestui que trust*. Such a judgment is really for the benefit of the vendor, who may be required by the covenants of his deed to defend the title which he assumed to convey. Nothing appearing to the contrary, it will be presumed that the decree rendered in this case was within the pleadings and justified by the proof.

The order overruling the motion to strike out the third paragraph of the decree is

AFFIRMED.

CICERO H. THOMPSON V. STATE OF NEBRASKA.

FILED JANUARY 23, 1901. No. 11,493.

1. **Instruction:** DEFENSE OF DOMICILE. An instruction charging that: "An assault on the house can be lawfully resisted to the extent of killing the assailant or assailants only in case the assault is made with the intent either of taking the life of the inmate or of doing him great bodily harm, and that such resistance was necessary to prevent such crime or in case the inmate acting honestly had reason to believe from the acts, facts and circumstances and in fact did believe that it was necessary to prevent the commission of such crime," is erroneous.
2. **Defense of Domicile.** A man may defend his domicile, even to the extent of taking life, if it be actually or apparently necessary to do so in order to prevent the commission of a felony therein. Whether this is the precise limit of the domiciliary right is not determined.
3. **Theory:** EVIDENCE. The submission to the jury of a theory which has no basis in the evidence, is error.
4. **Extortion:** UNNATURAL SIN: THREAT OF EXPOSURE: ROBBERY. Evidence that money or goods were obtained from a man by taxing him with the practice of an abominable wickedness and threatening to expose him, may be sufficient to establish the crime of robbery.
5. **Self-Defense:** BREAKING AND ENTRY: FELONIOUS INTENT. The occupant of a dwelling may lawfully kill, as a necessary measure of defense, a person who attempts to break and enter with the intention of extorting money by charging him with the commission of an infamous offense against nature and threatening to expose him to public reprobation and contempt.
6. **Instruction:** ERROR NOT CURED BY ANOTHER STATING LAW CORRECTLY. An instruction which misstates the law is not cured by giving another which states it correctly. The jury should not be required to choose between conflicting instructions.
7. **Plea in Abatement:** PRELIMINARY EXAMINATION. A plea in abatement, grounded on the facts that defendant had two preliminary examinations and that on the first he was held for a lower grade of crime than upon the one which is the basis of the information filed against him, is demurrable.

ERROR from the district court for Cherry county. Tried below before HARRINGTON, J. *Reversed.*

Frank M. Wolcott and *Moses P. Kinkaid*, for plaintiff in error:

The witness Milliman swore that the witness and the

deceased were entering the defendant's domicile with intent to extort money from the defendant by putting him in fear of the loss of his reputation.

"If any person shall forcibly, and by violence, or by putting in fear, take from the person of another any money or personal property, of any value whatever, with the intent to rob or steal, every person so offending shall be deemed guilty of robbery." Criminal Code, sec. 13.

The foregoing statute is declaratory of the common law. Coke, 2 Institutes, 308; Bishop, Statutory Crimes, pp. 5-8, 82, 86, 88, 131-144.

Robbery, by common law, is larceny from the person accompanied by violence or putting in fear. Anderson, Black, Bouvier, Dictionaries; Wharton, Lexicon; Russell, Crimes. But both these circumstances need not occur. Rawle, Bouvier's Law Dictionary, p. 935, art. Robbery; *Williams v. State*, 51 Nebr., 711.

Blackmail is robbery under the statute. It is defined: "A certain rate of money, corn, cattle, or other thing, anciently paid, in the north of England and south of Scotland, to certain men, who were allied to robbers, to be by them protected from pillage." Webster, Dictionary. In the United States: "Extortion of money from a person by threats of accusation or exposure." Bartlett, Synonyms.

The deceased, Arthur London, was breaking a mansion house in the night season to extort money by threat of accusation and exposure. The defendant slew him to defend himself from a felony. The act was justifiable homicide.

Constantine J. Smyth, Attorney General, and *Willis D. Oldham, Deputy, contra.*

SULLIVAN, J.

In the district court for Cherry county Cicero H. Thompson was found guilty of murder in the second degree and sentenced to imprisonment in the penitentiary for fifteen

years. The conviction apparently was the result of erroneous rulings, and must, therefore, be set aside. We can not consider in detail all the specifications of error discussed by counsel. They are altogether too numerous to be given separate treatment. For the most part they depend upon a few principles which, if recognized and properly applied, will prevent on another trial a repetition of the errors of which the defendant complains.

On the night of the tragedy Thompson was alone in his cottage in the city of Valentine. About 2 o'clock A. M., Arthur London, the deceased, with a companion named Milliman, rapped for admittance. Receiving no response from within they broke open the door and were about to enter, when they encountered the defendant, who commenced shooting at them. Five shots were fired. Milliman fell in the storm-shed and London lay mortally wounded just outside the threshold. Two theories of the case were submitted to the jury. The theory of the defense was that all the shots were fired by Thompson in the belief that his home was being broken and entered by robbers. The state's hypothesis was that the defendant recognized London when he first sought to gain admittance and knew that his purpose was to obtain money by threatening to publish a report to the effect that defendant was addicted to the practice of an abominable vice. It was also contended by the county attorney that the fatal shot was fired after London had retreated and while he lay helpless on the ground. There is no sufficient basis in the evidence for the theory that Thompson did the killing to protect himself from blackmail. There is nothing in the record from which it may be inferred that he knew, or had reason to believe, that the deceased intended on the night in question, or at any other time, to extort money from him by any species of intimidation. If it be true that London and Thompson had been accustomed to wallow together in the ooze and slime of a detestable sensualism, it does not by any means follow, as a natural or probable con-

clusion, that either would use his knowledge of the other's baseness as a means of obtaining money. The jury might, perhaps, have been justified in finding that the defendant recognized London before he shot him, but there was no sufficient evidence from which to conclude that the motive for the shooting was to prevent blackmail.

Some of the instructions touching the right of the accused to defend his habitation are erroneous. In the seventeenth paragraph of the charge it is said: "An assault on the house can be lawfully resisted to the extent of killing the assailant or assailants only in case the assault is made with the intent either of taking the life of the inmate or of doing him great bodily harm, and that such resistance was necessary to prevent such crime or in case the inmate acting honestly had reason to believe from the acts, facts and circumstances and in fact did believe that it was necessary to prevent the commission of such crime." The same thought is expressed in the eighteenth paragraph. The doctrine of these instructions is not, we believe, sustained by any adjudged case, although there are *dicta* in the opinions of courts and expressions in the text-books on criminal law that seem to give countenance to it. The true rule undoubtedly is that a man may defend his domicile, even to the extent of taking life, if it be actually or apparently necessary to do so in order to prevent the commission of any felony therein. *Semayne's Case*, 3 Coke, 91; *Foster's Crown Cases*, 273; *State v. Patterson*, 45 Vt., 308, 12 Am. Rep., 200; *Wright v. Commonwealth*, 85 Ky., 123; *State v. Taylor*, 143 Mo., 150. Whether this is the precise limit of the domiciliary right it is not here necessary to determine; but if it is the limit, then popular sentiment is not in accord with the law.

Another phase of the case seems to have been entirely overlooked at the trial. The right of the accused to resist an aggression having for its object the obtaining of money by threats of injury to his reputation was ignored.

There is no good reason why the law should differentiate between a threat to inflict physical injury and a threat to cause mental suffering. One may diminish the value of existence quite as much as the other. Of this fact the criminal law has but a dim perception; it is seen, but not seen clearly. If the mental anguish is acute and in its very nature calculated to lower the tide of life, the law takes cognizance of it. It appears from the authorities, ancient and modern, that the extortion of money by threatening to smirch a fair reputation is so atrocious a wrong that it is generally regarded as robbery, especially if the vice or crime imputed is an unnatural one. This being so it would seem that if London and Milliman came to the defendant's house with the intention, as claimed by the state, of obtaining money by taxing him with the commission of an infamous offense against nature and threatening to expose him to public reprobation and contempt, he might lawfully kill them as a necessary measure of defense, even though divining their purpose, or having actual notice of it. Under these circumstances the breaking and entry would be felonious because done with intent to rob. Evidence that money or goods were obtained from a man by putting him in fear of an injury to his property or reputation may, it is said, be sufficient to establish the crime of robbery. 1 Wharton, Criminal Law, sec. 852; Desty, American Criminal Law, sec. 142*d*; 3 Greenleaf, Evidence, secs. 233, 234; *Long v. State*, 12 Ga., 293; *Britt v. State*, 7 Humph. [Tenn.], 45. "As to the fear of injury to the reputation," says Greenleaf (sec. 234), "it has been repeatedly held that to obtain money by threatening to accuse the party of an unnatural crime, whether the consequences apprehended by the victim were a criminal prosecution, the loss of his place, or the loss of his character and position in society, is robbery." The instructions precluded the jury from considering this aspect of the case, and thereby deprived the defendant of a valuable right.

The seventh paragraph of the court's charge is a de-

fective definition of murder in the second degree. The attorney general does not defend the instruction, but contends that it furnishes no ground for reversal, because the elements of the crime were correctly stated in another instruction. This question is not a new one. It has been frequently decided by this court, and the rule is a just one and founded in good sense, that the jury should not be required to choose between conflicting instructions. *First Nat. Bank v. Lowrey*, 36 Nebr., 290; *Carson v. Stevens*, 40 Nebr., 112; *Richardson v. Halstead*, 44 Nebr., 606; *Barr v. State*, 45 Nebr., 458; *Metz v. State*, 46 Nebr., 547.

The demurrer to the plea in abatement was properly sustained. The fact that the defendant had two preliminary examinations, and that he was held only for manslaughter on the first, did not entitle him to immunity from prosecution for murder. The decision of the county judge furnished the basis for prosecuting the prisoner for one crime; the decision of the justice of the peace gave the right to put him on trial for another crime. There has never been any doubt about the power of the grand jury to return two indictments against a party grounded on the same criminal act; and no reason is suggested why an examining magistrate may not exercise, under the new procedure, the jurisdiction which the grand jury exercised under the old. *Bartley v. State*, 53 Nebr., 310; *Roby v. State*, 61 Nebr., 218.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

CLAUDE WATSON, APPELLANT, V. EDWARD B. COWLES, APPELLEE.

FILED JANUARY 23, 1901. No. 11,551.

1. **Taxation:** EXEMPTION: EDUCATIONAL USE. Property used exclusively for school purposes is exempt from taxation for general revenue.
2. ———: ———: ONUS PROBANDI. A person who claims that his property is not subject to taxation must show affirmatively the facts rendering it exempt.
3. ———: ———: RESIDENCE: INCIDENTAL. If a building is used at the same time for school purposes and as a family residence by the person having charge of the school, it is not exempt from taxation for general revenue, unless the residential use is incidental to the other and associated therewith in such wise as to be regarded as part of it.
4. **Finding:** CONFLICTING EVIDENCE. A finding which has substantial support, although based upon conflicting evidence, will not be disturbed.

APPEAL from the district court for Otoe county. Heard below before JESSEN, J. *Reversed.*

John C. Watson and *J. V. Morgan*, for appellant.

C. H. Denney and *W. W. Wilson, contra.*

SULLIVAN, J.

The plaintiff, Claude Watson, is the owner of several lots in Nebraska City upon which is situate a two-story brick building. The property was assessed for taxation and taxed under the general revenue law for the years 1896, 1897 and 1898. The building, during those years, was leased and used for school purposes, the lessor receiving an adequate rent therefor. The tax charged against the property became delinquent, and the defendant, Edward B. Cowles, acquired, by purchase at private tax sale, the interest of the public therein.

The plaintiff contends that the lots were exempt from taxation during the years in question and asks for a decree dissipating the cloud created by the proceedings of

the taxing authorities. The trial court made a general finding in favor of the defendant and dismissed the petition. The judgment can not be entirely sustained. The property was used exclusively for school purposes during the year 1898, and was, therefore, not subject to taxation for that year. Upon this point the case of *Scott v. Society of Russian Israelites*, 59 Nebr., 571, is decisive. Whether the building was used exclusively for educational purposes during 1896 and 1897 is not clear from the evidence. The decision of the district court resolving the issues in favor of the defendant is to be construed as a finding that it was not so used. It is conceded that Prof. W. H. Barrett, the lessee of the building, was conducting therein, in 1896 and 1897, a commercial and preparatory school; but it is claimed that he occupied some of the rooms as a habitation for himself and family. The testimony tends to support this claim, and we are disposed to think that the trial court was justified in concluding that it was established. The burden of proof was on the plaintiff; he was required to show affirmatively the facts that render his property exempt from taxation. The evidence warranted the court in finding that Professor Barrett occupied the building with his family, but it did not furnish any basis for an inference that such occupancy had any proper relation to the conduct of the school. If he lived in the building as a matter of mere personal convenience or advantage, and not because it was necessary in the discharge of his duties as an educator, or to promote the success of his school, then it is evident the property was not used exclusively for school purposes, and consequently was not exempt from taxation. *Red v. Johnson*, 53 Tex., 284; *Williams College v. Williamstown*, 167 Mass. 505. The taxes for 1896 and 1897 are valid, but those for 1898 are void.

The judgment is reversed and the cause remanded with direction to the district court to render a decree in conformity with the views herein expressed.

REVERSED AND REMANDED.

SAMUEL D. ROBY V. STATE OF NEBRASKA.

FILED JANUARY 23, 1901. No. 11,712.

1. **Former Information:** PENDENCY: PLEA IN ABATEMENT. The pendency of a former information for the same offense in the same court, furnishes no sufficient ground for plea in abatement.

2. **Evidence:** VERDICT. Evidence examined, and found insufficient to justify the verdict of the jury.

ERROR from the district court for York county. Tried below before GOOD, J. *Reversed.*

George B. France, for plaintiff in error.

Constantine J. Smyth, Attorney General, and *Willis D. Oldham, Deputy, contra.*

SULLIVAN, J.

Samuel D. Roby was tried and convicted in the district court for York county on an information charging him with having fraudulently and by misrepresentation obtained the signature of Peter Irrthum to a promissory note for $250.

The first point to which attention is directed by the petition in error and brief of counsel is the decision of the trial court sustaining a demurrer to a plea in abatement in which it is alleged that there was another information for the same offense pending against the defendant at the time the present prosecution was initiated. The ruling was correct. In *Commonwealth v. Drew,* 57 Mass., 279, it is said, in an opinion by Chief Justice Shaw, that where it is discovered that an indictment is defective, "the proper course is for the grand jury to return a new indictment, avoiding the defects in the first. And," he continues, "it is no good ground of abatement that the former has not been actually discontinued, when the latter is returned." This decision is cited with approval in *Bartley v. State,* 53 Nebr., 310, 322, in which

the conclusion of the court from a thorough examination of the adjudged cases is thus stated by NORVAL, J.: "The authorities are quite uniform in holding that the pendency of a former indictment for the same offense in the same court is no ground for abatement."

The next contention to be noticed is that the evidence did not justify the jury in finding the defendant guilty. The testimony for the state is exceedingly weak and inconclusive with respect to three elements of the offense; and upon one essential point it is so very unsatisfactory and improbable that we feel constrained to reverse the sentence and award a new trial. After a careful reading of the bill of exceptions we are thoroughly persuaded that the defendant was not convicted because he had committed the crime charged in the information, but because he was guilty of a moral dereliction which resulted in a serious financial loss to the prosecuting witness, an old and ignorant man. The note in question was signed at the law office of Geo. B. France, Esq., in the city of York. About that there is no dispute. Irrthum testified that it was signed on December 16, 1899, while the defendant and four other witnesses testified that it was signed on November 20, 1899. These dates are important, for the reason that the representation which Irrthum says induced him to sign the note was made, if at all, on the road between York and Benedict not earlier than November 25, 1899. The alleged misrepresentation was a statement by Roby that he owned 160 acres of good land on Lincoln creek, in York county. It is not contended that this statement had any immediate relation to the signing of the note, but Irrthum claims that it made an impression on him; that he remembered it and was influenced by it when, some two or three weeks later, he was asked to become surety for the defendant. If the note was really signed on November 20, it is obvious of course that the alleged statement afterwards made by Roby on the road to Benedict did not produce the mischief attributed to it. All the witnesses agree that de-

fendant was the owner of some land in Colorado. It was conveyed to him by Mrs. Bessie Cole on November 20, 1899. The deed was executed at the residence of Col. J. W. Roby, in York; it was witnessed by Peter Irrthum and acknowledged before Geo. B. France as a notary public. This deed was delivered to Irrthum and was in his possession at the time of the trial. He says it was turned over to him for safe-keeping, while the defendant insists that it was given and received as an indemnity against possible loss resulting from his suretyship. France testified that he heard Irrthum ask for the deed just after the note had been signed. He also testified that he took the note to the City National Bank in York on November 20 and there sold it to the president of the bank, Mr. H. M. Childs. This gentleman was called as a witness for the state and testified that he bought the note of Mr. France on November 20. Arthur G. Wray, who was the stenographer in Mr. France's office, stated that the note was signed on November 20; and he fortified his statement with an entry made by him at the time in the office day book. The transaction evidenced by this entry grew out of the sale of the note and could not have preceded that event. Colonel Roby testified that on the day the deed was executed by Mrs. Cole to the defendant, and very shortly after its execution, Irrthum returned to his house and told him that he had signed the note at France's office. Against these five witnesses, three of whom were wholly disinterested, the state produced no evidence worthy of any consideration, except that of the prosecuting witness. He was seventy-eight years old and had no memorandum with which to refresh his recollection. He may have intended to tell the truth, but to us his testimony is, under all the circumstances, utterly incredible. Mrs. Irrthum was a witness for the state, but her testimony on direct examination, which was not of much importance, was squarely contradicted by what she said on the cross-examination. In our opinion, the evidence did not warrant the jury in

reaching the conclusion that the defendant committed the crime charged against him, and the judgment is, therefore, reversed.

REVERSED AND REMANDED.

BRIGHT B. OGG ET AL. V. HARTWIG C. SCHULTZ.

FILED JANUARY 23, 1901. No. 9,298.

1. **Fraudulent Transfer**: EVIDENCE. Evidence examined, and *held* to establish vendor's disposition of his stock of merchandise to be with intent to hinder, delay and defraud his creditors, and that knowledge of such fraudulent intent was imputed to the vendee.

2. ——: VOID SALE. The conveyance by a failing debtor of practically all his property, not exempt, to one of his creditors in satisfaction of his debt, the difference between the amount of the debt and the agreed value of the property being evidenced by the note of the vendee in favor of the vendor, with knowledge on the part of the vendee that the sale will result in hindering, delaying and defrauding the other creditors of the vendor in the collection of their debts, is void as to such other creditors. *Switz v. Bruce*, 16 Nebr., 463, and *Henney Buggy Co. v. Ashenfelter*, 60 Nebr., 1, followed.

ERROR from the district court for Fillmore county. Tried below before HASTINGS, J. *Reversed.*

John Barsby and *Lodowick F. Crofoot*, for plaintiffs in error.

Charles H. Sloan and *James W. Christie, contra.*

HOLCOMB, J.

One Henry Mohr conducted a small jewelry store in Exeter, Nebraska, his stock of goods aggregating in value $800 or $900. At about the time of the transaction out of which the suit grew he was owing on his stock of goods for merchandise some $600 or $700. Mohr was possessed of no other property save his exempt homestead. From the evidence it is made to appear that

Mohr is a nephew of the defendant in error, Hartwig C. Schultz, who reared him from childhood almost as a member of his family. The uncle had advanced to his nephew various sums of money, aggregating $400; these advances covering a period from 1884, when he let him have $50 to come from his home in Germany to this country, to 1891, when $100 was advanced to him to take up a note on which the uncle was liable as surety. In 1884 $150 was given or loaned to buy jeweler's tools, and in 1888 $100 was advanced, which was invested in a homestead residence property in the village in which he was doing business. In November, 1895, Mohr, becoming somewhat uneasy regarding his commercial indebtedness, had, as alleged, a settlement with his uncle and gave, as he claims, a note for $600, the same being for the $400, which he had received as before mentioned, and $200, as interest on the several advancements; and it was then agreed that if Mohr was pressed for payment on sums he owed for goods purchased, he was to first prefer and secure the indebtedness as aforesaid to his uncle. In the latter part of January, 1896, the plaintiff in error, who is a creditor of Mohr in the sum of about $500, undertook to secure payment or security for the same, which, after some negotiations, resulted in Mohr giving to his uncle a bill of sale for his entire stock of goods, receiving in consideration therefor the note theretofore given to his uncle, of which mention has been made, and a note executed by his uncle in his favor for $200. The goods were valued at $800. No change of possession was had, save a nominal one, Mohr continuing, as he claims, as the agent of his uncle, who, by the transaction narrated, claimed to be the owner of the property. Proceedings in attachment were instituted and the property attached as belonging to Mohr. A suit for conversion was thereupon commenced by Schultz, resulting in a judgment in his favor, from which, by proceeding in error, the case is here for further consideration.

At the time of the alleged sale to his uncle, no invoice was taken, the goods being sold as stated as of the value of $800, the consideration being the surrender of the note given by Mohr for $600, and the remainder of the purchase price, $200, being evidenced by a note in Mohr's favor executed by his uncle for that amount. It also appears that about $100 worth of goods were taken by Mohr at the time, and some secret disposition made thereof, the exact nature of which is unknown. At the time of the execution of the $600 note it appears that some arrangements were made with an attorney residing in Exeter, whereby he was to look after the interests of Schultz, and secure the payment of the note whenever it seemed necessary to do so in order to secure or obtain payment in preference to other demands. At the time of the alleged sale Mohr represented both himself and his uncle, with the assistance of the attorney, who acted for both of them. It is quite evident, as we view the record, and relying on the evidence of the plaintiff alone, that the object of Mohr was not only to give his uncle a preference and satisfy his claim, but also to hinder and delay, if not actually defraud, his other creditors. His secretion of a part of the stock, and attempted disposition of all that remained, can justify no other inference than that he had determined to place his property beyond the reach of his commercial creditors. Had the uncle been satisfied with the payment or security of his indebtedness, which for the purposes of this case we may concede to be a *bona fide* and just one, it is not to be doubted that he would be protected, and the transfer could not be avoided on that account. But when he puts himself in the attitude of a general volunteer purchaser of all the stock of the debtor, which was appreciably greater in value than the debt which he held, executing his note for $200 to cover the excess, his action must then be gauged by the general rule applicable to sales and transfers of property with intent to hinder, delay and defraud creditors; and if the purchaser had knowledge of such fraudulent in-

tent, or such facts as would put a reasonably prudent man on inquiry, such sale is, under well settled principles and repeated decisions of this court, fraudulent and void as to the creditors of such debtor. In this case the purchaser not only had knowledge of facts and circumstances which would put a reasonably prudent man upon his inquiry, but actually participated in the fraudulent intent of the seller, by reason of the fact that the seller and his agent acted for him and on his behalf, and with full knowledge of all the circumstances attending the fraudulent transfer. The case, we think, comes squarely within the rule announced in *Henney Buggy Co. v. Ashenfelter*, 60 Nebr., 1, and *Switz v. Bruce*, 16 Nebr., 463, and, without further elaboration, we must hold that the findings and judgment are not supported by sufficient evidence, and are contrary to the evidence in the case, and opposed to the law as announced in the cases cited.

The judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

R. E. KUHN V. AKE NELSON.

FILED JANUARY 23, 1901. No. 9,337.

1. **Written Instructions:** WAIVER. At the conclusion of the taking of testimony in an action involving a small amount, it was stipulated by the parties that the court may instruct the jury orally in the case, such instructions to be of the same force and effect as though they were written out and read by the court to the jury in the usual manner. No objection was made or exception or other action taken because the oral instructions were not reduced to writing, filed with the clerk, and given to the jury. *Held*, That the stipulation waiving the giving of the instructions in the usual manner and agreeing to their being given orally also waived any right of the complaining party to have them reduced to writing, filed with the clerk and given to the jury during its deliberation upon the case.

2. **Evidence:** VERDICT. Evidence being conflicting, the verdict will not be disturbed when supported by sufficient competent evidence.

ERROR from the district court for Dakota county. Tried below before EVANS, J. *Affirmed.*

Jay & Welty, for plaintiff in error.

William P. Warner and *W. A. Martin, contra.*

HOLCOMB, J.

The judgment of the trial court should be affirmed. The assignment of error argued and relied on is as follows:

"The court erred in instructing the jury orally and not reducing his instructions to writing and filing the same with the clerk, and permitting the jury to take the written instructions to the jury room, when they retired to deliberate."

At the conclusion of the introduction of evidence on the trial of the case the parties filed the following stipulation: "It is hereby stipulated and agreed by and between the parties to this action, and with their consent, that the court may instruct the jury orally in this case, and such instructions to be of the same force and effect as though they were written out and read by the court to the jury in the usual manner." No objection was made or exception or other action taken because the oral instructions were not reduced to writing, filed with the clerk and given to the jury. The case was unimportant and involved only a small amount. Under the circumstances, and in view of the stipulation, we regard it as entirely clear that the waiver of the giving of the instructions in the usual manner was intended to, and did, operate as a waiver of any right the complaining party had to have them reduced to writing, and taken by the jury during its deliberation of the case.

The evidence is conflicting, and the verdict is supported by sufficient competent evidence.

AFFIRMED.

GLOBE LOAN & TRUST COMPANY, APPELLEE, V. JAMES W. ELLER, APPELLANT.

FILED JANUARY 23, 1901. No. 9,362.

1. **Foreclosure: PARTIES: JUNIOR AND SENIOR LIENS: APPRAISEMENT.** A junior mortgagee in foreclosure proceedings, in which the senior mortgagee was not made a party, obtained a decree of foreclosure, directing the sale of the mortgaged property, subject to the senior mortgage of five thousand dollars. Certificates of liens and incumbrances provided for by sections 491*b* and 491*c* of the Code were waived, the property appraised and the interest of the mortgagor fixed at the gross appraised value, less the amount of the prior mortgage, to which the sale was made subject. *Held*, that the interest of the mortgagor and owner in the premises was properly appraised, and that the sale made thereunder was regular and in conformity with the decree.

2. **Evidence: APPRAISEMENT.** *Held*, also, that the evidence failed to show that the property was appraised so grossly low as to be constructively fraudulent.

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

J. W. Eller, for appellant.

George W. Shields, contra.

HOLCOMB, J.

A junior mortgagee obtained a decree of foreclosure and an order for the sale of the mortgaged premises if the amount found due was not paid within a time therein stated. Under the pleadings and evidence, a decree was entered in favor of the junior mortgagee, subject to a prior mortgage of $5,000 on the same premises, the senior mortgagee not being made a party to the action; and the property was ordered sold to satisfy the amount found due in the decree, subject to the said prior mortgage of $5,000. An order of sale was duly issued on the decree, the property appraised, and the amount of the senior mortgage, as fixed in the decree, and to which the sale

of the premises was made subject, was deducted from the gross appraised value, and thereupon sold as in other cases. Objections to the appraisement and confirmation were entered, because, as alleged, the property was appraised too low, and did not sell for two-thirds of the appraised value, and because the appraisers were not authorized to deduct from the gross value of the premises the amount of the prior mortgage as fixed in the decree.

The certificates of liens and incumbrances provided for by sections 491*b* and 491*c* of the Code of Civil Procedure, were waived. The question thus directly presented is whether, in a sale of mortgaged premises on a decree in favor of a junior mortgagee which is ordered subject to a prior mortgage, the interest of the mortgagor or owner of the equity of redemption may properly be fixed at the gross value of the premises as made by the appraisers, less the prior mortgage, to which the sale is made subject by the terms of the decree. That the provisions of the sections referred to as to ascertaining prior liens and incumbrances are for the benefit of the plaintiff, and may be waived, has already been determined in the affirmative, and may now be regarded as the settled rule in this state. *Smith v. Foxworthy*, 39 Nebr., 214; *Craig v. Stephenson*, 15 Nebr., 362. The object of the proceedings begun by the junior mortgagee was to foreclose the equity of redemption of the owner of the premises. The priority of the senior mortgage was admitted, and the amount thereof was pleaded in the petition. The action, in its nature, is *in rem*. The interest of the mortgagor in the premises was susceptible, under the pleadings and the evidence, of ascertainment and determination more fully and accurately than would be possible by a certificate of either of the officers mentioned in the two sections referred to. The senior mortgagee might properly be made a party, yet he was not a necessary party. *White v. Bartlett*, 14 Nebr., 320. It is within the power of the court to decree a sale of the premises subject to a prior

incumbrance. *Finley v. United States Bank*, 11 Wheat. [U. S.], 306; *Jerome v. McCarter*, 94 U. S., 734; *Wright v. Rundy*, 11 Ind., 398. The court had jurisdiction over the parties to the action and the subject-matter thereof. The mortgagor is, we think, being a party, concluded by the decree ordering a sale of the premises subject to the prior mortgage and finding the amount thereof. If he were dissatisfied, he should, by proper proceedings, have sought a correction of the error, if one existed. The attack now is collateral in its nature, and by objection to the confirmation of sale, it is sought to review the proceedings had in determining the interest of the mortgagor in the premises, which were directed to be sold in satisfaction of the second mortgage, it having therein been decreed that the property should be sold subject to a prior mortgage of $5,000. The decree is binding on the parties to the action, and we see no impropriety in the appraisement of the mortgagor's interest being made subject to, and lessened by, the prior lien found to exist thereon.

By section 491*a* it is provided that when an execution (in this case an order of sale) "shall be levied on any lands and tenements, the officer levying the same shall call an inquest, * * * and such officer, together with said freeholders, shall appraise said interest at its real value in money, and such appraisement shall be signed by such officer and said freeholders, respectively." This was done in the present instance by deducting from the gross value the amount of the first mortgage as found by the decree, and the property sold for two-thirds of its value as thus found. We find no valid objection as to the method of appraisal of the mortgagor's interest in the property included in the decree.

It is also claimed that the property was appraised at a figure so grossly low as to be constructively fraudulent. An examination of the evidence, which is conflicting, leads to the conclusion that the ruling of the district court as to this phase of the question is supported by

sufficient competent evidence, and the objection can not be said to be well taken.

The order of confirmation should be, and is,

AFFIRMED.

JOHN TATUM V. STATE OF NEBRASKA

FILED JANUARY 23, 1901. No. 11,238.

1. **Continuance:** SHOWING. In an application for a continuance, where no reasonable probability exists of procuring the proposed evidence, which is that of unknown persons, or where it is shown that due diligence and seasonable effort have not been made to procure such evidence, the application for a continuance is properly overruled.
2. **Witness:** IMPEACHMENT. Where a witness for the defense in a criminal prosecution has testified to facts inconsistent with and contradictory to statements made by such witness prior thereto, and regarding matters material to the issues in the case, such inconsistent and contradictory statements may be proven on rebuttal for the purpose of affecting the credibility of such witness, the proper foundation having first been laid.
3. **Misconduct of Counsel:** STRICTURES ON WITNESS. Strictures by counsel of a witness for the defense held to be of a character warranted by the evidence, and that such argument was not misconduct upon which prejudicial error could be predicated.
4. **Instructions:** CIRCUMSTANTIAL EVIDENCE. Instructions to the jury examined, and held to embody the rule of law that circumstantial evidence, to justify a conviction, must be of such a character as to exclude every reasonable hypothesis save that of the guilt of the accused.
5. **Evidence.** Evidence examined, and *held* to support the verdict of the jury and the judgment rendered thereon.

ERROR from the district court for Buffalo county. Tried below before SULLIVAN, J. *Affirmed.*

Hamer & Hamer and *Norris Brown*, for plaintiff in error.

Constantine J. Smyth, Attorney General, Willis D. Oldham, Deputy, and *Fred A. Nye, contra.*

HOLCOMB, J.

The defendant, plaintiff in error, was informed against and convicted of the crime of horse stealing at the January, 1900, term of the district court of Buffalo county. Just preceding the trial different applications were made by the defendant for a continuance of the cause, which were overruled. The ruling thereon is assigned as error.

It appears from the record that after a preliminary examination an information was filed in the district court, at the September, 1899, term, charging the defendant with the crime mentioned, to which, upon arraignment, he entered a plea of not guilty, and the cause was thereupon continued until the next term, which convened November 20, the defendant entering into a recognizance for his appearance at such time to answer the charge preferred against him. At the November term, and on the 22d of the month, the defendant presented a motion, supported by affidavit, for a continuance until the next regular term, for the purpose of making preparation for trial, and procuring evidence alleged to be material for his defense. The application was granted and the cause continued until the next term. The next regular term convened on January 29, 1900, at which time another motion was presented by defendant for a further continuance, which was overruled and the case set for hearing on the 31st. On that day yet another motion for a continuance was filed, which was also overruled, and the case proceeded to trial.

In the application for a continuance, at the beginning of the term at which the trial was had, the reasons assigned therefor were that the defendant had not prepared for trial because accumulated business of his counsel had prevented the necessary steps to secure evidence material in the case and necessary to a proper hearing thereof, and that the term of court had been called earlier than was anticipated. The proposed evidence was that of unknown persons, and the probability of procuring it was

extremely indefinite and uncertain. The witnesses from whom the proposed evidence was to be had were to be found and their testimony procured after a trip was made to St. Louis, Missouri, where it is claimed a car load of horses was shipped, in which shipment, according to the theory of the state, were included the two horses alleged to have been stolen by the defendant. The proposed evidence, when discovered, was for the purpose of disproving the shipment of any horses answering the description of those alleged to have been stolen. In the showing for a continuance it was stated that the defendant could not prove what horses were received by the consignees except by the consignees themselves; but there was omitted all reference to any evidence, which might be procured, showing what horses were in fact loaded into the car at the place of shipment, in the county adjoining that in which the larceny was committed. By the record it is disclosed this testimony was procurable, and was introduced by the defendant for the purpose of establishing the same fact it was proposed to prove by the unknown consignees of the shipment. It also appears that no effort was made, prior to the time of the application for a continuance, to procure the testimony spoken of. The application was clearly insufficient and failed to state any of the essential requirements of diligence, materiality of evidence, and reasonable probability of procuring it from the sources relied on. It is also quite apparent that testimony of the same character, pertaining to the same alleged facts, was procurable from those having knowledge of the shipment from the place where made, and near the place where the alleged offense was committed, to procure which no effort appears to have been made at that time. Upon the overruling of the application subpœnas were issued, at defendant's request, for different witnesses to appear and testify in his behalf. The subpœnas were served on some and returned not found as to others. On the day set for trial, another application for a continuance was presented on

the ground of the absence of the witnesses not found. As to the last application, it was presented out of season, and there is an utter lack of diligence shown. The ruling thereon was proper. A perusal of the record does not impress us that diligence or reasonable effort was made to procure the presence of the witnesses whose absence is made the basis for the application. They all resided at points convenient to the place of trial, and a seasonable effort to procure their attendance would no doubt have been successful.

Many objections are made and exceptions taken to the introduction of testimony on the trial of the case. It will be unprofitable to note and discuss the objections in detail. We have carefully examined the record, and find no prejudicial error in the admission or rejection of the testimony.

Strenuous complaint is made because of certain impeaching evidence admitted to contradict a witness for the defense. It is urged that the contradiction is upon an immaterial point, and, therefore, the evidence was improperly and erroneously admitted. The property alleged to have been stolen consisted of two mares belonging to an uncle of the defendant, residing in the city of Kearney, Buffalo county. The theft was alleged to have occurred on the night of the 31st of March, 1899. This was Friday night. The theory of the state is that the horses were taken by the accused on the night mentioned from the stable of the owner and led by him behind a team and buggy, which he drove to the town of Minden, about twenty miles distant, and there disposed of to one Watt, who, on the Sunday following, shipped them with a car load of horses out of the state. The state offered evidence, which, if believed by the jury, as they evidently did and were justified in doing so, tended to show that the two mares were by the defendant taken from the stable on the night mentioned, and to the livery barn of the said Watt at Minden, and at the request of the accused, taken to a stall in the back part of the barn. By

one witness the property was clearly and accurately described as the two mares claimed to have been stolen. The horses were brought to the barn about midnight. The owner of the barn was called from his house, and he and the accused had a conversation of some duration, during which he claims to have purchased the horses. After this the accused, with the same team with which he had driven to Minden, returned to Kearney, where he resided. On the next morning, being Saturday, at the direction of Watt, the team was taken from the livery barn and placed in the private barn of a resident of the town, where it remained until Sunday morning, when, with other horses, it was shipped out of the state. On the trial Watt was a witness for the defendant, and testified to the accused bringing a team to his place on the night mentioned; to his purchase of the same, and to his removal of them to a separate barn the next morning, and their shipment on the Sunday morning following. In describing the horses he purchased, he testified that one was a gelding and one was a mare. Over objection the state was permitted to ask the witness if he had not stated to the owner, who seems to have gone to Minden in search of his team on the Sunday afternoon of the day when the horses were shipped, that no mares were shipped in the car load that was shipped that day. He was also interrogated, over objections, as to whether or not, in a conversation with the county attorney, some time afterwards, in response to a question asking him if he had obtained any horses of the accused on the night of March 31, or within a week before or after that date, he had not stated, after making an examination of his books, that he had received no horses from the accused at the time mentioned, or within a week prior or subsequent thereto. The witness answering in the negative to both of the questions asked for the purpose of laying the foundation for impeachment, the state was permitted in rebuttal to contradict the witness as to the statements he denied having made. The case as made out by the

state was that the team was stolen by the accused, taken to Minden, disposed of to Watt, and by him shipped out of the state as before mentioned. If, after the happening of these events, assuming them to have happened, the witness was interrogated regarding the matter and made statements in regard thereto, and afterwards testified to matters contradictory to his former statements, and regarding a matter material to the case, as certainly was his statement with reference to his purchase and shipment of the horses obtained from the accused, and which the state charged were stolen, such contradictory statements may be shown for the purpose of affecting his credibility as a witness in the case. The testimony is not regarding an immaterial matter, but goes to the vital issues of the case and the very essence of the controversy. A denial by the witness of any dealings with the accused, or of having any animal of the same sex as those stolen, if untrue, is inconsistent with innocence and honesty on the part of the witness respecting the subject-matter of the controversy, and materially affects his credibility as a witness when testifying to yet another and different state of facts inconsistent with his previous statement. The rebutting testimony we regard as legitimate for the purpose of impeachment and as affecting the veracity of the witness. We find no error in the admission of the testimony thus objected to.

Complaint is also made regarding conduct of counsel for the state during the trial of the case. Many of the objections are clearly without merit. There is more or less controversy as to the alleged misconduct, which, upon the motion for a new trial, as a question of fact was determined adversely to the defense. Except where the record discloses to the contrary, this finding is presumably correct and will not be disturbed. We think the finding is justified by the record. We find no such misconduct as would warrant prejudicial error being predicated thereon. The conduct most objected to is the comment of counsel for the state regarding the evidence

of the witness Watt, who was alluded to in the sense of one having guilty knowledge of the property he purchased of the accused being stolen and of receiving it as such. The statements were based on the evidence, and it can not be said that they were outside of the record or not justified by the evidence. The strictures were, perhaps, severer than they should have been, yet their general character was such as brought them within the scope of legitimate argument of the testimony introduced in the trial of the case.

Objection is also made to certain instructions given the jury relative to the rule of law justifying a conviction of one accused of crime on circumstantial evidence. It is urged that the instructions omit the requirements of law, that the circumstantial evidence, to justify a conviction, shall be such as to exclude every reasonable hypothesis save that of the guilt of the accused. We think defendant's counsel in error in the position taken as to the scope and purport of the instructions excepted to. By instruction No. 5 the jury were told, in substance, that if they were satisfied beyond a reasonable doubt that a larceny of the horses was committed, as charged, and also believed from the evidence that the facts and circumstances concerning which the state had offered evidence are true, and if, from all the circumstances and facts proven connected with the commission of the alleged larceny, they are satisfied of the defendant's guilt beyond a reasonable doubt, it would be their duty to return a verdict accordingly; and by instruction No. 6 they were told that, in determining whether the defendant was guilty or innocent, they should take up and consider the testimony offered by the state as to each and all the facts concerning which it has offered evidence, and consider the evidence of the state as to each fact in connection with that of the defendant concerning the same fact; and if they are satisfied of the truth of the facts and circumstances concerning which the state has offered evidence, and are satisfied beyond a reasonable doubt, that some

one stole the horses at the time and place charged, and that the circumstances proven are consistent with the defendant's having committed the larceny and are such as to be inconsistent with any other reasonable hypothesis or conclusion, then the defendant should be found guilty. But if reasonable doubt is entertained as to any of the material circumstances, or as to whether any one stole the horses, or if the circumstances proven are consistent with defendant's innocence, or if, after considering all the evidence, a reasonable doubt is entertained of the defendant's guilt, they should acquit. In the two instructions all the essential elements of a conviction upon circumstantial evidence are embodied, and the instructions are in harmony with the rule as announced by this court in *Casey v. State*, 20 Nebr., 138; *Dreessen v. State*, 38 Nebr., 375; *Carleton v. State*, 43 Nebr., 373.

It is also objected that the evidence is insufficient to support the verdict and sentence rendered thereon, and that the *corpus delicti* is not proven. We regard the evidence as being quite convincing in its volume and character. That the property was stolen is abundantly shown by the evidence. That the defendant was found in possession of it on the night of the larceny is, we think, clearly proven, and the time and method adopted in disposing of it, all make a case of circumstantial evidence scarcely less potent and convincing than testimony direct and positive in its character.

The verdict is supported by the evidence, the defendant has been convicted by an observance of the forms and requirements of law, and the judgment should remain undisturbed, and is accordingly

AFFIRMED.

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

FILED JANUARY 23, 1901. No. 11,350.

1. **Fraudulent Transfer: GUILTY KNOWLEDGE: CONSTRUCTIVE NOTICE.** Where a vendor sells and transfers his property with the intent and purpose of hindering, delaying, or defrauding his creditors, and the vendee purchases such property with knowledge of the fraudulent intent of the vendor, or knowledge of such facts and circumstances as would put a prudent man on inquiry, which, if pursued, would lead to a knowledge or notice of the fraudulent purpose of the vendor, such sale and transfer is fraudulent and void as to the creditors of such vendor.
2. **Instructions.** Instructions copied in the opinion *held* to correctly state the law and to have been properly given.
3. ———. Instructions requested and refused *held* properly refused.
4. **Evidence: VERDICT: JUDGMENT.** Evidence examined, and *held* to support the verdict of the jury and the judgment rendered thereon.

ERROR from the district court for Pawnee county. Tried below before STULL, J. *Affirmed.*

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

Story & Story, G. E. Becker and *Lindsay & Raper, contra.*

HOLCOMB, J.

The controversy in this action arises between the creditors of one Rosina Marquardt and the plaintiff in error, Selina F. Brown, over a stock of merchandise formerly owned by, or in the name of, said Marquardt, and of which the plaintiff in error claims the ownership by purchase. Marquardt and Place were the owners of a stock of merchandise located at Burchard. Selina F. Brown was also engaged in the same business at the same place. It is disclosed by the evidence that in April, 1891, Marquardt, being indebted for merchandise in the sum of three or four thousand dollars, sold her interest in the entire stock of goods, being two-thirds thereof, and the

goods were immediately divided, the plaintiff in error taking Marquardt's two-thirds interest as the vendee. These transactions were made by D. F. Marquardt, the son of Rosina Marquardt, and who was conducting the business in her name. There is some evidence tending to show that Marquardt first sold to one Coates, a clerk in the store of plaintiff in error, he, in turn, selling to Brown. However this may be, the transactions were engaged in and consummated on behalf of the purchaser by one J. D. Brown, the husband and business manager of plaintiff in error, and who had knowledge of all the facts and circumstances surrounding the one or the two transactions, as the case may be. It is quite apparent that Brown stood in no more favorable light than did Coates, conceding him to have been the purchaser in the first instance. The consideration for Marquardt's interest in the stock of goods was two quarter sections of land in Brown county of uncertain value. A deed to one of the quarters was executed in favor of D. M. Marquardt's wife, and a bond for a deed to the other quarter was made out also in favor of the wife of D. M. Marquardt. The question whether the sale of goods by Marquardt was with the intent to hinder, delay and defraud the creditors of Rosina Marquardt was fairly submitted to the jury, and that such fraudulent intent did exist, as found by the jury, we are satisfied is amply sustained by the evidence.

The gist of the controversy is as to whether the transfer can and should be avoided as to the purchaser, the plaintiff in error, and the title by which she claims divested for the benefit of the attaching creditors of Marquardt. It is insisted by counsel that she purchased the goods in good faith and for a full and valuable consideration, and without any participation in any fraud that may have been intended or practiced by the vendor, and that her title and ownership can not be successfully assailed. It is urged that error was committed by the trial court in submitting this question to the jury, in that it was not

required that before the sale could be avoided as to the vendee, Brown, the jury must find, not only that the vendor entertained a fraudulent design in the sale of his property, but also that the vendee participated therein, and that mere knowledge on her part of the fraudulent intent of the vendor is not sufficient to avoid the sale as to her. The court instructed the jury on this point as follows: "The court instructs the jury, that the law requires a debtor to act in good faith with his creditors and apply his property not exempt, if need be to the payment of his debts. If he attempts to evade this duty and for the purpose of hindering, delaying or defrauding his creditors transfers his property to others with knowledge on the part of such grantees of such intent, such grantees will take no title to such property as against such creditors, proceeding to the collecting of their claims by attachment upon said property." Also: "The court instructs the jury that if they believe from the evidence that the property in controversy was sold by Marquardt, and in making such sale it was the intent of the seller to hinder, delay or defraud his creditors, and the plaintiff purchased such goods and by herself or by her agent acting for her participated in such fradulent purpose or at or before the time such sale was made had knowledge of such facts and circumstances as would have aroused the suspicions and have put a reasonably prudent man upon inquiry, which inquiry, if pursued, would have led to the knowledge or notice of such fraudulent intent on the part of the seller, then in such case the plaintiff took no title to the property so conveyed as against the creditors of the seller, and the fact that the plaintiffs may have paid a valuable consideration or even full value for the goods will not render such sale good as against the creditors." Both instructions are excepted to, and it is argued that the instructions are erroneous because the law is therein held to be that the fraudulent transfer of property by a vendor is invalidated as to the vendee, if she had knowledge of the fraudulent intent of the vendor,

or knowledge of such facts and circumstances as would put a prudent man upon inquiry, which, if pursued, would lead to knowledge, or notice of the fraudulent purpose of the vendor. We understand these two instructions correctly to state the law, as has been repeatedly held in this jurisdiction. *Bollman v. Lucas*, 22 Nebr., 796; *Sunday Creek Coal Co. v. Burnham*, 52 Nebr., 364; *Savage v. Hazard*, 11 Nebr., 323; *Temple v. Smith*, 13 Nebr., 513; *Beels v. Flynn*, 28 Nebr., 575; *Farrington v. Stone*, 35 Nebr., 456; *Edwards v. Reid*, 39 Nebr., 645. These instructions, with others of the same character, were applicable to the evidence, correctly stated the law and were properly given to the jury. The instructions requested by plaintiff in error were drawn on the theory that active participation on the part of the vendee in the fraudulent purposes of the vendor was required to be established by the evidence before the sale could be avoided as to such purchaser. These, as we have seen, do not accord with the principle enunciated in this jurisdiction, and were, therefore, properly refused.

We find no error in the record. The verdict of the jury is supported by the evidence, the judgment is in conformity with law, and should be

AFFIRMED.

FLOYD SANDAGE V. STATE OF NEBRASKA.

FILED JANUARY 23, 1901. No. 11,407.

1. **Detectives: INSTRUCTION: WEIGHING OF TESTIMONY.** Where informers, detectives, or other persons employed to hunt up testimony against the accused, are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested. *Preuit v. People*, 5 Nebr., 377, followed.

2. **Charge: CONVICTION: PRINCIPAL: ACCESSORY.** Where one is charged as principal in a felony he can not be convicted as an accessory, and, *vice versa*, where one is charged as an accessory he can not be convicted as a principal; and where, in a criminal

prosecution against a defendant charged as principal in the crime of burglary, the jury are instructed that the defendant may be found guilty if he advised and counseled the commission of the crime, such instruction is erroneous, as authorizing a conviction as an accessory on an information charging him as principal in the alleged burglary.

ERROR from the district court for Fillmore county. Tried below before STUBBS, J. *Reversed.*

F. B. Donisthorpe, for plaintiff in error.

Constantine J. Smyth, Attorney General, and *Paul Pizey, contra.*

HOLCOMB, J.

The plaintiff in error, defendant below, was informed against and convicted of the crime of burglary. The offense charged was alleged to have been committed by breaking into a chicken-house with intent to steal and stealing a number of chickens therefrom. The evidence on which the verdict is based is wholly circumstantial. The defendant resided at Harvard, Clay county, and was engaged in the business of buying chickens and reselling them to a poultry dealer doing business at Hastings. The offense is alleged to have been committed about seventeen miles from Harvard, in the county of Fillmore. The only direct evidence tending to show the defendant to have been at or near the place where the offense is alleged to have been committed, and in the county, was the testimony of one witness, residing in the neighborhood, who testified that on the day preceding the night of the alleged burglary the defendant called at his residence and made inquiries respecting the purchase of poultry. The testimony of this witness is effectually disproven by other and sufficient evidence showing the defendant to have been at home during the afternoon and evening of the day mentioned. As to the testimony of the witness mentioned, it appears to have been a case of mistaken identity. It is abundantly established by the

evidence that the defendant was in possession of the stolen chickens on the day succeeding the night of the burglary. He claims to have purchased them through his wife of one Viret Hawkins and one unknown person. The theory of the state is that the defendant, a brother-in-law named Ed. Clark, and the said Viret Hawkins, who appears to be a nephew of Clark, were all engaged in the burglary and larceny. That the defendant had guilty knowledge of the stolen property being such is, we think, fairly inferable from the record. Whether as a principal, accessory, or as one receiving stolen property knowing it to be such, it is not necessary or proper that we should undertake herein to determine.

On the trial of the case the state relied on the testimony of a witness who is a member of a detective association, and was engaged in procuring evidence to establish the guilt of the parties accused of the crime. The witness testified to his work as a detective, certain facts which were offered as tending to establish the guilt of the defendant, and to reputed conversations had between the detective and the accused relating to the offense with which he was charged. The defendant on the trial, and after the introduction of such testimony, requested an instruction to the jury, to the effect that, in weighing such testimony, greater care should be exercised in relation to the testimony of a detective employed in hunting up evidence, who is interested in or employed to find evidence against the accused, than in other cases; because of the natural and unavoidable tendency and bias of the mind of such person to construe everything as evidence against the accused, and to disregard everything which does not tend to support a preconceived opinion of the matter in which such person is engaged. The instruction was drawn in conformity with the rule as announced by LAKE, C. J., in *Preuit v. People*, 5 Nebr., 377, and should have been given. The testimony was clearly of the character which entitled the defendant to an instruction that it should be weighed with greater care

than that given by disinterested witnesses. *Kastner v. State*, 58 Nebr., 767.

The jury were also instructed in the twelfth instruction given by the court on its own motion as follows: "You are instructed that if you shall find from the evidence that the defendant obtained possession of the chickens, or some of them, that were stolen from Mrs. Brotherton, if in fact you find that any were stolen, and shall further find from the evidence that the accused had knowledge at the time of receiving said chickens that they had been stolen from Mrs. Brotherton, still you should find the defendant not guilty of the crime of burglary unless you further find that he participated in the burglary or that he counseled or advised the commission of the crime." By this instruction the jury were authorized to find the defendant guilty as a principal, although the jury may have found by the evidence that he was only an accessory to the crime. This, we understand, can not be done under the laws of this state, which make the offense of an accessory independent of that of the principal, and a substantive offense in itself.

The defendant was charged with the crime of burglary, and by the jury was found guilty as charged. Under the instruction, this verdict was warranted, even though, as is more probable under the evidence as we understand the record, they believed he was guilty only of aiding, abetting, or advising the commission of the crime, and was the recipient of the fruits thereof. In *Casey v. State*, 49 Nebr., 403, says POST, C. J., writing the opinion of the court (p. 406): "In those states where, by statute, the distinction between principals and accessories has been abolished, the accused may be charged either as a principal or an accessory before the fact, or both, at the option of the pleader; but in other jurisdictions, where, as in this state, the rule of the common law has not been relaxed, one not present or actually participating in the commission of the crime alleged, but whose offense consists in the aiding, inciting,

or procuring of its commission by the principal offender, should be charged as an accessory before the fact, and since, as has been said, 'The law never condemns without accusation, * * * one indicted as a principal in a felony cannot be convicted of being an accessory before the fact, or, indicted as such accessory, cannot be found guilty as a principal felon.' (1 Bishop, Criminal Law, sec. 803.) And in *Wagner v. State*, 43 Nebr., 1, IRVINE, C., citing Wharton's Criminal Law, 208, asserts, as a familiar rule, that no conviction as an accessory will lie under an indictment charging one as principal, and *vice versa*."

It follows from what has been said that the judgment of conviction can not be sustained, but must be reversed and a new trial ordered, which is accordingly done.

REVERSED AND REMANDED.

FRED PARSONS V. STATE OF NEBRASKA.

FILED JANUARY 23, 1901. No. 11,423.

1. **Sale of Liquor: POSSESSION OF LIQUOR: PRESUMPTION: POWER OF LEGISLATURE.** It is competent for the legislature to provide in an act regulating the license and sale of intoxicating liquors, that the possession of such liquors by one not having a license or other permit for the sale thereof shall be presumptive evidence of the violation of the act, unless, after examination, the person charged shall satisfactorily account for and explain the possession thereof.
2. **Constitutional Law.** Such provisions are not violative of the constitutional provision to the effect that no person shall, in any criminal case, be compelled to give evidence against himself.
3. **Possession of Liquor: EVIDENCE.** In a prosecution under section 20, chapter 50, Compiled Statutes, for keeping intoxicating liquors for sale in violation of law, the possession of such liquors by the accused, when established by the evidence, is presumptive evidence of guilt, unless the accused shall satisfactorily account for and explain the possession thereof, and that they were not kept for an unlawful purpose. *Durfee v. State*, 53 Nebr., 214, followed.

4. **Instructions.** Instructions based upon the above mentioned section examined, and *held*, properly given.

5. ———. Instructions to the jury when taken together fix the time of the commission of the offense at or about the time charged in the information; *held* properly given as to the requirement that the intention to sell must be a present intention within the meaning of the statute.

6. **Court of General Jurisdiction:** JURISDICTIONAL PRESUMPTION. In a court of general jurisdiction, jurisdictional facts and the regularity of the proceedings had therein will be presumed; and where, on the trial in the district court of a person charged with the keeping of liquors unlawfully and for the purpose of sale, it is shown that such liquors were seized under a search warrant issued out of the county court, *held* that it is not necessary to introduce in evidence the statutory affidavit upon which the search warrant was issued.

ERROR from the district court for Lancaster county. Tried below before FROST, J. *Affirmed.*

W. M. Morning, for plaintiff in error.

Constantine J. Smyth, Attorney General, and *Willis D. Oldham, Deputy, contra.*

HOLCOMB, J.

The defendant was convicted on two counts for selling intoxicating liquors without a license, and on one count for keeping such liquors for the purpose of sale and with the intention of selling and disposing of the same without a license or druggist's permit. It is argued that the conviction as to the last of the counts mentioned is wrongful and erroneous, because of the section of the statute under which the charge was made, providing that "the possession of any of said liquors shall be presumptive evidence of a violation of this chapter and subject the person to the fine prescribed in section eleven, unless after examination he shall satisfactorily account for and explain the possession thereof."

The validity of the statute is assailed on the ground that it denies the defendant a fair jury trial according to the course of the common law, by substituting the judg-

ment of the legislature for the judgment of the jury as to the weight to be given to the evidence; and also violates the constitutional provision providing that no person shall, in any criminal case, be compelled to give evidence against himself. That it is competent for the legislature to provide that certain facts, when established, shall be presumptive evidence of the material and ultimate fact to be proven in cases of this character, is well settled by current authority, and the validity of the identical section now assailed is affirmed in *Durfee v. State*, 53 Nebr., 214. An exhaustive discussion of the subject and principles involved is found in *People v. Cannon*, 139 N. Y., 32. See, also, *State v. Wilson*, 15 R. I., 180. By section 20, chapter 50, it is made unlawful for any person to keep for the purpose of sale without license or druggist's permit any malt, spirituous or vinous liquors, and a penalty for the violation of the law is provided for. Any person who is found possessing intoxicating liquors with the intention of disposing of the same without a license or permit is deemed guilty of a misdemeanor, and may on conviction be punished as provided by section eleven. The validity of this legislation is, we presume, unquestioned. Provisions follow for a search of premises for intoxicating liquors kept for sale without a license and in violation of law, and it is provided that, in the event of arrest of a person charged with unlawfully keeping such liquors for the purpose of sale, on the trial, "the possession of any such liquors shall be presumptive evidence of the violation of this chapter, and subject the person to the fine prescribed in section eleven, unless, after examination, he shall satisfactorily account for and explain the possession thereof, and that it was not kept for an unlawful purpose." If it be true that the legislature has the power to provide that the possession of intoxicating liquors, unexplained and unaccounted for by one not having a license or other permit for the sale thereof, shall be presumptive evidence of the violation of the chapter regulating the license and sale of such

liquors, as has already been determined, and, as we think, correctly so, then, as it occurs to us, there is nothing in the act violative of the constitutional provision to the effect that no person, in any criminal case, shall be compelled to give evidence against himself. A defendant charged with unlawful keeping of intoxicating liquors for the purpose of sale may rely upon his constitutional right of not testifying, and require the prosecution, by competent evidence, to establish his guilt of the offense charged, beyond a reasonable doubt. A jury, upon the trial of a cause, can only convict after every material allegation is established by the required proof. No penalty can be imposed until a conviction is had. What the law says is that when the possession of intoxicating liquors by a person without a license or other authority to sell the same is established, such fact, unless the possession is accounted for or explained, shall be presumptive evidence that the liquor was kept for the purpose of sale in violation of the chapter regulating the license and sale of intoxicating liquors. When possession is established by competent evidence, then the legal presumption arises, and it devolves upon a defendant to satisfactorily account for or explain such possession. Such a rule existed in the trial of many criminal cases at common law, and we know of no legal principle or constitutional provisions inhibiting a legislature from enacting a law incorporating the same into the statutes. The possession may be accounted for and explained by any competent evidence, whether given by the defendant or others qualified to testify regarding the subject. The wording of the section, "and subject the person to the fine prescribed in section eleven," must be construed to mean that only after conviction the penalty prescribed may be imposed as a punishment for violating the law; and does not make it obligatory upon a jury to return a verdict of guilty, unless satisfied of the defendant's guilt, as in other criminal trials. The objections to the validity of the act are not well taken.

An instruction given, which follows the provisions of law as contained in the section referred to, is excepted to. The instruction is substantially the same as that given in *Durfee v. State*, 53 Nebr., 214, which, on error proceeding, was approved by this court as a correct expression of the law. That decision is adhered to and followed.

Objection is made to one instruction on the ground that it failed to state that the keeping of intoxicating liquors must be with a present intention of selling the same. The time mentioned in the information was definite and certain. The instruction complained of is as follows: "The jury are instructed that it is not incumbent upon the state to prove any specific sale to any individual or any particular date under the allegations of the fourth count of the information, but that under said count the jury may consider any evidence of sales together with other circumstances which tend to prove that the defendant was keeping in his possession beer as charged in the fourth count with the intent of disposing of the same without first having procured a license, or druggist's permit for the sale of the same, if any such facts are proven. You are further instructed that if you find from the facts proved, if any such are proved, that the defendant was on or about the —— day of —— 1900 keeping beer in his possession in the county of Lancaster and state of Nebraska, with the intention of disposing of the same without license or druggist's permit, then and in that case you will find the defendant guilty as he stands charged in the fourth count of the information." This, in view of other instructions, to the effect that, in order to convict, the proof must show possession for the purpose of sale at or about the time alleged in the information, is sufficient, and the failure to name the day and month is without prejudicial error.

It is also urged that no evidence was introduced of the filing of the statutory affidavit authorizing a search warrant for the liquor seized, and the order made directing the destruction of the same was erroneous. This pro-

vision is incidental only to the main trial, and the defendant can not predicate error as to his conviction because of an order erroneously entered directing the destruction of the liquors found under the search warrant. The evidence, however, discloses that the officer finding such liquors was acting under and by virtue of a search warrant issued out of the county court, and the proceedings had in the district court, being in a court of general jurisdiction, will be presumed to have been regular, and it will be presumed that jurisdiction over the property was obtained by filing the affidavit required by statute.

Perceiving no error in the record, the judgment is

AFFIRMED.

NOTE.—See the question of statutory evidence discussed in *Commonwealth v. Williams*, 6 Gray [Mass.] 1, opinion by Merrick, J., dissenting opinion by Thomas, J.—REPORTER.

JENS JENSEN V. LOTTA E. HALSTEAD.

FILED FEBRUARY 6, 1901. No. 9,325.

1. Verdict on Conflicting Evidence. Verdict of a jury on conflicting evidence will not be disturbed on review.

2. Malicious Prosecution: ADVICE OF COUNSEL. One who, before instituting a criminal prosecution, makes a full, fair and honest statement to an attorney of all the facts within his knowledge, or which he could have ascertained by the exercise of reasonable diligence, bearing upon the guilt of the accused, and in good faith acts upon his advice, will not be liable in an action for malicious prosecution. But if he withholds from counsel any material facts within his knowledge, the advice received will afford him no protection.

3. ———: DISCLOSURES TO COUNSEL: TESTIMONY: CONCLUSION. The defendant in an action for malicious prosecution will not be permitted to testify that he related to his counsel, before instituting the criminal prosecution, all the facts and circumstances within his knowledge, as it would be the statement of a mere conclusion, which it is the province of the jury to draw from the entire evidence adduced on the trial.

4. ———: INSTRUCTION: REVERSIBLE ERROR. In an action for malicious prosecution it is reversible error to instruct the jury that the information which will justify the making of a criminal complaint against another must be of such a character and obtained from such a source that business men generally, of ordinary care, prudence and discretion would feel authorized in acting thereon.

5. **Instruction.** An instruction is erroneous which contains conflicting statements of law.

ERROR from the district court for Douglas county. Tried below before FAWCETT, J. *Reversed.*

I. J. Dunn, for plaintiff in error.

Charles W. Haller, contra.

NORVAL, C. J.

This is an error proceeding from a judgment of the district court of Douglas county in an action wherein Mrs. Lotta Halstead was plaintiff and Jens Jensen was defendant. Jensen had caused the arrest of Mrs. Halstead on a charge of malicious destruction of property, of which charge she had, on trial, been acquitted. She thereupon brought an action against him for malicious prosecution, in which she was successful. Some sixteen alleged errors, out of the remarkable number of thirty-eight assigned, are insisted upon in the brief of counsel. These, however, can be grouped under more general heads, thus obviating the tediousness of referring to each separately. Several of the alleged errors go to the question of whether there is evidence in the record from which the jury could find that in bringing the criminal prosecution Jensen was actuated by malice, or whether there was on his part want of probable cause. Counsel cite the court to the evidence of the defendant to establish the fact that the jury were not justified in finding there was either malice or probable cause. Unfortunately for counsel, the testimony of plaintiff and defendant was contradictory in many material particulars. We have

carefully reviewed the record, and the conclusion is irresistible that if the jury believed plaintiff, and the verdict would indicate that it did, rather than defendant, it was justified in finding that he had no probable cause in causing her arrest on the criminal charge, and that in so doing he was actuated by malicious motives. The arrest of plaintiff on the criminal charge grew out of the removal by her of a certain hall rack, which had been attached to a house belonging to defendant, in which she was a tenant. It is claimed that she had no legal right to take this hall rack down, and, therefore, defendant was justified in believing that she acted maliciously in so doing. We do not so conclude. That she had no legal right to take it down (if such be a fact) would not make her act malicious; neither would the fact alone that she had torn it down without color of right justify him in believing that she acted maliciously. What construction he was warranted in putting upon her acts depended entirely upon her motive in the premises, as disclosed by the evidence. Had the jury believed defendant, it would have been authorized in concluding that she acted maliciously in taking down this rack, and that he was, therefore, justified in causing her arrest. As already stated, evidence was adduced by her which tended to establish the contrary; therefore we can not disturb the verdict.

Defendant pleaded as a defense to the cause of action of plaintiff that before instituting the criminal prosecution he had disclosed all the material facts to his counsel, and acted on his advice in bringing the same. Upon the stand he testified to what he stated to his counsel. It is contended that this constituted a defense to the present action, and that the jury should have found for the defendant. If they believed the statements of defendant and his counsel to have been the facts in the case, the jury certainly should have found in his favor. Unfortunately for him again, what he claimed to be the material facts, detailed to his counsel, failed to agree with those

testified to by plaintiff and her witnesses, which he must have known, and it must be presumed that the jury believed her. If it did, it was justified in reaching the conclusion that defendant failed to truthfully detail to his counsel all of the material facts that must have been within his knowledge; hence his defense, from the standpoint of the jury, failed him. *Manning v. Finn*, 23 Nebr., 511; *Dreyfus v. Aul*, 29 Nebr., 191; *Jonasen v. Kennedy*, 39 Nebr., 313.

Error is further predicated upon the ruling of the court sustaining an objection to the following question put to defendant by his counsel: "Q. I will now ask you, Mr. Jensen, if, when you went to the office of your attorney on the second day of July, before this complaint was filed, if you detailed to him all of the facts and circumstances so far as you knew or were able to learn at that time with reference to this matter?" The objection was that the question called for a conclusion. This ruling was proper. The conclusion called for was a very material one, wholly within the province of the jury, whose duty it was to infer this conclusion, or its opposite, from the evidence. It is argued that, although he had already stated what he had communicated to his counsel, an answer to this question was necessary in order to establish the fact that he had detailed to him all the facts that were at that time within his knowledge. Doubtless a question which sought to draw from him a statement that what he had told his counsel was all that he knew at the time of the communication might have been proper, as it would not have involved the objectionable part of the question propounded. However that may be, the question actually put was certainly properly excluded by the court.

Several errors are predicated upon instructions given by the court; among them the following instruction is duly excepted to and the giving of it urged in the brief as error: "The information that will justify the making of a criminal complaint against another for the purpose

of having him arrested must be of such character and obtained from such sources that business men generally, of ordinary care, prudence and discretion would feel authorized to act upon it under similar circumstances. And in this case, if the jury believe from the evidence that the defendant made the alleged affidavit before the police judge for the arrest of the plaintiff, and that she was arrested in consequence thereof, then it is a question of fact to be determined by the jury from the evidence whether the defendant, when he made the complaint, acted upon such information as a man of ordinary care, prudence and discretion would have felt warranted in acting upon under similar circumstances." There was undoubtedly error committed by the court in the first part of this instruction. The jury were confined to a certain class of men of ordinary care and prudence, to-wit, to business men. Now, the law knows no distinctions relative to men of prudence and discretion, the rule applies to all men of ordinary care and prudence regardless of their calling in life, or their mental attainments, or lack of them. A juror might believe that the defendant had acted, in the respects pointed out, with a degree of care equal to what would be expected of a lawyer, a physician, a laborer, a mechanic or a minister of the gospel of ordinary care and prudence, but not with a degree of prudence and discretion to be expected from a business man of that character; hence there was error in giving the instruction, although the latter part of the same instruction may have stated the rule correctly, for the jury were justified in assuming that the court referred in that part to the same class of persons referred to in the first part,—to business men rather than to men generally, of ordinary prudence and discretion. At best, the instruction is misleading, for one portion of the jury may have followed the first part of the instruction, and another the latter. The error, too, is of a character that can not be cured by giving another—correct instruction. In a great many cases this court has announced the rule

that an instruction which mistates the law can not be cured by another instruction which states it correctly, since the jury would be left in doubt as to which was correct. *Bank v. Lowrey*, 36 Nebr., 290; *Carson v. Stevens*, 40 Nebr., 112; *Richardson v. Halstead*, 44 Nebr., 606; *Barr v. State*, 45 Nebr., 458; *Metz v. State*, 46 Nebr., 547. Hence there was prejudicial error in giving this instruction, and for that reason the case must be reversed.

Numerous other objections are raised to the instructions, which it is unnecesary to notice.

For the reasons stated the judgment of the lower court is reversed.

REVERSED AND REMANDED.

NEBRASKA LOAN & BUILDING ASSOCIATION, APPELLANT, V. SARAH V. PERKINS ET AL., APPELLEES.

FILED FEBRUARY 6, 1901. No. 9,342.

1. **Constitutional Law:** LEGISLATIVE BILL: COMPREHENSIVE TITLES: SURREPTITIOUS LEGISLATION. The purpose of section 19, article 2, constitution of 1866, which declares that "No bill shall contain more than one subject, which shall be clearly expressed in its title," was not to prohibit comprehensive titles, but rather to prevent surreptitious legislation, and to obviate the evils following from the practice of including in one bill more than a single subject in nowise related to one another.

2. **Title:** ABSTRACT OF BILL. Where a title indicates the subject of proposed legislation, the essential requirements of the constitution are met, although such title is not a complete abstract of the bill.

3. **Legislative Act:** TITLE. The title to an act of the legislature of 1873, entitled "An act to enable associations of persons for raising funds to be loaned among their members for building them homesteads and other purposes, to become bodies corporate," with sufficient clearness indicates the subject of legislation.

4. **Act Complete in Itself.** Said act of 1873 is complete in itself, and embraces a single subject of legislation.

5. **Statute Complete Not Repugnant to Constitution.** A statute complete in itself is not repugnant to the constitution, though it may conflict with some other statute.

6. **Legislature Can Not Interpret Law.** The legislature may not prescribe what construction the courts shall place upon a law. The interpretation of statutes is for the judiciary.

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

Kennedy & Learned, for appellant.

Howard B. Smith, contra.

NORVAL, C. J.

Suit was commenced in the district court for Douglas county by the Nebraska Loan & Building Association against Sarah E. Perkins and Cyrus V. Perkins to foreclose a certain mortgage given by the latter to the former, also to cancel certain shares of the stock of said association pledged by said Sarah E. Perkins as security for the payment of the same debt. On trial, a decree was rendered in favor of defendants, the court having found that the debt was fully paid. Plaintiff was a building and loan association, organized under the laws of 1873, chapter 11, page 207, General Statutes, 1873, entitled "An act to enable associations of persons for raising funds to be loaned among their members for building them homesteads and other purposes, to become bodies-corporate." The contract in question was entered into prior to the amendment of said law in 1891. The court below could not have found that said debt was paid unless the contract was tainted with usury, and it could not have been usurious unless the act of 1873 was unconstitutional; and that it is unconstitutional is the contention of counsel for defendants, who insist in their brief that the act is void for the following alleged reasons:

1. That it contains more than one subject, and its subjects are not clearly expressed in its title.

2. That said act, in effect, amends the general interest law, also the general corporation law of the state, without containing the sections so amended, and without repealing the same.

3. Because a portion of the act has been by this court held void, and it is claimed such portion was a material inducement to the legislature to pass the act as a whole.

4. Because that portion of the act which provides that although the dues, fines, premiums and other charges paid by members may aggregate a greater amount than the legal rate of interest, on loans made them, such payments shall not be construed to make such transactions usurious, is an attempt on the part of the legislature to usurp the powers of the courts, and therefore void.

These objections we will examine and discuss in their order. If any one of them is tenable, the lower court was right in rendering the decree it did; if none of them can be sustained, the decree must be reversed.

The evils which the framers of the constitution of 1866 sought by section 19, article 2 thereof, to obviate were surreptitious legislation, and a then common practice of including in one bill various subjects in nowise related to one another, by means of which a sufficient number of votes could be mustered to the support of provisions which, if entertained on their individual merits, would fail of passage. It was not intended thereby to prohibit comprehensive titles. *State v. Stuht*, 52 Nebr., 209; *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation & Land Co.*, 45 Nebr., 884; *State v. Bemis*, 45 Nebr., 724; *Van Horn v. State*, 46 Nebr., 62. *Boggs v. Washington County*, 10 Nebr., 297. If each piece of legislation must be confined to a single subject, it is evident that, so far as that one bill is concerned, there is little opportunity for trading votes on one portion in order to secure votes on some other—certainly much less than under the old custom, which permitted the inclusion in a bill of any number of subjects, regardless of their relations or congruity. If the title must clearly express

the subject, the smuggling into a bill legislation inimical to public welfare is rendered more difficult, for a legislator or citizen who reads the title of a pending bill is apprised of the subject of legislation, although not necessarily of the specific contents of the bill, and thus put upon inquiry as to its contents. It is not essential that the title chosen by the legislature be the most appropriate; if it indicates the scope and purpose of the act, it is sufficient. *State v. Bemis, ubi supra; In re White,* 33 Nebr., 812. Neither is it necessary that the title inform its readers of the specific contents of the bill. If it indicates the subject of the proposed legislation, it meets all essential requirements. It needs not that it be a complete abstract and epitome of the contents of the bill. If no portion of the bill is foreign to the subject of legislation, as indicated by the title, however general the latter may be, it is in harmony with the constitutional mandate. *Boggs v. Washington County, ubi supra*; *Hopkins v. Scott,* 38 Nebr., 661; *State v. Moore,* 48 Nebr., 870. It is to be presumed that both legislators and citizens generally are familiar with the institutions sought to be encouraged by the legislation here attacked, and more or less so with the methods by them employed in attaining their objects. Any person reading the title of this act would infer that the object of the bill was to encourage the multiplication of these concerns, that shareholders might, through their instrumentality, secure themselves homes. He would further infer that the bill would disclose the usual provisions relative to organizations of that class. He would expect to find provisions relative to the manner in which money was to be obtained, the conditions upon which its use might be secured by those desiring it, the consideration exacted for such use, and all such matters as are usual to institutions of that nature. Everyone knows that, in order to obtain money for any purpose, some inducement must be offered those who have it by those who have it not. This inducement usually takes the form of interest. It is as much to be ex-

pected that in such legislation provisions regarding interest will exist, as that there will be found prescribed the rules and conditions for admission of members. If regulations concerning interest are to be anticipated, regulations concerning the rate of interest could scarcely be called surreptitious. Nor would it be a matter of surprise if the reader of such a title should, on a more particular examination of the bill, find therein the liabilities of stockholders defined, or the exception of such contracts as it makes with borrowers from the general usury laws, or provisions relative to assessments, dues, fines, premiums and forfeitures, for these subjects are all of the very essence of institutions of this character. Without them, there could exist no organizations of that character. To hold that these subjects are not within the title would strip the act down to the bare wording of the title itself, which would merely enable certain persons to incorporate, a right they already had under General Statutes, 1873, chapter 11, section 123, under which corporations may be formed for any lawful purpose; and this would be convicting the legislature of frivolousness. The constitutional provision under consideration does not tend to unnecessarily restrict legislation; it does not compel the division of laws into separate acts, each covering merely a minute subdivision of what would, if properly connected, constitute a systematically arranged whole, though the unconnected parts of the whole might be many. A construction of the fundamental law that would require the separation of logically or naturally connected parts from each other, and their separate enactment, would render valid legislation almost impossible. The purpose of the fundamental law is subserved when the objects for its existence are attained, when there is a natural connection between the various parts of an act, and nothing foreign to the title is hidden therein. This we think the act in question accomplishes.

Another phase of the same question may be discussed in this connection. It will be noted that the title of the

act provides for the organization of associations for the purpose of "raising funds to be loaned among their members for building them homesteads." Section 1 of the act provides that these shall be organized "for the purpose of raising moneys to be loaned among the members, * * * for use in buying lots or houses, or in building or repairing or removing incumbrances from houses," etc., and it is argued that this portion of the act is much broader than the title, and for that reason violates the constitutional mandate. Doubtless a legislature may make the title to an act as restrictive as it pleases, and may sometimes so frame it as to preclude many matters being included in the act which might with entire propriety have been embraced in the one enactment, had the title chosen not been too much narrowed. Cooley, Constitutional Limitations [6th ed.], 178. But a reasonable interpretation of this act will scarce comport with the argument of counsel to the effect that the title is too restrictive. While the word "build" is employed in the title, we doubt not it was employed in the sense of obtain, secure or acquire. The object sought was the obtaining of a home for the family, and the method of obtaining it, whether by purchase, by borrowing money from the association with which to buy a tract of land and thereon erect a home, or to repair, or remove incumbrances from, a home already purchased would be immaterial. We are, therefore, of opinion that the title does not restrict members to the single method of building a home but that all the means set out in section 1 are legitimate, and within the meaning and intent of the title.

The second objection is also untenable. The act in question is complete in itself, and could not, therefore, be repugnant to the constitution, though it might conflict with, or be repugnant to, some other statute. *State v. Moore, supra; Van Horn v. State, supra; Bryant v. Dakota County*, 53 Nebr., 755; *Smith v. State*, 34 Nebr., 689. Whether it does or does not conflict with the general usury laws, or those concerning corporations, is imma-

terial, for the reason just stated. Nor is the fact that it refers to another law, making it requisite to follow the requirements of the latter in forming these corporations, a reason why this rule should not prevail. This does not constitute the act so uncertain as to render it difficult to ascertain just what the law is intended to be. The object of the constitution in requiring the portion of the law amended to be included in the new legislation is to preclude the amendment of laws in so blind a manner as to render it difficult to ascertain just what law is intended to be amended. Cooley, Constitutional Limitations, 181. The act has none of the elements of an amendatory statute; it is distinctly legislation upon a new subject, and relative to such subject is complete, although some of its provisions may in effect modify other statutes. A building is an independent entity, although it may be composed of materials similar in form and substance to those contained in thousands of neighboring structures, and though it may exclude the light from and in many ways modify the appearance and use of these others. So a statute is not necessarily amendatory of another because of the fact that in its operation and effect it may widen or narrow the scope of some other act. In the case of *Lincoln Building & Saving Ass'n v. Graham*, 7 Nebr., 173, this court held certain portions of this act void, because it appeared that there was an attempt therein to give to those portions a retroactive operation, and in that manner validate contracts executed before the passage of the act, but which were void from their inception. It is evident that the portions referred to are not an essential part of the law now being considered; they have no relation whatever to future associations, or to their operations. To separate them from the body of the act in no way affects the operation or scope of the law, so far as relates to the organization of these associations, and the act is as complete, and as readily carried out, without as with those portions. *State v. Stuht, supra; State v. Moore, supra.* There is no convincing force in the argu-

ment that provisions relating solely to contracts made prior to the passage of the act in question could have been an inducement to its passage. The legislature was interested in enacting a law making it possible for the incorporation of these concerns, rather than in validating contracts which had never been made by them. *State v. Stuht, ubi supra.* It is not within the province of the legislature to interpret the law, or to apply it to particular cases, that being peculiarly the duty of the courts. But we do not think that the legislature, in reciting that the contracts of these associations should not be construed to be usurious, intended to usurp judicial functions. While the wording of the statute would bear the construction that it was a direction to the courts, yet the substance of the legislation must be regarded, rather than the form, and for that reason we are of opinion that it was rather the intention of the legislature to establish a rule of interest relative to this particular class of contracts; that the act is declaratory, the intent thereby being to relieve the contracts of these institutions from the operation of the usury laws, rather than an attempt to arrogate to the legislature judicial functions. Cooley, Constitutional Limitations, 113.

For the reasons given, it is the conclusion of the court that the act in question does not violate any of the constitutional limitations referred to in the brief of counsel; for which reason the judgment of the lower court must be reversed and the case remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

EMERY S. ELLIS ET AL. V. ALICE MUSSELMAN ET AL.

FILED FEBRUARY 6, 1901. No. 9,352.

1. **Creditor:** SECURITY FROM INSOLVENT DEBTOR: INTENT TO DEFRAUD. A creditor may lawfully accept security from an insolvent debtor, but it is not permissible to do so for the purpose, and with the intention, of defrauding other creditors.
2. **Mortgage:** FORM OF ABSOLUTE DEED: INSOLVENT DEBTOR: BADGE OF FRAUD: WITHHOLDING FROM RECORD: EXAGGERATED CONSIDERATION. A mortgage in the form of an absolute deed, when given by an insolvent debtor, is a badge of fraud. So also, under some circumstances, is the withholding of such an instrument from record, or the statement therein of a false and exaggerated consideration.
3. **Evidence:** JUDGMENT. Evidence examined, and found to support the judgment.

ERROR from the district court for Gage county. Tried below before LEITON, J. *Affirmed.*

L. M. Pemberton, for plaintiffs in error.

F. B. Sheldon and *Frank T. Ransom, contra.*

SULLIVAN, J.

The purpose of this action, which was brought by the defendants in error in the district court for Gage county, was to have the real estate described in the petition sold for the satisfaction of certain judgments recovered by them against Joseph Ellis. A trial of the issues formed by the pleadings resulted in a finding that Ellis, the former owner of the property, transferred it to his sons, the plaintiffs in error, on April 8, 1895, and that the deeds of conveyance were made and received for the purpose, and with the intention, of hindering, delaying and defrauding the grantor's creditors. A decree was rendered awarding the relief for which the creditors prayed. The only question discussed by counsel is the sufficiency of the evidence to sustain the conclusion of the trial court. As the result of a careful reading of the record our con-

viction is that the judgment rendered does complete justice between the parties and should not be disturbed. It is true that Joseph Ellis was indebted to his sons at the time he conveyed to them the land in question; but that fact did not necessarily make the conveyance valid, nor shield them from the assaults of creditors. The plaintiffs in error might lawfully accept security from their father, but it was not permissible for them to do so with the intention of defrauding other creditors. If a conveyance is the product of two motives, one innocent and the other corrupt, it is, according to all the authorities, within the proscription of the statute of frauds. *Hedrick v. Strauss*, 42 Nebr., 485; *Landauer v. Mack*, 43 Nebr., 430. The rule upon this subject is thus perspicuously stated in the American and English Encyclopedia of Law: "Although a creditor who obtains from an insolvent debtor an assignment of property in payment of, or as security for his debt, may know that his debtor is acting with the design of delaying and defrauding other creditors, he will not lose his preference by reason of such knowledge, if he takes the assignment in good faith, and without any view of aiding in the consummation of the purpose, further than necessarily results from securing a preference to himself. If, however, it appears from the circumstances attending the transaction that the preferred creditor was not acting with the sole purpose of securing the payment of his own debt, but also from a desire to aid the debtor in defeating other creditors, or in covering up his property, or in giving him a secret interest therein, or in locking it up in any way for the debtor's own use and benefit, the creditor will not be protected, but the transaction will be declared fraudulent." Vol. 14, 2d ed., pp. 295, 296. Although the Ellis boys knew that their father's affairs were involved and that he was liable to be sued at any time, they took from him warranty deeds which they withheld from record for about nine months. Those deeds when recorded were calculated to deceive creditors. They concealed the in-

terest of the father and proclaimed to the world that the absolute ownership of the property conveyed was in the sons. Neither of the deeds truly expressed the consideration for which it was given. Truth was not even approximated. The transaction, as the record reveals it, is flecked with the *indicia* of fraud. It was evidently designed by all the parties as a protection to the father as well as to the sons. The judgment is

AFFIRMED.

NATIONAL BANK OF COMMERCE, APPELLEE, V. ANNIE R. KINKEAD ET AL., APPELLANTS.

FILED FEBRUARY 6, 1901. No. 9,359.

1. **Decree of Foreclosure:** MODIFICATION: PERSONAL LIABILITY. A decree of foreclosure, in so far as it directs a sale of the mortgaged property, is in no manner affected by a modification touching the personal liability of one of the defendants.

2. ———: POWER OF OFFICER: DERIVATION: ORDER OF SALE: DECREE. The power of an officer under a decree of foreclosure is derived from the decree itself, and not from the order of sale issued by the clerk; and if such officer has made the sale in accordance with the decree, it is the duty of the court to confirm it.

3. **Valid Appraisement:** SALE: COMPLAINT: INVALID APPRAISEMENT. Where there is one valid appraisement of property and a sale thereof for more than two-thirds of such appraisement, it is no just ground of complaint that there was another appraisement which was not valid.

4. **Conflicting Evidence.** Where the evidence, adduced on the hearing of objections to an appraisement because the valuation is too low, is conflicting, if the finding of the court has substantial support it will not be disturbed.

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

A. N. Ferguson, for appellants.

E. J. Cornish, contra.

SULLIVAN, J.

This is an appeal from an order confirming a sale made by the sheriff of Douglas county under a decree of foreclosure. The real estate in question was originally owned by Mary Cunningham, who mortgaged it to the National Bank of Commerce and a part of it was subsequently sold to Annie R. Kinkead. The bank brought an action to enforce its security, and at the February, 1895, term of the court obtained a decree directing a sale of the mortgaged property and adjudging Kinkead to be personally liable for any deficiency that might exist after the due application of the proceeds of the sale. A motion by Kinkead to vacate this decree was considered and overruled at a subsequent term. The record, after reciting the decision of the court upon the motion, continues: "It further appearing to the court that a certain clerical error and mistake appears in said decree as entered of record herein, by consent of the parties hereto, on motion of the defendant Annie R. Kinkead in open court, it is ordered that said decree be amended *nunc pro tunc* as of the date of the 3d day of April, 1895, so that the said decree as amended shall read as follows." Then follows the decree substantially as originally rendered, except that the finding with respect to the personal liability of Kinkead is omitted. The property was appraised and sold under the second decree, but the court refused to confirm the sale, because that decree was entered without notice to Cunningham and was, as to her, void for want of jurisdiction. The bank then proceeded under the first decree and caused the property to be again appraised, advertised and sold. This sale was approved by the court, and, in our judgment, the decision was right. Conceding that the modified decree was void as to Cunningham and valid as to the bank and Kinkead, it does not follow that the court was without authority to sell the mortgaged property for the satisfaction of the amount due upon the mortgage. It is perfectly plain that it was

the office of the second decree to strike out of the first decree the provision making Kinkead personally liable for a deficiency. The court did not intend to make two decrees for the sale of the property. But if the court had made two decrees, that would not afford any sufficient reason for refusing confirmation of the sale. The power to sell was not derived from the order of sale held by the sheriff, but from the decree; and if the sale was in accordance with the decree, it was the duty of the court to ratify it. As there was one valid appraisement, and a sale of the property for more than two-thirds of such appraisement, it is no just ground of complaint that there was another appraisement which was not valid. *Nebraska Loan & Trust Co. v. Hamer*, 40 Nebr., 281. The court decreed a sale of the property; it then sold it for more than two-thirds of its value as fixed by appraisers lawfully chosen; that is all there is to this branch of the case; it is the sum and substance of the principal matter in dispute. Whether the power to sell was derived from one decree or the other, or from both, can be of no possible consequence in determining the controversy now before us for decision.

It is contended that the appraisement was not fair, that the valuation was too low, and that it should have been set aside. The evidence upon this question is substantially conflicting, and, while the preponderance seems to be with appellant, we think the finding of the trial court is not without sufficient support and we, therefore, decline to disturb it.

The order of confirmation is

AFFIRMED.

DAVID C. JOHN, APPELLEE, V. WILLIAM J. CONNELL ET AL., APPELLANTS.*

FILED FEBRUARY 6, 1901. No. 9,373.

1. **Ordinance of City:** GRADING STREET: ASCERTAINMENT OF DAMAGES: MANDATORY ENACTMENT. The provision of section 117 of the Omaha charter (Session Laws, 1887, ch. 10) with respect to the ascertainment of damages before ordering the grading of a street is mandatory and indispensable; and compliance with the requirement is essential to vest the mayor and council with jurisdiction to levy a grading tax.

2. **Void Tax:** LIEN: TRANSFER FROM PUBLIC TO PURCHASER. Whether a tax sale is void on account of irregularities, or is void for want of authority in the treasurer to sell, the lien of the tax for the non-payment of which the sale was made is transferred from the public to the purchaser.

3. **Lien:** TRANSFER. And in such case the lien for any prior or subsequent taxes afterwards paid by the purchaser for the protection of his rights under the tax-sale certificate is likewise transferred to him.

4. **Tax-Sale Certificate:** LIEN. A tax-sale certificate based upon a void levy or assessment gives to the person to whom it is issued no lien upon the property described therein.

5. ———: ———: OWNER'S RIGHTS. But if the owner of such certificate, in the belief that it is valid, pays taxes subsequently levied and which are a lien upon the property described in the certificate, he is subrogated to the rights of the public in such taxes and entitled to enforce the lien therefor.

6. **Record:** SUBSTANTIAL COMPLIANCE. Where the record shows substantial compliance with the jurisdictional prerequisites by the taxing authorities in levying a special assessment, and the landowner fails to point out or suggest the existence of any substantial defect in the proceedings, the judgment of the district court refusing to enforce the lien created by the statute in favor of the public will be reversed.

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

Connell & Ives, for appellants.

Henry P. Leavitt and *William D. Beckett, contra.*

*Rehearing allowed.

SULLIVAN, J.

This action to foreclose a tax lien was brought by David C. John against William J. Connell in the district court for Douglas county. It is claimed that the lien results from a tax sale based upon a special assessment made by the proper authorities of the city of Omaha to defray the cost and expense of grading Poppleton avenue between Twentieth and Thirty-sixth streets. It is alleged in the petition and shown by the proof that in 1892 the defendant's lot was, by the county treasurer, sold for the satisfaction of a delinquent grading assessment; that the plaintiff was the purchaser; that he received a tax-sale certificate in the usual form, and that he afterwards paid other general and special taxes charged against the property. The court found that the special assessments were void, but that the general taxes were valid; it also found that the plaintiff was the owner by subrogation of the lien for general taxes and rendered a decree enforcing the same. Both parties appeal. The defendant insists that the tax sale was not grounded upon a valid tax, and that, therefore, the plaintiff acquired neither a lien upon the property nor the right to pay taxes levied against it for subsequent years.

At the time Poppleton avenue was ordered graded by the city authorities the charter of 1887 had been adopted and was in force. By section 117 (Session Laws, 1887, ch. 10) it was provided: "Before any street, avenue, or alley shall be ordered graded, the damages, if any, by reason of such grading to property along that portion of the street proposed to be graded, including approaches thereto, shall first be ascertained and determined by three disinterested freeholders, who shall be appointed by the mayor and council for that purpose, who shall make such appraisement, taking into consideration the benefits, if any, to such property, and who shall exclude any damages resulting from any change or changes of the original or first established grade, and the amount of

damages so assessed, unless an appeal is taken, shall be due and payable to such property owners, or their agents, in sixty days after the completion and acceptance of such work of grading." The requirement of this section in regard to the ascertainment of damages was, in our opinion, mandatory and indispensable; it was a condition precedent to the exercise of the power to order the grading to be done. Our former decisions compel us to this conclusion. *Smith v. City of Omaha*, 49 Nebr., 883; *Ives v. Irey*, 51 Nebr., 136; *Merrill v. Shields*, 57 Nebr., 78; *Henderson v. City of South Omaha*, 60 Nebr., 125; *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. There was no attempt on the part of the city authorities to comply with section 117, *supra*, and consequently they never acquired jurisdiction to levy the grading tax. Not only was the sale to plaintiff unwarranted and null, but the levy itself was without lawful authority and created no lien against defendant's property.

Having concluded that the tax sale was not grounded on a valid assessment, we have next to inquire whether the court erred in giving judgment in favor of John for the general taxes which he paid on the assumption that he had obtained a lien by virtue of the treasurer's certificate. It is now thoroughly settled by the decisions of this court that, so far as the purchaser is concerned, there is no substantial distinction between tax sales that are void on account of irregularities and those that are void for want of authority in the treasurer to sell. In either case the lien of the tax, for the non-payment of which the sale was made, is transferred from the public to the purchaser; and so also is the lien of any prior or subsequent tax afterwards paid by the purchaser for the protection of his rights under the treasurer's certificate. *Grant v. Bartholomew*, 57 Nebr., 673; *Adams v. Osgood*, 60 Nebr., 779. The defendant, however, contends that the right to pay subsequent taxes does not exist in

favor of a person who has only an apparent and not an actual lien upon the property. It is said that in such case there can be no subrogation, because that right does not belong to one who makes a payment voluntarily, and not for the protection of some right or interest which he has in the property. Such is the rule laid down in Sheldon on Subrogation, sec. 240, and it is not questioned here; but it has been held in this state that the holder of a tax-sale certificate is not a volunteer, even though the land described in the certificate is exempt from taxation. *Wilson v. Butler County*, 26 Nebr., 676. In the case just cited MAXWELL, J., speaking for the court, said (p. 683): "A party having a lien on real estate, or having reason to believe that he has such lien, by paying taxes to protect the same, cannot be said to have made such payments voluntarily, so as to preclude a recovery." And further along in the same opinion the learned justice observes (pp. 683, 684): "The tax purchaser has a right to assume that the records of the county state the facts as they actually exist, and rely upon them, and is not compelled to look elsewhere for evidence of their veracity." In *Merriam v. Hemple*, 17 Nebr., 345, the tax, for the satisfaction of which the defendant's property was sold, was void because, according to the decisions under the former revenue law, the failure of the assessor to swear to the assessment roll was a jurisdictional defect. *Morrill v. Taylor*, 6 Nebr., 236; *Lynam v. Anderson*, 9 Nebr., 367; *McNish v. Perrine*, 14 Nebr., 582. But it was held, nevertheless, that the plaintiff had, by the payment of subsequent taxes, become subrogated to the rights of the public and was entitled to enforce the lien acquired thereby. The doctrine of the case is thus stated in the syllabus: "Where the purchaser at a void sale of real estate for taxes pays the taxes legally levied upon the real estate for subsequent years, upon a failure of his title he will be subrogated to the rights of the county to the extent of the legal taxes so paid by him with legal interest, even though the

taxes upon which the sale was had were void by reason of the default of the assessor in not filing the proper oath with the assessment roll."

It has been said over and over again in the decisions of this court that the policy of our revenue law has always been to encourage men to become purchasers at tax sales by insuring them against loss of the money invested. The most recent expression upon the subject is found in *Grant v. Bartholomew, supra.* In that case RAGAN, C., speaking of the legislation in favor of purchasers at tax sales, said (p. 688): "Now what was the object of this legislation? It was designed as an incentive and an inducement to persons to purchase real estate offered for sale by county treasurers for the nonpayment of delinquent taxes thereon so that the state might collect its revenues and discharge its obligations; and the legislature, having in mind the abhorrence of the courts for all forfeitures and the disposition upon their part to put a strict construction upon revenue laws which deprived the citizen of his property for a tax much less than its value, provided that in no event should a purchaser at a tax sale whose title failed lose his money. If one purchased at a tax sale real estate on which no tax was due at the time, then the county was to hold the purchaser harmless by reimbursing him the money he had paid out at such tax sale; and if the land was liable for taxation, if taxes were due and delinquent against the land, then the owner of a tax-sale certificate was declared to be the assignee and the owner of the liens which the public had against that land and for which the public had sold or attempted to sell it." The doctrine of subrogation has its foundation in the principles of natural equity, and it is quite probable that the legislature contemplated, as a matter of justice as well as of policy, that when the public received payment of any taxes from a tax-sale purchaser, the right of the public —its lien for taxes—should be transferred to and vest in such purchaser. The holder of a tax-sale certificate

pays subsequent taxes with the understanding that he will be subrogated to the rights of the public; and the county treasurer, the agent of the public, receives payment with a like understanding of the effect of the transaction. This being so it would seem that the statute (Compiled Statutes, 1899, ch. 77, art. 1, sec. 116) should be given a liberal construction, with the view of making the intention of the parties effective. To permit the extinguishment of a tax lien when the tax is paid by the holder of the treasurer's certificate would tend to frustrate the policy of the state with respect to the collection of its revenues, and would benefit no one except the delinquent landowner whose attempt to escape the burdens of government renders him undeserving of its solicitude.

Our examination of the record has not revealed any vital infirmity in the proceeding which resulted in the levy of the sewer tax, and defendant has not pointed out, or even suggested, the existence of any substantial defect in such proceeding. We conclude, therefore, that the special sewer tax is valid and that the court erred in not enforcing it. The judgment is reversed and the cause remanded, with direction to the district court to render a decree enforcing the lien for general taxes and for the special sewer tax.

JUDGMENT ACCORDINGLY.

HAYES COUNTY V. JOHN H. CHRISTNER.

FILED FEBRUARY 6, 1901. No. 9,380.

1. **County Clerk:** SALARY: FEE BOOK: ACCOUNTING. The county clerk of each county in this state is required by law to enter upon his fee book and account to the county board for all moneys received by him as salary.

2. ———: ———: AGREEMENT WITH BOARD: COMPENSATION IN EXCESS OF LIMIT. An agreement or understanding between the county board and county clerk that the latter shall receive, for per-

forming his official duties, compensation in excess of the limit fixed by law is null and void.

3. ——: ——: CLAIM: ADJUDICATION: AVAILABILITY PRO TANTO. Where a claim for salary and extra compensation is presented by a county clerk to the county board and allowed, the order of allowance is available to the clerk as an adjudication, only to the extent that the board acted judicially.

4. ——: ——: ——: ——: ——: PROOF. In such case the clerk, if he relies on the action of the board as an adjudication in his favor, must show affirmatively what part of the claim allowed was for extra compensation and what part for salary.

5. Finding of Referee: EFFECT: REVERSAL: ACTION OF THE COURT. Where the findings of a referee have the effect of a special verdict, and the decision of the trial court is reversed for error which does not affect the findings or impeach their correctness, this court will render the proper judgment or remand the cause with special directions.

ERROR from the district court for Hayes county. Tried below before GRIMES, J. *Reversed.*

John Wilson and *Webster S. Morlan*, for plaintiff in error.

John W. Cole and *R. C. Orr, contra.*

SULLIVAN, J.

John H. Christner, the plaintiff below, was the duly constituted county clerk of Hayes county during the years 1888 and 1889. In this action, which came to the district court by appeal from an order of the county board, he filed a petition asking a judgment for the sum of $1,361, which he claimed was due him on account of services rendered and money expended for the county while acting in his official capacity. The issues evolved by the pleadings were tried before a referee, who in due time filed his report finding that the plaintiff should be charged with fees earned and received amounting to $4,646 and be credited with $4,923, for services rendered and money paid out. For the difference between these amounts, being $277, the court gave judgment against the county. The report of the referee, which has the

effect of a special verdict, does not, in our opinion, support the decision rendered. It is quite evident from the report that the plaintiff received $350 as salary which the referee erroneously failed to charge him with in the accounting. The findings relating to this matter are as follows:

"3. That for the year 1888 it was agreed and understood by and between the plaintiff and the board of county commissioners of said county that the plaintiff should receive a salary of $200 per annum, for attending to the business of the county and for finishing work left undone by his predecessor in office.

"4. That the only record of the action of said board of county commissioners in the matter of * * * allowance for salary to the plaintiff for the year 1888, as county clerk of said county, entered upon the commissioners' record, was made on the 3d day of April 1888, and is as follows: 'On motion the county clerk is allowed $200 per year for doing the county work.' * * *

"13. That the plaintiff made out and filed with the board of county commissioners of said county, a sworn claim for the sum of $100 for his salary from January 5th, 1888, to July 1st, 1888, and on the 18th day of June 1888, said claim was duly audited by said board of county commissioners and a warrant was drawn on the treasurer of said county for said amount in favor of the plaintiff in payment of said claim of the plaintiff as county clerk, and the same was duly paid.

"14. That the plaintiff made out and filed with the board of county commissioners of said county, a sworn claim for the sum of $100 for his salary as county clerk from July 1st, 1888 to January 1st, 1889, which claim was on the 18th day of June 1889, duly audited, a warrant drawn on the treasurer for same and paid to plaintiff.

"15. That the plaintiff made out and filed with the board of county commissioners of said county, a sworn claim for the sum of $100 for his salary as county clerk

from January 1st to July 1st, 1889, which claim was, on the 27th day of July, 1889, duly audited, a warrant drawn on the treasurer of said county for same, and paid to plaintiff.

"16. That the plaintiff made out and filed with the board of county commissioners of said county, a sworn claim for the sum of $50 for salary as county clerk of said county for the third quarter of the year 1889, which claim was, on the 7th day of October, 1889, duly audited and a warrant for said amount drawn on the treasurer of said county and paid to the plaintiff.

"17. The plaintiff did not report or include in the fees or moneys received by him as such county clerk during his term of office, the * * * $200 which he received as salary for 1888, and the $150 which he received as salary for 1889.

"19. The $350 paid to the plaintiff as salary for the years 1888 and 1889 was with the knowledge and understanding of the board of county commissioners of said county and the plaintiff that the same was to be and was additional to the $1,500 salary which the plaintiff was entitled to from the fees received by him as such county clerk.

"20. No appeal was ever taken from the action of the said board of county commissioners, in the matter of the allowance of the claims of the plaintiff for salary."

The maximum compensation of the plaintiff as county clerk of Hayes county was $1,500 per year, and it was his duty to enter upon his fee book, and account to the commissioners for, the several sums received by him as salary. *State v. Silver*, 9 Nebr., 85. The agreement or understanding referred to in the nineteenth finding was in contravention of the statute and therefore void. The claims presented and allowed under the order set out in the fourth finding were not claims for extra compensation, but for salary. But if those claims had been in part for extra compensation, the orders of allowance would be available to the plaintiff as adjudications only to the

extent that the board acted judicially upon them. To bring himself within the rule established by *Heald v. Polk County*, 46 Nebr., 28, and *Ragoss v. Cuming County*, 46 Nebr., 36, the plaintiff would have to show affirmatively what part of the $350 was for extra services and what part for salary as clerk of the county board. The burden was upon him to show where the ministerial functions of the board ended and where its judicial functions commenced. In the absence of a finding that any part of the $350 was allowed as extra compensation, it must be all considered and dealt with as salary.

The plaintiff did not move to set aside the findings; they were apparently satisfactory to him, and he must now be content with the judgment which should be pronounced upon them. The legal conclusion from the facts found is that the county is not indebted to Christner in any sum whatever. The decision of the district court is, therefore, reversed and the action dismissed.

REVERSED AND DISMISSED.

SHEDRICK C. BURLINGIM V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1901. No. 11,365.

1. **Information:** IMMATERIAL VARIANCE. Where, in an information, a word found in the instrument proved is omitted from the instrument as recited, or a word inserted in the instrument described which is not in the instrument proved, or a word in the instrument proved is abbreviated or misspelled in the instrument described, or numbers and dates are represented by figures, and the change in no manner or for any purpose alters the signification or tends to prejudice the substantial rights of the defendant upon the merits of the case, the variance is immaterial.

2. **Criminal Code:** RATIONAL PROCEDURE: HYPERTECHNICAL RULES: ABOLITION OF COMMON LAW. In adopting the Criminal Code the legislature intended to provide a rational system of procedure for the trial of persons accused of crime, and to abolish the hypertechnical rules of the common law.

3. **Evidence:** VOLUNTARY CONFESSION. Where everything said by or to the accused, with respect to the crime charged, while he was under arrest, is disclosed, and it thus appears that the confession offered in evidence was voluntary and not made under the influence of hope or fear emanating from any one in authority, or concerned in the administration of justice, it is not error to receive such confession.

4. **Forgery:** ESSENTIAL ELEMENT: FRAUDULENT INTENT: ACCESSORY. A fraudulent intent is an essential element of the crime of aiding and abetting the commission of a forgery.

5. ———: EVIDENCE: ANOTHER TRANSACTION. On the trial of a person charged with having aided and abetted another in the forgery of a deed, it is proper, for the purpose of proving the criminal intent of the principal felon, to show that the person who committed the forgery had, but a short time before, forged another deed purporting to convey the same property.

6. **Exclusion of Evidence:** PROVINCE OF JURY. It is error to exclude evidence the legitimate tendency of which is to put an innocent complexion upon inculpatory circumstances proven by the state; the weight of such evidence is for the jury.

7 **Instruction:** ACCESSORIAL ACT. Where, in the trial of a person charged as an accessory before the fact, the evidence tends to prove the commission of the crime in two or more counties, the court should, in plain terms, charge the jury that there should be an acquittal, if no accessorial act was committed in the county in which the information was filed.

8. **Exclusion of Certain Evidence No Error.** It is not error to exclude evidence which has no tendency to impeach any witness on a material point, and which is not substantive proof of any fact relevant to the issue.

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

Ed P. Smith and *John A. Sheean*, for plaintiff in error.

Constantine J. Smyth, Attorney General, and *Paul Pizey, Assistant, contra.*

SULLIVAN, J.

In the district court for Douglas county Shedrick C. Burlingim was tried and convicted on an information charging him with having incited and instigated one John Johns to commit the crime of forgery. The forged

instrument, a warranty deed purporting to convey to Henry N. Moore a quarter section of land owned by Peter Buller, and situate in Seward county, was received in evidence over defendant's objection that it was not the instrument described in the information. The ruling of the court was excepted to and is assigned for error. The deed pleaded differed from the one given in evidence in no material particular. The differences pointed out consist of abbreviations, misspelling, improper use of numerals and the insertion of the phrase "and no 100" before the word "dollars" in the clause expressing the consideration. These variances did not tend to prejudice any substantial right of the defendant upon the merits of the case, and the trial court rightly held that they were immaterial. Criminal Code, secs. 412, 413; *State v. Collins*, 115 N. Car., 719; *Burress v. Commonwealth*, 27 Gratt. [Va.], 934; *People v. Baker*, 100 Cal., 188; *Commonwealth v. Costello*, 120 Mass., 358; *People v. Phillips*, 70 Cal., 64; 9 Ency. Pl. & Pr., 594. What we conceive to be the correct rule is thus stated by the supreme court of California in the last case mentioned, wherein McKinstry, J., says: "We think the rule is, that if the variance does not change the sense in any way, it is not material. We are not to be understood as saying that when a contract alleged to have been forged is set forth in the indictment or information in words and figures, any other contract is admissible the legal effect of which is the same as that alleged and set forth in terms in the indictment; but that, when in the indictment a word found in the instrument proved is omitted from the instrument as recited, or when a word is inserted in the instrument described which is not in the instrument proved, and the change in no manner or for any purpose alters the signification, the variance is unimportant." The decisions of this court cited by counsel for defendant (*Haslip v. State*, 10 Nebr., 590; *Davis v. State*, 58 Nebr., 465; *Sutton v. State*, 58 Nebr., 567) do not hold to, or countenance in any way, the absurd and an-

tiquated doctrine that the proof must respond to the allegations with literal exactness and that every trivial variance is material. It was the design of the legislature in adopting the Criminal Code to provide a rational system of procedure for the trial of accused persons and the punishment of crime. The intention was to abolish the hypertechnical rules of the common law; and that, we think, has been accomplished.

The court received in evidence alleged confessions made by the defendant while in the custody of the officers who arrested him, and it is claimed that this constituted reversible error. The rulings complained of were in accord with the decision of this court in *Snider v. State*, 56 Nebr., 309. Everything that was said by or to the accused with respect to the crime charged was detailed by the witnesses Wise and Carroll, and from their testimony it appears as a logical and necessary inference that the confessions, if they may be called such, were made voluntarily, and not under the influence of hope or fear emanating from any one in authority, or concerned in the administration of justice.

Over defendant's objection the court received in evidence a deed made to L. F. Schultz by John Johns while the latter was personating Peter Buller. The deed was made a short time before the execution of the one described in the information. It assumed to convey the same land and was uttered with intent to defraud Harry T. Jones, for whom Schultz was acting. It was permitted to go to the jury, not for the purpose of proving a distinct crime, but to establish a criminal intent on the part of Johns. The state was required to show not only that the deed to Moore was not genuine, but that it was executed with intent to defraud. A fraudulent intent was an essential element of the crime for which the defendant was tried (*Wagner v. State*, 43 Nebr., 1); and the deed to Schultz was evidence of such intent. *Knights v. State*, 58 Nebr., 225; *Davis v. State*, 58 Nebr., 465.

Another ground upon which the defendant claims a reversal of the sentence is that the court erred in excluding a letter written to him by Johnston & Kerr, land agents at Council Bluffs, Iowa. The letter is as follows:

"COUNCIL BLUFFS, IOWA, Feby. 25th, 1899.

"*Mr. Burlingim, Seward, Neb.*—DEAR SIR: You have been referred to us by a party who said we might be able to get a loan on the S. W. 4, sect. 9, Tp. 12, R. 4, your county. Please let us know the very most you can loan on it. Could you sell this quarter for cash; if so, at what price? Let us hear from you by return mail and oblige,

"Yours Truly, JOHNSTON & KERR."

The state introduced evidence to show that Burlingim had been endeavoring to find a purchaser for the Buller land, and the letter quoted was offered for the purpose of explaining his conduct and giving it the complexion of innocence. It seems quite clear that the letter should have been received. It was an exculpatory fact, the weight and influence of which it is not the province of the court to determine. The jury may have believed the evidence for the state and discredited the testimony of the defendant because his activity in seeking a purchaser was not, under the circumstances disclosed, susceptible of an innocent construction. He should have been permitted to show that what he did was referable to the suggestion of Johnston & Kerr and not to a criminal compact between Johns and himself. It is probable, of course, that such an explanation would not have brought about an acquittal, but the accused was, nevertheless, entitled to have his theory of the case given to the jury. It was for them to determine, in the light of all the circumstances, whether, in looking for a purchaser, the defendant acted honestly in the belief, or on the supposition, that Johnston & Kerr were representing Buller. We can not say they would have found that the defendant knew the letter was inspired by Johns.

The action of the court in charging the jury with respect to the venue of the crime is approved with some reluctance. The charge given was as follows: "And if you find from the evidence, beyond a reasonable doubt, that all the elements of forgery, as in these instructions described, were committed by the said John Johns in Douglas county, Nebraska; and if you should further find that the defendant, within the time hereinbefore mentioned, did willfully, knowingly and feloniously counsel with the said John Johns and aid or abet the said Johns in the committing of said forgery, although you find that only some part of the conversations of and pertaining to the said forgery, between defendant and John Johns, if there were any, such conversations, were had within Douglas county, you should find the defendant guilty in manner and form as he stands charged in the first count of the information." This instruction scarcely gives sufficient prominence to the venue. In view of the fact that the evidence tended to show the commission in three counties of the offense charged, it would have been fairer to have given the instruction requested by the defendant, which in plain terms stated that there should be an acquittal if no accessorial act was committed in Douglas county.

The fifth subdivision of the brief filed by defendant's counsel is directed to a discussion of the rulings of the court excluding evidence tending to show that Johns had a confederate named Clark who was with him in Council Bluffs. We think there was no error in rejecting this evidence. It had no tendency to impeach Johns upon any material point, and it was certainly not substantive proof of defendant's innocence.

For the error committed in excluding the letter from Johnston & Kerr the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

NORVAL, C. J., not sitting.

FRANK A. SEYMOUR ET AL. V. J. W. PHILLIPS.

FILED FEBRUARY 6, 1901. No. 9,309.

1. **Sale:** WARRANTY: NOTICE: EVIDENCE. A harvesting machine was sold on a special warranty that it was made of good material, properly constructed, and would do good work, and conditioned that if the machine did not work as represented, notice thereof should be given the seller and a reasonable time allowed to remedy the defects and to put it in proper order to do good work, when, if it could not be made to do good work, it should be returned to the place where received, and payment of money or notes returned. Upon trial the machine failed to do good work, and an expert was called, who partially remedied the defects, the machine, however, failing to satisfactorily do the work for which it was intended, of which the seller had notice. After the harvest the buyer gave his notes for the machine and retained it with the agreement, as he testified, that the machine should be put in good repair and made to do proper work. Negotiations for repairs continued for some time, and no repairs being made, the buyer offered to return the machine, which was refused. *Held*, Under the facts and circumstances, that the retention of the machine did not estop the buyer from recovering, by way of counter-claim in a suit on the notes, damages because of a breach in the warranty as to the material, workmanship and work guaranteed to be performed by such machine, and that the seller had waived its right to insist on the machine being returned and the contract rescinded under the provisions of the special warranty.
2. **Evidence.** Where the evidence is conflicting, a verdict of the jury as to amount of damages sustained will not be set aside unless clearly wrong and unsupported by sufficient competent evidence.
3. **Limitation of Argument.** Where the issues are not complicated, and the amount involved is small, it is not error for the trial court to limit the time for argument to the jury by counsel to fifteen minutes on each side.

ERROR from the district court for Buffalo county. Tried below before GREENE, J. *Affirmed.*

McDonald & Squires, for plaintiff in error.

B. O. Hostetler, contra.

HOLCOMB, J.

Plaintiff in error, also plaintiff below, brought an action to recover on two promissory notes, executed by

the defendant, in the sum of $50 each. By answer defendant admits the execution of the notes, and pleads that they were given as a part of the purchase price of a certain harvesting machine, and that in the purchase of such machine the plaintiff warranted it to be of good material and workmanship and to be properly constructed and to do good work of the character for which it was intended; that there was a breach of the conditions of the warranty, and the defendant suffered damages in a sum equal to and greater than the amount due on the notes; that he had offered to return the machine, but that the plaintiff refused to accept the same; wherefore he asked to be dismissed from the action with his costs. The reply admitted the giving of a warranty, but pleaded that it was a special warranty, setting forth a copy, and that the defendant had failed to comply with its terms by him to be complied with. By its terms the machine was warranted to be well made and of good material, and to do good work with proper management when set up and operated as per printed instructions. It was further provided in the warranty that if the machine should not work well, notice was to be given to the company selling, and a reasonable time allowed to get to it and remedy the defects, when, if it could not be made to do good work, it should be returned free of charge to the place where received, and payment of the money and notes would be returned; that failure to immediately give notice as required, or continued possession of the machine, whether kept in use or not, should be deemed conclusive evidence that the machine filled the warranty. The evidence on the trial disclosed, or tended to show, that at the time the machine was set up preparatory to beginning work the local agent was present and assisted therein; that after a number of attempts to regulate it, so as to make it do proper and satisfactory work, the local agent found himself unable to accomplish the same, and sent for an expert to properly arrange and regulate it. The expert came and made some changes,

and supplied a worn out part of the machine, and stated that some of the defects in the machinery to be remedied required certain heavy repairs, for which he would have to send to the factory, as he did not have them, and, with some further attentions, left the defendant in possession of the machine. The working of the same, however, was not satisfactory. The defendant in the meantime had finished the harvest for that year, some sixty or seventy acres, and afterwards, when called upon to give his notes in settlement for the machine, did so, as he testifies, upon the agreement that the repairs necessary to make the machine operate satisfactorily were to be procured and the machine put in good repair and satisfactory condition to perform good work in compliance with the terms of the warranty. No further attention seems to have been paid to the machine, or any other repairs made or furnished. In the following season of 1894 there was a crop failure where the defendant resided, and the machine seems not to have been used, save to cut some light corn-stalks which had been almost entirely destroyed by the drought. Defendant paid the first note about the time of its maturity, December 1, 1893. When the second note matured and payment was requested, demand was made that the machine be repaired and put in satisfactory condition to comply with the terms of the warranty as originally agreed upon. An agent was sent to examine the machine, who ordered a list of repairs, which were never furnished. Several attempts were made to secure the repairs ordered, which for some reason failed, primarily, it seems, because the agent on whom the order was given claimed not to have the desired articles in stock. After these different attempts, and about the beginning of the harvest of 1895, an agent of the plaintiff again came to the defendant, but without any repairs. After some controversy over the matter, the defendant offering to return the machine and the agent refusing to accept it, he departed without repairing or arranging for further repairs. Suit was in-

stituted and pleadings formed, as before mentioned. The court instructed the jury, substantially, that if the harvester failed to comply with the terms of the warranty, the defendant could recover as damages the difference in value between what the machine was actually worth and its fair value had it been as represented and warranted, provided the defendant had substantially complied with the terms of the warranty by him to be performed, or that such compliance had been waived by the plaintiff. The instructions are excepted to, the plaintiff insisting that the defendant having kept the machine for the length of time he did, this amounted to an acceptance thereof, and the defendant having failed to return it as by the special warranty provided, he is estopped from setting up the defense that it failed to comply with the terms of the warranty.

That the machine was not as warranted, and would not with proper management do good work and serve the purpose for which it was constructed, is, we think, fairly established by the evidence. The question, then, is whether the defendant could rely only on the provisions of the warranty for a return of the machine, if unsatisfactory, and a rescission of the contract, or whether he still had his remedy at law to retain the machine and recover in damages for a breach of the warranty. Under the defendant's testimony the machine did unsatisfactory work, of which the plaintiff was notified, as by the terms of the contract it should be. It undertook to regulate and repair the machine for the purpose of making it operate properly. This it failed to do, and the work of the machine during the entire time of the first harvest was improper and unsatisfactory, and of this it had notice. After the harvest, and at a time when defendant's right to return the machine and rescind the contract was unquestioned, he was induced to retain the machine, give his notes therefor, and the plaintiff promised and agreed to repair the machine so as to comply with the warranty and make it do satisfactory work.

Under such an arrangement, it occurs to us, that the defendant, by the retention of the machine, forfeited his right to a return thereof and a rescission of the contract, and the plaintiff waived its right to demand a return and insist on a strict compliance with the terms of the special warranty; but such action would not estop or preclude the defendant from his legal remedy of recoupment for such damages as he may have sustained because of a breach of the terms of the warranty as to the quality, workmanship of the machine and character of the work which it was warranted to perform. By the instructions given to the jury they were told that, notwithstanding the failure of defendant to return the machine, the defendant could recover on his counter-claim, if the plaintiff had waived its right to have a return or had refused a return when offered by the defendant. The question, we think, was properly submitted, and the defendant was not deprived of his remedy of damages for a breach of the contract. *Aultman v. Theirer*, 34 Ia., 272; *McCormick v. Dunville*, 36 Ia., 645; *Mandel v. Buttles*, 21 Minn., 391; *Park v. Richardson*, 81 Wis., 399; *Machine Co. v. Mann*, 42 Kan., 372; *Warder v. Fisher*, 48 Wis., 338.

It is also insisted that the finding of the jury as to the damages sustained equaling the amount due on the notes is not supported by the evidence. The evidence was conflicting, and there was evidence tending to establish the fact that the machine, as it really was, was not worth more than that which had been paid by the defendant on the purchase price thereof. The jury evidently took this view of the matter, and we can not say, under the evidence, the verdict is manifestly wrong and unsupported by sufficient competent evidence.

It is also urged that the court erred in limiting the argument of counsel to fifteen minutes on each side of the case. This is a matter that must be left largely in the discretion of the trial court; and in a case of this kind, where the issues were not complicated, and the

amount involved not large, we can not say that there was an abuse of discretion.

The judgment of the trial court must therefore be

AFFIRMED.

HATTIE L. BRAND, APPELLEE, V. JOSEPH GARNEAU, JR., ET AL., APPELLANTS.

FILED FEBRUARY 6, 1901. No. 9,344.

1. **Foreclosure Sale:** SECOND APPRAISEMENT. Under section 495 of the Code, when real estate ordered to be sold under decree of foreclosure has been appraised and twice offered for sale and not sold for want of bidders, a new appraisement is authorized.
2. **Order Vacating Appraisal:** APPLICATION: RIGHTS OF PARTIES. An order of the court vacating and setting aside the first appraisal so made, without any application therefor, is immaterial and in nowise affects the rights of the parties to the action.
3. **Confirmation.** Proceedings in an action confirming sale of real estate under decree of foreclosure examined, found regular, and the confirmation properly entered.

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

Charles Ogden, Joel W. West and *Albert Swartzlander,* for appellants.

J. O. Detweiler, contra.

HOLCOMB, J.

An appeal is taken from an order of confirmation of sale of real estate made under a decree in foreclosure proceedings. It appears from the record that under an order of sale first issued the property was appraised and offered for sale twice after due advertisement, but was not sold for want of bidders. Thereupon it was reappraised and after advertisement again offered for sale, but not sold for want of bidders. Objections to the last

appraisement, with a motion to set aside the same, were presented by appellants. The property not being sold after one offering under the second appraisal, the order of sale was returned with the proceedings taken thereunder properly indorsed thereon. A second or alias order of sale under the decree was issued and the property again appraised for sale at the sum of $200. After advertisement the property was sold. The appraisement and sale were objected to by appellants, and upon their motion vacated and set aside, and, in the order made, all prior appraisements were vacated. A new appraisement and sale were ordered. The property was again appraised and sold after due advertisement.

It is argued the court erred in its order vacating and setting aside the first appraisement of the property at $550. The objection is not well taken. Under the provisions of section 495 of the Code, the appraisement, after two offerings of the property, without bidders, became of no consequence in determining the amount for which the property should sell, and a new appraisement was authorized. The other appraisements were vacated on the appellants' objections, and, therefore, they can not now be heard to complain.

In the order of the court made on motion of the appellants, vacating the prior appraisements and setting aside the last sale, a new appraisement and sale was directed. The appraisement, sale and other proceedings had under such order appear regular, and the order of confirmation was properly entered.

We observe no cause for a special order as to the taxation or retaxation of the costs.

AFFIRMED.

LELAND SPAULDING V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1901. No. 11,452.

1. **Evidence:** VERDICT: JUDGMENT. Evidence examined, and found to be sufficient to support the verdict of the jury and the judgment rendered thereon.

2. **Cumulative Instructions.** Where an instruction is requested, the substance of which is contained in other instructions given, it is not error to refuse such requested instruction.

3. **Inapplicable Instructions.** An instruction requested, which is inapplicable to the issues in the case and not based on the evidence, is properly refused.

4. **Misconduct of Jury.** Where, in the trial of a criminal case, after submission to the jury, and while the jury was in charge of an officer, one of the jurors separated from the remainder while they went a short distance to eat one of their meals, and it appearing that no one communicated with the one juror during the absence of the others regarding the case, and that no improper influence could have been brought to bear upon him, the rights of the defendant are not prejudiced thereby, and a motion for a new trial because of such separation is not well founded.

5. **Relation of Attorney and Client:** CONFIDENTIAL COMMUNICATIONS: TESTIMONY OF ATTORNEY: CONSENT OF CLIENT. Where the relation of attorney and client exists, confidential communications between them, or statements made by the client to the attorney, are privileged, and the attorney will not be permitted to testify as to such statements without the consent of the client. Ruling by the trial court sustaining objection to an attorney testifying in the case as to statements made by the prosecutrix *held* proper.

6. **County Attorney:** DISQUALIFICATION: APPOINTMENT BY COURT. Where a county attorney is disqualified from prosecuting in a criminal case, the trial court may appoint other counsel to prosecute. Order of trial court, finding county attorney disqualified and appointing other counsel to prosecute, *held* not erroneous.

ERROR from the district court for Madison county. Tried below before CONES, J. *Affirmed.*

William M. Robertson and *Powers & Hays*, for plaintiff in error:

The relation of attorney and client must exist, in order

to make a communication privileged. *Romberg v. Hughes*, 18 Nebr., 579; *Basye v. State*, 45 Nebr., 261.

The confidential relation of attorney and client does not exist as between the prosecuting officer for the state and a state witness. *Cole v. Andrews*, 74 Minn., 93.

In the interest of justice, any testimony in possession of the state which is beneficial to the prisoner should go to the jury. *Marks v. Beyfus*, 25 Q. B. Div. [Eng.], 494.

Constantine J. Smyth, Attorney General, Willis D. Oldham, Deputy, Burt Mapes, Fred Free and *Michael F. Harrington, contra.*

HOLCOMB, J.

A thorough consideration of the briefs of counsel, and an examination of the record in this case, convince us that the judgment of conviction rendered in the trial should be permitted to stand undisturbed. The defendant was convicted of the crime of rape. The prosecutrix was a female, nineteen years of age, who for about three years prior, had been accustomed to work for others at general housework as a domestic. For a while she was engaged in learning the business of dressmaking, but failed. It is disclosed that, while not feeble minded, as the term is ordinarily understood, she was perceptibly below the average person of her age and situation in intelligence and strength of mind. On the night of the alleged crime she attended an entertainment and dance given by the colored people of Norfolk in celebration of emancipation day. Several different persons were concerned in the alleged assault, some five or six altogether. One obtained her consent to accompany her home at the close of the entertainment. Others, including the defendant, were cognizant of this arrangement, and discussed the matter with a view to a possible disturbance and fight between the party who was to accompany the prosecutrix and one other of the number, all of whom seemed bent on violence in some form or

other. By one witness it is testified that the defendant, during the evening and before leaving the hall, declared, in substance, that they (meaning the party of whom he was one) would prevent the party referred to from accompanying the prosecutrix home, whether she wanted to go with them or not, and that he would have intercourse with her whether she wanted to or not. When the prosecutrix and her escort left the hall, about 2 o'clock in the morning, the defendant with others was standing at the foot of the stairs leading from the hall. Some remarks were made about others taking the girl home, and about a fight between the escort and one other of the crowd. One of the party took hold of the girl's disengaged arm and, with the others a short distance in the rear, started towards the place where she was staying. At the railroad crossing the intruding party released his hold and returned to his companions a short distance behind. The defendant then left the party and seized the girl's arm, with the suggestion that they get away from the crowd, and she, still accompanied by her escort, traveled with them rapidly along the track of the railroad, leaving the street and going along and by several coal-houses and other buildings usually erected along side tracks, until they were near some stock-yards and empty cars standing on the track, where, as claimed by the prosecutrix, she was thrown violently to the ground, and, although offering all the resistance she was capable of, was, by the violence employed by the defendant and others, rendered unconscious and assaulted by the defendant and some five others. The manner of committing the offense was brutal and bestial, with not the trace of an extenuating circumstance. It is contended, and with some degree of plausibility, that the elements of force, resistance and non-consent are not established by the evidence sufficiently to support the verdict of guilty of the crime of rape. As to physical resistance, the evidence is not as strong and conclusive as would usually be expected un-

der similar circumstances. Just what terrorizing effect the unmanly and violent conduct of those connected with the affair had can not be known. The conduct of the parties to the assault at and after the entertainment was certainly enough to frighten a person of the age of the prosecutrix of more than ordinary courage. The suggestion of the defendant, that they get away from the crowd which was following them, very probably led her to the belief that he would assist her in escaping from them, and she readily and voluntarily accompanied him. The circumstances were unusual, and might well have overpowered a person of stronger mind than hers. There was evidence from which the inference could justly be drawn that she did resist to the full extent of her ability. There was evidence of a struggle; of her undergarments being torn; her hair disheveled and her clothes disarranged, and that she struck the defendant, leaving a mark visible for some time thereafter, which he admitted receiving by a blow from her. She testified that she became unconscious, and there is testimony by a third party who is disinterested, to the effect that after the several assaults had been made, she was crying, or, as he termed it, 'sniffling,' was bewildered and almost unconscious, and confused as to her location and the direction of her home. Her testimony was corroborated in many respects by circumstances, all tending to support the charge in the information. It can not be said, as we view the record, that the evidence is insufficient to support a finding in favor of every essential element and material allegation of the crime charged. The verdict is supported by sufficient competent evidence.

Complaint is made as to several instructions requested by the defendant and refused by the trial court. Of the instructions given to the jury were some twenty given by the court on its own motion, and four at the request of the defendant. The fact that no complaint is urged in the brief of counsel as to the instructions given by the court on its own motion is well calculated to raise the

presumption that the charge as a whole was as favorable to the defendant as he could rightfully ask. This presumption is strengthened by the fact that an instruction given by the court on its own motion, to which a formal exception was taken, and one given at the request of the defendant are exact duplicates. The instructions as a whole covered every salient feature of the case, and were fully as favorable to the defendant as he could, in any view of the case, reasonably request.

It is urged that two instructions upon the prior chastity of the prosecutrix as affecting the question of consent were erroneously refused. An examination of the record, however, discloses that in the third instruction given at the request of the defendant the jury's attention was especially called to the subject, and they were invited to a consideration of the evidence on this phase of the case for the purpose of determining the question of whether the prosecutrix consented to have intercourse with the defendant at the time of the alleged assault. The instructions requested and refused but stated the proposition in a different form, and to have given them would have been only a repetition, and they were, therefore, properly refused.

Complaint is also made because of the refusal of the trial court to give three other instructions touching the question of the use of force and the want of consent as necessary elements to constitute the crime charged. These same questions were covered by other instructions given by the court on its own motion, as well as one given at the request of the defendant, and no error was committed in the refusal to give those requested, of which complaint is made.

Instructions were also requested on the theory that unless the prosecutrix was *non compos mentis*, she was capable of consenting, if the jury found she did consent, and the crime of rape could not, therefore, be established. There was no such issue in the case or before the jury, and the instructions were inapplicable and not based on

any evidence. The state of the prosecutrix's mind was shown, as any other fact, for the purpose of aiding the jury in the determination of the question of whether she resisted to the extent of her ability and as an explanation of her after conduct. The jury were fully instructed on the question of consent, and that, if given, however tardily, the defendant could not be found guilty, no matter how much force he might have used prior to such consent. There was no issue in the case as to the incapacity of the prosecutrix to give consent, and the instructions were properly refused.

All the instructions requested and refused were quite fully, and sometimes by repetition, covered in the instructions already given. We find no error in the refusal to give any of the instructions requested.

Misconduct of the jury is also alleged, based upon the fact that during the deliberation of the jury, one, who was ill, was permitted to stay at the home of the sheriff, while the others went some little distance for the purpose of eating one of their meals. It is quite evident from the showing made that no one communicated with the one juror during the absence of the others, and by no possibility could any improper influence have been brought to bear upon him. There was no prejudice to any of the rights of the defendant from the acts complained of, and the ruling of the trial court on the objection was eminently proper.

The evidence of one W. E. Reed, an attorney at law, as to statements alleged to have been made by the prosecutrix, was sought to be elicited by the defendant. Objection was made because, at the time of the alleged statements, the relation of attorney and client existed, and the statements were, therefore, privileged communications. It is shown by the record that the relation claimed did exist; that the father of the prosecutrix, accompanied by her and her uncle, went to the office of Mr. Reed, paid him a fee and consulted him regarding the case, and that at this time the prosecutrix made the

statements sought to be elicited. That they were confidential and privileged we entertain no doubt, and fully approve the ruling of the trial court thereon. The case comes clearly within the rule as announced in *Romberg v. Hughes*, 18 Nebr., 579, and in *Basye v. State*, 45 Nebr., 261. In the latter case a discussion of the rule is found, and further comment is not necessary in this case.

The court found that the county attorney was disqualified from acting in the case and appointed other practicing attorneys to prosecute. This action is made the basis of a claim of error. The order was entered after an investigation of the matter, and the evidence upon which the court acted, not being preserved in the record, will therefore be presumed to have been sufficient. From the record presented we can think of no other proper action on the part of the court than to appoint some one to prosecute. The county attorney had refused to prosecute, and the filing of the information was had only under the direction of the court. From the reasons assigned for not wishing to prosecute, which are preserved in the record, the trial court was justified in concluding that the county attorney had disqualified himself from efficiently representing the state in the prosecution of the case, and the appointment of some other counsel appears for that purpose to be entirely proper and authorized by section 21, chapter 7, Compiled Statutes, 1899.

Finding no error in the record, and holding, as we do, the evidence sufficient to justify the verdict and sustain the judgment of the trial court, the same must be allowed to stand.

AFFIRMED.

NOTE.—*Separation of Jurors.*—Under the ancient law of England, jurors were held as prisoners of the court till they agreed upon a verdict. *Bishop of Northumberland v. Earl of Kent*, Trinity Term (Eng.), 14 Henry VII., c. 29. The rule is now relaxed. Separation in trial of felony held no ground for reversal in *Bilansky v. State*, 3 Minn., 313. —REPORTER.

CHARLES B. SMITH V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1901. No. 11,651.

1. **Evidence:** COLLATERAL FACT. Testimony relating to a collateral fact was offered for the purpose of strengthening and corroborating the theory of the defense, and excluded. The relation of such fact to the main facts in the case appearing to be conjectural and uncertain, and affording no reasonable presumption as to the main issues, *held*, that the exclusion of such proposed testimony is not prejudicial error.

2. **Instructions:** MOTIVE. The giving of the instruction copied in the opinion with relation to the want of motive for the commission of a crime, being a circumstance favorable to the innocence of the party accused, *held* not to be erroneous.

3. ———: CIRCUMSTANTIAL EVIDENCE. An instruction on circumstantial evidence was requested by the defendant, in which it was stated: "If there is any one single fact proved to the satisfaction of the jury which is inconsistent with the guilt of the defendant, this is sufficient to raise a reasonable doubt, and you should find him not guilty." *Held*, That such instruction was properly refused; first, because substantially the same propositions were embodied in other instructions given; second, because it did not restrict the jury to the consideration of material facts essential to the conclusion on which the guilt of the defendant was sought to be established; and third, it permitted the consideration of different facts as distinct and independent propositions, the true rule being, that the facts and circumstances on which reliance is placed for conviction must be considered and taken together.

4. **Conviction on Circumstantial Evidence.** To justify conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proven by competent evidence beyond a reasonable doubt, and, when taken together or as a whole, must be of such a character as to be consistent with each other, and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence.

5. **Instruction:** CIRCUMSTANTIAL EVIDENCE. An instruction as to the force and effect of circumstantial evidence, copied in the opinion, *held* to have been properly given.

6. **Self-Serving Statements:** IN EXTREMIS: RES GESTÆ. Statements in one's own interest, self-serving in their nature, made soon after the commission of the homicide which such person was charged with having committed, even though made under the

apprehension of impending death, the person recovering, *held*, to be inadmissible as evidence, either as declarations *in extremis* or as a part of the *res gestæ*.

7. **Cross-Examination.** On cross-examination of a witness questions were asked as to alleged prior statements made by him regarding the action and conduct of the defendant, to which objection was made and sustained. *Held*, Such questions to be improper on cross-examination or for the purpose of laying a foundation for impeachment to affect the credibility of such witness, and the ruling thereon to be without error.

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

H. A. Lambert, E. B. Quackenbush and *Francis Martin*, for plaintiff in error.

Constantine J. Smyth, Attorney General, and *Willis D. Oldham, Deputy, contra.*

HOLCOMB, J.

The defendant, plaintiff in error, was charged with and convicted of the crime of murder in the first degree, the penalty being by the jury fixed at imprisonment in the penitentiary during life. The homicide charged in the information was the killing of the wife of the defendant by shooting with a revolver. It is disclosed by the record that the deceased came to her death from a bullet wound in her right temple; that at the same time the defendant received a wound from a bullet entering the right side and back part of his head, which ranged forward and came out above and in front of the right ear, the bullet penetrating only beneath the skin, and apparently deflected from its course by coming in contact with the skull. The tragedy occurred in the kitchen of the dwelling-house occupied by the defendant and deceased. The evidence on which the conviction was had was circumstantial. The defense interposed, and as conducted during the trial of the cause, was on the theory that the deceased first shot the defendant as he was

passing her while she was standing in the kitchen, causing the wound alluded to, the shock producing unconsciousness for a short time, during which she fired the fatal shot resulting in her own death. A very short time after the tragedy, after others had appeared on the scene, the defendant, passing into an adjoining room, shot himself with the same weapon through the stomach, the ball entering a little to the side and above the navel, ranging downward and through his body, and lodged so as to be easily extracted from the hip. The state submitted testimony regarding the circumstances surrounding the tragedy and regarding the location of the room, furniture, etc., the finding of a bullet on the floor in one part of the room; and to the absence of bullet marks on the walls, doors or windows of the room. The homicide occurred April 22. The trial began June 25 following. During the introduction of testimony for the defense a witness was called by whom it was sought to prove that on the day previous (June 26) the witness had made an examination of the room of the house in which the tragedy occurred and found a mark on the door, leading from the kitchen to the sitting room, resembling the mark of a bullet. The question by which the testimony was sought to be elicited was objected to and the objection sustained. Counsel for defendant then made the following offer: "Defendant offers to prove by this witness, that on the 26th day of June this witness went to the house of Smith with Mr. Schantz, who has had control of the same and possession of it, and made an examination of the room for bullet marks and that on the door between the kitchen and the sitting room about an inch below the upper hinge of the door, he found a distinct mark about the size of a 38 bullet that would have struck lengthwise." And the following objection was made and sustained, the ruling thereon being assigned as prejudicial error: "State objects, as the time fixed by the witness is three months after the shooting, and it has already been testified by persons who found the bullet that

they made careful examinations of the room the same night the jury was there and there were no bullet marks on either the windows or doors. Incompetent. Irrelevant. Immaterial. Sustained. Exception." The testimony was offered as tending to prove a circumstance in support and corroboration of the theory of the defendant relative to the question of how the shooting occurred and who did the same. We assume the testimony was excluded because of the remoteness of time at which the mark was discovered from the time of the principal transaction, and, under the circumstances, the proposed testimony was regarded as of no evidentiary weight and irrelevant to the issues raised.

It appears from the record that for about ten days after the homicide the defendant, with others, occupied the premises for residence purposes, the last two or three days of which the defendant had recovered from the wounds received sufficiently to move about the rooms and outside of the building. After the defendant had left the premises, one Schantz, the father of the deceased, had control, but who had immediate possession or access to the building does not appear. The time elapsing from the homicide to the finding of the mark, of which the witness was interrogated, was sixty-five days. Whether or not in fact the mark was made by a bullet seems to be purely conjectural, and whether it was made at the time of the homicide and as a result of the shooting, which then occurred, is even more uncertain. Its connection with the transactions under investigation can only be inferred from the statement made in the offer that it was a mark "about the size of a 38 bullet that would have struck lengthwise." This fact alone, it seems to us, renders its connection with the principal facts so uncertain as to destroy its relevancy, and the circumstances as to time, and use and occupancy of the building, negative all probative force that otherwise it would possess. Had the mark been discovered at or near the time of the principal transaction, or were the proposed testimony

such as from it the jury would be warranted in deducing the inference that it was made by a bullet fired at the time of the death of the deceased or wounding of the defendant, its relevancy and materiality could not be open to question. But when it is discovered more than two months after the occurrence, and when the room had been occupied, and open to all comers, with the opportunities for and probabilities of a similar mark being made in countless ways, and without any means of identification or connection with the transactions occurring at the time of the homicide, it can hardly be said to be more than mere speculative and conjectural evidence. The question presented is entirely different from a case where the circumstance, object or fact sought to be established by proof as a collateral fact to the main issue, though discovered long after the principal transaction, is capable of identification and connection with the main fact. In the latter case, lapse of time and the element of remoteness would not be so important and controlling as in the former. "The rule," says POST, C. J., in *Blomgren v. Anderson*, 48 Nebr., 240, 242, in speaking of the admission of testimony as to collateral facts corroborative of the principal contention of the parties to a case, "as said by one author, 'excludes all evidence of collateral facts which are incapable of affording any reasonable presumption as to the principal matters in dispute; and the reason is that such evidence tends needlessly to consume the public time, to draw the minds of the jurors from the points in issue, and to excite prejudice and mislead; moreover, the adverse party, having had no notice of such evidence, is not prepared to rebut it. The due application of this rule will occasionally tax to the utmost the firmness and discrimination of the judge; so that while he shall reject, as too remote, every fact which merely furnishes a fanciful analogy or conjectural inference, he may admit as relevant the evidence of all those matters which shed a real, though perhaps indirect and feeble, light on the question in issue. And here it will

generally be found that the circumstances of the parties to the suit, and the position in which they stood when the matter in controversy occurred, are proper subjects of evidence; and, indeed, the change in the law enabling parties to give testimony for themselves has rendered this proof of "surrounding circumstances" still more important than it was in former times.' (Taylor, Evidence, sec. 316; 1 Greenleaf, Evidence, sec. 52 *et seq.*)" Were we to indulge in presumptions and probabilities regarding the origin of the mark made on the door, it would seem that there are far stronger reasons for the conclusion that it was made in some accidental manner, possibly on purpose, by those coming and going in and about the house, and its apparent resemblance to a mark that might be made by a 38 calibre bullet is no more than a coincidence. A careful examination of the record forces upon us the conclusion that the remoteness of time, and uncertainty as to what relation it may sustain to the main facts in the case, render the proposed testimony of inconsequential value, if not entirely worthless as evidence. We do not think any substantial right of the defendant was impaired by the ruling of the trial court thereon.

At the request of the state the following instruction was given the jury, to which an exception was taken, and error is now sought to be predicated thereon: "The court instructs the jury that when the evidence fails to show any motive to make an assault or commit a crime this is a circumstance in favor of the innocence of the party accused. And in this case if the jury find upon a careful examination of all the evidence that it fails to show any motive, cause or reason on the part of Louise Smith to assault and murder the defendant then you should consider this fact in determining the truth or falsity of the claim made by the defendant that his wife first shot him and then killed herself." It is admitted by counsel for defendant that as an abstract proposition of law the instruction is without error, and that the sub-

ject dealt with therein may be properly argued by counsel, and may have probative force worthy of consideration by the jury; but it is contended that it is an argument from the bench, giving a negative phase undue prominence by singling out the one feature of the case and imputing to it special significance and force, and that the instruction practically casts upon the defendant the burden of proving a motive in his wife to commit the crime. That part of the instruction relative to the want of motive being favorable to the innocence of a party accused of crime is a correct expression of the law when applied to the case at bar, either as an abstract or concrete proposition, and is as favorable to the defendant as to the state. The principle contained in the instruction is approved of in *Clough v. State*, 7 Nebr., 320. Under the circumstances of the case at bar, the defendant was accused of the crime of killing the deceased, his wife. His defense was that the deceased first shot him and then took her own life. That the shooting was done by the one or the other with felonious intent is established by the evidence, not only to a moral certainty, but to a degree amounting almost to the certainty of a mathematical demonstration. The jury were called upon to judge of the defense interposed in connection with the truth of the charge against the defendant. The establishment by the evidence of one hypothesis as to the circumstances of the homicide necessarily excluded the other. The evidence as to the defendant's guilt was strengthened or weakened as the circumstances proved might or might not point to the wife as the assailant. In determining whether she in fact made the assault, as contended for by the defendant, it was proper to consider her motive or lack of motive to make the alleged assault. If no motive appeared, the probability of her having committed the crime alleged is lessened, and the jury would be correspondingly freer from doubt as to the truth of the charge against the defendant. "The truth or falsity of the claim made by the defendant that his

wife first shot him and then killed herself" is a subordinate proposition included in the principal one in issue, that the defendant made the assault and committed the homicide. If the jury disbelieved the subordinate proposition, then stronger would be the reasons for the conclusion that the evidence proved, beyond all reasonable doubt, that the charges made in the information were true. It is quite true that it is only necessary that, under all the evidence, the jury should entertain a reasonable doubt of the defendant's guilt, and the truth of the matter claimed by him as a defense need not further be determined. But in the truth or falsity of the claim made by him is also involved the truth of the charge made by the state, and any fact or circumstance connected with the substantive defense interposed is properly to be considered by the jury in determining the weight and credit which should be given to the testimony in support of the theory and hypothesis sought by the defendant to be impressed upon them for the purpose of raising a doubt as to the truth of the charge of the crime imputed to him. Under the issues, the jury were required to consider and pass upon the questions presented by the defendant relative to his claim that his wife did the shooting, to the extent, at least, as to whether such evidence, in connection with all the other evidence, raised a reasonable doubt of the defendant's guilt, and in doing so it is apparent that the trial court might, with propriety, instruct as to a circumstance proper for them to consider in the determination of such question. If, from the evidence, no motive appeared for the wife to make the assault, that fact, it seems reasonably clear, was a matter pertinent and proper for the jury to consider in weighing all the testimony and in arriving at a verdict. This was all that was said in the instruction, and for that reason we find no error in its giving. While the language of the instruction is not fully approved, it is in substance, we think, a correct expression of law, and the matter spoken of is proper to be called to the atten-

tion of the jury in their consideration of the evidence and in arriving at a correct conclusion as to the truth of the charge made against the defendant. The instruction does not, we think, give undue prominence to any particular phase of the case, but rather is an application of an admittedly sound rule of law to the evidence in the case, and is calculated to assist the jury in applying and weighing the evidence before them.

An instruction on the rule as to circumstantial evidence was requested by the defendant, in which, among other things, it was stated: "If there is any one single fact, proved to the satisfaction of the jury, which is inconsistent with the guilt of the defendant, this is sufficient to raise a reasonable doubt, and you should find him not guilty." The refusal to give the instruction is assigned as error. Other instructions relating to the same subject, and covering substantially the same proposition, save possibly the portion quoted, were requested and given. The ruling of the trial court should probably be sustained on the ground that the same subject was covered in other instructions given, and to give the one requested and refused would be substantially a repetition. We think the instructions faulty, however, in not restricting the jury to facts material to the issues and essential to the conclusion of guilt. The range allowed, and the field to which the jury's attention was invited by the instruction, in finding a single fact inconsistent with guilt, is too broad and general, and manifestly tends to mislead rather than assist in reaching correct conclusions. The instruction also appears objectionable in directing consideration of each fact and circumstance as a distinct and independent proposition, rather than its consideration in the light of, and with relation to, all other facts and circumstances proven on the trial. We understand the rule to be that the facts and circumstances necessary to the conclusion sought to be established, to justify a conviction on circumstantial evidence, must be proven by competent evidence beyond a rea-

sonable doubt, and, when taken together, or as a whole, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence. This court has said, to warrant a conviction of crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt (*Walbridge v. State*, 13 Nebr., 236; *Bradshaw v. State*, 17 Nebr., 147), and that the circumstances relied upon must be of such a character that, when taken together, they are of so conclusive a nature and tendency as to lead to a satisfactory conclusion and produce in effect a reasonable and moral certainty that the accused, and no one else, committed the offense charged. It is essential that the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should, to a moral certainty, exclude every other hypothesis except that of the guilt of the accused. *Casey v. State*, 20 Nebr., 138. Says the supreme court of Texas, in *Brooken v. State*, 9 S. W. Rep., 735: "To warrant a conviction on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved beyond a reasonable doubt; all the facts (that is, the necessary facts to the conclusion) must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the defendant committed the offense charged."

The following instruction given to the jury is excepted to: "Circumstantial evidence is to be regarded by the jury in all cases. It is many times quite as conclusive in its convincing power as direct and positive evidence of eye witnesses. When it is strong and satisfactory, the jury should so consider it, neither enlarging nor belittling its force. It should have its just and fair weight with the

jury; and if, when it is all taken as a whole and fairly and candidly weighed, it convinces the guarded judgment, the jury should act on such conviction. You are not to fancy situations and circumstances which do not appear in the evidence, but you are to make those just and reasonable inferences from circumstances proven which the guarded judgment of a reasonable man would ordinarily make under like circumstances." We do not think the execption well taken. The instruction fairly states a rule applicable to the force and effect to be given circumstantial evidence. It occurs to us that it is a conservative statement of the rule announced. The rule, stated in stronger language than in the present instance, is approved in *Davis v. State*, 51 Nebr., 301. The rule as announced has received judicial sanction in many other jurisdictions. It does not appear to us that it permits a conviction on a preponderance of the evidence, as suggested. The jury are told in other instructions that they must be convinced of the truth of the charge beyond a reasonable doubt. The instruction does not purport to speak of the requisite degree of proof, but of the consideration to be given circumstantial evidence and the effect thereof. We find no error in the giving of this instruction.

On cross-examination one Schantz, a witness for the state and father of the deceased, was asked numerous questions relative to purported statements theretofore made by him as to the action and conduct of the defendant, which, if believed, would tend to prove that such acts and conduct were those of an insane rather than of a sane person. The testimony thus sought to be elicited was proper neither as cross-examination nor to lay the foundation for impeachment for the purpose of affecting the credibility of the witness. It was in no way contradictory or inconsistent with testimony given in the examination in chief of the witness in regard to certain actions and statements of the defendant in the nature of threats against, and showing ill will towards, the de-

ceased. While the evidence might have been proper as evidence in chief under a defense where insanity was a plea, it was, as we view the record, entirely improper and rightly excluded in the cross-examination of the witness.

Certain questions were asked a witness for the defense for the purpose of proving that soon after the tragedy had occurred the defendant had made statements exculpatory of guiltiness on his part of the act of shooting the deceased, and declaring, as was his testimony on the trial, that the shooting was done by the deceased. The reputed statements were made while the defendant was lying in the room where he shot and wounded himself, and after a physician and officer had been called, and some little time after he had been accused by the father of the deceased with the shooting. The statements do not appear to be a part of the *res gestæ*. Other statements of the same character, of which testimony was offered and excluded, it is claimed, were shortly afterwards made while the defendant was lying in bed, after an examination by a physician and under the apprehension that the wounds were fatal. The evidence, we think, was properly excluded. We know of no rule of law under which it could have been admitted. It was at most a statement by the defendant favorable to his own innocence, and was self-serving in its nature. The defendant, having recovered, was a competent witness in his own behalf, went upon the stand and testified to substantially the same statements before made, as claimed, regarding the matter, and this testimony could not properly be buttressed by his prior statements of the same character to others.

Lastly, it is earnestly insisted that the evidence is not sufficient to support the verdict of the jury and the judgment of the court rendered thereon. To this contention we can not give our assent. A full examination of the record leads to the conclusion that the evidence not only supports the verdict, but that it so strongly points to the

conclusion reached as to clearly exclude every other rational supposition or hypothesis. The evidence shows, or tends to show, that the defendant suspected the deceased of being unfaithful to him; that this rankled in his mind so strongly that he had threatened to take the life of both; that he had been violently demonstrative towards the deceased regarding the matter. Whether there was substantial ground or reason for the views entertained by him regarding the question of the deceased's infidelity is not a matter presented for consideration under the record before us. That the fact existed is abundantly shown by the evidence. At the time of the tragedy the positive evidence shows that while defendant was sitting or standing on the porch opening into the room where the tragedy occurred, the deceased came out and called to their little boy to come home, and immediately returned to the room, closely followed by the defendant, who pushed open the door after her, as testified to by one witness, his hand on his hip, following her into the room; and in a very short period of time two shots were heard in quick succession, one of which terminated the life of the deceased and the other produced the wound on the defendant's head. In a short time others came into the room, and the defendant was in possession of the revolver, and branishing the weapon, ordered the father of the deceased out of the room and then passed to an adjoining room, where a shot was fired by him, producing the wound in the stomach spoken of. He had purchased shortly previous the weapon with which the shooting was done. He said it was purchased for the purpose of shooting another with whom his wife was criminally intimate. He was resentful towards her. He fancied she had wronged him. He threatened to do what appears in fact to have been done. All the material facts and circumstances proven on the trial point unerringly to the conclusion that he committed the act. When taken and considered together, they are consistent with the hypothesis of guilt on his part and inconsistent with any other

rational theory or conclusion. It is true that the defendant's testimony as to the occurrence resulting in the homicide, if believed, would be inconsistent with his guilt. But the jury had the right to reject and disregard the testimony as improbable and untrue. It furnished no sufficient basis for the unavoidable conclusion of an essential fact proven connected with the transaction inconsistent with the hypothesis of guilt. *Carleton v. State*, 43 Nebr., 373, 394. Under the issues joined in the case, we entertain no serious doubt of the defendant's conviction being justified by the evidence and in conformity with law, and the judgment should therefore be affirmed, which is accordingly done.

AFFIRMED.

JONATHAN LYDICK V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1901. No. 11,691.

1. **Public Road**: STATUTORY PROCEEDING: PRESCRIPTION. Where a public road has been established by proceedings under the statute and opened and traveled by the public for more than ten years, the public thereby acquires an easement therein, and the court will not examine the original proceedings for the laying out of the road and determine whether or not they were valid. *City of Beatrice v. Black*, 28 Nebr., 263, followed.
2. **County Road**: TITLE: ADVERSE POSSESSION. Title to a part of a county road can not be acquired by an adverse possession. *Krueger v. Jenkins*, 59 Nebr., 641, followed.
3. **Complaint**. Complaint copied in the opinion *held* to charge an offense under the provisions of section 107 of the Criminal Code.
4. **Extent of Inquiry**: COMPENSATION OF OWNER. In a prosecution for the violation of said section the question of whether compensation to the owner has been made for the taking of real estate for a public highway can not be inquired into.

ERROR from the district court for Burt county. Tried below before KEYSOR, J. *Affirmed.*

H. E. Carter, for plaintiff in error.

No appearance, *contra.*

HOLCOMB, J.

A complaint was filed against the defendant, plaintiff in error, charging him with a violation of section 107 of the Criminal Code, providing as follows: "Any person who shall deposit any wood, stone, or other kind of materials, on any part of any lawful public road, in this state, inside of the ditches of such road, or outside of the ditches, but so near thereto as to cause the banks thereof to break into the same, or cause the accumulation of rubbish, or any kind of obstruction, shall, for every such offense, pay a fine of five dollars." On this complaint, after trial, a verdict of guilty was found by the jury, upon which a fine of the amount stated was imposed by the court. From this judgment, by error proceeding, the case is brought here.

Many questions are argued in brief of counsel for plaintiff in error. The state has filed no brief. As we view the record, the controlling propositions which must be decisive of the case are contained in instructions Nos. 4 and 5, given by the court on its own motion, to which exceptions were taken, and the giving of which is assigned as error. The instructions are as follows:

"4th. You are instructed that it is the law that after a road has been used ten years or longer, the original legal proceedings which were had to establish it cannot be inquired into, but must be regarded as valid. If you believe from the evidence beyond reasonable doubt that the road in controversy had, on May 2d, 1899, been traveled by the public ten years or longer, and that before said ten years or longer the county commissioners of this county established said road by a legal proceeding begun for that purpose, then you are instructed that said road was, on May 2, 1899, a public road, and you should so find.

"5th. You are also instructed that no person can gain title to any part of a public road by cultivating it or excluding the public travelers therefrom for any period of

time, however long it may be. If you find from the evidence beyond a reasonable doubt that more than ten years before May 2d, 1899, the county commissioners began legal proceedings to establish said road, and that they did establish it, and that afterwards the public used said road ten years or more, then the whole of the road, four rods wide, belongs to the public; even though the public used only a portion of said road, and a portion was fenced and cultivated by the defendant and his grantors."

The case appears to have been fairly and properly submitted to the jury, and the instructions quoted announce propositions of law which have heretofore been approved as a correct expression by this court. *City of Beatrice v. Black*, 28 Nebr., 263; *Krueger v. Jenkins*, 59 Nebr., 641. The defendant argues upon the theory that the only public road that was ever established at the point in controversy was by dedication, was limited in width to a less distance than the statutory width of four rods and did not include the strip or tract where the alleged obstructions were placed. But it appears quite satisfactorily from the evidence that in the year 1867 legal proceedings were instituted by the authorities of the county to establish a highway under the laws as then existing and along and at the place where the controversy arose. The records of these proceedings are incomplete. It is shown, however, by the commissioner's record that, acting upon a notice and petition and after hearing, a commissioner was appointed for the purpose of viewing and establishing the road petitioned for, if found practicable and required for the good of the public; that acting on such authority, the road was surveyed, platted and established, and has ever since, as well as long before, been traveled as a public highway. The road plat book was also introduced in evidence, showing the location of the road as a public highway. It having been shown that legal proceedings had been instituted for the purpose of establishing a public highway, and that a highway had been established thereunder and along the

route where the controversy originated, the regularity and validity of such proceedings, after the lapse of time which had intervened when the alleged offense was committed, will be presumed, and, as stated in the fourth instruction, the alleged irregularity and invalidity would not be inquired into. *City of Beatrice v. Black, supra.* The fifth instruction is fully justified by the holding of this court in *Krueger v. Jenkins, supra.*

While there is some objection to the sufficiency of the complaint, we do not find merit therein. The complaint charged that the defendant, unlawfully, willfully and maliciously, did injure and obstruct a certain lawful public road, describing it, by placing, depositing and leaving in and upon said public road, near the centre thereof, a large number of posts and logs, contrary, etc. The complaint is sufficient to charge an offense under the statute mentioned.

Objection is also made because it is not found that compensation was made to the owner of real estate for damages sustained by reason of the land being taken for public purposes at the time of the location of the public highway. However this may be, this question, as was very properly ruled by the trial court, could not be inquired into in this proceeding.

The judgment of the district court is right and should be affirmed, which is accordingly done.

AFFIRMED.

INSURANCE COMPANY OF NORTH AMERICA, APPELLEE, V. GUSTAVE A. ACKERMAN ET AL., APPELLANTS.

FILED FEBRUARY 20, 1901. No. 9,390.

1. **Judicial Sale:** APPRAISEMENT: ATTACK: FRAUD: POST HOC. An appraisement of property made for the purpose of a judicial sale, can not be successfully attacked after the sale except on the ground of fraud.

2. ———: ———: CONFIRMATION: OBJECTIONS: ALLEGATIONS. It is not error to refuse to vacate a judicial sale on the ground that the

appraisement was fraudulent, if the objections to the confirmation contain no allegation of fraud or other improper conduct on the part of the appraisers.

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

George O. Calder, for appellants.

Gregory, Day & Day, contra.

PER CURIAM.

The order under review confirms a sale of real estate made in execution of a decree of foreclosure. The motion for confirmation was resisted by appellant on two grounds: (1) That the register of deeds included in his certificate to the special master commissioner the mortgage which was the basis of the decree; and (2) that the appraisers' valuation of the property was too low. There was no attack on the appraisement prior to the sale; and after the sale it could be questioned only for fraud. *Ecklund v. Willis*, 44 Nebr., 129; *Kearney Land & Investment Co. v. Aspinwall*, 45 Nebr., 601; *Jarrett v. Hoover*, 54 Nebr., 65; *Ballou v. Sherwood*, 58 Nebr., 20. The evidence of fraud is not, by any means, convincing; but if it were conclusive, it would not impose upon the court the duty of setting the sale aside, since there was no allegation of a fraudulent appraisement. *Brown v. Fitzpatrick*, 56 Nebr., 61; *Nelson v. Alling*, 58 Nebr., 606. The order of confirmation is

AFFIRMED.

KEELEY INSTITUTE OF VIRGINIA V. JAMES T. WADE.

FILED FEBRUARY 20, 1901. No. 9,358.

1. **Direction of Verdict.** When there is no disputed question of fact in a case it is proper for the trial court to direct the verdict that shall be returned.

2. **Hearsay Evidence.** Hearsay evidence is inadmissible on the trial of a cause.

ERROR from the district court for Washington county. Tried below before SLABAUGH, J. *Affirmed.*

Jesse T. Davis and *Frank S. Howell*, for plaintiff in error.

Walton & Mummert, F. Dolezal and *W. S. Cook, contra.*

NORVAL, C. J.

The plaintiff below, James T. Wade, and the Keeley Institute of Virginia, a corporation, entered into a written contract, of date September 1, 1893, one clause of which reads as follows: "The said J. T. Wade for and in consideration of thirty-six hundred dollars per year payable in equal monthly payments, agrees to take full charge of the medical and business departments of the said Keeley Institute of Virginia, to employ at his own expense at least one assistant manager and one janitor for duty at the institute." At or about the date of said contract said Wade entered upon the discharge of his duties, and so continued until some time in the fall of 1895, when the relations existing between the parties created by said contract ceased, and said Wade sued said corporation in the district court of Washington county, alleging that there was due him on account of services rendered under said contract an unpaid balance of $728, for which sum he prayed judgment. To this petition defendant answered, alleging as defenses, among other things, that said Wade had failed to keep his contract, in this, that he had not employed an assistant manager at such institute; further, that by reason of the incompetency and immoral and drunken habits of plaintiff, the business which he was employed to manage had been injured, all to the damage of defendant in the sum of $1,000. To this a reply, denying said allegations, was filed by plaintiff. On the trial, after all the evidence was admitted, the plaintiff moved the court to instruct the jury to return a verdict in his favor, which motion was sustained, and the court accordingly directed the jury to

return a verdict for plaintiff for the sum of $735.94, which verdict was accordingly rendered, and for the judgment entered thereon the defendant brings the proceeding here on error, its assignments of error being: (1) The court erred in giving to the jury the instruction directing the jury to return a verdict for the plaintiff below; (2) in not submitting the question of performance of said contract; (3) in not submitting the question whether said contract had been substantially complied with; (4) in overruling the motion of defendant for a new trial.

The assignments of error present one question, which is, was there any evidence tending to show that plaintiff had not complied with his contract? A careful examination of a very long record leads the court irresistibly to the conclusion that there was absolutely no evidence which disclosed that plaintiff had not fully complied with all the terms of the contract on his part to be performed. His evidence, and that of his witnesses, is to the effect that he discharged his duties, not only personally, but by employing an assistant manager and janitor, down to some time in the year 1895, when, by mutual agreement of the parties, an assistant manager was dispensed with and an itinerant lecturer was employed in his place, at a fixed salary, which was deducted from that of plaintiff. While there was an attempt to contradict the evidence of plaintiff relative to the employment of an assistant manager, an examination of the evidence discloses the fact that the witnesses either did not know the facts about which they testified or attempted to hide the facts by saying that they had never heard any of the persons employed by the plaintiff called assistant manager, and did not know that he performed such duties. Without a single exception, all the evidence of defendant on this question is so utterly weak as to entitle it to no weight. There is an argument to the effect that, if persons were employed from time to time to act in the capacity of assistant manager, such persons were shown by the evidence not to be fitted for that position, and that ques-

tion should have been submitted to the jury. We do not think so. There is nothing to show that any of these persons failed to do any thing that was required of them by the manager, or that they were not capable of doing anything that he required of them, or that, by reason of any failure or inability to perform anything of that nature the defendant was damaged in the slightest, and there was, therefore, nothing to submit to the jury on that question.

It is also argued that this is an entire contract, and that there is evidence that part of it was unperformed by plaintiff, in his failure to employ an assistant manager, and that, having failed to perform part thereof, he can not recover on the contract. *Hale v. Sheehan*, 36 Nebr., 443, is cited as authority. It is useless to inquire into the question whether this was an entire contract or not. There was absolute proof of a complete and substantial performance of its terms on the part of plaintiff, and no evidence to the contrary, and that being the case, it is unimportant whether it was an entire contract or not.

It is further contended that there was evidence going to prove that the allegations of damages had been sustained, and that these should have been submitted to the jury; but we think not. The evidence on that question was merely to prove the plaintiff's personal habits, and also to the effect that he occasionally absented himself from the institute for several hours at a time, leaving no one to attend to the patients, and to further prove that the attendance of patients gradually diminished in number, and it is argued that this evidence tending to prove these acts and omissions on the part of plaintiff tended to damage defendant and its business. There is no evidence, except hearsay, that any one failed to attend the institute because of plaintiff's conduct, which evidence was of course inadmissible; nor can it be inferred that his conduct, if proven, was the cause of the business falling off, unless other evidence more nearly connecting the two as cause and effect was introduced. It is contended,

also, that the mere fact that the business fell off was of itself proof from which damage could be inferred; but we do not think so. *Bass Furnace Co. v. Glasscock*, 2 So. Rep. [Ala.], 315.

We think there is nothing under any of the issues to submit to the jury, and for that reason the action of the court in instructing the jury to render a verdict for the amount prayed was proper, under numerous decisions of the court. *Hamilton v. Ross*, 23 Nebr., 630; *Burlington & M. R. R. Co. v. Wendt*, 12 Nebr., 76; *Lent v. Burlington & M. R. R. Co.*, 11 Nebr., 201; *Burns v. City of Fairmont*, 28 Nebr., 866.

The judgment of the lower court is therefore

AFFIRMED.

CRAWFORD COMPANY, APPELLANT, V. HATHAWAY ET AL., APPELLEES.*

FILED FEBRUARY 20, 1901. No. 10,087.

1. **Motion for Rehearing:** CONTENTS. A motion for a rehearing should concisely state the ground or grounds upon which the decision is assailed.
2. ———: ARGUMENTS AND CITATIONS. Arguments or citations of authorities have no place in a motion for a rehearing.
3. **Jurisdiction:** SUBJECT-MATTER: CONSENT OF PARTIES. Jurisdiction over the subject-matter can not be conferred by the consent of parties.
4. **Waters on Public Domain:** STATUTE: GRANT. Sections 47 and 48, chapter 93*a*, Compiled Statutes, 1897, constitute no acceptance of any supposed grant to the state by the federal government of the waters on the public domain.
5. **Former Opinion.** Former opinion reported in 60 Nebr., 754, adhered to.

APPEAL from the district court for Dawes county. Heard below before KINKAID, J. Opinion supplemental to one appearing in 60 Nebr., 754. *Rehearing denied.*

*Rehearing allowed.

Hamer & Hamer, Allen G. Fisher and *Justin E. Porter*, for appellant.

Samuel Maxwell, Albert W. Crites and *W. H. Fanning, contra.*

J. W. Deweese and *John S. Kirkpatrick, amicus curiæ.*

NORVAL, C. J.

An opinion was filed in this case during the last term, which is found reported in 60 Nebr., 754. Subsequently the court, owing to the importance of irrigation, and a seeming misapprehension on the part of those interested in that important industry concerning the questions decided by the court, of its own motion ordered a reargument of the case. Since the filing of the opinion counsel for plaintiff has filed what he is pleased to designate a motion for a rehearing, which comprises some forty pages of solidly type-written matter, and is nothing more than an extended argument upon what counsel conceives to be the merits of the case. The attorney who filed the so-called motion is a practitioner of ability and extended experience, and it would seem to us is certainly acquainted with the practice relative to applications for rehearings. Arguments or citations of authorities have no place in a motion for a rehearing. Such motions should concisely state the ground or grounds upon which a rehearing is asked. 18 Ency. Pl. & Pr., 57, and cases cited. Were the questions determined by the prior opinion not important to others, we would be justified in striking the so-called motion from the files. But, for the reason stated, we will endeavor to remove any erroneous impressions that may prevail concerning the former opinion, so far as that is possible, within the issues involved in the case.

Before entering at large upon a discussion of what we conceive to be the only points necessary to a complete de-

termination of the case as made below, it may be well to mention briefly a few preliminary matters argued by counsel, which were not adverted to in the former opinion, for the reason that the court did not think them well taken. Other questions argued—and they are legion, but not noticed herein—may be considered as belonging to the class last mentioned.

At the commencement of the former opinion we stated that there were many reasons for sustaining the decree of the lower court. This is true, but it is manifest that it is unnecessary to decide more than the two questions there determined, namely, the right of plaintiff to maintain this action before the rights to the waters of the stream had been adjudicated by the state board of irrigation, and the right of Hall to have his vested interests protected from the invasion of plaintiff. These are the two vital questions discussed and decided, and the court has no doubt they were determined correctly, and is further satisfied that to a complete determination of the litigation the examination of other questions argued, or sought to be raised, is unnecessary at this time.

It is suggested that Hall had an adequate remedy at law for any damages he might suffer at the hands of plaintiff, and that, therefore, he was not entitled to relief by injunction. We do not think the law afforded him a remedy that was adequate; much more than mere compensatory damages was involved in the invasion of his rights by plaintiff, and it seems clear that he was entitled to the equitable relief accorded.

It is contended, however, that if the court entertain jurisdiction to enjoin plaintiff from destroying Hall's vested right to the use of the water for mill purposes, it should have proceeded to adjudicate all in controversy. We do not think so. The proper tribunal before which to try the rights to the priority was the state board of irrigation, a special tribunal of limited jurisdiction; and while the court below could properly interpose its equity powers, so far as necessary to prevent an invasion of his

rights, it was its duty to relegate the parties to the special tribunal provided by the legislature. In 1 Spelling, Extraordinary Relief, section 41, the author says, in substance, that the rule limiting the power of a court of equity in granting an injunction not to take jurisdiction of the whole case applies especially to cases pending in courts of special and limited jurisdiction. So far as concerns plaintiff's contention that the court should have taken jurisdiction of the whole case, because it had jurisdiction to grant the injunction sought by plaintiff, that is answered by reminding plaintiff that it failed to prove this cause of action. So far as the record discloses, the allegations upon which the prayer for an injunction was based were not sustained. A party can not compel a court to take cognizance of matters which are within the jurisdiction of the board of irrigation by seeking the aid of an injunction, when it is not entitled to such relief. So soon as it is shown that he is not entitled to such injunction, it is the duty of the court to refuse to proceed further in the case made by plaintiff. For that reason, the refusal of the court to adjudicate the question of water rights as between the parties was proper. Nor will the mere consent of the parties confer jurisdiction upon the court, where the subject-matter belongs to a tribunal of special and inferior jurisdiction, like the state board of irrigation, from whose decision an appeal lies to the court in which the parties seek redress.

Counsel for plaintiff complain of our former ruling, to the effect that sections 47 and 48, chapter 93*a*, Compiled Statutes, 1897, did not abrogate the common law rights of riparian owners as they theretofore existed, and insists that the court should hold that those sections, which are termed the act of 1877, in effect established a separate ownership of land and water in this state, and are in effect the acceptance of a grant by federal statute (Revised Statutes U. S., sec. 2339) of the waters on the public domain to the people of the several states. We copy the so-called act of 1877 as since amended:

"Sec. 47. Any corporation or association organized under the laws of this state for the purpose of constructing and operating canals, reservoirs and other works for irrigation and water power purposes shall have power to borrow money and to mortgage their property and franchises in the same manner and for the same purpose as railroad corporations, and all laws applicable to railroad corporations relating to the borrowing of money and the issuance of bonds and giving of mortgages and the manner of so doing, are hereby declared to be applicable to corporations and associations organized under this act.

"Sec. 48. Canals and other works constructed for irrigation or water power purposes or both are hereby declared to be works of internal improvement, and all laws applicable to works of internal improvement are hereby declared to be applicable to such canal and irrigation works."

There is nothing occult to this act, so far as we can ascertain. It is a simple, plain, straightforward authorization of certain classes of corporations or associations to borrow money, and to condemn for right of way. To give them the right to condemn, their object must be a public one, to conform to the constitutional requirements that private property can be taken for public uses only. The statute gives them nothing, other than these two powers. It does not point out the manner in which the water is to be procured to fill their ditches. The right to irrigate land has always existed everywhere. How then could this act be said to authorize these associations to take water from the streams of the state, irrespective of the rights of individuals thereto? If it had the effect that is claimed for it, to accept the gift from the general government of the water upon the public domain, this acceptance, it will be noted, was in favor solely of corporations or associations organized under the laws of the state. In that case, what became of the rights of individuals to the water, which counsel insists belong to the people and is no longer an adjunct to land? We think

this statute could not possibly have affected the rights of riparian owners. Certainly it was an easy thing for the legislature to have so framed the act as to leave nothing open to conjecture. There was no reason to hide, in an apparently simple act permitting corporations to perform certain very ordinary functions, an acceptance of a grant so important as that mentioned. We have no doubt of the correctness of our conclusion announced in the former opinion, that immediately after the passage of this act "the rights of riparian owners stood exactly where they did immediately prior thereto." We think counsel misapprehends the whole scope and purpose of this act, which to an unbiased mind would seem exceedingly simple, and not in need of the slightest interpretation. No other than one anxious to avoid Hall's contention that he had acquired his right by appropriation and user for more than ten years prior to the time plaintiff commenced this action could see between this easily understood act and the federal statute referred to any necessary or probable connection. Nor could any other than such imagine any connection between this act and the rights of riparian owners or prior appropriators or users. By this prior appropriation and use Hall had acquired a vested right to the waters of this stream, for milling purposes, and it was necessary to invoke the aid of the statute to deprive him of the rights so acquired; hence the endeavor to give to the statute a meaning contrary to its plain language and different from that intended by its framers. There was no necessity for the legislature to recognize any different rule relative to ownership of water than had existed prior thereto in any jurisdiction where the common law is in force. It is as possible to irrigate in England as in Arizona. The laws of gravitation obtain in both jurisdictions. The means of obtaining title to water would differ in the two, but the fact of irrigation would co-exist in both. But counsel for plaintiff seems to assume that irrigation can exist only where the common law rights relative to water have been blotted

out. We reiterate that the act of 1877 had no effect whatever upon riparian rights. Whether such common law rights have been in any manner modified or changed since that law was enacted is not within the scope of this inquiry, and for that reason it is not discussed. The rights of the lawmaking body to legislate where rights have not vested can not be doubted, any more than its lack of power to take away rights which have vested. Before plaintiff claims to have acquired any rights, at least before the commencement of this action, Hall acquired a vested right to use this water for power purposes; he was a prior appropriator. It is not necessary to a decision of the case that his rights as a mere riparian owner be decided. He undoubtedly had a vested right as a prior appropriator.

The federal statute, which the plaintiff claims constituted the grant of the waters on the public domain, of which the act of 1877 it is insisted was an acceptance, is as follows: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified, is acknowledged and confirmed," etc. Revised Statutes U. S., sec. 2339. It is claimed that this statute was a grant by the federal government to the people of the state of the waters on the public domain. We do not think so. Its purpose was to confirm the rights of those who have acquired, under certain conditions, the use of the water, and calls that right a vested one, even though the waters are taken from streams upon the public domain and without the assent of the government. If the statute were a grant, it protects Hall, for he appropriated the water of this stream ten years prior to the time this action was commenced. The statute would

seem rather to confirm his right, than to uphold the contention of plaintiff that its right was prior in time. True, its right was for irrigation purposes. But his was for manufacturing, and that right is acknowledged in the statute. So, under this act, his rights were prior to those of plaintiff. He was a prior appropriator, and by virtue of its provisions, if applicable here, could invoke the aid of the court to protect him from any attempt, on the part of plaintiff, to divert the water from his mill.

Some confusion is probably bred because of the use by the court of the terms "riparian proprietor" and "riparian rights" in the former decision. It is not necessary to the determination of this case that Hall should be designated merely a riparian proprietor. He was more; he was both a riparian owner and a prior appropriator. Whether by virtue of the mere fact that this stream flowed through his property he was entitled to the full flow of the stream is not necessary to the determination of the case. Whether, since Hall acquired his rights, which were vested at the time this action was commenced, the legislature has abrogated or modified the rights of riparian owners merely, as such, in cases where they have not attempted to appropriate the waters flowing through their lands, was not involved in the question being decided, as up to the time he appropriated this water there had been no legislation on the subject of water rights, save this law of 1877. The whole of the discussion turned upon Hall's rights as affected by said act of 1877, and the court, in effect, said that, independent of statute, the common law relative to riparian ownership was applicable to this state. The question of whether it is within the power of the legislature to abrogate or modify the mere naked right to the full flow of the stream, where no act looking to an appropriation has been taken by an individual, was not involved, and is not decided.

It appears from briefs filed by counsel not directly interested in the case at bar, but who, or whose clients are, interested in the subject, as well as from that of counsel

for plaintiff, that it is assumed the court in its former decision cast doubt upon the validity of the present irrigation laws. A careful reading of the opinion should dissipate any such idea, for, owing to the peculiar position taken by plaintiff, the court could not inquire into that question. It could go no further than to determine that the portion of the law which plaintiff attacked as invalid was of such a nature as to make it dependent upon the other parts of the same law, to such an extent as it could not be said that the part attacked was not a material inducement to the legislature to pass the act as a whole. Having so determined, the court was driven to the conclusion announced in the third point of the syllabus, to-wit, that "One can not successfully rely upon a statute, when he at the same time insists that a material portion thereof is unconstitutional, where it is obvious that the part claimed to be invalid formed an inducement for the passage of the remainder." For the reason given, it is evident that the validity of the irrigation laws is not in issue, owing to the manifest inconsistency of plaintiff in attempting to destroy that part of the act which conferred jurisdiction of the subject-matter upon a form different to that in which the action is brought, while it relied upon the validity of the remainder for its cause of action, when as a matter of law the act is an indivisible whole, to such extent as that, if one part be destroyed, the whole fabric falls in ruins. For the benefit of counsel for plaintiff a somewhat ampler discussion of the reasons of the court for holding that the act is an inseparable whole, so far as relates to the point under consideration, may be desirable.

It is insisted that, although the act which created the board of irrigation is constitutional, those portions thereof alone which it is claimed give to it judicial powers are invalid; that the residue of the act which confers upon the board the duty to distribute the water is valid, but that the former is invalid, and can be separated from the remainder of the act and still leave a valid board of

irrigation and a valid and complete law. However this may be, it does not in anywise obviate the objection that the erection of this board, with all the powers and functions therein conferred upon it, one as much as another, formed a material inducement to the legislature to pass the act. Can it be said that those who voted for it were induced to do so solely because of the power conferred upon it relative to the mere control and distribution of the waters, and that the fact that it was also given the power to decide the priority of right to use the same? Was not the party entitled to so use it also a factor conducing to the passage of the act? It is perfectly natural to expect these factors to co-exist in the same act. They seem a necessary part of it. Before such a board can distribute the water it must determine to whom it must be distributed; and such a determination is judicial in nature, quite as much as the acts of the county board sitting as a board of equalization. It must also necessarily adjudicate the right to use before it can proceed to distribute. Even though such right to use had been previously determined by a regularly constituted court, the board would be obliged to ascertain that such determination had been had before it could distribute it to the party entitled thereto, and such act of ascertaining would be a judicial act, quite as much as if it had determined that the matter of distributing the water and the determination of the right to it, and the person who possesses that right, are inextricably interwoven to the extent that it is practically impossible to separate the one from the other. The court, of course, is not passing upon the question of whether this board is merely an administrative body, and not a court, or whether it partakes of the characteristics of both, but is merely illustrating its reasons for holding that the conferring of administrative functions upon it could not have been the sole inducement for creating it, by pointing out the fact that it is practically impossible to create an administrative body which does not also possess, in a certain degree, judicial functions. But the

fact that such bodies possess to some extent judicial powers does not necessarily make such body a court, within the meaning of the constitution. A merely administrative body may have conferred upon it judicial powers and functions without in anywise trenching upon the powers or functions of the courts as regularly created. It is therefore impossible to discriminate between the judicial functions of a body and its ministerial functions, and say that the legislature was induced to create such body because it possessed powers of one character rather than those of another. If the bringing into being of this board was an inducement to its passage, and that is too patent for denial, the conferring of judicial or *quasi*-judicial functions was as much an inducement to its passage as were those of a mere administrative nature, and any endeavor to separate one function from the other as being the potent and predominant factor in determining the action of the legislature is but a piece of "specious and fantastical sophistry." To illustrate: Take a portion of section 16, chapter 69, Session Laws, 1895, "It shall be the duty of the state board at its first meeting to make proper arrangements for beginning the determination of the priorities of right to use the public waters of the state. * * * The method of determining the priority and amount of appropriation shall be determined by the said state board, which at its first meeting shall designate the streams to be first adjudicated." Counsel for plaintiff urged that this act of 1895 would seem to oust the courts of jurisdiction to try priorities of right to use the water, and we are asked to declare that portion of the law invalid for the reason that it was not a material inducement to the legislature to pass the law, the purpose of the legislature being rather to enact an irrigation law than to create a court. But before rights under a law can be secured there must be an instrumentality through which such law can be enforced. This the law in question furnished by erecting an irrigation board having jurisdiction over

these very rights. Was not the creation of this board, with all its powers, the one as much as the other, an inducement to its passage? How is it possible to believe that section 16, above quoted, and others connected therewith were not, all and each of them, material in influencing the legislature in making the whole act a law? No amount of refining, or the urging of immaterial distinctions, will dispose of the proposition that the erection of this board of irrigation, with all the duties and powers conferred upon it, was so inextricably interwoven with the rest of the act as to make the whole indivisible; and it is impossible to separate one function of the board from another and say that this or that was or was not an inducement to its passage. For that reason the act must stand as a whole or entirely fail; but the question of whether it must stand or shall fall is not involved in the case at bar. The court does not hold that the law is in any particular unconstitutional. It does not even cast a doubt upon its validity. It does not decide that the judicial functions conferred upon the board in anywise trench upon the constitutional powers of courts, or whether they are such as may be properly conferred upon administrative boards. It merely decides that if the act in question is valid, plaintiff proceeded in the wrong form. If it is unconstitutional in the respect urged by counsel, which we do not decide, it is void as a whole, and plaintiff's cause of action, if any it has, so far as relates to its right to divert the waters, falls with the law, on which it is wholly dependent.

The motion for a rehearing is denied.

REHEARING DENIED.

HERBERT WHALEN ET AL., APPELLEES, V. JAMES B. KITCHEN ET AL., APPELLANTS.

FILED FEBRUARY 20, 1901. No. 10,745.

Settlement of Decedent's Estate: REVIEW: APPEAL TO SUPREME COURT. Section 675 of the Code of Civil Procedure does not give the right to have reviewed by the supreme court on appeal the decisions made by a county court in the settlement of the estate of a person deceased, but such decision can be here reviewed by error proceeding only.

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

George E. Pritchett and *J. C. Cowin*, for appellants.

William D. Beckett and *J. W. Woodrough*, *contra.*

NORVAL, C. J.

In 1890 Richard Kitchen died, leaving a will, by the terms of which, among other provisions, he gave to Herbert and Wallace Whalen the sum of $10,000 each, with the proviso that his executor might pay such legacies in stock of the Kitchen Brothers Hotel Company, but that the whole estate was to be settled within three years from the death of testator. The executor, James B. Kitchen, failed to pay these legacies within the period limited in the will for closing the estate, and after the expiration of such time filed in the county court his report, in which he asked leave of court to deposit stock with such court in payment of such legacies, and prayed for an approval of his accounts and his discharge as executor. The Whalen children, through their guardian *ad litem*, filed objections to this report and demanded that their legacies be paid in cash, with interest from the time they should have been paid. From the judgment of the county court in the premises, adverse to said legatees, they appealed to the district court, and there such proceedings were had that a judgment was duly entered

for the full amount of their legacies. From this judgment of the district court said executor appeals to this court, and this hearing is on a motion to dismiss the appeal, on the ground that no provision is made by the law for the appeal of matters of this character, but that the proper mode for obtaining a review here is by proceeding in error only.

Section 675 of the Code of Civil Procedure provides: "That in all actions in equity either party may appeal from the judgment or decree rendered or final order made by the district court to the supreme court of the state," etc. Prior to the enactment of this statute all judgments of the district court must be reviewed by petition in error, and since its enactment "actions in equity" may be reviewed either on appeal or by petition in error. It was ruled in the case of the *Nebraska Wesleyan University v. Craig's Estate*, 54 Nebr., 173, that an appeal will not lie to this court from an order of the district court allowing a claim against an estate, and the statute governing the procedure in cases of that nature is there examined and construed. That an appeal will not lie in analogous cases, see the authorities cited in *Nebraska Wesleyan University v. Craig's Estate, supra*, also *Iler v. Darnell*, 5 Nebr., 192; *Sheedy v. Sheedy*, 36 Nebr., 373. It is, however, contended that this proceeding is essentially of an equitable nature, and not legal, and for that reason appeal will lie as well as error. To this we can not assent. While it is true that in England, to a large extent, courts of equity had cognizance of the settlement and adjustment of estates, such is not the case in this country, but the powers of courts of equity in cases of that nature are not only restricted, but in a majority of the states wholly nullified. Pomeroy, Equity Jurisprudence, sec. 77. In said section it is well stated: "It is true that the statutory rules for the settlement of estates are largely based upon the principles which had been settled in equity, and that equitable doctrines are constantly enforced by the courts of probate; but it is no

less true that this important head of equity jurisdiction has been greatly restricted, or even practically abandoned, in all the states." If such jurisdiction has been abandoned in any of the states, it certainly has in Nebraska. Here all the proceedings looking to the settlement and adjustment of estates are specifically prescribed by statute, even to the mode and manner of seeking the advice of higher courts in matters in dispute between litigants in the courts of probate and adjustment. The statute which confers the right to have reviewed the decisions of the county court in matters of probate is not found in the Code of Civil Procedure, but in the statute relative to decedents, which confers jurisdiction over estates upon the county court. The whole procedure is statutory, and while many of its provisions are of an equitable nature, and equitable doctrines are frequently enforced by such courts, that fact does not make such proceedings "actions in equity," within the meaning of Section 675 of the Code. It will be observed, too, that section 238, chapter 23, Compiled Statutes, relating to decedents, which prescribes the power of district courts in case of appeals from the county court in matters of this nature, is as follows: "The district court shall proceed to a trial and determination of the case in like manner as upon appeals brought from the judgments of justices of the peace; and such court may direct an issue to be made up between the parties when it shall be deemed necessary; and questions of law may be carried to the supreme court, and costs may be allowed or denied in the discretion of the court." It would seem a needless restriction of the powers of this court, and also an unnecessary provision, if it was thereby contemplated that such questions of law were to be determined by appeal, as it would add nothing to the rights already possessed by litigants, since there existed the right to review by petition in error. It was said by this court in *Wilcox v. Saunders*, 4 Nebr., 572: "In 3rd Bouvier's Institutes, 70, it is said that an appeal, in a civil suit, is a proceeding

unknown to the common law. It is authorized by statute in a variety of cases and is regulated entirely by the provisions of the act; it cannot be extended beyond the plain and obvious import of the statute granting it." So in this case, it seems plain, that in order to hold that this proceeding is appealable, we must ignore the fact that courts of equity have been deprived of jurisdiction over matters of estates, if they ever had such jurisdiction, and hold that in its inception in the county court the proceeding was legal in its form and nature, but that as soon as it reached the district court it became "an action in equity." We do not think that any such transformation occurred, but are of the opinion that, although the procedure and some of the principles involved had their origin in courts of chancery, looking at them historically, yet, in this state, all such proceedings are wholly statutory and legal as contradistinguished from equity. It would seem clear that, taking into consideration the constitutional provisions relative to jurisdiction of county courts in probate matters, section 16, article 6, constitution, and sections 233, 244, chapter 23, Compiled Statutes, relative to decedents, as contrasted with the provisions of the Code relative to the right to appeal in suits in equity, section 675, Code of Civil Procedure, that there was no intention on the part of the legislature to confer upon parties to proceedings in the adjustment and settlement of estates the right to appeal, although frequently in such cases equitable principles must be resorted to to determine the rights and duties of the respective parties, but that it was intended that the decision in all such matters should be determined by the supreme court in error proceeding only.

The motion to dismiss the appeal is accordingly sustained.

APPEAL DISMISSED.

JOHN T. ALEXANDER V. CULBERTSON IRRIGATION & WATER POWER COMPANY.

FILED FEBRUARY 20, 1901. No. 9,395.

1. **Enforcement of Contract:** ACTION ON BEHALF OF CORPORATION: RATIFICATION. Where, in an action to enforce a contract made on behalf of a corporation by an unauthorized agent, the evidence tends to show that the corporation, by acquiescence and acceptance of benefits, ratified such contract, an instruction which, in effect, withdraws such evidence from the consideration of the jury is erroneous.
2. **Unauthorized Act:** RATIFICATION. An act done in behalf of a corporation by one having no authority to represent it may be ratified by conduct implying approval and adoption.
3. **Self-Constituted Agent:** ULTRA VIRES: DISAVOWAL OF PRINCIPAL: PRESUMPTION FROM LACHES. A corporation having power to ratify or repudiate a contract made in its name by a self-constituted agent, or one acting outside of his authority, should within a reasonable time determine which it will do; and if it do not disavow the agency and dissent from the contract, assent and approval may be presumed.

ERROR from the district court for Hitchcock county. Tried below before NORRIS, J. *Reversed.*

W. R. Starr and *M. B. Reese,* for plaintiff in error.

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

SULLIVAN, J.

This action was brought by John T. Alexander against the Culbertson Irrigation & Water Power Company, a corporation, to recover rent claimed to be due upon a lease. The cause was tried to a jury in the district court for Hitchcock county, and resulted in a verdict and a judgment in favor of the defendant.

Of the numerous errors assigned we think there is only one that merits serious consideration. It is conceded that the lease mentioned in the petition was executed by C. J. Jones, the president of the company, but his authority in the premises is denied. The evidence before

us shows conclusively that Jones was not authorized to make the lease, but it tends strongly to prove that the corporation ratified his act. The court charged the jury that the defendant had power under the articles of incorporation to purchase and take by deed or lease such real estate as should be deemed advisable by its board of directors; that a contract made by an officer of a corporation outside the limits of his authority is not binding unless ratified; that a corporation, like a natural person, can ratify an act which it has authority to perform; that ratification of an act or contract by a corporation consists in the adoption of the act or contract by some one in authority and having power to make such contract or do such act; that acceptance of a contract and resulting benefits with full knowledge on the part of the proper corporate officers of all the material facts, amounts to a ratification. At the request of the defendant the jury were further instructed as follows: "The jury is instructed that the charter of the Culbertson Irrigation & Water Power Company provides that the business of the corporation shall be in the construction and maintenance of a water power and irrigating canal with power to purchase and take by way of deed in fee simple or lease such real estate as the directors shall deem advisable and that a lease or conveyance not executed or ratified by the corporation in the terms prescribed by its charter is void, unless you shall find that the corporation held out their president to the public as having power to transact such business." This instruction was erroneous and obviously mischievous. It was, in view of the evidence, almost, if not quite, equivalent to directing a verdict for the defendant. There was no evidence tending to prove that Jones had been held out to the world as having authority to rent land or do other like acts; there was no evidence that he was authorized by the board of directors to execute the lease; neither was there any proof of an express ratification, or a ratification of any kind in conformity with terms prescribed by the

articles of incorporation. Looking at the instruction quoted, the jury would naturally conclude that the evidence of ratification did not meet the requirements of the law,—that the act of Jones had not been duly adopted,—and that the lease was, therefore, void. Looking at the instructions given by the court on its own motion, they would find that acceptance of the lease and possession of the premises therein described might constitute ratification, but they would nowhere find that acquiescence and payment of rent would warrant them in concluding that the defendant had adopted the contract made by its president. The instructions, even when taken together, were certainly very misleading and their probable effect was to exclude entirely from the consideration of the jury evidence of a most satisfactory and convincing character. That there may be an implied ratification of an act done in behalf of a corporation by one having no authority to represent it is, of course, familiar law. A corporation having power to ratify or repudiate a contract made in its name by a self-constituted agent, or one acting outside of his authority, should, within a reasonable time, determine which it will do; and if it do not disavow the agency and dissent from the contract, assent and approval may well be presumed. *Rich v. State Nat. Bank*, 7 Nebr., 201; *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Nebr., 68; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. B. Co.*, 131 U. S., 371.

The instructions contain a number of inaccurate and irrelevant expressions, but we are inclined to think that the only one which is prejudicially erroneous is the one above set out.

We express no opinion upon the sufficiency of the evidence to support the verdict, as that question has not been discussed by counsel. It has occurred to us, however, after a careful reading of the bill of exceptions, that the question is a debatable one.

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

REVERSED AND REMANDED.

MARTHA J. PINKHAM, APPELLEE, V. JOHN H. PINKHAM ET AL., APPELLEES, AND EMMA E. RYAN ET AL., APPELLANTS.

FILED FEBRUARY 20, 1901. No. 11,168.

1. **Reply: STATUTE OF LIMITATION: FACTS: CONCLUSION: DISREGARD OF PLEADING.** A reply alleging that the defendant's counter-claim did not accrue within the period provided by law for asserting such claim, and containing no facts from which the conclusion is deduced, tenders no issue and such allegation may be entirely disregarded.
2. **Ejectment: PLEADING: PROOF: GENERAL DENIAL: EQUITABLE OWNERSHIP.** A defendant in the actual occupancy of land, may show under a general denial that he is the equitable owner, and thus defeat an action brought by the holder of the legal title to establish his ownership and recover possession of the property.
3. **Statute of Limitations: PROSECUTION: DEFENSE: DIFFERENCE IN RULE.** The right to commence and prosecute an action may be lost by delay, but the right to defend a suit for the possession of property is never outlawed.
4. **Evidence.** Evidence examined and found to support the decree.
5. **Error Procedure: PROPER PARTY.** A party, whose claim to property fails and whose rights are not affected by an erroneous decree, is not entitled to have such decree set aside or modified.

APPEAL from the district court for Otoe county. Heard below before RAMSEY, J. Rehearing of case reported in 60 Nebr., 600. *Former judgment adhered to.*

A. C. Ricketts and *Henry H. Wilson*, for appellants.

John C. Watson, F. E. Brown and *Frank Irvine, contra.*

SULLIVAN, J.

After a thorough consideration of the questions discussed by counsel we are entirely satisfied that the views expressed in the opinion filed at the last term (*Pinkham v. Pinkham*, 60 Nebr., 600) are sound and should be adhered to. The statute of limitations was not properly pleaded and is, therefore, not in the case at all. In the reply of each of the appellants it is alleged: "3. That the

alleged action for the reformation of said instrument set forth in the amended answer did not accrue to the defendant, John H. Pinkham, within the statutory period provided by law for proceedings for the reformation of instruments." This is only the statement of a legal conclusion unaccompanied by the facts from which the conclusion is deduced; it is in effect an assertion that, in the opinion of the pleader, the appellee's counter-claim is barred. It has often been held here and elsewhere that such an allegation tenders no issue and may be disregarded altogether. *Barnes v. McMurtry*, 29 Nebr., 178; *Scroggin v. National Lumber Co.*, 41 Nebr., 195; *Jenks v. Lansing Lumber Co.*, 97 Ia., 342; *Eno v. Diefendorf*, 102 N. Y., 720; *Pope v. Andrews*, 90 N. Car., 401. In *Scroggin v. National Lumber Co., supra*, which was an action to foreclose a mechanic's lien, the answer stated: "That this suit was not brought within the time required by law, nor until after the so-called lien of plaintiff had expired by lapse of time." Of this averment the court, speaking through Commissioner IRVINE, said (p. 200): "The answer in this respect pleaded no facts. It simply averred that the suit was not brought within the time required by law, nor until after the lien had expired. These were statements of mere conclusions of law and not of any facts. Where a plea of the statute of limitations is required, the facts must, as in other cases, be pleaded and not the pleader's conclusions of law. * * * The plaintiff in error, not having raised the defense by demurrer, was required to raise it by answer, and this being so, he was required to raise it by an answer which would have been sufficient against demurrer to the answer itself. We hold, therefore, that the defense of the statute, not being raised at all by demurrer or sufficiently by answer, was waived." But if the statute of limitations had been properly pleaded, the plea could, under no circumstances, do more than defeat the counter-claim and bar affirmative relief; it could in no manner affect appellee's right to act defensively and by proving his equitable ownership of

the property show that appellants' claim of title and right of possession is unfounded. The right to commence and prosecute an action may be lost by delay, but the right to defend against a suit for the possession of property is never outlawed. The limitation law may, in a possessory action, deprive a suitor of his sword, but of his shield never.

With respect to the contention that appellee's counterclaim does not allege mutuality of mistake and is, therefore, defective in substance, little need be said. The evidence upon which the decree of reformation is based bears upon the issue raised by the general denial and was received at the trial without objection. It tends to prove that the instrument, under which John H. Pinkham claims title to the property in dispute, was given and accepted as a deed of conveyance, and furnishes abundant support for the finding and judgment of the district court. In other words, it effectually rebuts appellants' claim of ownership and right of possession by showing a superior equity in the appellee. If it be conceded that the answer in its present form does not entitle appellee to affirmative relief, it does not by any means follow that the decree granting such relief should be set aside. If necessary, the pleading might yet be amended to conform to the proof. *Humphries v. Spafford*, 14 Nebr., 488; *Homan v. Steele*, 18 Nebr., 652; *Scott v. Spencer*, 44 Nebr., 93; Strawn, Supreme Court Practice, 112. But we think no amendment is necessary. Pinkham, by the evidence adduced in support of his general denial, has shown that he has a right to the land which, although not recognized by the common law, is enforceable in equity. He has produced evidence by way of defense which defeats the action of Babcock and Ryan. They can not make good their claims to the property and consequently have no interest in it, and are not prejudiced by the decree of reformation.

The judgment heretofore rendered by this court stands affirmed.

JUDGMENT ACCORDINGLY.

JOHN N. DRYDEN ET AL., APPELLEES, V. MARCUS L. PARROTTE ET AL., APPELLANTS.

FILED FEBRUARY 20, 1901. No. 11,403.

1. **Judicial Order:** COLLATERAL ATTACK: JURISDICTIONAL INFIRMITY. A judicial order or judgment can not be attacked in a collateral proceeding unless affected by some jurisdictional infirmity.
2. **Sufficiency of Petition:** TEST OF JURISDICTION. The sufficiency of the petition is not a test of jurisdiction; although it may be defective in substance it will support a judgment if the court has authority to grant the relief demanded and the facts upon which the demand is based are intelligibly set forth.
3. **Decree:** LIEN: MOTION TO VACATE: LIMIT OF INQUIRY. The correctness of a decree giving a party a lien on property, can not be inquired into on a motion to vacate a sale made in conformity with such decree.

APPEAL from the district court for Buffalo county. Heard below before SULLIVAN, J. *Affirmed.*

Hamer & Hamer, for appellants.

Dryden & Main, contra.

SULLIVAN, J.

This is an appeal from an order confirming a judicial sale of real estate situate in Buffalo county. Appellants contend that confirmation should have been refused because the sale was made in execution of a void judgment. The facts are undisputed, and the rule of law applicable to the facts is well understood. The action was commenced by Dryden and Main, who filed in the district court a petition in which they alleged that on April 12, 1888, John Johnson recovered a judgment in this court against Marcus L. Parrotte and Lewis W. Parrotte amounting to about $1,200; that Johnson afterwards brought a creditor's bill against the Parrottes and others, and on June 29, 1894, obtained a decree establishing his judgment as a first lien upon the land now in question;

that this decree was brought here for review on December 29, 1894, but was not superseded until January, 1895; that on September 15, 1894, Dryden and Main succeeded to the rights of Johnson as good-faith purchasers of his interest in the litigation. The petition then states that the decree of June 29, 1894, in favor of Johnson, was reversed by this court, and continues: "That the reversal of said judgment in nowise affected the rights of these plaintiffs acquired when said judgment was in full force and effect; but plaintiffs allege that such reversal would constitute a cloud upon the title of any one purchasing said land hereinbefore described when sold upon said judgment." The plaintiffs prayed that the judgment rendered in this court in favor of Johnson and against the Parrottes be adjudged to be a first lien upon the land described in the petition, and that they have such other relief as might be proper. The defendants were duly served with summons; they appeared in the action; issues were joined; a trial was had, and the court having found in favor of the plaintiffs, rendered a judgment giving them the relief for which they prayed. Upon this judgment no direct attack has ever been successfully made, and it can not, of course, be assailed collaterally unless it is affected by some jurisdictional infirmity. If it had appeared on the face of the petition that the judgment which was the basis of the plaintiffs' action was void, and had been so adjudged by this court, it would not follow that the decision of the district court enforcing such judgment would be a nullity. Whether the facts stated in the petition constituted a cause of action and entitled the plaintiffs to relief, was a judicial question which the trial court had authority to consider and decide; and it is a universal principle—an axiom of the law—that where a court has jurisdiction of both the subject-matter and the parties, power to decide implies authority to decide either way—to reach either a right or a wrong conclusion—and, in conformity therewith, to pronounce a judgment that will be conclusive upon the litigants and those

in privity with them, unless reversed, vacated or modified in an appellate or other direct proceeding instituted for that purpose. The sufficiency of the petition is not a test of jurisdiction; although it may be defective in substance it will support a judgment if the court has authority to grant the relief demanded and the facts upon which the demand is based are intelligibly set forth. *Trumble v. Williams*, 18 Nebr., 144; *Taylor v. Coots*, 32 Nebr., 30; *North Pacific Cycle Co. v. Thomas*, 26 Ore., 381; *Head v. Daniels*, 38 Kan., 1; *Frankfurth v. Anderson*, 61 Wis., 107; *In re James Estate*, 99 Cal., 374; Van Fleet, Collateral Attack, sec. 61; 17 Am. & Eng. Ency. Law [2d ed.], 1069. But, as we understand the petition in this case, it was sufficient, not only to give the court jurisdiction, but to withstand a demurrer; it contained no averment that the original judgment in favor of Johnson had been authoritatively condemned. The allegation that the decree in the creditor's suit had been reversed, carries no such implication. The decree in favor of the plaintiffs certainly rests upon an adequate foundation and is exempt from collateral attack. The present attack is collateral; it does not assail the proceedings under the decree, but the decree itself; its object is to obtain a rehearing upon a point adjudicated at the trial. The conclusiveness of the decision giving plaintiffs a lien upon the property could not be inquired into on a motion to vacate the sale. *State Nat. Bank v. Scofield*, 9 Nebr., 499; *Stratton v. Reisdorph*, 35 Nebr., 314; *Beatrice Paper Co. v. Beloit Iron Works*, 46 Nebr., 900; *Hampton Lumber Co. v. Van Ness*, 54 Nebr., 185; *Hoover v. Hale*, 56 Nebr., 67.

The order of confirmation is

AFFIRMED.

PATRICK E. COONEY V. STATE OF NEBRASKA.

FILED FEBRUARY 20, 1901. No. 11,689.

1. **Instruction:** WITNESS: GROUND FOR CENSURE. An instruction is not erroneous which, in substance, informs the jury that just censure of a witness, or the testimony which he has given, can not be grounded on the fact that he has performed a duty imposed upon him by law.
2. **Statute:** CONSTITUTION: STARE DECISIS. Section 20, chapter 50, Compiled Statutes, 1899, with respect to the keeping of intoxicating liquors for the purpose of sale without a license, is valid legislation.
3. **Presence of Officer in Jury Room:** MATERIAL WITNESS. An officer having charge of the jury was a witness on the trial and gave material evidence for the state. He accompanied the jury to their room and remained with them for several hours while they were deliberating on their verdict. *Held*, That the officer was guilty of misconduct prejudicial to the rights of the defendant and that a new trial should have been awarded.

ERROR from the district court for Dawson county. Tried below before SULLIVAN, J. *Reversed.*

Hector M. Sinclair, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy, contra.*

SULLIVAN, J.

This was a prosecution under section 20, chapter 50, Compiled Statutes, 1899. The defendant, Patrick E. Cooney, was found guilty of keeping intoxicating liquors for the purpose of sale without a license, and was sentenced to pay a fine of $300. Complaint is made of an instruction which, in substance, informed the jury that if one of the witnesses for the state, a man named Pierson, was a member of an incorporated detective association, he had by reason of his corporate membership assumed certain duties created by law, for the performance of which neither he nor his evidence could be rightfully criticised. This statement, we think, was neither harmful

nor inaccurate. The thought which it conveys is that just censure can not be grounded upon the performance of a legal duty. The right to criticise the witness and his testimony was not denied, but criticism directed against the discharge of a duty imposed by law was characterized as unjust. It is hardly possible that the jury were induced by the instruction to place an exaggerated or excessive value upon Pierson's evidence, for they were advised that they might consider the character of the business in which he was engaged and determine his credibility and the worth of his testimony by the application of the usual tests.

The constitutionality of the section of the statute under which the prosecution was conducted is raised and discussed at length. The point does not require particular consideration, as the cases of *Durfee v. State*, 53 Nebr., 214, and *Parsons v. State*, 61 Nebr., 244, decide that the argument of defendant's counsel is inadmissible and that the law is the result of a proper exercise of legislative power.

After the case was given to the jury and while they were deliberating upon their verdict the sheriff and bailiff having them in charge went with them to their room and remained with them for several hours. The trial court found that the sheriff and bailiff were in the back part of the room, which was quite large, and that the jury, while deliberating and discussing evidence, were north of the centre of the room; that neither of the court officers took any part in the deliberations or advised the jury regarding their verdict. The court further found that the presence of the sheriff and bailiff did not influence the jury in reaching their verdict and refused to grant a new trial on the ground of misconduct. The facts in this case are quite similar to those in *People v. Knapp*, 42 Mich., 267, where it was held that the mere presence of an officer in the jury room while the case was being considered was an unwarranted restraint upon free discussion and, in substance, an invasion of the right of trial by jury. *Gandy v. State*, 24 Nebr., 716, was a case in which

the bailiff having charge of the jury remained with them during their deliberations, although taking no part therein. There was no showing of prejudice to the defendant, but on the contrary, as appears from the dissenting opinion of Chief Justice REESE, there was a clear showing of non-prejudice. It was held, nevertheless, after a careful consideration of the question and an examination of the authorities, that the verdict was an unlawful one and should not be permitted to stand. In the majority opinion it is said that the doctrine of *People v. Knapp, supra,* is adopted as the law of this state. While there is a sharp conflict of judicial opinion upon some phases of the question now under consideration, we believe the cases all hold that the presence in the jury room of a material witness for one of the parties while the jurors are deliberating, is incurable misconduct and will nullify the verdict. It appears from the record in this case that the sheriff was a witness for the state. His testimony was material, but it is not likely that it was carefully scrutinized or subjected to hostile criticism within his hearing. His presence was calculated to restrict discussion and freedom of action in the jury room and the presumption that it was prejudicial to the defendant is not overthrown by the conclusion deduced by the trial court from facts above stated. We do not say that the presence of a bailiff or other intruder in the jury room for a short time while the jury are deliberating, will in every case vitiate the verdict rendered, but we have no hesitation in declaring upon the facts disclosed by this record that the defendant was by the misconduct of the sheriff and bailiff deprived of a substantial right and should have been awarded a new trial. It is claimed that the doctrine of *Gandy v. State, supra,* should not be applied to misdemeanor cases, but no reason for making a distinction between the two classes of cases has been suggested and none is perceived. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

SAMUEL I. GORDON V. FRANK E. MOORES ET AL.

FILED FEBRUARY 20, 1901. No. 11,770.

1. **Metropolitan Cities:** STATUTE: CONSTITUTION: REMOVAL OF POLICE MAGISTRATE. Section 103 of the charter of metropolitan cities, (Session Laws, 1897, ch. 10), to the extent that it assumes to confer upon the district courts authority to remove police magistrates for misconduct in office, is legislation prohibited by the constitution and, therefore, void.
2. **Removal for Official Misconduct:** DISTRIBUTION OF POWERS: QUÆRE. Whether the power to remove an officer for official misconduct can be concurrently exercised by two departments of the government without violating the provision of the constitution relating to the distribution of powers, *Quære.*

ERROR from the district court for Douglas county. Tried below before DICKINSON, J. *Reversed.*

Jeffcris & Howell Wright & Stout and *Brome & Burnett,* for plaintiff in error.

W. J. Connell, contra.

SULLIVAN, J.

In the district court for Douglas county Samuel I. Gordon, the plaintiff in error, was found guilty of official misconduct and removed from his office as police judge of the city of Omaha. The proceeding which resulted in the judgment of removal was commenced under the authority of section 103 of the city charter (Session Laws, 1897, ch. 10), which is here set out:

"Sec. 103. The power to remove from his office the mayor or any councilman or other officer mentioned in this act, for good and sufficient cause, is hereby conferred upon the district court for the county in which such city is situated, when not otherwise herein provided, and whenever any three of the city councilmen shall make and file with the clerk of said court the proper charges and specifications against the mayor, alleging and show-

ing that he is guilty of malfeasance and misfeasance as such officer, or that he is incompetent, or neglects any of his duties as mayor, or that for any other good and sufficient cause stated, he should be removed from his office as mayor or whenever the mayor or any three councilmen shall make and file with the clerk of said court the proper charges and specifications against any councilman or other officer mentioned in this act, alleging and showing that he is guilty of malfeasance or misfeasance in such office, or that he is incompetent or neglects any of his duties, or that for any other good and sufficient cause stated, he should be removed from his office, the judge of such court may issue the proper writ, requiring such officer to appear before him, on a day therein named, not more than ten days after the service of such writ, together with a copy of such charges and specifications, upon such officer to show cause why he should not be removed from his office. The proceedings in such case shall take precedence of all civil causes and be conducted according to the rules of such court in such cases made and provided, and such officer may be suspended from the duties of his office during the pendency of such proceedings by order of said court. During the time any officer is suspended the mayor and council may appoint any competent person to perform the duties of the officer suspended and provide for his compensation, and require him to execute a sufficient bond for the faithful performance of the duties of the office."

Counsel for Gordon contend that the legislature was without authority to confer upon the district court the jurisdiction which it assumed to exercise, and that the judgment of removal should, therefore, be annulled. The provision of the constitution (art. 6, sec. 19) upon which it is claimed the legislature encroached in adopting section 103, is as follows: "All laws relating to courts shall be general, and of uniform operation, and the organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated

by law, and the force and effect of the proceedings, judgments, and decrees of such courts, severally, shall be uniform." Prior to the adoption of the first act (Session Laws, 1887, ch. 10) providing for the incorporation and government of cities of the metropolitan class, the power to remove police magistrates for official misconduct was not possessed by the district courts, or any of them. This we believe is conceded. The power to remove police judges of metropolitan cities was given to the district court by the act of 1887, and is continued in force by section 103 of the present charter. If that section is constitutional and valid, all district courts have power within their territorial limits to remove for misconduct police judges of metropolitan cities; but authority to remove police judges of cities of inferior rank is not vested in any of such courts. The various charters classify cities; they do not of course assume to classify courts. The provision of the constitution above quoted, as we understand it, means that courts of the same grade or class shall have equal powers—equal authority to hear and determine the same class of cases. The district court of Douglas county has ousted the plaintiff in error from the office of police judge of a metropolitan city; and if section 103 is valid, the district court of any other county in the state may exercise the same power whenever a like case shall arise within its territorial jurisdiction. The constitutional rule of uniformity that we are now considering is not violated if all courts of the same grade have jurisdiction of the same matters and equal authority in dealing with them. That is the principle established by *State v. Magney*, 52 Nebr., 508. But a police judge, like a justice of the peace, is a constitutional officer, and the power to remove him is precisely the same power whether he holds his commission from a city of the highest or the lowest rank. If the legislature had given the district courts in counties under the township system of government power to remove justices of the peace for official misconduct, while permitting the power of removal to

remain with the county commissioners in all other counties, it would hardly be contended that the rule of uniformity had not been violated. It would be at once perceived that the form of county government could not change in any degree the essential nature of the power of removal, and that the jurisdiction which was given to the courts in one class of counties was in all respects identical with that which was denied to courts of the same grade in another class of counties. Under our constitution, jurisdiction to deprive justices of the peace of their offices can not be made to depend upon a classification of counties any more than can jurisdiction to deprive them of their property. This is equally true of police magistrates. Their rank and powers are the same wherever their functions may be exercised. They all belong to one class—as much so as justices of the peace or county courts; and when the legislature undertook by section 103 to give district courts, in counties containing metropolitan cities, authority to remove the police judges of such cities, what it did was a violation of the principle of uniformity, for it was an attempt to enlarge the jurisdiction of the district courts in one class of counties by classifying magistrates who are all of one grade and incapable of legal classification. Without pursuing the subject further our conclusion is that the judgment under review is based on an unconstitutional law and must be reversed.

Before leaving the case, however, there is another question which has to some extent engaged our attention and to which we shall briefly advert. The power we have been considering has been long exercised in this state by administrative bodies, and it was in one case (*State v. Oleson*, 15 Nebr., 247) held not to be judicial within the meaning of that provision of the constitution which vests the judicial power of the state in courts and magistrates. Section 1, article 2, of the constitution, relating to the distribution of governmental powers, declares that no person or collection of persons belonging to one of the departments of government "shall exercise any power properly

belonging to either of the others." If the power to remove an officer for official misconduct properly belongs to the executive department, can it be rightfully exercised by officers of the judicial department? In other words, can the same power be concurrently exercised by two departments of the government without violating the provision of the constitution relating to the distribution of powers? This is an interesting question, but since it has not been discussed by counsel and is not necessary to a decision of the case we express no opinion with respect to it.

The judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

NORVAL, C. J.

I concur in the judgment on the ground that the statute under consideration is in violation of section 19, article 6, of the constitution.

JOSEPH JERABEK V. JOSEPH A. KENNEDY.

FILED FEBRUARY 20, 1901. No. 9,382.

1. **Expert Testimony**: ADMISSION: JUDICIAL DISCRETION. In determining the competency of a witness to testify as to the values of land regarding which there is a controversy, much discretion is lodged in the trial court as to the admission of such testimony, and unless it is clearly inadmissible as a matter of law and prejudicial, the ruling will not be disturbed.

2. **Natural Flow of Water**: EFFECT OF MILL-DAM: MEASURE OF DAMAGES: TESTIMONY: INSTRUCTION. A plaintiff testified as to how the construction of a mill-dam affected his land by raising the water above the natural flow and thereby increased the danger of stock drowning therein, and stated that he had already lost some cattle in that manner, the rule as to measuring the damages sustained being correctly given the jury in the instructions of the court; *held*, that no rights of the defendant were prejudiced by the admission of such testimony.

ERROR from the district court for Nance county. Tried below before SULLIVAN, J. *Affirmed.*

W. F. Critchfield, for plaintiff in error.

J. W. McClelland and *Reeder & Albert, contra.*

HOLCOMB, J.

A trial was had in the district court in proceedings of *ad quod damnum* began under chapter 57 of the Compiled Statutes, entitled "Mills and Mill-Dams." A verdict and judgment was rendered in favor of the defendant in error, plaintiff below, from which the defendant, by error proceeding, brings the case here for review.

But two questions are argued by counsel for plaintiff in error and both relate to the admission of testimony objected to on the trial of the case. One witness was permitted to testify as to the value of the land, claimed to have been damaged by the construction of a mill-dam, just before and immediately after the erection of the mill, whose testimony, it is claimed, is incompetent because no sufficient knowledge is shown regarding land values of which he was testifying. The witness had been a farmer all his life, had purchased land adjoining that in controversy two or three years before, on which he had been living, and had made inquiries as to the value of the land in the neighborhood. He testified as to values, and that the land had been damaged by reason of the construction of the mill-dam. It is disclosed by the record that he was acquainted with the value of the land in the vicinity, and that his testimony was based upon knowledge and information not possessed by a jury or the people in general. Of necessity, much discretion must be lodged in the trial court as to the admission of such testimony, and unless it is clearly inadmissible as a matter of law and prejudicial, the ruling will not be disturbed. *Missouri P. R. Co. v. Fox*, 60 Nebr., 531, and cases there cited. The admission of the evidence is warranted

under the qualification shown to exist, and comes within the rule announced in *Swan v. County of Middlesex*, 101 Mass., 177.

The plaintiff, in testifying as to how the construction of the dam affected his land by raising the water above the natural flow, stated that it increased the danger of stock drowning therein, and that he had already lost some cattle in that manner. This was objected to, and on the ruling error is sought to be predicated. The statement was only made as an illustration of the damage occasioned by the rise of water in the stream because of the construction of the dam. The rule for measuring the damage sustained was correctly given the jury in the instructions of the court, which was stated to be the difference in the fair market value of the land immediately before and after the erection of the mill-dam. The jury could not have been misled by the testimony objected to, and none of the rights of the defendant were prejudiced thereby.

The judgment is

AFFIRMED.

SULLIVAN, J., not sitting.

W. S. BURNS, TRUSTEE, ET AL. V. SCHOOL DISTRICT NO. 18 OF ROCK COUNTY ET AL.

FILED FEBRUARY 20, 1901. No. 9,402.

1. **Schoolhouse:** REAL ESTATE MORTGAGE: PRIOR LIEN: ADJUDICATION. A schoolhouse was erected on a part of a tract of land of eighty acres incumbered by a real estate mortgage. The mortgage lien was foreclosed, the decree establishing the mortgage as a prior lien on the real estate, to which the interest of the school district was subject and inferior. *Held*, Not to be an adjudication that the schoolhouse was a part of the realty and included in the mortgage lien.

2. **Construction of Statute:** AUTHORITY OF BOARD: TITLE TO LAND. Under the provisions of section 7, subdivision 5, chapter 79, of the Compiled Statutes, the authorities of a school district have no authority to enter into any agreement, contract or

arrangement, express or implied, to build a frame schoolhouse on a site for which they have not a title in fee, without the privilege to remove the same when lawfully directed to do so by the qualified voters of the district.

3. **Condemnation of Land:** MEASURE OF DAMAGES. Where a schoolhouse has been erected upon land upon which there exists a mortgage, the school district authorities may, after the erection of such building, condemn the land required for a site for such building, and the true measure of damage is the value of the land taken, exclusive of the value of the building, and the damage to the remainder, if any.

ERROR from the district court for Rock county. Tried below before KINKAID, J. *Affirmed.*

W. J. Courtright, for plaintiffs in error.

J. A. Douglas, contra.

HOLCOMB, J.

In a condemnation proceeding of a schoolhouse site under the provisions of subdivision 12 of chapter 79 of the Compiled Statutes of 1899, the mortgagee, whose mortgage lien on the land, a part of which was sought to be condemned, had been reduced to decree, appealed from the award of the appraisers, contending that his mortgage lien extended to and covered a school building theretofore erected, and that the property could not be taken by condemnation proceedings without paying the value of the school building, as well as the site upon which it was located. This contention is certainly unwarranted. We know of no rule of law or principle in the administration of justice which would, by such a process, take the property of the taxpayers of the school district and transfer it to the mortgagee, to be again paid for in the proceedings in condemnation.

It is contended that by the decree in foreclosure the status of the building was fixed as a part of the realty on which it was situated, to which the lien of the mortgage attached. The decree on the record before us appears to do nothing more than establish the lien of the

mortgage upon the real estate covered by it, and directing a sale of the property in satisfaction of the debt. The question of the character of the property of the school district was not brought in issue by the pleading of the mortgagee, the defendant school district being in default, and was not adjudicated by the decree of the court, save that the interest of the school district in and to the real estate was held inferior and subject to the lien of the mortgage. We do not think it necessary to enter into a discussion of the law of betterments and fixtures where the circumstances are as in the case at bar. It is not a question of the rights of individuals in a contest over property placed by private parties on real estate and claimed to attach as a part of the freehold. The law as fixed by the legislature must determine the rights of the respective parties in this action, and beyond this we need not go. By section 7 of subdivision 5 of the chapter referred to it is specially provided that a school district shall not in any case build a frame schoolhouse, such as the one in controversy, "on any site for which they have not a title in fee, without the privilege to remove the same when lawfully directed to do so by the qualified voters of the district at any annual or special meeting." The authorities of the district are not empowered by any acts of their own to enter into any agreement, contract or arrangement, expressed or implied, conflicting with the provisions of this statute. Their authority being derived from the statute, their action must be guarded and controlled by its provisions. But in this case there is nothing to show any intention or action on their part inconsistent with its provisions, and it is quite manifest that the right to removal exists under the statute, and that a mortgage lien on the real estate upon which the building was erected could not attach thereto.

But there are other reasons for upholding the judgment of the trial court. The school district might, at its option, have either removed the schoolhouse, or, as it did, begin condemnation proceedings for the purpose of ob-

taining title to the site upon which the building was constructed. In the exercise of the right of eminent domain conferred upon the authorities of the school district by statute they might, either before or after the construction of the building, condemn the site, and the fact that it was not done before would not give to the person whose property was taken for public use the right to claim the improvement or betterment for the construction and use of which the condemnation was had. We can conceive of no good rule which would require that, in the exercise of the right of eminent domain, if the title to the property necessary for public use had in the first instance failed and subsequent proceedings were required, in estimating the damages sustained by reason of the property being taken for public use, the value of the improvement for which the condemnation was had should form an element of the damages sustained; and it is not believed that any such rule exists. The district, having the right of condemnation, might, either before or after the construction of the building, proceed in the manner pointed out by statute, and in doing so, the true measure of damages would be the value of the property taken, not including the improvement placed thereon, and the damage, if any, to the remainder. We would be slow, indeed, to adopt the proposition advanced by the plaintiff in error, that because the owner of the legal title to the real estate was unable to convey good title to the school district and the property at the time was mortgaged, the improvement constructed thereon inured to the benefit of the mortgagee, and for which he must be paid before the district might have and use what is in fact its own. This is utterly repugnant to every sense of justice.

The judgment of the district court is entirely proper, the only one that could have been rightfully entered, and must be

AFFIRMED.

A. H. ARMSTRONG ET AL. V. SIMON MAYER ET AL.

FILED FEBRUARY 20, 1901. No. 11,303.

1. **Original Jurisdiction:** PRACTICE OF SUPREME COURT. Owing to the numerous cases on the docket, it is the practice of this court not to entertain original jurisdiction and advance cases for hearing in applications for a writ of mandamus brought by private persons for the enforcement of private rights, unless some good reason is made to appear why the application is not in the first instance made to the district court.

2. **Mandamus:** ANCILLARY PROCEDURE. It is proper to grant an original application for a writ of mandamus made in a case pending in this court only when it appears that it is ancillary in character and subserves some useful purpose in the main case, protects the rights of the parties, which would otherwise be jeopardized, or renders effective a judgment which has been or may be entered in the case.

3. **Former Opinion:** MERITS: TERMINUS. An opinion heretofore filed in the case on consideration of a motion having fully disposed of the merits of the controversy and determined and made certain the final judgment to be rendered, and consuming time in the argument and consideration of interlocutory motions being useless, the final judgment, already determined, will be entered and the litigation terminated.

ERROR from the district court for Lancaster county. Tried below before CORNISH, J. *Dismissed.*

Burr & Burr and *Charles O. Whedon,* for plaintiff in error.

Walter J. Lamb and *Robert Ryan, contra.*

HOLCOMB, J.

Plaintiffs in error were defendants in an action of forcible entry and detention before a justice of the peace. An adverse judgment being rendered against them by the justice trying the case, they appealed to the district court. Judgment was again rendered against the defendants, to secure a reversal of which a proceeding in error was instituted in this court. The cause was sub-

mitted on motion, in the determination of which it was held that the provisions of the statute for appeals from a judgment rendered by a justice of the peace in actions of the kind under consideration were enacted in contravention of the constitution, and were, therefore, void and of no force and effect; and that the judgment rendered by the district court on appeal was *coram non judice*. A motion to dismiss the error proceeding for want of jurisdiction was at the same time denied, it being held that, while the district court was without jurisdiction over the subject-matter, the error proceeding was a new action begun in this court to review the judgment of the district court, and this court has original jurisdiction to hear and determine the same, notwithstanding the district court was without jurisdiction over the subject-matter of the action. *Armstrong v. Mayer*, 60 Nebr., 423. Since the filing of the opinion referred to, which in fact disposes of the merits of the controversy and makes certain the ultimate decision to be rendered in the case, several different motions, with as many objections, have been argued and submitted and a great deal of valuable time consumed over a matter of which all are advised as to how it must finally terminate. A motion has been submitted by the defendants in error, asking, first, that a writ of mandamus issue, commanding the justice of the peace trying the case to issue a writ of restitution on the judgment rendered by him in favor of the defendants in error; second, that the error proceeding be dismissed, for the reason that since the filing of the opinion referred to the plaintiffs in error have commenced alleged error proceeding in the district court, giving an alleged supersedeas bond therein, to obtain a review of the judgment of the justice of the peace, whereby these proceedings have been abandoned and all rights waived thereunder; and third, that the cause be advanced and set down for a speedy hearing.

The showing in support of the motion for a writ of mandamus verifies more fully and minutely the history

of the case as heretofore recited, and shows a demand on the justice trying the case that he issue a writ of restitution on the judgment by him rendered. In passing on the motion, we do not undertake to decide the merits of the application, nor do we want to be understood as saying that the relator, in a proper proceeding, may not be entitled to a writ as prayed for, or that it is not the duty of the justice to enforce the judgment rendered on the application of a party in interest. The writ, in the manner in which the application is made, can not, we hold, properly issue. The only rights invoked are those private in their nature. There is no public interest involved. Owing to the crowded condition and numerous cases on the docket, it is and has been the practice in this court, and for such a period of time that it may be regarded as a settled rule, to decline to entertain original jurisdiction and advance the case for hearing in applications for a writ of mandamus brought by private persons for the enforcement of private rights, unless some good reason is made to appear why the application was not in the first instance made to the district court. *State v. Lincoln Gas Co.*, 38 Nebr., 33; *State v. Merrell*, 38 Nebr., 510; *State v. School District*, 38 Nebr., 237. We do not find that there exists any circumstance connected with the present case which should make it an exception to the rule announced. The rights of the defendants in error to the writ desired must be determined by the same procedure and in the same manner as the enforcement of any other private right. In the proceedings in the present case it has been determined that the law granting appeals from judgments of justices of the peace in cases of forcible entry and detention is invalid; that the judgment, in name, of the district court rendered in the appeal proceedings was rendered by a court without jurisdiction of the subject-matter, and that this court in an error proceeding had jurisdiction to reverse a judgment, even though void for want of jurisdiction of the court rendering it. There is nothing, however, in the course

of this litigation, as we view the proceedings, which would render it proper and appropriate, on a motion filed in the case, conceding the same to be properly supported by affidavit and other evidence, to resort to the extraordinary writ of mandamus for the purpose of compelling the justice of the peace trying the case to enforce the judgment rendered by him. The application, if proper at all, in these proceedings, should be regarded as ancillary in its character and have some well defined relation to the main issues in the case. We can conceive of no sound rule for the issuance of such a writ in proceedings and under circumstances similar to those in the present case, except it be to subserve some useful purpose in the main case, protect the rights of the parties which would otherwise be jeopardized, and render effective a judgment which has been or may be entered in the case. Nothing of this nature appears to exist in the case at bar, and there appears to us no valid reason for the issuance of the writ prayed for. The application is therefore denied, but without prejudice to another application in an appropriate proceeding.

This cause has been fully determined. We all know what the judgment must be when entered. We have determined the statute for an appeal from a justice of the peace in forcible entry and detention cases to be invalid, and that a judgment rendered in the district court in proceedings taken under such statute is without jurisdiction and void. It is like pursuing a shadow, a phantom, to further consume time in the argument and consideration of that which is already firmly and finally settled and determined. The judgment of the district court being void for want of jurisdiction of the subject-matter, it only remains for us to declare it so, which is accordingly done and the action dismissed.

JUDGMENT ACCORDINGLY.

BANK OF STOCKHAM, BERNHARD WIENS AND HERMAN WIENS AS INTERVENERS, V. ISAAC R. ALTER ET AL.

FILED FEBRUARY 20, 1901. No. 11,309.

1. **Action by Mortgagee:** ACCOUNTING: PRIORITY OF LIENS: JUNIOR INCUMBRANCER: TRUSTEE. In an action by a mortgagee, where it is sought to have an accounting and an ascertainment as to priorities of liens and to charge a junior incumbrancer as trustee of the proceeds of the sale of mortgaged property, and to recover such proceeds to apply on the prior mortgage and the debt secured thereby, *held* that such action is properly cognizable as a proceeding in equity, and should be treated as such.

2. **Jurisdiction of Equity Court.** Where a court, in the exercise of its equity powers, acquires jurisdiction for any purpose, its jurisdiction will be retained for all purposes and to try all issues raised in the action.

3. **Exhibits:** PHYSICAL ATTACHMENT. Exhibits attached to a petition in a case, and being a part of the files therein, which are designated and referred to in an amended petition as exhibits attached thereto, and by reference made a part of the pleading, will be treated as such, in the absence of a motion directed to the same, in determining whether such amended pleading states a cause of action, even though not physically attached to such amended petition.

4. **Note and Mortgage:** PLEADING: EXECUTION AND DELIVERY: ANSWER: ADMISSION: MERE DENIAL OF OWNERSHIP. Where in an answer the execution and delivery of a note and mortgage pleaded in the petition are admitted, the legal presumption is that the ownership continued and remained in the party to whom delivered, and a mere denial of ownership in the answer is unavailing. The burden is on the defendant, after admitting the execution and delivery, to plead and prove some fact showing such want of ownership.

5. **Foreclosure Sale:** DEMAND OF PROCEEDS: COSTS. A demand by a party claiming the proceeds of the sale of mortgaged property from another can only affect the question of costs; and where both parties claim a prior right to such proceeds, no demand is required, even for the purpose mentioned.

6. ———: ———: INTERVENTION: STATUTE OF LIMITATIONS. Where, in an action to reach the proceeds of the sale of mortgaged property to apply on an amount alleged to be due on a note secured by mortgage, the makers, by intervention, deny that anything was due, and one of the issues tried was as to the

amount due on such note, *held* that the statute of limitations did not run during the litigation, even though the payees had not formally declared on such note and prayed judgment as against the makers.

7. **Partial Failure of Consideration:** EVIDENCE. Evidence in the case *held* to be insufficient to support a verdict or finding on an allegation as to fraud or mistake in the weight of cattle for which the note sued on had been given.

8. **Review:** INSUFFICIENCY OF EVIDENCE. Where on review in error proceeding in this court it is held that the evidence on the trial of the case is insufficient to support an allegation in the pleadings, and on retrial of the case the evidence in support of such allegation is substantially the same as in the first trial, the former ruling will be adhered to and followed as the law of the case as to the sufficiency of such evidence.

9. **Instruction.** Instructions on an issue raised by the answer and following the allegations thereof *held* to be correctly given.

10. ———: MEASURE OF DAMAGES: HARMLESS ERROR. An instruction as to the measurement by which recovery may be had, even though incorrect, is harmless error, if upon that issue the jury found against any recovery whatever.

11. **Verdict in Equity Case:** EFFECT. The verdict in an equity case on a finding of fact is advisory only and not binding and conclusive on the trial court.

12. **Evidence.** Evidence examined, and *held* to support the judgment rendered in the trial court.

ERROR from the district court for Hamilton county. Tried below before SEDGWICK, J. *Affirmed.*

Lambertson & Hall and *R. W. Graybill*, for plaintiffs in error.

Hainer & Smith, contra.

HOLCOMB, J.

A proceeding in error has been instituted in this court by which it is sought to reverse a judgment rendered in the district court for Hamilton county against plaintiffs in error, defendant and interveners in the trial court, and in favor of defendants in error, plaintiffs below. The action has heretofore been in this court for consideration.

Alter v. Bank of Stockham, 51 Nebr., 797, and on rehearing under the same title, 53 Nebr., 223. A difference of opinion exists as to the nature of the action, plaintiffs insisting that it is an action in equity, and defendants that it is one at law for the conversion of personal property. A question having thus arisen as to the character of the suit, whether in equity or at law, it would seem advisable, in order to more properly and intelligently consider the assignments of error, to first determine such question. In the first opinion rendered in this court the action was held to be one for the conversion of personal property, and, therefore, an action at law, and that it should be so tried, when by either party there is presented no equitable ground for relief or defense. On rehearing, without fully deciding the question, it is stated in the fifth paragraph of the syllabus, "A district court while sitting as a court of equity is clothed with the inherent power to submit to a jury any question of fact in the case"; and in the sixth paragraph, "To maintain a civil action under our Code, it is not essential that the action be denominated either an action at law or in equity, nor that it be given any particular name. If the litigant pleads the facts, and they constitute a cause of action or defense, the courts are bound to award the relief due." Says Commissioner RAGAN, the author of the opinion (p. 236): "We are not deciding that the action of Alter & Glover is an action at law for conversion as against the Bank of Stockham, nor that it is a bill in equity seeking to have the Bank of Stockham declared a trustee and to hold the proceeds of the sale of the Wiens cattle in trust for Alter & Glover. What we do decide, and all we decide, is that from the uncontradicted evidence it appears that the mortgagor converted the mortgaged property into money and placed it in the hands of his agent, the Bank of Stockham, it then and there knowing of the existence of Alter & Glover's lien upon the cattle; and, as against the mortgagees, Wiens himself was not entitled to such proceeds; that the bank, on the evidence

in this record, has no better title to the money than Wiens had, and is liable and should account to Alter & Glover for such proceeds, whether such a result will have the effect of making the action at bar one at law or in equity." The cause was reversed and remanded for further proceedings, after which the pleadings were in some particulars amended, but the issues thereunder were substantially the same as on the former trial.

The case having been fully stated in the opinions referred to, it is unnecessary here to make more than a brief allusion thereto, sufficient only to an intelligent understanding of what is said hereafter. Briefly, the plaintiffs' cause of action is based on a promissory note for $8,500, and mortgage given by the interveners for the purchase price, and to secure the payment thereof, of a lot of cattle purchased by the interveners from the plaintiffs; the plaintiffs alleging that the note had been only partially paid, and that during the existence of the lien of the mortgage, the interveners, with the defendant bank, which, it is alleged, held two second mortgages on the same property, subject to and with knowledge of plaintiffs' prior lien and mortgage thereon, had made certain shipments of the mortgaged property to the markets at South Omaha and sold the same on the open market, the net proceeds thereof being credited to the defendant bank and by it converted to its own use and benefit; all of which was done without the knowledge or consent of the mortgagees and in fraud and violation of their rights. An accounting is prayed, and for an ascertainment of the priorities of the several mortgages, that the plaintiffs' mortgage be adjudged a prior and first lien, and that the bank be adjudged to hold the proceeds of said sale in trust for the use and benefit of the plaintiffs, and that it be decreed to pay the same.

By the answer presented by the defendant bank and the petition of the interveners the execution of the note and mortgage to the plaintiffs was admitted, and in avoidance it was pleaded, in substance, that by fraud or

mistake the weight of the cattle sold to the interveners was represented and stated to be greater than their true and actual weight, and that to the extent of such excess weight the amount mentioned in the note was without consideration, and no recovery ought to be had; and also, that in October, 1889, when the mortgaged cattle were being fed by the interveners to fit them for the market, one of the plaintiffs, in a conversation with the cashier of the defendant bank, knowing that Wiens did not have sufficient money and means to purchase the necessary feed for said cattle and that he must depend upon the said bank for such means, represented and stated that Wiens had bought the cattle on such terms as he would be able to make considerable profit, and that he could, after feeding the cattle for a short time, from time to time sell some of the best of the herd and out of the proceeds derived pay for the feed purchased and used for the fattening of the cattle, and that the plaintiffs were willing that the said Wiens should so sell a portion of the cattle and use the proceeds thereof for such purpose; that the defendant relied upon the representations and statements, and loaned said Wiens large sums of money, aggregating about $5,000, all of which said sums were used for the purchase of feed which was actually fed to the cattle, which would not have been loaned had it not been for the statements and representations of the plaintiff as before set forth. Such statements and acts, being pleaded as an estoppel against recovery from the defendant bank of the proceeds of the cattle sold to the extent of the amount loaned by it and used for the purpose of buying feed for such cattle.

By the foregoing a fair idea of the substance of the controversy will be obtained. As it appears to us, the pivotal point is the proper disposition of the fund arising from the sale of the mortgaged property. By the petition, as we construe it, it is not sought to charge the defendant bank with the conversion of the mortgaged property, but rather have it declared a trustee of the

plaintiffs as to the proceeds of the sale of the property received by it, with knowledge of plaintiffs' lien on the property sold and of their superior and prior right thereto. By virtue of their mortgage lien the plaintiffs seek to impress a trust character on the proceeds in the hands of the junior incumbrancer to an amount required to satisfy their prior claim. The defendant and the interveners, by their pleadings, in effect, admit the superior rights of the plaintiffs but for the matters pleaded by them in avoidance, which are, first, that either by fraud or mistake the original consideration as claimed and expressed in the note was greater than it should have been according to the agreement of the parties, owing to a mistake or misstatement as to the weight of the cattle sold, and that as to such excess the note was without consideration, and, second, that by reason of the agreement pleaded, notwithstanding plaintiffs' lien was prior in time, it should be subordinated to that of the defendant bank's lien for money loaned to feed the mortgaged cattle to fit them for the market. As well stated, in effect, in the opinion on rehearing, the plaintiffs' right to the relief asked for is established and is due them, subject only as the same may be defeated or diminished by the defenses interposed. The whole controversy thus seems to be reduced to two propositions, the amount due on the note, and the respective rights of the contestants in relation to the proceeds derived from the sale of the mortgaged property, to which in equity each had claims, and, as we view the record, such as are more cognizable and to be adjudicated in equity rather than in an action at law. Under well known equitable principles, the defendant bank, having received the proceeds of the sale of the mortgaged property with notice of plaintiffs' mortgage lien and prior claim thereon, could be held and charged as a trustee of such funds for the use and benefit of the plaintiffs. *Smith v. Jeffreys*, 16 So. Rep. [Miss.], 377; *American Sugar-Refining Co. v. Fancher*, 40 N. E. Rep. [N. Y.], 206.

The proceeding is in many respects analogous and the principles involved similar to the case of *Cady v. South Omaha Nat. Bank*, tried as an equitable action, and reported in 46 Nebr., 756. While the question is not entirely free from doubt, we are disposed to the view that the cause should be regarded as a proceeding in equity and be treated as such. If the action is one cognizable in equity, the suggestion only is required that the court, having acquired jurisdiction for any purpose in the exercise of its equity powers, will retain such jurisdiction for all purposes of the case and to try all issues raised therein. Pomeroy, Equity Jurisprudence [2d ed.], sec. 181; *Morrissey v. Broomal*, 37 Nebr., 766; *Disher v. Disher*, 45 Nebr., 100. Proceeding, then, upon the theory that the action is one in equity, we will consider the several objections urged against the regularity of the proceedings in which the judgment was obtained.

It is urged that the petition fails to state a cause of action, the argument being based upon the assumption that the exhibits designated and referred to in the petition, the same being the note and mortgage, were not attached to and made a part of the petition, and their terms not being pleaded therein, no cause of action is stated. Several amended pleadings were filed. Under the system of filings practiced in the district court where the case was tried, all such pleadings are preserved, together with the other files in the case, attached to and held together as one complete package or set of filings. The note and mortgage referred to as exhibits were attached directly to the first amended petition filed in the case. They were by reference attached to and made a part of the last amended petition, but not physically displaced from the place in the files in connection with the first amended petition. The amended transcript presented shows them to have been attached to and made a part of the last amended petition. While this, speaking with exactness, may not be perfectly accurate, yet we think their filing in the case as an exhibit, and the refer-

ence to and designation of them as such exhibits in the petition objected to, sufficiently identifies and connects them with the pleading and as a part thereof; so that, in the absence of a motion directed to the same, they will be considered and treated, as they appear to have been on the trial of the case, as a part of the pleading, and when so treated, it is admitted that a cause of action is stated in the petition.

It is also objected that the evidence does not show that the plaintiffs were the owners and holders of the notes at the time of the beginning of the action and the trial thereof. As before stated, as we view the pleading, the execution and delivery of the note and mortgage being admitted, and a defense in the nature of an avoidance being pleaded, under the issues the burden rested, not upon the plaintiffs, but upon the defendant and interveners in the case. The execution of the note and mortgage being admitted, a mere denial that the plaintiffs are the owners or the real parties in interest can not avail the defendants. Having admitted as much as they did, the burden was cast upon them to plead and prove some fact showing a want of interest or ownership at the time the action was brought; and where they have failed to do so, the legal presumption is that the party to whom the instrument was executed and delivered continued and remained the owner thereof. *Doll v. Rizotti*, 96 Am. Dec. [La. Ann.], 399.

Objection is also made because no demand was made upon the bank by the plaintiffs for the proceeds of the sale of the cattle prior to the commencement of the action. This, we think, could at most only affect the costs in the case. The defendant, however, denying the plaintiffs' right to the relief sought, resisted their claim and interposing an adverse claim in its own behalf, would thereby waive any right or demand as to costs of suit, if judgment is adverse, which could properly be awarded against it. *Wright v. Greenwood Warehouse Co.*, 7 Nebr., 435; *Ogden v. Warren*, 36 Nebr., 715; *Rodgers v. Graham*, 36 Nebr., 730; *Wilcox v. Beitel*, 43 Nebr., 457.

There is a claim that the action is barred by the statute of limitations, based upon the proposition that in the last amended petition, for the first time, the liability of the interveners as the makers of the note was specially pleaded and a recovery as to them prayed for. We think under the pleadings it is quite apparent that the action was begun so as to prevent the running of the statute, when the parties were brought or came voluntarily into court and filed their pleadings under the first proceeding had, the time of which is clearly within the statute. In that proceeding the cause of action was based primarily upon the note and mortgage for the balance alleged to be due thereon, and a recovery was sought only against the defendant bank for the proceeds of the sale of the cattle, which it was claimed it had received and applied to its own use and benefit. The interveners, by proper petition, came in, admitted the execution and delivery of the note and mortgage and pleaded fraud or mistake as to the weight of the cattle at the time they were sold, and sought thereby to avoid the note for the balance then claimed to be due. The issue as tried was the amount due on the note and the liability of the bank on the cause of action pleaded against it. A judgment was rendered in conformity with such issues. Construing the pleadings together, the conclusion is irresistible that the amount due on the note, set out by the plaintiffs in their first petition filed, has been at all times the principal issue in the case. While the pleadings of the plaintiffs, as claimed, did not specially declare on and demand a recovery against the interveners in the proceeding first had, the suit was an action on the note even as against the interveners, who, by their petition of intervention, sought to avoid any further obligation thereunder, and to recover from plaintiffs for moneys overpaid on said note. Even though plaintiffs did not formally declare on the note and mortgage as against the interveners, the cause of action based thereon has all along been the subject of litigation, so that the statute as to all parties in

court ceased to run. It would seem that an issue, even if improperly pleaded, is treated by the parties and tried as such, the irregularity in the pleading, if one exists, is waived, and it will be treated as raising the issue thus irregularly presented and tried. *Parliman v. Young*, 4 N. W. Rep. [Dak.], 139.

On the trial of the case the court withdrew from the consideration of the jury the evidence submitted for the purpose of proving fraud or mistake as to the weight of the cattle at the time they were sold by the plaintiffs. This question was thoroughly considered in the last opinion given by this court heretofore referred to, and it was there found that the evidence in that trial was insufficient to support the verdict in favor of the interveners on that issue. The evidence in this case, it is admitted, is substantially the same. If so, the rule announced in that case has become the law of the case and will thereafter be followed. *Wittenberg v. Mollyneaux*, 59 Nebr., 203. The reasons stated in the opinion on rehearing are decisive of the question now presented. Viewing the matter either as an original proposition or as a point heretofore raised and decided in this same case, the ruling of the trial court must be held to be correct, and the withdrawal of the question from the jury proper.

It is urged that the court erred in its instruction to the jury to the effect that the defendant bank, if they found the defense pleaded as to money loaned to purchase feed to be sustained by the evidence, could retain of the proceeds of the sale of the cattle only the amount of the money loaned to the interveners and by them used for the purpose of purchasing feed for the mortgaged cattle. It is insisted that if the bank loaned the money for such purpose, this is sufficient to give them a superior claim on the proceeds, and that it is not necessary that they trace the money thus loaned to the purchase of feed. The instruction follows the pleading and allows the bank, if warranted by the evidence, what it claimed by its answer. We think the instruction correct and in harmony

with the agreement of the parties as pleaded in the answer, assuming the agreement to have been made. This agreement, according to the defendant's theory, was that some of the cattle might be sold and the proceeds used for the purpose of buying feed for the remainder. The only lawful use of the proceeds, then, would be for the purchase of feed, or to replace money used for that purpose, and if used for any other purpose, the use thereof would be wrong and contrary to the terms of the agreement. The interveners could, under the agreement if found to exist, sell of the mortgaged cattle enough to buy feed with the proceeds sufficient for feeding purposes and none other, and this agreement, as to the application which should be made of the proceeds, determines what use may rightfully be made of money loaned, in order to estop plaintiffs from asserting their prior lien on all the proceeds of the sale of the cattle until their demands are satisfied. The instruction, however, if erroneous, would be without prejudice, for the reason that the verdict discloses that on this issue the jury found in favor of the plaintiffs, and that the agreement pleaded had not been proven by a preponderance of the evidence. Further, the finding of the jury, being only advisory, was not conclusive and binding on the trial court. We think the evidence abundantly sustains the verdict and judgment.

The judgment, being in harmony with the pleadings and the evidence, properly determines the respective rights of the parties, is in conformity with law, and should, therefore, be

AFFIRMED.

HERMAN HOLT, APPELLANT, V. EILERT SCHNEIDER ET AL., APPELLEES.

FILED FEBRUARY 20, 1901. No. 11,654.

1. **Former Decision:** RES ADJUDICATA. Where on appeal a question involved in the controversy is clearly presented and fully determined, the decision thereon will be deemed to be the law of the case in all subsequent proceedings, binding alike on the trial court and in this court on another appeal.

2. **Principal and Agent:** PLEADING: REPUDIATION OF AGENCY: BENEFICIAL ACTS OF AGENT. Where a mortgagee, in whose favor a decree has been obtained and satisfied by one assuming to act as his agent, attempts to repudiate such agency, and begins a new action in equity on the same indebtedness, alleging a different and less sum due than found in the first decree, he can not, in the subsequent proceedings, urge the first decree as fixing the amount due him on such indebtedness.

3. **Judgment:** MANDATE. Judgment of the trial court *held* to be in conformity with the special mandate issued out of this court.

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

Flansburg & Williams, for appellant.

Stevens & Cochran and *Stevens, Love & Frampton, contra.*

HOLCOMB, J.

One C. C. Burr, as owner and holder of a second mortgage on the real estate of the appellee and the note secured thereby, commenced an action in equity in the district court for the purpose of foreclosing the lien arising by virtue of the mortgage. After the proceedings were instituted, assuming to act as the agent of the appellant Holt, Burr caused a cross-petition to be filed for and on behalf of Holt, who was the owner of the mortgage indebtedness secured by the prior lien, upon which, after pleadings were formed, a decree was rendered in favor of Holt on his cross-petition, and in favor of the

plaintiff on the cause of action set out in his petition, as well as establishing other and subsequent liens upon the property affected by the proceedings. After a stay of execution of the order of sale taken by the appellee Schneider had expired, Burr, still acting as the agent of Holt, entered into an arrangement with the judgment debtor and owner whereby another loan was obtained upon the premises, and the proceeds thereof, $3,800, received by Burr acting in his own behalf and as agent of Holt, being insufficient to meet all of the liens against the property, by another arrangement a chattel mortgage for $1,587.27 was executed by the mortgagor to Burr, who procured the satisfaction of the subsequent liens, and entered satisfaction of his own lien under the decree rendered on the second mortgage, and satisfaction as agent of Holt of the first lien in his favor rendered on his cross-petition. The amount of the decree in favor of Holt was $4,322.52, but in it, as appeared later, was included a large sum of money due to Burr for interest paid by him as guarantor on the debt secured by the principal mortgage. What part, if any, of the proceeds of the last loan negotiated was paid to Holt does not appear. After the transactions narrated had taken place, Holt, attempting to repudiate the agency of Burr, instituted proceedings in his own behalf to foreclose his mortgage, the principal sum being $3,200, with interest due thereon in the sum of $256, or a total of $3,456, for which he prayed a foreclosure of the lien of his mortgage and a sale of the premises to satisfy the same. In the proceedings in the suit instituted by Holt it was found that Burr was the agent and had authority to act in the capacity in which he assumed to act; and the decree rendered in the first suit having been duly satisfied, the second suit resulted in a finding and a judgment against Holt on the cause of action pleaded in his petition. Upon appeal to this court, the opinion being found in *Holt v. Schneider*, 57 Nebr., 523, the findings and judgment of the trial court were affirmed in all respects, save that, as

the agent of Holt, Burr had no authority to accept in payment of the indebtedness due Holt anything but money, and that the chattel mortgage given by Schneider could not be legally applied to the satisfaction of the debt due to Holt without his consent, and the case was remanded with specific instructions "to ascertain the amount due to Holt from Schneider after deducting the $3,800 paid by the latter to Burr, and to award Holt a lien upon the real estate in controversy for the payment thereof, postponing such lien, however, to that of the Union Central Life Insurance Company." The cause being remanded, on motion, and after the introduction of evidence and a hearing, the court found nothing to be due Holt after applying the $3,800 to his indebtedness, and dismissed the action. The case is again appealed by Holt, who contends that the directions contained in the mandate have not been followed.

It is argued that the decree in favor of Holt having been rendered for the sum mentioned, this is conclusive as fixing the rights of the parties, and a decree should have been awarded for the difference between $3,800 held to be properly applicable to the Holt indebtedness, and the sum for which the original decree was rendered. The former opinion, to which reference has been made, determines three questions, which were clearly presented, and which must be regarded in the subsequent proceedings as the law of the case; first, that Burr was authorized to act as the agent of Holt in the collection of the debt of the principal; second, that Burr, as agent of Holt, had no authority to take a chattel mortgage in satisfaction of his principal's indebtedness; and third, that the proceeds of the subsequent loan of $3,800 were received by Burr as the agent of Holt, and to that amount was a complete and legal payment and satisfaction of the indebtedness due from the mortgagor to the principal Holt. The first decree of $4,320.52 has been satisfied and canceled of record. Holt, as the principal, claimed nothing under that decree, and by the subsequent proceedings

begun by him alleges a definite sum as due from the mortgagor, for which he asks satisfaction. In these later proceedings it is not claimed by him that the amount mentioned in the first decree is due him, but, on the other hand, he asks only for the principal sum of $3,200, with an additional sum as interest. Under these circumstances, it appears to us that the amount in the prior decree, which in fact was due in part to Holt in his own behalf, and the remainder as agent or trustee of Burr, is not a matter which can be regarded as *res adjudicata* in the present proceedings. The amount which is due Burr in his own behalf may properly be satisfied by the chattel mortgage. There is nothing in the opinion which determines how any of the different items of indebtedness evidenced by the first decree may be satisfied and settled, save that as to the amount which is due to appellant Holt, the chattel mortgage can not be applied thereon. It having been determined that $3,800 received by Burr could legally be applied to the extinguishment of the indebtedness due from the mortgagee to Burr's principal, Holt, and there being no finding or determination as to the amount due Holt, it left to the trial court, under the mandate, the determination of that question, and when it was found, as appears to have been rightfully done, that the sum due to Holt was less than $3,800, which it has been decided should properly and legally be applied as payment of the indebtedness due him, then, under the opinion and mandate, such indebtedness had been fully paid and satisfied, and the order of dismissal was right and proper.

The judgment must be

AFFIRMED.

DANIEL C. STOVER, PLAINTIFF AND APPELLEE, V. WILLIAM L. STARK, DEFENDANT AND APPELLANT.

FILED FEBRUARY 20, 1901. No. 11,675.

1. **Dormant Judgment:** REVIVOR: RES ADJUDICATA. In a proceeding to revive a dormant judgment the defendant and judgment debtor must be held to have litigated in the action wherein the judgment was obtained every matter necessary to support any defense he then possessed against the demand of the plaintiff for a judgment against him.

2. ———: ———: ———: VALIDITY. In such proceeding no objection can be urged or inquired into which goes behind the original judgment not directed to its validity.

3. **Plaintiff in Foreclosure:** PURCHASE AT SALE: RESALE: DEFICIENCY JUDGMENT. A plaintiff in foreclosure proceedings may lawfully purchase the property sold to satisfy a decree in his favor. The fact that he afterwards sells the property for a sum equal to the amount of the decree and costs can not affect his rights with respect to a deficiency judgment obtained in the equity action.

APPEAL from the district court for Hamilton county. Heard below before SORNBORGER, J. *Affirmed.*

J. H. Grosvenor, for appellant.

Hainer & Smith, contra.

HOLCOMB, J.

In a proceeding in equity to foreclose a mortgage on real estate the appellant was made a party defendant and sought to be charged with any deficiency that might exist after the sale of the mortgaged property and application of the proceeds thereof to the mortgage debt, it being alleged that the appellant, as grantee of the mortgaged premises, and as part of the consideration, had assumed and agreed to pay the debt secured by the mortgage on the premises purchased. In the proceedings had in the case, the appellant appearing, on application of the plaintiff and after sale, a judgment was rendered in the dis-

trict court against appellant for a deficiency remaining after the sale of the mortgaged property and the application of the proceeds to the mortgage debt in the sum of $336.61. On appeal to the supreme court the judgment thus rendered was affirmed. *Stover v. Tompkins*, 34 Nebr., 465. The judgment became dormant, and proceedings under the statute were instituted to revive it. Upon notice, appellant appeared and resisted the application for a revivor. All the questions presented by the objections to a revivor of the judgment, save one, were those litigated or necessarily involved in the prior proceedings, and as to all such questions they have become *res adjudicata* and can not again, in this proceeding, be inquired into. As defendant in that case, appellant must be held to have litigated every matter necessary to support any defense he then possessed against the demands of the plaintiff for a deficiency judgment against him. *Stark v. Starr*, 94 U. S., 485. The rule that in proceedings to revive a dormant judgment no objection can be urged or inquired into which goes behind the original judgment not directed to its validity appears to be sound in principle and well established by the prior decisions of this court, as well as in other jurisdictions. *Wright v. Sweet*, 10 Nebr., 190; *Enewold v. Olsen*, 39 Nebr., 59, 65; *Nestlerode v. Foster*, 8 Ohio Cir. Ct. Rep., 70; Van Fleet, Collateral Attack [1st ed.], sec. 580.

The contention that because the mortgagee purchased the mortgaged premises under the decree, and afterwards sold the same for enough to satisfy the decree in full with interest and costs, is a reason sufficient under equitable considerations why revivor should not be had, is not well taken. He might so purchase under the law, and when the sale was confirmed and the deed delivered, the property became his as any other, to do with as he desired, and whether afterwards sold for more or less than under the decree can not affect the rights of the parties in that proceeding.

The judgment must be

AFFIRMED.

COUNTY OF DODGE ET AL. V. THOMAS R. ACOM ET AL.*

FILED FEBRUARY 20, 1901. No. 11,707.

1. **Drainage Ditch: JURISDICTION OF COUNTY BOARD: COMPLIANCE WITH STATUTORY PROVISIONS.** Where, in proceedings under the provisions of article 1, chapter 89, Compiled Statutes, 1899, for the establishment of a drainage ditch, a county board acquires jurisdiction over the subject-matter under consideration, any mere irregularity or want of exact compliance with all of the statutory provisions will be deemed insufficient to render void the whole proceedings taken regarding such matters.

2. ———: ———: **SPECIAL ASSESSMENT.** In establishing a drainage ditch and levying special assessments for benefits received the jurisdictional steps required to be observed are, first, a petition signed by one or more owners of land to be affected by the proposed ditch; second, a proper bond for costs, as provided by statute, to be approved by the clerk; third, a finding by the board on actual view that the proposed improvement is necessary, and will be conducive to the health, convenience or welfare of the public; fourth, that the proposed ditch is the best route for the contemplated improvement; and fifth, that notice, as provided by statute, to persons on whose lands the cost is to be apportioned, and the owners whose lands are to be taken or damaged, shall be given.

3. **Assessment: IRREGULARITY: NON-COMPLIANCE.** The provisions of section 28, to the effect that assessments shall not be set aside in consequence of any error or irregularity committed or appearing in any of the proceedings, must be given the force and effect fairly justified by the language used when applied to errors, irregularities or non-compliance with the strict letter of every provision of the statute not going to the question of jurisdiction.

4. **Appointment of Engineer: FINAL SURVEY: REPORT: VARIANCE FROM PETITION.** Where an engineer is appointed by the board, after it has found the route designated to be the best, the improvement necessary, and conducive to the public health, convenience and welfare, who goes upon the line of the ditch petitioned for, makes a final survey, sets grade stakes, notes intersections, and makes a profile and plat, fixes the dimensions and slopes of the banks, etc., and his report is confirmed by the board, the action taken will be deemed to be that of the board and in compliance with the statute. The fact that the line as finally established varies from that described in the petition, but for a less distance than is allowed by the petition and by statute, does not affect the validity of such proceedings.

*Rehearing allowed.

5. **Petition:** COMPLIANCE WITH STATUTE. A petition which describes with certainty the point of beginning of a drainage ditch and the direction in which the same is to run, giving the sections through which it passes, and the place where terminating, and providing that the line may vary from a straight line to avoid improvements and take advantage of the ground, but not more than 160 rods, is a sufficient compliance with the provisions of the statute to give the board jurisdiction to act in respect to the same.

6. **Actual View:** ADJOURNMENT: ACTION OF BOARD INTERIM. Where the record shows that a county board adjourned its sitting at the court house, and went in a body to view the proposed ditch and that they made such view, and afterwards resumed their sitting, such act is a compliance with the statute, and the view made will be regarded as the act of the board and not of individuals.

7. **Engineer:** COMPLIANCE WITH STATUTE. Where the engineer divided the proposed ditch into working stations, and showed in each the distance, and the number of cubic feet to be removed, together with the cost of removal, at the estimate upon which the total cost is arrived at, this, with the report of the assessment to be levied on each parcel or tract of land for special benefits, imparts all the information that would be necessary in case of an apportionment of the number of lineal feet and cubic yards to each lot or tract of land according to the benefits which will result to each from the improvement, and is a sufficient compliance with the provisions of the statute in that respect.

8. **Irregularity:** HARMLESS ERROR. An irregularity in not apportioning and reporting the number of lineal feet and cubic yards to each lot or tract of land according to benefits, *held*, harmless error, since the parties complaining made no effort to bid on the work of construction.

9. **Special Benefits:** MARKET VALUE. In determining special benefits accruing to land by reason of the construction of a drainage ditch, it is proper to take into consideration whatever will come to the land from the drain to make it more valuable for tillage, or more desirable as a place of residence, or more valuable in the general market, the true and final test being what will be the influence of the proposed improvement on the market value of the property.

10. **Evidence:** FINDING. Evidence examined, and *held* to support the finding and order of the county board levying special assessments for benefits received by reason of the construction of a drainage ditch.

11. **Jurisdiction:** PRESUMPTION. Where a county board has acquired jurisdiction to act, the presumption is in favor of the correct-

ness and regularity of the proceedings taken, and its action should not be overturned except when it is made to affirmatively appear that the action taken is erroneous.

12. **Findings of Board: ADMINISTRATIVE POWER.** The findings of the county board as to the necessity of a proposed drainage ditch, and that the public health, convenience or welfare will be promoted thereby, can not thereafter be made the subject of a controversy as to whether correct and well founded or not. It is the exercise of a delegated power, political or administrative in character, and not judicial, conferred upon the county board by the sovereign authority of the state acting through its legislative branch of government.

13. **Constitution.** The provisions of section 6, article 9, of the constitution, that "the legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment, or by special taxation of property benefited," do not prohibit the legislature from conferring the power to make local improvements by special assessments or taxation of property benefited upon counties. *Darst v. Griffin*, 31 Nebr., 668, followed.

14. **Statute.** The provisions of the statute under consideration *held* not to be violative of any of the provisions of sections 3, 13, 21, and 24 of article 1 of the constitution.

ERROR from the district court for Dodge county. Tried below before GRIMISON, J. *Reversed.*

Grant G. Martin, Clark C. McNish, Frank Dolezal and *Robert J. Stinson*, for plaintiffs in error.

E. F. Gray and *George L. Loomis, contra.*

HOLCOMB, J.

Under the provisions of article 1, chapter 89, Compiled Statutes, 1899, an act to provide for draining marsh or swamp lands, proceedings were instituted before the county board of Dodge county for the purpose of securing the establishment and construction of a drainage ditch in that county. After the presentation of a petition for the purpose mentioned action was taken resulting in the establishment and construction of the ditch prayed for, and the levying of special assessments upon many different tracts of land adjacent to the proposed ditch for

special benefits received by reason of such construction. From the order finding that the various properties were benefited by reason of the improvement, and levying a special tax therefor, ninety-eight different owners of such properties, by error proceeding, obtained a review of the action of the county board in the district court, which, upon a hearing, resulted in annulling, reversing and vacating the order of the county board levying the special assessment, and holding such proceedings to be null and void. The grounds upon which the trial court reached the conclusion announced in its judgment are not made clear from the record, the findings being only of a general character and to the effect "that there is error in said proceedings and final order or judgment of said board, and in said subsequent proceedings and orders of said board, and that said proceedings and final order of judgment of said board complained of in said petition in error are erroneous and void and should be vacated." And thereupon it was adjudged "that said proceedings * * * be and hereby are reversed, set aside, vacated and declared and adjudged to be void so far as the same in any manner affects the plaintiffs in error herein, and that the special tax assessed and levied by said board by its order entered on its journal under date of November 3, 1899, assessing the lands of each of the plaintiffs in error herein, to which their petition in error relates, for the cost and expense of the location and construction of the ditch mentioned in said petition and transcripts, known as the 'Central Cut Off Ditch,' and the entry of such tax upon the tax lists of said county in pursuance of said orders, be and hereby are vacated and set aside, and declared and adjudged to be void." From the judgment of reversal the case is upon error brought to this court for its consideration. Many questions are presented and argued by counsel upon both sides, directed to the validity and regularity, or want thereof, of the proceedings had before the county board relating to the judgment or order of which complaint is made. It is perhaps

well enough that we should consider the different questions presented and necessary to a proper disposition of the case in what appears to us the logical order of their presentation, rather than to follow the briefs of counsel upon either side.

At the outset it is proper to apply the principle heretofore adopted by this court, and which obtains quite generally, to the effect that jurisdiction having been once acquired by the county board in regard to and over the matters under consideration, any mere irregularity or want of exact compliance with all of the statutory provisions will be deemed insufficient to render void the whole proceedings by or under which the special taxes objected to were levied. *Darst v. Griffin*, 31 Nebr., 668. The jurisdictional steps required to be observed under different decisions of this court are declared to be, first, a petition signed by one or more owners of land to be affected by the proposed ditch; second, a proper bond for costs, as provided by statute, to be approved by the clerk; third, a finding by the board on actual view that the proposed improvement is necessary and will be conducive to the health, convenience or welfare of the public; fourth, that the proposed ditch is the best route for the contemplated improvement; and fifth, that notice, as provided by statute, to persons on whose land the cost is to be apportioned and the owners whose lands are to be taken or damaged shall be given. *County of Dakota v. Cheney*, 22 Nebr., 437; *State v. Colfax County*, 51 Nebr., 28. An observance of the different jurisdictional steps required by statute will give to the board jurisdiction to act regarding the subject matter, and when jurisdiction has attached, the further proceedings, and the establishment, construction and completion of the proposed improvement, can be regarded as voidable only, and not void, even though irregularity is shown. By section 28 of said chapter 89 it is provided that "the collection of assessments to be levied to pay for the location or construction of any ditch shall not be enjoined nor declared void; nor

shall said assessment be set aside in consequence of any error or irregularity committed or appearing in any of the proceedings provided by this act," etc. These provisions, while not applying to void assessments, must be given the force and effect fairly justified by the language used, when applied to errors, irregularities or non compliance with the strict letter of every provision of the statute, not going to the question of the jurisdiction of the board regarding the matter upon which they are acting. *Morris v. Merrell*, 44 Nebr., 423.

In the light of the observations just made, we now proceed to a consideration of the objections urged against the validity of the action of the county board in making the assessment complained of. A petition signed by several owners of lands to be benefited by the proposed ditch was filed with the county clerk, praying the county board to cause, in the manner provided by law, to be located, constructed and established, a ditch or drain on the following described lands in Dodge county, Nebraska, to-wit, "commencing at the ¼ corner on the north of section 19 (township 18, range 6 east, and running southeast [describing the sections through which it proceeded], and terminating in the Platte river about forty rods east of the west line of section 17, township 17, range 7 E. The final location shall be made by a competent engineer and may vary a little from a straight line to avoid improvements and take advantage of the ground, but not more than 160 rods from said straight line at any point in the route. Said ditch to be of such dimensions and with such slope of bank as may be designated by the engineer who may make the survey for said ditch," it being represented that it would be conducive to the public health, convenience and welfare to have said ditch and drain established as therein proposed, that the lands to be affected by said ditch or drain were low, wet and unfit for cultivation on account of the want of ditch and drainage facilities. Acting on this petition, the county board, by motion, proceeded to view the line of the proposed im-

provement, and after actual view, and after reciting the prior action taken, determined and found with respect thereto as follows: "We find that said petition is signed by one or more of the owners of lots and lands which will be benefited by the construction of said proposed ditch and drain; and whereas, we find that a good and sufficient bond has been filed and approved by the county clerk, as by law provided; and whereas, we find from actual view of the line and route of said proposed ditch and drain, as prayed for, and the premises along and in the vicinity thereof, that said ditch and drain as prayed for in said petition is a necessary improvement, and that the construction of the same will be conducive to the public health, convenience and welfare, and that the line proposed and designated in said petition is the best route for said ditch and drain; Therefore be it resolved, that this report and resolution be adopted, and that the clerk be and is hereby ordered to enter the same on the journal of this board." After the action recited had been taken by proper order, one J. W. Andrews, a civil engineer, was directed to go upon the line, survey and level the same, set a stake every 100 feet, note the intersections and make a report, profile and plat of the same. Upon this report it appears that a variation of the route described in the petition was made by constructing the ditch from the starting point due south 140 rods, and then in a straight line to the terminus mentioned in the petition.

It is urged that the action of the board as to the location and establishment of the ditch was not a sufficient compliance with the statute. We think differently. Counsel argue upon the theory that every act necessary to the establishment and construction of the ditch must be taken by the board, and none other, and that no authority existed for the engineer to make the exact and final location and provide for the dimensions thereof. To follow this contention to its logical conclusion would lead to the result that the board must itself construct as well as establish the ditch, and that no authority existed for

others to perform the necessary work to accomplish that end. The line was located with sufficient certainty when the board approved and adopted the route as defined in the petition, and the variation of the engineer from that route was not so great that it can be said that another route had been decided upon; and was within the language of the petition as well as the statute, which permits a variance of this character. By section 7, upon favorable action by the board on such petition, it is provided that an order shall be entered on the journal of the board, directing the county surveyor or engineer to go upon the line described in said petition and survey and level the same, and make a report, profile and plat of the same, and estimate the number of cubic yards for each working section as hereinafter provided. The orders of the board appear to be in strict compliance with the provisions of this section. The petition itself provided for the determination of the dimensions by a survey of the proposed route, and this was followed. While it is provided by section 6 that the county board has power to change and establish a new route, and determine the dimensions of the proposed improvement, this provision, even if applicable, does not preclude them from employing assistance as may be required in determining the dimensions, and adopting as their own a report made under such an arrangement by those competent to act thereon. We find no valid objection, either to the petition or the steps afterwards taken thereunder, by which the route of the proposed improvement was finally and definitely established by the engineer, or to his report of the dimensions and necessary excavations to construct the proposed ditch. There was, as it appears to us, a full and substantial compliance with the letter and spirit of the statute in this respect, and the proceedings must be regarded as regular. To give to each separate provision of the statute a literal construction, and require precise and exact compliance therewith, would defeat the very object of its creation and render its observance

utterly impossible. The petition for the proposed ditch described with certainty and definiteness the point of beginning, the direction it was to run, which was in a straight line, the sections through which it was to pass and the place where it was to terminate on the banks of the Platte river; that it might vary a little from a straight line to avoid improvements and to take advantage of the ground, but not more than 160 rods from said straight line at any point of the route. This description was and is a sufficient compliance with the statute, and to give the board jurisdiction to act in respect to the same. *Clark v. Teller*, 50 Mich., 618; *Kinnie v. Bare*, 36 N. W. Rep. [Mich.], 672.

Some objection is offered because the record discloses that the county board adjourned from their sitting in the county court house to go in a body and view the proposed improvement, which by the record it is shown was done, the contention being that the view as made was by the members as individuals and not as a board. The objection is without merit. The view was made, in full compliance with the requirements of section 5 of the statute, by the board in a body, making an actual view of the line of the proposed ditch. It is not required that the record should show that they were in session while viewing the proposed route.

Complaint is made because of the report of the engineer, together with his plat and estimate, failing to show an apportionment of the number of lineal feet and cubic yards to each lot or tract of land, according to the benefits which will result to each from the improvement, according to the provisions of section 8. This at most is only an irregularity, and does not go to any of the jurisdictional steps required to be followed. It is urged that the policy of the law is that each person against whom special assessments are levied may have the right to cancel the obligation by engaging in the work of construction. As the cost of removing the earth from the ditch is only a part of the total cost, it at once presents itself as an im-

possibility to permit each land owner whose lands are benefited to work out the special assessment against him by engaging in the work of excavation of the proposed ditch. Substantial compliance, however, was made in dividing the ditch into working stations, and showing in each the distance and number of cubic feet required to be removed in that working station, together with the cost of such removal at the estimate upon which the total cost is arrived at. This, with the assessments levied on each parcel or tract of land, imparted all the information that would be derived had the engineer followed with exactness the provisions of the section of the statute under consideration. All persons, by this means, have an equal opportunity, if desired, to engage in the work of construction and liquidate the special assessment levied against the property, so far as the same may be done, until the whole of the work of excavation is provided for. But even if irregular, it was harmless error, because the record discloses that none of the parties complaining bid, or apparently desired to bid, for any of the work upon advertisement and invitation for bids therefor. No right of any of the exceptors was prejudiced by the action of the engineer complained of.

It is strongly argued that the order finding the lands of those objecting specially benefited and levying a special assessment therefor is erroneous and not supported by sufficient evidence. It is contended that the lands being located west of the proposed ditch and at a higher level, the natural drainage being towards the ditch and then east, rendered the proposed improvement of no benefit to them. This involves a question difficult of discussion, unless the opinion is extended to an unwarranted length, which we are not at liberty to undertake. The land is located in the Platte valley, as the expression is occasionally heard, in the Platte river bottoms. Its general character with reference to its surface is that of flat, level, prairie land, the natural drainage is to the east over the surface, and through a tortuous stream, in

which, according to the testimony of the engineer, it is sometimes necessary to place a buoy or float in order to determine whether there is a current and its direction. There are depressions, swales and low places, upon which water accumulates and slowly drains off the land or is evaporated. Drainage ditches have been found advisable and advantageous in reclaiming the land, better adapting it to agriculture, and conducing to the public health and convenience. The water from the surrounding land is collected therein more rapidly, and it furnishes a better method of conducting the excess water into the Platte river, which finally receives all the waters running off the earth's surface in that locality. Just the extent of the benefits accruing to the lands some distance from the proposed ditch is, of course, involved in some uncertainty. The finding and report of the engineer, under the provisions of the statute, should, we think, when adopted by the board, be regarded as *prima facie* evidence of the benefits found to accrue to each tract of land, to be overcome in contest only by competent testimony showing the contrary. This question, it would seem, must be determined largely from the conformation of the surface of the ground where the land is located, in connection with and relation to the proposed drainage ditch. It will not do to say that because the natural drainage or average fall of surface of five or six feet to the mile to the east, over which surface water will in time or eventually find its way to the river, other and more expeditious methods of drainage may not be adopted, and thereby specially benefit the lands adjacent because of the adoption of such methods. The object sought is to carry the surface water off the lands, and thus more suitably adapt them to agriculture, and promote the public health and convenience. If lands immediately adjacent to the proposed improvement are benefited by the ditch and the drainage of the water therefrom is accelerated, then for the same reasons would lands further off, and yet within an area subject to the influence and affected by

the improvement, be benefited by permitting the water thereon to be more rapidly collected, drained into the ditch and carried from the locality. Many causes, it is shown, contribute to this result, such as road ditches, lateral drains and other means by which the surplus waters are conducted into the drainage ditch and then carried directly to the river by the most direct route. The necessity of a resort to artificial methods of drainage appears to arise from the flat, level condition of the surface with low places where the surface waters gather, the fact that the natural water courses or drains are tortuous and meandering, and of higher banks than the surrounding lands, and the currents more or less impeded by grasses and other growths of vegetation obstructing the free flow of the water therein. While there is complaint generally of the action taken by the board, the efforts of the objectors are directed principally to the object and for the purpose of showing that, as to them, no special benefits accrued to their property, and the tax thereon levied is, therefore, wrongful and erroneous. In speaking of benefits received by the lands taxed, to which objections are made, the engineer who examined and reported the special benefits accruing to the lands to the board, and who was a witness, says that the ditch will furnish a number one outlet for all the water on the land or that might come on it. "I don't believe," says he, "I know of any land that is covered here by the assessment but what the water that would fall on it would ultimately reach the ditch, * * * and to my knowledge there is not a foot of ground but what the surface water will get into the ditch." This evidence, and other of a similar character, is convincing and not refuted. In speaking on the subject of benefits it is said by the supreme court in *Lipes v. Hand*, 1 N.E.Rep. [Ind.], 874: "The conclusion to which the authorities lead is that benefits are special when they increase the value of the land, relieve it from a burden, or make it especially adapted to a purpose which enhances its value," citing 3 Sutherland, Damages [1st ed.],

454-462; *Allen v. Charlestown*, 109 Mass., 243; *Whitney v. Boston*, 98 Mass., 312; *Farwell v. Cambridge*, 11 Gray, 413; *Milwaukee, etc., v. Eble*, 4 Chand., 72. And in *Culbertson v. Knight*, 52 N. E. Rep., 700, says the same court in considering the objects of statutes similar to those now under consideration, "Public health, public convenience, and public utility are fundamental considerations; and these, with all other subjects that affect the value of land, must be counted upon by the viewers in determining the question of benefits. A rule that has received high sanction is stated thus: 'The only safe and practical course—the one which will do equal justice to all parties—is to consider what will be the influence of the proposed improvement on the market value of the property.' *In re William and Anthony Sts.*, 19 Wend., 678; Cooley, Taxation, 660; *State v. Mayor, etc., of City of Newark*, 35 N. J. Law, 166; *Lipes v. Hand*, 104 Ind., 503, 1 N. E., 871, and 4 N. E., 160. Whatever will come to the land from the drain, to make it more valuable for tillage, or more desirable as a place of residence, or more valuable in the general market, should be reckoned as benefits, and these questions arise without reference to whether the drain actually reaches the land and receives the water directly from it." Applying the rules above stated, which are based on reasoning sound in principle and quite applicable to the case at bar, the evidence, we think, gives substantial support to, and a sufficient basis for, the findings and order of the county board which are complained of.

The objectors all uniting in prosecuting error proceeding from the action taken by the county board, and the case having been presented and tried upon the theory that the law and the evidence applied to all the several tracts of land alike, we have considered the case as argued by counsel in the same manner, the question thus being reduced to the one proposition of whether any of the lands assessed, to which exception is taken, comes within the rule of special benefits as heretofore discussed. We think it does, and find no reason from the record for

any other conclusion than that all the separate tracts of lands of the ninety-eight parties objecting to the special assessments were properly and justly assessed under the provisions of the statute under consideration. By section 8 it is made the duty of the engineer, under the direction of the board, to return a schedule of all lots, lands, etc., that will be benefited by the proposed improvement, whether the same are abutting on the line of the proposed improvement or not. And by section 11 the county board, upon finding that due notice of the hearing has been given, shall examine the report of the engineer and the apportionment made by him, and if it is in all respects fair and just according to benefits, they shall approve and confirm the same; but if they find said apportionment to be unfair and unjust, they shall so order and so amend it as to make it fair and just according to benefits. After a full hearing and the production of much evidence, the action of the engineer in the case at bar was confirmed, and the board having acquired jurisdiction to act, as in other proceedings of this character, the presumption is in favor of the correctness and regularity of such proceedings, and should not be overturned except when it is made to affirmatively appear that the action taken is erroneous. *Little v. Sinnett*, 7 Ia., 324, 334; *Chicago, B. & Q. R. Co. v. Chamberlain*, 84 Ill., 333.

In the hearing of the case before the county board the objectors sought to raise an issue as to the correctness of the finding of the board, as one of the jurisdictional steps, that the route proposed was the best route, and that the improvement was conducive to public health, convenience or welfare. Evidence offered for this purpose was excluded, and we think rightly so. This was a matter upon which an issue to be judicially determined could not be formed. The power is conferred upon the board by the legislature to cause to be constructed a work of improvement of the kind contemplated, when the same is necessary for the purposes intended and will be conducive to the public health, convenience or welfare. The

exercise of this power is not judicial. The finding and conclusions of the board, to whom the legislature has given authority to act in the manner prescribed, are final and conclusive as to the necessity of the proposed ditch, and that the public health, convenience or welfare will be promoted thereby, and can not thereafter be made the subject of a controversy as to whether correct and well founded or not. It is the exercise of a delegated power, political or administrative in character, conferred upon the county board by the sovereign authority of the state acting through its legislative branch of government. *Lynch v. Forbes*, 161 Mass., 302; *In re Cooper, Mayor*, 28 Hun [N. Y.], 515, 524; *Chicago, R. I. & P. R. Co. v. Lake*, 71 Ill., 333, 336; *Barrett v. Kemp*, 91 Ia., 296.

The foregoing construction of section 1 of the statute under consideration does not render it violative of the provisions of the constitution as to due process of law, the administration of justice, the taking of private property without just compensation, or the right of appeal, as contained in sections 3, 13, 21 and 24 of article 1 of the constitution, since all rights guaranteed by these provisions are safeguarded by other sections of the same statute, the right to be heard, the judicial determination to be had, the compensation to be given and the right of appeal apply not to the conclusions of the board as to the necessity for the improvements, but to action taken which affects the property rights of the parties to the proceedings in the exercise of the right of eminent domain, and for which provisions are made in other sections, for notice, a hearing and determination, compensation or special benefits accruing, and the right of review or appeal by those dissatisfied with the result of such hearing and the determination thereof. This is all the constitution requires. As to the main and fundamental questions involved, the constitutionality of this statute has been, after mature deliberation, affirmed in a well considered opinion, which must be regarded as decisive of the question, and we are not disposed to enter into a re-

examination thereof now. *Darst v. Griffin, supra.* The objectors have had their statutory notice, they have appeared before the board and entered a remonstrance against its findings and exceptions to the levying of special assessments for benefits found to exist. From these findings they have been accorded a right to a review and hearing thereof in the district court, so that it can not be said that any question is involved as to a hearing, determination and adjudication of the subject before their property rights are affected by the special assessments complained of.

From an examination of the entire record, we are convinced that the county board obtained jurisdiction over the subject-matter regarding which they have taken action, and that the order made as against the remonstrators and exceptors is supported by the evidence and warranted by law. The order of the county board complained of being in accordance with law and valid, and there appearing no sufficient ground for reversal or vacation thereof, the judgment of the district court must be reversed and vacated, and the order of the county board reinstated, which is accordingly done.

JUDGMENT ACCORDINGLY.

GEORGE M. HOWELL V. STATE OF NEBRASKA.

FILED FEBRUARY 20, 1901. No. 11,714.

1. **Instruction: BURDEN OF PROOF.** An instruction, in criminal prosecution, which casts the burden on a defendant to prove the defense interposed by a preponderance of the evidence, or beyond a reasonable doubt, is erroneous.

2. **Contradictory Instructions.** The giving of an instruction incorrectly stating the law is not cured by another instruction on the same subject which is correct, the inconsistent instructions being confusing and leaving the jury in doubt as to which is correct, and it being impossible to know which in fact was accepted by them in their consideration and application of the evidence in the case.

3. **Instruction: PROVINCE OF JURY.** An instruction regarding the testimony of witnesses which invades the province of the jury and deprives them of the right to judge of the weight and credibility to be attached to the testimony of such witnesses is erroneous.

ERROR from the district court for Nemaha county. Tried below before STULL, J. *Reversed.*

George W. Cornell, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy, contra.*

HOLCOMB, J.

In the present case the defendant, plaintiff in error, was informed against under two counts, the first, for shooting with intent to kill, and the second, with intent to wound, and upon trial was convicted of the offense charged in the second count of the information, and sentenced to imprisonment in the penitentiary for a period of one year. As presented, the assignments of error, upon which reversal of the judgment of the trial court is sought, are based upon a transcript of the record unaccompanied by a bill of exceptions containing the evidence in the case. From the record before us it appears that the act of shooting, which is made the basis of the charge, was defended on the theory that at the time of the occurrence the defendant was intoxicated to such a degree as to prevent him from forming the criminal intent necessary to constitute the offense charged. Upon this phase of the case the court gave several instructions, which were excepted to, and are now urged as error, calling for a reversal of the judgment. A consideration of the instructions given and excepted to leads us to the conclusion that errors were committed, for which the judgment must be reversed and the cause remanded for further proceedings.

Instruction No. 2, given on the court's own motion, is

as follows: "If, from the evidence in this cause, you are satisfied beyond a reasonable doubt that the defendant, at the time and place, manner and form, set forth in the information, assaulted said Lorenzo Hill and shot at him as set forth in the information, then and in that event the burden will rest upon the defendant to satisfy you by the evidence that he was so under the influence of liquor at the time that he was mentally unable to form an intent in his mind to either kill, murder or wound said Lorenzo Hill. You are to determine this matter from all the evidence in the case. Drunkenness in itself is no defense, unless the drunkenness is of such a character that it dethrones the reason or understanding to such an extent that he [accused] is unable to discriminate between right and wrong, or unable to form an intent in his mind to commit a crime." By this instruction the jury were told that, in case they found beyond a reasonable doubt that the assault was committed as charged in the information, it was incumbent on the defendant to satisfy them by the evidence that he was so under the influence of liquor at the time that he was mentally unable to form an intent in his mind, either to kill or to wound the person upon whom the assault was alleged to have been committed. It cast the burden upon the defendant to satisfy them of this fact by a preponderance of the evidence, or beyond a reasonable doubt. This is contrary to the rule as frequently announced in this court, and is prejudicial to the rights of the defendant. A correct instruction at the request of the state was given substantially as in the case of *Ford v. State*, 46 Nebr., 390, which, though not unreservedly approved by this court, was held to be not prejudicially erroneous. But, as has been frequently said, the giving of an instruction incorrectly stating the law is not cured by another instruction on the same subject which is correct, for the reason that such instructions are confusing to the jury and leave them in doubt and uncertainty as to which of the conflicting instructions is right and should be followed. It is impos-

sible to know which of the inconsistent instructions is, in fact, accepted by them in their consideration and application of the evidence in the case. *Barr v. State*, 45 Nebr., 458; *Bergeron v. State*, 53 Nebr., 752; *Metz v. State*, 46 Nebr., 547; *Sweenie v. State*, 59 Nebr., 269. Had the jury been advised in the instruction quoted that the evidence as to intoxication must be sufficient to show a want of mental capacity by reason of intoxication to form the intent to commit the act of which he is charged, or to raise a reasonable doubt as to such intent, the instruction would perhaps not be open to the objection which is now urged against it. It will, however, as stated, admit of no other construction than that the burden was on the defendant to prove by a preponderance of the evidence, or beyond a reasonable doubt, the fact constituting the defense interposed. It devolved upon him by the instruction to establish his defense by at least the greater weight of the evidence. This, under the uniform holdings of this court, is an incorrect statement of the rule, and casts a burden upon the defendant which he is not, under the law, required to assume. The state is required to prove every material allegation beyond a reasonable doubt, and if, upon a consideration of all the evidence, the jury entertain a reasonable doubt as to any material fact essential to constitute the crime charged, it is their duty to acquit. Under no possible theory of the case, or of any evidence to be considered by the jury, is the instruction warranted, and for that reason the giving of it is prejudicial error.

Another instruction was given, applying the rule of law in which is included the maxim, *Falsus in uno, falsus in omnibus*, and which correctly stated the rule as sanctioned by the prior utterances of this court. After stating the rule, the jury were told that "this instruction should be kept in your minds in considering the evidence of each and every witness that has testified in the case"; and after reciting the different instances in which the rule should be applied, it is, among other things, said,

"or for instance if a witness is placed upon the stand and he is asked if he is acquainted with the general reputation in the community in which a person lives as to the general reputation of the person as to being a good, peaceable, law abiding citizen, and the witness answers the question in the affirmative, and at the same time if you find the witness knows that his statement is not true or for instance, if he knows the person inquired of has the reputation of being a drunkard or frequently becoming drunk or intoxicated, then you should apply to any such witness, if he so testifies, instruction five." And at the close of the instruction, "By our statute drunkenness is made an offense, and no man who is a common drunkard is a good, law abiding citizen." The effect of the instruction, in its entirety, was to direct the attention of the jury to witnesses who had testified to the reputation of the accused as being a peaceable and law-abiding citizen, and advised them that if a witness testified that his reputation was good, when in fact he had the reputation of being a drunkard or becoming frequently intoxicated, the rule should be applied to the testimony of such witness and his testimony disregarded, unless corroborated by other credible testimony. It was disparaging in its character, and suggested to the jury that in the mind of the trial court a witness who had so testified was unworthy of belief. It invaded the province of the jury, and deprived them of the right to judge of the credibility and weight to be given to the evidence of the several witnesses who had testified in the case. The object of such testimony was doubtless to show that the reputation of the accused was that of a peaceably disposed citizen, while the instruction made the question of reputation as to sobriety the test by which his character was to be determined. This was a false issue, and calculated to mislead the jury. While intoxication doubtless affects one's reputation as to being a law-abiding citizen, yet even if a witness were mistaken regarding the question of reputation, his testimony could

not for that reason be entirely discredited by the court. The testimony of such witness was entitled to consideration, unless it be found to have been willfully false, and in that event it was for the jury to say what weight should be attached to it or whether any, unless corroborated by other credible testimony.

Other errors are assigned which, without thorough examination, appear to us to be without merit. Those already discussed making it necessary to have a retrial, the others will not be further considered.

The judgment must be reversed and a new trial directed.

REVERSED AND REMANDED.

JOSEPH GARNEAU V. BURNEY J. KENDALL.

FILED FEBRUARY 20, 1901. No. 11,733.

1. **Res Adjudicata:** PETITION: EVIDENCE. Where it has been held on an error proceeding in this court that a petition states a good cause of action, evidence sustaining the allegations of such petition is sufficient to support a verdict and judgment in favor of the plaintiffs in the action.

2. **Assumption of Incumbrance:** CONSIDERATION. Where, in a conveyance of real estate, the grantee accepting the same covenants to pay an incumbrance on the land conveyed in the following words contained in the deed, "Subject to incumbrances amounting to fourteen thousand four hundred (14,400) dollars, which the said Joseph Garneau, Junior, [the grantee] hereby assumes and agrees to pay, and the interest on same from Dec. 11, 1890," *held*, that such an agreement is founded on a valid consideration, binding on the grantee, and will support an action for the recovery of the debt thereby assumed.

3. **Action at Law:** PENDENCY: CONCURRENT EQUITABLE PROCEEDING: ABATEMENT. During the pendency of the action at law for the recovery of a debt secured by mortgage the plaintiff began an action in equity in the federal court to enforce his lien as against the mortgaged property, obtaining at the same time in the federal court leave or authority under the provisions of section 848 of the Code, as existing prior to its amendment in

1897, to prosecute his action at law. *Held*, That the pendency of the equity action did not work an abatement of the suit at law.

4. **Enforcement of Section 848: LAW COURTS: EQUITY COURTS.** The enforcement of the provisions of the section of the statute referred to belongs to a court of equity, and they are not intended to change or affect the jurisdiction and practice in a court at law.

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

Joel W. West, for plaintiff in error.

O. C. Redick and *Albert Swartzlander*, *contra.*

HOLCOMB, J.

An action at law was instituted to recover from a grantee of real estate on a covenant in the deed of conveyance as follows: "Subject to incumbrances amounting to fourteen thousand four hundred ($14,400.00) dollars, which the said Joseph Garneau, Junior, [the grantee] hereby assumes and agrees to pay, and the interest on same from Dec. 11, 1890." A general demurrer to the petition was interposed and by the trial court sustained. From such ruling an error proceeding was prosecuted in this court, resulting in the reversal of the ruling of the trial court on the demurrer. *Kendall v. Garneau*, 55 Nebr., 403. Upon the case being remanded an answer was filed to the petition and, after reply, a trial was had, the evidence of the plaintiff as to the defendant's liability resting on the deed of conveyance accepted by him as grantee, with proof of the amount due on the indebtedness assumed by the terms of the deed. The defendant introduced no evidence, and on a peremptory instruction the jury returned a verdict for the plaintiff.

It is argued that the evidence is insufficient to support the verdict and judgment. Counsel contends that the language in the deed heretofore quoted, which in connection with the deed in its entirety constituted the evi-

dence by which the defendant was sought to be charged, fails to show a valid consideration for the liability assumed by the grantee. It was determined in the former opinion that the petition pleading the liability of the defendant on the covenant in the deed by which he assumed and agreed to pay the mortgage debt stated a good cause of action, and the evidence fully supporting this allegation of the petition, it would seem the former decision is decisive of the question and should be held to be the law of the case, and we are inclined to so regard it.

The demurrer was general and raised all questions going to the sufficiency of the petition. While the question primarily considered and argued was with regard to its relation to the statute of frauds and the operation of that statute on the agreements of the parties, yet in the disposition of the case was involved of necessity the liability of the grantee under the allegations of the petition, and the conclusion reached was in effect an adjudication that a cause of action was stated. Construing the instrument as a whole, and giving to the language used its ordinary and natural meaning, and thereby giving expression to the true intent of the parties, it should, we think, be held that, in consideration of the conveyance of the real estate described therein to the grantee, he was to pay the amount expressed, the receipt of which was acknowledged; and that he also assumed and agreed to pay the indebtedness spoken of in the covenant quoted. This construction, if proper, shows upon what consideration the assumption of the indebtedness was based, and having been properly pleaded and proved, answers all requirements as to the evidence showing a valid consideration and being sufficient to support the verdict. It has been the uniform holding of this court that an agreement founded on such a consideration will bind the grantee and support an action for the recovery of a debt thereby assumed. *Cooper v. Foss*, 15 Nebr., 515; *Rockwell v. Blair Savings Bank*, 31 Nebr., 128. In *Crawford v. Ed-*

wards, 33 Mich., 354, 359, a case involving the same question, it is said by the supreme court of that state: "The acceptance of such a deed binds the grantee as effectually as though the deed had been *inter partes*, and had been executed by both grantor and grantee," citing *Trotter v. Hughes*, 2 Kernan [N. Y. Ct. of App.], 78. The assumption clause is a part of the contract of the parties, and is binding on the grantee by the acceptance of the deed of conveyance. He is a party to the transaction, and the consideration entering into and forming a basis for the mutual covenants and obligations of the parties is sufficient support for the covenant of the grantee whereby he assumed the indebtedness by which the property transferred was incumbered.

During the pendency of the present action at law the plaintiff filed a bill of foreclosure in the federal court to enforce the lien on real estate securing the same debt for the recovery of which the action at law was being prosecuted. Leave to prosecute the law action was applied for and obtained at the time the equity proceedings were begun. The equity action was one *in rem*. It is now urged that by reason of the proceedings taken and had in the equity case the action at law was abated, and that error was committed in not sustaining defendant's plea in abatement for the reasons mentioned. Section 848 of the Code, as existing before the amendment of 1897, if applicable at all, was in force at the time the different actions were begun, and by its provisions the plaintiff was empowered to prosecute an action at law as a concurrent remedy with an action in equity for the foreclosure of a mortgage, when authorized by the court in the equity action, as was done in the present instance. The enforcement of the provisions of the statute to which reference has been made, and on which the defendant relies, properly belongs to the equity court, and they are not intended to change or affect the jurisdiction and practice in a court of law. "There is," says Campbell, J., in *Joslin v. Millspaugh*, 27 Mich., 517, in speaking on the

same subject under a similar statute, "no such thing known in a common-law court as a plea in abatement of a suit in equity"; and further, "and we conceive the statute was not designed to introduce a new practice in the law courts and allow a plea in abatement as to only one class of equity proceedings, when it does not authorize it in any others. The provision is found in the statute relating to foreclosures, and the natural inference is that it was merely designed to modify the old equity practice, and not to change the practice at law." Of like import is *Goodrich v. White*, 39 Mich., 489. Aside from these considerations, the action at law was properly begun and pending in a court of competent jurisdiction. The equity action was begun in the federal court, the jurisdiction of which is foreign to that of the state courts, and in which the concurrent remedies were allowed. The proceeding was *in rem*, and sought only to enforce the lien against the property mortgaged. The equity action, under such circumstances, could not be made available under a plea in abatement to defeat the law action in a state court.

The judgment of the district court should be, and is,

AFFIRMED.

SARAH BIDDLE V. EDWARD J. JENKINS.

FILED MARCH 6, 1901. No. 9,356.

1. **Commissioners of Insanity: JURISDICTION.** The commissioners of insanity have cognizance not only of applications for admission to the hospital for the insane, but also for the safe-keeping otherwise of insane persons in their respective counties.
2. ———: ———: **AFFIDAVIT.** An affidavit filed with the commissioners of insanity alleging that a person resident of their county is insane and his being at large is dangerous to the community, confers jurisdiction upon the board to act.
3. **Insanity: EVIDENCE: REPUTATION.** Insanity can not be established by proof of the reputation of the party in that regard.

4. **Advice of Counsel: AVAIL: STATEMENT OF ALL FACTS: GOOD FAITH.** The advice of counsel, to be of any avail, must have been given after a full and fair statement of all the facts within the knowledge of the person seeking the same, and must have been relied upon in good faith.

ERROR from the district court for Clay county. Tried below before HASTINGS, J. *Reversed.*

Charles O. Whedon, for plaintiff in error.

J. L. Epperson, contra.

NORVAL, C. J.

Sarah Biddle sued defendant for false imprisonment and malicious prosecution. The cause of complaint was that defendant had theretofore falsely and maliciously, without probable or reasonable cause therefor, charged her, in an affidavit presented to the commissioners of insanity, with being insane. The affidavit was as follows:

"STATE OF NEBRASKA, } ss.
CLAY COUNTY. }

"The undersigned, a citizen of Fairfield, Clay county, Nebraska, being sworn, says that he believes Sarah Biddle is insane. That her being at large is dangerous to the community. She has a legal settlement in said county. E. J. JENKINS."

Said affidavit was sworn to before a competent officer. Upon it a warrant was duly issued, and she was arrested and deprived of her liberty, remaining in the custody of the sheriff for five days. On the hearing had she was acquitted, and found not to be insane. She alleges that by reason of such imprisonment and prosecution she was injured in her credit and reputation, brought into public scandal, infamy and disgrace, and suffered great bodily and mental anxiety and pain, and was forced to expend certain moneys in securing her discharge; and that by reason of the premises she was damaged in the sum of $5,000, for which sum she prayed judgment. Defendant's

answer admitted the making of the affidavit and that she was discharged, but denied that it was made falsely or maliciously, and alleged as a defense that at the time he made the affidavit, and prior thereto, she had conducted herself in such a manner as would have induced a man of ordinary prudence and discretion to believe she was insane, and he so believed when he made the affidavit; that before making it he consulted creditable lawyers and a competent doctor, and to each of them made in good faith a full, true and fair statement of the facts relative to the conduct of plaintiff, and after hearing the same, they advised him to make said affidavit; and that he in good faith, acting upon such advice, made the same. A reply was filed, and on issues thus joined trial was had, resulting in a verdict in favor of defendant, and from the judgment rendered thereon plaintiff brings the case to this court on error.

Section 21, chapter 40, Compiled Statutes, provides, among other things, that the information therein required shall state that the person in whose behalf it is made is believed to be a fit subject for custody and treatment in the hospital for the insane. It is urged that, because the affidavit in this case failed to contain that allegation, no cause for action on the part of the board was stated, and that for that reason plaintiff was entitled to a verdict on the answer. Whether the affidavit was defective in this respect is immaterial, as it did state facts sufficient to call for the action of the board under section 20 of said chapter, for thereby the commissioners are given cognizance not only of applications for admission to the hospital for the insane, but also for the safe-keeping "otherwise" of insane persons in their respective counties. Under the allegations of the affidavit, that the plaintiff was insane and that her being at large was dangerous to the community, the board had jurisdiction to at least ascertain whether it was necessary to arrange for her safe-keeping within the county, if it did not have jurisdiction to pass upon the advisability of consigning

her to the state hospital. Hence the position that under the answer plaintiff was entitled to a verdict is not well taken.

A mass of testimony was admitted on the trial, over the objections of plaintiff, tending to establish the general reputation of plaintiff in the community of her residence for insanity. It is argued that this evidence was not admissible, for the reason that whatever her reputation may have been, no amount of evidence tending to prove her general reputation would in anywise establish the fact that she was insane. This is doubtless true, for insanity can not be established by proof of the reputation of the party so charged. *Fitzgibbon v. Brown*, 43 Me., 170; *Israel v. Brooks*, 23 Ill., 575; *Rosenkrans v. Barker*, 115 Ill., 332. But the evidence was admissible in mitigation of damages. See cases cited, *supra*. Complaint is made of the form of the interrogatories put to witnesses in inquiring into her reputation, but as the case must be reversed on another point, it is not necessary to discuss that matter, it being one not liable to occur on a second trial.

One of the defenses was that, prior to instituting the proceedings which resulted in the arrest and detention of plaintiff, defendant consulted creditable lawyers and made to each of them, in good faith, a full, true and fair statement of the facts relative to the conduct of plaintiff, and after hearing such statements they advised him to make such affidavit, and he, acting upon such advice did so. He testified that, after receiving the advice of one of the attorneys, "I just made the complaint right out upon that." On the trial the court on its own motion gave the following instructions:

"9th. One who makes a full and fair statement of the facts of a case to a reputable lawyer, and is by him advised that the facts authorize the filing of a complaint at the commencing of an action cannot be charged with malice in making the complaint.

"10th. In this case, if you find that defendant made to

the county attorney a full and fair statement of the facts as understood by him after investigating them with reasonable care and was advised by him to make the complaint complained of in this action, you will find for defendant."

Error is predicated upon the giving of these instructions for several reasons, among them being the claim that they wholly ignore an essential element of such defense, to-wit, that in so doing he acted or relied upon such advice. There is nothing in these instructions, or others given by the court, from which the jury could infer that he must rely, in any degree, upon such advice. So far as concerns the directions of the court, it is sufficient if he made his statement to counsel and received their advice, regardless of whether he relied upon it or not in his subsequent actions. This is clearly not the law. *Dreyfus v. Aul*, 29 Nebr., 191; *Jonasen v. Kennedy*, 39 Nebr., 316. These instructions failed to include a very essential element of this defense, and this constituted error prejudicial to plaintiff. Nor was plaintiff under obligation to tender an instruction covering this element of the defense, for it was the duty of the court to instruct upon all the elements of such defense, it having undertaken to instruct relative to some of the elements entering into it. It is not a question of an instruction wherein the court has instructed too generally, but one wherein the court has wholly failed to instruct upon an essential element of a defense.

Plaintiff contends that the proper rule in defenses of this character is that a defendant must have relied solely upon advice of counsel before he can interpose such reliance as a defense, and that the Nebraska case last cited upholds that doctrine. We are of opinion that the right principle is that he must have relied upon advice of counsel in good faith, and that it is not absolutely essential that reliance must have been wholly upon advice of counsel, and that this rule is not contrary to the opinions just mentioned.

For the error complained of the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

GEORGE MEISNER, APPELLANT, V. JOHN MOORE ET AL., APPELLEES.

FILED MARCH 6, 1901. No. 9,367.

Finding: REVIEW. A finding of fact based upon conflicting evidence will not be disturbed on review.

APPEAL from the district court for Hall county. Heard below before THOMPSON, J. *Affirmed.*

R. R. Horth, for appellant.

W. H. Thompson, *contra.*

NORVAL, C. J.

This suit was brought to foreclose a real estate mortgage. The plea of usury was interposed as a defense, which was sustained on the trial by the court, and plaintiff appeals. There is evidence tending to show that the note secured by the mortgage in question was given in renewal of a prior note given for the loan of money. The defendant insisted that the original note antedated the loan and that the plaintiff exacted and retained the sum of $25 as a bonus for making the loan, which plaintiff denies. It is unnecessary to set out the evidence adduced by the respective parties upon this point. Suffice it to say that the proofs are conflicting, but that submitted by defendant is sufficient to sustain the judgment of the court. The decree is accordingly

AFFIRMED.

MCCORMICK HARVESTING MACHINE COMPANY V. M. B. DAVIS.

FILED MARCH 6, 1901. No. 9,371.

1. **Interpretation of Contract: DUTY OF COURT.** It is the duty of the court to interpret the contract between the parties.
2. **Doer of Work Competent to Testify to Value Thereof.** One who has kept a team for another is competent to testify to the value of such keep.

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

Ricketts & Wilson, for plaintiff in error.

Monroe L. Hayward and *Paul Jessen, contra.*

NORVAL, C. J.

In 1894 one G. T. Davis acted as agent at Nebraska City, in this state, for the McCormick Harvesting Machine Company in the sale of its goods. Authority to so act was given by virtue of a written contract, which empowered him to sell for it, on commission, certain harvesting machines, twine binders, trucks, bundle carriers, flax dumps and repairs. The defendant in the lower court, M. B. Davis, signed the following contract of guaranty on the back of the above mentioned contract of agency:

"In consideration of one dollar paid to me by the McCormick Harvesting Machine Company, the receipt of which is hereby acknowledged and in a further consideration of constituting the within named agency by the McCormick Harvesting Machine Company, I hereby guarantee to them the fulfillment of the within contract and the payment of all obligations arising under the same, on the part of the said G. T. Davis.

"Dated this 6th day of Feb., 1894. M. B. DAVIS.

"Attested, O. F. SPENCER."

On an attempted settlement, after the season's sales were made, the agent and said company failed to agree, the latter claiming there was due it on account of goods sold, after deducting all commissions and other credits to which said G. T. Davis was entitled, some $203.36, and said Davis insisted, on the trial at least, that said company had been fully paid. In consequence of such disagreement the company sued the guarantor, M. B. Davis, and the latter having on trial in the district court recovered a verdict and judgment, the plaintiff comes to this court on error.

By the terms of the contract said G. T. Davis agreed to collect from the purchasers of machines and goods all freight thereon from Chicago, or to assume loss on same. On the trial, and under the issues, there was a controversy over this freight, particularly concerning that upon harvesting machines sold by Davis. The plaintiff contended that Davis was to collect the freight over and above the price for which the machines were actually sold, and Davis claimed that the freight was included in the purchase price thereof, and made up a part of each note taken, where time sales were made. Under these circumstances it was the duty of the trial court to construe the contract between the parties, and we think it was error for the court to refuse the following instruction tendered by plaintiff: "You are instructed that, by the contract between plaintiff and said Davis, the said Davis was obliged to collect from the purchasers of machines the Chicago freight paid by him thereon, or to assume the loss on such freight as paid by him, and he was obliged to collect such freight over and above the selling price fixed by the plaintiff." We have no doubt this instruction properly construed the contract, relative to the question of freight, and should have been given, and failure to give it was error, as the court did not construe the contract in any instruction. This we think is true although there was controversy as to whether in one or two instances the company, owing to its having sent ma-

chines to the wrong places, or having lost a sale, owing to the failure of a machine to work, was not under obligations to pay or refund to Davis freight paid in such instances. The plaintiff was entitled to have the contract construed in the respect mentioned, and the court should have given this instruction, or one similar to it, its attention having been called to that question. The mere fact that there was a controversy as to debits and credits on sales, and in relation to freight paid, did not render such instruction inapplicable to the issues, and it would certainly have been of assistance to the jury in reaching a just conclusion on that question.

The court deems it unnecessary to pass upon all the questions of law raised in the brief of plaintiff. One relative to admission of certain evidence may be noticed. G. T. Davis claimed that he was entitled to a considerable credit on the account between him and plaintiff by virtue of his having, as he claims, kept and boarded a team for plaintiff. After having testified to the fact that having kept and boarded the same, and the length of time, he was asked, "What has it been worth by the month?" To this objection was made, as incompetent, immaterial, irrelevant and that no foundation had been laid, which objection being overruled, exception was taken. Witness then, without having expressly shown that he knew the value of such keep, testified that it was worth a certain amount. It is claimed that the admission of this evidence was erroneous. The witness had testified that he had rendered these services, and for that reason his evidence was competent without his having first disclosed other qualifications to testify on that subject. The owner of land may testify to its value; and he who has rendered services is also competent to testify as to the value of such service, without other qualifications being shown. *Chicago, B. & Q. R. Co. v. Shafer*, 49 Nebr., 25; *Robertson v. Knapp*, 35 N. Y., 91; *Edwards v. Fargo & S. R. Co.*, 33 N. W. Rep. [Dak.], 100, 105; *Tucker v. Massachusetts C. R. Co.*, 118 Mass., 546; *Mercer v. Vose*, 67 N. Y., 56.

For the reason stated the judgment of the lower court must be reversed and the cause remanded.

REVERSED AND REMANDED.

T. J. SHEIBLEY V. DIXON COUNTY.

FILED MARCH 6, 1901. No. 11,099.

1. **County Board:** COURT. County boards are not courts in a constitutional sense.
2. **Court of Original Jurisdiction:** APPELLATE COURT: SAME ISSUE: RULE: COUNTY BOARD: DISTRICT COURT. The rule requiring issues in the appellate court to be the same as in the court of original jurisdiction, does not apply to appeals as to the district court from the decision of the county board in the allowance and rejection of claims.
3. **Liquidated Demand:** PART PAYMENT: ACCORD AND SATISFACTION. The payment of a lesser sum than is due on a liquidated and undisputed demand, does not constitute an accord and satisfaction.
4. **County Clerk:** SALARY: FEES IN EXCESS: ADJUSTMENT WITH COUNTY: BAR TO ACTION. Where through mistake a county clerk is allowed to retain fees in excess of his salary, the adjustment of the account between him and the county is not a bar to an action by it to recover the excess.
5. **Counter-Claim:** DEFINITION. A counter-claim within the meaning of section 101 of the Code of Civil Procedure must be one arising out of the contract or transaction set forth in the petition, or be connected with the subject of the action.
6. **Phrase:** CONSTRUCTION. The phrase "connected with the subject of the action" should be construed liberally, to prevent a multiplicity of actions.
7. ———: SUIT BY CLERK AGAINST COUNTY. Where a county clerk seeks to recover from the county compensation for making and correcting the assessor's books, the county may, by way of counter-claim, set up fees collected by plaintiff, by virtue of his office, which he failed to report and account for.
8. **Error:** ADMISSION OF EVIDENCE. Error can not be predicated upon the admission of evidence in a cause tried without the intervention of the jury.

9. ———: SPECIAL FINDINGS. Error can not be predicated on the failure of the court to make special findings of fact where none were asked.

10. **County Clerk**: FEES. A county clerk must account for all fees earned by him whether collected or not.

ERROR from the district court for Dixon county. Tried below before EVANS, J. *Affirmed.*

Alfred E. Barnes and *William E. Gantt*, for plaintiff in error:

Do the pleadings of the defendant, when taken into consideration with those of the plaintiff in the lower court, state a cause of action? The pleadings must be construed together. To admit evidence there must be a statement of ultimate facts conforming to the evidence. *Hale v. Walker*, 31 Ia., 344; *Ockendon v. Barnes*, 43 Ia., 615; *Williams v. First Presbyterian Society*, 1 Ohio St., 478; *Clark v. Dayton*, 6 Nebr., 192.

The presumption is that the matter of abstracts was included in the settlement, and can not again be brought up. *Smith v. Yager*, 85 Ia., 706.

McCarthy & Pearson, contra:

It was the duty of the plaintiff in error to report to the board all fees of his office, including fees for making abstracts and taking acknowledgments. *State v. Kelly*, 30 Nebr., 574. If, through fraud or mistake, the plaintiff was allowed to retain fees which he should not have retained, such adjustment is no defense or bar to an action by the court to recover such fees. *Hazelet v. Holt County*, 51 Nebr., 716. The rule in the *Ragoss Case*, 36 Nebr., 375, was that "where the county board has before it a matter which it may reject or allow, and its action thereon will be final unless appealed from, its order in the premises can not be attacked collaterally." This rule does not apply in the case at bar.

John M. Hench, also for defendant.

NORVAL, C. J.

This is a proceeding to review a judgment of the district court for Dixon county. The plaintiff below, T. J. Sheibley, had from 1890 to 1896 been county clerk of that county. He filed before the county board a claim for making and correcting the assessors' books for the years 1890, 1891, 1892 and 1893, asserting there was due him for such services, in addition to the salary allowed him by statute, the sum of $400. This claim was by the board rejected, and he appealed to the district court. In answer to his petition the defendant county, among other things, filed a counter-claim, alleging that plaintiff, while county clerk aforesaid, made and certified a large number of abstracts, and also took acknowledgments to a large number of deeds and mortgages, and performed other miscellaneous services, and received therefor an amount of money aggregating $1,601.50, for all of which he failed to account to the county, although he had retained from other sources sums sufficient to pay his salary and also those of such deputies and employees as he was entitled to, and that there was, therefore, due from him to the county the sum aforesaid, $1,601.50, for which it prayed judgment. To this counter-claim plaintiff answered, denying the same, and alleging further that before this action was brought, and after the matters and things alleged in said counter-claim had occurred, plaintiff paid to the county the sum of $355.10, which was received in full satisfaction and discharge of the demand alleged in said counter-claim; also that during all his terms of office the fees thereof in excess of the amount allowed by law for salary and for deputy and extra clerk hire amounted to $1,715.44, which sum he paid to the county treasurer as required by law, taking his receipt therefor, and made a full settlement with the board, and in consideration of such payment said board released and discharged plaintiff from the claim set out in said counter-claim; that said county employed an expert and ap-

pointed a committee and went through all the books and records of his office and made a full and complete report of all fees received, which committee and expert made their report and included in it all the fees received, or that should have been received by him as such clerk, including abstracts and acknowledgments, and, after hearing said report, the board found there was due the county a balance of $355.10, which plaintiff paid and was fully released and discharged; and denied that he had failed to account for any abstracts made or acknowledgments taken by him. To this the county replied, among other things, admitting that a committee was appointed to investigate the records of plaintiff's office and that they made a report, but denying all other allegations made by plaintiff relative thereto; and alleged that said committee did not report the amount of fees earned by plaintiff in making and certifying abstracts, or the taking of acknowledgments, but reported that he kept no account of the money received therefor, and that it had no way of determining the amount of such receipts, but that plaintiff had represented to it that he had probably made fifty abstracts which would amount to about $125, but defendant alleged that said representation was false and untrue, as plaintiff then well knew; that plaintiff presented no account or claim for the fees received from the sources mentioned in the counter-claim, nor were such fees allowed him by the county board, but that said board was never fully informed of the amount of such fees and that such amount was fraudulently concealed from the board by him; and any settlement with him was purely ministerial in character and only such as is required by law to be made annually, and was made upon his false and fraudulent reports of fees earned. Afterwards, plaintiff dismissed his appeal, and the court, refusing to dismiss the counter-claim, proceeded to try the case without a jury, and rendered judgment against plaintiff in the sum of $411.76 on the counter-claim, from which judgment plaintiff prosecutes error.

One of the contentions here is that the county could not present a counter-claim in the case, for the reason it did not do so on the hearing before the county board on the consideration of plaintiff's demand for compensation for correcting the assessors' books. Whether the matters set out in the counter-claim were considered or not before the board the record is silent. For the purposes of this case we will assume that no consideration was given to the facts set out in the counter-claim until the matter reached the district court. It is asserted the county is barred from setting these matters out as a counter-claim; in other words, that the same rule should obtain as to claims pending before the county board as applies to matters in litigation in a lower court, from which an appeal is taken to a higher. In the latter the rule doubtless is that the issue must be the same in both courts. This rule does not apply to claims filed before county boards. While the proceedings had before such boards on claims of that character are doubtless judicial in their nature, that fact does not constitute such board a court, within the meaning of the constitution, as will fully appear from a perusal of the case of *Stenberg v. State*, 48 Nebr., 299.

It is claimed that defendant is barred from setting up the items relative to the abstracts made and certified and acknowledgments taken by plaintiff, as a counter-claim by reason of the alleged settlement had with the board, wherein, after the report of the expert was had and after plaintiff had been examined, the board accepted the sum of $355, in full payment of all demands against plaintiff. We do not think so. Settlement was had under section 43, chapter 18, article 1, Compiled Statutes, and in making the adjustment the board performed ministerial functions only. *Heald v. Polk County*, 46 Nebr., 28; *Hazelet v. Holt County*, 51 Nebr., 716. There is no allegation in the answer to the counter-claim that the sum so received by the county board was accepted by it in compromise of a disputed claim. It is merely alleged that the board

"found" that sum due the county and that plaintiff paid it into the treasury. Now, if for any reason a mistake had been made by the board in the amount actually due the county, there is nothing in the way, so far as this answer is concerned, of the county recovering from plaintiff on such counter-claim the remainder that might be due the county after such payment of $355. So there is nothing in the answer that could amount to a plea of accord and satisfaction. *Beckman v. Birchard,* 48 Nebr., 805.

It is, however, contended that as this settlement was not appealed from by the county, it amounted to an adjudication of the matter and can not be questioned in a collateral proceeding. This action on the part of the board was not in any sense an adjudication, and if through mistake the county clerk was allowed to retain fees which properly belonged to the county, such adjustment is no bar to an action by it to recover such fees. *Hazelet v. Holt County, supra; Bush v. Johnson County,* 48 Nebr., 1. The action of the county board having been had under the section mentioned, it is not of a judicial nature, but ministerial only. The case of *Ragoss v. Cuming County,* 36 Nebr., 375, relied upon by counsel for plaintiff, is not in point, because, in the case at bar, under the pleadings and the evidence it is clear that a mistake occurred, the items in controversy having been omitted from the statement furnished the board by plaintiff on settlement, and it can not be said that by so doing he had "faithfully performed the duties of his office and made a full settlement" with the county board. *Bush v. Johnson County, supra.* It was unnecessary for the county to plead that at said settlement plaintiff fraudulently represented the fees collected by him to have been less than the amount he actually received. The allegations fall far short of tendering an issue of fraud. This issue was not necessary, there being sufficient allegations to admit evidence that a mistake had been made in said settlement, and that the amount paid by plaintiff was less

than was due defendant, which allegation was sufficient on which to base an action to recover the remainder that had not been accounted for. *Hazelet v. Holt County* and *Bush v. Johnson County, supra.*

It is further contended that the matters of counter-claim are not such as are contemplated by section 101, Code of Civil Procedure. An examination of the issues will show that plaintiff claims there was due him, by virtue of certain services performed by him as an officer, a specified sum of money. The "transaction set forth in the petition" was necessarily the mere act of having corrected and prepared these assessors' books; but in a wider sense, the claim arose by virtue of his official relation to the county. Now the counter-claim set out by the county arose by virtue of the same relations between plaintiff and defendant, and we are therefore of the opinion that it was connected with the subject of the action within the meaning of said section of the Code, even if not connected with the transaction declared on by the plaintiff. 22 Am. & Eng. Ency. Law, 397. The phrase "connected with the subject of the action" should be liberally construed to prevent a multiplicity of actions. Some forty assignments are predicated on rulings on the admission of evidence on behalf of defendant. Counsel concedes that we are committed to the rule that where a case is tried without the intervention of a jury, this court in a proceeding of this nature will not consider such alleged errors if on examination of the record sufficient competent evidence is disclosed to support the judgment, but contend that the rule, while good in theory, is abominable in practice. We think it a most salutary rule and it is adhered to. *Dewey v. Allgire*, 37 Nebr., 6; *Lihs v. Lihs*, 44 Nebr., 143; *Monroe v. Reid*, 46 Nebr., 316. In this case, an inspection of the record discloses ample competent evidence on which to base the judgment rendered, and it will, therefore, not be disturbed by reason of the admission of incompetent evidence, if any such was received—a question not necessary to decide.

Two errors, assigned as numbers 42 and 43 in the petition in error, are urged, predicated on the court refusing to admit certain evidence relative to the settlement between the plaintiff and the county of the matters constituting defendant's claim. This evidence was doubtless offered to support the allegation of his answer to the counter-claim, to the effect that, after the committee mentioned in said answer had made its report, which purported to be a full and complete report of all fees received, inclusive of sums received for abstracts and acknowledgments, said board found a certain sum due the county, which plaintiff paid in full satisfaction of such claim, and was thereupon released and discharged. We are of opinion that this allegation falls far short of a plea of accord and satisfaction. It is not shown that the sum paid was in compromise of a disputed demand. On the contrary, it is insisted that it was a payment of all that was actually due the county. The tender was merely an offer to prove that the sum received by the county at the time of the settlement alleged in the answer was accepted and understood to be in full for all excesses, fees and liabilities for abstracts and other fees of every kind and nature due from him to the county. Even if this were true and it afterwards developed that the amount received was not in fact equal to the amount which he had received and not accounted for, such settlement would not, under the pleadings, bar the county from proceeding to collect the remainder from him. Hence, if there was error in excluding this evidence, it was without prejudice to him. But, as a matter of fact, he had, prior to this offer, introduced in evidence the records of the county covering this settlement, which record was kept by himself, and it is to be presumed that he included therein all matters relating to such settlement. But whether he did or did not, the evidence offered in nowise tended to establish an accord and satisfaction, or a bar to the counter-claim of the defendant, and it was, therefore, not error to refuse to admit it.

Plaintiff also urges that there is no evidence to sustain the judgment, the amount thereof being larger than is justified by the proofs. But an examination of the record convinces us that a judgment for a larger sum could have been sustained, and no error would have been committed in that respect. The counter-claim of defendant was set out in six separate, so called, counter-claims, one for each yearly settlement of plaintiff, but the finding of the court in favor of the defendant was merely for a lump sum, instead of a finding of the amount due by virtue of each separate cause of counter-claim or action, and this is alleged as error. It was not necessary to set out each year's transaction as a separate cause of action, there being in fact but one cause of action, made up of as many items as were represented by the abstracts made and certified, and acknowledgments taken, and it was not error on the part of the court to treat all of the so-called counter-claims as in fact but one cause of action, particularly when the court was not asked to find on each so called counter-claim.

Another matter urged is that, although acknowledgments were taken by plaintiff, he did not in fact charge any fee for taking the same, and, therefore, should not be called upon to account for the same, never having received any money to account for. This is hardly a tenable position. The law cast upon him the duty of collecting this fee, and if he did not do so, the fault was with him, and he should be compelled to account for the same. *State v. Hazelet*, 41 Nebr., 257.

A careful examination of the record discloses no error on the trial, and the judgment of the lower court is therefore

AFFIRMED.

FRANK L. DINSMORE V. STATE OF NEBRASKA.

FILED MARCH 6, 1901. No. 11,470.

1. **Criminal Prosecution:** INFORMATION: CONSTITUTION: STATUTE. Chapter 54 of the Criminal Code, which authorizes the prosecution of criminal offenses by information, does not violate the rule of uniformity prescribed by section 19, article 6, of the constitution.

2. **Statute:** GENERAL OPERATION: INDICTMENT: INFORMATION. Said chapter 54 of the Criminal Code authorizes the filing of an information or indictment in each and every county in the state, and appplies to every county and to every district court, and hence is general in its operation, and not special.

3. ———: ———: ———: ———: CONSTITUTION. Said chapter 54 of the Criminal Code is not obnoxious to section 19, article 6, of the constitution merely because it permits the prosecution of one person by information and another by indictment in the same court.

4. **Discretion of Court:** UNIFORMITY OF STATUTE. The mere fact that a district court may elect whether a grand jury shall or shall not be called in any term of court does not make said chapter 54 lacking in uniformity.

5. **Proceedings and Practice:** UNIFORMITY. The proceedings and practice of the several district courts of the state are uniform, even though the prosecution in one case may be by information in one county, and in another case in another county by indictment, since, wherever the proceedings are by indictment, if it obtain in every county, the proceedings relating to indictments are uniform, and the same is likewise true if by information.

6. **Constitution:** INTENT OF FRAMERS. It was never contemplated by the framers of section 10, article 1, of the constitution, or by the people in adopting it, that the legislature must abolish the grand jury system entirely and permit criminal prosecutions by information only, but rather that the legislature might authorize prosecutions by either indictment or information, making the proceedings uniform in each method.

7. **Criminal Code:** CONSTITUTION: JUDICIAL DISCRETION: LEGISLATIVE POWER. Section 584 of the Criminal Code, which leaves to the discretion of any district court the determination of whether a grand jury shall be drawn, is not conferring upon the judicial branch of the state government legislative powers inhibited by section 1, article 2, of the constitution.

8 **Constitution:** SPECIAL LEGISLATION. Section 584 of the Criminal Code is not special legislation within the purview of section 15, article 3, of the constitution.

9. **Power of Legislature:** ABOLITION OF AN OFFICE. The legislature has the power to abolish any office by it created.

10. **District Attorney:** NOT A CONSTITUTIONAL OFFICE. The office of district attorney was not created by the constitution, but by general law before the adoption of that instrument.

11. ———: OFFICE ABOLISHED. The office of district attorney has been abolished.

12. **County Attorney:** CREATION: LEGISLATURE: CONSTITUTIONAL POWER. The legislature had the constitutional power to create the office of county attorney.

13. **Duty of County Attorney:** It is the duty of a county attorney to file informations for crimes and to prosecute all criminal cases in his county.

14. **Preliminary Examination:** WAIVER. The objection that the defendant in a criminal case has not had a preliminary examination is waived unless raised before he enters a plea of not guilty.

15. **Continuance:** JUDICIAL DISCRETION. The granting or refusing of a continuance of a criminal cause, rests in the sound discretion of the court, and a ruling in that regard will not be disturbed on review, in the absence of a showing of an abuse of discretion.

16. **Panel of Petit Jurors:** SUMMONING: STATUTE. When, at any 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 jurors.

17. ———: ———: ———: CONSTITUTION. Said section 664 of the Code of Civil Procedure is not inimical to section 19, article 6, of the constitution, as it does not violate the rule of uniformity therein prescribed.

18. **Impaneling:** EVIDENCE: BILL OF EXCEPTIONS. The evidence relative to the impaneling of a jury must be incorporated in the bill of exceptions and embraced in the certificate allowing and settling the bill, to entitle one to review the rulings of the court in denying a challenge for cause.

19. **Record:** VERITY: CONTRADICTION. Error can not be successfully predicated upon a ruling where the record is contradictory as to what the ruling was.

20. **Challenge:** JUDICIAL DISCRETION. The ruling of a trial court in deciding a challenge for cause will not be disturbed, unless an abuse of discretion is shown.

21. **Venireman:** OPINION. An opinion formed by a venireman in a criminal cause does not affect his competency, or afford cause for challenge, unless it is unqualified as to the guilt or innocence of the accused of the crime charged.

22. ———: ———: NEWSPAPER REPORT. An opinion formed solely on rumor and newspaper reports will not disqualify a juror, where it is shown that the opinion is merely hypothetical, and such as will not prevent his returning a fair and impartial verdict upon the evidence adduced on the trial, under the instructions of the court.

23. ———: CAPITAL PUNISHMENT: CONSCIENTIOUS SCRUPLES. The entertaining of conscientious scruples against capital punishment is a ground for challenge for cause in a prosecution for murder in the first degree, and it is competent to interrogate a venireman upon that subject.

24. **Murder:** SUICIDE: EXPERT TESTIMONY. In a prosecution for murder, where the death of the victim was occasioned by a gunshot wound, the theory of the defense being suicide of deceased, it is competent for a physician, who has examined the body and the surroundings at the place where it was found, to testify as to the position in which the body must have lain for the blood to take the course from the wound it did.

25. **Leading Question:** JUDICIAL DISCRETION. The propounding of leading questions is within the discretion of the trial court.

26. **Admission of Testimony.** Rulings on the admission of testimony examined and approved.

27. **Instructions.** One can not successfully assail an instruction where one tendered by him has been given which is subject to the same criticism.

28. ———. Before a party can complain of an instruction because not sufficiently specific, he must request an instruction covering the point.

29. ———. In a criminal prosecution the trial court may, in its discretion, give a cautionary instruction.

30. **Argument:** CRITICISM OF DEFENDANT. Counsel for the state in argument to the jury may criticise the conduct of the defendant as disclosed by the evidence, though such defendant was not a witness in his own behalf.

31. **Instruction:** DESIGNATING DEFENDANT. It is not erroneous to designate the defendant in such a case in an instruction as the "prisoner."

32. **Province of Jury:** MERCY. Questions of mercy are not for the

jury, but for the executive, in the exercise of the pardoning power, and it is not erroneous to so instruct the jury in a prosecution for murder.

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

Norris Brown, Thomas F. Hamer, Edward A. Cook and *Francis G. Hamer*, for plaintiff in error:

The defendant below should have been prosecuted by indictment instead of by information.

The proceeding in this case was contrary to the general and uniform rule enjoined by the state constitution, section 19, article 6. Under the constitution, and in the nature of things, the power to determine whether prosecutions shall be by indictment or by information is legislative. A judicial functionary can not exercise legislative functions, nor can the legislature delegate such a power to it. The legislature and a judge may not do what the legislature is forbidden to do. The act in question is not uniform in its operation, and it is an attempt on the part of the legislature to delegate its power. Legislative functions may not be delegated to a court. *People v. Bennett*, 29 Mich., 451; *People v. Carpenter*, 24 N. Y., 86; *People v. Town of Nevada*, 6 Cal., 143; *People v. Cooper*, 83 Ill., 585.

A statute that can not be reduced to a general rule, to operate in all parts of the state alike, is not a general law. *King v. State*, 3 L. R. A. [Tenn.], 211.

The proceeding by information was in violation of articles 5 and 14 of the amendments to the United States constitution, as its successful termination would deprive the plaintiff in error of his life or liberty without due process of law.

No preliminary examination was had, the same being waived. A prisoner can consent to nothing during a trial; and he can not consent to waive what the law requires. *Queen v. Bertrand*, 1 L. R. P. C., 520; notes to *King v. State, supra.*

The cautionary instruction against mercy was erroneous. If the plea for the defendant for the lighter punishment made the court fearful of the result, it was, nevertheless, no part of his duty to enter the debate on behalf of the state. *Morris v. Lachman*, 68 Cal., 109; *Hayes v. State*, 58 Ga., 35; *Thorp v. Goewey*, 85 Ill., 611; Thompson, Trials, 2301.

Constantine J. Smyth, Attorney General, Willis D. Oldham, Deputy, and *Hector M. Sinclair, contra.*

NORVAL, C. J.

In the district court for Dawson county, to which county the case had been taken on change of venue from Buffalo county, Frank L. Dinsmore was convicted of murder in the first degree and sentenced to be hanged, from which conviction he comes to this court on error. From the evidence of record it appears that for a year or more prior to the homicide defendant had been boarding at the home of one Fred Laue, in the little town of Odessa, in Buffalo county, during which time improper relations commenced between defendant and Mary Laue, wife of said Fred Laue, which relations continued, with more or less regularity, down to the time of the tragedy. After such relations commenced, Dinsmore married and brought his wife to board at Laue's. While they were boarding there he proposed to Mrs. Laue that he kill his wife and Laue, and so arrange their bodies as to make it appear that Laue had murdered Mrs. Dinsmore and had then committed suicide. Mrs. Laue, the principal witness for the state, claims she would not assent to this, but that she did, through fear of Dinsmore, remain silent while Dinsmore accomplished his fell purpose. The details of the act, that of "a fiend in the ordinary display and development of his character," are not necessary to an understanding of the errors alleged to have been committed by the trial court. On an information charging him with the murder of Laue, Dinsmore was convicted.

The errors argued will be noticed in the order of their presentation in the brief of defendant.

The provisions of the Criminal Code which permit prosecutions by either indictment or information are attacked by counsel for defendant as being in violation, among others, of section 19 of article 6 of the constitution, which is as follows: "All laws relating to courts shall be general, and of uniform operation, and the organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated by law and the force and effect of the proceedings, judgments, and decrees of such courts, severally, shall be uniform." It is urged that the statutes which authorize the prosecution of criminals by either information or by indictment, depending on the discretion conferred upon courts by section 584 of the Criminal Code relating to the calling of a grand jury, violate the rule of uniformity and generality prescribed in said section of the constitution. It is insisted that chapter 54 of the Criminal Code, which permits the filing of informations, is not general, because it admits of the filing of an information in one county and of an indictment in another county, while it should admit of the filing of one or the other in all counties, but not of both. The objection is not well grounded. The law permits the filing of either indictments or informations in any county in the state, and whether a prosecution shall be by indictment or by information depends upon whether a grand jury is or is not in session. The same law applies to every county in the state, and for that reason is general, and in no respect special. It is urged that it is not of uniform operation for this reason, and for the additional one that in the same court it permits an information to be filed in one case against a defendant and an indictment to be filed in another case, and all according to the whim or inclination of the judge. We think nothing depends upon the whim or inclination of the judge, but that it is left to the sound discretion of the court—

a very different thing. But does the mere fact that in the same court a man may be prosecuted by either information or indictment detract from the uniformity of the law? Does it not apply to every county in the state? Is there a district court in the state which is confined by law to the prosecution of crimes solely by information? Is there any that must prosecute by indictment only? If there be, then is the act lacking in uniformity. Is there any district court in the state where, if prosecution be by information, the procedure must be different from that in other counties where prosecution is by information, or where, if prosecution be by indictment, the procedure is different there from that in other counties where prosecutions are by indictment? Then is the law lacking in uniformity. But the mere fact that the court may elect whether a person shall be prosecuted by indictment or by information, as may seem best, renders the law not at all lacking in uniformity. It is urged that the law prevents the practice and proceedings from being uniform, because the prosecution may in one case be by information and in another by indictment, and the practice may be to indict in one court and to proceed by information in another. Neither does this abate one jot or tittle from the rule of uniformity formulated in the constitution. Wherever the proceeding is by indictment, if it obtain in every county in the state, the proceedings and practice relating to indictment are uniform, and the same is true if by information. There is no lack of uniformity in either case. It was not meant by this constitutional provision that there should be but one method whereby a legal right should be enforced or a crime punished. It was intended, whenever a mode of procedure was adopted, that mode should be uniform throughout the state in all courts of the same grade. This proposition is very different to that contended for by counsel. If his contention were sound, it would compel the legislature to adopt but one mode of procedure in all cases. For instance, in case of conversion of personal property,

a party wronged could not elect to sue either in conversion or in replevin. The legislature could permit him to have but one cause of action. Such was not the intention, but rather that whatever remedy or mode of procedure was adopted, the same should be uniform in all courts of the same grade.

It is contended that under section 10, article 1, of the constitution, by virtue of which the legislature is given the power to abolish, change, limit, amend or otherwise regulate the grand jury system, the legislature has power to abolish the grand jury system entirely, or to amend or regulate it, but that it was obliged to make the practice and proceedings uniform; in other words, to abolish it entirely, and have prosecutions by information solely, or to retain it and permit prosecution by indictment only. We do not so understand the fundamental law. If the legislature chooses to permit the prosecution of those charged with crime by either indictment or information, it must make the proceedings and practice uniform in each case, but is not confined to a choice between the two methods of prosecution. The two are very different propositions.

It is further urged that the legislature, by leaving it discretionary with the judges of the various district courts to call a grand jury or not, and thereby determine whether criminal charges shall be preferred by indictment or by information, has violated section 1, article 2, of the constitution, which defines the powers of the co-ordinate branches of the government, and inhibits those persons occupying one department from exercising any power properly belonging to either of the others, except as shall be in said instrument directed or permitted, in other words, that the legislature has conferred upon the district courts legislative powers, in violation of said section. It is urged that it is the function of the legislature solely to determine the organization, practice and proceedings of the courts, and that it can not delegate that function to a judge or court. The proposition

is doubtless true, but we fail to see the connection between these functions and this act of the legislature which merely leaves to the discretion of the court whether a grand jury shall or shall not be called. If one be called, prosecutions during that term shall be by indictment; if it be not, then by information. Has the legislature conferred upon courts any power to prescribe the procedure in either event? It were absurd to call the act of the court in ordering a grand jury the exercise of a legislative function. It seems eminently judicial.

Then, it is contended that the law is special legislation, in contravention of section 15, article 3, of the constitution, for the reason, for instance, that the legislature can not provide that prosecutions shall be by indictment in Douglas county and by information in Lancaster county. A sufficient answer to the argument would be that the act in question does not so provide. But it is urged that such may be true in fact, if the courts in Douglas county call grand juries, while those in Lancaster county fail to call them. True, but the courts of one county are not required to proceed in one way only, and those in the other in the other way. The courts in both counties may proceed in both ways, or in either, as may seem to them best suited to the exigency to be met. There is no feature of special legislation about an act of that kind. So it is argued that under the constitution, and in the nature of things, the power to determine whether proceedings shall be by information or by indictment is legislative. We do not assent to the proposition as made, or as intended to be applied. The power to prescribe that prosecutions shall be by either information or by indictment, or by both, is legislative; but it is not a legislative act to elect which of two permitted methods shall be adopted in any particular case. That is judicial, and may be executive or administrative. Section 468 of the Code of Criminal Procedure permits the court, under certain circumstances, to either accept or reject a juror who discloses that he has formed an opin-

ion relating to the guilt or innocence of an accused person. Is the act of the court in exercising this discretion a legislative one? It is quite as much so as its act in determining to call or not call a grand jury. Such are all judicial acts, the doing or not doing of which is within the sound legal discretion of the court. In so doing, it is not "passing new rules for the regulation of new controversies"; it is merely applying one of two methods of procedure prescribed by the lawmaking body, either of which it is at liberty to choose. Again, the statute gives parties to litigation the right to a trial by a jury in law cases. It also permits them to waive a jury and try the cause to the court. In such instance, of trial to the court, do the parties perform legislative functions, and by electing, suspend the general law respecting trials by jury? Do they, in such instances, cause the general law to lack in uniformity? So parties have the right, by general law, to have their causes tried before the regularly constituted courts. It also permits the court (section 299, Code of Civil Procedure) to direct a trial by a referee. In such instance, does the court perform legislative functions, and suspend the operation of a general law? So it may direct a verdict, in certain instances, instead of submitting the facts to a jury, and may in many instances, readily recalled by the curious, exercise its discretion in electing to pursue one of two methods of procedure prescribed by the legislature, without in anywise usurping legislative prerogatives. To sustain his argument, counsel cites the court to *King v. State of Tennessee*, 3 L. R. A., 210; but this case is not in point. In that state, by general law, juries in criminal cases are required to be kept in charge of an officer during the trial, and are not permitted to separate. The legislature, without in anywise referring to this general law, attempted to confer upon courts the right, in their discretion, to suspend this general law, in certain instances, and the court very properly held that the attempt to confer upon the courts the power to suspend or to enforce the general

law, as they were so minded, was attempting to confer upon them legislative powers. The following language of the court very clearly distinguishes that case from the point under consideration in this. The court says: "If this had been a general law, authorizing the court to disperse juries in the character of cases mentioned, except upon cause shown for the rule, or even without qualification, the question would have been different." It would seem clear that no legislative function is performed by the court in ordering or failing to order the calling of a grand jury.

It is claimed there is no warrant in the constitution for electing county attorneys, but that the constitution contemplates the election of district attorneys only, and that the case having been prosecuted by a county attorney, the conviction is void. There is now no such office in this state as that of district attorney. That was not an office called into existence by the constitution, but existed at the time that instrument was framed and adopted. General Statutes, ch. 5. The existence of the office of district attorney was recognized by the fundamental law, and the incumbents were, by section 6, article 16, of the constitution, continued in office until the expiration of their respective terms. This section reads: "The district attorneys now in office shall continue during their unexpired terms to hold and exercise the duties of their respective offices in the judicial districts herein created, in which they severally reside. In each of the remaining districts one such officer shall be elected at the first general election, and hold his office until the expiration of the terms of those now in office." The constitution created several new judicial districts, and the section quoted merely provided for the continuance in office of the incumbents and for the election of district attorneys for the districts so created, and expressly provided that the persons so elected should hold the office until the expiration of the terms of those then holding such office, but no longer. There is no provision of the

constitution that we are aware of which creates the office of district attorney, and the office having been established by the legislature, it had the undoubted power to abolish it, which it has done. Session Laws, 1885, ch. 40. The office of district attorney having been abolished, there was no district attorney to prosecute this defendant. It is true the office of county attorney was not created by the constitution, but by legislative enactment. Compiled Statutes, ch. 7, sec. 15. The power of the legislature to create such an office can not be doubted, in the light of section 4, article 10, of the constitution, which declares that "the legislature shall provide by law for the election of such county and township officers as may be necessary." The number and character of county offices that may be created rests in the discretion of the law-making body. The office of county attorney having been created by law, it was the duty of the incumbent thereof to prosecute the defendant. This is manifest from a mere reading of section 16, chapter 7, Compiled Statutes, which is in the following language: "It shall be the duty of the county attorney to appear in the several courts of their respective counties and prosecute and defend, on behalf of the state and county, all suits, applications or motions, civil or criminal, arising under the laws of the state, in which the state or the county is a party or interested." We repeat, obviously it was the duty of the county attorney to file the information against the accused, and to prosecute him for the offense therein charged. Criminal Code, ch. 54.

It is next urged that a preliminary examination should have been accorded the accused. There is no merit in this, since the record fails to disclose that he was not given a preliminary examination before the filing of the information. It is also said that the defendant could not waive a preliminary hearing. The record fails to show any such waiver. Moreover, the objection was not made in the district court, at least before the plea of not guilty was entered, hence it can not now be urged. Criminal

Code, secs. 440, 444. *Davis v. State*, 31 Nebr., 247; *In re Betts*, 36 Nebr., 282; *Hill v. State*, 42 Nebr., 503.

Without pointing out to the court any particular reason therefor, it is insisted that a motion for continuance filed in Buffalo county and another in Dawson county should have been granted. We have examined the motions and evidence in support thereof, and can find no error in the proceedings. The granting or refusing of continuances rests in the discretion of the trial court, and its ruling in that regard will stand, unless an abuse of discretion is established. *Welsh v. State*, 60 Nebr., 101.

The jury that tried the defendant was drawn under the provisions of section 664 of the Code of Civil Procedure, no jury being in attendance at that term. It is claimed and argued at great length that defendant was entitled to a jury selected under the provisions of sections 658 *et seq.* We have held contrary to that contention a number of times, and that the court might order the sheriff to summon jurors under section 664 of said Code when there is no panel of petit jurors. *Welsh v. State*, *supra*, and cases cited; *Carrall v. State*, 53 Nebr., 431. It is insisted on that point that section 664 is in contravention of said section 19, article 6, of the constitution; and again we say the rule of uniformity there promulgated does not inhibit the legislature from providing more than one form or method of procedure in any case, provided all such forms or methods are equally applicable to all courts of the same class or grade. We have examined the arguments advanced in support of the illegality of the manner in which the jury was drawn, and are of opinion that none of them is tenable. The jury was drawn in strict accordance with the statutes and within all requirements of the fundamental law.

Several errors are assigned relative to the rulings of the court in impaneling the jury. These alleged errors we will examine in the order presented, prefacing, however, with the remark that there is nothing in the certificate of the trial judge settling the bill of exceptions

which entitles defendant to be heard on this question, as the evidence relative to impaneling the jury is not embraced in the terms of said certificate. However, as the case is of exceeding gravity, the court will examine the questions raised as if they were so included. It is objected that one Peter Kinnan, called as a juror, and said to have been excused by peremptory challenge of defendant, should have been excused for cause on challenge by defendant. The record discloses that Kinnan was excused by the court for cause. It also shows that he was peremptorily challenged by defendant. Such a record can not import verity, for it contradicts itself, for which reason the court is unable to examine further into the alleged error.

Objection is made to the ruling of the court refusing to excuse one W. A. Love on defendant's challenge for cause. Part of his *voir dire* examination is as follows:

Q. Now, the opinion you had when you first read this account you have not changed, because you have not since heard anything to the contrary?

A. Nothing since, no, sir.

Q. Now, your opinion, I suppose, will remain unchanged until you hear some evidence in the case?

A. Certainly.

Q. In other words, it will take some evidence to change your present opinion?

A. Yes, sir.

Q. And that opinion is concerning the guilt or innocence of the accused?

A. Certainly.

And in response to questions put by the court, after having been challenged by defendant, he answered, in part, as follows:

Q. Do you say that at this time you have an opinion concerning the guilt or innocence of the defendant, a well defined opinion in your own mind?

A. No, no I couldn't form a well defined opinion from what I read, of course I had an impression.

Q. And you say the impression you had at that time you have now?

A. Never had anything to contradict it.

Q. Now you say that impression didn't amount to an opinion?

A. No, sir.

Q. Then you can't say that you now have an opinion concerning the guilt or innocence of the defendant?

A. Couldn't say that I had.

And in response to questions put by the court the juror further testified that he believed he could sit as a juror in the case and render a fair and impartial verdict regardless of what he had read, and that he thought he could start into the case with his mind as free from bias or prejudice against defendant as though he had not read these newspaper accounts. The challenge was thereupon overruled, and exception taken. Another juror testified on his examination that he had read an account of the tragedy in the newspapers; that he did not think it had made a great deal of an impression on his mind, but would not say that he had not formed an opinion; that he had no fixed opinion; that he did not think it would require very much evidence to change his opinion or impression; that it might take some. Whereupon he was challenged by the defendant. In answer to interrogatories on the part of the court he said he did not think his impression amounted to a fixed opinion; that he hardly considered it an impression; that the opinion or impression he had would not influence his mind during the trial, and that he could entirely exclude it from consideration in making up his verdict; whereupon the challenge was overruled. Another juror testified that he had read an account of the homicide in the papers, that from it he had not formed an opinion as to the guilt or innocence of the defendant; that what he read he did not think purported to be a detailed account of the evidence in the case; that the reading made no more impression on his mind than an occurrence of that kind would gen-

erally make; that he thought he remembered the nature of the articles read, and still had the same impression that was formed at the time of reading them; that he did not think the impression he formed was at all relative to the guilt or innocence of defendant, and that he had no impression as to his guilt or innocence; that the impression he got at the time of reading was that there was a tragedy committed; that he had some impression as to who committed the act, but not as to his guilt or innocence; that he did not think it would take any evidence to remove any impression he had relative to the guilt or innocence of the accused, that he had no opinion as to that. On cross-examination he stated that he at the time of reading the paper had formed an opinion as to who the guilty party was "as to the statement in the paper"; that he did not know as he could call it an opinion, it was merely an impression that he got in his mind when he read it; that, calling it an impression, he thought he still had that impression; that he did not think it would take evidence to remove such opinion or impression; that he presumed it would remain with him until modified or changed by such evidence as might be introduced on the trial; that it might take some evidence to change that impression as to who the guilty party was; that the defendant was mentioned in the article he read as the alleged perpetrator of the deed, he thought. In response to questions put by the court, he stated that he could sit and impartially try accused regardless of any impression he might have, and the challenge was overruled. The action of the court relative to accepting these jurors is urged as erroneous. The evidence as a whole shows that any impression or opinion these jurors had was wholly hypothetical, which brings the case within the principles announced in *Basye v. State*, 45 Nebr., 261, where all objections urged by defendant are discussed and resolved against him, and the earlier opinions of this court cited by defendant are discussed and distinguished. The dis-

cretion conferred by section 468 of the Criminal Code was in nowise abused by the trial court relative to any one of these jurors, and no error prejudicial to accused was committed.

Two other jurors were also asked by the state, on their *voir dire* examination, if they had any objections or conscientious scruples against the infliction of capital punishment, if the evidence warranted it. It is urged that the question was improper, because it tended to exclude from the jury any one who might lean towards the infliction of a lesser penalty. This court has decided adversely to defendant's contention in *Hill v. State*, 42 Nebr., 503, and no substantial reason is advanced for receding from the position there announced. The entertaining of conscientious scruples against the infliction of the death penalty is ground for challenge for cause under section 468 of the Criminal Code; hence it follows that it is proper to interrogate a venireman on that subject.

Objections are urged to rulings of the court permitting two physicians, who saw the body of deceased as it lay on the bed where he had met his death, to answer the following questions: "What position would the body necessarily have lain in for the blood to have the course from the wound which you found it had taken?" It is claimed that it was both incompetent and not a matter for expert testimony. This evidence was offered, evidently, to corroborate that of Mary Laue, who testified that Dinsmore, who had come into the kitchen where she was, after having committed the deed, remained there a short time and left, stating that he would go to the chamber where his victim lay and so arrange the body as to lead to the conclusion that he had committed suicide; the answer of the physicians tending to show that the body must have lain in a different position when the blood flowed from the freshly made wound to that in which it lay when first found by witnesses. The evidence was competent, whether it was or was not a matter for expert testimony. The witnesses had seen the body and

examined it and all the surroundings, and were competent to testify to the position in which it must necessarily have lain in order that the blood should have flowed from the wound in the direction taken. It was such a conclusion, if it was a conclusion, as was competent, under all the circumstances, and was a fit subject for expert testimony, and the witnesses had qualified as such.

It is next urged that the court erred in permitting Mrs. Laue, the principal witness for the prosecution, to testify as to the fact and time when illicit relations began between her and defendant, on the ground that no foundation for the question was laid, and that it was leading and incompetent. The question, with the objection made, is:

Q. When did improper relations begin between you and him, if they did so begin?

Defendant objects as leading. Objection overruled; defendant excepts.

There was no objection made, other than that it was leading. It is within the sound legal discretion of the trial court to permit leading questions to be put to witnesses. If this question was leading, the record discloses a sufficient justification to permit it to stand, for this woman was by it called to disclose to the world that she had lost the immediate jewel of womanhood, her chastity, and as a rule women do not readily lay bare their shame. The discretion of the trial court was not abused.

It seems that, after the burial of her husband, Mrs. Laue, who up to that time had insisted that her husband had committed suicide, made a confession, signed and sworn to by her, implicating the defendant in the murder of her husband. On cross-examination it was developed that after making this confession she was examined by the county attorney, but not under oath, relative to the facts in the case, and such examination was taken down in shorthand by some person. It further developed that the statement then made by her, if ever reduced to shorthand, was never afterwards read to or seen by her, nor

did she sign or swear to the same. On trial counsel for defendant demanded possession of this statement, as well as of her confession. The latter the court ordered turned over to her, but refused to order the statement not signed by her to be turned over to defendant. This refusal it is urged is a denial of the right of defendant to a full and fair opportunity to cross-examine the witness concerning the facts in the case. We can not see that it was. If the statement was ever transcribed, a fact not positively sworn to by any one, it was the property of the county attorney. It was nothing more than a brief of the evidence prepared by the county attorney for his own convenience in trying the case, or preparing it for trial. We can not imagine any reason for compelling the county attorney to turn over to counsel for defendant his private memoranda. The defendant had no right to it, and the court was right in refusing to compel a surrender of it.

The confession of witness turned over by the county attorney to counsel for defendant was by him introduced in evidence as defendant's Exhibit No. 1, and on cross-examination Mrs. Laue was asked referring to the statement made to the county attorney, "In the other statement which you made and which you have testified about, did you recite what was in this statement, Exhibit 1, or do you know?" To this objection was made, as incompetent, irrelevant, immaterial and no foundation laid, which objection was by the court sustained, exception being duly taken. This ruling is alleged as error. As before observed, this statement was not admissible in evidence, and as counsel was not entitled to it, could not be made the basis of an impeaching question, the only purpose that could have been served by permitting the witness to answer. The matters relative to these statements were brought out wholly on cross-examination, and we think the lower court did not unduly restrict counsel in such cross-examination.

Another question propounded by counsel for defendant on cross-examination was: "Did you, in any of these

statements which you have made with reference to the killing, [state] that you had no poison in the house except strychnine and laudanum, and that the strychnine and laudanum was kept down-stairs?" To this the state objected, because there was no foundation laid, and no time and place fixed. The court sustained the objection, for this reason, and the further one, that it was improper cross-examination. To the objection that this ruling was erroneous, we say that it was clearly not cross-examination, all the evidence relative hereto having been brought out on cross-examination. There was no contention that Laue met his death by poison. If it was an attempt to impeach the evidence of witness, no foundation was laid for such impeachment, and such impeachment, if accomplished, would have been upon an immaterial matter. It is urged, however, that it would have thrown light upon the means by which Mrs. Dinsmore met her death; but Dinsmore was not on trial for the murder of his wife, and the fact that Mrs. Dinsmore met her death on the same night and in the same house in which Laue was murdered was not an issue in the case, further than such fact may have served to throw some light upon the homicide in question; and it was an attempt to cross-examine her upon a matter not in issue, and upon a question not brought out on the direct examination.

Certain evidence introduced served to prove that Dinsmore paid improper attentions to Mrs. Laue prior to the night of the homicide, and for some time prior to the tragedy he more or less neglected his wife. This evidence is claimed to be immaterial and highly prejudicial to defendant. We think it admissible, if for no other purpose than as tending to establish a motive for the crime.

One Overmier was permitted to testify, over objections duly made on behalf of defendant, that he took defendant to the residence of deceased, after the tragedy, and while accused was under arrest, the corpses of Laue and Mrs. Dinsmore being then in the house; and that Dinsmore lifted the covering from one of them and said, "Humph,

I wonder how long I will have to stay in that God damn jail down there." This testimony was, on motion, stricken out. It is, however, contended that the prejudice resulting from the answer could not be and was not cured by striking it out, but we do not think so. The court had no means of knowing beforehand whether the evidence was or was not relevant. So far as the court could tell, the question propounded was calculated to bring out testimony of an admission of guilt on the part of defendant as readily as it admitted of evidence like that actually given. The question itself was entirely proper, although it developed that the evidence actually elicited by it was not relevant. It can not be said that the court erred in permitting the question to be answered, and it would be a sad comment on modern jurisprudence if it were possible for a witness, in answering a perfectly proper question, to commit the trial court to an irremediable error. Until courts are endowed with foreknowledge, the adoption of such a rule would prevent the conviction of any criminal, if a witness for the state, through either design or inadvertence, testifies to irrelevant facts while answering a proper question. The court very appropriately permitted the question to be answered, and wisely struck the answer from the record as soon as it developed the fact that it was improper. In this no error was committed which was not cured by the court.

Some ten or eleven assignments of error raise questions of alleged improper remarks made by counsel for the state on argument to the jury. The language excepted to is too lengthy to insert in this opinion. In every instance, objections to these remarks made by defendant, or in nearly every instance, were by the court sustained. The court was exceedingly careful of defendant's rights in the premises, as an examination of the record will disclose, and in several instances complained of, excluded remarks that were perfectly proper, in summing up the case to the jury. Whenever counsel may have overstepped the bounds of propriety, the court very willingly

and promptly sustained objections to the same. A careful examination of the record convinces the court that defendant was in nowise prejudiced in the premises.

Another alleged error is one going to the action of the trial court in refusing a new trial because, it is claimed, one Tussing attempted an assault upon defendant after the trial had ended, and while the jury was deliberating, which fact of attempted assault is insisted was communicated to the jury and by its members discussed during such deliberation. We can not imagine any reason for assuming that an attempt at violence against the person of accused by some third party would influence the jury in its conclusions concerning the guilt or innocence of defendant of the crime charged. But, be that as it may, the evidence relative to the fact of the attempted assault, and of its communication to and discussion by the jury, was merely hearsay, and, therefore, insufficient to establish such fact.

Exception was taken by the defendant on the trial to the giving of the eleventh instruction by the court, on its own motion, which is as follows:

"No. 11. Mrs. Laue has been called by the state and has testified to facts and circumstances, tending to show the guilt of the defendant; and defendant's counsel, upon the cross-examination of this witness, has shown that at the coroner's inquest she made other statements concerning the same subject, entirely different from those testified to by her here. As an explanation of this difference in her testimony, she here claims that she, at the time of the inquest, was under the influence and control of the defendant, and made such statements at his request, and by his direction; and she here says, that the statements made at the inquest were untrue. Now, it is for you to determine from all the testimony, facts and circumstances shown, as to whether or not the statements made at the inquest or the statements here given by her or either, are true. If you believe that her statements at the inquest were true, then it will be your duty to entirely disregard

all the uncorroborated testimony that she has here given, which is in conflict with that given at the inquest. On the other hand, if you believe her testimony given at the inquest was false, and believe her explanation of the giving of the same is true, then you should give her evidence in this case, upon this trial such weight and credit as you think it fairly entitled to. Evidence of her testimony at the inquest was offered by the defendant for the purpose of impeaching her testimony here given. And it is a rule of law that if a witness has knowingly sworn falsely to any material matter in the case, then the jury are at liberty to entirely disregard the testimony of such witness, upon all matters concerning which she is not corroborated. Whether or not she has been successfully impeached, so that her credibility has been entirely destroyed is a question exclusively for you to determine. You are not bound by any rule of law to disregard her evidence wholly, but may take it into consideration for what it is worth, together with the other evidence in the case; for, though a witness may have been impeached on some material point, his evidence on others may be creditable in itself, or may be corroborated by other evidence which is creditable."

In the first place it is insisted that it was error to give this instruction, for the reason that it singled out by name a witness and discussed her testimony. Mrs. Laue was a witness called on behalf of the state, and it might have urged against this instruction the point now brought forth by defendant, but he is not in position to complain, since she was not his witness, and, moreover, he requested an instruction, which was given by the court, singling out this same witness and her testimony quite as explicitly as the one copied above. Said instruction requested by defendant follows:

"In considering the testimony of Mrs. Laue, it is proper for you to remember that she testified before the coroner's jury to a different state of facts from that to which she testifies here. You may look to the testimony of other

witnesses, and to all the circumstances shown by the evidence to surround the case, for facts which may tend to corroborate her evidence taken during the trial; and you will reject her testimony, unless you find that it is corroborated as aforesaid, or unless you are satisfied that it is true, notwithstanding that she has made other and different statements under oath."

It is urged that the instruction complained of gave undue prominence to that portion of Mrs. Laue's testimony explaining how she came to swear falsely, as she says, at the inquest. This objection is not well taken. It did not make prominent her explanation of the discrepancies in her statements, but merely called the attention of the jury thereto, leaving it to them to determine from all the facts and circumstances proven which statement was true and which was false. In fact, the instruction was favorable to the defendant. Another criticism made upon this instruction is that it did not call to the attention of the jury the alleged written confession of Mrs. Laue brought out on her cross-examination and offered by the defendant. A sufficient answer to this contention is that no request to so charge was made by defendant. One can not predicate error upon the failure to charge, unless a proper instruction covering the point has been tendered by him. *Housh v. State*, 43 Nebr., 163.

It is finally urged that the court erred in giving instruction numbered 16, which we quote:

"You have heard the evidence offered on both sides of the case. From that evidence, you learn what the facts are. The attorneys have had a wide range of discussion; they have had complete freedom of argument before you, upon all questions of fact. It is their privilege in the argument to criticise the evidence. Those for the state to criticise the conduct of the prisoner; those for him to criticise the conduct of the witnesses against him; to impugn their motives, if the evidence justifies it; to assault the credibility of the witnesses. Counsel for the state

have called your attention to the children of the deceased, and have intimated that, because of your sympathy for their fatherless condition, you should punish the defendant. Counsel for the defendant have pointed out to you the horrors of the penitentiary and of death upon the gallows, and have made appeals to you for mercy. Now I desire to impress upon you that you have nothing to do with questions of mercy. You are ministers of justice. The administration of mercy is a power that is vested in the executive department of our state, in the exercise of its authority to pardon. It is absolutely necessary and essential to the preservation of society that law should be enforced, and especially where acts of violence have been done. If we would preserve society, and the rights of individuals, the law must be obeyed, and violaters of the law punished; and you as jurors would be faithless to your trust if you should return a verdict of acquittal in this case, when the facts demanded a conviction. And above all, it is important that innocence should not be punished. You are not impaneled for vengence, but to subserve the ends of public justice, and you would be disloyal to your obligation if you should find the prisoner guilty when the evidence required his acquittal. I have said this to impress you with a sense of responsibility which you owe to your conscience and oaths, that your verdict should be honest, intelligent and in conformity to the evidence and the law. Do your duty honestly, conscientiously, courageously and justly, as you see it under the evidence and the law of this case."

It is urged that the instruction is argumentative and declamatory, and by it the court invaded the province of the jury, and that it was erroneous to inform the jury that the state had a right to criticise the conduct of the prisoner. The instruction was neither argumentative nor declamatory, nor did the giving of it invade the functions of the jury. It was merely a usual cautionary instruction, which the trial court may, in its discretion,

give, or not. *Smith v. State*, 4 Nebr., 277; *State v. Talbott*, 73 Mo., 347.

But it is said that it was error to inform the jury that counsel for the state might criticise the conduct of the prisoner, since he was not a witness at the trial. His conduct, as disclosed by the evidence, was a proper subject of discussion, whether he was or was not a witness.

It is urged that it was prejudicial to designate the defendant as the "prisoner." This objection carries its own refutation upon its face, and deserves no further comment. The same may be said of some other criticisms upon the instruction.

It is suggested that the court erred in informing the jury that they had nothing to do with questions of mercy. Manifestly this is the law, though the statute confers upon the jury the right to fix the penalty. In determining the punishment they have no right to be actuated by considerations of mercy, but should be guided alone by the evidence, the facts and circumstances disclosed by the record, under the instructions of the court. If the evidence reveals a case in which the death penalty should be fixed, the jury have no right to be deterred from discharging their sworn duty through any sympathy for the accused. Mercy lies solely within the province of the executive in his exercise of the pardoning power.

Again it is said the court erred in telling the jury "you would be disloyal to your obligation if you should find the prisoner guilty when the evidence required his acquittal." This was entirely sound. By it was meant that the defendant should not be convicted upon insufficient evidence. The jury had been previously instructed as to the burden of proof, and that the guilt of the defendant must be established by the state beyond a reasonable doubt.

We have carefully and faithfully examined the record, and all objections urged against the conviction, and the conclusion is irresistible that the defendant has been ac-

corded a fair and impartial trial, and that the verdict is a just one. The judgment is accordingly

AFFIRMED.

NOTE.—The grand jury is not a *sine qua non* in the prosecution of offenses under state law. Amendments 5 and 14 of the United States constitution do not apply to the matter of the prosecution of crimes under state law. The words "due process of law" do not necessarily require an indictment by a grand jury. *Lybarger v. State*, 2 Wash., 552; *State v. Nordstrom*, 7 Wash., 506; *Spies v. Illinois*, 123 U. S., 131, 8 Sup. Ct. Rep., 21; *Hurtado v. California*, 110 U. S., 516; *Hawkins v. State*, 60 Nebr., 380. But see dissenting opinion of Mr. Justice Harlan in *Hurtado v. California, supra*.—REPORTER.

STATE, EX REL. WILLIAM L. NEWBY, ATTORNEY IN FACT FOR FRANCES J. ALLSMAN, V. O. G. ELLSWORTH.

FILED MARCH 6, 1901. No. 11,580.

1. **Public Records:** INSPECTION. Public records are open to the free inspection of all citizens of the state, and other persons interested in such examination.
2. ——— ———: JUSTICE DOCKET. Dockets of a justice of the peace containing the entry of judgments are public records.
3. **Justice of the Peace:** TRANSCRIPT. A justice of the peace must furnish, upon request and upon being paid the legal fee therefor, an authenticated transcript of a judgment recorded in his docket to either of the parties to the same, or to any one interested in obtaining such transcript.
4. ———: ———: PARTY IN INTEREST: ATTORNEY IN FACT. An attorney in fact for one against whom a judgment has been rendered on the docket of a justice of the peace has such an interest as entitles him to demand a transcript of such judgment.

ERROR from the district court for Saline county. Tried below before STUBBS, J. *Reversed.*

Abbott & Abbott and *William L. Newby*, for plaintiff in error.

J. D. Pope, contra.

NORVAL, C. J.

J. H. Phillips obtained a judgment against Mrs. Frances Allsman before O. G. Ellsworth, a justice of the peace of Saline county, on April 4, 1899, for $25.71. Thereafter William L. Newby, the attorney in fact for said Allsman, demanded of the justice that he be permitted to examine the docket entry of said judgment, which was refused, and said Newby requested a transcript of said judgment, tendering the fees therefor, which transcript was likewise refused, whereupon said Newby, as such attorney in fact, instituted this proceeding in the district court for a mandamus against the justice to compel him to permit relator to inspect the docket entry of said judgment, and to require respondent to make out and deliver to him a transcript thereof. The respondent filed an answer admitting certain averments of the application or petition for the writ, and denying others. Subsequently he demurs to the petition for defect of parties plaintiff, and that the petition does not state sufficient facts to entitle relator to the relief demanded. The demurrer was sustained by the court and the proceeding dismissed. Relator prosecutes error proceeding.

The ruling of the district court was erroneous. Chapter 74, Compiled Statutes, declares that "All citizens of this state, and all other persons interested in the examination of the public records, are hereby fully impowered and authorized to examine the same, free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business." The docket of a justice of the peace wherein are recorded judgments is a public record within the meaning of the statute quoted, and relator, being a resident of the county and state, was entitled to examine and inspect such docket. Moreover, relator was the attorney in fact for a party against whom a judgment had been rendered by the respondent and recorded in this docket, therefore, he was interested in the examination of the docket in question. By section

587 of the Code of Civil Procedure it is provided that "Judges of probate courts, justices of the peace * * * shall upon request and being paid the lawful fees therefor, furnish an authenticated transcript of the proceedings, containing the judgment or final order of said courts, to either of the parties to the same, or to any person interested in procuring such transcript." It is plain that under the section just quoted it was the duty of the respondent to give a transcript of the judgment of *Phillips v. Allsman* to either of the parties, or to any person interested in procuring such transcript, upon being paid the legal fees therefor. Relator, being the attorney in fact of Mrs. Allsman, had such an interest as entitled him to a transcript of the judgment rendered against his principal. It follows that there was no defect of parties plaintiff, and that the affidavit stated sufficient facts to justify the issuance of the writ of mandamus. The district court erred in sustaining the demurrer and dismissing the proceeding and the judgment is therefore

REVERSED.

JOHN J. TROMPEN ET AL. V. CHARLES HAMMOND.

FILED MARCH 6, 1901. No. 9,407.

1 **Judgment Creditor:** INTEREST. A judgment creditor is entitled to interest upon his judgment until the same is actually paid.

2. ———: ———: DATE OF CONFIRMATION. In case real property is sold to satisfy a judgment or decree, the creditor is entitled to interest upon his claim up to the date of confirmation.

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

S. L. Geisthardt, Lorenzo W. Billingsley and *Robert J. Greene,* for plaintiffs in error.

Daniel F. Osgood, contra.

SULLIVAN, J.

In an action brought by Charles Hammond against Josiah Paden and others to foreclose a real estate mortgage Francis C. Faulkner, one of the defendants was given a first lien and the plaintiff a second lien. Execution of the decree was committed to plaintiff in error, who was at the time the duly constituted sheriff of Lancaster county. The mortgaged property was offered for sale in the usual way and was purchased by Hammond, whose bid was considerably in excess of the amount due upon the first lien. Eighteen days intervened between the sale and confirmation, and the question presented for decision by this record is whether Faulkner is entitled to interest on his decree for that period. It is urged on behalf of defendant in error that he paid to the sheriff on the day of the sale the full amount then due upon the first lien, and that the remainder of the purchase-money belongs to him as a junior incumbrancer. Section 3, chapter 44, Compiled Statutes, 1899, is as follows: "Interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof at the rate of seven dollars upon each one hundred dollars annually until the same shall be paid; *Provided*, That if said judgment or decree shall be founded upon any contract, either verbal or written, by the terms of which a greater rate of interest, not exceeding the amount allowed by law, than seven per centum shall have been agreed upon, the rate of interest upon such judgment or decree shall be the same as provided for by the terms of the contract upon which the same was founded." This section, it seems to us, admits of but one construction. It provides, in terms too plain to be misunderstood, that all judgments and decrees for the payment of money shall bear interest from the date of rendition to the date of payment. When the purchaser at a judicial sale pays to the sheriff the amount of his bid, the money does not pass at once under the control or dominion of the creditor. The statute (Code of

Civil Procedure, sec. 498) contemplates that the money shall remain in the custody of the court—in the hands of the officer making the sale—until the proceedings under the execution or order of sale have been examined and approved. Until the order of confirmation has been entered, there is no consummated sale, and the purchaser, as a matter of law, is in the attitude of one having made an offer which may be accepted or refused. The obligation of the debtor is not discharged and the creditor is not paid so long as the sheriff holds the purchaser's money awaiting the action of the court upon the report of the sale. In our opinion there is no escape from the conclusion that Faulkner's decree was not paid on the day of the sale, and that consequently it continued to bear interest up to the date of confirmation. To hold that interest on a claim in process of collection shall cease before the creditor receives, or becomes entitled to receive, the money due him from his debtor would be to establish a principle essentially unjust and in many cases violative of contract rights. Adjudged cases bearing upon the question under consideration are not numerous, but those we have found are in entire accord with the views here expressed. *Lombard Investment Co. v. Burton*, 5 Kan. App., 197, 47 Pac. Rep., 154, and *Central Trust Co. v. Condon*, 67 Fed. Rep., 84.

It is said that Faulkner was responsible for the tardy action of the court upon the sheriff's report, but we are unable to understand how the filing of a motion to confirm the sale could have any tendency to delay confirmation. The sheriff's motion for an order requiring Hammond to pay over so much of the purchase price of the mortgaged property as should be necessary to cover the interest on Faulkner's claim from the date of sale to the date of the confirmation should have been sustained. The order denying the motion is, therefore, reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

NATIONAL LIFE INSURANCE COMPANY, APPELLEE, V. JOHN J. BUTLER ET AL., APPELLANTS.

FILED MARCH 6, 1901. No. 9,423.

1. **Mortgage:** CONDITIONAL CLAUSE: ELECTION: NOTICE. Where a mortgage provides that the failure of the mortgagor to comply with any of its conditions shall cause the entire debt to become due, and provides, further, that the mortgagee may in such case, if he so elect, proceed at once, without notice, to enforce his security, the commencement of a foreclosure suit is notice of his election, and no other notice is necessary.

2. **Tax:** PAVING ASSESSMENT. Special paving assessments are "assessments" within the meaning of a clause in a mortgage imposing on the mortgagor the duty of making prompt payment of all "taxes and assessments" lawfully charged against the mortgaged property.

3. **Mortgage:** CONDITION: RIGHTS OF MORTGAGEE. Where a mortgage is conditioned that on the mortgagor's default the mortgagee may pay delinquent taxes and assessments, and insurance, and add such payments to the original debt and that the mortgage shall stand as security therefor; and provides, also, that on the mortgagor's default the mortgagee may declare the whole debt due and foreclose at once, the mortgagee may not only make the payments which the debtor failed to make, but also, at his option, declare the whole debt due and proceed immediately to collect it by suit.

4. **Tax Receipts:** ADMISSION. An admission, when tax receipts are offered in evidence, "that the taxes described in the receipts were duly levied and assessed" is an admission that the assessments were made at the dates mentioned in the receipts.

5. **Collector's Receipt:** REFERENCE TO DATE: EVIDENCE PER SE. A tax collector's receipt in which a special assessment is described by reference to the date at which it was made is *per se* evidence that the assessment was made at the date named.

6. **Taxes:** AGREEMENT TO PAY: MEANING OF "BEFORE DELINQUENT." An agreement to pay taxes before they become delinquent is not fulfilled by paying such taxes on the day they become delinquent.

7. **Unnecessary Costs:** COMPLAINT: ITEMS. A party who claims that unnecessary costs were taxed against him must point out the items of which he complains.

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

Charles O. Whedon and *Alfred W. Scott*, for appellant.

S. L. Geisthardt, contra.

SULLIVAN, J.

This action was instituted by the National Life Insurance Company against John J. Butler and others to foreclose two real estate mortgages. Upon the issues joined the court found in favor of the plaintiff and rendered a decree in accordance with the prayer of the petition. The notes secured by the mortgage had not by their terms matured at the time the action was commenced, and the right to maintain the action is grounded only upon the alleged failure of the mortgagor, Butler, to comply with certain conditions of the mortgages relative to payment of interest, taxes and insurance. The conditions referred to are as follows: "It is further stipulated and agreed, that if the taxes or assessments levied on the granted premises are not paid before they become delinquent, or if there is any failure to comply with the foregoing stipulation in regard to insurance, the grantee, its successors or assigns, may pay such taxes or assessments, or effect such insurance, and any sums of money paid therefor shall be recoverable from them or their heirs, or assigns, and together with overdue interest shall bear interest at the rate of ten per cent per annum; that this mortgage shall stand as security not only for said mortgage note and interest coupons, but for interest upon all interest not paid when due, and for all sums of money advanced as hereinbefore stipulated for payment of insurance, taxes and assessments, with interest on such sums so advanced; that a failure to pay any of the said money, either principal or interest, within thirty days after the same becomes due, or a failure to perform or comply with any of the foregoing agreements or conditions, shall cause the whole sum of money hereby secured to become due and collectible at once, without

notice, if the mortgagee or its successors or assigns shall so elect, and this mortgage may thereupon be foreclosed immediately for the whole of said money, interest and costs; * * * And it is hereby agreed that after any default in the payment of either principal or interest, the whole indebtedness secured by this mortgage shall draw interest at the rate of ten per cent per annum from the date hereof, and that all payments of interest that have been made shall be deemed to be payments on account only of such interest."

One of the contentions of appellants is that the action can not be maintained because the plaintiff did not, before filing its petition, give notice of its election to declare the entire debt due. This question was considered in the case of the *Northwestern Mutual Life Ins. Co. v. Butler*, 57 Nebr., 198, and it was there held that the bringing of an action to foreclose the mortgage was notice of plaintiff's election, and that no other notice was necessary. In the same case it was also held that special paving assessments, like those involved in the present suit, were "assessments" within the meaning of a clause in the mortgage imposing upon the mortgagor the duty of making prompt payment of all "taxes and assessments" lawfully charged against the mortgaged property.

Another argument advanced in behalf of appellants is that the plaintiff could not, under the provisions of the mortgages above quoted, pay delinquent taxes, assessments and insurance and, after adding the amounts paid to the original indebtedness, proceed at once to enforce the mortgages. We think by the plain terms of the contracts between the parties the creditor was given not only the right to make the payments which the debtor, in violation of his contract failed to make, but also the further right at its option to declare the entire debt due and proceed immediately to collect it by suit.

It is contended that the court erred in including in the decree $345.15 for paving assessments which the plaintiff claims to have paid for the protection of his security.

It is said that there is no evidence in the record tending to show that those assessments were regularly charged against the property, or that they were paid; and it is especially insisted that there is no proof that they were paid after they became delinquent. At the trial, plaintiff offered together all the receipts for taxes and special assessments paid by it upon the mortgaged property. The defendant made a general objection to the admission of each and all of the receipts, and objected specifically to those relating to the special assessments. Thereupon it was stated by Mr. Geisthardt, attorney for the plaintiff: "It is admitted that the taxes described in the receipts were duly levied and assessed by the proper authorities, and that the amounts named in the receipts were actually paid by plaintiff at the times the receipts bear date." The record further shows that Mr. Scott, attorney for the defendant, assented to the foregoing statement, and that the objection was then overruled. Evidently the admission was intended to embrace, and was understood by the court and counsel for both parties, to cover all the receipts included in the offer and affected by the objection. Those receipts show the date of each special assessment. The assessments are described by reference to the dates at which they were made, and that is the only means employed to identify them. The admission "that the taxes described in the receipts were duly levied and assessed" is, therefore, an admission that the assessments were made at the dates mentioned in the receipts. It also appears from the interest and penalties charged against the various installments of special taxes that they must have been delinquent when the plaintiff paid them. Furthermore, we are disposed to think that the receipts were *per se* competent evidence of the dates of the assessments. Section 26 of the charter of the city of Lincoln, where the property is situate, provides (Session Laws, 1889, ch. 14) that the city treasurer shall give to every person paying money into the city treasury a receipt specifying the date of payment and

upon what account paid. The accounts upon which plaintiff made payments were general taxes for certain years and special assessments which could be appropriately described only by reference to the dates at which they were levied. If the date of an assessment was an appropriate part of what the law required to be written in the treasurer's receipt acknowledging payment of such assessment, then the receipt was evidence of the date, and, unaided by any admission, would fix the time when the defendants were in default.

The plaintiff paid certain city taxes for 1896, the payment being made on the first day of December of that year. It is insisted by counsel for appellants that those taxes were not delinquent until the following day, and that the payment was premature and unauthorized. The statute provides: "On the first day of December next succeeding the levy thereof, all unpaid city taxes shall become delinquent." Compiled Statutes, 1899, ch. 13*a*, art. 1, sec. 52. If the taxes became delinquent on December first, the mortgagor was bound by his contract to pay them on or before the last day of the previous month. He could not pay them before they became delinquent by making payment on the day they become delinquent. The law does not ordinarily in computing time take notice of fractional parts of a day.

It is claimed that appellants were taxed with costs made by bringing unnecessary parties before the court. We do not find in the record anything to indicate that any costs were incurred in bringing the parties in question before the court. Neither do we find that any costs were charged against the defendants on account of those parties having been brought in.

The decree is not erroneous, and it is, therefore, in all things

AFFIRMED.

COMMONWEALTH MUTUAL FIRE INSURANCE COMPANY ET AL. V. HAYDEN BROTHERS.*

FILED MARCH 6, 1901. No. 11,468.

1. **Insolvent Corporation:** ACTION FOR CLOSING AFFAIRS: ASSESSMENT BY COURT: EXTENT OF JUDICIAL DETERMINATION. In an action brought for the purpose of winding up the affairs of an insolvent corporation an assessment made by the court upon the stockholders of such corporation is a conclusive judicial determination only to the extent that it ascertains the amount of corporate assets and liabilities and declares the necessity for making the assessment ordered.
2. **Foreign Judgment:** BASIS OF ACTION: CONCLUSIVE: JURISDICTION OF FOREIGN COURT. A judgment rendered against a party in one state is conclusive upon him when made the basis of an action in another state, unless the court rendering the judgment was without jurisdiction.
3. ———: FULL FAITH AND CREDIT: JURISDICTION. A judgment rendered by a court of one state is entitled to full faith and credit in the courts of another state, only to the extent that jurisdiction appears or may be presumed.
4. **Insolvent Corporation:** JURISDICTION: PERSONAL JUDGMENT AGAINST STOCKHOLDER. A court having jurisdiction of an insolvent corporation for the purpose of winding up its affairs has no authority to render a personal judgment against one of its stockholders who is not a party to the action by service of process or voluntary appearance. Neither has the court in such case authority to adjudicate the fact of membership in the corporation.

ERROR from the district court for Douglas county. Tried below before KEYSOR, J. Rehearing of case reported in 60 Nebr., 636. *Judgment below affirmed.*

Richard S. Horton, for plaintiff in error.

T. J. Mahoney and *F. H. Larson, contra.*

SULLIVAN, J.

This case, which was brought by the plaintiff in error to enforce two assessments made by the supreme judicial court of Massachusetts against the firm of Hayden Bros. as a member of an insolvent insurance corporation, was submitted and decided at the last term. *Commonwealth*

*Rehearing allowed.

Mutual Fire Ins. Co. v. Hayden, 60 Nebr., 636. Afterwards a rehearing was allowed and additional arguments presented. In the light of these arguments we have reexamined the grounds of our former decision, and have reached the conclusion that the petition does not state a cause of action, and that the district court was right in sustaining the demurrer directed against it. It is shown by appropriate averments that the orders and decrees of the Massachusetts court, which are made the basis of this suit, were made and rendered in an action in which George S. Merrill was complainant and the insurance company, the plaintiff herein, was defendant. It is not alleged that the defendant in this case was a party to that suit, and the inference to be deduced from the petition is that the court did not get jurisdiction over it by any of the ordinary methods of obtaining personal jurisdiction. It is not, indeed, contended that the defendant firm was served with any kind of process in Massachusetts, or that it entered a voluntary appearance in the action, or agreed in advance to be bound by some substituted form of service; but the argument by which it is sought to sustain the assessments as judgments *in personam* is that jurisdiction of the corporation included jurisdiction of the shareholders. In other words, it is asserted that the court, in the absence of the defendant and without giving it notice or an opportunity to be heard, had authority to adjudicate the fact of membership and render a personal judgment for a specific sum. This position is repugnant to the fundamental principles of justice and is not, we believe, sustained by any well considered case. "It is," says Mr. Justice Gray in *Goldey v. Morning News*, 156 U. S., 518, "an elementary principle of jurisprudence, that a court of justice can not acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want

of due service." Further along in the same opinion it is said that "under the provisions of the constitution of the United States and of the acts of congress, by which judgments of the courts of one state are to be given full faith and credit in the courts of another state, or of the United States, such a judgment is not entitled to any force or effect, unless the defendant was duly served with notice of the action in which the judgment was rendered, or waived the want of such notice."

The principle of the case just cited controlled the decision in *Wilson v. Seligman*, 144 U. S., 41, which was an action by a creditor of an insolvent corporation to enforce a stockholder's liability. The defendant Seligman, a citizen of New York, was adjudged by a Missouri court, upon facts substantially like those involved in the present case, to be a stockholder of an insolvent corporation, and a personal judgment was rendered against him. This judgment was held to be void for want of jurisdiction. The opinion, written by Mr. Justice Gray, states the grounds of the decision in the following language: "In the case at bar, the defendant never resided in Missouri, and was not served with process within the state, either upon the original writ against the corporation, or upon the motion for execution against him. He denies that he was a stockholder, and the question whether he was one was not tried or decided in the controversy between the plaintiff and the corporation, nor involved in the judgment recovered by one of those parties against the other. Under the statute of Missouri, and upon fundamental principles of jurisprudence, he is entitled to legal notice and trial of the issue whether he is a stockholder before he can be charged with personal liability as such; and personal service of the notice within the jurisdiction of the court is essential to support an order or judgment ascertaining and establishing such liability, unless he has voluntarily appeared, or otherwise waived his right to such service, which he has not done in this case." This decision is cited with approval in the recent case of *Whitman v. Oxford Nat. Bank*, 176 U. S., 559.

Hancock Nat. Bank v. Farnum, 176 U. S., 640, was an action brought in Rhode Island upon a judgment recovered by a creditor of the Commonwealth Loan & Trust Company, an insolvent corporation, in the state of Kansas. The declaration pleaded the judgment and charged that the defendant was a stockholder in the loan and trust company. The court held that a cause of action was stated, and that the decision of the circuit court of the United States for the district of Kansas was conclusive upon shareholders of the corporation; but that it was not considered as an adjudication of the fact of membership in the corporation clearly appears from the following extract from the opinion of Mr. Justice Brewer: "We do not mean that it [the judgment] is conclusive as against any individual sued as a stockholder that he is one, or if one, that he has not already discharged by payment to some other creditor of the corporation the full measure of his liability, or that he has not claims against the corporation, or judgments against it, which he may, in law or equity, as any debtor, whether by judgment or otherwise, set off against a claim or judgment, but in other respects it is an adjudication binding him."

In our opinion, the rule to be deduced from the cases referred to, and from a large number of other cases which have been examined, is that an assessment made by a court upon the stockholders of an insolvent corporation is a conclusive judicial determination only to the extent that it ascertains the amount of corporate assets and liabilities and declares the necessity for making the assessment ordered. *Great Western Telegraph Co. v. Purdy*, 162 U. S., 329; *Howarth v. Angle*, 162 N. Y., 179; *Howarth v. Lombard*, 175 Mass., 570; *Wilson v. St. Louis & S. F. R. Co.*, 108 Mo., 588; *Langworthy v. Garding*, 74 Minn., 325; *Ball v. Reese*, 58 Kan., 614; *Pennoyer v. Neff*, 95 U. S., 714, 723. This, as we understand it, is the doctrine of *Howarth v. Lombard, supra*, upon which plaintiff mainly relies. In the course of the opinion Knowlton, J., after stating that stockholders are bound by a decision fixing the amount

necessary to be raised by assessment, goes on to say: "Of course the defendant may show if he can that he is not a stockholder of this bank, or not a stockholder for so large an amount as alleged, or may make any other defense that is personal to himself. But we are of opinion that, as a member of the corporation, he is bound by the decision of the court of the state where the corporation was organized, made in administering its affairs in insolvency and determining the amount of its assets and liabilities and the amount of the assessment which should be made upon the stockholders."

The record of the Massachusetts court is entitled to full faith and credit only so far as jurisdiction appears or may be presumed. If the defendant was not before the court as the result of a voluntary appearance, or the service of lawful process, its relation to the corporation has not been judicially determined and is still an open question. The plaintiff might have stated a cause of action by alleging that defendant was one of its shareholders at the time the liabilities were incurred for which the assessments were made, but this it did not do. And it might have made a case by simply pleading the action of the court and relying on the presumption of jurisdiction which ordinarily results from the rendition of a judgment by a superior court, but this it also failed to do. It not only pleaded the decrees of the court, but went farther and alleged facts showing the method by which it is claimed jurisdiction of the defendant was obtained. The matters pleaded, however, disprove jurisdiction and show that the fact of membership has not been adjudicated. Our conclusion is that jurisdiction of the insurance company did not confer upon the Massachusetts court authority to render a personal judgment against Hayden Bros., and that to the extent it assumed to do so its action was void.

The judgment heretofore rendered in this court is set aside and the judgment of the district court is

AFFIRMED.