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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1901.

VOLUME LXII.

LEE HERDMAN,

OFFICIAL REPORTER.

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By Lee Herdman, Reporter of the Supreme Court,
In behalf of the people of Nebraska.

SUPREME COURT OF NEBRASKA

DURING THE

PERIOD AND PREPARATION OF THIS REPORT

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JOHN S. STULL.....Auburn

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PAUL JESSEN.....Nebraska City

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EDWARD P. HOLMES.....Lincoln

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GEORGE W. STUBBS.....Superior

Eighth District—

GUY T. GRAVES.....Pender

Ninth District—

JAMES F. BOYD.....Neligh

* Appointed territorial judge for New Mexico by President Roosevelt.

† Succeeded Benjamin S. Baker by appointment of Governor Savage, on recommendation of the bar.

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ED L. ADAMS.....Minden

Eleventh District—
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JOHN R. THOMPSON.....Grand Island

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

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Fourteenth District—
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Fifteenth District—
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WILLIAM H. WESTOVER.....Rushville

*Appointed by Governor Savage to succeed Charles A. Munn, deceased, July 1, 1901, and elected to succeed himself November 6, 1901.

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REPORTER'S NOTES.

A table of statutes and constitutional provisions cited and construed can be found numerically arranged on pages lxix to lxxiv.

It is proper to note a departure from the former method in the arrangement of the lists of cases reported, cited and overruled. In these lists, which may be found on pages ix to xxiii, pages xxv to xlvii, pages xlix to lxviii, respectively, words beginning "M'," "Mc," "O'," "St.," "Van," "De," etc., have been arranged phonetically, that is to say, as though spelled out in full, viz., "Mac," "Saint," etc. This is not the method pursued in the city directories, with the single exception of Toronto, Ontario, but it is the method which has been adopted by the Century Dictionary, the Standard Dictionary, the Encyclopædia Britannica and the American Cyclopædia. The usage of law reporters is divided.

It is proper to note, also, some departure in punctuation from the usage of former reporters: (1.) When a simple sentence is a long one, or when the subject nominative is accompanied by an inseparable adjunct, a comma is inserted before the verb. This rule has the support of Goold Brown and Bullions. It is condemned by Wilson, Teall and Noble Butler. Wilson lays down the sweeping rule that no comma is admissible between the subject nominative and its predicate. (2.) In a series of words, all of the same part of speech, a comma is inserted in place of a conjunction omitted, but never when the conjunction is used.

In the present volume the word "centre" has been uniformly spelled with an e-final. This method has been followed because it is the usage of writers of permanent English literature, *e. g.*, James G. Blaine and Mark Twain. "Can not" is treated as two words. "Employee" has been substituted for the French word "employé." This last change has been made (1) to avoid the annoyance of a French pronunciation, (2) to make the word correspond with payee, assignee and other familiar forms, (3) because employé, being a noun of the masculine gender, can not properly be applied to a female, and some other word would have to be substituted in such cases. The spelling of this word with a double e-final has been adopted by the reporter of the supreme court of Massachusetts.

James M. Woolworth edited the first two volumes of the Nebraska Reports. Lorenzo Crounse the third volume. Guy A. Brown edited volumes 4 to 25, inclusive. Charles S. Lobingier edited volumes 26 to 34, inclusive. William B. Rose edited volumes 35 to 58, inclusive. Among their respective methods of indexing a marked difference will

be observed. Mr. Lobingier divided his matter into a greater variety of subjects than Mr. Rose. The method of Mr. Rose has been more nearly followed, not because it is the best, but because it is the most in vogue. It will be noticed that "Judicial Sale" is a mere cross-reference to "Execution" in the index. This is on the authority of *Burkett v. Clarke*, 46 Nebr., 466, 467, paragraph 2 of syllabus.

In preparing the list of overruled cases, a total revision has been attempted. The magnitude of the task was not appreciated until it was well under way. Pride of purpose was the spur to its completion. That it is open to just criticsm, goes without saying. It is the work of the reporter, who will have to bear the blame for its imperfections. The classification of cases under the heads "Expressly Partially Overruled," "Compare," etc., was made, not only as a convenience to the bar, but as an act of justice to the bench. Even where the case of A v. B is in apparent conflict with the case of C v. D; and in the subsequent case of E v. F, the writer of the opinion does not *in hæc verba* overrule A v. B, but says that it is overruled by C v. D, A v. B should not, except in an extreme instance, be placed in the list of cases overruled. In the present list such cases have been collated under the subhead "Compare."

A few instances of head-lines of paragraphs to syllabi will appear in this volume. But this method will be practically abandoned hereafter. The catch-word will be substituted for the head-line. (See Reporter's Notes to Volume 61.) There is too much danger of the head-line, which is the work of the reporter, being mistaken for an authoritative statement by the court.

Attention is called to the preliminary notes on pages 123 and 214, also to foot-notes on pages 30, 126, 136, 180, 207, 222, 269, 371, 427, 445, 461, 493, 520 and 805.

Acknowledgments are due Commissioner Pound, Hon. Robert Ryan, Prof. Frank Irvine of Cornell and Hiland H. Wheeler, for valuable suggestions as to the editing of the 59th, 60th, 61st and 62d volumes of these reports.

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NOTE.—The insertion in the following list of a case from another state would necessitate a change in the foregoing 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., 175. 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, sec. 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., 672, overruling paragraph 3 in *Hallenbeck v. Hahn*, 2 Nebr., 377, *Coffield v. State*, 44 Nebr., 417, 423 and *Forrester v. Kearney Nat. Bank*, 49 Nebr., 655, 663. *Morgan v. State* is upheld in *Rhea v. State*, 63 Nebr., —., opinion by HOLCOMB, J. The Ohio decision is mentioned with disapproval in a dictum by the Oregon supreme court; opinion by Kelly, C. J., *State v. Brown*, 7 Ore., 186, 197.—REPORTER.

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Omaha Consolidated Vinegar Co. v. Burns, 49 Nebr., 229.

Mechanic's lien for sinking well.

Omaha & R. V. R. Co. v. Wright, 47 Nebr., 886.

Omaha & R. V. R. Co. v. Wright, 49 Nebr., 456, 457.

Pleading negligence.

Osborne v. Canfield, 33 Nebr., 330.

Moline v. Curtis, 38 Nebr., 520, 534.

Bill of exceptions on review of attachment proceeding in county court.

Pacific Express Co. v. Cornell, 59 Nebr., 364.

Nebraska Telephone Co. v. Cornell, 59 Nebr., 737.

Maximum rate law.

Richards v. State, 22 Nebr., 145.

Horbach v. City of Omaha, 49 Nebr., 851.

Latter case reaffirmed in Matthews v. Mulford, 53 Nebr., 252, 253.

Extension of time for filing bill of exceptions.

Richardson v. Campbell, 34 Nebr., 181.

Havemeyer v. Paul, 45 Nebr., 373, 374.

Latter decision reaffirmed in Omaha Loan & Trust Co. v. Hansen, 46 Nebr., 870, and in Connecticut Mutual Life Ins. Co. v. Westerhoff, 58 Nebr., 379, 383.

Contract rate of interest after maturity.

Russell v. Rosenbaugh, 24 Nebr., 769.

Aultman v. Martin, 49 Nebr., 103.

Separate assignments of error in the giving of instructions.

Schields v. Horbach, 40 Nebr., 103.
State v. Scott, 53 Nebr., 571, 572.
Amendment of bill of exceptions. Time to present for allowance. Notice.

Scott v. Flowers, 60 Nebr., 675.
Scott v. Flowers, 61 Nebr., 620.
State industrial school. Constitutionality of statute. Constitutional portion stands notwithstanding the defect.

State v. Sioux City & P. R. Co., 7 Nebr., 357.
Foree v. Stubbs, 41 Nebr., 271.
Latter case reaffirmed in Hall v. Hooper, 47 Nebr., 111, 118.
Right to maintain action to quiet title defined.

Strader v. White, 2 Nebr., 348.
Gibson v. Smith, 31 Nebr., 335.
Waggoner v. First Nat. Bank of Creighton, 43 Nebr., 84, 94, 95.
Liability for partnership debts.

Stutzner v. Printz, 43 Nebr., 306.
Herman v. Hayes, 58 Nebr., 54.
Discharge of attachment after judgment.

Thomas v. Markmann, 43 Nebr., 823.
Barker v. Wheeler, 60 Nebr., 470, 471.
Judgment of court having jurisdiction against an officer does not conclude his bondsmen, but is only prima facie evidence.

Walker v. Turner, 27 Nebr., 103.
City of Omaha v. Richards, 49 Nebr., 244, 245.
Specific exceptions to instructions.

Weaver v. Cressman, 21 Nebr., 675.
Anheuser-Busch Brewing Ass'n v. Hier, 52 Nebr., 424.
Funds in hands of clerk of district court not subject to garnishment. Action in equity.

Westcott v. Archer, 12 Nebr., 345.
Grebe v. Jones, 15 Nebr., 312, 317.
Latter case reaffirmed in Darnell v. Mack, 46 Nebr., 740
Attachment. Levy. Jurisdiction.

White v. State, 28 Nebr., 341.
Coffield v. State, 44 Nebr., 417.
Filing information without preliminary hearing.

Whitman v. State, 42 Nebr., 841.
Metz v. State, 46 Nebr., 547, 556.
Burglary. Presumption. Possession of stolen property.

Wilson v. Mecklin, 7 Nebr., 50.
Muller v. Plue, 45 Nebr., 701, 702.
Writ of replevin against officer holding goods under execution issued on void judgment.

Winslow v. State, 26 Nebr., 308, 312.
Leisenberg v. State, 60 Nebr., 628, 629.
Allegation of the particular hour of the night in an indictment for burglary.

Woodruff v. White, 25 Nebr., 745.
Stevens v. Carsons, 30 Nebr., 544, 551.
Good faith of transaction between husband and wife.

PARTIALLY (NOT EXPRESSLY) OVERRULED.

Chicago, B. & Q. R. Co. v. Cass County, 51 Nebr., 369.
James v. Higginbotham, 60 Nebr., 203.
Latter case reaffirmed in Gandy v. Cummins, 63 Nebr., ..., and Achenbach v. Pollock, 63 Nebr., ...
Assignment in petition in error that court erred in overruling motion for new trial.

Coffield v. State, 44 Nebr., 417, 419.
Forrester v. Kearney Nat. Bank, 49 Nebr., 655.
Morgan v. State, 51 Nebr., 672, 693.
See note at the head of this list of cases.

Crowell v. Johnson, 2 Nebr., 146.
Wescott v. Archer, 12 Nebr., 345.
Attachment. Jurisdiction.

Eiseman v. Gallagher, 24 Nebr., 79.
Brewster v. Bank of Ainsworth, 43 Nebr., 79.
[Eiseman v. Gallagher approved in a dictum in Frenzer v. Richards, 60 Nebr., 131.]
Usury. Defense. Affirmative relief. Rule of equity.

Forrester v. Kearney Nat. Bank, 49 Nebr., 655.
See Coffield v. State, *supra*.

Hallenbeck v. Hahn, 2 Nebr., 377.
Johnson v. Hahn, 4 Nebr., 139.
Enjoining the collection of taxes.

Morgan v. State, 51 Nebr., 672.
See note at head of this list of cases.

Hurley v. Estes, 6 Nebr., 386.
Hale v. Christy, 8 Nebr., 264.
Limitation of mortgage foreclosure.

Kane v. Union P. R. Co., 5 Nebr., 105.
Hurlburt v. Palmer, 39 Nebr., 158.
Anheuser-Busch Brewing Ass'n v. Peterson, 41 Nebr., 897.
Herbert v. Wortendyke, 49 Nebr., 182, 185.

Defective service. General appearance. Waiver of objection setting up want of personal jurisdiction in answer.

Kountze v. Scott, 49 Nebr., 258.
McCord v. Bowen, 51 Nebr., 247, 251.

Motion to dissolve attachment. Right of defendant who does not own property.

Kyger v. Ryley, 2 Nebr., 20.
Hale v. Christy, 8 Nebr., 264.

Limitation of mortgage foreclosure.

Morrissey v. Schindler, 18 Nebr., 672.
Herron v. Cole Bros., 25 Nebr., 692.

The discrepancy in the two preceding cases pointed out and the latter held to overrule the former in Hanna v. Emerson, 45 Nebr., 708, 709.

Right to bring action in county where one of the defendants resides.

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

Limitation of mortgage foreclosure.

OVERRULED ON A POINT NOT DISCUSSED IN FORMER OPINION.

Shiverick v. Gunning, 58 Nebr., 29.
Shiverick v. Gunning, 59 Nebr., 73.

Instructions as to matters not in evidence.

MODIFIED.

Boyer v. Clark, 3 Nebr., 161.
Raymond Bros. v. Green, 12 Nebr., 215, 220.

Set-off. Unliquidated damages.

Hiatt v. Brooks, 17 Nebr., 32.
City of Hastings v. Foxworthy, 45 Nebr., 676, 682.

Law of the case.

Jefferson County v. Saxon, 10 Nebr., 14.
Schuyler v. Hanna, 28 Nebr., 601.

Practice. Appeal. Transcript.

Mathews v. Toogood, 23 Nebr., 536.
Mathews v. Toogood, 25 Nebr., 99.

Interest-bearing coupons. Aggregate interest of principal debt and coupons must not exceed ten per cent.

Miller v. Waite, 59 Nebr., 319.
Miller v. Waite, 60 Nebr., 431.
Voluntary assignment. Partnership property.

Plummer, Perry & Co. v. Rohman, 61 Nebr., 61.
Plummer, Perry & Co. v. Rohman, 62 Nebr., 145.
Plea of estoppel.

Real v. Hollister, 17 Nebr., 661.
Real v. Hollister, 20 Nebr., 112.
Eviction before action on covenant.

Romberg v. Hughes, 18 Nebr., 579.
Romberg v. Hughes, 62 Nebr., 254, 263.
Damages in replevin.

Scott v. Flowers, 60 Nebr., 675.
Scott v. Flowers, 61 Nebr., 620.
State Industrial School.

OVERRULED IN TOTO.

Allis v. Newman, 29 Nebr., 207.
Stull v. Cass County, 51 Nebr., 760.
Bill of exceptions. Mistake. Loss. Failure to file in time.

Arlington State Bank v. Paulsen, 57 Nebr., 717.
Arlington State Bank v. Paulsen, 59 Nebr., 94.
Review of questions not litigated below.

Banghart v. Lamb, 34 Nebr., 535.
Selby v. McQuillan, 45 Nebr., 512.
Judgment against sureties on appeal bond.

Barker v. Wheeler, 60 Nebr., 470.
Barker v. Wheeler, 62 Nebr., 150.
General denial. Proof of payment.

Bartlett v. Bartlett, 13 Nebr., 456.
Bartlett v. Bartlett, 15 Nebr., 593.
Husband and wife. Equitable title to real property.

Bennet v. Fooks, 1 Nebr., 465.
Galway v. Malchow, 7 Nebr., 285.
Mansfield v. Gregory, 8 Nebr., 432.
Harral v. Gray, 10 Nebr., 186.
Mansfield v. Gregory, 11 Nebr., 297.
Hubbart v. Walker, 19 Nebr., 94.
Galway v. Malchow reaffirmed in Sheasley v. Keens, 48 Nebr., 57, 59.
Purchaser at sheriff's sale. Prior lien.

Bonns v. Carter, 20 Nebr., 566, 22 Nebr., 495.
Jones v. Loree, 37 Nebr., 816.
Kilpatrick-Koch Dry Goods Co. v. Bremers, 44 Nebr., 863, 866.

Last two cases reaffirmed in Grand Island Banking Co. v. Costello, 45 Nebr., 119, 140, and Goldsmith v. Erickson, 48 Nebr., 48.

No presumption of fraud because the property transferred was all the vendor owned.

Bressler v. County of Wayne, 25 Nebr., 468.
County of Wayne v. Bressler, 32 Nebr., 818.

Taxation of national bank stock. Deduction of debts.

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

Railroad company's liability for damages where line is not fenced.

Cass County v. Chicago, B. & Q. R. Co., 25 Nebr., 348.
Chicago, B. & Q. R. Co. v. Richardson County, 61 Nebr., 519.

Railroad bridge across navigable river assessable by state board.

Cedar County v. Jenal, 14 Nebr., 254.
State v. Hill, 47 Nebr., 456.
Bush v. Johnson County, 48 Nebr., 1.
Bartley v. State, 53 Nebr., 310, 337.

Payment by county treasurer to his successor without manual delivery of legal tender, viz., with deposits in a bank.

Coy v. Jones, 30 Nebr., 798.
Globe Publishing Co. v. State Bank of Nebr., 41 Nebr., 175, 176.

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

Voluntary assignment.

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

Taxation of land purchased from the government before issuance of patent.

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

Negotiable paper. Legal holiday. Presentment and protest. Common law not abrogated by statute.

First Nat. Bank of South Bend v. Gandy, 11 Nebr., 431, 433.
Mackintosh v. Johnson, 51 Nebr., 33, 34.

Public funds. Garnishment.

Godman v. Converse, 38 Nebr., 657.
Godman v. Converse, 43 Nebr., 463.
Administration of estates. Allowance to widow. Acceptance of conditional will.

Horn v. Miller, 20 Nebr., 98.
Bickler v. Dutcher, 35 Nebr., 761.
Latter case reaffirmed in Continential Building & Loan Ass'n v. Mills, 44 Nebr., 136, 142.
Taking appeal. Limitation of time.

Howell v. Roberts, 29 Nebr., 483.
Globe Publishing Co. v. State Bank of Nebr., 41 Nebr., 175, 176.
Liability of stockholder in corporation.

Landauer v. Mack, 39 Nebr., 8.
Landauer v. Mack, 43 Nebr., 430.
Attachment. Levy on mortgaged chattels. Burden of proof.

McDonald v. Bowman, 35 Nebr., 93.
McDonald v. Bowman, 40 Nebr., 269.
Chattel mortgage. Attachment. Replevin by mortgagee.

Mathis v. Pitman, 32 Nebr., 191.
Wallace v. Sheldon, 56 Nebr., 55, 59.
Taxing of costs and attorneys' fees, in a will contest, against the estate.

Morehead v. Adams, 18 Nebr., 569.
Scott v. Overall, 50 Nebr., 144.
Construction of statutes relative to settling a bill of exceptions.

Morgan v. State, 48 Nebr., 798.
State v. Cornell, 50 Nebr., 526.
Compensation of stenographer.

Nebraska Telephone Co. v. Cornell, 58 Nebr., 823.
Pacific Express Co. v. Cornell, 59 Nebr., 364.
Construction of petition in injunction.

Nebraska Telephone Co. v. Jones, 59 Nebr., 510.
Nebraska Telephone Co. v. Jones, 60 Nebr., 396.
Contributory negligence. Directing verdict.

Nicholls v. Barnes, 32 Nebr., 195.
Nicholls v. Barnes, 39 Nebr., 103.
Landlord and tenant. Possession by tenant under written lease unilaterally executed tantamount to occupying under oral lease.

Omaha & R. V. R. Co. v. Clark, 35 Nebr., 867.
Omaha & R. V. R. Co. v. Clarke, 39 Nebr., 65,
Question of fact,

Pickens v. Plattsmouth Land Co., 31 Nebr., 585.
Pickens v. Plattsmouth Investment Co., 37 Nebr., 272.
Mechanic's lien. Question of fact.

Phillips v. Bishop, 31 Nebr., 853.
Phillips v. Bishop, 35 Nebr., 487.
The latter case overruled the former, on a question of fact and not of law.

Rice v. Gibbs, 33 Nebr., 460.
Rice v. Gibbs, 40 Nebr., 264, 265.
Assignability of a contract of option for a sale of real estate.

Rittenhouse v. Bigelow, 38 Nebr., 543.
Rittenhouse v. Bigelow, 38 Nebr., 547.
Cities of the first class. Equalization of taxes by township.

St. Joseph & D. R. Co. v. Baldwin, 7 Nebr., 247.
Railroad Co. v. Baldwin, 103 U. S., 426.
Government grant of land to railroad company.
The latter case overruled the former on a question of fact and not of law.

Sandwich Mfg. Co. v. Feary, 34 Nebr., 411.
Sandwich Mfg. Co. v. Feary, 40 Nebr., 226.
Harvesting machine. Sale. Contract. Warranty.

Scott v. Overall, 50 Nebr., 144.
Williams v. Miles, 62 Nebr., 566.
Construction of statute relative to settling bill of exceptions. See Morehead v. Adams, *supra*.

Scott v. Waldeck, 11 Nebr., 525.
Jones v. Wolfe, 42 Nebr., 272.
City Nat. Bank of Hastings v. Thomas, 46 Nebr., 861.
State v. Ambrose, 47 Nebr., 235, 241.
Use of quashed bill of exceptions.

Shawang v. Love, 15 Nebr., 142.
Hurlburt v. Palmer, 39 Nebr., 158, 159.
Latter case reaffirmed in Mayer v. Nelson, 54 Nebr., 434.
Waiver of defects in process by appeal or error.

Shellenberger v. Ransom, 31 Nebr., 61.
Shellenberger v. Ransom, 41 Nebr., 631.
Latter case reaffirmed in Veeder v. McKinley-Lanning Loan & Trust Co., 61 Nebr., 892, 912.
Descent in case of murder of ancestor by heir.

Smith v. Boyer, 29 Nebr., 76.
Smith v. Boyer, 35 Nebr., 46.
The latter case overruled the former by the established rule that where evidence is fairly conflicting the finding or verdict of the nisi-prius court will not be disturbed, the court applying this rule to an order discharging an attachment.

Sonnenschein v. Bartels, 37 Nebr., 592.
Sonnenschein v. Bartels, 41 Nebr., 703.
Fraudulent conveyance.

Stanwood v. City of Omaha, 38 Nebr., 552.
Stanwood v. City of Omaha, 42 Nebr., 303.
Rule as to conflicting evidence applied.

State v. Keim, 8 Nebr., 63.
Farmers & Merchants Banking Co. v. City of Red Cloud, 62 Nebr., 442.
Garnisheeing public money.

State v. Missouri P. R. Co., 29 Nebr., 550.
Missouri P. R. Co. v. Nebraska, 164 U. S., 403, 17 Sup. Ct. Rep., 130.
Latter case reaffirmed in Chicago, B. & Q. R. Co. v. State, 50 Nebr., 399.
Grain elevator case. The taking by a state of the private property of a person or a corporation without the owner's consent for the use of another.

State v. Roper, 46 Nebr., 724.
State v. Roper, 47 Nebr., 417.
Relocation of county seat.

State v. Seavy, 22 Nebr., 454.
State v. Moores, 55 Nebr., 480.
Municipal corporation. Local self-government.

Stewart-Chute Lumber Co. v. Missouri P. R. Co., 28 Nebr., 39.
Stewart-Chute Lumber Co. v. Missouri P. R. Co., 33 Nebr., 29.
Railroad. Mechanic's lien. Material-man.

Svanson v. City of Omaha, 38 Nebr., 550.
Svanson v. City of Omaha, 42 Nebr., 303.
Sufficiency of evidence.

Thomas v. Edgerton, 36 Nebr., 254.
Thomas v. Edgerton, 40 Nebr., 25, 26.
Liability of officer for sufficiency of sureties on replevin bond.

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

Commercial paper. Restrictive indorsement.

COMPARE.

Atchison & N. R. Co. v. Baty, 6 Nebr., 37.
Graham v. Kibble, 9 Nebr., 182.

The former case held a part of a statute which gave double value in damages void. The latter case held the fifty-dollar penalty for illegal fees constitutional.

Becker v. Anderson, 11 Nebr., 493, 496.
Marsh v. Burley, 13 Nebr., 261, 264.
Housel v. Cremer, 13 Nebr., 298.
Lancaster County v. Gillilan, 49 Nebr., 165, 180.

In the first of the foregoing cases, it was stated [dictum] that the filing and recording of a chattel mortgage was equivalent to a change of possession of the property. In the second case, the writer of the former opinion retracts the statement. In the first case, it was held that, where a chattel mortgage was void as to creditors, the mortgaged property was assets in the hands of the executor of the mortgagor. The third and fourth cases appear to be in almost direct conflict with this doctrine, and in the fourth case the opinion in the first, as to this point, is analytically criticised.

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

Execution. Homestead. Confirmation of sale.
The last decision says that the second overruled the first.

Bradshaw v. City of Omaha, 1 Nebr., 16.
Turner v. Althaus, 6 Nebr., 54, 77.

Taxation of vacant and farm lands within city limits.

Bryant v. Estabrook, 16 Nebr., 217.
Schoenheit v. Nelson, 16 Nebr., 235, 238.
Holmes v. Andrews, 16 Nebr., 296.
Otoe County v. Brown, 16 Nebr., 394, 397.
McClure v. Warren, 16 Nebr., 447.
D'Gette v. Sheldon, 27 Nebr., 829.
Alexander v. Wilcox, 30 Nebr., 793.
Warren v. Demary, 33 Nebr., 327.
Fuller v. Colfax County, 33 Nebr., 716.
Black v. Leonard, 33 Nebr., 745.
Alexander v. Thacker, 43 Nebr., 494, 497.

Foreclosure of tax lien. When does the five-year limit begin to run?

In the opinion in the last case cited NORVAL, C. J., makes an exhaustive review of the decisions on this point.

Commercial Nat. Bank v. Nebraska State Bank, 33 Nebr., 292.

Lancaster County v. Gillilan, 49 Nebr., 165, 178.

Assignment for benefit of creditors. Title of assignee.

The opinion in the latter case, by IRVINE, C., contains an exhaustive summary. The decisions which he cites are cited elsewhere in this table.

Dawson v. Merrille, 2 Nebr., 119.

Simmons v. Yurann, 11 Nebr., 516.

Carkins v. Anderson, 21 Nebr., 364, 368.

Carkins v. Anderson, 135 U. S., 483.

Public lands. Improvements.

Entry of land under United States laws. Agreement by entryman to convey after he shall have acquired title. Public policy.

The third case in the foregoing series states that the second overrules the first. But the fourth case in such series reverses the third.

Filley v. Duncan, 1 Nebr., 134.

Colt v. Du Bois, 7 Nebr., 391, 394.

In the opinion in the former case CROUNSE, J., says that the lien of a judgment does not attach to lands acquired after its rendition, so as to affect bona-fide purchasers, until levy of execution. In the latter opinion, GANTT, C. J., says that question was not before the court in the former case, and then proceeds to lay down the opposite rule.

Grimes v. Farrington, 19 Nebr., 44.

Bonns v. Carter, 20 Nebr., 566.

Hershiser v. Hingman, 31 Nebr., 531.

Hamilton v. Isaacs, 34 Nebr., 709, 713, 714, 716.

Jones v. Loree, 37 Nebr., 816.

Kilpatrick-Koch Dry Goods Co. v. Bremers, 44 Nebr., 863.

Assignment for the benefit of creditors.

The sixth opinion in the foregoing series contains a learned discussion by IRVINE, C.

Hagenbuch v. Reed, 3 Nebr., 17.

Washington County v. Fletcher, 12 Nebr., 356, 359.

Graff v. Ackerman, 38 Nebr., 720, 724.

Taxation of school lands where the state has not parted with the title.

Handy v. Brong, 4 Nebr., 60, 64.

Buckmaster v. McElroy, 20 Nebr., 557, 564.

In the former opinion GANTT, J., appears to lay down the rule that statutes in derogation of the common law are to be strictly construed. In the latter, COBB, J., lays down the opposite rule. The first section of the Code of Civil Procedure would appear to settle the question as to that Code.

Hill v. Palmer, 32 Nebr., 632.

Reynolds v. Fisher, 43 Nebr., 172, 173.

Farmers Loan & Trust Co. v. Memminger, 48 Nebr., 17.

Lien upon personal property for taxes.

Howell v. Hathaway, 28 Nebr., 807.

Rust-Owen Lumber Co. v. Holt, 60 Nebr., 80.

Mechanic's lien for material furnished to husband for improvements upon wife's property with her knowledge.

Insurance Co. of North America v. Bachler, 44 Nebr., 549.

Hartford Fire Ins. Co. v. Corey, 53 Nebr., 209, 213.

Recovery of attorney fees in action on insurance policy.

Johnson v. Jones, 2 Nebr., 126.

Holliday v. Brown, 33 Nebr., 657, 34 Nebr., 232.

Wilson v. Shipman, 34 Nebr., 573.

Campbell Printing Press & Mfg. Co. v. Marder, 50 Nebr., 283, 287.

Impeachment of officer's return.

McCord, Brady & Co. v. Krause, 36 Nebr., 764.

Kilpatrick-Koch Dry Goods Co. v. Bremers, 44 Nebr., 863.

Attachment. Chattel mortgage.

Merriam v. Goodlett, 36 Nebr., 384.

Brown v. Ulrich, 48 Nebr., 409, 413.

Specific performance. Default in payment. Essence of contract. Waiver.

The writer of the opinion in the latter case says that the point in question was not necessary to a decision of the former; yet he makes a conditional overruling *in hæc verba*.

Minneapolis Harvester Works v. Hedges, 11 Nebr., 46, 48.

O'Leary v. Iskey, 12 Nebr., 136, 137.

Creighton v. Keith, 50 Nebr., 810, 814.

Jenkins v. State, 60 Nebr., 205.

Effect of appeal as to vacating judgment.

Morse v. Engle, 28 Nebr., 534.

Holliday v. Brown, 34 Nebr., 232, 234.

Radzuweit v. Watkins, 53 Nebr., 412, 416.

Service of summons in the alternative manner.

Morse v. Steinrod, 29 Nebr., 108.
Brown v. Work, 30 Nebr., 800.
Thompson v. Richardson Drug Co., 33 Nebr., 714.
Lininger v. Raymond, 12 Nebr., 19.
Nelson v. Garey, 15 Nebr., 531.
Bierbower v. Polk, 17 Nebr., 268.
Grimes v. Farrington, 19 Nebr., 44, 48.
Costello v. Chamberlain, 36 Nebr., 45.
Kavanaugh v. Oberfelder, 37 Nebr., 647.
Farwell v. Wright, 38 Nebr., 445.
Sherwin v. Gaghagen, 39 Nebr., 238.
Hewitt v. Commercial Nat. Bank, 40 Nebr., 820.

Preferring a creditor. Fraudulent conveyance.

Patrick v. Leach, 8 Nebr., 530, 538.
Search v. Miller, 9 Nebr., 26, 27, 30.
Kopplekom v. Huffman, 12 Nebr., 95.
Altschuler v. Algaza, 16 Nebr., 631.
Dunbar v. Briggs, 18 Nebr., 94, 97.
Stevens v. Carson, 30 Nebr., 544, 550.
Wylie v. Charlton, 43 Nebr., 840.
Veeder v. McKinley-Lanning Loan & Trust Co., 61 Nebr., 892.
Doane v. Dunham, 63 Nebr. —.

Preponderance of evidence.

In *Search v. Miller* MAXWELL, J., says: "The court also erred in instructing the jury that a 'clear preponderance of the evidence was required to impeach the consideration.' In a civil action a preponderance of evidence is all that is required to sustain the claim of a party to the action."

In *Doane v. Dunham* POUND, C., says: "Parol evidence to establish a resulting trust, must be clear, unequivocal and convincing."

Pearson v. Kansas Mfg. Co., 14 Nebr., 211.
Barry v. Wachosky, 57 Nebr., 534, 537.

The former decision held in effect that where an action was commenced in one county against several defendants, and summons was issued to another bailiwick, the court retained its jurisdiction notwithstanding it developed that the defendant, whose presence gave the court jurisdiction, was improperly joined. The writer of the latter opinion says that the former opinion "is no longer regarded as sound, but has in effect long been overruled."

Peckinbaugh v. Quillin, 12 Nebr., 586.
Burnham v. Doolittle, 14 Nebr., 214, 216.

Attachment. Garnishment. Equity of redemption.

Ray v. Mason, 6 Nebr., 101.
Credit Foncier v. Rogers, 8 Nebr., 34.
Aultman v. Howe, 10 Nebr., 8.
Oliver v. Sheeley, 11 Nebr., 521.
Walker v. Lutz, 14 Nebr., 274.

Sides v. Brendlinger, 14 Nebr., 491.
Kyle v. Chase, 14 Nebr., 528.
Republican V. R. Co. v. Royse, 14 Nebr., 130, 132.
Donavan v. Sherwin, 16 Nebr., 129, 130.
Tessier v. Crowley, 16 Nebr., 369, 372.

Preserving affidavits in bill of exceptions. The last case repudiates what it claims was a dictum in the eighth opinion of this series.

Scott v. Waldeck, 11 Nebr., 525.
Donovan v. Sherwin, 16 Nebr., 129, 130.
City of Seward v. Klenk, 27 Nebr., 615, 30 Nebr., 775.
Jones v. Wolfe, 42 Nebr., 272.
City Nat. Bank of Hastings v. Thomas, 46 Nebr., 861, 863.

Use of bill of exceptions after the same has been quashed.

State v. Moore, 37 Nebr., 13.
Weis v. Ashley, 59 Nebr., 494.

The governor as part of the law-making body.

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

An obiter-dictum in the first opinion disapproved in the second. Plea in bar. Jury trial.

State v. Sanford, 12 Nebr., 425.
State v. Krumpus, 13 Nebr., 321.
Mann v. Welton, 21 Nebr., 541.
Hamilton v. Fleming, 26 Nebr., 240.
State v. Wilson, 31 Nebr., 462, 464.
Johnson v. Bartek, 56 Nebr., 422, 424.

Attachment. Exempt property.

The doctrine in Nebraska now is that the judgment of a court sustaining an attachment does not settle the status of the property attached as to its exemption.

Walker v. Morse, 33 Nebr., 650.
Moline v. Curtis, 38 Nebr., 520, 528.

Motion to quash bill of exceptions.

Wescott v. Archer, 12 Nebr., 345.
Grebe v. Jones, 15 Nebr., 312, 317.

The opinion in each of these cases was written by MAXWELL, J. The latter opinion, at the most, hardly more than modifies the former. In the latter case there is a vigorous dissenting opinion by LAKE, C. J.

Woods v. Shields, 1 Nebr., 454.
Kyger v. Ryley, 2 Nebr., 20, 27.

Strict foreclosure. Effect of statute.

NEGATIVED BY CONSTITUTION OF 1875.

Burlington & M. R. R. Co. v. Lancaster County, 4 Nebr., 293.

Land road tax valid under constitution of 1867.

McCann v. Merriam, 11 Nebr., 241.

Land road tax invalid under constitution of 1875.

City of Tecumseh v. Phillips, 5 Nebr., 305.

License money collected by towns and villages belongs to county.

City of Hastings v. Thorne, 8 Nebr., 160.

License money collected by a city or village belongs to such municipality.

NEGATIVED BY STATUTE.

Armstrong v. Mayer, 60 Nebr., 423.

Chapter 82, Laws of 1883, which attempted to amend section 1030 of the Code by grafting into the original section the right of appeal, is inimical to section 11, article 3, of the constitution.

House Roll No. 8, introduced by Loomis, of Dodge (Session Laws 1901, p. 484, ch. 85), provided for an appeal in forcible entry and detainer.

Aultman, Miller & Co. v. Mallory, 5 Nebr., 178.

A sale and delivery of goods on condition that the property is not to vest until the purchase-money is paid or secured, does not pass the title to the vendee until the condition is performed.

The legislature of 1877 enacted (Session Laws, p. 170) "that no sale, contract or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any purchaser or judgment creditor of the vendee or lessee, in actual possession, obtained in pursuance of such sale, contract or lease, without notice, unless the same be in writing, signed by the vendee or lessee, and a copy thereof filed in the office of the clerk of the county within which such lessee or vendee resides," etc.

Campbell Printing Press & Mfg. Co. v. Dyer, 46 Nebr., 830, 833, 835.

The statute of 1877 was in effect a legislative command that the decision in the *Aultman Case* should no longer be the law of this state so far as judgment and attaching creditors and purchasers without notice were concerned.

Brotherton v. Brotherton, 14 Nebr., 186.

Session Laws, 1883, p. 284, ch. 40.

Nygren v. Nygren, 42 Nebr., 408, 411.

Judgment for alimony as a lien on real estate.

Brunswick v. McClay, 7 Nebr., 137.

Session Laws, 1881, ch. 33.

Larabee v. Klosterman, 33 Nebr., 150, 156.

Assignment of error in motion for new trial.

Haller v. Blaco, 10 Nebr., 36.
Howard v. Lamaster, 11 Nebr., 582.
Thompson v. Merriam, 15 Nebr., 498.
Shelley v. Towle, 16 Nebr., 194.
General Statutes, 1873, p. 923, sec. 68.
Larson v. Dickey, 39 Nebr., 463.
Session Laws, 1879, p. 327, sec. 127.
Form of tax deed.

Hand v. Phillips, 18 Nebr., 593.
This was an action to foreclose a mortgage containing a stipulation for an attorney's fee. The mortgage was dated February 18, 1879. On February 24, 1879, the governor approved the act repealing the act of February 18, 1873, providing for stipulated attorney's fee. General Laws, 1873, p. 98. This repealing act took effect June 1, 1879.
Dow v. Updike, 11 Nebr., 95.
This was a suit on a note, providing for an attorney fee, dated June 20, 1879, twenty days after the repealing act went into effect. The opinion is to the effect that in the absence of a statute no recovery of a stipulated attorney's fee can be had.
Under the old law it was held that attorney fees must be taxed as costs and kept separate from the judgment. *Rich v. Stretch*, 4 Nebr., 186; *Hendrix v. Rieman*, 6 Nebr., 516; *Hand v. Bank*, 8 Nebr., 10; *Dow v. Updike*, 11 Nebr., 95.

Hardy v. Miller, 11 Nebr., 395. See Hand v. Phillips, *supra.*

Heard v. Dubuque County Bank, 8 Nebr., 10.
Session Laws, 1881, p. 212.
Larabee v. Klosterman, 33 Nebr., 150, 157.
Assignment of error in motion for new trial.

Hewerkle v. Gage County, 14 Nebr., 18.
Session Laws, 1885, ch. 106.
Liability of county for defendant's witness's fees where he is indicted for a felony.

Howard v. Lamaster, 11 Nebr., 582. See Haller v. Blaco, *supra.*

Johnson v. Hahn, 4 Nebr., 139.
Session Laws, 1877, p. 43.
Kittle v. Shervin, 11 Nebr., 65.
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Kemerer v. State, 7 Nebr., 130.
Session Laws, 1879, p. 366, sec. 40.
State v. Baushausen, 49 Nebr., 558.
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McCormick v. Keith, 8 Nebr., 142. See Heard v. Dubuque County, *supra.*

Merriam v. Rauen, 23 Nebr., 217.
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Midland P. R. Co. v. McCartney, 1 Nebr., 398. See Brunswick v. McClay, *supra*.

Moore v. Kepner, 7 Nebr., 291.
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Rich v. Stretch, 4 Nebr., 186.
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White v. Blum, 4 Nebr., 555, 558.
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Shelley v. Towle. See Haller v. Blaco, *supra*.

Thompson v. Merriam. See Haller v. Blaco, *supra*.

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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, } COMMISSIONERS.

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

OMAHA LOAN & TRUST COMPANY V. COUNTY OF DOUGLAS.

FILED JUNE 5, 1901. NO. 9,417.

1. **Action for Damages Against a County on Account of Official Dereliction Can Not Be Sustained Under Plaintiff's Theory.** Nominal damages are not recoverable in an action against a county for damages alleged to have been sustained by reason of the grading of a street adjacent to the property of the owner, on the theory that the board of county commissioners were guilty of a breach of official duty to the plaintiff in not serving

notice and having an assessment of damages sustained and special benefits received in the manner provided by statute.

2. **Competency of Expert With the Court, Only Patent Error Ground of Reversal.** The determination of the competency of witnesses to testify as to their opinion of the value of real estate, which is the subject of controversy, rests largely in the discretion of the trial court, and a ruling thereon will not be disturbed on review except when clearly erroneous as a matter of law.

3. **Irrelevant Instruction Properly Refused.** An instruction requested by one of the parties not based on the evidence nor pertinent to the issues to be decided by the jury is properly refused.

4. **Witness's Attention Must Be Called to Impeaching Testimony, and Same Must Be Duly Authenticated.** A written statement of a witness, inconsistent with and contradictory to his testimony, offered for the purpose of impeachment, is not admissible unless the witness's attention has been called thereto with reasonable certainty, nor until properly authenticated if not admitted by the witness.

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

McCoy & Olmsted, for plaintiff in error.

George W. Shields, contra.

HOLCOMB, J.

Plaintiff in error instituted an action against the defendant in error for the recovery of damages to real estate alleged to have been sustained by reason of grading down a street, on which the real estate abutted, in the town of Florence, in defendant county. From a verdict and judgment in favor of the county the plaintiff prosecutes error to secure a reversal thereof.

The grading was done under the provisions and authority of sections 1*a* to 1*d*, inclusive of chapter 78 of the Compiled Statutes, entitled "Roads." The sections referred to are a part of the laws of 1889, being chapter 8 of the Session Laws, entitled "An act to authorize the county board of any county in which a city of the metropolitan, or cities of the first class having over

twenty-five thousand inhabitants, is situated, to grade, pave, or otherwise improve roads leading thereto, and to assist such city in the improvement of such roads within the corporate limits as are extensions of roads leading thereto." At the time of the grading resulting in the alleged damages the plaintiff held a mortgage on the real estate affected, and before the commencement of the suit became the purchaser and legal owner thereof by proceedings brought for the foreclosure of the mortgage and sale of the mortgaged premises, the property failing to sell for enough to satisfy the debt.

It is conceded that no notice was given to the legal owner or the mortgagee at the time of, or prior to, the act of grading complained of. By paragraphs 9 and 10 of the petition it is averred:

"9. That no action whatever was taken by the defendant or board of commissioners for the assessment of the damages done to said property and suffered by the plaintiff as mortgagee thereof or as suffered by the holder of the legal title thereto, and that no effort has been made even at this date, on the part of said defendant or its board of commissioners to determine the amount of damage done to said premises by reason of the said grading of State street in front thereof, suffered by this plaintiff and by the holder of the legal title of said premises during said time.

"10. That neither the said defendant nor its board of commissioners ever caused personal or any notice to be served on this plaintiff of the defendant's intention to grade said State street and especially that part thereof in front of the aforesaid premises, although this plaintiff all the while had its chief office and its chief officers within the city of Omaha in said Douglas county; nor ever served or attempted to serve the said Hannah K. Kilborn with either personal or public notice of the defendant's intention to grade that part of said State street; and said board of commissioners of said defendant never gave this plaintiff or said Hannah K. Kilborn an

opportunity to be heard upon the question of grading said State street."

The damages claimed and the cause thereof are stated in the eleventh paragraph, as follows:

"11. * * * That the west half, or 330 feet of the north side of said block, has been left by said grading a perpendicular wall and all ingress from said street to the west half of said lot and all egress from said street to the west half of said lot to said street has thereby been wholly cut off and destroyed; that by reason of the grading of said State street in front of the aforesaid premises, the said defendant damaged and lessened the value of said premises in fully the net amount of $3,000 and that the plaintiff, because of its interest in said premises during the whole of the time of said grading, has been damaged thereby by the county of Douglas in the sum of $900.54 together with interest thereon at the rate of ten per cent. per annum from the twenty-first day of September, 1891, until paid."

The cause was submitted to the jury on instructions directing them to find from the evidence the actual damages sustained by the plaintiff, if any, and return a verdict accordingly.

It is now urged that the court erred in not authorizing a recovery of at least nominal damages, on the theory that the failure of the county commissioners to give the notice to property owners contemplated by the statute, providing for the mode of assessment of damages sustained or benefits received by reason of the proposed improvement, before the work of grading was engaged in, was an actionable wrong, giving to the plaintiff the right to recover, in any event, nominal damages, when it is found that no actual loss was suffered by reason of the grading complained of. We do not think the position of counsel tenable, or that a recovery is permissible, except for the actual damages sustained by reason of the grading of the highway. The petition is not framed, nor was the case tried, on the theory that the county

commissioners' failure to follow the provisions of the statute was a breach of official duty, for which an action in damages would lie. The damages alleged were not based on the failure to notify the plaintiff of the contemplated improvement and have an assessment of damages and special benefits contemplated by statute, but because the grading done on the street abutting its property impairs its value, for which it was entitled to be compensated in damages. While it is a rule held to in this and in many other jurisdictions that a breach of official duty to one suing for damages by reason thereof will ordinarily support a judgment for nominal damages, even though actual damages are not shown, the present case does not fall within the rule. No damages were sustained, nor are any pleaded by the plaintiff, by reason of the failure of the county commissioners to comply with the statute as to assessment of damages, and under the law he may recover all damages sustained, even though no notice be given. For the taking of or damage to his property he is entitled to be compensated to the extent of the loss suffered, regardless of the question of notice, which is a part of the special proceeding pointed out by statute in the assessment by county boards of damages and special benefits, and which must be taken before the board has jurisdiction to act; and if not followed, the injured party yet has his right, under the law, to any damages sustained. The plaintiff has lost no right nor suffered any injury that can not be fully protected or compensated for, even though the statutory notice be not given. Under the provisions of the constitution, compensation must be allowed for private property taken or damaged for public use. The action, primarily, is not one against the county commissioners or they and their bondsmen based on an alleged breach of official duty to the plaintiff, but against the county as a public or municipal organization because of a liability to respond in damages for any injury to plaintiff's property, by reason of grading the street for public use.

The rule as to the recovery of nominal damages can not, therefore, we hold, be invoked under the pleadings and the facts and circumstances of the case at bar. The instructions submitting to the jury the question for a recovery of actual damages, if any were found, are without error.

The plaintiff attempted to prove by its president the value of the land alleged to be damaged. The proposed testimony was excluded, on the ground that the witness had not shown himself qualified to testify as to its value. The witness had not shown himself familiar with the value of that particular tract of land, or with values generally in that vicinity. He says that at the time the loan was made he knew "what we thought the value was," and "it was sufficient to make a loan of $4,500." As to its value in May, 1891, when the grading was done, he says: "No, I could not say that I would place a value at that time." It was not error to exclude the proposed testimony. The witness had not shown himself sufficiently qualified. The plaintiff had abundant sources of establishing the value of the land without resorting to the testimony of one so unfamiliar with values in that vicinity as the witness whose testimony was rejected. It is claimed that he should be treated as the owner of the property and presumed to know its value, because he is the president of the corporation purchasing it at the foreclosure sale. He, as the president of the company, is not an owner of property belonging to the corporation in the sense of the word when applied to an individual owner. An officer of a corporation may have no greater personal knowledge of the value of its property than an entire stranger. The question would depend on the nature of his duties in relation to the corporation and his means of acquiring knowledge of the value of the property inquired about. In this case there is no presumption in his favor, as in the case of an individual owning property, and nothing to show that the witness's knowledge was such as qualified him to testify as to the value be-

cause of his knowledge of values generally in that vicinity. He may not, so far as the record discloses here, have been a stockholder in the corporation of which he was president. The relation of the witness to the property does not bring him within the rule of qualification to testify to the value of the land, as the owner, as stated in *Chicago, R. I. & P. R. Co. v. Buel,* 56 Nebr., 205, and kindred cases.

It is next contended that the court erred in permitting a witness for the defendant to testify as to the value of the property, because he had not shown himself qualified. The witness testified that he was dealing in real estate some, trading in real estate, buying and selling, etc., and was familiar with the value of property in Florence during the period covered by the acts out of which grew this controversy. He showed himself sufficiently qualified to express an opinion as to the value of the property involved. There must of necessity be lodged in the trial court some discretion in determining the competency of testimony in the nature of opinion-evidence, which will not be disturbed on review, except when clearly erroneous as a matter of law. Such is not the case regarding the objections to the rulings of the trial court in the case at bar.

On the cross-examination of a witness, after he had testified in chief that the graded street was 100 feet wide, it was elicited that the street as graded was but 82½ feet wide, having been narrowed at the time the grading was done. It was then attempted to be further shown on cross-examination that the adjacent property, including the plaintiff's, received the benefit of the portion vacated by reason of the street being narrowed. This character of testimony was objected to and excluded. It is now urged that the plaintiff was prejudiced by reason of the testimony which was admitted, most of which was without objection, and on a subject drawn out in the direct examination, and that the jury was at liberty to draw the inference that the property had been specially

benefited by reason of a part of the strip vacated being attached to the plaintiff's property, and allowed the benefit as an offset to the damages sustained by reason of the grading. There was no evidence admitted submitting this question to the jury. While it was apparently attempted, the proposed testimony, as to any benefit to the property accruing by reason of the vacation or narrowing of a part of the street, was excluded, and there was nothing before the jury to base any findings in this regard. The question was not presented by the pleadings, nor did the testimony admitted submit the matter to the consideration of the jury. The plaintiff's witness, having testified that the street was 100 feet wide, the defendant on cross-examination might properly show its true width, and this is as far as the testimony admitted extended. There was no error in its admission. The plaintiff tendered an instruction on the point, to the effect that the street had been narrowed by the authorities of the town of Florence, in the manner provided by law, and the jury should not consider the evidence as to the strip vacated when the street was narrowed, as a special benefit to the property which might be offset against any damages resulting from the grading which is complained of. The instruction was refused, and, we think, properly. The matter presented was not an issue before the jury. There was no testimony tending to show that any special benefit was derived by reason of the narrowing of the street to the adjacent property, nor was there any evidence as to how a part of the street had been vacated. The instruction was not based on the evidence, nor was it pertinent to the issues to be decided by the jury.

Complaint is made because of the exclusion by the court of a certain exhibit offered by the plaintiff, in the nature of impeaching evidence of a witness who had testified for the defendant as to the value of the property claimed to be damaged. The exhibit offered for the purpose of impeachment purported to be an official ap-

praisal of the same property, made by the witness and others in a sale made in the foreclosure of the plaintiff's mortgage lien thereon, and through which it acquired legal title to the land. The defendant objected to the offer, as being incompetent, irrelevant, immaterial, no foundation having been laid for it, the witness's attention not having been called to the exhibit. The witness, on his cross-examination, was asked if he was one of the appraisers of the property when the mortgage was foreclosed by the Omaha Loan & Trust Company. He answered, "I would not say one way or the other," and said in answer to another interrogatory he would not swear he was not. "Q. Didn't you at that time appraise that property at something like $7,000? A. I can not say whether I did or not; I am not able to state whether I did or not." His attention to the alleged appraisal was not challenged in any different manner or with more certainty than indicated by the questions and answers above given. He was not shown the appraisal, nor what purported to be his signature thereon. The time and place and the amount of the appraisal were only alluded to in the most general terms. The written appraisal was in no way authenticated when offered in evidence. Whether genuine or not, rests in mere speculation. There was, we think, no abuse of discretion in excluding as evidence the exhibit offered for the purpose stated. The witness's attention should have been called directly to the exhibit, when, if denied, or if his answer was equivocal, its genuineness could have been proved in the ordinary way and received for the purpose for which offered; if the appraisal had been admitted by the witness, no further foundation was required to render it admissible. The witness's attention not having been called with sufficient certainty to the appraisal, and it not having been properly authenticated, the court properly excluded it. *Wood River Bank v. Kelley*, 29 Nebr., 590; *Thompson v. Wertz*, 41 Nebr., 31; *Draper v. Taylor*, 58 Nebr., 787; McKelvey, Evidence, sec. 249.

Some exceptions of a general nature are presented, and argued in brief of counsel, regarding the admission and rejection of the evidence, which, upon examination and of the rulings thereon, we find no prejudicial error calling for a reversal of the case, and they are not deemed of sufficient importance to notice in detail.

The judgment is accordingly

AFFIRMED.

MARY B. SHELBY ET AL. V. JAMES B. MEIKLE.

FILED JUNE 5, 1901. No. 9,668.

Dismissal of a Contested Will Case Does Not Oust Court of Jurisdiction to Adjudicate Fee of Guardian Ad Litem. Transcript Without Copy of Will Gives Jurisdiction. In a case pending in the district court on appeal involving the validity of a will in which certain minors were named as devisees a guardian *ad litem* was appointed for the minor devisees, who, after an arrangement fully securing and protecting the rights of the minors, asked leave to withdraw his pleadings, and for the allowance of a reasonable sum as compensation for his services. Leave to withdraw the pleadings was given, and the hearing on the application for a guardian *ad litem* fee reserved. The appeal was then dismissed, on motion of the appellee and contestant, on the ground that as to another devisee the will was void for uncertainty. At the following term a hearing on the application of the guardian *ad litem* for allowance of compensation was had and an order rendered allowing a sum, fixed by the court, to be taxed as costs in the case and made a charge against the estate of the deceased testator and the funds derived therefrom. *Held*, The court retained jurisdiction of the case for the purpose of passing on the application, and that the dismissal of the appeal did not deprive it of jurisdiction to act thereon. *Held, also*, That the court acquired jurisdiction of the cause on appeal by the filing of a duly certified transcript of the proceedings had in the county court containing the order disallowing the probate of the will, although the transcript did not contain the original will or a copy thereof.

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

J. W. Woodrough and *William D. Beckett*, for plaintiffs in error.

Duffie, Gaines & Kelby, contra.

HOLCOMB, J.

The will of Joseph Creighton, deceased, was contested by the plaintiff in error in this action, who was the daughter and sole heir at law, on different grounds not necessary to enumerate. Her minor children were, by the terms of the will, made devisees of property represented to be of the value of $50,000. An appeal was taken from the order of the county court, denying the probate of the will, to the district court for a trial *de novo* on the issues involved by the filing of the contest against it being admitted to probate. The defendant in error was duly appointed guardian *ad litem* for the said minors and devisees under said will. The case was of more than ordinary importance, and apparently was tried under difficulties, resulting in one trial in which the verdict of the jury was set aside and a second trial of the same issues in which the jury were unable to agree. The two trials consumed twenty or thirty days' time of those acting as attorneys and litigants. After the second trial in the district court, resulting in the disagreement of the jury, the contestant of the will (the plaintiff in error) and the guardian *ad litem* effected an arrangement by which she conveyed to her minor children all her interest as heir at law of the deceased testator to the property which by the terms of the will they were to receive. The guardian thereupon made report of the fact to the district court, asked to have his acts approved and to withdraw his pleadings from the case. He also asked that he be allowed a guardian-*ad-litem* fee in such sum as should be reasonable and proper, as compensation for his services in behalf of the minor children of the contestant. An order was entered granting leave to withdraw his pleadings, and the hearing of the

motion for an allowance of fees as guardian *ad litem* was reserved. The case then came on to be heard on the issues as between the contestant and another devisee on a motion to dismiss the appeal because of indefiniteness and uncertainty in the provisions of the will as to such other devisee, which upon consideration by the trial court was sustained. From the order of dismissal an appeal was prosecuted to this court, where the order was reversed and the cause remanded for further proceedings. No action had been taken by the trial court on the application of the guardian *ad litem* for the allowance of a fee for his services in the litigation when the order of dismissal was entered. On March 16, 1897, and while the controversy was yet pending in the district court, the guardian *ad litem* filed a formal petition for his allowance of a fee for his services, setting forth the nature of the litigation and the time consumed in its determination, and asking to be allowed the sum of $3,000 for his services. The order mentioned dismissing the appeal on the issue between the contestant and the other litigant was entered March 29, 1897. The term of the district court at which these proceedings were had was adjourned *sine die* April 10, 1897. At the next term of court, and on June 6, 1897, the matter of the application of the guardian *ad litem* came on to be tried, all parties being represented in person and by counsel, and after the submission of proof, the court allowed the guardian *ad litem* the sum of $1,240, and ordered the same to be made a charge upon the estate of the deceased testator and paid out of the funds thereof. From this order error proceeding is prosecuted by the plaintiff in error, alleging as her ground of error that "at the time of the rendition of said final order in said cause the court had no jurisdiction of said cause for the purpose of granting an allowance of guardian *ad litem's* fee, for the reason that said cause had been finally adjudicated and dismissed."

The only question presented is whether the court lost jurisdiction to make the order of allowance of a fee to the

guardian *ad litem* for his services, by the act of dismissing the appeal taken from the county court, as heretofore stated. We are of the opinion that it did not. It is entirely clear from the record that as to the matter of allowance of compensation to the guardian *ad litem* the question was reserved for further consideration, and as to that branch of the case the court retained the jurisdiction it possessed at the time application was made for the allowance. We do not think that the rule as to the taxation of costs as an incident to a judgment rendered in favor of or against a party to the litigation is applicable to the present case. The guardian *ad litem* had been duly appointed, and he apparently performed the duties devolving upon him with fidelity and ability. He secured for the minors all they would have received under the terms of the will, so that whether it was upheld or not was of no pecuniary consequence to them. He had rendered valuable services and was entitled to compensation. By section 14 of chapter 7, Compiled Statutes, it is made the duty of every attorney to act as the guardian of an infant defendant, when appointed for that purpose, for which he shall be entitled to such compensation as the court shall deem reasonable. An attorney acting under appointment as a guardian *ad litem* must look only to the court for the amount of his compensation, to be taxed as a part of the costs in the proceedings, and collected as such. *Englebert v. Troxell*, 40 Nebr., 195. We do not understand this to mean that a fee can be recovered only when the infant would be entitled to a recovery of costs ordinarily incurred in matters of litigation, or that the rule as to the taxation of costs generally must control as to the liability for the payment of a fee allowed a guardian *ad litem*, but rather that in enforcing the payment of such fee it shall be taxed against any proper party or against certain property as costs and collected as such. In fact, it is practically conceded in the present instance that the court was authorized to make the order of allowance complained of a charge against the property and

funds of the estate as was made, save for the alleged want of jurisdiction, because the case on appeal had been dismissed before the allowance of a fee was ordered. In our judgment, the court retained jurisdiction for the purpose of determining the amount of compensation to be allowed the guardian *ad litem* and was empowered to act thereon and with respect thereto as fully and effectually as before the entry of the order of dismissal of the appeal. *Smith v. Smith*, 69 Ill., 308. *Sheahan v. Wayne Circuit Judge*, 42 Mich., 69; *Jones v. Yore*, 43 S. W. Rep. [Mo.], 384; *Tyson v. Richardson*, 79 N. W. Rep. [Wis.], 439, and cases cited. In a supplemental brief it is argued that the district court was entirely without jurisdiction, because the transcript of the proceedings had before the county court in relation to the contest of the will did not contain the will of Joseph Creighton, deceased, which had been refused probate, or any copy thereof. The suggestion that the district court was without jurisdiction and had no will before it, but only a piece of unauthenticated paper, excites some surprise, in view of the fact that three or four weeks' time was consumed in a controversy of no insignificant proportions, which finally culminated in a dismissal of the appeal on the ground advanced by the contestant, plaintiff in error here, that the provisions in the will were void for uncertainty. There was, we think, a substantial recognition by the parties of the will in controversy in the district court, being the one offered and refused probate in the county court, from which order an appeal was prosecuted to said district court. The transcript may be incorrect or defective; but if so, it was amendable, and failure to amend would not deprive the district court of its appellate jurisdiction. The transcript was properly certified, contained a record of the proceedings had in the county court relating to the offer of the will for probate and the objections thereto, the proceedings under the contest and the final order complained of refusing and disallowing the will probate in that court, and was, we think, sufficient to give the district court

jurisdiction to hear and try the cause on appeal. While it is suggested that the proceeding had in the district court is in the nature of an original action begun in that court to secure the probate of the will and, therefore, without jurisdiction, from the entire record, it is obvious that its jurisdiction as an appellate court was exercised and the cause tried on appeal from the order made in the county court, to which it was remanded on the final hearing thereof.

The judgment or order complained of is

AFFIRMED.

GEORGE COIL V. STATE OF NEBRASKA.

FILED JUNE 5, 1901. No. 11,367.

1. **No Valid Constitutional Objection to Prosecution of Capital Offense by Information.** There are no valid objections, by reason of any of the provisions of the constitution, to the prosecution of one charged with a capital offense upon an information by the county attorney, under the provisions of chapter 54 of the Criminal Code. *Dinsmore v. State*, 61 Nebr., 418, followed.

2. **Where the Record Discloses that the Jury Were Placed in Charge of a Sworn Bailiff, Such Custody Is Presumed to Continue in Absence of Countervailing Proof.** Where the record, in a prosecution charging the defendant with a capital offense, discloses that at the beginning of the trial the jury were placed in charge of a sworn bailiff, and were in charge of a sworn officer at subsequent stages of the trial, and there is nothing to warrant the inference that they were allowed to separate at any time during the trial, and no complaint is made during the trial, nor in the motion for a new trial, an objection, made for the first time in this court, that it is not shown by the record that the jury were kept in charge of an officer, is unavailing.

3. **Juror Having Been Called Within Two Years Ground for Challenge.** It is a good cause for challenge that a juror called to sit in a criminal case has been summoned and served as a juror in the same court within the two years preceding.

4. ———: TALESMEN. The objection is good as to those called as talesmen as well as those summoned on the regular panel.

5. **Right of Challenge May Be Waived.** The right to challenge a juror for the cause above mentioned may be waived or lost if not interposed in apt time, or when there is lack of diligence.

6. **Challenge for Cause Subject to 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.

7. **Error Not Presumed.** Errors will not be presumed, but must affirmatively appear from the record.

8. **Bill of Exceptions Not Properly Authenticated, Question Dehors the Record.** Whether the trial court erred in overruling a challenge for cause, on the ground that a juror had been summoned and served as such within two years prior thereto, not interposed until after the juror had been passed for cause, and when the right to peremptory challenges was being exercised, not determined, because purported bill of exceptions is not properly authenticated.

9. **Voir Dire Examination No Part of Trial.** The certificate of the trial judge to a bill of exceptions "that the foregoing is all the evidence offered by either party on the trial of the cause" is not sufficient to embrace the *voir dire* examination of a juror. *Durfee v. State*, 53 Nebr., 214, followed.

10. **Voluntary Confession of Prisoner Admissible in Evidence.** Statements of a prisoner charged with a crime, in the nature of an admission or confession, voluntarily made, and not induced by hope or fear from those having custody of the prisoner or concerned in the administration of justice, may properly be admitted in evidence.

11. **Error May Be Cured.** Where testimony is offered, objected to, and excluded on the ground that no proper foundation has been laid, and later on the witness is recalled and the proposed testimony received, the first ruling is without prejudice, even though erroneous.

12. **No Prejudicial Error of Record.** Record examined, and found free of prejudicial error regarding the ruling of the court on the admission and rejection of evidence.

13. **Instruction Not Prejudicially Erroneous.** The use of the words "as in sound reason," in an instruction on the law of self-defense, *held* not prejudicially erroneous.

14. **Cowardice No Defense.** It is not error to instruct the jury that one who shoots another through mere cowardice will not be justified on the ground of self-defense.

15. **Instructions On Points Substantially Covered.** It is not error to refuse instructions requested on points substantially covered and included in other instructions given.

16. **Instructions.** Instructions given and refused examined, and *held* to be without error.

17. **Misconduct of Sheriff:** RULING OF COURT: EVIDENCE. Ruling of

the trial court as to alleged misconduct of the sheriff during the impaneling of the jury *held* to be supported by the evidence and free from error.

18. **Misconduct of Counsel Not Shown.** *Held, also,* That alleged misconduct of consul for the state calling for a reversal of the case, is not shown.

19. **Verdict With Request Refused: REQUEST ELIMINATED: NO PREJUDICE.** Where a verdict finding a defendant guilty of murder in the second degree, and requesting that the term of imprisonment be not more than five years, is returned, which is not received by the court, and the jury retire and return the same verdict, with the request for a term of not more than five years' imprisonment eliminated, the defendant is in nowise prejudiced and has no legal ground of complaint.

20. **Degree of Punishment in Its Effect upon a Verdict No Ground for New Trial.** Affidavits of jurors to the effect that they believed that the jury could fix the term of imprisonment at five years, or they would not have agreed to a verdict of guilty of murder in the second degree, can not be received to impeach their verdict returned in open court, and assented to by them in a poll of the jury.

21. **Verdict Can Not Be Set Aside Because Juror Misunderstood Witness.** The verdict of a jury can not be impeached by one of the jurors on the ground that he misunderstood the evidence of one of the witnesses.

22. **Affidavits Insufficient.** Affidavits in support of the right, as alleged, of a witness to correct his testimony, *held* without merit, since it appears from the record that no mistake had been made.

23. ———. Affidavits in support of a motion for a new trial, on the ground that a witness for the state was not allowed to correct an alleged mistake in his testimony, and exception to the ruling of the court thereon, *held* without merit, since from the record and the affidavits, it appears that no mistake had been made.

24. **Assignments of Errors.** Other assignments of errors *held* to be not well taken.

ERROR from the district court for Dawes county. Tried below before WESTOVER, J. *Affirmed.*

Allen G. Fisher, George A. Eckles and *Albert W. Crites,* for plaintiff in error.

Frank N. Prout, Attorney General, Norris Brown, Deputy, and *Michael F. Harrington, contra.*

HOLCOMB, J.

The plaintiff in error was informed against in the district court of Dawes county on the charge of murder in the first degree. A trial to the court and jury on the issue raised by a plea of not guilty resulted in a verdict of guilty of murder in the second degree, with a recommendation of leniency in the infliction of punishment by the court. A sentence of imprisonment in the penitentiary for the period of ten years was imposed, the minimum permitted by law. From the verdict and judgment the defendant prosecutes proceeding in error in this court to secure a reversal thereof. A number of alleged errors in the trial of the case are assigned which, in so far as they are deemed essential in reviewing the case, will be noted in the order of presentation.

We have carefully noted each and every error assigned and argued in the brief of counsel for defendant, and a failure to note each in detail is because they are so numerous; an opinion would be extended to an unwarranted length in the discussion of many which are not regarded as of sufficient importance to justify more than a passing notice.

By a motion to quash, plea in abatement, and demurrer, the question is presented of the right of the state to proceed against the defendant upon an information, charging the crime of which he was tried, made and filed by the county attorney, instead of presentment under an indictment by a grand jury duly returned in the manner provided by law. This question has so recently been considered and passed upon by this court in the case of *Dinsmore v. State,* 61 Nebr., 418, that it is not thought necessary now to more than refer to that case for an exposition of our views on the subject, and the reason for holding against the contention of defendant's counsel regarding the matter in the case at bar. There are no valid objections, by reason of any of the provisions of the constitution, to the prosecution of one charged with a

capital offense, upon an information by the county attorney, under the provisions of chapter 54 (secs. 578-585) of the Criminal Code.

It is next urged that it is not shown by the record that the jury called to try the case was kept in charge of an officer during the trial. An examination of the record discloses that upon the first adjournment, after the impaneling of the jury began, they were placed in charge of a sworn bailiff, and thereafter, during the entire proceedings, until the verdict of the jury was returned and they discharged, they were, while not in open session of the court, in the charge of an officer of the court. There is nothing in the record to warrant the inference that the jury were allowed to separate at any time during the progress of the trial, no indication that the defendant has in this respect been in anywise prejudiced, no complaint made during the trial, nor in the motion for a new trial, and the objection is now unavailing and without merit. *St. Louis v. State*, 8 Nebr., 405; *Polin v. State*, 14 Nebr., 540.

It is further contended that error was committed by the court in overruling a challenge for cause interposed by the defendant to a juror named Hilbert, called to sit in the case. From the purported record before us it is made to appear that the said juror was called into the jury-box, examined by counsel for both the state and the defendant, and by each was passed for cause. Thereafter, and when some of the peremptory challenges allowed each of the parties had been exercised by the state and by the defendant, leave was asked by the defendant's counsel, and granted by the court, to further examine this juror for cause. It was thereupon by such examination disclosed that the said Hilbert had been summoned and had served as a juror in the district court of that county within two years next preceding the time he was summoned to sit in the case at bar. The defendant challenged the juror for cause. The state resisted the challenge "for the reason that the juror was passed for cause,

and since he was passed the state has been required to exercise two of its peremptories." The court overruled the challenge, to which ruling defendant duly excepted, and assigned the ruling as one of his grounds for a new trial. The ruling, it is argued, is error with prejudice to the defendant. Whether the court erred in overruling the challenge is dependent on the question of the defendant having waived or lost the right to challenge the juror for cause when he was examined on his *voir-dire* examination and passed without objection being raised as to his qualification to sit in the trial of the cause. The right of a defendant to challenge a juror in either a civil or criminal cause, on the ground that he has been summoned and served as such in the same court within the two preceding years, must be conceded without discussion. The right is given by statute, has been confirmed by the decisions of this court and is held to extend to those who have been called to serve as talesman as well as those summoned on the regular panel. Code of Civil Procedure, sec. 665; Criminal Code, sec. 468; *Northeastern N. R. Co. v. Frazier*, 25 Nebr., 42, 48; *Wiseman v. Bruns*, 36 Nebr., 467, 468. A defendant may waive his right to interpose challenge on the ground stated, and will be held to have absolutely waived the right unless the objection is presented before the jury is sworn. This is made so by statute. Whether he will be deemed to have waived the right or allowed to interpose a challenge after he has examined and passed a juror for cause must, we think, rest upon the circumstances of each particular case and to a degree rests unquestionably in the sound discretion of the trial court. The proceedings being under the control and direction of the court, an orderly presentation of all matters for consideration and action requires that the successive steps be taken one after the other in regular order until the cause is finally disposed of, and that when one stage of the case has been passed it be not gone over again, except for sufficient reason. If a challenge for cause is not presented in apt time, or if a party has

been lacking in diligence in discovering the causes for challenge, it would seem very proper to hold him to have lost the right when subsequent to the proper time a challenge is sought to be interposed. It is quite probable also that the nature of the objection to the juror may have some bearing in determining the propriety of a ruling disallowing it. If a juror is manifestly unfair, or is disqualified for reasons which would ordinarily influence his conduct as a juror to the prejudice of one of the parties, by all means the utmost latitude consistent with regularity of proceedings should be given to a challenge for cause, in order that a fair and impartial jury may be secured. Where the ground of objection is more technical than substantial, the reason for relaxing the method of procedure is not so cogent. Ordinarily it is said "the ruling of a trial court in deciding a challenge for cause will not be disturbed, unless an abuse of discretion is shown."

Whether the facts and circumstances in the case at bar render the overruling of the challenge proper or the reverse, must be answered by an examination of the record to ascertain whether sufficient cause existed or is shown for the interposition of the challenge after the juror had been passed and the parties were engaged in the exercise of their right to challenge peremptorily the number allowed by statute of those called to sit in the case. The error alleged will not be presumed. Before the defendant can rightfully claim a reversal on the ground advanced, it is incumbent upon him to present a record from which it appears affirmatively that the court erred and abused its discretion in regard to the ruling complained of. This is an elementary rule of practice in the review of proceedings, both civil and criminal in their nature. As presented in the record before us, we are wholly unable to ascertain therefrom the reason why the defendant's counsel did not interpose the challenge at the time the opportunity arose and the examination of the juror as to his qualifications was engaged in. Whether he had knowledge of a cause existing for a

challenge or made any reasonable effort to inform himself or omitted to inquire regarding the matter through caprice or for some unknown purpose does not appear. Nor did he offer any explanation or advance any reason why the challenge was not sooner and in more appropriate time interposed. In the absence of any showing of diligence or explanation of a reason for not making the objection in apt time and before passing the juror for cause, and in view of the presumption of the correctness of the ruling of the trial court, the question, perhaps, should be disposed of on the proposition that error and abuse of discretion is not made to appear affirmatively by the record before us. We do not, however, directly decide the point, because the defendant has failed to present us a properly authenticated record which can avail him as a bill of exceptions containing the evidence and the rulings of the court relating to the impaneling of the jury and their *voir-dire* examination, by which their qualifications to try the issue may be determined.

In *Durfee v. State*, 53 Nebr., 214, it is held in the second paragraph of the syllabus: "The certificate of the trial judge to a bill of exceptions 'that the foregoing is all the evidence offered by either party on the trial of the cause' is not sufficient to embrace the *voir-dire* examination of a juror, or the evidence adduced on the hearing of a challenge to the whole panel or array of jurors." Says NORVAL, J., in the opinion, in speaking of this form of the certificate: "This is insufficient to show that the bill of exceptions contained either the testimony on the hearing of the challenge to the panel, or the *voir-dire* examination of the jurors. Those matters did not occur during, but preceded, the trial." The rule thus announced was reiterated in the case of *Dinsmore v. State*, *supra*, very recently decided by this court. In the present case the certificate of the trial judge settling the bill of exceptions is as follows: "Now, I, the said judge, do hereby certify that this bill of exceptions contains all the testimony adduced or offered by the plaintiff and defendant on the trial of said

cause, all of the objections to the admission of testimony, all the rulings of the court on such objections, and all of the exceptions taken to such rulings at the time," etc. The certificate does not embrace the proceedings had and taken in impaneling the jury to try the case, and its insufficiency becomes at once obvious under the rule announced.

Numerous objections are urged to the admission and rejection of certain of the evidence received and offered in the trial of the cause, some of which will be noted. Regarding much of the evidence received, to which objections are made and argued in this court, we find that when offered and during the trial no objections were offered or exceptions taken; and it is now too late to have the same properly presented for review. As to all such we have not taken the time to examine the evidence or the grounds of objections.

A witness, Anna E. Rhyan, was allowed to testify as to statements made by the defendant to her while he was confined in the county jail awaiting trial. The sheriff was also present and gave testimony regarding the same statements. It is contended that the statements should be regarded as made under coercion and that no sufficient foundation was laid, inasmuch as it is not shown that the defendant knew or was told that the statements would be used against him. The objection is not well grounded. It is clearly shown that the statements were entirely voluntarily made and without inducement of hope of reward or fear of punishment. It is not required that he be informed that the statements would be used against him. Declarations or admissions against interest would be of little or no practical value if it were necessary to advise those making them that the statements could be used against them, before being admissible as evidence.

Objection is also made because the testimony of a witness was excluded as to alleged threats made by the deceased and coming to the knowledge of the defendant, on

the ground that no proper foundation had been laid. The witness was re-called later on and testified regarding the same statements first inquired about, which cured any error, if any existed by reason of the ruling complained of.

Other similar objections are presented for consideraiton, but we find in them nothing prejudicing the substantial rights of the defendant. He has no meritorious ground of complaint on account of the admission or rejection of the evidence offered during the trial of the cause.

The defendant justified the homicide, which was admitted, on the ground of self-defense. On this point, by the 16th instruction, the jury were told: "The jury are instructed that in this case the defendant sets up the plea of necessary self-defense. The rule of law on the subject of self-defense is this: Where a man in the lawful pursuit of his business is attacked, and where from the nature of the attack there is reasonable ground to believe that there is a design to take his life, or to do him great bodily harm, and the party attacked does so believe, then the shooting of the assailant under such circumstances will be excusable or justifiable although it should afterwards appear that no injury was intended, and no real danger existed. The jury are instructed that if they find from the evidence and believe that at the time the defendant is alleged to have shot said Thomas E. Rhyan, the circumstances surrounding the defendant were such as in sound reason would justify or induce in his mind an honest belief that he was in danger of receiving from the said Thomas E. Rhyan great bodily harm, and that the defendant in doing what he then did was acting from instinct of self-preservation, then he is not guilty although there may in fact have been no real or actual danger." An exception was taken to this instruction and it is here argued that because of the language, "as in sound reason," the instruction is erroneous; that the word "sound" when applied to the word "reason," as a

qualifying adjective, is an incorrect statement of the law. While it is possible that the word is not the most apt in expressing the law applicable, yet upon the whole, the impression conveyed is substantially correct if not exactly accurate. The rule, as we understand it, is that the threatened danger, real or apparent, must be such as to induce a reasonable and well-grounded belief that one's life is in peril, or great bodily harm impending, before the act of taking life can be justified on the ground of self-defense. *Vollmer v. State*, 24 Nebr., 838; *Darling v. Williams*, 35 Ohio St., 58; 1 Bishop's New Criminal Law, sec. 865. By an examination of the entire instruction the law, we think, is announced substantially as approved by well recognized authority. In the first part of the instruction it is stated that a reasonable ground for the belief must exist, and in the latter part the phrase "sound reason" is equivalent to saying that the reasoning powers must be exercised honestly and in good faith, leading to a conviction of the threatened danger which is actual and substantial, before a person will be excused or justified for a homicide on the ground of self-defense.

Another instruction excepted to is as follows: "The court further instructs the jury that if a person shoots another through mere cowardice, or under circumstances which are not, in the opinion of the jury, sufficient to induce a reasonable and well grounded belief of danger to life, or of great bodily harm, in the mind of an ordinarily courageous person, the law will not justify the shooting on the ground of self-defense." The instruction correctly states the law. "Cowardice" is an antonym of "courage." The rule is that a defendant is excusable if he does nothing more than a reasonably prudent and courageous man would have done under like circumstances. *State v. Crawford*, 66 Ia., 318, 321. A person under such circumstances is excusable if he acts as an ordinarily prudent and cautious man would have done under the same circumstances. There must be a reasonable cause for a belief in the existence of the facts relied on to justify the

homicide on the ground of self-defense, and not one founded on mere cowardice. 1 Bishop's New Criminal Law, sec. 305, and cases cited.

Other objections to the giving of certain instructions are presented, which we have considered, and hold to the view that they are not well taken. We find it inadvisable to treat them in detail.

Certain instructions were requested by counsel for defendant, and refused, to which exceptions are taken. We find no error in the rulings of the court in respect thereto. In most of these instructions the court had, on its own motion, or at the request of the defendant, covered substantially the same point; and the giving of other instructions would have been in the nature of a repetition and, therefore, not required. We are of the opinion that, upon the whole, the case was fairly submitted to the jury by the instructions, which were as favorable to the defendant's theory of the case as he might rightfully ask. We find no prejudicial error in the giving and refusal to give any of the instructions of which complaint is made.

On the motion for a new trial several matters were presented to the court, such as misconduct of the sheriff and of counsel for the state, and, also, with reference to the deliberations of the jury, by which it was attempted to impeach their verdict. Regarding the alleged misconduct of the sheriff complained of an effort was made after verdict, by affidavits, to show that he was prejudiced against the defendant, did not in summoning jurors act impartially but in such manner as to prejudice the defendant and preclude a fair and impartial trial. Counter affidavits were filed. As a question of fact, the court rightly ruled in favor of the state. Had the defendant or his counsel really believed that the sheriff was prejudiced against him, and would not act impartially as an officer of the court in the proceeding, the law furnished him an easy method of securing one to whom no valid objection could apply. Compiled Statutes, 1899, ch. 18, art. 3, sec. 16. Not having done so, the latter effort to show his dis-

qualification may properly be regarded as a desperate effort to escape the consequence of the verdict returned by the jury, rather than as establishing that a sworn officer of the court had been derelict in his duty which prevented him from having a fair trial. Misconduct of counsel for the state is also claimed, but we find no such departure from the rules of propriety as would work a reversal of the case.

By affidavits it is sought to be shown that the court refused to receive a verdict finding the defendant guilty of murder in the second degree, commending him to the leniency of the court and requesting that the term of imprisonment be not more than five years; and directed the jury to retire for further deliberation. By the record it is shown that the same verdict was returned, received and filed, except the request for a five year sentence. Conceding that the first verdict should have been received and filed as claimed, no error was committed, the second verdict in legal effect being identical. The jury could not fix the sentence. That was a matter solely for the court, within the limits of the law. The court could give such consideration as it regarded as warranted to the recommendation and request of the jury for leniency. By the defendant's own showing, he was in nowise prejudiced by the action complained of.

The affidavits of two of the jurors trying the case, were presented in the motion for a new trial, the purport of which was that they believed the defendant innocent, but because of the cost of another trial, if the jury did not agree, and the likelihood of defendant being kept in jail for a long period of time awaiting another trial, and believing that the jury could fix the term of sentence, they agreed to a verdict of guilty of murder in the second degree, in which the jury fixed the sentence at five years in the penitentiary, and that they did not agree to the verdict as finally returned. These affidavits were on motion stricken from the files as an unauthorized attempt of the two jurors to impeach their own verdict. The rec-

ord in the case belies the affidavits of the two jurors. It not only shows that the verdict was returned into open court and received in the presence of the jury, but also that the jury was polled, each for himself answering that it is his verdict. The question of the length or duration of the term of sentence under the verdict of guilty was of no concern of the jury. It was not for them to act on or determine any question regarding that matter. It is entirely immaterial how they regarded the sentence which might be imposed. As triers of fact they were to determine whether the defendant was guilty of either of the degrees of homicide included in the information, or neither, and return a verdict corresponding to the conclusion reached. When that question was determined the function of the jury ceased. Resort to another power must be had for the imposition of a sentence on the verdict.

Can a juror be heard to say that the verdict he returns under the oath he has taken to well and truly try and true deliverance make, and which in open court he solemnly declares is his, is not in fact his verdict and that he did not agree or consent to it? Can he be permitted to declare in his verdict that a defendant is guilty of the crime charged, and subsequently in an affidavit that he is not guilty because he (the juror) was not correctly informed as to the sentence the law authorized to be imposed? We think not. If such can be done, judicial proceedings rest upon a very insecure foundation. "It is," says REESE, C. J., in *Harris v. State*, 24 Nebr., 803, 809, "the well established rule of law, as held in all courts, so far as we know (unless the rule be changed by statute), that affidavits of jurors will not be received for the purpose of impeaching or avoiding their verdict in respect to a matter which essentially inheres in the verdict itself, as that the juror was mistaken in a computation, or misunderstood a witness, or did not comprehend the instructions of the court." A juryman will not be permitted to testify that he was misled by the form of the verdict and

would not have signed it had he known its real meaning. *State v. Burwell*, 34 Kan., 312. Affidavits of jurors as to their understanding of the verdict they rendered or were to render, can not have the effect to impeach their verdict. *United States v. Daubner*, 17 Fed. Rep., 793. A juror will not be allowed to impeach his verdict by his affidavit that he would not have found the defendant guilty if he had known that the punishment fixed by law for the crime charged was death. *State v. Shock*, 68 Mo., 552. Says the author of the opinion in the case last cited: "In support of the motion for a new trial an affidavit of one of the jurors was filed, which stated in substance, that while the jury were considering their verdict, he was of the opinion that the case was not one in which capital punishment should be inflicted, but he was induced to believe that the court had the power to inflict a less degree of punishment; that he and others of said jury were opposed to rendering a verdict in said case that would result in the death of the defendant. It will be sufficient to say on this point that a juror will not be allowed to impeach his verdict on the ground that he would not have found the defendant guilty if he had known that the punishment fixed by law for the crime charged was death. The nature of the punishment had nothing to do with the guilt or innocence of the defendant." See also *State v. Doon*, R. M. Ch. [Ga.], 1; *State v. Senn*, 32 S. Car., 392; Thompson & Merriam on Juries, sec. 440, and cases there cited. The court, we think, committed no error in striking from the files the affidavits of the two jurors, as they came entirely within the rule prohibiting a juror from impeaching his own verdict by affidavit.

Lastly, complaint is made because, as alleged, a witness who had testified in the case was not allowed by the state to correct his testimony, he having, as claimed, made an erroneous statement while on the witness stand which he afterward asked to be allowed to correct, and which, it is claimed, had great weight with the jury in arriving at their verdict. A careful reading of the record dispels

any doubt which might at first arise regarding the matter. The affidavits in support of the contention seem to confirm an impression received from reading other portions of the record, that many of the affidavits in support of the motion for a new trial were made with extreme recklessness and without due regard to the truth, the evidence being to discredit the showing made in support of the motion for a new trial. The defendant testified regarding the deceased having, as alleged, shot at him and mentioned one Griffith as one of the persons with whom, he believed, he had talked about the subject. The object of the testimony is not perfectly clear. The state called Griffith and asked him if he had told the defendant that the deceased had told the witness that deceased had shot at the defendant; and the witness answered in the negative. On cross-examination the witness was asked if the defendant or his mother had not told him that the deceased had shot at defendant; this was properly ruled out as incompetent and hearsay. In his affidavit the witness is made to say that he testified that Frank Coil had told him about the deceased having shot at the defendant, George Coil, and that if he did so testify, he was mistaken; and that it was the defendant and his mother who told him. The witness had not so testified and there was no correction to make. If the jurors misunderstood the testimony of the witness, that is no ground for a new trial, nor can their affidavits be received to impeach their verdict by reason of such misunderstanding. *Harris v. State, supra.*

Other assignments of error, not noted specifically, are found to be not well taken.

We find no error in the record, and the judgment is accordingly

AFFIRMED.

NOTE.—A state law which provides for the prosecution of a felony by information by the public prosecutor, instead of indictment by a grand jury, is not contrary to the fifth and fourteenth amendments of the constitution of the United States. *State v. Nordstrom*, 7 Wash.,

506, 35 Pac. Rep., 382; *Hurtado v. California*, 110 U. S., 516; *Hawkins v. State*, 60 Nebr., 380. To justify homicide in self-defense, the fear of death or great bodily harm must be well founded. *Barnards v. State*, 88 Tenn., 183. If the killing is the act of a timid man who fears an assault and battery, it is manslaughter. *Grainger v. State*, 5 Yerger [Tenn.], 458.—REPORTER.

SWIFT & COMPANY V. FRANK HOLOUBEK.

FILED JUNE 5, 1901. No. 11,178.

Commissioner's opinion, Department No. 1.

1. **Instruction, Burden of Proof.** Judgment for an employee will not be reversed at suit of employer for the giving of an instruction that the burden of proof is on employee to show both defect in machine with negligence in providing it and also negligence in permitting floor, on which he stood to operate it, to be wet and slippery, when accompanied also by instruction to find for employer if the machine was not defective, although there was no evidence that the admittedly wet and slippery condition of the floor was due to negligence.

2. ———: CONTRADICTORY. A statement of the employer's duty to furnish "a reasonably safe place to work," where evidence shows employee worked at rear of a machine, close to two swiftly revolving scrapers, each furnished with several knives which worked against a drum revolving beneath them, against which latter it was the duty of the employee with his left hand to press entrails to draw them out beneath the scrapers, and where it tends to show a defective shield over the scrapers, is not contradictory of an instruction to find for the employer if machine was not defective and does not assume the existence of negligence in other respects.

3. ———. An instruction that the defendant would not be liable if the machine operated by plaintiff was the one in general use for its purpose, and in good repair, even if the jury should find the shield would admit plaintiff's fingers and hand between it and the drum, was not erroneously refused. The court was not called upon to decide as to the possibility of such a machine's admitting plaintiff's hand.

ERROR from the district court for Douglas county. Tried below before SLABAUGH, J. *Affirmed upon filing of remittitur.* Rehearing of case reported in 60 Nebr., 784.

I. R. Andrews and *Brome & Burnett,* for plaintiff in error.

J. L. Kaley, contra.

HASTINGS, C.

This case is presented on a rehearing from the decision filed last November and published in 60 Nebr., 784, which was the second reversal of judgment in favor of plaintiff. A somewhat careful re-examination of the record shows no ground for changing the conclusion that there is evidence from which a jury might reasonably conclude that the machine the plaintiff was operating was improperly and defectively constructed, and the furnishing of it to him by defendant for use at the place and under the circumstances, indicated by the testimony on his behalf, would constitute negligence and render the defendant liable for resulting damage. Neither does there appear any reason to alter the statement that there is no evidence to show that the condition of the floor was due to anything but the necessary effect of working the machine.

The last reversal is for the giving by the trial court of instructions numbered 3 and 11. It was thought they, without evidence, submitted to the jury questions of negligence on the part of defendant in permitting the floor where plaintiff was standing to become wet and slippery, and, also, in not providing a reasonably safe working place for the plaintiff. The doctrines that instructions must be applicable to the pleadings and the evidence, and that they must not assume the existence of facts as to which there is no evidence, were thought to require the reversal of the case. This conclusion is earnestly assailed by the plaintiff below and will be re-examined.

Assuming, then, that this verdict should be sustained if based upon negligence in furnishing the machine in question, and that it should be reversed if based upon negligence in permitting the floor to become slippery, are

the instructions, taken as a whole, fairly open to the objections urged? The two held erroneous are in terms as follows:

"3. The burden of proof is upon the plaintiff in this case to establish by a preponderance of the evidence the material allegations in his petition, which are denied in defendant's answer, that is that the defendant negligently furnished plaintiff for his use and operation a defective machine as alleged and negligently permitted the floor on which plaintiff stood, when operating the machine to be slippery as alleged, whereby plaintiff, without any negligence on his part was injured; and the extent of the injury, and the damages caused thereby."

"11. It is the duty of every master to conduct his business with reasonable care and prudence, so as not to negligently or carelessly subject his servant to any danger not ordinarily incident to or connected with his employment, and it is the duty of the master to provide his servant with a reasonable safe working place and with reasonably safe machinery and appliances with which to work, and if the master fails in this regard, that is, fails to exercise such reasonable care and prudence in the conduct of his business and fails to provide his servant with a reasonably safe working place and with reasonably safe machinery for the prosecution of his work, and the servant is injured thereby and for such reason, then the master is liable in damages for such injury, unless negligence or want of ordinary care of plaintiff contributed to his injury."

By themselves, they certainly seem to indicate that the question of negligence in the condition of the floor is in the case. They must, however, be considered in connection with the others given, and the question to be determined is whether or not in connection with those others they fairly submit to the jury the questions of negligence raised by the pleadings, and as to which evidence was produced, and no others. Paragraph 1 of instructions given by the court on its own motion summarized the

pleadings. Paragraph 2 states the action to have been properly brought by a next friend. Paragraph 3 is as given above. Paragraph 4 defines preponderance of evidence. By paragraph 5 the jury were instructed that if the machine was defective and defendant negligent in providing it and thereby plaintiff was injured, and there was no contributory negligence, he should recover damages proved, unless he had assumed the risk. By paragraph 6 the jury were told that if the machine was not defective, or defendant not negligent in providing it, or if plaintiff did not exercise ordinary prudence in its use, or if he assumed the risk, in either case, verdict should be for defendant, and that the fact of injury while using the machine was not evidence of defendant's negligence. By paragraph 7 the jury were told to take into consideration the age and experience of plaintiff, the nature and operation of the machine, instructions given, condition of the floor, whether or not plaintiff was exercising due care, and all other circumstances bearing on the question of contributory negligence. By instructions 8 and 9 negligence and contributory negligence were briefly defined, and by number 10 the jury were informed that the relation of employer and employee existed between the parties and that defendant was responsible in certain respects for acts of the foreman, Wollweber. Number 11 was as given above. Number 12 was in terms following:

"And in determining whether the machinery and appliances referred to in the evidence in this case, were reasonably safe and fit for plaintiff to operate at the time of his injury, you should take into consideration all of the evidence relating to such machinery and appliances and more especially the shield in question, including the fact whether or not, such machinery and appliances and their conditions at the time of the injury were those ordinarily used and existing in business of a like and similar nature, and that at the time of the injury the machine in its condition was one ordinarily used in such business, and was reasonably safe for the operation of the plaintiff, all as it appears in the evidence."

Number 13 informed the jury that not the safest, but only reasonably safe machinery and appliances are required. Number 14, that there could be no recovery for injury that might have been avoided by the exercise of ordinary care and prudence on the part of plaintiff. Number 15 instructed them that known risks from defective machinery and appliances and conditions in which he is to work, or such as would be apparent, the servant assumes, if he voluntarily engages in the work or continues it without objection. Number 16 instructed the jury that offers of compromise were not to be considered for the purpose of establishing defendant's liability. Number 17 stated the effect of willful misstatements by witnesses. Number 18, that the jury should pass upon the credibility of witnesses. Number 19 was as to the measure of damages, and number 20 the form of verdict. Instruction number 3, asked by defendant and given, told the jury no evidence had been produced of its being usual or necessary to sprinkle salt to prevent slippping on the floor, and the allegations of negligence in that respect were to be disregarded.

Assuming that there was no evidence that the wet and slippery condition of the floor was due to negligence on the part of defendant, and granting that such condition is the ordinary and necessary result of the operation of the machine, is paragraph 3 of the court's own instructions to be taken as an assumption that such condition by itself was negligence and an intimation that recovery might be had on that ground? The jury were told that the burden of proof was upon the plaintiff to establish negligence in furnishing a defective machine. They were told that the burden of showing negligence in the condition of the floor was also on the plaintiff. Was this to be taken as an intimation that there was evidence to sustain a finding that the condition of the floor was due to the negligence of defendant? In connection with the instruction in number 6, to find for the defendant, if the machine was not found defective, this statement would

seem to have been intended and only reasonably understood to mean, that such burden was upon the plaintiff in order to enable him to recover on the grounds mentioned. No court would intentionally declare that in order to recover on one ground of negligence, a party must prove two, and no jury should be taken to have so understood an instruction, unless clearly necessary. In view of the close connection with instruction number 6, it would seem that the natural meaning would be that to warrant a recovery on either ground, negligence, in the respect indicated, must be established. Instruction number 3 does not expressly say that to find any verdict for plaintiff, the jury must find both conditions to be met. The natural inference from the phraseology that such a requirement is made must have been prevented by the 6th instruction, to find for defendant unless the machine was defective. It does not seem, upon careful reconsideration, that these instructions are so contradictory in terms that they can not be reasonably understood together and to bear the meaning required by the case and intended by the court. Of course, if this view is taken of the meaning of the instructions as a whole, there can be no complaint, under our view of the evidence, that the verdict is contrary to the instructions taken together. The fact that no one thought of raising this objection at the trial, nor until after the application for a rehearing, indicates that no one then understood the court as requiring the plaintiff to prove two grounds of negligence in order to recover on the one as to which evidence appears.

Instruction 11, at two places, refers to the duty of furnishing "a reasonably safe working place," and it speaks of the liability for injury caused by a failure to do so. It purports to be simply a statement of abstract law. Its application to this case is apparently sought to be made by instruction number 12, in that the jury were expressly referred to the machinery and appliances, and especially to the shield, "and their condition at the time of the in

jury." The jury had been, as indicated above, directed in instruction number 6 to find for the defendant in case they should decide the machine was not defective, and in view of the facts that the condition of the floor could not be wholly eliminated from the case so long as the plaintiff was employed to stand upon this wet floor in the rear of this machine within two feet of the revolving knives, and that the evidence discloses his slipping as one of the circumstances of the injury, a mention of the duty of an employer to provide "a reasonably safe place to work" would seem more naturally referable to the machine and its surroundings. It does not seem necessary to regard it as an intimation to the jury that they were at liberty to find negligence in the condition of the floor taken by itself. These two instructions, when taken in connection with the others given, and especially number 6, instructing the jury to find for defendant in case they should decide the machine was not defective, and number 12, referring the jury particularly to the machine and its appliances as what they were to pass on, do not seem on careful consideration to call for the reversal of the case. Briefly, an instruction that the burden of proof of the slippery condition of the floor was on plaintiff ought not to be construed as saying that a verdict might be found on such proof alone, nor as contradictory of an instruction to find for defendant, unless the machine was defective. Nor should a mere declaration that it is the employer's duty to provide a reasonably safe place to work in, be taken as equivalent to submitting the question of negligence in relation to the floor, unconnected with the machine.

We do not find anything in the instructions refused that calls for the reversal of the case any more than did the court at the former hearing. Number 1 instructed a verdict for defendant, and, of course, could not be given under our view of the evidence. Number 2 was to the effect that there was no evidence of undue hurrying "and upon that issue of negligence charged in the petition your

verdict will be for defendant." Number 3 was given. Number 4 was sufficiently discussed in the former opinion. Number 5 was to the effect that employment of a boy of plaintiff's years and instructing him to work at this machine was not negligence. As to these instructions it has already been remarked that the court, in the plainest language, in number 6 of its own instructions told the jury to find for defendant, unless they found the machine defective, and unless they found defendant negligent in supplying it. It could not be prejudicial to refuse to go further and expressly caution the jury against all other allegations. Number 2 and number 5, too, share with number 4 the defect of calling for a verdict in disregard of any defect in the machine. Number 6 in effect told the jury that the only complaint as to the machine was that the shield was raised an inch or more in front of the knives and if they found that the machine was the one in ordinary use and in good repair, defendant would not be liable though the shield was high enough above the drum to admit plaintiff's fingers and hand. It was not error to refuse this instruction. All the evidence as to the ordinary distance between the drum and shield in these machines fixes it at from one-eighth to one-quarter of an inch. It was not for the court to determine whether this would admit plaintiff's hand.

The damages assessed in the sum of $11,500 are claimed to be excessive. A former jury in this case assessed the damages at $5,000, and that verdict was set aside because of an instruction that practically declared the defendant liable unless there was contributory negligence on plaintiff's part. It appears that the plaintiff was a day laborer, and at the time of the accident was earning $1.25 per day. His expectancy of life at that time is given as forty-six years. A much smaller sum than the amount of this verdict at current rates of interest would purchase an annuity greater than his earnings as a laborer. He is, of course, not totally disabled. Under the rule of damages announced by the trial court on the evi-

dence plaintiff would be entitled to compensation for pain suffered, for disfigurement and for loss of earning capacity subsequent to his majority. Of course, none of these can be exactly estimated, but it seems clear that the amount found is much in excess of the ordinary rule in such cases, and that there should be a remittitur of a considerable amount of this verdict, and judgment entered for the remainder, rather than send this case back for another trial where two juries have found there was a meritorious cause of action, and this court has said that their finding is based upon the evidence. Plaintiff testifies to suffering severe pain for "the first week" and that he was confined to his bed some three weeks and to the house for about two months. No medical expenses are shown, and it appears a surgeon was supplied by defendant. It is recommended that plaintiff below be allowed to file a remittitur, within thirty days, of $4,000, and upon filing of the same the judgment for the remainder be affirmed, and in default thereof that the judgment be reversed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons above given, it is ordered that plaintiff be allowed to file a remittitur in thirty days of $4,000, and that the remainder of the judgment, with interest on such remainder from date of its rendition, be affirmed, and in default of such remittitur the judgment to be reversed and the cause remanded.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA, EX REL. WAHOO WATER WORKS COMPANY, V. CITY OF WAHOO ET AL.

FILED JUNE 5, 1901. No. 11,577.

Commissioner's opinion, Department No. 1.

1. **Cities and Villages:** STATUTE CONSTITUTIONAL. Act of March 10, 1885, to amend section 69 of act of March 1, 1879, as to cities and villages, not invalid because of that section's having been amended in 1881, a new section substituted and section 69 as enacted in 1879 repealed. The new section of 1881 took the place of the one repealed.

2. **Silence of Journal.** Act mentioned not invalidated because of silence of senate journal as to concurrency in a formal amendment by the house.

3. **Mandamus:** LEVY. City authorities not required by mandamus to levy tax for water supply in excess of limit on such tax existing at time of contract.

ERROR to the district court for Saunders county. Tried below before HOLLENBECK, J. *Affirmed.*

Ira D. Marston and *Frank Irvine,* for plaintiff in error.

H. Gilkeson, G. W. Simpson and *E. E. Good, contra.*

HASTINGS, C.

May 16, 1889, the city of Wahoo adopted an ordinance "to supply water to the city of Wahoo," and authorizing plaintiff to construct, maintain and operate water-works in the city. By section 3 the city agrees, in consideration of benefits derived, to rent for twenty years forty-three hydrants, at an annual rental of $46.50 for the first ten years and $58 for the second ten years, after January 1, 1899, for each hydrant. The ordinance was accepted by the plaintiff and the plant erected, and the rents paid for some years—plaintiff says until 1898,—when the city refused to levy the necessary taxes to pay in full, the valuation of property in the city having fallen so low that seven mills on the dollar would not pay the rental.

Plaintiff says that the deficiency in March, 1900, when application for mandamus was filed, was $2,939. The defendants admit the ordinance and its acceptance and building of the water-works, but deny the authority of the city council to contract in that way, and say that the city could not levy to exceed seven mills on the dollar for such purpose in any one year; that this has been done and the money paid to the relator. Defendant also claims that there was some modification of the contract by means of a settlement of an injunction case before it went into effect, but this is not insisted upon in the argument here. The trial court found for respondents and dismissed the application for mandamus, and the relator appeals.

The relator concedes that if the legislature has limited the authority of the city council to a levy of seven mills on the dollar yearly and this has been exhausted, then relator can ask no more. It is, however, insisted that there is no such limitation, and that the legislative acts of 1885 and 1887, which seek to establish it, are void because not constitutionally passed.

It is insisted that the act of March 10, 1885 (Session Laws, 1885, ch. 20), is void because it purports to be "An act to amend section (69) of an act entitled 'An act to provide for the organization, government, and powers of cities and villages,' approved March 1st, 1879." By chapter 23 of the Session Laws of 1881 this act was amended, and section 69, among others, changed and repealed "as then existing." It is insisted that this rendered it forever impossible to amend section 69 of the act of 1879, because it was thereafter repealed, and so non-existent. It would seem to us much more reasonable to hold that it was changed, rather than abolished. By the amendment a new section 69 had been substituted and the old one repealed, in accordance with the requirements of the constitution. The cases are numerous enough that a repealed and abolished act can not be amended. *State v. Benton*, 33 Nebr., 823. That an amended act can not

thereafter be further amended under its original title, we find no authority holding, and it seems to us that this objection is overruled as to this very act in *State v. City of Kearney*, 49 Nebr., 325, 332. It is urged that the latter case ignored *State v. Benton, supra*, but the two are clearly distinct. In *State v. Benton* the court was dealing with an attempt to amend a wholly abrogated statute. There was nothing to rest on. Here is something to rest on, and the question is whether or not the reference to it is sufficiently distinct. We see no reason to change the ruling in *State v. Kearney* as to this act.

It is next asserted that the act of March 10, 1885, was not constitutionally passed, because it was amended in the house by inserting a repealing clause, and this was not concurred in by the senate. The journals of the house and senate are appealed to in order to sustain this contention. It is not claimed that the senate journal shows a non-concurrence in this formal amendment. It is merely claimed that an inspection of the journal fails to show a concurrence, and this is sought to be helped out by a showing that the message of the house to the senate stating the passage of the act calls attention to no amendment. We think that this condition of things hardly calls for a reversal of the lower court's finding. The holding in *State v. Frank*, 61 Nebr., 679, is that the silence of the journal is not to be taken as conclusive that the act was not passed. The rehearing opinion rests that decision chiefly upon the doubtful and mutilated condition of the journal. *Hull v. Miller*, 4 Nebr., 503, dwells upon the distinction between mere silence of the journals and an affirmative showing that the constitution has not been complied with. The evidence in this case certainly shows a degree of carelessness in the journals that would amply justify the court in refusing to take their mere silence against the affirmative evidence of the signed and certified acts. As we understand the case, the upholding of this act of March 10, 1885, and its limitation of the water tax to five mills, disposes of the whole contention. This

being upheld, the avoiding of the amendment of 1887 fixing the limit at seven mills would only put the relator at a still further disadvantage. We, therefore, do not care to discuss the objections to the act of March 31, 1887, further than to say that the chief objection to it is that it purports only to amend the act of 1885, which is urged to be no law, and its amendment, therefore, void. As we have decided against the premise, the conclusion will have to go with it. The discussion as to the act of March 2, 1885, to amend subdivision 1, seems equally unnecessary, for the same reason. The amendment of March 10, if valid, would seem to supersede this, at least so far as the two conflict. It, therefore, in our view, becomes unnecessary to discuss the distinction which is sought to be drawn, by which the granting of powers to tax is germane to the section amended, but limiting such grant to cases where they are authorized by a vote of the people is not germane.

It remains to mention the contention of relator that the council was empowered to contract for water-works, and was by subdivision 2 of section 69 of the act of 1879, in all its forms and amendments, authorized to levy "any other tax or special assessment authorized by law," and, therefore, could and should make a special provision to meet this contract. We are not able to uphold this contention. Both the act of March 10, 1885, and that of March 31, 1887, expressly limit the tax that may be levied to pay on contract for water. This contract purports expressly to be one for the supply of water. That it is in the form of a rental of hydrants makes it none the less what it says it is,—an agreement to supply water. We apprehend that relator would expect scant attention if its claim was only that it furnished dry hydrants.

For the reasons above given we think the judgment of the trial court should be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

GRAND ISLAND & WYOMING CENTRAL RAILROAD COMPANY, APPELLEE, V. COUNTY OF DAWES ET AL., APPELLANTS.

FILED JUNE 5, 1901. No. 9,465.

Commissioner's opinion, Department No. 1.

1. **Levy:** OUTSTANDING WARRANTS. When county commissioners have made a levy of nine mills for general fund purposes, they have no further power to levy an additional tax for payment of outstanding warrants previously issued against the general fund in excess of the statutory limit, unless authorized by a vote of the people of the county.

2. **Void Tax:** INJUNCTION. "Where a tax is void, that is, where there is no tax which the plaintiff is in equity bound to pay, he may invoke the aid of a court of equity to protect his rights by an injunction, notwithstanding section 144 of the revenue act. [Compiled Statutes, ch. 77, art. 1.]" *Bellevue Improvement Co. v. Village of Bellevue*, 39 Nebr., 877, and *Touzalin v. City of Omaha*, 25 Nebr., 817, followed.

APPEAL from the district court for Dawes county. Heard below before WESTOVER, J. *Affirmed.*

W. H. Fanning, Allen G. Fisher and *Albert W. Crites*, for appellants.

James E. Kelby, J. W. Deweese and *Charles F. Manderson, contra.*

DAY, C.

This is an appeal from a decree rendered by the district court of Dawes county, enjoining the appellants from collecting a certain tax of three mills on the dollar valuation, levied upon appellee's property. The facts are undisputed, and so far as we deem them necessary to an understanding of the question presented by the record are as follows: The county of Dawes, appellant, is one of the regularly organized and existing municipal sub-

divisions of the state. Appellee is a corporation owning a line of railway located in part in Dawes county. For the fiscal year of 1896 the state board of equalization, pursuant to law, assessed appellee's property in the various counties throughout the state at a certain sum per mile; the assessment so made upon the mileage in Dawes county amounting to the sum of $100,800. For the year of 1896, the county commissioners of said county made a levy upon the taxable property of the county as follows: General fund, nine mills; old outstanding warrants, three mills; bridge fund, two and seven-tenths mill; soldiers' relief fund, three-tenths mill; bonds and interest, five mills. The total levy for the year, outside that for bonds and interest, being fifteen mills. This levy upon appellee's property aggregated the sum of $4,803.81; all of which has been paid into the treasury of the county, except that portion arising out of the three-mill levy to pay "old outstanding warrants," amounting to the sum of $302.40. It is the legality of this three-mill levy which is here questioned.

The old outstanding warrants, for the payment of which the three-mill tax was levied, were all drawn upon the general fund during the years 1891 to 1896 inclusive, and the indebtedness which they were designed to cover accrued long after the adoption of the present constitution, and no vote of the people was had authorizing any levy for their payment, or the indebtedness leading to the tax. In each of the years from 1891 to 1896, inclusive, a levy of nine mills for general fund purposes had been laid. The aggregate of these outstanding warrants, with interest thereon, at the date of the stipulation of facts, amounted to the sum of $44,091.43, for the payment of which there were no funds in the treasury. For the purpose of enlightening the discussion we insert a table, based upon the facts presented by the record, taken in part from appellee's brief, showing the assessed value of property in the county for each year from 1891 to 1896, inclusive; the amount levied for general fund

purposes; the amount possible to be realized from the levy; the amount of warrant actually issued against the general fund; the amount of unpaid general fund warrants; the amount of warrants which might have been issued within the limit of 85 per cent. of the tax; and the per cent. of warrants issued to the total tax levied.

Year.	Valuation of taxable property.	Levy for general fund purposes.	Amount realized from levy.	Warrants issued.	Outstanding warrants unpaid.	Warrants authorized 85% of tax.	Percentage of issue to total tax levied.
1891	$1,702,423.00	9 mills	$15,321.80	$20,625.00	$6,767.84	$13,023.53	134.62%
1892	1,729,151.00	9 mills	15,562.35	15,451.00	4,250.31	13,227.99	99.28%
1893	1,931,811.00	9 mills	17,386.29	17,720.76	4,142.68	14,778.34	101.92%
1894	2,221,426.57	9 mills	19,992.83	16,969.36	6,050.89	16,993.90	84.88%
1895	1,496,820 68	9 mills	13,471.38	11,460.17	2,862.11	11,450.67	85.07%
1896	1,499,244.00	9 mills	13,493.19	10,560.73	8,497.60	11,469.21	78.26%

It needs but a glance at the foregoing table to disclose that for the years of 1891 and 1893 warrants were issued far in excess of any ability to pay them out of the taxes to be realized from the nine-mill levy, and that during the entire period, excepting only the years 1894 and 1896, warrants were issued in excess of the limit of 85 per cent. prescribed by the statute, and in these two years, while the limit had not been exceeded, still a large amount had been issued which at the date of the stipulation remained unpaid.

Section 5 of article 9 of the constitution provides: "County authorities shall never assess taxes the aggregate of which shall exceed one and one half dollars per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people of the county." It is plain that this provision is not a grant of power to county authorities to levy a tax of fifteen mills on the dollar valuation; it is simply a limitation upon the power, operative alike upon the county and the legislature. The principle of the law is firmly established that counties or other municipal corporations have no inherent power in matters relating to taxation, and they can exercise only

such power as is delegated to them by the constitution or by the legislature. We have shown that such power has not been granted by the terms of the constitution; let us now examine what power has been conferred by the legislature. Section 25, article 1, chapter 18, Compiled Statutes, 1899, provides:

"It shall be the duty of the county board of each county: First. To cause to be annually levied and collected taxes authorized by law for county purposes, not exceeding one dollar and fifty cents on the one hundred dollars valuation, unless authorized by a vote of the people of the county, and in addition thereto sufficient to pay the interest, and create a sinking fund for the payment of the principal, of all indebtedness which existed at the adoption of the constitution, November 1, 1875. * * * Sixth. At their regular meeting in January of each year, to prepare an estimate of the necessary expenses of the county during the ensuing year, the total of which shall in no instance exceed the amount of taxes authorized by law to be levied during that year, including the amounts necessary to meet outstanding indebtedness as evidenced by bonds, coupons, or warrants legally issued," etc.

"Sec. 34. It shall be unlawful for the county board of any county in the state to issue any warrants for any amount exceeding the aggregate of 85 per cent of the amount levied by tax for the current year, except there be money in the treasury to the credit of the proper fund for the payment of the same; nor shall it be lawful for the county board to issue any certificate of indebtedness in any form in payment of any account or claim, nor to make any contracts for or to incur any indebtedness against the county, in excess of the tax levied for county expense during the current year, nor shall any expenditure be made or indebtedness be contracted to be paid out of any of the funds of said county in excess of the amount levied for said fund.

"Sec. 35. Each warrant shall specify the amount levied

and appropriated to the fund upon which it is drawn, and the amount already expended of such sum."

Section 77, article 1, chapter 77, Compiled Statutes, 1899, provides: "On the last day of sitting as a board of equalization the county board shall levy the necessary taxes for the current year, including all county, township, city, school district, precinct, village and other taxes required by law to be certified to the county clerk and levied by the county board; provided, * * * The rate of tax for county purposes shall not exceed one dollar and fifty cents on the one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of the present constitution, unless authorized by a vote of the people of the county, and shall be as follows: 'In counties under township organization, for ordinary county revenue, including the support of the poor not more than nine mills on the dollar valuation; for roads, not more than five mills on the dollar valuation; for county bridge fund, not more than four mills on the dollar valuation; for county sinking fund, not more than four mills on the dollar valuation, and labor tax as provided in the following section. In counties not under township organization, for ordinary county revenue (including the support of the poor) not more than nine mills on the dollar valuation; for roads, not more than five mills on the dollar valuation; for county bridge fund, not more than four mills on the dollar valuation; for county sinking fund not more than three mills on the dollar valuation, and labor tax as provided in the following section.' "

It will be noted that by the terms of the statute above quoted, the county authorities are limited to a levy of nine mills for general fund purposes. This being the basis of their power to act, they must, in the exercise of it, keep within the limit granted, both as affects the amount of the levy and the purpose specified. The restriction of a levy of nine mills for general fund purposes is manifestly for the purpose of compelling the commissioners to ad-

minister the affairs of the county with economy and to prevent the municipal subdivisions of the state from becoming burdened with debts to be paid by the taxpayers. The county commissioners had the undoubted right, by virtue of the statute, to make a levy of nine mills for general fund purposes for each of the years from 1891 to 1896, and having done so, they had no further power to raise additional funds by a levy for the purpose of discharging debts properly chargeable to the general fund. If the commissioners had made a levy of twelve mills for the general fund for the year 1896, we think all would concede that the levy would be void to the extent of the excess of the amount authorized by the law for that purpose; and yet that is the effect of the levy of nine mills for general fund purposes and three mills for old outstanding warrants in the case under consideration. If such a transaction were permitted to stand, it would be to accomplish by indirection that which the law prohibits to be done directly. In the case before us, the general fund in the six years was entitled to a levy of fifty-four mills; by the process proposed this fund would have the benefit of a levy of fifty-seven mills. In *Union P. R. Co. v. Buffalo County*, 9 Nebr., 449, speaking of the power of the commissioners, the court says: "They have no authority to levy taxes for any purpose unless authorized by statute." In *Bellevue Improvement Co. v. Village of Bellevue*, 39 Nebr., 876, it is said: "Where a tax is void, that is, where there is no tax which the plaintiff is in equity bound to pay, he may invoke the aid of a court of equity to protect his rights by an injunction, notwithstanding section 144 of the revenue act. [Compiled Statutes, ch. 77, art. 1.]" *Touzalin v. City of Omaha*, 25 Nebr., 817. In *Morris v. Merrell*, 44 Nebr., 429, the court in speaking of mere irregularities in assessment and a void assessment, says: "But the rule is otherwise where the assessments are absolutely void for want of jurisdiction or power to impose the same. In such a case, a party may invoke the aid of a court of equity."

For the reasons set forth in this opinion the attempted levy of three mills to pay the outstanding warrants is illegal and unauthorized, and being so, a court of equity, in a proper case, will enjoin its collection. It is recommended, therefore, that the decree be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

JAMES H. ROTHWELL V. COUNTY OF KNOX ET AL.

FILED JUNE 5, 1901. No. 9,738.

Commissioner's opinion. Department No. 1.

1. **Taxes**; ASSESSMENT: JURISDICTION: INJUNCTION. An injunction will lie to restrain the collection of personal taxes by distress, when the assessment was without jurisdiction.
2. **Injunction**: JURISDICTION: IRREGULARITIES. Where the taxing officer acts with jurisdiction, injunction will not lie because of mere irregularities in assessment.

ERROR from the district court for Knox county Tried below before ROBINSON, J. *Reversed.*

Berryman & Meserve, for plaintiff in error.

W. L. Henderson and *O. W. Rice, contra*

DAY, C.

The relative positions of the parties plaintiff and defendants being the same in this court as in the court below, they will be so designated here. Plaintiff brought an action in the district court for Knox county, against defendants, praying for a permanent order of injunction restraining the defendants, the county of Knox and J. S. Patton its treasurer, from in any manner attempting

to enforce the collection of certain taxes mentioned in the petition.

The application for an injunction was in the form of a petition, verified affirmatively and set forth two causes of action.

To this petition a demurrer was filed upon the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was sustained and plaintiff electing to stand on his petition, a judgment of dismissal was entered at the costs of plaintiff, to review which, the case is brought to this court.

The petition, among other averments, charges, that in April and May, 1893, the plaintiff and his brother Samuel J. Rothwell, one of the defendants, were residents of Creighton Township, Knox county; that Samuel J. Rothwell was then the owner of 500 head of cattle—the ranch, yard and place of keeping and feeding said cattle being in Creighton township, and that said cattle were duly assessed to Samuel J. Rothwell on the 17th day of May, 1893, by the assessor of said township; that during the months of March, April and May, 1893, 435 head of said cattle were driven from Creighton township to South Dakota for pasturage, and in transit were driven into Raymond township, Knox county, on the 3d day of April, 1893. On May 2, 1893, the said 435 head of cattle, while the same were yet in transit, were assessed by the assessor of Raymond township, to Rothwell Brothers, meaning thereby to assess said cattle as the property of the plaintiff and Samuel J. Rothwell jointly. On the 14th day of June, 1893, the board of supervisors of Knox county caused the assessment of said cattle, made on the 17th day of May, 1893, to Samuel J. Rothwell, to be canceled and annulled and caused the schedule of the assessment made in Raymond township to be changed by adding the name of S. J. Rothwell thereto, and by resolution, attempted to make said assessment of said cattle in Raymond township a valid and binding assessment against the plaintiff and S. J. Rothwell. That plaintiff never resided in or

had a residence or domicile in Raymond township; that no partnership existed between him and S. J. Rothwell; that he was not and never had been the owner of, nor in any manner interested in said cattle, or any of them, and that all the proceedings, actions and things were done and performed without his notice or consent and against his will; that the amount of the tax so levied in Raymond township upon said cattle amounted to the sum of $160 with interest thereon as provided by law; that if a distress warrant is allowed to be issued and a levy made, it will cause plaintiff great annoyance, inconvenience and expense, and bring upon him irreparable injury, and that no adequate remedy at law is available to him.

For a second cause of action it is alleged, that on May 30, 1892, 400 head of cattle were assessed to plaintiff in Washington township by one Abrams, the assessor of said township, which assessment was without plaintiff's knowledge or consent and against his will; that said year he had no cattle or other property whatever in said township, and had no interest of any kind or nature whatever in any cattle in said township; that the claim for taxes on said assessment is barred by statute of limitations; that the taxes on the pretended assessment amounts to $51.90; that he had no notice, until the spring of 1897, that any pretended assessment had been made against him; that none of said taxes have been paid, and they stand upon the record against him; that the county treasurer threatens to issue a distress warrant against this plaintiff and cause his property to be levied upon, and if not restrained will levy upon his property and sell same to satisfy said tax and cause the plaintiff great annoyance, inconvenience, hardship and irreparable injury and that for this he has no adequate remedy at law.

The argument on behalf of defendants proceeds upon the theory that the tax was not assessed for an illegal or unauthorized purpose and that therefore an injunction will not lie to restrain its collection, and section 144 of

chapter 77, article 1, Compiled Statutes, is cited in support of this contention. This section, so far as it has application to the point in controversy, is as follows: "No injunction shall be granted by any court or judge in this state, to restrain the collection of any tax, or any part thereof, hereafter levied, nor to restrain the sale of any property for the non-payment of any such tax, except such tax, or the part thereof enjoined, be levied or assessed for an illegal or unauthorized purpose." The provisions of this section of the statute apply with equal force to taxes levied upon real or personal property. It will be noted that the above section relates to a tax which is apparently legal, but by reason of irregularities or error, is open to attack and has no reference to a tax which is absolutely void.

This court in *Touzalin v. City of Omaha*, 25 Nebr., 817, construing a statute, in almost the exact language above quoted, says: "Injunctions to prevent the collection of taxes are not favored, and should only be granted where the relief at law is wholly inadequate. If, however, the tax is void, in other words, is levied without authority of law, the forms of law nevertheless being used to cast a cloud upon the title of the party's real estate, and thereby diminish its value, the power of the legislature to close the doors of the courts to aid the tax-payer is very doubtful. A void tax is no tax. How then can the statute debar the tax-payer from enjoining the unlawful sale of his property to pay such alleged taxes? The law might as well authorize the seizure of the property of A by force and violence, and without authority, to pay the debts of a municipality, as to seize and sell such property under a void assessment. In either case the tax-payer may invoke the aid of the courts to protect him from wrong and oppression." *Sioux City Bridge Co. v. Dakota County*, 61 Nebr., 75; *Harmon v. City of Omaha*, 53 Nebr., 164; *Morris v. Merrell*, 44 Nebr., 423; *Chicago, B. & Q. R. Co. v. Nebraska City*, 53 Nebr., 453.

In *Earl v. Duras*, 13 Nebr., 234, it was said: "Where

taxes are levied upon real estate without authority of law, a court of equity may enjoin the collection of the same."

In *Chicago, B. & Q. R. Co. v. Cass County*, 51 Nebr., 369, it was said: "The district courts of this state are, by the constitution, invested with general equity jurisdiction, and this includes the authority to enjoin the collection of a void tax; and this jurisdiction the legislature can neither take away nor impair."

The defendants, while recognizing the rule as laid down in this state, by the above citation, contend that it has no application to a tax, however illegal and void, levied upon personal property. We are aware that this contention is supported by some of the leading text writers on the subject of taxation, and a number of decisions of the courts of last resort can be found upholding such a doctrine, the basis of the reasoning being that an adequate remedy at law exists. But it seems to us in view of the decisions of our own court, construing our statute, as to the extent of the lien created by a levy of taxes upon personal property, that such a rule ought not to prevail in this state.

In *Reynolds v. Fisher*, 43 Nebr., 172, it is said: "The taxes assessed on personal property are not confined as a lien to the property upon which they are assessed, but are a lien upon all personal property owned by the person assessed, during the existence of the taxes, from and after the delivery of the tax list to the county treasurer for collection." *Farmers Loan & Trust Co. v. Memminger*, 48 Nebr., 17.

Thus it will be seen that unpaid taxes levied upon personal property are a general lien upon all the personal property of the tax-debtor. He can not sell or convey his property freed from the claim for taxes; so long as they remain unpaid they are a cloud upon his title and a hindrance to the free enjoyment of his property. If the collection of a void tax will be enjoined when levied upon real estate, the writer can conceive of no good reason why

it may not be enjoined when levied upon personal property; especially is this true where the personal tax becomes a lien which follows the property. The only way by which this tax could be canceled and the lien annulled was by the payment, or by recourse to a court of equity for relief. If the tax levied was void the county would have no legal right to it and all will concede that had it been paid under protest, the amount so paid could be recovered. It would be a vain thing for the law to require a tax to be paid, the payment of which would immediately give rise to an action for its recovery.

We think the true principle is concisely stated in *Drake v. Phillips*, 40 Ill., 388, 393, in the following language: "When persons authorized to lay a tax exercise the power for a purpose authorized by law, courts of equity refuse to take jurisdiction, simply because some formality or legal requirement in making the levy is wanting, if it is laid for an authorized purpose and by the persons designated by law. In such a case, if wrong ensue, the party injured has a complete remedy at law. But when officers or individuals have no legal authority to lay a tax, and they assume the right; or when persons are vested with legal authority to lay a tax for a specified purpose, but instead of exercising that power they proceed to impose a tax which the law has not authorized, or lay it for fraudulent or unauthorized purposes,—then a court of equity will interpose to afford preventive relief, by restraining the exercise of powers perverted to fraudulent or oppressive purposes."

The facts alleged in the petition show, that the assessor in Raymond township had no authority to assess the cattle in the name of plaintiff, in whole or in part. Plaintiff did not reside in Raymond township; no partnership existed between him and S. J. Rothwell; he was not the owner of these cattle or any of them, and never had been, and had no interest in them, as against this plaintiff; the assessor had no jurisdiction to make the assessment and his action is void.

Plaintiff's second cause of action rests upon the same basis; he charges he had no property in Washington township, and resided in Creighton township; if so there was no jurisdiction to make the assessment.

There is no principle of law or good morals which requires a person to pay taxes upon property which he does not own or in which he has no interest.

From the foregoing observations, it follows that the learned district judge erred in sustaining the demurrer to the petition and in dismissing said cause, and it is therefore recommended that the cause be reversed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

REVERSED.

JANE SMITH V. CHARLES WHITE.

FILED JUNE 5, 1901. No. 9,610.

Commissioner's opinion, Department No. 1.

1. **Receiver Will Not Be Appointed In Ejectment.** In an action of ejectment a receiver will not be appointed to take charge of the property, and to collect rents and profits before judgment entered.

2. **Ejectment:** SHERIFF'S DEED: BURDEN OF PROOF. In an action of ejectment, where plaintiff claims under a sheriff's deed resulting from a mortgage foreclosure, to which defendant was not a party, and defendant in possession claims under a prior unrecorded deed made by the mortgagor, the burden is upon the plaintiff to show that he took his mortgage for value and without notice, actual or constructive, of defendant's title; and an instruction placing the burden on defendant to show want of *bona fides* and of notice on the part of the plaintiff is prejudicial error.

3. **Estoppel by Silence; There Must Be Occasion to Speak.** To sustain an estoppel because of an omission to speak there must be both the specific opportunity and the apparent duty to speak. The party maintaining silence must have known that some one was

relying thereon, and was either acting, or about to act, as he would not have done had the truth been told. *Scharman v. Scharman*, 38 Nebr., 39.

4. **Evidence.** Evidence examined, and found insufficient to sustain plaintiff's plea of estoppel.

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

Francis A. Brogan, for plaintiff in error.

George W. Shields, contra.

KIRKPATRICK, C.

This is an action in ejectment brought in the district court of Douglas county by Charles White, defendant in error, plaintiff below, against Jane Smith, plaintiff in error, defendant below. The petition is in form usual in actions of ejectment, setting up ownership of the property in controversy; that Jane Smith was in possession; that during her unlawful possession she had received rents and profits amounting to the sum of $100, with a prayer for judgment for the delivery of the possession of the property, and for rents and profits. The answer of Jane Smith admits her possession of the property; that she is collecting rents; and alleges that she purchased the property in 1869 with her own money, and became the equitable owner; that in the year 1885 she entered into possession of the property, and has resided there ever since; that on July 31, 1886, she received a deed to the property, and that ever since she has been the legal and equitable owner of the same and entitled to the possession thereof. To this answer a reply was filed by Charles White, in which he admits the execution and delivery of the deed mentioned in Jane Smith's answer, dated July 31, 1886, and admits that it was recorded June 5, 1896; and alleges that he is a bona-fide purchaser of the property; that on September 17, 1892, he loaned John D. Smith, the holder of the record title of said premises, the

sum of $4,500, and took from him a note and mortgage payable May 6, 1895, with interest at seven per cent. until paid; that default was made in payment of interest; that he commenced his foreclosure suit, and on June 26, 1895, obtained a decree of foreclosure; that stay was taken by John D. Smith; that on May 23, 1896, he, White, purchased the premises under his decree at a sale made by a special master; that in June, 1896, sale was confirmed, and on June 25, 1896, he received a master's deed to the property, which was placed of record July 14, 1896. He further sets up certain matters which he claims amount to an estoppel against Jane Smith asserting title to the premises. On October 27, 1896, before trial, White filed a petition praying the appointment of a receiver. In his petition he alleged his ownership; set up the execution and delivery by John D. Smith of the note and mortgage upon which he had foreclosed; the delivery of the master's deed to him; the possession of the property by Jane Smith; that she was collecting the rents and profits, that she was not keeping the property in repair, or paying taxes; that both Jane and John D. Smith were insolvent; and the same matters by way of estoppel which were pleaded in his reply. To this petition for the appointment of a receiver Jane Smith filed objections, alleging that it was an action at law to recover possession of the property in ejectment; that the court had no jurisdiction to dispossess her until after judgment; setting up that White had not asked the appointment of a receiver in his petition in ejectment, and that his petition for a receiver, when filed, set up no matters arising since the filing of his original petition; and that the facts stated did not warrant the appointment of a receiver. On December 11, 1896, a receiver was appointed to take possession of all the property, except two rooms in which Jane Smith was living, to collect the rents and hold them subject to the order of the court. Afterwards trial was had to a jury, which resulted in a verdict for White, upon which judgment was entered. Jane Smith prosecutes error to

this court, alleging various errors, of which those necessary to be examined will be considered in their order.

The first error complained of is that the court erred in appointing a receiver. The determination of this question requires a consideration of section 266 of the Code of Civil Procedure, providing for the appointment of receivers, which is as follows: "A receiver may be appointed by the supreme court, or the district court, or by the judge of either, in the following cases: First—In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of any party to the suit, when the property or fund is in danger of being lost, removed, or materially injured. Second—In an action for the foreclosure of a mortgage, when the mortgaged property is in danger of being lost, removed, or materially injured, or is probably insufficient to discharge the mortgage debt. Third—After judgment, or decree to carry the same into execution, or to dispose of the property according to the decree or judgment, or to preserve it during the pendency of an appeal. Fourth —In all cases provided for by special statutes. Fifth—In all other cases where receivers have heretofore been appointed by the usages of courts of equity." White, defendant in error, does not say under which subdivision of the foregoing section he places his right to the appointment, but an examination discloses that his claim can be sustained, if at all, only under subdivision five. It seems clear that this subdivision was not intended to confer any additional authority upon the court, but to make it plain that the preceding subdivisions providing for the appointment of receivers in particular cases were not exclusive, and did not attempt to, and indeed could not, take from the court the equitable jurisdiction given by the constitution to appoint receivers where the usages of courts of equity had theretofore authorized their appointment. Or, differently stated, the fifth sub-

division is declaratory of a power already existing under the constitution. *Bateman v. Superior Court*, 54 Cal., 285. It therefore follows that unless the case at bar is one where "receivers have heretofore been appointed by the usages of courts of equity," the order complained of is erroneous and should be reversed. We will briefly examine the cases, seemingly most in point, cited by White, defendant in error, in support of his contention. The first cited is *Rogers v. Marshall*, 38 How. Pr. [N. Y.], 43. This case, the court rendering the opinion said, "is totally different from an action of ejectment. It seeks relief on the ground of fraud, mistake and want of jurisdiction in the court in which the proceedings to foreclose the alleged lien of Maginn, were concerned. It clearly presents, therefore, precise grounds for the equitable interposition of this court, and in such cases we never refuse preliminary injunctions and the appointment of a receiver, if the condition of the subject of the controversy requires the aid of these provisional remedies." It appears that this was an equity case, pure and simple, and could in no sense be considered an authority in the case at bar.

The case of *Ireland v. Nichols*, 37 How. Pr. [N. Y.], 222, cited, was an action brought by the owner of the fee against the tenant who had sublet contrary to the terms of the lease. The answer of the tenant admitted the plaintiff's title, and that he had sublet contrary to the terms of his lease. The court held that a receiver was properly appointed, but it authorized the appointment under section 244 of the Code of New York, from which it quoted as follows: "A receiver may be appointed before judgment in an action; and on application of either party, who establishes an apparent right to property which is the subject of the action, and which is in the possession of the adverse party, and the property, or its rents and profits, are in danger of being lost or materially injured, or impaired." In this state we have no statutory provision similar to the one quoted above, and for that reason the case cited would not be an authority; however, in that case the

learned judge rendering the opinion said the appointment of a receiver in an action at law could not be sustained in the absence of the statute quoted. This case, *Ireland v. Nichols, supra,* overruled the earlier case of *Thompson v. Sherrard,* 35 Barb. [N. Y.], 593, in which it was held that a receiver could not be appointed in an action of ejectment. In the later case of *Guernsey v. Powers,* 9 Hun [N. Y.], 78, the supreme court of New York expressly reaffirmed the case of *Thompson v. Sherrard, supra,* and overruled *Ireland v. Nichols, supra.* In the *Guernsey Case* it was expressly held that "in an action to recover the possession of real estate from one in possession thereof under a contract of sale, the court will not appoint a receiver thereof *pendente lite.*" In the case of *Burdell v. Burdell,* 54 How. Pr. [N. Y.], 91, the supreme court of New York again held that a receiver would not be appointed in an action of ejectment, the syllabus of the case being as follows: "In an action of ejectment a receiver cannot be appointed before judgment."

Again, in the case of *La Bau v. Huetwohl,* 60 Hun [N. Y.], 407, which is the latest New York case we have been able to find, the supreme court of that state reversed an order of the lower court appointing a receiver in an ejectment case. In the syllabus the court made use of the following language: "Where one is personally in possession of premises under a contract for the sale thereof, the court will not, in an action to recover possession of said premises, appoint a receiver *pendente lite.*" It will thus be seen that the supreme court of New York has placed itself squarely in opposition to the rule contended for by White, defendant in error.

In the case of *Whitney v. Buckman,* 26 Cal., 447, the lower court appointed a receiver in an action of ejectment. No objection was made to his appointment. From an order granting a new trial in the main case, the plaintiff in the lower court prosecuted error, resulting in a judgment setting aside the new trial, and directing a judgment on the verdict in the lower court. A motion

was then made for an order directing the receiver to pay over to the successful party the money collected by him as receiver during the pendency of the litigation. This order was made by the lower court, from which an appeal was taken to the supreme court. At the hearing on this appeal, although the question was not presented, in a mere dictum, the court said that the appointment of a receiver after judgment was proper, but placed the authority for such appointment solely on section 143 of the practice act of California, which expressly authorizes the appointment of a receiver in such cases after the entry of judgment. This case can not be considered an authority in the case at bar. But if it were so considered, the supreme court of California in the later case of *Bateman v. Superior Court,* 54 Cal., 285, has held that a receiver could not be appointed in an action of ejectment, the syllabus of that case being as follows: "Under the Code of Civil Procedure, the district court had no jurisdiction to appoint a receiver in an action of ejectment; and an order making such appointment should be annulled." An examination of the California statute providing for the appointment of receivers discloses that subdivision 6 of section 564 of the practice act is identical with subdivision 5 of section 266 of our statute. It is thus seen that the supreme court of California, in passing upon a statute identical with our own, under which White claims, has held that a receiver can not be appointed in an action of ejectment.

While reported cases may be found in which courts of equity, in actions in the nature of ejectment, have appointed receivers in aid of actions at law, an examination discloses that such appointment is based upon some statute expressly authorizing it; or that some very exceptional conditions, such as fraud, etc., are shown to exist. It may, therefore, be safely stated as the rule, sustained by the weight of authority, that the usages of courts of equity do not authorize the appointment of a receiver in ejectment cases before judgment. So care-

fully does the law in this state guard the rights of a defendant in possession, that he is entitled to have a jury twice say that his possession is wrongful before he can be ousted. It may, therefore, be safely stated as the rule in this state that the court will not appoint a receiver in an action of ejectment before judgment. Not only is the foregoing rule based upon right reason, but it is supported by authority. *State v. District Court*, 13 Mont., 416; *Sengfelder v. Hill*, 16 Wash., 355; *Bennallack v. Richards*, 125 Cal., 427; *Emerson's Appeal*, 95 Pa. St., 258. Whether there may be authority to appoint a receiver in an action of ejectment after judgment is a question not presented in this case, and will not be considered.

It is contended by White that the correctness of the order of the district court in appointing a receiver is not properly presented; but this contention is without merit. It follows from what has been said that the order appointing a receiver was erroneous and should be reversed.

Numerous errors are alleged in the giving and refusal of instructions, but only those apparently relied upon and discussed in briefs of counsel will be considered. The third instruction given by the court on its own motion is as follows: "The burden is upon the defendant in this case to establish by a preponderance of the evidence that defendant was in the open, notorious and exclusive possession of the premises in controversy at the time of the execution and delivery of said mortgage from John D. Smith to plaintiff on December 17, 1892, or that plaintiff knew of such deed from John D. Smith to defendant at the time of the execution and delivery of the mortgage from John D. Smith to plaintiff December 17, 1892, or that at said time plaintiff had a knowledge of sufficient facts with reference thereto, as would, if pursued, have led to such knowledge of said deed. The burden is upon the plaintiff to establish by a preponderance of the evidence, if you find defendants were in such possession, at such time, that the defendant, by her actions or silence, is estopped from asserting her claim to said premises." It is claimed

that this instruction is erroneous, because it placed upon Jane Smith the burden of proving that her possession was open, notorious and exclusive under her unrecorded deed, and that White was not an innocent mortgagee without notice. There can be no doubt that the instruction is vulnerable to this objection. Neither is there any doubt that it is the settled law of this state that a person claiming under a mortgage as against a person in possession under an unrecorded deed must allege and prove that his mortgage was given for a valuable consideration, and that he had neither actual nor constructive notice of the existence of the deed. *Keeling v. Hoyt*, 31 Nebr., 453; *Bowman v. Griffith*, 35 Nebr., 361; *Baldwin v. Burt*, 43 Nebr., 245; *Phœnix Mutual Life Ins. Co. v. Brown*, 37 Nebr., 705; *First National Bank of Plattsmouth v. Gibson*, 60 Nebr., 767. Counsel for White, in effect, admits that this instruction is erroneous, but claims that it was not prejudicial, because White did in fact assume and maintain the burden of proof. We are unable to discover any merit in this contention. There is no doubt the giving of this instruction was prejudicial error.

It is claimed the court erred in refusing to give instruction No. 5, requested by Jane Smith, which is as follows: "You are instructed that the burden of proof is on the plaintiff to prove that he took the mortgage from John D. Smith as the owner of the legal title of record, and that in taking it, he acted in good faith, and paid a valuable consideration for it, and that he had no notice either actual or constructive of the title of the defendant Jane Smith under her unrecorded deed, and unless you find all of these elements in favor of the plaintiff, then you are instructed that the said mortgage from John D. Smith to the plaintiff was not binding upon the property of the defendant, and the foreclosure thereof has given no title to the plaintiff as against the defendant's title, and you will in that case find for the defendant." Measured by the decisions of this court heretofore cited, this instruction seems correctly to state the law. It was applicable

to the evidence and proper under the pleadings, and should have been given. We do not find that this error was cured by any instruction given. The refusal to give it was therefore error.

This brings us to a consideration of the matter of estoppel urged by White. The trial court received in evidence over the objection of Jane Smith evidence showing that an action had been brought in the United States court affecting this property, in which John D. Smith, and not Jane Smith, was named as defendant; that other mortgages had been given on the property by John D. Smith before the execution of the one relied upon by White. This evidence seems to have been admitted by the learned trial judge in support of White's plea of estoppel. If the execution of these prior mortgages by John D. Smith had been brought to the knowledge of Jane Smith, and it had been shown that White knew of them, and relying upon them parted with his money, and that Jane Smith, knowing of White's reliance thereon, kept silent when she should have spoken, this evidence would have been admissible. The rule seems to be correctly stated in the third paragraph of the syllabus in the case of *Scharman v. Scharman*, 38 Nebr., 39, 40, in the following language: "To sustain an estoppel because of the omission to speak there must be both the specific opportunity and the apparent duty to speak. The party maintaining silence must have known that some one was relying thereon, and was either acting, or about to act, as he would not have done had the truth been told." It will serve no useful purpose to set out the evidence in the case, and it will, therefore, not be done. It is sufficient to say that there was an entire lack of evidence tending to show that Jane Smith ever knew that her brother had given any mortgage on the property, or that he had held himself out to the public or to any individual as the owner; and there is also an entire lack of evidence tending to show that White had ever known of the mortgages, or that he ever knew or relied upon any acts or silence on

the part of Jane Smith. The principal elements to constitute estoppel are, therefore, entirely wanting. The admission of this evidence should not have been otherwise than prejudicial to Jane Smith, and its admission was error.

Other errors assigned, in view of what has already been said, will not be considered.

For errors pointed out, the judgment, verdict, and the order appointing a receiver should be reversed, and a new trial granted.

DAY and HASTINGS, CC., concur.

By the Court: For the reasons given in the opinion, the verdict and judgment and the order appointing a receiver are reversed and a new trial granted.

REVERSED AND REMANDED.

NANCY J. TUCKER, ADMINISTRATRIX, v. THOMAS DRAPER, ADMINISTRATOR.

FILED JUNE 5, 1901. No. 9,467.

Commissioner's opinion. Department No. 2.

1. **Injury by Wrongful Act:** RESPONSIBILITY OF LANDLORD TO GUEST. One who goes upon the premises of another, by express or implied invitation of the owner, may recover damages for an injury caused by a failure on the part of such owner to keep the premises in a reasonably safe condition.
2. **For Death of Intestate, Petition Must Show Pecuniary Injury to Widow or Next of Kin.** In an action by an administrator to recover damages for the death of his intestate under chapter 21, Compiled Statutes, the petition must show a pecuniary injury to the widow or next of kin, but as against a general demurrer it is sufficient in that regard to allege that "by reason of the death of the intestate and the loss of the service and society and fellowship of the said intestate the plaintiff has been damaged in the sum of five thousand dollars."
3. **Question of Negligence for Jury.** In such action, unless the facts are undisputed and are of such a nature that ordinary minds would not differ in their judgment of them, the question of negligence must be submitted to the jury.

4. **Evidence Sufficient.** Evidence examined and found sufficient to warrant the trial court in submitting the question of negligence to the jury.

5 **Instruction:** DEATH OF CHILD: CONTRIBUTORY NEGLIGENCE OF FATHER. In such action for the death of a child, the father as administrator being plaintiff, it is error to instruct the jury that contributory negligence of the father is no defense.

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

Field & Brown, for plaintiff in error.

E. J. Burkett and *Lamb & Adams, contra.*

Argued orally by *Allen W. Field,* for plaintiff in error; and by *George A. Adams, contra.*

SEDGWICK, C.

The plaintiff sued as administrator of his son, a child three years and three months of age, who was killed by falling into a well on the premises of the defendant. There was a trial with a jury and verdict for the plaintiff. The defendant's motion for a new trial was overruled and judgment entered on the verdict. The case is brought here upon petition in error.

The defendants insist that the petition was insufficient, and that the general demurrer thereto ought to have been sustained by the court. And the first ground of this objection is that as the accident occurred on the private property of the defendant and in the absence of an express or implied invitation to the deceased child to go upon the premises there can be no recovery; and that the facts alleged in the petition fail to show such invitation. There is some repetition and some incoherency in the petition, but it contains the allegations that defendants permitted the public in general to use the lots for hitching horses and teams, and permitted their use by the patrons of the saloon and other persons desiring places to hitch horses and teams during their temporary

stay in the city of Lincoln, and the lots were thrown open to the public in connection with said saloon so as to better enable the tenant to rent said saloon and make it bring a better rental and more money to the owners; and for said reason the public was, by defendant, notified and invited to go upon said lots and use them as above stated; and said lots and premises were by defendants thrown open to the public in general, and the general public was, by defendant, invited to enter and use the same as public property. As against a general demurrer we think there is here an allegation that the lots were thrown open to the general public and the general public was invited to use the lots as public property, and the deceased child being one of the general public he was of course embraced in the invitation.

2. The second objection to the sufficiency of the petition is, that there is no sufficient allegation of pecuniary loss to the plaintiff. The allegation is that "by reason of the death of the said Harry Draper the plaintiff has been damaged by reason of the loss of the service and society and fellowship of the said Harry Draper in the sum of $5,000." It is assumed that the society and fellowship of one's children have no pecuniary value. Some courts have so expressed themselves, but we do not find it necessary to discuss that proposition. In *Hurst v. Detroit City Railway*, 84 Mich., 539, 48 N. W. Rep., 44, the supreme court of Michigan in a well reasoned opinion, citing many authorities, concludes that "pecuniary injury must be alleged and proved." There was no allegation of loss of service nor of actual pecuniary damage. The allegation was, "by reason of which negligence of said defendant and injury to and death of said Lorenzo Hurst an action has accrued to said plaintiff as representative of the next of kin of said Lorenzo Hurst, and in which he claims damages from said defendant in the sum of $10,000." The court said: "It is argued however, by counsel, that this statute declares the liability of the person or corporation whose negligence caused the death, and that therefore,

no evidence of pecuniary damages was requisite to entitle the next of kin to maintain the action and recover such damages; the statute leaves the jury to give such damages as they shall deem fair and just"; and held that there must be a special allegation of pecuniary loss in the petition, which must be supported by proof. See also *Orgall v. Chicago, B. & Q. R. Co.*, 46 Nebr., 4; *Kearney Electric Co. v. Laughlin*, 45 Nebr., 390. In *Chicago, B. & Q. R. Co. v. Van Buskirk*, 58 Nebr., 252, the action was brought by the administrator of the estate of Charles P. Van Buskirk, deceased; and the petition alleged that "the said Charles P. Van Buskirk has neither wife nor children, but left Alonzo J. Van Buskirk, Mary P. Van Buskirk, his parents, and Gertrude G. Eledge, Lewis G. Van Buskirk, * * * brothers and sisters, who are heirs at law and next of kin, who have been damaged in the sum of $5,000." This petition was precisely within the rule announced in *Hurst v. Detroit City Railway*, 84 Mich., 539, and other cases, and was clearly insufficient, and was so held. In the opinion it is said, that it is necessary to aver a loss of means of support where from the relation of the survivors the law would not presume that from his death such survivors had been deprived of their means of support; but it was not intended to declare the rule that the action can not be maintained unless it in some way appears that the survivors of the deceased have lost their means of support. Loss of means of support is pecuniary injury, but it by no means follows that it is the only pecuniary injury for which a recovery may be had in such actions. *City of Friend v. Burleigh*, 53 Nebr., 674. The services might be valuable to a parent entitled thereto who was in such financial condition as not to be dependent upon such services.

3. The defendants insist that there was not sufficient evidence to warrant the submission of the issues to the jury. The case of *Richards v. Connell*, 45 Nebr., 467, is cited as decisive of this question. In that case the court

said: "The owner of a vacant lot upon which is situated a pond of water or dangerous excavation is not required to fence it, or otherwise insure the safety of strangers, old or young, who may resort to said premises not by invitation, express or implied, but for the purpose of amusement or from motives of curiosity." A boy of about ten years of age who was accustomed to play in and about a pond of water in a vacant lot, the property of defendant, fell from a section of sidewalk which he was using as a raft on the pond, and was drowned. The defendant had permitted the surface water to accumulate on this lot, he had nothing to do with causing it to accumulate there, the pond was formed in the course of nature. The boy formed a raft, and "went on said pond floating thereon." He was capable of constructing and did construct the "raft" that caused his death, negligence and even recklessness was properly chargeable against him, and it was held that the defendant was not liable. We have no doubt that under the facts in that case the law was correctly applied. The case of *City of Omaha v. Bowman*, 52 Nebr., 293, is similar in character. "A body of water—either standing, as in ponds and lakes; or running, as in rivers and creeks; or ebbing and flowing, as on the shores of seas and bays—is a natural object, incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land; the danger of drowning in it is an apparent open danger, the knowledge of which is common to all; and there is no just view, consistent with recognized rights of property owners, which would compel one owning land upon which such water, or part of it, stands or flows, to fill it up, or surround it with an impenetrable wall." *Peters v. Bowman*, 47 Pac. [Cal.], 113; *City of Omaha v. Bowman, supra.* "There is no hard and fast rule applicable to every one under like circumstances. To an adult, in full possession of his mental and physical powers, one standard may be applied; to a boy, particularly if he be of limited intelligence, another standard; and to

an infant not *sui juris* and totally ignorant of danger, still another." *Baltimore & P. R. Co. v. Cumberland,* 20 Sup. Ct. Rep., 380; *Huff v. Ames,* 16 Nebr., 139. "Much may depend upon the character of the injury, the circumstances under which it occurred, and the size, intelligence and maturity of the child. In such cases a jury must be allowed to pass upon the question of contributory negligence; it is error to rule it as a question of law." *Gillespie v. McGowan,* 100 Pa. St., 144, 45 Am. Rep., 365, 368. It is only where the facts are undisputed and are of such a nature that ordinary minds would not differ in their judgment of them that the question is one of law for the court.

In *Richards v. Connell, supra,* it is said "that plaintiff can recover in cases where the plaintiff was injured while upon defendant's premises by invitation of the latter, and where the negligence consists in a failure to keep such premises in a reasonably safe condition." It appears that these premises, consisting of three lots in the heart of the city of Lincoln, had a saloon located at one corner of the tract; that the lots were so situated that teams could drive thereon immediately from the principal streets of the city, and that people had frequently been invited by the owner to use the lots for the purpose of hitching their teams, and that the citizens generally did so, both those who patronized the saloon and others; that there had been shows or some kind of public entertainments upon the lots at different times and people had frequented them at such times, the people being, as one of the witnesses expressed it, "as thick as they could stand"; that there were at one time stairs put in at least two places to enable the people to go on the lots directly from the sidewalk on one side thereof, and it does not appear how long these stairs so remained, or whether they were taken away; the evidence also tends to show that a neighbor was allowed to, and did, use the lots for storing sewer-tiling, and that piles of said tiling, three to five feet in height and covering a

considerable space, were at times upon said lots; that the well was located in an open part of said lots about twenty feet from the said tiling; that the well was something more than twenty feet deep, and that the top was surrounded by a curb ten or twelve inches high, which had been covered over with boards; that these boards, or at least some of them, were loose and had been removed and had been allowed to remain so for six months or more immediately prior to the accident; that there was a path running somewhere in the lots and within three or four feet of the well; that it was a very public place, and that the boys of the city had frequently played ball on an adjoining lot and on such occasions had, in playing ball, run across the lot in question; that they were playing ball there on the day of the accident, and not long before the accident one of the boys in chasing the ball, nearly ran into the well; that the health officer of the city, some two or three years before the accident, called the attention of the owner of the premises to the dangerous condition of the well, and was told by the owner to go to h—, that he would run his own business; and that the well had thereafter remained substantially in the same condition until the accident; that on the day of the accident the deceased boy, with his little brother who was about five years old, walked down to the livery stable near the premises, where their father's family horse was kept, to see the horse, and then walked from there over to these lots and to the well in question; and the little boy in question while standing by the well and without any apparent cause, was seen by one of the witnesses "just stand and fall into the well apparently reaching for something"; that the persons employed by the defendant to take care of the premises must have known the condition of the premises and how it was being used and the apparent danger from the well.

There may be, and often are, circumstances under which one owes some active duty to a trespasser upon his premises. If a man willfully lies down upon a rail-

road track the engineer must not wantonly run his engine over him. One may not set a snare or spring gun for trespassers, and, knowing that some stranger had placed the snare or spring gun, if he wantonly allows it to remain he will be responsible for the consequences. A well may be so contrived as to act as a dangerous trap, and one who allows it so to remain upon his premises will, under some circumstances, be liable. If adults, or children of such age as to ordinarily be capable of discerning and avoiding danger are injured while trespassing upon the premises of another, they may be without remedy, while under similar circumstances children of three or four years of age would be protected. If I know that there is an open well upon my premises and know that children of such tender years as to have no notion of their danger are continually playing around it and I can obviate the danger with very little trouble to myself and without injuring the premises or interfering with my own free use thereof, I owe an active duty to those children, and if I neglect that duty and they fall into the well and are killed it is through my negligence; I can not urge their negligence as a defense, even though I have never invited or encouraged them expressly or impliedly to go upon the premises. In *Kinchlow v. Midland Elevator Co.*, 46 Pac. Rep. [Kan.], 703, a boy ten years of age who was by permission of the company, assisting in sweeping grain cars for which he and other boys were paid by being allowed the grain which they so gathered, went to an exhaust-steam barrel to warm his feet. He had no permission from the company to go there, and in stepping upon the cover (which was loose) the cover tipped and he fell into the barrel, scalding his feet and legs. The court said: "We think it ought to have been submitted as a question of fact for the jury to determine upon the evidence whether the defendant was guilty of negligence or not in placing the barrel in that position, and in maintaining it with such an insecure cover; and also whether or not, considering the age and capabilities of the plain-

tiff, he was guilty of contributory negligence in stepping upon the cover." The court also quotes the following from an opinion of the supreme court of Michigan: "A license to come upon one's premises, especially if in the licensor's interest, imposes upon him the duty to warn those who come, of any danger in coming of which he knows or ought to know and they do not." And the court also quoted the following from the supreme court of Pennsylvania: "While it is true, in general, that where no duty is owed no liability arises, this rule varies with circumstances, and where, therefore, an owner has reason to apprehend danger from the peculiar situation of his property and its openness to accident, the question of duty then becomes one for a jury, to be determined upon all its facts of the probability of danger and the grossness of the act of imputed negligence." The demurrer to the evidence which the trial court sustained, was overruled by the supreme court.

In *Hargreaves v. Deacon*, 25 Mich., 1, the cistern into which the child fell was made for the lawful use of the owner, and was then being used in the customary way; there was no evidence of its having been abandoned or that the owner knew that little children were accustomed to play around it; there was "nothing to indicate any wanton or inhuman disposition in the defendant"; the defendant had not allowed the cistern to remain uncovered, but in using the cistern the cover had been temporarily removed. From the very interesting opinion of Mr. Justice Campbell, it appears that if there had been circumstances in the case indicating a wanton or inhuman disposition in the defendant he would have been held liable. In *Klix v. Nieman*, 32 N. W. Rep. [Wis.], 223, a boy of nine years "while playing upon and about a pond of water on defendant's premises, was drowned." In holding the defendant not liable the court said: "Unless we hold that the defendant was under a legal obligation to fence this pond for the protection of children reaching and playing upon it, there can be no recovery. And it is

obvious that a fence would have to be very high and very tight to afford any effectual guard against children having access to the pond. But upon the facts, we do not think the law imposed the duty upon the defendant of building a fence or guard to prevent children from reaching the pond." In the case at bar the well was apparently of no use to any one, it ought to have been filled, or at any rate it could easily have been put in such condition as to have prevented this accident.

We are not called upon to say what finding we would make upon the evidence in this record. We think it was for the jury to say whether there was an implied invitation to go upon these lots which included this little boy, and whether there was on the part of the owners of the premises such recklessness of danger to little children as to "indicate a wanton and inhuman disposition in the defendant." The former question was submitted by the trial court with proper instructions and defendant can not complain of a failure to submit the latter.

The trial court excluded evidence offered by the defendant to show contributory negligence on the part of the plaintiff; there were circumstances shown in the evidence sufficient to require this question to be submitted to the jury if, under the law, contributory negligence of the plaintiff would constitute a defense in this case; but the court instructed the jury that "contributory negligence on the part of either or both his parents under the law is no bar to this action"; and this instruction is complained of as error. Under our statutes, if the "neglect" was such as would have entitled the party injured "to maintain an action and recover damages in respect thereof," then the person who would have been liable if death had not ensued "shall be liable to an action for damages." Under a statute which provides that all causes of action shall survive, an action was brought by an administrator for the benefit of the estate of a child whose death was caused by the negligence of the county; the negligence of the parents contributed to the injury.

Neither the father nor mother was a party to the action. The court said: "It is claimed that appellant ought not to recover, for the reason that it is not shown that the parents of the child were free from contributory negligence; and, since they inherited his estate, the rule which would bar a negligent parent from recovering in such a case in his own right ought to apply. But plaintiff seeks to recover in the right of the child, and not for the parents," and "such negligence would prevent a recovery by the parents in their own right." *Wymore v. Mahaska County*, 43 N. W. Rep. [Ia.], 264. It was clearly shown by the supreme court of Vermont in *Ploof v. Burlington Traction Co.*, 41 Atl. Rep., 1017, that the case last cited is not in point under a statute like ours. Under our statutes the intestate's right of action does not survive. No action can be brought for the benefit of his estate. The petition must show a pecuniary injury to the wife and next of kin. *Chicago, B. & Q. R. Co. v. Van Buskirk*, 58 Nebr., 252, and cases cited. In this case the father is the next of kin; he is also the administrator and the plaintiff in the case, suing for his own benefit. Shall the state say to the father, "If you know that your child is in danger of injury from the negligence of others you are under no legal obligation to protect it from such injury, and if you allow the child to be killed, you may recover, from one who is equally at fault with yourself, for any pecuniary injury you may suffer by reason of the death"? No such meaning can be derived from the statute. The negligence of the father can not be imputed to the child and in an action for the benefit of the child, or of his estate, where such action is allowed, the negligence of the father is no defense. *Huff v. Ames*, 16 Nebr., 139. But in an action by the father for his own benefit to recover for the pecuniary injury which he has suffered by reason of the death of the child, his own negligence contributing to the death will defeat his recovery. *Atlanta & C. A. L. R. Co. v. Gravitt*, 26 L. R. A., 553, 20 S. E. Rep. [Ga.], 550.

In the case of the *Consolidated Traction Co. v. Hone*, 35 Atl. Rep. [N. J.], 899, the supreme court of New Jersey announced a different rule. The supreme court of Vermont in *Ploof v. Burlington Traction Co.*, cited above, criticises the New Jersey case, and says: "The opinion cites —evidently without careful consideration—the Iowa case as supporting the decision." But the New Jersey court of errors and appeals had already reviewed the decision of the lower court, and being equally divided upon the question here considered reversed the decision of the lower court upon another point. *Consolidated Traction Co. v. Hone*, 38 Atl. Rep. [N. J.], 759.

We think that the question of contributory negligence ought to have been submitted to the jury, and for the error of the trial court in refusing to do so it is recommended that the judgment be reversed, and the cause remanded for a new trial.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

OMAHA NATIONAL BANK V. JOHN KRAUS ET AL.

FILED JUNE 5, 1901. No. 9,686.

Commissioner's opinion, Department No. 2.

1. **Contract of Sale With Option.** An arrangement whereby chattels are conveyed at a price certain, with a provision that the vendee may, if he fails to resell them, return them to the vendor, is a contract of sale with an option to rescind. *Houck v. Linn*, 48 Nebr., 227, followed.

2. **Instruction: REFUSAL: ERROR.** Where the title to a stock of merchandise is in issue, which is claimed to have been purchased

by the vendee, under a contract in which he reserves the option of returning such goods as he is unable to sell, it is reversable error for the trial court to refuse an instruction requested which defines such transaction as a sale when no other proper instruction has been given on this theory.

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

Lodowick F. Crofoot, for plaintiff in error.

Richard S. Horton, contra.

Argued orally by counsel for both parties.

OLDHAM, C.

The facts in this case appear to be that the Omaha National Bank, herein styled the defendant, took possession of a stock of cigars from Max Meyer & Co., under a chattel mortgage executed by said company to said bank to secure a bona-fide indebtedness; that said stock of goods was sold under the provisions of this mortgage and was purchased at such sale by the defendant bank. These goods were afterwards replevied by Kraus & Lewin, herein styled plaintiffs, under a claim of ownership. Plaintiffs had judgment below and defendant brings error.

The evidence offered in the case below by plaintiff tended to show that the goods in dispute had been delivered to Max Meyer & Co. on consignment and that the title had never passed to them. Defendant's evidence, on the contrary, tended to show that there had been a sale of the goods in dispute to Max Meyer & Co. prior to the execution of the mortgage to the defendant, and that a privilege had been reserved by the vendee of returning such goods as it was unable to dispose of.

Defendant's counsel have directed our attention to a number of alleged errors in the admission and rejection of evidence in the proceeding of the trial court. If the evidence admitted had been properly controlled by in-

struction it would not, perhaps, have been sufficiently prejudicial to have warranted a reversal of this cause, and in view of the conclusion we are compelled to reach on the more serious allegations of error on account of instructions given and refused, it is not necessary to enter into a discussion of the merits of the objections on the admission and exclusion of testimony.

Defendant below requested two instructions, either of which would have properly presented his theory of a sale of the goods in dispute to Max Meyer & Co., with a reservation of a right, by the vendee, to return such of the goods as it was unable to resell. Both of these instructions told the jury that under such a sale the title to the goods in dispute would pass to Max Meyer & Co.; each of these instructions was refused by the trial court and instead of either of these the court gave the following instruction:

"6. If you find from the evidence that plaintiff sent goods in controversy to Max Meyer & Co., under an arrangement by which Max Meyer & Co. were to take said goods at a stated price, without any restrictions as to when they should sell them, they were to remit to the plaintiff for all goods so sold 30 days from the last day of the month during which such sales were made less five per cent. discount from invoice prices if paid in cash, otherwise a four months acceptance at invoice prices for the amount sold; and if you further find that the arrangement did not provide for the return to the plaintiff of the goods remaining unsold, such an arrangement would in law constitute an actual sale, and the title to such goods would pass to Max Meyer & Co., and they would become the owners thereof."

Now the vice of this instruction is that it makes the fact that "the arrangement did not provide for the return to the plaintiff of the goods remaining unsold," an essential element of a sale. In other words, it told the jury that if there was any arrangement between the plaintiff and Max Meyer & Co., by which the goods unsold might

be returned to the plaintiff, such an arrangement would prevent the title of the goods from passing to Max Meyer & Co. We think that this instruction is clearly erroneous and at war with the principles announced by this court in the case cited in the syllabus, and because this error must have been highly prejudicial to the defendant, it is recommended that the judgment of the district court be reversed and this case be remanded for further proceedings.

POUND and SEDGWICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

THOMAS MALOY V. DANIEL H. MUIR ET AL.

FILED JUNE 5, 1901. No. 9,751.

Commissioner's opinion, Department No. 2.

1. **Vendee in Default:** RIGHT OF ACTION. A vendee in a contract for the sale of lands, which provides for the forfeiture to the vendor of all payments made as liquidated damages in case of default in any of the payments and for the right of the vendor to rescind the contract on such default, can not, while so in default, maintain an action against the vendor to recover back money paid in part performance of said contract on the ground of a rescission of the contract by the vendor. *Eaton v. Redick*, 1 Nebr., 305, distinguished.

2. **Evidence:** JUDGMENT. Evidence examined, and *held* to sustain the judgment of the trial court.

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

Halleck F. Rose, for plaintiff in error.

Frank Irvine and *John P. Maule, contra.*

Argued orally by *Frank Irvine,* for defendants.

OLDHAM, C.

This was a suit to recover back money paid in part performance of a land contract. The facts are that on the first day of September, 1890, Thomas Maloy, herein styled the plaintiff, entered into a contract with Daniel H. Muir and Abraham L. Hoover, herein styled the defendants, for the purchase of two lots in Arlington Heights, an addition to the city of Lincoln, Nebraska, for the sum of $500. The contract entered into provided for payments to be made in sums of $125 each, the last one of which was due on the first day of September, 1893. The contract contained a provision that in case of the failure of the plaintiff to make either of the payments or perform any of the covenants on his part, the contract should, at the option of the defendants, be forfeited and determined and that the plaintiff should forfeit all payments made by him on the contract and that all such payments so made should be retained by the defendants in full liquidation of damages sustained by them and that they should have the right to re-enter and take possession of the premises. The plaintiff made payments on this contract in the sum of $290, the last payment having been made on the first day of January, 1892. He then made default in his payments and has never tendered any further payments since the time of his default. It appears from the pleadings and evidence introduced below that at the time this contract was entered into by the defendants there was a mortgage for a large sum of money on the entire Arlington Heights addition in which these two lots were situated; that this mortgage had been executed to one Charles E. Perkins by the defendants as a part of the purchase price of the land on

which this addition was laid out; it also appears that the defendants had an agreement with said Perkins that upon the payment of $100 to him he, Perkins, would release any lot in the addition from the lien of the mortgage. It also appears that on the 29th day of June, 1895, the defendants conveyed their interest in the entire addition to Charles E. Perkins in payment of the remainder then due on the mortgage, and that this conveyance included the two lots in dispute. It also appears from the testimony and findings of the court below that Charles E. Perkins agreed, as a part of the purchase price of this conveyance, that he would fulfill all contracts which defendants had made for the sales of lots in this addition; it also appears from the testimony and findings of fact of the lower court that plaintiff Maloy was informed of this arrangement by the defendant Hoover before the bringing of this suit. At the trial below defendants had procured a warranty deed from Charles E. Perkins for the lots in dispute and tendered this deed to plaintiff in open court on condition that he, plaintiff, would pay the balance of the purchase money. Under these issues the court found for the defendant and dismissed plaintiff's petition and further decreed that the defendant might deposit the deed to plaintiff with the clerk of the court and that the plaintiff might pay into court the amount due upon the contract within twenty days, in which event the clerk should deliver to him, plaintiff, the deed; and if default in such payment was made the contract was declared forfeited. From this judgment and decree plaintiff brings error to this court.

The sole reliance of the plaintiff in this case for a right of recovery is based on the doctrine announced by this court in the early case of *Eaton v. Redick*, 1 Nebr., 305. In that case the vendee had made a first payment on a land contract and had executed four promissory notes due in three, six, nine and twelve months each for the remainder. After default had been made in the payment of the notes first maturing, but before the last one was

due, the vendor rescinded the contract by conveying the property to a stranger. In this case it is held that this act of the vendor was a rescission of the contract by the vendor and that the vendee was entitled to recover back the money he had paid in part performance of this contract. No right of rescission by the vendor, in default of the payment of any of the installments of the purchase money, appears to have been provided for in the contract, at least no such a condition is discussed in the opinion. Hence, it is fair to presume that such a condition did not exist. This case was decided on the theory that the act of the vendor in conveying to a stranger had put it beyond his power to comply with the contract, and in this particular case this conclusion of fact was no doubt well founded. But in the case at bar the facts as found by the trial court clearly show that the defendants, by their conveyance to Perkins, never put it out of their power to perform their part of the contract in issue. This was clearly demonstrated by the fact that they produced a deed from Perkins to the plaintiff and tendered it to him at the trial.

While the case of *Eaton v. Redick, supra*, has never been overruled by this court, yet in the later case of *Patterson v. Murphy*, 41 Nebr., 818, referring to this case the court says: "We cannot believe that the opinion in the case just referred to is a correct statement of the law applicable to all cases embraced within the language employed." In this later decision the rule was announced that should control the decision of this case when the court said: "Where a vendee had failed to perform according to the terms of a written executory contract for the purchase of real property, and the vendor, as was his contract right, has rescinded such contract, the vendee cannot maintain an action against the vendor for payments already made," etc.

It would seem that the trial court in finding generally for the defendant had acted in harmony with this rule.

Complaint is made of the decree of strict foreclosure

of the contract which followed the general finding for the defendant, but we do not think it necessary to examine into the merits of this complaint as there is no way in which this decree could have been prejudicial to the plaintiff. He had clearly forfeited all of his rights under the contract and if the court saw fit to still give him an opportunity to avail himself of the benefits of the contract which he had broken, it is not for him to complain of the court's liberality in this particular. It is therefore recommended that the judgment of the lower court be affirmed.

POUND and SEDGWICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

MARTHA E. STUART, APPELLEE, V. HENRY BURCHAM ET AL., IMPLEADED WITH JACOB ROCKE, APPELLANT.

FILED JUNE 5, 1901. No. 9,732.

Commissioner's opinion, Department No. 2.

1. **Creditor's Bill**: DECREE: INTEREST. Where the decree in a suit in the nature of a creditor's bill orders a defendant to pay a fund in his hands into court forthwith, interest is chargeable thereon as upon any other judgment, without an express direction to that effect in the decree.

2. **Claimant Plaintiff**: FUND IN HANDS OF DEFENDANT: DECREE: APPEAL: ESTOPPEL. A defendant in a suit to which all the claimants of a fund in his hands are parties, who, being ordered by the decree to pay the fund into court, excepts to such decree and participates in an appeal therefrom by one of the claimants, can not be heard to claim, after affirmance of the decree, that he was a mere stakeholder and therefore is not chargeable with interest.

3. **Decree**: EXECUTION. Execution is a proper process to enforce a decree directing a defendant to pay moneys in his hands into court.

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

O. P. Davis and *Robert Ryan,* for appellant.

Stephen L. Geisthardt, contra.

Argued orally by *Robert Ryan* for appellant; by *Stephen L. Geisthardt, contra.*

POUND, C.

Stuart and another brought a suit in the nature of a creditor's bill against Henry Burcham, Hannah S. Burcham and Jacob Rocke, alleging that plaintiffs were judgment creditors of Henry Burcham, that the latter had made fraudulent transfers and assignments of certain moneys in the hands of the defendant Rocke to defendant Hannah S. Burcham, and that plaintiffs had liens upon the fund in the hands of Rocke by reason of garnishment proceedings. The court found for the plaintiffs, held the assignments invalid, gave the plaintiffs liens on the moneys held by Rocke in the sum of $679.61 and ordered Rocke to pay that sum into court forthwith. To this decree each of the defendants, which would include Rocke, excepted, and the record contains a mandate from this court from which it appears that each of the defendants, who are specifically named, were appellants in an appeal from said decree prosecuted in this court, which resulted in an affirmance. *Stuart v. Burcham,* 50 Nebr., 823. Upon filing of the mandate, Rocke paid said sum of $679.61 into court, whereupon the plaintiffs moved for execution to collect interest since the date of the decree and costs in the supreme court. This motion was granted and such execution ordered, and Rocke has brought the cause here once more by way of appeal from this ruling.

Three reasons are urged why the motion for execution should not have been granted. In the first place, it is said that as the original decree was silent as to interest

upon the sum ordered to be paid into court, the action of the court subsequently, in directing execution to collect interest thereon, amounted to an amendment of the decree, and was not permissible after expiration of the term at which decree was rendered. If it was necessary for the decree to provide for interest in case the sum ordered to be paid was not so paid in, this would be a tenable objection. But we do not think an express direction to that effect was required. Section 3, chapter 44, Compiled Statutes, reads: "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." The decree in question, so far as it directed Rocke to pay the moneys in his hands into court, was a decree for the payment of money within the purview of the statute, and could draw interest from the time of rendition until the money was paid in, without any express provision therefor. Hence the issuance of an execution to collect such interest was not in conflict with nor did it add anything to the original decree.

With respect to the next point raised, namely, that Rocke throughout was a mere stakeholder, holding the money subject to order of the court for such claimant as should ultimately be found entitled thereto, and for such reason is not chargeable with interest, the record does not bear out the proposition of fact upon which it must rest. As has been said, he excepted to the decree and, along with one of the claimants of the fund, prosecuted an appeal therefrom. It has been suggested that he filed no brief on the appeal. We do not think that a material consideration. The mandate in the record shows that he was one of the appellants. Instead of paying in the money and remaining neutral, he appealed from the decree which ordered the money paid into court and attempted to secure its reversal. All claimants of the fund were parties to the suit and his interests did not require him to take sides. He would have been pro-

tected amply had he paid in the money. Having chosen to withhold it and appeal from the decree, interest is properly chargeable. *Oppenheimer v. Marr*, 31 Nebr., 811; *Elkhorn Valley Lodge v. Hudson*, 59 Nebr., 672; *Hawley v. Tesch*, 88 Wis., 213, 59 N. W. Rep., 670. In the bill of exceptions there is a stipulation of facts signed by all the parties, dated prior to the decree, in which it is set forth that in the garnishment proceedings Rocke was ordered to hold not to exceed $700 subject to further order of the court, and that he had in his hands $679.61 which he held himself ready to pay to such persons as the court might decree to be entitled thereto. This stipulation shows upon its face that it was made for the purpose of the trial at which the original decree was rendered. But counsel contend that it conclusively establishes Rocke's position as a mere stakeholder and that the order allowing execution for interest is contrary to the order to hold not exceeding $700 disclosed by the stipulation. This stipulation was not all that the court had before it in ruling on the motion. It also had its own records, of which a transcript is before us. These records showed a decree subsequent to the stipulation, in which Rocke was ordered to pay into court the money which he stated he held subject to its decree, which was a less sum than that directed to be held by the order in the garnishment proceedings. They showed that instead of complying with this decree he appealed from it. The three orders are in entire harmony; one directing the money to be held till further order, the next, furnishing such further order by directing it to be paid in; the next, granting execution for the interest from the date at which he should have paid in, pursuant to the statute fixing interest on judgments. The stipulation that Rocke held subject to the order of the court prior to its decree can not control the decree ordering the money paid in, especially as the decree was rendered in part on the stipulation and he has appealed therefrom and procured a review and affirmance of it in this court. Conceding that

he occupied a neutral position originally, and that the parties, including himself, so stipulated at that time, he ceased to do so when, instead of complying with the decree which took him at his word, he appealed therefrom.

Another point is made to the effect that contempt proceedings, not execution, afford the proper remedy. Proceedings for contempt were the original mode of enforcing decrees, and we should not wish to hold that they may not be had even to enforce decrees for payment of money in some cases at the present time. But the more direct remedy of execution has long been the usual method of carrying decrees into effect, and it seems entirely proper in such cases as this.

As to the costs of the former appeal to this court, the order is clearly right. The mandate recites an affirmance of the original decree "at the costs of said defendants," of whom Rocke is named as one, and directs execution. If the record was in error in setting forth that Rocke excepted to the decree, or the mandate in naming him as one of the appellants and one of the defendants against whom judgment for costs was rendered, due and timely measures should have been taken to obtain correction.

It is recommended that the decree be affirmed.

OLDHAM and SEDGWICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

MODERN WOODMEN OF AMERICA V. JENNIE LANE.

FILED JUNE 5, 1901. No. 11,508.

Commissioner's opinion, Department No. 2.

1. **Assignment of Error.** In an action tried to the court, in which separate findings of fact and conclusions of law were made, an assignment in the petition in error that "the judgment is contrary to law and is not sustained by sufficient evidence" does not call for specific review of each of the several conclusions of law.

2. **Assignment Considered Only as to Whether Conclusions Support Judgment.** In such case, the assignment that the judgment is contrary to law, none of the separate conclusions of law being complained of, and some being clearly right, can only be considered so far as to ascertain whether such conclusions support the judgment.

3. **Surrender of Benefit Certificate:** ISSUANCE OF NEW ONE: IGNORANCE OF LAW. Where a representative of a mutual benefit insurance company, within the scope of his authority, accepts a surrender of a benefit certificate and a fee for the issuance of a new one, with knowledge that the holder of the certificate is in arrears for dues or assessments, the effect of his so doing is not avoided by evidence that he acted in ignorance of the legal consequences.

4. **Forfeiture Waived Without Estoppel on New Agreement.** The recognition of the continued validity of a certificate or policy, with knowledge of facts entailing a forfeiture, is a waiver of the forfeiture as a matter of law, and it is not necessary that there be a new agreement or the elements of an estoppel.

5. **A Secret Intention Can Not Prevail Against Deliberate Act.** A secret intention to insist upon a forfeiture can not prevail against deliberate acts, with knowledge of the forfeiture, which in law amount to a waiver thereof.

6. **Rules of Insurance Company:** WAIVER. The rules of a mutual benefit insurance society provided that nonpayment of dues or assessments should operate as a suspension, and that a member under suspension, in order to be reinstated, must make proof of continued good health. They also provided that only members in good standing might change beneficiaries by surrendering the certificate and obtaining a new one. *Held*, That cancellation of a prior certificate, acceptance and retention of a fee for issuing a new one with change of beneficiary, and issuance of a new one accordingly, amounted to a waiver of such requirements, though the certificate holder was not in good health at the time.

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

J. W. White, Talbot & Allen, J. G. Johnson and *J. F. Hess*, for plaintiff in error:

William A. Lane was suspended and his certificate became null and void by reason of his own failure and default. No act was necessary on the part of the order or of its officers as a condition precedent. *Supreme Lodge v. Keener*, 25 S. W. Rep. [Tex.], 1084; *Borgraefe v. Supreme Lodge*, 22 Mo. App., 127; *Grand Lodge v. Jesse*, 50 Ill. App., 101.

William A. Lane was bound to know the provisions of the by-laws of the order of which he was a member, to wit, (1) that he could not be reinstated while sick; (2) that he must be reinstated before he could change his beneficiary. Niblack, Accident Insurance and Benefit Societies, sec. 18; *Supreme Commandery v. Ainsworth*, 71 Ala., 436; *Supreme Lodge v. Knight*, 117 Ind., 489; *Bauer v. Samson Lodge*, 1 N. E. Rep. [Ind.], 571; *Harvey v. Grand Lodge*, 50 Mo. App., 472.

Waiver in insurance law is governed by the same rules as equitable estoppel. The act relied on as a waiver, must have been done intentionally, or with gross carelessness and with a knowledge of the facts and circumstances surrounding the case. 2 Bacon, Benefit Societies and Life Insurance, 420-424; May, Insurance, secs. 505, 507; *Burke v. Utah Nat. Bank*, 47 Nebr., 247.

There can be no waiver unless so intended by one party and so understood by the other. 2 Herman, Estoppel and Res Judicata, sec. 825; *Bennecke v. Ins. Co.*, 105 U. S., 355, 359.

The waiver under consideration, never arises by implication. It is only enforced to prevent fraud. *Security Ins. Co. v. Fay*, 22 Mich., 467; *Flower v. Elwood*, 66 Ill., 438, 447; *Illinois Masons' Benevolent Society v. Baldwin*, 86 Ill., 479; *Northwestern Mutual Life Ins. Co. v. Amer-*

man, 119 Ill., 329, 336; *Lewis v. Phœnix Mutual Life Ins. Co.,* 44 Conn., 72, 73, 89; *Union Mutual Life Ins. Co. v. McMillen,* 24 Ohio St., 67; *Stohr v. Musical Fund Society,* 82 Cal., 557; *Robertson v. Metropolitan Life Ins. Co.,* 88 N. Y., 541; *Diller v. Brubaker,* 52 Pa. St., 498; *Lantz v. Vermont Ins. Co.,* 139 Pa. St., 546; *Schmidt v. Modern Woodmen,* 84 Wis., 101.

The burden of showing such waiver is always on the party claiming it.

The by-laws must be followed strictly. *Lyon v. Supreme Assembly,* 26 N. E. Rep. [Mass.], 236; *Wells v. Independent Order of Foresters,* Vol. 9, Canadian Law Times, 178.

Matthew Gering, contra:

It is now the universal doctrine of courts that any mutual organization which has for its purpose, in addition to its fraternal character, the insurance of its members and the payment of a stipulated sum, upon the member's death, to his beneficiary is to all intents and purposes an insurance company and is bound in the same manner as ordinary life insurance companies, and the doctrine of waiver and agency is applicable to them. 1 Joyce, Insurance, sec. 34; *Commonwealth v. Wetherbee,* 105 Mass., 149, 160; *State v. Live Stock Ass'n,* 16 Nebr., 549, 552; *State v. Farmers' Benevolent Ass'n,* 18 Nebr., 276, 281; *Burlington Voluntary Relief Department v. White,* 41 Nebr., 548.

The failure of a member to pay an assessment does not avoid the policy; it is only voidable at the option of the insurer. The by-law under which it was said the contract was void, and the one allowing the member to be reinstated under certain conditions are irrevocably opposed to each other, and both can be upheld only on the rational theory that the contract is voidable at the option of the insurer. If the constitution contains two inconsistent provisions, the one most favorable to the insured will be adopted. *Wolf v. Grand Lodge,* 102 Mich., 23; *Phœnix Ins. Co. v. Lansing,* 15 Nebr., 494; *Campbell*

v. Merchants & Farmers' Mutual Fire Ins. Co., 37 N. H., 35; *Schreiber v. German-American Hail Ins. Co.*, 45 N. W. Rep. [Minn.], 708.

A society, after demanding, receiving and retaining, until after the death of a member, the amount of an assessment due from him, can not claim that the money was demanded and received by mistake, and that the certificate is forfeited. Niblack, Accident Insurance and Benefit Societies, sec. 302; *Bailey v. Association*, 71 Ia., 689; *Millard v. Supreme Council*, 22 Pac. Rep. [Cal.], 864; *Menard v. Society*, 27 Atl. Rep. [Conn.], 1115.

POUND, C.

This action was brought upon two benefit certificates issued to William A. Lane, husband of the plaintiff. Upon trial to the court, a jury being waived, the plaintiff, as beneficiary, recovered upon the certificate set up in her second cause of action, and judgment was rendered for the defendant upon the other. The cause is here on error to review the judgment for the plaintiff upon the second cause of action.

The trial court made very full and clear findings of fact and conclusions of law, and we have been furnished with unusually careful and elaborate briefs in which a number of points arising thereon are exhaustively discussed. But we find ourselves unable to review a great number of questions suggested, by reason of failure to assign them specifically in the petition in error. There are eight separate findings of fact and three of law, and we are asked to review each of the latter specifically, upon an assignment in the petition in error that "the judgment is contrary to law and is not sustained by sufficient evidence." As we shall show presently, the findings of fact are sustained by the evidence. But we need not pass upon the effect of the joint assignment of error under such circumstances for the reason that, even if the assignment that the judgment is contrary to law stood alone, it would not suffice to call for a specific

review of each of the conclusions of law. The Code of Civil Procedure (sec. 297) requires separate statement in writing of the findings of fact and conclusions of law, where trial is had to the court, if either party desires to except to "the decision of the court upon the questions of law involved in the trial." As the expressed purpose of making separate findings and conclusions of law is to enable the parties to question the rulings of the court upon legal questions involved, it would seem that if they desire so to do they should except to the conclusions found, or such of them as they desire to make exception to, expressly and specifically. In Indiana, where a similar statutory provision is construed by the courts as intended for the "express purpose of enabling a party to except to the decision of the court upon the questions of law involved in the trial" (*Nading v. Elliott*, 137 Ind., 261, 36 N. E. Rep., 695), it is well settled that in order to obtain a review of separate conclusions of law, error must be assigned with respect to them specifically, and that an assignment that the judgment is contrary to law will not avail to that end. *Nading v. Elliott, supra; Midland R. Co. v. Dickason,* 130 Ind., 164, 29 N. E. Rep., 775, and cases cited. In *Midland R. Co. v. Dickason,* the court says: "In order to present for review in this court the correctness of the conclusions of law, deduced by the court from the facts found, two things are necessary: 1. An exception to the conclusions of law must be taken at the time the decision is made. 2. It must be assigned as error in this court that the court below erred in its conclusions of law. * * * The appellants having waived, by failing to except, all objections to the conclusions of law, it was not error for the court to render judgment for the plaintiffs in accordance with such finding and conclusions." In *Nading v. Elliott,* the court says: "As the specifications make no legal attack upon the conclusions of law, but only seek to assail the judgment that the court rendered thereon, they are ineffectual to bring into review such conclusions." This rule seems to follow from the ex-

pressed purpose of the requirement that separate conclusions of law be made, and is in accord with the holdings of this court in analogous cases. *World Mutual Benefit Ass'n v. Worthing*, 59 Nebr., 587; *Frenzer v. Richards*, 60 Nebr., 131; *Drexel v. Daniels*, 49 Nebr., 99. See also *Hanover Fire Ins. Co. v. Shrader*, 11 Tex. Civ. App., 255, 31 S. W. Rep., 1100; *Lytle v. Prescott*, 57 Minn., 129, 58 N. W. Rep., 688; *Smith v. Kipp*, 49 Minn., 119, 51 N. W. Rep., 656. For these reasons we do not think that the assignment that the judgment is contrary to law requires us to go further than to ascertain that the judgment follows from and is sustained by the findings of law, as to which there are no specific assignments of error. As they are not complained of, we may take them to be the law of the case, and a judgment in accordance with them may not be said to be contrary to law. *Frenzer v. Richards, supra.* If, however, it could be said that the assignment in question challenged the conclusions of law, there is still the difficulty that it would of necessity assign them as error *en masse*, and hence, in view of the obvious correctness of at least one of them, would clearly fail. An assignment of error which assails several conclusions of law jointly, will fail if any one is correct. *Jones v. Mayne*, 55 N. E. Rep. [Ind.], 956.

Another assignment of error, however, properly challenges the sufficiency of the evidence upon the 7th finding of fact, which is also complained of in the brief. In that finding, the court finds that after the certificate recovered upon was issued no dues or assessments became payable or were levied; that prior to such time, Lane had been in arrears for dues, but that the defendant with notice and knowledge of that fact accepted a surrender of the prior certificate, and accepted and retained a fee for issuing, and issued the certificate in question. Several objections are made to this finding. It is said, first, that the clerk of the local camp, who received the money and sent it in with the old certificate for cancellation and the application for the new one, while he knew that the

member was in arrears and under suspension, did not understand that he was waiving any rights of the defendant by his acts, and did not intend so to do. It is said that the evidence is that he "unthinkingly" signed the papers and sent them in. The rules of the society required a member to be in good standing in order to change the beneficiary by surrender of certificate and issuance of a new one, and required that, if suspended, he must be in good health in order to be reinstated. The clerk of the local camp, knowing these requirements and all the circumstances, proceeded to take the money, sign and forward the papers, because, he says, he thought if Lane "got well he could be reinstated and it would be in force just the same." In other words, he was under no misapprehension as to the facts, and the sole objection is that he did not apprehend the full legal effect of acts he did voluntarily, with knowledge of all the circumstances. We think the finding of the court that defendant accepted the fee and the surrender of the old certificate with full notice and knowledge of the facts is abundantly justified by this evidence. It is also said that the head clerk, who prepared and forwarded the new certificate, did so by reason of carelessness or oversight of an employee in the certificate department in his office, in that such employee failed to look up Lane's standing, but accepted the certificate of the clerk of the local camp to the application as sufficient evidence of good standing. This was only a conjecture of the head clerk in his testimony. But, conceding that such were the circumstances under which the new certificate was issued, the evidence discloses that the records in the head clerk's office showed at the time exactly where Lane stood, and hence we fail to perceive wherein the fact that the head clerk failed to act upon the knowledge in his possession, and notice conveyed by his own records contravenes the finding of the court that defendant had such knowledge and notice. As was said of a similar organization in a like case, "It acted under no deception or misrepresentation, but it had all the in-

formation which it cared to take the pains to acquire." *Rice v. New England Mutual Aid Society,* 146 Mass., 248, 15 N. E. Rep., 624.

The defendant contends that the objections just considered are tenable because there would be no waiver by reason of the acts of the local and head clerks in the absence of further facts and circumstances sufficient to create an estoppel, or unless they intended by what they did to waive the requirements and conditions in question. We can not agree to either proposition. It is well settled in this state that estoppel is not the basis of the rules of law as to waiver of forfeitures. *Home Fire Ins. Co. v. Kuhlman,* 58 Nebr., 488. In that case SULLIVAN, J., says: "The contention that a waiver must have the elements of an estoppel in cases of this kind cannot be sustained. 'It is,' says Sutherland, J., in *People v. Manhattan Co.,* 9 Wend. [N. Y.], 351, 'a technical doctrine introduced and applied by courts for the purpose of defeating forfeitures.' In *Titus v. Glens Falls Ins. Co.,* 81 N. Y., 410, it was held that an effective waiver need not be based on either a new agreement or an estoppel. Substantially the same holding was made in *Hollis v. State Ins. Co.,* 65 Ia., 454; and such is now the settled doctrine of this court." A benevolent association which issues benefit certificates to its members payable from a fund maintained by assessments upon the certificate holders is in effect a mutual life insurance company, and is governed by the general rules of law applicable to such companies. *Supreme Lodge Knights of Honor v. Davis,* 26 Colo., 252, 58 Pac. Rep., 595. As to life insurance companies, the principle that waiver is not a matter of new agreement or estoppel, but is a legal consequence flowing from recognition of continued validity of the policy after facts amounting to forfeitures, is well settled. *Mee v. Bankers Life Ass'n,* 69 Minn., 210, 72 N. W. Rep., 74. As a consequence, it would seem clear that so long as the officers of defendant knew the facts and knew what they were doing, an undisclosed intention to rely upon a forfeiture which their acts ig-

nored could not avail to prevent a waiver. To hold otherwise, would enable the insurer to collect assessments indefinitely, in disregard of the forfeiture, so long as it suited its interest so to do, and to assert a secret intention to insist upon the forfeiture, whenever such course better accorded with its advantage. Such is not the law. As the court well said in *Mee v. Bankers Life Ass'n, supra*, "To the contention that a waiver of forfeiture necessarily involves an intention to waive, and that from the evidence of the secretary it conclusively appeared that the defendant did not intend to waive this forfeiture, it may be said that such a rule would allow a secret intention to defeat the legal effect of unequivocal and deliberate acts. The secret intention, if there was one, to consider the insurance certificates as forfeited, unless the health certificate was furnished, cannot be allowed to prevail against the acts of the officers of the association."

For the foregoing reasons, we think the defendant can not insist that Lane was not in good standing when the change of beneficiary was made. Nor do we think that it may now urge that at the time it accepted his money and made the change Lane was not in good health. It is true that Lane was sick at the time and died shortly after the new certificate issued. But his condition was well known to the clerk of the local camp who took the money, canceled the old certificate and sent for the new one, and the head clerk, whose records showed that Lane was under suspension and could not make such change without a physician's certificate of good health, made no objection and issued the new certificate. The knowledge of the local clerk was probably chargeable to the defendant (*Order of Foresters v. Schweitzer*, 171 Ill., 325, 49 N. E. Rep., 506), but the records of the head clerk's office disclosed enough so that we need not pass upon that question. The acts of the two clerks taken together certainly waived all requirements as to good health or proof thereof at the time the change was made. *Supreme Lodge Knights of Honor v. Davis, supra; Order of Foresters*

v. Schweitzer, supra; Mee v. Bankers' Life Ass'n, supra; McCormick v. Catholic Relief Ass'n, 39 App. Div. [N. Y.], 309. In the *Mee Case*, the insured was not in good health and could not have been reinstated had the company insisted on the forfeiture, but demand and receipt of a subsequent assessment was held a waiver. In the *Davis Case*, receipt of assessments, with knowledge that the certificate holder was beyond the age limit upon which the certificate was conditioned, was held to waive the condition. In the *Schweitzer Case*, the certificate holder was engaged in a hazardous and prohibited business when the certificate issued, but as this was known to the local officers at the time, the society was not permitted to take advantage thereof. These rulings are in accord with principles long established in this state as to other forms of insurance (*Hartford Life & Annuity Ins. Co. v. Eastman*, 54 Nebr., 90; *Phenix Ins. Co. v. Holcombe*, 57 Nebr., 622; *Slobodisky v. Phenix Ins. Co.*, 53 Nebr., 816), and meet with our full approval.

It is recommended that the judgment be affirmed.

OLDHAM and SEDGWICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

CREAM CITY HAT COMPANY V. H. M. TOLLINGER ET AL.

FILED JUNE 5, 1901. No. 9,667.

Commissioner's opinion, Department No. 3.

Representations to Mercantile Agency: FRAUD: EVIDENCE. Where it is sought to establish fraud in representations made to a mercantile agency upon whose report credit was extended to a merchant, the evidence must connect the merchant with making the report upon which credit was given.

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

Charles Kamanski, for plaintiff in error.

W. R. Ellis, contra.

DUFFIE, C.

On the 14th of April, 1896, the plaintiff commenced this action in the district court of Knox county to replevin a bill of goods sold by it to the defendant H. M. Tollinger on the 9th day of January, 1896. Previous to the sale the plaintiff in error applied to the commercial agency of R. G. Dun & Co. in the city of Milwaukee, and obtained from said agency a statement of the commercial standing of the defendant Tollinger, and it claims to have relied upon said statement in extending credit for the goods. On the 19th of February, 1896, Tollinger executed and delivered to the Bloomfield State Bank a chattel mortgage upon his stock of merchandise to secure the payment of two certain promissory notes, one for twelve hundred and forty-seven dollars, and one for three thousand dollars, and this mortgage was recorded on the 11th of March, 1896. On the 2d of March, 1896, Tollinger executed and delivered to said bank another chattel mortgage to secure the payment of one promissory note for $4,571, which mortagage was recorded on the 9th day of March, 1896. On the 9th day of March, 1896, or at some date previous thereto, George M. Reed was appointed receiver for said bank and the two mortgages above mentioned were turned over to him as such receiver and he took possession of the stock of goods on or about March 29, 1896. It is claimed by the plaintiff that Tollinger was insolvent when the goods sought to be replevied were purchased by him and by this action it is sought to rescind the contract and retake possession of the goods. The only evidence introduced was a stipulation signed by the parties, and the deposition of one Hanson, the president of the plaintiff corporation. He testified that when the order was received, not knowing the rating of

Tollinger, he applied to the Dun agency and obtained from said agency a statement which, it is claimed, was given by Tollinger to the agency at Omaha and by that agency transmitted to the Milwaukee agency. The case was tried to the court by which judgment was entered for the defendant, a motion for new trial was made by the plaintiff and overruled, and the case brought here upon error.

To establish false representations made by Tollinger in obtaining the goods sought to be replevied the plaintiff depended upon the statement made to it by the R. G. Dun & Co. agency in Milwaukee. It is evident that this statement, unless authorized by Tollinger, was not competent evidence for the court to consider. It is not attempted to connect Tollinger with such statement except by the provisions of a stipulation entered into between the parties and used upon the trial, the fifth clause of which is as follows:

"Fifth: That the paper hereto attached and marked Exhibit A is a certified copy of the report of the assets and liabilities of said H. M. Tollinger furnished by the Milwaukee office of R. G. Dun & Co. to the plaintiff herein in the regular course of business as testified in the deposition of Oscar C. Hanson herein."

Then follows Exhibit A, which consists of a heading or certificate of the Dun agency as follows:

"This is to certify that H. M. Tollinger of Bloomfield, Knox county, Nebraska, did on November 19th, 1895, make statement of his assets and liabilities to the mercantile agency of R. G. Dun & Co., Omaha, Nebraska, as a basis for credit, and that the following figures are a correct copy of aforesaid statement appearing on the records of said agency at Omaha, Nebraska, and by the said agency transmitted in regular course of business to its Milwaukee, Wisconsin, office November 19th, 1895."

This is no part of the statement itself; it is merely the statement of R. G. Dun & Co. that Tollinger did on the 19th of November make a statement to its Omaha agency and that that statement was forwarded to Milwaukee

and is the same as that furnished by the Milwaukee agency to the plaintiff. It is evident that the Milwaukee branch of the agency could have no personal knowledge of any statement made to the Omaha branch by the defendant Tollinger, and if it did the certificate is not made under the solemnity of an oath and was not admissible evidence, and the court, as we understand, properly refused to consider it. This was an end of the plaintiff's case, there being no proper and competent evidence before the court that Tollinger did in fact make the statement relied upon. There was no evidence of any false representations upon his part and judgment was properly entered for the defendant. It is recommended that the judgment be affirmed.

ALBERT and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

SELZ, SCHWAB & COMPANY, APPELLANTS, V. GEORGE HOCKNELL, EXECUTOR, ET AL., APPELLEES.*

FILED JUNE 5, 1901. No. 9,692.

Commissioner's opinion, Department No. 3.

Fraud: POOR JUDGMENT: TRADE: DEBTOR AND CREDITOR: COURT CAN AFFORD NO RELIEF. The courts will use their efforts to protect a creditor against the fraudulent acts of his debtor, but as against his poor judgment and unfortunate trades they can afford no relief.

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

Stephen L. Geisthardt and *Mockett & Polk,* for appellants.

Ricketts & Wilson, contra.

* Rehearing allowed.

DUFFIE, C.

The plaintiff and appellant filed its petition in the nature of a creditor's bill by which it sought to charge the defendants, William Simpson and George Hocknell as partners, the First National Bank of McCook, Nebraska, and the McCook Loan & Trust Company, with the value of a certain stock of boots and shoes sold by the defendant Parker, to William Simpson and George Hocknell on the 5th of September, 1895. It is alleged in the petition that the defendants Simpson and Hocknell, acting on their own behalf and on behalf of the First National Bank of McCook and the McCook Loan & Trust Company, entered into a conspiracy to obtain possession of Parker's stock of goods at much less than its real value and to defraud the creditors of said Parker. The evidence clearly establishes that on or about the 5th of September, 1895, Parker sold his stock of goods to Simpson and Hocknell for the sum of $8,500 in cash, and fifteen quarter sections of land in Dundy county to be selected out of fifty-two sections, a description of which is contained in a list furnished Parker at the time the trade was made, the fifteen sections to be incumbered by a mortgage for $8,500. At that time Parker was indebted to a considerable amount, and the stock of goods transferred to Simpson and Hocknell is shown to be of the value of from $14,000 to $16,500. No conveyance of the Dundy county land was ever made to Parker, and the agreement to convey such land appears to have been assigned by Parker to one Cook.

At the conclusion of the trial the district court entered a decree dismissing the plaintiff's petition, as well also as certain petitions of intervention filed by other creditors of Parker. The evidence is not conflicting as to most of the material facts in the case, and counsel for appellant insists that the rule so long followed by this court, that it will not disturb a judgment where the evidence is conflicting, can not apply. He argues that where

the material facts are established by uncontradicted testimony, it becomes a question of law merely as to what judgment should be entered, and if the trial court does not enter the proper judgment, this court on appeal should so do. We accept, without hesitation, the views of counsel. Where the facts are agreed upon, or where all the testimony goes to support one state of facts, the only deduction to be drawn from such facts is a question of law, and if the trial court errs in correctly applying the law to the undisputed facts, this court will not hesitate to vacate such judgment and enter a proper one.

The plaintiff, in order to be entitled to a decree in its favor, must show that Parker sold his stock of goods with the intent to hinder, delay or defraud his creditors, and that Simpson and Hocknell purchased the goods either knowing of Parker's intent or participating therein. If the undisputed evidence makes this kind of a case, then the district court should have given a decree for the plaintiff and the interveners. If such a case was not clearly made, or if the evidence was conflicting upon these propositions, then the district court was to exercise its best judgment as to the decree it would enter and this court will not interfere. We have examined the evidence carefully, and can not see that the district court erred in the judgment which it entered.

Before trading, Parker went to Dundy county from Lincoln and examined several of the quarter sections of land which he was offered in the trade. He testified that from this examination he concluded that the land was worth from $7 to $10 per acre. At the lowest price which he fixed as the value of the land at that time, there would be a margin of $8,000 or more above the incumbrance thereon, and this, together with the cash actually paid, would be about the fair value of his stock of goods.

During the negotiation he refused to trade his stock and take the entire value of the same in land, stating to Simpson that he wished money to pay his creditors and to start in business again. He further testified that he did

use the money received from the sale of his goods to pay his creditors.

It is true that the land which was to be conveyed to him is shown to be of no value, above the amount for which it is incumbered, but we do not think that a mistaken judgment exercised by Parker, relating to the value of the land which he was getting, has any tendency to show fraud or bad faith toward his creditors in making the sale. The law undertakes to protect a creditor against the fraudulent acts of his debtor, but as against his poor judgment and unfortunate trades, however disastrous they may prove, the law can afford no relief. In selecting parties to whom credit is to be extended, the creditor must, at his peril, select those on whose judgment in business affairs he is willing to rely, and can not look to the courts to relieve him from unwise and unfortunate trades made by his debtor, unless they are tainted with a fraudulent intent to place his property beyond the creditor's reach.

At the time he visited the lands, the crops in Dundy county were, as he testified, in better condition and more promising than crops in the vicinity of Lincoln, and this influenced him in his estimate of the value of these lands. But showing a mistaken judgment as to value is not showing a fraudulent intent, and the trial court, who saw the witness and heard him testify, had a much better opportunity to judge of his candor and credibility than have we who are confined to what the records disclose. The trial court evidently believed that there was no intent upon the part of Parker to defraud his creditors. There is evidence ample to sustain such a finding and we recommend that the judgment be affirmed.

AMES and ALBERT, CC., concur.

By the Court: For the reasons above given, the judgment of the district court is

AFFIRMED.

PAUL SCHIMPF V. LINA RHODEWALD ET AL.

FILED JUNE 5, 1901. No. 9,777.

Commissioner's opinion, Department No. 3.

1. **Construction of Will:** GERMAN LANGUAGE: LIFE ESTATE. A will consisting of a single sentence in the German language of which the following is, as nearly as possible, a literal translation into English, omitting names, "I do will and bequeath to my wife all my property, she has entire control (sie habt zu verfuegen) over the same after my death as long as she lives," devises a life estate only and the reversion, at the death of the testator, vests in his heir or heirs at law.

2. **Devise by Life Tenant:** FEE: EQUITABLE LIEN. A will by a tenant for life only, which purports to devise the fee of the lands which are the subject of the tenancy, does not operate as a bequest of an equitable lien upon the reversion in behalf of the testator because of his having paid off an incumbrance upon the premises existing at or prior to the creation of the life estate.

3. **Life Tenant:** BETTERMENTS: REVERSION: OCCUPYING CLAIMANT. Ordinarily, a life tenant who makes betterments upon the estate is not entitled to be reimbursed for the same by the reversioners or out of the reversion, but in case he should be so entitled, his right will not pass by his will purporting to devise the lands in fee, and the "Occupying Claimant's Act" will not, in such case, be available to the devisee with respect to betterments made before the termination of the life estate.

4. **Action in Partition:** DEFENDANT IN POSSESSION: WAIVER. When, in an action for a partition of lands, the defendant in possession claims title to the premises adversely to the plaintiff, he will, by waiving a jury and participating without objection in the trial of all the issues in the cause before the court alone, also waive any objection he might otherwise have had on account of irregularity in the procedure in this respect.

ERROR from the district court for Richardson county. Tried below before STULL, J. *Affirmed.*

Jefferson H. Broady, J. R. Wilhite and *C. Gillespie,* for plaintiff in error.

Edwin Falloon, amicus curiæ.

Francis Martin, T. E. Martin and *Reavis & Reavis, contra.*

AMES, C.

In February 1878, Christian Ertman Schimpf, a resident of Richardson county in this state, died leaving an estate consisting of one hundred and sixty acres of land lying in that county, and certain live stock and farming utensils situate thereon and belonging thereto. He left surviving him his widow and eight children, his heirs at law, of whom the plaintiff in error herein, Paul Schimpf, then about nineteen years of age, was the only son. The father was German born and previous to his death he had executed a will written by himself and in the German language. Shortly afterwards the will was duly admitted to probate in the county of his residence. The widow, the son and one of the daughters continued to reside upon the land after the death of the father, the daughter until the time of her marriage, the widow until her death in 1895, and the son until now. The widow and son until the death of the former, and the latter since that event, have managed and controlled the property, personal and real, as their own, receiving to their own use the produce, rents and profits and increase of the same, and out of the same have expended considerable sums in buildings and betterments upon the lands, and in 1878, in paying, and causing to be satisfied of record, a mortgage executed thereon by the father. In 1895 the widow died, after executing a will purporting to devise the fee in the land to her son. In the meantime, Paul bought from some of his co-heirs, and obtained from them conveyances of, whatever title or interest they had in the premises. In 1897 this action was begun by the remaining heirs at law of the father, to determine their shares in the land and obtain partition thereof.

The principal contention in this action concerns the interpretation of the will of the father. A transcript of this instrument, in German, is set out in the answer of Paul and is admitted by the reply to be correct. At the time it was admitted to probate, the probate judge made

and spread upon the records of his office a purported translation of it, as follows:

"ARAGO, Feb. 1st, 1873.

"I, Christian Ertman Schimpf, do will and bequeath to my wife, Frederike Schimpf, all my property. She has entire control over the same after my death as long as she lives. That is my will. In testimony whereof I have hereunto set my hand."

The chief controversy in the briefs and arguments of counsel is over the meaning of the word "verfuegen," rendered in the above translation "entire control." With that exception, it is not disputed that the English words in the copy are the equivalents of the corresponding German words in the original. But it is admitted that the translation by the probate judge was not an official act and that the copy has no judicial importance.

Judging from the transcript contained in the answer, the document was written without punctuation except commas. The witnesses who attempt a translation of the entire instrument indulge in some freedom both as to breaking it up into two distinct sentences and as to the transposition of words. One Kaiser, a witness for the defense, inserts a period, as does the probate judge, after the word "property." Jessen, another witness for the defense, renders the will thus:

"I Christian Ertman Schimpf will to my wife Frederike Schimpf all my property after my death as long as she lives. She will have the disposition."

Keller, a witness for the plaintiff, renders the will in a single sentence as follows:

"I, Christian Ertman Schimpf, make my wife, Frederike Schimpf, all my property after my death as long as she lives has she thereof disposition."

Tanner, a witness for the defense, translates as follows:

"I will to my wife, Frederike Schimpf all my property after my death as long as she lives. She shall have the disposition of said property."

According to Burchard, a witness for the plaintiff, an almost literal translation is:

"I bequeath to my wife, Frederike Schimpf all my property for her use after my death during her lifetime she shall have control thereof" or "disposition thereof."

These witnesses are all shown to be more or less expert in the German language, and there are also in the record two dictionary definitions of the word "verfuegen," in some of its forms, by which the words order, arrange, ordain, decree, provide, dispose of, command, enact, etc., are given as among its nearest English synonyms. It does not seem to me that much light can be derived from the dictionary except that the variety of definitions makes it evident that the meaning of the word in any given composition depends largely upon the subject matter and the context, nor does it seem to me that there is any important difference between the various translations made by the witnesses. Neither does it seem to me that the provision of our statute that "every devise of land in any will hereafter made shall be construed to convey all of the estate of the devisor therein which he could lawfully devise unless it shall clearly appear by the will that the devisor intended to convey a less estate," has any applicability to the instrument in question.

In order to make the statute seem applicable, it is necessary to divide into two parts that which is organically one. It is contended that the part of the instrument preceding the words "that is my will," should be divided into two sentences or clauses, and that the first clause or sentence, "I do will and bequeath to my wife all my property," is sufficient of itself to vest her with the entire estate in fee and that the following words, constituting as it is contended the second clause or sentence, "she has entire control over same after my death as long as she lives," are either insufficient to limit the preceding devise to a life estate or else are repugnant thereto and void. Or, at least, it is said, the two clauses are in such

conflict and contradiction as to raise a doubt as to whether the testator did not intend to convey the fee, and since it does not "clearly appear" to the contrary, the doubt must be resolved in favor of the widow and her devisee. But is this not creating a doubt by construction where none is suggested by the language of the testator, in order to afford an opportunity for the use of the statutory resolvent?

Suppose we omit the interpolated period in the probate judge's translation and substitute the words "to have" for the words "she has." The instrument would then read, "I do will and bequeath to my wife all my property to have entire control over same after my death as long as she lives." Would this change in phraseology make any difference in the meaning of the document? I think not. To my mind, the words "she has," not only in this translation, but in all those given by the witnesses, as disclosed by the record, have the precise force of the English infinitive "to have." "She has," says the German; "She to have," say we, and then it occurs to us that the pronoun is redundant and unnecessary and we strike it out. Whoever has talked much with English-speaking Germans has had abundant opportunity to observe that in translating their ideas into English they as frequently as otherwise express the infinitive by the present possessive. In legal parlance we say "to have and to hold during her natural life." The German says "she has to control" (sie habt zu verfuegen) as long as she lives." The difference in meaning between the two phrases, if any there be, is an imperceptible shade. There is but one clause, but one complete sentence in the granting part of the will. The words following "property" are not words of limitation, and were not intended by the testator to enlarge or diminish an estate previously granted, but are words of definition pertaining to the grant itself and particularly describing the estate intended to be conveyed. The exact force or meaning or the true translation of the word "verfuegen" is not a matter of extreme

importance. Whatever control, dominion or power of disposal accompanied the estate which the will conveyed terminated with it, and the duration of that estate was, by express terms of the instrument, that of the life of the devisee. It is true that if this word had been omitted, the estate conveyed would have been a freehold and that the devisee would, during its existence, have had entire control, disposal, order, arrangement, command, avails and dominion over and concerning the same; but the fact that that which the law implies was unnecessarily expressed in the writing of his will by an unlearned German, unfamiliar with our language, is insufficient to enlarge what would otherwise have been a life estate into a fee.

It is to be observed that the witnesses Tanner and Burchard, who are at least as expert in the German language as any others sworn, translate the will as conveying "to my wife all my property after my death so long as she lives" or "during her lifetime," and that the witness Keller translates it with but little transposition and as a single sentence, conforming in this last respect to the German transcript in the record.

The will construed in *Little v. Giles*, 25 Nebr., 313, is so unlike that now under discussion that the decision in that case affords no guidance for the present inquiry. The will there construed gave to the widow the entire estate of the testator, "the same to remain hers, with full power, right, and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow, upon the express condition, however, that if she should marry again, then it is my will that all of my estate herein bequeathed, or whatever may remain, shall go to my surviving children," etc. Here are two distinct clauses: first, an absolute devise with expressed and unlimited power of disposition, coupled with an equally express and emphatic condition subsequent, and a devise over of so much of the property as should remain—that is, the undisposed of residue of the

property at the termination of the qualified life estate. This court did not definitely or distinctly decide whether the widow took the whole estate in fee and the devise over was void, or whether she took a life estate only, with power to sell and convey the fee and the devise over was valid and effective upon the undisposed of residue, if any, at the date of her marriage. The construction of the same instrument in *Roberts v. Lewis*, 153 U. S., 367, which professes to interpret and follow the opinion of this court in *Little v. Giles*, *supra*, takes the latter view of the question, saying that the testator "clearly manifests his intention to restrict the estate given to the children to whatever has not been disposed of by the widow." That court evidently adhered to the opinion, which this court did not explicitly repudiate, that the widow took a life estate only, and that neither the unlimited power of disposition enlarged the estate into a fee nor was the devise over, void for repugnancy. But the question was not involved in either litigation. Conveyances executed by the devisee during her widowhood were alone in the controversy, and it was held that during that time she had power to convey the fee. This sufficed for the disposition of the suits, and that this was all that this court definitely decided, is apparent from the syllabi in *Little v. Giles*, *supra*, which were prepared by the same hand that wrote the opinion in that case.

At and before the date of the death of the father, there was a mortgage on the land in question, which the widow paid off and caused to be discharged of record in 1878, when it amounted, together with accumulated interest, to something above a thousand dollars. It is contended by the plaintiff in error that if the widow took only a life estate by the will of her husband, she was entitled to have the amount thus paid refunded to her by the heirs and charged as a lien upon the reversion, and that this right passed to the plaintiff in error under his mother's will and the district court erred in omitting to adjudicate the matter in the pending suit. It is unneces-

sary to decide as to the validity of the claim, or whether the widow was subrogated to the lien of the mortgage, or what rights, if any, accrued by reason of the transaction to her estate, or her personal representatives as such upon her death. Such a lien, if it exists, is an asset in the hands of an executor or administrator to be enforced against the entire reversion and reversioners alike. Its validity, or, if valid, the right to enforce it, would not be barred or in any way affected by a partition of the lands among the reversioners. A controversy concerning it would be in no way relevant to any issue properly joined in a partition suit. The executor of the will of the mother is not, as such, made a party to this action, nor does the plaintiff, who is such executor, make in his answer any claim in that capacity. He avers in his answer that by the terms of his mother's will he succeeded to her alleged right of subrogation to the mortgage debt and that he is entitled to have it adjudged and paid to him in his individual and not in his official capacity. This claim is without foundation. The mother died in May, 1895, leaving a will executed in July, 1894, in which the plaintiff in error is named as beneficiary, only as devisee of the lands in controversy and a certain other forty-acre tract. It goes without saying that an attempted devise of lands to which the testator has no title can not operate as a bequest of a chose in action, by way of an equitable lien in behalf of the testator upon the same lands. There is no evidence that the mother supposed she had such a lien, but if she did suppose so, there is no evidence of any intent on her part to make a specific bequest of it to the plaintiff in error or to any other person, and she named no residuary legatee. If she had such a lien it is the duty of her executor to enforce it as in case of any other chose in action and to account for and distribute the proceeds as in other cases.

The plaintiff in error makes a further claim under what is commonly known as the "Occupying Claimant's Act." What has been said with reference to the forego-

ing claim to subrogation on account of the payment of the mortgage has equal application to this demand. Whatever right the widow may have had to compensation for betterments upon the premises, such right did not pass to the plaintiff in error under her will. If it survived her, it accrued upon her death to her personal representatives as such. This statute protects any person for the value of any lasting and valuable improvements made by him upon lands to which he claims title and to which he "can show a plain and connected title in law or equity derived from the records of some public office or from the United States or from this state, or derived from any such person by devise, descent, deed, contract or bond, such person claiming or holding as aforesaid," etc. The betterments in question are alleged to have been made by the mother in her lifetime out of her own means, the plaintiff in error assisting therein as her employee. The mother, whose will was executed in July, 1894, did not die until May, 1895. Until the day of her death her will was ineffectual and might have been revoked. Until that day the plaintiff in error did not become and could not have become a claimant of the lands in controversy, and since then no betterments have been made. The plaintiff in error can, therefore, make no claim for benefits in his own behalf, and, as already said, whatever claim the widow may have had in the premises either terminated with her life or passed to her personal representative. It is not requisite now to decide whether there was or is any such claim, but it would, perhaps, be somewhat startling to the profession if the court should hold that the "plain and connected title" mentioned in the statute includes a title which does not purport to convey any estate in the lands to the claimant and is insufficient to amount to a "color of title." If a tenant for life by "claiming," not even in good faith, to own the reversion or remainder may make betterments upon the lands and charge the value thereof upon the estate in reversion or remainder, there appears to be no reason

why a tenant for years or from year to year, or even from month to month, or at will, may not make a like "claim," and under its cover expend such sums as he sees fit for buildings and improvements on the demised premises and then retain possession until he is reimbursed his outlays by his lessor. There remains to be considered a question of practice. The action was begun to obtain a partition of lands in dispute by the plaintiffs claiming as coparceners therein as the heirs at law of Christian Ertman Schimpf, and against the defendant, who was alleged to be entitled to parts of the land by like title. The petition also recited the execution and probate of the will of the common ancestor conveying a life estate in the lands to his widow, and the termination of that estate by the death of the devisee. The answer of Paul Schimpf, plaintiff in error herein, admits substantially all the allegations of fact contained in the petition, except that it denies that the will of the father conveyed to his widow a life estate only, but alleges that it devised the lands to her in fee and that she remained in open, notorious possession of them claiming title thereto until her death, and that since her death such possession and claim has been maintained by the defendant in his own right, asserting title under both the will of his father and that of his mother, and further setting up his claim to the right of subrogation to the mortgage lien and to protection under the "Occupying Claimant's Act." Issue was taken by reply to the material allegations of the answer and the court ordered that the question of title be first tried as in an action of ejectment. Afterwards, the cause coming on for trial, a jury was waived by the parties, and the court proceeded without objection to try both the issue of adverse title and of the right of partition at one time. This course seems to have been approved by this court in several cases. *Seymour v. Ricketts*, 21 Nebr., 240; *Phillips v. Dorris*, 56 Nebr., 293. If there was any irregularity in the proceedings it was waived by the plaintiff in error by waiving a jury. The trial being to the court

alone, it would have been somewhat absurd to require him to traverse substantially the same ground twice, as upon the trial of an action in ejectment, and again to determine the right of partition. The trial having taken place in the absence of a jury, errors in rulings as to the admission of evidence will not be considered by this court. At the conclusion of the trial, the court found all the allegations of the plaintiff's petition to be true, rejected the claim of the defendant below to subrogation to the mortgage lien and to protection under the "Occupying Claimant's Act," determined the aliquot parts to which the several parties were entitled in the lands in dispute and adjudged that the plaintiffs were to have partition thereof. The defendant filed a motion for a new trial and brought the case here by petition in error. In my opinion, no error in the proceedings is disclosed by the record and the findings and judgment are supported by the evidence and the law and ought to be affirmed; but since proceedings in partition were suspended upon bringing the action on error to this court, the case should be remanded to the district court for further proceedings not inconsistent herewith.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed and the cause remanded for further proceedings not inconsistent herewith.

JUDGMENT ACCORDINGLY.

HAMILTON BROWN SHOE COMPANY V. JAMES MILLIKEN.

FILED JUNE 5, 1901. No. 9,673.

Commissioner's opinion, Department No. 3.

1. **Evidence:** DEPOSITION: USE BY OPPOSITE PARTY. Where a deposition is taken by one party to a suit, and is not used by him, his opponent may use it in evidence.

2. ———: ———: ———: USE, GENERAL OR RESTRICTED. If the witness has been examined as to different transactions, such party may introduce only that part of the deposition which relates to one or more transactions; but should not be permitted to introduce a portion of his testimony on any given subject, while declining to introduce all the witness has said on that subject.

3. **Attorney and Client.** A party to a suit is not bound by any step taken by his attorney, in the latter's behalf, in another action.

4. **Pleading in Evidence.** Plaintiff commenced an action in the county court, which was afterward dismissed without prejudice; it afterward brought its action in the district court; on the trial, defendant, over plaintiff's objection, was permitted to introduce the petition, filed in the county court, in evidence. *Held*, under the facts in the case, it should have been excluded.

5. **Statement of Fact v. Expression of Opinion.** The rule that charges a party with notice of the truth in all cases where he makes positive representations of existing facts, does not apply to representations which in their nature are mere expressions of opinion.

6. **Fraud:** RESCISSION OF SALE. In an action to rescind a sale on the ground of false and fraudulent representations as to the financial condition of the vendee, a corporation: *Held*,

   (1.) **Annual Statement, Addressed to World.** That the annual statement, published by authority of the vendee, showing its debts and assets, is addressed to the world.

   (2.) **Party Has Right to Rely.** That a party dealing with the vendee has a right to rely on such statement.

   (3.) **Source Immaterial.** That the source from which such person receives such statement is immaterial.

7. **Timely Action of Plaintiff.** In an action to rescind a sale on the ground of fraud, it is incumbent on the plaintiff to show that within a reasonable time from the discovery of the fraud he, in some way, indicated to the vendee his intention to rescind; the bringing of an action, or any other act clearly indicative of such intention, and brought to the knowledge of the vendee, is sufficient.

ERROR from the district court for Dodge county. Tried below before MARSHALL, J. *Reversed.*

John S. Bishop and *Conrad Hollenbeck,* for plaintiff in error.

Loomis & Abbott, contra.

ALBERT, C.

On November 6, 1894, the Hamilton Brown Shoe Company of St. Louis, Missouri, plaintiff, sold and delivered a bill of goods to the Goldgraber Dry Goods & Clothing Company, of Fremont. Both were corporations. On December 21, 1894, the latter failed. Its store was closed under orders of attachment and chattel mortgages and its stock seized and held by the sheriff of Dodge county, defendant, by virtue of said orders and mortgages. Thereupon the plaintiff elected to rescind its contract of sale, on the ground of fraud, and on the 17th day of September, 1895, brought an action in replevin to recover the goods sold and delivered. No bond was given and the case proceeded as one for damages. A trial was had to a jury, which resulted in a verdict for the defendant. Judgment was rendered accordingly, and the plaintiff brings error to this court.

1. One of the grounds relied on by the plaintiff for a reversal is, that the court erred in excluding a part of the deposition of one Goldgraber. The deposition had been taken by the defendant, and the offer of the plaintiff was a portion of the cross-examination of the witness. Upon defendant's objection thereto, the court held that plaintiff might offer the entire deposition and then read such portions as it might see fit. The plaintiff declined to act on this suggestion, and defendant's objection was sustained. We are unable from the record to determine the correctness of this ruling. The rule appears to be that where a deposition, taken by one party to a suit, is not

used by him, his opponent may use it in evidence; and if the witness has been examined as to different transactions, such party may introduce only that part which relates to one or more of such transactions; but he should not be permitted to introduce a portion of his testimony on any given subject, while declining to introduce all the witness had said on that subject. *Citizens Bank v. Rhutasel,* 25 N. W. Rep. [Ia.], 261. Only that portion of the deposition offered is before us; consequently we are unable to determine whether the plaintiff brought himself within the rule just stated.

2. It is next argued that the court erred in excluding the answer of George L. Loomis and John W. C. Abbott in another action, which plaintiff offered as evidence in this case. We confess our inability to discover upon what theory it can be claimed that this evidence was admissible. Neither Loomis nor Abbott are parties to this suit; neither does it appear that either of them is in any manner interested in the result, save the former in the capacity of attorney. We can not believe it will be seriously contended that a client is bound by any steps taken by his attorney, in his own behalf, in another action. The evidence was properly excluded.

3. Prior to the commencement of this action, the plaintiff filed a petition in the county court of Dodge county against the defendant, seeking to recover the same goods, on the same state of facts as in this case. Subsequently, and before the commencement of this action, plaintiff dismissed its case in the county court. On the trial of this action the petition filed in the county court was received in evidence on behalf of the defendant, over plaintiff's objection. We are unable to see how the introduction of that petition in evidence served any legitimate purpose. The tendency of such evidence is to give rise to speculation and conjecture as to the result of the former action and the effect thereof on the present, and to divert the minds of the jury from the real issues. While its admission might not be sufficient, in itself, to justify a re-

versal, in our opinion the evidence should have been excluded.

4. The main question in this case arises from the instructions of the court relative to the alleged false and fraudulent representations of the vendee. It sufficiently appears that representations as to the financial condition of the vendee were made by its president direct to the agent of the plaintiff in 1893, and that in October, 1894, a representative of a commercial agency called on the vendee for a report which its president refused to give, whereupon its secretary gave him a copy of its annual statement published in March, 1894, in pursuance of the law governing corporations. The instruction under consideration is as follows:

"8. The jury are instructed that in order that representations may be regarded as fraudulent, so as to be ground for rescinding the contract of sale, they must be both false and fraudulently made. If they are made with an honest belief of their truth, at the time they are made, they are not fraudulent; but if made recklessly, and without any knowledge or information on the subject, calculated to induce a belief of their truthfulness, and they prove to be untrue, or if made knowing them to be false at the time, then they are fraudulent within the meaning of the law."

It will be observed that, by the foregoing, the jury were instructed, in effect, that if such statements were made with an honest belief in their truth, they were not fraudulent, even though false, unless made recklessly and without any knowledge or information on the subject calculated to induce a belief of their truthfulness. The plaintiff contends that these instructions ignore an important rule, applicable to cases of this kind, and one not covered by any part of the charge, and that is, the rule that charges a party with notice of the truth in all cases where he makes positive representations of existing facts. A clear statement of the rule is to be found in *Foley v. Holtry*, 43 Nebr., 133. But that rule is not univer-

sal in its application, and can not be extended to representations which, in their nature, are mere expression of opinion. The falsity of the representations under consideration lies in the alleged excessive valuation placed on the assets of the vendee. The valuation placed thereon by the vendee was merely the expression of an opinion on a point on which no two minds would agree, and upon which it is not to be presumed the parties making the representations assumed to have accurate knowledge. *Cohn v. Broadhead,* 51 Nebr., 834, and cases there cited. That one of the representations consisted of the published annual statement of the vendee, as a corporation, does not change the rule. It is true the annual statement contained an estimate of the value of the vendee's assets, but the law does not require it; it requires only a list of its debts. But if it did, it could require of it nothing more than that the valuation should represent the honest estimate of those making the statement, based upon sufficient knowledge of the facts to induce them to believe the estimate a fair one. In our opinion the instruction fairly states the law applicable to the facts.

5. Relative to the statement furnished the representative of the commercial agency, the court instructed the jury as follows:

"9. The jury are instructed that if from the evidence they believe that the report made and published by said Goldgraber Company in March 1894, as to its financial or property condition, and that this published statement was exhibited by the secretary of the said Company to the travelling agent of the Commercial Agency of R. G. Dun & Co., merely as information to said agent of the financial condition of said Goldgraber Company, and not as a representation by said company for the purpose of obtaining credit, then the said statement could not be considered by the jury, if untrue, as made to the plaintiff for the purpose of obtaining credit, especially if from the evidence the jury believe that at that time Joseph Goldgraber was General Manager of said company, and that

he refused to make any statement or representation as to his company's financial condition. Information gained and published by the R. G. Dun & Co.'s commercial agency as to the financial condition of the Goldgraber Company, when made without the authority of that company for the purpose of obtaining credit although obtained through the medium of its secretary, could and would not bind the Goldgraber Company as a representation by it to obtain credit, nor could it operate in that case as a fraud upon the plaintiff, even though the plaintiff or its agents had seen such published statement of the R. G. Dun & Co. To make such report or statement binding upon the Goldgraber Company it must have been published by that company under such circumstances as to show that it was made to procure credit, and be made by some officer or agent of said company authorized or having the authority to make such report or statement for that purpose, and it must appear from the evidence that such statement was false at the time to make it fraudulent."

The correctness of this instruction is squarely called in question by the record. It appears from the evidence that about October, 1894, the representative of a commercial agency asked the president of the vendee for a report on its financial condition. The president refused to give it or to make any statement in regard thereto; whereupon, the secretary furnished such representative with a copy of the annual statement of vendee, published the preceding March, showing a list of its debts and assets, the latter being about $20,000 in excess of the former. The testimony of the secretary is to the effect that he furnished such copy for the information of the said representative only, for the purpose of preventing an adverse report, and not for the purpose of obtaining credit.

In our opinion the instruction is bad. It ignores the fact that the statement furnished by the secretary, and upon which plaintiff claims to have relied, was a public

statement, made and published by the governing officers of the corporation. It was intended to inform the public of the financial condition of the vendee. There can be but one purpose in such publication, and that is, that parties dealing with the vendee could do so with a knowledge of its financial condition. It was addressed to the world, and to all to whom it came, by whatever means it reached them, it was the deliberate statement of the vendee of its financial condition, in March, 1894, when it was made and published. The authority of the secretary to furnish a copy of such statement, and the purpose for which he furnished it to such representative, are wholly immaterial, except that, if acting within the scope of his authority, his reiteration of the statement would operate as a reiteration thereof by the vendee. The plaintiff having been informed of the contents of the annual statement, and, according to its theory, supported by some evidence, at least, having parted with its goods on the strength thereof, the sole question is, whether such annual statement was false and fraudulent.

6. The plaintiff complains of an instruction which, it alleges, required it to show that it had given notice of its intention to rescind. The instruction on this point is somewhat obscure, but, fairly construed, it charges the jury that it was incumbent on the plaintiff, in some way or another and within a reasonable time from the discovery of the alleged fraud, to indicate to the vendee its intention to rescind the sale. The court might have gone farther and charged the jury that the bringing of an action to recover the goods, or any other act, clearly indicative of its intention to rescind, and brought to the knowledge of the vendee, would be sufficient. But if the plaintiff desired the rule to be stated more fully, it should have tendered an instruction covering the omission.

Many other errors are assigned and argued at length, but as they involve questions already discussed or those not likely to arise in another trial of the case, we shall not consider them further. It is recommended that the

judgment of the district court be reversed, and the cause remanded for further proceedings according to law.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

STATE OF NEBRASKA V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

FILED JUNE 19, 1901. No. 11,270.

1. **Federal Court Can Not Enjoin the Enforcement of State Law.** The circuit court of the United States is without jurisdiction to enjoin a state from the enforcement of its own laws.
2. ——: CAN NOT DO SO BY INDIRECTION. That which the federal court is without power to do directly it can not accomplish indirectly.
3. **Federal Injunction No Ground for Dismissal.** It is no valid ground for the dismissal of an action brought by the state against a corporation that the federal court has granted an injunction to restrain the attorney general from the prosecution thereof.

ORIGINAL jurisdiction. Proceeding to recover certain penalties claimed to be due under Maximum Freight Law. Motion by the attorney general to dismiss on the ground that he had been enjoined by the federal court. *Motion overruled.*

In 1893 the legislature of Nebraska passed an act, commonly called the Maximum Freight Rate Law, which named certain rates of transportation, required the railway companies operating in the state to reduce their rates to those prescribed, and provided that they should become liable to severe penalties for any failure to comply with its provisions. Compiled Statutes, 1893, ch. 72, art. 12.

On August 3, 1893, James C. Starr and Samuel W. Allerton, non-resident stockholders of the Chicago, Rock Island & Pacific Railway Company, exhibited, in the federal circuit court, their bill in equity against the railway company and the state board of transportation of which the attorney general was, *ex officio*, a member. They alleged in this bill that the rates prescribed in the act were confiscatory and prayed for a temporary injunction and for an order, on hearing, making the injunction perpetual against the enforcement of the said act. At the same time similar actions were brought by the stockholders of other railroad companies. In January, 1895, Arthur S. Churchill succeeded George H. Hastings as attorney general. In January, 1897, Constantine J. Smyth succeeded Churchill in that office, and was substituted as defendant in the suit brought by the stockholders of the Burlington & Missouri Railway Company, but not in this present case. Perpetual orders of injunction were made in four suits brought by stockholders. One of these was taken to the supreme court of the United States, and there affirmed. *Smyth v. Ames*, 169 U. S., 466.

This present action was begun by Constantine J. Smyth, as attorney general, on March 10, 1900. It was pending at the close of his term. On the 3d day of January, 1901, Frank N. Prout succeeded Smyth. The railway company, by its attorneys, Woolworth & McHugh, answered, setting up, *inter alia*, that George H. Hastings, as attorney general, had been enjoined in the premises. At the March session the attorneys of the railway company moved for judgment upon the pleadings. The court called for further argument; and finally, March 20, handed down the opinion denying the motion for judgment upon the pleadings on the theory that "the eleventh amendment to the federal constitution would be effectually emasculated if it were permissible to enjoin or coerce agents through which a state performs its corporate functions." *State v. Chicago, R. I. & P. R. Co.*, 61 Nebr., 545.

In the case of *Starr v. Chicago, R. I. & P. R. Co.*, in the federal court, the plaintiffs exhibited a supplemental bill, praying that the former order may be extended to the present attorney general. To this bill a demurrer was filed. On the 25th day of April, 1901, Hon. Walter H. Sanborn, circuit judge, handed down an opinion overruling such demurrer and in effect continuing the injunction against the present attorney general.

On the 7th day of May, 1901, the attorney general moved the supreme court of the state to dismiss this cause, attaching to the motion a copy of Judge Sanborn's opinion. On June 19th the following opinion, denying such motion, was handed down.—REPORTER.

Frank N. Prout, Attorney General, for the state.

M. A. Low, W. F. Evans, James M. Woolworth and *W. D. McHugh, contra.*

PER CURIAM.

The attorney general has presented a motion to dismiss this cause, for the reason that he has been enjoined by the circuit court of the United States for the district of Nebraska from the prosecution thereof. During the present term, in this very same case, we held that the federal court was without power or jurisdiction to enjoin the state, and that the attempted restraint of the attorney general by such court was an attempt to restrain the state itself. 61 Nebr., 545. What the circuit court can not do directly it may not do indirectly. This is clear. Attached to the motion is a copy of the recent opinion delivered by Sanborn, circuit judge, in *Starr v. Chicago, R. I. & P. R. Co.*,* holding that the federal court had jurisdiction to enjoin the attorney general. The argument of the learned jurist is not convincing as to the soundness of his conclusion upon this subject. With our former

*The title of the case is *James C. Starr and Samuel Allerton v. The Chicago, Rock Island & Pacific Railway Company, Frank N. Prout et al.* —110 Fed. Rep. 3.

opinion we are entirely satisfied, and until the supreme court of the United States has spoken upon the subject, it will be adhered to.

MOTION DENIED.

NOTE.—U. S. Constitution, art. 3, sec. 3, and Eleventh Amendment; Bryce, American Commonwealth, Vol. I., p. 231; Federalist, LXXXI; Scott, Repudiation of State Debts, p. 10; *Chislom v. Georgia*, 2 Dallas [U. S.], 419; *Florida v. Georgia*, 17 Howard [U. S.], 520; Chamberlain, Constitutionality of Repudiation, North American Review, Vol. 138, 1884.

State and State Officer.—The word "state" (commonwealth) signifies any of the officers or agents by whom the powers of the commonwealth are exerted. Political Science and Constitutional Law, Burgess, Vol. I., p. 210. Wherever one, by virtue of his public position under a state government, acts in the name and for the state, and is clothed with her power, his act is her act. *Ex parte Virginia*, 100 U. S., 339; *Carter v. Texas*, 177 U. S., 442. But see *Arrowsmith v. Harmoning*, 118 U. S., 194.—REPORTER.

FRANCIS C. FAULKNER V. CYRUS P. GILBERT.

FILED JUNE 19, 1901. No. 11,775.

1. **A Judgment Will Not Be Reversed for the Admission of Testimony Which Has Been Withdrawn From Jury.** A reversal of a judgment can not be based upon the admission of irrelevant testimony, when such testimony has been wholly withdrawn from the consideration of the jury by the charge of the court.
2. **Instructions, Conflicting, Misleading, Erroneous.** Instructions that are conflicting or misleading are erroneous.

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

Motion for rehearing of case reported in 61 Nebr., 602. *Motion denied.*

S. L. Geisthardt, for plaintiff in error.

Byron Clark, C. A. Rawls and *A. N. Sullivan, contra.*

NORVAL, C. J.

A judgment of reversal was rendered in this cause at the present term upon three grounds, the opinion being

reported in 61 Nebr., 602. A motion for a rehearing has been filed, assailing the soundness of the former decision in every particular. The first point we predicated a reversal upon was the admission by the trial court of evidence contradicting the execution of the contract of guaranty. It is not contended by counsel for the motion, nor could it be successfully argued, that the evidence alluded to was properly received, but it is insisted that whatever error was committed by its reception was cured by the giving of the following instruction tendered by the defendant: "The jury are instructed that the defendant by his answer 'admits that after the execution and delivery of said note the defendant wrote upon said note substantially the words of the pretended guaranty as set forth in said petition.' You will therefore disregard any evidence admitted tending to disprove this allegation of the answer as therein worded." In the brief originally filed our attention was challenged to this instruction, but the writer, in the preparation of the opinion, unintentionally failed to give it consideration. The rule undoubtedly is that error can not be based upon the admission of testimony which is wholly withdrawn from the consideration of the jury by the charge of the court. *Obernalte v. Johnson*, 36 Nebr., 772; *American Building & Loan Ass'n v. Mordock*, 39 Nebr., 413; *Nelson v. Jenkins*, 42 Nebr., 133, 136; *Missouri P. R. Co. v. Fox*, 60 Nebr., 531. The instruction quoted, if it were not for another one given in conflict therewith, would have had the effect to wholly withdraw from the consideration of the jury the testimony relative to the execution of the guaranty in suit. But the trial court instructed the jury "that whether or not defendant guaranteed the note in controversy and made the basis of this action at the time of its delivery, and before the maturity thereof, is a question of fact for you to determine from all the evidence before you bearing upon that point." By this instruction the making of the guaranty was submitted to the jury for their determination from the evidence ad-

duced, and by the other instruction it was sought to withdraw from the jury all the evidence before them upon that subject. We are unable to tell which instruction the jury followed when considering of their verdict. The two are contradictory, and probably had the effect of confusing the jury. We are entirely satisfied with the former conclusions upon the other points discussed in the opinion.

The motion for a rehearing is denied.

MOTION DENIED.

ERNEST BUSH V. STATE OF NEBRASKA.

FILED JUNE 19, 1901. No. 11,779.

1. **Information: VERIFICATION: COUNTY ATTORNEY.** An information charging murder may be verified by the prosecuting attorney of the proper county.
2. **Prosecuting Attorney Equivalent to County Attorney.** The terms "prosecuting attorney" and "county attorney" are used interchangeably in our statutes, and are synonymous.
3. **Assistant County Attorney Not Required to Give Bond.** It is proper for the county attorney, under the direction of the district court, to procure an attorney to assist him in the trial of a person charged with a felony, and such assistant is not required to qualify and give a bond as deputy county attorney.
4. **Copy of Information.** The state is required to furnish a defendant informed against for a felony with one copy, and no more, of the information filed against him, within twenty-four hours after such filing.
5. **Jury in Custody of Sheriff.** *Held*, That the record discloses that the jury were in the custody of the sheriff during the entire progress of the trial.
6. **Misconduct of Jury Must Appear of Record and in Motion for New Trial.** The alleged misconduct of a juror, to be available on review, must be presented by the record and assigned for error in the motion for a new trial.
7. **Grouping Instructions in Assignments.** Assignments of error complaining of the giving of groups of instructions are too indefinite and uncertain to be considered, unless all included in such groups are bad.
8. **Evidence Sufficient.** Evidence examined, and *held* sufficient to sustain a conviction of murder in the first degree.

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

Charles W. Meeker, James S. West and *Burr & Spencer,* for plaintiff in error.

Frank N. Prout, Attorney General, Norris Brown, Deputy, B. F. Eberhart and *Webster S. Morlan,* for the state.

NORVAL, C. J.

In the district court for Dundy county Ernest Bush was informed against, and found guilty of the murder of one Silas Bailey, and from the judgment of conviction he brings the record here for review.

There is complaint concerning the form and manner in which the information is verified. In the body of the information it is recited that "B. F. Eberhart, county attorney in and for Dundy county," informs against the defendant for the crime charged. The name of B. F. Eberhart is subscribed thereto. It is verified as follows, omitting the formal portions: "I, B. F. Eberhart, do solemnly swear that I am prosecuting attorney in and for said county, and that the allegations and charges in the foregoing information are true, as I verily believe." The same is signed by Eberhart, and the jurat of the clerk follows. It is claimed that it is defective, in that it purports to be verified, not by the "county attorney," but by the "prosecuting attorney." Without inquiring whether defendant has so made the record as to entitle him to raise this question, it is sufficient to say that it is evident that the terms "prosecuting attorney" and "county attorney," as employed by our legislature, are synonymous, and may be used interchangeably. The section of the statute which authorizes the election of such an officer designates him as "county attorney." The section of the Code of Criminal Procedure which requires the verification of informations names him as "prosecuting attorney," and he is alluded to in other sections and stat-

utes by one or the other of those names, indicating plainly that the legislature employs the two terms with the same sense and meaning. Section 579 of the Criminal Code was followed literally by the prosecuting officer, and we have no doubt of the propriety of such action. *Dinsmore v. State*, 61 Nebr., 418.

The court, during the proceedings, made the following record: "On the 28th day of November, 1899, on application of said B. F. Eberhart, county attorney, for the appointment of an attorney to assist in the prosecution, and it appearing to the court that it was necessary for the county attorney to have assistance in the prosecution of the matter, W. S. Morlan, attorney at law, is hereby appointed to assist the county attorney in the prosecution of this action." No exception was taken to this order of the court at the time, but complaint is made for the first time in this court that the proceeding was erroneous, because Morlan took no oath and filed no bond as deputy county attorney while acting as such assistant. It is quite evident from the record that Mr. Morlan was not acting as deputy attorney, but his appointment as assistant was pursuant to that portion of section 20, chapter 7, Compiled Statutes, which provides that the county attorney of any county may, under the direction of the district court, procure such assistance in the trial of any person charged with the crime of felony as he may deem necessary therefor. Mr. Morlan, therefore, did right in not qualifying or giving bond as deputy county attorney, because he was not appointed to act in that capacity.

Counsel for defendant asked an order of the court directing the clerk to furnish them with a copy of the information, which order was refused, and such refusal is assigned as error. The record discloses that prior to the filing of this motion the sheriff had duly served a true and certified copy of the information upon the defendant personally. We know of no law requiring the state to furnish a defendant or his counsel more than one copy

of the same information or indictment, and none is pointed out by counsel. Criminal Code, sec. 436.

It is next complained that the record does not affirmatively show that the jury was, during the whole of the trial, in the custody of the sheriff. We think the record does fully disclose this fact, as will appear by the following portion thereof: "And thereupon the plaintiff and defendant entered into the trial of said cause and proceeded with said trial, until the 4th day of December, 1899, during all of said time the said Ernest Bush accompanied by his attorneys J. S. West and C. W. Meeker being present in open court, and the said trial having been adjourned from time to time during said time, and the jury all of said time being in the custody of the sheriff; said cause also being adjourned over a holiday and a Sunday." It is perhaps possible to so twist this language as to make it appear that the jury was not in the custody of the sheriff during the Sunday and the holiday, but such a construction would be a very strained one; and we think it very clearly appears from the record that the jury was properly guarded by the proper officer.

There is further complaint made of certain alleged misconduct on the part of the jury, or of those having it in charge. If any such misconduct occurred, the defendant is not in position to avail himself of it, as no such ground was alleged in his motion for a new trial, and it can not be raised for the first time in this court. *Dolen v. State*, 15 Nebr., 405. This also applies to certain alleged misconduct on the part of the prosecuting officers, and of remarks of the court during the progress of the trial, all of which alleged errors are clearly waived.

Again, error is alleged in the giving of certain instructions. The assignment of error in the motion for a new trial, relative to giving of instructions by the court of its own motion is as follows: "The court erred in giving paragraph No. eight, ninth and eleventh paragraph of instructions on its own motion." As one of the instructions so complained of is undoubtedly a proper instruc-

tion, the court will not inquire further to ascertain whether the other two should have been given. *South Omaha v. Powell,* 50 Nebr., 798; *Hawkins v. State,* 60 Nebr., 380.

Lastly, it is contended that the verdict of guilty is not sustained by the evidence. From the record it is disclosed that the defendant and deceased were, on and prior to February 7, 1899, employed by one L. Morse as hands upon his stock ranch in Dundy county. Defendant was a boy, at that time between sixteen and seventeen years old. Bailey was over sixty. At noon on the day in question, Morse left the ranch and was absent until nightfall. When he left, defendant and Bailey were alone. Bailey had instructions to do some work upon a hay rack, or feed rack, in the barn lot, and defendant was engaged in doing odd chores around the place. When Morse returned, Bailey was not at the ranch, and defendant claimed he had not seen him since about 2 o'clock in the afternoon. Search was instituted for him, but he was not found for about two weeks, when his dead body was found in the Republican river about half a mile from the ranch house and barn of Morse. Search disclosed that Bailey had been shot in the chest and neck with a shotgun containing buckshot. Between the ranch house and the spot where Bailey was found were discovered a portion of his false teeth, also a knife owned by defendant. Defendant was arrested on a charge of having murdered Bailey, but was discharged, owing to a lack of evidence to hold him. Afterwards, however, a detective ingratiated himself into the confidence of defendant, who confided to him the whole of the facts relative to the tragedy. From his confession, as given by the detective on the witness-stand, it seems that Bailey had, on one or more occasions while about the house, drawn from his pocket a large pocket-book, whose appearance indicated that it contained a large amount of money. Defendant had planned for a number of days to murder the old man and secure this presumptively large sum.

The occasion offered this day, when he and his intended victim were alone for several hours. Consequently, while the latter was at work at the feed rack in question, defendant secured a shotgun, which he loaded with a charge of buckshot in one barrel and smaller shot in the other. Watching his opportunity he crept out of the house and into a hog pen which had been built of sods. Resting his gun upon a sod wall he took deliberate aim and shot the unsuspecting old man. Death was practically instantaneous, the shot having cut the aorta. The nature of the wound was such that no blood flowed from it, hence no trace of the latter was found in the vicinity. After robbing his victim, upon whose person he found only about $25, he harnessed a horse and hurriedly dragged the corpse half a mile to the river and sank it in a water hole in the ice from which the stock upon the farm were watered. He then drove the cattle over the trail made by the body while it was being dragged to the river, and thus obliterated from the snow that evidence of his guilt. These and many more facts testified to by the detective as having been told him by defendant were fully corroborated by other facts and circumstances which, taken together, as they appear of record, make it evident to this court that if the jury erred at all in the premises, it was on the side of leniency, for it fixed the penalty at life imprisonment. The record, as a whole, discloses conclusively that the defendant was proved guilty of a most revolting crime; that he had a fair and impartial trial, and has nothing to complain of at the hands of the court or the jury. Hence it is our duty to affirm the sentence of the lower court, which is accordingly done.

AFFIRMED.

STEPHEN A. HOLT V. STATE OF NEBRASKA.

FILED JUNE 19, 1901. No. 11,808.

1. **Physician Can Not Sell or Keep for Sale Liquor Without License.** A physician is forbidden, by section 20, chapter 50, Compiled Statutes, from selling or keeping for sale intoxicating liquors, unless he has a license or permit so to do.
2. **Keeping Liquor for Home Consumption Does Not Give Right to Sell.** The mere fact that one keeps intoxicating liquors for home consumption, will not authorize him to sell or keep for sale intoxicating liquors without a license or permit.
3. **Negative Averments Only Necessary as to Descriptio Delicti.** The rule is that only such exceptions and provisions of a statute are required to be negatived in an information as are part of the description of the offense.
4. **Bill of Exceptions: EVIDENCE ON MOTION FOR NEW TRIAL.** Evidence adduced on the hearing of a motion for a new trial, to be available on review, must be incorporated in a bill of exceptions.

ERROR from the district court for Boyd county. Tried below before HARRINGTON, J. *Affirmed.*

W. T. Wills and *W. A. Meserve,* for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy,* for the state.

NORVAL, C. J.

Stephen A. Holt was prosecuted in the lower court under section 20, chapter 50, Compiled Statutes, for keeping intoxicating liquors for sale without a license so to do. From a judgment of conviction and sentence he brings error.

The first contention of counsel for the accused is that the information fails to charge a crime. It avers: "That Stephen A. Holt, late of the county aforesaid, did on the 9th day of July, in the year of our Lord 1900, in said county, keep for sale and with intent to sell and vend and did then and there sell and keep for sale intoxicating liquors, consisting of whiskey, brandy and alcohol, in a

building then occupied by him, the said Stephen A. Holt, in the village of Gross, in said county, without him, the said Stephen A. Holt, first having procured a license for the sale of malt, spirituous or vinous liquors, and without first having procured a druggist permit for the sale of said liquors for medicinal, mechanical or sacramental purposes, contrary to the form of the statute in such case made and provided and against the peace and dignity of the people of the state of Nebraska." It is argued that the information is fatally defective, because it does not specifically allege that the defendant was not one of the persons designated in the proviso clause of section 20, chapter 50, Compiled Statutes, which reads, "That this [section] shall not apply to physicians or druggists holding permits for the sale of liquors for medicinal, mechanical, chemical, or sacramental purposes, or persons having liquors for home consumption." The information sufficiently negatives the exceptions of the statute. It alleges that the accused had no liquor license or druggist's permit, and that the defendant kept the intoxicating liquors for sale and did sell the same. It is sufficiently alleged, if that were essential, that the liquors were not kept for home consumption alone, which the statute permits. A physician has no right to keep intoxicating liquors for sale or sell the same; and if he do so, he is amenable to the penalty of the statute. The provisions of the act exclude neither physicians nor persons having liquors for home consumption from the operation thereof. Neither have the right to sell intoxicating liquors without having first procured a license or permit so to do. The information negatives all exceptions of the statute which are a necessary description of the crime attempted to be charged. Moreover, the general rule is that only such exceptions and provisions of a statute as are part of the description of the offense need be negatived in the information.

Complaint is also made because the information does not charge that the defendant had neither a license nor permit, but that it avers he did not have both a license

and permit. This contention is exceedingly hypercritical and needs no argument to refute it.

Samples of the whiskey taken from the keg found by the sheriff in the defendant's possession were introduced in evidence over the objection of the latter. They were competent and were properly received as evidence against him. Moreover, the defendant could not have been prejudiced by their reception as evidence, since he testified on the trial that he had a ten-gallon keg of whiskey which was seized by the officer.

The next argument is that John Hajek, one of the jurors on the case, after the verdict had been agreed upon, signed, sealed and delivered to the foreman, but before the same had been returned into court, made a bet with one Main relative to what the verdict would be. This point is not available in this court, since the certificate to the bill of exceptions does not disclose that the evidence adduced on the hearing of the motion for a new trial is incorporated therein. The certificate of the trial judge, attached to the bill of exceptions, shows that the bill merely contains the evidence taken on the trial of the cause. *Dinsmore v. State*, 61 Nebr., 418.

We have examined the ruling relative to the cross-examination of the witness J. M. Fuller, and discover no prejudicial error therein.

The judgment is

AFFIRMED.

NOTE.—Chapter 50 of the Compiled Statutes is known as the Slocumb Law. The real author of that law was John H. Ames.—REPORTER.

STATE OF NEBRASKA V. JESS B. HELDENBRAND.

FILED JUNE 19, 1901. No. 11,817.

1. **Statute: CONSTITUTION.** Section 9, chapter 12, Compiled Statutes, is not violative of section 3, article 1, of the constitution, which decrees that "no person shall be deprived of life, liberty or property, without due process of law."

2. **Oral Evidence in Criminal Case:** ANTE-CONSTITUTIONAL RULE. Prior to the adoption of the constitution no person had the inherent right to establish his defense in every instance by oral evidence.

3. **No Vested Right in Common Law.** There is no vested right in any rule of the common law.

4. **Rule of Evidence:** LEGISLATIVE POWER. The legislature may change the rules of evidence.

5. **Statute:** PUBLIC POLICY. A statute will not be declared void as against public policy, since such statute, when duly enacted, is the expressed public policy of the state upon that subject.

6. **Constitution:** BILL: COMPREHENSIVE TITLE. The constitution does not prohibit the legislature from adopting comprehensive titles to bills.

7. **Title Broader Than Act.** A law will not be declared unconstitutional merely because the title is broader than the body of the act.

8. **Act:** TITLE. The title of the act of the legislature of 1877 (Session Laws, 1877, p. 5), "to prevent the fraudulent transfer of personal property," with sufficient clearness indicates the subject of the proposed legislation.

ERROR from the district court for Dawson county. Tried below before SULLIVAN, J. *Exceptions sustained.*

James H. Van Dusen, W. A. Stewart, Warrington & Stewart and *H. M. Sinclair,* for the state.

George C. Gillan and *E. A. Cook, contra.*

NORVAL, C. J.

An information was filed in the court below charging one Jess B. Heldenbrand with violating section 9, chapter 12, Compiled Statutes, by selling mortgaged personal property without the written consent of the owner and holder of the debt secured by the mortgage. A demurrer to the information was interposed by defendant, which was sustained by the court, and the prosecution dismissed. The county attorney has brought the record here under the provisions of section 515 of the Criminal Code.

In 1877 the legislature passed an act "To prevent the fraudulent transfer of personal property." Session Laws,

1877, p. 5. This act made it a felony to sell, transfer or dispose of personal property covered by a mortgage during the existence of the lien or title created thereby without the consent of the mortgagee. The legislature of 1889 amended this statute so as to read as follows: "That any person, who after having conveyed any article of personal property to another by mortgage, shall, during the existence of the lien or title created by such mortgage, sell, transfer, or in any manner dispose of the said personal property, or any part thereof so mortgaged to any person or body corporate, without first procuring the consent in writing of the owner and holder of the debt secured by said mortgage, to any such sale, transfer or disposal, shall be deemed guilty of a felony, and upon conviction thereof shall be fined in any sum not less than one hundred dollars, or imprisoned in the penitentiary, for a term not less than one year, nor more than ten years, or both fine and imprisonment at the discretion of the court." Session Laws, 1889, ch. 35. This amendatory act is carried into the Compiled Statutes as section 9, chapter 12. The district court held that this act, so far as it declared it a crime for the mortgagor to sell the mortgaged chattels "without the consent in writing" of the owner of the debt, was an attempt to deprive a person charged with violating the act of the right to adduce oral testimony in favor of his innocence, and for that reason was violative of section 3, article 1, of the constitution of this state. Further, that the act attempted to create a crime where no criminal intent exists, and is against public policy and void. There are other questions argued by counsel.

We think the first reason assigned not tenable. Section 3, article 1, of the constitution reads as follows: "No person shall be deprived of life, liberty or property, without due process of law." It is argued that, as a person charged with this offense must, to establish his innocence, prove that he had the written consent of the owner of the debt,—and in such case the writing itself would

be the best evidence,—he would be deprived of a constitutional right, it being assumed that at the time the constitution was adopted a person accused of crime had an inherent right in all instances to establish his defense by oral evidence. Had a person at such time such right? Manifestly not. A person charged with violating a law requiring a license must produce his license on trial, if charged with doing the business requiring a license, or account for his failure to produce it. One charged with forgery, if his defense consists of an admission that he affixed the signature which he is accused of falsifying, but the act was authorized by a written power of attorney, must produce the paper writing, or account for its absence. In many actions under the statute of frauds, or the statute of limitations, causes of action or defenses must be supported by paper writings. Many other instances may be readily recalled by the curious wherein both civil and criminal actions, causes or defenses must be made out by writings. It can not then be said that it was the intention of the constitution builders that in all cases, either civil or criminal, the defendant should have the right to offer oral evidence in his defense. The term "due process of law" employed in that section of the constitution can not then be construed to imply an inherent right on the part of litigants to offer oral evidence in support of their causes of action or defenses. If this were not so, then, in the language of counsel representing the state, the following results would follow: "There could be no amendments to the law; the legislature could make no new laws, especially those creating new and different offences; the legislature could not regulate or change the procedure in criminal cases; could not prescribe rules of evidence; in short, could do nothing except those things especially mentioned or granted to it by the constitution." Manifestly, this can not be the law. The constitution did not have the effect, on its adoption, to petrify the social structure. The purpose or intent of its adoption was not to preclude legislation, except in certain

specified instances, where the power of the legislature for harm is expressly and impliedly restricted. It was not intended that the common law should thenceforth continue to the end of time, unaltered by legislative action. If such had been the intention, a legislative branch of the state government would have been a superfluity. One of the main purposes for which that branch of government is created is that the common law may from time to time be changed or abrogated in those instances wherein, by reason of changed social conditions, or other reasons, it may become ineffectual for the preservation of public or private rights. "A person has no property, no vested interest, in any rule of the common law." *Munn v. Illinois*, 94 U. S., 113, 134. Neither is there such a thing as a vested right in any particular remedy. Plainly, also, rules of evidence may be as readily changed as rules of conduct. The constitution did not affect the right of the legislature to change such. It found them in a certain condition, and left them to be changed by the legislature as it might see fit, so long as no prohibition of that instrument was infringed. It is neither expressed nor implied therein that rules of evidence shall not be changed or abrogated; neither is it expressed or implied that in all cases, either criminal or civil, persons shall have the unimpeded right to establish their contentions by oral evidence in the courts.

The law attacked prohibits a mortgagor from disposing of the mortgaged property without the consent in writing of the owner or holder of the debt. Such consent is essentially in the nature of a license. When granted, the mortgagor may lawfully do what without it is forbidden. Individuals are prohibited from disposing of certain articles of merchandise, unless authorized in writing by the proper authorities so to do. A person accused of violating a law requiring a license for the sale of his wares, establishes his innocence by producing the written consent of the proper officials. In the case at bar, the accused is prohibited from disposing of this property very much as are individuals prohibited from dealing

in certain commodities. He can establish his innocence in very much the same manner as can they theirs. Why, then, is not such requirement due process of law? There are no unnecessarily harsh restrictions attached to it. As well might the liquor dealer or the auctioneer or the drayman complain of the hardships attached to the carrying on of their particular employments? We think there is no doubt that it is due process of law. Moreover, the statute under consideration does not prevent a person prosecuted for violating its provisions from introducing oral evidence in his defense, as he may show by such testimony that he did not dispose of the property, that he never gave the mortgage, or that the debt had been fully paid, and the lien created by the mortgage discharged.

It is also urged that the law is against public policy, because it is not required to be proved or pleaded that the accused in such a case was actuated in disposing of the property by an intent to defraud the owner or holder of the debt. We shall not stop to inquire into the meaning of the term "public policy," although we should go far to find better evidence of the public policy than acts of the legislative body. If it be true that moral turpitude must accompany an act in order to make it a crime, then a vast body of laws, those which are merely *mala prohibita*, not *mala per se*, must likewise be swept from the statute books. So long as there is no constitutional inhibition, the legislature may make any act a crime, whether moral crookedness be involved in such act or not. When defendant sold this property without the written consent of the owner of the debt, if he is guilty of such act, the intent to violate a law was present, quite as certainly as it would be had he merely shot a quail in the closed season. In neither of the acts would moral turpitude be involved, but in each a criminal act would be committed, for in doing the act is implied the intent to defy the "thou shalt not" of the legislature. *State v. Hughes*, 38 Nebr., 366. Whether or no this act was a wise

rule of action, is not for this branch of government to decide. There being no restriction, express or implied, in the fundamental law, upon the legislature in such instance, its expediency was solely for the determination of that body, not of this.

Again, it is urged that the law is unconstitutional, for the reason that the act of 1877 was not clearly expressed in its title, and that the present section, which is amendatory of that act, is not germane to the subject-matter of the original act. The title of the act of 1877 is "An act to prevent the fraudulent transfer of personal property." The title of the act is extremely broad. Indeed, it is much more comprehensive than the act itself. The latter refers solely to transfers by mortgagors, whereas under the title all transfers of personal property, the effect of which would be to work a wrong or fraud upon some other party, might have been included. A law is not necessarily void because its title is comprehensive. *Paxton v. Farmers Company*, 45 Nebr., 884; *State v. Bemis*, 45 Nebr., 724; *Van Horn v. State*, 46 Nebr., 62. A title may be general, yet not necessarily void on that account. "An act to amend the Code of Civil Procedure" has been upheld by this court. *Gatling v. Lane*, 17 Nebr., 80. The mere fact, however, that the legislature chose a title much more comprehensive than the matter covered by the body of the act can not be objectionable. If the title were more narrow than the act, then complaint might well be made that the constitutional inhibition was invaded. The title in question is doubtless not so appropriate an one as might have been chosen, but we think it fairly indicates the scope and purpose of the act, and that a person reading it might expect legislation of this character in the body of the act. *State v. Bemis, supra.* The usual consequence of transfers of property covered by chattel mortgage is to work a wrong or fraud upon the person holding the mortgage, for, being of a movable nature, it is difficult to trace it from one person to another. A transfer of cattle by a mortgagor resident in Nebraska to a

person resident in Chicago, London or Berlin would certainly be, in effect, a fraud upon the holder of the debt, whether the mortgagor intended it so to be or not.

Some other questions of law are argued in the able brief of defendant, which, in the interest of brevity, we do not deem it necessary to discuss at length. We have examined them with care, and are of opinion that they are not well taken. The exceptions are sustained.

EXCEPTIONS SUSTAINED.

LEROY ALYEA V. STATE OF NEBRASKA.

FILED JUNE 19, 1901. No. 11,845.

1. **Information for Felonious Assault in Language of Statute Is Sufficient.** An information for an assault with intent to commit great bodily injury, framed under section 17*b* of the Criminal Code, is sufficient where the offense is charged in the language of the statute, without stating the means with which the assault was committed.

2. **Conviction of Lesser Offense:** AVERMENT OF BATTERY. A conviction of an assault and battery is improper under an information charging an assault with intent to inflict great bodily injury, where the averments therein do not include a battery.

ERROR from the district court for Madison county. Tried below before CONES, J. *Reversed.*

William V. Allen and *Willis E. Reed*, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy*, for the state.

NORVAL, C. J.

Leroy Alyea was tried upon an information charging him with making a felonious assault upon one Peter F. Sullivan with intent to inflict great bodily injury, convicted of an assault and battery, and sentenced to the county jail for the period of thirty days.

The first assignment of error challenges the sufficiency

of the information, the charging part of which is as follows: "That the defendant, Leroy Alyea, then and there being in said county and state, on or about the seventh day of July in the year of our Lord nineteen hundred, in and upon Peter F. Sullivan, then and there being, unlawfully and maliciously did make an assault with intent of him, the said Leroy Alyea, thereby then and there to inflict great bodily injury upon him the said Peter F. Sullivan." The information was framed under section 17*b* of the Criminal Code, and charges the offense in the language thereof. But it is strenuously insisted that this is insufficient, since the act creating the offense designates no particular fact or facts in defining the offense; further, the particular facts constituting the assault should have been set forth in the information. The precise question now urged upon our attention was passed upon adversely to the contention of the learned and distinguished counsel for the prisoner in *Murphey v. State,* 43 Nebr., 34, 38, and *Smith v. State,* 58 Nebr., 531. It was ruled in those cases that in a prosecution under section 17*b* of the Criminal Code the information is sufficient which charges the offense in the language of the statute. The information in the case at bar follows the wording of the statute, and under those decisions, which we adhere to, is sufficient in substance.

It is next urged that the crime of assault and battery, of which the defendant was convicted, is not embraced or included in the offense charged in the information. This, we think, is true. The information alleges an assault, but not a battery. If the latter had been averred in the information, the charge would have been sufficiently broad to have sustained a conviction for an assault and battery. *Mulloy v. State,* 58 Nebr., 204. But as the information contains no averment of a battery, the conviction can not stand. *Turner v. Muskegon,* 50 N. W. Rep. (Mich.), 310.

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

REVERSED AND REMANDED.

PLUMMER, PERRY & COMPANY, APPELLANTS, V. CHARLES H. ROHMAN ET UX., APPELLEES, ET AL., APPELLANTS.

FILED JUNE 19, 1901. No. 9,294.

1. **Creditor's Bill:** GENERAL DENIAL: EVIDENCE. In an action by creditors to set aside a conveyance of real estate alleged to have been made in fraud of their rights, the defendant may, under a general denial, give evidence of any fact tending to disprove the charge of fraud.

2. **Estoppel:** UNSECURED CREDITOR. A party who pleads facts which would, if proved, preclude the assertion by his adversary of an equitable title to, or lien upon, the property in litigation, is not entitled, under such plea, to show that the party against whom the estoppel is alleged, is precluded from asserting the rights of an unsecured creditor.

3. ———: ERROR NOT PREJUDICIAL. A party who pleads an estoppel is not prejudiced by any ruling of the court in relation thereto, if the facts sought to be suppressed are not asserted at the trial nor permitted to influence, in any way, the decision complained of.

4. **Withdrawal of Former Opinion.** What was said in the former opinion (*Plummer, Perry & Co. v. Rohman*, 61 Nebr., 61) in regard to pleading an estoppel, not being necessary to a decision of the case, is now withdrawn; and the question is left open for future determination.

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

Rehearing of case reported in 61 Nebr., 61. *Reaffirmed.*

A. G. Greenlee, Frank H. Woods, Stevens & Cochran and *Ricketts & Wilson,* for appellants.

Burr & Burr, contra.

SULLIVAN, J.

In this case, which is a controversy between the creditors and the wife of Charles H. Rohman, an insolvent trader, an opinion was filed at the last term affirming the judgment of the district court. *Plummer, Perry & Co. v. Rohman,* 61 Nebr., 61. The correctness of our conclusion

upon one point was challenged by motion for a rehearing, but we are entirely satisfied, after again examining the record, that our decision is right and ought to stand, even though we erred in holding that the estoppel was improperly pleaded. The petition alleges that the conveyance of the property in dispute was made in fraud of the rights of Rohman's creditors. The answer of Eda M. Rohman, although abounding in statements of evidential facts, is in substance and legal effect a general denial. The second defense, which was the result of an abortive effort to plead an equitable lien or title, was stricken out. The only issue formed by the pleadings, the only issue tried and decided, was whether the transfer of the property was fraudulent. Upon that issue the court found in favor of Mrs. Rohman; it found that Rohman, on November 14, 1895, owed his wife about $3,600, and that he sold and conveyed the homestead to her in payment of this indebtedness. There was also an express finding that the transaction was an honest one. These findings being supported by sufficient evidence, the judgment of the district court is necessarily right. If the trial court had held with appellants on the question of estoppel, the only effect of its ruling would be to preclude Mrs. Rohman from denying that her husband had the complete, unincumbered legal and equitable ownership of the homestead during the time the title stood of record in his name. The right to disprove the charge of fraud by showing an actual, bona-fide purchase for an adequate consideration would still remain. The creditors were not prejudiced by the rejection of their plea of estoppel, because the facts which they sought to suppress were not asserted at the trial and exerted no influence whatever upon the decision. The theory upon which the court gave judgment against the creditors was that Mrs. Rohman bought and paid for the property in good faith, not that she had an equitable title to, or lien upon, it before the purchase and transfer were made. She asserted merely the right of an unsecured creditor, and it is not contended that she had said or done anything that ought

to exclude her from the race of diligence with other creditors having like claims.

What was said in the former opinion in regard to pleading an estoppel being unnecessary to a decision of the case, is now withdrawn, and the question is left open for future determination.

The judgment of affirmance is adhered to.

AFFIRMED.

W. A. VAN NORTWICK V. GOTTLIEB K. HOLBINE.

FILED JUNE 19, 1901. No. 9,983.

1. **Negligence:** IMMATERIAL ALLEGATION: REPRESENTATION. In an action to recover damages for negligence in threshing grain, an averment that the thresher represented he had a good machine and could, and would, do a good job, is immaterial and need not be established by proof.

2. **Labor:** CONSIDERATION: TOOLS: IMPLIED REPRESENTATIONS. One who undertakes for a consideration to do work requiring special skill, impliedly represents that he possesses, and will exercise, such reasonable degree of skill as the nature of the service may require; and if he is to furnish his own tools, implements or machinery, there is an implied representation as to their fitness for the use to which they are to be put.

3. **Instruction.** An instruction which, without warrant, assumes the possible existence of a material fact, is erroneous.

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

E. A. Cook, for plaintiff in error.

George C. Gillan, contra.

SULLIVAN, J.

This was an action by Gottlieb K. Holbine against W. A. Van Nortwick commenced in the county court for Dawson county and removed thence by appeal. The petition filed in the district court, in substance, alleges that there is due to the plaintiff from the defendant the sum of

$106.44, with interest, for threshing wheat and millet in 1896. After admitting that the threshing was done as alleged in the petition, and that the plaintiff had been employed to do the work on the faith of his representations that he had a good machine and could, and would, do a good job, the answer continues as follows: "That the plaintiff did not do the defendant a good job of threshing, but negligently, carelessly and improperly done the threshing of the defendant, and by the negligent and careless manner in which the plaintiff operated the engine and thresher when doing said threshing, and by means of over-feeding during said time, the grain of this defendant was largely wasted by being run through said thresher unthreshed, and that large quantities of said grain that was threshed was run over and into the straw." The reply denies in general terms the facts constituting the counter-claim. The jury found in favor of the plaintiff for the full amount of his claim, and judgment was rendered on the verdict.

The giving of the third instruction was excepted to, and is now alleged as error. By this instruction the jury were told that they should find for the plaintiff and reject the counter-claim entirely, unless the defendant had satisfied them "by a preponderance of the evidence that plaintiff represented to defendant that he could and would do defendant a good job of threshing, and that defendant relied upon said representations and promises in letting the said work to plaintiff." Under the rule here laid down by the court the defendant could not succeed in the action without showing to the satisfaction of the jury two facts which he was under no legal obligation to prove. The doctrine of the authorities upon this point is that one who undertakes for a consideration to perform a particular service, impliedly represents that he possesses, and will exercise, such reasonable skill as the nature of the service may require; and if he is to furnish the tools, implements or machinery with which the work is to be done, there is also an implied representation that they are rea-

sonably fit and suitable for the purpose for which they are to be used. *McDonald v. Simpson,* 4 Ark., 523; *Norris v. Cargill,* 57 Wis., 251; *Ely v. Wilbur,* 49 N. J. Law, 685; *Morris v. Redfield,* 23 Vt., 295; *Craig v. Chambers,* 17 Ohio St., 253; *Smith v. Bristol,* 33 Ia., 24; *Chase v. Heaney,* 70 Ill., 268; *Thomas Fruit Co. v. Start,* 107 Cal., 206; *Murray v. Warner,* 55 N. H., 546; Bishop, Contracts, sec. 1416; 15 Am. & Eng. Ency. Law [2d ed.], 1095; 2 Parsons, Contracts, 54. The third instruction was clearly erroneous, and, from an inspection of the whole record, we are not able to say that it was not prejudicial. The jury may have found that Holbine did not represent "that he could and would do defendant a good job," or they may have found that the defendant did not rely upon those representations. These matters were immaterial, and they should not have been permitted to influence, in any way, the decision of the case. The only issuable averment of the answer is the one charging negligence.

In the fourth instruction the jury were told that they might, in determining the question of negligence, take into account "the amount and quality of help furnished by the defendant to assist the plaintiff, and force connected with him, in the operation of the machine." This instruction suggests the idea that the defendant may have been in some degree to blame for the failure of the machine to do good work. There is no evidence to which it is applicable and it should not have been given.

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

REVERSED AND REMANDED.

GEORGE E. BARKER ET AL. V. BERT GLENDORE WHEELER.

FILED JUNE 19, 1901. No. 11,288.

1. **General Denial Being Plea of Non-Assumpsit, Does Not Traverse Allegation of Non-Payment.** In an action upon a promissory note, or other contract for the unconditional payment of money, a general denial, being regarded as the Code equivalent of the common-law plea of non-assumpsit, does not put the allegation of non-payment in issue.

2. **Under General Denial, Proof of Payment Not Permissible.** In actions upon contract for the unconditional payment of money it is not permissible, under a general denial, to prove payment, even though made in accordance with the terms of the contract.

3. **In Suit on Official Bond, a General Denial Does Not Relieve Plaintiff of Proving Injury.** But in an action on an official bond, or other bond of indemnity, the plaintiff is not, by an answer consisting of a general denial, relieved of the necessity of proving the loss or injury out of which his right of action arose.

4. **Tender of Proof of Payment Not Implied Admission of Actionable Denial.** An offer to prove payment is not in every case an implied admission that the plaintiff once had an actionable demand; its purpose may be to prove that a right of action never existed.

5. **Payment Offered to Disprove Official Misconduct Not New Matter.** Payment is not new matter, within the meaning of section 99 of the Code of Civil Procedure, when it is offered to disprove a charge of official misconduct.

ERROR from the district court for Douglas county. Tried below before SCOTT, J.

Rehearing of case reported in 60 Nebr., 470. *Judgment below reversed.*

E. J. Cornish, for plaintiffs in error.

Isaac Adams, C. V. Miles and *John P. Breen, contra.*

SULLIVAN, J.

Bert Glendore Wheeler sued the plaintiffs in error as sureties upon an official bond and obtained judgment against them. The petition alleges that one James W. Eller was county judge of Douglas county during the term

ending January 3, 1894; that the defendants, George E. Barker and William S. Rector, were the sureties upon his official bond; that Eller, in his official capacity, received certain money belonging to the plaintiff and converted the same to his own use. The answer admits that Eller was county judge and that defendants were his sureties, but denies in general terms the other averments of the petition. The only assignment of error with which we have to deal calls in question a ruling of the trial court excluding evidence tending to show that Eller, while he was yet judge of the county court, paid the plaintiff's money to her duly constituted guardian. The correctness of this ruling depends upon whether, in actions of this kind, evidence of payment is admissible under a general denial. It is settled doctrine in this state that, in actions to recover money claimed to be due upon ordinary contracts, the general denial is the Code equivalent of the common law plea of non-assumpsit, and hence does not put the allegation of non-payment in issue. *Magenau v. Bell,* 14 Nebr., 7; *Clark v. Mullen,* 16 Nebr., 481; *Lamb v. Thompson,* 31 Nebr., 448; *Lewis v. Lewis,* 31 Nebr., 528; *Ashland Land & Live-Stock Co. v. May,* 51 Nebr., 474; *Hudelson v. First Nat. Bank,* 51 Nebr., 557. These cases recognize no distinction between payment according to the terms of the contract and payment after breach of the contract; and one of them at least (*Clark v. Mullen, supra*) is a direct adjudication to the effect that payment at the time goods were sold and delivered, and before a cause of action arose, could not be shown unless specially pleaded. But neither this court, nor any other so far as we know, has ever held in an action on an official bond or other bond of indemnity, that the plaintiff was, by a general denial, relieved of the necessity of proving the loss or injury out of which arose his right of action. The defendants did not by their bond become indebted to the plaintiff; they assumed no specific obligation to her which they were bound at all events to discharge by payment or otherwise; their promise, given to the county of

Douglas, was to make good any loss that the public or individuals might sustain by reason of the official misconduct of Eller. This being so, it would be illogical—it would be inconsistent with reason and common sense—to hold that a general denial, like the plea of non-assumpsit, put in issue nothing but the execution of the bond. An offer to prove payment is not in every case an implied admission that the plaintiff once had an actionable demand against the defendant; its purpose may be, as in this case, to prove that a right of action never existed. Eller received the money in question rightfully; his possession of it as county judge was lawful, and there is no presumption that he was guilty of official misconduct. The allegation of conversion was, therefore, a material one, and it was not admitted by the general denial. Payment was not new matter, within the meaning of section 99 of the Code of Civil Procedure, for it was offered, not to show the discharge of an obligation that once existed, but to show that the bond had not been forfeited as alleged; that Eller had not been guilty of official misconduct; that the plaintiff had not been injured;—in short, that one of the essential averments of the petition was not true. In *State v. Peterson,* 39 S. W. Rep. [Mo.], 453, which was an action upon an official bond, the court, speaking by Macfarlane, J., said: "In cases in which non-payment is a material fact necessary to constitute plaintiff's cause of action, it must be alleged in the petition and proved as a part of plaintiff's case, and defendant can controvert it, under a general denial, by proof that payment was made."

Other cases to the same effect are *Wheeler & Wilson Mfg. Co. v. Tinsley,* 75 Mo., 458, and *Knapp v. Roche,* 94 N. Y., 329. The case of *Hudelson v. First Nat. Bank, supra,* does not at all support the position for which the plaintiff contends. It merely decides that, in an action by a mortgagee for possession of mortgaged chattels, an allegation of non-payment of the mortgage debt is indispensable. The legal effect of a general denial was not determined, nor was there any occasion to consider the question, as the

statute declares the effect of such a denial in actions of replevin.

The judgment heretofore rendered in this court is set aside, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

LUSETTA J. SOLT ET AL., APPELLEES, V. LEWIS C. ANDERSON, APPELLANT, AND JOHN H. SOLT ET AL., APPELLEES.*

FILED JUNE 19, 1901. No. 9,457.

1. **Petition Sufficient.** Petition examined, and *held* to state facts sufficient to constitute a cause of action.
2. **Review of Error Upon Appeal.** On appeal to this court of an action in equity tried in the district court, alleged errors in the admission and rejection of evidence by the trial court can not be reviewed. The correctness of the judgment or decree appealed from will be determined from the record as presented by the appeal.
3. **Allegation of Fact in Reply Denied by Code.** An allegation of fact in a reply is taken as denied by force of the Civil Code; and when the allegation is not admitted and no proof in relation thereto is in the record, the fact alleged can not be said to exist.
4. **Administratrix of Vendor:** HER RIGHT TO PROSECUTE. The administratrix of a deceased vendor to a contract for the sale of real estate is authorized by the provisions of section 323 *et seq.*, chapter 23, Compiled Statutes, 1899, to prosecute an action against a vendee for specific performance of the contract and obtain authority to execute according to the terms of such contract a conveyance of the premises of the deceased vendor.
5. **Evidence:** FINDING OF TRIAL COURT. Evidence examined, and *held* to support the findings of the trial court, on the questions of fact put in issue by the pleadings.

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

Stark & Day, for appellant.

Hainer & Smith and *D. A. Scovill,* *contra.*

*Rehearing allowed.

HOLCOMB, J.

Defendant Anderson appeals from a judgment adverse to him, rendered in the district court, wherein he was adjudged to pay the plaintiff the sum of $1,093, balance found due on a contract for the sale of real estate. The action was in its nature for the specific performance of an agreement for the sale of a tract of land entered into by Jacob Solt in his lifetime, and his wife, the appellee, the then owners of the land, on the one part and the appellant on the other. By the terms of the agreement, which is dated November 4, 1893, and pleaded in the petition, Anderson, the appellant, agreed to pay Solt, the owner of the land, $2,500, of which $50 was paid in cash and the balance to be paid the 1st day of March, 1894, less the amount of a certain mortgage then on the place. The vendor was to give peaceable possession of the premises on or before the 1st day of March, 1894, and to let Anderson do any work he wished to do on the place in the meantime; and Anderson agreed to forfeit all improvements and moneys paid if he failed to fulfill his part of the contract. The petition is assailed on the ground that it fails to state facts sufficient to constitute a cause of action. The petition alleges, in substance, that the deceased Solt was, in his lifetime, the owner of the land, and that the plaintiff was his wife and the administratrix of his estate; the execution of the mortgage thereon and of the written agreement with the defendant for the sale of the land, which is copied in the petition; the death of the owner and the names of those surviving him as his heirs at law; the payment of the further sum of $50 on the contract of sale March 6, 1894; that the deceased Solt, at the time of making the contract of sale, was the owner of the land and was ready and willing to convey the real estate to Anderson; that the deceased and plaintiff had complied with each and all the conditions in said contract on their part to be performed, and that since the death of Solt the plaintiff, both individually and as adminis-

tratrix, had been ready to convey the real estate to Anderson upon his paying the purchase price thereof, and has complied with each and all the conditions on her part to be performed; that Anderson had wholly failed, neglected, and refused to comply with his part of the contract, or to make any payment on the mortgage on the land or to pay the excess to Solt in his lifetime, or to the plaintiff as administratrix since his decease. She prayed for authority to convey the premises to Anderson, and that he be required to comply with the contract, and in the event of his refusal, that the plaintiff have judgment for the amount due on the contract with interest and costs. The objections to the petition are that it does not show that the deceased could convey a good title at the time he agreed to; that no deed was tendered on March 1, 1894, or at any subsequent date, nor that a state of facts existed rendering it unnecessary or unavailing; and no allegation is made that the plaintiff, as representative of the deceased, could convey a good title, or that she tendered a deed or demanded that Anderson comply with his contract. The petition, we think, states a cause of action. It is alleged that the plaintiff's intestate was the owner of the real estate when the contract was entered into; that as to him and his successors and representatives, all conditions of the contract obligatory on them had been performed; that they were ready and willing at all times to comply with the contract and execute a conveyance, and that defendant's failure, refusal and neglect to perform the conditions imposed on him had alone prevented the consummation of the contract. It may be admitted that after the decease of the owner authority to convey the premises in pursuance of the contract must be first obtained, of which more will be said hereafter; but defendant's refusal to comply with the agreement leaves him in a condition where he can not complain, because a conveyance was not made before the institution of the present suit. While he is in default, he can not be heard to say the plaintiff had not tendered him a good conveyance to

the premises. It was his duty to comply with the terms of the agreement, tender the amount owing, and upon failure to obtain a conveyance of the land by good title, he would be absolved from the obligations he had assumed. The petition on its face discloses compliance with the contract on the part of the deceased and his representatives at all times, and their ability and willingness to execute a conveyance of the land and pass a good title thereto upon the payment of the purchase price due under the agreement. The petition of the administratrix, under the facts pleaded, is equivalent to a vendor bringing a deed of conveyance into court and asking specific performance on the part of the vendee. The objection to the petition can not be upheld. The answer of the guardian *ad litem* of the minor heirs of the deceased is substantially the same as is the petition of the plaintiff and presents no different question as to its sufficiency.

Some attention is given by appellant's counsel, in his brief, to a discussion of alleged errors in the rulings of the trial court on the admission and rejection of evidence. The errors complained of can be reviewed properly only by proceeding in error. This being an appeal, we are to pass on the record as presented to us and therefrom determine the correctness of the judgment rendered in the trial court. We can not review the case on alleged errors in the admission and rejection of evidence when brought here on appeal. *Te Poel v. Shutt,* 57 Nebr., 592; *Zimmerman v. Zimmerman,* 59 Nebr., 80; *Orr v. Bailey,* 59 Nebr., 128.

It is also argued that the agreement to sell, being unacknowledged by the husband and wife and the land being a homestead, the contract is absolutely void and unenforceable. Whether the land is or was the homestead of the vendor we are unable to determine from the record before us, and are, therefore, precluded from considering the proposition thus advanced.

The reply alleges that it was the homestead of the vendor, but this, by force of the statute, is denied and there is no proof whatever on the subject. The allegation being

denied by operation of the Code as to the effect of a pleading in reply, and it nowhere being admitted that the allegation is true, the parties are in the same position as if a pleading to the reply were permissible in which the defendant denied the allegation of the reply alleging the land was a homestead, and there being in the record no evidence touching that issue. It can not, therefore, be said, from an inspection of the pleadings and the evidence, that the land in controversy was the homestead of the vendors.

It is further contended that the plaintiff being without authority to execute a conveyance of the real estate at the time the suit was instituted, she has no cause of action against the defendant, and the action, for that reason, must fail. The argument is based upon the proposition that no authority is given by statute for an administrator of a deceased vendor to bring and prosecute an action for specific performance by a vendee under a contract for the sale of real estate. Proceedings of this character are directly authorized by the provisions of section 323 *et seq.*, chapter 23, Compiled Statutes, 1899, especially sections 335*a*, 335*b* and 335*c* of said chapter, being a part of the laws of 1889, chapter 60, entitled "An act providing for the conveyance of real estate by executors and administrators in certain cases." The administratrix, under the authority thus given, is authorized to institute an action to compel specific performance of the contract and obtain authority to execute a conveyance of the real estate under the terms of the agreement executed by her intestate during his lifetime. The statute has been construed with reference to the right of the vendee to enforce specific performance after the death of the vendor, and the same reason for a similar construction in the case of a deceased vendor exists and a like construction will be given in the case at bar. *In re Reed,* 19 Nebr., 397, 401, and citations therein made.

By the answer the defendant interposed as a defense the plea that there were certain apparent liens on the land

which prevented the conveyance of a good title, and that the administratrix had abandoned the contract and committed waste on the real estate materially diminishing its value. On these issues, under the evidence, the court found against the defendant, and its findings are, we think, supported by the evidence. While there may have been apparent liens, the evidence failed to show any actual present lien for any sum or sums whatever. They were either dormant or for other reasons were shown to be of no validity as against the property described in the contract. On the question of the alleged abandonment of the contract by the plaintiff, and of waste committed on the premises, the evidence being conflicting, the court's conclusions and the judgment rendered thereon, under well settled rules for reviewing its proceedings on appeal, ought not to be disturbed.

In the reply brief the appellant urges that in any event, in addition to the amount of the face of the mortgage being deducted from the purchase price named in the agreement, there should be further deductions made for taxes accrued and interest accumulated. We do not find in the record any evidence of any taxes which were a lien on the land at the time the purchase price should have been paid or accumulated interest due at such time. We are of the opinion that the respective rights of the parties under the agreement to sell should be fixed and determined as of the time when by its terms the vendee was to make final payment of the sum due in excess of the mortgage on the land, and the vendor convey the land and surrender to the purchaser the peaceable possession thereof. So far as the record discloses this would be the total amount agreed upon as the purchase price, less the $100 paid by the vendee and the face of the mortgage, which sums appear to have been deducted by the trial court in its findings of the amount then due the plaintiff and for which judgment was rendered.

From what has been said it follows that the judgment appealed from is in conformity with law and equity, sup-

ported by the evidence, and should be affirmed, which is accordingly done.

AFFIRMED.

MARY LAMMERS, EXECUTRIX, v. JOSEPH BOEHMER.

FILED JUNE 19, 1901. No. 10,009.

Jury Judge of Weight of Evidence. The weight to be attached to the testimony of different witnesses is peculiarly and especially a question for the jury. They are the triers of fact, and their judgment, based on the consideration and weighing of conflicting evidence, should not be overturned, unless it can be said the verdict is clearly wrong and under no rational view of the case can the conclusion reached be justified.

ERROR from the district court for Cedar county. Tried below before EVANS, J. *Affirmed.*

Homer A. Miller, Elberti Ready and *James C. Robinson,* for plaintiff in error.

Miller & Ready: This action was originally brought by John Lammers, deceased. It is admitted by defendant that he bought a tract of land of said John Lammers in the year 1886, and that he paid for it by giving notes in the sum of $2,200; but that, instead of giving three notes, as was contended by Lammers, he gave one for $1,000 and one for $1,200, at nine per cent., due March, 1891. Boehmer claims to have paid the interest on these notes, as it came due, to 1891, inclusive; and that he then paid the plaintiff's son and agent, Anton K. Lammers, $600 to apply on the principal, taking up the original and giving for the remainder thereof two notes for $800 each, at nine per cent., due in one and two years respectively. It is admitted that in October, 1891, Boehmer purchased of Lammers a car-load of cattle, giving therefor his note for $690, with interest at seven per cent., which payor contends was to run six months and the payee contends was to run till the July, next following. Boehmer further contends that in March, 1892, he paid Lammers $1,798.13, to liqui-

date the two $800 notes; the remainder to be applied upon the $690 note, leaving a remainder of $668 still due thereon. He says that he gave the $600 in part payment of the $690 note. He testifies further that, in July following, he sold a car-load of hogs for $640, took up the $600 note, paid the $68 and with the remaining cash made some purchases of the plaintiff. He says a portion of the hogs sold belonged to the plaintiff. Defendant's statement, in the form of an account, would be as follows:

Balance due on steer note of $690	$68
Interest on same	2
Account for pipe and twine (maximum)	80
Note sued on in this action	600
Interest on same at nine per cent. for four months	18
Plaintiff's part of hog check	84
	$852
Amount of hog check	$724
Balance, for which note was given	128
	$852

The plaintiff contends that in July, 1892, there was due and unpaid on the $690 note the sum of $726, and the plaintiff admits that at the time the defendant sold the car-load of hogs in July, for which he claimed to have received $640, he paid to the said John Lammers the sum of $606 to apply upon the $690 note, and that he gave his note for the sum of $120 for the balance due upon the $690 note, and that no sum of money whatever was paid upon the note in suit, and in fact the same was not due.

The defendant admits that, in case he is mistaken in saying that he paid $600 on the principal of the land notes in March, 1891 to Anton K. Lammers, then the note in suit has never been paid. This is the vital question in this case, and the key to the whole situation. Upon this the defendant is bound to establish his claim by a preponderance of the testimony; and in this he has signally failed.

Wilbur F. Bryant, Lorenzo W. Billingsley, Robert J. Green and *Richard H. Hagelin, contra.*

HOLCOMB, J.

It is contended by the plaintiff in error, plaintiff below, that the verdict of the jury and the judgment rendered thereon should be vacated and reversed because not supported by the evidence and as being contrary to the third instruction of the court, wherein the jury were instructed that if the evidence were evenly balanced or preponderated in favor of the plaintiff, a verdict should be returned for the plaintiff, and against the defendant for the amount of the note sued on with interest. The action was based on a promissory note of the defendant, the execution of which was admitted and payment pleaded as a defense. The issue was fairly submitted, and the only question presented to us is whether, under the evidence, the verdict ought to have been sustained or set aside by the trial court as unsupported by the evidence and contrary to the instruction referred to. The principal sum in controversy was $600. The alleged payment was vigorously denied. The evidence on each side was of a most positive character and in flat contradiction. The conflicting testimony can not, as we view the record, be reconciled on the theory that some of the parties were mistaken. The defendant was the principal witness in his own behalf and swore positively as to the alleged payment, giving with much detail the circumstances regarding the transactions related thereto and connected therewith. The plaintiff and his son were equally positive as to plaintiff's contention that the payment pleaded had never been made, and testified to facts and circumstances surrounding the transactions between the parties corroborative of their view of the case. There are circumstances shown in evidence which must be taken as true lending plausibility and reasonableness to claims of each of the parties. Are we justified, under such circumstances and in view of such a rec-

ord, in saying the verdict was wrong and can not stand? After a careful consideration of the evidence as presented by the bill of exceptions, we are of the opinion that the verdict should not be disturbed. It is not the number of witnesses on a side which determines the preponderance of the evidence. The weight to be accorded to the evidence of different witnesses is peculiarly and especially a question for the jury. They are the triers of fact, and their judgment, based on the consideration and weighing of conflicting evidence, should not be overturned, unless it can be said the verdict is clearly wrong and under no rational view of the case can the conclusion reached be justified.

A brief reference to the conflicting evidence in the case would probably subject our views of the case to misconstruction, and an exhaustive consideration and analysis is prohibited for want of time, nor do we think any useful purpose would be subserved by so doing. The trial judge, who with the jury heard the testimony of the different witnesses, has refused to set aside the verdict as being contrary to and not supported by the evidence. In the exercise of his deliberate judgment on the sufficiency of the evidence, which it is presumed he exercised in passing on the motion for a new trial, the ruling made is entitled to consideration from a reviewing court, and will not be interfered with unless clearly wrong. *Central City Bank v. Rice,* 44 Nebr., 594. In *Risse v. Gasch,* 43 Nebr., 287, it is held that this court is not vested with authority to set aside the verdict of a jury, having for its support sufficient competent evidence, even though this court may be of the opinion that had it been the triers of the case it would have reached a different conclusion. In *Fremont, E. & M. V. R. Co. v. French,* 48 Nebr., 638, the third paragraph of the syllabus states: "The credibility of witnesses is for the jury, and this court can not say that the finding of a jury is not supported by sufficient evidence because a greater number of witnesses testified against the finding than testified in its favor." The authorities are uniform

and numerous to the effect that when the evidence is conflicting and there is sufficient to support the finding made by the jury this court will not assume to usurp the province of the jury by passing upon the credibility of the witnesses and weighing the conflicting testimony introduced on the trial of the case.

For the reasons stated the judgment of the trial court rendered on the verdict should be permitted to stand undisturbed, and is accordingly

AFFIRMED.

PAUL H. MARLEY, APPELLANT, V. HENRY STURKERT ET AL., APPELLEES.

FILED JUNE 19, 1901. No. 10,025.

United States Homestead: MORTGAGE BEFORE FINAL PROOF NO LIEN, WHERE PROOF IS MADE BY HEIRS. A homestead claimant, after making a homestead entry and occupying public land under the United States homestead laws, executed a mortgage on the land thus occupied, and, before full compliance with the law entitling him to make final proof and obtain title thereto, died. *Held*, As against his heirs at law who perfected the entry, made the required final proof of settlement and cultivation and obtained from the government title to such land, that the mortgage was ineffectual to create any valid lien thereon.

APPEAL from the district court for Custer county. Heard below before SULLIVAN, J. *Affirmed.*

C. L. Gutterson, for appellant.

James B. Smith and *James Leavitt, contra.*

HOLCOMB, J.

To a petition in equity for the foreclosure of an alleged lien of a mortgage on real estate a demurrer was interposed and sustained. The correctness of the ruling on the demurrer is challenged.

The sole and only question raised by the demurrer is the validity of the lien claimed by virtue of the mortgage on the real estate described therein. The petition dis-

closes that the mortgage was executed by a homestead claimant after entry made under the United States public land laws relating to the acquisition of title to government lands as a homestead of the entryman. It is alleged that the mortgagor was occupying the land under a government homestead entry at the time of the execution of the mortgage; that the mortgage was given to secure a loan for money advanced to make improvements on the land and for necessary living expenses of the claimant while so residing on his homestead; that he died December 16th, 1896, and that his heirs at law, naming them, on February 15, 1897, made final proof on the land as the heirs at law of the deceased entryman, and now claim the land and interest therein as the heirs of the deceased. It is not stated in the petition for what length of time the deceased had resided on and improved the land prior to his death, or other facts from which it could be inferred that at the time of his death he had complied with all the requirements of the homestead act and become entitled thereby to make final proof and receive a final certificate and patent therefor from the United States government. From what is stated in the petition we must conclude that at the time of his death the homestead entryman had not fully complied with all the laws relating to his homestead, and was not, therefore, at that time, entitled to make final proof and receive the evidence of his title thus acquired. By section 2291 of the Revised Statutes of the United States it is provided, among other things, that no certificate or patent shall issue until the expiration of five years from the date of entry, and that if at the expiration of said time, or at any time within two years thereafter, the person making such entry, or, if he be dead, his heirs or devisees, prove by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, he, she or they, if at that time citizens of the United States, shall be entitled to a patent as in other cases provided by law.

It is not here necessary to consider the effect of the mortgage on the land had the mortgagor, in his lifetime, fully complied with the law relating to his entry, made proof thereof and had become invested with the equitable or legal title thereto. At the time of the mortgage he had only an inchoate right thereto. This right was never perfected into either a legal or equitable title. Neither at the time nor afterward did the mortgagor acquire any title in the real estate which he could incumber by the mortgage he executed thereon. By the provisions of the section, a part of which is quoted, title to the land after his death and when residence or cultivation was shown for five years was perfected in his heirs at law. They, upon making proof of the necessary acts in complying with the law governing homestead entries on public lands, did not receive the land from or through their ancestor, the original entryman, but direct from the government, which, upon the issuance of the patent, possessed them with the full and complete legal and equitable title free from any lien sought to be created thereon by the entryman in his lifetime. The mortgage is entirely ineffectual to constitute a lien as against those who under the public land laws had fulfilled the requirements of the law as to the entry of a deceased homestead claimant and obtained a patent to the land included and covered by such entry. *Cheney v. White,* 5 Nebr., 261; *Webster v. Bowman,* 25 Fed. Rep., 889; *Rogers v. Clemmans,* 26 Kan., 522; *Schoolfield v. Houle,* 13 Colo., 394.

The demurrer to the petition was rightly sustained.

AFFIRMED.

HUBBARD SAVARY V. STATE OF NEBRASKA.

FILED JUNE 19, 1901. No. 11,866.

1. **Tender of Proof.** In a criminal trial, as well as civil, when to a question in direct examination an objection is interposed by the adverse party and sustained, in order to present the ruling to this court for review, there must be an offer of proof of the facts sought to be put in evidence by the question to which the answer was excluded.

2. **Expert Witness:** EXHIBITS. When physicians called as experts in a criminal trial for murder, in testifying to the manner and cause of death, refer to and use the skull of the deceased and a photograph thereof in explanation and as a part of their testimony, it is not erroneous to admit the exhibits as evidence in the case.

3. **Instruction Defining Murder in First Degree Not Erroneous.** Instructions copied in the opinion defining murder in the first degree examined, and *held*, the giving of the same was not erroneous.

4. **Not Error to Refer Jury to Instruction Formerly Given.** When a point arising in a criminal trial has been covered in an instruction to the jury, it is not error to refer to such instruction as answering an inquiry submitted by the jury during their deliberations, in place of giving another instruction on the same point, although another instruction might properly have been given.

5. **All Phases of the Case Need Not Be Embodied in One Instruction.** It is not required that all phases of the case be covered by one instruction. An instruction referring only to murder in the first degree may be given without objection when other instructions properly advise the jury as to the lesser degrees of the crime charged in the information and also the defense interposed by the plea of not guilty.

6. **Instruction on Reasonable Doubt Held Not Erroneous.** An instruction on the subject of reasonable doubt in which the jury were told, "You are not at liberty to disbelieve as jurors, if from the evidence you believe as men; your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered," *held* not erroneous.

7. **Instruction of General Application Not Erroneous.** An instruction of general application regarding the credibility of witnesses, otherwise proper and correct, is not open to objection because the defendant who testified in his own behalf was the only witness having a direct legal interest in the result of the trial.

8. **Word "Impartial" Does Not Render Instruction Erroneous.** The use of the word "impartial" in an instruction when applied to the consideration of the evidence by the jury does not render the instruction erroneous.

9. **Instruction Properly Refused.** An instruction, the substance of which is copied in the opinion, requested by the defendant, *held* properly refused.

10. **Murder:** IRRESISTIBLE PASSION: COOLING TIME. When one theory of the defense is that the homicide was committed under the impulse of irresistible passion provoked by the deceased, the true inquiry is whether the suspension of reason, if shown to exist, arising from sudden passion, continued from the time of provocation till the instant of the act producing death took place; and if from any circumstance shown in evidence it appears that the party reflected and deliberated, or if in legal presumption there was time or opportunity for cooling, the provocation can not be considered by the jury in arriving at a verdict.

11. **Evidence:** MURDER IN FIRST DEGREE. Evidence examined, and *held* sufficient to support a verdict of murder in the first degree.

12. **Statement of Juror Impeaching Verdict:** STATEMENT BY THIRD PARTY: HEARSAY. Statements of a juror after trial as to the manner of arriving at a verdict during the deliberations of the jury can not be testified to by others for the purpose of vitiating the verdict. Such testimony is incompetent as hearsay.

13. ———: UNSWORN STATEMENT INSUFFICIENT TO IMPEACH. A statement made by a juror after trial, and when not under oath, tending to impeach his verdict is insufficient to rebut and overcome the presumption arising from the record that the verdict returned under oath and assented to by the jury was the result of the deliberation of the jury on the evidence in the case.

14. **Impeachment of Verdict by Juror.** A juror can not be heard to impeach a verdict by him returned as to any matter essentially inhering in such verdict.

ERROR from the district court for Richardson county. Tried below before STULL, J. *Affirmed.*

Clarence Gillespie and *Edwin Falloon*, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy*, for the state.

HOLCOMB, J.

The defendant, plaintiff in error, was informed against, tried, and by a jury found guilty of murder in the first degree, the penalty being fixed at life imprisonment. Sentence having been duly pronounced on the verdict, the cause is by proceeding in error brought to this court for review. The errors assigned and argued as grounds for a reversal of the judgment of the trial court may, for convenience, be grouped and considered in the following order: 1. Errors in the admission and rejection of evidence. 2. Errors in the instructions to the jury given and refused. 3. The evidence does not sustain the verdict. 4. Misconduct of the jury during their deliberations in arriving at a verdict.

As to the first of the grounds mentioned, complaint is made because the court, during the examination in chief of the defendant, who was a witness in his own behalf, sustained an objection interposed by the state to a question by which he was asked the reason why he struck the deceased at the time of the homicide. As no offer was made as to what the witness would testify in answer to the question, we are unable to say there is prejudicial error in the ruling complained of. The rule is, and it is applicable alike to criminal and civil trials, that when to a question in direct examination objection is interposed by the adverse party and sustained, in order to present the ruling to this court for review, there must be an offer of proof of the facts sought to be put in evidence by the question to which the answer was excluded. *Ford v. State,* 46 Nebr., 390, 394; *Mathews v. State,* 19 Nebr., 330, 338; *Denise v. City of Omaha,* 49 Nebr., 750; *Murry v. Hennessey,* 48 Nebr., 608, 613; *Smith v. Hitchcock,* 38 Nebr., 104, 110; *German Ins. Co. v. Hyman,* 34 Nebr., 704, 709.

Complaint is also made because, over the objection of the defendant, the trial court admitted in evidence as exhibits the skull of the deceased and a photograph thereof. An examination of the records discloses that these exhibits

were referred to and made use of by the physicians testifying in the case as to the manner and cause of death, and were in fact a part of the evidence of these witnesses proper and necessary to an intelligent understanding of the testimony relating to and bearing on the subject concerning which the witnesses as experts were called to testify. We find no valid objection to the introduction of the exhibits as evidence in connection with the physicians' testimony as to the manner and cause of death, and regard them as entirely competent in establishing a material element in the state's case, viz., that the blow delivered by the defendant to the deceased was the direct and proximate cause of his death. Counsel has cited no authority holding the evidence inadmissible, nor is it believed that any can be found.

With scarcely an exception, all the instructions given the jury at the request of the state are excepted to, and the giving of each is assigned as sufficient reason for the reversal of the judgment. All instructions were given either at the request of the prosecution or the defense, and we think, upon the whole, covered the issues raised in the case in a very satisfactory manner and fairly submitted the law applicable to the evidence, for the guidance of the jury in their deliberations.

Instructions 1 and 2, requested by the state and given, are vigorously assailed as an incorrect expression of the law defining murder in the first degree. They are as follows:

"1. To constitute murder in the first degree there must have been an unlawful killing done, purposely, and with deliberate and premeditated malice. If a person has actually formed the purpose maliciously to kill, and has deliberated and premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the purpose and its execution. It is not time that constitutes the distinctive difference between murder in the first degree and murder in the second degree; an un-

lawful killing, with malice, deliberation and premeditation constitutes the crime of murder in the first degree. It matters not how short the time, if the party has turned it over in his mind, and weighed and deliberated upon it.

"2. The jury are instructed that while the law requires in order to constitute murder of the first degree, that the killing shall be willful, deliberate and premeditated, still, it does not require that the willful intent, premeditation or deliberation, shall exist for any length of time before the crime is committed; it is sufficient if there was a design and determination to kill distinctly formed in the mind at any moment before or at the time the blow is struck; and in this case, if the jury believe from the evidence, beyond a reasonable doubt, that the defendant feloniously struck and killed the deceased, as charged in the information, and that before or at the time the blow was struck the defendant had formed in his mind a willful, deliberate and premeditated design or purpose to take the life of the deceased, and that the blow was struck in furtherance of that design or purpose and without any justifiable cause or legal excuse therefor, as explained in these instructions, the jury should find the defendant guilty of murder in the first degree."

It is argued that the instructions fail to distinguish between murder in the first and second degree and eliminate the elements of premeditation and deliberation. We are unable to so conclude. The instructions are substantially the same as those given in *Carleton v. State*, 43 Nebr., 373, which were approved in an opinion of the court by IRVINE, C. In the first it is said, it is true, that "It is not time that constitutes the distinction between murder in the first and second degree." It is earnestly insisted that time is required for premeditation and deliberation. While this is true, the time required may be of the shortest possible duration. The time may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed, and this is the substance of the

instructions complained of. Whether the defendant had sufficient time to premeditate and deliberate, and whether he in fact did so, was a question for the jury as triers of fact under proper instructions from the court. From an examination of both instructions it can not be said that the purpose to kill could be formed, reflected upon and turned over in the mind and the act committed at one and the same time. To constitute the crime of murder in the highest degree there must be a reflection, a turning over in the mind, a weighing and consideration of the act and the purpose formed to do it before its actual commission. The instruction could perhaps be improved and save criticism by the most exacting, by the use of language entirely free from ambiguity, fixing the time for premeditation and deliberation, even though instantaneous it may be, before the actual commission of the act on which the charge of the crime is based. In the first paragraph it is stated, in a manner leaving no room for doubt or uncertainty, that premeditation and deliberation must precede the act resulting in death; that if the party has turned the question over in his mind, weighed and deliberated upon it, it matters not how short the time. The correctness of the instruction as a legal proposition can not be questioned. In the second the jury are told that if before or at the time the blow was struck the defendant had formed in his mind a willful, deliberate and premeditated design or purpose to take the life of the deceased, and that the blow was struck in furtherance of that design, without any justifiable cause or legal excuse, his guilt of the highest degree of the crime charged would be established. It can hardly be argued, by any logical process of reasoning, that under this instruction a verdict of guilty of murder in the first degree would be justified upon the theory that the premeditation and deliberation required to be shown and the act of killing may take place simultaneously. Clearly, deliberate and premeditated malice must be found to exist before the blow was struck resulting in death.

In 1 Wharton, Criminal Law [10th ed.], section 380, it

is stated: "It is not necessary, however, that this intention should have been conceived for any particular period of time. [Citing a long list of authorities.] It is as much premeditation if it entered the mind of the guilty agent a moment before the act, as if it entered ten years before;"—citing other cases. In *Haunstine v. State,* 31 Nebr., 112, it is held in the third paragraph of the syllabus: "To warrant a conviction of murder in the first degree it is not necessary that the evidence show that the accused deliberated over the matter and formed the purpose to kill, for weeks, days, or hours before committing the crime. The law fixes no particular length of time for premeditation and deliberation as the criterion to distinguish murder in the first from the lower degree thereof, but leaves each case to be determined from the circumstances surrounding it." In paragraph sixteen of the syllabus in *Carleton v. State, supra,* the law is thus stated: "Where a person has actually formed the purpose maliciously to kill another, and has deliberated and premeditated upon it before committing the offense, this constitutes murder in the first degree. The length of time that intervenes between the time such purpose is formed and its execution is not material." Says MAXWELL, J., in *Milton v. State,* 6 Nebr., 136, 143: "Where a person has actually formed the purpose maliciously to kill another, and has deliberated and premeditated upon it before committing the offense, the length of time that intervenes between the time such purpose is formed and its execution is not material, as it is the formation of such purpose after deliberation and premeditation, and carrying the same into execution, that constitutes the crime of murder in the first degree." See, also, *People v. Williams,* 43 Cal., 344.

During the deliberations of the jury they returned into court and inquired as to "What constitutes a premeditated act and what length of time it would require a person to premeditate committing a deadly assault upon another person, and whether it is possible for a person to, in an instant either pick up a club and injure a person or use a

revolver in a moment whether it would be premeditated or not?" Without giving a new instruction the court instructed the jury that they would find the question answered in instruction No. 2 given at the instance of the prosecution. This is assigned as error. Having instructed the jury on the point raised by the inquiry, we observe no imperative reason for again instructing them on the same subject. While another instruction might properly have been given in relation to the same question, and in answer to the inquiry by the jury, the failure to do so, an instruction already having been given, is not prejudicially erroneous.

In the third instruction the jury were told that if they found, beyond a reasonable doubt, from the evidence, all the elements constituting murder in the first degree, to render verdict of guilty accordingly. Complaint is made because nothing is said in the instruction of the lesser degree, or justifiable homicide on the ground of self-defense. But these subjects were fully covered by other instructions, and it was proper to direct a verdict of guilty of murder in the first degree, if the facts, when found, warranted such a verdict.

An instruction is complained of in which the jury were told "You are not at liberty to disbelieve as jurors, if from the evidence you believe as men; your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered."* The writer does not regard the instruction entirely free from merited criticism, but it having for a long period of time been sanctioned by repeated decisions of this court, we do not feel justified in judicially condemning it. *Leisenberg v. State*, 60 Nebr., 628, 630.

Instruction No. 10 was of general application, and stated the law as to the credibility of witnesses. Exception is taken on the theory that the defendant being the only interested witness in the result of the case, the instruction must be taken as directly referring to and designating

**Willis v. State*, 43 Nebr., 102; *Barney v. State*, 49 Nebr., 515.

him. We do not so regard it. The instruction was one of approved form and applied to all witnesses in the case. The mere fact that the defendant was a witness in his own behalf and had a greater and more direct interest in the result, did not render the instruction erroneous, if otherwise it was a correct expression of the law, as we hold it is. A cautionary instruction referring directly to the defendant's interest in the result of the trial as affecting his credibility and the weight to be given to his testimony would have been altogether proper.

Complaint is also made because in an instruction defining a reasonable doubt it is said: "If, after a careful and impartial consideration of all the evidence, the jury have an abiding conviction of the guilt of the accused and are fully satisfied of the truth of the charge, then the jury are satisfied beyond a reasonable doubt." It is insisted that the use of the word "impartial" renders the instruction erroneous. The objection is hypercritical. The use of the word in the connection in which it is used conveys the idea that the jury are to act impartially with no preconceived opinion or desire to find the question of fact submitted to them in favor of or against the accused. That they are to act disinterestedly, and candidly, fairly and dispassionately investigate and consider all the evidence before them, giving to each part such weight as it is fairly entitled to, and render such a verdict as the conclusions thus reached will justify.

The other exceptions taken to the instructions given at the request of the prosecution have been considered, are not well taken and will not be further noticed.

Most, if not all the instructions thus given have heretofore been before the court for consideration and have been approved as a correct statement of the law applicable to trials where the charge, as in the case at bar, is the unlawful killing of another in such a manner as to constitute murder in the first degree.

Counsel for the defendant requested twenty-three instructions to the jury, all of which were given except six.

Error is sought to be predicated on the ruling of the court in refusing to give those requested and refused. The substance of one of the instructions refused is as follows: That when anger is shown to have existed between the parties to the killing, before there could be deliberation and premeditation growing out of the killing, the slayer should have had time for his passion to cool and to deliberate in his rational moments over his trouble before he could be convicted of murder in the first degree, if he subsequently slew the party with whom he had the trouble; and if you find from the evidence that prior to the killing, the deceased and the defendant had some difficulty, then, before the jury could find any deliberation or premeditation, they (the prosecution) must prove some act of hostility, either committed or threatened, by the defendant toward the deceased before they (the jury) could find that the act committed, by which the deceased lost his life, was committed with deliberation and premeditation. The instruction is an incorrect statement of the law. We know of no rule of law that requires proof of some act of hostility, committed or threatened, as an evidence that irresistible passion has subsided and reason resumed her sway. It may well be doubted whether the evidence on this point is sufficient to submit to the jury the question of whether the defendant acted under the impulse of passion suddenly aroused which clouded the reason and prevented rational action; but if so, the only questions were whether there existed reasonable and adequate provocation to excite the passion of the defendant and obscure and disturb his power of reasoning to the extent that he acted rashly and from passion, without due deliberation and reflection, rather than from judgment; and secondly, whether, under all the facts and circumstances as disclosed by the evidence, a reasonable time had elapsed from the time of the provocation to the instant of the killing for the passion to subside and reason resume control of the mind. The true inquiry appears to be whether the suspension of reason, if shown to exist, arising from sudden passion, continued from the

time of provocation till the very instant of the act producing death took place, and if, from any circumstances whatever shown in evidence, it appears that the party reflected and deliberated, or if in legal presumption there was time or opportunity for cooling, the provocation can not be considered by the jury in arriving at their verdict. *State v. Shelledy,* 8 Ia., 477; *May v. People,* 8 Colo., 210; *Maher v. People,* 10 Mich., 212, 222. In the case at bar, an instruction on the subject was given at the request of the defendant which substantially covered the proposition contained in the instruction refused. The instruction is as follows: "This court instructs this jury that under this information you can; and the court instructs you that it is your duty to find this defendant guilty of manslaughter if you believe from the evidence before you beyond a reasonable doubt the the fatal blow was struck unlawfully, but without malice and while the defendant was under the influence of passion and in the heat of blood produced by an adequate and reasonable provocation and before a reasonable time had elapsed for the blood to cool and reason to control. But if on the other hand you have any reasonable doubt of the guilt of this defendant it is your duty to find him not guilty."

The other instructions requested by defendant and refused are either incorrect expressions of law or the substance of the instruction refused had been covered and included in one already given, and no error was committed in the refusal to give them.

The evidence, it is contended, is insufficient to support a verdict of murder in the first degree. The homicide occurred at a railroad grading camp where deceased, defendant, and several others were engaged in the work of grading. On the evening preceding the tragedy the defendant and some others visited a neighboring village and procured intoxicating liquor, which was brought back to the camp late at night. On the next morning, Sunday, different ones were engaged in card playing, out of which grew quarreling that finally broke up the game. The de-

ceased seemed to have been the disturbing element. He was unpopular at the camp and accused almost all the others of "having it in for him," as he expressed himself. It was this sort of petty quarreling that appears to have interfered with the card playing. A short time before the homicide the deceased was in a tent with the defendant, occupied by them jointly, when the deceased upbraided the defendant for breaking up the game of cards, and asserted that he was one of several who were trying to impose upon the deceased and were not treating him right. The defendant denied that he was unfriendly to the deceased, and contended that the card game was ended to prevent quarreling. A third party, hearing the talk, came to the door of the tent and urged that the loud talking be stopped and advised the deceased to stop quarreling with the other members of the camp. The deceased passed out of the tent and, after some words with the party who had thus interrupted, went to another tent where the contractor was and stated that he was not being treated right by the other workmen and was going to leave the camp. Just then the same party who had interrupted the talk between the deceased and the defendant appeared and told the deceased to not be telling his troubles to the boss, but to come out and talk to him about them. After some words, a scuffle ensued; the deceased, being struck with a roll of tar paper, seized a stick of wood as if to strike the other party, when a third party named Shumate seized the other end of the stick, saying, "You sha'n't hit nobody with that club." While deceased and Shumate were struggling over the stick of wood the defendant came rapidly up to where they were, having on his way seized a wagon-spoke, and struck the deceased a hard blow on the side of his head, fracturing his skull and causing death. It is in evidence that, as he approached the place where the deceased and the other party were struggling over the stick of wood, he said, "he would kill the son of a bitch." It is also testified that after the blow was struck he said, "he intended to kill him"; "he meant to kill him"; "he

aimed to kill him." The defendant claims that after the conversation in the tent with the deceased heretofore mentioned the dinner bell rang and he had started to the well to wash, when he heard the party seizing the stick of wood in the hands of the deceased say, "You sha'n't hit nobody with that club," and thinking the deceased intended to attack him, he seized the wagon-spoke and went to the place where the deceased and Shumate were for the purpose of protecting himself from the anticipated assault. There was not the slightest reason for striking the fatal blow. No one was in any immediate or apparent danger. Several others were near by, and no reasonable ground existed for serious apprehension of danger to life or of great bodily harm to any of the parties participating in the affray. The stroke was obviously without justification or excuse and was purposely and maliciously inflicted. Some possible doubt may arise in the mind of one examining the record, as to whether the homicidal act was with deliberation and premeditation on the part of the assailant; but if so, this question was fairly submitted to the jury and, as indicated by their verdict, resolved against the defendant, and it can not, we think, be said that there is not sufficient evidence to support the conclusion thus reached. The record, we are of the opinion, justified the verdict finding that all the elements necessary to constitute the highest degree of the crime charged have been established by the required legal proof.

We are also asked to reverse the judgment on the ground of alleged misconduct of the jury. The error claimed in this regard is based on the statements of one of the jurors claimed to have been made after the trial of the case, to the effect that during the deliberations of the jury it was agreed that a vote should be taken as to the different degrees of homicide of which the defendant might be found guilty, and the degree receiving the highest number of votes should be the one the jury would agree to in the verdict. This fact was sought to be established by the testimony of other witnesses, who testified to what one of

the jurymen had said after the verdict had been returned. The evidence, we think, was clearly incompetent as hearsay. It certainly was not primary evidence, and could not be admitted on the theory that it was in the nature of statements or admission against interest. If the evidence could be received at all, it must be by the testimony of a juror or others having knowledge of the fact testified about, and mere hearsay would, under no view of the question, be admissible. Admitting the evidence to be competent, it was clearly insufficient to overcome the evidence in the record, that the verdict was the judgment of the jury arrived at regularly and in the manner sanctioned by law. The verdict was returned in open court as the finding of all the jurors and assented to by them. They had taken an oath to faithfully and impartially try the issue raised by the plea of not guilty, and truly try and true deliverance make between the state and the accused. The presumption is they properly discharged the obligation thus assumed and that the verdict returned, after a trial in which the rights of the accused were protected and safeguarded by the observance of all the forms of law, was the deliberate judgment of the jury after mature reflection and candid investigation and consideration of the evidence. This presumption can not, and ought not, we think, be rebutted by a loose statement of one of the jurors after trial and after being relieved from the obligation of the oath he had taken, to the effect that the verdict was the result of chance and not a deliberate conclusion deduced from the evidence. Admitting the evidence introduced to be competent for the purpose of impeaching the verdict of the jury, it was clearly insufficient, and the trial court rightly so held. *Tracey v. State,* 46 Nebr., 361; *State v. Ducstoe,* 1 Bay [S. Car.], 377. In no event, as it occurs to us, can a juror be permitted, either directly or indirectly, to stultify himself and impeach a verdict by him returned and assented to in the manner and on the ground attempted in the case at bar. The matters complained of inhere in the verdict. They formed a part of the delibera-

tions, method of procedure and course of reasoning by which the conclusions announced in the verdict were reached. A juror can not be heard to impeach his own verdict by showing that he reasoned from false premises or adopted an illegitimate method in reaching a conclusion. On principle, the question in the case at bar comes within the rule announced in *Harris v. State,* 24 Nebr., 803, 809, and *Coil v. State,* 62 Nebr., 15, holding that a juror can not be heard to impeach his own verdict regarding such matters. It logically follows that no statement he may make when not under oath can be by the testimony of others introduced for a like purpose.

We find no prejudicial error in the record, and the judgment of the district court is therefore

AFFIRMED.

NOTE.—Murder is malicious homicide. From certain facts malice is to be inferred; here these facts exist; hence malice is to be inferred. Wharton, Homicide, p. 27, ch. 3, par. 39. For a full discussion of murder in the first degree, under the statute afterwards adopted in this state, see *Robbins v. State,* 8 Ohio St., 131. But see *Morgan v. State,* 51 Nebr., 672. As to homicide committed in anger being murder in the first degree, see *Green v. Commonwealth,* 83 Pa. St., 75.—REPORTER.

NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT COMPANY V. CHARLES BALDWIN.

FILED JUNE 19, 1901. No. 9,632.

Commissioner's opinion, Department No. 1.

1. **Foreman Not Fellow Servant.** A foreman who has the management, superintendence and control of a branch of defendant's work is not a fellow servant with a workman under him. *Union P. R. Co. v. Doyle,* 50 Nebr., 555.

2. **Instruction as to Foregoing Not Erroneous.** There being no conflict in evidence as to powers and duties of the foreman in question, it is not error to instruct the jury that he was not a fellow servant, and that his negligence was imputable to the employer.

3. **Instruction: BURDEN OF PROOF.** Instruction that burden of proof of contributory negligence is on defendant unless it appears

from "plaintiff's own testimony," *held* to refer to all testimony produced on plaintiff's behalf.

4. **Instructions Not Prejudicial.** Certain instructions, while possibly not applicable, *held* not prejudicial, and evidence found sufficient to support the verdict.

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

Charles Offutt and *W. W. Morsman*, for plaintiff in error.

Acheson & Adams and *E. H. Scott, contra.*

HASTINGS, C.

As a large part of the discussion in this case will relate to instructions given and refused in which the plaintiff in error is called defendant and defendant in error is called plaintiff, the parties will be designated in the same manner here as at the trial below.

It appears that the plaintiff, Baldwin, in September, 1896, was employed by the defendant electric light company as a "lineman"; that he worked under the immediate supervision of a foreman, one James Brinkman, and that he was directed by such foreman on the morning of September 9, 1896, to remove the arc lamps on Sixteenth street, in Omaha, in connection with another workman, who is described as a "groundman." Plaintiff's duty was to ascend an extension ladder placed against the sustaining wire of the lamp, taking with him a rope, put the latter over the sustaining wire, attach it to the lamp, and the "groundman" let it down by paying out the rope. They had reached the point on Sixteenth street opposite the alley between Harney and Howard streets when the foreman, Brinkman, arrived, ordering the other workman to another service, and himself engaged in assisting plaintiff in the removal of the lamp. There is some discrepancy in the testimony as to the precise occurrence, plaintiff's evidence indicating that Brinkman assisted in bringing up the ladder and adjusting it for the removal of this last

lamp, and Brinkman declaring that he came up after the ladder was adjusted and while plaintiff was in the act of loosening the lamp from the sustaining wire. Each statement is to some extent corroborated. Plaintiff's evidence is to the effect that he objected to the shortness of the ladder and asked that it be extended further, which could have been easily done, and was told by the foreman that it was high enough and directed by him to ascend; that he went up, carrying a rope, passed the rope over the sustaining wire to which the lamp hung, tied it to the lamp, loosened the lamp from its fastening and the foreman, Brinkman, standing below and holding the rope, let it down; that, when it reached the ground, Brinkman untied the rope, but neglected to keep his hold upon it, and by the taking off of the lamp's weight the wire to which it had hung was allowed to spring up past the end of the ladder, and plaintiff and the ladder were precipitated to the pavement, with resulting injuries to plaintiff. The "groundman" had been instructed by this very foreman to keep hold of both ends of the rope till the "lineman" reached the ground, to avoid exactly this danger. The negligence asserted is that Brinkman, by his refusal to extend the ladder and directing plaintiff to mount it, was negligent, and in untying the rope and leaving the end loose was again negligent, and that such negligence was the immediate cause of the injury. It is conceded that the evidence shows Brinkman to have been foreman. It was conceded on the argument that there is evidence of negligence on his part sufficient to uphold the verdict, if he is to be deemed throughout the transaction a vice-principal and responsibility for all his acts imputed to his employer. It is contended on the part of defendant that, while Brinkman in his general employment may have had some of the duties of a vice-principal, yet, so far as his connection with this injury is concerned, he was acting simply as a fellow servant, and for any negligence committed in that capacity defendant is not liable because plaintiff had assumed all such risks. The trial court, however, adopted the view,

and so expressly instructed the jury, that Brinkman, being foreman and intrusted with the control and management of the work, in which plaintiff was employed, was so far identified with the defendant employer that his negligence was defendant's negligence. The giving of this instruction is the chief error complained of; the defendant asserting that it incorrectly states the law, because Brinkman, in his connection with this accident, was acting as a fellow workman, and because the question of whether or not he was a fellow servant is, at all events, not purely a question of law, but a mixed one of law and fact, and should have been submitted to the jury, as was specifically requested by defendant at the trial. The case seems to turn upon the question whether the court's view that Brinkman was a vice-principal throughout, and the sweeping instruction to that effect, can be sustained. In *Union Pacific R. Co. v. Doyle,* 50 Nebr., 555, this is said to be not always a question of law, nor always a question of fact, but generally a mixed one, and, ordinarily, no set rule can be laid down. In this present case, however, there seems to have been no dispute in the testimony as to Brinkman's duties and authority. The plaintiff seems to have been contented to show that Brinkman was foreman, exercising general control and supervision over the work for which plaintiff was employed as lineman. Defendant admits he was foreman, and shows clearly by its evidence that he had authority to "superintend, direct and control" the work. It appears that he employed and discharged men, but usually on consultation with the manager. No statement of either party as to what his powers and duties were seems to be contradicted even inferentially by the other. Under such circumstances, it seems clear that it was the duty of the court to say whether the evidence made of Brinkman a vice-principal or a mere fellow servant. This responsibility the court took, and declared in the eighth instruction that he was not a fellow servant, and that defendant was chargeable with any negligence of his. Was this error?

Counsel say that to review all the cases on this question would be a useless and almost superhuman task. We shall not attempt it any more than they have. Judge Dillon, in his widely influential article in 24 American Law Review, 175, says that a commanding position and a telescope, and not a microscope, are what is needed to reach a correct rule in this matter. For our part, we would gladly use both, if they would lead to our better enlightenment. We think, however, that where the courts are widely disagreeing and the same courts changing views from time to time and legislatures frequently altering the rule, the safe course for us is to learn what our state has done and follow it if we can.

An examination of our own cases seems to justify the trial court. There are widely different views as to what renders an employee such a vice-principal as to take his acts out of the rule that an employee assumes the risk from negligence of his co-employees. The English cases seem to hold that there is practically no such doctrine of vice-principalship; that there are absolute duties resting upon the master whose non-performance, either by himself or by some one else, will render him liable. They are, apparently, a duty of providing reasonably safe materials and appliances, which is a continuing duty involving reasonably frequent inspections; the duty of providing a reasonably safe place to work and the duty of giving, or providing for, reasonable instructions to inexperienced employees placed in dangerous positions. These duties being discharged, any injury that arises in operation of the work out of negligence of employees imposes no liability upon the master. The English rule has been adopted in many of the states with the proviso that, where the performance of any of these absolute duties is delegated to third parties, those parties become, as to these duties, vice-principals, and their negligence in respect to such duties is the negligence of the principal. Of this view of the principal's liability the courts of Massachusetts have been strong exponents, manifestly under the influence of Chief Justice Shaw, in

Farwell v. Boston & W. R. Corp., 4 Met. [Mass.], 49, and the English decisions. The courts of Ohio, however, early adopted a different view, deriving the liability for the acts of a vice-principal, not from the fact of absolute duties devolving upon him, but from the fact that he was given authority and control, and must be held in his actions to immediately represent the employer, and his negligence to be imputed to his principal. *Little Miami R. Co. v. Stevens*, 20 Ohio, 415; *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St., 201; *Whaalan v. Mad River R. & L. E. Co.*, 8 Ohio St., 251; *Berea Stone Co. v. Kraft*, 31 Ohio St., 287. This doctrine was, in the case of *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Nebr., 254, expressly adopted in this state. In that case the railroad company was held liable for the negligence of one Carnes, the conductor of a construction train, in sending his men into a cut to clear away snow without maintaining a suitable watch, or giving any signal of an approaching train. For his negligence in that respect resulting in injury to plaintiff's intestate, the railroad company was held liable. This holding has been uniformly adhered to.

In *Burlington & M. R. R. Co. v. Crockett*, 19 Nebr., 138, Crockett had been ordered by the foreman in charge of a wrecking train to clear the dirt away around a car which had been derailed by a fall of earth from a high bank; no watch was kept to notify men shoveling below when a fall of dirt was likely, and for the foreman's negligence in that respect the company was held liable.

In *Sioux C. & P. R. Co. v. Smith*, 22 Nebr., 775, a section foreman had directed a workman upon his hand-car to hold to the rear of a freight train in riding back from work and when the freight train threatened to acquire too high a rate of speed for safety to the hand-car and its occupants, directed him to let go, and at the same time applied the brake to the hand-car, but his order was not heard, and the man holding to the rear of the freight train was injured. A jury having found that this was negligence, it was held that it was the act of a vice-principal and that plaintiff could recover.

In *Chicago, B. & Q. R. Co. v. Sullivan,* 27 Nebr., 673, Sullivan was placed for instruction under the employee whom he was about to succeed as a car-repairer, and while working under the latter's direction was sent under some cars and was injured by a train backing up against that under which he was at work. The injury having been found due to negligence of the employee under whose direction Sullivan was working, it was held that he could recover, because as to him the directing person was a vice-principal.

In *Crystal Ice Co. v. Sherlock,* 37 Nebr., 19, where defendant's foreman had ordered an employee to loosen one of the ice blocks which had stuck fast in the chute, and while plaintiff was doing this, without warning, let down another heavy piece of ice, it was expressly held that the employer was liable for the foreman's negligence in dropping the second piece of ice upon the plaintiff, and could not shelter itself behind the proposition that in handling the second piece of ice the foreman was not exercising any power or duty of supervision.

In *Hammond v. Johnson,* 38 Nebr., 244, a co-servant, whose duty was to assign to others horses for use in defendant's employment, was the vice-principal with respect to one to whom he had assigned a vicious horse, and who was injured in consequence of it, because "his language was the language of one in authority." He told the plaintiff he could take that horse or quit work.

In *Union P. R. Co. v. Doyle,* 50 Nebr., 555, the latter was a section-hand under the control of a foreman, and the court holds that by virtue of the fact that Doyle was under the direction of a "foreman, who superintends, manages, controls and directs when, how and where the work shall be done, this foreman is not made by the rules of the railroad company a fellow servant with the men under his direction, but he is responsible for his conduct to the road-master. * * * We are not prepared to adopt the doctrine that an employee, to become a vice-principal as to his co-employee, must be the 'chief of a separate and distinct

department or branch of the business of his employer.' The court did not err in refusing to instruct the jury that Forrest and Doyle were fellow servants."

In *Clark v. Hughes,* 51 Nebr., 780, the answer contained the admission, "on the 16th day of January, 1894, the above named plaintiff was in the employ of defendants as brakeman on freight train No. 16 on said road, and that said train was under the control of conductor E. W. Meyers." The court, having referred to some of the above cases, adds: "Under the authorities just cited, the admission in the quotation just made obviated the necessity of proof to establish the relation of servant and vice-principal as between the brakeman and the conductor."

From the foregoing cases it seems clear that whatever may be the rule elsewhere, in this court the liability of the employer for the actions of a vice-principal grows out of the fact that he is directly intrusted with authority; that the movements of those under him are directed by him, and that he is held to be the direct representative of his principal. If in *Clark v. Hughes, supra,* the mere admission of the fact that the party in fault was conductor was sufficient to do away with all proof that he was a vice-principal, it would seem in this case that the same effect should be given to the admission that the party in fault was foreman, and to the uncontradicted evidence of his authority, and that the court was warranted in instructing that he was also a vice-principal. If this is conceded, we are of the opinion that all the other claims of error in this case fall to the ground with this one. Of course, if the learned trial judge was warranted in instructing that this foreman was a vice-principal, he was warranted in rejecting all instructions drawn from the point of view of his being anything else.

We do not find any prejudicial error in the instruction that the burden of proof to show contributory negligence is on defendant, unless it appears from "plaintiff's own testimony." This expression does not seem to us fairly to mean, or likely to have been taken to mean, testimony

which plaintiff himself gave on the stand. It would naturally refer to all produced at the trial on his behalf. But if it did not, we are not pointed out any other portion of the evidence on his side which supports the inference of his negligence. If there was none, the restriction was not prejudicial, granting there was such a restriction.

The third claim of error is in instructions 13 and 14, endeavoring to apply to this case the rule that contributory negligence would not prevent recovery if reasonable care on the part of defendant would, after the discovery of such negligence of plaintiff, have prevented its consequences. These two instructions were apparently intended to inform the jury that if they found plaintiff negligent in going up an insufficiently extended ladder, still, if Brinkman loosened the rope after plaintiff was up and Brinkman knew it and such act of Brinkman's caused the injury, plaintiff could recover, if at that moment exercising due care. This was correct, if we find the act of Brinkman in taking off the lamp and loosening the rope the act of the employer. It was not correct if we allow Brinkman a dual capacity, a vice-principal when giving directions, and a mere fellow workman when taking off the lamp. There are many authorities for such a distinction and for a dual capacity of vice-principal and workman on the part of one who both directs and assists. A notable recent case is *Barnicle v. Connor,* 81 N. W. Rep. [Ia.], 452; *Crispin v. Babbitt,* 81 N. Y., 516, is another. Generally they will be found to be rendered by courts which adopt the restricted rule that vice-principalship depends upon the delegation of absolute duties. It is a doctrine that is evidently not compatible with the decisions in *Sioux C. & P. R. Co. v. Smith, Crystal Ice Co. v. Sherlock, Burlington & M. R. R. Co. v. Crockett* and *Chicago, St. P., M. & O. R. Co. v. Lundstrom, ut supra.* In each of these cases the defendant, employer, was held liable for imputed negligence, on the part of one to whom supervision and direction were intrusted, in respect to other matters than the mere giving of such directions. In this state it is

clear that the vice-principal's character as such comes from his authority and his direct representation of his master. If that is the source of liability for his acts, evidently he represents the master as much in ordering away the cautious and instructed lineman and assuming his place as in anything else. We can not distinguish this case from *Crystal Ice Co. v. Sherlock, supra,* where the injury came from the foreman's letting down a second piece of ice while the workman was in the chute loosening the lodged one; nor from *Berea Stone Co. v. Kraft,* 31 Ohio St., 287, where the foreman's attaching the hard stone grapple to the soft stone permitted the latter to slip and harmed the fellow workman. What has just been said also disposes of the claim of contributory negligence. There are many cases holding that one who obeys the command of a superior, not evidently endangering life or limb, is not necessarily guilty of contributory negligence because the one issuing the command is. But plaintiff, if chargeable with contributory negligence in going up an insufficiently extended ladder, is not chargeable with helping to let loose the rope. If this was the act of a vice-principal, then the question of contributory negligence should have gone, as it did, to the jury. We are thus again brought back to the fact that the instructions in effect tell the jury that the act of loosening the rope, if under all the circumstances they find it negligent, was imputable to the employer. The federal courts hold that this question of vice-principalship is a matter of general law, as to which they are not bound by state decisions. *Hunt v. Hurd,* 39 C. C. A., 226. It is, therefore, a matter of much regret that we should be compelled to recognize that in the federal courts, since the express overruling of *Chicago, M. & St. P. R. Co. v. Ross,* 112 U. S., 377, in *New England R. Co. v. Conroy,* 175 U. S., 323, an opposite conclusion to ours would be reached. In the case of *Alaska Mining Co. v. Whelan,* 168 U. S., 86, judgment for a miner, who had been set to work breaking ore at the head of a chute by the mine foreman and injured through the drawing by order of the same foreman of the

gate of the chute without customary warning, was reversed and the case dismissed, because the injury was due to the negligence of the foreman and he was held to be a fellow servant. The uncertainties of law are great enough without having one rule avowed and upheld in our United States courts and another one here in the state capitol. We do not, however, in view of the legislative provisions which have so often followed the adoption of English rules in this matter, think it desirable to change the rule of this state, which is as stated by Mr. McKinney in his Law of Fellow Servants [1890 ed.], p. 136: "The Ohio cases are followed in this state, and the limitation therefore prevails to its fullest extent." The liability established in this case by the instructions and the verdict under them seems precisely what was intended to be fixed by section 2 of the English "Employers' Liability Act." The Massachusetts act of 1893 seems to have intended a similar effect. Both seem to have been in a measure defeated in their results by unfriendly action of the courts. But while the current of legislation is steadily towards the position heretofore held by this court, there seems small reason to change it in the opposite direction. It is to be said, too, that the federal decisions are much weakened by the fact that they are obliged to admit that there is a degree of authority that makes the employee an *alter ego* for his principal, but they have set up no limiting principle to determine when this is and is not the case. Our court has said the satisfactory evidence of vice-principalship is his "supervision, control" and "subjection to his orders and directions." *Union P. R. Co. v. Doyle,* 50 Nebr., 555.

For these reasons it is recommended that the judgment below should be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

ISAAC N. WATSON V. SABINA HEYN.

FILED JUNE 19, 1901. No. 9,917.

Commissioner's opinion, Department No. 1.

Specific Performance: LIMITATION. Premises conveyed by warranty deed were at the time in possession of a third party under a verbal agreement of sale with a previous holder of the title. By subsequent litigation with vendee's grantee, a specific enforcement of this agreement was decreed. *Held*, That vendee's title failed at the time of the rendition of this decree, and the statute of limitations did not begin to run against action on the covenant of warranty till then.

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

Meikle & Gaines, for plaintiff in error.

Arthur C. Wakeley and *Eleazer Wakeley, contra.*

HASTINGS, C.

The sole question in this case is as to the application of the statute of limitations to the covenant of warranty in a deed. It arises upon demurrer to the petition of defendant in error, plaintiff below. The petition alleges that on October 14, 1886, the defendant conveyed to plaintiff certain property in Omaha, and that the deed contained a warranty of title, to wit, "That the said Isaac N. Watson would warrant and defend the title to said premises against the lawful claims of all persons whomsoever"; that in reliance upon the deed plaintiff paid for the property $450; that on March 27, 1887, plaintiff, in consideration of $950, conveyed the premises by deed of general warranty to Albert F. Ohman; that defendant's title was derived through one Richard C. Patterson, who on October 2, 1885, had made a verbal agreement with Mary K. Lund to convey the same premises with other lands to her, and she entered into possession of them and made improvements thereon, and on February 8, 1889, commenced suit against Patter-

son and Ohman, with others, to obtain a specific performance of her verbal agreement from Patterson for the conveyance of the premises, and on September 22, 1890, recovered a decree for a conveyance of them, and that if they were not so conveyed, the decree should have that effect; that on January 3, 1891, Ohman demanded the premises of Mary K. Lund, who refused to surrender them, and on May 15, 1891, he commenced suit against plaintiff on his warranty deed for the property, on the ground that his title had wholly failed; and July 18, 1892, he recovered judgment against plaintiff for $1,324.65 and costs, and November 9, 1894, that judgment was affirmed in this court and plaintiff was compelled to, and did, satisfy it in full on February 9, 1895; that the judgment and interest and costs amounted to $1,657.41, and plaintiff paid out for costs and legal expenses in said suit $311.54; that she had no knowledge of Mary Lund's title till just before the institution of this last action. She asks judgment in this action for her consideration money, $450, and interest and the expense so paid, $311.54.

The sole point raised by the demurrer is that on the face of the petition above recited the action is barred by the statute of limitations. It is conceded by plaintiff that the covenant against incumbrances was broken when made, and any action upon it barred in five years from the date of the deed. It is conceded that possession is not alleged to have ever been obtained under plaintiff's deed, and, therefore, the covenant for quiet enjoyment was broken from the beginning, or never in effect; but it is asserted, and the contention was sustained by the trial court, that the covenant for title and to warrant and defend it was not broken until the passage of the legal title to Mary K. Lund by virtue of the decree of September 22, 1890, and if that is true, then the action was begun within five years from that date, viz., on August 12, 1895. Defendant's contention is that the title of Mary K. Lund relates back to the commencement of her possession in 1885; was an outstanding title at the time of the conveyance, and the cove-

nant against it was broken when made. Defendant also claims that there has been no eviction, because no possession was ever acquired, and that, if eviction can be held to result from the failure to get possession, it must be held to date from the beginning of such failure. The case seems to turn, therefore, upon the effect which is to be given to the allegation of the petition that Mary K. Lund got possession of these premises in 1885 and has retained it ever since. If Mary K. Lund's possession is to have the effect of putting the statute of limitations in motion at once on the making of this deed as against the covenant for warranty of title, then, of course, it must amount to a breach of such warranty, and such, in effect, is the defendant's assertion. Plaintiff replies that the possession of Mary K. Lund was under a merely inchoate title; that whether or not it would ever ripen into a perfect and paramount title depended upon whether she, her representatives or assigns should make the required payments; that Watson's grantor, Patterson, was denying her right *in toto,* and that plaintiff had the right to wait until the issue of that litigation should be determined before giving up her title to the premises conveyed and seeking her remedy against the defendant Watson on the covenants of his deed. Could plaintiff have maintained her action on the covenant of warranty on the next day after this deed was made and have successfully asserted Mary K. Lund's possession at that time as a breach of the covenant of warranty? Of course, since Mary K. Lund prevailed in her contest with Patterson and Ohman, it must be assumed that when plaintiff's deed was made she had already placed valuable improvements upon the premises and had an inchoate title in them. It is, however, alleged, and the demurrer admits, that her payment for them was after the recovery of her decree on September 22, 1890. Of course, the covenant of seizin which was in this deed, was broken when made, if at all. The allegation of the petition with regard to covenants is the one quoted. It is certainly not in terms a covenant for seizin. The record, however, shows there was one in

the deed. Action on that covenant would lie as soon as plaintiff failed to get possession, and by tendering a reconveyance of the property she could have recovered the consideration paid. *Bowne v. Wolcott,* 48 N. W. Rep. [N. Dak.], 336; *Frazer v. Supervisors,* 74 Ill., 282; *Kincaid v. Brittain,* 5 Sneed [Tenn.], 119; *Resser v. Carney,* 52 Minn., 397; *Rombough v. Koons,* 6 Wash., 558. Was plaintiff compelled to resort to this method of proceeding? Could she not, instead of bringing action for failure of seizin, rely upon her warranty of title and the agreement to defend it? Would she not be entitled to the necessary costs and expenses of defending this title which defendant had conveyed to her? *Cheney v. Straube,* 35 Nebr., 521; *Walton v. Campbell,* 51 Nebr., 788. If plaintiff had the right to litigate the title and charge the expense to the defendant, if it failed, she could convey this right as she did, to Ohman and await the result of his litigation over this title, and, when it finally failed, bring action on the covenant of warranty for both the original consideration money and any costs and expenses which she had actually incurred during that litigation. It is true that in *Real v. Hollister,* 20 Nebr., 112, it is held that a clause of general warranty is equivalent to a covenant for quiet enjoyment, and there are many decisions holding that they have practically the same effect. But it is one thing, however, to say, as in *Real v. Hollister,* that the warranty of title has the effect of a covenant for quiet enjoyment and quite another to affirm that it has no other effect. In *Hartman v. Spencer,* 5 How. Pr. [N. Y.], 135, it is said that the covenant for quiet enjoyment has no application where possession has never been given. Can it be said that the covenant of warranty has none? The argument of plaintiff in error would make of this covenant in cases where possession is not given a mere covenant for seizin and confine the grantee to his damages on that covenant alone. In fact, this contention is expressly made on page 4 of his brief. It is not without support. *Kortz v. Carpenter,* 5 Johns. [N. Y.], 120. But the better holding is that the

covenant is to secure a legal entry as well as the enjoyment of land. *Caldwell v. Kirkpatrick,* 6 Ala., 60, 41 Am. Dec., 36 and note. If the holder is without right, his tortious possession is not a breach of the covenant of warranty nor for quiet possession. *Andrus v. St. Louis Smelting & Refining Co.,* 130 U. S., 643, 9 Sup. Ct. Rep., 645. Nor if the grantor has the right to convey does it make any difference that the holder is claiming adversely. *Pigeon River L. & I. Co. v. Mims,* 48 S. W. Rep. [Tenn.], 385; *Voss v. Hoffman,* 40 S. W. Rep. [Tex.], 544. Watson had by his deed to plaintiff asserted that Mrs. Lund's possession was wrongful. He can not now come and say it was rightful. Nor can he shelter himself under any notice conveyed by Mrs. Lund's possession. A party knowing defects in title has the right to rely, nevertheless, upon the covenants of the deed. *Batterton v. Smith,* 3 Kan. App., 419, 43 Pac. Rep., 275; *Mizell v. Ruffin,* 118 N. Car., 69, 23 S. E. Rep., 927. By his deed defendant had expressly authorized her to claim title to these lots. As long as her grantee was asserting title to them, she could not be heard to claim damage for its failure. Therefore, her claim on the warranty did not mature till that litigation ended. Doubtless, plaintiff could have surrendered her claim of title and tendered a reconveyance to defendant, as above suggested, and so acquired a right of action for her purchase-money, and that would have set the statute of limitations in motion, and her claim would have been barred within five years after so doing, but she was under no obligations to take that course, and in waiting for Mary K. Lund's title to ripen into a complete one and an absolute bar against any recovery of possession under her deed from Watson, it is impossible to see how plaintiff was doing anything which she had not a right to do. In *Cheney v. Straube,* 35 Nebr., 521, it is expressly held that a party may either pay off the incumbrance or may wait until a mortgage ripens into a title and proceed upon the warranty after the eviction. Of course, the defendant gave the deed as an ex-

press authorization for the plaintiff's proceeding to possess herself of the property conveyed. The position which he takes now is that she had no right to attempt to assert her ownership; that her sole remedy was to at once abandon it and proceed against him, and that the statute of limitations ran against any claim on her part because she did not do so. It would be a strange inconsistency to hold that she might not take the direct and obvious course pointed out by her conveyance, viz., litigate the claim of Mary K. Lund and hold the defendant responsible for the result of such litigation. There seems no reason why the same necessity should not exist for a legal determination as to plaintiff's right of entry before she can proceed upon this covenant of warranty as would exist for a legal determination of her possession, if she had once obtained it, before she could sue upon the covenant. It is not, however, necessary in this case to resort to the doctrine of estoppel to prevent defendant from claiming that he had no title and that the eviction was *eo instante* on the giving of the deed. The conveyance vested in plaintiff the legal title. With that title goes the constructive possession. Mrs. Lund's holding was admittedly subordinate to that title, and so long as it remained so, must be held to rest the constructive possession in the legal owner. The acquisition of the legal estate by Mrs. Lund would work a transfer of such constructive possession, and so constructive eviction. Judge Ruffin, in *Grist v. Hodges,* 3 Dev. [N. Car.], 198, 200, while holding that if at the time of the conveyance the premises are held adversely by title paramount, there is an eviction *eo instante,* admits that this is not the case where some title passes and the vendee may choose to assert it. He also says that where the outstanding claim is a mere incumbrance, the vendee may wait till it ripens into a title and produces an eviction. Both justice and authority seem to require that the recovery of Mrs. Lund's decree, and the yielding to it, be held an eviction and to give a right of action on this deed.

It is recommended that the judgment be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons above given the judgment of the district court in this cause is

AFFIRMED.

OMAHA LOAN & TRUST COMPANY, APPELLANT, V. EMMA GOODMAN ET AL., APPELLEES, IMPLEADED WITH FIRST NATIONAL BANK OF OMAHA, APPELLANT.

FILED JUNE 19, 1901. No. 9,933.

Commissioner's opinion, Department No. 1.

1. **A Conditional Contract to a Corporation to Be Formed in Futoro, is an Offer Whose Acceptance Makes a Valid Agreement.** A contract, running to a corporation to be formed and providing for a conveyance of land to it on certain conditions, must be taken as an offer whose acceptance, within a reasonable time by forming the corporation and performing the conditions, would constitute a valid agreement.

2. **Agreement:** FULFILLMENT. An agreement to furnish bond in sum of $150,000 to locate a university and commence building by May 1, 1888, and complete it by May 1, 1890, at cost of $50,000 or more, "and this and other buildings and campus to be used for university purposes," is not fulfilled by simply locating and erecting a building of the required cost within the time.

3. **Indefinite and Uncertain Terms.** Agreement to convey ten acres of forty owned by vendor, "being every fourth block in said forty acres," when the forty acres consist of blocks 59 and 60, 73 and 74, 75 and 76 and the north half of 91 and 92, is too indefinite and uncertain for specific enforcement.

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

Congdon & Parish and *Francis A. Brogan,* for appellants.

C. M. Parker, contra.

HASTINGS, C.

In the year 1887, C. F. Goodman, with others, signed an agreement providing that the subscribers should pay the

money and convey the lands and lots opposite their names to secure the location and building of the University of the Christian Church of Nebraska on a certain quarter section of land in Lancaster county. The money was to be paid, one-fourth when half the foundation should be laid, the rest in one, two and three years, with eight per cent. interest. The lands were to be deeded to trustees when the university location should be agreed to by the state convention of the church, the trustees to give a good and sufficient bond to the subscribers that one of the buildings should be completed by January 1, 1890, and "permanently used for the purpose of a Christian university." Some other conditions were attached. Goodman's subscription was ten acres of land wholly undescribed. Subsequently the following agreement was made:

"Articles of agreement made this 30th day of December in the year of our Lord one thousand eight hundred and eighty-seven, between C. F. Goodman and Emma Goodman, party of the first part, and the Nebraska Christian Educational Board (when incorporated), party of the second part, witnesseth: That said party of the first part hereby covenants and agrees that if the party of the second part shall first perform the covenants hereinafter mentioned on their part to be made and performed, the said party of the first part will convey and assure to the party of the second part in fee simple clear of all encumbrances whatever, by good and sufficient warranty deed, the following lot, piece or parcel of ground, viz.: Ten acres in the N. E. ¼ of the N. W. ¼ section 21, town. 10, range 7 east, 6th P. M., being every fourth block in said forty acres; said parcel of ground to be conveyed on or before the first day of May, 1888, or as soon as I can obtain a release from the parties holding mortgages, and this agreement to take the place of the one previously signed by me agreeing to donate ten acres for the benefit of parties locating a college in that neighborhood. And the party of the second part hereby covenants and agrees to execute and place in trust a bond in the sum of $150,000 at issue of the above deed

that they will locate the university of the Christian Church of Nebraska on the S. E. ¼ of section 16, town. 10, range 7 east of the 6th P. M., and to commence one of the buildings of said university by the first day of May, 1888, and complete same by the first day of May, 1890, at a cost of $50,000 or more, and this and other buildings and campus to be used for university purposes. And in case of the failure of the said party of the second part to perform any of the covenants on their part hereby made and entered into this contract shall at the option of the party of the first part be forfeited and determined and the party of the second part shall forfeit all their rights on this contract, and said first party shall have the right to re-enter and take possession of the premises aforesaid. It is mutually agreed that all of the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties." It was signed only by Goodman and wife.

It appears the educational board referred to was organized February 14, 1888. No bond was ever given as provided in the agreement. The university was located as agreed, a building commenced within the time and finished in April, 1890, costing about $80,000. The deed was not given. At the time of the agreement, the forty acres consisted of blocks numbered 59 and 60, 73 and 74, 75 and 76, and contained the north half of blocks numbered 91 and 92 in Bethany Heights Addition to Lincoln, and all belonged to Goodman. In 1889, the board procured appointment of appraisers under the statute and had their property appraised, including subscriptions and donations, but it did not include this land or contract. C. R. Van Duyn, treasurer, says that Goodman told him that when he could get a blanket mortgage off this land he would deed. Van Duyn thinks this was in 1893. No other claim of right by the board appears; and in 1892 Goodman and wife vacated the plat of Bethany Heights as to this land. October 14, 1893, the plaintiff loan company filed a judgment in Lancaster county against Goodman for $1,099.51 and $15.48

costs. November 4, 1893, the agreement was filed with the register of deeds and recorded in the miscellaneous records. It was never acknowledged. November 17, 1894, Goodman and wife made a mortgage to the First National Bank of Omaha for $6,000 on this forty acres and other lands. The judgment of plaintiff appearing on record, its amount was deducted from the $6,000 and indorsed on the note.

January 11, 1896, plaintiff commenced suit to set aside an old mortgage and have the property sold on its judgment, making the First National Bank and Goodman's widow and executrix, he having died in 1895, his children, the educational board, and one Robert S. Dill parties defendant, together with a mortgagee whose lien was alleged to have been satisfied. It asked that all parties be compelled to show their rights and priorities and a sale had to satisfy its judgment. Dill answered, setting out the facts as to the educational board's claim and an assignment January 26, 1896, of that claim to himself and asked specific performance as to an undivided one-fourth of the forty acres. The First National Bank answered, denying any right in Dill, admitting plaintiff's lien as first and asking to foreclose its mortgage for $4,900.49 and interest. Goodman's executrix, and, after her resignation pending the suit, his administrator, denies that the educational board ever perfected its claim; says that it was not in existence when the agreement was made, and denies all rights of Dill under it, and pleads some payments on the judgment and the mortgage of the bank. These payments were subsequently admitted, and the only question here is as to Dill's claim for specific performance and its priority over the plaintiff's judgment and the bank's mortgage. The trial court found Dill entitled to a conveyance of an undivided one-fourth of the forty acres, and his rights prior to both the judgment and the mortgage. From this part of the decree is the appeal.

Appellants urge (1) that the alleged contract is no contract, because never executed by the second party, though

clearly intended to be, and that it could not be binding, because the second party was not in existence; (2) that it was abandoned by the educational board; (3) that it was never performed; (4) that its description of premises is too indefinite.

As to the first point, the terms of the contract bear out the appellants' contention. It would be difficult to draw an instrument more strictly bilateral in its form. However, every instrument must be interpreted by its surroundings and connections; and in considering the facts surrounding this contract we are compelled to conclude that this was an agreement for a conditional subscription, an offer to the other parties when they should be incorporated, which looked to their incorporation and undertook to carry out this agreement when they should comply with its conditions. Such an offer, of course, could be withdrawn at any time before acceptance; and if no action towards organizing the corporation was taken within a reasonable time, it would be deemed withdrawn. If, however, within a reasonable time, the incorporation was effected and the conditions performed before withdrawal of the offer, it would seem to make a binding obligation. Counsel for appellants make no claim for the application of the well-known doctrine that specific performance of an agreement for a gift will not be enforced, and that this remedy avails only upon contracts for a valuable consideration. Pomeroy, Equity Jurisprudence, sec. 1405. Probably they thought the location of the university and erecting of its buildings sufficient to take the case out of the rule by establishing a subsequent valuable consideration and to bring this gift under the exception made for one who has expended money or changed his position in expectation of the promised gift. *Darke v. Smith,* 45 Pac. Rep. [Utah], 1006. If so, however, it must be presumed from the fact of building at the agreed place. The record fails to disclose any other proof that this agreement was any part of the inducement to either location or building.

The incorporation was effected within forty days after

the execution of the Goodman agreement. Nothing appears to show that this was an unreasonable delay. The question remains, did they comply with the terms of this agreement? They had incorporated as an educational board. They commenced a building by the time stipulated and completed it by the time limited at a sufficient cost. Appellee Dill contends that this was all the contract required. It hardly seems so. This agreement in fact did not stipulate for the location of the university and its building, but for a bond that it should be located and built, "and this and other buildings and campus used for university purposes." This was all to be done before the right to a deed should accrue. The other party can not say that it is better to have this building on the location than the security for it. The owner had stipulated for what he wanted, and he could not be required to take something else. This bond was to be for something more, viz., "this and other buildings and campus to be used for university purposes." The bond stipulated for in the first subscription was to "permanently maintain a Christian university." The object that Goodman had in signing this agreement may, for aught we know, have depended entirely upon the making and deposit of this bond within a reasonable time. At all events he stipulated for it, was entitled to get it before making the deed, and was under no obligations to accept anything else. This contract is not to deed lands when a college is located and built. The incorporation of the board and the giving of the stipulated bond in any reasonable time would have perfected its right to whatever the contract gives. The actual making of the deed might have had to wait until the land was freed from the old mortgage, but the donees' right to it would have been perfect. The agreement is not in the alternative. If the furnishing of the required bond to locate, build and use for university purposes would comply with it, then surely merely locating and building would not. It is urged that Goodman could not sit down and wait till the agreements of the contemplated bond were all complied with and then

say, after getting all the benefits, that the agreement had not been fulfilled. As above suggested, the immediate assurance which such a bond would have given may have been the moving consideration for the gift. The securing the future use of the building may have been uppermost. A donor is surely under no obligation to make demand of performance of conditions by a donee.

The defective description is also objected to. When this contract was made the land was platted. It remained so until two years after the right of the educational board became, as its assignee claims, perfect. The plat is still in existence and can be applied to the ground. Its vacation took away no rights of the board in any specific land and gave it none in any other. If it ever became entitled to a conveyance of anything, it was some specific ten acres obtainable by taking every fourth block in the forty acres described. The vacation of the streets and alleys would have no effect except on the public easement. The ground would still be there and the plat in the files, both just as certain and as recognizable as before. The situation of these blocks and the impossibility of telling from this description what was intended to be covered by it has been indicated. It seems to be clear that an undivided interest was not to be conveyed, for a division is provided for. The court, however, can not make the division, for the point of commencement to count off each fourth block is not indicated. The contract must be such as can be specifically enforced by the decree of the court. So long as the parties left it to be determined by themselves where the beginning should be made, the court can not begin for them. 3 Pomeroy, Equity Jurisprudence, secs. 1404, 1405; *Camden & A. R. Co. v. Stewart,* 18 N. J. Eq., 489. In *Nippalt v. Kammon,* 39 Minn., 372, a description, like the one we have, was found too vague for specific enforcement. In that case the defendant agreed to sell "5 acres, lot 3, sec. 23, town. 28, range 23." The court says it has no means of knowing which five acres was intended. No more have we as to which ten of the forty, all of which was owned by Good-

man, is meant by our contract. Similar indefinite descriptions are held to prevent a decree for performance in *Burnett v. Kullak*, 76 Cal., 535; *Rochester v. Yesler's Estate*, 6 Wash., 114; *Appeal of Holthouse*, 12 Atl. Rep. [Pa.], 340; *Pierson v. Ballard*, 32 Minn., 263.

It is therefore recommended that the decree be reversed as to defendant, Robert S. Dill, and his cross-bill dismissed, and affirmed as to the findings and decree for plaintiff, the Omaha Loan & Trust Company, and defendant First National Bank of Omaha.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the above reasons the findings and decree in favor of cross-petitioner, Robert S. Dill, are reversed and his cross-bill dismissed; the decree in other respects is affirmed.

JUDGMENT ACCORDINGLY.

CARL ZIMMERMAN ET AL. V. KATE SMILEY.

FILED JUNE 19, 1901. No. 10,045.

Commissioner's opinion, Department No. 1.

A Mother Can Not Compromise Rights of Her Children in Pending Action on Liquor Seller's Bond. A mother, pending an action upon a liquor seller's bond, under section 16, chapter 50, Compiled Statutes, brought on her own behalf and that of her minor children, has not authority to settle and compromise their rights without the authority and approval of the court.

ERROR from the district court for Jefferson county. Tried below before LETTON, J. *Affirmed.*

E. H. Hinshaw, Charles Clifton and *W. H. Barnes*, for plaintiffs in error.

John C. Hartigan, John Heasty and *Alfred Hazlett, contra.*

HASTINGS, C.

But one question is raised in this case. It is an action brought under section 16, chapter 50, Compiled Statutes, by a married woman in her own name, and as the next friend of her children, for damages alleged on account of the death of the husband and father. During the pendency of the action, she executed the following receipt:

"FAIRBURY, NEBR., Sept. 8th, 1896.

"In the District Court of Jefferson County, Nebraska.

"MRS. SMILEY, PLAINTIFF,
VS.
W. H. BEARDSLEY, DEFENDANT. } Receipt.

"Received of W. H. Beardsley fifty dollars ($50.00) in full satisfaction of all claims, damages and demands held or due me from the said W. H. Beardsley, and in full settlement of the above case, so far as the same affects the said W. H. Beardsley. MRS. KATE SMILEY."

At the trial the jury were instructed that if they found that this receipt was executed voluntarily and without misrepresentation or fraud, it would be a bar to the claim of the plaintiff for her own personal damages against the sureties of the liquor seller, but that it would be no bar to her recovery for any loss of support which the jury should find that the children had suffered through the liquor traffic of the defendant principals. The jury returned a special finding that the receipt was executed without fraud or misrepresentation. The jury also returned a special verdict finding that plaintiff should recover $1,000 on account of her children from all the defendants, and recover nothing from any of them on her own account.

The errors complained of all relate to the holding of the defendant sureties liable, notwithstanding this receipt, for the children's loss of support. It is earnestly claimed that the statute in question gives the mother full control, not only of this action, but of the funds, and is ample warrant for her releasing the action of her children, as well as her

own. The section reads as follows: "It shall be lawful for any married woman, or any other person at her request, to institute and maintain, in her own name, a suit on any such bond for all damages sustained by herself and children on account of such traffic, and the money when collected shall be paid over for the use of herself and children."

The case of *Wardell v. McConnell,* 23 Nebr., 152, is cited in support of the contention that the mother is able to exercise full control of not only the litigation, but the rights of her children; that in fact the right is her right, while given her on account of her children, and in confidence that as a mother she will exercise it for their benefit. *Wardell v. McConnell* hardly seems to bear out the contention of the plaintiff in error. In that case the jury found, and the court decided, that the mother had estopped herself from claiming anything on her own account by her contributing to the procuring of the liquor which caused the damage; but it held that this, if it prevented recovery on her own account, did not interfere in the least with a recovery on account of her children. If an estoppel on her own account did not prevent a recovery on behalf of her children, it is difficult to see why a receipt would do so, which purports to be signed simply on her own account. It is to be remembered, too, that in *Buckmaster v. McElroy,* 20 Nebr., 557, the complicity of a drinker in his own intoxication was held to be no bar to his recovery of damages for the loss of his legs occasioned by such intoxication. If the reasoning of that case is carried to its logical result, action for damages of this kind is barred only by payment or by the statute of limitations. The statute seems to authorize the mother to institute and maintain an action and collect the proceeds for her use and her children's. We do not see, however, that any greater control is given her than that exercised by a next friend in suits on behalf of a minor, and it seems well established that a next friend has no authority to compromise or settle the claim of the ward, except by the approval of the court.

Tripp v. Gifford, 155 Mass., 108, and cases cited in that opinion.

We do not discover any error in the instructions, nor in the findings of the jury thereunder. It would seem that the mother, while she might collect the compensation for her children's loss, could barter away only her own, and that in carrying on an action of this kind she has only the authority of a next friend, so far, at least, as her children's rights are concerned. That seems to be as much as the statute contemplates giving her. We therefore recommend that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

NOTE.—While the next friend may be any person who will undertake the infant's cause, he is in theory of law appointed by the court. *Morgan v. Thorne,* 7 Mees. & Wels. [Eng.], *400; *The Etna,* 1 Ware [U. S. D. C.], 462; *Baltimore & O. R. Co. v. Fitzpatrick,* 36 Md., 619. A next friend can not bind the infant's estate for attorney fees. *Houck v. Bridwell,* 28 Mo. App., 644. He can not submit the case to arbitration. *Tucker v. Dabbs,* 12 Heisk. [Tenn.], 18. He can not compromise the suit without the express sanction of the court. *Isaacs v. Boyd,* 5 Porter [Ala.], 388; *Miles v. Kaigler,* 10 Yerg. [Tenn.], 10; *Crotty v. Eagle,* 35 W. Va., 143; *Clark v. Crout,* 13 S. E. Rep. [S. C.], 602. But he may assent to arrangements which will facilitate the trial and determination of the cause. *Kingsbury v. Buckner,* 134 U. S., 650. Not being a party to the suit, he is not liable for costs.—REPORTER.

JOHN T. JONES V. W. E. STEWART.

FILED JUNE 19, 1901. No. 9,880.

Commissioner's opinion, Department No. 1.

1. **Dealer Not Bound to Disclose Superior Knowledge.** Where persons are dealing with each other upon equal terms, and no confidential relation exists between them, neither is bound to disclose superior information he may have respecting the transaction.

2. **Poor Judgment No Basis for Relief in Equity.** Poor judgment, or unfortunate trades, in the absence of fraud or deception, form no basis for relief by the court.

3. **Conflicting Evidence.** The finding of a jury, upon questions properly submitted, when the evidence is fairly conflicting, will not be disturbed unless it appears to have been influenced by passion or prejudice.

4. **Admission of Evidence.** Certain rulings on the admission of evidence, presenting no new questions of law, examined and sustained.

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

Frederick Shepherd, for plaintiff in error:

The active concealment of a material fact has the same effect as an express false representation. Larson, Contracts, 227.

In setting aside a transaction as fraudulent, inadequacy of price is a strong circumstance. That *suppressio veri* is equal to *suggestio falsi*, is a principle which will prevail. In the absence of a satisfactory reason, it is a badge of fraud. *Beard v. Campbell,* 2 A. K. Marshall [Ky.], *125.

Addison S. Tibbets and *Halleck F. Rose, contra:*

A purchaser is not obliged to disclose a fact to the vendor, which would enhance the value of the property. *Coddington v. Goddard,* 82 Mass., 436; *Hurt v. Wallace,* 49 S. W. Rep. [Tex.], 675.

DAY, C.

The facts in this case present a very singular transaction. On and prior to November 12, 1892, Willard E. Stewart was the owner of lots 7 and 8 of College Hill, an addition to the city of Lincoln, upon which was erected a seven-room dwelling-house. The premises were incumbered by a mortgage of $2,000, together with a small

amount of accumulated interest and taxes. On said day, and for several years prior thereto, the plaintiff, under the name of John T. Jones, treasurer, had on deposit and to his credit in the First National Bank of Lincoln, $2,609.35, and, incomprehensible as it may seem, this fact had entirely escaped his attention. The defendant discovering this fact, made a proposition to the plaintiff to deed him the property above mentioned, subject to the incumbrance, for an assignment of the plaintiff's interest in and to certain property, the nature and location of which the defendant declined to disclose. One of the conditions of the proposed trade was that the plaintiff should sign his name to the papers without seeing, reading or knowing the contents of the instruments he signed. After some modification of the proposition the parties came to an agreement, in pursuance of which the defendant, on November 12, 1892, executed and delivered a warranty deed conveying the premises above mentioned to a person named by the plaintiff for plaintiff's use, and also paid to the plaintiff $100 in cash. In consideration of this conveyance and the cash payment, the plaintiff, in pursuance of the agreement, signed two papers without reading them or seeing their contents, or knowing what they contained, except that they were to operate as an assignment of certain interests which he had, of the nature of which he was ignorant. At the time of the negotiation the plaintiff secured a written statement from the defendant that there was nothing contained in the papers which plaintiff signed which would subject him to criminal liability, or bring upon him public ignominy or disgrace. Protected by this simple assurance, he blindly entered into the contract and signed the instrument placed before him. One of the papers so signed was a check in favor of the defendant, on the First National Bank for $2,609.35, by means of which the defendant drew said sum from the bank and applied it to his own use. Plaintiff kept the real estate for about two years, at which time he sold it, realizing from the sale just sufficient to pay the mortgage lien upon it. In 1894, plaintiff discovered the

nature and extent of the property he had assigned to the defendant, and the full purport of the contract he had made dawned upon him. This action was brought in the district court of Lancaster county to recover of the defendant $2,609.35 and interest, and is in the nature of an action for deceit. As a basis for his claim, the plaintiff, in substance, alleges that he was induced to sign the check without reading it, or seeing its written and printed contents, by the untruthful and fraudulent representations made to him by the defendant; that defendant told him he wished to procure from plaintiff a power of attorney and an assignment; that it would not put the plaintiff in a worse condition or position, lose him any money or deprive him of any interest, but would be of great value to the defendant; that plaintiff, by oversight and error, forgot the fact of his deposit in the bank, and relying on the representations made by the defendant, and believing them to be true, signed his name twice, but that in doing so unknowingly signed the check on which the defendant drew said money from the bank. The answer denied any false or fraudulent representations whatever to induce him to sign the papers, and alleged that the plaintiff signed the check and papers voluntarily and knowingly and in accordance with the agreement entered into between the plaintiff and defendant. The trial resulted in a verdict and judgment in favor of the defendant, to review which the case is brought to this court on error.

Much as the court may feel disposed to condemn the selfish cunning manifested by defendant in this transaction, and to lament the artless confidence of plaintiff, yet the legal rights involved are governed by well established principles of the law, and by the law only must they be settled. The rule is well established that where persons are dealing with each other upon equal terms, and no confidential relation exists between them, neither is bound to disclose superior information he may have respecting the transaction, and, in the absence of fraud or deception to induce the contract, the courts can afford no relief. The law pre-

sumes every man capable of taking care of his own interests, and his poor judgment or unfortunate trades can not form a basis of interference by the court. To recover, it was necessary for plaintiff to prove that the representations were made; that they were false; that plaintiff believed the representations to be true and relied upon them; and that he was injured thereby. The question of fact as to whether defendant had made any false or fraudulent representations upon which plaintiff relied in entering into this transaction and signing the check and power of attorney was submitted to the jury under proper instructions, upon evidence which was slightly conflicting, and the finding of the jury is conclusive upon this court.

For the purpose of determining the amount of plaintiff's damage, in the event the jury should find there had been false representations made by defendant, upon which plaintiff relied in making the contract, testimony was introduced on both sides as to the value of the property at the date the trade was made. Plaintiff's witnesses, four in number, placed the value of the real estate at sums ranging from $2,500 to $2,700, while the defendant's witnesses, seven in number, placed it at from $4,000 to $5,000. There was ample evidence for the jury to find that the value of the property received by the plaintiff was equal to the value of the property he parted with. This question was also submitted to the jury under proper instructions, and being resolved by the jury in defendant's favor upon fairly conflicting evidence, their finding will not be disturbed. *Interstate Savings & Loan Ass'n v. Strine,* 59 Nebr., 27; *Van Housen v. Broehl,* 59 Nebr., 48. This rule has been announced so many times by this court that it is unnecessary to cite authorities to support it. Fourteen cases can be found in the index of volume 59, under the title of "Review."

Another error complained of by plaintiff was a ruling of the court excluding from the evidence a part of the defendant's answer, which had previously been stricken out, to the effect that the moneys standing to the credit of

plaintiff on the books of the bank "was connected and involved with the affairs and business of Doolittle & Co., of which firm the plaintiff was a member." Plaintiff's contention is that this part of the answer was admissible, notwithstanding it had been stricken out, for the purpose of showing admissions of defendant that the funds for which he desired the assignment grew out of matters relating to the business of Doolittle & Co., and that such admissions tended to corroborate the testimony of the plaintiff. The portion of plaintiff's testimony which it is claimed this part of the answer tended to support is where the plaintiff, in relating what defendant said to him, testified: "You know you are a bankrupt and this affair refers to matters you have forgotten and can be of no benefit to you; and besides I think you would do me a special favor before you would some of your old creditors of the firm of Doolittle & Co." This was denied by the defendant. In this connection the plaintiff testified that defendant "was very careful not to refer in any manner to the credit or property he wished to obtain," and that the defendant at the time did not represent that the property or thing he wanted had any connection with the affairs of Doolittle & Co. He argued that "I being a bankrupt, it would in no way harm me financially and at the same time do him a great kindness." To our minds, the portion of the answer previously stricken out, and which was excluded by the court, tended in no way to corroborate the plaintiff's testimony—in fact it was a contradiction of it. Neither was it competent to discredit the testimony of defendant; at most it was but an admission of defendant at variance with his testimony upon an immaterial point, and one upon which the testimony of both plaintiff and defendant agreed.

The defendant testified that he told the plaintiff that, in his opinion, the property he was deeding to him was of about equal value of the property he was getting from plaintiff. To discredit this, and to show defendant did not regard the properties of equal value, plaintiff sought to

show that defendant had paid $600 for the information which enabled him to make the trade. We can see no error in excluding the testimony; it was entirely immaterial what defendant may have paid for the information; he may have made a good or a bad bargain; it did not go to show that the value of the property was less than defendant claimed. It is a matter of common experience that persons ofttimes make great sacrifices of their property for the purpose of realizing therefrom ready cash.

All of the elements of fraud presented by the pleadings were fully and fairly submitted to the jury by the instructions, and after a careful investigation of the record, we can find no legal reason to disturb the judgment. It is therefore recommended that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

HOLCOMB, J., dissents.

FARMERS & MERCHANTS INSURANCE COMPANY V. FRANK DOBNEY.

FILED JUNE 19, 1901. No. 9,888.

Commissioner's opinion, Department No. 1.

1. **Exception to Excluding Testimony Unavailing Without Tender.** Exceptions to the exclusion of testimony are unavailing unless there be a tender made of the proof which it was sought to elicit. *Union P. R. Co. v. Vincent*, 58 Nebr., 171, followed.

2. **Pleading: NEW CAUSE OF ACTION IN REPLY NOT GOOD: GENERAL RULE: WAIVER.** As a general rule, it is not good pleading to state a new cause of action, or part thereof, in the reply; but where no objection is made on that ground in the district court, 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. *Gregory v. Kaar*, 36 Nebr., 533, followed.

3. **Conflicting Proof: WAIVER.** Where the proofs before a jury are conflicting, the verdict will not be disturbed unless it is clearly wrong.

4. **Evidence: JURY.** Evidence examined, and *held* to present a proper question for the jury.

5. **Error Must Be Brought to Attention of Trial Court.** An alleged error not brought to the attention of the trial court will not be considered by this court on a review of the case by petition in error. *Ecklund v. Willis*, 42 Nebr., 737, followed.

6. **Classified Legislation Is Not Unconstitutional.** There is nothing in the constitution of the United States or of this state which forbids classification of subjects for the purpose of legislation. The power to classify is subject only to the limitation that the classification must not be arbitrary.

7. **Taxation of Attorney's Fee as Costs Constitutional.** The provision of section 3 of the valued policy law (Compiled Statutes, 1899, ch. 43, sec. 45), permitting the taxation as costs of a reasonable attorney's fee upon rendering judgment against an insurance company on a contract insuring real estate, is grounded on considerations of public policy, and is constitutional.

ERROR from the district court for Holt county. Tried below before KINKAID, J. *Affirmed.*

This cause was taken to the supreme court of the United States, on writ of error issued by Justice Brewer, October 14, 1901. A reversal is claimed because, as alleged, the decision is contrary to the doctrine announced in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S., 150.—REPORTER.

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

Michael F. Harrington, contra.

DAY, C.

For brevity the parties will be referred to as "plaintiff" and "defendant" as they appear in the court below.

This action was brought by plaintiff on appeal from the county court to the district court of Holt county, against the defendant, the basis of the action being an insurance policy issued by the defendant to the plaintiff, dated April 26, 1892, and expiring April 26, 1897. The consideration

for the policy was plaintiff's note for $36, dated April 26, 1892, and due December 1, 1892. The specific property covered by the policy and the amount of insurance thereon were as follows: $800 upon the dwelling-house, $300 on barn number one, $200 on barn number two, and $500 on cattle. The dwelling-house was wholly destroyed by fire on March 14, 1896. The trial resulted in a verdict for plaintiff for $837, upon which, with accrued interest, a judgment was subsequently rendered. To review this judgment defendant brings error to this court.

The answer admitted the issuance and delivery of the policy, but alleged that the note given for the premium contained a stipulation that the company should not be liable for any loss or damage which might occur to the property while the note or any part thereof was past due and unpaid; that at the time of the alleged fire the note was past due and unpaid, and still remains unpaid; that the policy, by its terms, became suspended and inoperative, and no liability attached to the defendant thereunder. The policy contained a stipulation as follows: "If a note be given for the premium on this policy, or any part thereof, it is mutually agreed and understood by and between the assured and this company, that in case said note, or any part thereof, be not paid at maturity, this policy shall be suspended, inoperative, and of no force or effect, so long as such note, or any part thereof, remains overdue and unpaid; and in case of any loss of said property, either partial or total, while said note, or any part thereof, remains overdue and unpaid, this company shall not be liable for such loss, nor shall the payment of said note, or the receiving or retention of the proceeds, or any part thereof, by this company, render it liable for any loss occurring while said note, or any part thereof, remains overdue and unpaid, nor shall such payment or retention be construed to be a waiver of any condition in this policy or application. The payment of the premium, however, revives this policy and re-instates the same for the remainder of its term only."

The reply alleged that previous to the fire it had been mutually agreed that the contract of insurance was severed; that the dwelling-house was insured separately from the other property; that the defendant received from plaintiff full payment of the premium on the dwelling-house prior to the loss. By order of the court, the petition filed in the county court was to stand as the petition in the district court, to which defendant filed answer and plaintiff filed reply.

It will not be necessary to consider all of the numerous errors alleged in the petition in error; such as are not argued in the brief will be deemed to have been waived. One of the assignments relates to the overruling of the motion to strike the reply from the files.

Immediately after the jury was sworn, the defendant called the county judge as a witness, presumably to show by oral testimony that the issue presented by the pleadings was different from what it was in the county court. Upon objection to the examination of the witness on the ground that its purpose was not disclosed, defendant made an oral motion to strike the reply, for the reason that the pleadings presented a new issue from the one tried in the county court; but before the motion was passed on, or any testimony taken in support thereof, and apparently immediately following the motion to strike the reply, the defendant suggested a diminution of the record. A colloquy followed between the court and counsel for both sides, at the conclusion of which the court made a ruling: "The order is granted and I will look up the question of jeopardy." This is the only ruling disclosed by the record on the motion to strike the reply; and to this ruling no exception was taken by the defendant. The order of the court is indefinite as to its application to the motions then before the court, but it referred to the diminution of the record; otherwise there would have been no occasion to have proceeded with the trial upon the theory the case was tried. It would have been an easy matter, by comparison of the pleadings in the county court with those in the district

court, to determine whether a new issue had been raised. The record brought to this court shows the proceedings had in the county court and discloses that plaintiff was granted leave to file a reply and that a reply was filed; but it is not set out in the transcript. If it had become lost, its contents could have been established by competent evidence. If the defendant desired to insist on its motion to strike, it should have interrogated the witness further; and if denied that right, made its offer to prove the fact. Failing to do this, there is nothing presented in this assignment of error for our review.

Assignment of error No. 4 is, "In permitting the trial of issues which were not raised in the trial in the county court, where the case originated." Nowhere in the record is it shown what the issues were in the county court, nor is it shown in what respect the issues tried in the district court were different from those that were tried by the county court. There is, therefore, nothing before us from which it can be determined whether the issues were the same or not. Defendant started to show the difference, if any, at the entrance of the trial, but did not persevere long enough to prove any difference. At the conclusion of the evidence defendant made an offer "to show that the issues in the case and tried in this court are different and other issues from the issues tried in the court below." But the offer did not inform the court in what respect the issues differed, nor what the issues were in the court below, nor any facts from which such conclusion could be drawn. The offer was a mere conclusion—the facts should have been stated so that the court could say from them whether a new issue was presented. From the record made, this court is unable to say that the offered testimony, if received, would have shown any difference. "Exceptions to the exclusion of testimony are unavailing unless there be tender made of the proof which it was sought to elicit." *Hambleton v. Fort,* 58 Nebr., 282; *Union P. R. Co. v. Vincent,* 58 Nebr., 171.

Defendant insists that on the pleadings and evidence it

was entitled to a verdict as a matter of law. This contention rests in part upon the peculiar state of the pleadings. Plaintiff had stated one part of his cause of action in the petition and the remainder of it in the reply. The answer admitted a part of the petition, including some facts that were at variance with the reply. To illustrate: The petition charged that the consideration for the issuance of the policy was plaintiff's note for $36; and the property described as being covered by the policy was the dwelling-house only. The answer admitted this, but alleged the note had not been paid, and pleaded conditions of the note and policy which would suspend its operation. The reply alleged that the contract had subsequently been severed, and that the amount of premium on the dwelling-house for the full period had been paid and that the balance due upon the note was for the premium upon the other items of property covered by the policy. With this confusion as a basis, defendant contends that the facts alleged in the petition, which were expressly admitted in the answer, became conclusively established for the purpose of trial and could not be avoided by a reply. As a general rule of pleading, we think this contention is correct, but, as applied to the procedure adopted by the defendant in this case, the claim is too broad. If the defendant had moved the court to strike the reply or a part thereof because the allegations therein were inconsistent with the material allegations of the petition, we think it would have been sustained; but where no objection is made on that ground in the district court, and the issues are presented and submitted on their merits, the objection that the cause of action was first stated in the reply will be held to have been waived. *Gregory v. Kaar*, 36 Nebr., 533. The petition should contain a full statement of the facts constituting plaintiff's cause of action, and the facts should be stated so as to harmonize with the proof produced at the trial. It is no part of the office of a reply to contain allegations which are necessarily a part of the cause of action and which must be sustained by plaintiff's proof in open-

ing. *Wigton v. Smith*, 46 Nebr., 461; *Anderson v. Imhoff*, 34 Nebr., 335. Where the pleader has interchanged these offices, the defendant in the trial court must move at the proper time in the interest of better pleading, or he will be deemed to have waived the defect. He can not go to trial and, after verdict against him, be heard to object that the cause of action is stated in the reply. *Vernon v. Union Life Ins. Co.*, 58 Nebr., 494.

The contention of defendant, that it was entitled to a verdict on the pleadings and evidence, is also supported by an exhaustive analysis of the evidence. There was a difference in the testimony given by the plaintiff and that given by the principal witness for defendant concerning the severance of the policy and the application of payments. In many details they were in complete harmony; and both agreed that the company was to approve the request of plaintiff before it would become operative, and the agent was to communicate from Lincoln, after submitting the question to the company. He did communicate in a letter, omitting formal parts, as follows: "Frank Dobney—Dear Sir: Enclose your policy. Everything O. K. Note extended to fall due same time as last one." The letter is so indefinite that it will sustain almost any contention based on the policy. Plaintiff testified that when the payment of $10 was made, no instruction was given as to how it should be applied; that later, when the agent adjusted the loss on a steer which had been killed by lightning, that plaintiff wanted the amount, $17.86, applied on the note, so that the house would be insured anyhow; that the agent thought it would be all right to apply the payment that was already paid on the house, and that he would write when he got to Lincoln. He was then asked:

Q. What did he say about insurance on the dwelling-house, the $800?

A. He said it would be all right.

Q. Well, explain how it would be all right.

A. If it would be satisfactory to the company, and he thought it would. To apply the payment that was already

paid, on the house, and he would write me when he got to Lincoln, and the $17.86, apply that on the note.

Q. What did he say about the premium on the house?

A. Sixteen dollars he said.

Q. Now, what was to be done after you had paid the premium on the dwelling-house, the $16 and interest; what was to be done with the balance?

A. It was to be applied on the rest of the insurance.

The testimony of plaintiff tending to establish a severance of the contract, the conversations with the agent, and the letter, together with the testimony of the agent, that he reported to the company all that was said between plaintiff and himself, and that the letter was written in pursuance of the direction of the company, were all matters presenting an issue of fact, upon which there might be a difference of opinion, and in submitting the issue of a severance of the contract to the jury we think the court acted wisely.

Defendant further urges that the clause in the policy suspending it, while the premium note is past due, is reasonable and just, and that nothing short of full payment or waiver of the stipulations can remove the suspension caused by the failure to pay the note. Granting this to be true, it can not avail defendant, for the question was fairly submitted to the jury as to whether the contract had been severed and whether the full premium upon the dwelling had been paid. The jury resolved these questions in favor of the plaintiff.

Where the proofs before the jury are conflicting, the verdict will not be disturbed unless clearly not sustained by the evidence. *Van Housen v. Broehl,* 59 Nebr., 48; *Chicago, M. & S. P. R. Co. v. Johnston,* 58 Nebr., 236; *Louis v. Union P. R. Co.,* 48 Nebr., 151. In our view, there was evidence sufficient to sustain the verdict.

Defendant also contends that the verdict was excessive, —the full amount of insurance upon the house destroyed, when there was a small sum still due upon the note originally given for the policy. This point might be well taken

if a counter-claim had been filed for that amount. It did not do it, nor did it call the attention of the court to it at the trial nor in the motion for a new trial. It is presented in this court for the first time. It is the established rule of the court, in reviewing a case by petition in error, to refuse to consider an alleged error that was not brought to the attention of the trial court. *Ecklund v. Willis,* 42 Nebr., 737; *Clark v. Carey,* 41 Nebr., 780; *Bankers Life Ins. Co. v. Robbins,* 59 Nebr., 170; *Broadwater v. Foxworthy,* 57 Nebr., 406.

The district court, on the day the motion for a new trial was overruled, entered an order finding there was due the plaintiff from the defendant a reasonable attorney's fee in the case in the sum of $150, and taxed this amount as part of the costs. This order was made under the authority of section 45, chapter 43, Compiled Statutes, which provided: "The court upon rendering judgment against an insurance company upon any such policy of insurance shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs." A very able and exhaustive argument has been made by counsel for defendant, assailing this section of the law as unconstitutional, and to the mind of the writer, at least, the argument seems to be founded upon good reason. The question, however, can hardly be said to be an open one in this state. The precise question has been decided by this court and many of the authorities cited in the brief of defendant were considered and reviewed by the court. *Lancashire Ins. Co. v. Bush,* 60 Nebr., 116, in which Judge SULLIVAN, referring to the decisions of our own court, says: "These decisions are vigorously attacked, but we are convinced, as the result of further investigation of the subject, that they are sound and should be adhered to. There is nothing in the constitution of the United States, or of this state, which forbids classification of subjects for the purpose of legislation. *Barbier v. Connolly,* 113 U. S., 27 [5 Sup. Ct. Rep., 357, 28 L. Ed., 923]; *Atchison, T. & S. F. R. Co. v. Matthews,* 174 U. S. 96 [19 Sup. Ct. Rep., 609, 43 L. Ed., 909]; *State v.*

Farmers & Merchants Irrigation Co., 59 Nebr., 1. * * * The legislature was, we think, within its constitutional power in selecting this class of insurance companies from all other litigants, and subjecting them, if unsuccessful, to the payment of attorney's fees, because experience and observation had shown that the defenses upon which they generally rely, are without merit and constructed out of some of the forfeiture clauses with which their policies are thronged. The law in question was designed to repress an evil practice, to advance public interest and promote justice. It was an exercise of legislative power justified by considerations of public policy. Similar statutes have been held valid in other jurisdictions. *Kansas P. R. Co. v. Mower*, 16 Kan., 573; *Atchison, T. & S. F. R. Co. v. Matthews*, 58 Kan., 447 [49 Pac. Rep., 602]; *Peoria, D. & E. R. Co. v. Duggan*, 109 Ill., 537; *Perkins v. St. Louis, I. M. & S. R. Co.*, 103 Mo., 52 [15 S. W. Rep., 320]; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Ia., 312 [48 N. W. Rep., 98]; *Wortman v. Kleinschmidt*, 12 Mont., 316 [30 Pac. Rep., 280]; *Cameron v. Chicago, M. & St. P. R. Co.*, 63 Minn., 384 [65 N. W. Rep., 652]; *Vogel v. Pekoc*, 157 Ill., 339 [42 N. E. Rep., 386]." In numerous cases this court has sustained an allowance for attorney's fee as part of the costs under this statute. *Insurance Co. of North America v. Bachler*, 44 Nebr., 549; *Hanover Fire Ins. Co. v. Gustin*, 40 Nebr., 828; *American Fire Ins. Co. v. Landfare*, 56 Nebr., 482; *Hartford Fire Ins. Co. v. Corey*, 53 Nebr., 209; *German Ins. Co. v. Eddy*, 37 Nebr., 461; *Home Fire Ins. Co. v. Skoumal*, 51 Nebr., 655; *Home Fire Ins. Co. v. Weed*, 55 Nebr., 146.

It is therefore recommended that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

NOTE.—Attorney's fee as guardian *ad litem*. *Englebert v. Troxell*, 40 Nebr., 195. In a tax-foreclosure. *Merrill v. Jones*, 39 Nebr., 763; *Stege-*

man v. Faulkner, 42 Nebr., 53; *Adams v. Osgood*, 42 Nebr., 450; *Alexander v. Thacker*, 43 Nebr., 494; *Osgood v. Grant*, 44 Nebr., 350. Statutory provisions giving an attorney a lien on papers, etc., are merely declaratory of the common law. *Sayre v. Thompson*, 18 Nebr., 33. Charging and retaining lien. *Cones v. Brooks*, 60 Nebr., 698; *Hurlbert v. Brigham*, 56 Vt., 368, 372. In a suit by a client to recover money collected by an attorney, it was held to be the duty of the attorney to pay over as well as collect, and that by retaining the money he simply substituted one debtor for another, and was entitled to no compensation. *Bredin v. Kingland*, 4 Watts [Pa.], 420. Where fees are due an attorney for services rendered a person, who sues him for money collected and not paid over, such indebtedness will constitute a proper set-off against the plaintiff's demand. *Foster v. Jackson*, 8 Baxter [Tenn.], 433.—REPORTER.

CITIZENS STATE BANK OF WOOD RIVER V. THOMAS J. SMOUT ET AL.

FILED JUNE 19, 1901. No. 9,845.

Commissioner's opinion, Department No. 1.

1. **Married Woman:** COMMON LAW DISABILITY TO CONTRACT IN FORCE, EXCEPT WHERE STATUTE ABROGATES. The common law disability of a married woman to contract is in force in this state, except as abrogated by statute. *Grand Island Banking Co. v. Wright*, 53 Nebr., 574.

2. **Married Woman:** CONTRACTS: SEPARATE PROPERTY, TRADE OR BUSINESS. She may make contracts only in reference to her separate property, trade or business, or upon the faith and credit thereof, and with the intent on her part to thereby charge her separate estate. *Grand Island Banking Co. v. Wright, supra.*

3. ———: SIGNING NOTE: NO PRESUMPTION OF INTENTION TO BIND SEPARATE PROPERTY: BURDEN OF PROOF. When a married woman signs a note, there is no presumption that she intended thereby to fasten a liability upon her separate estate; but in an action on such note, where coverture is pleaded as a defense, and proved, the burden is upon the plaintiff to establish that it was made with reference to, and upon the credit of, her property, and with the intent to bind the same. *Grand Island Banking Co. v. Wright, supra.*

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

Othman A. Abbott, for plaintiff in error.

W. H. Platt, contra.

KIRKPATRICK, C.

This is an action brought by the plaintiff in error, the Citizens State Bank of Wood River, against Thomas J. Smout and Josephine Smout, his wife, in the district court of Hall county, on July 14, 1897. The petition filed was in the form usual upon promissory notes, and set out two notes for $1,000 and $800, respectively, signed by both defendants. Thomas J. Smout made default. Josephine Smout filed an answer, in which she admitted signing the notes set out in the petition, but pleaded coverture, and that she signed the notes as surety for her husband only; that she received no consideration whatever; did not sign the notes for the purpose or with the intention of binding her separate estate or property, and that said notes, or either of them, did not concern her separate property, trade or business, and that she did not sign them intending in any way to bind her separate estate. Judgment was entered in favor of the bank and against Thomas J. Smout, and in favor of the defendant, Josephine Smout, dismissing the case as to her with costs.

Two errors are particularly relied upon by plaintiff in error to obtain a reversal of the judgment of the trial court. In the trial of the cause, over the objections of plaintiff in error, the court permitted each of the defendants to testify to conversations had between them at the time Thomas J. Smout presented the notes in question to his wife Josephine, and asked her to sign them. The testimony discloses that at this time Thomas J. Smout was a director in the bank; that he was owing the bank for borrowed money, the amount represented by these two notes; that the bank examiner had been complaining that the bank held too much paper with only one name upon it, and the other officers of the bank asked Thomas J. Smout

to procure the signature of his wife to the notes, which he promised to do. The cashier of the bank made out the notes and gave them to Smout and asked him to procure his wife's signature to them. It seems clear that in performing this act Smout was acting for the bank. The bank, more than any one else, was interested in getting the additional signature on these notes, and for that purpose it constituted Thomas J. Smout its agent to get the additional signature. It follows, therefore, that the testimony given to conversations had between Smout and his wife regarding her signature to the notes is not open to the objection urged by plaintiff in error. But if this evidence had been objectionable, its admission would have been error without prejudice, because, under all the evidence in the case and the instructions of the court, but one verdict could properly have been returned.

Plaintiff next complains of the giving of instruction No. 6, which reads as follows: "You are instructed that in order [to] bind a married woman upon a note or contract entered into while the marriage relation subsists, it must be made with reference to or upon the faith and credit of her separate estate or business, or in relation to her separate estate, trade, or business, and you will determine whether Josephine Smout so signed the notes in question, and bring in your verdict accordingly." If this instruction is open to any objection, it is that it states the law more favorably to plaintiff than can be upheld. This being true, the bank is in no position to complain because it was given. Counsel for plaintiff in error complains of the decisions of this court construing what is known as the "Married Woman's Act," and admits that if the law is as frequently announced by this court, there was no error in the giving of the instruction complained of. The precise question involved has been so many times passed upon by this court that it would be of no advantage to reexamine the question. In the case of the *Grand Island Banking Company v. Wright*, 53 Nebr., 574, the present chief justice, in a very able opinion, after a careful exami-

nation of all previous decisions of this court, held that a married woman could only contract with reference to her separate property, trade or business, or upon the faith and credit thereof, and with the intent thereby to charge her separate estate. It was also said in that case that when a married woman signs a note, there was no presumption that she intended to fasten a liablity upon her separate estate, and that in an action on such note, where coverture was pleaded and proved, the burden was upon the plaintiff to establish that the note was made with reference to and upon the credit of her property and with the intent to bind the same. The question was again considered in the case of *Westervelt v. Baker,* 56 Nebr., 63, in an opinion by RAGAN, C. In that case, the learned commissioner, in discussing the presumption that arose by reason of a married woman signing a promissory note, said: "We have read and examined these cases heretofore, and have again studied them, and still we feel that our construction of the statute is correct. The court is divided as to the proper construction of this statute. It has several times been given the most careful consideration of which we are capable, and in *Grand Island Banking Co. v. Wright,* 53 Nebr., 574, will be found the views of the majority of the court, sustaining the construction which it has placed upon the statute, and the views of the members of the court who dissent from that construction. The construction there placed by the majority of the court upon the statute must be considered as closing the question." It follows, therefore, that, in the case at bar, the burden was upon the plaintiff bank to establish by a preponderance of the evidence that defendant Josephine Smout signed the notes, intending thereby to pledge her separate estate with their payment. Plaintiff bank wholly failed on the trial to introduce any evidence upon this question. The only evidence in the case was negative in character, and introduced by defendants, and from it the facts appear that the notes in controversy represented a pre-existing debt of the husband; that the wife signed as surety only, and

without the intention of charging her separate estate with the payment of the notes.

From what has been said it appears that the trial court could with propriety have instructed the jury to bring in a verdict in favor of the defendant, Josephine Smout. There being no error in the record, the judgment of the lower court should be affirmed.

DAY and HASTINGS, CC., concur.

By the Court: For the reasons given in the opinion the judgment of the lower court is

AFFIRMED.

UNION STOCK YARDS NATIONAL BANK v. THOMAS J. SMOUT ET AL.

FILED JUNE 19, 1901. No. 9,995.

Commissioner's opinion, Department No. 1.

1. **Homestead Once Occupied, Burden on Creditor to Show Abandonment.** It appearing from the evidence that the premises had been occupied by the debtor as a homestead, the burden is upon the execution creditor to show both removal therefrom and intentional abandonment.

2. **Homestead:** NOTICE TO SHERIFF: PROCEDURE OF CREDITOR. When the execution debtor notifies the sheriff that the premises about to be sold are his homestead, and claims the same as exempt before sale made, the creditor must proceed under section 5 *et seq.*, chapter 36, Compiled Statutes, 1899.

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

W. H. Thompson, for plaintiff in error.

W. H. Platt, contra.

KIRKPATRICK, C.

On December 2, 1896, plaintiff in error, the Union Stock Yards National Bank of South Omaha, which was plaintiff

below, and will be so designated herein, recovered a judgment against Thomas Smout, as principal, and David Barrick, as surety, on a prommissory note for the sum of $937.81. On August 11, 1897, an execution was issued on the judgment and a levy made upon certain lands in Hall county owned by the defendant Smout. After notice, this real estate was offered at public sale by the sheriff, on September 23, 1897, at 2 o'clock P. M. After said real estate had been offered, but before it had been sold, defendant Smout caused to be delivered to the sheriff a notice as follows:

"To George P. Dean, Esq., Sheriff of Hall County, State of Nebraska.—Take Notice: That the land you have levied on under execution in favor of the Union Stock Yards National Bank of South Omaha vs. Thomas J. Smout and David Barrick, to wit: west half of northwest quarter and west half of southwest quarter of section six (6) township nine (9) range eleven (11) west 6th P. M., and containing 160 acres, is claimed by me as my homestead and is not liable to seizure on an ordinary execution such as you hold in said case; that the said judgment was not rendered for mechanic's, laborer's wages or vendor's liens, nor upon any debt secured by mortgage on the premises; that I am a married man, the head of a family, consisting of a wife and child; that said land is mortgaged for the sum of $2,500.00 with interest at ten per cent., and that there is due on this mortgage $2,800.00; that said mortgage was executed for a valid loan long prior to the time of obtaining the said judgment on which you hold the execution, and I hereby notify you that the said homestead is exempt from said forced sale on said execution; that the said land does not exceed in value the above exemptions. You will therefore take due notice and govern yourself accordingly and as provided by law."

Notwithstanding this notice, by direction of counsel for plaintiff, the property was sold by the sheriff to plaintiff, for the sum of $10, it appearing from certificates of prior incumbrances in the hands of the sheriff that the interest

of Smout in the premises was of no value. Defendant Smout filed a motion to set aside this sale. Plaintiff asked for confirmation. At the request of plaintiff, and by agreement, the cause was set down for trial on a subsequent day, and trial had upon the motion to confirm the sale and objections thereto. After hearing the evidence, the trial court found that the premises sold were the homestead of Thomas Smout and wife, and that they were not subject to levy and sale upon execution, and the sale was vacated and set aside. From this judgment plaintiff prosecutes error to this court.

The petition in error contains a number of assignments, but presents but three questions: First, did the court err in overruling plaintiff's motion to strike from the files the objections filed by the defendant; second, did the court err in finding that the premises in controversy were the homestead of defendant Smout and his wife; and third, did the court err in refusing to confirm the sale? These questions will be considered in their order.

The grounds upon which plaintiff in error asked to have the objections to confirm action filed by the defendant stricken from the record are as follows: "That the same is redundant, irrelevant and immaterial." The exact point which plaintiff desired to present by this motion is not entirely clear; but from the discussion in the brief we take it that the point sought to be made is that the claim that the land was a homestead, in order to avail defendant, must have been made at the time the sheriff made the levy under the execution. Under the provisions of chapter 36 of the Compiled Statutes of 1899, entitled "Homesteads," a homestead of a head of a family to the extent of 160 acres of the value of $2,000 is exempt from sale upon execution, with certain exceptions not material here to be noticed. Section 5 of that act provides that when an execution is levied on such exempt land, the head of the family may notify the officer at the time of the making of the levy of what he regards as his homestead, with a description thereof, within the limits above described, and the remainder alone shall

be subject to such levy, except as otherwise provided in this chapter. It is claimed by virtue of the language of this section, as we understand counsel for plaintiff in error, that defendant Smout was required to notify the officer at the time the levy was made that he claimed the premises as exempt. The testimony in the case disclosed that defendant did not know of the levy until some time after it was made, and not until he saw a notice of the sale in a newspaper. So that in this particular case he could not well have notified the sheriff at the time of the levy that he claimed the property as exempt. However this may be, we are unwilling to say that under the terms of this statute the defendant who failed to notify the sheriff at the time of the levy would by reason of that fact be prevented from claiming his exemptions. It has been said by this court that property exempt as a homestead was not subject to sale under execution, and that a purchaser at such sale, as against the person residing upon the land at the time, obtained no title. *McHugh v. Smiley,* 17 Nebr., 626; *Schribar v. Platt,* 19 Nebr., 625; *Giles v. Miller,* 36 Nebr., 346. In the case at bar Smout delivered the notice to the sheriff before a sale was actually made, and there can be no doubt that this notice was given in time to protect the defendant in his exemptions. *Quigley v. McEvony,* 41 Nebr., 73; *Ard v. Pratt,* 60 Pac. Rep. [Kan.], 1048. All proceedings of the sheriff, after receiving notice that the property was claimed as exempt, were unlawful. The sheriff was an officer of the court, and it was the duty of the court to see that there was no abuse of its process; and where the sheriff had been notified of the exempt character of the property, and had wrongfully proceeded to sell it, it was the duty of the court to set such sale aside. It therefore follows that the first point made by the plaintiff in error can not be sustained.

It is next contended that the finding made by the trial court, that the premises levied upon were the homestead of Smout and wife, is not sustained by sufficient evidence. We have carefully considered the evidence introduced at

the trial, and are unable to find any merit in this contention. The testimony clearly establishes the fact that Smout and his wife had resided on, and had proved up on, this land under the laws of the United States. It was also undisputed that they had resided thereon for many years, and the testimony fails to show that they had ever abandoned their homestead right in the premises. It having been clearly established that defendant had resided upon this tract as a homestead for many years, the burden was upon plaintiff to show, not only that Smout had actually removed from the premises, but that it was his purpose to abandon the land as his homestead. *Eckman v. Scott,* 34 Nebr., 817; *Edwards v. Reid,* 39 Nebr., 645. The rule is well settled that removal from a homestead, and residing elsewhere for the purpose of business, health or pleasure, does not work an abandonment of the homestead, unless coupled with such removal is the intention not to return. *Mallard v. First Nat. Bank of North Platte,* 40 Nebr., 784; *Corey v. Schuster,* 44 Nebr., 269. Plaintiff failed to introduce testimony establishing or tending to establish abandonment of homestead. The finding of the trial court seems to be abundantly sustained by the evidence introduced upon this point, and will, therefore, not be disturbed.

The court having found that the land levied upon was exempt as a homestead, it was its duty to set the sale aside. We find no error in the proceedings of the trial court. It is therefore recommended that the order of the trial court vacating the sale be affirmed.

DAY and HASTINGS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the order of the district court is

AFFIRMED.

ADA JACKETT, APPELLANT, V. DANIEL C. BOWER ET AL., APPELLEES.

FILED JUNE 19, 1901. No. 10,026.

Commissioner's opinion, Department No. 1.

1. **Homestead:** VACATION OF SALE: COMPLAINT FOR FIRST TIME IN THIS COURT. Where the court, having jurisdiction of the subject-matter and of the parties, upon trial and without objection vacates a sale because the property sold was exempt, the execution creditor can not be heard to complain for the first time in this court that the question of exemptions can not properly be tried on confirmation of sale.

2. **United States Homestead:** NON-LIABILITY. Land acquired under the homestead laws of the United States is not liable for the debts of the patentee contracted before the issuance of the patent.

APPEAL from the district court for Deuel county. Heard below before GRIMES, J. *Affirmed.*

Hoagland & Hoagland, for appellant.

Wilcox & Halligan, contra.

KIRKPATRICK, C.

On the 23d day of March, 1896, Ada Jackett recovered a judgment in the district court of Deuel county against the defendants Daniel C. Bower and Olivia E. Bower, his wife, in the sum of $8,135.64. There was on that date also entered an order by the court directing the sheriff to sell as upon execution certain real estate, which it appears had been attached in the proceedings prior to the entry of judgment. A sale was thereafter duly made by the sheriff, and on February 15, 1897, the defendants Bower filed objections to the confirmation of sale, in which they said that the land sold was obtained from the United States under the homestead laws, and that the debt upon which judgment had been entered was contracted prior to the issuance of both the final receipt and the patent. The hearing upon the objections to confirmation of sale was, by agree-

ment of the parties, continued from time to time until November 15, 1897, at which date the district court found from the evidence, which had been previously introduced by the parties, that the defendants Bower had obtained title to the premises by virtue of the homestead laws of the United States, and that the indebtedness upon which judgment had been entered was contracted prior to the issuance of the patent. The court thereupon concluded that the land was not subject to sale upon execution on the judgment, and vacated and set aside the sale, from which judgment appellant, Ada Jackett, prosecutes appeal to this court.

Appellant, in her brief, sets out four grounds of complaint of the action of the trial court, which are in substance as follows: First, that the court had no jurisdiction upon confirmation of sale to hear and determine the question of exemptions; second, that defendant appellees were estopped from claiming the land as exempt, because of an agreement entered into to mortgage the land in controversy to secure the payment of the debt; third, that appellee Daniel C. Bower had fled the country prior to the recovery of the judgment, and had not returned, and that his brother, W. W. Bower, had no right or authority to employ counsel to resist the confirmation of sale; fourth, that the real estate was not exempt from sale under the homestead laws of the United States. The second and third questions presented will be first considered.

It appears from the evidence that Daniel C. Bower, at the time the indebtedness was contracted, purchased from appellant Ada Jackett a large amount of real estate and a great number of cattle, and in payment of the contract price was to execute a mortgage on the cattle and on the real estate purchased, and also upon the homestead in question. In some way, not made clear from the evidence, but probably on account of a mistake, the particular land in controversy in this action was omitted from the mortgage. Appellant seems to have foreclosed her mortgage upon all the land described in the mortgage without asking

the reformation of the instrument to cover the land in controversy. She afterwards instituted attachment proceedings, and caused a levy to be made upon this land. She seems to base her matter of estoppel solely upon the ground, as she claims, that the defendants Bower had agreed to execute a mortage on the land in controversy. In regard to this matter it is sufficient to say that neither under the pleadings nor the evidence in the case is the question of estoppel in any form presented. It therefore follows that the question can not be first considered here.

Upon the third point the evidence discloses that Daniel C. Bower left the country shortly before the attachment was served. He directed his brother, W. W. Bower, to take charge of all of the property, and look after and protect his interests, whatever they might be. This testimony was entirely undisputed, and was clearly sufficient to authorize W. W. Bower to institute the proceedings which it appears he has in this case.

Upon the fourth ground assigned by appellant,—that the land in controversy was not exempt from sale upon attachment,—it may be said that the evidence clearly establishes the fact that the indebtedness upon which the judgment was obtained was contracted, not only before the patent, but before the final receipt had been issued by the United States. The homestead law of the United States contains a provision in the language following: "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." (Revised Statutes, U. S., sec. 2296.) This court, in a uniform line of decisions, has held that land acquired from the United States under the homestead laws was not liable for the debts of the patentee contracted before the patent was issued. *Smith v. Schmitz,* 10 Nebr., 600; *Baldwin v. Boyd,* 18 Nebr., 444; *Brandhoefer v. Bain,* 45 Nebr., 781; *Duell v. Potter,* 51 Nebr., 241. There can be no doubt that this land was exempt from sale under attachment or execution issued on the judgment obtained by appellant.

This brings us to a consideration of the only remaining question in the case, and that is whether the district court properly vacated and set aside the sale. Counsel for appellant insists that upon the authority of the case of *Best v. Zutavern*, 53 Nebr., 619, the district court had no jurisdiction to consider the question of the exempt character of the land sold. Conceding that the case of *Best v. Zutavern* goes to the extent claimed by counsel for appellant, it does not control the determination of this case. When the objections to confirmation of sale were made, in which it was set up that the land was exempt from sale under the United States laws, appellant did not present to the district court the question here presented, that court did not have jurisdiction to try the case, and the question is first presented in this court. When the objections were filed, by agreement of the parties, the hearing on the confirmation was continued. It seems to have gone over one or more terms of court, and was not finally determined until November 15, 1897. The parties seem to have entered upon the trial without objection from either side. A number of witnesses were called, and their testimony taken, and certain affidavits read in evidence. The hearing having been had in the district court in the county where the land was situated, there can be no doubt that the district court had jurisdiction to try and determine the question presented, and appellant having gone to trial upon the question involved, introduced evidence, and submitted the question for determination with the hope of obtaining a confirmation of the sale, can not now be heard to complain in this court of an adverse decision. This rule finds support in the language of Mr. Justice MAXWELL, in the case of *McHugh v. Smiley*, 17 Nebr., 620, 625, following: "If the homestead was claimed by the party in possession before the sale was confirmed, and decided adversely to him, such adjudication probably would be conclusive upon him as a final determination." The court had jurisdiction of the subject-matter involved, and of the parties to the controversy, heard the evidence, and seems to have reached a cor-

rect conclusion. The sale being void, appellants could have acquired no rights under it, even if confirmed. It follows, therefore, that appellant was not prejudiced by the order of the district court in vacating and setting aside the sale.

We are unable to discover any error in the record, and it is therefore recommended that the order of the district court be affirmed.

DAY and HASTINGS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the order of the district court is

AFFIRMED.

ELISHA P. REYNOLDS, JR., V. TOUZALIN IMPROVEMENT COMPANY.

FILED JUNE 19, 1901. No. 9,715.

Commissioner's opinion, Department No. 2.

Injunction Will Lie to Prevent the Transfer of Stock in Case Stated. The transfer of shares of stock of a corporation may be enjoined at the suit of the owner when a bank of another state has wrongfully received the certificates of stock in pledge from one not the owner thereof, and not authorized to so pledge the same, and is attempting to have the stock transferred to the bank as the owner thereof upon the books of the corporation.

ERROR from the district court for Gage county. Tried below before STULL, J. *Reversed.*

Hazlett & Jack, for plaintiff in error.

A. D. McCandless, Samuel Rinaker and *Robert S. Bibb, contra.*

SEDGWICK, C.

Elisha P. Reynolds began this action in the district court for Gage county against the defendants, the Touzalin Improvement Company and Charles W. Robertson, its secretary, for an injunction enjoining them from registering and transferring to the Union National Bank of

Chicago, Illinois, certain shares of stock in the defendant company which the plaintiff claimed to own. The Union National Bank of Chicago, Illinois, filed a written request that it be allowed to intervene and plead to said action, which was allowed by the court; and the bank thereupon filed a general demurrer to the petition; the other defendants also filed a general demurrer. The court sustained these demurrers, and the plaintiff electing to stand upon his petition, judgment was rendered for the defendants, dismissing the cause, and the plaintiff has brought it here for review upon petition in error.

The petition alleges that the Touzalin Improvement Company is a corporation incorporated and existing under the laws of Nebraska, with its principal place of doing business in Wymore, Gage county, Nebraska, and that Charles W. Robertson is its secretary; that the plaintiff is a stockholder in said company and is the owner of the following shares of the capital stock in said company, viz.: Certificates Nos. 21, 22 and 23, which are dated July 18, 1893, and each certificate represents 100 shares, of the par value of $50 each, in the capital stock of said company; and that on or about November, 1893, W. P. Chapman, who at said time was a member of Chapman, Reynolds & Co., a copartnership of which the plaintiff was a member, without being authorized so to do, pledged said certificates of shares, which were the private property of this plaintiff, to the Union National Bank of Chicago, Illinois, as collateral security for money loaned by said bank to said firm. It then alleged that said bank claims to be the owner of the stock, having pretended to foreclose its lien thereon by sale, and that the sale was fraudulent and was done as a means of converting the shares of stock to the use of the bank, and that the bank then presented the certificates of shares to the defendant secretary and demanded that they be registered upon the books of the company; that the plaintiff filed an objection to said registry; and that the secretary will register and transfer the stock unless prevented by this injunction, and so great and irreparable in-

jury will be done to the plaintiff, and that the plaintiff has no adequate remedy at law.

1. It is insisted by the defendants that the allegations that the plaintiff is a stockholder in the company and the owner of the shares of stock in question, which are the private property of the plaintiff, and that Chapman pledged them to the bank without being authorized so to do, are not sufficient allegations to negative the right of Chapman to pledge the stock; but we do not see any merit in this contention. Certainly, if the plaintiff owned the stock and it was his private property and Chapman was not authorized to pledge it, he would have no right to do so. We think the allegations of the petition are sufficient in that regard.

2. It is further insisted that there is no allegation that the bank did not comply with the law in all things, and that there is not sufficient allegation of fact in the petition to show that there was any fraud practiced on the part of the bank; but this objection is not well taken. The plaintiff's right of action does not depend upon the question as to whether the bank acted fraudulently in the matter of its dealings with Chapman, and the allegations of fraud on the part of the bank, and other similar allegations, are of no importance in the petition, except so far as they tend to show the danger that exists that the plaintiff will lose his property unless he is granted relief in this action.

3. It is next insisted that the petition does not show that the plaintiff has no adequate remedy at law, or that the plaintiff will suffer any irreparable injury for want of the relief asked for; and it is suggested that an action for damages against the bank would afford the plaintiff adequate relief; but we do not so regard the case. The allegation is that a national bank of Chicago, Illinois, which of course must be a foreign corporation, has taken the stock in pledge, which would include a delivery of the certificates to the bank, and that the bank is claiming to be the owner and seeking to complete its possession and control over the stock represented by the certificates; and that

there is danger that the bank will succeed in so doing. A remedy which would involve permitting the bank to so complete its title in and control over the stock and then permit one to go to a foreign jurisdiction and bring an action against the bank for a conversion of the stock is not, we think, an adequate remedy.

The petition, therefore, states a cause of action entitling the plaintiff to relief, and the court erred in sustaining the demurrers thereto. It is therefore recommended that this cause be reversed and remanded.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

D. M. ALTER ET AL. V. STATE OF NEBRASKA, EX REL. KOUNTZE BROTHERS.

FILED JUNE 19, 1901. No. 11,886.

Commissioner's opinion, Department No. 2.

1. **Judgment Insufficient as to Part of Defendants Reversed as to Them.** There being no evidence to support the findings and judgment as to a part of the defendants, the judgment is reversed as to them.

2. **Municipal Corporation:** IRREGULAR JUDGMENT: BUT WILL RESIST COLLATERAL ATTACK. If suit is begun against a municipal corporation by filing petition and issuing and service of summons, it is irregular to enter a judgment against defendant without first entering its default. But judgment, when so entered, after answer day, upon the written stipulation of defendant's attorney, will not be void when collaterally attacked.

3. **Execution:** MANDAMUS. Section 482 of the Code applies to judgments against municipal corporations; but proceedings by mandamus, if in good faith, to compel a levy and collection of taxes to pay the judgment will be equivalent to issuing an execution on judgment against an individual.

4. **Dormant Judgment:** REVIVOR: QUERE. Whether levy and collection of taxes by the proper officers and paying the same upon

the judgment will prevent the same from becoming dormant, *quære.*

5. ———. If no tax is levied and no proceedings begun to compel such levy, a judgment against a municipal corporation will become dormant in five years.

6. ———: STATUTORY REVIVOR. After a judgment against a municipal corporation has become dormant the levy of a tax and payment on such judgment will not revive the same; the statutory method of revivor is exclusive.

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

Harrison & Pearne, W. P. McCreary and *W. F. Button,* for plaintiffs in error.

John M. Ragan, Reavis & Reavis and *A. Bowen, contra*

Argued orally by *W. P. McCreary* and *T. O. C. Harrison,* for plaintiffs; by *John M. Ragan, contra.*

SEDGWICK, C.

This action was begun in the district court of Adams county to procure a peremptory writ of mandamus to compel the levy and collection of taxes to pay a judgment which it was alleged, the relators had obtained against school district No. 34 of Adams county and school district No. 21 of Hall county. Upon trial in the district court there was a judgment awarding the peremptory writ as prayed. The action was against the chairman and supervisors, county clerk and county treasurer of Adams county, and also the chairman and supervisors, county clerk and treasurer of Hall county, and the defendants therein have brought the case here for review upon petition in error, the said officers of Hall county having united in a petition in error to reverse the judgment as against them, and the officers of Adams county having united in a separate petition in error to reverse the judgment as against them.

It is alleged in the petition for the writ that at the June

term, 1878, of the district court for Adams county the relators obtained a judgment against school district No. 34 of Adams county, Nebraska, and school district No. 21 of Hall county, Nebraska, for the sum of $1,258.98 and costs, with interest at ten per cent. per annum from that date; that both school districts were organized on the 12th day of April, 1873, and that permission was granted to these school districts respectively by the respective superintendents of public instruction of the two counties to join with each other for school purposes; and that the bonds were issued jointly by the two districts in pursuance of authority of the legal voters of both districts, but the bonds ran in the name of school district No. 34 alone; that said judgment was pronounced equally against both districts, describing the territory in both of them. The petition then describes the territory in both districts respectively, and alleges that the said judgment, "by its terms and the stipulation of the parties in open court, was made to run against all of the original territory comprised in both the school districts herein mentioned.

1. The defendant officers of Hall county insist that the decree, as against them, is not supported by the evidence. It will be observed that the petition for the writ shows that there were, at the time of issuing the bonds in question, two independent school districts, No. 34 and No. 21, and alleges that they have been authorized to unite in building a schoolhouse and issuing the bonds in payment therefor; and these and all other allegations of the relators tending to show that any territory of Hall county was included in district No. 34 at the time of the issuing of the bonds, or that school district No. 21 of Hall county was in any way connected with the issuing of the bonds, or liable therefor, are denied by the defendant officers of Hall county, and there was no proof on the trial tending to support these allegations, except the record of the proceedings of the district court in the former suit against district No. 34, from which it appears that one Bowen, attorney at law, acted for district No. 34, and as such attorney stipulated

that the judgment against that district should include and bind the territory of district No. 21, situated in Hall county. So that, even upon the theory of the relators, there is no foundation shown in the evidence offered in any way connecting any of the territory in district No. 21 of Hall county with district No. 34 of Adams county, and this judgment can not be sustained as to the officers of Hall county.

2. In behalf of the officers of Adams county it is insisted that the alleged judgment upon the bonds is void, because "it was entered upon confession of an attorney and no warrant of attorney for making such confession was produced at the time." This court has held that under our statutes a warrant of attorney is necessary to enter a judgment by confession against a corporation. *Howell v. Gilt Edge Mfg. Co.*, 32 Nebr., 627; *Chicago, B. & Q. R. Co. v. Hitchcock County*, 60 Nebr., 722, and *Fogg v. Ellis*, 61 Nebr., 829, decided at the present term of this court. But the judgment in question was not entered by confession. A petition was filed, summons regularly issued and served, and defendant was in default for answer. If there had been no stipulation between the parties, there still would have been no irregularity, except the omission to enter a formal default against the defendant. Such an irregularity would not render the judgment void. *Likes v. Wildish*, 27 Nebr., 151; *Smith v. Silvis*, 8 Nebr., 164.

3. It is also insisted that no execution was ever issued on said judgment, nor any other proceeding had to revive the same, and the judgment was, therefore, at the time of the commencement of these proceedings, dormant under section 482 of the Code. The statute no doubt applies to judgments against municipal corporations, as well as other judgments. *State v. School District*, 25 Nebr., 301. The statute makes no exception, and the court can make none; but our statute provides that no execution shall issue against municipal corporations, and the remedy by mandamus to compel a levy of taxes to pay the judgment against such corporations performs the office of an execu-

tion in ordinary cases. In *United States v. Township of Oswego,* 28 Fed. Rep., 55, it was held by Judge Brewer: "A writ of mandamus to enforce collection of judgment against a municipality on its bonds is in the nature of, and is legally equivalent to, the statutory writ of execution. The right to prosecute the writ for such a purpose is limited to the same period of time within which execution may be sued out on a judgment against individuals," which we think is the correct rule. Certainly a peremptory writ of mandamus will not be allowed to compel the levy of a tax to pay a dormant judgment. *State v. School District, supra.* But it is contended that upon the facts admitted by the defendant officers of Adams county, or established by the proof, the judgment in question was not dormant. The allegations so admitted by the officers of Adams county are: "That the judgment so obtained against the two districts aforesaid by its terms and the stipulation of the parties in open court, was made to run against all of the original territory comprised in both the school districts herein mentioned, and has been recognized by the inhabitants of both districts constantly from that time hitherto as binding on said territory, and each district has from time to time made divers payments on said judgment, the last being on the 17th of May, 1899; that in the year 1892, at the instance of the authorities of school district 34 the supervisors of said county levied a tax of forty mills on all the original territory comprised in school district 34 in Adams county, and that tax so levied was spread upon the tax books of said county and collected by the treasurer; * * * that after all of said tax had been paid and sometime in the month of January, 1894, and before the money had been applied on the judgment aforesaid divers taxpayers in the detached district aforesaid sued out an injunction against the treasurer of Adams county, restraining him from paying over the money so collected on the detached territory aforesaid and also restraining the plaintiff herein from doing anything toward enforcing its judgment against said detached territory; that on the

trial of said cause in the district court of Adams county, the temporary injunction theretofore issued was made perpetual by the judgment of said court, and thereupon said cause was removed by appeal to the supreme court by this relator, where upon consideration of the record of said cause the judgment of the court below was reversed and the action dismissed; that on or about the first day of July, 1899, at the annual meeting in school district 34, Adams county, and school district 21 of Hall county, it was voted that the joint indebtedness of said districts to this relator be reported to the several boards of supervisors of said counties with a view to levy a tax sufficient to pay what remains unpaid on said judgment which at this date amounts to about $1,800 inclusive of costs in the original action; that upon the receipt of said report of the indebtedness of the school districts aforesaid the several boards of supervisors at their next regular meeting which occurred about the 10th of August, 1899, refused to levy the tax asked for and which was necessary to pay the remaining indebtedness to this relator on the judgment and the bonds aforesaid."

The findings of the trial court, that school districts No. 34 and No. 21 constituted, and still continue, one district, known as school district No. 34, for all school purposes, and that all of the inhabitants of both districts participated in the issue of the bonds to build a schoolhouse, are not supported by the petition or evidence, nor is the finding that both districts "have constantly recognized said judgment as valid and subsisting and have voted and levied taxes on said combined districts from year to year, thereby raising money to pay on said judgment and the interest accruing thereon by its terms." The evidence and stipulation between the relator and tax-levying body of Adams county show that about $2,000 has been paid on the judgment. The deputy clerk of the district court was sworn as a witness and presented a paper, which he testified was a list of the dates and payments that he had taken from the ledgers, and that one item of $500 on the list was placed

there at the instance and request of Mr. Reavis, attorney for the plaintiff. This paper was then offered in evidence and was objected to by the defendant officers of Adams county as incompetent. The objection was overruled and exception taken. In the petition in error of the defendant officers of Adams county the receiving of this paper in evidence is not assigned as error; so that the question of its competency is not now raised. The first item thereon is "Jan., 21, 1882, by W. S. Crow, Co. Treas., Ledger 1, page 13, 5, 12." There are similar items dated in each subsequent year consecutively to and including the year 1896, except the years 1884, 1885, 1888, 1889, 1894 and 1895, and a memorandum made in 1899, "admit by Reavis, $500.00." No other evidence was offered as to the assessment or levy of tax, or the action of either district or the inhabitants thereof, or the dates or amounts of payments or by whom and how paid. It seems that ordinarily payments made upon a judgment will not prevent its becoming dormant. *Stanley v. McWhorter,* 1 S. E. Rep. [Ga.], 260. In *Godman v. Boggs,* 12 Nebr., 13, this court, quoting from *Kelley v. Vincent,* 8 Ohio St., 418, said: "Taking a writ of execution from the clerk's office by the judgment creditor or his attorney, and returning the same to the clerk, without delivering to the sheriff, is not suing out on execution within the meaning of the statute." The supreme court of Ohio, in the case cited, further said: "Having the writ of execution delivered to the officer, attended with the usual effort to make service and return thereon by him, affords a reasonable public claim, on the part of the plaintiff, that the judgment remains in full force, which would be wanting, by dispensing with the writ being issued to the sheriff." And it seems reasonable that by analogy, in order to prevent the running of the statute upon judgments against municipal corporations, the application for the writ of mandamus must be with the intention in good faith to obtain the writ and procure the assessment and levy of the necessary tax thereunder. If the proceedings were abandoned as soon as the writ was allowed, it may well

be doubted whether the running of the statute would be prevented. It might be considered that the levy of the tax would correspond to the levy of the writ on judgments against individuals; but while no levy can be had under ordinary judgments without the formal issuing and delivery of the execution, this is not true in the case of judgments against municipal corporations; and in such case, where the proper officers proceed and levy the tax, as their duty would require them to do, there may be reason to suppose that such levy will take the place of the levy of an execution, including the issuing and delivery of the same upon ordinary judgments; and if so, it would follow that where the proper authorities levy the necessary tax for the purpose of paying a judgment against a municipal corporation, and the same is collected and actually paid upon the judgment, this would be equivalent to the issuing of an execution upon an ordinary judgment within the meaning of section 482. But such a construction of the statute would not be decisive of this case. Issuing an execution upon a dormant judgment, even though the execution should be actually levied and a sale of the property made thereunder, will not revive the judgment; nor would the levy of a tax and the collection and payment of the same upon a dormant judgment against a municipal corporation revive the judgment. The statute provides a method of reviving dormant judgments, and it is exclusive. To levy a tax to pay a dormant judgment would be a violation of duty on the part of the officers so levying it. *State v. School District, supra.* There is no allegation in the petition for the writ in this case that any tax was levied for this judgment, nor any mandamus allowed or asked for, until 1892, nearly fourteen years after the date of the judgment. The judgment was, therefore, dormant, and the subsequent levy and other proceedings alleged in the petition would not revive the same. It follows that the relators were not entitled to the writ against the defendant officers of Adams county.

It is therefore recommended that this judgment be reversed and cause dismissed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed and the cause dismissed.

REVERSED.

EZRA S. ABBOTT ET AL. V. HAMILTON J. COATES.

FILED JUNE 19, 1901. No. 9,913.

Commissioner's opinion, Department No. 2.

1. **Purchaser at Judicial Sale:** EJECTMENT: FORCIBLE ENTRY AND DETAINER. The grantee in a sheriff's deed executed on a confirmation of sale, in a proceeding to foreclose a tax lien, may maintain ejectment against an adverse claimant to the lands described therein; the proceeding by forcible entry and detainer being a cumulative and not an exclusive remedy for such relief.

2. **Description in Sheriff's Deed.** The office of a description in a sheriff's deed is not to identify lands, but to provide the means of identification, and it is sufficent when this is done.

3. ———: EVIDENCE ALIUNDE. Extrinsic evidence is admissible to locate lands conveyed by a sheriff's deed containing an accurate but general description.

4. **Ejectment:** STRENGTH OF PLAINTIFF'S TITLE. Plaintiff in an action of ejectment must rely for a recovery on the strength of his own title and not on the want of title in his adversary.

5. **Sheriff's Deed.** Where the plaintiff's claim of title is founded on a sheriff's deed made on an order of sale, in a proceeding to foreclose a tax lien, and the decree and order of sale are introduced in evidence to supplement such sheriff's deed, the decree and order of sale will control the description of the property to be sold; and where such decree and order of sale excepts certain lots in a block, but the sheriff's deed conveys the entire block, *held* that as to the lots specifically excepted in the decree and order of sale, such sheriff's deed conveys no title.

ERROR from the district court for Saline county. Tried below before HALL, J. *Reversed.*

Ezra S. Abbott, for himself, *W. H. Morris* and *Robert Ryan,* with him.

Hastings & Sands, contra.

Argued orally by *Robert Ryan* for plaintiffs in error, and by *Addison S. Tibbets* for defendant in error.

OLDHAM, C.

This was an action in ejectment instituted by the defendant in error, herein styled the plaintiff, against the plaintiffs in error, herein styled the defendants, to recover the possession of certain lots and blocks in Lane's First Addition to Pleasant Hill, in Saline county, Nebraska. Plaintiff claims title by virtue of a sheriff's deed executed and delivered to him on a decree and order of sale in a proceeding in the district court of Saline county, Nebraska, to foreclose tax liens on these lands. To this foreclosure proceeding defendants were both made parties and answered, setting up substantially the same defense which they have interposed in this action. No appeal or error proceedings were instituted to review this judgment. Plaintiff had judgment in the court below and defendants bring error.

Almost all the allegations of error relied on for a reversal of the judgment of the lower court are predicated on the proposition that the description, in the sheriff's deed of the plaintiff, is too vague and uncertain to convey any lands. This contention arises from the fact that no plat of the original town of Pleasant Hill was ever filed with the county clerk or register of deeds of Saline county, Nebraska, as provided by law. The plat of the addition in which the lots and blocks in controversy are situated was properly filed for record on August 4, 1871; but to locate these lands it was necessary for the trial court to

admit extrinsic evidence as to the location of the town of Pleasant Hill. This extrinsic evidence consisted of the notes of the county surveyor, who platted and surveyed the original town of Pleasant Hill; these notes being part of the public records of Saline county. The court also admitted in evidence a book called the "Irregular Tract Book," which contained a plat of the original town of Pleasant Hill made by the county surveyors of Saline county, which was preserved as a public record in the office of the register of deeds and county clerk in said county. Evidence was also admitted that for many years lots and blocks had been sold in Pleasant Hill from the plat made by the county surveyor and that taxes had been assessed on these lots and blocks from this Irregular Tract Book for over twenty years. Evidence was also introduced that the defendant had bought and sold lots both in the original town of Pleasant Hill and in the addition thereto. Now the question to be disposed of is, was this extrinsic evidence properly admissible for the purpose of aiding the description in the sheriff's deed?

It has been held that it is not necessary that a sheriff's deed should of itself describe lands so that they may be located by the deed alone, but it is sufficient if the description contained in such deed furnishes the means by which the lands can be definitely located. This doctrine of the construction of a deed received the unqualified approval of this court in an able and exhaustive opinion written by NORVAL, J., in the case of *Hubermann v. Evans,* 46 Nebr., 784, 65 N. W. Rep., 1045. It has also been held that extrinsic evidence is admissible to locate lands conveyed by a sheriff's deed containing an accurate but general description. *Works v. State,* 22 N. E. Rep. [Ind.], 127. *Rucker v. Steelman,* 73 Ind., 396; *Smith v. Crosby,* 86 Tex., 15, 23 S. W. Rep., 10; *Brown v. Warren,* 16 Nev., 228; *Ward v. Saunders,* 6 Ired. [N. Car.], 382. As these authorities seem to sustain the action of the trial court in admitting extrinsic evidence, the next question which follows is as to the competency of the evidence actually

admitted. On this question we think that the action of the trial court is fully sustained by the holding of this court in the case of *Roads v. Estabrook*, 35 Nebr., 297, 303. In this case, as also in the earlier case of *Bryant v. Estabrook*, 16 Nebr., 217, 223, it was held that for the purpose of enforcing the collection of tax liens it was not necessary that a plat of an addition to a city or village should be legally recorded; and in *Roads v. Estabrook, supra*, evidence of the exact nature of that admitted in the case at bar was received with approval.

Defendants contend that the decision in this case is governed by the decision in the case of *Lane v. Abbott*, 23 Nebr., 489. That case was a suit in ejectment instituted by Lane against this defendant to recover the possession of all or a part of the lots now in controversy. Lane claimed title by deeds from owners of the different lots in the addition which he had received subsequent to the deed which he had executed to Abbott for the entire quarter-section in which this addition was located. Abbott had judgment below, and this judgment was affirmed because Lane had failed to establish with certainty the location of Pleasant Hill. It was said in the opinion that "there is not sufficient proof of the exact location of the 'walnut stake' in the surveyor's certificate, from which the location of the plat of the addition could be established." But in the case at bar the location of this "stake" was definitely established by the testimony of the witness Castor, who made the survey. Again, it is plain from a review of that case that the Irregular Tract Book was not introduced in evidence, as in the case at bar. And again, in this case plaintiff, by his purchase at the sale in the foreclosure proceedings, to which defendants were parties, acquired all the title of the defendants to the lands involved in that suit. *Carson v. Dundas*, 39 Nebr., 503. *Merriam v. Goodlett*, 36 Nebr., 384; *Buchanan v. Griggs*, 18 Nebr., 121, 130. It therefore follows that the issues in this suit are in nowise determined by the judgment in *Lane v. Abbott, supra.*

The contention is urged that plaintiff had mistaken his remedy in bringing ejectment in this suit and in not proceeding under section 1020 of the Code of Civil Procedure, by an action of forcible entry and detainer. It can hardly be possible that this contention is seriously relied upon, as it has long been held that where the holder of the legal title to real estate is dispossessed, his proper remedy is by ejectment. *Gregory v. Lancaster County Bank,* 16 Nebr., 411. While section 1020 of the Code would have permitted plaintiff in this case to proceed by forcible entry and detainer, yet such provision is plainly a cumulative and not an exclusive remedy.

There is one contention, however, of counsel for the defendants with which we agree, and that is that there is not sufficient evidence to sustain the judgment with reference to lots 3 and 4 in block 9 of the addition. The decree and order of sale on which the sheriff's deed was based were offered in evidence to supplement the deed. It is a well defined rule that the sale must be according to the decree. *Nebraska Loan & Trust Co. v. Hamer,* 40 Nebr., 281. *Tootle v. White,* 4 Nebr., 401. The decree and order of sale directed the appraisal and sale of all of block 9, except lots 3 and 4, while the deed purports to convey all of block 9, and by the verdict of the jury and the judgment of the court below the plaintiff recovered all of block 9. Hence the judgment of the lower court, so far as lots 3 and 4 in said block are concerned, is wholly unsupported by the evidence. Jones, Mortgages [4th ed.], sec. 655 and cases cited. This was an error that probably crept into the proceedings without the attention of the trial court having been specifically called to it, and as section 594 of the Code of Civil Procedure provides that "When a judgment or final order shall be reversed either in whole or in part, in the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment," it is recommended that this cause be remanded to the court below with directions to render judg-

ment for plaintiff for all the lands described in his petition except lots 3 and 4, in block 9, in Lane's First Addition to Pleasant Hill, Saline county, Nebraska.

SEDGWICK and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed and the cause remanded to the court below with instructions to render judgment for plaintiff for all the lands described in his petition, except lots 3 and 4, in block 9, in Lane's First Addition to Pleasant Hill, Saline county, Nebraska.

REVERSED AND REMANDED.

ULRICH LIONBERGER, APPELLANT, V. GEORGE H. PELTON ET AL., APPELLEES.

FILED JUNE 19, 1901. No. 11,805.

Commissioner's opinion, Department No. 2.

Injunction Will Not Lie to Restrain Opening of Road Merely Because Appeal Is Pending, on Damages. When a board of county commissioners have established a section-line road and have made an award of damages to the claimants for damages by reason of the opening of such road, and the amount of the damages so awarded has been paid by the petitioners into the road fund of the district in which such highway is located, and such sum has been tendered to the claimants, and the claimants have refused to accept such damages and have appealed from the award so made, injunction will not lie at the suit of such claimants to restrain the opening of such road.

APPEAL from the district court for Pawnee county. Heard below before LETTON, J. *Affirmed.*

E. L. Fulton and *Ernest O. Kretsinger,* for appellant.

J. C. Dort and *D. D. Davis, contra.*

OLDHAM, C.

This is an action in which the plaintiff seeks to enjoin the board of county commissioners of Pawnee county from proceeding to open a section-line road which had been duly established by such board. The plaintiff was a remonstrator against the location of such road, and was also a claimant for damages. No question is raised as to the regularity of the proceedings of the board in establishing the road, nor could any such objections be raised by the plaintiff, in view of the fact that he filed his claim for damages. *Davis v. Boone County,* 28 Nebr., 837. It appears from the agreed statement of fact on which the cause was tried below that the plaintiff herein had filed a claim for $175 damages by reason of the opening of the road, and that another claim for $200 damages had also been filed. It also appeared that the board allowed the claimants $37.50 each and that the petitioners paid the amount of damages so allowed, and that the amount so paid had been tendered to the claimants for damages before the road was ordered to be opened. It also appeared that the claimants for damages had refused the amount tendered them and had taken an appeal from the award of damages, and that this appeal was pending when this suit was begun. The lower court found for the defendants and dismissed plaintiff's petition, and plaintiff appeals.

Plaintiff's only contention seems to be that at the time the award of damages was made the amount of the award was in excess of the levy made and the funds on hand in the road district, and hence it had the effect of creating an illegal indebtedness on the district and was therefore void. This position is clearly untenable, in view of the fact that the damages awarded by the board were directed to be paid by the petitioners before the road was opened, and in fact were paid and tendered to both claimants for damages; consequently no indebtedness was incurred upon the road district. The judgment of the lower court was clearly in harmony with the decisions of this court on all the ques-

tions involved in the controversy. *Rose v. Washington County,* 42 Nebr., 1; *Howard v. Board of Supervisors of Clay County,* 54 Nebr., 443.

It is therefore recommended that the judgment of the lower court be affirmed.

SEDGWICK and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

C. A. SCHRANDT ET AL. V. W. E. YOUNG.

FILED JUNE 19, 1901. No. 9,585.

Commissioner's opinion, Department No. 2.

1. **Replevin Damages:** UNDER A GENERAL DENIAL DEFENDANT MAY PROVE AND RECOVER. A defendant in replevin under a general denial may prove and recover any items of damage properly allowable to him in such an action.

2. **Answer:** AFFIRMATIVE DEFENSES WITH GENERAL DENIAL: REMEDY, MOTION TO STRIKE, NOT TO REQUIRE SEPARATE STATEMENT. Where such defendant, in addition to a general denial, sets up in his answer a further paragraph containing a number of affirmative grounds of defense, the proper remedy of the plaintiff is by motion to strike out; and hence a motion to require the several defenses to be separately stated and numbered is properly overruled.

3. **Replevin Damages Must Be Incident to Contest.** The damages recovered in replevin must be connected with and incident to the contest over possession of the property.

4. **Withholding Property:** DAMAGES CAN NOT INCLUDE ANTICIPATED PROFITS. The damages for withholding the property which a defendant in replevin may recover under section 191*a* of the Code do not include damages for anticipated future profits under a contract by which he held the property in controversy, nor for failure to comply with subsequent oral modifications thereof, nor for misrepresentations inducing him to enter into the contract.

5. **Replevin:** MEASURE OF DAMAGES: INTEREST: USE OF PROPERTY. Interest is the ordinary measure of damages of the defendant

in replevin; but where the use of the property has a value which exceeds the interest, he may recover such value, and his right so to do does not depend upon return of the property.

6. ———: DAMAGES: RULE RESTRICTED. The rule announced in *Romberg v. Hughes*, 18 Nebr., 579, that damages for detention may only be had where there is a return of the property, should be restricted to damages for deterioration or depreciation after the taking.

7. **Transcript:** PRESUMPTION FROM CERTIFICATE OF CLERK: NATURE OF AMENDMENT: CERTIFICATE OF CLERK: SUGGESTION OF DIMINUTION. Where the record shows that pleadings were amended at the trial, but the nature of the amendment does not appear, the clerk's certificate that the transcript is full and complete creates a presumption that the pleadings as set forth contain the amendment. If such is not the fact, the party desiring to avail himself of the portion omitted should suggest diminution and procure a complete transcript.

8. **Verdict:** AGISTER'S LIEN. A verdict in replevin finding a special ownership in the defendant and fixing its value is sustained by evidence of an agister's lien for the sum so fixed.

9. **Agister's Lien.** One who receives a flock of sheep for care and pasturage, under an agreement whereby he is to receive a share of the wool and of the increase as his compensation, is within the purview of section 28, article 1, chapter 4, Compiled Statutes, creating an agister's lien for the "contract price."

10. **Provision in Contract Requiring Arbitration Will Not Be Enforced.** It is the settled law of this state that a provision in a contract requiring arbitration, whether of disputes arising under the contract generally or only of the amount of any loss or damages sustained by the parties thereto, will not be enforced; nor will refusal to arbitrate be available in an action growing out of the contract.

11. **Tender.** A tender, in order to be effectual, must be absolute and unconditional.

12. **Immaterial Testimony:** ADMISSION CURED BY INSTRUCTION. Where testimony as to immaterial matters is closely connected with, and not easily separated from, that of the same witness going to material and important issues, any error in admitting such testimony is cured by an instruction which clearly and explicitly directs the jury to ignore it and properly defines the issue to be tried.

13. **Cross-Examination.** Questions calling for evidence tending to show the improbability of, or to throw doubt upon, statements made in the examination in chief are proper upon cross-examination, especially where such statements were in the nature of expert opinions.

14. **Error Without Prejudice.** Error in rejecting evidence upon an issue that was afterwards fully proved in another way is without prejudice.

15. **Party Estopped by His Own Request.** A party who requests a trial court to give instructions framed upon a certain theory can not be heard to complain that the court gave other instructions proceeding upon the same theory.

ERROR from the district court for Sheridan county. Tried below before WESTOVER, J. *Affirmed upon filing of remittitur.*

Robert Lucas and *Albert W. Crites,* for plaintiffs in error.

W. W. Wood and *Stewart & Munger, contra.*

POUND, C.

This is an action of replevin involving some 536 sheep taken by the plaintiffs from the possession of the defendant, who held them under a written contract of agistment whereby he was to receive one-half of the increase after making good all losses and one half of the wool-clip, by way of compensation. The contract was for a term of three years, but at the end of the first year the plaintiffs, claiming that the defendant had failed to comply with the terms of the contract as to care, feed and protection of the sheep, so that a number had been lost and the others damaged, demanded possession, and on refusal instituted this suit. Upon trial, the jury found the right of possession to be in the defendant, found that he had a special ownership and interest of the value of $239.80, and assessed his damages by reason of the detention of the property by the plaintiffs at $400. Judgment was rendered accordingly, and the plaintiffs prosecute error to review this judgment and the proceedings on which it is based.

The defendant, in his answer, after a general denial, set up in a further paragraph the written contract between the parties and a number of affirmative defenses based thereon, claimed a special interest or ownership by way of agister's lien for $292, the value of his agreed compensation up to

the time the sheep were taken, and damages in the sum of $450, for the taking and detention, being the probable profit which would have accrued to him under the contract had it not been broken by plaintiffs' replevying the sheep. The plaintiffs moved the court to require the defendant to separately state and number the several defenses set up in this second paragraph, and error is assigned in that the trial court overruled such motion. We do not think that this ruling was either prejudicial or erroneous. The matters set up in the second paragraph were mere surplusage, as the defendant might have proved every available defense therein pleaded and recovered every item of damage properly allowable to him for the detention of the property under his general denial. *School District v. Shoemaker,* 5 Nebr., 36. Obviously the more particular statement was not prejudicial. But counsel say there were matters pleaded which were not properly triable and damages claimed which were not recoverable, and that if separate statements had been required these might have been eliminated. Such course was not necessary. The whole of the second paragraph was superfluous and redundant. Plaintiffs' remedy was not by a motion for an order to separately state and number, but by motion to strike out. There was nothing to prevent their reaching any part or all of the paragraph in question without separate statements. *Aultman, Miller & Co. v. Stichler,* 21 Nebr., 72. A more serious question arises, however, upon the rulings on evidence, instructions, and verdict as to these damages. All of the assignments of error upon these points may be considered together, as they present the same questions, namely: what is included in the damages for detention recoverable by a successful defendant in replevin; whether he can recover more than interest on the value, or alternatively the value of use of the property, and deterioration or depreciation between the date of taking and the trial; and whether any distinction with respect to the recovery of the value of use of the property must be made, dependent upon return or failure to return.

This court has heretofore remarked that the measure of damage in actions of replevin "has been the occasion of much controversy and diversity of opinion." *Teel v. Miles*, 51 Nebr., 542. In the action of replevin originally no damages were recoverable by the defendant. The right to damages arises from the provisions of statutes, which differ considerably in the several states in essential particulars. Hence we must look primarily to the provisions of the statutes to ascertain the limits of such right. Section 191 of the Code of Civil Procedure says that when the jury find for the defendant they shall find whether he had the ownership or the right of possession only, and shall award him such damages as "they think right and proper," for which judgment shall be rendered. Section 191*a* provides that the judgment mentioned in the prior section shall be for the return of the property, or, if return can not be had, for the value or value of possession, "and for damages for withholding said property." In other words, the damages allowed are for the withholding or detention of the property, not all damages generally which may be connected with the subject in dispute or grow out of the relations of the several parties to each other or to the property. They must arise from, and be incident to, the contest over possession of the property; and unless they do so arise, are not recoverable merely because connected with the transaction by reason or virtue of which the plaintiff's alleged right of taking possession accrued. It is true that in *Schars v. Barnd*, 27 Nebr., 94, a plaintiff who replevied a stock of goods from a sheriff was allowed to recover damages resulting from the closing of his store under the levy. But this was as part of his damages for the withholding of the stock after levy and until retaken in replevin. During that time, as a result of the withholding of the stock, the store remained closed, and such damages represented the value of the use of the stock to the plaintiff during the time it was withheld, which obviously might be more than the probable net income during the days the sheriff was in charge. That decision does not extend the

statutory recovery of damages for the withholding or detention to other damages not connected with the detention of the property but depending upon the effect of the replevin proceedings upon collateral undertakings or obligations not immediately connected with the controversy over possession of the property. The replevin action is primarily to adjudicate the possession of the property. Other rights and claims must be determined, as a general rule, in other appropriate proceedings, even though closely connected with the controversy out of which the contest over possession arises. *Gillespie v. Brown,* 16 Nebr., 457. For the same reasons, damages not connected with the respective rights of the parties to possession, such as injury to other property occasioned by the removal of that in controversy, are not recoverable. *Dietrichs v. Lincoln & N. W. R. Co.,* 13 Nebr., 43, 47; *Jameson v. Kent,* 42 Nebr., 412.

What, then, is the measure of damage for detention? Ordinarily it is interest upon the value of the property. *Hooker v. Hammill,* 7 Nebr., 231; *Hainer v. Lee,* 12 Nebr., 452; *Dodge v. Runels,* 20 Nebr., 33. But where the use of the property is valuable, the value of the use may and often does considerably exceed the lawful rate of interest. In such case interest does not afford adequate compensation, and, accordingly, it is well settled that the value of the use, where use has a special value above and in excess of interest, is recoverable as damages for detention, and is the measure thereof, instead of interest. *Boston Loan Co. v. Myers,* 143 Mass., 446; *Williams v. Wood,* 61 Minn., 194, 63 N. W. Rep., 492; *Nash v. Larson,* 83 N. W. Rep. [Minn.], 451; *Burt v. Burt,* 41 Mich., 82; Shinn, Replevin, sec. 646. Another kind of damage which may properly be allowed to a defendant arises from change in the value or condition of the property while withheld from him. In this state the value of the property is fixed with reference to the time when it was taken under the writ. *Heidiman-Benoist Saddlery Co. v. Schott,* 59 Nebr., 20. If the property is injured or deteriorates in value after it is taken, a return does not

make the defendant whole, because he does not get it in the condition in which it was, and, in order to be fully restored to his former position, he ought to have the difference in value as damages. This is universally recognized, and such deterioration is considered a proper element of damage. *Hooker v. Hammill,* 7 Nebr., 231; Shinn, Replevin, sec. 648. But such damages are allowed upon the theory that the defendant is getting back the property in a damaged or deteriorated condition, or that it is less valuable than when taken from him. If the property is not returned, and the defendant recovers its value at the time it was taken instead, he is fully compensated, and should not be awarded in addition damages for deterioration, meant only to make up deficiencies in the property as returned. Hence it is held properly that damages for deterioration are only recoverable where the property is returned, and may not be had, along with the value at the time of taking, in case no return is made. A difficulty arises in this state, however, in view of prior decisions of this court, to the effect that damages for detention generally, and not merely those assessed to cover deterioration and depreciation, may not be recovered except where there is a return, and that where there is no return interest is the sole measure of damage. *Romberg v. Hughes,* 18 Nebr., 579; *Hale v. Wigton,* 20 Nebr., 83, 94; *Aultman, Miller & Co., v. Stichler,* 21 Nebr., 72, 79. In *Romberg v. Hughes, supra,* it is said: "It is only in cases where a return of the property is had that the party to whom the property is returned is entitled to damages for the detention. The rule allowing the value of the use is peculiar to replevin, and grows out of the fact that the party to whom the property is awarded seeks to recover the property itself, and not its value. In such case, when the property is returned, the party to whom the return is made is entitled to the damages awarded for the detention. If, however, a verdict is rendered for the value of the property, the action in that regard being one for damages only, the measure of damages is the value of the property as proved, together with law-

ful interest thereon from the date of the unlawful taking." In considering the application of the rule here laid down and the basis upon which it may rest, we must bear in mind that a considerable diversity exists in various jurisdictions both as to the time with reference to which value is to be fixed and as to the course to be taken by the defendant in claiming the property or merely its value. Such considerations must not be overlooked when seeking for precedents in other states. Where, as in some jurisdictions, the defendant may or must elect whether to claim return or to claim the value of the property so that the verdict may run one way or the other exclusively, there may be ground for saying that in the one case the proceeding is to recover the property itself, in the other, if he elects differently, the action, as to him, is for damages only. *Just v. Porter*, 64 Mich., 565, 31 N. W. Rep., 444; Shinn, Replevin, sec. 682, and note. With us, the election to return or to pay the value is left practically to the plaintiff. The statute requires an alternative judgment in every case where the defendant recovers, and there is nothing in the statute to make the recovery of damages for detention depend upon return or failure to return. As has been seen, however, there is sound reason for limiting the right to damages for deterioration or depreciation to the event of a return of the property. Unless the judgment conditions the recovery of such damages upon return, it obviously works an injustice to the plaintiff, in case for some reason he can not make return, and gives double compensation to the defendant. To this extent, and to the extent that it precludes the recovery of both interest and value of use, one being merely a substitute for the other, in case the latter is uncertain or not ascertainable, the rule announced in *Romberg v. Hughes* is sound and salutary. But when the rule goes further and makes the recovery of other damages for detention depend upon the return of the property, it works no less injustice to the defendant. If the value of the use exceeds the interest, it is unjust that the defendant, who was entitled to and deprived of the use, should be required

to take the interest only; and it is equally inequitable to allow the plaintiff, by merely paying the value of the property and the interest, to retain the difference between the interest and the value of the use of the property. Not only is the rule in *Romberg v. Hughes* one-sided, in so far as it goes beyond damages for depreciation or deterioration, but it would necessarily operate to prevent return of the property by making failure to return profitable. It has sometimes been laid down that such damages ought to be assessed as would insure return (Cobbey, Replevin, sec. 976), and, while damages ought to be assessed solely with a view to full and fair compensation, yet, if there is any policy in this connection, we think it should be in the direction of securing rather than preventing a return of the property. It is generally held that the defendant's right to recover damages for detention does not depend upon whether the property is or is not returned. "The return of the property only discharges the judgment for its 'value,' and does not affect the defendant's rights to damages for its detention." Shinn, Replevin, sec. 639; *Buckley v. Buckley,* 12 Nev., 423; *Haskins v. Everett,* 4 Sneed [Tenn.], 531; *Mayberry v. Cliffe,* 7 Cold. [Tenn.], 117. Except so far as it applies to damages for deterioration, the rule in *Romberg v. Hughes* is not required by, nor has it any support from, the statute or the authorities, and has been cited only to be received with doubt. *Minthon v. Lewis,* 78 Ia., 620, 43 N. W. Rep., 465. Nor is it sustained in a jurisdiction like ours, where the defendant is not required to elect whether to claim return or value, by the suggested analytical distinction between replevin and trover. The rule that a defendant who did not claim a return could not have damages was based on the older modes of pleading. Even then, however, he could have damages along with recovery of the value if he claimed the property. Wells, Replevin, secs. 522, 523. The object of the provision allowing the defendant damages for detention is to fully compensate him for the wrongful withholding of the property under the writ. The Code means that he shall be fully compensated when it

says that he shall have such damages as are right and proper, and, as has been said, he ought to recover "all damages which he has actually sustained by reason of the unlawful detention of the property in controversy." *Teel v. Miles,* 51 Nebr., 542. Value of the use of the property is a just and recognized element of such damages, and the right to it should not be made nugatory by limiting its recovery to the event of a return. Hence we think that *Romberg v. Hughes* should be limited, in its application, to damages for depreciation and deterioration, and that measure of the damages for detention recoverable by a defendant in replevin may be stated thus: He may recover, (1) if there is no special value attaching to use of the property, interest; (2) if the value of use of the property exceeds the interest, then such value, without regard to whether the property is returned, but, in such case, no interest; (3) if loss, deterioration or depreciation occur while the property is withheld, then the amount of such loss, damage or depreciation, to be conditioned, however, upon return of the property, the alternative judgment for the value being fixed as of the date of the taking. Moreover, the damages for detention must be such as grow out of the detention and are connected with or incident to the contest over possession. Judged by these standards, we do not think that the large judgment recovered by the defendant as damages for detention can be upheld. It was probably allowed by way of damages for future profits under the contract by which defendant held the sheep; but, as defendant's counsel admit, it may have been for this, for failure to replace certain old ewes with new ones, pursuant to an alleged oral arrangement, or for misrepresentations prior to the making of the contract. None of these grounds would justify assessment of damages for detention in an action of replevin. They are not damages for detention of the property at all. They arise out of collateral matters and are not incident to the dispute over possession. But we can not, for the reasons above stated, accede to the further contention of the plaintiffs that, since the record

shows that the property can not be returned, no damages for detention whatever are recoverable. Nothing is claimed by way of compensation for deterioration or loss, which alone would be affected by the impossibility of a return. The defendant must recover all his damages in this action. *Teel v. Miles,* 51 Nebr., 542. If interest is not a full compensation for such loss as he has suffered by reason of withholding of the property, he should not be restricted thereto. As but little time intervened between the taking and the trial, the damages under this head could not be large. Indeed, after a careful review of the testimony, we find no proof that during this time the use of the flock was of any ascertainable value to the defendant. At the same time, he ought not to be deprived of such damages, if any he can show, in case he elects to have a new trial. Otherwise, as the damages are assessed upon a wrong and inadmissible basis, in the absence of data from which to allow any special damages for detention to which he may be entitled, this court can only require a remittitur of all in excess of lawful interest from the date when the property was taken. Whether future profits reasonably to be anticipated under the contract might not be taken into consideration in determining the amount of defendant's interest by way of agister's lien, we need not consider, since the instructions and verdict do not proceed upon that idea, nor was the element in question considered or sought to be considered in that connection.

We have not overlooked in this connection an argument made on behalf of the defendant that since the record shows that by leave of court the answer was amended by interlineation at the trial, and the answer set forth in the record is merely stated to have been filed prior to the trial, there is no means of knowing what the amendments were, and they should be presumed to be sufficient to sustain the damages in question. The order allowing the interlineation does not specify its nature, but the clerk certifies that the transcript is full and complete and contains the answer of the defendant. This raises a presumption that it

contains the interlineation. *City of Topeka v. Dupree,* 8 Kan. App., 286, 55 Pac. Rep., 511. If it does not, defendant might and should have supplied the missing portions by suggestion of diminution. Moreover, due objection was made to the evidence, instructions and verdict with respect to these damages, and no additions or amendments which might have been made to the answer would have enabled the defendant to prove any items of damage which were not already provable under his general denial.

As the error in the assessment of damages is curable by remittitur, without a new trial, it becomes necessary to examine the other errors assigned. These relate to the form of the verdict, to rulings upon evidence, and to the charge of the court. The verdict finds the right of possession in the defendant, finds the value of the property, finds that the defendant has a special ownership and interest and the value thereof, and assesses damages for detention. The form is clearly unobjectionable, and the evidence showed an agister's lien for the agreed compensation under the contract, which is sufficient basis for the finding of special ownership. The repeated rulings of this court that proof of lien or special ownership will not support a finding of general ownership are not in point. True, the statute directs the jury to find whether the defendant has the right of property or the right of possession only. But as special property means right of possession coupled with a limited or qualified interest, the substance of the statutory requirement was complied with. Counsel contend, however, that an agister's lien existed only as to certain of the sheep subsequently delivered to be kept at an agreed price in money. The statute providing for an agister's lien does make use of the words "contract price," and the word "price" in ordinary parlance undoubtedly refers to money. But this is not controlling. Contracts like the one in question have always been considered agistment contracts equally with those where a money compensation was agreed on. *Bass v. Pierce,* 16 Barb. [N. Y.], 595. The reason of the law extends to all contracts of agistment,

whether for money or some other valuable consideration, and the words in the context, "procure, contract with or hire," indicate no intention to restrict the benefit of the statute to agisters for a money consideration. Moreover, the word "price" does not invariably refer to money, but may mean reward or compensation generally. In *Hudson Iron Co. v. Alger*, 54 N. Y., 173, the court said: "It is said further, that the words 'price' and 'vendee' used in the statute imply a sale for money. It is true that 'price' generally means the sum of money which an article is sold for; but this is simply because property is generally sold for money; not because the word has necessarily such a restricted meaning. * * * The Latin word from which price is derived, sometimes means 'reward,' 'value,' 'estimation,' 'equivalent,' and Webster shows that it is sometimes used in the same sense; and I can not doubt that it was used in this statute in the sense of 'value' or 'compensation.' There is just as much reason for applying the rule of the statute to this case as to one where the sale was for a money price; and it is right to assume that congress meant to apply the rule to every case wholly within the reason of the rule, unless the language used clearly forbids it." In an English statute the word "price" received a like construction in a connection very like that here in question. *London & Yorkshire Bank v. Belton*, 15 Q. B. Div. [Eng.], 457. It is no reason for denying the protection of the statute to this contract, that the compensation was to be made out of the wool and the increase of the flock, and not in money.

Error in the rulings upon evidence is assigned, in that the court excluded all evidence with reference to the arbitration clause in the contract and a demand by the plaintiffs for arbitration, and also rejected an offer to prove tender of the compensation due under the contract prior to suit. These rulings were correct. Whatever distinction may be made elsewhere between arbitration generally and arbitration as to damages only, it is well settled in this state that a provision in a contract requiring arbitration,

whether of all disputes arising under the contract, or only of the amount of loss or damage sustained by the parties thereto, will not be enforced, and that refusal to arbitrate is not available to the parties in an action growing out of the contract. *National Masonic Accident Ass'n v. Burr,* 44 Nebr., 256, 268. The alleged tender, which was in writing, was not an absolute and unconditional offer, and hence was ineffectual and rightly excluded. *Te Poel v. Shutt,* 57 Nebr., 592.

Other assignments relate to the admission of testimony with respect to statements and representations made to the defendant prior to the contract with reference to the kind and condition of the sheep that were to be delivered. This testimony appears to have been immaterial, and without correction by the trial court might have been prejudicial. But the court clearly and explicitly withdrew this testimony from the jury in the charge, and directed them not to consider any conversations or statements made prior to the contract, but to be governed solely by its terms. The advisability of admitting immaterial and possibly prejudicial matter and afterwards withdrawing it by instruction is open to grave doubt; but in the case at bar it was necessary to go into the kind, quality and condition of the sheep before they were taken by the defendant, since their condition at that time bore directly upon the causes of their condition at the time suit was brought, charged by plaintiffs to be due to improper care and handling by defendant. The immaterial testimony was so closely connected with and difficult to separate from testimony of the same witnesses going to material and important issues, that we think any error in its admission was cured by the instruction referred to. *American Fire Ins. Co. v. Landfare,* 56 Nebr., 482; *Darner v. Daggett,* 55 Nebr., 198. Complaint is also made that the court permitted one of the plaintiffs to be cross-examined as to losses in other flocks taken from the same original lot of sheep as those delivered to the defendant under his contract. The witness had given testimony tending to show that a large number

of the sheep were lost and that such losses were due to improper handling by defendant. His testimony was largely in the nature of expert opinion, as to which a considerable latitude upon cross-examination is always allowable. Whatever tended naturally to show the improbability of his conclusions or to throw doubt upon his statements in the examination-in-chief was admissible; and the fact that losses had occurred also in other flocks taken from the same original lot might tend to show that the original condition of the animals, which was a matter of dispute, was chargeable with all or a portion of the loss. The rejection of evidence tending to show that defendant mortgaged the sheep is the basis of another assignment of error. But the facts as to such mortgage were afterwards fully proved in another way, so that the error, if any, was without prejudice. *Missouri P. R. Co. v. Fox,* 60 Nebr., 531. Two further alleged errors in rulings on evidence remain to be considered. The rejection of evidence as to losses among the sheep replevied after they were taken under the writ was proper, because no offer was made to prove any connection between such subsequent losses and the defendant's care or want of care while he had possession. A large number of separate letters were offered and excluded, and the rulings on all of them are assigned as one error; several being palpably irrelevant, no question for review is raised as to the others.

The charge of the court, so far as it relates to the damages recoverable, has been considered already. Apart from its failure to define accurately what is meant by damages for detention, it is not open to criticism, and sufficiently covered the points raised in the instructions tendered by plaintiffs. The most serious of the errors assigned as to the instructions is that they do not make any distinction between the sheep delivered under the original contract and those subsequently delivered under distinct agreements of a different character. But the instructions requested by the plaintiffs are open to the same objection. No point seems to have been made in the instructions

offered as to the difference in the contracts under which the sheep were taken at various times, and hence the court committed no error in framing his instructions upon the same theory as that adopted by counsel in their requests. *American Fire Ins. Co. v. Landfare,* 56 Nebr., 482; *Missouri P. R. Co. v. Fox,* 60 Nebr., 531.

Misconduct of the jury is also charged, but review of the evidence satisfies us that the finding of the trial judge to the contrary was correct.

Apart from the assessment of excessive damages for detention, we find no prejudicial error. It is therefore recommended that in case the defendant, within thirty days from the filing hereof, remit all damages awarded him for detention of the property in controversy in excess of lawful interest upon the value of his interest from the date of the taking, the judgment be affirmed; otherwise, to be reversed and the cause remanded for a new trial.

SEDGWICK and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion it is hereby ordered that if the defendant, within thirty days from the filing hereof, remit all damages awarded him for detention of the property in controversy in excess of lawful interest upon the value of his interest from the date of the taking, the judgment be affirmed; otherwise, to be reversed and the cause remanded for a new trial.

JUDGMENT ACCORDINGLY.

NOTE.—Agister, agistor or, perhaps more properly, agistator, was the ancient official title of the guardian of the cattle pastured for a stipulated sum in the king's forest. He collected the money paid for them. Encyclopædic Dictionary. In the absence of any statute upon the subject, an agister's lien exists only in the absence of credit extended by the surrender of physical possession. *Grinnell v. Cook,* 3 Hill [N. Y.], 485, 492, 493, and authorities therein cited.—REPORTER.

FRED A. MILLER ET AL., APPELLEES, V. FITZ GERALD DRY-GOODS COMPANY ET AL., APPELLANTS.

FILED JUNE 19, 1901. No. 9,718.

Commissioner's opinion, Department No. 2.

1. **Lease of Part of Building.** A lease of a part of a building passes with it as incident thereto everything necessarily used with, or reasonably necessary to, the enjoyment of the part demised.
2. ———: EASEMENT: STAIRWAY: ENTRYWAY. Where rooms in the upper story of a building are leased to tenants for office purposes, a right, in the nature of an easement, to the use of the entryway and stairway leading to said upper story, by such tenants and those having business with them, arises by implication.
3. **Obstruction of Stairway, Entryway, Street or Sidewalk.** A tenant of the lower floor of such building has no right, either by reason of his lease, or by reason of authorization of the landlord, to obstruct such stairway or the entryway or street or sidewalk space immediately leading thereto, so as to prevent or impede access to such rooms on the upper floor.
4. **Nuisance: INJUNCTION.** Such obstruction or attempted obstruction, interfering with or impairing the easement of the tenants on the upper floor, is in the nature of a nuisance, and may be enjoined.
5. **Concealment of Sign.** Where by the terms of their tenancy such tenants upon the upper floors are given the privilege of using a portion of such building about or adjacent to the stairway for signs, a tenant of the lower floor has no right to cover up and conceal such signs either by virtue of his tenancy or by authority from the landlord.
6. **Vacating Decree: ABUSE OF DISCRETION: MISTAKE OF COUNSEL.** Where a cause is regularly set for trial and heard in its order, the district court does not abuse its discretion in refusing to set aside a decree rendered in the absence of one of the parties, upon a showing that counsel were present when the cause was set down for trial, but did not hear the court's announcement to that effect.

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

C. H. Bane and *Macfarland & Altschuler,* for appellants.

Stevens & Cochran, contra.

POUND, C.

This suit was brought by Miller and some sixteen others, tenants of office rooms on the second floor of a business and office building in the city of Lincoln, to enjoin the defendant, tenant of the ground floor, from erecting or maintaining certain show-cases and signs about and in front of portions of the stairway leading to the upper floors and the sides and faces of the columns on either side of the entry to such stairway. A decree was rendered perpetually enjoining the defendant from so doing, and the cause is here on appeal therefrom.

No bill of exceptions was preserved upon the main case, and we may take the facts found by the court to be undisputed. The court found that the sole means of access to the upper floor of said building from the street was by means of an entryway leading to the stairway in question and such stairway; that at the time the building was built sign-boards were placed upon the sides and faces of the columns on either side of such entryway abutting on the street in order to provide for the signs of tenants on the upper floors, and that by the terms of their tenancies the plaintiffs were using, and entitled to use, such sign-boards for that purpose. It was also found that the defendant, which was a tenant of the lower floor, had removed said sign-boards and was constructing certain show-cases or show-windows about said columns, extending into and occupying a portion of the entryway on each side and a portion of the sidewalk or street space in front of the stairway, and that such show-windows obstruct the entry and stairway and conceal and cover up the sides and faces of the columns used by plaintiffs for their signs. The decree enjoins the defendant from constructing or maintaining any such obstructions within the entryway or between the columns on either side thereof, or upon the sidewalk space immediately in front of the entryway or covering up the sides and faces of the columns.

Upon the facts as found, plaintiffs were clearly entitled

to an injunction. The lease of the office rooms on the upper floor included as incident thereto everything necessarily used with, or reasonably necessary to the use of, the offices leased. The case is not unlike that of a way of necessity. There was no means of access to the rooms except through the entryway and stairway, and an easement in the same for use by the plaintiffs and those having business with them was clearly implied from this circumstance and the obvious intent of the landlord in constructing the building as he did and leasing it as he did. Although a tenant may not acquire an easement against his landlord by prescription, the landlord may create easements in favor of the tenant, and in case of necessity they may be implied. Goddard, Easements [Am. ed.], 12, 14. Neither the landlord nor other tenants under him, either by virtue of their tenancy or under authority of the landlord, which was the claim of defendant in this case, had any right to obstruct the entryway or stairway so as to impede access to the rooms leased to plaintiffs; and any obstructions of that character, like any other interferences with easements, were nuisances and could be enjoined. *Spies v. Damm*, 54 How. Pr. [N. Y.], 293; *O'Neill v. Breese*, 3 Misc. Rep. [N. Y.], 219, 23 N. Y. Supp., 526. In *Spies v. Damm* a tenant of a basement was granted an injunction against a cotenant who occupied the floor above, restraining the latter from maintaining a show-case which covered and obstructed an iron grating in front of the building through which light and air were supplied to the basement. In *O'Neill v. Breese* it was held that a tenant of a basement lighted by a so-called floor-light had an easement in such floor-light by implication, and might enjoin any obstruction of such light by tenants of the floor above. It can make no difference that in this case the landlord attempted to give the defendant authority to maintain the obstructions. He had no right to interfere with the plaintiffs' easement, and could give none to others.

With reference to the signs, the case is no less clear. The sign-boards had been provided specially to hold these

signs, and the court found that the plaintiffs were using, and entitled to use, them by the terms of their tenancy. The right to maintain the signs necessarily implied and carried with it the right to have them remain reasonably visible to passers-by. Neither the landlord nor other tenants, with or without his authority, had any right to conceal and cover them up. *Snyder v. Hersberg,* 11 Phil. [Pa.], 200.

After decree, an application was made to set it aside and for a new trial, for the reason that the defendant was not represented at the hearing, through misapprehension of counsel as to the date of trial. This was not one of the statutory grounds for a new trial, but was an application addressed to the discretion of the court to control its judgments during the term at which they are rendered. *Bradley v. Slater,* 58 Nebr., 554. We think there was no abuse of discretion in denying the application. The cause was called and set for trial in open court and taken up in its regular order. Counsel were present when it was so called and set down, but failed to hear or misapprehended the announcement of the order made. The business of the courts must move, and counsel must take notice of orders duly made and entered. Moreover, the affidavits in support of the application do not disclose any ground for belief that the presence of defendant or its witnesses would have contributed to a different result. We recommend that the decree be affirmed.

OLDHAM and SEDGWICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

ROBERT H. BOGGS ET AL. V. IDA M. BOGGS.

FILED JUNE 19, 1901. No. 9,780

Commissioner's opinion, Department No. 2.

1. **Wills:** UNDUE INFLUENCE. Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own.

2. ———: ———: NATURE OF INFLUENCE. It may consist in constant pressure of importunity or persuasion, whereby the mind of the testator is not left free to act. But in such case there must be such a degree of urgent solicitation that, under the circumstances, and considering the testator's condition of mind and body, he was too weak to resist it and acted under constraint of fear, desire for peace, or some other motive than affection or an intelligent sense of duty.

3. **Husband and Wife.** Although in general confidential relations may raise strong suspicion of undue influence, this is not true to the same extent of the relation of husband and wife, where the relation has subsisted for a long time under circumstances which give rise to a strong legitimate influence and the disposition in question is not unjust or unnatural.

4. **Burden Upon Contestants.** The burden is upon the contestants to establish undue influence, and in so doing it is not enough to show that the circumstances attending execution of the will are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis.

5. **Taking Immaterial Issue from Jury.** It is not error to take from the jury an immaterial issue concerning which there is no sufficient evidence to sustain a verdict, even though there be a scintilla of evidence thereon which was admitted without objection.

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

John C. Cowin, Virgil O. Strickler and *J. A. Williams*, for plaintiffs in error:

George H. Boggs died on June 1, 1895, in the city of Omaha. He left surviving a wife, Ida M. Boggs, but no children. The plaintiffs in error are brothers, sisters,

nieces and nephews of the testator. On the 19th day of June, 1895, the proponent (defendant herein) offered for probate in the county court of Douglas county an instrument purporting to be the last will of said George H. Boggs, executed May 16, 1895. The matter was taken to the district court on appeal. The trial resulted in a verdict for proponent. The trial judge refused to hear argument on the motion for a new trial. The objectors bring the cause to this court for review. The objections to the proposed will were:

1. That it was made by Mr. Boggs at a time when he was so weakened and enfeebled by disease that he was mentally incapable of executing a valid will;

2. That the instrument was not in accord with his declared intention, made when he was in health, on repeated occasions as to the manner in which he intended to dispose of his property;

3. That Ida M. Boggs and her mother and father conspired with each other, and with divers other persons for the purpose of procuring the execution by Mr. Boggs of the will in question, so that Ida M. Boggs might obtain all of his property.

The evidence discloses that about the year 1870, George H. Boggs and his friend Lew W. Hill, both being young men and very poor, formed a partnership, and engaged in the real estate business in the city of Omaha. They both possessed more than ordinary business ability. The partnership continued for twenty-five years, and when they came to divide their property shortly before Mr. Boggs' death, it was found that each had accumulated about $400,000. The evidence discloses that for fifteen years prior to his death, George H. Boggs declared it to be his intention to bequeath one-half of his property to his wife and one-half to his brothers and sisters. It further appears that in 1886, when Mr. Boggs was in health, he wrote a will in his own hand, and executed it in the presence of his partner, Lew Hill, and his private secretary, Harry Westerfield, in which he bequeathed one-half of his property to

his wife and the remainder to his brothers and sisters. On the first day of March, 1893, just before Mr. Boggs went to the depot to leave Omaha, under medical advice, Mr. Connell went to the house with a typewritten will, which Mr. Boggs signed and immediately delivered to Mrs. Boggs. On the 16th day of May, twelve days after his return, Mr. Boggs executed the will in controversy. This was sixteen days before his death. The disease invaded the larynx and was eating out the vocal chords. He was scarcely able to utter an audible sound. The question then naturally arises as to why the will offered for probate was executed at all, since Mrs. Boggs already had in her possession one exactly like it, executed two years before. It is very easy to answer this inquiry. In these two years Mr. Boggs had been able to be about his office some. Mrs. Boggs had been desperately afraid that he had executed a will in accord with his declared intention. He had come back to Omaha to die. The first thing she did on her return to Omaha was to let her own mother and father come to her house, where they remained till after the will was executed, and then went to their own home in another part of the city. None of the brothers and sisters of George H. Boggs were permitted to see him in Omaha till after the will was executed.

Conspiracy is generally proved by circumstances. Although the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed, in terms, to have that design and to pursue it by common means. *Spies v. People,* 122 Ill., 1, 12 N. E. Rep., 865; 3 Greenleaf, Evidence, 83; *Mussel Slough Case,* 5 Fed. Rep., 680; *Sucker v. Finch,* 66 Wis., 17; Wharton, Criminal Law, 1398; Bishop, Criminal Procedure, 227.

Connell & Ives, contra:

That the testator, when he executed this will, was in the full and unimpaired enjoyment of every mental faculty can not be the subject of serious controversy. We have not

the slightest inclination to deny the promises made by the proponent to the testator at the time the will was executed. She said she would carry out his wishes as to caring for his relatives. What those wishes were, has now become wholly immaterial. Without exception they have repudiated the provisions made for them by the testator. They rejected the promises almost as soon as known. They gave her no chance to redeem her words or to demonstrate her good faith.

Influence, to vitiate a will, must be such as to amount to force and coercion, destroying the free agency of a testator, and there must be proof that the will was obtained by this coercion; and it must be shown that the circumstances of its execution are inconsistent with any hypothesis but undue influence, which can not be presumed, but must be proved, and in conjunction with the will and not with other things. *Latham v. Schaal,* 25 Nebr., 535; *Seebrock v. Fedawa,* 30 Nebr., 437; *Bradford v. Vinton,* 26 N. W. Rep. [Mich.], 401.

All questions of fact were submitted to the jury. In a case of conflicting evidence, this court will not disturb the verdict. *Whitcomb v. Thomas,* 47 Nebr., 909; *Wakefield v. Connor,* 225; *Lungren v. Crum,* 242; *State v. Spirk,* 337; *Galligher v. Wolf,* 589; *Buffalo County Bank v. Gilcrist,* 897, all in the same volume.

Argued orally by *John C. Cowin* and *Virgil O. Stickler,* for plaintiff in error; by *W. J. Connell, contra.*

POUND, C.

This is a petition in error to review a judgment of the district court of Douglas county, admitting to probate an instrument propounded as the last will and testament of George H. Boggs, deceased. A large number of exceptions were taken during the course of the trial, and numerous errors are assigned in this court. But the briefs and argument have been confined to the assignment that the verdict and judgment are contrary to the evidence, and to

one based on an instruction given by the court on its own motion. Three objections were made to the will, to the effect that the testator, at the time of its execution, was so weakened by disease that he was mentally incapable of executing a valid will; that the will propounded was not in accordance with his intentions, repeatedly declared when he was in health; and that it was procured through undue influence of the proponent, his wife, and conspiracy of the proponent and her father and mother to that end in order that she might obtain all the property. The principal contention of the contestants is that the will was procured by undue influence of Mrs. Boggs, at a time when her husband was greatly weakened by disease and substantially incapable of resistance, and, to pass upon this question, it has been necessary to review a very voluminous record in which all the testimony taken at a trial lasting nearly two weeks is set forth at large.

From the evidence it appears that George H. Boggs was the youngest of a family of ten, of whom three brothers and five sisters, the youngest about fifty and the oldest about seventy, were surviving at his death. These brothers and sisters, and the children of a deceased sister, are the contestants. George Boggs came to Omaha about 1866, and for many years was a mail clerk at a small salary. In 1872 he married the proponent, with whom he lived in Omaha until his death. At the time of his marriage he had saved about a thousand dollars, but afterwards he lost his position as a mail clerk, and, during the earlier years of his married life, was in poor circumstances, his wife doing her own housework for some five years. He seems to have been a business man of no little ability, and by fortunate investments, industry and saving, in which on one occasion, at least, he acknowledged that his wife was in part instrumental, he succeeded in the course of ten or fifteen years in amassing a fortune estimated at close to half a million. In 1886, when his fortune was at its maximum, he made a will, in which he left one-half of his estate absolutely to his wife, and the remainder, there being no chil-

dren, subject to $2,000, to his father, to his brothers and sisters equally. At about this time, and for several years immediately thereafter, he repeatedly told his brothers and sisters that it was his intention to leave them half of his property, and there can be no doubt that such was long his intention. But several events operated to alter his plans. His father died in 1891; in 1892 a period of financial depression set in, as a result of which his property shrank in value about one-half; and, somewhere about the end of 1892, it became apparent that he was affected with an incurable disease. At the time of his death he had tuberculosis of the larynx, his lungs were greatly affected, and he had a tuberculous sore upon his hand. There is some conflict in the medical testimony as to whether the disease began in his throat and worked downward or *vice versa*. At any rate it first became such as to create alarm about the end of 1892, and one physician testified that in 1894 his lungs were in fairly good condition and that apparently he then had only tuberculosis in the throat, though it was spreading downward. There is no doubt that in 1893 he was in every way in full mental vigor and that his will was not impaired at that time. But it would seem that he had expected that his wife would receive about $250,000 under his first will, and the great shrinkage in values, the death of his father, and the fact that he was compelled to leave the state for his health, evidently moved him to make a new will which would conform to his intentions with respect to his wife in view of altered conditions. Accordingly on March 1, 1893, he made a new will whereby he gave his home property, all his personal estate and one-half of the residue of his real estate to Mrs. Boggs absolutely, and the other half to his secretary in trust to pay the income thereof, or such part as she should require, to his wife during her life, and at her death to divide it, or such part as should remain and any accumulations of income, among his brothers and sisters. It also provided that upon the written request of his wife, the trustee should sell any of the property she might designate and otherwise invest the

proceeds, and gave her power to remove the trustee and appoint another and to fill any vacancy. This will was drawn by Mr. Connell, who had long been his attorney, and was witnessed by Mr. Connell and Mr. W. S. Poppleton, who happened to be at the house that day for the purpose of taking Mr. Boggs' deposition. It does not appear that Mrs. Boggs had anything to do with suggesting or procuring this will or any of its terms. She was not present when its terms were settled, when Mr. Boggs and Mr. Connell went over the draft, nor when it was executed. She testifies that she was busy packing his trunk at the time, and that when he came to her with the draft of the will just before he signed it and wanted her to read it, she told him that she was busy and that any way he wanted it would suit her. There is nothing to throw any suspicion upon this will, except that it does not do so well by his brothers and sisters as he had originally intended and that he continued to tell the latter that on his death they would be well provided for. But many circumstances indicate that he was solicitous that after his death his wife should live as she had for many years since he had acquired wealth, and that, while he wished to do what he might for his brothers and sisters, his first care was that his wife should have as near as might be all that would insure her complete independence and enable her to do everything that she desired. Hence he not only considerably increased the absolute gifts to her, but he provided also that the entire income of his estate should be at her disposal during her life, should she require it. From that date his health appears to have declined gradually with the progress of his disease, until early in 1895 he had partially lost the use of his vocal chords, had become weak and emaciated, and was substantially confined to his room. About this time he went to Chicago for treatment; but finding no relief, he returned to Omaha about the first of May, and died on the first of June. On May 16 he made the will in question. With respect to his mental capacity on that date there can be no serious question. The physicians who attended him, a

clergyman who called upon him regularly during his last days, the lawyer who took his instructions for and drew the will, and a member of the bar who called upon him four days before he died, concur in the statement that he was bright and clear mentally down to a day or two before death, and there is evidence that he gave intelligent and detailed directions as to the conduct of his business down to the last. One of the physicians testified, and it is a well known fact, that a tuberculous disease produces great weakness physically but not much mentally, and that consumptives are usually bright mentally to the end.

With respect to the claim that the will was procured to be made by undue influence on the part of Mrs. Boggs, it is to be observed, in the first place, that the testator was a man of unusual force and strength of will. All who came in contact with him, even the physicians who treated him in his last illness, remarked this, and at every turn in the record we see him positive, confident, and giving clear directions about his business in the manner of one who expects to be obeyed. It is true some of the contestants testify that he was accustomed to yield to his wife and even that he stood in some fear of her displeasure. But there is ample ground for thinking that this sprang from affection solely. It is not unlikely that both, having won their way in the world by industry and saving from comparative poverty, were self-reliant and determined. Nothing appears to indicate that a man as obstinate and pertinacious as he seems to have been was under the dominion of his wife's will, even when enfeebled by incurable disease. It is undoubtedly true that physical weakness more or less enfeebles the will. But it is in evidence that there was no observable waning of his mental powers till a day or two before he died, and the physician who attended him at the time the will was executed says that on that date he was just as able to resist importunity and entreaty as when well. In the next place, the evidence shows that Mrs. Boggs took no immediate part in the making of this will. She was not present when the testator gave the instruc-

tions for drawing it, when the draft was gone over by the testator and his lawyer, nor when the final draft was afterwards read over preparatory to execution. It appears that after he returned from Chicago, Mr. Boggs called for his will. He read it over and said he was going to make a new one. He sent for his secretary, gave him a memorandum of specific property which he desired to have given to his wife absolutely, and had Mr. Connell sent for. Mr. Connell had been his attorney for twenty years. They talked the matter over fully in the absence of Mrs. Boggs and no reason appears why the testator should not have revealed his true intentions completely. Mr. Connell had never talked with Mrs. Boggs about it, and there is no indication that she interfered in any way. The notes for the will were taken down from the testator's own direction. The next day the draft was gone over with him paragraph by paragraph, and in the evening the new and final draft, corrected to meet his views, was again read over, first by paragraphs and then as a whole. He expressed himself as satisfied, got up, walked across the room, and signed it. Earlier in the day he asked one of his physicians to come to the house that evening and witness the will. In every step we see him the principal actor, and his wife has no part. Counsel have criticised the lawyer who drew the will for opposing or advising against some suggestions offered by the testator as to the terms of the trust. But we think it was his duty to tell the testator whatever his experience and knowledge of the law suggested as appropriate; and if some course proposed by the testator appeared impracticable or unwise, he was retained to say so, and his so doing is no indication of undue influence or conspiracy.

Again, it is to be noticed that the will in question and the will of 1893 are not essentially different. In the former will, Mrs. Boggs was given the home, all the personalty, and one-half of the residue of the realty. In the last one, she was given certain specific realty instead of an undivided one-half. The testimony shows that Mr. Boggs was not hopeful of a speedy revival of business and recovery

of values. He evidently wished to give the improved and productive property to his wife, and he told his secretary and his lawyer that his object in making the new will was to give her specific property in lieu of one half generally. Under the new will the property given to her absolutely was in fact somewhat less than that given by the former will. A similar case was presented in *Seebrock v. Fedawa*, 30 Nebr., 424, 443, and the fact that the prior will was more favorable to the proponent was considered a strong circumstance.

It was attempted to show that Mrs. Boggs systematically prevented the testator's relatives from talking with him in private and that she endeavored to keep them away from him. Many occurrences which appear in evidence might be given such construction. But they are all equally compatible with an honest and sincere solicitude for his welfare and the demands of caring for one in his condition. She took care of him substantially unaided. He required constant attention by day, and she had to get up during the night at stated intervals and administer certain remedies. He was inclined to be talkative and to exhaust himself in conversation, and his physicians had to caution repeatedly against permitting him so to do. Under such circumstances, constant presence at his side and jealous watchfulness lest he talk too much or become unduly excited were in nowise reprehensible.

Some statements are testified to by the contestants as having been made to them by the testator after the will was executed to the effect that he would have liked to do better for them, but that his wife would not let him. Were it not for the prior will of 1893, these statements might not be without weight. But he was not coerced two years before, or, if he was, had had ample time to retract, and we do not think these statements should outweigh his deliberate acts. Moreover, his statement to Mr. Hill, his former partner, that he had made a will, but did not know whether he had done the right thing or not, is suggestive. He had asked his wife, and she had agreed, to give whatever of the in-

come she did not need or use to his relatives, for whom he made no immediate provision, and had also asked her to make a will in their favor. As his lawyer told him at the time, this left it to her honor so to do. He was anxious to leave his wife secure in all that she had been accustomed to. He also wished to do something for his relatives. That he had some doubt even after he made the will as to how far his solution of the conflicting claims upon him was the best one, does not indicate that the solution he adopted was not his own. Counsel say that Mrs. Boggs has done nothing in the way of carrying out these wishes of her husband. But the pendency of this contest has doubtless precluded any action, and we are loth to think that the confidence which he reposed was misplaced. There is nothing to show that she did not fully intend to do all that he asked and that she assented to.

Where undue influence is charged, the question is, in substance, whether or not the testator acted freely and upon his own judgment or under some species of coercion or imposition. In one of the leading cases, Lord Cranworth said: "It is extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say that, allowing a fair latitude of construction, they must range themselves under one or the other of these heads,—coercion or fraud." *Boyse v. Rossborough,* 6 H. L. Cas. [Eng.], *2, *48. In other words, in the absence of fraud and imposition, undue influence, in order to invalidate a will, must amount at least to a moral coercion; it must be of such character as to destroy the free agency of the testator and substitute another person's will for his own. *Latham v. Schaal,* 25 Nebr., 535. Such moral coercion may consist in constant pressure of importunity or persuasion, whereby the mind of the testator is not left free to act understandingly. But in such case, there must be such a degree of urgent solicitation that, under the circumstances, and considering the testator's condition of mind and body, he was too weak to resist it, and acted under constraint of

fear, desire for peace, or some motive other than affection or an intelligent sense of duty, contrary to his real intention. Persuasion of persons *in extremis* is looked upon with disfavor. But in this case the testator was not in that condition. It was then thought that he might live for some time, and one of the physicians says he had a chance to hold out several months. He was able to do business at least ten days afterwards, and fully understood his affairs in all their details. He was by no means so feeble that he could not have resisted a very considerable amount of importunity or solicitation had he been subjected thereto. Undoubtedly, as a general rule, confidential relations may raise strong suspicion of undue influence. But this is not true to the same extent of the relation of husband and wife where, as here, the relation has subsisted for a long time under circumstances which give rise to a very strong legitimate influence, and the disposition in question is not unjust or unnatural. Mrs. Boggs had shared his poverty, and her thrift and saving had contributed to his rise. She had faithfully and zealously attended him in his long illness, and there can be no doubt that he held her in great and well-deserved affection. No presumption of undue influence can be drawn from such facts. It can not be denied that proof of undue influence must usually be circumstantial, and that there are many circumstances in the record which are consistent with a uniform course of importunity and of exclusion of the testator's relatives from his presence. But they are equally consistent with zealous attention to the duties that devolved upon the proponent as his wife, and there is no direct evidence of such importunity. In the leading case already quoted from, Lord Cranworth said: "It is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis"; and this statement of the rule has been universally accepted and has been approved by this court. *Latham v. Schaal,* 25 Nebr., 535. The contestants'

case falls far short of this, and hence we think the conclusion of the jury was entirely correct.

The instructions given by the court on its own motion fully and correctly present the law as to undue influence and testamentary capacity. Possibly they may be open to some criticism, as suggested by counsel, by reason of undue length and a tendency to argumentativeness. But no specific objections are urged upon us except as to one instruction, nor do we perceive any prejudicial error in the charge as a whole. In one instruction the court told the jury that there was no sufficient evidence of a conspiracy on the part of the proponent and her father and mother for the purpose of influencing the will of the testator. We do not think this instruction prejudically erroneous for two reasons. In the first place, the real issue was not whether there was a conspiracy as charged, but whether the will had been procured by undue influence on the part of Ida M. Boggs, singly or in conjunction with others. The court clearly and repeatedly pointed out that such fact, if established, would vitiate the will, and having that question definitely before them, we do not think the jury were confused by having the immaterial issue of conspiracy taken out of their hands. If such conspiracy existed, it would not of itself be ground for setting aside the will, but the facts indicating it might bear upon the issue as to undue influence. In the second place, there was no sufficient evidence to sustain a finding of conspiracy. Aside from a remark of the testator to one of the contestants, which, at most, only shows that he suspected her parents of some scheme, every circumstance urged upon our attention as evidence of conspiracy is entirely susceptible of an honest construction. Mrs. Boggs's parents stayed at the house a short time after the return from Chicago, at a time when she was devoting her whole time to the care of her husband and was in sore need of assistance. Some days after the will was made, one of Mr. Boggs's sisters came; presently others of his relatives arrived, and Mrs. Boggs's parents withdrew. At one time her mother suggested that so many

people in the house was bad for the testator, whose tendency to overexertion in conversation gave great anxiety. Thereupon Mrs. Boggs said that she and one of her husband's sisters could take care of him sufficiently, and, as he might live for some time to come, there was no need that all of them remain. Mrs. Boggs positively denies any conspiracy, and, bearing in mind the strain she was under at the time, we do not think that the circumstances referred to would warrant a finding that there was one. Counsel say that the evidence in question was admitted without objection. Neither that fact nor a possible scintilla of evidence as to some scheme, required submission of an immaterial issue to the jury.

It is recommended that the judgment be affirmed.

SEDGWICK and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

JOHN SIMONS V. JOHN FAGAN.

FILED JUNE 19, 1901. No. 9,866.

Commissioner's opinion, Department No. 3.

1. **Action on Attachment Bond:** PLEA OF RES JUDICATA: DEMURRER. After the dissolution of an attachment, and after a trial of the case in which the writ was issued, in which it was found that the plaintiff had no cause of action, the defendant commenced an action against the attaching plaintiff and the surety on the bond, claiming damages in the sum of $3,400, for maliciously attaching his property. This action was removed to the circuit court of the United States, where, on a trial, apparently in the absence of the plaintiff therein, a verdict was returned for the defendants and judgment for costs against the plaintiff given. Thereafter the defendant in the attachment proceeding commenced a second action against the surety in the attachment bond to recover the penalty of said bond. In his answer the surety pleaded the former suit and judgment as a bar to the second action. *Held*, That a demurrer to said plea was properly sustained.

2. ———: ELECTION OF REMEDIES. In the same case the surety pleaded the commencement of the first action by the plaintiff as an election of remedies on his part, and a bar to the second action because of such election. *Held*, That the suit for malicious attachment and the action on the bond were not inconsistent remedies, and that the doctrine of election did not apply.

3. **Instruction: REVIEW.** Where the court instructs the jury to return a verdict in favor of one party to an action, without submitting to their determination any issue in the case, this court will not review the ruling of the trial court on the admission of evidence in the progress of the trial.

ERROR from the district court for Boone county. Tried below before KENDALL, J. *Affirmed.*

McCabe, McGilton & Rath, for plaintiff in error.

Thomas J. Doyle, contra.

DUFFIE, C.

The defendants in error commenced this action in the district court for Boone county, Nebraska, to recover from John Simons, the plaintiff in error, the penalty named in an attachment bond signed by said Simons, in an action commenced in justice court by Aultman, Miller & Co. against John Fagan and Thomas Fagan. The petition alleges the making of the bond sued on, the issuing of an attachment and the levy thereon by garnishment of certain property of the defendant in error. It further shows that the attachment was dissolved in justice court, and that the order of dissolution was affirmed upon error taken by Aultman, Miller & Co. to the district court. Other allegations of the petition relate to the matter of damages sustained and need not be further noticed. The answer admits the giving of the bond, the issuing of an attachment in favor of Aultman, Miller & Co., and that certain notes of the value of $540, and money to the amount of $65, was garnished in the hands of one Squairs. The answer further alleges that after the termination of the suit of *Aultman, Miller & Co. v. John Fagan,* he elected to redress all griev-

ances which he had suffered arising out of said suit by instituting an action against the defendants for a malicious attachment. For a further answer and defense the defendant alleges that on February 17, 1893, the plaintiff commenced an action in the district court of Boone county against Aultman, Miller & Co. and John Simons, a copy of the petition in said case being attached to the answer as an exhibit, and from which it appears that the action was an action for the malicious attachment of the property of the plaintiffs therein by Aultman, Miller & Co. and John Simons. It is further alleged that said case was, upon the application of the defendants Aultman, Miller & Co., removed to the United States circuit court for the district of Nebraska, and that such proceedings were had in said case after the removal that a verdict was returned for the defendants therein, upon which judgment was entered in their favor, and this judgment, it is claimed, is a bar to the present action. To that part of the answer setting up a former adjudication by the judgment of the federal court and an election of remedies on the part of plaintiffs below by bringing said action a demurrer was interposed, which was sustained by the district court, and this is one of the errors complained of upon this appeal. At the conclusion of the trial the court directed the jury to return a verdict in favor of the plaintiffs below for the sum of $555, and upon this verdict judgment was entered. Did the court err in sustaining a demurrer to that part of the answer setting out the proceeding in federal court as a bar to the present action? The determination of this question necessarily involves the inquiry whether the two causes of action are the same.

It has been uniformly held in this country that an attachment plaintiff may be subject to damages for attaching the defendant's property maliciously and without probable cause. The defendant's remedy in this respect is not at all interfered with by the plaintiffs having given a bond at the institution of the suit, conditioned to pay all damages which the defendant might sustain by reason of the attach-

ment having been wrongfully obtained. In the absence of a statute conferring the right, the defendant can not maintain an action against the plaintiff for the mere wrongful suing out of an attachment. Such an action may be maintained on the attachment bond, but on common law principles the element of malice is indispensable to an action on the case. Drake, Attachment, sec. 726. Bearing in mind the distinction made between a suit on the bond where a recovery may be had on a showing that the writ was wrongfully obtained, and an action on the case where malice on the part of the plaintiff in suing out the writ must be shown, we proceed to examine the record of the case tried in the federal court to determine whether it was a suit on the bond or an action on the case for a malicious attachment of the plaintiff's property. The petition in that case alleges the commencement of an action by Aultman, Miller & Co. in justice court against John Fagan and Thomas Fagan to recover an indebtedness of $199.75; that an affidavit for an attachment was made, an attachment bond given and approved and a writ duly issued, and such proceedings had thereunder that one Squair, holding notes belonging to John Fagan of the value of $540, and money to the amount of $65, was garnished; that thereafter, on motion made, the attachment was dissolved and adjudged to be wrongfully issued; that error was taken from said order of dissolution to the district court, where, on proceedings duly had, the order of the justice court was affirmed; that thereafter, and without giving any new bonds, Aultman, Miller & Co. obtained a second writ of attachment from the clerk of the district court and again garnished the same property, and that this second order was on motion dissolved by the district court of Boone county; that afterward, upon the trial of the case pending before the justice, it was adjudged that the plaintiff had no cause of action, and judgment duly entered for the defendants in said cause; that said defendants Aultman, Miller & Co. and the defendant John Simons, wrongfully and maliciously and without cause, and for the purpose of in-

juring the defendant financially and to bankrupt defendant, caused said attachment to issue. Other allegations of the petition relating to matters of damage suffered on account of the attachment proceedings need not be noticed further than to state that the damages claimed are proper in an action for maliciously suing out the attachment, but not such damages as could be allowed in a suit upon an attachment bond. The petition, taken as a whole, shows very clearly that it was not an action upon the bond, but an action upon the case in the nature of an action for malicious prosecution. It is true that Simons was made a party defendant in that action, and it is also true that while damages were sought in the sum of $3,000 against Aultman, Miller & Co., judgment in the sum of $400 only was asked against Simons. But it is to be observed that the bond was not declared upon. No breach of the bond was alleged, and there is nothing in the petition to indicate that the defendants in that suit, or either of them, were sought to be held upon contract, but all of the allegations are to the effect that the defendants were liable for a tort committed. It is well established that in order to make the former action a bar the circumstances must be such that the plaintiff might recover in the first action for the same cause of action alleged in the second. It is not enough that the transaction involved in, and giving rise to, the two actions are the same. *Stowell v. Chamberlain,* 60 N. Y., 272. In the case cited, the plaintiff brought an action against the defendant for the wrongful conversion of bonds which he alleged he had loaned to him. Judgment was rendered in favor of the defendant, when another action to recover the value of the bonds was brought, the allegations of the petition being that the defendant sold the bonds as plaintiff's agent but had failed to account for the proceeds. The former judgment was pleaded as a bar to the action. The court held that the same evidence would not sustain both actions and that the former was not a bar. The case was approved by this court in *Gayer v. Parker,* 24 Nebr., 643.

In the case determined in the federal court the plaintiff could not recover, except by showing that the writ was maliciously sued out by the defendants. Proof that it was wrongfully obtained would not in the least aid in his recovery of damages or tend to prove the case made by his petition. In the present case the action is on contract. The defendant, by his bond, has agreed to be answerable for all damages sustained by the plaintiff in case the writ was wrongfully obtained. The proof here need not go beyond showing that the writ was wrongfully sued out. Such proof shows a breach of the bond and makes the defendant liable for such damages as are properly allowed for wrongfully obtaining an attachment.

Churchill v. Abraham, 22 Ill., 455, is the only case cited or which we have been able to find resembling the one at bar. In that case the property of Abraham had been attached by Huntington, Wadsworth and Parks, and after the termination of the suit, which went in favor of Abraham, he commenced a suit against Huntington, Wadsworth and Parks for a malicious attachment of his property, claiming damages in the sum of $5,000. On the trial of that action judgment went in favor of the defendants, who recovered judgment against Abraham for costs. Afterward Abraham commenced another action on the attachment bond against Churchill, Huntington, Wadsworth and Parks, to recover his damages sustained because of the wrongful obtaining of the writ. The former action and the judgment entered therein in favor of the defendants was pleaded as a defense. At the trial the record in the first suit was offered in evidence, but the court refused to admit it, and this ruling was approved by the supreme court. We infer from the opinion that the record in the first case was offered upon the theory that the plaintiff could not maintain an action on the attachment bond until his damages had been ascertained and fixed by an independent action brought for that purpose; but it is significant that the case as reported fails to show that the court or the attorneys engaged in the case regarded the former

judgment as a bar to the suit on the bond in the sense that the question of liability thereon had been adjudicated and set at rest between the parties by the judgment entered in the first action. On principle, we are of opinion that the action determined in the United States circuit court is not a bar to the present suit. By the issue there made no recovery could be had in the absence of a showing that the defendants acted maliciously in obtaining the attachment against his property. The proof which he offered, or might have offered in that case had he appeared to prosecute it, might have been ample to entitle him to a recovery in a suit on the bond, and yet availed him nothing, where his cause of action was based wholly on the malicious acts of the defendants. The issues in the two suits are radically different. In the first the issue was, did the defendants act maliciously and without probable cause in obtaining the writ; in the present case the sole issue is, did the defendants wrongfully obtain the writ? In the first action no damage could be recovered in the absence of a showing that the defendants were moved by malice; in the case at bar the good faith of the defendant is of no moment,—he contracted to pay the defendant his damages if the writ was wrongfully obtained, and a showing that it was wrongfully obtained entitles the plaintiff to a verdict.

The supreme court of Illinois in a later case, *Lawrence v. Hagerman,* 56 Ill., 68, expressed the opinion that the remedies of an attachment defendant by action on the bond and by an action on the case for a malicious attachment were in part concurrent remedies. In the body of the opinion it is stated: "It is insisted that an action on the case for maliciously suing out a writ of attachment cannot be maintained. The objection proceeds on the ground that inasmuch as the statute requires the plaintiff in attachment to give bond, with security, conditioned to pay all damages in case the writ is wrongfully issued before obtaining the process, the remedy is confined to an action on the bond. We think the objection taken is not tenable, certainly not to the extent insisted upon by the

counsel. The remedies by an action on the case and upon the bond may be concurrent to a certain extent. Actual damages such as direct loss on the property attached, expenses incurred in defense of the suit, may be recovered in an action on the bond. But for loss of credit, breaking up of business, loss of customers and injury to reputation, resort must be had, to obtain full indemnity, to an action on the case for malicious prosecution under the common law."

We are inclined to believe that the above language expresses the true situation, and that an attachment defendant who has been injured in consequence of the malicious attachment of his property may at the same time maintain an action upon the bond for his actual damages and an action on the case for damages consequential in their nature. It is true that a recovery in the action brought for a malicious prosecution would include the actual as well as the consequential damages, but if a recovery was first had upon the bond, the amount of such recovery would undoubtedly go in mitigation of damages on the trial of the case for malicious prosecution. The least reflection must make it evident that the consequential damages suffered by a defendant whose property has been maliciously attached, can not be allowed him in an action on the bond. They are damages, however, which the law will allow in a proper action brought for their recovery, and this demonstrates beyond controversy that there are two causes of action—one upon the bond in which the actual pecuniary injury may be recovered, the other for a malicious prosecution in which consequential damages and injury is proper to be taken into consideration; one requiring the proof of malice to maintain, the other evidence of a mere wrongful obtaining of the attachment. We think there was no error in the ruling of the district court in sustaining the demurrer to that part of the answer alleging a former adjudication. Relating to the plea of the defendant of an election of remedies, and which was also held bad on demurrer, it is familiar law that to conclude one by an election of reme-

dies the remedies must be inconsistent. As regards what are known as "consistent remedies," the plaintiff may, without let or hindrance from any rule of law, use one or all in a given case. He may select and adopt one as better adapted than the others to work out his purpose; but his choice is not compulsory or final, and if not satisfied with the result of that, he may commence and carry through the prosecution of another. *New York Land Co. v. Chapman,* 118 N. Y., 288; 7 Ency. Pl. & Pr., 362.

It is unnecessary to examine the exception taken to the admission of evidence, for the reason that the court left nothing for the jury to pass upon. We think that where the court gives a peremptory instruction to find for one or the other of the parties, the same rule relating to the admission of evidence should govern on appeal to this court as though the trial had been to the court without a jury.

The objection that incompetent or immaterial evidence was admitted avails nothing on appeal when the trial is to the court, as the presumption obtains that such evidence was not considered by the court. Why should a different rule apply when the court refuses to allow the jury to consider the evidence and, in effect, tries the case himself by directing a verdict?

The judgment is not excessive. The conditions of the bond were broken on the same day it was made, interest on the penalty named in the bond to the date of the trial makes a larger sum than the judgment entered. We recommend that the judgment be affirmed.

ALBERT and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

GEORGE E. PRITCHETT V. JOHN I. REDICK.

FILED JUNE 19, 1901. No. 9,912.

Commissioner's opinion, Department No. 3.

Deed by Minor: DISAFFIRMANCE OF CONTRACT: LIMITATION. P. purchased certain real estate in the city of Omaha from E., a minor, and conveyed the same to M. for the consideration of $2,000. M. conveyed to R., the defendant in error, and R. conveyed to T., who subdivided the same into seven lots and sold four of the lots to different parties. After these several conveyances, the minor, who had then attained his majority, disaffirmed his conveyance to P. and commenced an action against P. and those claiming under him to cancel his conveyance to P. and all subsequent conveyances of the property, and to quiet his title thereto. On the trial of the case, the relief prayed in his petition was granted. Thereupon the purchasers of lots from T. commenced actions against T. on the covenants in their deeds, and recovered judgments for the amount paid for their lots and interest thereon. T. thereupon demanded of R. that he make good the covenants in his deed, and R. negotiated for and purchased the paramount title, and caused the same to be conveyed to the grantees of T. upon their canceling the judgments they had obtained against T. R. thereupon brought an action of covenant against M., his immediate grantor, for failure of title, and obtained judgment, but execution on the judgment was returned *nulla bona*, whereupon he brought this action against P. upon the covenants in his deed to M. *Held*, First, that having satisfied the claims of those claiming title under his deed to T., R. became reinvested with the covenants running with his deed, and was entitled to maintain an action of covenant against P. Second, that the deed from the minor to P. gave P. title to the land which was good and valid up to the time that the minor disaffirmed his deed, and that the covenants in the deed from P. to M. were not broken when made, nor until the minor had attained his majority and disaffirmed his conveyance to P. Third, that the statute of limitations did not commence to run against this action until the minor had disaffirmed his conveyance to P.

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

George E. Pritchett, for himself.

William A. Redick, contra.

DUFFIE, C.

December 29, 1875, Frances H. Englebert died intestate, leaving a husband and Francis Leon Englebert, a son, as her sole heirs at law. At the date of her death she was the owner in fee of lot 3, Gise's Addition to the city of Omaha. A mortgage existed upon said lot in favor of Max Meyer & Co. and in 1881 a suit was commenced to foreclose said mortgage. A decree was entered in that case to the effect that the mortgage was a lien upon the life estate of J. Lee Englebert, the husband of Frances H. Englebert, and the life estate was ordered sold to satisfy the debt secured by the mortgage. At the mortgage sale Max Meyer and Adolph Meyer became the purchasers, and received a sheriff's deed for the life interest for which said lot was ordered sold. The sheriff's deed was made in March, 1886. August 4, 1885, Francis Leon Englebert and his father, J. Lee Englebert, conveyed an undivided half of said lot to George E. Pritchett, the plaintiff in error, and June 21, 1886, they conveyed the other undivided half of said lot to Pritchett. This gave Pritchett paper title to the whole lot, subject to the estate for the life of J. Lee Englebert held by Max Meyer and Adolph Meyer. At the date of the two deeds above mentioned, made to Pritchett, Francis Leon Englebert was a minor, and he did not attain his majority until October 11, 1889. June 28, 1886, Pritchett and wife conveyed the lot in question to Adolph Meyer, subject to the life estate then held by them. The consideration named in the deed was $2,000. September 26, 1886, Adolph Meyer conveyed the lot to Max Meyer & Brother, and September 27, 1886, Max Meyer & Brother conveyed the lot to John I. Redick, the defendant in error, for the consideration of $3,500. February 8, 1887, Redick conveyed the lot to Benj. F. Troxell for the consideration of $5,000. The lot comprised about one acre of ground, and after conveyance to Troxell he subdivided the same into seven lots, which is known as Troxell subdivision of lot 3, Gise's Addition to Omaha. After subdividing lot 3, Troxell sold five

of the lots. All of the deeds above mentioned contain full covenants of warranty. December 12, 1888, J. Lee Englebert, the father, died, and November 14, 1889, within about a month after attaining his majority, Francis Leon Englebert commenced suit in the district court of Douglas county disaffirming his conveyance to Pritchett, and praying that these deeds and all subsequent deeds affecting said property might be set aside and the title quieted in him. August 1, 1891, a decree was entered in that suit as prayed in the petition, and on appeal to the supreme court the decree was affirmed, the case being reported in 40 Nebr., 195. Soon after the decree in the district court, in favor of Francis Leon Englebert, Johnson, Trennery, Ryan and Lawton, who had each purchased from Troxell one of the lots, into which the land had been subdivided, each commenced an action against Troxell on the covenants of warranty in his deed to them, and each recovered judgment against Troxell for the amount of the consideration paid, with interest and costs. Thereupon Troxell demanded from Redick satisfaction upon the covenants of warranty in the deed made by Redick to him, and Redick opened negotiations with Francis Leon Englebert and one St. John, to whom Francis Leon Englebert had conveyed an undivided half of said lot, which resulted, May 16, 1894, in the purchase by Redick of the paramount title, he paying therefor $2,500. The purchasers of lots 1, 2, 3 and 4 of the subdivision of lot 3 were still in possession under their deed from Troxell, and to prevent the title purchased from Francis Leon Englebert and St. John from vesting in the purchasers of those four lots Redick, on becoming owner of the paramount title, had it conveyed, so far as those four lots were concerned, to his son, W. A. Redick, until the grantees of those four lots should satisfy the judgment which they still held against Troxell. Thereafter, those lots were conveyed to the several grantees of Troxell, who satisfied their several judgments. Upon receipt of the deeds, lots 5, 6 and 7 were conveyed to W. H. Lawton under the following arrangement: Lawton had

purchased lot 5 from Troxell, and had recovered judgment against him for the purchase-money and interest, amounting to $2,008.41. He refused to release this judgment unless Troxell would procure him title to all three lots, for which he would pay an additional amount of $1,000 cash. Troxell refused to do this unless Redick would cancel an unpaid purchase-money note of $750, upon which there was due at that time the sum of $1,075. This arrangement was finally made. Lawton paid $1,000 in cash to Troxell, Redick surrendering up his note, and paid the remaining $1,500 for the title. The conveyances to the several grantees of Troxell by which they were invested with the paramount title were dated as follows: October 26, 1894, lot 1 was conveyed to B. F. Troxell, and this inured to the benefit of Stevens who had brought no action; May 31, 1895, lot 2 was conveyed to Susan Cook, the assignee of the Johnson judgment; June 20, 1894, lot 3 was conveyed to John H. Trennery; January 20, 1894, lot 4 was conveyed to Ada Ryan. In November, 1894, Redick brought an action of covenant against Max Meyer and Adolph Meyer, his immediate grantors. This judgment is wholly unpaid, execution having been returned *nulla bona*. Redick thereupon brought this suit upon the covenant in the Redick's deed to Adolph Meyer, claiming to be the assignee thereof by virtue of the conveyances above set forth. On the trial, judgment was entered for the plaintiff for $2,081 and costs of suit, and this record is brought here upon petition in error, and we are asked to review the same.

It is first insisted by Pritchett that he never had title to the premises described in his deed to Meyers; that nothing passed by that deed, as he had no title to convey; that, therefore, the covenant of warranty on which the action is based was broken as soon as made, and did not pass from Meyer to Redick. It is the settled rule in this state that where no interest whatever passes from a grantor by a conveyance, the covenant contained in the deed can not run to a subsequent assignee. In such case the covenants are merely personal and not assignable at common law.

Scott v. Twiss, 4 Nebr., 133; *Walton v. Campbell,* 51 Nebr., 788. Pritchett took title to the premises by deed from a minor. This was not a void deed, and until disaffirmed by the minor, passed to Pritchett a good contract. Had the minor taken no steps to disaffirm his deed after attaining his majority, it would have vested a complete and perfect title to the land in Pritchett and his grantors, which no one but the minor himself could question, and he is allowed only a reasonable time after attaining his majority to do so. This very question was before the court in *Troxell v. Stevens,* 57 Nebr., 329, and it is there said at page 336: "The covenant in Troxell's deed was not broken when made. He at that time possessed title to the lot, which was perfect until Englebert disaffirmed his conveyance to Pritchett, which act of disaffirmance was subsequent to the making of the deed by Troxel to Maulsby." This language relates to the same deed which the plaintiff in error now insists conveyed to him no title, and gave him no interest which he could convey by his deed to Meyer. That decision is decisive of the question and it need not be further considered.

It is next insisted by the plaintiff in error that the Englebert deeds were never delivered to him, and that without delivery the deeds could pass no title. By some means the deeds found their way to the office of the recorder of deeds and were recorded. Pritchett evidently claimed title through the deeds, as it can not be presumed that he would knowingly convey land to which he had no title, and accept a large sum of money in payment from his grantee. Such an act would not only be against good morals, but in violation of our Criminal Code. The argument by which it is sought to show that the deeds were never delivered is to this effect: Pritchett never had any direct dealing with the minor relating to his purchase of this land; all his negotiations and correspondence were with the father, J. Lee Englebert, and the deeds were received from him through the mail, the two Engleberts being residents of Des Moines, Iowa, at the time. It is said

that the authorities are all in accord upon the proposition that an infant can not appoint an attorney, and that the appointment of J. Lee Englebert by the son to make delivery of the deeds was beyond the power of the minor to make, and that the appointment being void, the delivery under the appointment is also void. This seems to us to be begging the question. There is no evidence before us as to who mailed the letter containing the deeds. Why should we assume that it was the father and not the son who mailed this letter, or why are we driven to presumption at all? Pritchett's testimony is to the effect that he secured these deeds from the son through the negotiations and correspondence had with the father alone. This being so, it is too plain for argument that whatever was done by the father in procuring the deeds was done as agent for Pritchett, and a delivery of the deeds by the son to his father for delivery to Pritchett would be a delivery to Pritchett's agent, and not to an agent of the minor.

It is further urged, by the plaintiff in error, that there was no eviction under the paramount title, and that until evicted, no action can be maintained upon the covenants of the deed. As shown in the statement heretofore made, the parties purchasing from Troxell brought action against him on his covenant for title and obtained judgment. He then called upon Redick to make good the title, and Redick negotiated for and purchased the paramount title, taking a deed to four of the lots into which the tract had been divided, in the name of his son W. A. Redick, a stranger to the title, in order that the title so bought in might not inure to the benefit of Troxell's grantees until they satisfied the several judgments they had obtained against him. They canceled their judgments and accepted conveyance of the paramount title in satisfaction. This in law constituted an eviction. The paramount title was established by decree of the court in an action in which they, as well as Pritchett, were parties defendant; that decree was affirmed upon appeal to this court. The grantees of Troxell then accepted the paramount title bought in by John I.

Redick, the grantor of Troxell, in satisfaction of their judgment against him. Here was a clear recognition of the paramount title, and buying it in is, in legal effect, an eviction under it. *Cheney v. Straube*, 35 Nebr., 521.

Another defense urged is the statute of limitations. As we have already seen, the deeds from Francis Leon Englebert to Pritchett, although voidable, conveyed title to Pritchett, which was good until Englebert disaffirmed his deeds. The covenant of warranty contained in the deed of the plaintiff in error to Adolph Meyer was not broken when made, nor until young Englebert elected to disaffirm his conveyance to Pritchett. This disaffirmance was not until the year 1888 or 1889, while this action was commenced in February, 1895. The statute has not run against the action.

The court directed the jury to allow interest from May 19, 1894, on whatever amount they found due the plaintiff. Only $750 of the amount paid for the outstanding title was paid in May, 1894. It is conceded that interest to the amount of $15.55 was embraced in the verdict of the jury, which, under the theory upon which the case was tried by the district court, the plaintiff is not entitled to recover. The defendant in error insists that he should have been allowed the full consideration paid to Pritchett for the lot, with interest at seven per cent. from the date of payment, and that he should not, therefore, be required to remit any amount on account of excessive interest allowed. Whether the court adopted the proper measure of damage is not now in question, as the plaintiff has made no complaint by way of appealing from its ruling. Having acquiesced in the rule adopted by the trial court, we think the defendant in error must be limited in his recovery to the amount which a proper computation under that rule will allow.

Relating to the complaint that the defendant in error went outside the record in an unfair way in his argument to the jury, we do not think that prejudicial error is shown. We have read the statements to which objection was taken

with care, and while some of them may have encroached upon the proper rule to be observed in the argument of a case, a great many of them were inferences drawn from the testimony offered and which were perfectly proper.

We recommend that the defendant in error be required to remit from the judgment the sum of $15.55, and that the judgment be affirmed.

ALBERT and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion it is ordered that the judgment of the district court be reversed unless the defendant in error, within thirty days from the filing of this opinion, remit from the judgment the sum of $15.55; and it is further ordered that if said defendant in error remit said $15.55 as aforesaid, then the judgment of the district herein shall be, and is by this order, affirmed.

JUDGMENT ACCORDINGLY.

SWAN J. LARSON V. FIRST NATIONAL BANK OF PENDER, NEBRASKA.*

FILED JUNE 19, 1901. No. 9,974.

Commissioner's opinion, Department No. 3.

Where Indian Lands Have Been Leased and Sublet, a Note Given by the Last Lessee for Rent Is Void Under the U. S. Statute. The Flournoy Live-Stock & Real-Estate Company held a lease from the Indian owners for a large quantity of lands lying within the limits of the Winnebago and Omaha Indian reservation; the company subleased a portion of this land to Larson, taking his note for the rent agreed upon. A statute of the United States relating to these lands provided, "and if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, such conveyance and contract shall be absolutely null and void." *Held*, That the note given for rent was a part of the contract of subleasing made between the company and Larson; that the statute above quoted made it null and void, and that it could not be enforced against Larson even by a bona-fide holder.

*Rehearing allowed.

ERROR from the district court for Thurston county. Tried below before EVANS, J. *Reversed.*

D. H. Sullivan and *R. G. Strong,* for plaintiff in error.

Guy T. Graves, M. C. Jay, A. C. Abbott and *Day & Whitcomb, contra.*

DUFFIE, C.

Larson, the plaintiff in error, made his note to the Flournoy Live-Stock & Real-Estate Company for the sum of $600, and this note was indorsed to the defendant in error in the usual course of business before maturity and for a valuable consideration. Suit was brought upon this note against the maker and indorser, and A. L. Maryott and H. C. McHirron, who had guaranteed its payment, were also made defendants. Larson, the maker, alone answered. In his answer he states that the Flournoy Live-Stock & Real-Estate Company had made a pretended lease of certain lands situated within the limits of the Winnebago and Omaha Indian reservation in the state of Nebraska, and that he subleased certain of these lands from said company and executed the note in suit for the rental agreed to be paid therefor for the year 1895. The fifth paragraph of the answer is as follows:

"The defendant, further answering, alleges that the lands pretended to be leased by the said Flournoy Live-Stock & Real-Estate Company to the defendant, had been alloted to Jane, John and George Little Thunder Peterson, and other Indians whose names are to the defendant unknown, all of said Indians residing upon said Winnebago and Omaha reservations, pursuant to an act of Congress of the United States approved February 8, 1887, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and territories over the Indians, and for other purposes,' the 5th section of which act is in words and figures following, to-wit:

"'Section 5. That upon approval of the allotment provided for in this act, by the secretary of the interior, he shall cause patents to issue therefor, in the name of the allottees, which patent shall be of legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust, and free of all charges or incumbrances whatsoever; Provided that the president of the United States may in any case, in his discretion, extend the period, and if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, such conveyance and contract shall be absolutely null and void.'

"That said Indians leasing said lands to the Flournoy Live-Stock & Real-Estate Company, aforesaid, were at the time of the making said leases under the supervision and control of the Indian agent appointed by authority of the government of the United States and had no right or authority to enter into any written contract of whatever kind or nature for the alienation, incumbrance or leasing of the real estate alloted to them, as aforesaid; that the said leases procured from said Indians by the said Flournoy Live-Stock & Real-Estate Company, were never approved by the secretary of the interior, nor the commissioner of Indian affairs, and were absolutely null and void; that the note in suit, and to recover upon which this action is brought, was made, executed and delivered by the defendant to the said Flournoy Live-Stock & Real-Estate Company, in direct violation of the statutes above referred to, and in direct violation of the laws of the United States, whereby in consequence of which, the consideration of said note was and is illegal, and the said

Flournoy Live-Stock & Real-Estate Company never acquired any title thereto, all of which was well known to the plaintiff before it acquired possession of said note."

A trial was had to a jury, and after the parties had closed their evidence, the court, on the request of the bank, instructed the jury to return a verdict for the plaintiff. The petition contains forty-five assignments of error which we are asked to examine and pass upon; but as there is one question which, in our opinion, is decisive of the case, we will confine ourselves to that.

The statute set out in the fifth paragraph of the defendant's answer makes any contract touching the lands, for the rental of which the note in suit was given, absolutely null and void. It will not be disputed that a lease of these lands is a contract "touching the same," and it can hardly be doubted that a note given for the rental agreed upon is a part of the same contract. In *Kittle v. De Lamater*, 3 Nebr., 325, 332, it is said: "In law it seems clear that the contract to print and publish the Eureka map and lottery scheme, as alleged in the answer, and the execution of the note by the plaintiff in error to Asher & Adams, must all be taken as one transaction, and as constituting but one contract." The fact that an independent written contract in the form of a note was given by Larson to evidence his agreement to pay rent does not make it the less a contract touching these lands. What was the contract? The Flournoy Company agreed to rent certain lands to Larson; Larson on his part agreed to pay a certain sum as rent therefor. The agreement to lease on one side and the agreement to pay rent on the other were both necessary elements entering into the contract; and the agreement to pay rent, though evidenced by the note, was just as much a part of the contract as though made in any other form. It is true, as urged by the defendants in error, that *Kittle v. De Lamater* has been overruled as to one question decided by a later case, *Smith v. Columbus State Bank*, 9 Nebr., 31, but the point above ruled was not questioned or doubted, nor do we see how it well could be. In *Smith v. Bank, supra*,

it was held that it was no defense to a note in the hands of a bona-fide holder to show that it was founded on an illegal consideration; but in the opinion it is said, quoting from Edwards on Bills of Exchange and Promissory Notes, "There are exceptions to this rule: such as the case of a note given upon an usurious consideration, or for money lost by gambling, such notes and securities being declared by statute to be absolutely void." Where the statute makes a note void, it is not validated by being put in circulation. What the statute makes void never has life or vitality, and never becomes an enforceable contract in the hands of any person. Daniels, in his excellent work, after stating the general rule that as against the bona-fide holder of a note the illegality of the consideration can not be urged as a defense, gives the exceptions to the rule in the following words: "There is, however, one exception to this rule 3; that when a statute, expressly or by necessary implication, declares the instrument absolutely void, it gathers no vitality by its circulation in respect to the parties executing it; though even upon such instrument an indorser may, as we shall hereafter see, be held liable to a bona-fide holder without notice." Daniels, Negotiable Instruments, sec. 197. At section 807 the question is further discussed in these words: "So if the statute law pronounces the contract evidenced by the bill or note to be void, because made upon a gambling, usurious or other illegal consideration, it is an absolute nullity; and, although in form negotiable, no currency in the market, and no degree of innocence or ignorance on the part of the holder can impart any validity to it. But although the party executing such bill or note can not be bound, even to a bona-fide holder, the indorser will be liable upon his indorsement which warrants its validity, and is a separate and independent contract."

The rule that the tenant can not dispute the title of his landlord is urged as an estoppel against the plaintiff in error, and it is insisted that having taken a lease from the Flournoy Company, he ought not to be allowed to show

the invalidity of the title of that company as a defense to the note. There are some cases in the brief of the defendant in error which apparently give countenance to this argument. *Cherokee Strip Live-Stock Ass'n v. Cass Land & Cattle Co.,* 40 S. W. Rep. [Mo.], 107; *Wilcoxen v. Hybarger,* 38 S. W. Rep. [Ind. T. Ct. of App.], 669. We can not agree with the reasoning used in the above cases. If, as congress has declared, this lease was absolutely null and void, we can not comprehend how any right of any kind can be founded on it or grow out of it. How can one claim another as his tenant under an agreement which the law declares shall have no existence, and under which no right or duties of any character can be claimed? *Dupas v. Wassell,* 1 Dill. [U. S. C. C.], 213, and the cases therein cited establish a rule directly contrary to that announced in the cases above cited,—a rule which we think more consonant with reason, and better calculated to an observance of the laws of the country. To allow any right to be founded on a lease of the character of the one in question would be offering a premium to those reckless enough to assume the attitude of landlord over the lands with which the government has forbidden them to deal.

We recommend that the judgment of the district court be reversed and the case remanded with directions to dismiss the same as against the plaintiff in error.

AMES and ALBERT, CC., concur.

By the Court: For the reasons above given, the judgment of the district court is reversed and the cause remanded with directions to dismiss the action.

REVERSED AND REMANDED.

LENA GEIST V. MISSOURI PACIFIC RAILWAY COMPANY.

FILED JUNE 19, 1901. No. 10,062.

Commissioner's opinion, Department No. 3.

1. **Personal Injury:** CONTRIBUTORY NEGLIGENCE: INSTRUCTION. The plaintiff, a child of six years, in crossing the defendant's tracks on Nicholas street, in the city of Omaha, was run over by an engine operated by the defendant and one of her legs was cut off above the ankle. The court instructed the jury as follows: "If, in this case, you find from the evidence that Lena Geist was of sufficient age, intelligence and experience to know and realize the danger of being where she was, and of attempting to cross in front of an approaching train, then she would be chargeable with contributory negligence." The evidence was undisputed that the track over which the engine approached the crossing was obstructed from the plaintiff's view by the box cars standing on another track, and the plaintiff's evidence tended to show that no bell or whistle was sounded, or other signal given, and that the plaintiff did not know of the approach of the engine until she had reached the middle of the track where the accident occurred. *Held*, That the instruction was erroneous, in that it excluded from the consideration of the jury all evidence that the plaintiff was without fault in attempting to cross the track, and that she was lured into her dangerous position by the negligence of the defendant in failing to give any warning by bell, whistle or otherwise that the engine was approaching the street crossing, and that her view of the approaching engine was obstructed by the box cars.

2. ———: ———: ———. The defendant's evidence tended to show that when the plaintiff discovered the engine, she had not yet reached the track of the defendant where the accident occurred, and that if she had remained in the position she occupied, she would not have been injured. On this phase of the case the court instructed as follows: "In this case, if you find from the evidence that Lena Geist knew of the approach of this engine in time to avoid a collision, and at the time she obtained this knowledge she was in a position of safety if she had remained there, then it is immaterial whether warnings or signals of the approach of the train were given or not." *Held*, Error, as it excluded from the consideration of the jury the question of whether she occupied a position of apparent danger when she first discovered the engine, and that it required her to remain in a position of apparent danger, if such was the case, regardless of what persons of her age, intelligence and experience would ordinarily do under the same circumstances.

3. ———: ———: ———. The court refused an instruction asked by the plaintiff, to the effect that if the jury found that no signal was given, and that, under all the circumstances of the case, it was negligence in the defendant to run its engine onto the crossing at Nicholas street without signaling its approach by bell or whistle, and that such negligence was the proximate cause of the injury, and that the plaintiff was damaged thereby, then she should recover, unless they further found that by her own negligence she contributed to the injury. *Held*, A proper instruction, and error to refuse it.

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

T. J. Mahoney, for plaintiff in error.

John F. Stout, James W. Orr and *Bailey P. Waggener, contra.*

DUFFIE, C.

This case was before the court, under the title of *Missouri Pacific Railway Company v. Lena Geist,* at the September, 1896, term, the former opinion being found in 49 Nebr., 489. On a second trial judgment was for the defendant, and the case is now brought here by the plaintiff, and we are asked to review certain instructions given by the trial court and other instructions asked by the plaintiff and refused. The issues made by the pleadings are fully set out in the former opinion; but a statement of the facts which the evidence tends to establish is necessary to an understanding of the objections made to the instructions given, and to the exceptions taken to the refusal of the court to give those requested by the plaintiff. The brief of the defendant contains a complete statement of the facts, which it claims is established by the testimony given on the trial, and as this statement contains a fair deduction of the facts to be drawn from the evidence, we copy it into this opinion, remarking, however, that as to one or two of the points about which there was conflicting testimony we will hereafter call attention to the evidence.

"Nicholas street, in the City of Omaha, runs east and west, and the tracks of the Missouri Pacific cross this street, running north and south between Fourteenth and Fifteenth streets. On the day of the accident complained of, about 3 o'clock in the afternoon, Lena Geist, in company with four other girls, was returning home from school, going east on Nicholas street. It seems one of the girls, Bessie Hilkner, was slightly in advance of the other four when they arrived at the point where Nicholas street crosses the Missouri Pacific tracks. The four other girls were going along, as children will, having hold of each others' hands, Lena Geist being furthest north, and as some of the witnesses say, were running along. Nicholas street, where it crosses the tracks of the railroad company is planked in the centre about thirty-two feet in width. There was no sidewalk on this street across the tracks, but foot-travelers would leave the sidewalk when going east on arriving at the most westerly track and bear off to the centre of the street and cross the tracks on the planking. The defendant company at that time had about six tracks crossing this street, the most westerly of which was called the 'house track,' the next track east (and which was about twenty-five or thirty feet east) of 'house track' was called 'Green's track' and the third track from the west was called the 'West side track,' and was located perhaps six to eight feet east of 'Green's track.' At the time of the accident, there were several, perhaps five or six, box cars standing on 'Green's track,' south of Nicholas street, the most northerly of which cars came up about flush with the south side of the planking; the cars were set close together, but it does not appear whether they were coupled to each other or not. A few moments before the accident occurred switch engine No. 296 was backed south across Nicholas street to a point about eighty feet south of the south line of the street and stopped, where it remained stationary for a few moments while the foreman received orders from the yardmaster, and after receiving his orders (his engine being headed north) he signalled

the engineer to move northward on this third track from the west, the purpose being to go to the north part of the yard in the discharge of some duty. The uncontradicted evidence is that before starting northward, the engine bell was rung for the purpose of notifying two of the crew that the engine was about to start, and as the engine moved forward at a rate of speed of three or four miles an hour, on the east side of this string of box cars, the engineer being in his proper place, was on the right or east side of the engine, the fireman on the left or west side. The engineer's position was such as to prevent his seeing any one coming from the west on Nicholas street, and for that reason the fireman kept a lookout from his side, and when within about twenty-five or thirty feet of the south side of the crossing of Nicholas street, the fireman saw the girl (Bessie Hilkner) crossing the track upon which the engine was moving, she going east, and signalled the engineer to stop or slow-up which he did, and after the little girl was seen by the engineer, having crossed the track, the engineer started forward again at about two miles an hour when the remaining four of the party of girls came up to the track, going east, and as has been said, Lena Geist was furthest north and consequently furthest from the engine, it coming from the south. She was perhaps, slightly in advance of the other three, but all had hold of hands. It seems when they first saw the engine, according to the testimony of plaintiff's witnesses, the one nearest the engine, May Aylesbury, was thirteen feet from the engine and about six feet west of the track upon which it was moving, and Lena Geist was still further north. Lena Geist attempted to run across the track in front of this approaching engine and pull the other girls with her, and they attempted to prevent her doing so when she either let go of the hand holding her or the hand-hold was broken, and she either ran or fell in front of the approaching engine, the wheels of the engine passing over her left foot cutting it off above the ankle. She was taken out from under the locomotive at about the

place where the tank or the tender is coupled to the engine, and was about six or eight feet south of the north side of the planking, and on the planking.

"The engineer did not see Lena Geist until after he had stopped his engine, and was not in a position where he could have seen her. Indeed it is admitted in the record that 'The plaintiff announces to the court for the second time, that she makes no claim of negligence against the defendant for failure to discover the perilous situation of the plaintiff, or for failure to do anything to prevent the accident after the defendant's employees did discover her situation.'

"John Swift, the crossing watchman seeing these four girls approaching when he was about forty or fifty feet east of them, started towards them running, shaking his flag and attempting to stop them from going on the track upon which the engine was moving, and the engineer seeing the flagman making these gestures, concluded something was wrong, and without knowing what it was, stopped his engine, as he says, in the distance of five or six feet, and then discovered the accident had occurred."

The evidence for the plaintiff tends to establish the following as the circumstances under which the accident occurred: The plaintiff with three companions but little older than herself were returning home from school, going east on Nicholas street. Their view of the railroad track south of the Nicholas street crossing was obstructed by a number of box cars standing on one of the tracks west of the track on which the accident occurred. The engine in question approached the crossing from the south. The four little girls were walking side by side, holding each other by the hand, the plaintiff being farthest north and slightly in advance of her companions. When the engine was first discovered, the plaintiff was between the rails of the track over which the engine was passing, and her companions just outside the west rail of said track. The engine was at the time close to them. Under the testimony, the jury could well have found the facts as above

stated; or, on the other hand, there was evidence which would support a finding by the jury that the facts were as given above in the statement taken from the defendant's brief.

In this condition of the case we proceed first to examine the instructions given by the court and excepted to by the plaintiff. The 18th, 23d and 24th instructions of the court are as follows:

"18. The jury are instructed that persons of immature or tender years are not necessarily exempt from the charge of contributory negligence; and while as a rule infants are not chargeable to the same degree as adults are with acts of negligence contributing to an injury, yet every person is held, of any age, chargeable with that degree of precaution for their own protection that their intelligence, experience and discretion enables them to exercise; and if in this case you find from the evidence that Lena Geist was of sufficient age, intelligence and experience to know and realize the danger of being where she was, and of attempting to cross in front of an approaching train, then she would be chargeable with contributory negligence, if under the evidence and instructions you find that the plaintiff was negligent."

"23. The jury are instructed that while persons of immature years and infants are not held to the same degree of care for their own protection as adults are, yet they are held to the exercise of that degree of care and prudence for their own safety that their knowledge, experience and intelligence teaches them they should exercise; and in this case if you find that Lena Geist was of sufficient age and intelligence to know and appreciate the danger of attempting to cross in front of a moving locomotive, and that she made such attempt, and that she was injured while making such attempt, then she can not recover in this action and your verdict must be for the defendant."

"24. The jury are instructed that signals of warning of the approach of a train, and the service of flagmen or crossing watchmen are for the purpose of warning persons

who are about to cross the tracks of the railroad company that a train or an engine is approaching and that it is dangerous for such person to proceed further or go upon the track where such engine or train is moving, but if such person is aware of the approach of such train and at the time she became aware of it she is in a position of safety, then it is immaterial whether such warnings are given or not. In this case if you find from the evidence that Lena Geist knew of the approach of this engine in time to avoid a collision and at the time she obtained this knowledge she was in a position of safety if she had remained there, then it is immaterial whether warnings or signals of the approach of the train were given or not."

One of the objections made to these instructions is that they completely eliminate and take from the jury the question of whether Lena Geist was in a position of apparent danger when she first discovered the engine, and whether she was induced to place herself there by the negligence of the defendant in failing to ring the bell or sound the whistle of the engine or to take other precautions which ordinary prudence would suggest to warn persons about to cross its tracks that an engine was approaching. The law is well settled that one who is placed in a position of apparent danger by the negligent act of another is not guilty of contributory negligence in an attempt to escape the apparent impending peril, though he does not use the same judgment and discretion in making the attempt that one of ordinary prudence and judgment would exercise under other circumstances. The question in such a case is not what a prudent man would do under ordinary circumstances, for the suddenness of the emergency and the excitement of the influence of terror must be taken into account. This is the rule even in case of adults, who are chargeable with a higher degree of diligence and prudence than a child of the age of six years. Beach, Contributory Negligence, 44, and cases cited. This court, in *St. Joseph & G. I. R. Co. v. Hedge,* 44 Nebr., 448, has said: "6. Independent of the statutory rule, a passenger who is

placed in a position of apparent imminent peril through the negligence of a carrier may recover for injuries received while endeavoring to escape in obedience to the natural instinct of self-preservation, provided he exercise ordinary prudence in view of the circumstances, as they appear to him at the time. 7. And such is the rule, although it subsequently appear that the danger was apparent only, and not real, since the carrier, whose negligence is the proximate cause of the injury, can not complain on the ground that passengers err in their estimate of the danger confronting them or the choice of means to insure their safety."

The circumstances under which the injury occurred to the plaintiff were related by Louisa Benson, the oldest of the four school children who were together at the time. She states that she had to cross the tracks of the company on her way to and from school; that there were about a dozen tracks crossing Nicholas street; that there was no sidewalk along the street where it was crossed by the railroad tracks, but the street itself was planked for wagons and people to cross on; that the children were dismissed from school about 3 o'clock on the day of the accident and were going home; that when they came near the tracks and to the end of the sidewalk, they went into the street, and were walking east on the planking and near the south part thereof when they first saw the engine. From this point her evidence continues as follows:

Q. Did you see any engine coming along there while you were going east?

A. Yes, sir.

Q. Where were you and the other girls when you first saw the engine?

A. We was right near the track.

Q. How close was your sister Anna to the track?

A. She was right pretty near on it.

Q. Pretty near on the track?

A. Yes, sir.

Q. Did you have hold of hands?

A. I don't think so.

Q. Where was Lena Geist at the time you saw the engine?

A. She was on the middle of the track.

Q. And where was May Aylesbury?

A. She was on the other side of Lena.

Q. On the other side of Lena?

A. Yes, sir.

Q. Do you know whether May and Lena had hold of hands?

A. Yes, sir.

Q. They had hold of hands?

A. Yes, sir.

Q. Where was May with reference to the track?

A. Why, she was about two steps away from it.

Q. And Lena was between the rails?

A. Yes, sir.

Q. How close was the engine to Lena when you first saw it?

A. About fifteen feet.

Q. When you first saw the engine it was about fifteen feet from Lena?

A. Yes, sir.

Q. And at that time Lena was between the rails?

A. Yes, sir.

Q. Which way was Lena going at that time?

A. She was going across the street.

Q. That is east or west?

A. East.

Q. Which way were you going?

A. I was going east.

Q. You were going east also?

A. Yes, sir.

Q. Which way was Anna going?

A. She was going with Lena.

Q. Your little sister?

A. Yes, sir.

Q. Which way was May going?

A. She was going with them.

Q. Which direction was the engine going?

A. North.

Q. Would that be towards the little girls or away from them?

A. Towards them.

Q. Now, up to the time that you saw them in that position was there any bell sounded by that engine?

A. No, sir.

Q. Was there any whistle sounded.

A. No, sir.

Q. Was there any flagman or person there watching that crossing at that time?

A. No, sir.

Q. Did you know anything about the engine coming until Lena got on the track and your sister up against the track?

A. No, sir.

Q. How was the engine going?

A. It was going fast.

Q. Do you know whether it had any cars attached to it?

A. No, sir.

Q. Do you mean that you do not know or that it did not have any?

A. It didn't have any.

Q. Then, what did you do when you saw the engine in that position and the other girls in that position?

A. I told them to get off of the track.

Q. What else did you do?

A. Began to holler.

Q. And what else did you do?

A. When Lena was knocked down and my sister was knocked down I pulled my sister off of the track.

Q. When Lena was knocked down your sister was knocked down?

A. Yes, sir.

Q. Where did your sister fall when she was knocked down?

A. She fell on the track.

Q. That is, on the rails or between the rails?

A. I don't just remember.

Q. What did you do with your sister?

A. I took her off the track.

Q. Do you know what part of the engine struck your sister?

A. The front part.

Q. And what became of Lena when she was knocked down?

A. She got under the engine, I thought it was.

Q. How far did the engine go before it stopped?

A. It ran across the street.

Q. To which side of the planking?

A. The north side.

It will be seen from the foregoing that the jury might have found that the plaintiff, at the time she discovered the engine, was on or about the centre of the track over which the engine was approaching. Certainly there was evidence to show that she was already crossing the track before she knew of the approach of the engine, and that she got into this dangerous position through the neglect of those in charge of it to give any warning. If such was the case, then she was not negligent in getting into the dangerous position in which these witnesses place her; but the court ignores this testimony in its 18th instruction and charges the jury that if "you find from the evidence that Lena Geist was of sufficient age, intelligence and experience to know and realize the danger of being where she was and of attempting to cross in front of an approaching train, then she would be chargeable with contributory negligence, if under the evidence and instructions you find that plaintiff was negligent." We have been at some loss to determine just what construction to put upon the last phrase of this instruction and we doubt whether it expresses the true meaning of the court. Our best judgment leads us to believe that the court used the word "plaintiff" where "defendant" was intended, and this construction is

supported by the fact that this is the first instruction in which the court calls the attention of the jury to matters that would constitute contributory negligence on the part of the plaintiff. In the preceding instruction the court called attention to facts in the case which would or would not make the defendant negligent, and had told the jury that in the absence of negligence on its part the plaintiff could not recover. In these prior instructions it had been stated in a general way that the plaintiff could not recover even on a showing that the defendant had been negligent, provided her own negligence had contributed to the injury, and the 18th instruction took up matters which the jury were told would constitute contributory negligence on her part and prevent a recovery even though under the evidence and instructions the jury believed that the "plaintiff" (meaning defendant) was guilty of negligence. Can this instruction be supported as a correct rule of law to govern in such cases? We are speaking of it now under the well understood rule that each party has a right to have the case presented to the jury upon his own theory, provided there be sufficient evidence to support that theory. There was evidence, as we have seen, sufficient to support a finding that the plaintiff without any warning from the defendant reached the centre of the track before discovering that she was in any danger from the passing engine; that this was a dangerous position all will concede, that it was dangerous "to attempt to cross in front of an approaching train" is not a question for dispute, but to say that she was chargeable with contributory negligence because of this situation, is to wholly ignore the evidence tending to show that she walked to the centre of the track and attempted to cross in front of the approaching train, because of the defendant's failure to give her warning of the danger of the attempt, and because that danger was not visible to her, in consequence of the box cars left by the defendant in such a position as to shut off her view of the approaching engine. Under this instruction the plaintiff might have been exercising the highest

possible degree of care up to the time she found herself between the rails, and though she may have gone as far as she did in consequence of the defendant's negligence, still she is guilty of contributory negligence, and this, in the words of the plaintiff's brief, "not because of anything she did, or omitted to do, but because she may have been old enough to know that it is dangerous to dispute the right of way with an approaching locomotive." The vice of the instruction inheres in wholly disregarding the fact that the plaintiff's evidence tends to show that the plaintiff's attempt to cross the defendant's track was without negligence on her part, and that the dangerous position in which she found herself was in consequence of the neglect of the defendant in failing to give any warning of the approach of the engine. It left to the jury but one fact to pass on, viz.: "Was the plaintiff of sufficient age, intelligence and experience to know and realize the danger of being where she was and of attempting to cross in front of an approaching train?"

What has been said probably sufficiently disposes of instructions 18, 23 and 24; and as the case will have to be reversed because of the errors discussed, it will not be profitable to spend time in an examination of the sixteenth instruction to which exceptions are taken by the plaintiff. The error complained of arises more, we believe, from a use of words not aptly adapted to convey the idea in the mind of the court than in the announcement of an erroneous legal principle. No one can doubt under the decisions in this state, that the statute requiring the ringing of a bell or the sounding of a whistle was intended to give warning to those approaching a railway crossing as well as those actually on the track of the company, and we can hardly believe that the jurors would understand that because the court told them in this instruction "that the defendant company has a right, and it is lawful for it to cross Nicholas street with its engines and cross upon its tracks as it was doing at the time of the injury complained of," that it might negligently run over any one who might

be upon the crossing; the idea in the mind of the court, and intended to be conveyed by this language, undoubtedly was that the defendant had a lawful right to lay its tracks across the street and operate its engines thereon.

Error is also alleged on account of the refusal of the court to give instruction numbered 1 requested by the plaintiff. This instruction is too lengthy to be copied into this opinion, which is already extended beyond what is desirable. The material part of the instruction, and the legal principle embodied therein, is fairly set out in the following paragraphs taken therefrom: "You are therefore instructed that to entitle the plaintiff to recover in this case on account of failure to give a signal by bell or whistle in approaching the crossing, the following facts must be established by a fair preponderance of the evidence: First, that the defendant did at the time and place specified in plaintiff's petition run its engine onto the said crossing of Nicholas street over the defendant's tracks without giving a signal of the approach of said engine to said crossing by either bell or whistle; second, that said failure to give signal by a bell or whistle was under all the circumstances in this case shown by the evidence, negligence on the part of the defendant; third, that said negligence was the proximate cause of the injury to said Lena Geist. And fourth, that said Lena Geist sustained damages by reason of said negligence. Unless the evidence in the case establishes every one of the foregoing elements, the plaintiff would not be entitled to recover on account of the alleged negligence in omission to give a signal of the approach of said locomotive to said crossing, but if all of the foregoing elements are established by a preponderance of the evidence, your verdict should be for the plaintiff unless the said Lena Geist by negligence on her own part contributed to the injury." The court in its seventeenth instruction had told the jury "that the failure to ring the bell or give other warning of the approach of the train to the crossing, if such failure there was, does not in itself constitute negligence and entitle the plaintiff to recover, but such cir-

cumstance can only be considered by you in connection with others as tending to prove negligence on the part of the defendant company." Whether this announces a correct rule of the law under our statute, can not now be considered. It was the rule adopted by this court in *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Nebr., 848, and has been followed in other cases. It was the rule applied by this court on the former appeal, and has become the law of the case and must govern the case to the end. *Hiatt v. Brooks*, 17 Nebr., 33; *Meyer v. Shamp*, 26 Nebr., 729. While a neglect of the statutory duty to ring the bell or blow the whistle of an engine on the approach to a crossing may be only evidence of negligence on the part of the company, the rights of the plaintiff are not dependent on the statute alone. The common law imposes on the defendant the duty to so operate its trains that others shall not be injured through its negligence. This court has often been called on to say what constitutes negligence, and the following, taken from the head notes in *Brotherton v. Manhattan Beach Improvement Co.*, 48 Nebr., 563, is probably as apt and brief a definition as can be found: "Negligence is the failure to exercise such care, prudence and forethought as under the circumstances duty requires should be given or exercised. It may consist in the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do. *Foxworthy v. City of Hastings*, 23 Nebr., 772, followed." Another definition is this: "The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." *Omaha Street R. Co. v. Craig*, 39 Nebr., 601, 616. Under these definitions of negligence, it is evident that if ordinary care and prudence required the defendant to give warning of the approach of the engine to the crossing at Nicholas street, by ringing the bell or blowing the whistle, a neglect to do so would be negligence. Under the instruc-

tions asked by the plaintiff it was left with the jury to say whether, under all the circumstances in the case, the giving of these signals was necessary in the exercise of ordinary care, and if they found that ordinary care required it, then a failure to give such signals would be negligence. In the 17th instruction given by the court the jury were not only permitted to say whether, under the circumstances, the giving of the signal was necessary in the exercise of ordinary care, but they were told that even if they should find that ordinary care required the giving of such warning that even then the omission of the signal, that is, the omission to exercise ordinary care, was only evidence of negligence. It is urged by the defendant that the instruction now under consideration is objectionable as selecting out a circumstance or group of circumstances as to which there has been evidence, and telling the jury that if proved they constituted negligence. The facts upon which the jury were to determine the negligence of the defendant under this instruction were ultimate facts, viz.: Was a signal given, and did ordinary care and prudence require that one should be given under the circumstances in evidence before them? If these two facts were found as claimed by the plaintiff, negligence of the defendant was established as a matter of law. The instruction was as unobjectionable as would a charge in the case of one on trial for theft, that if he feloniously stole and carried away the property of another, intending thereby to deprive the owner permanently of his property and to convert it to his own use, he would be guilty of larceny. We think the instruction should have been given.

We recommend that the judgment of the district court be reversed and the case remanded for a new trial.

AMES and ALBERT, CC., concur.

By the Court: For the reasons above given the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

W. R. ADAMS ET AL. V. A. WEISBERGER ET AL.

FILED JUNE 19, 1901. No. 9,807.

Commissioner's opinion, Department No. 3.

1. **Action on Official Bond**: REPLEVIN BOND: INSUFFICIENT SECURITY. In an action against an officer for taking insufficient security upon a bond in replevin, in a suit pending before a justice of the peace, the plaintiff need not allege in his petition, although he may be required to prove upon the trial, that he has prosecuted the sureties upon the bond to judgment and execution without obtaining satisfaction.

2. **Officer Taking Security Becomes Guarantor of Its Sufficiency at Taking**: PETITION: ALLEGATION. An officer who takes security upon a replevin bond in an action pending before a justice of the peace guarantees absolutely that the surety is sufficient at the time he is accepted. In an action upon the bond of such officer for damages for taking insufficient security it is not necessary to allege that in so doing the defendant acted wrongfully or negligently, and it is not a defense that the latter acted in good faith and with the exercise of diligence.

3. **Action on Official Bond**: TAKING INSUFFICIENT SECURITY ON REPLEVIN BOND: JUDGMENT IN REPLEVIN: RETURN NULLA BONA: JURISDICTION OF JUSTICE IMMATERIAL. When, in an action on the bond of an officer for taking insufficient security upon a replevin bond in a suit pending before a justice of the peace, it has been proved that the sureties upon the latter bond have been prosecuted to judgment and execution, without obtaining satisfaction, and that the judgment remains in force and unimpeached by the parties to it, it is immaterial whether the justice did or did not exceed his jurisdiction in rendering judgment in the replevin suit.

4. **Duty of Legislature to Express and of the Courts to Interpret the Public Will.** The function of expressing the public will is intrusted to the legislature, but not to the courts, and to this principle it is the duty of the latter to give practical force as well as theoretical recognition.

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

Brome & Burnett, for plaintiffs in error.

Bartlett, Baldrige & DeBord, contra.

AMES, C.

This was an action in the district court for Douglas county against a constable and his sureties upon his official bond, for having taken insufficient security upon a replevin bond in a suit pending before a justice of the peace. The property taken in replevin was appraised at the value of $200, and the penalty of the replevin bond was double that amount. The replevin suit proceeded to judgment, before the justice, in behalf of the defendant for a return of the property, or, in case a return could not be had, for the value of the interest of the defendant therein which was adjudged to be $200 and for costs. Execution upon this judgment was issued and returned unsatisfied for want of goods or chattels whereof to levy the same. Thereupon the defendant in the replevin suit brought an action in the county court of Douglas county upon the replevin bond against the principal and surety thereon to recover damages for the breach of that bond on account of the failure of the plaintiff in the latter action to obtain satisfaction of his judgment in replevin. The suit upon the bond proceeded to judgment in favor of the plaintiff therein for damages and costs on account of the breach alleged, and upon this judgment, execution was also issued and returned unsatisfied for want of goods or chattels whereof to levy the same. Still subsequently, this action was brought in the district court for Douglas county against the constable and his sureties, upon the official bond of the former, to recover damages for a breach of that bond on account of the above related transactions, and because of the alleged insufficiency of the surety in replevin. Answers were filed by the sureties admitting the official bond and official character of their co-defendant, Adams, but denying generally every other fact alleged against them. The answer of Adams denies the insufficiency of the surety upon the replevin bond and pleads affirmatively that he used due diligence in the matter of taking the bond and that he made diligent inquiry as to the financial worth and

responsibility of the surety thereon and required the latter to justify, by making oath as to his responsibility to the effect that he was worth in real and personal property situate in Douglas county, and not exempt from execution, at least the sum of $700, and that from such oath and as the result of such inquiries he had good reason to believe and did, in fact, believe that the surety was sufficiently responsible, and that in accepting him as such he exercised due diligence and was free from negligence, and denies the other matters alleged in the petition against himself. The action below was tried before Judge Slabaugh and a jury and resulted in a judgment and verdict for the plaintiff and is brought here on error by the constable and his sureties.

It is first assigned for error that the court overruled an objection by the defendants to the introduction of any evidence on the ground that the petition does not state facts sufficient to constitute a cause of action, and it is argued in support of this objection, that the petition is fatally defective in failing to set forth the suit upon the replevin bond and the failure of the plaintiff to obtain satisfaction thereby. The petition, however, contained the following allegation: "The plaintiff alleges that said replevin bond given in said action, and signed by The Bates Company and C. D. Cannon, as obligors, was worthless and was not sufficient security, and that said obligors, The Bates Company and C. D. Cannon, were not sufficient surety, and that they and each of them were insufficient surety, and that in accepting said bond, said W. R. Adams, constable, took insufficient security to the plaintiff's damage in the amount of the judgment and costs rendered in said action, to-wit, in the sum of $225." The statute enacts that "if the officer deliver any property so taken, to the plaintiff, his agent, or attorney, or keep the same from the defendant without taking such security within the time aforesaid, or if he take insufficient security, he shall be liable to the defendant in damages." Code of Civil Procedure, sec. 1040. The defendant in error contends that in an action

on the constable's bond it is sufficient to assign the breach in the language of the statute, which he has in substance done, and that the record of the suit on the replevin bond is part of the evidence merely, by which the existence of the breach is proved, and that, as in case of other evidence, it is neither necessary nor proper to plead it. The defendant in error has the best of the argument. The defendant in replevin suing upon the officer's bond need not plead how he expects to prove that the security was insufficient. It is enough for him to allege that it was insufficient and that in consequence of that fact he has suffered damages. The record of the suit on the replevin bond is not the only, or conclusive, nor yet the complete evidence requisite to support the claim. A case is conceivable in which, notwithstanding a fruitless prosecution of the replevin bond, he has suffered no damage, and, besides, he may even have suffered damage without legal injury. The officer is required to take security which shall be sufficient at the time it is taken, not such as shall remain sufficient for an indefinite time and until the determination of two suits, one of which is just begun and may consume years in its progress, and the other of which can not be begun until after the former has terminated.

It is further objected that the petition does not allege the taking of insufficient security to have been wrongful or negligent. The reasoning applicable to the former objection applies in a measure to this also, but there is another consideration even more radical and conclusive for denying its validity. The statute above quoted enacts, without qualification or exception, that the officer shall be liable in damages "if he take insufficient security." The official bond sued upon is conditioned as required by section 12 of chapter 10 of the Compiled Statutes, for the faithful discharge of all duties required of the officer by law. This court has held, after mature deliberation, that this condition requires of the principal, who is a custodian of public moneys, the absolute accounting for and payment over of such moneys coming into his official possession,

and that the utmost care and diligence on his part, or the loss of the funds by inevitable accident which no human foresight and skill could have guarded against, will not excuse him or his sureties for not having them forthcoming when required. *Bush v. Johnson County*, 48 Nebr., 1. No reason can be assigned for the existence of this rule in the case of fiscal officers that does not apply with equal or greater force to officers who accept sureties upon judicial bonds and recognizances. Indeed, the justness of the rule is more apparent in the latter case than in the former. The public may and does supervise its treasurers to any extent it deems advisable, requiring of them frequent accounts, and subjecting their books and records to frequent examinations, and summarily removing them from office in case of actual or threatened delinquency. The private litigant has none of these rights or powers, but is absolutely at the mercy of the officer entrusted with the authority to substitute personal security, a mere chose in action, for his rightful possession of his own property. But in the case at bar it may seem to be a work of supererogation to speculate as to the wisdom of the law or the motives which may have prompted its enactment. The function of expressing the public will is intrusted, not to the courts but to the legislature, and to this principle it is the duty of the former to give practical force as well as theoretical recognition. The issue of negligence can not be imported into this case without open violation of an unqualified, unequivocal and unambiguous statute.

It is still further contended by the plaintiff in error that this action can not be maintained because, it is said, the justice exceeded his jurisdiction in the rendition of judgment in the suit in replevin. The answer to this objection is that the replevin bond was valid when executed; that it was afterwards sued upon in a court of competent jurisdiction and a judgment for damages recovered thereon for condition broken; that, however erroneous that judgment may be, it remains in full force and unimpeached by the parties thereto and that it is not subject to collateral at-

tack. Whether the sureties on that bond are justly or unjustly held to be liable, is a matter with which he has, and has had, no concern. What he was required to do was to see to it that, in case they should be held liable, they should be of sufficient ability to respond in damages, or at least, that they had such ability at the time he accepted them. The admission of the justice's docket in evidence, while it was erroneous, wrought the plaintiff in error no injury. The turning point in the case was the sufficiency of the surety on the replevin bond at the time that instrument was executed. In fact, this was the only material issue in the case about which there was any real controversy. With respect to it there was a mass of conflicting testimony. The question was fairly left to the jury by the instructions and their verdict with respect to it is final.

There are other errors assigned in the brief of the plaintiff in error, but they have in effect been disposed of by what has been already said, and a specific discussion of them would serve no useful purpose. The judgment of the district court should be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

MARY M. PAINTER V. CITY OF NORFOLK.

FILED JUNE 19, 1901. No. 9,833.

Commissioner's opinion, Department No. 3.

1. **Contract by Ordinance:** INTEREST ON BONDS: CERTIFICATE OF CLERK: ULTRA VIRES. A city, by ordinance, contracted with a corporation that in consideration that the latter should construct and maintain within the city a system of water-works, the city would pay to it hydrant rentals to the amount of $3,000 per annum, and that in case the company should issue mortgage bonds upon its works, the city clerk should indorse upon each bond a certificate to the effect that in lieu of such rentals the

city would pay to the trustee or trustees named in the instruments annual interest upon said bonds to the amount aforesaid. The company issued seventy-five such bonds for $1,000 each, payable twenty-five years after date, with semi-annual interest at the rate of six per cent. per annum, evidenced by interest coupons attached, and the clerk indorsed upon each of said bonds a certificate that the city would pay the interest thereon as it should mature. *Held*, That the certificate was in excess of the authority purported by the ordinance to be conferred upon the clerk and was void.

2. **An Ordinance Against Statute Void.** In the case above stated, the city reserved the right to purchase the works, and agreed, in such case, to assume whatever outstanding bonded debt should, at the time of the purchase, exist thereon, and shortly after the completion of the works did, in fact, purchase them. The statute provided that no bonded debt should be incurred by the city for the construction or purchase of a system of waterworks unless the same should first be authorized by a popular vote. No such vote was taken, and the guaranty contemplated by the ordinance would, if valid, have bound the city for the payment of a fixed sum annually for hydrant rentals, irrespective of a statute which limited such expenditures to the proceeds of a specified annual levy on the taxable property of the city as disclosed by the public assessment records. *Held*, That the provisions of the ordinance with respect to the assumption of the bonded debt and the guaranty of interest payments thereon was in violation of the statute and void.

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

Powers & Hays, for plaintiff in error.

Burt Mapes, contra.

AMES, C.

A general demurrer to the petition of the plaintiff was sustained by the district court for Madison county, and the plaintiff electing to stand upon her exception, a judgment of dismissal and for costs was rendered against her. The judgment is brought here for review by a petition in error. The claim of the plaintiff had its origin in an ordinance enacted by the mayor and council of the city of Norfolk, which, with the exception of dates, names and

amounts, and perhaps some minor matters not material in this controversy, is admitted to be a literal copy of the ordinance set forth at large in the opinion of *State v. Mayor and Council of Crete*, 32 Nebr., 568. It is unnecessary to consume time or space in reproducing the document here. If the validity of this enactment was not supposed to have been conclusively established by a series of decisions by this court, beginning with that in the case just cited and ending with *Lincoln Land Co. v. Village of Grant*, 57 Nebr., 70, the writer would heartily agree with the opinion of Judge SULLIVAN in the latter named case, that the ordinance violates and ignores a multitude of statutory provisions expressly designed to limit and restrain municipal authorities within reasonable bounds and to guard and protect the taxpayers against the consequences of improvidence and fraud.

Assuming the validity of the ordinance, it becomes necessary to determine the legality of the instruments sued upon in this action. Section 12 of the Norfolk ordinance contains the following stipulation: "In the event that the grantee shall issue mortgage bonds secured by mortgage or deed of trust upon its water-works together with its lands, machinery, pipes, outfits, rights, privileges and franchises, a sufficiency of the hydrant rentals payable by the city of Norfolk under this ordinance to discharge the interest upon such bonds as it will mature from time to time to be paid by the city of Norfolk to the trustee or trustees of such bonds, to the extent of $3,000 per annum, when such hydrant rentals are earned by the grantee and are payable by the city, and such sums shall be paid while interest on such bonds remain due and unpaid, and the city clerk is hereby authorized and instructed to sign a certificate on the back of said bonds to that effect and to affix the seal of said city to such certificate and payment so made to trustee or trustees shall be made exclusively to pay interest upon said bonds so long as the same remains due and payable, and the amount remaining after the interest on the bonds shall have been discharged shall be paid over to

said grantee, and in the event that the city should elect to purchase the works as herein provided for, the payment of such bonds, if any there be, shall be assumed by said city and the face value of said bonds with accrued interest, if any, shall be deducted from the purchase price of said works."

The petition alleges the acceptance in writing of the terms and conditions of the ordinance, by A. L. Strang, the grantee therein, and the execution by him of a bond as required by the ordinance, and that he commenced and completed the construction of a system of water-works which was in full compliance with the terms of the grant and which was duly approved and accepted by the mayor and council. Afterwards, Strang conveyed the works to the Norfolk Water-Works Company, a corporation, and, as alleged in the petition, the company, on the 15th day of January, 1890, "executed, as contemplated in section 12 of said ordinance, its five negotiable mortgage bonds, numbered, respectively, 30, 31, 32, 33 and 34, in the sum of $1,000 each, payable twenty-five years from the date thereof, with interest thereon at the rate of six per cent. per annum, the interest payable semi-annually as evidenced by the fifty coupon interest notes of $30 each attached to said bonds, payable on the first days of January and July of each year until the maturity of said bonds." The petition alleges that the plaintiff became the owner for value and before due of the coupons maturing during the years 1891 to 1895, both inclusive, and on January 1, 1896, which were attached to the above mentioned five bonds, and alleges that the coupons have become and remain overdue and unpaid, and prays judgment against the city for their amount and interest. The coupons are without indorsement and are in the following form:

"EXHIBIT A.—Coupon.

"$30.00. No. 6.

"NORFOLK WATER-WORKS COMPANY

Will pay to bearer thirty dollars on the first day of January, 1893, at the office of the Farmers Loan & Trust

Company in the city of New York and state of New York, on the surrender of this coupon being the interest due at that date on bond.

"No. 31. A. L. STRANG, *President.*"

On each of said bonds is an indorsement as follows:

"STATE OF NEBRASKA, } ss.
MADISON COUNTY, }

"I, the undersigned clerk of the said city of Norfolk, do hereby certify that the interest on the within bond, as it shall mature from time to time, will be paid by the said city of Norfolk, to the within named trustee, out of such hydrant rentals as shall be earned from and payable by the city of Norfolk pursuant to the ordinance granting the franchise for the building of the within named Norfolk Water-Works, and that such hydrant rentals pursuant to such ordinance are to be first applied to pay the interest on this and seventy-four other bonds of like tenure and effect as it shall become due or remain due and unpaid.

"Witness my hand and the seal of said city, this 28th day of January, A. D. 1890.

[SEAL.] "W. GERECKE, *City Clerk.*"

The petition also contains the following allegation:

"After the completion of the water-works aforesaid, and in the year 1889, and annually thereafter, the said city levied and collected a tax upon the taxable property therein for the purpose of paying the interest on said bonds as provided in the said ordinance until February, 1894, when the city became the purchaser of the water-works and all the property, real and personal, and franchise belonging thereto, from the Shickle-Harrison & Howard Iron Company, the then owners of the same: and in order to protect itself in the payment of said bonds, the city exacted and required of said Shickle-Harrison & Howard Iron Company, the following bond and undertaking, which was given, to-wit:

"'Whereas, The Shickle-Harrison & Howard Iron Company, has sold to the city of Norfolk, Madison county, Ne-

braska, the property, real and personal, and all rights, privileges and franchises formerly belonging to the Norfolk Water-Works Company, a corporation; and whereas, the said city granted certain franchises to said Norfolk Water-Works Company mentioned in ordinance number 69 of said city; and whereas, by certain provisions of said ordinance, said city, should it acquire title to said water-works property in the manner provided therein agreed to assume any outside standing bonds of said company; and whereas, said Shickle-Harrison & Howard Iron Company acquired title to said property by foreclosure of the bonds mentioned in said ordinance:

" 'Now, therefore, the Shickle-Harrison & Howard Iron Company agree to hold the said city harmless to the extent of $15,000 by reason of any liability under said ordinance incurred by said city in the purchase of said water-works property from Shickle-Harrison & Howard Iron Company.

" 'Dated February 16, 1894.

[SEAL.] " 'SHICKLE-HARRISON & HOWARD IRON CO.,

" 'By THOMAS HOWARD, *President.*

" 'Attest: THOMAS E. GALLAGHER, *Secretary.*' "

The clerk's indorsement is recited in the petition and is a part thereof. Even if it must be assumed, which, notwithstanding the authorities above cited, I still hesitate to believe, that the city authorities may, in the indirect way contemplated by this ordinance, create a bonded municipal debt without a popular vote in direct contravention of the very section of the statute under the assumed authority of which the ordinance was adopted, it is still to be established that the city clerk is empowered to obligate the city in the absence, or in excess, of authority conferred upon him either by statute or by ordinance. The clerk's certificate is not negotiable in form or otherwise; it purports to have been executed pursuant to a specified ordinance and assumes to bind the city for the amount of the annual payments of interest by way of hydrant rentals to the amount of $4,500, while the ordinance mentioned

limits the amount of such payments to $3,000 a year. Whatever, therefore, may be said about the ordinance, the clerk's certificate is, as respects any contractual character it may have been intended to have, absolutely void. The case is analogous to the familiar instance of the issuance of municipal bonds in excess of a specified percentage of the assessed valuation of the city as disclosed by a public record. The law has been too long and too well settled to require the citation of authorities to the effect that such bonds are, as to their entire issue, utterly void. If the principle that public officers are agents with limited powers and that persons dealing with them must see to it, at their peril, that they do not exceed their authority, the same conclusion must be reached with reference to this certificate, which, by its own terms, directs attention to the ordinance from which alone it could derive any validity.

If the plaintiff has any right of action against the city, it arises not upon this certificate or upon the coupons, but out of the ordinance itself, as a participant in the fund of $3,000 per year which the city thereby undertook to pay to the trustee or trustees for her benefit. We have not the trust mortgage before us, but it is probable that the right of action against the city for delinquency in this respect is vested in the trustee alone, but whether it so expressly stipulated or not, payment of the interest to the trustee would discharge the liability of the city therefor. Whether such payment has or has not been made the petition does not show, but it is alleged that after the completion of the works and until February, 1894, when the city purchased the property, an annual tax of sufficient amount was levied and collected and it may reasonably be inferred that the same was devoted to the purpose intended. If not, or if, as to subsequent years, the city is bound to continue the payment of hydrant rentals for the use of its own water system and has or has not continued so to do, and if, in any such case, a right of action has accrued to the holders of coupons, it still does not follow that the plaintiff is en-

titled to recover the full amount of the instruments sued upon. Her recovery could not, in any event, exceed two-thirds of that amount, because a recovery by her would not, in such case, discharge the equal liability of the city to the holders of coupons attached to the remaining seventy bonds. The plaintiff, in order to recover, must allege and prove at least the number of outstanding coupons and the years and extent of the city's delinquency and the holders of other coupons must be permitted to intervene so that the court may be in position to determine the entire amount of the liability of the defendant, and, if necessary or expedient, appoint a trustee to take charge of and to distribute the funds so that upon payment of the amount adjudged against it its obligations will be finally and effectually discharged. In short, as has been already said, the plaintiff's right of action, if she has any, which to my mind is extremely doubtful, is not upon the coupons or clerk's certificate at all, but upon the contract created by the ordinance, and the petition falls far short of stating facts sufficient to constitute a cause of action upon the latter instrument. But there is, to my mind, a more vital objection to these instruments, considered as obligations of the city, which has as yet been but barely mentioned. The very section of the statute, under the assumed authority of which this ordinance was adopted and this contract entered into, contains a proviso to the effect that the city may borrow money and issue bonds for the purpose, and levy and collect a general tax in the same manner as other municipal taxes may be levied and collected, for the purchase of steam engines, and for the purchase, erection or construction and maintenance of such water-works, or to pay for water furnished such city or village under contract, to an amount not exceeding seven mills on the dollar in any one year on all the property within such city or village as shown and valued upon the assessment rolls of the assessor of the proper precinct or township, in addition to the sum authorized to be levied under subdivision 1 of this section, and all taxes raised under this clause,

shall be retained in a fund known as "Water Fund"; Provided further, that no such money shall be borrowed or bonds issued, unless the same shall have been authorized by a vote of the majority of the electors of such city or village to that effect. The bonds shall be bonds of the city called "Water Bonds," to become due in twenty years from the date of issue, but payable any time after five years, drawing seven per cent. interest per annum, payable annually. No such vote is alleged to have been had in this instance, and yet the ordinance pretends to authorize the bonding of the works and the guaranteeing of the interest by the city to the extent of $3,000 per year and the assumption by the city of the obligation to pay the principal of the bonds in case of a purchase by it of the works. As a matter of fact, it seems that the works were bonded for $75,000, and that within five years after they were constructed the city did buy, or attempt to buy them and, as it is contended, thereby assumed liability for the bonded debt. It is not stated what the assessed valuation of the city is or at any time has been. If this transaction can be upheld, the statutory limitations upon the power of the city to borrow money and issue bonds and expend money for hydrant rentals are practically nullities. If such is the law, there is no reason why the construction of the works, their purchase by the city and the assumption of the bonded debt might not have been contemporaneous acts. Nor is there any reason why the amount of the bonded debt and of the hydrant rentals, which are to be paid by way of meeting the semi-annual interest charge, might not have been as much larger as the cupidity of the grantee and the "discretion" of the mayor and council would have warranted. The bondholder is, indeed, a favored individual of his class, because he may not only, like other creditors of the city, resort for payment to the general fiscal resources of the municipality, but he has in addition thereto a specific lien upon the very property which the city incurred the liablity for the purpose of procuring.

A case is conceivable in which the mortgage trustee

would, by means of foreclosure and sale, deprive the city of the works for the satisfaction of a fraction of the mortgage debt and afterwards compel the taxpayers to discharge the residue out of the public revenues. In fact, it is indicated by the recitals of the above quoted bond of the Shickle-Harrison & Howard Iron Company, that precisely this state of affairs exists, and precisely this attempt is being made in the case at bar. In my opinion, the provisions of the ordinance with respect to guaranteeing the payment of interest by way of hydrant rentals, and with respect to the issuance by the water company of bonds and the assumption of liability therefor by the city in case of its purchase of the works, are absolutely void, as in violation, not of the spirit only, but of the very letter of the statute. It is immaterial that the city has received a bond executed by a foreign corporation of limited powers and unknown responsibility, conditioned to partially indemnify it against liability upon these bonds, no such liability in fact existing. If the city shall not be compelled to pay obligations which it did not lawfully incur, it will not stand in need of indemnity.

The judgment of the district court should, in my opinion, be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

F. F. BEDELL v. HARBINE BANK OF FAIRBURY.

FILED JUNE 19, 1901. No. 10,044.

Commissioner's opinion, Department No. 3.

1. **Bank Check:** AGREEMENT OF PAYEE WITH FORWARDING BANK. If the payee of a check drawn upon a bank in this state indorses and delivers it to a bank in a neighboring town for collection, and accompanies the act with a request that it be not immediately presented for payment and agrees that it may be sent

for collection through a distant bank situate outside the state, the indorsee will not be liable for the consequences of the delay necessarily incident to the course adopted, nor for the default or negligence of the bank chosen to make presentment for payment.

2. ———: LIABILITY OF INDORSEE: SENDING CHECK TO DISTANT BANK. If the payee of a check drawn upon a bank in this state indorses it to a bank in a neighboring town for collection and the latter, without the knowledge or consent of the payee, sends it for collection through a distant bank situate outside the state, thereby consuming three days for making a presentment for payment which might have been made in one day, the indorsee will be liable for the consequences of such delay and for any default or negligence of the bank chosen to make the collection.

ERROR from the district court for Jefferson county. Tried below before LETTON, J. *Reversed.*

E. H. Hinshaw, for plaintiff in error.

W. H. Barnes, contra.

AMES, C.

On Saturday, the 26th day of October, the plaintiff in error, Bedell, was the payee named in a check drawn by C. F. Dawson, on the Steele City Bank, in this state, and indorsed and delivered it to the defendant in error, the Harbine Bank of Fairbury, Nebraska. It is testified by the cashier of the latter bank, with whom the business was done, but denied by Bedell, that at the time of the transaction the latter told the former, in substance, that the drawer, Dawson, had not at present a sufficient deposit for the payment of the check and that he, Bedell, preferred that it should not be presently presented for payment, and that to this the cashier replied, it then being late in the day, that on the following Monday he would send the check for collection to the First National Bank of St. Joseph, Missouri, by which it would be forwarded to the Steele City Bank, the drawee, for collection, so that several days would necessarily elapse before its presentment for collection. It is not disputed that the check was, on Mon-

day, sent to the St. Joseph bank and on the next day sent by it to the Steele City Bank, which latter received it on Wednesday, the 30th, and retained it until after Monday, November 4, when the Steele City Bank ceased to do business and went into the possession of an official representing the state board of banking. So far as it is shown by the record, the check has never been paid. At the time the check was indorsed to the Harbine Bank Bedell received credit for its amount, but it is not denied that the indorsement was for collection only, and that the services of the indorsee were to be, and were, rendered without compensation. On Wednesday, the 30th of October, and again on Saturday, the 2d of November, Bedell was told by the cashier that nothing had been heard from the check and that he presumed, therefore, that it had been paid, and on the latter date Bedell was permitted to withdraw the amount from the Harbine bank. On Monday, November 4, Bedell removed to Kansas City, and he seems never to have been formally notified of the non-payment of the check, nor to have learned of that fact until several days later. This action was brought by the Harbine bank against Bedell to recover the amount of the check as having been paid to him without consideration, and resulted, upon a trial before Judge Letton and a jury, sitting in the district court for Pawnee county, in a verdict and judgment for the plaintiff. Bedell prosecutes a petition in error in this court.

The issues, as above outlined, were fairly, and somewhat more fully than here, stated to the jury by instructions, but they were instructed that although they should find that the agreement was made as testified to by the cashier, yet, if they should further find that there was negligence by the St. Joseph bank in presenting the check for payment, or by the Harbine bank in notifying Bedell as soon as it had itself received notice of non-payment, the latter bank could not recover. There is no evidence that the Harbine bank ever received formal notice of non-payment. These instructions were, in this aspect of the case,

at least as favorable to the plaintiff in error as the circumstances of the case justified. If the jury believed the testimony of the cashier, which they apparently did, they were bound under the authority of *First Nat. Bank of Pawnee City v. Sprague,* 34 Nebr., 318, to return a verdict for the defendant in error. It is decided by that case that when a bank, without compensation for its services, receives and forwards commercial paper for collection, and is guilty of no negligence in selecting the person to whom it is sent, the latter, and not the bank, will be treated as the agent of the owner of the paper, and the bank will not be responsible for the negligence or default of its correspondent. If such is the law in an instance in which the owner is not consulted as to the selection of the person chosen to make the collection, much more certainly is it so when he is so consulted and participates in, or at any rate assents to, the choice, and in a general way to the methods to be employed. In such case, the place of residence or of business of the person so chosen is immaterial. There is evidence that continuously from the date of the check until the Steele City Bank closed, the drawer had on deposit therein funds sufficient for its payment. The plaintiff in error requested of the court the following instruction, which was refused: "The court instructs the jury that if you find from the evidence that the Steele City Bank paid checks which were presented to it for payment during the week following October 28, 1895, where the drawer had funds to his credit in said bank, and if you further find that the plaintiff did not notify the defendant promptly and within reasonable time of the failure of said Steele City Bank and non-payment of the check in controversy in this action, and if you further find that there was no agreement between the plaintiff and defendant in relation of said check, except the ordinary implied contract for the collection of commercial paper, then you will find for the defendant." The refusal of this instruction was error, to which the defendant below took due exception and which he has properly assigned in this court.

The facts are undisputed that the check was finally sent for collection to the drawee bank, which retained it for several days and until the institution closed. It is not pretended that any formal notice of dishonor was ever given, or attempted to be given, to the drawer or to the indorser, Bedell. Under the law, as announced in *Western Wheeled Scraper Co. v. Sadilek,* 50 Nebr., 105, the drawer was, by these circumstances, discharged. Fairbury, at which the Harbine bank is situate, and Steele City, the location of the drawee bank, are distant from each other about twelve or thirteen miles on a railroad which, at the time of the transaction in question, operated a daily mail train between them in each direction. In the absence of agreement, the defendant in error would, under the authority of the case just cited and that of *First National Bank of Wymore v. Miller,* 37 Nebr., 500, have been inexcusably negligent in sending the check for collection through the agency of the St. Joseph bank, thus consuming three days' time in doing what might have been done in one day, and would be also responsible for the negligence of the latter bank in sending the check directly to the drawee either to make payment or give the requisite notice of dishonor. In such case, any of these circumstances would have been sufficient to discharge the drawer, irrespective of whether the latter suffered actual damages by the loss of his deposit in the Steele City Bank, and the consequences of such discharge would have fallen on the Harbine bank. In such case, the rule announced in *First National Bank v. Sprague, supra,* when the correspondent bank is situate in the same locality as the drawee, is not applicable. In the absence of the alleged agreement, the Harbine bank is responsible for the consequences, not only of the delay occasioned by sending the check to the St. Joseph bank, but for any default or negligence committed by the latter which, under the undenied facts disclosed by the record in this case, would, as a matter of law, preclude the plaintiff below from recovery, and the plaintiff in error had a right to have the jury so told.

It is recommended that the judgment of the district court be reversed and a new trial awarded.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed and a new trial awarded.

REVERSED.

ALVIN L. LEIGH, APPELLEE, V. H. S. GREEN, APPELLANT.*

FILED JUNE 19, 1901. No. 9,838.

Commissioner's opinion, Department No. 3.

1. **Service by Publication**: AFFIDAVIT BEFORE FILING PETITION. Where service is had by publication, jurisdiction attaches, although the affidavit for service is sworn to before the filing of the petition, provided the interval between the two acts is so brief that no presumption can fairly arise of a change in the jurisdictional facts set forth in the affidavit.

2. **Interval of Two Days.** An interval of two days held too short to give rise to such presumption.

3. **Affidavit**: INFORMATION AND BELIEF. Where the facts required in an affidavit are of such a character that positive knowledge on the part of affiant is impossible, such affidavit may be made on information and belief.

4. ———: ———. An affidavit for service by publication is sufficient if made upon information and belief.

5. **Affidavit Not to Inform Defendant But Court.** An affidavit for service by publication is not for the information of the party to be served, but to enable the court to determine whether the action is one in which jurisdiction may be acquired by such service.

6. **Affidavit, Sufficiency and Object.** When such affidavit is sufficient to enable the court to determine whether the action is one of which jurisdiction may be acquired by service by publication, service based thereon is valid.

7. **Affidavit**: JURISDICTION. Affidavit examined, and *held* sufficient to give the court jurisdiction.

8. **Attaching Creditor, Owner.** An attaching creditor held not to be an owner within the meaning of section 4, article 5, chapter 77, Compiled Statutes.

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*Rehearing allowed.

9. **Foreclosure of Tax Lien.** The holder of a tax lien may bring an action for the foreclosure in a state court and prosecute the same to a decree and sale of the land, notwithstanding the pendency of an action between other parties, in the federal courts, wherein such lands have been levied upon under an order of attachment.

APPEAL from the district court for Knox county. Heard below before ROBINSON, J. *Reversed.*

Reed & Gross, James McCabe and *W. R. Green,* for appellant.

James C. Crawford, Clark C. McNish, Andrew R. Oleson, Anderson & Keefe and *Woolworth & McHugh, contra.*

ALBERT, C.

On the 24th day of November, 1880, Erwin Davis held the record title to certain lands in Knox county. On the date mentioned Algernon S. Patrick commenced an action in the district court of that county and procured an order of attachment to be levied on said land. On the 18th day of April, 1882, the case was removed to the United States circuit court, wherein a judgment was rendered in favor of the plaintiff on the 21st day of January, 1890, and an order made for the sale of the lands for the satisfaction thereof. In pursuance of said order, on the 15th day of May, 1894, the lands were sold to Lionel C. Burr by the United States marshal, whose deed to Burr therefor was filed for record in the office of the clerk of Knox county on the 26th day of May, 1894. On the day the deed was executed Burr conveyed the premises to J. C. Crawford and R. C. Peters by warranty deed, which was recorded on the 28th day of May, 1894. On the 23d day of May, 1894, Crawford and Peters conveyed the land to Alvin L. Leigh, the plaintiff in this case. On the 28th day of December, 1882, and while said attachment proceedings were pending, a warranty deed to said lands, purporting to have

been executed by Erwin Davis to Henry A. Root on the 8th day of October, 1880, was filed for record in the office of the county clerk of Knox county. On the 12th day of May, 1894, in an action pending in the district court of Douglas county, wherein Algernon S. Patrick was plaintiff and Erwin Davis, Henry A. Root, J. N. H. Patrick and J. M. Woolworth were defendants, a decree was entered whereby the said deed from Davis to Root was canceled and set aside as fraudulent and void, as against the plaintiff in that case, and whereby the title to said land was quieted and confirmed in said plaintiff as against said Root. In 1891, several actions were brought in the district court for Knox county, wherein the Farmers Loan & Trust Company was plaintiff and Henry A. Root and different subdivisions of the land in controversy were defendants, for the foreclosure of certain tax liens, which actions so taken together involved the title to the land in controversy in this suit. In the same year a decree of foreclosure was entered in each case, and an order made directing the sale of said subdivisions, respectively, for the satisfaction of the amount found due by the respective decrees. In pursuance of these several decrees and orders the lands were sold by the sheriff of that county to H. S. Green, the defendant in the present action, and deeds of conveyance therefor were duly executed and delivered to said purchaser by the sheriff. The plaintiff in the present case claims title to the lands, basing his claim of title on the attachment proceedings hereinbefore mentioned; the defendant also claims title thereto, basing his claim of title on the proceedings had for the foreclosure of the tax liens. The present action was brought by the plaintiff, Alvin L. Leigh, against the defendant, H. S. Green, to quiet his title to the land in controversy. From a decree in favor of the plaintiff the defendant prosecutes an appeal to this court.

From the foregoing statement it will be seen that both parties trace their title to Erwin Davis. The sole question to be determined in this case is whether the plaintiff is

concluded by the proceedings had in the district court of Knox county for the foreclosure of the tax liens, by virtue of which the defendant claims title to the lands in controversy. The plaintiff assails those proceedings upon three grounds: (1) That the service was had by publication, and the affidavits therefor were not sufficient to authorize service by publication; (2) that there was no case made for proceedings against the land in any of said foreclosure proceedings, without impleading Algernon S. Patrick, who at the time said proceedings were brought had an attachment lien on the lands for the satisfaction of which the land afterwards sold; (3) that the proceedings to foreclose said liens were had during the time the land in controversy was under attachment in an action pending in the circuit court of the United States, and for that reason the proceedings to foreclose the tax liens were void.

The actions for the foreclosure of the tax liens were brought under article 5 of chapter 77 of the Compiled Statutes. Section 4 of that article is as follows: "Service of process in causes instituted under this chapter shall be the same as provided by law in similar causes in the district courts, and where the owner of the land is not known, the action may be brought against the land itself, but in such case the service must be as in the case of a non-resident; if the action is commenced against a person who disclaims the land, the land itself may be substituted by order of court for the defendant, and the action continued for publication." In each of the foreclosure cases, the subdivision of the land to be affected thereby was made a party as provided by the section just quoted, and service was had by publication. The affidavit in each case, except as to the land described, which varied according to the subdivision made a party, was as follows:

"In the District Court of Knox County, Nebraska.

FARMERS LOAN & TRUST COMPANY vs. HENRY A. ROOT AND N. E. ¼, SEC. 27, TWP. 31, RANGE 3 WEST 6TH P. M. } Affidavit for Publication of Notice.

"STATE OF IOWA, } ss.
WOODBURY COUNTY, }

"I, M. J. Sweeley, being sworn, do state that I am the attorney for the plaintiff above named; that this case is one of those named in section 77, title V., of the Code of Civil Procedure of the state of Nebraska, and is an action relating to real property in said state in which the defendants have or claim a lien or interest actual, or contingent, and the relief demanded consists, wholly or partially, in excluding the defendants from any interest therein; that the defendant Henry A. Root is a non-resident of said state of Nebraska; and that service of summons cannot be made on him within said state.

"I further state that the owner of the real estate involved in said action and described above is not known, all of which I verily believe to be true.

"(Signed) M. J. SWEELEY.

"Subscribed and sworn to before me this 28th day of September, 1891. L. GREENWOOD,
[SEAL.] *"Notary Public."*

The plaintiff insists that the affidavits were insufficient, and for that reason the court acquired no jurisdiction.

One objection urged against the affidavits is that they were sworn to some two days before the petitions were filed in the respective cases. The argument on this point, as we understand it, is that between the making of the affidavit and the filing of the petition conditions might have changed so that service might have been had on the defendant in this state, or in some other way, so that the affidavit could not have been truthfully made at the time of filing. It is clear that the law must permit some inter-

val to elapse between the making and the filing of the affidavit, because, strictly speaking, the two acts could not be simultaneous. That being true, the only question that can arise is what length of time it will permit to elapse between the two acts. The statute is silent on the subject; hence the inference is warranted that it will permit a reasonable time. Just what will be regarded as a reasonable time this court has not decided. However, in *Armstrong v. Middlestadt,* 22 Nebr., 711, it was held that an affidavit made one day before the petition was filed was sufficient. But in that case the court expressly disclaims any intention to go beyond the facts, and, of holding that an affidavit made several days before the commencement of the action would be sufficient. In our opinion, when the petition is filed within such time after making the affidavit that no presumption could fairly arise that the state of facts had changed in the interval, it is sufficient. *Crombie v. Little,* 47 Minn., 581; *Snell v. Meservy,* 91 Ia., 322. Applying this rule to the affidavits in question, we do not believe that any presumption of a change in the state of facts, during an interval of two days, could fairly arise.

Another objection urged against the affidavits is that they are sworn to upon information and belief. The affidavits contain the positive statements of the affiant which are followed by these words: "All of which I verily believe to be true." We do not believe the objection is well taken. Among other things, the affidavit must show that service can not be had on the defendant in this state. In the very nature of things, upon this point, at least, the affiant, whatever the wording of the affidavit, can never have positive knowledge. That he makes such statement upon information and belief, is a necessary implication. To expressly state that which, in the absence of such statement, would be necessarily implied, affects only the form and not the substance of the affidavit. *Colton v. Rupert,* 60 Mich., 318; *Pratt v. Stevens,* 94 N. Y., 387; *Belmont v. Cornen,* 82 N. Y., 256; *Howe Machine Co. v. Pettibone,* 74 N. Y., 68. In Kansas such an affidavit has been held defective,

but not void. *Harrison v. Beard,* 30 Kan., 532. In our opinion, an affidavit for service by publication, sworn to upon information and belief, is not for that reason void.

A more serious objection to the affidavit is that the matters set forth are insufficient to warrant service by publication, and for that reason the court acquired no jurisdiction by such service. The section of the statute, under which the actions under consideration were brought, hereinbefore set out at length, provides that service must be as in case of non-residents. Section 77 of the Code of Civil Procedure prescribes the manner of making service on non-residents, and, so far as is material for present purposes, is as follows: "Service may be made by publication in either of the following cases: First—In actions brought under the fifty-first, fifty-second and fifty-third sections of this code, where any or all of the defendants reside out of the state. * * * Fourth—In actions which relate to, or the subject of which is, real or personal property in this state where any defendant has or claims a lien or interest, actual or contingent therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a non-resident of the state." The actions mentioned in sections 51, 52 and 53, referred to in the section just quoted, are actions for the recovery of real property, or of an estate or interest therein, actions for the partition of real property, actions for the sale of real property, under a mortgage lien or other incumbrance or charge, and actions to compel the specific performance of a contract for the sale of real estate. Section 78 of the Code of Civil Procedure relating to the affidavit for service by publication is as follows: "Before service can be made by publication, an affidavit must be filed, that service of a summons cannot be made within this state, on the defendant or defendants to be served by publication, and that the case is one of those mentioned in the preceding section. When such affidavit is filed the party may proceed to make service by publication."

One of the grounds urged against the sufficiency of the

affidavits is that the object of the action is not set forth. Each affidavit contains the following statement: "This case is one of those named in section 77, title V, of the Code of Civil Procedure of the state of Nebraska." In *Majors v. Edwards,* 36 Nebr., 56, this court held that such a statement of the object was sufficient, although at the same time it intimated that the better practice would be to set out the object of the action more fully. But it will be observed that the language above quoted is followed by the further statement, "and is an action relating to real property in said state, in which the defendants have or claim a lien or interest, actual or contingent, and the relief demanded consists, wholly or partially, in excluding the defendants from any interest therein." Plaintiff contends that, assuming that the object is sufficiently stated by saying that the action is one of those named in said section 77, the subsequent statement renders the affidavit invalid, for the reason that the object thereby stated is different than that sought in the actions, and that such statement being specific must prevail over the general statement. It must be kept in mind that an affidavit for service by publication is not required for the information of the defendant as to the nature and object of the action. The sole purpose of such an affidavit is to enable the court upon inspection to determine whether the action is one in which jurisdiction may be obtained by service by publication; when it is sufficient for that purpose, it serves the only purpose for which it is intended. The affidavits under consideration, fairly construed, mean that the actions, wherein they were respectively filed, were those named in section 77 of title 5 of the Code of Civil Procedure, and that the relief demanded consisted in part of excluding the defendant Root from any interest in the lands described. The relief sought by those actions was the foreclosure of certain tax liens on the several subdivisions of the land, and the sale thereof, for the satisfaction of the amount found due. In the petitions filed in the several cases it is alleged "that the owner of said land is not known and that the defend-

ant Henry A. Root has, or claims, some interest therein." The prayer of each, in part, is, for the adjudication that plaintiff's tax lien is a first lien on the land, and that the deed issued in pursuance of such proceedings be an absolute bar against each and all of the defendants, and for such other and further relief as may be deemed equitable in the premises. In our opinion, the affidavits were sufficient to advise the court of the nature of the actions, and that the actions were of such a character that it could acquire jurisdiction by service by publication. It follows, therefore, that the affidavits were sufficient for all purposes, especially when assailed in a collateral proceeding.

It is argued, in support of plaintiff's second proposition, that at the time of the commencement of the actions to foreclose the tax liens, Algernon S. Patrick, plaintiff in the attachment proceedings in the United States circuit court, by virtue of such proceedings had a lien on the land in controversy and was therefore an owner within the sections of the revenue law, hereinbefore quoted; that his lien was a matter of record in Knox county, and that, therefore, the plaintiff in such foreclosure proceedings had the means of knowledge of such lien; that means of knowledge, being equivalent to knowledge, the owner of the land was not unknown to the plaintiff in the actions to foreclose the tax liens, and that as the proceeding against the land was purely statutory, and authorized only in case the owner is unknown, the several decrees are not binding on Patrick, nor those claiming under the title acquired in the attachment proceedings. The validity of the argument stated depends on the meaning to be given to the word "owner." Its meaning varies according to the context. In proceedings in the exercise of the delegated right of eminent domain by a railroad company, the word has been held to include any person having any interest in land. *Gerrard v. Omaha, N. & B. H. R. Co.*, 14 Nebr., 270; *Dodge v. Omaha & S. W. R. Co.*, 20 Nebr., 276. In those cases the meaning given to the word by this court would include an attaching creditor; but it is clear from

a comparison of the statutes regulating the exercise of the delegated right of eminent domain by a railroad company, and the revenue act, that the legislature intended to give the word "owner" a wider meaning in the former than in the latter. In the revenue act the word is frequently employed, and always, in the sense of absolute owner. For example, it provides that real estate becoming taxable for the first time shall be listed to the "owner" thereof; that the "owner" of the property, on the first day of April in any year, shall be liable for the taxes of that year; that the purchaser of property on the first day of April shall be construed the owner on that day; that land, comprising more than one subdivision, belonging to one owner, may, at his request, be listed as one tract. Compiled Statutes, ch. 77, art. 1, secs. 43-45. These, and many other provisions of the revenue act, clearly indicate that the legislature used the word "owner" in the popular sense, the sense in which it is understood by the people at large; and having employed it in that sense in the other parts of the act, the inference is warranted that they used it in the same sense in the sections providing for the foreclosure of tax liens. *Tracy v. Reed,* 38 Fed. Rep., 69. At first sight, it may seem anomalous that a person should be concluded by a proceeding to which he was not a party and of which he had no notice. But it must be kept in mind that the procedure providing for the foreclosure of a tax lien is a part of the revenue system of the state, and that the necessities of a government will not always permit an overscrupulous regard for private rights. In many states the land is sold and the title of all parties interested divested without any judicial investigation whatever, but by the purely ministerial acts of the county treasurer. Relatively speaking, our procedure for the collection of taxes, including the procedure under consideration, even when construed broadly as the language will permit, is eminently calculated to conserve the rights of the owners of property subject to taxation. In our opinion, Patrick was not the owner within the meaning of the statute, and

the proceedings for the foreclosure of the tax lien were in substantial compliance with the statute, and conclusive against the whole world.

The validity of the proceedings for the foreclosure of the tax liens is assailed on still another ground, and that is, they were brought, tried and determined and the land sold in pursuance thereof, while the land was subject to an attachment issued in an action pending in the circuit court of the United States, and for that reason, it is urged, the proceedings were void, and the deed executed by the sheriff to the defendant conveyed no title. The doctrine of the supreme court of the United States is that when two courts have concurrent jurisdiction, that which first takes cognizance of the cause has the right to retain it to the exclusion of the other; that where property is *in gremio legis,* if it be a court of rightful jurisdiction, no other court can interfere and wrest from it the possession and jurisdiction first obtained; and that a sale, under an order of one court, of property in the custody or possession of another conveys no title. *Gumbel v. Pitkin,* 124 U. S., 131; *Heidritter v. Oil-Cloth Co.,* 112 U. S., 294; *Freeman v. Howe,* 24 How. [U. S.], 450; *Krippendorf v. Hyde,* 110 U. S., 276; *Covell v. Heyman,* 111 U. S., 176; *Vaughan v. Northup,* 15 Pet. [U. S.], 1; *Williams v. Benedict,* 8 How. [U. S.], 107; *Peale v. Phipps,* 14 How. [U. S.], 367, 372; *Barton v. Barbour,* 104 U. S., 126; *Taylor v. Carryl,* 20 How. [U. S.], 583; *Gay v. Brierfield Coal & Iron Co.,* 94 Ala., 303, 16 L. R. A., 564. The case last cited contains an exhaustive review of the authorities from which the rule just stated is deducible. This rule has its foundation, it would appear, not merely in comity, but in necessity; for were it otherwise, the orders of one court might be offset by those of another, and the parties left without any remedy; besides, in their rivalry for possession of property in controversy, a conflict would arise that would not only be embarrassing in the administration of justice, but would be liable to lead to unseemly strife and personal conflicts between the officers of the different

courts. A study of the cases cited shows that in each case the property was in the actual or constructive possession of the court whose jurisdiction was invaded. The decisions are based, in most cases, upon the facts that the subsequent proceedings in another court would interfere with such possession. In none of these cases was the question of the effect of a foreclosure of a mortgage, or other lien on real estate, and the sale thereof in a state court, pending an action between other parties in a federal court, wherein the same property had been levied upon under an order of attachment directly raised, nor was the determination of that question necessary to a decision in any of said cases. Hence, whatever expressions they may contain on that point are dicta.

In the case of *Prugh v. Portsmouth Savings Bank*, 48 Nebr., 414, which was brought to restrain a United States marshal from selling certain lands on an execution issued from the United States circuit court, it was held "that when land has been levied upon, it is as much in custody of the court, and under the control of the process, as when personal property has been seized on execution or in attachment, and the state court was, therefore, without any authority by injunction or otherwise to interfere with the marshal in the execution of the writ." It will be observed that the foregoing is, to some extent at least, dictum. It was not necessary to decide in that case whether the lands levied upon were in the custody of the court; the precise question involved was, whether the state court might, by injunction, restrain the execution of the process of a federal court. With due regard for the learning of the writer of that opinion, we do not believe the dictum in that case should be adopted as a rule in this state. By the levy of the attachment on the real estate the federal court did not obtain possession of the premises; the possession remained unchanged. The effect of the levy was merely to give the attaching creditor a lien on the equity of redemption of the defendant. By the subsequent foreclosure and sale of the premises under the tax lien the state court

having concurrent jurisdiction, no contest for the possession between officers of the different courts arises, nor can arise; neither can there be any conflict of jurisdiction; neither the parties nor the *res* were the same. The purchaser, under the judgment rendered in the attachment suit, and the purchaser at a foreclosure sale were left to their remedies, for the adjustment of their respective rights. The jurisdiction of the circuit court of the United States, after judgment and a sale of the premises for the satisfaction thereof, was at an end. It was not, like a court of equity, required to place the purchaser in possession, and such purchaser acquired only the interest of the execution defendant. The proceedings to foreclose the tax liens in the state court in no manner interfered with the federal court or its process, nor with the due and orderly administration of justice. Hence none of the reasons upon which the rule of non-interference between the courts of concurrent jurisdiction is based apply to this case. Where the reasons for a rule cease, the rule should no longer apply.

In *National Foundry & Pipe Works v. Oconto City Water-Supply Co.*, 81 N. W. Rep., 125, the supreme court of Wisconsin held that the commencement of a suit in the federal court, to enforce a mechanic's or material-man's lien on property, does not preclude the foreclosure of a mortgage on the same property in the state court; that where there is no possession, other than constructive, a suit on a different cause of action may be commenced in the state court and carried to judgment, and actual possession of the property obtained under it, notwithstanding the pendency of the action in the federal court; citing *Compton v. Jesup*, 68 Fed. Rep., 263. *In re Hall & Stilson Co.*, 73 Fed. Rep., 527, it was held that the rule of comity which forbids the seizure of property subject to the jurisdiction of one court of concurrent jurisdiction applies only where there is actual or constructive possession of the property by the former court; that the levy of an attachment on real estate gives the court whence the process is-

sues neither actual nor constructive possession of the property, but only creates a lien thereon in favor of the attaching creditor. The doctrine stated in these cases meets with our unqualified approval, especially as applied to this case. The opposite doctrine would require the holder of a tax lien, under the circumstances, to apply to the federal court for leave to enforce it. But it will not be claimed that the state, under any circumstances, may be compelled to resort to the federal courts for the collection of its revenues. For it to do so would be inconsistent with its sovereign character. The tax sales in question operated as an assignment of the lien of the state to the purchaser. Good faith, as well as the efficiency of our revenue system, requires that the state afford such purchaser the same facilities for the enforcement of his lien it would command for itself.

In our opinion, therefore, the pendency of the action in the federal court was no obstacle to the prosecution by the holder of the tax lien, of the actions in the state courts for their foreclosure, and the sales made in pursuance of such actions are valid and binding, and the defendant in this case thereby acquired a good title to the land in controversy as against the plaintiff. We therefore recommend that the decree of the district court be reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons given in the foregoing opinion the judgment of the district court is reversed and cause remanded, with directions to enter a decree in accordance with this opinion.

REVERSED AND REMANDED.

MICHAEL O'NEILL V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.*

FILED JUNE 19, 1901. No. 9,992.

Commissioner's opinion, Department No. 3.

1. **Bill of Exceptions:** PONDEROUS EXHIBITS. Where ponderous articles, which do not admit of physical attachment to the record proper, are part of the evidence in the case, are referred to in the bill of exceptions, and articles, answering to such reference, are filed in this court with the record in the case, and produced at the hearing, bearing the marks of identification of the official reporter of the trial court; and their identity is unchallenged, save in the course of the argument, the articles produced will be treated as a part of the bill of exceptions.
2. **Employee Has Right to Assume Ordinary Care in Employer.** An employee of a railroad company has a right to assume that his employer has taken ordinary precautions to protect him from injury in the course of his employment.
3. **Contributory Negligence:** BRAKEMAN GOING BETWEEN CARS. It is error to hold, as a matter of law, that a brakeman who, in the course of his employment, goes between cars moving at the rate of four or five miles an hour, is guilty of such negligence as will preclude a recovery for injuries sustained by him while in that act, where such injuries result from the negligence of his employer.
4. **Negligence of Employer Assumption of Risk.** Negligence of the employer, of which the employee is ignorant, is not one of the risks assumed by the latter by his contract of service.
5. **Evidence:** DIRECTING VERDICT. Evidence examined, and *held*, that the trial court erred in directing a verdict for the defendant.

ERROR from the district court for Sarpy county. Tried below before SCOTT, J. *Reversed.*

James Hassett and *Michael F. Harrington,* for plaintiff in error.

W. F. Evans, Woolworth & McHugh, M. A. Low and *Billingsley & Greene, contra:*

W. F. Evans, Woolworth & McHugh and *M. A. Low* cited: On challenge to bill of exceptions, Wells, on Questions of Law & Fact, sec. 826; *Cox v. Chicago, R. I. & P.*

*Rehearing allowed.

R. Co., 51 Pac. Rep. [Kan.], 904; 3 Ency. Pl. & Pr., 418; *Atterberry v. Railway Co.*, 18 Ore., 85. On contributory negligence, *Towner v. Missouri P. R. Co.*, 52 Mo. App., 647.

Cause was argued orally for plaintiff by *Michael F. Harrington* and by *W. F. Evans, contra.*

ALBERT, C.

This is an action brought by the plaintiff to recover for personal injuries sustained by him by reason of the alleged negligence of the defendant. At the close of the testimony the court directed a verdict for the defendant, and from a judgment rendered thereon the plaintiff prosecutes error to this court.

At the threshold of this case we are met by an objection to the bill of exceptions. The defendant insists that a part of the evidence is omitted therefrom, and for that reason the bill of exceptions should be disregarded. The evidence, which it is claimed is omitted, consists of ponderous articles which do not admit of physical attachment to the record proper. These articles are all referred to in the written portion of the bill of exceptions, and articles answering to such reference were filed with the record in the case, and produced at the hearing in this court, bearing the marks of identification of the official reporter of the trial court. Their identity is unchallenged, save in the course of the argument. Under such circumstances, the articles produced will be regarded as a part of the bill of exceptions. The bill of exceptions, therefore, is complete and will be considered as a part of the record in the case.

Coming down to the merits of the case, it is undisputed that at the time of the injuries complained of the plaintiff was in the service of the defendant in the capacity of brakeman on one of its freight trains. In the course of his employment he stepped between two cars to uncouple them. While between the cars his foot caught between the guard-

rail and one of the main rails, and before he could extricate himself he was struck by one of the cars, thrown down and part of the train passed over both his legs, whereby they were crushed and mangled, so that amputation was necessary. The negligence imputed to the defendant by the plaintiff is its omission to fill or block the space between the guard and the main rail of the road. That the guard-rail is a source of danger to those employed in operating trains is sufficiently clear from the evidence. It is an ordinary iron rail, varying in length according to the requirements of the particular place. It is placed on the inner side of the main rail, and parallel with it, at points on the road where there is danger of derailment. The space between the guard and main rail is usually about four inches, except at the ends of the former, which are somewhat curved. What renders this contrivance dangerous is that the rails in cross-sections are in the form of the letter "T," and the guard-rail being curved, at its ends, from the main rail, the foot of one walking on the track is liable to be forced into the space between the two rails, and when it is, it is difficult to withdraw it. It sufficiently appears from the evidence that long prior to the injury complained of most railway systems had adopted the precaution of blocking the space between the two rails with wood, thereby lessening the danger to the employees. As to the relative advantages and disadvantages of this precaution, the evidence is conflicting; but the court having directed a verdict, it will suffice for present purposes to say that there was sufficient evidence to sustain a finding that ordinary care and prudence, and a due regard for the safety of its employees, required the defendant to keep such spaces blocked, and that the injury to the plaintiff would not have occurred but for the omission of the defendant in this regard. In other words, there was sufficient evidence to establish negligence on the part of the defendant.

The defendant invokes the rule that a servant, by his contract of service, assumes the risks and dangers incident

to his employment, and insists that such rule relieves it of liability for the injury sustained by the plaintiff. That the servant, by his contract of service, assumes certain risks is true. Just what such risks are we are not required to determine in this case, because it is sufficient to say that the negligence of his employer is not one of the risks assumed. On the contrary, a servant has a right to assume that his employer has used ordinary care and prudence to insure his safety in the course of his employment. *Seley v. Southern P. R. Co.*, 2 American R. & C. Rep., 151; *Miller v. Southern P. R. Co.*, 4 American R. & C. Rep., 1; *Nord Deutscher Lloyd Steamship Co. v. Ingebregsten*, 51 Am. St. Rep. [N. J.], 604; *Carter v. Oliver Oil Co.*, 27 Am. St. Rep. [S. Car.], 815; *Chicago & E. I. R. Co. v. Hines*, 22 Am. St. Rep. [Ill.], 515; *Southern Pacific Co. v. Yeargin*, 48 U. S. C. C. A., 497. We have not overlooked the case of the *Missouri P. R. Co. v. Baxter*, 42 Nebr., 793. We do not deem it necessary to discuss the rule laid down in that case, because, in our opinion, it is not applicable to the state of facts shown by this record. In that case it was neither alleged nor shown in evidence that the plaintiff was ignorant of the defects causing injury. In the reasoning employed in the deduction of the rule in that case great stress is laid on that omission. In the present case it is alleged in the petition, and shown by the evidence, that the plaintiff had been in the employ of the defendant but a short time when the injury occurred, and was ignorant of the defect causing the injury. Hence the rule stated in the case referred to does not apply to the one at bar.

This brings us to what we regard as the most difficult question presented by the record, and that is, whether the plaintiff himself was guilty of such negligence in the premises as to preclude a recovery. It is conclusively established that the train by which the plaintiff was injured, at the time of such injury, was under his control and direction; that at the time he stepped between the cars to uncouple them, they were moving at the rate of about four or five miles an hour; that he might, by a mere signal,

have had them stopped and thus effected the uncoupling without danger to himself. There is evidence sufficient to sustain a finding that the plaintiff, though an experienced man, had been in the employ of the defendant but a short time when the injury occurred, and was ignorant of the guard-rail at the point where the injury occurred. The defendant insists that plaintiff's acts, under the circumstances, amount to contributory negligence and bar a recovery. It would serve no useful purpose to cite authorities in support of the general rule that there can be no recovery if the negligence of the injured party proximately contributed to the injury. The soundness of the rule is not questioned; the only question is whether it was correctly applied in this case. In other words, the question is whether the trial court was warranted in holding, as a matter of law, that the acts of the plaintiff, in the light of all the circumstances, constitute such negligence as would defeat a recovery. Negligence is rarely an unmixed question of law. It has been defined by this court as doing that which an ordinarily careful and prudent man would not do under the existing circumstances. *Dailey v. Burlington & M. R. R. Co.*, 58 Nebr., 396, 400. The risk involved is the deterring cause. If the risk is so great that an ordinarily careful and prudent man would not, under the circumstances assume it, then to assume it is negligence. The magnitude of the risk is to be determined by many considerations. Among them is the experience and skill of the individual in the performance of such acts; the time and place and the instrumentalities involved. These, and other elements affecting the risk, which readily suggest themselves, the plaintiff was bound to take into account in deciding whether to assume the risk of going between the moving cars to uncouple them. But he was not required to weigh the chances of negligence on the part of the defendant. On the contrary, he had a right to assume that it had used ordinary care and taken due precautions to protect its employees from danger. He was not required to anticipate the negligence of his employer, but

had a right to assume that it had performed its duty. The cases just cited amply sustain this proposition. Such an assumption is not only warranted, but is essential to the successful operation of a railroad, which will not admit of the employee's stopping to weigh the probabilities of negligence or a mistake on the part of his superiors, but requires prompt and unquestioning obedience.

This leaves then the bare question whether, as a matter of law, one who goes between cars, moving at the rate of four or five miles an hour, on a road where ordinary precautions have been taken for the safety of the employees, is guilty of negligence. As before stated, negligence is seldom an unmixed question of law. Whether an ordinarily careful and prudent man would do a particular act depends upon the attendant risk. As we have seen, the risk depends in part on the individual doing the act. A young man, with long experience as a brakeman, might go between moving cars and uncouple them without incurring any serious risk, while the same act by an old and inexperienced man would be perilous in the extreme. Again, the risk would vary according to the condition of the road, being greater if it should be rough and uneven or covered with ice and snow than if smooth and level and free from such covering. These, and an almost infinite number of other elements, must be taken into account in estimating the risk incurred by the individual doing the act. In view of the manifold factors entering the problem of estimating the risk, it is impossible to say, as a matter of law, what an ordinarily careful and prudent man, under the circumstances would do. From the evidence reasonable minds might reach different conclusions; hence the question was one of fact for the determination of the jury. *Omaha Street R. Co. v. Martin,* 48 Nebr., 65; *Omaha & R. V. R. Co. v. Morgan,* 40 Nebr., 604; *Trott v. Chicago, R. I. & P. R. Co.,* 86 N. W. Rep. [Ia.], 33; *Chicago, B. & Q. R. Co. v. Wymore,* 40 Nebr., 645.

It follows, therefore, that the trial court erred in directing a verdict for the defendant, and the judgment

should be reversed and the cause remanded for a new trial, and such is our recommendation.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

GEORGE C. GRAHAM ET AL. V. ESTATE OF WILLIAM TOWNSEND, DECEASED.

FILED JULY 10, 1901. No. 9,829.

1. **Claim Against Estate:** OBJECTIONS: PROOF. Under objections to a claim presented for allowance to the probate court, (1) that deceased did not, at the time of his death, owe claimant anything whatever, and (2) that the estate did not owe claimant anything at the time the objection was filed, the administrator may prove payment, release, fraud or any other fact which will show that claimant has no valid claim against the estate.

2. **Appeal:** PLEA OF FRAUD: ISSUE. And, on an appeal from an order allowing or disallowing such claim, an answer charging that plaintiff's claim originated in and grew out of a fraudulent transacton, does not raise a new issue in the appellate court.

3. **Subsequent Creditors Can Not Attack Fraudulent Conveyance.** Section 17, chapter 32, Compiled Statutes, 1899, makes conveyances and assignments in fraud of the rights of creditors void and of no effect as against persons who have been hindered, delayed or defrauded by such conveyance or assignment. Subsequent creditors who have not been in any way prejudiced by a fraudulent transfer can assert no rights under this section.

4. **Fraudulent Transfer for Use of Vendor Is Void.** But where a fraudulent transfer of property, or choses in action, is made in trust for the use and benefit of the person making the same, it is void both as to existing and subsequent creditors.

5. **Subsequent Sale for Satisfaction Valid.** A debtor who has made a conveyance of property which is void under either section 7 or 17, chapter 32, Compiled Statutes, 1899, may afterwards transfer the title and ownership of such property to a creditor who is willing to receive it in satisfaction of his claim.

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

S. W. Christy, for plaintiffs in error.

Cole & Brown and *S. A. Searle, contra.*

SULLIVAN, J.

This controversy originated in the county court of Nuckolls county, where the estate of William Townsend, deceased, was being administered. The plaintiff in error, George C. Graham and S. W. Christy, claiming to be assignees and owners of a debt due from Townsend to James W. Carson, presented to said court for examination, adjustment and allowance a claim, whereof the following is a copy: "The estate of William Townsend, deceased. In account with George C. Graham and S. W. Christy. March 1st, 1894. Account of James W. Carson, assigned to Geo. C. Graham and S. W. Christy, June 28th, 1894, $625.00. And 7% interest from March 1st, 1894, to July 5th, 1895, $58.28. Total, $683.28." The administrator, Duane Townsend, objected to the allowance of this claim, and in a formal manner stated the grounds of his objection to be: "William Townsend did not at the time of his death owe James W. Carson, assignor, $625, nor any amount whatever, nor did he owe claimants, and said estate does not now owe said Carson, or claimants any sum of money whatever." Upon the claim and written objection a hearing was had, which resulted in an order of disallowance. From this order an appeal was taken. In the district court pleadings were filed, a trial was had, the issues were found in favor of the estate, and judgment was rendered dismissing plaintiffs' claim.

The first point urged upon our attention is that the court erred in refusing to strike out a paragraph of the answer in which it is charged that plaintiffs' claim originated in, and grew out of a fraudulent transaction—a transfer of property made by Carson to Townsend with

the intention, and for the purpose, of hindering, delaying and defrauding Carson's creditors. It is said that this paragraph raised a new issue, and that the ruling complained of disregarded plaintiffs' right to have the case tried upon the issue made in the county court. We are not able to accept this view of the matter. The objection to the allowance of the claim was not limited to a denial of facts; it stated mere conclusions of law: First, that Townsend did not at the time of his death owe Carson any sum whatever; and, second, that the estate did not owe the claimants anything at the time the objection was filed. Under these denials, it seems to us, it was competent for the administrator to prove payment, release, fraud or any other fact which might show that the plaintiffs had no valid claim against the estate. If the assigned account is for any reason unenforceable, it is entirely true, as stated in the objection, that "said estate does not owe said Carson or claimants any sum of money whatever."

It is next contended by the plaintiffs that they were creditors of Carson; that the account was assigned to them in satisfaction of their claim; and that they are, consequently, not affected by the fraudulent transaction between their assignor and Townsend. This contention must be sustained. The evidence warrants no other conclusion than that the transaction between Carson and Townsend was fraudulent, and that the latter held in trust for the former a portion of the proceeds of the property fraudulently conveyed. Whether the plaintiffs were creditors of Carson at the time of the fraudulent conveyance does not clearly appear. If they were not, it must be conceded that they could not, according to the weight of modern authority, claim any rights under section 17, chapter 32, Compiled Statutes, 1899. *Sheppard v. Thomas,* 24 Kan., 780; *Keeler v. Ullrich,* 32 Mich., 88; *Hanson v. Power,* 8 Dana [Ky.], 91; *Fullington v. Northwestern Importers & Breeders Ass'n,* 48 Minn., 490; *Reid v. Gray,* 37 Pa. St., 508; *Bewick v. Muir,* 83 Cal., 368; *Sledge v. Obenchain,* 58 Miss., 670; *Lehmberg v. Biberstein,* 51 Tex., 457; *Porter*

v. Pittsburg Bessemer Steel Co., 120 U. S., 649. That section declares conveyances and assignments made to hinder, delay or defraud creditors to be void and of no effect only "as against the persons so hindered, delayed or defrauded." But section 7 of chapter 32 declares: "All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person." Under this section there can, we think, be no doubt but that the fraudulent transfer, to the extent that it resulted in the creation of a trust for the benefit of Carson, was void as to all his creditors, whether prior or subsequent. The theory of the statute seems to be that property held in trust is to be regarded, so far as creditors are concerned, as the property of the beneficial owner. Whether a transfer of property is the result of an honest or corrupt motive is not, under section 7, of the least importance. If the parties to the transaction regard the vendor, or assignor, as the real owner, his creditors may so regard him; and the fact that he does not possess the legal title is no obstacle to the enforcement of their claims. Whatever belongs to the debtor may be seized by his creditors; and whatever they may take by judicial process they may acquire by assignment. A conveyance which is void under either section 7 or 17, although good between the parties, does not, as against creditors, change the ownership of the property conveyed. *Senter v. Williams,* 61 Ark., 189; *Mason v. Vestal,* 88 Cal., 396; *Bradtfeldt v. Cooke,* 27 Ore., 194.

The judgment is

REVERSED AND REMANDED.

WALTER ERICKSON V. MINNIE SCHMILL.

FILED JULY 10, 1901. NO. 10,056.

1. **Bastardy Proceeding: UNDUE INTIMACY BETWEEN PROSECUTRIX AND THIRD PARTY IRRELEVANT.** In a proceeding under the bastardy act, evidence of a rumor to the effect that there existed an undue intimacy between the complainant and a man other than the defendant at or about the time the illegitimate child was begotten, is not relevant to the issue.
2. **Sexual Intercourse With Others Than Defendant Competent.** In prosecutions for bastardy, evidence is admissible to show that the complainant had sexual intercourse with men other than the defendant about the time she became pregnant.
3. **Judicial Cognizance: PERIOD OF GESTATION.** Courts do not take judicial notice of the fact that the possible period of gestation exceeds ten calendar months.
4. **Exclusion of Evidence Proper at Time Bars Further Inquiry.** In reviewing the rulings of the trial court excluding evidence, this court will only inquire whether the evidence was properly rejected at the time it was offered.
5. **Refusal to Receive Evidence Not Covered by Question No Error.** A refusal to receive evidence embraced within an offer to prove, but not covered by any question propounded to the witness upon the stand, is not error.
6. **Instruction on Burden of Proof and Credibility of Witness Need Not Direct to All Matters.** The giving of an instruction with respect to the burden of proof and the credibility of witnesses is not erroneous because it fails to direct the attention of the jury to all the matters proper to be considered in determining the questions submitted to them.
7. **Evidence.** Evidence examined, and found to sustain the verdict.

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

Barnes & Tyler, for plaintiff in error.

A. A. Welch, contra.

SULLIVAN, J.

Walter Erickson, who was defendant below, is seeking in this court the reversal of a judgment of affiliation rendered against him in a proceeding under the bastardy act.

The first specification of error discussed in the briefs of counsel relates to the exclusion of evidence, which it is claimed had some tendency to show that an undue intimacy existed between the complainant, Minnie Schmill, and one Henry Brugeman at or about the time the illegitimate child was begotten. The evidence offered by the defendant and refused by the court was to the effect that the witness, Annie Fredolph, had heard an evil rumor concerning Minnie and Brugeman, and that Minnie's father had also heard this rumor and had declared it to be false and altogether groundless. It is past question that the ruling of the court was right. Neither the rumor nor the denial of it was relevant to the issue.

Another assignment of error challenges a ruling of the court refusing to permit the defendant to show by cross-examination of the complainant that she was with other men under suspicious circumstances about ten months before her child was born. It is, of course, a rule everywhere recognized that in prosecutions for bastardy, evidence is admissible to show that the complainant had sexual intercourse with men other than the defendant about the time she became pregnant (*Burris v. Court,* 34 Nebr., 187; *Stoppert v. Nierle,* 45 Nebr., 105); but the record before us does not disclose any violation of this rule. The court, it is true, struck out the name of one of the young men with whom Miss Schmill attended a dance and stayed out all night, but the main fact remained in the record and was considered by the jury. We are not able to see any possible prejudice in the order granting the motion to strike. But if the evidence excluded from the jury were material, the defendant has no just ground of complaint, for the events which he claims throw doubt on the paternity of the child, with whose maintenance he stands charged, occurred outside the normal period of gestation; and when the court made its ruling it was not advised that the period between conception and birth is, in exceptional cases, as great as ten months. While there is no absolute rule upon the subject, by general consent,

based on extended observation, the usual period of gestation is considered to be about 280 days. This is common knowledge which courts may be assumed to possess; but that the possible period of embryonic existence is more than 300 days is a fact which courts are not bound to know and act on in the trial of causes.

Eddy v. Gray, 4 Allen [Mass.], 435, was a case in which the complainant's child was born August 1, 1860. The court, over objection, admitted evidence of circumstances tending to show illicit intercourse with men other than the defendant about the last of September or first of October, 1859. The admission of this evidence, without proof that the period of gestation was prolonged beyond the usual duration according to the common and natural course of life, was held to be reversible error. This decision was cited with approval in *Ronan v. Dugan,* 126 Mass., 176, and in *Easdale v. Reynolds,* 143 Mass., 126. The evidence taken from the jury had no apparent relevancy at the time the motion to strike it out was sustained. The ruling was not erroneous when made, and it did not become so by the subsequent reception of evidence tending to prove that there are cases in which more than ten calendar months have intervened between impregnation and delivery. For the reason just stated the defendant's offers to prove were properly rejected. And they were properly rejected for other reasons. They embraced some matters which were clearly irrelevant in any view of the case; and they were not covered by any questions propounded to the witness who was being examined.

Complaint is made of the instructions with respect to the credibility of witnesses and the preponderance of proof. It may be conceded that these instructions did not direct the attention of the jury to all the matters proper to be considered in determining the question which they were called upon to decide, but that, in our opinion, is not a fatal fault. If the defendant was not satisfied with either of the instructions given he was at liberty to tender a better one. If he desired elaboration or amplification he had only to ask for it.

It is contended that the evidence does not sustain the finding of the jury; but, from a careful reading of the bill of exceptions, we are well satisfied that it does. The statement of counsel for defendant, that the story of the complainant contradicts, and is opposed to, all the experience of mankind, must be regarded, in view of the verdict and the approval of it by the learned trial judge, as too broad a generalization.

The petition in error contains no other specifications that can be considered. The judgment is

AFFIRMED.

NOTE.—*Period of gestation.* Nicholas, Adulterine Bastardy, 212, 213; Taylor, Medical Jurisprudence [Reese's 8th Am. and 10th London ed.], pp. 683-701; Wharton & Stille, Medical Jurisprudence [4th ed.], vol. III., ch. III., pars. 40-43; Le Merchant, Report of Gardner Case; Tidy, Legal Medicine, Part II., pp. 65-70; Rodgers, Domestic Relations, 601; Lyall, Medical Evidence, p. 8; Greenleaf, Evidence [Lewis's ed.], vol. II., par. 152 and authorities cited in note 2; Hohl, Annals of Hygiene, vol. II., p. 153; *State v. Read*, 45 Ia., 469; *Zweifel v. State*, 27 Wis., 396; *Humphrey v. State*, 47 N. W. Rep. [Wis.], 836; *Beers v. Jackman*, 103 Mass., 192; *O'Brien v. State*, 14 Ind., 469; *Benham v. State*, 91 Ind., 82; *State v. Smith*, 61 Ia., 538; *Masters v. Marsh*, 19 Nebr., 458, 461; *Sang v. Beers*, 20 Nebr., 365, 373; *Oleson v. Peterson*, 33 Nebr., 358, 365; *Harrington v. Barfield*, 30 La. Ann., 1297.—REPORTER.

EDWARD NIGHTINGALE V. STATE OF NEBRASKA.

FILED JULY 10, 1901. No. 11,951.

1. **Deputy Clerk of Court May Swear Prosecutor to Information.** A deputy clerk of the district court has authority to swear the county attorney to an information in a criminal case.

2. **If Answer to Improper Question Has No Prejudicial Tendency, Not Reversible Error.** The overruling of an objection to an improper question propounded to one of the witnesses for the defendant in a criminal case is not reversible error if the answer of the witness has no prejudicial tendency.

3. **Trial Judge May Cross-Examine Witness for Accused.** The trial judge may cross-examine witnesses for the accused, in a criminal case, in order to prevent a miscarriage of justice, but the

right to do so should be exercised sparingly and with great discretion.

4. **Reasonable Doubt.** The court as part of its charge gave to the jury an instruction on the subject of reasonable doubt almost identical with the one set out in the fifth point of the syllabus to *Willis v. State*, 43 Nebr., 102. *Held*, Not error.

5. **Where Defense Is Alibi, Presence of Accused at Locus in Quo Must Be Established Beyond Reasonable Doubt.** An instruction in which the court said to the jury that the evidence tended to show that the defendant was, when the crime was being committed, at such a distant and different place that he could not have participated in its commission, and that they should acquit unless the evidence satisfied them beyond a reasonable doubt that he was present when the crime was committed, *held* not error.

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

John M. Macfarland, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy,* for the state.

SULLIVAN, J.

In the district court for Douglas county Edward Nightingale was charged with the crime of robbery. The jury found him guilty and he was sentenced to imprisonment in the penitentiary for a period of ten years. The testimony given by the state to establish defendant's guilt was direct, positive and, in our opinion, quite sufficient. The crime was a bold and reckless one committed in broad daylight in a saloon in the city of South Omaha. That the prosecuting witness was robbed by some one seems to be admitted. Two witnesses identified the defendant as the robber, and a third claimed to have received from him an order for the payment of money which was one of the fruits of the crime. The defense relied upon was an alibi, but the evidence in support of it is neither satisfactory nor convincing. Certainly it is not so persuasive as to compel belief.

The second specification of error discussed by counsel is that the information was not properly verified. It was sworn to before the deputy clerk of the district court, who had, by virtue of his appointment, all the power and authority in the premises that his principal possessed. In the absence of an implication to the contrary in the statute the rule is that a deputy is authorized to do any official act that may be done by his principal. In *Scottish-American Mortgage Co. v. Nye,* 58 Nebr., 661, it was decided that a deputy sheriff has authority to appraise property for the purpose of a judicial sale; and in other cases it was held that such an appraisement is not a ministerial, but a judicial act. *Vought v. Foxworthy,* 38 Nebr., 790; *Ecklund v. Willis,* 44 Nebr., 129; *Kearney Land & Investment Co. v. Aspinwall,* 45 Nebr., 601; *Burkett v. Clark,* 46 Nebr., 466. That the clerk of the district court has authority to swear the county attorney to an information in a criminal case is settled in this state by *State v. Lauver,* 26 Nebr., 757, *Sharp v. State,* 61 Nebr., 187, and *Trimble v. State,* 61 Nebr., 604.

Defendant excepted to a ruling by which one of his witnesses was required to answer this question: "Are you related to Mr. Boylan, who was charged in this court with Mr. Nightingale's son in some crime?" While the ruling is not to be commended, it affords no ground for reversing the judgment. The answer cast no imputation on the prisoner; it afforded no ground for an inference that he had been previously charged with the commission of a public offense of any grade.

It is alleged as error that the trial judge was perniciously active in assisting the county attorney during the progress of the trial. The record, we regret to say, does show that the learned judge did on several occasions interrogate defendant's witnesses, but the questions propounded were not important and they elicited no material information. It can not be fairly said, we think, that the indiscretion complained of is ground for reversal. When the interests of the state are manifestly in incompetent

hands, the presiding judge may, to prevent a miscarriage of justice, examine witnesses who have testified on behalf of a person charged with crime; but, as was said by REESE, J., in *Yager v. State,* 22 Nebr., 332, the right to do so should be exercised sparingly and with great discretion. In this case there was clearly no occasion for the court to take charge of the cross-examination of defendant's witnesses, for the state was represented by an able and zealous prosecutor.

The giving of the seventh paragraph of the court's charge to the jury is assigned for error. This instruction, at least the part of it to which counsel objects, was given in the *Anarchists' Case* (*Spies v. People,* 122 Ill., 1), and will be found in Sackett on Instructions to Juries [2d ed.], p. 716. To the writer it has always seemed objectionable, as tending to obscure a plain matter by prodigality of definition. But in *Willis v. State,* 43 Nebr., 102, it was distinctly approved, in an opinion by Commissioner RAGAN; and in other cases in which it was challenged it was not condemned. *Barney v. State,* 49 Nebr., 515; *Leisenberg v. State,* 60 Nebr., 628; *Savary v. State,* 62 Nebr., 166. It must now be regarded as an instruction which it is not error to give.

The fifth paragraph of the charge is as follows: "There is evidence in this case tending to show an alibi, that is, at the time the crime, with which the defendant stands charged, was being committed, the defendant was at such a distance and different place that he could not have participated in its commission. You will carefully consider the testimony on the subject of an alibi, with all the other evidence in the case, and from that if you are not satisfied beyond a reasonable doubt of the defendant's presence at the commission of the crime charged against him, then you should acquit him; but after a full and careful consideration of all the evidence in the case you are satisfied of the guilt of the defendant, then you should find him guilty." This instruction, we think, is not subject to any just criticism. It did not say to the jury, as it was as-

sumed the instruction in *Peyton v. State*, 54 Nebr., 188, did, that to entitle the defense of alibi to consideration it must appear that the place where the defendant claimed to have been was so great a distance from the place where the crime was committed as to preclude the possibility of participation therein.

There is no reversible error in the record and the sentence is, therefore,

AFFIRMED.

KENT K. HAYDEN, APPELLANT, V. EDWARD T. HUFF ET AL., APPELLEES.

FILED JULY 10, 1901. NO. 9,186.

1. **Action May Be Revived in Name of Representative of Deceased Party Within One Year.** Under the provisions of the Code entitled "Revivor of Actions," sections 456-470, an action may be revived in the name of the representatives or successor in in interest of a deceased party to the action, on a conditional order, without the consent of the adverse party, at any time within one year from the time when the order might have been first entered.

2. **Action Not Revived in One Year, Should Be Stricken from Docket.** If an action is not revived within one year from the time an order of revivor might have been first made, and this fact is made to appear by affidavit, it is made the duty of the court in which the action is pending to strike it from the docket.

3. **Statutory Method Not Exclusive.** The summary mode pointed out in the statute referred to for the revivor of an action is not exclusive.

4. **Surviving Action May Be Continued by Pleading and Summons.** By section 45 of the Code, where the cause of action survives, the court may allow the action to continue by or against the representatives or successor in interest by the filing of supplemental pleadings and the service of summons, as in the commencement of an action.

5. **Limitation Does Not Apply to Proceeding Under Section 45.** The limitation of the statute as to time, contained in the provisions for summary proceedings to revive an action on a conditional order, does not apply to proceedings for revivor under the provisions of section 45 of the Code.

6. **Striking Cause from Docket Suspends, But Does Not Dismiss.** Striking an action from the docket, as provided for in the summary proceedings referred to, is not equivalent to dismissing the case out of court; the legal effect is to suspend further proceedings till some other steps are taken by which a final disposition thereof can be made, and the case yet remains in the court in which it was pending.

7. **Right to Revivor in Discretion of Court.** The right to revivor under the provisions of section 45 rests in the exercise of a sound discretion by the trial court, governed by equitable principles, which requires reasonable diligence and good faith on the part of those invoking its action; the right to revival to be granted or refused according to the circumstances and nature of the case. *Carter v. Jennings*, 24 Ohio St., 188.

8. **Petitioner Entitled to Revivor.** *Held*, In the present case, that the petitioner is entitled to have the action revived in his name as the lawful representative of the deceased plaintiff.

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

Application, on rehearing being allowed, by administrator for order of revivor. *Allowed.*

Cobb & Harvey, for appellant.

Wolfenbarger & Williams, A. S. Tibbets, James E. Philpott and *Lambertson & Hall, contra.*

HOLCOMB, J.

The present action is one in equity pending in this court on an appeal from a judgment rendered in the district court of Lancaster county in favor of the defendants, appellees in this court. The cause was submitted on its merits for a decision on the issues raised by the pleadings and the evidence, and an opinion handed down October 18, 1900, affirming the decree of the lower court. *Hayden v. Huff,* 60 Nebr., 625. A motion for a rehearing was in due time presented, which, on consideration, was sustained and a rehearing allowed.

At this stage of the proceedings, the appellee, Alice A. Minick, suggested the death of plaintiff and appellant, ac-

companied by a showing that his death occurred in July, 1898; that Minnie E. Hayden was, on the 15th day of August following, duly appointed administratrix of the estate of the deceased, and because no application had been made to have the action revived in the name of the administratrix for more than one year after her appointment, it was moved that the appeal be stricken from the docket. The motion was sustained and the action stricken from the docket. The administratrix having died in the meantime, Edwin T. Peters was duly appointed administrator *de bonis non* of the estate of the appellant, Kent K. Hayden, deceased, and appears in this action for the purpose of having it revived in his name as such administrator. The application is made by a supplemental petition in the nature of a bill of revivor. By the answer filed to the petition for revivor the issue presented is one of law only, and that is, whether, when more than a year has elapsed after the appointment of the administratrix of the estate of the deceased appellant, without any steps having been taken to have the action revived in her name, and after the action has been stricken from the docket on motion of the appellee, by the proceedings now resorted to for that purpose, a revivor may be rightfully ordered. The law governing the subject, in this state at least, appears to be somewhat obscured by doubt and diversity of opinion. More or less confusion on the part of the bench and bar has been the natural result thereof. There is no question in the present case as to the cause of action existing in favor of the deceased being one which under the law survives his death when the proper steps are taken to have the action revived in the name of the proper party as successor in interest. The question is not whether the cause of action survives, but by what method, and whether more than one, may the action be revived, which otherwise would abate by the death of the plaintiff and appellant.

Under the title, "Revivor of Actions," sections 456-470, of the Code of Civil Procedure, it is provided by section 459 that the revivor shall be by a conditional order that

the action be revived in the names of the representatives or successor of the party who died, or whose powers ceased, and proceed in favor of or against them. By section 460 the conditional order may be made on the motion of the adverse party or the representatives or successor of the party who died. Sections 461 and 462 provide for the manner in which notice of the conditional order shall be served, unless the order is made by consent, in which case the action shall forthwith stand revived. In section 466 it is declared that an order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor, unless in one year from the time it could have been first made; and in the following section (467), with reference to the death of a plaintiff, it is provided that the order may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made; but where the defendant shall also have died, or his powers ceased, the order of revivor on both sides may be made in the period limited in the last section. By section 468 it is provided that when it is made to appear to the court by affidavit that either party to an action has been dead for a period so long that the action can not be revived in the names of his representatives or successor without the consent of both parties, it shall order the action to be stricken from the docket.

From the foregoing, and other sections relating to the subject, the following is fairly deducible from our statutory enactment concerning the proceedings of a summary character by which an action may be ordered revived in the name of the proper party in interest, where the cause of action survives: (1.) By the consent of all parties in interest an order of revivor may be entered at any time. (2.) By a conditional order served on the opposite party or parties, if no cause is shown to the contrary, the order of revivor may be made at any time within one year from the time the order might have been first made. (3.) That

if an action is not revived within one year from the time an order of revivor might have been first made, and this fact is made to appear by affidavit, it is made the duty of the court in which the action is pending to strike it from the docket. The provisions under consideration, no doubt, apply to all actions pending in this court, whether upon appeal or by proceedings in error, to the same extent and with equal force, as to actions before judgment, pending in the district courts of the state. If these statutory provisions for revivor were exclusive, the questions under consideration would require no further discussion, and our conclusion of necessity would be adverse to the application of the petitioner. That the summary method pointed out by the statute referred to is not exclusive has already been determined by the former adjudications of this court.

By section 45 of the Code it is provided that in case of the death or other disability of a party, where the cause of action survives, the court may allow the action to continue by or against his representative in interest. This section has been construed as giving the right to revive an action independent of the provision of the statute under the title of revivor heretofore referred to. In *Rakes v. Brown,* 34 Nebr., 304, it is decided by the fourth paragraph of the syllabus that: "The mode provided by title 13 of Civil Code, for reviving actions by conditional order of revivor, is not exclusive. Section 45 of the Code confers authority upon the court to allow the action to be prosecuted by or against the representatives or successors in interest of a deceased party. For this purpose supplemental pleadings may be filed and summons served as in the commencement of an action. *Fox v. Abbott,* 12 Nebr., 333; *Carter v. Jennings,* 24 Ohio St., 182." Says NORVAL, J., in the opinion in that case: "True, no conditional order of revivor in the names of the heirs was made by the district court. But the mode provided by title 13 of the Civil Code, for reviving actions by conditional order, is not exclusive. Section 45 of this Code provides, among other things, that 'in case of the death, or other

disability, of the party, the court may allow the action to continue by or against his representative or successor in interest.' It has been held that the proper practice to revive an action under this section is by filing supplemental pleadings, and the service of summons, as in the commencement of an action." *Fox v. Abbott,* 12 Nebr., 328, 333; *Carter v. Jennings,* 24 Ohio St., 182. In this case no summons was necessary, as all the parties voluntarily appeared.

In the opinion in *Fox v. Abbott,* cited above, MAXWELL, J., who wrote the opinion, says, "The chapter providing for a summary revivor of actions is not exclusive. The court undoubtedly has power under section 45 of the Code, to allow the action to be prosecuted by or against the representatives of a deceased party, in which case supplemental pleadings may be filed and summons served as in the commencement of an action. And this is the practice in Ohio under a similar statute. *Carter v. Jennings,* 24 Ohio St., 182."

While somewhat in the nature of a dictum, because the question for decision was the limitation as to time of reviving a dormant judgment, it is observed by MAXWELL, J., in *Hunter v. Leahy,* 18 Nebr., 80, 81, that "the mode of reviving actions by motion is not exclusive. A party may, after the expiration of a year, revive an action by bill or supplemental petition. *Carter v. Jennings,* 24 Ohio St., 188; *Fox v. Abbott,* 12 Nebr., 328; *Pendleton v. Fay,* 3 Pai. Ch. [N. Y.], *204; 2 Daniels, Ch. Pr. (4th ed.), 1509; Maxwell, Pl. & Pr. (3d ed.), 695."

It is insisted, however, by counsel for appellee that, conceding the summary proceedings authorized by the statute on a conditional order are not exclusive, yet the limitation as to time must control, whatever may be the mode pursued to revive, and if the action is not revived by either method within the time limited, further proceedings are forever barred, and the action must stand abated. If the summary proceedings are to be construed as not exclusive, we know of no sound reason for taking the position that

the section therein limiting the time within which the action may be revived against the consent of the opposing party should apply to all proceedings brought to revive an action. In other words, the limitation as to time therein mentioned could not logically be held to extend further than the provisions of which it forms a part. If other proceedings are authorized independent of the statute providing for summary proceedings, then the time limit mentioned for the summary proceedings does not govern in the independent action. It was not, as we construe the legislative intent, intended to operate beyond and regarding proceedings not within the scope and purview of the statute in which the limitation for proceedings thereunder is prescribed.

But there exists yet another and a stronger reason for holding the limitation as to time mentioned in the summary statute is not of general application to all proceedings brought to revive an action because of the death of a party in interest. In the first place, it is provided unequivocally that by the summary method pointed out a final order of revivor shall not be made without the consent of the parties after one year from the time when it might have been first made. Secondly, the provision is that after the time has elapsed in which an order of revivor may be made without the consent of all parties, the court shall, when it is made to appear by affidavit that such is the fact, strike the action from the docket. It is nowhere provided that the action shall abate, or that no revivor shall thereafter be had. The action is only stricken from the docket. This is not, in our view of the law, equivalent to dismissing the case out of court, either by dismissing the action, or the appeal, or the proceedings in error. The legal effect is to suspend further proceedings until some other steps are taken by which a final disposition thereof can be made. The case yet remains in the court in which it is pending. It has not been finally disposed of. It is a temporary abatement of the case, which must continue until the proper steps are taken by which the action

may be revived and proceed to final judgment. It is not a final order abating the action. Whether such an order may be entered on notice to the proper parties need not now be decided. The action, however, is not finally disposed of by the entry of the order striking it from the docket.

In *Carter v. Jennings, supra,* under Code provisions for the revivor of actions similar to our own, and from which ours were almost bodily taken, it is held by the supreme court of Ohio, first, that the chapter providing for the summary proceedings is not exclusive, but that the court, under the general provision for the revivor of actions (our section 45), in the exercise of a sound discretion, is authorized to allow actions to be prosecuted by or against the representatives or successor in interest of a deceased party, for which purpose supplemental pleadings may be allowed, and process served, as in the commencement of an action; and second, that the court, in the exercise of the discretion by it possessed for such purpose, is governed by equitable principles, which require reasonable diligence and good faith on the part of those invoking its action; and where the time has elapsed within which an action can be revived by a conditional order under the chapter providing for summary proceedings, the application for leave to continue the suit by supplemental pleadings may be granted or refused, according to the nature and circumstances of the case. Says White, J., in writing the opinion: "The limiting the right of continuing an action against the representative of a party to the year within which a conditional order may be made, would evidently in many cases work great inconvenience, and sometimes defeat the ends of justice. In equity cases, the parties are often very numerous, many of them living remote from the place of litigation. If the failure to revive an action against the representatives of a necessary party within the time allowed for a conditional order, necessarily defeats the action, the consequences may be very serious to litigants chargeable with no laches. That a new suit may be brought is true;

but, in the meantime, the cause of action may have become barred. Besides, whatever expense may have been incurred or progress made in the former suit, in the way of taking testimony or otherwise, goes for nothing. If a new action has not become barred, the representatives of a deceased party would not be benefited, while the opposite party would be unnecessarily embarrassed. The tendency of the rule would be to multiply litigation and prolong the final determination of the controversy. No such absolute limitation upon the right of reviving an action was found in the former practice. And before we are authorized to say it was intended to be introduced by the Code, we think the intention ought to be more clearly evinced."

In *Black v. Hill,* 29 Ohio St., 86, the case of *Carter v. Jennings, supra,* was cited, approved and followed. It was also therein held that the provision of the Code for reviving or continuing actions in favor of or against the successors in interest of a party, or the representatives of a deceased party, may be applied to proceedings in error, and that the court was authorized, on the application of the representatives of a deceased party, to allow them to become parties, and the proceedings in error to be carried on in their names, although more than a year may have intervened from the death of the original party to the time of the application.

In *Pavey v. Pavey,* 30 Ohio St., 600, it was also held that notwithstanding more than a year had elapsed after the death of the original party, the action might be revived by or against his representatives or successor in interest, following the two prior decisions on the same point.

In *Reid v. Stuart,* 20 W. Va., 382, it is held that an action in equity may be revived either by the statutory mode or by bill of revivor. Of the same import is *Hall v. Hall,* 1 Bland's Ch. Rep. [Md.], 130. See, also, 18 Ency. Pl. & Pr., 1100, and authorities cited in notes 4 and 5; *McArthur v. Williamson,* 45 Fed. Rep., 154; *Pingree v. Coffin,* 12 Gray [Mass.], 288; *Barr v. Chapman,* 11 Ohio Cir. Ct., 196; *Russell v. Craig,* 3 Bibb [Ky.], 377.

In the case at bar, the appeal to this court was perfected and briefs were filed under the rules of court during the time the plaintiff and appellant was living. Because of the accumulation of business and the crowded condition of the docket no submission for a decision could be had for quite a period of time after the case was docketed. At the time of its submission for final decision, and when the opinion was filed, no action had been taken by either party suggesting the death of the plaintiff, although the event had transpired over a year prior thereto, and nothing had been done to secure a revivor in the name of his legal representative. After the granting of the motion for a rehearing, for the first time the attention of the court was called to the death of the plaintiff, and the suggestion was accompanied by the motion to strike the case from the docket. This order the moving party was entitled to under the provisions of the section heretofore quoted. At the time, the administratrix of the deceased plaintiff was also deceased, having died but a short time prior thereto. The present application is by her successor as administrator *de bonis non,* and was made soon after his appointment. Adherence to safe rules of practice, and commendable diligence in the prosecution of the case, would, we think, have suggested the advisability of reviving the action within a reasonable time after the death of the plaintiff and the appointment of the administratrix of his estate. Both parties appear to have been content to let the action proceed in his name, notwithstanding his death. There could be no legal abatement of the action until the death was suggested in some way to make it a matter of record in the court in which the action was pending. All proceedings had and orders entered after death, but before suggestion thereof, would, we apprehend, relate back to the time prior to death of plaintiff, and become as valid and binding on all parties to the record, or those entitled to become parties, as though he were living. There is no objection offered or existing for not ordering the action revived, save the contention that the limitation of the stat-

ute bars the right of the present applicant to have the cause revived. We are not willing to hold that plaintiff's representatives have been negligent to such a degree that under equitable considerations and in good conscience the order ought not now to be granted. Otherwise, his legal and equitable rights, as the duly appointed and regularly constituted representative of the deceased, entitled to enforce every right and obtain all the relief that the deceased may be found to have been entitled to, are beyond any serious question.

By the application of the equitable principles heretofore considered to the facts and circumstances in the case at bar, relating to the right of revivor, we arrive at the conclusion that the supplemental petition for revivor is well grounded, and ought to be sustained. An order will, therefore, be entered, reviving the action in the name of the petitioner as the representative of the deceased plaintiff, and directing its continuance in his name in such representative capacity.

JUDGMENT ACCORDINGLY.

PITKIN & BROOKS ET AL., APPELLANTS, V. BURNHAM, HANNA, MUNGER & COMPANY ET AL., APPELLEES.

FILED JULY 10, 1901. No. 9,451.

1. **Judgment Confessed to Defraud Creditors, Voidable, Not Void.** Judgment confessed for the purpose and with the intent to defraud creditors of the judgment debtor, the court having jurisdiction over the parties and the subject-matter, is not absolutely void, but voidable only at the instance of the person or persons attempted to be defrauded, in a proper proceeding brought for the purpose of avoiding such judgment.

2. **Execution Issued on Such Judgment Can Not Be Treated as a Nullity.** An execution issued on such judgment for like purpose, and levied by an executive officer on the property of the judgment debtor, can not be treated as a mere nullity by another officer holding process against the judgment debtor issued out of a different court and the possession of the officer mak-

ing the first levy forcibly wrested from him for the purpose of levying thereon the process subsequently issued and held by such officer.

3. **Property Taken Under Such Execution In Custodia Legis.** A legal levy on personal property of a writ of execution valid on its face issued on a judgment voidable only and not void and taking possession of the property levied on by the officer serving the writ places the property *in custodia legis.*

4. **Test of Liability Is: Was Officer Trespasser?** The test of the validity of a levy upon personal property is whether or not the acts of the officers under his writ have been such as would make him liable as trespasser but for the protection afforded by such writ. *Grand Island Banking Co. v. Costello*, 45 Nebr., 119.

5. **Constable Acquires Special Property by Levy.** When a constable has levied on personal property under a valid process and taken the property in his possession he has a special property therein which can not be interfered with or taken away by another officer holding another process against the same debtor.

6. **Judgment Described in First Paragraph, May Be Vacated.** When property has been levied upon under an execution issued on a judgment confessed for the purpose of defrauding the creditors of the judgment debtor such levy may be vacated and held for naught as against the creditors thus attempted to be defrauded in any proper proceeding brought for that purpose.

7. **Property Held Under Such Levy, Not Subject to Lawful Second Levy.** When personal property has been legally levied upon, during the existence of the lien created thereby, it is not subject to a lawful second levy by another officer under a different process, and when a subsequent levy by another officer is accomplished by force or fraudulent means or by an unauthorized procedure such levy is illegal and void.

8. **Officer May Make Successive Levies or May Be Garnished.** When personal property has been lawfully seized under mesne or final process successive levies on the same property may be made thereon by the same officer; or by garnishment proceedings such officer may be charged as garnishee and the property bound from the time of the service of summons in garnishment on him.

9. **Proceeding Binds Garnishee From Service of Notice.** Proceedings in garnishment bind the garnishee from the time of the service of the notice, and the property in his hands is not thereafter subject to levy and sale on process thereafter issued against the debtor during the continuance of the attachment. *Northfield Knife Co. v. Shapleigh*, 24 Nebr., 635.

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

Tibbets Bros., Morey & Ferris, for appellants.

J. B. Cessna, Batty, Dungan & Burton, M. A. Hartigan, John Hartigan, Smith & Olmstead and *John C. Stevens, contra.*

HOLCOMB, J.

The present action has its origin in a controversy between creditors of an insolvent merchant in regard to their respective rights in, and priorities to, the proceeds of a sale of a stock of merchandise formerly owned by the insolvent debtor. The plaintiffs, appellants, claim priority by virtue of proceedings taken in attachment and garnishment, and processes issued therein and served on one David Barlass, a constable, who, it is claimed, was in possession of the stock of merchandise under and by virtue of several successive levies of writs of execution issued out of the county court of Adams county on judgments against the debtor by confession which were in favor of several alleged creditors who are not parties to this action. The defendants, appellees, lay claim to the proceeds of the debtor's property by reason of several writs of attachment levied or attempted to be levied directly thereon by the sheriff of said county in whose hands they were placed, and who, ignoring the possession of the constable, by acts amounting to force and violence wrested from him the possession of the property the proceeds of which are in dispute.

The salient features of the case as we gather them from the record appear as follows: One Rollins, a retail merchant, was indebted in various sums to all the parties to this action save the sheriff and constable; and being in failing circumstances went before the county court of said county at about 2 o'clock in the morning, and confessed judgments in favor of different parties, who it is claimed,

were relatives of the debtor and who were represented by attorney, for various sums of money alleged to be due and owing such parties aggregating in amount between sixteen and seventeen thousand dollars. Immediately after the confession of the several judgments and the entry thereof executions were issued thereon and delivered to the said David Barlass, constable, for service. In the execution of these several writs the constable went to the building containing the stock of goods of the judgment debtor and served the same by taking possession of the property, declaring that by virtue of the executions which he held and for their satisfaction he levied on all the property in the building; after fastening the doors and windows, putting a locked padlock on the front door, and posting a notice to the effect that the store was closed on executions levied on the property therein, he temporarily departed from the building. While the constable was thus absent, the sheriff of the county, in whose hands there had been placed several writs of attachment issued at the instance of the appellees, who are creditors of the judgment debtor or some of them, knowing of the possession taken by the constable, his levy of the writs of execution, and that he claimed the property by virtue of the levies he had made thereon and the actual possession taken thereunder, entered the building and in form levied on the stock of goods under the writs of attachment he then held, in utter disregard of the rights and claims and possession of the constable under his several executions theretofore levied. It appears that some one, whether the sheriff or some person for him, is not disclosed by the record, had broken open the rear door of the building and by this means the sheriff gained an entrance to the building. When the constable sought to regain possession, he was barred from entrance into the building until finally, after gaining admission by strategy, he was forcibly ejected therefrom and by superior force denied any further control or possession of the property on which he had levied the executions placed in his hands for service. Immediately following the levy by the

sheriff of the attachment writs in the manner stated, the appellants, as creditors also of the judgment debtor, instituted attachment and garnishment proceedings for the recovery of the debts due them and garnisheed the constable as having in his possession property and goods of the debtor subject to attachment which could not otherwise be reached. Later on the judgments rendered against Rollins by confession were satisfied of record and the constable directed to return the executions issued thereon, which was accordingly done, with a return indorsed thereon showing what had been done in pursuance thereof, and that the constable, while the levy was in force, had been garnisheed by other creditors of the judgment debtor as having property in his possession belonging to such debtor. The constable also answered in the garnishment proceedings, disclosing in his answers the facts as to his levy on the property of the debtor under the executions he then held, and the subsequent transactions with reference to the property being wrested from his possession by the sheriff.

In the petition filed in this cause it is alleged: "That during the night between said December 28, 1896, and the following day, said Harry B. Rollins, for the purpose and with the intent of hindering and delaying his said creditors, confessed judgments before the county judge of said county and procured executions to issue thereon forthwith." This allegation is, by the different answers filed, admitted to be true. Because it stands admitted under the pleadings by all the parties to this action that the judgments on which the executions were issued, and by the constable levied on the judgment debtor's property, were confessed for the purpose and with the intent of hindering and delaying the creditors of the judgment debtor, it is contended by those claiming under the levies of the attachment writs made by the sheriff that the judgments and executions issued thereon are mere nullities and wholly void and no rights of any kind were or could be acquired thereunder or thereby, while the other creditors who garnisheed the

constable while in the constructive possession of the property by virtue of the executions levied thereon insist that the judgments and the executions were valid and binding and the possession of the constable lawful until the time the judgments were satisfied and the execution withdrawn, or until it was judicially determined that the judgments were fraudulent and void as against the creditors of the judgment debtor; that the judgments were at most voidable only, and not void.

A correct decision of the case therefore hinges on the legal status of the property in the possession of the constable under the executions he held, issued on the judgments, which we may, for the purpose of this case, assume to have been fraudulently confessed for the purpose of defrauding the other creditors of the judgment debtor. It is not suggested nor is there anything to warrant the inference that either the county judge entering the judgments by confession or the constable in whose hands the executions were placed for levy and satisfaction of the judgments, acted other than in good faith and in an honest discharge of official duty. If the judgments were fraudulent, the officers connected with their rendition and enforcement are free from any taint of the fraud thus sought to be perpetrated. All parties to this action then acting on the assumption that the judgments by confession were procured for the purpose of defrauding the good-faith creditors of the debtor, what are the rights of the constable in possession of the property under the writs of execution placed in his hands for service and the other good-faith creditors who sought to charge the constable as garnishee so holding the property by a constructive, if not actual, possession before the judgments by confession were satisfied of record and the executions recalled? Or stating the proposition in another way, can the sheriff make a valid levy under the attachment writs placed in his hands for execution on the same property which the constable had levied on, in disregard of the levy and possession of the constable under the executions issued on the judgments

thus fraudulently confessed? Counsel for the appellees take the affirmative of the last proposition and say in their brief: "Property levied upon and taken into possession on judgments fraudulently confessed and executions issued to hinder and delay creditors is not *in custodia legis,* but is subject to another process issued from another court." Counsel for appellants vigorously combat the proposition thus contended for. Let us briefly examine the question. The judgments were not void. They were only voidable. The court had jurisdiction over the parties and over the subject-matter. The judgments on their faces were in all respects regular and valid and the court was possessed of power to render them. The parties were before it and it had jurisdiction of their persons. The judgments were binding on the parties and all the world, save perhaps the creditors of the judgment debtor, who could assail them as being fraudulent and void in so far as by them the property of the debtor was sought to be taken in fraud of their rights. The judgments were not nullities; they were not absolutely and altogether void. They were enforceable except in so far as they conflicted with the rights of the creditors, and as to them they were voidable, and together with any lien on property attempted to be created by an execution issued thereon could be set aside in any proper proceedings and subordinated to the rights of creditors thereby attempted to be defrauded. Says Mr. Freeman in his excellent work on Judgments (4th ed., sec. 116, vol. 1), in speaking of void judgments; that they must be so from one or more of the following causes: "1. Want of jurisdiction over the subject-matter; 2. Want of jurisdiction over the parties to the action, or some of them; or 3. Want of power to grant the relief contained in the judgment." And in Black on Judgments, sec. 170, speaking on the same subjects, it is stated: "Now a void judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. * * * On the other

hand, a voidable judgment is one which, though not a mere nullity, is liable to be made void when a person who has a right to proceed in the matter takes the proper steps to have its invalidity declared. It always contains some defect which may become fatal. It carries within it the means of its own overthrow. But unless and until it is duly annulled, it is attended with all the ordinary consequences of a legal judgment. The party against whom it is given may escape its effect as a bar or an obligation, but only by a proper application to have it vacated or reversed. Until that is done, it will be efficacious as a claim, an estoppel, or a source of title. If no proceedings are ever taken against it, it will continue throughout its life to all intents a valid sentence."

Whether the judgment entered by confession and the levy of execution issued thereon were in fact fraudulent and void as to creditors was a question of fact to be determined in a proper proceeding at the instance of those having an interest in the matter upon judicial inquiry and investigation, and before that fact is determined, or before the executions are recalled and the levies abandoned, can it be said that an executive officer of another court, holding process mesne or final, may by his fiat declare the judgment void and a nullity, the executions of no force or vitality and forcibly wrest the property taken under such execution from another officer who, acting in the legitimate sphere of his duties, possesses such powers and rights of equal degree? It would seem to us not; that such action, instead of being calculated to advance the due and orderly administration of justice, would bring about conflict of authority, insecurity, strife and contention and "confusion worse confounded." The executions under which the constable held the property were regular and valid, and in all respects duly levied and free from imperfection, except that the lien created thereby might be subordinated and annulled as to the creditors of the judgment debtor because confessedly fraudulent as to such creditors. The sufficiency of the levy is not questioned and as made comes

entirely within the rule announced by this court in *Grand Island Banking Co. v. Costello,* 45 Nebr., 119 and *Boslow v. Shenberger,* 52 Nebr., 164. In fact counsel rely principally, if not exclusively, on the proposition announced by them and heretofore quoted in support of the right of the attachment creditors to levy on the property, treating the constable's possession as that of the debtor and the writs of execution as nullities and without any force or effect whatever. It is to be borne in mind that the present controversy is not one between bona-fide creditors on the one part and those claiming under judgments fraudulently confessed for the purpose of hindering and defrauding the good-faith creditors. It will not be seriously contended that a judgment creditor of such a judgment who participates in the fraud can not by means of an execution acquire a lien on property or a special interest therein as against the good-faith creditors of the judgment debtor, who, in any proper proceeding brought for the purpose of testing the rights of the respective parties, proves the facts from which the fraudulent intent and purpose may be inferred.

The contest here is between bona-fide creditors, each contending for a superior right to the proceeds of the debtor's property by virtue of steps of a different character taken by them respectively to establish such right. While we are cited to a number of authorities by counsel for appellees which, it is claimed, sustain the proposition contended for by them, in none, so far as our examination has extended, has it been held that property seized by an officer under an execution valid on its face, issued on a judgment voidable only, is subject to seizure by another officer on a process issued out of a different court in entire disregard of the right and custody of the officer holding the first writ; nor do the authorities hold that such property is not *in custodia legis* when taken under a writ on a judgment voidable only or confessed for the purpose of defrauding other creditors. In most of the authorities thus cited the controversy was between parties who

claimed through successive levies by the same officer as to priority or between those securing a first levy which was challenged and others who had intervened for the purpose of challenging the levy so made. To the general proposition that a levy made for the purpose of satisfying a judgment confessed for the purpose and with the intent to defraud creditors may be vacated and held for naught by those sought to be defrauded we are all agreed. In the case at bar appellants sought to have the principle applied and the levies first made by the constable held for naught as to them, by garnisheeing the constable and thereby obtaining a lien on the property in his possession and challenging the right of the judgment creditors to a superior lien because of the alleged fraud in the procurement of such judgments and the executions issued thereon, while the appellees, through the sheriff, by force and violence wrested the property from the possession of the constable, treating the writs under which he held as utterly void. Because the levy of executions thus made may in a proper action be attacked and defeated, it does not necessarily or logically follow that the execution writs in the hands of the constable may be treated as a nullity and his possession that of a trespasser. Had the writs been void or the levy made illegal, an entirely different question would be presented. A void judgment or illegal levy would afford the officer no protection whatever, nor would the property be *in custodia legis*. The possession of the constable, however, was lawful. The execution writs were regular and valid on their face, and the levy was made as required by law. The judgments were rendered by a court of competent jurisdiction having the power and authority to act, both with respect to the person and the subject-matter of the action. We know of no principle of law that would permit an executive officer having another writ for service, on the advice of counsel or otherwise, to declare the possession of the officer making the first levy wrongful and the judgments and executions under which he acted mere nullities and his acts thereunder those of a trespasser, and to forci-

bly seize the property, relying upon future investigation to justify his action, upon the assumption that the judgments and executions could be proven to have been confessed and sought to be enforced for the purpose of defrauding other creditors of their lawful demands. Until successfully challenged by some suitable proceedings, the judgments and the executions issued thereon were valid and enforceable. They could not be set aside and disregarded by the mere *ipse dixit* of the officer holding the second writ. He could not take the law into his own hand, declare the writs void and forcibly dispossess the officer in whose possession he found the property. Such acts are not only wrongful, but lawless in the extreme, and well calculated to breed strife, conflict of authority, and possibly consequences much more serious in their character. In *Ilsley v. Nichols,* 29 Mass., 269, 275, a case in principle analogous to the present one, it is said in the opinion: "These cases therefore seem to establish the general principle, that a valid and lawful act can not be accomplished by any unlawful means; and whenever such unlawful means are resorted to, the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by these unlawful means, to his rights." Shaw, C. J., who wrote the opinion, enters into an exhaustive and interesting discussion of the effect and result of levying an attachment writ by means of acts which are wrongful and unlawful and reaches the conclusion that a levy accomplished by such methods is invalid. We are cited to authorities which hold that the lien arising by the levy of an attachment writ when obtained on false grounds will be postponed to the lien of subsequent attachments on the same property by other creditors in good faith (*Kollette v. Seibel,* 26 S. W. Rep. [Tex.], 863; *Bateman v. Ramsey,* 12 S. W. Rep. [Tex.], 235), and that other creditors may set aside an execution issued on a fraudulent judgment. *Corning v. Dreyfus,* 20 Fed. Rep., 426; *Walton v. First Nat. Bank,* 22 Pac. Rep. [Colo.], 440; *Seibert v. Switzer,* 35 Ohio St., 661;

Patterson v. Stephenson, 77 Mo., 329. Our views fully coincide with the authorities cited, but we think counsel has inadvertently overlooked the proper practice by which such questions shall be determined. Can it be done outside of the courts and without judicial inquiry as to the facts on which the lien challenged as fraudulent is based? It is, we think, in this particular regard that the proper remedy of the attaching creditors who rely on the sheriff's wrongful acts and unlawful seizure have been misconceived. Authorities in abundance are cited to the proposition that a judgment may be attacked collaterally for fraud, and that executions issued on such judgments are tainted with the original fraud. While unreservedly acceding to the propositon thus advanced they do not, we think, with all due deference to the learned counsel, control in the disposition of the case at bar. If the property was *in custodia legis* at the time the sheriff wrested it from the possession of the constable, as we think it undoubtedly was, then the validity of the lien by virtue of the executions the constable held and the special property he had therein must be determined by some recognized principle in the enforcement and application of which it will be unnecessary to resort to force, but rather an orderly and lawful procedure by which the rights and interest of all will be fully protected and subserved. The constable being in the lawful possession of the property under valid writs of execution on judgments then in full force, it becomes pertinent to inquire respecting the method of effectuating other liens upon the same property to satisfy other lawful demands, and in what manner can a successful attack be made on the validity of the levies made on the property because of the fraudulent intent and purposes entering into and becoming a part of the judgments by confession and the executions issued thereon. The constable acting within the scope of his authority and under a valid process is as much an officer of the court out of which the process is issued and brings the property into possession lawfully and in the

law's custody as effectually and to the same extent as though the acts were performed by a sheriff of a state court or a marshal of one of the federal courts. There is no different principle to be applied to the possession of one than the other, and to the lawful possession of either there must be given equal consideration and protection from the courts in matters of controversy growing out of conflicting claims to the same property. The lawful possession of one can not rightfully be invaded and set at naught by the other because of the assumption of arbitrary power to do so. The possession in each instance first taken under a valid process binds the property from the time of taking and brings it *in custodia legis,* to be respected alike by all other officers and courts. Code of Civil Procedure, sec. 477; *Stationery & Paper Co v. Case,* 26 Kan., 299; *McKinney v. Purcell,* 28 Kan., 446; *Gilman v. Williams,* 7 Wis., 287. The property having been levied upon under a valid process by one officer and reduced to possession, he has a special property therein which can not be interfered with or taken away by another officer holding another process against the same debtor. 1 Freeman, Executions [3d ed.], sec. 135; Murfree, Sheriffs, sec. 269; *Tefft v. Stenberg,* 40 Fed. Rep., 2; *Covell v. Heyman,* 111 U. S., 176; *Hagan v. Lucas,* 10 Pet. [U. S.], *400; *Stationery & Paper Co. v. Case, supra.*

In *Gumbel v. Pitkin,* 124 U. S., 131, cited by counsel for appellees, although a United States marshal had levied upon property under an attachment writ from a circuit court of the United States issued and levied on Sunday, and for that reason admittedly invalid, it is held that the property in possession of the marshal under his attachment writ was *in custodia legis* and could not be taken or levied on by a sheriff under process out of the state court, but that the creditor represented by the sheriff must intervene in the action pending in the federal court and there have his right to the property determined and the priority of liens ascertained as between himself and the marshal holding under an illegal levy. Says Mr. Justice Mathews,

who delivered the opinion of the court (p. 144): "In the subsequent case of *Covell v. Heyman*, 111 U. S., 176, it was decided that the principle that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being, applies both to a taking by a writ of attachment under a mesne process and to a taking under a writ of execution. It was there also decided that 'property thus levied on by attachment or taken in execution is brought by the writ within the scope of the jurisdiction of the court whose process it is, and as long as it remans in the possession of the officer it is in the custody of the law. It is the bare fact of that possession under claim and color of that authority, without respect to the ultimate right to be asserted otherwise and elsewhere, as already sufficiently explained, that furnishes to the officer complete immunity from the process of every other jurisdiction that attempts to dispossess him.'"

While the property in the case at bar was in the possession of the constable under the levies he had made thereon, it was incapable of a legal and valid levy by another officer under a process, mesne or final, issued out of another court. Possession of personal property is essential and necessary to a valid levy, and two officers can not at the same time hold possession of the same property under two different writs issued out of different courts of co-ordinate jurisdiction. One of the levies so attempted to be made must, in the light of the essential requirements of a valid levy, be held and deemed to be illegal and unavailing. Says Brewer, J., in *Stationery & Paper Co. v. Case, supra*, p. 304: "It matters not whether the officer in possession be a constable, a sheriff, or a receiver—it is still *in custodia legis*. It is true the remedies may be different, whether the possession be that of a constable or a receiver, but still the ultimate fact is the same, that the possession is the possession of the law. Such possession when once established is absolute and exclusive; it cannot be interfered with, it cannot be divided. When a sheriff has levied, a

marshal cannot touch, and *vice versa;* when a sheriff has levied, a constable can not touch, and *vice versa;* when a constable has levied, no other constable can touch. The levy made must in some way be carried out to completion, whether by sale of the property or by payment of the judgment before any other legal process can attach, because if the first levy implies absolute and exclusive possession, there is nothing for the second levy to touch." The property, whenever levied upon during the existence of the lien created thereby, not being subject to a lawful second levy by another officer under a different process, it logically follows that a subsequent levy accomplished by force or fraudulent means and by an unauthorized procedure is illegal and void. Drake, Attachment [7th ed.], sec. 193; *Ilsley v. Nichols,* 29 Mass., 269, 275; *Lewis v. Dillard,* 76 Fed. Rep., 688; 1 Am. & Eng. Ency. Law, p. 927, and cases cited in note 5.

Adherence to the doctrine that but one officer can have the lawful custody of property levied upon under a process placed in his hands for service in nowise militates against the legal or equitable rights and interests of other persons for the satisfaction of demands against the same debtor. The law furnishes a speedy, adequate and effective means for the subjection of the property thus levied upon to all lawful demands, in so far as it is capable of satisfying such demands according to the priority of the liens acquired thereon. Nor is a party prohibited from challenging and attacking the validity of all prior levies upon any ground which may be found sufficient to vitiate the levy or subordinate the lien to others prior in right even though subsequent in time. The property having been lawfully seized and brought within the law's custody, successive levies may be made by the officer having the possession of such property, and the property may also be constructively attached and a valid lien acquired thereon by suitable proceedings, in which the officer in possession may be garnisheed, as was done in the case at bar by appellants, as having in his possession goods and chattels of the debtor

subject to attachment. In such case, the attaching creditor acquires a lien thereon, and an interest therein to the same extent and of like effect as though the property had been directly attached in the first instance, subject of course to all prior valid levies existing thereon at the time of serving on the officer summons in garnishment. In *Northfield Knife Co. v. Shapleigh,* 24 Nebr., 635, it is held: "Proceedings in garnishment bind the garnishee from the time of the service of the notice, and the property in his hands is not thereafter subject to levy and sale on process thereafter issued against the debtor during the continuance of the attachment." Says MAXWELL, J., in the opinion (p. 638): "The goods and the party garnisheed being both within the jurisdiction of the court, it will exercise such jurisdiction over them as the necessities of the case may require. We are aware that in *Bigelow v. Andress,* 31 Ill., 322, it was held that garnishment imposed no lien upon the goods in the garnishee's hands and did not put them *in custodia legis.* If this was the rule, proceedings by garnishment would be an expensive farce, which would give the attaching creditor no rights under the attachment. Neither can the right be restricted to the personal liability of the garnishee, as he might be insolvent or unable to pay the value of the property. We hold, therefore, that garnishment is an attachment of the goods in the hands of the garnishee, and that such goods are not subject to levy and sale upon process thereafter levied, during continuance of said attachment." See, also, *Fitzgerald v. Fitzgerald & Mallory Construction Co.,* 44 Nebr., 463, 496; *Grand Island Banking Co. v. Costello,* 45 Nebr., 119; Drake, Attachment [7th ed.], sec. 263; *Bates v. Days,* 17 Fed. Rep., 167, 168; *Locke v. Butler,* 19 Ohio St., 587; *Bailey v. Childs,* 46 Ohio St., 557. In the case last cited, it was decided by the supreme court of Ohio "that the property in the custody of the sheriff was not subject to levy and seizure by the constable. While different attachments of the same property may be made by the same officer (Revised Statutes, sec. 5535), personal property

held under attachment by one officer can not be levied upon under a writ in the hands of another officer. In order to attach the property in the hands of the sheriff, he should have been proceeded against as a garnishee. *Locke v. Butler,* 19 Ohio St., 587. His assent to the so-called levy did not change the rule."

Applying the principles deducible from what has heretofore been said to the facts in the case at bar, our conclusions are: (1.) The judgments by confession and the executions issued thereon under which the constable levied on the property, the proceeds of which are in controversy, were not absolutely void, and to be treated as nullities but voidable only at the instance of a bona-fide creditor in a proper proceeding who was being defrauded of his rights by such confessions of judgment and the levy of executions issued thereon on the property of the judgment debtor. (2.) That at the time of the forcible seizure of the property by the sheriff, the constable was in the lawful possession thereof under writs of execution valid and binding on their face and the property was *in custodia legis.* (3.) That the act of the sheriff in forcibly seizing the property was unlawful and unauthorized and rendered the levy attempted to be made thereby illegal and void as against the rights of the constable and those he represented and was ineffectual to deprive him of his special interest in the property by reason of his levy thereon and the liens acquired by the subsequent constructive attachment of the property by garnishment process served on him while lawfully entitled to the possession of such property. (4.) That the property, having been levied upon by the constable under the executions in his hands and the possession thereof taken by him, was not subject to a further levy by the sheriff under writs of attachment issued from another court, while the first levy continued in force and before the judgments were satisfied and the execution recalled. (5.) That the property levied on by the constable and in his possession could only be reached by other creditors by virtue of subsequent levies of mesne or final process made

by the same officer, or by attachment of the property by garnishment process served on the constable having in his possession property of the debtor subject to attachment. (6.) That as between those claiming under and through the sheriff by virtue of the levies attempted to be made by him under writs of attachment in the manner stated, and those claiming through garnishment proceedings against the constable as having the lawful possession of the property, the latter, by the process of garnishment, acquired liens on the property seized by the constable superior to the former and are entitled to precedence in the distribution of the proceeds of the sale of such property.

While some other questions are presented in briefs of counsel they are included in, and necessarily disposed of by, what has already been said and will not further be considered.

We are therefore of the opinion that the judgment must be reversed and the cause remanded for further proceedings in harmony with the views herein expressed, which is accordingly done.

REVERSED AND REMANDED.

JOHN W. ARGABRIGHT V. STATE OF NEBRASKA.

FILED JULY 10, 1901. No. 11,340.

1. **Action on Application for Change of Venue Discretionary.** An application for a change of venue in a criminal prosecution is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed when no abuse of discretion is disclosed. *Welsh v. State*, 60 Nebr., 101.

2. **Overruling Application Not Error Where It Is Not Shown that Defendant Can Not Have Fair Trial in Original Venue.** It is not error to overrule an application for a change of venue in a criminal trial when from all the evidence introduced in support and in resistance of the application, there is not shown to exist any reasonable ground for the belief that the defendant can not have a fair and impartial trial in the county from which a change of venue is applied for.

3. **Law of the Case.** Where, in a criminal prosecution, instructions given the jury are assigned as error and on appeal such instructions held properly given, and on a subsequent trial the same instructions are given and again assigned as error, the decision of the question on the first appeal will be held to be the law of the case and followed in reviewing the case on the appeal last taken.

4. **Not Error to Refuse Cumulative Instructions.** It is not error to refuse to give an instruction stating a proposition of law which is substantially covered and included in an instruction already given.

5. **Misconduct of Counsel.** Misconduct of counsel for the state in the argument of the case, in order to work prejudicial error, must have been in disregard of the rules of legitimate argument of the evidence, and sufficient to unduly influence the jury and prejudice the rights of the defendant.

6. **Where Counsel Argues Dehors the Record, Misconduct May Be Cured by Court's Instructions.** Where counsel for the state referred in an argument to the jury to facts not in evidence, and upon objection that the statements were unwarranted by the evidence the district court instructed the jury to disregard such statements, there was left no ground for complaint, for the reason that the court, when appealed to, granted all relief prayed for. *Hoover v. State*, 48 Nebr., 184.

7. **Alleged Misconduct Insufficient.** Alleged misconduct of assistant counsel for the state examined, and *held* insufficient to have improperly influenced the jury or prejudiced the rights of the defendant.

8. **Question Not Prejudicial When Objection Is Sustained.** Record examined, and *held* no prejudicial error was committed by counsel for state asking questions of witness claimed to have been pregnant with assumptions and insinuations, the objections interposed to such questions having been sustained by the trial court.

9. **Refusal to Call Impeached Witness Not Suppression of Evidence.** The refusal of the state to call certain witnesses, on a second trial, whose testimony on a former trial had been impeached, there being many other trustworthy witnesses by which the same facts could be proven, *held* not a suppression of evidence nor prejudicial to the rights of the defendant.

10. **Law of the Case.** The defendant on a former trial was found guilty of murder in the first degree, and on error to this court the evidence was examined and found sufficient to support the verdict. A subsequent trial resulted in a like verdict, and on error it is again urged that the evidence is insufficient to support the verdict. The evidence in the last trial being substan-

tially the same and fully as strong and convincing on the part of the state as in the former, *held* that the decision first had on the sufficiency of the evidence has properly become the law of the case decisive of the question and to be followed in the subsequent review of the case.

11. **As an Original Question, the Verdict Sustains the Evidence.** *Held further*, as an original and undecided question from an examination of the record, that the evidence is sufficient to support the verdict of guilty of murder in the first degree as found by the jury.

12. **Verdict Not Result of Passion and Prejudice.** *Held*, also, from an examination of the record, that the verdict is not the result of passion and prejudice on the part of the jury.

ERROR from the district court for Nemaha county. Tried below before LETTON, J. *Affirmed.*

William H. Kelligar and *Francis Martin*, for plaintiff in error:

The defendant was prosecuted in the district court of Nemaha county under an indictment for murder in the first degree, for the killing of one William Smelser on the night of February 9, 1894. At the time of the tragedy the defendant was a resident of South Omaha, where he had resided about three years, and at the date named was one of the police force of that city. The defendant's wife, Rose Smelser Argabright, was the daughter of the deceased. By this union there were two children, one about two and one-half years old at the time of the tragedy, and the other an infant. Until within about four months of the date of the tragedy, the defendant's family resided with him at South Omaha; but at said date were living at the home of the deceased. It appears of record that there had been some trouble between the defendant and his wife. The cause is not disclosed and is immaterial. The difficulty ending in the tragedy, occurred in an ordinary country schoolhouse. The building was thirty-six feet long by twenty-four feet wide, and was supplied with thirty-three desks, a stove, and a platform eight feet wide and twenty feet long. At the time of the shooting there were some

forty to sixty people in the schoolhouse, congregated in the rear part. On the 8th day of February, 1894, the defendant left South Omaha, came by rail to Howe, Nemaha county, and from thence went to his father's place for the purpose of seeing his children, who were then at Mr. Smelser's home in the same neighborhood. He had made a prior visit to the same place, for the same purpose, on November 28, 1893. At the former visit, with considerable difficulty, he had seen his baby only. He had not seen his little boy since he was first taken from him, more than three months before. The first time he came to the county to visit his children, he met the defendant, on the road from Howe, and requested to see them. The request was denied, with a command to keep off the premises of deceased. On the occasion of the second visit he again met the deceased, who refused to speak to him. Both the defendant and his father failed in an attempt to arrange a meeting between the father and his children at the home of Mrs. Copeland, a daughter of the deceased, who resided across the road from her father. The deceased refused to permit the meeting. On the night of February 9th, an entertainment was given at the Champion schoolhouse. The defendant attended it. After it was over he saw Mrs. Smelser with his sleeping boy in her arms; and as she started to leave the room he stepped forward, and requested her to let him see the boy. When he did this the deceased assaulted him; and a fight took place, which culminated in the death of William Smelser. The defendant claims that he acted in self-defense.

The defendant was entitled to a change of venue. 4 Ency. Pl. & Pr., 398; *Muscoe v. Commonwealth,* 87 Va., 460, 462.

The minds of the jury were not purged of the gangrene of the statements and reprehensible arguments by the court's instructions. *People v. Ah Len,* 92 Cal., 283, 284; *Martin v. State,* 63 Miss., 505; *State v. Towler,* 13 R. I., 661, 666.

There is no evidence that the killing was premeditated.

The purchase of the Colt's revolver was necessary to the performance of his duties as night policeman. The mackintosh was a necessity in cold weather. No statement made by the defendant prior to the shooting has been shown to have referred to any contemplated killing of the deceased.

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

HOLCOMB, J.

The plaintiff in error was the defendant in a criminal prosecution had in the district court of Nemaha county, in which he was charged with murder in the first degree for the killing of one William Smelser in said county on the night of February 9, 1894. The prosecution resulted in a conviction of guilty of murder in the first degree, the jury fixing the punishment at imprisonment in the state penitentiary for life. Prior to the trial we are now asked to review, the defendant has been twice before tried, the first trial resulting in a verdict of manslaughter and the second of murder in the first degree. By proceeding in error to obtain a review and reversal of the judgments rendered on the verdicts thus returned the defendant has in each instance been successful, and the judgments so rendered were reversed by this court and new trials awarded. The opinions resulting in such reversals and the reasons therefor are found in *Argabright v. State,* 49 Nebr., 760, and under the same title on the second appeal in 56 Nebr., 363. After the case was reversed and remanded the second time the defendant applied to the trial court for a change of venue on the grounds that a fair and impartial trial could not be had, and a fair, impartial and unprejudiced jury could not be obtained, in said county. The specific grounds for the application were, in substance, that by reason of the defendant's conviction in the two former trials great notoriety and wide publicity had been given the transaction surrounding the homicide, and that a general

sentiment was prevalent that the defendant was guilty as charged, which would prevent a calm and dispassionate inquiry into the merits of the case. It is also claimed that a strong prejudice existed against the defendant because of the cost of the prosecution of the defendant, which permeated the whole county and tended to influence the action of a jury, to the defendant's prejudice. The application for a change of venue was resisted by the state, and upon a hearing, in which there were filed numerous affidavits in support of the application and in resistance thereof, the trial court overruled the motion, to which the defendant excepted, and now assigns error on the ruling. The defendant filed his own affidavit in support of his motion, in which, with some particularity as to causes set forth in the motion, and also of alleged false reports of his conduct while imprisoned, placing him in the light of being unruly and recalcitrant, he sought to sustain the contention that there existed a deep-seated prejudice against him, extending to all parts of the county, which would prevent a fair and impartial hearing of the charge pending against him. Some eight or ten other affidavits of a general nature sustaining the grounds stated in the application were also filed. In opposition there were presented some sixty affidavits of citizens from all parts of the county, the substance of which was that no undue excitement or interest had been created by reason of the former trials; that no prejudice existed against the defendant and no feeling manifested because of the expense entailed on the county arising from the prosecution of the defendant. In many of the affidavits it was stated that in many of the localities but little was known of the supposed facts surrounding the homicide, and no unusual interest manifested at any time. In all the affidavits it was stated that a fair and impartial jury could be secured to try the case; other affidavits denying specifically some of the statements in support of the motion were also introduced. The record does not show any abuse of discretion in the ruling complained of. From all the evidence presented in support of the mo-

tion it seems reasonably clear that there existed no reasonable grounds for the belief that the defendant could not have a trial by a jury free from prejudice and fair and impartial in all respects. The showing we regard as insufficient to establish error in the court's ruling denying the motion. In *Welsh v. State,* 60 Nebr., 101, it is held that "An application for change of venue or a continuance is addressed to the sound discretion of the court, and its ruling thereon will not be disturbed where no abuse of discretion is disclosed." Applying the rule to the case at bar the defendant's contention must be held not well founded.

Instructions 4 and 5, given the jury, are excepted to and the giving thereof assigned as error. These instructions are almost identical with instructions numbers 4 and 13 given on the second trial and held on review of the case to have been properly given. *Argabright v. State,* 56 Nebr., 363, 366. The decision there made has become the law of the case and will be adhered to on this, a subsequent appeal involving the identical question there passed upon. While there was a slight modification in one of the instructions as compared with the one first given and approved by this court, the change was altogether favorable to the defendant and conformed more nearly to his contention as to the evidence bearing upon his actions immediately preceding the tragedy.

Complaint is made because the trial court refused to give an instruction requested by defendant on the law of self-defense. The requested instruction is as follows:

"No. 1. If the jury believe from the evidence, that at the time the said defendant is alleged to have shot the deceased the circumstances surrounding the defendant were such as in sound reason would justify, or induce in his mind, an honest belief that he was in danger of receiving, from the deceased some great bodily harm, and that the defendant, in doing what he then did, was acting from the instinct of self-preservation, then he is not guilty, although there may have been no real or actual danger."

On its own motion the court gave instruction number 20 on the same subject.

"No. 20. Upon the question of self-defense the court instructs you when a person is assaulted by another in such a manner as to incite in him a reasonable belief that he is in danger of losing his life, or receiving great bodily injury, he may legally resist the attack by employing such reasonable means within his power as are apparently necessary to defend himself. In order to justify self-defense, it is not indispensable that there should exist actual and positive danger. A party who is assaulted in such a way as to infuse in him a well grounded and reasonable belief that he is in danger of suffering great bodily harm will be justified in defending himself, although the danger be not real, but only apparent. In other words he is justified in acting upon the facts as they appear to him at that time and is not to be judged by the facts as they actually are. And in this case, if the jury believe from the evidence that the defendant was assaulted by the deceased in such a way, and under such circumstances as to infuse and fix in his mind a sincere conviction that his life was in danger, or his body in eminent peril, then he was justified in defending himself, whether the danger was real or only apparent. The law considers that men when threatened with danger, are obliged to judge from appearances and determine therefrom as to the actual state of things surrounding them; and in such cases if persons act from honest conviction induced by reasonable evidence they will not be held responsible criminally for a mistake as to the extent of the actual danger."

We regard the subject as having been fully covered in the court's own instruction as favorably to the defendant as the one requested, and for that reason it was entirely proper to refuse to give a second instruction covering the same point. It is said the instruction is faulty because by some of the testimony there is evidence tending to show that a son-in-law of the deceased also and at the same time made an assault on the defendant. We do not so regard

it. All the evidence was before the jury and it was for them to say whether, under all the facts and circumstances disclosed by the evidence, the defendant was justified in shooting the deceased in order to repel the threatened assault. The assault made by the deceased's son-in-law, if found by the jury, was one of the circumstances to be considered in determining the situation of the defendant, and whether there existed at the time reasonable grounds for a well-founded belief that he was in real or apparent danger of death or great bodily harm and killed the deceased under an honest conviction that the act was necessary for self-preservation. There was no error in refusing to give the requested instruction.

Much of the brief of counsel for defendant is devoted to a discussion of alleged misconduct of counsel assisting in the prosecution of the case, which, it is urged, was prejudicial to the defendant's rights, and on account thereof the judgment should be reversed. From the record we infer that a great deal of warmth of feeling was engendered between assistant counsel for the state and defendant's counsel. Much of the criticism grows out of the arguments made to the jury after the introduction of the evidence. Assistant counsel for the state made the closing argument, and it is claimed he departed, in several instances, from a legitimate discussion of the evidence in the case. Some of the objections are based on statements made in reply to the line of argument adopted by counsel for the defendant and do not seem to merit the criticism offered. In several instances we regard the statements of counsel for the state as reprehensible, and an apparent attempt to discuss matters not warranted by the evidence. The defendant's counsel, however, on all such occasions, was prompt to interpose an objection, and the court, when the objection was well taken, with equal promptness sustained the objection, instructed the jury to disregard the statement and all statements of counsel not founded on the evidence and admonished counsel to keep within the sphere of legitimate argument. The court would have been justified in more severely

rebuking the counsel than was done. The defendant's substantial rights were not, we think, invaded or prejudiced by the conduct complained of. Usually the matters referred to were not pertinent to the issues in the case. They were petty references to matters outside of the record which, as we view the subject, neither assisted nor in anywise obstructed the jury in arriving at a fair and impartial verdict. Frequently objections to the argument of counsel were interposed, which, upon consideration, the court properly overruled on the ground that the argument was legitimate and warranted by the evidence. In no instance was an objectionable argument engaged in to the extent of stating with fullness the subject referred to. No very accurate or intelligent idea could be formed as to counsel's meaning or the impressions he sought to convey by the objectionable remarks. Counsel for defendant, vigilant in protecting the rights of his client, would instantly object at the beginning of the statement, and upon the objection being sustained, the argument would again be resumed on lines unobjectionable. The record does not disclose a persistent effort to override the court and continue arguing any particular matter objected to, or wantonly overstep the bounds of propriety, but rather, in many instances during the closing argument, probably through inadvertence, a want of a clear conception of the line of legitimate argument, and an under-estimation by counsel of his duty to, with circumspection, maintain the dignity of the state and assist to enforce its laws only by methods and arguments entirely unquestionable in character, the bounds of legitimate argument would be trespassed upon, when an objection would be interposed, sustained, if proper, and acquiesced in by counsel, and the argument would be brought within its proper sphere. The court having in the main sustained the objections interposed by counsel for defendant, instructed the jury properly regarding the matter and admonished assistant counsel for the state to refrain from the objectionable line of argument, secured the protection of defendant's rights to which he was entitled and he has

now no substantial ground of complaint on that account. *Hoover v. State;* 48 Nebr., 184. An investigation of the record satisfies us that the jury were not influenced by the misconduct complained of, nor were the rights of the defendant prejudiced thereby, and that no sufficient reason appears for disturbing the verdict on that ground.

In this connection, it is also contended that there was misconduct of counsel for the state amounting to prejudicial error in asking witnesses leading and improper questions pregnant with assumptions and insinuations detrimental to the rights of the defendant and in violation of the rules of legal evidence. No complaint is made on the admission of improper evidence. It is conceded that the rulings of the court on the alleged improper questions were without error, but it is insisted that the questions propounded are, obviously, objectionable and for the purpose of unduly influencing the jury, counsel knowing full well that an answer would not be permitted. We are unwilling to believe counsel's motives were as contended for, or that prejudice to the defendant was occasioned by such questions. Many of the questions, it is true, were improper, and the trial court properly excluded the witnesses' answers thereto. But this occurs in all trials. It is one of the most common incidents to every trial of importance to have many questions propounded by counsel on both sides of the controversy which are by the trial court held improper. There is in this case, as we gather the proceedings from the record, no such willful misconduct of counsel in propounding questions to the different witnesses, or wanton disregard of the rules governing the examination of witnesses and the introduction of evidence, as to amount to prejudicial error, and the assignment of error in respect thereof can not be sustained.

Error is sought to be predicated because the court permitted the attorneys for the state to suppress alleged evidence within their knowledge and under their control which was used on the former trials of the case and which the defendant could not use except by way of cross-exam-

ination, and which suppressed evidence, it is claimed, would reduce the finding of the jury as to the degree or grade of the crime committed or result in an acquittal. This assignment of error is based on the following circumstances, which transpired subsequently to the homicide, but in relation thereto: Three witnesses called by the state on the former trials to give evidence regarding the facts surrounding the homicide to which they were eye witnesses, after testifying, were, by the defense, apparently successfully impeached by proving by the coroner, and perhaps otherwise, that at the coroner's inquest the witnesses had given testimony radically opposed and quite contradictory to their testimony given on the trial of the case. It was proven or admitted that these witnesses gave testimony at the time of the coroner's inquest more favorably to the defendant, and the tendency of which was to prove that the defendant had been, not only by the deceased, but also by his son-in-law, vigorously assaulted until he was crowded down and apparently overpowered and hard pressed at the time the fatal shot was fired. The statements made by these witnesses before the coroner's jury at the inquest gave substantial support to the theory of the defense that the killing was done in self-defense. On the former trial the same witnesses called by the state testified regarding the circumstances of the homicide substantially in harmony with the other witnesses examined by the state regarding the same matter, and which tended to show that the act of shooting was not justified on the ground of self-defense, and that the defendant was in no immediate, real or apparent danger when he fired the fatal shot. The witnesses being thus impeached, the state declined to use them further. There were many who witnessed the tragedy and whose testimony was not of the unreliable character of those who were not called and of which complaint is made. The evidence of these witnesses was certainly unworthy of much credence. They were sadly mistaken in their first version of the affair or the one later testified to. Having been thus proven unreliable,

we know of no rule of law that would compel the state to call them as witnesses in order that their evidence might be impeached. Declining to call them was not a suppression of evidence, but a refusal to ask a conviction of the defendant on confessedly unreliable, if not false, testimony. The homicide having been committed in a crowded schoolhouse and witnessed by a large number of persons, there existed no reasonable necessity for resorting to the testimony of witnesses so unworthy of belief. The state could not be required to place these witnesses on the stand and interrogate them for the purpose of allowing the defendant to show that they made statements regarding the transaction favorable to his theory of the case. The true inquiry was not whether certain witnesses had made contradictory statements regarding a material fact, but what were the true facts regarding the matters in issue, and this was to be ascertained by the best and most reliable evidence obtainable. The defense, as well as the state, had recourse to the testimony of a number of witnesses to the transaction who were just as competent and much more reliable and worthy of belief than those not called on the last trial. The trial court did not err in refusing to require the state to produce the three witnesses mentioned and have them testify.

It is earnestly argued that the verdict is not supported by sufficient evidence; that there is a total want of evidence to prove premeditation; that malice is not shown, except as it may be inferred from the act of shooting; and that the verdict is the result of passion and prejudice caused by the improper conduct of the prosecution and the refusal of the court to grant a change of venue. While there is some merit in the argument we are disposed to the view, after a consideration of the entire record, that the contention of counsel in this regard ought not to prevail. The question can hardly be considered an open one. On the former hearing the same question was presented and decided adversely to the defendant. *Argabright v. State*. 56 Nebr., 363. It is there stated in the first paragraph of

the syllabus: "Evidence examined, and held sufficient to sustain a verdict of murder in the first degree." Says NORVAL, J., writing the opinion: "The killing is admitted, but it is asserted that there is no evidence to establish premeditation, deliberation, and malice. A careful perusal of the bill of exceptions convinces us that this contention is without foundation. It was established that defendant, a short time before the tragedy, purchased the revolver with which the fatal shot was fired, also bought a long-caped mackintosh, under which the revolver was concealed the night of the tragedy; that before leaving South Omaha he was advised by a friend not to take the fire-arm with him on his trip to Nemaha county, else he might get into trouble; that the defendant related his family difficulties to W. H. Beckett, and in that conversation with reference to his children and his father-in-law stated to Beckett 'that he would have his children or kill the old son-of-a-bitch'; that just before the defendant entered the train at South Omaha on February 7 he showed his revolver to James Emerick and stated to the latter as he stepped on the cars: 'I shall surprise you wonderfully when I come back'; and that while the defendant was at the home of Mrs. Copeland the day preceding the tragedy he stated to her 'that he had offered everything that was fair, and they would not let him see the children, and that he proposed to make it hot for them'; and in the same conversation stated that he would see the children before a week. These facts detailed by disinterested and credible witnesses, considered in connection with the actions and conduct of the accused at the schoolhouse the night of the homicide as detailed by the state's witnesses, are ample to show that the life of the deceased was taken with deliberation and premeditation, and that the verdict is not the result of either passion or prejudice on the part of the jury." These observations of the present chief justice apply with equal force to the evidence in the record now before us. We may, with perfect fairness to the defendant, say that the evidence on the last trial is fully as strong and

convincing as on the former trial, and that there is no substantial difference between the evidence on the part of the state in the two trials. Our attention has been invited by the defendant to the bill of exceptions containing the evidence taken on the second trial, and we have the same now before us. If the evidence is not materially different on the last trial from that introduced on the second trial, then the holding as to the sufficiency of the evidence on the former hearing has become the law of the case, to be followed in all subsequent proceedings. Treating the objection, however, as an original and undecided question, an independent examination of the record of the proceedings of the last trial must, we think, lead to the same conclusion. To review the evidence in detail would require us to repeat much that is said by Chief Justice NORVAL in the opinion from which we have quoted, which it would serve no useful purpose to do. It is said that the witness Beckett's testimony as to the alleged threats of the defendant has been rendered worthless by the testimony of the former county attorney and four members of the grand jury presenting the indictment against the defendant, to the effect that the witness, when called before the grand jury, stated that he had never heard the defendant make any threats against the deceased, but that he knew of two or three men who did. Grant that such is the case, and yet there is aside from such testimony sufficient evidence to warrant the finding of the jury. Leaving out of consideration altogether Beckett's testimony, the purchase of the revolver shortly before the homicide, the purchase of a mackintosh overcoat for the purpose, according to the state's theory, of better concealing the weapon, the statement of defendant testified to by one witness, that something surprising would happen before he returned, the incontrovertible fact remains, and stands prominently towering above the surrounding circumstances, that the defendant, obtaining a leave of absence from his duties as a policeman in South Omaha, left for the vicinity where the deceased resided with the defendant's wife and children,

armed with a deadly weapon, without any rational excuse or cause therefor, and in the face of the advice of the chief of police under whom he served, not to take his revolver, as it might be the means of getting him into trouble. The advice was given the defendant not to take the weapon, not only because he might get into trouble, but also because it was not thought advisable or proper for a policeman when off duty to be carrying deadly weapons about his person. It is true there is testimony tending to show that the defendant offered to let another officer have his revolver shortly before he left for the purpose of seeing, as he claims, his children or obtain permission to visit them. Unfortunately for him, however, he did not give up the weapon but retained it and persisted in carrying it with him on a mission in which there existed not the slightest excuse for carrying such an article, the carrying of which could only be regarded from any lawful point of view as a burden and inconvenience. It is urged that the defendant visited the neighborhood of the deceased, who was his father-in-law, where lived defendant's wife and children who was separated from him, for the purpose of seeing his children, and that in the event of his failure to obtain the voluntary consent of the parties interested, he intended to apply to the courts for an order granting him the desired permission. The evidence, however, shows that after an attempt and failing in his object in making some amicable arrangement, he took no further steps looking to a resort to the courts save to make some mention about being taken to a nearby station to telegraph his lawyer, and that on the evening of the same day the unsuccessful effort was made he went to an entertainment at the schoolhouse where the tragedy occurred, armed with his revolver, which was concealed from view by his overcoat, where he remained after the close of the exercises in about the same position near the door for twenty or thirty minutes and until the family of the deceased started for the door to leave the building, when the shooting occurred. It is in evidence that the defendant said to a brother-in-law

who was with him while standing near the door: "I will stand right here." He was apparently waiting for the approach of the family of the deceased. The mother-in-law was carrying in her arms one of defendant's little children. As she approached the defendant, he reached out his hands and inquired if the child was his. Some of the witnesses testify that the defendant reached forth his hands as if to take the child. The defendant's counsel contend that he made no attempt to take the child, but only inquired if it were his child and started to lift a veil or covering of some kind from its face. We think the evidence warrants the inference that he was about to take the child, and those in whose custody it was were justified in so believing. At the time he stretched forth his hand as if to take the child the deceased's wife, who was holding it, turned suddenly around to escape him and at the same time deceased struck over her shoulder at and, as testified by some, hit the defendant on the head. The act was evidently for the purpose of driving the defendant away and permitting egress from the building to his family. It was not a dangerous blow or one calculated to excite grave apprehensions as to the safety of the person struck. The deceased's hands were incased in mittens and remained so until after his death. The defendant immediately drew his revolver and stepping back only a short distance, while the deceased continued to strike, as most of the witnesses expressed it, sidewise as if to ward off or strike the revolver in the defendant's hand, and in a moment's time the fatal shot was fired. The defendant was not crowded to the wall, but was standing out therefrom in an aisle next to the one where he had been standing after the conclusion of the exercises and with the distance of one ordinary school seat between him and the deceased. He was standing erect or leaning a little towards the deceased and the deceased leaning a little towards him when the shot was fired. These are, substantially, the facts as we glean them from the record. The theory that the defendant was justified in the act on the ground of self-defense we regard as

utterly untenable. He appears to have been in no serious danger whatever, real or apparent. He drew his revolver almost the same instant the deceased struck at him in the manner heretofore stated and fired the shot but a moment or two thereafter. He was apparently inviting a conflict and seized the first opportunity to attack the deceased in a deadly manner and cause his death. If the truth were laid bare and the fact considered free from human imperfections, we do not believe the act could be regarded as other than malicious. Some doubt may possibly arise in the minds of some as to the necessary elements of premeditation and deliberation in order to constitute murder in the highest degree, and of which the defendant was found guilty. Murder in the second degree would have been more satisfactory to the writer were he permitted to express his individual views. But however we may look at the question, as triers of fact it can not be said, after consideration of the record presented, that there is insufficient evidence to sustain the conclusion arrived at by the jury, whose duty and province it was to weigh the evidence and deduce the facts justified thereby. The verdict is supported by sufficient evidence.

Somewhat related to the subject last discussed is an assignment of error to the effect that the verdict is the result of passion and prejudice. In the motion for a new trial the ground furnishing a basis for this assignment of error was supported by several affidavits of divers persons of certain alleged statements made by different jurors as to the motives which actuated them in returning the verdict they did, which, if competent and true, would support the contention of counsel that the verdict was not the result of a fair and dispassionate consideration of the evidence, but of considerations which should not have entered into the deliberations of the jury. These affidavits were denied individually by the jurors alleged to have made the statements, and a general affidavit by all the jurors was presented denying that any improper influences or considerations entered into their deliberations or affected the ver-

dict returned, and that the verdict was the result of a full and fair consideration of the evidence, and nothing else. As a question of fact solely the court was, we think, justified in finding in favor of the state. The record does not warrant the conclusion that the verdict of the jury was the result of passion or prejudice. The showing is entirely insufficient to overcome the presumption, which is fully borne out by the record, that the verdict was in response to a faithful discharge by the jury of the obligation they assumed to try the questions of fact submitted to them impartially from the evidence and the law as given by the court. As we have already determined, the evidence is sufficient to support the verdict, and we prefer to believe that it was from the evidence and not from other considerations wholly improper that the jury were constrained to the action taken.

We find no error in the record prejudicial to the defendant and must, therefore, overrule the different assignments of error and affirm the judgment of the trial court, which is accordingly done.

AFFIRMED.

IN RE ESTATE OF JOSEPH B. MORTON, DECEASED, ET AL. V. CHARLES T. MORTON.

FILED JULY 10, 1901. No. 9,982.

Commissioner's opinion, Department No. 1.

1. **Petition for Distribution of Estate Being Denied, Appeal Lies.** An order of the county court denying a petition for distribution of the personal estate in the hands of an executor and distributable under the terms of the will, and dismissing the petition on the ground that the petitioner is not an heir nor devisee, is appealable.

2. **Meaning of Phrase in Statute.** The expression "adopted into his family," in section 31, chapter 23, Compiled Statute, does not mean adopted in the manner prescribed by chapter 2, title 25, Code, but means admitted and received into one's family, given the family name and acknowledged and recognized as a child.

3. **Rights of Illegitimate Child Under Devise.** An illegitimate child whose parents, before his death, intermarry and have other

children, and whose father has adopted him into his family, as above stated, and so acknowledged him, shall be counted among the legitimate children of a testator and share in a devise "to my children share and share alike" equally with the legitimate children.

ERROR from the district court for Pawnee county. Tried below before STULL, J. *Affirmed.*

S. P. Davidson, for plaintiffs in error.

Martin & Barton, contra.

HASTINGS, C.

This action began with a petition in the county court of Pawnee county, by Charles T. Morton, defendant in error, for distribution to him of a one-seventh part of the proceeds of personalty of the estate of Joseph B. Morton, deceased. This resulted in a finding that petitioner was not an heir of Joseph B. Morton and not entitled to share in the estate. From this finding, Charles T. Morton appealed to the district court of Pawnee county, where the finding of the county court was reversed, and a decree of the district court entered that upon the final settlement and distribution of the estate of Joseph B. Morton, Charles T. Morton have a one-seventh part of the estate. The petition in the county court seems to have been resisted on the ground that Charles T. Morton was not a child nor a devisee of Joseph B. Morton, nor an heir of any portion of the estate. Such was the finding of the county court, and his action was dismissed. He gave bond for appeal, and in the district court filed a petition setting out the death of Joseph B. Morton August 26, 1889; the probate of his will and provision in it that after the lapse of five years the estate should be divided equally among the testator's children; that the children were seven in all, including the petitioner; that the executor, Gabriel Morton, had $205.90, which should be distributed, and asking for its distribution. The executor moved to dismiss the appeal,

for the reason that the order of the county court was not appealable, not a final order, nor such a judgment as could be brought to the district court on appeal. This motion was overruled, and an exception taken by the executor. The executor then answered on his own behalf and that of all the heirs at law, except Charles T. Morton, denying all the latter's allegations, and denying that he was a son or heir of Joseph B. Morton, or interested in the estate. They admitted the death of Joseph B. Morton August 26, 1889, testate, but say that the will provided for the sale of his real estate; that it had not been sold for want of bidders, though all diligence had been used to sell it; that final distribution could not be made until the real estate could be sold. On the hearing in the district court, a general finding that Charles T. Morton was an heir and entitled to one-seventh of the estate was made, as above indicated. Motion for a new trial, because the finding was against the weight of the evidence, and for error in the admission of certain school director's reports of the deceased, and for error in admitting statements of the deceased, whereby he acknowledged himself to be the father of the petitioner, and for error in overruling the motion to dismiss the appeal, was filed. It is claimed that the district court made its finding on the basis of a supposed compliance with section 31, chapter 23, Compiled Statutes, in regard to acknowledging parentage of a bastard child, in that the deceased had filed sworn reports, as school director, in which he had enumerated Charles T. Morton, under that name, as a member of his family, and named himself as guardian or parent. He had never been appointed guardian, and it was, therefore, urged that the designation of parent alone could apply, and that this was a sufficient acknowledgment to comply with the statute. The petitioner, Charles T. Morton, was born July 18, 1861. Joseph B. Morton and the mother were married February 11, 1862, and a daughter was subsequently born to them. Charles T. Morton was brought up in the household of the deceased, always went by his name, and was treated as a

child by the family, including deceased. There is ample evidence in the record from which a court might find that the deceased had acknowledged himself to be the father of Charles T. Morton. It is claimed, however, that this intermarriage of his parents, rearing him in the family of the deceased, and under his name, and acknowledging him as a child, does not legitimate him; that notwithstanding this he is not an "heir," nor legally a child, nor included in the "children" to whom the estate is bequeathed "share and share alike." As above indicated, the objections to the finding and decree of the district court may be summed up in two: That the appeal should have been dismissed, and that the finding is against the weight of the evidence.

As to the first point, the question is simply whether Charles T. Morton, claiming to be an heir, could apply for a distribution of the personalty in the hands of the executor, or whether he was bound to wait until such time as the executor had disposed of the real estate. It would seem that the question of his heirship, and his right to participate in the proceeds of the estate and bring an action with reference to it, might be raised at any point in the proceedings, where interference on his part would be appropriate; and the fact that when he appeared before the county court to ask for a portion of the personalty in the hands of the executor, he was met by the objection that he had no interest in the estate, brought that question at once to the consideration of the court, and its finding, when once made, if not appealed from, would have been conclusive on both the court and the parties. If such was the case, then, clearly this order of the county court dismissing his petition for that reason was appealable, and the motion to dismiss the appeal was rightly overruled. *In re Jessup's Estate,* 81 Cal., 408.

The question of the sufficiency of the evidence in this case to uphold the district court's finding that the petitioner was a child of the deceased, and included in the terms of the will, seems to depend upon the construction of section 31, chapter 23, Compiled Statutes. The con-

tention that the director's reports are a sufficient acknowledgment of the paternity of Charles T. Morton has been ruled against by this court. *Lind v. Burke,* 56 Nebr., 785. No other acknowledgment in writing is claimed, and plaintiff in error says that he is not permitted, under that statute, to make any claim as heir, nor can he be included among the testator's children, unless he is held to be legitimated. 1 Blackstone, Commentaries, 459; 4 Kent, Commentaries, 413; *Lind v. Burke, supra.* The statute cited provides as to an illegitimate child, "he shall not be allowed to claim, as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried and had other children, and his father, after such marriage, shall have acknowledged him, as aforesaid, or adopted him into his family, in which case such child and all legitimate children shall be considered as brothers and sisters." It is claimed on the part of the plaintiff in error that the acknowledgment must be in the manner provided in the previous portion of the section, by writing, signed in the presence of a competent witness. It is claimed that the adoption into his family must be in the manner pointed out by chapter 2, title 25, of the Code. So far as the acknowledgment is concerned, the contention must be sustained, because the reference is definite and precise. The child must be "acknowledged as aforesaid." The question remains as to the meaning of the phrase "or adopted into his family." In *Blythe v. Ayres,* 96 Cal., 532, 31 Pac. Rep., 915, and in *Eddie v. Eddie,* 8 N. Dak., 376, 79 N. W. Rep., 856, a statute identical with this one was construed, and in both cases it was held that the adopting into the family consists in "publicly acknowledging the child as his own, receiving him as such with the consent of his wife into his family, otherwise treating it as if it were a legitimate child." But we find that in each of those states there is added to the general provision for the adoption of a child, other than one's own, a provision that the father of an illegitimate child, who treats it in the manner stated,

thereby adopts it, and the child is thereupon deemed for all purposes legitimate. Nebraska has no such statute. It had, during all the years that this child was growing up in Joseph B. Morton's family, a provision whereby persons might adopt the child of another. Code of Civil Procedure, title 25, ch. 2, secs. 796-801. This law was not changed in its terms until the passage of chapter 94, Laws of 1897, eight years after the death of Joseph B. Morton. There was in it no authority whatever for the father of an illegitimate child adopting it. We are cited to the proposition that the common law knows no such thing as adoption. *In re Thorne's Will,* 155 N. Y., 140; *Morrison v. Sessions,* 70 Mich., 297, 38 N. W. Rep., 249; *Ballard v. Ward,* 89 Pa. St., 358; *Abney v. De Loach,* 84 Ala., 393. The enacters of the Revised Statutes of 1866, from which we get both section 31, chapter 23, Compiled Statutes, and the law as to adoption as it stood before 1897, could hardly have meant to refer in section 31 to the process of adoption of the child of another provided in title 25 of the Code. They must have had some other adoption in view. The court manifestly would have had no authority to decree an adoption of the party's own child under the latter act. What they intended, it seems, should be taken as indicated by the phrase "into his family." The legislation which provides that one whose parents have intermarried subsequently to his birth, and who has been brought up in his father's family in all respects as his child, shall be deemed legitimate, is as old as the time of Constantine the Great. Gibbon, Decline & Fall, ch. 44,* Guizot's note. The extent to which such legislation has prevailed among the states of the Union is remarkable (2 Kent, Commentaries, 209, note *d*), and especially the extent to which the doctrine has been carried in the state of Ohio, from which our Code was mainly drawn. *Ives v. McNicoll,* 59 Ohio St., 402, 43 L. R. A., 772. It would seem to be the reasonable interpretation of section 31 that an adoption in fact rather than the legal one was what was intended.

*Harper's edition, vol. IV, pp. 352, 353.—REPORTER.

It is true that by the Statute of Merton, cited and staunchly supported by Blackstone, it was decided that in England there should be no such legitimation by subsequent intermarriage of the parents and rearing and treatment of the child as one's own. 1 Blackstone, Commentaries, 456. But this rule has been followed in comparatively few of our states, and we do not think it was intended to be followed in Nebraska. It was early abandoned in the Roman law, and in Novels 74 and 89 of the *Corpus Juris* are to be found nearly all the provisions of modern legislation on this subject. The court was amply justified by the evidence before it in this case, in finding that the petitioner was the natural child of the deceased; that his parents had intermarried within a few months after his birth and other children were born to them; that he had been taken into deceased's family and brought up as his child. Does this show that the deceased "adopted into his family" the petitioner? It is clear that the law of adoption was not available, because we have seen that law only provided a manner for doing it, "Whenever it may be desirable that any person or persons shall adopt the child of another." Code of Civil Procedure, sec. 796, as it was prior to April 12, 1897. As soon as it appeared that the child proposed to be adopted was that of its proposed foster parent, a competent court would at once say there was no jurisdiction, and that the proper step was an acknowledgment. Statutes for the legitimation of children should have at least a fair construction. *In re Estate of Jessup,* 81 Cal., 408; *Blythe v. Ayers,* 96 Cal., 532; *Dickinson's Appeal,* 42 Conn., 491; *Swanson v. Swanson,* 32 Tenn., 446. As is remarked in *In re Estate of Jessup, supra,* "undoubtedly the most satisfactory way of establishing the necessary facts [parentage and acknowledgment] is by proof that the claimant has been received into the family, and given the family name." 81 Cal., 408, 458. Mere adoption under the terms of chapter 2, title 25, of the Code would not necessarily admit the adopted child into the family. It could be maintained elsewhere. It

seems then that adoption under the Code could not have been sufficient or possible. There is nothing left to do but say that "adopted into his family" means simply taken in, given the family name and treated and currently recognized as a child. This is correctly found to have been done in this case, and the judgment should be affirmed.

We therefore recommend that the decision of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

NOTE.—Bastardy: *Spurgeon v. Clemmons*, 6 Nebr., 307; *Cottrell v. State*, 9 Nebr., 125; *In re Carleton*, 11 Nebr., 99; *Ex parte Cottrell*, 13 Nebr., 193; *Jones v. State*, 14 Nebr., 210; *Kremling v. Lallman*, 16 Nebr., 280; *Altschuler v. Algaza*, 16 Nebr., 631; *State v. Moran*, 18 Nebr., 536; *Hutchinson v. State*, 19 Nebr., 262; *Masters v. Marsh*, 19 Nebr., 458; *Sang v. Beers*, 20 Nebr., 365; *Ingram v. State*, 24 Nebr., 33; *Ex parte Donahoe*, 24 Nebr., 66; *Denham v. Watson*, 24 Nebr., 779; *Elliott v. Atkins*, 26 Nebr., 403; *Planck v. Bishop*, 26 Nebr., 589; *Dodge County v. Kemnitz*, 28 Nebr., 224; *Strickler v. Grass*, 32 Nebr., 811; *Daly v. Melendy*, 32 Nebr., 852; *Dodge County v. Kemnitz*, 32 Nebr., 238; *Olson v. Peterson*, 33 Nebr., 358; *Burris v. Court*, 34 Nebr., 187; *Dukehart v. Coughman*, 36 Nebr., 412; *Hanisky v. Kennedy*, 37 Nebr., 618; *Dodge County v. Kemnitz*, 38 Nebr., 554; *Robb v. Hewitt*, 39 Nebr., 217; *Munro v. Callahan*, 41 Nebr., 849; *Clark v. Cary*, 41 Nebr., 780; *Stoppert v. Nierle*, 45 Nebr., 105; *Davison v. Cruse*, 47 Nebr., 829; *Lisy v. State*, 50 Nebr., 226; *Harshman v. Ingwerson*, 52 Nebr., 116; *Wurdeman v. Schultz*, 54 Nebr., 404; *Johnson v. State*, 55 Nebr., 781; *Lind v. Burke*, 56 Nebr., 785; *State v. Murdock*, 59 Nebr., 521; *In re Walker*, 61 Nebr., 803; *Myers v. Baughman*, 61 Nebr., 818.—REPORTER.

STATE OF NEBRASKA, EX REL. FRANK N. PROUT, ATTORNEY GENERAL, V. MARTIN I. AITKEN.

FILED JULY 10, 1901. No. 12,011.

Commissioner's opinion, Department No. 1.

1. **Act Not Void for Uncertainty.** Act of March 27, 1901, relating to the government of cities of 40,000 to 100,000 inhabitants, not void for uncertainty as regards the office of tax commissioner
2. **Uniform Taxation.** The provisions of the act as to tax commissioner do not violate the constitutional requirement of uniform taxation.
3. **Special Legislation.** It is not, as to tax commissioner, void as being forbidden special legislation.
4. **Not an Amendatory Act.** It is not an amendatory act, nor subject to the constitutional requirements as to amendments.
5. **Provisions Covered by Title.** Its provisions, as to tax commissioner, are sufficiently covered by its general title.

ORIGINAL action in the nature of a quo warranto to oust the respondent from the office of tax commissioner of the city of Lincoln. *Dismissed.*

Frank N. Prout, Attorney General, and *Chas. O. Whedon,* for the state.

E. C. Strode and *D. J. Flaherty, contra.*

HASTINGS, C.

This is an original action by quo warranto to oust the defendant from the office of tax commissioner of the city of Lincoln. The petition alleges that the defendant, about April 10, 1901, assuming that an act of the legislature of March 27, 1901, created the office of tax commissioner, qualified as such officer, claiming to have been appointed by the mayor with the consent of the city council. It is alleged that the defendant is not an assessor of any precinct in Lancaster county; that since April 10 he has unlawfully held and exercised the office of tax commissioner,

and is now engaged, with certain deputies, whom he claims to have appointed with the consent of the mayor and city council, in assessing and valuing for taxation all the property within the city not exempt from taxation, except railroad property; that he assumes the right to provide blank forms for listing property and making assessments of it, and assumes the right to administer oaths to the owners; assumes to perform all the duties which that act pretends to empower a tax commissioner to do, and that so much of that act as pretends to create the office of tax commissioner is unconstitutional, and asks that he be ousted from such office. The defendant answers that the legislature of the state of Nebraska at its twenty-seventh session passed an act entitled "An act to incorporate cities of the first class having a population of more than 40,000 and less than 100,000 inhabitants; to define, regulate and prescribe their organization, duties, liabilities, power, and government, and to repeal article 1, of chapter 13*a* of the Compiled Statutes of 1899"; that this act was approved March 27, 1901, containing an emergency clause, and has been ever since one of the laws of the state of Nebraska in full force and effect; that the city of Lincoln was on and prior to March 27, and now is, a city of the first class having more than 40,000 and less than 100,000 inhabitants, and is governed by the provisions of that act; that section 13 of the act provides: "The following officers shall be elected by a plurality vote of the electors of the city, to-wit: * * * tax commissioner * * * The term of all elective officers under this act shall commence on the Tuesday next after their election, and provided further that the office of tax commissioner shall be filled by appointment by the mayor for a term of two years after the passage of this act, after which time the said office shall be filled by election as herein provided"; that section 33 of said act provides as follows: "The tax commissioner shall be the assessor of the city; he shall hold his office for a term of two years, and until his successor shall be elected and qualified; he shall on or before the first day of April in

each year appoint, by and with the consent of the mayor and council, not to exceed five deputies for the purpose of assessing the real and personal property within the corporate limits of the city subject to taxation. The tax commissioner shall by himself and his deputies assess and value at a fair cash value all property within the corporate limits of the city which is not exempt by law from taxation. Provided that the tax commissioner shall take the valuation and assessment of railroad property within the city limits from the returns made by the state board of equalization to the county clerk of the county in which the city is located. Each of the deputies so appointed, before entering upon the discharge of his duties, shall take oath to impartially list and assess all property required by him to be listed and assessed at its fair cash value, and shall give bond in such sum as may be required by ordinance for the faithful discharge of his duties. The deputies so appointed shall be under the direction of the tax commissioner, and shall be governed by such regulations as may be prescribed for the purpose of securing just and equitable assessments. The deputies shall be allowed for their services the same per diem and for the same length of time as is allowed to the precinct or county assessor by the law of the state. The tax commissioner shall provide such blank forms of schedule as in his judgment may be required for the purpose of listing property and making assessments, and he and his deputies shall have the same power and authority to compel full and complete listing of property for taxation as assessors under the state law, and they and each of them shall have power and authority and it shall be their duty to administer oaths to all persons required by law to list property for taxation in like manner as is required by the revenue laws of the state. The tax commissioner shall have such other and further duties and powers as may be defined or prescribed by ordinance" (Session Laws, 1901, ch. 16); that respondent was duly appointed tax commissioner and has qualified as such about April 1, 1901, in compliance with said law, and is

now in the discharge of the duties of said office; admits that he is assessing for taxation all property in the city not exempt, except as provided in the act, and that he assumes the right to provide forms of schedule for such purpose, and to administer oaths to the owners of property; that his office is duly created and established under the laws of the state, and himself duly appointed and qualified, and is engaged in the discharge of his official duties, and he asks to be dismissed with costs. To this answer a general demurrer is interposed, and the relator asks judgment as prayed.

It will be seen that the sole question presented for consideration here is the constitutionality of this act of March 27, 1901, or at least of so much of it as seeks to create the office of tax commissioner. In relator's brief and argument it is objected, first, that this law is so vague and uncertain as to be inoperative and void for uncertainty; second, that it violates the provisions of our state constitution in regard to uniformity of taxation; third, that it is special legislation, and so prohibited by section 15, article 3, of the constitution; fourth, that it is void, as being a violation of section 11, article 3, of the constitution, in that it amends the general revenue law in several places which are not referred to in the act, nor the original provisions repealed; and fifth, that it violates the same section of the constitution, in containing provisions not covered by its title. It will be observed that we are concerned here with this act only in so far as it seeks to create the office of tax commissioner, and that the relator, to make out his case, must establish either that the entire act is unconstitutional or else that those parts of it which create the office of tax commissioner are so. A large share of the argument of counsel was directed to the proposition that certain provisions of this act, not directly relating to the creation of the office of tax commissioner, but relating to the manner in which he shall discharge his duties, and in which the city council, in levying taxes, should proceed, are unconstitutional. At the same time no

attempt was made to establish the unconstitutionality of the act as a whole.

The first contention, that the act is too vague to be operative, can not be sustained. It is urged principally upon the ground that the tax commissioner is required to make oath to the correctness of the entire assessment, and is empowered to appoint five deputies to assist in the making of it, and it is urged that such assistance is incompatible with personal knowledge on his part of the correctness of the return. It is answered that a similar objection could be made to the constitutionality of any of our statutes providing for the work of a deputy and a return to be made by the principal. It is not thought worth while to consider this objection further. The regular precinct assessor is required to make such a return, and is authorized under certain circumstances to employ a deputy. Compiled Statutes, ch. 77, art. 1, sec. 51. The tax commissioner, like the assessor, is only required to make oath to his own diligence, and that he verily believes that his returns set out the true value. If the law is incomplete in some respects, it could hardly be objected to as inoperative for such reason, for we find at the end of section 33 the provision "the tax commissioner shall have such other and further duties and powers as may be defined or prescribed by ordinance." If it be found necessary or desirable that he should require a like return from his deputies, it may be easily provided.

It is objected that the deputies are to be under the direction of the tax commissioner and governed by such regulations as may be prescribed for the purpose of securing just and equitable assessments, but surely there can be no objection to this in view of the provision in section 33, just quoted.

A more serious objection is lack of uniformity. Section 1, article 9, of our state constitution requires that the valuation within the same taxing district shall be uniform. It is complained that under this act all property is to be assessed at its fair cash value, except railroad property, whose

valuation is to be taken as returned by the state board of equalization, which latter is required to assess it at its actual value. It is urged that under the general revenue act personal property is to be assessed at its fair cash value, and real property at its fair value, estimated at the price it would bring at a voluntary sale where public notice had been given, upon a payment of one-third cash and the balance secured by mortgage on the property. It is further complained that under the general revenue act property in transit is to be assessed at the residence of the owner, but that this tax commissioner and his deputies are authorized and required to assess at its fair cash value all the property in the city. It is further objected that under section 27 of the revenue law, in making up the amount of credits with which a person shall be assessed, he is entitled to deduct the amount of all bona-fide debts owing by him; that no such provision is left in the new act. It is claimed, too, that the provision of section 2 of the revenue act, for deducting any depreciation occasioned by public easement, and that for deducting any increase of the value of land by reason of live fences, fruit and forest trees, grown and cultivated thereon, are both to be disregarded. To this it must be said in the first place that the taxation proposed to be levied upon this assessment is city taxation, and is governed by the provisions of section 6, article 9, of the state constitution, which requires that such taxes shall be "uniform in respect to persons and property within the jurisdiction of the body imposing the same." It is hard to see how any requirement of uniformity is violated, in letter or in spirit, by the fact that outside the municipality, or within the municipality as regards other than municipal taxes, a different method of valuation prevails; the municipal tax falls equally on all property in the jurisdiction, and the state and county taxes are not disturbed. No provision of our state constitution requiring, in terms, that the municipal taxation shall be levied and collected in the same manner as state taxation is pointed out to us. On the contrary, the constitution, as

above cited, has expressly authorized the legislature to vest the method of imposing their municipal taxes in the corporate authority, towns and villages, and has only limited their powers in respect to raising revenue, by the requirement that special assessments shall go against the property benefited, and municipal taxes shall be uniform as to persons and property within the jurisdiction. It is hard to see how the fact, if it were a fact, that some things which the tax commissioner is authorized to do are unconstitutional would do away with his office, in any event. It must be conceded that the municipal authorities have the right to tax, because the legislature is, by the constitution, authorized to organize municipalities and invest them with the power of taxation. This taxation must be according to the value of property. We think it must be conceded that it is within the constitutional power of the legislature to authorize the city to make its own valuations of property within its limits, so long as the result is that the city taxes are uniform in respect to persons and property within the municipality, and there is no interference with state and county taxes. The provisions of the act in question are that property, which is not exempt from taxation, shall be valued. If the general revenue law is to be construed as exempting from taxation credits against which the owner can show bona-fide debts to an equal amount, and all increase of value of property because of fruit and forest trees, we see no difficulty in applying it to city property under the act in question, and upholding both laws. If, however, it should be found that such exemptions are not provided for in the latter act, we see nothing unconstitutional in holding that as to property within the limits of cities the former law is so far modified that in respect to municipal taxation there are no such exemptions. As long as this is held to apply, as it must, only to municipal taxes, the latter would still be uniform throughout the municipality, and would not infringe in any degree upon the constitution. In any event, the fact that unconstitutional requirements are made of an officer,

or unconstitutional duties are imposed upon him, would not prevent his holding the office and exercising constitutional and appropriate duties attached to it. The provision that justices of the peace might both fine and imprison, though unconstitutional, has never been supposed to oust all justices in the state of Nebraska from their offices. The provision that railroad property shall be assessed at the valuation fixed by the state board of equalization certainly can not be held, whether constitutional or not, to deprive the tax commissioner of all authority to assess property within the corporation. Our constitution expressly provides that property shall be taxed according to its value, to be ascertained in the manner provided by the legislature. The legislature in its wisdom has decided that the value of railroad property can be more accurately and justly estimated by the state board of equalization than by local assessors, and has exercised its constitutional prerogative by providing that railroad property shall be assessed in that manner. Whether or not it is reasonable to suppose that the state board of equalization would have more knowledge and a better opportunity to make a just valuation of such property than local assessors is quite unnecessary to be determined in deciding upon respondent's right to act as tax commissioner. Why may not several valuers constitutionally act upon different kinds of property, or upon the same property, for the purpose of different taxes? The real objection to this act on the ground of uniformity is, evidently, the idea that value is not such a fixed quantity that it is possible for two independent appraisers to agree. If values are fixed for purposes of municipal taxation by one body of assessors, and for county and state by another, it is practically certain that the two will disagree. Enough is said above to indicate an opinion that the only uniformity required as to any tax is that it should be uniform throughout the jurisdiction; *i. e.*, that state taxes shall be uniform throughout the state, county taxes throughout the county, and city taxes throughout the city. *Pleuler v. State,* 11

Nebr., 547. Such uniformity would be as well secured by having one set of assessors value property for county taxation, another set for city taxation, and still another for state taxation, as it would by having all the valuations made by one set of assessors, and one appraisement adopted in the levy of all the taxes throughout. With the good or ill policy, relative expense or cheapness of the two methods, this court has nothing to do. The constitution has expressly said that the valuations shall be determined in the manner that the legislature points out. If the legislature chooses a foolish or expensive way, so long as it is not a pretext for some unconstitutional purpose, it must stand.

The complaint that this is special legislation prohibited by section 15, article 3, seems to be based upon the proposition that it is special because of the provision with regard to railroad property. So far as this provision is concerned, it seems sufficient to have pointed out that the office of tax commissioner, and the right of respondent to hold it, does not depend in any degree upon the validity or invalidity of this provision in the act. Whether in discharge of his duties he shall obey and follow this provision or pay no attention to it, does not need to be decided for a determination of his title to the office which he is exercising. In none of the cases cited by counsel for the relator do we find that the conferring of unconstitutional powers upon an officer deprives him of his right to exercise the constitutional ones; nor do we think that an unconstitutional restriction of an officer's powers should be held to deprive him of them altogether. The remedy for an unconstitutional omission to assess property would seem to be mandamus rather than quo warranto. This objection amounts in effect to saying that no general act of the title and for the purpose of this one can be enacted by the legislature of the state of Nebraska, owing to the inhibition upon special legislation. The objection is just as good against any other provision of this charter for cities from 40,000 to 100,000 inhabitants as it is against

the provision for a tax commissioner. So far as the objection of special legislation is concerned, we can see no difference between the provisions of the old charter, section 50, that the assessment of property values as equalized by the county board shall be the assessed valuation for general city taxation, and the provision here. The question whether or not the legislature may classify cities seems to have been conclusively determined in this state. *State v. Graham,* 16 Nebr., 74; *State v. Stuht,* 52 Nebr., 209. In the latter case it was expressly held, without dissent: "If the provisions of a law establishing a class of cities on the basis of population are such that other cities may in the future, without additional legislation, enter the specified class, the law is general."

The further objection that the law is amendatory of the state revenue law and unconstitutional, because of its form, can not be maintained. It is expressly provided by our state constitution that such a charter may contain provisions for municipal taxation. Such provisions are not amendatory of the state revenue law. The fact that the title was comprehensive and not detailed, makes no difference so long as such title is fairly descriptive of the purposes and intention of the act. *State v. Stuht, supra.* To say that this act may be abused and may, in its practical workings, result in a failure of uniformity of taxation is not to establish its unconstitutionality. If all laws which may fail to bring about a just and equal valuation of property and a perfectly fair and equitable adjustment of taxation are to be unconstitutional, it is to be feared that not only the city of Lincoln, but every other municipality in the state of Nebraska, might have to wait a long while for authority to collect its revenues.

It is therefore recommended that this case be dismissed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion this case is hereby

DISMISSED.

JOHN M. WAUGH ET AL. V. J. K. NEWELL.

FILED JULY 10, 1901. No. 9,947.

Commissioner's opinion, Department No. 1.

1. **After Foreclosure, Mortgage Creditor Must Obtain Leave of Court to Further Proceed.** Under the provisions of sections 847, 848, 849 and 850 of the Code of Civil Procedure prior to the amendments of 1897, a creditor whose debt is secured by mortgage, having foreclosed the mortgage, can not proceed in an action at law to recover a judgment for the remainder due upon the note or obligation, without leave obtained of the court having jurisdiction of the action of foreclosure to commence such action at law.

2. **Plaintiff Must Plead Authority.** The lack of authorization to bring such an action is not a defense necessary to be pleaded, but should be alleged, or at least proved by the plaintiff, as without such authorization the action can not be maintained. *Meehan v. First Nat. Bank*, 44 Nebr., 213.

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

Ellery H. Westerfield, for plaintiffs in error.

McCabe, McGilton & Rath, contra.

DAY, C.

On November 5, 1896, J. K. Newell commenced an action in the district court for Douglas county against the defendants, John M. Waugh and Jane Waugh, to recover upon certain promissory notes alleged to have been executed and delivered by the defendants to the Central Investment Company and by that company assigned to the plaintiff. The petition discloses that one note for $4,000 had been given by the defendants, and that to secure the payment thereof a mortgage upon certain real estate had also been executed by the defendants; that the mortgage had been foreclosed and the premises sold for $2,270, and after deducting the expenses of the foreclosure sale there

remained to be credited upon the note $1,888.32. The other eight causes of action alleged in the petition were each upon a note of $80, claimed, likewise, to have been executed and delivered by defendants to the Central Investment Company and by it transferred to plaintiff. No reference is made in the petition to any mortgage security for these notes. The plaintiff also caused an attachment to be issued and levied upon certain real estate, the grounds therefor being the non-residence of the defendants. On December 28, 1896, defendants appeared specially by a plea in abatement, and alleged that the court had no jurisdiction of the subject-matter of the action set forth in the several counts of the petition, for the reason that a suit had been commenced by plaintiff in the district court for Douglas county against the defendants to foreclose two mortgages upon real estate given to secure the indebtedness claimed in the several causes of action of plaintiff's petition, and that plaintiff had obtained no authority of court to bring the action as required by the statutes of the state. The plea asked that the writ of attachment be quashed and the levy discharged. The facts alleged in the motion were supported by affidavit and are not disputed. The trial court overruled the plea in abatement and entered judgment for the plaintiff. To review this ruling error is brought to this court.

The question presented may be stated as follows: Was it necessary for plaintiff to obtain leave of the court in which the foreclosure proceedings were prosecuted, before commencing this action to recover for any amount remaining due on the notes? All of the proceedings herein occurred prior to the act of 1897, repealing sections 847 and 849 and amending section 848 of the Code of Civil Procedure. The question presented must be determined in view of the statutes as they existed prior to the amendments of 1897. In *Meehan v. First Nat. Bank,* 44 Nebr., 213, the opinion of the court set out at length the provisions of sections 847 and 848 and the substance of 850 and 851 of our Code of Civil Procedure as they existed prior

to the amendments of 1897, and commenting thereon uses this language: "By reading and construing these sections together, as they should be, we reach the following conclusions: That if a creditor whose debt is secured by mortgage, commences an action at law for the recovery of the debt and obtains judgment, before he can afterward foreclose his mortgage by suit, he must show that he has exhausted the remedy at law; and if he first begins an action of foreclosure to enforce payment of the debt, inasmuch as he may, in the suit by foreclosure, recover a deficiency judgment against all proper parties who are liable for the payment of the indebtedness for and amount of the debt which the proceeds of the sale of the mortgaged property under the decree are insufficient to meet, then he must, if for any reason they have not been made parties to the foreclosure suit, or for any valid reason he desires to commence an action at law against any one of them, obtain permission so to do of the court before which foreclosure proceedings are pending or were instituted. It seems to have been contemplated by the law-makers in the enactment of these provisions embodied in the sections referred to that whichever course of procedure the creditor might elect to pursue for the recovery of his debt, he should pursue it to the end, and that while either a suit at law or action of foreclosure was in progress, the other should not and could not be, and whichever was first commenced, full relief should be afforded and obtained by it if possible before resorting to the other." It is urged by the plaintiff that the rule announced in *Meehan v. First Nat. Bank, supra,* has no application to the case under consideration, because, in the foreclosure proceeding, service was obtained upon defendants by publication, and that, therefore, no deficiency judgment could have been entered against them and that the reason of the statute would in consequence fail. There is nothing in the record showing that the defendants did not appear in the foreclosure suit. True, the petition alleges in the first cause of action that service was obtained on defendants by pub-

lication, but this is far from an allegation that defendants did not appear or that a personal judgment could not have been entered against them. In New York, under a similar statutory provision, in *Scofield v. Doscher,* 72 N. Y., 491, it is held: "The owner of a debt secured by mortgage, who holds an obligation or covenant for its payment or collection, given by a person other than the mortgagor, cannot enforce the obligation by action during the pendency of, or after judgment in an action to foreclose the mortgage unless authorized by the court; also held that the lack of authority to sue was not a defense necessary to be pleaded and proved affirmatively by defendants; but as there was no right of action without the authority it was for the plaintiff to allege, or at least to prove it in order to maintain his action." And in *Meehan v. First Nat. Bank, supra,* the same rule has been adopted in language as follows: "The lack of authorization to bring such an action is not a defense necessary to be pleaded, but the contrary should be alleged, or at least proved by the plaintiff, as without such authorization the action can not be maintained." But granting there was personal service or appearance of defendants, the principle announced by this court in the above mentioned case is conclusive against plaintiff's contention. In that case the record shows that service was had by publication upon Little, the maker of the note and mortgage, and that he made no appearance, and no service was attempted to be made upon the indorser, Meehan; and yet the court held that, having become liable by the indorsement and transfer for the payment to the holder of the whole amount of the debt or any sum remaining due thereon after the sale of the mortgaged premises and application of the proceeds to its payment, he was a proper, if not a necessary, party to the action, and judgment could have been rendered against him for deficiency, and, therefore, in order to bring suit at law against him as indorser the plaintiff should have obtained leave of the court in which the foreclosure suit was commenced to bring the action at law.

It is therefore recommended that the judgment be reversed and the cause remanded.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

FARMERS & MERCHANTS BANKING COMPANY V. CITY OF RED CLOUD.

FILED JULY 10, 1901. No. 10,019.

Commissioner's opinion, Department No. 1.

Municipality May Recover Public Money Deposited by Officer in His Own Name. When an officer charged with the collection and custody of public money unlawfully deposits the same in a bank for safe-keeping, and the same is subject to the check or demand of such officer, the state, county or other municipal body for whom such officer acted may maintain an action in its own name to recover such deposit. *State v. Keim*, 8 Nebr., 63, overruled.

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

J. S. Gilham and *Randolph McNitt*, for plaintiff in error.

James McNeny and *George R. Chaney, contra.*

DAY, C.

The city of Red Cloud brought this action against the Farmers & Merchants Banking Company to recover $6,087 alleged to be due it on account of city funds deposited in said bank by one Henry Cook, treasurer of said city. The principal error complained of is the overruling of defendant's demurrer to the amended petition and the rendition of a judgment against defendants for $5,349.17. The

facts alleged in the petition will sufficiently appear in the course of the opinion to make clear the point raised by the demurrer.

It is contended by the defendants that the deposit of the city funds in the bank by Cook, treasurer, was unauthorized and illegal, and in consequence thereof an action could not be maintained by the city for its recovery. In support of this contention the case of *State v. Keim,* 8 Nebr., 63, is cited, in which it was held that the state could not maintain an action against a bank to recover the money of the state, deposited in a bank by the state treasurer in violation of law, unless such act of the treasurer had been ratified by the legislature. Whether the plaintiff can maintain this action depends upon the extent to which *State v. Keim, supra,* is now to be considered as an authority in this state. In *McIntosh v. Johnson,* 51 Nebr., 33, the present chief justice, in commenting upon the principle announced in *State v. Keim, supra,* used the following language: "The writer by no means concedes that an illegal or unauthorized deposit of state money in a bank constitutes no cause of action in favor of the state to recover such money." In the case of *State v. Hill,* 47 Nebr., 456, 527, Justice POST says: "All [Nebraska cases mentioned] depend for their authority upon *State v. Keim;* but that case, although in this state accepted as an authoritative statement of the law, appears from a more careful analysis to rest upon premises wholly false, while the doctrine therein asserted has been, by a verdict practically unanimous, rejected in other jurisdictions. Reduced to the form of a syllogism the reasoning there employed may be thus stated: Public money, unlawfully loaned by an officer charged with its collection and safe keeping, can not, in the absence of an express ratification, be followed and recovered by the state, county or other public body. The deposit in bank for safe keeping, by an officer, of public money in his official custody is a loan thereof within the meaning of the Criminal Code. Therefore, public money can not be recovered in an action

against the bank in which it is deposited for safe keeping without an express ratification of such unlawful loan. The subject might in view of the obvious fallacy of that argument be dismissed without further comment, but in view of the importance of the controversy and the gravity of the question involved, a reference to a few of the many authorities in conflict with the utterances of this court will be here indulged. Mr. Mechem, in a note to section 922 of his valuable work on Public Officers, after a careful review of the authorities, intimates that *State v. Keim* stands alone in denying to the state the right to recover upon the facts reported, and adds that it 'is not consistent with reason or authority if it was intended to hold that the state could not recover the money at all.' And in *Wolffe v. State,* 79 Ala., 201, Chief Justice Stone, in criticising that case, declares that it ignores 'the principle that an outsider, by aiding in the misapplication of trust funds, knowing them to be such, constitutes himself a trustee and must account as trustee.' *San Diego County v. California Nat. Bank,* 52 Fed. Rep., 59, arose out of a state of facts quite similar to *First Nat. Bank of South Bend, Ind., v. Gandy,* [11 Nebr., 431]. There one D. made a deposit of money to his account as county treasurer, there being no agreement that the identical money should be returned, and it was in fact mingled with the funds of the bank. It was held, in an elaborate opinion by Judge Ross, that the county could recover on the ground that the bank was a mere trustee and was liable as such; and the principle there stated was distinctly recognized by this court in the recent case of *Cady v. South Omaha Nat. Bank,* 46 Nebr., 756, holding that trust funds do not lose their character as such by being deposited in bank to the trustee's own account, but may be followed through any number of transformations and reclaimed by the owner so long as they can be distinguished in the hands of the trustee or his assignees." In this case, *State v. Hill,* it was held that the "loans" of public money that were prohibited by the statutes and made criminal acts on the part of the officials making the loans include those

transactions only in which the conventional relation of borrower and lender exists, and have no application to the deposit in bank, for safe-keeping, of public funds by the custodian thereof who so far retains his control over them that they may be by him at any time reclaimed. And on page 540, Judge POST, at the close of the opinion, says: "And the cases mentioned, so far as they conflict with the rule herein stated, should be overruled." The allegations of the petition in the case before us show that the deposit in controversy was a demand deposit, made in the usual course of business and subject to the check and demands of Cook, the city treasurer, and was not a loan as that term is ordinarily used and understood in commercial transactions where the conventional relation of borrower and lender exists. In our view, the rule announced in *State v. Keim* is not supported by any sound principle of justice or reason; it has been criticised by our own court and censured by the courts of other states, and can no longer be said to be an authority in this state. We hold, therefore, that a cause of action was stated in the petition, and that the general demurrer was properly overruled, and in doing so expressly overrule the principle announced in *State v. Keim, supra.*

There is no evidence preserved by bill of exceptions, and the presumption must be indulged that on the merits of the case a proper judgment was rendered.

It is therefore recommended that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

NOTE.—Embezzlement by public officer. *Cedar County v. Jenal*, 14 Nebr., 254; *State v. Knox*, 17 Nebr., 683; *Conley v. State*, 46 Nebr., 187; *State v. Hill*, 47 Nebr., 456; *Bolln v. State*, 51 Nebr., 582; *Bartley v. State*, 53 Nebr., 310; *Whitney v. State*, 53 Nebr., 287; *Moore v. State*, 53 Nebr.,

831. Embezzlement of public funds by a private person. *Mills v. State*, 53 Nebr., 263. In the *Jenal Case*, *supra*, the county treasurer turned over to his successor the funds in a bank which was universally considered a solvent institution. His successor received the money on deposit without a manual delivery. The bank failed. The county board elected to sue the old treasurer instead of the new. The *Jenal Case* is apparently overruled in the *Hill Case*, *supra*. In the *Knox Case*, *supra*, the justice, in refusing to issue a warrant in a case of embezzlement, was but following the ruling of the district judge who had sustained a demurrer to an indictment in the same form for the same offense. The case *State v. Knox* was brought by the ex-district attorney to test the correctness of the ruling by the district judge.—REPORTER.

JOHN S. MORGAN, SR., V. HOG RAISERS MUTUAL INSURANCE COMPANY.

FILED JULY 10, 1901. No. 12,092.

Commissioner's opinion, Department No. 1.

1. **Mutual Insurance Company:** LIMITED LIABILITY. A mutual insurance company organized under chapter 46, Session Laws, 1899, can not by contract limit the number or amount of assessments for which its members are liable.

2. **Void Contract.** That portion of a contract of insurance between a company organized under the provisions of chapter 46, Session Laws, 1899, and one of its members, which seeks to limit the liability of a member as to number or amount of assessments, is contrary to law and can not be sustained.

3. **Continuing Liability.** The liability of a member of such insurance company to pay his proportionate share of all assessments required to satisfy the indebtedness of the company is a continuing one so long as he remains a member of the company.

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

T. M. Wimberly and *A. G. Greenlee*, for plaintiff in error.

E. J. Clements, *contra*.

KIRKPATRICK, C.

This is an action brought by the defendant in error, the Hog Raisers Mutual Insurance Company, against John S. Morgan, Sr., plaintiff in error, to recover the sum of $23.65, being a nine per cent. assessment on the amount of his insurance made to cover losses sustained by the members of the company. Judgment was entered in the district court for the company, and Morgan brings his case here by proceeding in error.

The defendant in error organized under the provisions of chapter 46, Session Laws, 1899, providing for the organization of mutual insurance companies to insure against loss of hogs by disease. From the record it appears that plaintiff in error made an application in due form to the insurance company for insurance on his hogs in the sum of $250. His application was approved, a policy was issued to him and he became a member of the company. At the time of making his application plaintiff in error paid the company $5, and signed an application, which, among others, contained a clause in the following language: "Future liability of the applicant for assessments or otherwise under this application or the policy issued thereon shall not exceed double the amount paid for this policy, as stated on the back of this application." The policy issued by the company contained, among other provisions, one as follows: "Future liability of the applicant for assessments or otherwise under his original application, or this policy issued thereon, shall not exceed double the amount paid for this policy, as stated on the back hereof." It appears that two assessments were made against plaintiff in error, which he paid, aggregating $10, which was double the amount he paid when he made his application, and, according to the foregoing provisions in the application and policy, was all he was obliged to pay. The sole question presented by the record in this case is whether or not plaintiff in error can be required to pay an additional assessment of nine per cent., which is his

proportionate share of the losses and expenses of the company. A determination of this question requires a consideration of sections 130, 137 and 140 of chapter 43, Compiled Statutes 1899, which are part of the statute under which the company was organized, and for convenience they will be set out:

"Sec. 130. All persons who take insurance in such company shall thereby become and continue members of such company during the period their insurance is in force and no longer. Such persons shall sign an application obligating themselves to pay all assessments made for losses sustained by a member and expenses of such company while they continue members of such company, and they shall also at the time of taking such insurance pay such an amount in cash as the by-laws may require."

"Sec. 137. If any member for the space of thirty (30) days after personal notice of assessment, or by having the same mailed to him or her directed to the post office stated in the application for insurance, shall neglect or refuse to pay the sum assessed, then such company may sue for and recover such amount, together with costs. Suits at law may be brought against such company by the members thereof for the loss sustained if payment is withheld after the same becomes due."

"Sec. 140. Whenever the liabilities of such company shall exceed the amount of cash on hand there may be an assessment on the members payable in cash within thirty (30) days thereafter. No assessment shall be made on a member for liabilities incurred prior to his or her membership. Any member shall be excluded from all benefits of insurance during all the time in which he or she may be in default of payment of assessments. Such company by proper provisions in the by-laws may elect to make only an annual assessment, and no member shall be liable directly for losses and expenses otherwise than as in this act provided. In such event should it become necessary such company may borrow money to pay its losses and expenses to the date of the annual assessment."

From an examination of these sections it very clearly appears, first, that the person becoming a member is by law obliged to pay all assessments necessary to satisfy the losses and expenses of the company arising during his membership; second, that it is the duty of the board of directors of the company to make assessments whenever money is required to meet claims against the company; third, that upon failure of the members to pay for thirty days after notice of an assessment, the company is authorized to maintain a suit to collect such assessment. It was the manifest intention of the legislature that all losses and expenses of the company should be paid, and under the law as we find it the member must respond to any and all assessments required to satisfy the indebtedness of the company.

It is claimed by plaintiff in error that each member of the company made a like contract with plaintiff in error, limiting his liability, and that each member must be held to have contracted to accept in full of his loss the proportionate share realized from the assessments provided for in the application and the policy. We find no merit in this contention. The law in force when the contract was made entered into and became a part of it, and members of a mutual insurance company, such as defendant in error, will not be permitted to avoid a liability created by statute in the manner attempted in the case at bar. *Russell v. Berry,* 16 N. W. Rep. [Mich.], 651.

There appears to be no error in the judgment of the trial court, and it is therefore recommended that the same be affirmed.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the trial court is

AFFIRMED.